BEYOND SUSPECT CLASSIFICATIONS

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ABSTRACT

Suspect classification analysis is dead. Or so it would seem.

As is well known, suspect classification analysis and the associated tiers of scrutiny framework are the primary doctrinal features of contemporary equal protection jurisprudence. How plaintiffs fare under these twin doctrines determines the ultimate fate of their equal protection claims. Accordingly, equal protection advocates often turn their attention to suspect classification analysis in crafting their arguments.

And yet, despite the profound impact of suspect classification analysis on contemporary equal protection jurisprudence, the doctrine sits much like an aging patriarch, exerting a level of control that far exceeds its actual efficacy. Indeed, suspect classification analysis was conspicuously absent in the United States Supreme Court's most recent term, and it has been well over a quarter century since the Court last recognized a new suspect classification. The doctrine has been lambasted by scholars and jurists alike. Further, as this Article argues below, worse than being ineffective, suspect classification analysis actively inhibits the growth of equal protection jurisprudence.

This raises the inevitable question: is there anything of value to be salvaged from suspect classification analysis? This Article contends that there is. Rather than reading the Court's suspect classification jurisprudence for the discrete doctrinal innovations of any one case, this Article takes the long view in an effort to discern from these cases a political theory and associated theory of judicial review—that is, the elusive normative philosophy of the Equal Protection Clause.

In taking this perspective, what emerges is a theory of judicial review in the equal protection context that focuses not on protecting minorities from the inevitable flaws of a majoritarian political process, but on protecting individuals from the social and political effects of laws that, based on objective characteristics, can be identified as tending to create and enforce permanent divisions between social classes—that is, a caste society.

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INTRODUCTION

There have been myriad critiques of suspect classification analysis, from both the bench and the academy. The most prominent concerns are that the analysis does not protect groups that it should protect, and that it is internally inconsistent as well as inconsistently applied.

This Article is concerned with two other problems: the failure of suspect classification analysis to recognize contemporary prejudices and the unwarranted role of the analysis in justifying the institution of judicial review. But there is no need to throw the baby out with the bath water. Rather, these very concerns can be addressed by reading the Supreme Court's suspect classification jurisprudence not for the discrete doctrinal innovations of each case, but for a political

theory and an associated, alternative theory of judicial review latent in the Court's reasoning in this area.[1]

What emerges from this reading is a political theory that is less concerned with the ordering of social groups and more concerned with preserving individual self-determination and the social mobility that gives self-determination meaning. This primary concern, in turn, provides a more vigorous and principled justification for the role of the judiciary in overturning the actions of the political branches.

A. The Problem of Contemporary Prejudices

> Close-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.[2]

The central challenge of equal protection jurisprudence is not to account for those prejudices that are already apparent to us (the blunt and obvious biases of our forefathers), but for those prejudices that today seem natural, familiar, and fair.[3] Stated another way, the central challenge of equal protection jurisprudence is to prevent an-

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1 In this way, this project is directly inspired by Bruce Ackerman's 1985 essay reading footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), toward a similar end. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985).

2 United States v. Virginia, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting). Here, Justice Scalia was acknowledging the persistence of prejudice, which always takes new forms for new generations. He made this assertion toward the larger point that our democratic system is well equipped to eventually root out these prejudices and the associated oppression of disfavored social groups. *Id.* at 567. This Article starts from the same initial premise—that biases are ever-present and evolving, such that we are generally unaware of the prejudices of our own time—but contends that it is precisely the role of the judiciary to balance majoritarian complacency and prevent unfair prejudices from being enshrined in and perpetuated by the public laws.

3 *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("It is now commonplace to condemn slavery and segregation—a rhetorical practice presumably intended to bind Americans ever more closely to principles of equality. But repeated condemnation of slavery and segregation may have just the opposite effect. We have demonized subordinating practices of the past to such a degree that condemning such practices may instead function to exonerate practices contested in the present, none of which looks so unremittingly 'evil' by contrast."); *see also* Michael Gentithes, *The Equal Protection Clause and Immutability: The Characteristics of Suspect Classifications*, 40 U. MEM. L. REV. 507, 522–23 (2010) ("The Equal Protection Clause should protect against discrimination based upon immutable characteristics regardless of whether any case involving such discrimination has previously been litigated or whether that particular form of discrimination has become prevalent only recently. In other words, the clause should respond to more than history; it must be strong enough to protect against novel forms of discrimination that may arise in the future.").

other *Plessy v. Ferguson*[4] or another *Bowers v. Hardwick*[5]—decisions soaked in the prejudices of their time and entirely devoid of any cognitive or doctrinal mechanism to correct the unreflective, prejudicial impulse. In the passage quoted above, Justice Antonin Scalia accepts capitulation to contemporary prejudices as inevitable, although something that can be corrected over time. This Article contends that we can aspire to more.

The Court has, in fact, devised mechanisms that are supposed to be particularly adept at rooting out unfair prejudices: suspect classification analysis and the associated tiers-of-scrutiny framework. Suspect classification analysis identifies those groups that are likely to be the targets of unfair prejudice; heightened scrutiny requires the judiciary to take a more skeptical view of laws that explicitly target those groups.

To identify which groups merit additional judicial solicitude, suspect classification analysis traditionally asks if a particular social group (1) constitutes a discrete and insular minority; (2) has suffered a history of discrimination; (3) is politically powerless; (4) is defined by an immutable trait; and (5) is defined by a trait that is generally irrelevant to one's ability to function in society.[6] If the Court answers "yes" to some portion of these questions, then it will deem that group a suspect or quasi-suspect class and will apply more searching scrutiny to laws discriminating against that group. These twin doctrines (suspect classification analysis and heightened scrutiny) are supposed to identify and protect against laws that enforce invidious discrimination.

But, as demonstrated below, these doctrinal mechanisms are useful (and indeed, are invoked) only in cases where the prejudice at issue has already been recognized and understood as unfair. They do nothing to force identification of unrecognized and evolving (that is, contemporary) prejudices. And while heightened scrutiny is intend-

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4 Plessy v. Ferguson, 163 U.S. 537, 547–52 (1896). In *Plessy* (discussed at length below), the United States Supreme Court held that racial segregation on railroad cars was permissible under the now-infamous "separate but equal" doctrine. *Id.*

5 Bowers v. Hardwick, 478 U.S. 186, 191–95 (1986) (upholding a state statute criminalizing sodomy based on the prevalence of such laws in the nation's history). *Bowers* is not discussed at length here because it is not a recognized equal protection case. But *Bowers* may nonetheless be compared to *Plessy* in that it represents an instance of the Court relying on nothing more than subjective and unexamined social judgments in affirming a discriminatory law.

6 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–47 (1985) (concluding, after such an analysis, that the mentally retarded were not a suspect class).

ed to force reasoned analysis,[7] the vast majority of equal protection claims are subject to deferential rational basis review—a level of scrutiny that affirmatively shuns reasoned analysis in the name of federalism and separation of powers. By enumerating specific areas of equal protection concern, suspect classification analysis and the tiers-of-scrutiny framework create all other claims as presumptively not of concern. Thus, it is questionable what work heightened scrutiny is really doing for the Court in terms of prompting critical analysis of the dynamics of invidious discrimination.

B. Suspect Classification Analysis in Context

A brief background in equal protection jurisprudence provides a necessary foundation for the contentions of this Article. Suspect classification analysis and the tiers-of-scrutiny framework are the primary doctrinal features of modern equal protection jurisprudence and are the primary mechanisms for filtering equal protection claims.[8] Ultimately, the fate of any given equal protection claim depends largely on the level of scrutiny assigned to review the challenged law.[9] Levels of scrutiny, in turn, come in essentially two varieties: rational basis review and heightened scrutiny.

Rational basis review is the default level of scrutiny in equal protection cases.[10] Where a law implicates neither a suspect classification nor a fundamental right, the Court will apply rational basis review, which asks only whether the discriminatory classification employed by the challenged law is rationally related to a legitimate governmental interest.[11] Unsurprisingly, plaintiffs overwhelmingly lose under this standard.[12]

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7 *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) ("The purpose of [heightened scrutiny] is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions . . . .").

8 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 717–23 (3d ed. 2009).

9 *Id.* at 719–21.

10 *Id.* at 723.

11 *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (applying rational basis review to a local economic regulation for this reason).

12 CHEMERINSKY, *supra* note 8, at 724 (explaining that plaintiffs lose so often in such instances because a challenger to a law analyzed under the rational basis test has the burden of proving that there is no rational basis for the law and that a law will be upheld under that test if there is any conceivable legitimate purpose for the law, even if that was not the government's actual purpose in enacting the law). *But see* Romer v. Evans, 517 U.S. 620, 631–32 (1996) (striking down Amendment 2 of the Colorado Constitution under rational basis review).

The term "heightened scrutiny" refers to both strict scrutiny and intermediate scrutiny, with strict scrutiny being the more demanding of the two standards. The Court applies strict scrutiny in reviewing laws that implicate a suspect classification or a fundamental right,[13] while the Court applies intermediate scrutiny to cases involving so-called quasi-suspect classifications.[14] The two standards are formulated differently: strict scrutiny requires that the discriminatory classification be narrowly tailored to serve a compelling state interest; intermediate scrutiny requires that the discriminatory classification be substantially related to an important state interest.[15] Minor semantic distinctions aside, the two forms of heightened scrutiny are more alike than different in that a plaintiff's chances of prevailing are much greater under either of these forms of heightened review, as compared to deferential rational basis review.[16]

Most significantly, under either form of heightened scrutiny, the burden is on the government to provide a real and credible justification for the discriminatory law, and the justification must be weighty.[17] By contrast, under rational basis review, the burden is on the plaintiff to prove the *absence* of any legitimate basis for the law, and legitimate state interests can be relatively trivial.[18] In addition, under rational basis review, the Court is free to imagine justifications for the law, regardless of whether the legislature actually considered

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13 *E.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

14 *E.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

15 *See, e.g.*, *id.* (applying the intermediate scrutiny standard); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (applying strict scrutiny).

16 *But see* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a law under strict scrutiny that classified on the basis of race in the context of college admissions); Tuan Anh Nguyen v. Immigration & Nationalization Servs., 533 U.S. 53 (2001) (upholding a law, under intermediate scrutiny, that classified on the basis of gender in the context of determining the citizenship of children born out of wedlock).

17 *See* Johnson v. California, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (requiring that government action based on sex, to withstand intermediate scrutiny, must establish an "exceedingly persuasive justification" (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979))).

18 *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.").

or advanced those justifications.[19] For these reasons, rational basis review has been criticized as bordering on meaningless.[20]

Understandably, equal protection plaintiffs are eager to have some form of heightened scrutiny applied to their claims. And suspect classification[21] analysis is the gatekeeper to heightened scrutiny.[22] As a result, equal protection plaintiffs frequently argue that the social group to which they belong ought to be considered a suspect classification.[23]

Suspect classification analysis and the tiers-of-scrutiny framework have been around for quite a while and have come to seem like inevitable features of equal protection law.[24] Indeed, litigants have little incentive to attempt to challenge these doctrinal structures;[25] instead, their best approach is to make arguments within them.[26] And while

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19 *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961) (noting that "statutory discrimination[s]" subject to rational basis review will be upheld if "any state of facts reasonably may be conceived" to justify them).

20 *See* Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 33 (1980) (arguing that such open-ended requirements allow for justifications that are too abstract for proper evaluation).

21 Although proving that a challenged law burdens a fundamental right is an alternative means of achieving strict scrutiny, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985), this Article focuses exclusively on the suspect classification prong of the heightened scrutiny analysis.

22 Described in greater length below, suspect classification analysis essentially asks whether the group targeted by a law has been historically subjected to unfair prejudice, such that laws targeting the group are more likely to be motivated by prejudice and should be subject to more rigorous judicial scrutiny as a result. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011) ("There is at least superficial consensus for the basic premise of equal protection law: courts should be skeptical of—and should scrutinize more carefully—classifications involving politically powerless groups that have historically been discriminated against."). Thus, the focus of suspect classification analysis is on the nature (some would say worthiness) of the group being discriminated against, rather than on the nature of the government discrimination.

23 *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (analyzing the argument that heightened scrutiny should be applied to a law that classifies on the basis of sexual orientation); *see also* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 10 (2010) (suggesting that those belonging to other social groups, such as transgender and intersex individuals, may similarly seek heightened review of laws classifying on the basis of gender or gender expression).

24 *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 893–95 (2012) (tracing the development of the tiers-of-scrutiny framework back to at least the 1960s).

25 *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 524 (2004) ("[L]itigators of equal protection cases before the Court have not generally pressed for anything other than standard application of the three tiers.").

26 *See* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079–80 (2011) ("The familiar tiered framework for judicial analysis means that the results in equal protection cases will almost always depend on the abil-

myriad scholars have parsed, rationalized, and criticized these doctrinal structures, in some ways, the volume of critique has added to the sense that those structures are inevitable and fixed.[27]

But, upon closer examination, we can see that the evolution of suspect classification analysis and the tiers-of-scrutiny framework was very much historically contingent and arguably irrational. From its unholy origins to its fitful evolution, suspect classification analysis is more Frankenstein's monster than a creature of rational construction.[28] And, indeed, there is an emerging consensus that suspect classification analysis and the tiers-of-scrutiny framework are broken, in need of repair if not complete abandonment.[29]

The question posed by the Article is this: are the doctrinal structures of modern equal protection analysis equipped for the task of identifying and addressing contemporary prejudices? The initial answer is "no." But there is promise latent in the largely unexamined transcendent values of the Court's equal protection jurisprudence—values that this Article seeks to unearth and solidify in doctrinal form.

This Article contends that, despite the many flaws in the whole of equal protection doctrine, including suspect classification analysis, it is possible to step back and read the Court's seminal suspect classification cases not for the specific doctrinal mechanisms each introduces, but for evidence of transcendent equal protection values that can provide clear guidance in revising existing doctrinal mechanisms to meet the challenges facing this body of law. Specifically, this revived doctrine can cure the most serious ills of equal protection jurisprudence: meaningless rational basis review,[30] the symmetry problem,[31] and the Court's resistance to expanding categorical heightened scru-

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ity to convince a court that there is a racial or gender classification present or discrimination with regard to a fundamental right.").

27 *Id.* at 1087–88.

28 MARY SHELLEY, FRANKENSTEIN, OR, THE MODERN PROMETHEUS (Marilyn Butler ed., Oxford Univ. Press 1994) (1818); DAVID J. SKAL, SCREAMS OF REASON: MAD SCIENCE AND MODERN CULTURE 33 (1998) ("The Frankenstein myth had its origins in the nineteenth-century Romantic rebellion against scientific rationalism . . . .").

29 *See, e.g.*, Strauss, *supra* note 22, at 173–74 (concluding that under the tiered framework, "the factors used in its analysis are ambiguous and inconsistent" and that this "test risks unprincipled results and thwarts equality under the law").

30 *See* Goldberg, *supra* note 25, at 482 (arguing that application of the rational basis standard has "waver[ed] between its typical deference to government decisionmaking and the occasional insistence on meaningful review"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011) ("The words 'scrutiny' and 'review' suggest an examination rather than a result. Yet in this jurisprudence, looks can kill.").

31 Strauss, *supra* note 22, at 168–69. Strauss asserts that the Court's symmetry in applying strict scrutiny to protect, for example, whites as well as blacks, or men as well as women, constitutes a rejection of the criteria altogether. *Id.*

tiny review.[32] Furthermore, such a doctrinal mechanism can be assembled from what we already have before us in terms of Supreme Court precedent, without disavowing what has come before but also without being unduly constrained by past missteps.

To elaborate on this thesis, Part I of the Article retells the story of suspect classification analysis in a way that denaturalizes its evolution and questions its inevitability. Part II analyzes the exiting critiques of suspect classification analysis, which attempt to rationalize, explain, or disassemble the framework, but which stop short of questioning its fundamental legitimacy. Part III exposes deeper problems with these doctrinal frameworks and then performs an alternative reading of the precedent that traces the transcendent equal protection values submerged within the piecemeal development of suspect classification analysis. Part III goes on to present an alternative doctrinal framework that expresses these values.

I. MISSTEPS

From one perspective, contemporary equal protection jurisprudence, characterized by suspect classification analysis and the tiers-of-scrutiny framework, begins and ends with *Plessy v. Ferguson*.[33] It begins there because *Plessy* demonstrates the abject failure of deferential rational basis review—that is, of an unreflective "reasonableness" standard—in detecting contemporary prejudices. That the Court later developed more rigorous forms of scrutiny to be applied when there was reason to believe that prejudice was afoot is an implicit admission of the profound failure of rational basis review. And yet the Court applies heightened scrutiny in very few cases and continues to apply deferential rational basis review—the standard employed in *Plessy*—to the remainder. In this way, contemporary equal protection jurisprudence ends with *Plessy* because the Court continues to apply *Plessy*-like rational basis review to the vast majority of equal protection claims.

This Part discusses the failure of rationality as manifest in *Plessy*, and the Court's initial efforts to discern and justify different levels of judicial scrutiny for different types of equal protection claims as a response to that failure. It then examines suspect classification analysis' sudden and brief rise to fame.

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32 Yoshino, *supra* note 30, at 748. Yoshino observed that the Court has failed to acknowledge new suspect classes, and limited protection of existing classes, due to pluralism anxiety. *Id.* Yoshino further claims that as it related to Equal Protection, the cannon of heightened scrutiny is "closed." *Id.* at 757.

33 Plessy v. Ferguson, 163 U.S. 537 (1896).

It further describes how, contrary to what one might expect, the Court did not articulate a comprehensive suspect classification analysis in the context of race discrimination. Indeed, although race is the paradigmatic suspect classification,[34] the reasons for designating it so have never been fully examined or articulated by the Court. Instead, we must turn to the Court's awkward and pained recognition of quasi-suspect classifications, as well as its decisions rejecting claims to suspect classification status, to better understand the normative principles underlying the concept.

A. Plessy v. Ferguson *and the Failure of Rationality*

Plessy is best known for establishing the "separate but equal" doctrine that was later repudiated by the Court in *Brown v. Board of Education*.[35] *Plessy* is also well known for Justice John Marshall Harlan's dissent, in which he famously claimed, "[o]ur Constitution is color-blind"[36]—a turn of phrase that some have taken as articulating a post-race democratic ideal and that others have taken as a component of a deeply racist jurisprudential philosophy.[37]

Plessy is perhaps less well known for the precise reasoning that the Court employed to reach its conclusion, including its reliance on a prototype of traditional deferential rational basis review. The facts of *Plessy* are familiar. At issue was a Louisiana state law stating that "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races," although the law made a generous exception for "nurses attending children of the other race."[38] The law further required railway personnel to enforce this segregation.[39] Homer Plessy, who was "seven eighths Caucasian and one eighth African blood[,]

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34 *See, e.g.*, Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of* Hernandez v. Texas, *in* RACE LAW STORIES 273, 291 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (referring to African Americans as the "quintessential constitutional out-group").

35 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

36 *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

37 *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 1–4 (4th ed. 2014) (discussing how "color-blind racism" became the "dominant racial ideology as the mechanisms and practices for keeping blacks and other racial minorities 'at the bottom of the well' changed"); *see also* Jerry Kang & Kristin Lang, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

38 *Plessy*, 163 U.S. at 540–41 (internal quotation marks omitted).

39 *Id.* at 540–41.

that the mixture of colored blood was not discernable in him," challenged the law by claiming a seat in the car reserved for whites.[40]

The Court interpreted the scope of the Equal Protection Clause very narrowly, in particular distinguishing between equality in the legal versus social spheres.[41] The Court further noted that racial segregation within the social sphere was firmly within the police power.[42] This type of routine, presumptively permissible segregation included segregation in schools and anti-miscegenation laws.[43] The Court cited abundant precedent approving of such arrangements.[44]

Thus, the *Plessy* Court articulated a vision of judicial deference to legislative action that still guides the Court today. As a general proposition, the Court will not involve itself in matters within the states' police power. This expresses a commitment to principles of both federalism and separation of powers. Those commitments are expressed through application of deferential rational basis review—that is, the Court declaring that it will go no further than to ask whether a particular state law is "reasonable."

The Court's application of this standard to the racial segregation challenged in *Plessy* clearly demonstrates that such deferential review is incapable of identifying and addressing contemporary prejudices. Specifically, Homer Plessy argued that if the Court permitted laws segregating passengers in railroad cars, then states would be free to pass legislation mandating pervasive markers of segregation throughout social intercourse (a classic "slippery slope" argument).[45] The

40 *Id.* at 541.

41 *Id.* at 544 ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."). Reva Siegel has detailed the conceptual underpinnings of the substantive reasoning in the case. *See* Siegel, *supra* note 3, at 1126–27.

42 *Plessy*, 163 U.S. at 544 ("Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.").

43 *Id.* at 545.

44 The Court's deference to those matters within the police power is significant. Seventy-one years later, in *Loving v. Virginia*, the Court would recognize that the mere fact that an area of regulation was traditionally within the police power did not immunize laws from equal protection review. *See* Loving v. Virginia, 388 U.S. 1, 7 (1967). But at the time of *Plessy*, there was a fundamentally different understanding of the relationship between state power and the mandate of the Equal Protection Clause. *Plessy*, 163 U.S. at 548.

45 *Plessy*, 163 U.S. at 549–50 ("[I]t is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens,

Court had little difficulty responding to this contention: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."[46] The Court was confident in its ability to separate reasonable regulations from measures designed to oppress. In retrospect, this confidence was unwarranted.

Plessy has been criticized as "wrong the day it was decided"[47] and an expression of a morally bankrupt philosophy: that it was permissible in our democracy for a dominant group to harness the public laws toward the end of controlling the social circumstances of a subordinate group.[48] But another way of viewing *Plessy* is as a failure of judicial process—specifically, the failure to develop a legal test that would force the members of the Court to look beyond what seemed familiar and reasonable, and instead engage in a critical analysis of whether the law at issue violated the central directive of the Equal Protection Clause.

From this perspective, *Plessy*, more than any other case (certainly more than *Carolene Products*[49]), explains why the Court would ultimately turn to varying levels of scrutiny in an effort to produce more just decisions: because we are not the rational beings we suppose ourselves to be. Across-the-board deference to legislative judgments, tested against only a standard of "reasonableness," did not give meaning to equal protection guarantees in *Plessy*, nor did it produce just results. Stated another way, deferential rational basis review provides no resistance to the logic of contemporary prejudice. It is not a reason-forcing analysis.[50] But the Court's response to this realization was

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or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.").

46 *Id.* at 550.

47 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

48 *Id.*

49 United States v. Carolene Prods. Co., 304 U.S. 144 (1938). As discussed below, the Court's decision in *Carolene Products* is widely credited as the origin of suspect classification analysis and the tiers-of-scrutiny framework.

50 *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 178–81 (2006) (discussing the concept of "reason-forcing conversations"). Further, the Court does not always engage in the entire rational basis review. "[T]he standard's emphasis on deference at times leads courts to skip over the required step of evaluating the link between that permissible goal and the government's action." Goldberg, *supra* note 25, at 490. In

not, as it might have been, to abandon rational basis review altogether in evaluating facially discriminatory laws. Rather, over several decades, the Court set about a tenuous process of discerning between groups that deserved more judicial protection versus those that did not. The groups that did not deserve such protection would continue to be subject to *Plessy*-style rational basis review.

B. Carolene Products *and Its Surprising Progeny*

It was not the Court's concise and clear-headed decision in *Brown v. Board of Education*[51] that redeemed the sins of *Plessy*. Of course, *Brown* corrected *Plessy* on the level of substantive doctrine—rejecting the theory that "separate" could be "equal" in any meaningful sense—but it did not correct the *Plessy* Court's failures of judicial epistemology—that is, failures in the Court's way of knowing or identifying the presence of invidious discrimination. Notably, *Brown* did not engage in suspect classification analysis or apply any form of heightened scrutiny. Rather, *Brown* is more properly understood as representing a turning point in social consensus and "scientific understanding" about race, race segregation, and segregation's symbolic and social effects.[52] Stated another way, what changed between *Plessy* and *Brown* was the social consensus about the permissibility of pervasive race segregation. The Court's doctrinal mechanisms for detecting the presence of invidious discrimination were not examined or changed.

Rather than being based in *Brown* or any of the seminal race cases, the most prominent doctrinal features of contemporary equal protection jurisprudence—suspect classification analysis and the tiers of scrutiny—trace their intellectual heritage back to a law-clerk-drafted[53] footnote in a six-page decision about filled milk.[54] What is filled milk, you ask, and why is it important to equal protection law? Filled milk

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other words, in the spirit of deference, once a court analyzes the sufficiency of the governmental purpose, it fails to conduct any tailoring analysis whatsoever.

51 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

52 Suzanne Goldberg notes that "the suspect classification tier gained its early foothold at a time when a majority of the Court and significant sectors of society at large had begun to accept as a matter of course that racial classifications typically lacked legitimacy." Goldberg, *supra* note 25, at 526.

53 *See* Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 304 (2008) ("Justice Harlan Fiske Stone allowed his law clerk, Louis Lusky, to write the most significant footnote in Supreme Court history.").

54 *See also* United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (attributing "the genesis of heightened standards of judicial review" to *Carolene Products* footnote four).

is an insidious substance—starting out as skim milk to which some non-milk oil or fat is added so as to mimic higher quality milk or cream. Indeed, this substance was viewed as so insidious that Congress enacted the Filled Milk Act of 1923 in an attempt to stem its evils. What does filled milk have to do with the Equal Protection Clause? Nothing, really, except that the producers of said unnatural product argued that other unnatural products were being given preferential treatment and that this constituted an unjustified discrimination.[55]

Despite the focus on discrimination, the plaintiffs in *Carolene Products* did not seriously advance an equal protection claim per se. Still, in responding to the plaintiffs' non-argument, the Court, in dicta, briefly sketched out a basis for subjecting certain types of discrimination to greater scrutiny than the deferential standard typically applied in cases of discrimination in the commercial context.

First, the Court set out the default standard for deferential rational basis review,[56] which it emphasized was the applicable standard for cases involving commercial transactions:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[57]

One component of this standard becomes particularly important over time: the notion that, under rational basis review, legislatures need not actually support their judgments with actual, record facts.[58]

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55 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 151 (1938) ("Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none.").

56 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2616–17 (2012) (citing *Carolene Prods.*, 304 U.S. at 144, for the rational basis standard).

57 *Carolene Prods.*, 304 U.S. at 152.

58 *See* Heller v. Doe, 509 U.S. 312, 320 (1993) ("[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" (quoting Fed. Commc'ns Comm'n v. Beach Commc'ns Inc., 508 U.S. 307, 313 (1993))); *see also id.* ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."). *Heller* is the case that advocates and courts cite to invoke the weakest form of rational basis review. Interestingly, virtually all of the cases cited in *Heller* for the rational basis review standard were cases involving discrimination in the commercial context. *Beach Communications*, for example, was a case involving regulations affecting cable television providers. 508 U.S. at 307.

Rather, the judiciary is free to presume the existence of such facts. Further developed in future cases, this aspect of rational basis review has a profound effect on litigation underneath this standard. Specifically, it relieves the legislative branch of any obligation to provide reasons for its decisions, permits the judiciary to engage in rank speculation in an effort to justify legislative action, and thereby creates a virtually insurmountable evidentiary barrier for plaintiffs attacking legislative action: proving the absence of any conceivable justification for a law.[59]

In a footnote appended to this passage, the Court briefly stated (without deciding) that this default standard of rational basis review would not necessarily apply in every instance where the Court was reviewing state legislative action:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[60]

It is these one-hundred-some words that gave birth to the structure of modern equal protection doctrine.

From the standpoint of precedential weight, there are several significant aspects to this passage. First, it is clearly signaled as being dicta—the Court is enumerating issues that it need not decide. Second, it was offered in a case that did not even purport to undertake any sort of serious equal protection analysis. Third, the text of the footnote is brief and ambiguous. Taken in context to the passage to which it is appended, it could be seen as drawing a fundamental distinction between laws that, on their face, distinguish between classes of *things* (e.g., "regulatory legislation affecting ordinary commercial transactions"[61]) and those that distinguish between classes of *persons*, a

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59 *See Heller*, 509 U.S. at 320 ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (internal quotation marks omitted)). The *Lehnhausen* case involved a tax code distinction between corporations and other entities. 410 U.S. at 356.

60 *Carolene Prods.*, 304 U.S. at 152 n.4 (internal citations omitted).

61 *Id.* at 152.

category in which religious, racial, and other "discrete and insular" minorities may just be an example. It is certainly not clear that the reference to religious, racial, and other "discrete and insular minorities" was meant to be an exhaustive list of areas of concern.

From its humble beginnings, the "theory" articulated in *Carolene Products* footnote four was quietly elevated to the level of core constitutional doctrine, the first step, arguably, being in the following passage from *Korematsu v. United States*,[62] where the Court declared (without citation to *Carolene Products* or any other authority):

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[63]

This was the first time the Court alluded to the notion of "suspect" classifications and the greater level of scrutiny the Court would apply to laws relying on them.[64] The Court's 1967 decision in *Loving v. Virginia*[65] solidified race as a suspect classification to which heightened scrutiny should apply, but again, without invoking *Carolene Products* or performing a suspect classification analysis.[66]

Indeed, the Court did not explicitly invoke *Carolene Products* as providing the basis for suspect classification analysis until 1971 (and even then, it did so in a cursory manner).[67] Nonetheless, two years later, in 1973, the Court had already deemed the *Carolene Products* criteria "traditional indicia of suspectness."[68] In a sense reflecting its baffling, disproportionate, and sudden impact, reminiscent of unde-

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62 Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (affirming the conviction of Fred Toyosaburo Korematsu for violating an order excluding persons of Japanese descent from a military area).

63 *Id.* at 216.

64 *See* Barnes & Chemerinsky, *supra* note 26, at 1078.

65 Loving v. Virginia, 388 U.S. 1 (1967).

66 *See* Eskridge, *supra* note 23, at 5 ("In *Loving v. Virginia*, 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." (footnote omitted)).

67 *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (announcing without analysis that aliens were a "'discrete and insular' minority" per *Carolene Products* and therefore entitled to "heightened judicial solicitude").

68 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (referring to the "traditional indicia of suspectness"); *see also* Strauss, *supra* note 22, at 144–45 (describing the evolution of suspect classification analysis from being relatively uniform in the early 1970s but deemed "traditional" by the time of the Court's 1973 decision in *Rodriguez*).

served celebrity status, some members of the Court came to refer to footnote four as "famous."[69]

Thus, rather than emerging from a thoughtful consideration of the meaning and purpose of the Equal Protection Clause, we see that the governing structures of equal protection analysis originated as an afterthought from an unimportant case[70]—indeed, a case that did not even purport to engage in an equal protection analysis. It is little wonder, then, that suspect classification analysis does not appear to reflect a coherent set of values tied to the history and purpose of the Equal Protection Clause. And its haphazard development in later years did not serve to correct this problem.

C. Suspect Classifications: The Unarticulated Race Paradigm

Race is the paradigmatic suspect classification.[71] It is the classification to which others are compared. But the Court has never performed a suspect classification analysis per se with respect to race. On the one hand, this makes sense, as the original historical purpose of the Equal Protection Clause was to protect emancipated slaves from invidious discrimination, such that it can be presumed that race classifications are generally impermissible.[72] But the absence of an affirmative explanation of why it is presumptively invidious to discriminate on the basis of race has left a void of reasoning on the issue, inhibiting the Court's ability to evaluate other claims to suspect classification status. In failing to affirmatively articulate, as a matter of principle, why race is suspect, the Court has left the core understanding of suspect classifications under-theorized.

As described above, the Court's 1944 decision in *Korematsu* declared race a suspect classification but did not explain why this was so. The plaintiff in *Korematsu* was described as "an American citizen of Japanese descent" who had been convicted of violating an order of the army to the effect that "all persons of Japanese ancestry" were to be excluded from a designated military area.[73] Prior to engaging the merits of the plaintiff's claim, the Court announced that "all legal restrictions which curtail the civil rights of a single racial group are im-

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69 United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting).

70 Ackerman, *supra* note 1, at 713. ("These famous words, appearing in the otherwise unimportant *Carolene Products* case . . . .").

71 *See, e.g.*, López & Olivas, *supra* note 34, at 291 (referring to African Americans as the "quintessential constitutional out-group").

72 Strauss, *supra* note 22, at 142.

73 Korematsu v. United States, 323 U.S. 214, 215–16 (1944).

mediately suspect."[74] This assertion was not supported by citation to any authority. Ultimately, despite expressing this suspicion of racial classifications, the Court concluded that Japanese ancestry was a sufficient proxy for potential "disloyalty" under the circumstances of war and affirmed the conviction.[75]

Between *Korematsu* and the Court's groundbreaking decision in *Brown* came an arguably equally important decision that nevertheless has been largely lost to the annals of history: *Hernandez v. Texas*.[76] *Hernandez* recognized the concept of social group discrimination outside of/in addition to the familiar race discrimination paradigm, and articulated a surprisingly clear alternative vision of equal protection analysis—complete with a coherent evidentiary rule. The plaintiff in the case, who had been a defendant in a criminal trial, claimed that "persons of Mexican descent" were being systematically excluded from jury service and that this violated the plaintiff's equal protection rights. As in *Brown*, the Court did not apply a suspect classification analysis or discuss tiers of scrutiny. Rather, the Court stated that excluding persons belonging to a particular class from jury service was, in essence, a per se violation of equal protection.[77]

In so holding, the Court first rejected the State of Texas's contention that "there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment."[78] The Court acknowledged that "differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws."[79] In other words, clearly, there was a history of discrimination based on visible race differences between African Americans and whites, and the fact of that discrimination necessitated special judicial solicitude. But that was not to say that this was the only type of discrimination plaguing American

74 *Id.* at 216.

75 *Id.* at 223–24.

76 Hernandez v. Texas, 347 U.S. 475 (1954); *see* López & Olivas, *supra* note 34, at 273 (noting that *Hernandez*, despite being the first case in which the Warren Court "set out to dismantle Jim Crow segregation," is nonetheless "almost entirely forgotten").

77 "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." *Hernandez*, 347 U.S. at 478. The Court's reference to a "reasonable classification" could be seen as alluding to rational basis review, but in its analysis, the Court actually hewed to a bright line, per se rule of equal protection violation.

78 *Id.* at 477.

79 *Id.* at 478. Although the decision focused on analogies to race discrimination, it did not explicitly treat the case before it as race discrimination because Mexican Americans were considered to be white. *See* López & Olivas, *supra* note 34, at 293.

society, and the only type that required a remedy. Rather, the Court recognized the possibility that discrimination might evolve and take new forms: "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."[80]

Given the current disarray of the Court's equal protection jurisprudence, *Hernandez* presents a remarkably clear framework for identifying impermissible discrimination, on both a doctrinal and an evidentiary level. The Court simply asked whether the targeted group was a distinct social group—a question that it designated as a factual inquiry—and further indicated precisely how plaintiffs could prove this element: "The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class [in the plaintiff's community], distinct from 'whites.' One method by which this may be demonstrated is by showing the attitude of the community."[81] In *Hernandez*, the evidence revealed that "residents of the community distinguished between 'white' and 'Mexican.'"[82] In addition, Mexican children were sent to segregated schools, and "[a]t least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.'"[83] Spanish-speaking men were directed to the courthouse restroom reserved for "Colored Men" by a sign that read "Hombres Aqui."[84] This was sufficient to establish "the existence of a class."[85]

Having proved the existence of a distinct class, the plaintiff "was then charged with the burden of proving discrimination," which he did successfully (and straightforwardly) by pointing to the complete absence of Mexicans from juries in the county for some twenty-five years.[86] The general assertions by jury commissioners that they had not discriminated in selecting jurors was deemed too vague to overcome the plaintiff's prima facie case of discrimination.[87]

Hernandez articulated a radically different—and radically simpler—vision for identifying when a law violates the Equal Protection Clause. "Chief Justice Warren asked two questions: if there existed a 'distinct class,' and if the challenged practice amounted to 'different

80 *Hernandez*, 347 U.S. at 478.
81 *Id.* at 479.
82 *Id.*
83 *Id.*
84 *Id.* at 480.
85 *Id.*
86 *Id.* at 480–81.
87 *Id.* at 481–82.

treatment.'"[88] Compared to the factors involved in suspect classification analysis—assessments of groups' relative political power, or whether the trait defining that group is immutable—these determinations are grounded in concrete evidence, accessible to the equal protection plaintiff, and within the competence of the judiciary to evaluate. Further, *Hernandez* expressed a clear focus on the consequences of discriminatory laws, rather than inquiring into the relative worthiness of different social groups for judicial protection.[89]

But the insights provided by the *Hernandez* decision—that impermissible discrimination could take many forms and be directed at many groups—were eclipsed by the Court's subsequent race discrimination cases, which established race as the paradigmatic suspect classification at the same time that the Court avoided explaining why this was so.[90]

From the perspective of *Hernandez*, *Brown* can be read as applying Chief Justice Earl Warren's two-part test: of course African-Americans were a distinct social group; the real question was whether "separate but equal" segregation in the context of public education meant that these school children were being subject to "different treatment." The *Plessy* Court had concluded that mere segregation was not a problematic form of discrimination. The *Brown* Court repudiated that view, concluding that segregation was unequal treatment of concern to the Equal Protection Clause.

Thus, the *Brown* Court held that segregation—particularly state-imposed segregation—was, in and of itself, a harm sufficient to constitute "different treatment" à la *Hernandez* and a constitutional violation.[91] But nowhere in *Brown* did Chief Justice Warren reiterate a core portion of the reasoning in *Hernandez*: that these concepts and concerns applied to differential treatment of any distinct social group, not just to cases of race discrimination.[92] Without this angle,

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88 López & Olivas, *supra* note 34, at 291.

89 *Id.* at 291–92 ("The *Hernandez* test rests on opposition to group hierarchy: It focuses on status and subordination, without being distracted by the irrelevant questions of the exact nature of the group identity or the presence of discriminatory intent.").

90 In fact, the Court has never fully explained how any classification becomes suspect. *See* Strauss, *supra* note 22, at 138 ("The Supreme Court has not provided a coherent explanation for precisely what factors trigger heightened scrutiny."). Strauss contends that the absence of a coherent, disciplined test enables judicial manipulation of the doctrine. *Id.* at 140 ("The ambiguity surrounding equal protection analysis produces incoherent results.").

91 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "[s]eparate educational facilities are inherently unequal").

92 *Hernandez*, 347 U.S. at 477–78. *See generally Brown*, 347 U.S. at 483; Barnes & Chemerinsky, *supra* note 26, at 1074 (finding that the Court has rejected the notion that equal pro-

Brown can easily be read as nothing more than a statement of the presumptive impermissibility of race discrimination.

Similarly, in *McLaughlin v. Florida*,[93] a case involving prohibitions against interracial cohabitation, the Court seemed to contradict *Hernandez* by suggesting that the suspectness of racial classifications was unique given the history and original purpose of the Fourteenth Amendment.[94] Because of this, race classifications were "'constitutionally suspect' . . . and subject to the 'most rigid scrutiny.'"[95] Thus, the *McLaughlin* Court made the strong connection between suspect classifications and heightened scrutiny, but pinned suspect classification status to the original purposes of the Fourteenth Amendment, as opposed to a recognition that we as a society inevitably tend to discriminate, and that those forms of discrimination evolve over time (the view endorsed by *Hernandez*).

The Court similarly emphasized the uniqueness of race discrimination in *Loving v. Virginia*, all but erasing the notion advanced in *Hernandez* that forms of discrimination were subject to change and that all social-group discrimination was inherently problematic. In defending the challenged anti-miscegenation law at issue in *Loving*, the State argued that equal protection concerns did not apply to laws that merely contained racial classifications where those classifications did not impose differential treatment in terms of the punishment meted out. As a result, according to the State, the anti-miscegenation laws should be subject only to rational basis review.[96] The Court rejected this "equal application" argument and the associated notion that laws with facial classifications should be reviewed with typical deference—that is, in the same manner as when evaluating "a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City . . . or an exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse."[97] Thus, the *Loving* Court cemented the connection be-

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tection is limited to protecting blacks and that what really matters is whether the racial group existed within a community).

93 McLaughlin v. Florida, 379 U.S. 184 (1964).

94 *See id.* at 191–92 (justifying departure from rational basis review because "we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States").

95 *Id.* at 192.

96 Loving v. Virginia, 388 U.S. 1, 8 (1967).

97 *Id.*

tween suspect classification designation and heightened scrutiny.[98] Like *Carolene Products* footnote four, this reasoning could plausibly be read as establishing a bright-line distinction between discrimination in a commercial context versus discrimination among classes of persons. But because of the heavy emphasis on the presumptive impermissibility of race discrimination, *Loving* is typically read as being limited to that narrower proposition.

The closest the Court came to explaining the reasons why race was a suspect classification (beyond the historical purpose of the Fourteenth Amendment) was by declaring the color of one's skin irrelevant to determining legal—especially criminal—burdens.[99]

It was not until 1971, in examining the issue of discrimination based on alienage, that the Court explicitly invoked *Carolene Products* and articulated something that could be called a suspect classification analysis. The laws at issue in *Graham v. Richardson*[100] excluded resident aliens from welfare benefits. The State asserted that alienage was not a suspect classification akin to race and national origin, but the Court determined that its prior decisions "established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[101]

The Court stated simply, "Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[102] Thus, the case tipping off the era of

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98 *See* Eskridge, *supra* note 23, at 5. Although *Loving* declared that race classifications must be subject to the "most rigid scrutiny," *Loving*, 388 U.S. at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)), the Court's articulation of that standard does not comport with our contemporary understanding of strict scrutiny. Specifically, the Court stated that, to be upheld, such laws "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving*, 388 U.S. at 11. The Court then concluded, "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." *Id.* Thus, the anti-miscegenation laws in *Loving* were not struck under strict scrutiny per se, but because they performed an impermissible function—expressing and enforcing unconstitutional animus. *See id.* (describing anti-miscegenation laws "as measures designed to maintain White Supremacy"); *see also* Pollvogt, *supra* note 24, at 917 ("Thus, one may read *Loving* as standing for the proposition that it is impermissible for laws to exist solely for the purpose of enforcing distinctions between social groups, thereby expressing the view that certain social groups are superior to others.").

99 *Loving*, 388 U.S. at 11 ("[T]wo members of this Court have stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.'" (quoting McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring))).

100 Graham v. Richardson, 403 U.S 365 (1971).

101 *Id.* at 371–72 (footnotes omitted).

102 *Id.* at 372.

suspect classification analysis invoked *Carolene Products* footnote four as established doctrine, despite the novelty of this approach and sealed the "discrete and insular minority" concept in the pantheon of suspect classification criteria, without analysis or explanation.

Thus, the story of the development of the suspect classifications is opaque. The Court's decision in *Hernandez* suggested the possibility of a robust equal protection jurisprudence that would monitor the laws for evolving forms of social group discrimination. But this approach was quickly abandoned as subsequent cases emphasized race as a historically distinct social marker, so inherently pernicious that the Court never bothered to discuss *why* race is a problematic classification. This void of analysis thus left room for the Court to later declare that race classifications would be subject to strict scrutiny regardless of whether it was whites or racial minorities who were affected.

It was not until the Court considered arguments to expand suspect classification status to include other social groups that the Court began to articulate a more reasoned basis for granting—or denying—this designation.

D. Quasi-Suspect Classifications: Stereotype and Self-Determination

Paradoxically, suspect classification analysis was not clearly articulated around the identification of suspect classifications. Rather, it was in recognizing lesser classifications ("quasi-suspect" classifications) and non-suspect classifications that the Court began to offer reasons for granting the designation in some cases while denying it in others.

Recognizing that not every classification was always inherently suspect, but that rational basis review was insufficient to protect against some types of discrimination that were still of concern, the Court developed yet another category of classifications and another level of scrutiny: quasi-suspect classifications, which are subject to the chimeric intermediate scrutiny standard. Two classifications were ultimately placed in this category: gender and illegitimacy.

The Court's treatment of gender discrimination perhaps best embodies the Court's ambivalence about suspect classification analysis. In 1971, the Court recognized that gender discrimination was of concern to the Equal Protection Clause in *Reed v. Reed*.[103] The law at issue in that case was an Idaho statute providing that, in the context of

103 Reed v. Reed, 404 U.S. 71 (1971).

choosing between otherwise equally qualified persons for the role of administrator of an estate, "males must be preferred to females."[104] The Court determined that, because the statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause."[105] The Court did not perform any sort of suspect classification analysis in this early case, but simply determined that the sex classification lacked a rational relationship to the goal of the law.[106] Under this standard, the Court determined that creating a sex preference in order to reduce workload on the probate courts was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[107]

Thus, *Reed* at most reflected a common sense agreement that gender classifications were an object of concern for the Equal Protection Clause and that gender was not a valid proxy for competence to administer an estate. The Court did little to support these conclusions beyond stating them.

It was not until the Court's next major gender case, *Frontiero v. Richardson*,[108] that the Court explicitly considered whether gender was a suspect classification. At issue in *Frontiero* was a statute used to determine whether a member of the military was entitled to certain spousal benefits. Under the statute, male service members were entitled to such benefits simply by virtue of having a wife; female service members had to affirmatively prove that their husbands were dependent to access the same benefits.

The plaintiff—apparently not content with the vague arbitrariness analysis in *Reed*—argued that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."[109] A plurality of the Court agreed, deciding that sex was a trait

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104 *Id.* at 73 (quoting IDAHO CODE § 15-314) (internal quotation marks omitted).

105 *Id.* at 75.

106 *Id.* at 75–76 ("The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."); *see also id.* at 76 ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'") (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). As suggested by its evocative title, *Royster Guano Co.* was a case dealing with discrimination in a commercial (tax) context against a fertilizer producer. 253 U.S. at 412.

107 *Reed*, 404 U.S. at 76.

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

109 *Id.* at 682 (footnotes omitted).

sufficiently analogous to race[110] such that sex-based classifications were inherently suspect and should "be subjected to strict judicial scrutiny" as a result.[111]

In reaching this conclusion, the Court first pointed to *Reed*, which it characterized as departing from traditional rational basis review. In *Reed*, the government had justified the law at issue as reflecting a fair assumption that men were "as a rule more conversant with business affairs than . . . women."[112] Because the *Reed* Court (1) acknowledged that there was some truth to this generalization (certainly enough to provide a rational basis), but (2) nonetheless determined that it represented forbidden, arbitrary discrimination, the *Reed* Court had "depart[ed]" from traditional rational basis review.[113] In other words, because the *Reed* Court "implicitly rejected appellee's apparently rational explanation of the statutory scheme,"[114] it must have been applying some form of heightened scrutiny.

In addition to generally comparing gender to race, the Court examined what are now the recognized suspect classification criteria. First, it noted that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination."[115] As a result of pervasive, paternalistic views of women and their abilities, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes."[116] The Court conceded "that the position of women in America has improved markedly in recent decades" but countered that "because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination."[117]

Second, the Court addressed the immutability factor. The Court found that,

> since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would

110 *See id.* at 685 ("[T]he position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.").

111 *Id.* at 688.

112 *Id.* at 683 (quoting Brief for Respondent at 12, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4)).

113 *Id.* at 684.

114 *Id.* at 683.

115 *Id.* at 684.

116 *Id.* at 685.

117 *Id.* at 685–86 (footnote omitted). Note that the fairness or unfairness of distributing legal burdens based on a trait over which one does not have control represents an entirely independent and distinct philosophy of invidious discrimination from an inquiry into the history of discrimination or political powerlessness.

> seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[118]

The Court went on to reason that sex is different than other immutable traits (e.g., intelligence or physical disability) because "the sex characteristic frequently bears no relation to ability to perform or contribute to society."[119] Thus, such stereotypes are dangerous because they interfere with the ideal of self-determination: "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[120]

Finally, in assessing the political power of women, the Court noted that "Congress has itself manifested an increasing sensitivity to sex-based classifications."[121] Interestingly, the Court took this legislative solicitude as evidence that women lacked political power (as compared to the Court's analysis in *Cleburne*, where the Court interpreted legislative concern as a sign of the presence of a certain type of political power). The Court deferred to Congress's conclusion "that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."[122]

Concluding that sex was a suspect classification, such that strict scrutiny should apply, the plurality found the government's reliance on distinction between male and female service members vis-à-vis spousal benefits could not be justified by an interest as minimal as "administrative convenience."[123]

It is important to note that the Court conceded that the gender classification in *Frontiero* would survive rational basis review. The government's interest in expediently distributing benefits (and conserving the fisc, where possible) is patently legitimate. Further, the presumption implicit in the classification—that wives are more likely dependent on their husbands than the other way around—while a generalization, was sufficiently precise to satisfy the "rationally related" requirement. Under rational basis review, it is permissible to rely on inaccurate stereotypes. We can see very clearly here how suspect

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118 *Id.* at 686 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

119 *Id.* The focus on ability is especially poignant in thinking about people with disabilities and the *Cleburne* analysis. If we give a blanket authorization (that is, apply rational basis review) to discrimination based on ability, we permit laws to disadvantage the disabled in areas not related to their disability and mark them as an underclass.

120 *Id.* at 686–87.

121 *Id.* at 687.

122 *Id.* at 687–88.

123 *Id.* at 688–90.

classification analysis and the tiers of scrutiny determine outcomes in equal protection cases. The fate of the plaintiff's claim in *Frontiero* truly depended on whether the Court could be convinced to apply heightened scrutiny.

The concern expressed in *Frontiero* is not that gender is an entirely inaccurate proxy for the qualities that the government is seeking to regulate, but that it is nonetheless invalid because it tends to perpetuate harmful stereotypes. This is an interesting take on the difference between rational basis review and heightened scrutiny. It suggests that invidious discrimination may, in fact, be rational but nonenonetheless problematic because it perpetuates stereotypes or simply expresses a sentiment that we consider to be unfair. If invidious discrimination can have a rational basis, this in turn suggests that rational basis review on its own cannot effectively screen for invidious discrimination because what makes such discrimination invidious is not that the underlying presumptions are radically inaccurate, but the expressive function of such classifications.

Justice Lewis Powell, joined by Justice Harry Blackmun, concurred in the judgment but disagreed with the plurality's decision to deem sex a suspect classification. The concurrence evidences the nascent concern with the multiplication of suspect classes and the effect of this development on the dynamics of judicial review.[124] Justice Powell further criticized the Court for prematurely interfering in the democratic debate over the Equal Rights Amendment.[125] He contended that premature designation of suspect classifications disrupts the balance between the judicial branch and the democratic process:

> There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.[126]

Thus, Justice Powell drew a connection between suspect classification analysis, the levels of judicial scrutiny, and a commitment to separa-

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124 *Id.* at 691–92 (Powell, J., concurring) ("It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding."); *see also* Yoshino, *supra* note 30, at 757–58 (noting that the Supreme Court has not accorded heightened scrutiny to any new group based on suspect classification since 1977 and arguing that, due to "pluralism anxiety," "[a]t least with respect to federal equal protection jurisprudence, this canon has closed").

125 *Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

126 *Id.*

tion of powers that would echo through the Court's subsequent jurisprudence.

In its next major gender decision, the Court retreated from equating sex discrimination to race discrimination. In *Craig v. Boren*,[127] the issue was whether young men's[128] equal protection rights were being violated when the State of Oklahoma denied them the right to purchase "nonintoxicating" 3.2% beer while under the age of twenty-one, when the seductive elixir was made available to women upon reaching the age of eighteen.[129]

The Court noted that *Reed* had established that sex-based classifications receive equal protection scrutiny and further asserted (without immediate citation, although the Court eventually referred to *Frontiero*, among other cases) that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[130] The Court also credited *Reed* with establishing the notion that laws may not rely on gender as a proxy when other, "more germane bases of classification" were available.[131] The Court then asked, essentially, whether gender was an adequate proxy in this particular context.[132] Specifically, the Court agreed that the purported goal of enhancing traffic safety was an important state interest but rejected the State's statistical argument that the gender distinction "closely serves to achieve that objective."[133] The Court characterized the evidentiary record as "unpersuasive." It was less a matter of the accuracy of the statistical surveys (the Court conceded that the statistical gender disparities were "not trivial in a statistical sense"[134]), than a matter of the inquiry itself being beside the point:

> There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely il-

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

128 Interestingly, the male plaintiff, Craig, dropped out because he attained the age of twenty-one, rendering his claim moot. *Id.* at 192. The remaining plaintiff, Whitener, was female but challenged the law as a vendor of 3.2% beer subject to penalties under the statute—not on the basis of being discriminated against because of her gender. *Id.* at 192–93.

129 *Id.* at 192.

130 *Id.* at 197.

131 *Id.* at 198.

132 *Id.* at 199 (posing the controlling question as "whether . . . the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute").

133 *Id.* at 199–200.

134 *Id.* at 201.

> lustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.[135]

Thus, the Court expressed what became a recurring theme in the gender cases. It does not matter if a generalization is true or useful. Generalizations (at least about the genders) are always problematic in and of themselves. But the Court did not articulate precisely why this is the case. After alluding to unarticulated "normative" concerns, it merely offered: "[T]he relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based differences be substantially related to achievement of the statutory objective."[136]

This piece of reasoning is a perfect demonstration of the manner in which scrutiny of the tailoring of a particular law (that is, whether the relationship between the classification and the purpose of the law is "too tenuous") supplants a discussion of the normative principles at play.

The Court made some effort to elaborate on these underlying "normative" principles in footnote twenty-two of the decision, where it explained by analogy that, even if there were real statistical differences between ethnic or religious groups vis-à-vis alcohol abuse, the Equal Protection Clause would not permit such distinctions to be drawn in the laws.[137] But even here, the Court never precisely explained *why* such regulations would be offensive. It simply noted "society's perception of the unfairness and questionable constitutionality of singling out groups to bear the brunt of alcohol regulation."[138]

It was in his concurrence to this case that Justice John Paul Stevens famously expressed his fatigue with the tiers of scrutiny, stating, "There is only one Equal Protection Clause."[139] According to Stevens, the provision "does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[140] Justice Stevens then identified his reasons for finding the gender classifications at issue unconstitutional: (1) the fact that gender is "an accident of birth,"[141] such that imposing differential burdens on the basis of gender "would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsi-

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135 *Id.* at 204.
136 *Id.*
137 *Id.* at 208 n.22.
138 *Id.*
139 *Id.* at 211 (Stevens, J., concurring).
140 *Id.* at 211–12.
141 *Id.* at 212.

bility";[142] (2) the law was based on an abandoned "tradition of discriminating against males in this age bracket";[143] and (3) the stereotype was "perverse" because the actual physical differences between men and women suggested that it was women who should have restricted access to alcohol (because "males are generally heavier than females").[144]

Justice Stevens emphasized that the law was "not totally irrational" and would have survived the Court's most deferential level of scrutiny.[145] (Indeed, it is virtually impossible to imagine what laws—including those based on race—would not survive if subject only to rational basis review, because rational basis review (1) permits reliance on inaccurate stereotypes and (2) contains no mechanism for identifying which stereotypes we consider unfair.)[146] But under a standard even slightly more demanding—say, one of plausibility—the law would necessarily fail due to the lack of correlation between the trait of gender and the purported goals of the statute. Justice Stevens considered such an overbroad classification—burdening 100% of young males when only 2% were prone to violating drinking and driving laws—to amount to "an insult to all of the young men of the State."[147] Much like the majority opinion, Justice Stevens, in his concurrence, conflated concerns over accuracy with concerns over reliance on offensive stereotypes.

Justice Potter Stewart also wrote separately to assert that "[t]he disparity created by these Oklahoma statutes amounts to total irrationality," demonstrating a rather striking lack of consensus as to the meaning of the term,[148] while Chief Justice Warren Burger dissented, arguing that there was no constitutional basis for treating gender as a disfavored classification, and noting that, because eight of nine Justices had concluded that the law was not irrational (albeit unwise), the law should have been upheld under the default standard of rational basis review.[149]

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142 *Id.* at 212 n.2 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)) (internal quotation marks omitted).

143 *Id.* at 212.

144 *Id.* at 212–13, 213 n.4.

145 *Id.* at 213.

146 Following Stevens's rationale, Suzanne Goldberg claimed that "a unitary [equal protection] standard potentially would narrow the gap between the virtually assured fatal blow dealt to classifications under strict scrutiny and the rubber stamp regularly received by classifications subjected to rational basis review." Goldberg, *supra* note 25, at 491.

147 *Craig*, 429 U.S. at 214 (Stevens, J., concurring).

148 *Id.* at 215 (Stewart, J., concurring).

149 *Id.* at 217 (Burger, C.J., dissenting).

Justice William Rehnquist dissented as well, focusing on two points: first, that it was inconsistent to apply heightened scrutiny to a law discriminating against men—a class that had not suffered a history of discrimination and marginalization[150]; and second, that the majority had created a new level of scrutiny out of whole cloth.[151] Unsurprisingly, relying heavily on the deferential nature of traditional rational basis review and the statistical evidence provided by the State, Justice Rehnquist concluded that the laws would have survived rational basis review.

The various opinions in *Craig* show the Justices struggling mightily over the proper application of equal protection principles, but this normative debate is deflected almost entirely onto an argument about the proper standard of review, rather than a discussion about the theory of equality underlying the provision.

The Court's confusion about the significance of gender discrimination and its meaning came to a head in *Mississippi University for Women v. Hogan*.[152] In that case, Justice Sandra Day O'Connor wrote for a slim majority to strike a nursing college's policy of excluding male students. Because the policy "expressly discriminate[d] among applicants on the basis of gender," it was subject to equal protection scrutiny and, in particular, the heightened level of scrutiny applicable to sex discrimination.[153] The Court further explained, "[t]hat this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review."[154] The Court articulated the applicable standard as placing the burden on the state to provide an "'exceedingly persuasive justification' for the classification,"[155] which could be met "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[156] In applying this test,

150 *Id.* at 219 (Rehnquist, J., dissenting).

151 *Id.* at 220 ("The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard."). Justice Rehnquist further criticized the multiplication of standards as mere rhetoric devoid of inherent meaning. "How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the attainment of such objective . . . ?" *Id.* at 221. "Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices, . . . masquerading as judgments . . . ." *Id.*

152 Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

153 *Id.* at 722–723.

154 *Id.* at 723.

155 *Id.* at 724 (internal quotation marks omitted).

156 *Id.* (internal quotation marks omitted).

courts are obligated to exclude "fixed notions concerning the roles and abilities of males and females."[157]

Here, Justice O'Connor made what is perhaps the most compelling (and explicit) justification for applying heightened scrutiny and, in particular, the more stringent tailoring requirement associated with it:

> The purpose of requiring that close relationship [between the governmental objective and the discriminatory means] is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.[158]

Thus, according to Justice O'Connor, heightened scrutiny serves to force courts to reason through the appropriateness of relying on certain classifications rather than presuming their validity because they rest on familiar and comfortable stereotypes.

The Court found that the policy failed both prongs of the intermediate scrutiny standard. The State offered the important state interest of remedying discrimination against women, but O'Connor noted that women made up the vast majority of nurses both in Mississippi and nationwide, giving lie to the contention that any remedy was needed.[159] Further, because of the predominance of women in nursing, maintaining the school for women only "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job."[160] Finally, the policy was not appropriately tailored to achieve its objectives because men were permitted to audit classes at the school and fully participate, such that a single-gender educational environment was not being preserved in any case.[161]

The four dissenters in the case—Justices Burger, Blackmun, Powell and Rehnquist—reflected a fundamentally different perspective on the role of gender segregation in educational environments. Specifically, Chief Justice Burger worried that the holding might be extended to other types of schools as well.[162] Justice Blackmun lamented the "rigid" approach to sex discrimination, suggesting that it would erode legitimate values preferences without necessarily increasing equality.[163] Justice Blackmun invoked the specter of con-

157 *Id.* at 724–25.
158 *Id.* at 725–26.
159 *Id.* at 727–29.
160 *Id.* at 729.
161 *Id.* at 730–31.
162 *Id.* at 733 (Burger, C.J., dissenting).
163 *Id.* at 734 (Blackmun, J., dissenting).

formity,[164] and Justice Powell echoed this theme.[165] Specifically, Justice Powell contended—in rhetoric eerily and surely unintentionally reminiscent of *Plessy*—that "[t]he sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy."[166] Justice Powell further found it illogical that a heightened level of judicial scrutiny, "designed to free women from 'archaic and overbroad generalizations,'" would be applied to a claim of discrimination advanced by a man—in particular, a man who had the opportunity to attend a nursing school elsewhere in the state.[167]

On the whole, the various opinions in the case express a deep ambivalence about whether gender discrimination is equally problematic in different contexts. In another parallel to *Plessy*, some members of the Court appeared to perceive distinctions between discrimination in the sphere of core legal and civil rights, as opposed to the social sphere.

The Court veered back in the other direction in *J.E.B. v. Alabama ex rel T.B.*[168] The issue there was whether preemptive challenges based on gender violated the Equal Protection Clause. The emphasis in the Court's analysis was that gender was not a valid proxy for ability.[169] The Court reasoned that heightened scrutiny applies to gender classifications primarily because of the danger of stereotype:

> [T]his Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, . . . or based on "outdated misconceptions concerning the role of

164 *Id.* at 734–35 ("I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and relegate ourselves to needless conformity."). It is certainly fair to say that some may be attached to the values or tradition associated with single-sex educational institutions, but Justice Blackmun's sentiment is remarkably unreflective. It does not offer any limiting principle—a mechanism for distinguishing between those traditions that are benign versus those that are oppressive.

165 *Id.* at 735 (Powell, J., dissenting) ("The Court's opinion bows deeply to conformity.").

166 *Id.* at 737; *see also id.* at 740 (noting that the policy "seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college"). The Court in *Plessy* minimized the state's role in imposing legally sanctioned segregation by stating that it reflected private preferences that the races remain separate. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

167 *Miss. Univ. for Women*, 458 U.S. at 740 (Powell, J., dissenting) (citation omitted); *id.* at 741 ("By applying heightened equal protection analysis to this case, the Court frustrates the liberating spirit of the Equal Protection Clause." (footnote omitted)).

168 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

169 *Id.* at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

> females in the home rather than in the 'marketplace and world of ideas.'"[170]

The Court rejected the government's attempt to distinguish between race discrimination and sex discrimination.[171] The Court stated that "[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'"[172]

The Court then went on to state that the question under heightened scrutiny was "whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."[173] The Court further demanded that the state offer an "exceptionally persuasive justification" for the discrimination.[174] The state offered that an all-male jury might be more sympathetic to the male defendant in the case at hand. To this, the Court responded: "We shall not accept as a defense to gender-based preemptory challenges 'the very stereotype the law condemns.'"[175]

Echoing sentiments first articulated in *Brown*, the Court expressed concern that, when the government relied on and enforced stereotypes, this resulted in a larger symbolic harm to the affected individuals, to society, and to the structures of government itself.

> Discrimination in jury selection, whether based on race or gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. . . . The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.[176]

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170 *Id.* at 135 (citations omitted).

171 *Id.* at 136. The government had argued that "'gender discrimination in this country . . . has never reached the level of discrimination' against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom." *Id.* at 135.

172 *Id.* at 135.

173 *Id.* at 136–37.

174 *Id.* at 137.

175 *Id.* at 138.

176 *Id.* at 140 ("When state actors exercise preemptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women."); *see also id.* at 142 ("Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'").

The dissenters, Justices Scalia and Rehnquist, expressed a fundamental disagreement that reliance on stereotype—no matter how accurate—was always impermissible.[177]

In *United States v. Virginia*,[178] the Court attempted to tackle head-on the tension between the harm of stereotype and the "reality" of differences between the sexes. The female plaintiffs challenged their exclusion from the all-male Virginia Military Institute. The Court began by noting that *J.E.B.* and *Mississippi University for Women* stood for the proposition that gender discrimination must be supported by an "exceedingly persuasive justification."[179] This heightened scrutiny was merited, the Court explained, by the nation's "long and unfortunate history of sex discrimination."[180] Applying rational basis review to gender discrimination did not take gender discrimination seriously enough and permitted unfettered reliance on stereotype (due to the minimal tailoring requirements of rational basis review).[181] From this perspective, reliance on stereotypes or generalizations (permissible under rational basis review) interferes with individual self-determination. According to the Court, women must be afforded "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[182]

But the Court noted that gender classifications need not be "equat[ed] . . . for all purposes, to classifications based on race or national origin"[183] for there to be meaningful review of gender discrimination. Specifically, the Court reiterated the "exceedingly persuasive justification" standard, that the burden of meeting that standard was on the state, and that this justification required the state to show that the classification was substantially related to an important governmental objective.[184] In contrast to justifications offered under rational basis review, "[t]he justification must be genuine, not hypothesized or

177 *See id.* at 156 (Rehnquist, C.J., dissenting) ("The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room."); *id.* at 158 (Scalia, J., dissenting) ("Even if sex was a remarkably good predictor in certain cases, the Court would find its use in preemptories unconstitutional.").

178 518 U.S. 515 (1996).

179 *Id.* at 531.

180 *Id.* (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

181 *Id.* at 531–33 (noting that gender discrimination was previously acceptable if it had "any 'basis in reason,'" but that since *Reed*, relying on generalizations about women was no longer permissible).

182 *Id.* at 532.

183 *Id.*

184 *Id.* at 532–33.

invented *post hoc* in response to litigation."[185] Finally, the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[186] These standards, then, stood alone as the means to protect from gender-based discrimination and did not rely on comparisons to race-based analyses.

Additionally, the Court marked a key distinction between race discrimination and gender discrimination. While race discrimination was always presumptively invalid, gender was not "a proscribed classification."[187] This is because there were recognized "inherent differences"[188] between the genders. The Court noted that "[p]hysical differences between men and women . . . are enduring."[189] On this basis, Justice Ruth Bader Ginsburg, writing for the Court, attempted to import normative principles, drawing a distinction between gender classifications that served to denigrate women versus those that sought to further women's equality.[190]

In a concurring opinion, Chief Justice Rehnquist criticized the majority for muddying the intermediate scrutiny standard by adding the "exceedingly persuasive justification" language.[191] The Chief Justice also would not have evaluated the state's actions prior to recent decisions regarding gender-based classifications because the state had no reason to believe that it was violating the Constitution until recently. "Long after the adoption of the Fourteenth Amendment, and well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause."[192] Chief Justice Rehnquist further questioned the lack of distinction drawn between excluding women from jury service and excluding them from an all-male educational institution, reiterating the notion expressed in *Plessy* that concerns about discrimination might apply only to some types of government action and not others.

In a more pointed critique, Justice Scalia accused the majority of "drastically revis[ing] our established standards for reviewing sex-

185 *Id.* at 533.
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *See id.* at 533–34 (asserting that "inherent differences" between the sexes may not be used for "denigration of the members of either sex or for artificial constraints on an individual's opportunity.").
191 *Id.* at 559 (Rehnquist, C.J., concurring).
192 *Id.* at 560.

based classifications."[193] Justice Scalia agreed that social institutions—historical and contemporary—are permeated with prejudice. But rather than being a call to judicial intervention, such prejudices could be dealt with by our democratic political system: "The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly."[194] Interestingly, this stance rejects the one portion of *Carolene Products* footnote four that is relatively clear: the observation that sometimes, certain social groups are compromised vis-à-vis their participation in the political process, and the judiciary must take care to notice marginalizing laws of this nature. Justice Scalia later cited footnote four for the proposition that women were not a suspect class because they were neither a discrete and insular minority nor politically powerless.[195]

Justice Scalia went on to mock the "scientific" tiers-of-scrutiny framework as an artifice that served to disguise judicial activism.[196] Scalia's chief complaint, however, was that the judiciary should work "to *preserve* our society's values . . . , not to *revise* them."[197]

The persistent theme in the gender cases is ambivalence and confusion over whether reliance on stereotype is ever permissible and, if so, whether the Court should be guided by the accuracy of the stereotype (i.e., whether it is based on "real differences") or the symbolic harm associated with it.

In contrast to the ambivalence expressed around the quasi-suspect classification of gender, the Court's vision regarding the other quasi-suspect classification—illegitimacy—was quite clear. In *Levy v. Louisiana*,[198] the Court considered a wrongful death statute that precluded recovery of benefits by illegitimate children. The Court described the Equal Protection Clause as prohibiting invidious discrimination, which would be tested by asking whether "the line drawn" by the challenged law was a rational one.[199]

But the Court drew a distinction between different types of legislation, noting that "[i]n applying the Equal Protection Clause to social

193 *Id.* at 566 (Scalia, J., dissenting).

194 *Id.* at 567.

195 *Id.* at 575 ("[T]he suggestion that they are incapable of exerting . . . political power smacks of the same paternalism that the Court so roundly condemns.").

196 *Id.* at 567 ("These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.").

197 *Id.* at 568.

198 Levy v. Louisiana, 391 U.S. 68 (1968).

199 *Id.* at 71.

and economic legislation, we give great latitude to the legislature in making classifications,"[200] but that this deferential posture had not prevented the Court from striking down "invidious classification[s]," especially those touching on "basic civil rights."[201] The Court concluded that the child's status as illegitimate did not change the harm of losing a parent: "We conclude that it is invidious to discriminate against [the mother's illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done to the mother."[202] In other words, legal burdens should follow responsibilities, and children can never be held responsible for the circumstances of their birth.

The Court echoed this moral clarity several years later in *Weber v. Aetna Casualty & Surety Co.*[203] At issue in *Weber* was the constitutionality of a state law that prevented unacknowledged illegitimate children from recovering benefits under the workman's compensation system. The Court first confirmed that applicable precedent framed the inquiry as whether "the fact of a child's birth out of wedlock" bore any "reasonable relation" to the purpose of the statute at issue.[204] This was arguably still rational basis review in form, but the Court posed a more pointed question in practice. The Court asked whether the difference between legitimate and illegitimate children mattered with respect to *the child's interest in the benefit provided by the law*—which was to be shielded, at least to some extent, from the consequences of parental injury or loss.

Purportedly applying rational basis review to the challenged law, the Court noted the state's interest "in protecting 'legitimate family relationships.'"[205] The Court acknowledged that "the regulation and protection of the family unit have indeed been a venerable state concern."[206] The Court did not "question the importance of that interest" but did question "how the challenged statute will promote it."[207] Protecting the family unit is one matter; expressing a bare preference for one type of family is another.

The Court ultimately concluded that "[t]he state interest in legitimate family relationships is not served by the statute."[208] "The inferi-

200 *Id.*
201 *Id.*
202 *Id.* at 72 (footnote omitted).
203 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).
204 *Id.* at 168.
205 *Id.* at 173 (citation omitted).
206 *Id.*
207 *Id.*
208 *Id.* at 175.

or classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[209] In other words, despite the valid governmental interest in promoting marriage and childbirth in marriage, the Court concluded that punishing or excluding one group of children from important benefits does not advance the interests of the other.

In the penultimate passage of the decision, the Court recognized that punishing "the inferior classification" of children was not only ineffective, but profoundly unfair: "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons . . . . But visiting this condemnation of the head of an infant is illogical and unjust."[210]

Thus, the Court specifically disavowed the legislative technique of denying benefits to children in an effort to control the conduct of their parents:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[211]

In 1977, the Court implicitly recognized that it treated classifications based on illegitimacy as quasi-suspect and that the applicable standard was, as with gender classifications, intermediate scrutiny.[212]

The quasi-suspect classification cases illuminate three different concerns animating suspect classification analysis: the validity or accuracy of certain proxies; the harm of stereotype, regardless of accuracy; and the larger principle of correlating burdens to individual responsibility. The Court never clearly identified, however, which if any of these was a guiding "normative principle" of its jurisprudence.

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209 *Id.*

210 *Id.*

211 *Id.*

212 *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977) (holding that classifications based on legitimacy were not inherently suspect but that "[i]n a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose"); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."); Yoshino, *supra* note 30, at 757 ("[T]he last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977." (citing *Trimble*, 430 U.S. at 766–76)).

E. Non-Suspect Classifications: Differences That Matter

The cases where the Court denies suspect classification status provide a study in contrasts. Some of these cases are extremely superficial in their analysis, which is troubling, because once suspect classification status is denied, the issue is unlikely to be revisited. This means that the group at issue is virtually permanently excluded from receiving meaningful judicial review of their claims, given the general weakness of the rational basis standard.

On the other side of the spectrum are cases where the Court carefully considers and explains why a particular group is not being accorded suspect classification status, but nonetheless applies a form of meaningful rational basis review animated by many of the values underlying the recognition of presumptively suspect classes. It is from this small set of exceptional cases that one perhaps can learn the most about the true concerns of equal protection jurisprudence. Further, as explored in Part IV, these cases provide a concrete, workable doctrinal and evidentiary framework for giving meaningful review to all equal protection claims.

Although *San Antonio Independent School District v. Rodriguez*[213] is cited for the proposition that poverty is not a suspect classification,[214] the decision is not particularly helpful in understanding the Court's suspect classification analysis. The law at issue in the case—a complicated series of tax regulations designed to provide adequate funding for school districts throughout the state—did not contain facial classifications of persons, and so arguably did not present the issue squarely in the first place.[215] Indeed, the Court's primary criticism of the plaintiffs' argument was that the classification at issue was poorly defined, such that it was difficult to analyze for suspect or non-suspect traits. The Court did opine that a classification based on wealth might be too diffuse and diverse to meet suspect classification criteria. But this was not a case where the law clearly defined a classification of persons on its face. Had the law, for example, denied public education to persons below the poverty line, the analysis surely would

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

214 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 806 (4th ed. 2011) ("In *San Antonio School District v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.").

215 *Rodriguez*, 411 U.S. at 19 ("The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class.").

have taken on a different tone and likely produced a different result.[216]

In assessing the plaintiffs' contention that the Texas school financing system burdened a suspect classification, the Court, at the outset, noted that lower courts, in many cases, had deemed wealth a suspect classification without engaging in any principled analysis of the issue.[217] The tone of the Court's discussion very much suggests that it saw its role as reining in power-drunk lower courts that were finding new suspect classifications left and right. Thus, the Court was compelled to analyze "the hard threshold questions" of whether "the class of disadvantaged 'poor' [can] be identified or defined in customary equal protection terms."[218]

After considering the possible definitions of the affected class, the Court concluded,

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[219]

Significantly, this is as much an indictment of a failed evidentiary presentation as it is a disciplined suspect classification analysis.

The Court also dealt summarily with the claim that age was a suspect classification in its 1976 decision in *Massachusetts Board of Retirement v. Murgia*.[220] The Court determined that the aged had been subject to some discrimination, but not a sufficient amount—making this assertion without any citation to the factual record or precedent.[221] Further, according to the Court, the relevant age—fifty—was more properly characterized as middle rather than old age. Finally, in conclusory fashion, the Court observed that those in old age were not a "discrete and insular minority" per *Carolene Products* footnote four.[222]

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216 Neither was this a case where the disfavored group was denied access to a right altogether. Rather, the discrimination involved was relative. Namely, children in the poorest school district in Texas received funding at the level of $356 per pupil, while children in the wealthiest school district received funding at the level of $594 per pupil. *Id.* at 13–14.

217 *Id.* at 19 ("[T]he courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis . . . .").

218 *Id.*

219 *Id.* at 28.

220 427 U.S. 307, 312 (1976) ("We need state only briefly our reasons for agreeing that strict scrutiny is not the proper test for [the plaintiff's claims].").

221 *See id.* at 313.

222 *Id.*

Rather, old age "marks a stage that each of us will reach if we live out our normal span."[223] In the final analysis, old age was not "sufficiently akin to those classifications that we have found suspect."[224]

By contrast, *Plyler v. Doe*—while denying suspect classification status to the plaintiffs in that case—provides detailed insight into why certain classifications cause concern for the Court.[225] *Plyler* is among the handful of cases where the Court declined to find a suspect or quasi-suspect class, and therefore declined to apply heightened scrutiny to the plaintiffs' equal protection claim, and yet ultimately ruled for the plaintiffs in the case. Thus, *Plyler* can be read for its use of the elusive "rational basis with bite" standard, but it can also be read for guidance on what counts as a suspect classification and why.

The law challenged in *Plyler* was a Texas statute that sought to deny public education to the children of undocumented immigrants. The federal district court in the case made several significant factual findings.[226] First, the court determined that the law did not have "the purpose or effect of keeping illegal aliens out of the State of Texas."[227] The district court found that increased immigration into the state "had created problems for the public schools of the State, and that these problems were exacerbated by the special educational needs of immigrant Mexican children," although there were other sources of problems as well.[228] Thus, "barring undocumented children from the schools would save money, but it would 'not necessarily' improve 'the quality of education.'"[229] Further, the district court observed that "without an education, these undocumented children, '[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.'"[230]

In determining the proper level of scrutiny to apply to the challenged law, the Court reflected on the reasons why certain classifications were treated as suspect:

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legitimate rationality in the pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recog-

223 *Id.* at 313–14.
224 *Id.* at 314.
225 Plyler v. Doe, 457 U.S. 202 (1982).
226 *Id.* at 207.
227 *Id.* (quoting Doe v. Plyler, 458 F. Supp. 569, 575 (E.D. Tex. 1978)) (internal quotation marks omitted).
228 *Id.* at 207 (citing *Doe*, 458 F. Supp. at 575).
229 *Id.* (quoting *Doe*, 458 F. Supp. at 577).
230 *Id.* at 207–08 (quoting *Doe*, 458 F. Supp. at 577).

> nized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.[231]

What is particularly interesting about *Plyler* is that, although it ultimately declined to grant suspect classification status, it implemented some of the same values (in particular, protecting individual self-determination) discussed above in its subsequent application of rational basis review, as discussed in Part IV.

Addressing the tension between deference and judicial concern, the Court noted that, at the same time that the Equal Protection Clause "directs that 'all persons similarly circumstanced shall be treated alike,'" it "does not require things which are different in fact or opinion be treated in law as though they were the same."[232] Further, "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States."[233] In light of the latitude given to legislatures in this realm, the Court "seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."[234]

But the Court recognized that deferential rational basis review does not always get the job done: "[W]e would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. . . . Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' . . . ."[235]

The Court next turned its attention to the class at hand. The Court placed blame for the existence of the "shadow population" of

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231 *Id.* at 216 n.14 (citations omitted).

232 *Id.* at 216 (citations omitted) (internal quotation marks omitted).

233 *Id.*

234 *Id.*

235 *Id.* at 216; *see id* at 217 ("With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.").

undocumented immigrants squarely at the feet of the government, noting its failure to adequately enforce existing immigration laws.[236]

Thus, the Court first implied that adult undocumented immigrants were, on some level, not entirely responsible for their circumstances, then further determined that the children of immigrants truly could not be held accountable for their undocumented status and presence in the country.

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.[237]

Because, while "[t]heir 'parents have the ability to conform their conduct to social norms,' . . . the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'"[238] "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[239]

This is one of the clearest statements of a normative justification for designating suspect classifications—and, at the same time, reveals that the normative principle invoked has a much broader and more flexible application than existing rigid suspect classification analysis.

Despite recognizing the inherent concerns with classifications that affect children, the Court noted that "undocumented status is not irrelevant to any proper legislative goal[;] [n]or is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."[240]

While denying that the subject classification was suspect, the Court continuously reiterated reasons to be concerned about Texas's statutory scheme.

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the

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236 *Id.* at 218–19 ("This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.").

237 *Id.* at 219–20.

238 *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

239 *Id.* Here, the Court cited its reasoning in *Weber* regarding "the basic concept . . . that legal burdens bear some relationship to individual responsibility or wrongdoing." Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

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

> abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.[241]

The Court further expressed concern that the law would brand the excluded class of children with the "stigma of illiteracy."[242]

The Court purported to apply rational basis review, but departed from a traditional application of that standard in a number of ways to strike down the statutory scheme. In his concurrence, Justice Powell noted that the Court's decision was grounded in the same considerations as the cases addressing discrimination against illegitimate children: "Although the analogy is not perfect, our holding today does find support in decisions of this Court with respect to the status of illegitimates."[243] Justice Powell emphasized that the children were "innocent" with respect to their status.[244] On this basis, Justice Powell contended that the Court's review in this case was "properly heightened."[245]

Chief Justice Burger was joined by Justices White, Rehnquist, and O'Connor in dissent. The thrust of the dissent pointed to separation of powers concerns: "Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education."[246] But it was not the role of the Court, Chief Justice Burger argued, to judge the wisdom of social policy. "We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking rule as the Court does today."[247] Chief Justice Burger further criticized the majority for being unfaithful to precedent, in particular by "patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases."[248]

The Court's most thorough exegesis of suspect classification analysis appears in *City of Cleburne v. Cleburne Living Center, Inc.*[249] In *Cleburne*, individuals with cognitive disabilities were required by the City to go through a special permitting process to establish a group home. These individuals applied and were denied the requested

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241 *Id.* at 221–22.
242 *Id.* at 223.
243 *Id.* at 238 (Powell, J., concurring).
244 *Id.*
245 *Id.*
246 *Id.* at 242 (Burger, J., dissenting).
247 *Id.*
248 *Id.* at 244.
249 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

permit, based in large part on the fears and stereotypes expressed by neighbors of the proposed group home.

The Court began its analysis by considering the argument that individuals with cognitive disabilities were members of a suspect class.[250] Laying out the backdrop of precedent, the Court emphasized that it had declined "to extend heightened review to differential treatment based on age," characterizing "[t]he lesson of *Murgia*" as follows:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to the interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.[251]

Thus, drawing on the gender cases as well as *Murgia*, the Court focused on the inherent relevance of the trait (whether it "bears . . . [a] relation to ability to perform or contribute to society")[252] from the perspective of legislatures. Predictably, the focus on ability stacked the deck in the analysis of disability as a suspect classification.

Indeed, the Court stated at the outset of its analysis that "it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world."[253] The Court further emphasized that the group was not homogenous, compromising a "large and diversified group"[254]—something the Court apparently considered unique to this group, as compared to women, or racial minorities.

The Court determined that the fact that there had been a "distinctive legislative response, both national and state, to the plight of those who are mentally retarded"[255] demonstrated that the group's concerns were being addressed in the political process,[256] and there

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250 As a related side note, while the Court's decision in *Heller v. Doe*, 509 U.S. 312 (1993), is sometimes cited for the proposition that mental illness is also not a suspect classification, the Court did not, in fact, rule on the issue. *See* Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1055 (2012) ("[T]he Supreme Court did not actually hold that persons with developmental mental disabilities do not constitute a suspect class, as is sometimes claimed.").

251 *Cleburne*, 473 U.S. at 441–42.

252 *Id.* at 440–41 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

253 *Id.* at 442.

254 *Id.*

255 *Id.* at 443.

256 *See id.* at 445 ("[T]he legislative response . . . 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."). The paternalistic premise of this observation becomes apparent when one considers whether the "ability to attract the attention of lawmakers" would suffice in the case of women or racial minorities.

was not official, state-sponsored antipathy toward the group. The Court concluded that "[s]uch legislation thus singling out the retarded for special treatment"—that is, legislation addressing the needs of the group—"reflects the real and undeniable differences between the retarded and others."[257] The Court expressed concern that careful examination of laws benefiting those with cognitive disabilities would inhibit lawmakers in their attempts to assist those with cognitive disabilities.[258]

Concluding that the group was not a suspect class, the Court went on to apply rational basis review to the discrimination at issue. But, as in *Plyler*, the Court applied a version of rational basis review that expressed commitment to the same values undergirding suspect classification analysis—in particular, concern with the larger harms caused by reliance on stereotype—and ruled in favor of the plaintiffs. [259]

A final important example of a court denying suspect classification analysis can be found the Ninth Circuit's 1990 decision in *High Tech Gays v. Defense Industrial Security Clearance Office*.[260] (As of this writing, the Supreme Court has yet to rule on the status of sexual orientation.) Much like *Rodriguez* and *Murgia*, the analysis in *High Tech Gays* is conclusory and dismissive.

Plaintiffs in that case challenged the Department of Defense's ("DoD") "policy of subjecting all homosexual applicants for Secret and Top Secret clearances to expanded investigations and mandatory adjudications, and . . . the alleged DoD policy and practice of refusing to grant security clearances to known or suspected gay applicants."[261]

The DoD regulations provided a detailed and colorful list of criteria for determining eligibility for a clearance: "[A]ll indications of moral turpitude, heterosexual promiscuity, aberrant, deviant or bizarre sexual conduct or behavior, transvestitism [sic], transsexualism, indecent exposure, rape, contributing to the delinquency of a minor,

257 *Id.* at 444. Accepting this reliance on "real differences" as presumptively permissible conflicts with the Court's reasoning in the gender cases, where the Court held that (1) even where generalizations are true, they can still be problematic and (2) the existence of "real differences" still merited application of a form of heightened scrutiny—intermediate scrutiny, which recognizes that the existence of "real differences" means that classifications relying on such differences are not per se illegitimate (as is virtually the case for the suspect classifications), but still merit careful, case-by-case examination.

258 *See id.* ("[M]erely requiring the legislature to justify its efforts in these terms [of heightened scrutiny] may lead it to refrain from acting at all.").

259 *See* discussion *infra* Part II.

260 High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

261 *Id.* at 565.

child molestation, wife-swapping, window peeping, and similar situations from whatever source."[262]

In addressing the plaintiffs' argument that sexual orientation was a suspect or quasi-suspect classification meriting heightened equal protection scrutiny, the court first noted that, under the Supreme Court's 1986 decision in *Bowers*, "homosexual activity is not a fundamental right protected by substantive due process and that the proper standard of review under the Fifth Amendment is rational basis review."[263] It further reasoned that "because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes."[264]

The Ninth Circuit then engaged in a suspect classification analysis using the now-recognized suspect classification criteria:

> To be a "suspect" or "quasi-suspect" class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are either a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.[265]

Although the court agreed that homosexuals had suffered a history of discrimination, the court found the other two factors absent. The court stated summarily, "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."[266] "Moreover, legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power . . . ."[267] Accordingly, the court applied rational basis review to the plaintiffs' claims.

In applying rational basis review, the court focused on the plaintiffs' obligation to prove a negative (the absence of a rational basis) and the DoD's lack of obligation to prove anything at all. The court found that "[t]he plaintiffs' affidavits and evidence fail to make a sufficient showing that the DoD does not have a rational basis for its ex-

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262 *Id.* at 566–67.
263 *Id.* at 571.
264 *Id.*
265 *Id.* at 573.
266 *Id.*
267 *Id.* at 574 (footnote omitted).

panded security investigation of homosexuals."[268] "Under a rational basis review as promulgated by the Supreme Court in *Cleburne*, the DoD is not required to conclusively establish that homosexuals have transmitted classified information for its policy of subjecting homosexual applicants to expanded investigations to be constitutional."[269]

Various studies offered by plaintiffs (pointing out the small number of homosexuals deemed to actually be a security risk) were deemed insufficient to prove the lack of a connection between homosexual identity and valid security concerns. Indeed, it is difficult to imagine what sort of affirmative evidence would be exhaustive enough under deferential rational basis review.

What the Ninth Circuit essentially did was engage in a cost-benefit analysis of using the trait of homosexuality as a proxy for conduct that would create a security risk. In contrast to the gender cases, the court did not consider the impact of stereotype and discrimination as part of the cost.

What does the above exposition on the evolution of suspect classification analysis tell us? First, that underneath the doctrinal superstructure of equal protection jurisprudence lies an implicit recognition that the Court cannot trust itself to root out invidious discrimination through the application of a mundane "rational basis" standard, as was aptly demonstrated by the failure of reasoning in *Plessy*. However, since *Plessy*, the Court has never directly examined or addressed the inherent folly of applying deferential rational basis review in cases involving facial discrimination against a class of persons. Instead, it attempted to separate out areas of categorical concern (preliminarily identified in *Carolene Products* footnote four) while leaving all other discriminatory laws subject to what we might properly term "the *Plessy* test"—that is, deferential rational basis review.

We see that the seminal race cases solidified the concept of suspect classes and the associated need for heightened scrutiny, but, again, because of the unreflective consensus that race discrimination was beyond the pale,[270] the Court failed to fully examine and articulate the underlying theoretical and jurisprudential justifications for creating these categories. This lack of clarity became manifest in the Court's decisions establishing—in fits and starts—the quasi-suspect

268 *Id.* at 575.

269 *Id.*

270 This Article certainly does not contest that consensus; rather, it questions the dearth of positive reasoning in the precedent explaining why race discrimination is wrong. Without such an accounting, we cannot identify what practices of thought allowed race prejudice to be accepted as just, nor identify evolving and contemporary prejudices.

classifications, as well as the non-suspect classifications. By the time suspect and quasi-suspect classifications became a closed set in 1977, there was still no clear statement of what exactly was required for suspect classification status and why.

II. DISCONTENTS

Unsurprisingly, the doctrinal disarray of suspect classification analysis has prompted myriad critiques, as well as attempts to rationalize and account for the doctrine. Responses to suspect classification analysis can be placed on a spectrum from those that tend to preserve the doctrine to those that seek to modify the doctrine to those that seek to abandon it altogether.

A. The Pragmatists

The first category of critiques includes those scholars who do not take issue with suspect classification analysis per se, but instead argue that the doctrine should be read to include certain groups currently not favored with suspect classification analysis.[271]

In particular, there is a rich body of scholarship advocating that sexual orientation be recognized as a suspect classification, beginning as early as 1985, with Carol Steiker's prescient student note, published in the Harvard Law Review.[272] In her note, which preceded the Court's decision in *Bowers*,[273] Steiker argued that the interests of gays and lesbians could not be adequately protected either by rights to privacy or First Amendment rights to free expression.[274] Rather, recognition as a suspect classification was the key to protecting the rights of sexual minorities. Extending this recognition was justified primarily by the extent of discrimination against gays and lesbians,

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271 This is, understandably, also the approach of advocates. *See* Goldberg, *supra* note 25, at 525 (noting that, rather than challenge the fundamental doctrinal structures of equal protection analysis, advocates "have sought to satisfy the test for suspect classification rather than urging a new construct that might create more room for the invalidation of discriminatory classifications").

272 Carol Steiker, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297 (1985) ("Whereas arguments for privacy and first amendment rights ultimately give way to social consensus, equal protection theory rejects social consensus and the democratic process as the final arbiters of the rightful status of social groups.").

273 Although *Bowers v. Hardwick*, 478 U.S. 186 (1986), did not directly address the issue, its holding nonetheless effectively precluded recognition of sexual orientation as a suspect classification, at least for the time being.

274 Steiker, *supra* note 272, at 1287.

Steiker argued.[275] Steiker also focused on sexual orientation as an aspect of identity, as opposed to mere conduct, and ultimately concluded that "[b]ecause homosexuality is a determinative feature of personhood and because gay people have historically been victims of stigmatization and discrimination, courts must subject legislation that classifies on the basis of sexual orientation to a heightened standard of review and must closely scrutinize the state interests embodied in the legislation."[276]

Since Steiker's early piece, numerous other scholars have advocated for a similar outcome, although with different emphases.[277] For example, some apply the traditional suspect classification criteria, but take issue with interpretation of the evidence regarding immutability, specifically the contention that sexual orientation was best understood as a behavior rather than an identity.[278] Others contend that the Court has already implicitly recognized sexual orientation as a suspect classification by applying something more than rational basis review in cases involving sexual orientation discrimination.[279]

While sexual orientation is perhaps the most examined basis for expanding the canon of suspect classifications, scholars have advanced numerous other groups for recognition, including individuals

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275 *Id.*

276 *Id.* at 1305.

277 *See, e.g.*, John Nicodemo, *Homosexuals, Equal Protection, and the Guarantee of Fundamental Rights in the New Decade: An Optimist's* Quasi-Suspect *View of Recent Events and Their Impact on Heightened Scrutiny for Sexual Orientation-Based Discrimination*, 28 TOURO L. REV. 285, 290 (2012) ("Recent and current federal court rulings, legislative actions (and inactions), socio-political mores, and general statistics and facts regarding the LGBT community will reveal that sexual orientation, as a classification for equal protection, clearly warrants some level of heightened scrutiny."); Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 388 (2010) ("Strong support exists for the argument that statutes distinguishing based on sexual orientation merit heightened review because LGBTs meet the criteria courts have consistently employed to determine whether a class is suspect."); Lori J. Rankin, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right's Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055, 1073–78 (1994) (arguing that gay men and lesbians merit suspect classification status under the traditional suspect classification criteria).

278 *See* Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 240 (1993) (citing scientific literature, they argued that "[h]omosexuals do not consciously or unconsciously choose homosexuality. Their sexual orientation is as much a part of them as is that of heterosexuals.").

279 *See* Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) ("[T]he Supreme Court not only ought to make gay men and lesbians a suspect or quasi-suspect class, but . . . it has in practice already done so, albeit without the sufficient binding force of precedent.").

who are impoverished, those who are intersex, the elderly, ex-offenders, the homeless, foreign corporations, and students.[280]

Each of these arguments makes an important contribution to our awareness of the persistence of social group subordination. But by advancing arguments within the suspect classification framework, such analyses necessarily preserve that framework rather than challenge it. Advocating for suspect classification recognition validates the Court's hierarchical ordering of social groups, sorting between those that are deserving of additional judicial solicitude and those that are not.

B. The Improvers

The second category of critiques includes those arguments that take issue with certain features of suspect classification analysis, but essentially treat it as a coherent doctrinal framework to be worked within, if improved. First and foremost among these critiques is Bruce Ackerman's important essay, *Beyond* Carolene Products. In the essay, Ackerman situates the "famous words" of *Carolene Products* footnote four in the historical context of the struggle over the Court's le-

280 *See, e.g.*, Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 MO. L. REV. 569, 572 (1994) (examining foreign corporations under the suspect classification criteria and arguing that classifications of corporations based on nationality should receive at least intermediate scrutiny); Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 144 (2011) (offering "a new equal protection doctrine that takes cognizance of the realities of sex, and regards sex categories as a suspect classification, not based on immutability, but on ground of sex categories' very imprecision"); Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 233–38 (2010) (arguing that the Court should reconsider whether age is a suspect classification because the Court's assessment of the evidence of suspectness in *Murgia* was faulty); Leon Letwin, *After* Goss v. Lopez*: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 630–31 (1977) ("[T]he rights of students should be set aside only when compelling state purposes require it, and any such deprivation should be tailored carefully to meet those compelling purposes at minimum cost to constitutional values."); Nice, *supra* note 250, at 1065–67 (arguing that the Court should revisit heightened scrutiny for poverty); Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1191–93 (2006) (documenting the pervasive marginalization of ex-offenders in American society and arguing that laws singling out members of this class for unique legal burdens ought to be subjected to heightened scrutiny); Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 503 (2003) (arguing that, "according to the criteria determined by the Court," the homeless deserve suspect classification).

gitimacy during the first half of the twentieth century.[281] Ackerman credits the *Carolene Products* case with advancing a coherent political theory as well as strategically rehabilitating the Court's role in our democracy.[282] If the Court was previously susceptible to accusations that it defeated majoritarian democracy when it invalidated legislation (the so-called "counter-majoritarian difficulty"), it could now defend judicial activism under certain circumstances as justified by a defective political process. Through this approach, the Court could avoid asserting value judgments about the subject matter of legislation, but instead identify formal features of a defective process.

Ackerman's problem with *Carolene Products* footnote four is based on his interpretation of it as standing for the proposition that only "discrete and insular minorities" are subject to unfair oppression by the majority, and thus the only candidates for judicial protection.[283] Ackerman refutes this proposition, contending instead that discrete and insular minorities are much better equipped to participate in democratic politics than diffuse minorities. The focus on discrete and insular minorities, Ackerman argues, reflected the blunt mechanisms of political exclusion that existed as of 1938, and fails to address evolving and more subtle forms of political marginalization. Accordingly, Ackerman called for scholars to rethink the discrete-and-insular-minority framework in response to the evolution of pluralist politics in the United States.

Thus, Ackerman redefines those groups with which the Equal Protection Clause should be concerned (and suggests a "sliding scale of *Carolene* concern,"[284] a concept that is pleasingly alliterative but difficult to imagine the Court articulating and implementing in any principled manner). He does not, however, fundamentally question the judiciary's competence to determine as a matter of fact or law the political situation of a given social group. Indeed, Ackerman explicitly disclaims any interest in questioning the essential premise of footnote four: that some groups should be entitled to presumptive judicial so-

281 Ackerman, *supra* note 1, at 713 ("These famous words, appearing in the otherwise unimportant *Carolene Products* case, came at a moment of extraordinary vulnerability for the Supreme Court.").

282 *Id.* at 714 ("Rather than look back longingly to a repudiated constitutional order, *Carolene* brilliantly endeavored to turn the Old Court's recent defeat into a judicial victory.").

283 Because the footnote is dicta, and because there is nothing in the content or structure of the note to suggest that its list of areas of concerns is exhaustive, this is itself a contestable proposition.

284 Ackerman, *supra* note 1, at 721.

licitude while discrimination against other groups is presumptively permissible.[285]

While Ackerman's critique focused on the discrete-and-insular-minority criterion, Janet Halley, writing in 1994, tackled the immutability factor, specifically in the context of evaluating sexual orientation as a potential suspect classification.[286] Halley noted that scholars and advocates had engaged in heated debate over whether the trait of sexual orientation was, in fact, immutable. Halley emphasized, however, that the Court did not treat immutability as a firm requirement for suspect classification designation in practice. She further argued that by attempting to prove the immutability of sexual orientation—while perhaps advantageous in the short term—advocates risked misrepresenting and dividing the gay community. Again, this critique raises important questions about constitutional theory and strategy, but stops short of questioning the legitimacy of using factors like immutability to draw distinctions between social groups and determine the extent to which they merit special protection from the courts.

Arguing in a similar vein, William Eskridge contended in 2010 that political powerlessness—supposedly the crux of *Carolene Products* footnote four and the very justification for judicial intervention in equal protection cases—was not, in truth, a requirement of suspect classification designation.[287] Eskridge begins by noting the paradoxical nature of the political powerlessness criterion, as viewed in the particular context of sexual orientation and marriage equality:

> 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.[288]

In attempting to explain this conundrum, Eskridge describes the manner in which, as a historical proposition, suspect classifications based on race, gender and alienage were recognized *not* when the

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285 Ackerman openly states, "My aim here . . . is to work out the doctrinal implications of the *Carolene* formula rather than to criticize its foundations." *Id.* at 722.

286 Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

287 *See* Eskridge, *supra* note 23, at 2. In the same volume, Richard Levy responds to Eskridge's contentions by pointing to instances in which the Court did examine considerations of political power. Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 38–45 (2010).

288 Eskridge, *supra* note 23, at 1.

groups at issue truly lacked any political power, but when they had accumulated enough political power to be noticed. Indeed, Eskridge argues, neither immutability nor political powerlessness—the two criteria supposedly most troubling in the case of sexual orientation—have truly been enforced as suspect classification requirements by the Court. Rather, the Court looks at three quite different criteria: (1) is the class defined by the trait a coherent social group; (2) has the class suffered a history of state-sponsored discrimination; and (3) is the trait one that generally does not contribute to legitimate public policies.[289]

Eskridge's argument is both descriptive and normative. First, he contends that the Court has not, as a matter of historical fact, required that a group actually be politically powerless to attain a suspect classification designation. Second, he asserts that, if the Court were to intervene on behalf of groups that are truly politically powerless, it would be "too far ahead of political opinion" and thus risk illegitimacy and public backlash.[290]

Eskridge's concern with judicial restraint is well-founded, but it avoids the twin questions of (1) whether such restraint should perhaps be modified in the case of equal protection challenges and (2) what costs are incurred when the Court cannot recognize and protect those groups in our society that are the most marginalized, the most despised, and the most disenfranchised.

C. The Disassemblers

Scholars who fall into the final category of critiques are more actively hostile to suspect classification analysis and its incoherence, and propose abandoning the framework altogether.

These scholars eschew efforts to rationalize or improve upon existing suspect classification analysis and instead highlight the inconsistencies and contradictions plaguing the doctrine. For example, in a 2011 article, Marcy Strauss thoroughly documents the extent to which "[t]he Supreme Court has not provided a coherent explanation for

289 This begs the question—addressed squarely by *Cleburne*—of why Courts should consider only the categorical issue of whether a trait is "generally" relevant to legislative goals, versus the specific issue of whether a trait is relevant to the precise legislative goals asserted in any given case. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) ("Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, . . . we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.").

290 Eskridge, *supra* note 23, at 25–26.

precisely what factors trigger heightened scrutiny."[291] Strauss contends that the absence of a coherent, disciplined test enables judicial manipulation of the doctrine.[292] She seeks to "comprehensively and systematically expose the flaws, confusion, and unanswered questions that inure in the criteria for assessing suspect and nonsuspect classes."[293] At the conclusion of Strauss's thought-provoking piece, one is left with the conclusion that suspect classification analysis is difficult to explain, much less justify.

Perhaps the most comprehensive and damning critique of suspect classification analysis can be found in Suzanne Goldberg's 2004 article, *Equality Without Tiers*.[294] Goldberg's critique was spurred in part by the Court's affirmative action decisions in *Grutter v. Bollinger*[295] and *Gratz v. Bollinger*,[296] in which the Court reiterated its commitment to applying strict scrutiny in a symmetrical fashion. That is, laws explicitly implementing race subordination (non-existent for the past several decades, although laws with a discriminatory impact persist) and those attempting to ameliorate race subordination (affirmative action measures) are both subjected to strict scrutiny—which typically leads to the challenged law being struck.[297] Goldberg questioned whether this acontextual application of strict scrutiny was justified, and examined the foundations of suspect classification analysis to determine the answer.

The resulting tour through suspect classification jurisprudence reveals a profoundly inconsistent framework, beset by "intractable internal contradictions."[298] Most significantly, one of the primary justifications for recognizing and extending special protection to suspect classifications is that the excluded class has suffered a history of discrimination. And yet under this theory, it makes little sense to treat as suspect (and apply heightened scrutiny to) laws that discriminate against whites in the context of race discrimination, or against men in the context of gender discrimination.[299] A reasonable explanation for symmetry is the notion that certain traits are always irrelevant to law-

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291 Strauss, *supra* note 22, at 138.

292 *See id.* at 140 ("The ambiguity surrounding equal protection analysis produces incoherent results.").

293 *Id.* at 141.

294 Goldberg, *supra* note 25.

295 Grutter v. Bollinger, 539 U.S. 306 (2003).

296 Gratz v. Bollinger, 539 U.S. 244 (2003).

297 Goldberg, *supra* note 25, at 482.

298 *Id.* at 485.

299 *See id.* at 504 (detailing that heightened scrutiny is applied regardless of whether the classified group has suffered oppression).

making, but then what role remains for the history-of-discrimination factor of suspect classification analysis? How can the two justifications—one historical and the other decidedly ahistorical—be reconciled? Indeed, implicit in the focus on a history of discrimination is the notion that suspect classification designation is a type of remedial measure. How then, can this judicial remedy be used to prohibit legislatively enacted remedial measures (that is, affirmative action)?

Goldberg's solution is to develop a single standard of review for all equal protection claims. Goldberg's proposed standard focuses on enhancing the consideration of context and eliminating reliance on generalizations. She does not, however, explicitly engage the issue of which party should bear the burden of proof under her test. Nor does Goldberg discuss what would count as evidence under her test, or suggest that the standard would "ban . . . judicial hypothesizing."[300] As discussed below, these issues—the burden of proof and the role of judicial speculation—are at the heart of modern equal protection jurisprudence's failings and must be addressed by any effort at doctrinal reform.

Further, in a curious move, Goldberg characterizes the tiers of scrutiny as a "'training' tool for the Supreme Court and lower courts that lacked an inclination or ability to identify bias or outmoded stereotypes within familiar classifications."[301] This seems to assume that courts have evolved in this respect—an assumption that does not appear to be grounded in reality. If we take Reva Siegel's thesis of "preservation through transformation" seriously, then courts need to be ever more vigilant and forward-looking to really do the job of protecting against impermissible prejudice becoming enshrined in the law.

III. TOWARD A JURISPRUDENCE BEYOND SUSPECT CLASSIFICATIONS

As demonstrated above, suspect classification analysis is under attack. Critics allege that the analysis does not protect groups that should be protected, that it places the emphasis on the wrong considerations, and that it is inconsistently applied and beset by "intractable internal contradictions"[302] on a doctrinal level.

But while there is much to criticize about suspect classification analysis in terms of its outcomes and doctrinal incoherence, these are not, in fact, the fundamental flaws of the doctrine. Rather, the fun-

300 *Id.* at 555.
301 *Id.* at 493.
302 *Id.* at 485.

damental flaw of the doctrine is that it asks the wrong question, namely: what social groups are deserving of special judicial solicitude (by virtue of their political marginalization, or the fact that they have no control over the trait that defines them, or the history of discrimination they have experienced)?

What equal protection analysis should be concerned with is how the judiciary can competently (that is, based on competent evidence and without invoking subjective policy judgments) identify laws that violate the "normative philosophy" of the Equal Protection Clause. This necessitates assessing the attributes of the laws, not the groups against which they discriminate—and also identifying what we mean by the "normative philosophy" of the Equal Protection Clause.

Fortunately, although the Court's suspect classification jurisprudence does not present a coherent or particularly workable doctrinal framework, it does set forth principles that can help us discern the contours of the elusive "normative philosophy" of equal protection.

The following Subpart first describes in greater detail the fundamental flaw of suspect classification analysis, in particular the way in which the doctrine affirmatively preserves and justifies evolving forms of discrimination. It then performs an alternative reading of the precedent to identify themes in reasoning that transcend the context of any one case and point to larger values animating the Court's equal protection jurisprudence.

A. The Fundamental Illegitimacy of Suspect Classification Analysis

It is by now beyond argument that suspect classification analysis is rife with inconsistencies and contradictions. Further, despite the best efforts of scholars to provide the Court with an overarching theoretical justification for the doctrine, the Court's own inconsistent application and explanation of the doctrine, paired with its general reluctance to justify it at all, ultimately defeat these efforts. The doctrine's origins are both remote and opaque; its subsequent development was chaotic and under-theorized.

But the doctrine is more than incoherent. In keeping with Reva Siegel's theory of preservation through transformation,[303] suspect classification analysis goes beyond failing to promote equality to actively sustaining structures of inequality.

First and most importantly, the fundamental premise of suspect classification is that it is *presumptively permissible to facially discriminate*

303 Siegel, *supra* note 3, at 1119.

against social groups unless the Supreme Court declares otherwise. There is nothing in the history or text of the Equal Protection Clause to suggest that limiting equal protection concern in this manner is warranted.

It is true of course that the Equal Protection Clause was originally intended to prevent state-sponsored discrimination against one social group in particular: emancipated slaves.[304] But the Court has long held that the provision should be interpreted as serving the larger purpose of preventing all forms of state-sponsored invidious discrimination.[305] Once this step is taken, it is not at all apparent that the Court should be essentially ranking social groups with respect to one another to achieve this mission. Stated another way, is it the nature of the group being discriminated against that makes the discrimination invidious, or the nature of the discrimination itself?

By comparing social groups to one another and sorting them into suspect, quasi-suspect, and non-suspect classes, the Court itself engages in discriminatory, hierarchical ordering of these social groups with respect to one another. Worse yet, this ordering is virtually permanent. Rather than analyzing the relevance of a particular trait in the context of a specific discriminatory action, the Court declares certain classifications suspect for all time and in all circumstances. And although this designation is based on history, it then becomes permanent and ahistorical, applied with symmetry[306] to subordinated and non-subordinated groups, and unlikely to be subject to reexamination. On the other side of the equation, once a group has been declared non-suspect, the binding force of precedent discourages reconsideration. The fact that suspect classification status is a permanent rather than contextual designation increases its impact, and in this sense, its value, making it more likely to be seen and treated as a scarce doctrinal resource.

Treating suspect classification status and heightened scrutiny as scarce resources in turn preserves excessively deferential rational basis review as the default standard. The distinction drawn between heightened scrutiny and rational basis review constantly and unreflectively reinforces the notion that the vast majority of facial discrimination against social groups is presumptively permissible.

In addition to enforcing this presumption, suspect classification analysis calls upon the Court to evaluate realities outside of judicial

304 Strauss, *supra* note 22, at 142.

305 Levy v. Louisiana, 391 U.S. 68, 71 (1968).

306 *See supra* notes 295–96 and accompanying text.

competence. Even if the Court were to rely on expert testimony to assess political powerlessness (as opposed to its normal practice of simply eye-balling the issue, presumably based on the Justices' subjective perceptions), this is not the sort of thing that courts should be ruling on, much less enshrining into permanent doctrine. Political realities are constantly shifting over time. Further, other questions related to suspect classification analysis—for example, the question of "immutability" vis-à-vis sexuality, gender, and race[307]—are hotly contested and ever-evolving.

Finally, suspect classification analysis asks the wrong question, and scrutinizes the wrong actor. Suspect classification analysis essentially boils down to asking whether the social group at issue is deserving of special judicial solicitude.[308] The more the group has been unfairly marginalized, the more likely that discrimination against its members will be subjected to heightened scrutiny. This approach relies on a questionable assumption that the Court can properly identify social and political marginalization, and in particular, in the case of contemporary prejudices. In fact, suspect classification factors like immutability and relevance of the defining trait internalize rather than externalize subjective judgments of the worthiness of a group.

Further, as discussed below, suspect classification analysis focuses exclusively on the political process that produces a law and broad (as well as inconsistent) assumptions about the ability of certain groups to affect that process given our majoritarian system.[309] But such an approach utterly ignores the constitutive function of the law—the way in which, for example, homosexuals would not necessarily be considered a distinct social group, much less an unfairly persecuted one, until anti-sodomy laws defined sexual orientation as a fixed identity and attached burdens to sexual practice.[310] Read carefully with an eye toward identifying broader principles, the Court's suspect classification analysis suggests that it is this constitutive function with which we should be most concerned, and that should drive the mechanics of equal protection analysis.

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307 Indeed, one could argue that race identity was patently indeterminate at the time of *Plessy*, where Plessy himself was legally designated as "Negro" although this was not discernable in his appearance.

308 *See generally* Halley, *supra* note 286 (reviewing the debate as to whether sexual orientation is immutable).

309 *See infra* notes 312–15 and accompanying text.

310 *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements*, 150 U. PA. L. REV. 419, 422 (2001) ("Much of what made it intelligible (as well as denigrating) to be a 'colored person' or a 'homosexual' or a 'retarded person' was the line drawn by law and the discourse stimulated by legal actors.").

B. An Alternative Reading of Suspect Classification Jurisprudence

In 1985, Bruce Ackerman read *Carolene Products* footnote four as articulating a political theory and a theory of judicial review designed to rehabilitate the Court's legitimacy at a time when it was under attack.[311] The political theory contends that laws targeting certain minority groups are the product of a flawed majoritarian democratic process—namely, the political and social marginalization of those groups such that its members cannot adequately represent themselves in that process.[312] The fact of this flaw, in turn, justifies the counter-majoritarian institution of judicial review.[313] The role of the judiciary is to identify which groups have been unfairly marginalized such that laws discriminating against them may be carefully scrutinized.[314] And the judiciary employs the doctrine of suspect classification analysis to that end.

It is possible to read the Court's subsequent suspect classification jurisprudence in a similar manner, but to different conclusions. *Carolene Products* footnote four clearly expressed a concern with "discrete and insular minorities" and the challenges such groups would face in our majoritarian political system.[315] By contrast, the Court's subsequent suspect classification jurisprudence—particularly the Court's treatment of gender, non-marital status, and some of the so-called non-suspect classifications—expresses a concern not with the relative political power of social groups, but with the quality of individual self-determination. For example, where laws relied on gender stereotypes, this interfered with the ability of both men[316] and women[317] to chart their own destiny based on their individual ability. Similarly, the problem with attaching legal penalties to a child's non-marital status was that the child had no control over that status.[318] Such laws are problematic because they decouple legal burdens from individual responsibility.

Further, these cases express concern not only with political marginalization preceding adoption of discriminatory laws, but political

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311 *See supra* note 281 and accompanying text.

312 Ackerman, *supra* note 1, at 715.

313 *Id.*

314 *See supra* Part I.C.

315 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938).

316 *E.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) (holding unconstitutional a law banning the sale of 3.2% alcohol beer to males, but not females, age eighteen to twenty).

317 *E.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (striking down a law preferring males over females as administrators of estates).

318 Levy v. Louisiana, 391 U.S. 68, 72 (1968).

marginalization resulting from adoption of discriminatory laws. This idea—that certain discriminatory laws have the result of calcifying class distinctions—is most strongly expressed in the cases dealing with the rights of children. For example, in *Plyler*, the Court focused on the fact that imposing a disability (exclusion from public education) on the children of undocumented immigrants "permanently locked [these children] into the lowest socio-economic class,"[319] thus preventing future social and economic mobility based on individual merit.

Thus, the political theory underlying much of the Court's post-*Carolene Products* jurisprudence actually focuses more on the individual than on the group. Specifically, it seeks to preserve (1) an ethos of self-determination based on individual merit and, in connection with this, (2) a modicum of social mobility in which individuals can express that merit.

While *Carolene Products*' focus on groups and the dynamics of group marginalization suggested one justification for judicial review (as a corrective for majoritarian excesses), the above-described focus on individual self-determination suggests another. If the majoritarian process is generally to be trusted except where it imposes legal burdens on politically powerless minorities, then the role of judicial review is to intervene only where the targeted group is politically powerless (that is, a suspect classification). But if, instead, we recognize that laws always have the ability to interfere with self-determination (simply by relying on facial classifications of persons), then the role of judicial review is to intervene whenever a law imposes legal burdens in a way that does not correspond to individual responsibility. As the cases suggest, this occurs where laws rely on status as a proxy for conduct.[320] Such reliance is offensive to democracy even if there is a measure of accuracy to the stereotype.[321]

If suspect classification analysis was the proper doctrinal mechanism for enforcing the political theory of *Carolene Products* footnote four, what alternative doctrinal mechanism can enforce the princi-

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319 Plyler v. Doe, 457 U.S 202, 208 (1982) (quoting Doe v. Plyler, 485 F. Supp. 569, 577 (E.D. Tex. 1978)) (internal quotation marks omitted).

320 *See, e.g.*, *Craig*, 429 U.S. at 201–02 (holding a law unconstitutional that used gender status as a proxy for drunk driving conduct).

321 *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) ("When persons are excluded from participation in our democratic processes [here, jury service] solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized."). Justice O'Connor's concurrence acknowledged that "gender-based assumptions about juror attitudes" were "sometimes accurate," but nevertheless agreed that state actors could not make use of them. *Id.* at 150 (O'Connor, J., concurring).

ples of self-determination and social mobility established in the Court's broader jurisprudence?

The answer, unsurprisingly, comes from one of the Court's decisions dealing with a non-suspect class: *City of Cleburne v. Cleburne Living Center, Inc.*[322] In that case, the Court determined that individuals with cognitive disabilities were not properly considered a suspect class primarily because the trait of cognitive disability, as a general matter, was relevant to one's ability to function in society and therefore a trait that could validly be considered by governmental actors.[323] But the Court struck the regulation at issue nonetheless, as a result of applying what some have deemed "heightened rational basis review." The Court's analysis in *Cleburne* is more accurately described as a sort of "micro-suspect classification analysis"[324] or "trait-relevancy analysis."

The essential features of this analysis are as follows. Where a law or other government action relies on a facial classification of persons, the burden is on the government to prove an affirmative connection between the trait that defines the targeted group and the governmental and individual interests being regulated. Thus, in *Cleburne*, the trait of cognitive disability was unrelated to either the government's interest in regulating group housing or the individual's interest in accessing group housing.[325] Similarly, in *Plyler*, the trait of undocumented immigration status was unrelated to either the government's interest in regulating public education or the child's interest in accessing public education.

This analysis can account for not only the cases involving groups not recognized as suspect classes, but also the traditional suspect classification cases. For example, in *Brown*, there was no relationship between race and the interests involved in public education. In *Frontiero*, there was no relationship between gender and the entitlement to certain military benefits. In *Weber*, there was no relationship between a child's non-marital status and the entitlement to wrongful death benefits.

What are the advantages of this approach as opposed to traditional suspect classification analysis? As alluded to above, one of the primary benefits is that such an analysis relies on evidence that judges can competently assess. While trait-relevancy analysis is not entirely immune to the effect of contemporary prejudices, concrete evidence about the relevance of a specific trait to a specific regulated interest

322 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).
323 *Id.* at 442.
324 Pollvogt, *supra* note 24, at 927.
325 *Id.*

provides a firmer footing for analysis than broad judgments about the relative political power of social groups.

Another advantage is that the analysis is infinitely more flexible than suspect classification analysis. Once the Court determines that a classification is "suspect," it is suspect for all time and under all circumstances. This categorical approach in essence "freezes" our understanding of discrimination and prejudice, reducing sensitivity to societal evolution in these arenas. By contrast, trait-relevancy analysis is fact- and context-specific, allowing more nuanced and nimble determinations over time.

Finally, because this standard forces the government to justify all facial discrimination and relies on relatively concrete and objective criteria as opposed to broad judgments about social reality, it is more adept at identifying evolving and contemporary prejudices. Currently, discrimination against classes that have not been deemed suspect or quasi-suspect is subject to deferential rational basis review, which does not require the government to justify a discriminatory measure in any way, shape, or form.[326] Creating a presumption that the government must justify all facially discriminatory laws forces the government to provide reasons and rationales in every case, which can help to out irrational, stereotyped thinking.

CONCLUSION

> [T]hat a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very different on a bathroom door than a courthouse door.[327]

Justice Thurgood Marshall's comment is significant on at least two levels. First, it is a prime example of the evolution of standards of fairness and equal treatment. In 1985, it was plausible for Justice Marshall to claim that labeling bathroom doors with gender assignments was uncontroversial; in 2013, this is an issue of serious debate.

Second, Justice Marshall expressed a truth that transcends the specific facts of his example. The dynamics of impermissible discrimination are fluid and context-specific. They are not amenable to fixed categorization. They require exploration through concrete, real evidence (rather than untethered judicial speculation) such that the *reasons* for any particular act of discrimination can be offered, ex-

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326 *See supra* Intro.B.

327 *Cleburne*, 473 U.S. at 468–69 (Marshall, J., concurring in part and dissenting in part).

amined, and assessed. Moving toward an equal protection framework that can undertake this analytical task requires moving beyond suspect classifications.