Reevaluating Suspect Classifications

Marcy Strauss[*]

I. INTRODUCTION

State and federal governments inevitably classify and distinguish between individuals. Despite the promise of the Fourteenth Amendment's Equal Protection Clause,[1] the state rarely treats people equally, and the Clause does not require it to do so.[2] The government must simply justify any legal distinction between individuals with a sufficient rationale.[3] In most cases of unequal treatment under law, courts simply defer to the legislative judgment that the distinction is rational; only in certain unusual circumstances will the courts subject the government's classifications to more rigorous examination.[4]

This phenomenon is easily translated: courts employ different levels of scrutiny depending on whether the discrimination affects a suspect class.[5] Discrimination among "nonsuspect" classifications receives

---

[*] Professor of Law, Loyola Law School; J.D., Georgetown University Law Center, 1981; B.S., Northwestern University, 1978. I am grateful to the assistance of my research assistants, particularly Ilana Guler and Arsen Kourinian. I wish to also thank Erwin Chemerinsky for reading and critiquing drafts of this Article.

1. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the Supreme Court held that the requirement for equal protection of the laws applies to the federal government through the Due Process Clause of the Fifth Amendment. The analysis under the Constitution's Fourteenth Amendment Equal Protection Clause and the equal protection guarantee via the Fifth Amendment is the same. Buckley v. Valeo, 424 U.S. 1, 93 (1976); *see generally* Kenneth Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

2. "The guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010).

3. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 669 (3d ed. 2006).

4. *Perry*, 704 F. Supp. 2d at 995. A similar phenomenon arises with respect to the Due Process Clause. Laws that infringe on, or discriminate with respect to, a fundamental right generally receive strict scrutiny, and laws that do not receive rational basis review. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978).

5. *See* Plyler v. Doe, 457 U.S. 202, 215–21 (1982) (establishing that equal protection claims are evaluated according to three levels of scrutiny: strict scrutiny, intermediate or heightened scruti-

"rational basis scrutiny," which is highly deferential to the legislative judgment.[6] Those challenging such a law have the burden to establish that the law is not rationally related to any legitimate government purpose.[7] Although not all of these laws survive rational basis review, most do.[8] Laws that facially discriminate against a "suspect class," however,

---

ny, and rational basis review). The choice between the three levels depends on the nature of the statute in question; if a suspect class is disadvantaged or a fundamental right impinged upon, the courts will employ strict scrutiny, and the statute will fail unless the government can demonstrate that the classification has been precisely tailored to serve a compelling government interest. *Id.* at 216–17. Of course, the *Plyler* model is somewhat simplistic because courts occasionally skip the step of deciding if a group is suspect or even what level of scrutiny it will employ. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Lubin v. Panish, 415 U.S. 709 (1974); Rosario v. Rockefeller, 410 U.S. 752 (1973); s*ee generally* J. Harvie Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975). Moreover, as many scholars point out, claiming that there are three levels of scrutiny may be too simplistic; the Court employs more of a sliding-scale or nuanced approach. For example, many contend that the Court employs "rational basis plus" in cases like *Romer*, 517 U.S. at 620, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *USDA v. Moreno*, 413 U.S. 528 (1973), and "strict scrutiny minus" in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Korematsu v. United States*, 323 U.S. 214 (1944). Under any of these approaches, however, the Court attempts to justify the level of scrutiny primarily by considering the factors discussed in this Article.

6. Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 693 (2008) (explaining that the concept of rational basis review was established by Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819)). Justice Marshall wrote, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421. As Professor Rush explains, "[T]he concept of rational basis review—the idea that all legislation at a minimum must be rationally related to a legitimate government purpose—generally is not controversial. Minimum judicial review to evaluate the constitutionality of laws is consistent with preserving the supremacy of federal law, particularly the Constitution." Rush, *supra*, at 693.

7. *See Cleburne*, 473 U.S. at 440 ("[T]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

8. For examples of laws that are struck down under rational basis review, see, e.g., *Cleburne*, 473 U.S. at 432, and *Moreno*, 413 U.S. at 528. Rational basis review is so deferential that it has been called "minimal scrutiny in theory and virtually none in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971). The Supreme Court has upheld over one hundred classifications under rational basis review since 1973 and invalidated about a dozen classifications. Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 489 (2004); s*ee also* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 416–19 (1999). Rational basis review is deemed so minimal that academics and other observers of the Court often maintain that when a law is struck down under a purported rational basis test, the Court is not actually applying "true rational basis" review but rather is employing "rational basis with a bite." *See, e.g.*, Gunther, *supra*, at 19. For a general discussion of rational basis with a bite, see Ronald Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189 (2008).

are subject to "strict scrutiny."[9] Here, the government must demonstrate a compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose.[10] While some laws survive such rigorous scrutiny, most do not.[11] Finally, laws that affect a "quasi-suspect class" receive intermediate scrutiny review.[12] Such laws are upheld if the classification is substantially related to an important government purpose.[13] Striking down laws under an intermediate level of scrutiny is difficult but not insurmountable.[14]

---

9. *See Cleburne*, 473 U.S. at 440 (The classifications race, alienage, or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . . These laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); Goldberg, *supra* note 8, at 496–98.

10. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (finding that the Equal Protection Clause demands that racial classification be subjected to the most rigid scrutiny, and if ever upheld, must be shown to be necessary to the accomplishment of some permissible state objective). Two members of the Court 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." McLaughlin v. Florida, 397 U.S. 184, 198 (1964) (Stewart, J., concurring); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986); Peter Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 13–26 (2000) (discussing the purpose of imposing strict scrutiny, which includes ensuring that the reviewing court does not allow the bias that may infect a legislative branch to affect its own decision).

11. *See* Gunther, *supra* note 8, at 8 (coining the famous phrase that strict scrutiny is "strict in theory and fatal in fact"); Wilkinson, *supra* note 5, at 948 n.15 (arguing that heightened scrutiny almost invariably results in the law being struck down); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 488 (1998). Although the strict in theory, fatal in fact mantra has been renounced, at least in the context of affirmative action, *see e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995), it remains an accurate assessment of the application of strict scrutiny. *See* Rubin, *supra* note 10, at 4 (arguing that strict scrutiny so often leads to a finding of invalidity that it is not really a tool of analysis, as its name may suggest). For examples of laws surviving strict scrutiny, see *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Korematsu v. United States*, 323 U.S. 214 (1944).

12. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (setting forth, for the first time, the concept of intermediate scrutiny for gender discrimination). Justice Rehnquist criticized the Court's approach, accusing the majority of making up this level of scrutiny from thin air. *Id.* at 220 (Rehnquist, J., dissenting). To a large extent, all levels of scrutiny are susceptible to this criticism since they are all judicially created.

13. *Id.* at 197.

14. *See, e.g.*, *id.* (striking down, under intermediate scrutiny, a law prohibiting males under twenty-one from drinking beer because the means were not substantially related to the ends); s*ee also* Nguyen v. INS, 533 U.S. 53 (2001) (upholding a citizenship law that drew a distinction when the citizen–parent was a mother or father because there was an important purpose of preventing fraud and ensuring a relationship between child and citizen–parent); United States v. Virginia, 518 U.S. 515 (1996) (striking down a law under intermediate scrutiny because the government lacked an important reason for barring the admission of females to the Virginia Military Institute); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding, under intermediate scrutiny, a law limiting draft registration to only males because it was substantially related to an important government interest of ensuring an orderly draft); Michael M. v. Sonoma Cnty. Super. Ct., 450 U.S. 464 (1981) (upholding a law punishing only males for statutory rape because of its sufficient relatedness to the important government interest of decreasing teenage pregnancy). The difference between "compelling" and "im-

Since the outcome of an equal protection case is largely determined by whether the group is designated as a suspect, quasi-suspect, or nonsuspect class, one may assume that the test for distinguishing between the three types of classes has been carefully crafted and precisely defined. But despite decades of case law on this specific issue, nothing could be further from the truth.[15] The Supreme Court has not provided a coherent explanation for precisely what factors trigger heightened scrutiny. As one professor wrote, "[T]he Court uses a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and nonsuspect classes is drawn in a haphazard way."[16]

Why is the law in such disarray? 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.[17] But beyond this basic truism, much is unsettled. What Professor Wilkinson said in 1975 remains true today: "[T]he law of suspect classes is largely one of latent confusion . . . . The criteria of suspectness have not been thoughtfully defined or consistently applied."[18]

This inconsistency is manifested in various ways. First, courts utilize various tests—what this Article will refer to as "factors"—to distinguish between suspect and nonsuspect classes.[19] Different courts em-

---

portant" is also incredibly amorphous, but that problem lies predominantly beyond the scope of this Article.

15. Professor (and now Fourth Circuit judge) Wilkinson made this point in 1975: "[T]he Court has not defined satisfactorily the elements of a suspect class." Wilkinson, *supra* note 5, at 979. Over time, this ambiguity has not been clarified. *See, e.g.*, Rubin, *supra* note 10, at 16 ("The Supreme Court has never provided a comprehensive explanation of the concept of suspectness . . . ."); Cass Sunstein, *What did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 55 SUP. CT. REV. 27, 34 (2003) ("To say the least, the Court has not laid down a clear test for deciding when [strict] scrutiny will be applied" in equal protection cases.).

16. Thomas Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 141 (1990). Of course, this argument proceeds under the assumption that the Court reasons from these factors to a conclusion. The factors are part of the "discovery" process—trying to determine the level of scrutiny—rather than just part of the justification. It could legitimately be argued, however, that the Court decides on the level of scrutiny and then uses these factors simply to justify its conclusion.

17. *See infra* notes 53, 55; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) ("Certain racial and ethnic groups have frequently been recognized as discrete and insular minorities who are relatively powerless to protect their interests in the political process . . . . Moreover, race, nationality or alienage is in most circumstances irrelevant to any constitutionally acceptable legislative purpose.").

18. Wilkinson, *supra* note 5, at 983; *see also* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 90 (1984) (arguing that the Court has never sufficiently explained the nexus between the factors that make a classification suspect and the need for both a stronger government interest and a tighter fit).

19. *See* Graham v. Richardson, 403 U.S. 365 (1971) (holding alienage as suspect only because it is a discrete and insular minority); Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a*

phasize different factors without any real explanation why some are more important than others. For example, some courts are exclusively concerned with the "discrete and insular" nature of the group, others focus on immutability of the group's characteristics, and still others are mostly concerned with the group's history of discrimination.[20]

Yet, even if courts were to agree on which factors should be emphasized in equal protection cases, there remains significant uncertainty about the precise definition and measure of each factor. Even the most commonly utilized factors have no clearly established meaning. What exactly constitutes a discrete and insular minority? What does immutability require? How do we determine if a group is "politically powerless"? Is it an absolute question or a relative one? If the latter, how much "powerlessness" is sufficient?[21] Is powerlessness measured by the inability to vote (so that minors under eighteen would be politically powerless), or by the ability to be adequately protected by the political process (so that minors would likely not be politically powerless)?[22] And even if the substantive definition of political powerlessness were universally defined, there remains the question of timing. Should powerlessness be measured from the date the law was passed (i.e., a law passed discriminating against women at a time when women could not vote), or at the time of the legal challenge?

Moreover, even if courts agreed on which factors to consider and the meaning of each factor, they do not emphasize each factor uniformly. For example, it is unclear what factors or elements are necessary to a finding of suspectness, what are sufficient, or whether all elements must be satisfied.[23] No readily definable test distinguishes between nonsuspect

---

Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records, 7 J.L. SOC'Y 18 (2005) (discussing the various factors); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 636 (2003) ("To obtain suspect class status, a group must demonstrate that it has suffered a history of discrimination, that it is politically powerless, and that it faces discrimination on the basis of an immutable, obvious, or visible characteristic. Although all of these factors have appeared in cases discussing the standards for heightened scrutiny, courts . . . have often disregarded some or all of them in their analysis.") (internal quotation marks omitted). All of these factors will be discussed in much more detail in Part III of this Article.

20. The differences among courts are discussed in detail later in this Article. *See infra* notes 53, 55.

21. Rush, *supra* note 6, at 740.

22. *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (finding that women are not a small and powerless minority but are vastly underrepresented in the nation's decision-making councils). In *Brown v. Heckler*, 589 F. Supp. 985, 990 (E.D. Pa. 1984), the plaintiffs argued for heightened scrutiny for children because of their lack of political power, but the court rejected that level of scrutiny because of the absence of the other factors for suspect class status.

23. For example, the Supreme Court has expressed the factors in the disjunctive, suggesting that meeting *any of them* is sufficient to find a class is suspect. A suspect class entitled to strict scrutiny is one "saddled with such disabilities, *or* subjected to such a history of purposeful unequal

or suspect classification. Suspect classification presumably meets more of the elements, but it is unclear whether all, most, or merely some must be satisfied before a court will determine the class is suspect.[24]

The ambiguity surrounding equal protection analysis produces incoherent results.[25] Most would agree that the poor or the mentally infirm are groups that have suffered from political powerlessness and a history of discrimination. And most would agree that white males are not such a group. Yet, whites and males receive heightened scrutiny because race is a suspect class and gender is a quasi-suspect class, while the poor and disabled do not.[26]

---

treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (emphasis added). Other cases have emphasized other factors. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (emphasizing relevancy of trait shared by group); Kerrigan v. Comm'r, 957 A.2d 407, 427 (Conn. 2008) ("[The] Supreme Court has placed far greater weight—indeed, it invariably has placed dispositive weight—on . . . whether the group has been the subject of long-standing and invidious discrimination and whether the group's distinguishing characteristics bears no relation to the ability of the group members to perform or function in society."). For a general discussion of this principle, see *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (finding that transsexuals are not a suspect class because they are not "necessarily" a discrete and insular minority and not shown to be immutable); Kari Balog, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 CLEV. ST. L. REV. 545, 551 (2005) (suggesting, without citation, that when all factors are shown, classification receives strict scrutiny); Althea Gregory, *Denying Protection to those Most in Need: The FDA's Unconstitutional Treatment of Children*, 8 ALB. L.J. SCI. & TECH. 121, 136 (1997) ("A group seeking suspect class must demonstrate: (1) political powerlessness or minority status, (2) obvious, immutable or distinguishing characteristics delineating a discrete group, and (3) a history of discrimination."); Hutchinson, *supra* note 19, at 635 (arguing that courts have often disregarded some or all of the factors in their analysis and the presence of some or even most of the factors have not necessarily resulted in heightened scrutiny); Jeremy B. Smith, *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, 2775 (2005) (stating that irrelevance of characteristic and history of discrimination are necessary and sufficient to finding suspect class and that other factors like immutability and political powerlessness are not essential but may "enhance" the finding of suspectness).

24. Rush, *supra* note 6, at 740; *see, e.g.*, Mathews v. Lucas, 427 U.S. 495, 518 (1976) (The Court held that illegitimacy is entitled to heightened—though not strict—scrutiny. It emphasized immutability as a factor in favor of heightened scrutiny but ultimately did not find that strict scrutiny was justified in this case because the history of discrimination of illegitimate children was not as severe as discrimination based on race.).

25. Many have made this point, particularly with respect to the symmetrical treatment of laws involving any racial classification. *See, e.g.*, Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 752 (1991) (arguing that the Court's affirmative action jurisprudence is "virtually impossible to justify on *Carolene Products* grounds"); Cristina M. Rodriguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41, 44 n.16 (2009) (arguing that in consideration of racial minorities, "the discrete and insular formulation has been supplanted by the presumption that all racial classifications are invalid").

26. Rush, *supra* note 6, at 740. More precisely, as will be discussed later, whites are part of a suspect classification—race—under the Court's principle of symmetry; "once a subordinate class successfully establishes that the discrimination it faces warrants exacting judicial scrutiny, the Court

This Article explores the inconsistencies and absurdities of the tests used to establish a suspect classification for equal protection purposes. Although scholars have discussed the factors for distinguishing nonsuspect and suspect classes in the context of advocating a particular level of scrutiny for specific groups like homosexuals,[27] children,[28] the disabled,[29] and even felons,[30] there has been little systematic evaluation of the criteria without regard to a particular group. This Article attempts to provide that evaluation. It is primarily descriptive: the goal is to comprehensively and systematically expose the flaws, confusion, and unanswered questions that inure in the criteria for assessing suspect and nonsuspect classes.

Despite the fact that the levels of scrutiny appear fairly established, this critique is important. First, appraising what the Court has done in its equal protection jurisprudence (i.e., applying strict scrutiny for race and rational basis for age) requires consideration of the underlying justifications for the levels of scrutiny. As mentioned previously, the determinative question in equal protection analysis is what level of scrutiny to apply to a particular classification. Second, issues remain about what level of scrutiny to use in the future. The level of scrutiny for certain groups, most prominently sexual orientation, have not been determined. A reevaluation of the factors used to determine suspect classes is essential as the Court not only considers new groups[31] but also potentially reconsiders the level of scrutiny accorded to already established groups.[32] Finally,

---

applies heightened scrutiny symmetrically and extends judicial solicitude to any individual who encounters discrimination based on the 'same' trait as members of the subordinate class." Hutchinson, *supra* note 19, at 638. As Professor Hutchinson wrote, "The application of heightened scrutiny to white plaintiffs is impossible to justify under the *Carolene Products* formulation." *Id.* at 639. *See also infra* Part II.

27. *See generally* Balog, *supra* note 23; Rush, *supra* note 6; Smith, *supra* note 23; Sunstein, *supra* note 15.

28. *See* Brown v. Heckler, 589 F. Supp. 985, 990 (E.D. Pa. 1984); Gregory, *supra* note 23.

29. *See* St. Louis Developmental Disabilities Treatment Ctr. Parents Ass'n v. Mallory, 591 F. Supp. 1416, 1471 (W.D. Mo. 1984) (declining to determine whether handicapped children are members of a suspect class because it found that even if strict scrutiny were applied, the law would be upheld); Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 908 (1975) (arguing that individuals with handicaps are a suspect class).

30. *See generally* Aukerman, *supra* note 19.

31. There are almost an unlimited number of groups that could request the Court for suspect status. In California alone, requests have included licensed physicians, *Griffiths v. Super. Ct. of Los Angeles Cnty.*, 117 Cal. Rptr. 2d 445 (Ct. App. 2002), dentists, *Naismith Dental Corp. v. Bd. of Dental Exam'rs*, 137 Cal. Rptr. 133 (Ct. App. 2005), and even lawyers, *Russell v. Hug*, 275 F.3d 812, 819 (9th Cir. 2002). For all of these classifications, however, the courts rejected suspect status.

32. The Court, having received criticism for not awarding suspect status to certain groups, such as the mentally disabled and wealthy, could reevaluate the classification of those groups. Additionally, as discussed further *infra*, even established groups might be subject to the Court's reevaluation as

a restructuring of equal protection analysis requires a discussion about the standards for determining suspect and nonsuspect classes. Any debate over alternative approaches to equal protection analysis, such as whether the three-tiered approach of rational basis, intermediate scrutiny, and strict scrutiny should even exist, can proceed only after a review of the factors currently used by courts.[33]

Accordingly, in Part II, I present a brief background on the development of the equal protection doctrine's relevant provisions, exploring where the idea of suspect classes originated and what factors the Court developed to determine such classes. Part III discusses and evaluates each factor, and analyzes the meaning—or lack thereof—of each element and how it has been used or misused in case law. In Part IV, I elaborate on possible solutions to the incoherency.

II. SETTING THE STAGE: A BRIEF DISCUSSION OF EQUAL PROTECTION AND THE DEVELOPMENT OF SUSPECT CLASSIFICATIONS

The Equal Protection Clause of the Fourteenth Amendment demands that no state shall deny any person equal protection of the laws.[34] Originally limited to protecting freed slaves,[35] the Clause was deemed the "last resort of constitutional arguments" and hence rarely invoked in

---

well. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding that the Court will reconsider the affirmative action program after twenty-five years).

33. This limited goal of initiating a discussion about critical constitutional issues is consistent with *Carolene Products* Footnote 4. *See infra* Part II. Professor Lusky, who clerked for Justice Stone, the author of the *Carolene Products* opinion, at the time of its drafting, suggested that the Footnote was not intended to be definitive or exhaustive: "[The Footnote] 'did not purport to *decide* anything; it merely made some suggestions for future consideration.' On its face, it did no more than identify questions . . . . The modest hope was that the Footnote would catalyze thoroughgoing analysis and discussion by bar, bench, and academe, and that a complete and well-rounded doctrine would eventuate." Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1098–99 (1982) (quoting Louis Lusky, *Public Trial and Public Right: The Missing Bottom Line*, 8 HOFSTRA L. REV. 273, 305–06 (1980)); *see also* ALPHEUS THOMAS MASON & HARLAN FISKE STONE: PILLAR OF THE LAW 513 (1956) (discussing how Justice Stone liked to use footnotes to start debates over ideas he had not fully developed in his own mind).

34. The Fourteenth Amendment was enacted in 1868 to protect the rights of newly freed slaves. *See generally* JACOBUS TENBROEK, EQUAL UNDER LAW 201 (1965); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). Even prior to *Carolene Products*, however, the Court had extended the protection of the Equal Protection Clause to races beyond freed slaves. Until the 1960s, the Equal Protection Clause had been applied only to racial classifications.

35. Early language suggested that the Equal Protection Clause would protect only freed slaves. The *Slaughter-House Cases* limited the scope of the Amendment to the freedom of the slave race, and to the security and protection of former slaves from those who had exercised dominion over them. Slaughter-House Cases, 83 U.S. 36, 71 (1872). The Court's focus on slave freedom is evident by its initial rejectment of the idea that gender could also be protected by the Fourteenth Amendment. *See generally* Minor v. Happersett, 88 U.S. 162 (1875); *see also* BARBARA A. BABCOCK, ET AL., SEX DISCRIMINATION AND THE LAW (1975).

its first fifty years.[36] Indeed, equal protection claims were uncommon until revitalized during the Warren Court.[37]

The notion that certain types of classifications warrant more rigorous review than others under the Equal Protection Clause is often traced to the U.S. Supreme Court's seminal pronouncement in *United States v. Carolene Products Co*.[38] In the 1938 case involving a federal law banning filled milk, the Court decided whether a unitary, deferential standard for evaluating government action under the Fourteenth Amendment Due Process and Equal Protection Clauses was constitutionally required.[39] In a famous footnote[40]—Footnote 4—Justice Stone suggested that "a more searching judicial inquiry" is warranted when prejudice against "discrete and insular minorities" undercuts 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."[41]

---

36. Buck v. Bell, 274 U.S. 200, 208 (1927) (describing the Equal Protection Clause as the "last resort of constitutional arguments"); *see also* Klarman, *supra* note 25, at 750 (describing how equal protection "emerged during the interwar period from a long hibernation").

37. *See* Sherry, *supra* note 18.

38. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). Professor Brilmayer described the case this way: "*United States v. Carolene Products* is no longer only a case. It is a line of reasoning, and one so venerable as to have achieved almost axiomatic status in a world where virtually every other proposition of constitutional law is best considered controversial." Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Insider-Outsider,"* 134 U. PA. L. REV. 1291, 1291 (1986).

39. The *Carolene Products* case came at a time of tremendous importance, for it marked the end of the *Lochner* era. During the *Lochner* period, the Court applied heightened scrutiny to a variety of economic legislation. By the 1930s, the Court switched gears and began to reaffirm traditional judicial deference to legislative choices on economic issues. Thus, the *Carolene Products* decision was handed down just as the Court was "beginning to dig itself out of the constitutional debris left by its wholesale capitulation to the New Deal a year before." Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 713–14 (1985). In Footnote 4, the Court wanted to ensure that the rational basis standard utilized in the case to evaluate a law regulating filled milk was not deemed the only standard for constitutional adjudication. In a sense then, Footnote 4 "undertook to substitute one activist judicial mission for another." Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1089 (1982). "Where once the Court had championed rights of property, now, according to some—it should view its special function as the identification and protection of 'discrete and insular minorities.'" *Id.* at 1089–90.

40. Footnote 4 has been universally called "the most celebrated footnote in constitutional law." Powell, *supra* note 39, at 1087; *see also* Ackerman, *supra* note 39, at 722–24; Brilmayer, *supra* note 38, at 1294.

41. The Footnote actually had three paragraphs setting forth three distinct ideas. The first paragraph evolved after a discussion between Justice Stone and Chief Justice Hughes and incorporates the Bill of Rights: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Carolene Prods.*, 304 U.S. at 152 n.4. The second paragraph is concerned with legislation that restricts or impedes the political process and suggests that "more exacting" scrutiny is required in such circumstances. *See* Simon, *supra* note 16, at 123. The third paragraph is

The Footnote did not specify what precisely constituted such a minority (although the Court did refer to religious, racial, and ethnic minorities),[42] and it was unclear whether the political process must simply fail to protect discrete and insular minorities or whether an affirmative prejudice was necessary before such groups received special consideration. But the Court was clear in one respect: the Equal Protection Clause demanded more rigorous scrutiny of legislation when the political process could not be trusted. Justice Powell explained the meaning of the Footnote this way:

> The theory properly extracted from Footnote 4 . . . is roughly as follows: The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress, and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government: First to clear away impediments to participation, and to ensure that all groups can engage equally in the political process; and Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.[43]

After *Carolene Products*, courts slowly began to develop a more elaborate framework for determining which groups deserved heightened scrutiny. Although the Court first referred to race as a suspect classification in *Korematsu v. United States*,[44] and then again in *McLaughlin v. Florida*,[45] the Supreme Court did not articulate any real criteria for determining suspectness until the early 1970s.[46] For example, in the 1971

---

the focus of this paper. *See* Lusky, *supra* note 33. For cases that use the discrete and insular criteria, see *Bernal v. Fainter*, 467 U.S. 216 (1984), and *Graham v. Richardson*, 403 U.S. 365 (1971).

42. In a lecture, Justice Powell suggested that limiting discrete and insular minorities to race, religion, and ethnicity would be a plausible reading of the Footnote. Powell, *supra* note 39, at 1089.

43. *Id.* at 1086–87.

44. Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding that such legislation is subject "to the most rigid scrutiny"). Many scholars believe that although the Court purported to use strict scrutiny, the Court's analysis was more like rational basis. *See, e.g.*, Klarman, *supra* note 25, at 213–32.

45. McLaughlin v. Florida, 379 U.S. 184 (1964) (striking down, under strict scrutiny, a state law that prohibited men and women of different races from living together).

46. Indeed, in *Korematsu*, the Court declared that laws that discriminate based on race are entitled to the most rigid scrutiny without any explanation at all. 323 U.S. at 214. Historical evidence has shown that the discussion of strict scrutiny in *Korematsu* was inserted late in the process, with-

case *Graham v. Richardson*, the Court held, without any real elaboration, that "aliens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[47]

Shortly thereafter, the Court began employing more concrete criteria beyond reference to discrete and insular minorities. For example, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court used the term "suspect class" for the first time,[48] and most importantly, suggested some oft-quoted considerations for suspectness. In rejecting suspect class status for poor school districts, the Court noted that

> [t]he 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 positi on of political powerlessness as to command extraordinary protection from the majoritarian political process.[49]

That same year—1973—the Supreme Court, in a case considering the suspectness of gender, set forth two more factors: whether a group's defining characteristic was relevant to its ability to perform or contribute to society, and the immutability of that trait.[50] The plurality found that a classification based on sex, for example, had no relevance to the ability to perform or contribute to society. Because sex is an "immutable characteristic determined solely by the accident of birth,"[51] the group deserved a quasi-suspect classification.[52]

---

out any debate among the Justices. *See* PETER IRONS, JUSTICE AT WAR 340 (1983); Rubin, *supra* note 10.

47. Graham v. Richardson, 403 U.S. 365, 372 (1971). The opinion provided no further explanation for why aliens are a prime example of discrete and insular minorities. This was called an "amazing assertion" by Louis Lusky. Lusky, *supra* note 33, at 1105 n.72. *See also* Goldberg, *supra* note 8, at 485.

48. Reginold Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, 13 TEMP. POL. & CIV. RTS. L. REV. 583, 594 (2004).

49. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). This case involved members of minority groups and the poor who challenged the Texas school finance system, arguing that it was unconstitutional because it collected its money through local property taxation and therefore created a disparity in the level of education that was proportional to the wealth of the neighborhood and its residents. *Id.* at 18. But the Court found that the Texas school finance system was constitutional because the poor are not a suspect class, and since the opportunity to receive an education remained, the fundamental right to education had not been infringed upon. *Id.* at 28–29. The Court applied rational basis review, and Texas satisfied a showing of a rational relation to a legitimate state purpose. *Id.* at 38–39. In my review of lower court cases, this quote came up most often as the definition of suspect class.

50. Frontiero v. Richardson, 411 U.S. 677 (1973). Only four Justices agreed on the appropriateness of strict scrutiny for gender. Shortly thereafter, in *Craig v. Boren*, 429 U.S. 190, 197 (1976), a majority settled on intermediate scrutiny review for gender classifications.

51. *Frontiero*, 411 U.S. at 686.

52. *Id.*

Thus, although described in different ways, the basic factors for determining suspect class status were in place by the early 1980s: (1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the ability of the group to seek political redress (i.e., political powerlessness); (4) the immutability of the group's defining trait; and (5) the relevancy of that trait. Using some combination of these factors, the Court has deemed various groups suspect, others quasi-suspect, and still others nonsuspect since the 1970s. Facial classifications based on race, national origin, and religion are considered suspect and receive strict scrutiny.[53] Gender and illegitimacy are considered quasi-suspect and receive intermediate scrutiny.[54] Age, socioeconomic status, and mental disability are subject to rational basis review.[55] All other classifications (such as sexual orientation)[56] either have not been decided or are reviewed under the default rational basis standard.[57]

---

53. *See generally* Adarand Constructors v. Pena, 515 U.S. 200 (1995) (discussing race); Graham v. Richardson, 403 U.S. 365 (1971) (discussing national origin/alienage); Loving v. Virginia, 388 U.S. 1 (1967) (discussing race); Korematsu v. United States, 323 U.S. 214 (1944) (discussing race). Facially neutral classifications that have a discriminatory impact but do not have a discriminatory purpose, however, only receive rational basis review. Washington v. Davis, 426 U.S. 229 (1976).

54. *See* Clark v. Jeter, 486 U.S. 456 (1988); Trimble v. Gordon, 430 U.S. 762 (1977) (holding that illegitimacy received intermediate scrutiny); *Frontiero*, 411 U.S. at 677 (plurality recognizing gender as a suspect class). Later in *Craig*, the Court held that gender is more appropriately described as a quasi-suspect class. 429 U.S. at 197.

55. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc, 473 U.S. 432, 440–42, 447 (1985) (discussing the mentally disabled); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (discussing age); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20, 25 (1973) (discussing socioeconomic status). Of course, many argue that while the Court claims to be applying rational basis review, it is actually imposing some "bite" into the process. For example, Professor Ronald Krotoszyniski suggests that in cases like *Romer*, *Cleburne*, and *Plyler* where the Court purported to apply rational basis review, it actually required the government to "offer the actual reason for the enactment and to establish that the government purpose was actually advanced by the application of the law on the facts presented." Krotoszynski, *supra* note 8, at 1264–65; *see also* Sunstein, *supra* note 15, at 59–61.

56. *See* Romer v. Evans, 517 U.S. 620 (1996). In *Romer*, the Supreme Court held that Colorado's Proposition 2, which facially discriminated against homosexuals, violated the Equal Protection Clause using rational basis review. *Id.* The Court, however, never discussed the factors described here nor held that sexual orientation was not a suspect class. Additionally, in *Lawrence v. Texas*, 539 U.S. 558 (2003), when Justice O'Connor analyzed the Texas law prohibiting sodomy under the Equal Protection Clause, she utilized a rational basis standard of review. While the lower courts have employed mostly rational basis review, the Obama Administration has recently issued a statement that it believes that heightened scrutiny is appropriate: "After careful consideration the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny." Press Release, U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

III. WHAT MAKES A CLASSIFICATION "SUSPECT"? THE INHERENT AMBIGUITY AND UNRESOLVED QUESTIONS ABOUT THE HEIGHTENED SCRUTINY FACTORS

The suspectness of a group, and the level of scrutiny accorded to it, is almost always critical to the outcome of an equal protection case. Almost no law survives strict scrutiny; virtually nothing fails rational basis review. The designation of a group as suspect or nonsuspect is the penultimate question in determining if a law violates the Equal Protection Clause. Yet, as I argue in this part, the criterion for determining a group's suspectness is anything but clear. As Professor Wilkinson colorfully stated, "[T]he suspect class is . . . an unruly horse which the Court refuses to tame."[58] Even the Court itself has conceded that the formula for determining suspect status suffers from lack of specificity. In *Plyler v. Doe*, the Court noted that "[s]everal formulations *might* explain our treatment of certain classifications as 'suspect'"[59] and then tentatively listed several factors.[60]

Though oft-repeated, the factors by which to measure suspectness are not adequately defined. Many are duplicative and inconsistent, and all are amorphous. Further, it is not clear whether a suspect class must meet all of them, most of them, or just some of them. After over fifty years of employing these factors, significant questions still remain about the meaning of the factors for determining one of the most important questions in constitutional law: whether and when a legislative judgment involving equal protection of the law should be rigorously scrutinized by a court.

This Part describes the various factors and discusses the unanswered questions about their meaning. Specifically, I consider three issues: (1) the ambiguity about the meaning of each factor; (2) the ambiguity about how the factors interrelate; and (3) the problem of symmetry.

---

57. *See generally* CHEMERINSKY, *supra* note 3; *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a food stamp regulation that distinguished between related and nonrelated members of a household under rational basis review).

58. Wilkinson, *supra* note 5, at 983.

59. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (emphasis added).

60. As the Court explained,

> Some classifications *are more likely than others* to reflect deep-seated prejudice . . . . Classifications treated as suspect *tend* to be irrelevant to any proper legislative goals . . . . Finally, certain groups, indeed, largely the same groups have historically been relegated to . . . a position of political powerlessness . . . .

Id. (emphasis added).

A. Applying the Factors: Ambiguity and Questions Within the Established Criteria

This section explores the criteria commonly identified in case law. I argue that even the presumably well-established factors are unclearly and even inconsistently applied by courts. Moreover, it is not always clear how the factors relate to the underlying goal identified in *Carolene Products* of employing judicial scrutiny when the legislative process cannot be trusted.

1. Discrete and Insular Minorities

The most famous factor is the original from *Carolene Products* Footnote 4: courts must apply heightened scrutiny to laws that burden a discrete and insular minority.[61] Specifically, Justice Stone wrote that "prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry."[62] This factor, perhaps more than any other, has received the most thorough academic discussion and criticism.[63]

On an abstract level, the idea of protecting discrete and insular minorities under the Equal Protection Clause has intuitive appeal.[64] In practice, however, this factor raises significant questions.[65] First, there is no commonly accepted definition of the terms "discrete" and "insular."[66] In

---

61. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); *see also* Brown v. Heckler, 589 F. Supp. 985, 990 (E.D. Pa. 1984) (explaining the identification of a suspect classification simply by repeating Justice Stone's phrase, "protecting discrete and insular minorities"). Ironically, this is likely the least-used factor today.

62. *Carolene Prods.*, 304 U.S. at 153 n.4.

63. *See supra* notes 31, 37–39. At one point, Justice Rehnquist expressed concern about the validity of the discrete and insular criteria to determine suspectness, reasoning that there would be so many groups qualifying as a suspect class that the Equal Protection Clause could become unworkable: "[American] society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). As it turns out, this concern was unwarranted. Today, very few groups are subject to heightened scrutiny, and the Court has failed to categorize any class as suspect since the 1970s.

64. *See, e.g.*, Wilkinson, *supra* note 5, at 981 (A court's act of designating groups as "discrete and insular has so far been more a matter of feel on the part of the court than of any rationally justifiable process. The label is more emotive than analytical."). *Cf.* Lusky, *supra* note 33, at 1105 (arguing that legal scholars have attributed meaning to the terms "discrete" and "insular" that are not found in any dictionary or have "any foundation in the Footnote's language or in the thinking that engendered it").

65. Wilkinson, *supra* note 5, at 981.

66. Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1235 (2003).

early cases, courts often conclusorily asserted that a particular group was or was not a discrete and insular minority.[67] It is also unclear precisely what must be established in order for a court to consider a group discrete and insular. Must a group be discrete *and* insular *and* a minority *and* experiencing "prejudice"? Moreover, how is prejudice measured or determined?

Academics have attempted to fill in the gaps left by the courts. Perhaps the most widely accepted explanation for the terms "discrete and insular minority" is that suggested by Professor Bruce Ackerman. Professor Ackerman equated discreteness with visibility: A group is discrete if they are visible in a way that makes them "relatively easy for others to identify."[68] A group is insular if they tend to interact with each other with "great frequency in a variety of social contexts."[69]

Yet, it is unclear why these traits, as so defined, translate into a justification for heightened judicial scrutiny. One assumption may be that discrete and insular minorities need heightened scrutiny because they cannot rely on the political process to protect their interests. But such reasoning is superficial at best. Indeed, as Professor Ackerman describes, a group's discreteness and insularity may allow for some degree of political power. Discrete and insular minority groups are able to form coalitions that are politically influential. In other words, a group's visibility (discreteness) and its cohesiveness and group identity (insularity) make it *more likely* to become a cohesive, powerful minority force to be reckoned with. Conversely, diffuse groups that lack a clear identity may not have a similarly strong political voice.[70] As Professor Ackerman wrote,

> Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the one *Carolene* emphasizes—groups that are 'anonymous and diffuse' rather than 'discrete and insular.' It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.[71]

---

67. *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (concluding, without any other explanation, that transsexuals are not "necessarily" a discrete and insular minority).

68. Ackerman, *supra* note 39, at 729.

69. *Id.* at 726.

70. For example, it has been argued that indigents are invisible, Wilkerson, *supra* note 5, as are many alcoholics and homosexuals who remain in the closet, Yoshino, *supra* note 11.

71. *See* Ackerman, *supra* note 39, at 723–24.

The critique by Ackerman and others affirms that the phrase "discrete and insular minority" needs further clarification, refocus, and revision. Justice Stone in *Carolene Products* invoked the phrase to identify groups for whom the political process would not work, but the words "discrete" and "insular" were not instructive. Thus, courts began to use other factors, such as a group's political power, history of discrimination, and immutability, to determine whether the group was indeed a discrete and insular minority.[72] Accordingly, courts today measure suspectness by these more specific factors, discussed below, to implement the theory behind Footnote 4 of *Carolene Products* rather than by attempting to define the phrase "discrete and insular."

2. History of Discrimination

An additional factor used by courts is a group's history of discrimination.[73] This factor is separate from (but often related to) whether the group is a statistical minority because even a numerically strong group may have suffered from discrimination.[74] Considering the group's history of discrimination raises two questions: its relevance (i.e., why is discrimination history used to determine suspectness?); and its meaning (i.e., how do we determine when a group has truly experienced discrimination?).

A history of discrimination is relevant to a group's suspect status because it is connected to the group's political power and indicates whether the legislative process has failed to protect it, warranting judicial intervention. Thus, some courts or commentators consider the history of discrimination factor to be a subset of the political powerlessness criteria rather than its own separate and distinct criterion.

---

72. *See, e.g.*, Hoffman, *supra* note 66, at 1235 (describing the criteria as factors to determine if a group is a discrete and insular minority deserving the protection of heightened scrutiny); Michael Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV 5, 26 (2005) (explaining that to determine if a minority was discrete and insular, the Court would consider history of discrimination, political powerlessness, and immutability of the group's defining characteristic). Many see the immutability requirement as an implementation of the "visibility" element. *See, e.g.*, Yoshino, *supra* note 11, at 565.

73. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (finding that close relatives excluded from food stamps have not been subjected to discrimination); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (finding that the mentally disabled are not subject to continuing antipathy or prejudice); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (finding that the aged generally do not experience a history of purposeful unequal treatment).

74. Scaperlanda, *supra* note 72, at 26–27 (The theory that women, who comprise a majority of the population, are so politically powerless that they require the judiciary's protection is weak. Yet, they are a group that has suffered a history of discrimination.).

A group's history of discrimination might have affected the group's relationship to the political process in two ways. First, because of this history, a group may be unable to form coalitions with other groups, which may be necessary to garner effective political power.[75] Other possible allies may share discriminatory views toward this group. Second, legislators may be susceptible to prejudice toward the group as well. Legislators are not always immune from the public biases that have resulted from a history of discrimination against the group. In other words, a history of discrimination can determine whether a bias exists in the legislature (which can otherwise be difficult to ascertain) and whether it necessitates judicial scrutiny. As Professor Ackerman wrote,

> While no group can expect to win every time in a democratic system, we all expect our lawmakers to consider our arguments with respect and to reject them only when they are inconsistent with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits.[76]

The accuracy of these assumptions is hampered by the inherent ambiguity in what exactly constitutes a true history of discrimination. What does a "history of discrimination" mean? How do we determine if a group has experienced the requisite history of discrimination? As Professor Wilkinson noted, "The Court has not . . . defined what quantum, kind or how recent past discrimination is required."[77] Nor has the Court clarified the requisite historical period. In other words, how much time is necessary to establish a history of discrimination? What happens when a relatively new group with minimal history seeks suspect status (e.g., transgendered individuals)? As Professor Sharona Hoffman noted, "[I]t is not clear when evidence becomes historical . . . . For example, is discrimination against those with HIV historical or contemporary, given that it began only after the disease was first identified in 1981?"[78]

Because of the lack of precise guidance in determining whether a group has the requisite history of discrimination, courts often decide discriminatory history by comparing the experience of the group to that of African-Americans or women.[79] Presumably, if a history is not analogous

---

75. Yoshino, *supra* note 11, at 507.

76. Ackerman, *supra* note 39, at 738.

77. Wilkinson, *supra* note 5, at 981.

78. Hoffman, *supra* note 66, at 1255 n.242 (internal quotation marks omitted).

79. *See* Wengler v. Druggist Mutual Ins., 446 U.S. 142, 152 (1980) (holding that similar to the discrimination against female service workers in *Frontiero*, male widowers were discriminated against by a Missouri statute that gave death benefits only to widows); Mathews v. Lucas, 427 U.S. 495, 506 (1976) (finding that the history of discrimination experienced by illegitimate children was less severe than that suffered by women or blacks "perhaps in part because illegitimacy does not

to that of either African-Americans or women—the former a suspect class and the latter a quasi-suspect class—the group is probably nonsuspect.

The courts' use of this analogy begs the question: Which part of a group's historical experience must mirror that of women or of African-Americans in order to be worthy of suspect status? For example, the LGBT community, like the African-American community, has been subjected to a history of physical violence.[80] On the other hand, LGBTs have never been enslaved, as have African-Americans, and, because sexual orientation is often hidden, have not been subject to employment discrimination in nearly the same degree. But long after African-Americans could freely marry and serve in the military, the LGBT community continues to experience discrimination in those realms. How should a court analyze such similarities and differences? Without more guidance, judges are free to indulge their own stereotypes and biases about a particular group, which is the precise reason the group seeks refuge from the legislative process.

The analogy also seems inherently unfair and restrictive. No group's history is truly analogous to that of African-Americans. If slavery is a requisite factor in determining that a group has truly suffered from discrimination, suspect status will be difficult—if not impossible—for others to obtain. The historical experiences of women lacked the formal bonds of slavery but share many similar discriminatory experiences with African-Americans. So if quasi-suspect status is reserved for groups whose history is "analogous to women," what precisely does that entail?

One may argue that Hispanics and Asians, who have never been enslaved nor suffered the exact deprivations as African-Americans, are still categorized as suspect, which proves that courts do not require the analogy to be precise. But a law that discriminates against Hispanics, Asians, or Caucasians receives strict scrutiny because the Court treats all facial racial classifications the same, without regard to history of discrimination. The discrimination history of racial groups does not illustrate how a court would assess a new nonracial group. Moreover, the discrimination of any group in comparison to that of African-Americans will fall short of 100 years of enslavement followed by years of segregation and Jim

---

carry an obvious badge"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that poverty is not a suspect classification because it lacks the "traditional indicia of suspectness" that is apparent in established suspect classes, such as race and gender).

80. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 2008 HATE CRIME STATISTICS (Nov. 2009), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2008 (last visited Mar. 30, 2011).

Crow laws. The courts have never adequately explained how we compare that history to that of the poor, LGBTs, or any other group.

Besides the analogy's lack of clarity, there is also a concern that it may cause some groups to mischaracterize or downplay the discrimination of another minority in order to describe themselves as similarly victimized. A legal approach that encourages minimizing another group's suffering is misguided and unwise.

3. Political Powerlessness

Political powerlessness refers to a group's inability to rely on the legislative process to protect its interests.[81] In many ways, the issue of political power overlaps with the earlier criteria: it is the reason we care about a group's history of discrimination or whether the group is a discrete and insular minority. Thus, some courts consider political powerlessness to be the ultimate question and view the other factors as subissues. Whether viewed as the penultimate issue or simply one factor among several,[82] the idea behind political powerlessness is the same—the courts must protect groups that are vulnerable to legislative bias.[83]

Courts do not employ a consistent approach in measuring political powerlessness,[84] and the Supreme Court provides little guidance. "[I]n

---

81. *See* Rush, *supra* note 6, at 713–14 (calling political powerlessness a "major" criteria the Court uses to classify groups as suspect).

82. Several lower courts have taken the position that political powerlessness is actually one of the least significant factors or even irrelevant. *See, e.g.*, Kerrigan v. Comm'r, 957 A.2d 407, 429 (Conn. 2008) (arguing the Court has, and should, accord political powerlessness little weight); *see also* Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 860 F. Supp. 417, 437–38 n.17 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996) ("[T]he significance of [the political powerlessness factor] pales in comparison to the question[s] of whether . . . the characteristic bears any relationship to the individual[']s ability to function in society, whether the group has suffered a history of discrimination based on misconceptions of that factor[,] and whether that factor is the product of the group's own volition."). But see the comments of Justice Borden, dissenting in *Kerrigan*, where he argues that political power of the group seeking heightened scrutiny is a highly relevant consideration that relates to the central thesis of *Carolene Products*: "Although the United States Supreme Court has not always cited the *Carolene Products Co*. footnote in its formulation of the test for heightened scrutiny, it has applied the political power factor in determining whether legislation affecting a particular class is to be made subject to that scrutiny." *Kerrigan*, 957 A.2d at 491 (Borden, J., dissenting).

83. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (finding that although the position of women has improved, they still face pervasive, although conspicuous, discrimination in the political arena).

84. *See id.*; *see also Mathews*, 427 U.S. at 506 ("[I]llegitimacy does not carry an obvious badge, as race or sex do, [and] this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 37 (finding that children still have "an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of free speech and full participation in the political process"); *Kerrigan*, 957 A.2d at 429 (finding that this factor "is not readily discernible by reference to objective standards . . . and [is] not readily susceptible to judicial

most cases [the Court] has no more than made passing reference to the political power factor without actually analyzing it."[85]

Judges and scholars have suggested four possible approaches, used either separately or in combination, to assess power. These approaches consider (1) the group's ability to vote; (2) the pure numbers of the group; (3) the existence of favorable legislative enactments that might demonstrate political power; and (4) whether members of the group have achieved positions of power and authority.

First, courts consider a group's ability—or more precisely, inability—to vote. A group lacking the power to vote is a quintessential politically powerless group. So, for example, children,[86] aliens,[87] or even ex-felons[88] would satisfy this condition. But even here, a seemingly clear-cut criterion is not necessarily so. Should a court measure a group's inability to vote at the time the law was passed or at the time of challenge? This problem can be illustrated by a law passed in 1901 but challenged in 1970. Women did not have the power to vote in 1901, but at the time of the lawsuit, they had more than fifty years to seek redress and to alter that law in the political process.[89] Should a court find women politically powerless because they lacked the right to vote in 1901? Or does the fact that they had the power to vote when the lawsuit was filed render that conclusion irrelevant when placed in a larger context?

Moreover, the inability to vote may be sufficient for a finding of political powerlessness, but it is not necessary. The right to vote "does not cure a condition of political powerlessness, for blacks, women, indigents, and illegitimates may all vote, and yet all are politically powerless."[90] Political powerlessness must mean something other than simply an inability to vote. A minority group may still be unable to garner enough votes to protect themselves in the political process, even if they can vote.

The problem with using the right to vote as a proxy for political power leads to the second approach used by the courts: political power-

---

fact-finding"); Yoshino, *supra* note 11, at 565 (The standards for political powerlessness are applied inconsistently across contexts.).

85. *Kerrigan*, 957 A.2d at 440–41.

86. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 36.

87. Foley v. Connelie, 435 U.S. 291, 294 (1978) (holding that aliens receive strict scrutiny because they "have no direct voice in the political process").

88. Aukerman, *supra* note 19, at 55.

89. Women received the right to vote in 1920 with the passage of the Nineteenth Amendment to the Constitution. U.S. CONST. amend. XIX.

90. Wilkinson, *supra* note 5, at 981. Judge Wilkinson made this point in 1975, and while some may now question the conclusion, the basic point remains valid.

lessness measured simply by the pure numerical power of the group.[91] Using this approach, a court asks simply if the group seeking heightened scrutiny is a minority.[92] This approach, however, equates the political powerlessness factor with the *Carolene Products* discrete and insular minority test, and is subject to identical ambiguities about the true definition of "minority." Political science theorists have consistently rejected the notion that being a minority renders a group powerless in the political arena simply by virtue of its numbers.[93]

Additionally, determining powerlessness by looking solely at population numbers could indicate that a group's suspectness would vary depending on the particular law challenged, an approach no court has endorsed. For example, some have argued that homosexuals, a group with a 4% or 5% national population, are numerically significant in other contexts, such as large cities.[94] Such a group would be considered suspect in one locality and not another, and the challenged law might be struck down in one community and upheld in another.[95] For obvious reasons, this would create an equal protection nightmare.[96]

Using a group's population percentage to measure its political powerlessness would also be inconsistent with the Supreme Court's awarding gender quasi-suspect status. At the time of that decision, women were a statistical majority of the voting population,[97] yet the Court still suggested that women were politically powerless when it held that classifications based on gender must receive heightened scrutiny.

---

91. See, for example, the comments of the Washington State Supreme Court, where the court said that to qualify as a suspect class, "the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society *and show that it is a minority or politically powerless class*." Anderson v. King County, 138 P.3d 963, 974 (Wash. 2006) (emphasis added). The use of the word "or" seems to indicate that being a minority or being politically powerless is interchangeable.

92. This was one of the elements of political power discussed in the lengthy hearing held in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

93. *See, e.g.*, Ackerman, *supra* note 39.

94. Erik Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513, 553 (2006).

95. *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 351 (D.C. Cir. 1995) (Terry, J., concurring) ("[F]or purposes of evaluating constitutional norms, the focus on political power, or powerlessness, has to be national, not local, lest constitutional rights vary from city to city.").

96. Additionally, it would create the horror Justice Marshall mentioned in *Croson* whereby a group might have to choose between suspect status and strict scrutiny and numerical supremacy and power. *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 554 (1989) (Marshall, J., dissenting).

97. *See* Kerrigan v. Comm'r, 957 A.2d 407, 456 (Conn. 2008) (discussing that, in 1970, census data revealed that there were approximately seventy million women of voting age and approximately sixty-three million men).

Third, political power could be measured by the existence of laws that are favorable toward the group in question.[98] This reasoning is similar to the torts doctrine of *res ipsa loquiter*, or the idea that "the action speaks for itself." If laws favorable towards a particular group have been enacted, that group obviously has political influence. Justice White employed this type of logic in *Cleburne* when he determined that the mentally disabled were not a politically powerless group.[99] After surveying the various state and federal laws that responded to the plight of the mentally handicapped, the Court concluded: "[T]he legislative response, which could hardly have occurred and survived without public support, 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."[100]

More recently, lower courts have made a similar point with respect to sexual orientation discrimination. For example, the Ninth Circuit held that gays and lesbians failed to demonstrate that they were politically powerless because "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; they have the ability to attract the attention of lawmakers as evidenced by such legislation."[101]

The *res ipsa loquiter* method for measuring political power is problematic on a number of levels. First, it is too simplistic. The fact that other laws may be beneficial to a particular group does not mean that the particular law in question does not violate the group's right to equal protection.[102] A group can be both politically powerless and have some legislation passed on its behalf. This is particularly true in our system of federalism. For example, if a group challenges a discriminatory state or local law, should the existence of federal legislation demonstrate political power? The existence of a federal law says little about laws at a local

98. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); St. Louis Developmental Disabilities Treatment Ctr. Parents Ass'n v. Mallory, 591 F. Supp. 1416, 1471 (W.D. Mo. 1984) (pointing to passage of the Rehabilitation and the Education Act as "detracting" from any political powerless concern for the handicapped).

99. *Cleburne*, 473 U.S. at 445.

100. *Id.*

101. *High Tech Gays*, 895 F.2d at 574; *see also* Anderson v. King County, 138 P.3d 963, 975 (Wash. 2006) ("The enactment of provisions providing increased protection to gay and lesbian individuals . . . shows that [they] are not powerless but, instead, exercise increasing political power . . . . [The] plaintiffs have not shown that they satisfy the third prong of the suspect classification test.").

102. James Ellis, *On the Usefulness of Suspect Classifications*, 3 CONST. COMMENT. 375, 379–80 (1986); *see also* Rush*, supra* note 6, at 713 (calling the inference that because a group has some favorable legislation, the group is not the target of prejudice or hostility a "huge leap").

level. Yet, that presumption is one the Court indulges. In *Cleburne*, the Court pointed to a variety of congressional enactments protecting the mentally disabled to justify its conclusion that the group possessed political power when evaluating a local zoning law.[103]

This method of measuring political power seems naïve. Under this analysis, even African-Americans would not be considered "politically powerless" in light of the passage of the Fourteenth Amendment itself, the Civil Rights Act of 1868, and the Civil Rights Act of 1964. Similarly, women benefited from Title X and Title VII of the Civil Rights Act of 1964. "If pursued to its logical end, this inquiry could actually support removal of traits such as race and sex from the list of suspect classifications."[104]

The assumption that the existence of beneficial laws equates to inherent political power ignores the myriad of contexts in which legislation is passed.[105] It also ignores the complicated relationship between courts and legislatures. For example, a legislature could pass a palliative, symbolic, or mostly ineffective law with respect to a minority with the intent of preventing real change for that group. Or a legislature could pass a law in response to, or in anticipation of, a judicial order.[106] Under an approach that merely looks to the existence of such a law rather than its substance, that law would indicate that a group has sufficient political power, negating the need for any heightened judicial scrutiny.

Professor Segura has suggested a number of variables that would need to be considered before concluding that favorable legislation is a reliable measure of political power, including whether the laws were judicially triggered, whether they were passed with bipartisan majorities or by slim majorities, and the nature of the law itself.[107] But courts rarely

---

103. *Cleburne,* 473 U.S. at 445.

104. Goldberg, *supra* note 8, at 504–05. The Connecticut Supreme Court made this point as well and concluded that political powerlessness cannot be judged by the mere existence of favorable legislation. Kerrigan v. Comm'r 957 A.2d 407, 440–41 (Conn. 2008). Rather, the court found the relevant question to be whether the discrimination suffered by the group has been so severe that even despite favorable legislation, the group still requires the judicial protection. *Id.* at 442–43. The court suggested that the question should be a comparative one: in the case of gays and lesbians, the relevant question would be whether the group has the same amount of political power as women did in the 1970s. *Id.* at 444.

105. In his testimony, Professor Segura explains federal hate crime law as an example. In order to get it passed, the Democrats had to attach it as a rider to the Defense Authorization Bill. This practice essentially involves attaching a controversial piece of legislation (the Hate Crime Law) to a law with widespread support (the Defense Authorization Bill). Even then, 75% of the Republican senators voted against the Defense Authorization Bill, an unusual position for Republicans. Transcript of Record at 1541–42, *Perry v. Schwarzenneger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

106. *Id.* at 1549.

107. *Id*. at 1539.

engage in the elaborate analysis that Segura suggests is necessary to make a reliable finding of political power based on favorable legislation.[108]

Besides being too simplistic, the theory also provides no way of reconciling the very common situation when both favorable and unfavorable legislation exists. For example, while there are many laws beneficial to the LGBT community, particularly in the area of employment rights, there are also many laws demonstrating antipathy toward the group, particularly in the realm of family rights.[109] A court that focuses on one set of laws might be inclined to find a group politically powerful; another court more concerned with the family law restrictions might well reach the opposite conclusion.[110]

Finally, it is not always clear whether a law is truly beneficial toward a group, particularly without context and perhaps the perspective of time. For example, laws requiring that blacks and whites travel on separate railroad cars was argued—and accepted by the Court at the time—to be "beneficial" for blacks because it would help ensure peaceful relationships between the races.[111] The difficulty of determining whether legislation truly benefits a group is parallel to the difficulty of determining whether a law is benign or invidious in the affirmative action context.[112]

Because of all of these problems, it is unsurprising that the Court has been inconsistent in how it uses the existence of favorable legislation to determine a group's political power. While the Court in *Cleburne* held that rational basis review was justified since the legislative response to the mentally disabled "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,"[113] the Court in *Frontiero* used the existence of laws against sex discrimination to reach precisely the opposite conclusion. There, the plurality reasoned that heightened scrutiny in gender cases was justified in part because of such legislation:

> [O]ver the past decade, Congress has itself manifested an increasing sensitivity to sex-based classification . . . . Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not

108. One exception is the district court's approach in *Perry*, 704 F. Supp. 2d at 921.

109. One obvious example is the Defense of Marriage Act (DOMA), which defines marriage as between a man and a woman. 28 U.S.C. § 1738C (2000).

110. *See, e.g.*, Rush, *supra* note 6, at 722–34.

111. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

112. See, for example, comments by Justice Thomas in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

113. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985).

> without significance to the question presently under consideration.[114]

The fact that favorable legislation can support one proposition (the existence of political power justifying courts' reluctance to intrude on the political process), as well as its opposite (political powerlessness and suffering by a group requiring court intervention on behalf of that group), suggests that political power is not accurately determined by the existence of such laws. Courts should consider legislation only after receiving testimony about the complex political and social construct behind such a law.

Besides considering a group's ability to vote, its numerical power, or the existence of favorable legislation, some courts have attempted to measure political powerlessness by looking at whether members of the group have achieved positions of power and authority. A plurality of the Court in *Frontiero* attributed women's political powerlessness to the lack of women holding political office. In a footnote, Justice Brennan noted that while women were not a small and powerless minority, they are

> vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives . . . . [T]his underrepresentation is present throughout all levels of our State and Federal Government.[115]

Determining a group's political powerlessness by the number of public representatives of that group in positions of power suffers from three problems. First, numbers are not an accurate measure of power. Second, courts do not employ a clear definition of underrepresentation or adequate representation. Third, this factor suggests that the level of scrutiny must be constantly reevaluated over time, a task that is not embraced by courts.

First, underrepresentation is not necessarily an accurate proxy for political powerlessness. Measuring a group's political power by the number of congressional representatives from that group grossly simplifies the group's ability to otherwise garner political attention (i.e., through coalition building or other tactics). After all, corporate CEOs are vastly underrepresented in Congress, yet no one would argue that corporate interests suffer from lack of representation.[116]

---

114. Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973).

115. *Id.* at 686 n.17.

116. *See* Kerrigan v. Comm'r, 957 A.2d 407, 501 (Conn. 2008) (Borden, J., dissenting).

Second, this test provides no real measure for determining underrepresentation, except at the extremes. For example, three current Supreme Court Justices are women, but women constitute over 50% of the national population. Does this indicate that they are sufficiently represented or underrepresented? Instead of defining underrepresentation, courts use a sort of "gestalt" method of analysis, making a gut-level assessment of whether the group has the ability to attract the attention of lawmakers. Justice Scalia's dissent in *Romer* typifies this approach when he wrote that it is "preposterous" to refer to gays as politically powerless, since even though they constitute only 4% of the population, they still have an "enormous influence in American media and politics."[117] Justice Scalia partially attributes this influence to a large disposable income (which is a clearly relevant factor for political power that is rarely discussed in equal protection case law).[118] Justice Scalia's approach here is disturbing. Courts invite bias when they "guesstimate" a group's political power based on its percentage in the general population or its numbers in positions of authority.[119]

Finally, this criterion suggests that the award of suspect status must be reconsidered and constantly reevaluated over time. Consider, for example, the argument made in *Frontiero* that women are politically powerless. The statistics reflecting the underrepresentation of women have changed. As of 2011, there are eighty-eight women out of the 535 representatives in Congress. There are sixty-nine women who hold statewide elective offices, 21% of the total available positions.[120] A woman has run for—and come close to achieving—the Democratic nomination for President.[121] Two women have been vice-presidential candidates for the major parties in the last two decades.[122] Does this mean women are no longer politically powerless?

---

117. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

118. *See, e.g.*, Transcript of Record at 1541–42, *Perry v. Schwarzenneger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW) (briefly discussing the effect of money on political power).

119. *Cf.* Yoshino, *supra* note 11, at 566.

120. Specifically, there are eighty-nine women in the House, and seventy women hold statewide elective office. CTR. FOR AM. WOMEN & POLITICS, RUTGERS UNIV., WOMEN IN ELECTIVE OFFICE (2011), http://www.cawp.rutgers.edu.

121. *See* John Harwood, The Caucus, *Democratic Primary Fight is Like No Other, Ever*, N.Y. TIMES, June 2, 2008, http://query.nytimes.com/gst/fullpage.html?res=9F0CE7DA1339F931A35755C0A96E9C8B63&ref=hillaryrodhamclinton (discussing the close race between then-Senators Barack Obama and Hillary Rodham Clinton during the 2008 Democratic primary election).

122. In 1984, Representative Geraldine Ferraro was selected by Walter Mondale to be his vice-presidential running mate on the Democratic ticket. *See* Kevin Rudin, *Geraldine Ferraro Broke a Barrier for Women, but Roadblocks Remain*, NAT'L PUB. RADIO, Mar. 26, 2011, http://www.npr.org/blogs/itsallpolitics/2011/03/28/134882628/geraldine-ferraro-a-political-trailblazer-for-women-is-dead. In 2008, Republican Senator John McCain selected Governor Sarah Palin to join his ticket as his vice-presidential running mate. Michael Cooper & Elisabeth Bumiller, *Alaskan*

This timing issue raises the question, once again, of whether courts should consider a group's political powerlessness as of the date of the court challenge, or the date the law was passed. Should courts reevaluate the status provided to a group? Only one court has discussed the timing issue. The California Supreme Court in *In re Marriage Cases* held that state laws that restricted marriage to a man and a woman violated the California Constitution and, specifically, the state's equal protection provision.[123] With respect to political powerlessness, the Court stated the following:

> Although some California decisions in discussing suspect classifications have referred to a group's "political powerlessness," our cases have not identified a group's *current* powerlessness as a necessary prerequisite for treatment as a suspect class. Indeed, if a group's *current* political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications.[124]

The timing issue will become especially pertinent if the Court continues to use political powerlessness as a factor in determining suspect class status.[125] In the context of affirmative action, at least, the Court has indicated that reassessment of an affirmative action plan is appropriate no later than twenty-five years after the Court sanctioned it.[126]

4. Immutability

The immutability of a group's defining trait is frequently discussed by scholars, especially since the debate over whether the LGBT community will become a suspect class has taken center stage. This factor raises

---

is McCain's Choice; First Woman on G.O.P. Ticket, N.Y. TIMES, Aug. 30, 2008, at A1, *available at* http://www.nytimes.com/2008/08/30/us/politics/29palin.html?adxnnl=1&pagewanted=all&adxnnlx=1313971780-PT1GjW45MNu+8NWdSH+ahg.

123. *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008). Although the Court's opinion dealt with California law on suspect classification, its analysis is equally germane to the factors under the Constitution.

124. *Id.* at 443 (internal citations omitted). The California Supreme Court in fact minimized both political powerlessness and immutability, suggesting that the most important factor in deciding suspect status is a group's history of invidious and prejudicial treatment for a trait that is not relevant to the person's ability to perform or contribute to society.

125. It may be that political powerlessness is not a relevant criteria at all, but that is a different question. *See* Rubin, *supra* note 10, at 16 (arguing that surely an invidious, racially discriminatory law would not lose its abhorrent quality simply because it was the product of a smoothly functioning democratic process).

126. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

the same two questions as the others: how is it defined, and why is it relevant to the determination of suspectness?

Courts have not provided a definitive, clear-cut definition of immutability.[127] Rather, they have employed several definitions over time. Initially, courts considered immutability something that a person is born with, a trait biologically determined, or as the Court phrased it in *Frontiero*, a trait "determined solely by the accident of birth."[128] This definition has spurred lower courts' vehement debate as to whether homosexuality is something one is born into.[129] The Ninth Circuit in *High Tech Gays v. Defense Industrial Security Clearance Office* rejected the immutability of sexual orientation, noting that "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from [a] trait such as race."[130]

Some courts have modified the test of immutability, partially due to a realization that it may be difficult for courts to determine what is biologically determined,[131] and partially due to a belief that such a question is not an appropriate judicial inquiry. Instead, immutability depends on whether the trait is easily changed. A biologic trait may not be difficult to change. A person is born with a certain nose, for example, but can alter it with a simple surgery. Other advancements in surgery and medicine have even made it possible to alter one's sex or certain physical disabilities.[132] This theory urges that immutability should depend on social constructs instead of biology and on how easily the trait is altered. A trait may be difficult to change because it is not within a person's control, like illegitimacy,[133] or because to change it would enact too great a cost to personhood.

---

127. *See* Marc Shapiro, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409, 430 (2002) (arguing that the Supreme Court has failed to clearly define immutability).

128. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

129. *See* Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 511 (1994) (discussing the approaches taken in various courts).

130. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

131. Detailed and lengthy hearings have taken place concerning this precise question in some equal protection cases regarding homosexuals. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Equal. Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994).

132. "The immutability requirement also finds itself in conflict with the factual reality that purportedly fixed traits, such as sex, are in fact more alterable and flexible than commonly presumed." Goldberg, *supra* note 8, at 507.

133 [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.

Mathews v. Lucas, 427 U.S. 495, 505 (1976).

Determining whether the trait is too difficult to change is also an amorphous inquiry. For example, aliens are legally incapable of becoming citizens for a certain period of years. And a child cannot change his or her age, although the age will change over time. Are aliens and children considered immutable under the "too difficult to change" criteria?

The too difficult to change method of measuring immutability is gaining traction in both scholarly literature and judicial opinions, and is also supported by those in favor of awarding gays and lesbians some form of suspect status. Sexual orientation is immutable even if not biologically determined, and even if a behavioral choice, because sexuality is a defining characteristic of personhood. Courts should consider sexual orientation immutable because it "would be abhorrent for government to penalize a person for refusing to change [it]."[134]

Whichever definition of immutability is embraced, the question still remains: why does the immutability of a trait matter to equal protection analysis? Why is it relevant to determining suspectness? This criterion is different from the others because it is not germane to the question of whether the political process adequately protects a group. When considered separately from issues of historical discrimination or political powerlessness, there is no reason to believe that a legislature would think it fair to discriminate against someone for a trait that they cannot change without great cost. John Hart Ely thought not: "Surely one has to feel sorry for a person disabled by something that he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling."[135]

Thus, immutability seems to reflect a substantive concern rather than a procedural one. Rather than seeking to ensure a fair legislative process, it seeks to defend the very idea of equal protection, which is undermined if legislators discriminate against a person based on some biological trait out of their control. As Professor Yoshino argues, "Treating people differently because of traits they cannot change violates fundamental norms of fairness and equality."[136]

If this is the correct definition of immutability, immutability alone should be enough to justify heightened scrutiny despite a group's political powerlessness or history of discrimination.[137] Of course, no court has

---

134. Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring), *cert. denied,* 498 U.S. 957 (1990).

135. JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980).

136. Yoshino, *supra* note 11, at 504. *See also* Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) (finding that immutability and relevance of a trait reflects a concern for stigma, and that the other factors relate more to the *Carolene Products* process concern).

137. This was indeed suggested by one case under Oregon law. Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970 (Or. 1982) (finding immutable characteristics sufficient for defining a

ever applied immutability that way. Height, eye color, intelligence, and some physical and mental disabilities are reasonably considered immutable, but no court has awarded a group suspect status based on those traits alone.[138]

Instead, many courts merge the concern about immutability with the "relevancy" criterion. For example, the Supreme Court in *Mathews v. Lucas*, when considering the legal status of illegitimacy, held that

> illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society.[139]

An immutable*, irrelevant* trait is unfair; a relevant immutable one is not.[140]

Other courts seem to reject the substantive definition of immutability and instead adopt a procedural one. These courts equate immutability with the discreteness of a group and ask whether the characteristic is visible, distinguishing, or obvious.[141] For example, the Court in *Frontiero* concluded that "it can hardly be doubted that, in part, because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination."[142] Courts that embrace this concept of immutability believe that

> distinct groups are politically powerless because, *inter alia*, they cannot evade discrimination. When confronted with discrimination, an indistinct group may temporarily or permanently escape by changing or hiding its defining trait. Distinct groups do not have this chameleon like ability and thus are subject to the full force of discrimination.[143]

---

suspect class under Article I, Section 20 of the Oregon Constitution); *but see* Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 446 (Or. Ct. App. 1998) (finding that immutability is not necessary to establish a suspect class).

138. *See* Sunstein*, supra* note 15, at 2443 (arguing that immutability under this definition is neither necessary nor sufficient for heightened scrutiny).

139. Mathews v. Lucas, 427 U.S. 495, 518 (1976) (finding that the history of discrimination experienced by illegitimate children was less severe than that suffered by women or blacks "perhaps in part because illegitimacy does not carry an obvious badge").

140. As Professor Halley wrote, "The Court tentatively suggested in *Frontiero* that immutability is a factor that intensifies the invidiousness of government-imposed burdens unrelated to the job at hand." Halley, *supra* note 129, at 509.

141. *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (lumping immutability with obvious, distinguishing characteristics); Lyng v. Castillo, 477 U.S. 635, 638 (1986); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976).

142. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

143. Yoshino, *supra* note 11, at 507–08.

Under this definition then, immutability is more consistent with the other factors: an immutable trait that is highly visible makes it more likely that the group is or remains politically powerless or subject to a history of discrimination.

The point of this Article is not to suggest what definition of immutability should prevail but instead to urge further discussion. Immutability suffers from the same flaws as the other factors—it is imprecisely and inconsistently defined by the courts.

5. Relevancy

Courts also consider the relevancy of a group's defining characteristic or whether the trait bears a relation to the individual's ability to participate and contribute to society.[144] This factor was part of the Court's justification for finding that women warranted quasi-suspect status in *Frontiero*.[145] It was also the preeminent factor considered by the Court in *Cleburne*[146] and considered by lower courts.[147] If a trait does not reflect a person's abilities, it is presumptively irrelevant, and the law illegitimately discriminates on the basis of it.[148] Relevancy helps determine whether the political process protects a group, or whether a legislative determination about a group is infected by bias or stereotype. Since overt evidence of bias is difficult to ascertain, the Court uses relevance as a proxy: if the group characteristic is rarely relevant to a legitimate legislative objective, then strict scrutiny may be appropriate. Intermediate scrutiny is appropriate where it is sometimes relevant, and rational basis review is appropriate where the trait is often relevant.[149]

Courts frequently rely on relevancy as a proxy for the trustworthiness of the political process.[150] Relevancy was the determinative factor in creating two nonsuspect classifications: mental disability and age. Al-

144. Goldberg, *supra* note 8, at 537.

145. *Frontiero*, 411 U.S. at 686.

146. The factor received starting-line-up status in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 466 (1985). In *Cleburne*, the Court held that "any form of heightened scrutiny is inappropriate for classifications that reasonable legislators *could* conscientiously use for legitimate purposes." Ellis, *supra* note 102, at 376–77.

147. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006) (finding that rational basis is appropriate where "individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement").

148. Oh*, supra* note 48, at 591. Professor Simon suggests another possible purpose of looking at the relevancy of a particular trait—that it is a way to make a moral judgment as to whether the classification is desirable. For example, he argues that it would be equally irrelevant to prevent blacks and plumbers from being denied a state benefit, like in-state tuition, but there is something worse about denying the benefit to blacks than to plumbers. *Id.*

149. Aukerman, *supra* note 19, at 57.

150*. See, e.g.*, Smith, *supra* note 23 (describing relevancy as an "essential" element along with history of discrimination).

though in both cases the Court discussed the other criteria for determining a suspect class, its finding that the trait was relevant was clearly significant. In *Kimel v. Florida Board of Regents*, the Court held that age classifications deserved only rational basis review because "unlike government conduct based on race or gender, [age] cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'"[151] Similarly, in *Cleburne*, the Court found that although the mentally disabled "have a reduced ability to cope with and function in the everyday world . . . [they are different, immutably so, in relevant respects] and the State's interest in dealing and providing for them is plainly a legitimate one."[152] Despite determining that the mentally disabled are entitled to only rational basis review, the Court found that a law requiring a special use permit for the operation of a group home rested on irrational prejudice against the mentally disabled and thus violated the Equal Protection Clause.[153]

Relevancy suffers from the same problems as the other factors: there are inherent ambiguities that make it a less reliable indicator of legislative bias. First, it is not clear how to determine the relevance of a trait. Should the trait be relevant in some broad, abstract sense or merely relevant for the purposes of the statute under review? For example, being a sex offender may be a very relevant factor in a hiring decision for a public school but less relevant for deciding who has access to mass transportation. Being mentally disabled may be highly relevant for an airline pilot but not relevant at all for determining who may live in a flood zone. Being nearsighted is certainly relevant for hiring a pilot and irrelevant for hiring a law professor.[154] As Thurgood Marshall once remarked,

> [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.[155]

The point that relevancy is context-specific suggests a broader methodological question: can a group be suspect in one situation and not in

---

151. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (quoting *Cleburne*, 473 U.S. at 440).

152. *Cleburne*, 473 U.S. at 441.

153. *Id.* at 432.

154. Halley, *supra* note 129, at 508.

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

others? Such a possibility was raised by Judge Smith of the New York Court of Appeals:

> Perhaps that principle [of considering whether the trait is relevant to state interests in legislating] would lead us to apply heightened scrutiny to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships. A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the state's interest in fostering relationships that will serve children best. In this area, therefore, we conclude that rational basis scrutiny is appropriate.[156]

Whether courts *should* do this, of course, is beyond the scope of this Article. Rather, the point is more basic: courts have not adequately defined relevancy and are inconsistent in how they accord it weight. In some cases, the Court has insisted on rational basis review for traits considered relevant to a group's ability to contribute to society.[157] Other times, however, it has awarded suspect or quasi-suspect status to groups whose characteristics are relevant to legislative goals.[158]

A final critique is whether relevancy should be considered at all. Why is relevancy an appropriate inquiry when determining whether a law violates the Equal Protection Clause? One answer may be that the relevancy of a trait helps to determine when the legislative process adequately protects a group. But it is unclear whether relevancy is truly an effective proxy for legislative bias. The inclusion of an *irrelevant* trait in a statute may be strong evidence of bias, but the opposite is not always true. Classification based on a relevant trait is not indicative of a *lack* of prejudice. A mental disability, for example, may be both a relevant factor and one used in a discriminatory manner.

Another answer may be that relevancy of a trait is not related primarily to a procedural concern about the political process but instead pertains to a substantive concern about fairness. It may be fundamentally unfair to classify people based on irrelevant traits, especially if they are immutable. This idea raises the deeper question of precisely what courts are trying to accomplish through the equal protection criteria.

---

156. Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006).

157. *See id.* (finding that rational basis scrutiny is appropriate "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement") (quoting *Cleburne*, 473 U.S. at 441).

158. *See* Aukerman, *supra* note 19, at 57. The issue of how to weigh this factor is not limited to the "relevant trait" inquiry. It pertains to every factor and accordingly is further discussed in Part III.B.

B. The Factors in Relation to Each Other

The Court has never described how the factors exist in relation to each other, explained which factors are to be given priority, or clarified how much weight to assign any particular factor. The Supreme Court once suggested that meeting even one factor is sufficient to award a group suspect status, finding that a suspect class entitled to strict judicial scrutiny is one "saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[159] Yet, no court has ever found that a group is awarded suspect status by its political powerlessness alone, for example. The same is true for the other factors. As Professor Hutchinson wrote,

> Although all of these factors [discussed above] have appeared in cases discussing the standards for heightened scrutiny, courts . . . have often disregarded one or all of them in their analysis. In addition, the presence of these (or most of these) factors has not necessarily resulted in the application of heightened scrutiny.[160]

Without more guidance, courts are left performing a mushy, gestalt-type analysis. Presumably, the more factors satisfied the merrier. Beyond that, it is unclear how the factors interplay. What happens if a group has an extensive history of discrimination but is politically powerful? What about a group with a moderate discrimination history that is not completely powerless but also is not powerful, and its defining characteristic is not immutable? The combinations are almost endless. When these questions remain unanswered, equal protection analysis leads to unprincipled results.

C. A Rejection of the Criteria: The Problem of Symmetry

Determining what groups are entitled to suspect classification is also confusing because there is no set hierarchy or weight applied to the factors, and sometimes factors are inexplicably ignored. I refer here to the problem of "symmetry." Under the doctrine of symmetry, African-Americans receive strict scrutiny but so do whites. Women receive intermediate scrutiny but so do men. Courts consider not the particular discriminated *classes* but rather a group's general *classification*. One scholar described the phenomenon this way:

---

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

160. Hutchinson, *supra* note 19, at 635 (internal citations omitted).

> [O]nce a subordinate class successfully establishes that the discrimination it faces warrants exacting judicial scrutiny, the Court applies heightened scrutiny symmetrically and extends judicial solicitude to any individual who encounters discrimination based on the 'same' trait as the members of the subordinate class . . . . Thus, while blacks or women might constitute suspect classes due to their socially disadvantaged statuses, whites and men receive heightened scrutiny when they challenge laws that classify on the basis of race of gender.[161]

Symmetrical treatment of race or gender could be justified based on the factors discussed in Part III.A. In other words, laws that discriminate against men also treat women differently, and it is this treatment of women that violates the Equal Protection Clause. In *Craig v. Boren*, the first case that established intermediate scrutiny for gender, males could not drink 3.2% beer until they were twenty-one, but females could drink at eighteen.[162] Eighteen-year-old males have not been historically discriminated against, and clearly, they are not politically powerless. Indeed, immutability is the only factor that males could claim in their favor.

But the law in *Craig* could also be characterized as discriminatory against women. The law was ultimately based on stereotypes that women are more responsible and less likely to drink and drive. Perhaps even "positive" stereotypes should not be the basis of legislative judgments. Similarly, it could be argued that laws that discriminate against whites harm African-Americans as well: this is a common argument in the context of affirmative action.[163]

Yet, whether a court applies strict scrutiny or intermediate scrutiny does not really turn on ascertaining the "real" group that is harmed by the law. None of the Justices in *Craig v. Boren* suggested that heightened scrutiny was being applied because the law discriminated against women. And not all laws that discriminate against whites also harm African-Americans, but strict scrutiny is applied to both groups. For example, a state-sponsored play on Martin Luther King, Jr. that advertised for only black actors to play the lead role would receive strict scrutiny even though only whites were excluded, and the advertisement did not stigmatize African-Americans. The Court has declared that any facial classi-

---

161. *Id.* at 638–39.

162. Craig v. Boren, 429 U.S. 190, 197 (1976).

163. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

fication based on race justifies the highest level of scrutiny, the factors so carefully laid out in prior equal protection cases be damned.[164]

In analyzing suspect classes symmetrically, the Court adds another inconsistency to its equal protection analysis and makes many of the factors irrelevant.[165] Historical discrimination, political powerlessness, and discrete and insular minority status are not considered in a symmetrical approach.[166]

The Court adds further confusion to the criteria by switching back and forth between concern about suspect classes (i.e., African-Americans) and suspect classifications (i.e., race in general). The symmetrical approach indicates that the Court recognizes some factors in some situations but will ignore most of those factors in other situations.[167] For example, when determining whether the LGBT community should receive suspect class status, the Court focuses on factors like history of discrimination, political powerlessness, and immutability. But for racial groups, the same factors are essentially irrelevant. One may wonder if these factors are truly important if they are sometimes cavalierly disregarded by the Court.

IV. HOW SHOULD WE THINK ABOUT THE FACTORS AS APPLIED TO SUSPECT CLASSES (OR CLASSIFICATIONS)? FRAMING THE DEBATE

The Court has not produced a new suspect class applying the existing criteria since 1973,[168] although many believe that certain groups like the LGBT community, the poor, and the disabled deserve heightened scrutiny.[169] Perhaps this indicates that the current factors are at fault and should be reconsidered or more precisely defined by the courts. Or perhaps it shows that the current criteria is perfectly fine but has been subverted by conservative judges. A close analysis of the factors only leads to more questions.

---

164. The Court has clearly embraced a classification-based approach as opposed to a class-based one. Yoshino, *supra* note 11, at 489.

165. The switch to symmetry classification has "basically rendered suspect class analysis irrelevant." Oh, *supra* note 48, at 601.

166. Yoshino, *supra* note 11, at 563.

167. Oh, *supra* note 48, at 601.

168. *See* Emily K. Baxter, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 894 (2007).

169. *See generally* Romer v. Evans, 517 U.S. 620 (1996) (using rational basis review to find that a law discriminating against gays and lesbians violated the Equal Protection Clause); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (finding that the mentally disabled are not subject to continuing antipathy or prejudice); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (deciding that the poor are not a suspect class).

In this Part, I pose some overarching thoughts that should guide the discussion. Before deciding how to approach an equal protection makeover, the following issues should be considered.

A. Is Suspect Class Status a Scarce Resource?

One issue is whether suspect status should remain rare. Many believe the Court has developed the current criteria as a gatekeeper to ensure the judiciary does not recognize too many suspect classes and to ensure that suspect status is granted only in extraordinary circumstances. This fear is illustrated by Justice Rehnquist's comments warning that almost any group could "package" itself as a discrete and insular minority[170] and by the Court in *Cleburne*, which expressed the need for caution in defining a group as suspect.[171]

Three arguments support the view that suspect status should only be stringently granted: First, awarding suspect status to more groups may dilute its meaning. For example, classifying the mentally disabled as suspect may denigrate the prejudice and discrimination experienced by African-Americans. Second, the requirements of strict scrutiny might be watered down or less rigorously applied if more groups qualified for its protection. Third, the proper role of the courts in our constitutional system mandates that heightened scrutiny be utilized only rarely because courts must defer to legislative judgment, not constantly scrutinize its objectives and means.

None of these arguments seem particularly persuasive. The first argument, that awarding suspect status to other groups may dilute the history of discrimination experienced by African-Americans, is moot: the Court considers *all* races, not just African-American, suspect. Moreover, more is not necessarily less. Awarding suspect status to one group is unrelated to another group's egregious history of discrimination or political powerlessness. Other countries classify many groups as suspect without minimizing the victimhood of any one group. For example, the South African Constitution prohibits discrimination equally with respect to numerous groups: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[172] State constitutions and statutes also often protect a broader array of groups without detriment to one specific group.

---

170. Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

171. *Cleburne*, 473 U.S. at 441–42.

172. S. AFR. CONST., 1996.

The second argument, that if the Court awards suspect status more liberally it will begin applying a watered-down version of strict scrutiny, is a legitimate but not significant concern. Strict scrutiny is well-established: a law will be upheld only if the government proves a compelling interest for the law and proves that the means for achieving that interest are narrowly tailored. Considering that the government bears the burden to demonstrate a compelling interest and to justify its means, and given that the current strict scrutiny analysis has been used for over fifty years, a court could not easily subvert this test.

The final argument that heightened scrutiny analysis should be applied sparingly since it involves an intrusive judicial intervention with the legislative process merely counsels caution not abdication by the Court. Critics argue that the more groups that are awarded suspect status, the more times a court will overturn a legislative decision, which subverts its judicial role as a restrained and deferential body. But for groups not adequately protected by the political process, judicial intervention is justified and necessary. As Professor Yoshino stated,

> [T]he fact that many groups are deserving of the courts' protection is not, in itself, a principled reason for excluding any of them. It can also be criticized as leading to a "first in time is first in right" jurisprudence, which privileges groups that made their claims before the judiciary imposed an arbitrary cutoff.[173]

But the Court seems to believe that such a limitation is necessary.[174] Many attribute the Court's refusal in *Cleburne* to award suspect status to the mentally disabled to a fear of opening the suspect-class floodgates. There, the Court stated the following:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others who cannot themselves mandate the desired legislative responses and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course and we decline to do so.[175]

---

173. Yoshino, *supra* note 11, at 562.

174. *Id*. at 552 (arguing that the criteria serve as a "gate-keeping function" to limit the number of suspect classes). The Court is unlikely to accept a different solution without an alternative means of limiting the number of protected groups. *Id.*

175. *Cleburne*, 473 U.S. at 445–46.

Thus, justified or not, part of the reevaluation of equal protection analysis is whether suspect class status should be uncommon.

B. What is the Purpose of the Factors? Rethinking the Equal Protection Doctrine

Ultimately, a reevaluation of the criteria should address the broader question of whether the Equal Protection Clause seeks to achieve a procedural objective (to compensate for an inadequate or untrustworthy political process), a substantive one (to prevent groups from being treated differently for an immutable trait)[176] or both. For the former, history of discrimination and political power are crucial, and creating a consistent and workable meaning for those factors is essential. For the latter, history of discrimination and political power are less important or even irrelevant, but immutability and relevancy take center stage.

Additionally, this discussion should begin to include the true nature of the group at issue. For example, scholars have recently debated what "race" really means, whether African-American women should be treated differently than African-American men or women of other races, and the interplay of overlapping characteristics like race and poverty.[177]

The ambiguities and nuances of equal protection jurisprudence may ultimately require the Court to reconsider the validity of the three-tier analysis of rational basis, intermediate scrutiny, and strict scrutiny. Scholars[178] and judges[179] are already questioning this scheme. Some argue that the ideals of equal protection are more likely protected by a balancing test[180] or by a single standard[181] or continuum approach that does not attempt to fit the factors within clearly circumscribed slots.

V. CONCLUSION

Like the famous *Carolene Products* Footnote 4, this Article raises more questions than it answers. Despite the fact that equal protection jurisprudence appears to be a settled area of constitutional law, the fac-

176. *See* Hutchinson, *supra* note 19, at 616 (arguing that the meaning of the Equal Protection Clause remains open and subject to diverging views).

177. *See generally* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (discussing the construct of race).

178. *See, e.g.*, Goldberg, *supra* note 8.

179. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 202 (1976) (Stevens, J., concurring); Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting). On the other side of the spectrum, Justice Rehnquist has also questioned the tiers. *Craig*, 429 U.S. at 220–21 (Rehnquist, J., dissenting). In Alaska, the state courts have adopted a balancing test to analyze equal protection issues. *See, e.g.*, Schiel v. Union Oil Co., 219 P.3d 1025 (Alaska 2009).

180. *See, e.g.*, *Cleburne*, 473 U.S. at 468–69 (Marshall, J., dissenting) (arguing for a balancing test).

181. *See Craig*, 429 U.S. at 202; Goldberg, *supra* note 8, at 831.

tors used in its analysis are ambiguous and inconsistent. This Article has sought to better frame the equal protection analysis debate by comprehensively describing these factors. Such a debate is critical to ensure that our government treats its citizens equally as guaranteed by the Equal Protection Clause. An amorphous test risks unprincipled results and thwarts equality under the law.