The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement

David Schraub†

INTRODUCTION

A widely held conception of the federal courts is that they are supposed to protect the politically powerless and vulnerable, particularly from state predations. The famous Footnote Four of *United States v Carolene Products Co*[1] first established the principle that courts should pay special attention to the claims of "discrete and insular minorities."[2] This standard has grown to become an important part of the judiciary's heightened scrutiny analysis—a part that this Comment argues should be largely abandoned. To be sure, the logic is compelling: heightened scrutiny should be accorded only to groups who cannot protect themselves in the political process. Once they begin flexing political muscle, courts ought to step aside and let the democratic system take the reins. But this paradigm leaves many minority groups in a perplexing paradox. Since truly powerless groups do not typically receive judicial protections, a vulnerable social group must show political power in order to gain the attention of the courts. But, by showing this power, vulnerable groups simultaneously give the judiciary a doctrinal excuse to reject their claims.

The history of gay rights illustrates the problem. Though courts can nearly uniformly point to an array of antidiscrimination laws, policies, and principles demonstrating that gays and lesbians possess at least some political clout, they use this information quite inconsistently. Some cite it as evidence of evolving attitudes toward gays and lesbians, a signal that discriminatory practices are wrong and must be abandoned. Others showcase it as proof that gays and lesbians are adequately heard in the democratic arena and thus do not need special judicial protection. But this debate proceeds in the shadow of the broader history of gay rights litigation—one that unambiguously shows that without some political influence, gays and lesbians enjoyed no judicial protection at all. The narrative of judges protecting the powerless not only enjoys weak historical grounding, but it also allows

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† BA 2008, Carleton College; JD Candidate 2011, The University of Chicago Law School.

1 304 US 144 (1938).

2 Id at 152–53 n 4.

unsympathetic judges to justify demanding absolute political powerlessness as a prerequisite for judicial protection, which ensures that disfavored groups such as gays never receive judicial solicitude.

Drawing on this analysis, this Comment asserts that the Equal Protection Clause should not focus on the relative political power of the disfavored group. Fundamentally, the wrong that increased judicial scrutiny is supposed to rectify is not measured by some baseline "proper" level of political power. Rather, courts should provide special protection to certain groups to check against prejudicial or stereotyped treatment, demonstrations of animus that ought not be tolerated in a liberal society. The ability to secure passage of a few antidiscrimination provisions, or other high-profile political victories, does not in itself demonstrate that this prejudice is no longer salient. Focusing on the existence of animus, rather than power, better matches both the reasoning behind why courts are willing to intervene in the democratic process, as well as the actual mechanics governing when courts have launched such interventions.

This Comment proceeds in four parts. Part I provides an outline of the scrutiny-based analysis the Supreme Court and many states apply to civil rights claims. Courts nominally apply some form of raised scrutiny (compared to the baseline rational basis test) to classifications disadvantaging certain vulnerable groups. In at least the formal doctrinal structure of these tests, the relative political power of the group in question, along with a historical analysis of the discrimination it faces, is an important consideration. Part II briefly sketches the history of the gay rights legal movement from the late 1960s through *Lawrence v Texas*.[3] Though the judiciary has slowly shown itself more and more willing to defend gay rights over the past four decades, this has occurred synchronously with *increased* political influence by gays and lesbians, contrary to the traditional story of judicial protection.

These two Parts lay the groundwork for Part III, which explores how courts, particularly state courts hearing gay marriage cases, have determined whether sexual-orientation classifications should receive heightened scrutiny. The particular focus is on the variable of gay and lesbian political power. Some states have used the presence of state antidiscrimination measures as proof that gays and lesbians are sufficiently protected by the political process and do not need special judicial protection. Others have cited similar laws as indications that such discrimination is no longer tolerable in an egalitarian society.

Finally, Part IV argues that the inconsistent application of political power as a relevant variable in triggering heightened scrutiny implies

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3 539 US 558 (2003).

that it should no longer be an effective precondition for attaining additional judicial protection.[4] The history of the gay rights movement, as well as other civil rights endeavors, demonstrates not only that political power historically has played little, if any, role in the judiciary's *actual* application of heightened scrutiny, but also that judicial bodies will generally not entertain claims by the politically powerless. Thus, political power analysis is at best a vestigial factor, and at worst a mask for hostile decisions by unsympathetic judges. The courts would be better served to look at the presence and salience of social animus directed against the group as the primary justification for additional protective measures.

I. Political Power and Fourteenth Amendment Doctrine

There are two primary ways courts apply the Fourteenth Amendment to protect disfavored groups from hostile legislation. First, some "suspect" or "quasi-suspect" groups are afforded heightened scrutiny, whereby courts look more closely at legislation appearing to target or disadvantage them. Second, courts also demand strong rationales for legislation that burdens so-called fundamental rights. Both forms of protection matter for gays and lesbians. For example, a court might strike down laws prohibiting gay marriage by reasoning that they discriminate against gays as a class, or that they burden the fundamental right to marry. This Part outlines the criteria for becoming a suspect or quasi-suspect group or class, or for registering a right as fundamental. It then proceeds to overview the tests courts apply when faced with legislation burdening such groups or rights. The upshot is that the relative political influence of a group is, formally speaking, a disadvantage when seeking to attain suspect classification, but an advantage when trying to make claims under the ambit of "fundamental rights." As later sections show, however, this description of the formal doctrine does not capture the actual history of judicial behavior with regard to gay rights claimants.

A. Suspect Classes

The criteria for becoming a suspect class, and thus being a candidate for intermediate or strict scrutiny, remain in flux. What is clear is that on a formal doctrinal level, courts determining whether a given class ought to receive some form of enhanced scrutiny are supposed to

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[4] To be sure, if a particularly far-sighted court did wish to provide such protections to the truly marginalized, this author would have no objection. Given, however, that this sort of judicial behavior has been historically infrequent, the doctrine should not take powerlessness as a threshold condition for securing judicial protection. See notes 169–82 and accompanying text.

take account of that group's relative political power. This concern can be traced to *Carolene Products*'s Footnote Four, which worried that "discrete and insular minorities" may face "prejudice" tending to "seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[5]

The Supreme Court first attempted to lay out a comprehensive standard for attaining suspect classification in *San Antonio Independent School District v Rodriguez*.[6] Turning back an effort to declare poverty a suspect class, the Court listed the "traditional indicia of suspectness" as including whether the group was "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."[7] Three years later, in *Massachusetts Board of Retirement v Murgia*,[8] the Court added an additional factor to the *Rodriguez* list: whether the group members have been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities [to contribute meaningfully to society]."[9] Another case, *Lyng v Castillo*,[10] indicated that the courts should also consider whether the group members possess "obvious, immutable, or distinguishing characteristics that define them as a discrete group."[11]

Finally, lurking in the background of this doctrinal analysis is the plurality opinion in *Frontiero v Richardson*.[12] When *Craig v Boren*[13] established a new standard of heightened review for sex-based classifications,[14] it asserted that *Frontiero*, and its predecessor, *Reed v Reed*,[15] had already established that the Constitution demanded scrutiny of

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5 304 US at 152–53 n 4.

6 411 US 1 (1973).

7 Id at 28 (emphasis added).

8 427 US 307 (1976).

9 Id at 313 (declining to recognize age as a suspect classification). See also *Frontiero v Richardson*, 411 US 677, 686–87 (1973) (plurality) (asserting that sex-based classifications ought to receive strict scrutiny because the category "frequently bears no relation to ability to perform or contribute to society").

10 477 US 635 (1986).

11 Id at 638 (declining suspect or quasi-suspect review to a classification distinguishing between close and more distant relatives, disadvantaging the former, because "[a]s a historical matter," close relatives "have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless").

12 411 US 677 (1973).

13 429 US 190 (1976).

14 See text accompanying notes 47–51.

15 404 US 71 (1971) (striking down an Idaho law granting automatic preference to men over equally qualified women in the administration of estates).

sex classifications at some level beyond rational basis review.[16] Because of *Frontiero*'s important role in laying this foundation, it has been read into the line of cases providing guidance as to which classifications deserve some form of heightened judicial scrutiny.[17] *Frontiero*, like *Lyng*, took notice of the immutability of the characteristic in question as an important part of the heightened scrutiny analysis.[18] It also took notice of the discrimination women faced in the democratic process, observing that "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[19]

In sum, all four of the key cases—*Rodriguez*, *Murgia*, *Lyng*, and *Frontiero*—identify a history of discrimination and prejudice, and some degree of political powerlessness, as factors courts should take account of when determining whether suspect classification is appropriate. In addition, *Murgia* and *Frontiero* took special notice of a particular type of discrimination: that which manifests itself via stereotyping unreflective of the group's true abilities. Meanwhile, *Lyng* and *Frontiero* also addressed the immutability of the characteristic in question. Teasing out the precise contours of what entitles a group to additional scrutiny is beyond the scope of this Comment. What matters is that, as a formal doctrinal concern, political power and its counterpart—a history of discrimination and prejudicial treatment—are important factors to be considered.

B. Fundamental Rights

Related to, but distinct from, scrutiny-based analysis is the Court's treatment of so-called "fundamental rights."[20] A right does not necessarily require explicit constitutional articulation in order to attain

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16 See *Craig*, 429 US at 197–98.

17 See, for example, *Conaway v Deane*, 932 A2d 571, 606 & n 39 (Md 2007) (citing *Frontiero* in delineating the "indicia of suspect or quasi-suspect classes that have been used in Supreme Court cases to determine whether a legislative classification warrants a more exacting constitutional analysis than that provided by rational basis review"); *Baehr v Lewin*, 852 P2d 44, 66 (Hawaii 1993) ("Of the decisions of the United States Supreme Court cited [in a prior case determining the scope of Hawaii's equal protection clause,] *Frontiero v. Richardson* was by far the most significant.").

18 See *Frontiero*, 411 US at 686.

19 Id.

20 In *Corfield v Coryell*, 6 F Cases 546 (CC ED Pa 1823), Justice Bushrod Washington discussed those rights he deemed "in their nature, fundamental," including the right of free passage through the states, the right to petition the courts, and the right to obtain property. Id at 551. Although his discussion was framed with reference to the Privileges and Immunities Clause, US Const Art IV, § 2, cl 1, the evisceration of this clause in the *Slaughter-House Cases*, 83 US (16 Wall) 36 (1873), pushed fundamental rights jurisprudence into the purview of the Due Process Clause, US Const Amend XIV, § 1.

fundamental status.[21] Instead, the Court has given two indications of what qualities a rights claim must possess in order to be considered fundamental. In *Palko v Connecticut*,[22] the Court described fundamental rights as those "implicit in the concept of ordered liberty,"[23] while in *Moore v City of East Cleveland*,[24] fundamental rights were those "deeply rooted in this Nation's history and tradition."[25] Both of these articulations, but particularly the latter, give preference to those rights that have enjoyed substantial political vibrancy across the nation's history.[26]

A critical point of contention in fundamental rights analysis is the level of abstraction to apply. So, for example, in *Bowers v Hardwick*,[27] the majority of the Court described the question as whether there is a "constitutional right of homosexuals to engage in acts of sodomy."[28] In response, Justice Harry Blackmun's dissenting opinion began by stating: "This case is no more about 'a fundamental right to engage in homosexual sodomy' . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth."[29] Similarly, although the right to marry is well established as a fundamental right,[30] there is sharp disagreement about whether this subsumes gay marriage, or whether gay marriage must separately satisfy the *Palko* or *Moore* tests.[31]

Notably, this blurs the line between the group-based protections discussed earlier[32] and the rights-based analysis addressed here. On the one hand, if "gay marriage" is a separate right from "marriage," then the alleged fundamental right itself is group based. So for a group-based

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21 See, for example, *Pierce v Society of Sisters*, 268 US 510, 536 (1925) (holding unconstitutional a law prohibiting private schooling); *Meyer v Nebraska*, 262 US 390, 402–03 (1923) (holding unconstitutional a law prohibiting the teaching of a foreign language).

22 302 US 319 (1937).

23 Id at 325.

24 431 US 494 (1977).

25 Id at 503.

26 See text accompanying notes 100–03.

27 478 US 186 (1986), overruled by *Lawrence*, 539 US at 578 (2003).

28 Id at 191 (upholding a Georgia sodomy statute as constitutional).

29 Id at 199 (Blackmun dissenting) (concluding instead that the case was about "the right to be left alone"), citing *Stanley v Georgia*, 394 US 557 (1969); *Katz v United States*, 389 US 347 (1967).

30 See *Zablocki v Redhail*, 434 US 374, 384 (1978) (holding that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause").

31 Compare *Goodridge v Department of Public Health*, 798 NE2d 941, 957 (Mass 2003) (analyzing the state's prohibition of gay marriage as in potential conflict with the right to marry) with *Lewis v Harris*, 908 A2d 196, 208 (NJ 2006) ("[T]he liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry. Thus, we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience.").

32 See Part I.A.

right to meet the hurdles posed by *Moore* or *Palko*, the group in question must have clearly achieved substantial social integration and influence. On the other hand, fundamental rights analysis is not typically associated with group-based protections; the default orientation courts take when addressing such claims is to look at the scrutiny-based analysis outlined above, which looks for vulnerability, not authority.

These two positions operate at cross purposes: scrutiny analysis tells courts to intervene on behalf of the politically powerless and let the powerful hash things out in the legislature, while fundamental rights analysis protects those strong enough to leave an imprint on America's traditions and moral fiber, excluding more marginal actors. Ideally, this would result in a seamless web of protection, with fundamental rights analysis picking up where equal protection leaves off. But the combination works both ways—unsympathetic judges can as easily deploy each framework's respective rationales for *declining* protection as they could reach for the reasons to extend it. The result, as shown in Part III, is a fatal indeterminacy—one that has become quite apparent as the gay rights movement has progressed.

C. The Tests

Most legislative classifications reviewed under the Fourteenth Amendment's Equal Protection Clause are subject to what is known as rational basis review.[33] This is the baseline of review—the application of a higher standard is the exception.[34] For legislation to meet this threshold, the court must find merely that the classification at issue is "rationally related" to a "legitimate governmental interest."[35] Moreover, these purposes can be entirely hypothetical—there is no need for the legislature to show that it actually had any legitimate interest in mind. Instead, the burden is on the plaintiff to rebut any and all possible rationales for the challenged legislation.[36] Consequently, some have argued that "[t]his technique of rational basis review can be so deferential as to amount to no review at all. Any statute could survive a review that freely hypothesizes purpose and does not insist that there

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33 See, for example, *Minnesota v Clover Leaf Creamery Co*, 449 US 456, 461 (1981) (applying "the familiar 'rational basis' test").

34 See *City of New Orleans v Dukes*, 427 US 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

35 See, for example, *Romer v Evans*, 517 US 620, 631–32 (1996); *City of Cleburne v Cleburne Living Center*, 473 US 432, 446 (1985).

36 See, for example, *FCC v Beach Communications*, 508 US 307, 315 (1993); *United States Railroad Retirement Board v Fritz*, 449 US 166, 179 (1980) ("[W]here … there are plausible reasons for Congress' action, our inquiry is at an end.").

be any connection in fact between a classification and such a hypothesized purpose."[37]

In certain special cases, however, courts will employ tests more stringent than rational basis review. The Supreme Court has developed two levels of increased scrutiny beyond the rational basis test for certain types of suspect classifications: "strict scrutiny," and "heightened" or "intermediate" scrutiny.[38]

While *Carolene Products* implied that some form of enhanced scrutiny would be available to politically marginal groups,[39] strict scrutiny's particular origins lie in *Korematsu v United States*[40]—the Japanese internment case. Although the Supreme Court eventually upheld the confinement of Japanese citizens in relocation camps, the Court also declared that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."[41] Today, what is now known as strict scrutiny applies "when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to [achieving] any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—[that] the burdened class [is] not as worthy or deserving as others."[42] Furthermore, if a law or policy burdens a right ranked as fundamental, it is subjected to this same strict scrutiny.[43]

Legislation that is targeted under strict scrutiny analysis must be "narrowly tailored to serve a compelling governmental interest."[44] This is a tremendously difficult hurdle to surmount—placing it on the opposite pole of the highly deferential rational basis review. If rational basis review virtually never results in judicial invalidation of a democratic decision,[45] strict scrutiny has famously been labeled "'strict' in theory and fatal in fact."[46]

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37 Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term through* Romer v. Evans, 32 Ind L Rev 357, 359 (1999).

38 See *United States v Virginia*, 518 US 515, 567 (Scalia dissenting) (noting the three extant equal protection tests: "'rational basis' scrutiny, intermediate scrutiny, [and] strict scrutiny").

39 See 304 US at 152–53 n 4.

40 323 US 214 (1943).

41 Id at 216.

42 *Cleburne*, 473 US at 440.

43 *Dukes*, 427 US at 303.

44 *Miller v Johnson*, 515 US 900, 904 (1995).

45 See Farrell, 32 Ind L Rev at 357 (cited in note 37) (observing that rational basis invalidations "are sufficiently rare to stand out as unusual, but they do exist").

46 Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 8 (1972). The Supreme Court denies this is the case, *Adarand Constructors, Inc v Pena*, 515 US 200, 237 (1995) (seeking to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'"), but after *Korematsu* the Court did not actually uphold a policy under strict scrutiny for another sixty

Between strict scrutiny and rational basis lies what is known as "intermediate" or "heightened" scrutiny.[47] This test was first established and applied to sex classifications in *Craig*,[48] and sex still remains its prototypical application.[49] The language of this test has varied somewhat from case to case,[50] but its original formulation in *Craig* stated that sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[51]

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The decision about which level of scrutiny a Fourteenth Amendment claim should receive is intricately connected to the issue of the relevant group's political power. Officially, judicial scrutiny toward fundamental rights claims should increase in direct proportion to political power, while in equal protection contexts, the relationship should be inverted. This disjuncture could result in continuous and comprehensive coverage, as each element would act to fill the gaps of the other. Unfortunately, as will be explored below, the effect is often quite the opposite. Few courts are actually willing to protect the politically marginal. Yet once those groups begin emerging from the fringes of society, judges are eager to use that fact to justify continued nonintervention.

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years, until *Grutter v Bollinger*, 539 US 306, 326–27 (2003) (upholding the University of Michigan's use of race in law school admissions decisions).

47 The doctrine was introduced in *Craig*, 429 US at 197–99 (striking down an Oklahoma statute allowing women to buy "near-beer" at age eighteen, but men at age twenty-one); the term "intermediate" itself appears in Justice William Rehnquist's dissent. Id at 218 (Rehnquist dissenting).

48 See id at 197 (majority). The *Craig* court simply asserted, without explaining, that sex classifications would henceforth receive a higher degree of review than present in the normal rational basis test. See id. This may be because the law at issue actually discriminated against men, not women, meaning that the normal factors that lead courts to apply higher scrutiny were not in play. See *Rodriguez*, 411 US at 28 (identifying "the traditional indicia of suspectness" as the class being "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"). In *Frontiero*, when heightened scrutiny for women was first broached, the linkage to these factors was far more explicit. See text accompanying notes 12–19.

49 Though it has been used in other contexts. See, for example, *Trimble v Gordon*, 430 US 762, 769 (1976) (applying intermediate scrutiny to classifications concerning illegitimate children).

50 See *Virginia*, 518 US at 531 (stating that the justification for a sex classification measured under intermediate scrutiny must be "exceedingly persuasive"); *Madsen v Women's Health Center*, 512 US 753, 791 (1994) (Scalia concurring in the judgment in part and dissenting in part) (criticizing a reformulation of the intermediate scrutiny language as establishing "intermediate-intermediate scrutiny"). See also Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo Wash L Rev 298, 301 (1998) (observing that the intermediate scrutiny test and language have "been particularly vulnerable to manipulation by the Supreme Court").

51 429 US at 197. See also *Cleburne*, 473 US at 441 (holding that a legislative classification reviewed under intermediate scrutiny must be "substantially related to a sufficiently important governmental interest").

II. THE GAY RIGHTS LEGAL MOVEMENT

Shifting from a general account of the relevant Fourteenth Amendment doctrine, this Part overviews the recent history and progression of the American gay rights movement, from the early Stonewall riots era, through *Bowers v Hardwick*, and up to *Lawrence v Texas*. History demonstrates that courts largely did not protect the gay and lesbian community until after it began to gain political momentum.

A. The Stonewall Riots to *Bowers*

The gay rights movement is widely acknowledged to have begun in 1969,[52] though sporadic efforts at normalizing the status of gays and lesbians—legally, socially, and medically—had occurred since the turn of the century.[53] 1969 is notable in the history of gay rights because of the Stonewall riots—three days of protests sparked by a police raid of a gay bar in New York.[54] The early efforts of the movement were largely not directed at the courts.[55] Instead, the movement scored its most important victory by convincing the American Psychiatric Association to remove homosexuality from its list of mental disorders.[56] An extremely early challenge to laws prohibiting gay marriage was casually dismissed by the Supreme Court in 1972, indicating that despite (or because of) its clearly marginal status, the judiciary was unwilling to adopt a proactive role in protecting the gay and lesbian community.[57]

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52 Joshua Kaplan, *Unmasking the Federal Marriage Amendment: The Status of Sexuality,* 6 Georgetown J Gender & L 105, 123–24 (2005) (noting that "1969 is widely recognized as the beginning of the gay rights movement," which was considered "relatively new to the national agenda").

53 See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va L Rev 1551, 1554–79 (1993) (outlining the state of the gay rights movement prior to the Stonewall riots). These efforts were largely unsuccessful. See, for example, *Boutilier v INS*, 387 US 118, 119 (1967) (affirming a policy of blanket immigration exclusion of homosexuals, holding that the INS correctly deduced congressional intent by treating homosexuals as possessing a "psychopathic personality").

54 See Cain, 79 Va L Rev at 1580 (cited in note 53) (noting that what was "unusual" about this particular raid was that the patrons "resisted police harassment").

55 Id at 1582.

56 Id.

57 See *Baker v Nelson*, 409 US 810, 810 (1972). The totality of the Court's opinion was contained in a single sentence: "Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question." Id. The opinion of the Minnesota Supreme Court went into at least a little more detail on the issue, but could hardly be held up as an exemplar of deep legal analysis. The court rejected the notion that there was a "fundamental right" to gay marriage, citing, among other sources, the book of Genesis to show the importance of preserving the traditional family unit, which did not include gay couples. *Baker v Nelson*, 191 NW2d 185, 186–87 (Minn 1971). On the equal protection claim, the court appealed to little more than "common sense" in asserting that heterosexist restrictions on marriage did not offend the Constitution. Id at 187. It is apparent and notable that both prongs of this analysis relied heavily, if implicitly, on the marginal nature of gay rights claims at the time.

In 1985, the gay rights movement seemingly took a major stride forward when, for the first time, a justice of the Supreme Court indicated that gay individuals may qualify for suspect status. Dissenting from the denial of certiorari in *Rowland v Mad River Local School District*,[58] which concerned a school district's decision to dismiss a bisexual teacher solely on the basis of her disclosure of her sexual orientation, Justice William Brennan wrote:

> First, homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are *particularly powerless to pursue their rights openly* in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.[59]

Justice Brennan concluded by stating that the rights of gay, lesbian, and bisexual Americans were "an issue that cannot any longer be ignored."[60] At that time, there was no question that the prevailing attitude toward gays and lesbians remained "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."[61]

B. *Bowers v Hardwick*

In 1986, one year after *Rowland*, the court took up Justice Brennan's invitation and decided *Bowers v Hardwick*, a challenge to a Georgia statute prohibiting sodomy.[62] In a 5-4 decision, the Supreme Court reversed the Eleventh Circuit and upheld the law.[63] In doing so,

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58 470 US 1009 (1985) (denying certiorari).

59 Id at 1014 (Brennan dissenting from denial of certiorari) (emphasis added).

60 Id at 1018.

61 Richard A. Posner, *Sex and Reason* 291 (Harvard 1992).

62 Although the Georgia law was technically written without regard to the orientation of the participants, see *Bowers*, 478 US at 188 n 1, the Court dismissed a claim by two heterosexual plaintiffs, writing that "[t]he only claim properly before the Court … is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." Id at 188 n 2. Georgia, for its part, placed an "exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute." Id at 202 n 2 (Blackmun dissenting).

63 Id at 189 (majority).

the Court, through Justice Byron White, rejected the claim that its prior privacy case holdings "extend[] to homosexual sodomy."[64] Indeed, the Court thought "it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[65] The prohibition against homosexual conduct, Justice White argued, has "ancient roots" extending across the nation's history, rendering it a poor candidate for recognition as a fundamental right.[66] "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[67]

There is some argument that the *Bowers* decision may have politically benefited the gay rights movement by sparking its social mobilization.[68] In terms of immediate legal impact, however, it was disastrous. Though *Bowers* did not itself address whether gays and lesbians deserved additional class-based scrutiny, lower courts viewed the decision as effectively foreclosing the matter. As the DC Circuit explained in *Padula v Webster*:[69]

> It would be quite anomolous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. More importantly, in all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class, the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable . . . to discriminate invidiously against the particular class.[70]

Other circuits agreed.[71] If additional scrutiny is only warranted for groups who may not be legally discriminated against (a quite plausible claim),

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64 Id at 190.

65 Id at 190–91.

66 *Bowers*, 478 US at 192. See also id at 192 n 5 (listing sodomy laws in effect as of 1791); id at 193 n 6 (listing sodomy laws in effect as of 1868).

67 Id at 193, quoting *Moore*, 431 US at 503; *Palko*, 302 US at 325.

68 See Michael J. Klarman, Brown v. Board of Education*: Facts and Political Correctness*, 80 Va L Rev 185, 188 (1994) ("I think it probable that *Bowers* was one of the more significant factors in mobilizing today's gay rights movement."). For more on how judicial decisions can mobilize legal losers, see Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 Cal L Rev 959, 971 (2004) (conceding that even skeptics about judicial power believe that it has the ability to spark countermobilization); Mark A. Graber, *The Law Professor as a Populist*, 34 U Richmond L Rev 373, 403–04 (2000) (arguing that court decisions often aid political mobilization by granting an issue a national profile).

69 822 F2d 97 (DC Cir 1987).

70 Id at 103.

71 See, for example, *Thomasson v Perry*, 80 F3d 915, 928 (4th Cir 1996) (arguing that there cannot be heightened scrutiny toward a group identified by its propensity to engage in proscribable

then the Supreme Court affirming the states' right to proscribe homosexual conduct essentially precluded status-based protection as well.

C. The Turning Point: *Romer* and *Lawrence*

Transitioning into the 1990s, gay rights litigators began to see signs that their long string of defeats may have been coming to an end. In 1993, Hawaii held that restrictions on gay marriage constituted a sex classification and thus were subject to strict judicial scrutiny.[72] Like Justice Brennan's pronouncement in *Rowland*, it was a short-lived victory. The Hawaii legislature immediately passed a law criticizing the decision and reiterating state policy against allowing gay marriage,[73] hoping that it would prompt the state supreme court to revisit its decision.[74] Gay marriage opponents, however, were initially defeated on the legislative floor when they tried to introduce a constitutional amendment formally overturning the decision.[75] "Alarm bells went off across the country, and within two weeks"[76] the United States Congress began considering, and quickly passed, the Defense of Marriage Act, which established the anti–gay marriage position as federal policy.[77] A year later, Hawaii followed suit with its own amendment.[78] In terms of positive legal protection, gays and lesbians were objectively worse off than they were before.

Romer v Evans,[79] by contrast, was an unambiguous advance. Several Colorado towns municipalities, including Denver, Boulder, and Aspen, passed ordinances forbidding discrimination on the basis of sexual orientation.[80] These policies mobilized anti-gay forces in the state, who

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behavior); *Equality Foundation v City of Cincinnati*, 54 F3d 261, 266 (6th Cir 1995) ("Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.").

72 *Baehr v Lewin*, 852 P2d 44, 68 (Hawaii 1993). The court did not strike down the law, instead remanding it to the lower court to see if it could "overcome the presumption that [the law] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." Id.

73 Hawaii Rev Stat § 572-1 (1993 & Supp 1994).

74 See David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U Hawaii L Rev 19, 29 n 36 (2000) (noting that the state court had responded to similar legislative prompting in the past).

75 Id at 38 ("The failure of the proposed amendment was seen widely as presaging [a victory] for supporters of same-sex marriage.").

76 Id.

77 Defense of Marriage Act, Pub L No 104-199, 110 Stat 2419, 2419 (1996) (establishing that the federal government would recognize only opposite-sex marriage, and permitting states to deny recognition to same-sex marriages legally performed in other states).

78 Hawaii Const Art I, § 23 (granting the legislature the power to restrict marriage to opposite-sex couples).

79 517 US 620 (1996).

80 Id at 623–24.

were successful in securing passage of "Amendment 2."[81] Amendment 2 did more than overturn these statutes. Indeed, it established that

> neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[82]

The US Supreme Court invalidated the law. Recalling the familiar rational basis test—that legislation must be "rationally related" to a "legitimate" interest[83]—the Court held that the Colorado law met neither element.[84] "First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . . Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[85] Intriguingly, the court partially relied upon its observation that the discrimination at issue was "unprecedented in our jurisprudence."[86] The Court observed that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision," indicating that had such restrictions been more prevalent, the law might have survived constitutional scrutiny.[87]

Gay rights opponents noted a change in the air and began justifying the discrimination as a rational response to rising gay political power. Justice Antonin Scalia, in dissent, characterized Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[88] Indeed, a significant portion of Justice Scalia's dissent was dedicated to surveying what he viewed as rising homosexual power in the democratic

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81 Id at 623.

82 Colo Const Art II, § 30b, declared unconstitutional in *Romer*, 517 US at 635–36.

83 See text accompanying note 35.

84 See *Romer*, 517 US at 632 ("Amendment 2 fails, indeed defies, even this conventional [rational basis] inquiry.").

85 Id.

86 Id at 633.

87 Id, quoting *Louisville Gas & Electric Co v Coleman*, 277 US 32, 37–38 (1928).

88 *Romer*, 517 US at 636 (Scalia dissenting).

arena.[89] He noted that Colorado was among the first states to repeal antisodomy laws, and justified Amendment 2 as an important mechanism for maintaining the "moral and social disapprobation of homosexuality" without the heavy hand of criminal sanction.[90] The legitimate goal of Amendment 2 was "to counter both the geographic concentration and the disproportionate political power of homosexuals."[91]

Both trends—the increase in gay political power, and its schizophrenic usage as a rationale to both extend and withhold further protections—continued in 2003 with *Lawrence v Texas*, which overturned *Bowers* and struck down laws prohibiting (homosexual or heterosexual) sodomy as inconsistent with the Due Process Clause.[92] It did so in stark terms: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[93] At least part of the decision was justified on the basis of the changed political fortunes of the gay rights movement, namely, the successful decriminalization of sodomy in the vast majority of American states.[94] Moreover, the bold, moralist language deployed by Justice Anthony Kennedy suggested a new judicial outlook on the compatibility of continued anti-gay sentiment with America's liberal tradition. The majority opinion criticized antisodomy laws for the "stigma" they imposed upon gays and lesbians,[95] pronounced that *Bowers*' continued vitality "demeans the lives of homosexual persons,"[96] and concluded by citing a moral progression from a blinded past to a present where society knows antisodomy laws serve "only to oppress."[97]

Justice Scalia's *Lawrence* dissent attempted to preserve the legitimacy of anti-gay discrimination as legitimate state practice, while also reviving his *Romer* observations regarding the ability of the gay community to attract the attention of political and social elites. On the former, he argued that anti-gay attitudes still are "mainstream" in American society, with "[m]any Americans" objecting to "persons who openly engage in homosexual conduct [serving] as partners in their business, as

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89 See id at 645–46 (arguing that gays are geographically concentrated, relatively affluent, and politically mobilized, giving them "political power much greater than their numbers, both locally and statewide").

90 Id at 645.

91 Id at 647.

92 *Lawrence*, 539 US at 558.

93 Id.

94 Id at 571–73.

95 Id at 575.

96 *Lawrence*, 539 US at 575. See also id at 578 ("The State cannot demean [homosexuals'] existence.").

97 Id at 579.

scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."[98] "They view this," he wrote, "as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive," and this belief was reflected in Congress's general disinclination to prohibit anti-gay discrimination.[99]

With regard to the latter, Justice Scalia cast gays and lesbians as the beneficiaries of the "homosexual agenda['s]" success in the academic legal community, which aimed to "eliminat[e] the moral opprobrium that has traditionally attached to homosexual conduct."[100] Moreover, he noted that gays and lesbians had met with some success in the democratic arena, as evidenced by their ability to secure the repeal of most states' antisodomy laws.[101] Though he seemed to argue that these victories ought not translate into *legal* claims,[102] this exists in at least some tension with his earlier heavy reliance on the fact that (according to him) a right to engage in sodomy was an "emerging awareness," rather than one "deeply rooted in this Nation's history and traditions."[103] Presumably, if at some point gay rights became sufficiently entrenched so as to become a clear part of our historical traditions, then fundamental rights analysis could be deployed against any remaining holdouts.

On one level, *Lawrence* changed the terms of the judicial debate, paving the way for the gay marriage decisions explored in Part III.[104] But it is important to note that, on another level, *Lawrence* did very little. As *Lawrence* was silent on the question of class-based judicial protection for gays and lesbians, lower courts did not see it as affecting prior decisions denying heightened scrutiny on the basis of sexual orientation—even those that relied upon the *Bowers*-dependent logic that homosexuality was proscribable conduct.[105] Instead, these courts simply adapted the logic first laid out by the Ninth Circuit in 1990[106] that heightened scrutiny was inappropriate due to the political power of the

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98 Id at 602 (Scalia dissenting).

99 Id at 602–03.

100 *Lawrence*, 539 US at 602 (Scalia dissenting).

101 Id at 603.

102 See id at 603–04 ("[P]ersuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else.").

103 Id at 598.

104 The first case to successfully strike down a law prohibiting gay marriage, *Goodridge v Department of Public Health*, 798 NE2d 941 (Mass 2003), cited *Lawrence* extensively throughout the opinion.

105 See *Lofton v Secretary of the Department of Children & Family Services*, 358 F3d 804, 818 & n 16 (11th Cir 2004) (citing exclusively pre-*Lawrence* cases in observing that "all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class").

106 See *High Tech Gays v Defense Industry Security Clearance Office*, 895 F2d 563, 574 (9th Cir 1990). This case is discussed in more depth below. See text accompanying notes 136–41.

gay community—a position echoed in Justice Scalia's dissents. This analytical shift was noted by legal actors on all sides, making the issue of gay political power a central battlefront in subsequent litigation.[107]

III. GAY POLITICAL POWER AND JUDICIAL PROTECTION

This Part explores the inconsistent treatment of gay political power in, mostly, state-level gay marriage decisions.[108] In some states, noticeable gay political power, as expressed in the passage of antidiscrimination laws and other gay-friendly ordinances, has been cited to buttress opinions further protecting their rights. These political victories are taken as proof that anti-gay animus is morally intolerable, or, more concretely, that the state itself can no longer assert in good faith an interest in subjugating gay and lesbian persons. In other states, these same victories have been used as rationale for courts to refrain from intervening in the democratic process. For courts that view political powerlessness as a necessary condition for strict scrutiny, political triumphs are a signal that gays and lesbians no longer require special judicial protection.

A. Political and Social Advances Assist in Gaining Further Protections

In many localities, the increased political power demonstrated by the gay and lesbian community has helped pave the way for enhanced judicial protection. At some level, of course, this movement can be seen as simple slippery slope logic.[109] This was evident when, shortly after

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107 In the federal litigation challenging the legality of Proposition 8, which reversed California's recognition of same-sex marriage, much of the dispute between the parties centered on this very issue. See, for example, Bob Egelko, *Gays Have Political Power, Prop. 8 Defense Says*, San Fran Chron A1 (Jan 26, 2010); Maura Dolan, *Prop. 8 Trial Focuses on Gays' Political Power, Legal Rights*, LA Times A4 (Jan 26, 2010); Susan Ferriss, *Professor Testifies at Prop. 8 Trial That Gays Don't Lack Clout*, Sacramento Bee 1A (Jan 26, 2010).

108 Of course, at the state level, this inquiry is technically conducted under the individual state's, not the federal, constitution. By and large the relevant state constitutional provisions parallel federal guarantees, however, and states rely heavily on federal precedents. See, for example, *Varnum v Brien*, 763 NW2d 862, 886–88 (Iowa 2009) (noting that the Supreme Court's articulation of the criteria for suspect status has been the baseline for how many states, including Iowa, approached the problem with regard to gay rights); *Conaway v Deane*, 932 A2d 571, 607 (Md 2007) (finding "useful in our analysis those additional criteria used by the Supreme Court in assessing claims of a new suspect or quasi-suspect classification"). States that do not follow the federal model are not addressed in this Comment. See, for example, *Morrison v Sadler*, 821 NE2d 15, 21 (Ind App 2005) ("Unlike federal equal protection analysis, there is no varying or heightened level of scrutiny based on the nature of the classification or the nature of the right affected by the legislation.").

109 In terms of legal doctrine, a slippery slope is observable starting from *Griswold v Connecticut* (which specifically claimed that it would not lead to permitting homosexual conduct). 381 US 479, 498–99 (1965) (Goldberg concurring). *Griswold*, of course, has become the linchpin of cases establishing legal protections for gays and lesbians. See *Lawrence*, 539 US at 564 (identifying

Lawrence, Massachusetts became the first state in the nation to legalize gay marriage.[110] The court there explicitly cited legislative protections accorded to gays and lesbians as part of the rationale for its decision. Responding to several amici who claimed a "community consensus that homosexual conduct is immoral," the court cited both statutes prohibiting discrimination on the basis of sexual orientation, as well as prior judicial pronouncements of gay equality.[111] Contrary to the claims of the amici, this demonstrated that "Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation."[112] That fundamentally political determination by Massachusetts was an asset, not a liability, for the gay plaintiffs in *Goodridge*.

Five years later, the California high court followed Massachusetts's lead and struck down its state's prohibition on gay marriage.[113] In doing so, the court observed that "[t]here can be no question but that, in recent decades, there has been a fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples."[114] Like its Massachusetts brethren, the California court cited several state ordinances providing protection on the basis of sexual orientation to demonstrate that "gay individuals are entitled to the same legal rights and the same respect and dignity afforded to all other individuals."[115] In a particularly bold move, the court took notice of the state's domestic partnership laws to observe that "gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children."[116] In doing so, the court stated, "California has repudiated past practices and policies that were based on a once common viewpoint that denigrated the general character and morals of gay individuals."[117] Like in Massachusetts, this repudiation, though clearly demonstrative of gay political power, was considered a reason to extend further protections.

Perhaps the most sophisticated analysis of the issue came from the first heartland state to legalize gay marriage—Iowa, in 2009.[118] A

Griswold as "the most pertinent beginning point" of all the statements on the "substantive reach of liberty under the Due Process Clause"). See also Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L Rev 1155, 1158–63 (2005) (tracing the development of the slippery slope toward gay marriage, beginning from *Griswold*).

110 *Goodridge v Department of Public Health*, 798 NE2d 941, 969–70 (Mass 2003).

111 Id at 967.

112 Id.

113 *In re Marriage Cases*, 183 P3d 384, 453 (Cal 2008).

114 Id at 428.

115 Id at 428 & n 46.

116 Id at 428 & n 47.

117 *Marriage Cases*, 183 P3d at 428.

118 See *Varnum*, 763 NW2d at 906–07.

unanimous Iowa Supreme Court addressed the political power question on two levels. First, it took the familiar step of citing state ordinances prohibiting discrimination as evidence that sexual orientation ought to receive heightened scrutiny.[119] Importantly, it linked this inquiry to a specific part of the Supreme Court's heightened scrutiny analysis: whether the group is subjected to stereotyping that causes disabilities unrelated to its members' ability to contribute to society.[120] The weight of antidiscrimination ordinances passed by the legislature "indicated the irrelevancy of sexual orientation" to one's membership in Iowa's social and political community.[121]

Iowa also addressed whether these political victories ought to preclude heightened scrutiny. Rejecting the notion that "absolute political powerlessness" is necessary to trigger heightened scrutiny, the court observed that such a position was inconsistent with the Supreme Court's own practice.[122] The *Frontiero* court, for example, freely acknowledged that the political power of women had been increasing dramatically in the course of recommending strict scrutiny.[123] Statutes such as the Civil Rights Act of 1964 and the Equal Pay Act of 1963 "manifested an increasing sensitivity to sex-based classifications" on the part of Congress, demonstrating Congress's conclusion "that classifications based upon sex are inherently invidious."[124] The Iowa court also noted that "a group's current political powerlessness is not a prerequisite to enhanced judicial protection."[125] It approvingly quoted the California Supreme Court's decision a year earlier, in which that court proclaimed: "[I]f a group's *current* political powerlessness [was] 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

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119 Id at 890–91.

120 Id at 890 ("A second relevant consideration [in deciding whether discrimination based on a characteristic should be closely scrutinized by courts] is whether the characteristic at issue—sexual orientation—is related to the person's ability to contribute to society."). See *Murgia*, 427 US at 313 (examining whether the plaintiffs had been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities [to contribute meaningfully to society]"); *Frontiero*, 411 US at 686–87 (plurality) (asserting that sex-based classifications should receive strict scrutiny because sex "frequently bears no relation to ability to perform or contribute to society"). See also text accompanying notes 8–9.

121 *Varnum*, 763 NW2d at 891 n 19.

122 Id at 894.

123 411 US at 685–88 & n 17 (taking notice of statutory protections against sex discrimination and observing that women did "not constitute a small and powerless minority").

124 Id at 687, citing Civil Rights Act of 1964, 42 USC § 2000e-2(a)–(c); Equal Pay Act of 1963, 29 USC § 206(d).

125 *Varnum*, 763 NW2d at 894.

suspect classifications."[126] The court finally noted that, whatever political power gays and lesbians possessed, it had proven insufficient to overturn gay marriage statutes, for at the time of the decision, forty-two states had laws prohibiting gay marriage and none had allowed gay marriage without judicial prompting.[127]

Finally, the New Jersey Supreme Court had the opportunity to address this issue in *Lewis v Harris*.[128] Unlike the three cases discussed above, *Lewis* declined to strike down the state's prohibition on gay marriage, instead holding only that the state must provide some equal accommodation to same-sex couples.[129] The line of reasoning the court took in reaching this holding, however, clearly demonstrated the court's belief that social advancement was a benefit, not a burden, in obtaining judicial legal protections. The court noted how "[o]ver the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation."[130] Nevertheless, it ruled that the net effect of these gains was insufficient to show that "a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right."[131] The language it used in making this determination was telling: "*Despite* the rich diversity of this state, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law," the right was still not implanted deeply enough in New Jersey's soil so as to rank as fundamental.[132] The clear implication was that, were gays and lesbians to continue pressing forward in attaining recognition of their equal status, the court's decision might shift.

B. Gay Political Power Used to Stymie Suspect Classification

Iowa, New Jersey, California, and Massachusetts all increased the judicial protection of gays and lesbians in tandem with other indicators of gay and lesbian acceptance. Several states and the federal government,

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126 Id, quoting *Marriage Cases,* 183 P3d at 443. See, for example, *Grutter v Bollinger,* 539 US 306, 326 (2003) (holding that racial classifications still receive strict scrutiny); *United States v Virginia*, 518 US 515, 532–33 (1996) (holding that sex classifications receive heightened scrutiny).

127 *Varnum*, 763 NW2d at 894–95.

128 908 A2d 196 (NJ 2006).

129 Id at 200 ("Although we cannot find that a fundamental right to same-sex marriage exists in this State, the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution.").

130 Id at 213. See also id at 213–16 (citing the development of these protections).

131 Id at 211.

132 *Lewis*, 908 A2d at 211 (emphasis added).

however, have taken a decidedly opposite approach—using demonstrations of gay and lesbian political muscle as reason to *avoid* providing extensive judicial scrutiny to laws discriminating against them.

1. Non–gay marriage cases prior to *Lawrence*.

It was a federal court that first raised the prospect that gays might be too politically powerful to be viable candidates for heightened scrutiny. As noted above, most federal circuits decided the question of gay and lesbian suspect status between *Bowers* and *Lawrence* and used the precedent of *Bowers* as an indication that heightened scrutiny would be inappropriate.[133] Even after *Lawrence*, federal courts still have referred to these precedents to hold that the position of gays and lesbians in the three-tiered scrutiny system has been established, notwithstanding the fact that these cases relied on overturned precedent.[134]

The Ninth Circuit, however, did not rely solely on this logic. Instead, in the 1990 case of *High Tech Gays v Defense Industry Security Clearance Office*,[135] it became the first court in the nation to argue that gays and lesbians ought not receive heightened scrutiny because of their political accomplishments.[136] The court explained that "legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of antidiscrimination legislation."[137] In support of this proposition, the court cited a smattering of gay rights legislation passed across the country, including a comprehensive employment discrimination law in Wisconsin, an executive order barring discrimination in the provision of state services in New York, a Michigan law outlawing discrimination in healthcare provision on the basis of sexual orientation, and scattered city antidiscrimination regulations.[138] Of all the rules cited by the court, only four—city ordinances in Seattle, Los Angeles, and San Francisco, and a hate crimes law passed in California—were even within the boundaries of the Ninth Circuit.[139] Still, this was sufficient to show that "homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation."[140] Hence, even those extremely limited

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133 See Part II.B.

134 See *Lofton v Secretary of the Department of Children & Family Services*, 358 F3d 804, 818 & n 16 (11th Cir 2004).

135 895 F2d 563 (9th Cir 1990).

136 Id at 573–74. The court also determined that homosexuality is not "immutable." Id at 573.

137 Id at 574.

138 Id at 574 n 10.

139 See *High Tech Gays*, 895 F2d at 574 n 10.

140 Id at 574.

political victories were considered enough to push gays and lesbians outside the realm of heightened scrutiny.

Six years later, *Romer v Evans* provided another opportunity for courts to discuss the relative power of gays and lesbians. Justice Scalia's claim that the Colorado law was a rational decision by Colorado voters to stem the endeavors of the politically powerful gay lobby has already been discussed above.[141] It was the state trial court in *Romer*,[142] however, that, in determining whether gays and lesbians ought to receive suspect status,[143] took the argument a step further. Whereas the court in *High Tech Gays* cited scattered legislative accomplishments by the gay rights movement, the trial court in *Romer* reasoned that the electoral fight over Amendment 2 "supports a finding of the political power of gays and bisexuals."[144] "[M]ore than 46% of Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness."[145] Likewise, the court cited the very city ordinances Amendment 2 overturned as further proof that gays and lesbians possessed political power, or, at the very least, that they were not "particularly politically vulnerable or powerless."[146] Once again, absolute political powerlessness was the effective precondition for receiving heightened scrutiny.

2. State gay marriage cases after *Lawrence*.

After *Lawrence*, courts began relying more heavily on political power arguments. In contrast to the courts in Massachusetts, Iowa, New Jersey, and California, Washington's high court used state enactments providing legal protections to gay and lesbian citizens as evidence that "as a class gay and lesbian persons are not powerless, but instead, exercise increasing political power."[147] At the same time, the

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141 See notes 88–91 and accompanying text.

142 *Evans v Romer*, 1993 WL 518586 (Colo Dist Ct).

143 This issue was not raised on appeal to the Colorado Supreme Court or the US Supreme Court. See *Evans v Romer*, 882 P2d 1335, 1341 n 3 (Colo 1994) (declining to address whether gays and lesbians are a suspect class, as the issue was not appealed); *Romer*, 517 US at 640 n 1 (Scalia dissenting) ("The trial court rejected respondents' argument that homosexuals constitute a 'suspect' or 'quasi-suspect' class, and respondents elected not to appeal that ruling to the Supreme Court of Colorado.").

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

145 Id.

146 Id ("Because the gay position has been defeated in certain elections, such as Amendment 2, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election. No adequate showing has been made of the political vulnerability or powerlessness of gays.").

147 *Andersen v King County*, 138 P3d 963, 975 (Wash 2006).

court sought to distinguish other precedents that seemingly pointed toward heightened protection. The court was able to dismiss several such precedents because they interpreted distinct state constitutional clauses, were reversed by higher courts, or spoke only in dicta.[148] But two cases (in Alaska and Hawaii) granting heightened protection to gays and lesbians were distinctive because they were met with immediate popular rejection in the form of constitutional amendments.[149] Even though the inability to defend favorable court rulings from constitutional reversal would seem to demonstrate a definitive lack of political power by those states' gay communities, the Washington court cited this repudiation as reason for *not* giving additional protections to gays and lesbians.[150] The seeming implication was that both popular favor and disdain for gay rights played against suspect classification as far as the Washington court was concerned.

The dissenters in the Washington case harshly criticized the majority's treatment of gay political power. First, they characterized the rationale behind the anti–gay marriage statute as akin to how "anti-papal laws once sought to 'defend' a protestant way of life from an onslaught of Catholic immigrants, and segregation laws sought to 'defend' white-privilege from people of color"[151]—in other words, as part of a long tradition of recasting discriminatory legislation as desperate defenses by a besieged majority struggling against the political threat of despised others.[152] This fictive belief in the overwhelming political power of gays, the dissent suggested, was itself indicative of prejudice.[153] Meanwhile, the vaunted victories of the gay rights movement cited by the majority were narrowly decided and the product of a bitter, thirty-year struggle; they were also national outliers.[154] Finally, in Washington and across the country, gays and lesbians were largely absent from important political and judicial offices.[155]

The Maryland Court of Appeals (Maryland's highest court) also relied explicitly on the political power argument in rejecting a gay marriage challenge.[156] Maryland was somewhat unique in that it at

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148 Id (distinguishing cases from California and Oregon).

149 See id, citing *Brause v Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super Ct); *Baehr v Lewin*, 852 P2d 44 (Hawaii 1993).

150 See *Andersen*, 138 P3d at 975.

151 Id at 1030 (Bridge dissenting).

152 Notice also the implicit rebuke to Justice Scalia's *Romer* and *Lawrence* dissents. See text accompanying notes 88–91 and 98–103.

153 *Andersen*, 138 P3d at 1031 (Bridge dissenting) (arguing that laws rooted in this false stereotype are "rooted in prejudice, not rationality").

154 Id.

155 Id at 1031–32 (noting only four openly gay legislators and no gay judges or executive officers in Washington and pointing to similarly lackluster representation in the federal government).

156 *Conaway v Deane*, 932 A2d 571, 613 (Md 2007).

least recognized the "irony" that the promotion of gay rights legislatively was hurting gays doctrinally in the judicial arena,[157] and the court was explicit in holding that these advances were sufficient to render irrelevant the sustained history of purposeful discrimination under which the majority admitted gays and lesbians had suffered.[158] Like Washington (and, for that matter, Iowa and its compatriots), the Maryland court was able to point to a significant number of political successes (both in terms of legislation and executive orders) won by the gay rights movement.[159] In tandem with these, the court also cited favorable cases like *Romer* and a substantial number of Maryland family law decisions to demonstrate "[e]volutionary legal developments highlighting changing views toward gay, lesbian, bisexual, and transgender persons."[160] But whereas states such as Iowa used these developments to hold that the state no longer could assert an interest in furthering anti-gay discrimination, Maryland instead characterized them as proof of a "political coming of age."[161] It sided with Washington, viewing these developments as signals that the courts should refrain from disturbing the democratic consensus in the state.

IV. POLITICAL POWER SHOULD PLAY A MINIMAL ROLE IN HEIGHTENED SCRUTINY ANALYSIS

The conflict outlined Part III is, at first blush, difficult to resolve because both sides capture something intuitively compelling in their arguments. On the one hand, it is certainly not implausible that suspect classification should eventually fall away as groups attain political equality. The *Rodriguez* court, after all, labeled enhanced judicial inquiry "*extraordinary* protection from the majoritarian political

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157 Id at 614 n 56 ("The irony is not lost on us that the increasing political and other successes of the expression of gay power works against Appellees in this part of our analysis of the level of scrutiny to be given the statute under review."). The court compounded this irony by citing, as part of the evidence demonstrating gay political power and counseling against judicial intervention, a student comment that used the increased equalization of the status of gays and lesbians to argue in favor of judicial recognition of gay marriage. See id at 611 n 49, citing Gregory Care, Comment, *Something Old, Something New, Something Borrowed, Something Long Overdue: The Evolution of a "Sexual Orientation–Blind" System in Maryland and the Recognition of Same-Sex Marriage*, 35 U Balt L Rev 73, 75–92 (2005).

158 *Conaway*, 932 A2d at 611 ("In spite of the unequal treatment suffered possibly by Appellees and certainly a substantial portion of other citizens similarly situated, we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to 'extraordinary protection from the majoritarian political process.'").

159 Id.

160 Id at 612–13.

161 Id at 613. But see *Andersen*, 138 P3d at 1031 (Bridge dissenting) ("[A] limited number of protective laws do not a powerful contingent make, particularly where they do not provide comprehensive equal rights.").

process."[162] Additional judicial protection is extraordinary; rational basis review is ordinary. As groups proceed toward becoming normal political interest groups on facially equal standing with their peers, enhanced judicial protection should fall away. On the other hand, it is ironic, to say the least, that judicial solicitude for minority claims should contract precisely at the point where these groups begin gaining political traction.[163]

This Part advances two arguments on this issue. First, whatever the theoretical merits of the above positions, there is almost no evidence that the *actual* history of judicial behavior has been one in which heightened protection is accorded only to absolutely marginalized groups. Indeed, much the opposite: groups that are absolutely politically powerless typically are afforded little judicial solicitude.[164] The groups that have received additional judicial protection have done so only after gaining some measure of political influence. Second, putting historical arguments aside, this Part argues that the use of political power as a decisive factor gives unsympathetic judges an opportunity to mask their prejudicial attitudes under the veneer of legal doctrine. Focusing on the presence of poisonous discriminatory attitudes directed toward a putatively vulnerable group—rather than focusing on the measure of political power the group has attained—aligns better with our reasons for wanting courts to intervene in democratic processes.

A. Political Power Has Played Little Determinative Role in Judicial Decisions to Either Grant or Withhold Heightened Scrutiny

If Fourteenth Amendment jurisprudence is primarily about protecting the powerless, judicial scrutiny ought to decline as political power rises. Under this theory, because gays and lesbians are now sufficiently politically powerful, they missed the opportunity to attain heightened scrutiny. Instead, the gay rights movement should have launched its legal campaign against discrimination immediately in tandem with the birth of the movement in 1969.[165] Unfortunately for the theory, it did: the US Supreme Court actually decided a case in 1972, *Baker v Nelson*,[166] challenging on equal protection and due

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162 411 US at 28 (emphasis added).

163 See *Conaway v Deane*, 932 A2d 571, 614 n 56 (Md 2007).

164 See Jack Balkin, *The Constitution of Status*, 106 Yale L J 2313, 2341 (1997) ("[G]roups that are truly politically powerless usually do not even appear on the radar screen of legal decisionmakers—including courts—because the status hierarchy is so robust that few in power even notice that there is a problem.").

165 See notes 52–54 and accompanying text.

166 409 US 810 (1972).

process grounds the legality of excluding gays and lesbians from the marriage institution. Specifically, the Supreme Court dismissed the case in a single sentence: "Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question."[167] In addition to demonstrating what happens when litigants put their legal carts before their political horses, *Baker* also raised a significant legal barrier to future gay rights litigation because technically it constitutes a decision on the merits and thus carries with it precedential value.[168]

The lesson of *Baker* tracks the experience of other disadvantaged groups, such as blacks and women, seeking judicial protection. In general, the judiciary tends to lag well behind the political branches in protecting the rights of minority groups, playing, at best, a supporting role.[169] Jack Balkin described judges as akin to "place kickers" on a football team (compared to legislative "linebackers"):

> Most place kickers are pretty bad at making an open-field tackle to stop a speedy running back returning a kickoff. But place kickers can help pile on after the other players have tackled or slowed down a runner. That is sometimes how I imagine courts and their relationship to social change: They see the running back lying on the ground, groaning under the weight of a huge pile of linebackers. The judges say to themselves, "It's time for us to do some justice!" and they throw themselves on the pile.[170]

Far from being at the vanguard of social justice, "when it comes to sensing large-scale changes in social attitudes and acting on them, courts are often like the cuckolded husband in the French farce: always the last to know."[171] It is only after "a significant amount of groundwork has already been prepared through political agitation,

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167 Id at 810.

168 See *Walker v State*, 2006 US Dist LEXIS 98320, *4 (SD Miss) (noting that since such a dismissal constitutes a judgment on the merits, lower courts must follow *Baker*'s lead on the propriety of such equal protection and due process claims "until the United States Supreme Court makes a different pronouncement on the issues" that case decided).

169 See generally Gerald Rosenberg, *The Hollow Hope* (Chicago 2d ed 2008) (arguing that judicial action against Jim Crow was a lagging indicator against increased black political power); Michael J. Klarman, *From Jim Crow to Civil Rights* (Oxford 2004) (same). For a contrary view asserting that judges can and do act as vanguards for social change, see Paul Finkelman, Book Review, *Civil Rights in Historical Context: In Defense of* Brown, 118 Harv L Rev 973, 1008–10 (2005) (arguing that *Brown* was not a product of social forces but represented a bold step by the court that overcame substantial social and legal pressures), reviewing Klarman, *From Jim Crow*; Paul Finkelman, *The Radicalism of* Brown, 66 U Pitt L Rev 35, 38 (2004) (explaining "why *Brown* was jurisprudentially and substantively radical and why its implications were truly revolutionary").

170 Jack Balkin**,** *What* Brown *Teaches Us about Constitutional Theory*, 90 Va L Rev 1537, 1549 (2004).

171 Id.

direct action, and legislative reform" that courts intervene.[172] Where there is no social support for protecting a given minority, it is unclear why judges, who are part of that same society, should be expected to consistently rise above the prejudices of their times.[173]

This dynamic, recognized by the Iowa Supreme Court in *Varnum*,[174] has played out again and again across American history. There is a reason why in 1973 one gets a decision like *Frontiero*,[175] while in 1873 one gets profoundly prejudiced opinions like the concurrence in *Bradwell v Illinois*, declaring women unfit for legal practice.[176] Likewise for the timing difference in *Dred Scott*[177] or *Plessy v Ferguson*[178] compared to *Brown v Board of Education*[179] or *Loving v Virginia*.[180] Courts respond to social movements agitating for political change—they do not predate them.[181]

Furthermore, the courts extend enhanced protection to groups that by no measure could be said to be politically powerless, at least compared to gays and lesbians.[182] As far as current federal doctrine is concerned (echoed by many states), gays and lesbians receive *less* judicial protection than do men,[183] whites,[184] and illegitimate children.[185]

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172 Id at 1549–50. See also id at 1550 ("[C]ourts confirm what has already been happening in the larger legal and political culture.").

173 See Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L J 1346, 1404 (2006) (observing that "judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights").

174 See text accompanying notes 122–27.

175 411 US at 685–88 & n 17 (plurality) (taking notice of statutory protections against sex discrimination and observing that women did "not constitute a small and powerless minority" in the course of invalidating a legislative classification discriminating against them).

176 83 US (16 Wall) 130, 141 (1873) (Bradley concurring) (asserting that it was "the law of the Creator" that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother").

177 60 US (19 How) 393 (1857).

178 163 US 537 (1896).

179 347 US 483 (1954).

180 388 US 1 (1967).

181 See Balkin, 106 Yale L J at 2340 (cited in note 164) ("[L]egal elites . . . usually respond to 'disadvantaged' groups only after a social movement has demanded a response. Ironically then, a status group must display some degree of political power . . . before it can be considered 'politically powerless' and hence deserving of legal protection.").

182 See Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 L & Ineq 1, 30–31 (2005):

> Several . . . courts have specifically held, pointing to scattered statutory enactments that prohibit sexual orientation discrimination, that gays and lesbians possess too much political power to qualify as a suspect class. Yet the vast array of statutes that prohibit race and sex discrimination also apply to white men, and courts, nevertheless, apply strict scrutiny to their racial discrimination claims.

183 See *Craig*, 429 US at 204 (holding that laws discriminating against men warrant heightened scrutiny).

To be sure, these groups typically gain such protections ancillary to protection granted to less powerful peers with whom they share a class. For example, whites receive strict scrutiny protection because black political vulnerability is translated into class-based protection from "racial" discrimination, not because whites themselves are seen as politically powerless.[186] This demonstrates that the initial focus of the doctrine is on groups, not classes: looking to whether race, or sex, or poverty, or sexual orientation deserves heightened scrutiny means looking at the *disadvantaged* contingent of those denominations to see if they qualify.[187] The enhanced protection provided to privileged groups such as whites is a logically unnecessary extra step, one that undermines the notion that the judicial focus accords solely to the politically powerless.

At the same time as they have been solidifying enhanced judicial protection for the privileged counterparts of already protected groups, courts have effectively frozen the list of new groups and classes to be deemed worthy of suspect status—neither adding new groups recognized as being politically powerless nor subtracting those whose political fortunes have risen. Consequently, there is no reported case in which a group that has at one point been classified as a suspect or quasi-suspect class has subsequently lost that classification, notwithstanding further advances in political potency.[188] This paralysis results from the disjuncture between rhetoric and practice: the doctrine tells us that more power should correlate with reduced protection, while the history indicates the reverse. In any event, this sort of judicial behavior makes it difficult to hold that political powerlessness is a necessary condition for receiving heightened scrutiny.

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184 See *Richmond v J.A. Croson Co*, 488 US 469, 493–96 (1989) (mandating strict scrutiny for laws that discriminate against whites).

185 See *Trimble v Gordon*, 430 US 762, 769 (1976) (applying heightened scrutiny to laws classifying people based on their status as illegitimate children).

186 Though some commentators have strongly implied that whites are politically vulnerable. Consider, for example, Abigail Thernstrom and Edward Blum, *Do the Right Thing*, Wall St J A10 (July 15, 2005) (asserting the Congress renewed the Voting Rights Act because representatives were "terrified by" the political power of groups such as the NAACP).

187 See Ruth Colker, *Anti-subordination above All: Sex, Race, and Equal Protection*, 61 NYU L Rev 1003, 1022 n 71 (1986) (observing that the *Brown* court reached its decision based not on an abstract misuse of racial classifications, but by concretely focusing on the harms to black children specifically); Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 Ethics 86, 89 (1984) ("[A] claim made by a white person as a member of the dominant majority draws its moral force largely from our collective horror at centuries of oppressing black people."). But note that strict scrutiny for whites was established in *Croson* in 1989—well after blacks began enjoying strict scrutiny protection.

188 See Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* 24 (Chicago 1999) ("The list of protected classes has been in stasis since [the mid-1970s].").

Because of considerations like these, the Connecticut Supreme Court decided that, at best, political powerlessness (along with immutability) are "subsidiary" to whether the group has faced a history of discrimination and stereotyping unreflective of its ability to contribute to society.[189] Instead, the court simply observed that (1) gays and lesbians had less political power than do women and blacks today; (2) heightened scrutiny was applied to whites and men, unquestionably nonmarginal groups; and (3) "when African-Americans and women first were recognized as suspect and quasi-suspect classes, respectively, comprehensive legislation barring discrimination against those groups had been in effect for years [without] deter[ing] the United States Supreme Court from according them protected status."[190] Ultimately, the Connecticut court did not truly make a determination that gays and lesbians met some threshold level of political powerlessness so much as it observed that political powerlessness seemed to have no dispositive effect in prior judicial determinations of suspect status.

B. Demonstration of Political Power Should Have Minimal Probative Value in Assessing Whether a Group Should Receive Increased Judicial Protection

As a historical matter, (lack of) political power has played little role in the allocation of suspect status, and the presence of political power has not been a bar to receiving suspect status. Indeed, for the most part courts have only been willing to subject discrimination against marginal groups to close scrutiny when those groups had already demonstrated some political clout. At some level, this descriptive account itself is a strong warrant for the normative claim that the courts *should* take little notice of a group's political power in their heightened scrutiny analysis, to avoid imposing on courts an obligation they have proven themselves unable to meet and to avoid placing litigants in a no-win situation in which past triumphs close more doors

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189 See *Kerrigan v Commissioner of Public Health*, 957 A2d 407, 427 (Conn 2008).

190 Id at 440–41. See also Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum L Rev 1753, 1806 (1996) ("Blacks are protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875 . . . 1957, 1960, 1964, 1965, and 1968, as well as by antidiscrimination laws in 48 of the states."). It is also worth noting that the definitive division between "gays and lesbians" and "person of color" is itself representative of an inaccurate stereotype of gays and lesbians as predominantly white and upper-class. See Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 Cornell L Rev 1358, 1372–74 (2000) ("[T]he narrow racial and class construction of gays and lesbians in the anti-gay context appears in the 'special rights' rhetoric, which anti-gay advocates employ to depict the gay and lesbian community as affluent, well-educated, privileged, and, therefore, undeserving of civil rights protection.").

than they open.[191] The point is not to demand that courts vigorously protect women's rights in 1873, or black rights in 1896, or gay rights in 1972; the historical inquiry demonstrates that this is unrealistic. This Comment accepts that courts will not be vanguards. Once that acknowledgment is made, however, it no longer makes sense for courts to rely on factors predicated on the notion that courts will be the first progressive actors on the scene.

1. The focus on political power allows judges to rationalize discriminatory attitudes.

Beyond historical observation, there are positive reasons for rejecting political powerlessness as a prerequisite for heightened scrutiny. A focus on whether putatively marginalized minorities have secured some political victories caters to cognitive instincts that act to reinforce discriminatory systems. In a liberal polity, discrimination is seen as wrong, and thus support for seemingly discriminatory or inegalitarian policies must be justified.[192] Gunner Myrdal described the "American dilemma" as

> the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we call the "American creed," where the American thinks, talks, and acts under the influence of high national and Christian precepts and, on the other hand, the valuations on the specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; consideration of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.[193]

The problem is that, faced with this dilemma, people seek to resolve the cognitive dissonance by redefining the current state of affairs as just, rather than challenging the underlying inequality.[194] Even at the height

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191 For a fuller exploration of how past victories can act to block, rather than enable, future successes, see generally David Schraub, *Sticky Slopes* (unpublished manuscript, 2010), online at http://ssrn.com/abstract=1506125 (visited Mar 29, 2010).

192 See Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* 117 (Westminster 2002) (originally published 1932) ("Since inequalities of privilege are greater than could possibly be defended rationally, the intelligence of privileged groups is usually applied to the task of inventing specious proofs for the theory that universal values spring from, and that general interests are served by, the special privileges which they hold.").

193 Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* lxxix (Transaction 1996) (originally published 1944).

194 See Jon Hanson and Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 Harv CR–CL L Rev 413, 419 (2006) ("[P]eople crave justice .... [H]owever ... we

of American racial apartheid, supporters of the system of white supremacy nonetheless sought to cast it as consistent with American norms of equality.[195] The conflict between discriminatory practices, on the one hand, and people's desire to see themselves as egalitarian, on the other, causes people to search persistently for ways to convince themselves that their behavior is fair and not motivated by prejudice.[196] Courts, as members of society, are generally implicated in this unjust scheme and thus have a psychological incentive to redefine it as justified.

One common way of reifying the justness of inequality is to recast the victims as truly advantaged—in possession of "special rights" or great political influence. Any amount of political power or social advancement can and has been taken to show that a group has attained "equality" and thus does not require "special" legal protections.[197] This is amply demonstrated in the history of the gay rights movement. Recall the *High Tech Gays* opinion, in which a handful of antidiscrimination ordinances (many quite limited) scattered across the country was considered sufficient to label gays and lesbians political powerful.[198]

Any evidence of gay political power can only be interpreted against an implicit baseline of how much power that group "should" possess—a determination that is necessarily subjective. Consequently, "[c]ourts have used identical evidence regarding pro-gay legislation as indicative of both gay power and powerlessness."[199] Because any expression of gay power will seem noteworthy and aberrant against a

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often satisfy the craving through troubling means: when alleviating innocent suffering is at all difficult or complex, people reconceive the victim as deserving the suffering by assigning negative characteristics to her.").

195 See Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 Cardozo L Rev 1689, 1692 (2005) (noting that many "believed that Jim Crow was fully consistent with equality and that to eliminate it would interfere with people's rights and liberties"); Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 Utah L Rev 781, 790–91 ("Many slaveholders sincerely believed that for Negroes, bondage was a positive good. Similarly, many segregationists believed, honestly, that keeping blacks in their 'place' would redound to their benefit as well as to the interests of white society.").

196 See John F. Dovidio and Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 Psych Sci 315, 317–18 (2000) (arguing that given a neutral cover for making a decision, whites will overwhelmingly discriminate against blacks, whereas without such a cover they will treat whites and blacks equally); John F. Dovidio and Samuel L. Gartner, *Aversive Racism*, 36 Advances Exper Soc Psych 1, 3 (2004) (noting that the mechanisms behind aversive racism do not necessarily restrict themselves to the American racial context).

197 See generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 Wash U L Rev 917 (2009) (sourcing this argument to opponents of the original Reconstruction amendments and tracing its deployment against virtually every piece of civil rights legislation ever proposed).

198 See 895 F2d at 574 n 10 (citing, among others, an antidiscrimination provision in Michigan that was limited to health care providers and several forward-looking city ordinances as proof that gays and lesbians were political equals).

199 Yoshino, 96 Colum L Rev at 1805 (cited in note 190).

backdrop of heterosexual normalcy,[200] maintaining political power as a barrier to judicial protection provides an easy psychological out for legal policymakers who do not wish to grapple with the continued effects of prejudice and inequality.

2. Opposing impermissible animus provides the strongest warrant for judicial protection of minorities.

Because society will always try to reinterpret its unjust social practices as fair and appropriate, any effective judicial intervention scheme must go straight to the source: the prejudice itself. This focus also attaches to the strongest elements of the *Carolene Products* framework.

Consider Bruce Ackerman's famous critique of the *Carolene Products*'s Footnote Four. Ackerman observes that all three elements of the "discrete and insular minorities" formulation either are *boons* in a democratic system, or at the very least cannot be the basis for suspicion when they result in defeats.[201] First, he argues that "minorities are *supposed* to lose in a democratic system—even when they want very much to win and even when they think (as they often will) that the majority is deeply wrong in ignoring their just complaints."[202] Even if one thinks that minority groups should generally be able to secure their ends (at least some of the time) through coalition dynamics, it is unclear

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[200] A DC district court judge, addressing the argument that gays and lesbians could not "gain the attention of politicians," responded that "[o]ne need only remember St. Patrick's Day 1991 in New York City to see Mayor David Dinkins marching in the traditionally Irish-Catholic parade with homosexual groups and activists who were important supporters during his tough mayoral campaign." *Steffan v Cheney*, 780 F Supp 1, 8–9 (DDC 1991), affd, *Steffan v Perry*, 41 F3d 677 (DC Cir 1994) (en banc). In response, Kenji Yoshino observed that "[t]he court does not ask why one can be expected to remember this event. Dinkins marching with the gays is memorable because it is the exception that proves the rule of politicians not wanting to support gays." Yoshino, 96 Colum L Rev at 1806 (cited in note 190).

[201] Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv L Rev 713, 723–24 (1985):

> *Carolene* is utterly wrongheaded in its diagnosis. 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 ones *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.

[202] Id at 719 (asserting that "absolutely central to democratic theory" is the observation that minorities are supposed to lose—their recourse lies in influencing the majority). See also *Holder v Hall*, 512 US 874, 901 n 10 (1994) (Thomas concurring) ("[I]n a majoritarian system, numerical minorities lose elections."); Waldron, 115 Yale L J at 1398 (cited in note 173) ("People—including members of topical minorities—do not necessarily have the rights they think they have. They may be wrong about the rights they have; the majority may be right.").

"why minorities may dress up these expectations in the language of constitutional rights and demand judicial protection for them."[203]

Discreteness and insularity, for their part, are both actually beneficial qualities in the democratic process. Drawing on public choice literature, Ackerman notes that concentrated (insular) groups can overcome collective action problems,[204] have greater political influence in Congress,[205] and are more easily organized.[206] This last attribute itself is assisted by discreteness (visibility), because a discrete group does not have to induce its members to reveal their stigmatized attribute in order to organize them.[207] These arguments were later echoed in Justice Scalia's *Romer* dissent, in which the gay community's insularity, relative affluence, and concentration were used to cast it as politically quite potent.[208]

But recall why *Carolene Products* extended special protection to these minority groups in the first place—because these groups may face "prejudice . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[209] Addressing the problem of prejudice, Ackerman retreats to a far more modest claim—simply expressing skepticism that legislators will forgo the opportunity to bargain with a potentially fruitful source of votes.[210]

This chink in the armor provides the point of counterattack. John Hart Ely's famous defense of *Carolene Products* focuses primarily on the need to provide open and equal democratic participation by invalidating laws that are indicative of procedural failures.[211] In defending heightened scrutiny for vulnerable minorities, however, he implicitly concedes that the worry is effectively substantive: laws singling out a minority group likely stem from "a simple desire to disadvantage the minority in question."[212]

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203 Ackerman, 98 Harv L Rev at 720 (cited in note 201).

204 Id at 724–26 (citing the NAACP and Anti-Defamation League as examples of collective action among minorities).

205 Id at 726–28 (emphasizing that insular groups are "more likely to form a political lobby peopled by credible leaders who remain in close touch with the insular constituency they represent").

206 Id at 726.

207 Ackerman, 98 Harv L Rev at 730–31 (cited in note 201) (explaining that African-Americans need not purposefully and deliberately reveal the attribute making them an insular minority because it is apparent, unlike the case of gays, lesbians, or Jews).

208 See notes 88–91 and accompanying text.

209 *Carolene Products*, 304 US at 152–53 n 4.

210 Ackerman, 98 Harv L Rev at 732–35 (cited in note 201) (arguing that the "pariah model" wherein political majorities simply refuse to work with minority groups is implausible in all but the most extreme circumstances).

211 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 181 (Harvard 1980).

212 Id at 147. There is, as Charles Lawrence, III argues, no way around the fundamentally substantive nature of the claim—courts protect minority groups because they have bought into a substantive value judgment that discrimination against, and subordination of, those groups is

In their own reconstruction of *Carolene Products*, Daniel Farber and Phillip Frickey also use the angle of prejudice to critique Ackerman on both theoretical and empirical grounds.[213] Where there is an *ideological* preference for subordinating a certain group, it is quite possible that prejudice can override normal democratic bargaining, because part of what the legislator is attempting to achieve is the continued marginalization of the disfavored group.[214] As Farber and Frickey put it, "part of the 'political processes ordinarily to be relied upon to protect minorities' may be a legislator's ideological commitment to fair treatment, which may not extend to 'second-class citizens.'"[215] These prejudicial attitudes can manifest without overt intention—indeed, where "a society has recently adopted a moral ethic that repudiates racial disadvantaging for its own sake, governmental decisionmakers are as likely to repress their racial motives" as they are to simply lie about them after the fact.[216] Consequently, it makes more sense for courts to analyze allegedly inegalitarian actions with reference to the act's prejudicial "cultural meaning," rather than to look for explicit statements denying the minority group the right to equal participation.[217]

In normal democratic operations, discrete and insular minorities should be quite capable of protecting their own interests; it is when they *cannot* that we begin to search for some sort of failure. What distinguishes groups worthy of heightened protection from normal political losers is the existence of morally intolerable prejudice, which blocks targeted groups from equal participation in the system of democratic bargaining. Where hostility to, and subordination of, a particular group is itself a popular and salient political goal, then judicial scrutiny is warranted even if at times the marginalized group has managed to secure some legislative protections.[218]

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morally intolerable. See Charles R. Lawrence, III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 Yale L J 1353, 1382–84 (2005) (asserting that Ely's theory has to be undergirded by a substantive constitutional norm that certain groups cannot be subjected to social subordination).

213 See Daniel A. Farber and Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal L Rev 686, 702–08 (1991).

214 See id at 702 ("The power a minority group can muster will be limited to the extent that other voters (and legislators) are ideologically motivated to suppress it.").

215 Id, quoting *Carolene Products*, 304 US at 152–53 n 4.

216 Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317, 349 (1987).

217 See id at 355 (explicating the "cultural meaning" test as the proper standard for when judicial actors ought to apply heightened scrutiny).

218 See Ely, *Democracy and Distrust* at 153 (cited in note 211) (noting the possibility of "attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members"); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L J 1287, 1296–97 (1982) ("[O]rganized baiting of minorities has been one of the levers for manipulating masses

CONCLUSION

Antidiscrimination law recognizes the existence of a problem, not its solution.[219] This Comment does not make the idealistic demand that courts be the first responders for politically marginalized groups.[220] It merely asks them to abandon doctrinal standards that presuppose that they do play this role—standards whose malleability and inconsistent application have caused the law surrounding gay rights to dissolve into virtual incoherency. Given courts' unwillingness to entertain claims made by marginalized minorities until they flash some political power, the ability to get an antidiscrimination law passed should not be taken as sufficient proof that the problem of discrimination has been resolved. Eliminating (or at least greatly reducing) the courts' inquiry into whether a group is politically powerless, and replacing it with a focus on the prejudice and animus directed at that group, both better matches the historical treatment of judicial protection of minority groups and provides a normatively superior account of how the court should mete out such protection.

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since the advent of modern politics. It represents, thus, a failure of politics not only in the nonprotection of the victim group, but also in the deflection and perversion of other public purposes."). This helps distinguish groups like gays, or blacks, or women from other groups that face negative stereotyping but seem to be inappropriate candidates for heightened judicial review. There are stereotypes that blondes are dumb, or that landlords are greedy, for example, but there is no political constituency that seems to view punishing or restricting the rights of blondes or landlords as an inherent social good in the same way that those views have historically manifested against gays, racial minorities, and women.

219 See *Hernandez v Robles*, 855 NE2d 1, 28 (NY 2006) (Kaye dissenting) ("[Antidiscrimination] measures acknowledge—rather than mark the end of—a history of purposeful discrimination.").

220 Though, once again, if courts want to break from the historical trend and take on that role, they are most welcome to do so. See note 4.