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## UNSUSPECTING

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*All laws classify, but not all classifications are created equal. Under contemporary Fourteenth Amendment doctrine, certain classifications are "suspect," triggering heightened judicial review and often rendering the*

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*targeted legislation unconstitutional. Because the alternative rational basis test is so deferential, the question over which sorts of classifications are suspect may be the single most important—and most discussed—issue in equal protection doctrine. Yet amidst all the talk about how a group gains recognition as a “suspect class,” there has been virtually no discussion about a seemingly obvious corollary: how a group loses its status as one. After all, if suspect status is designed for a particular, exceptional sort of minority—for example, those uniquely unable to protect themselves in the political process—facts indicating that the group is no longer saddled by such disabilities should kick it back into the normal rough-and-tumble of democratic politics. But no case has even contemplated, much less seriously threatened, that a hitherto protected class might one day be removed from the list. By all appearances, suspect classification is a one-way ratchet.*

*This is a mistake. Descriptively, the criteria we use to assess which classifications are suspect are nearly all transient in character, and it is incongruous that shifts in these characteristics should not be accompanied by changes in which classifications we consider suspect. Normatively, perpetual suspect classes are hard to square with norms of democratic self-governance and presume that judges are always better positioned than legislatures to protect the suspect class. Labeling a classification suspect functionally results in a shift in power away from legislatures and towards the judiciary. Whether this is a benefit or a burden depends on the nature of the discrimination the protected group faces and the relative level of sympathy each branch accords to that group. Where courts are hostile, or discrimination transcends overt classificatory bars or conscious antagonistic motives, a suspect classification may block salutary democratic gains more frequently than it arrests genuinely harmful legislation.*

#### INTRODUCTION

All laws classify, but not all classifications are created equal. Under contemporary Fourteenth Amendment doctrine, certain classifications are “suspect,” triggering heightened judicial review and often rendering the targeted legislation unconstitutional. The jurisprudential genesis for this state of affairs is the famous “footnote four” of *United States v. Carolene Products Co.*<sup>1</sup> This brief footnote indicates that “prejudice against discrete and insular minorities” may render them susceptible to majoritarian discrimination and, by the same token, may interfere with their ability to resort to the democratic process for redress.<sup>2</sup> Consequently, while under normal circumstances the

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<sup>1</sup> 304 U.S. 144, 152-53 n.4 (1938).

<sup>2</sup> *Id.* For an assessment of this principle, compare JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-104 (1980) (drawing on *Carolene Products* to create a comprehensive “representation-reinforcing” theory of judicial review), with Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985) (declaring

Court will only inquire as to whether there exists a “rational basis” for a legislative enactment, classifications burdening these vulnerable minorities may warrant more stringent review.<sup>3</sup>

Because the rational basis test is so deferential, the question of which sorts of classifications are suspect may be the single most important issue in equal protection doctrine.<sup>4</sup> Yet amidst all the talk about how a group *gains* recognition as a “suspect class,” there has been virtually no discussion about a seemingly obvious corollary: how a group *loses* its status as a suspect class. After all, if suspect status is designed for a particular, exceptional sort of minority—for example, those uniquely unable to protect themselves in the political process—facts indicating that the group is no longer saddled by such disabilities should kick it back into the normal rough-and-tumble of democratic politics. But no case has even contemplated, much less seriously threatened, that a hitherto protected class might one day be *removed* from the list.<sup>5</sup> By all appearances, suspect classification is a one-way ratchet.

This is a mistake. The criteria we use to assess which classifications are suspect are nearly all transient in character, and there are ample reasons—ranging from general democratic values to structural limitations on the judiciary’s ability to protect a wide range of marginalized groups—to question the status quo where suspect classifications are perpetual in duration. As *Shelby County v. Holder*<sup>6</sup> demonstrates, the Supreme Court certainly does not always shy away from justifying substantial alterations in important constitutional doctrines by reference to the changed and improved

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*Carolene Products* “utterly wrongheaded in its diagnosis” and arguing that “discrete and insular minorities” should be expected to fare better than average in a democratic system).

<sup>3</sup> See, e.g., *Carolene Products*, 304 U.S. at 152 (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).

<sup>4</sup> See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079 (2011) (“[T]he Court’s choice of a level of scrutiny [is] likely to be decisive: under rational basis review the government virtually always won and under strict scrutiny the government almost always lost.”); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 226 (2004) (“[P]rotection under the footnote four rationale is a particularly valuable prize, for once a group is protected, it remains a protected class until the courts are willing to say that criteria for protection no longer exists.”).

<sup>5</sup> See David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1464 (2010) (“[C]ourts 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 . . .”).

<sup>6</sup> 133 S. Ct. 2612 (2013).

circumstances of marginalized minority groups.<sup>7</sup> And as *Schuetz v. Coalition to Defend Affirmative Action*<sup>8</sup> makes clear, the Court seems perfectly willing to defer to democratic decisionmaking on racial issues when the polity concludes that race-conscious measures are unnecessary or harmful.<sup>9</sup> Strict scrutiny doctrine now applies to only a rump portion of racial equality claims—a sliver that functionally consists solely of affirmative action and racial integration programs. Yet despite these retreats and despite the doctrine’s limited practical reach, neither the Court nor progressive advocates for racial equality have demonstrated any willingness to reassess the continued necessity of heightened scrutiny as a whole.

This Article fills a substantial gap in our understanding of equal protection by exploring when it is appropriate for a classification to *stop* being suspect—that is, to be returned to the normal democratic process that dictates the vast majority of legislation governing the affairs of the nation. To be sure, there are plenty of arguments for why a particular class should or should not be considered suspect. We argue over whether sexual orientation and sexual minorities ought to be included in the pantheon, and we argue over whether racial majorities ought to be taken out. But these arguments tend to focus on matters of transcendental principle—the argument that strict scrutiny should not apply to programs burdening racial majorities is not that whites once needed but no longer need such protection; it is that, properly understood, the doctrine should have never applied to them in the first place. By contrast, my focus is not on the Court deciding that, as a matter of constitutional first principles, a given group never should have received heightened scrutiny at all.<sup>10</sup> Rather, my focus is on cases that have become “outmoded”—correct when decided, but rendered obsolete by changing social and political developments.<sup>11</sup> I do not argue here that the Court has made a mistake in identifying our current crop of suspect classifications. The question instead is when the designation of a classification as suspect—originally appropriately applied—should be withdrawn.

In Part I, I survey the current doctrinal state of affairs—in particular, what factors the Court claims are “indicia” of “suspectness,” and how these criteria

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<sup>7</sup> *Id.* at 2648-50 (striking down Section 4(b) of the Voting Rights Act of 1965 because it did not account for reduced racial discrimination in the covered jurisdictions); *see also* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>8</sup> 134 S. Ct. 1623 (2014).

<sup>9</sup> *Id.* at 1648 (upholding a Michigan constitutional amendment barring race-conscious affirmative action programs).

<sup>10</sup> *Compare* *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (holding that “any incidental burden on the free exercise of . . . religion” must be justified by a “compelling state interest”), *with* *Emp’t Div. v. Smith*, 494 U.S. 872, 878-88 (1990) (rejecting generally the propriety of the *Sherbert* test as contrary to “the record of more than a century of our free exercise jurisprudence”).

<sup>11</sup> *See* JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 185 (2011).

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have been applied since *Carolene Products*. What stands out is that most, if not all, of the factors the Court claims to consider are transient—they could, at least in theory, fade away. For example, a group that was formerly politically powerless may eventually gain substantial political influence and clout. The temporary nature of these factors stands in sharp contrast to their doctrinal effects—a group that was once politically powerless and managed to then gain the favor of a sympathetic audience retains in perpetuity its doctrinally superordinate state.

Given these considerations, Part II asks why the effect of finding a classification suspect appears to last in perpetuity. Three reasons seem to be strong possibilities. First, while the relevant factors *can* change, since the inception of suspect status doctrine in the middle of the twentieth century, it may be that none of them *have* in fact changed enough to render any currently suspect classification no longer so. Second, there may be a lack of parties who have an incentive to rock the boat. While there are often bitter struggles to obtain suspect status, once such status has been ascertained, there appears to be a surprising degree of acquiescence to that determination. Third, the doctrine surrounding suspect classifications may be so incoherent that judges find no legal compulsion to alter doctrinal classifications that match their policy preferences. Suspect classification doctrine is murky even compared to other areas of constitutional law; this makes it difficult to construct compelling legal arguments that would pressure Justices to shift away from constitutional rules which allow them to strike down policies or practices they find deeply repugnant.

Part III critiques the concept of perpetual suspect classes along three dimensions. First, the calcified nature of suspect classes clashes dramatically with the most prominent defenses for why we have such classes in the first place. To the extent that suspect classification represents an exception from a general preference for the democratic resolution of contested social issues, it is difficult to justify permanently eliminating certain questions from the democratic arena if the conditions that originally justified their removal no longer attach. This problem is compounded insofar as the “grandfathered” classes diverge ever further from the black-letter indicia of suspectness, delegitimizing the doctrinal rules relied upon to keep new groups out. It is, for example, difficult to say to gays and lesbians that they are too politically powerful to be justly labeled a suspect class at the same time as the courts treat whites as a suspect class. Second, because a considerable amount of judicial rhetoric indicates the Court’s belief that suspect classification should remain a rarity, the refusal to cycle out anachronistic suspect classes may preclude groups with a more pressing need for protection from admission to the pantheon. While most scholarship advocating the recognition of this or that classification as suspect simply urges its addition alongside all the rest, the Court’s desire to sharply limit the number of suspect classifications may imply that it is actually a zero-sum game. Third, there is a growing sense that strict scrutiny can be a double-edged sword for marginalized groups—blocking not

just hostile but also beneficent legislation aimed at improving their social standing or quality of life. At a certain level of social and political influence, the groups may believe themselves better off if they are able to operate unconstrained in the political arena. This is impossible so long as their labeling as a suspect class is a permanent state of affairs.

Part IV concludes by offering guidance as to when a classification should be “unsuspected.” Counterintuitively, it is not the case that an unsuspecting decision requires there to be agreement or proof that the hitherto marginalized group has transcended its prior discrimination. What matters is how the courts (rightly or wrongly) *perceive* that issue. Unsuspecting may in fact be most essential in scenarios where discrimination remains widespread but the judiciary is in denial about its prevalence. In such cases, the suspect classification designation will operate almost exclusively to block legislative initiatives aimed at remedying ongoing inequality.

The current Court’s race jurisprudence provides grim evidence. When democratic actors elect to openly pursue the cause of racial integration and inclusion, the Court applies strict scrutiny with ever-increasing skepticism. But when democratic actors instead move in opposition to such inclusive measures, the Court reverses course and extols deference to the will of the voters. *Schuette* is a stark example of the Court upholding an obviously race-conscious law while disclaiming any authority to engage in the sort of searching inquiry strict scrutiny purports to demand.<sup>12</sup> In *Schuette* and other cases, the Court has made it clear that it does not perceive official racial animus to be a continuing threat necessitating aggressive judicial response. Whether the Court is correct in that assessment is irrelevant; what matters is that the playing field be level. If we are going to decide racial issues at the ballot box rather than at the courthouse, that conclusion should be applied consistently regardless of whether the policies in question favor or oppose affirmative steps to foster racial inclusion.

### I. SUSPECT STASIS

Equal protection doctrine is not the only area of constitutional law where strict scrutiny comes into play. Impositions on “fundamental rights” must satisfy strict scrutiny,<sup>13</sup> as must content-based restrictions on speech.<sup>14</sup> What

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<sup>12</sup> 134 S. Ct. 1623 (2014).

<sup>13</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (“[Due process] forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”).

<sup>14</sup> See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813-14 (2000); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268-70 (2007) (documenting the “sweep” of strict scrutiny over a variety of doctrinal contexts aside from equal protection).

makes the Equal Protection Clause different is that the question of which classifications are subject to heightened review is, on its face at least, a question of fact.<sup>15</sup> There are no factual shifts that could render content-based speech restrictions, as a rule, no longer subject to strict scrutiny. But the doctrinal triggers for equal protection heightened scrutiny are all nominally questions about the current characteristics of the subject class, and the answers to these questions are capable of considerable variance over time. Prejudices may fade, political power may shift, and minorities may become majorities. Where these facts change, the black-letter equal protection doctrine would seem to counsel that a classification formerly deemed suspect be dropped back into the normal rough-and-tumble of democratic politics.

A. *The Indicia of Suspectness*

Some principle of non-discrimination clearly lies at the center of the Fourteenth Amendment's Equal Protection Clause. Yet it is equally clear that not all classifications necessarily run afoul of the Fourteenth Amendment. One person's discrimination is another's discernment, and there are many cases when we fairly and properly distinguish between one class of human beings and another.<sup>16</sup> The first move of creating any enforceable equal protection clause is figuring out what makes some distinctions benign and others impermissible (or at least worthy of extra suspicion).<sup>17</sup> This is the Court's endeavor in establishing certain suspect classes or classifications.

Unfortunately, the process by which a group joins the suspect ranks is among the most opaque and inconsistent in constitutional law. Though *Carolene Products* was decided in 1938, the Court did not even attempt to lay out the "indicia" of suspect status for another thirty-five years,<sup>18</sup> and has since

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<sup>15</sup> See *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) ("[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.")..

<sup>16</sup> See, e.g., Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 151 (1992) ("We all know it is wrong to refuse to hire women as truck drivers, to refuse to let blacks practice law, to bar Moslems from basketball teams, or to refuse to sit next to Rastafarians at lunch counters. At the same time, we also know it is not wrong to refuse to hire the blind as truck drivers, to refuse to admit those who flunk the bar exam to the practice of law, to bar short, slow, uncoordinated persons from the basketball team, or to refuse to sit next to people who haven't bathed recently."); Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES* 194, 197 (Austin Sarat ed., 2012).

<sup>17</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 106 (1979) (observing that there is a "vast range of arguably unjust but shared bases for human differentiation which Congress and the courts do not see as their function to police").

<sup>18</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

been markedly erratic in applying these factors. As various groups—such as gays, the disabled, and the poor—have attempted to secure suspect standing, courts have struggled mightily to articulate exactly what keeps them out while inviting other groups—such as men, whites, and illegitimate children—in.

As noted above, *Carolene Products* presented the original template for suspect classifications—“discrete and insular minorities” who are burdened by “prejudice.”<sup>19</sup> *Carolene Products* also forwarded three potential classes that it viewed as susceptible to this problem: religious, national, and racial minorities.<sup>20</sup> Since then, however, the mechanics of suspect classification have only gotten murkier. While in the intervening decades the Supreme Court did announce on several occasions that certain classes were worthy of heightened judicial scrutiny,<sup>21</sup> it was not until 1973 that the Court made another attempt to systematize the criteria by which a class is rendered suspect. In *San Antonio Independent School District v. Rodriguez*,<sup>22</sup> the Court delineated “the traditional indicia of suspectness” as whether “the class is . . . 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.”<sup>23</sup> That same year, a plurality opinion urged that sex also be treated as a suspect classification, forwarding two additional considerations: that sex is irrelevant to a person’s ability to contribute to society, and that sex is “an immutable characteristic.”<sup>24</sup>

The facial problem with the preceding paragraph is apparent: it proffers an armada of considerations that are somehow related to a finding of suspect status without any indication of which (if any) are necessary or sufficient, or how the factors relate to one another.<sup>25</sup> Broken down, one can spot up to nine distinct factors the Court purports to consider: (1) prejudice, (2) discreteness,

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<sup>19</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

<sup>20</sup> *Id.*

<sup>21</sup> *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” (citation omitted)); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (reiterating that strict scrutiny applies to racial classifications).

<sup>22</sup> 411 U.S. 1 (1973).

<sup>23</sup> *Id.* at 28.

<sup>24</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (plurality opinion); *see also* *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (concluding that strict scrutiny was inappropriate because the class in question did not “exhibit obvious, immutable, or distinguishing characteristics”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (reiterating the importance that the subject class had faced stereotyping unrelated to its ability to contribute to society).

<sup>25</sup> Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 147 (2011) (“[T]he factors by which to measure suspectness are not adequately defined. Many are duplicative and inconsistent, and all are amorphous. Further, it is not clear whether a suspect class must meet all of them, most of them, or just some of them.”).



(3) insularity, (4) minority status, (5) present discrimination or disabilities, (6) past discrimination, (7) political powerlessness, (8) irrelevancy, and (9) immutability.<sup>26</sup> It's almost unfair to accuse the courts of inconsistency in this field, as it is entirely unclear what a "consistent" application of all these factors at once would look like.

Subsequent jurisprudence has provided little clarification. When considering strict scrutiny for racial minorities in *Adarand Constructors, Inc. v. Pena*<sup>27</sup> and *City of Richmond v. J.A. Croson Co.*,<sup>28</sup> the obvious absence of political disadvantage was not dispositive—instead the Court simply asserted that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people,”<sup>29</sup> and held that if classifications burdening racial minorities were suspect, “consistency” demanded that those burdening majorities be suspect as well.<sup>30</sup> Justice Scalia, prior to his appointment to the bench, characterized his repulsion for race-based decisionmaking as stemming from his belief that nobody can be “indebted” to someone else “because of the blood that flows in our veins”—i.e., race’s immutability.<sup>31</sup> This concern has been echoed in his judicial opinions.<sup>32</sup> Yet when the Court examined whether disability deserved heightened review, its immutable status was considered immaterial because disability is relevant to legitimate governmental purposes and because the disabled are unlikely to experience significant political prejudice.<sup>33</sup> The holding that immutability was not a strong player in heightened scrutiny analysis apparently escaped the Washington Supreme Court, which dismissed plaintiffs’ showing that sexual orientation was an irrelevant characteristic precisely because it was not also shown to be immutable.<sup>34</sup> At other times, it was the lack of political powerlessness, which

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<sup>26</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 442-43 n.10, 446 (1985); *Murgia*, 427 U.S. at 313; *Frontiero*, 411 U.S. at 685-86.

<sup>27</sup> 515 U.S. 200 (1995).

<sup>28</sup> 488 U.S. 469 (1989).

<sup>29</sup> *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

<sup>30</sup> *Croson*, 488 U.S. at 494 (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”); *Adarand*, 515 U.S. at 224 (explaining that *Croson*’s requirement for strict scrutiny across all races exemplifies the Court’s requirement of consistency).

<sup>31</sup> Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U.L.Q. 147, 153.

<sup>32</sup> E.g., *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s . . . rejection of dispositions based on race or based on blood.” (citations omitted)).

<sup>33</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 442-43 n.10 (1985) (citing *ELY*, *supra* note 2, at 150).

<sup>34</sup> *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (“[Plaintiffs] focus . . . on the lack of any relation between homosexuality and ability to perform or contribute to

was clearly *not* dispositive in *Adarand* and *Croson*, that purportedly doomed the gay rights claim.<sup>35</sup> As Marcy Strauss puts it, what results is “a mushy, gestalt-type analysis. Presumably, the more factors satisfied the merrier. Beyond that, it is unclear how the factors interplay.”<sup>36</sup> And while a cottage industry of law review articles has attempted to narrow down precisely why and in what contexts a group should be given heightened scrutiny,<sup>37</sup> judicial determinations still seem ad hoc and unpredictable.<sup>38</sup>

Recent applications of this doctrine have further compounded this incoherency. Courts now interpret the tiered scrutiny model as protecting not suspect *classes* but suspect *classifications*—that is, it is not the class of blacks or Latinos that get heightened protection but rather “race” as a classification.<sup>39</sup> Thus, courts applying strict scrutiny to racial classifications do not ask whether the law in question entrenches the vulnerability of politically powerless racial groups or augments preexisting racial prejudice or stereotyping. The fact that the law classifies on the basis of race is alone sufficient to render it suspect.

The move to protect suspect *classifications* is sharply inconsistent with the doctrinal inputs outlined above.<sup>40</sup> Latinos may or may not be a discrete and

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society. But plaintiffs must make a showing of immutability, and they have not done so in this case.”).

<sup>35</sup> See, e.g., *Conaway v. Deane*, 932 A.2d 571, 611 (Md. 2007) (“[W]e 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.’”); *Andersen*, 138 P.3d at 974-75 (explaining that the “increasing political power” of gays and lesbians weighs against a finding of suspect classification). See generally Schraub, *supra* note 5.

<sup>36</sup> Strauss, *supra* note 25, at 168.

<sup>37</sup> See, e.g., Ackerman, *supra* note 2 (arguing that the *Carolene Products* factors actually correlate with political influence, not disadvantage); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that the Equal Protection Clause provides special protection for certain types of distinct “groups”); Michael Gentithes, *The Equal Protection Clause and Immutability: The Characteristics of Suspect Classifications*, 40 U. MEM. L. REV. 507 (2010) (arguing for the primacy of a qualified form of immutability); Darren Lenard Hutchinson, “*Unexplainable on Grounds Other than Race*”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (concluding that only political powerlessness and a history of discrimination should be considered); Schraub, *supra* note 5, at 1466-68 (arguing against using political powerlessness as a consideration).

<sup>38</sup> See Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 739 (2008) (observing, with respect to the differential treatment of sexual orientation, disability, and racial majorities, that “the cases increasingly tend to be all over the map”).

<sup>39</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”).

<sup>40</sup> On the distinction between doctrinal inputs and outputs in the heightened scrutiny context, see David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. (forthcoming 2016) (manuscript at 10-12).

insular minority, but “race” cannot be. Women might be politically powerless, but “sex” surely is not.<sup>41</sup> In short, there is a marked divergence between how suspect classification is *attained* and how it is *applied*. And while one might infer from this that the above criteria are simply no longer the law, the courts do not seem to agree. While the judiciary has shifted to a classification-based focus on the back end, there has been no court decision offering an alternative criterion for deciding whether to encompass new groups within the doctrine. Hence, courts still at least purportedly apply the transient considerations found in the formal black-letter doctrine when, for example, analyzing whether gays (or sexual orientation) should be deemed suspect.<sup>42</sup> This disjuncture does more than exacerbate the already murky parameters of the suspect classification model; it actively undermines any pretense that the model will continue to provide protections to those most in need of active judicial intervention. In effect, the Court gets to have its cake and eat it too—it requires new claimants to meet a hefty burden of process-failure to overcome the presumption in favor of legislative primacy, but then indiscriminately applies its “protection” without any regard for the alleged democratic defects which justify them.<sup>43</sup>

The lack of an unsuspecting doctrine masks this contradiction because the groups currently entitled to heightened scrutiny do not ever have to re-justify themselves—either against the traditional rules for attaining suspect standing or against any other doctrine the Court might articulate as a new alternative. A court today applying strict scrutiny to race, for instance, need do nothing more than cite to the plethora of cases establishing that racial classifications get strict scrutiny.<sup>44</sup> To be sure, establishing an unsuspecting doctrine would not necessarily require the Court to reassess current suspect groups against the suspect classification doctrine as it stands now—it could create a new doctrine that justifies heightened judicial review on other criteria. In Part III, I critique the concept of perpetual suspect classifications on normative grounds. For now, it suffices to say that drawing this latent tension to the surface is

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<sup>41</sup> See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CALIF. L. REV. 481, 504 (2004) (“The most apparent conflicts within the suspect classification framework occur between the Court’s insistence on symmetrical evaluation of all classifications, whether or not they burden a vulnerable group, and the indicia’s targeted focus on the vulnerable group.”).

<sup>42</sup> See, e.g., *De Leon v. Perry*, 975 F. Supp. 2d 632, 650-52 (W.D. Tex. 2014) (analyzing the case for according heightened scrutiny to sexual orientation by looking to a group’s history of discrimination, immutability, and political powerlessness); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1007-08 (D. Nev. 2012) (declining to allocate heightened scrutiny to sexual orientation based on the conclusion that gays do not face significant contemporary prejudice or lack of political power).

<sup>43</sup> See *infra* Section III.C.

<sup>44</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (citing, e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005)); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

beneficial in its own right.<sup>45</sup> If the Court wants to reconfigure the entire suspect classification doctrine so as to affirmatively endorse perpetual suspectness, it should say so and come up with constitutional warrants to justify what would be a radical, permanent intrusion into democratic policymaking.

The severe indeterminacy as to when suspect status is appropriate certainly makes it more difficult to determine when it no longer is. For our immediate purposes, however, determining what, if anything, coherently holds the doctrine together is less important than noticing the transient nature of many of its constituent parts. With few exceptions, the factors the Court relies upon in finding a class suspect are not permanent. A group that might be a discrete and insular minority facing bias today may be a well-integrated, popular, and influential group tomorrow, and vice versa. If and when such shifts occur, it is unclear why suspect protection should not shift along with them.

### B. *The Indicia's Impermanence*

The overwhelming majority of the factors the Supreme Court has claimed to look into when determining if a group is a suspect class are not permanent. This transient nature is buttressed by the Court's own characterization of the suspect classification decision—representing “extraordinary protection from the majoritarian political process.”<sup>46</sup> Of course, for any given group and for any given factor, there may not have been any material change since heightened scrutiny status was assigned. So, for example, the *Carolene Products* Court labeled racial minorities worthy of heightened judicial solicitude because the prejudice they face limits their ability to fully resort to normal political processes.<sup>47</sup> That appraisal may still be accurate today—that is, prejudice against racial minorities might still be strong enough to preclude their full access to political protections, thus necessitating heightened judicial oversight. But few would be so cynical as to say that there is something inherent in being a racial minority that forever damns them to be victims of severe, systematic prejudice. In many ways, the goal of equal protection doctrine is precisely to avoid that grim fate. And, as it turns out, most of the many considerations the Court has articulated for suspect classifications are similarly transient—while they may accurately characterize any given group at a particular (often quite extended) time period, they are at least conceptually nonpermanent and liable to change.

#### 1. The *Carolene* Factors

*Carolene Products* sets forth four characteristics that may invite special judicial solicitude: whether a group (1) is discrete, (2) is insular, (3) is a

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<sup>45</sup> See David Schraub, *Sticky Slopes*, 101 CAL. L. REV. 1249, 1304-05 (2013) (“At the very least, stripping away a rather benign but fictive justification for a political action can reveal deep inconsistencies between the projected image of a society and its base reality.”).

<sup>46</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>47</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

minority, and (4) faces prejudice.<sup>48</sup> With the possible exception of discreteness, all four are liable to change over time.

Many groups have been “insular”—that is, relatively separate and unassimilated—over their collective histories, and many of these groups have since become well-integrated into the broader fabric of American life.<sup>49</sup> While certain groups, such as the Amish or some religious Jewish sects, maintain a deliberately insulated lifestyle as an integral part of their collective identity, for the most part, the history of America has been one where groups attempt to join—however fitfully—the broader institutions and markings of American society. In doing so, they may lose their cohesive identities as separate groups whose particular, localized interests can be identified, much less demand heightened judicial protection.<sup>50</sup>

It is true, of course, that some groups that have attempted to integrate into broader American society have encountered serious difficulties. Though racial integration was the watchword of the civil rights revolution, American society is still sharply divided along racial lines.<sup>51</sup> But this is seen as a political and moral failing, not a conceptual one; few have been so bold as to suggest that there is an inherent barrier towards integrating formerly isolated groups. Much the opposite—integration remains a popular ambition, even if it is one we have continually fallen short of fulfilling. This aspiration would make little sense if insularity was believed to be a permanent and intractable state of affairs.

With regard to discreteness, Bruce Ackerman has noted in his classic critique of *Carolene Products*'s footnote four that it is unclear whether the Court meant to split “discrete” and “insular” off from one another and give them independent meanings.<sup>52</sup> Nonetheless, Ackerman does believe that discreteness could be defined in such a way as to add something unique and important to the *Carolene Products* formula, defining a discrete group as one where “its members are marked out in ways that make it relatively easy for others to identify them.”<sup>53</sup> Consider the difference between an Orthodox and a secular Jew. The former may wear distinctive garb that makes it easy for the casual observer to identify him as Jewish. The latter is more likely to be

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<sup>48</sup> *Id.*

<sup>49</sup> See Ackerman, *supra* note 2, at 729.

<sup>50</sup> See Cristina M. Rodriguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41, 44-45 (2009) (observing that Latinos may be losing their “insularity and commonality” as their population grows and becomes even more heterogeneous).

<sup>51</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (“It is well documented that conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals.”); see also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

<sup>52</sup> Ackerman, *supra* note 2, at 728-29.

<sup>53</sup> *Id.* at 729; see also Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) (“[T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so.”).

dressed in ways resembling the larger population, and thus may not be immediately identified as Jewish if she chooses not to reveal that fact. Racial and gender identity are often visible characteristics; sexual orientation, by contrast, frequently is not.<sup>54</sup>

Sometimes discreteness seems permanent, particularly when it is associated with physiological distinctions.<sup>55</sup> But other times, discrete characteristics are cultural and thus mutable—for example, the assimilation of religious minorities makes it much harder to tell “at a glance” if a person is Jewish, Christian, Muslim, or Atheist. Even with respect to phenotypical distinctiveness, such as that which attaches to race, contemporary discreteness may give way to future ambiguity—through racial intermarriage,<sup>56</sup> for example, or through shifting definitions of racial categories that change the borders of which race persons of varying skin tones are considered to fall into.<sup>57</sup>

Minority status is perhaps the most clearly transient of all. As has been well-documented, current demographic trends indicate that racial “minorities” will soon comprise the majority of the American population.<sup>58</sup> Even prior to that point, however, a national minority may represent a local majority, and may be quite capable of protecting itself (or even impermissibly favoring itself).<sup>59</sup>

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<sup>54</sup> See Ackerman, *supra* note 2, at 729.

<sup>55</sup> See *id.*

<sup>56</sup> Stephen Reinhardt, *Guess Who's Not Coming to Dinner!?*, 91 MICH. L. REV. 1175, 1179 (1993) (book review) (“[T]he growing racial blurring, caused in part by intermarrying and interracial dating to a degree unthinkable a generation ago, may make sharp racial separation far more difficult to implement.”).

<sup>57</sup> See, e.g., *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (holding that although Jews are considered to be white today, they can still validly state claims under § 1982 because they were seen as members of a distinct race in the nineteenth century); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (same with respect to Arabs); IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 102-07 (2d ed. 2006) (documenting a significant shift in popular understandings of who is white over the course of American history).

<sup>58</sup> JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., *U.S. POPULATION PROJECTIONS: 2005-2050*, at i (2008), <http://www.pewhispanic.org/files/reports/85.pdf> [perma.cc/9CW5-K43S] (predicting that non-Hispanic whites will become a minority in the United States by 2050).

<sup>59</sup> See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739-40 n.58 (1974) (observing that the rationale permitting “discrimination” in favor of racial minorities falls away when it is a majority-minority actor making the decision); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down an affirmative action program passed by a city council in a majority-minority city). Note though that in *Croson* the city implemented its quota program after finding that less than one percent of its prime construction contracts were awarded to racial minority contractors (in spite of racial minorities comprising over fifty percent of Richmond's population), and set the quota at thirty percent of the total value of all contracts—less than the city's overall minority population. Hutchinson, *supra* note 37, at 643-44.

Minority status, taken literally, is merely a numbers game, and demographic numbers are always fluctuating in response to immigration, birthrates, intermarriage, and other such factors.<sup>60</sup> “[W]here a population forms a majority,” or at least is no longer so marginal in size that it cannot fairly expect to influence democratic outcomes, “it must compete in an open marketplace rather than rely on the sort of preferential treatment deserved only by those who might be disadvantaged in open competition because of their size.”<sup>61</sup>

That leaves prejudice, which for many lies at the heart of *Carolene Products*.<sup>62</sup> And prejudice, too, is quite variable. From an early stage, the Court was clear that faithful application of the *Carolene Products* formula required taking heed of how prejudice actually manifested in particular communal contexts. So in *Hernandez v. Texas*,<sup>63</sup> the Court observed that while historically

race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws . . . community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.<sup>64</sup>

There is no reason to think such prejudice is a permanent facet of American life. Indeed, it would be an exercise in depressing fatalism to argue otherwise—if prejudice is so ingrained in the American psyche that no disadvantaged group can ever hope to transcend its grasp, it is difficult to understand why law is even bothering to engage in an inevitably futile struggle against it.<sup>65</sup>

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<sup>60</sup> See PASSEL & COHN, *supra* note 58 (attributing future projected changes in minority and majority status to an influx of new immigrants and to the children and grandchildren born to those immigrants in the United States).

<sup>61</sup> Rodriguez, *supra* note 50, at 48 n.31.

<sup>62</sup> Ackerman, *supra* note 2, at 731 (“But surely it is time to stop playing *Hamlet* without the Prince. The whole point of *Carolene Products*’s concern with ‘discrete and insular minorities’ cannot be understood . . . without grasping the final term of the formula: prejudice.”); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 702-08 (1991) (explaining that prejudice in *Carolene Products* plays a role in forming the ideology of those voters and legislators motivated to limit the power of minority groups); Schraub, *supra* note 5, at 1470 (“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.”).

<sup>63</sup> 347 U.S. 475 (1954).

<sup>64</sup> *Id.* at 478.

<sup>65</sup> *But see* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992) (articulating the dignitary benefits of the continued struggle against racial injustice, even if it is unlikely to achieve tangible changes towards equality).

The *Carolene* factors thus seemingly are not meant to identify permanent features of the groups seeking heightened protection. This is eminently sensible—questions of equality are context-dependent, and trying to lock in particular groups or classes as permanently suspect (or not) means consciously ignoring this context in favor of simple rules which may have long since floated free of their originating justifications.<sup>66</sup> In theory, then, the *Carolene* factors are well-positioned to adapt to changing social and political contexts, shielding marginal groups at the fringes of the American political process, then stepping away once their exclusion has lessened and they are capable of defending themselves via normal democratic means.

## 2. The *Rodriguez* Factors

Aside from *Carolene Products, San Antonio Independent School District v. Rodriguez*,<sup>67</sup> is probably the most influential case in the development of suspect-class doctrine.<sup>68</sup> *Rodriguez* listed “the traditional indicia of suspectness,” as whether “the class is . . . 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.”<sup>69</sup>

Again, most of these factors are transient. If by “saddled with . . . disabilities” we mean contemporary barriers to social inclusion—such as de jure legal prohibitions or widespread communal prejudice—obviously such barriers can, and one hopes will, shift over time. Political powerlessness is in the same boat—a group that was once without political influence may wield considerable clout in the future. Indeed, political powerlessness is often variable from one place to another—a group that is marginal in most of the nation may be dominant in particular localities.<sup>70</sup>

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<sup>66</sup> See ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 36 (1995) (“When we think of equality as . . . a ‘simple univocal principle,’ we turn it into a unique set of prescriptions that must apply regardless of historical context. We then lose the flexibility and sensitivity that enable us to judge between different situations—and we may become baffled by the most ordinary of questions.” (footnote omitted)).

<sup>67</sup> 411 U.S. 1 (1973).

<sup>68</sup> Generally, courts refer to *Rodriguez* in conjunction with immutability as the black-letter test for suspect status. See, e.g., *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 638 (7th Cir. 2007) (citing the *Rodriguez* factors and immutability as the “rigorous and specific” criteria the Supreme Court has provided for suspect status); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 354 (1st Cir. 2004) (same). I discuss immutability separately in Section I.B.3 *infra*.

<sup>69</sup> *Rodriguez*, 411 U.S. at 28.

<sup>70</sup> See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (striking down the creation of a school district tracking the borders of a Hasidic Jewish village); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down an affirmative action program enacted by the majority-minority city of Richmond, Virginia).



The second factor in *Rodriguez* is the existence of a history of discrimination.<sup>71</sup> Of course, once a group has faced discrimination in its history, that fact does not change—the history itself is inalterable. But it is unclear how much work a “history of discrimination” alone does when pressed against current practices of deprivation. When the Supreme Court struck down the female-only admission policy of the State of Mississippi’s nursing school in *Mississippi University for Women v. Hogan*,<sup>72</sup> Justice Powell’s complaint that “[t]here is no history of discrimination against men” fell upon deaf ears.<sup>73</sup>

More to the point, while history does not end, its salience does fade away as time passes.<sup>74</sup> Consider the history of discrimination in favor of aristocratic bloodlines. Surely this is an important part of Western (if not global) history; favoring the highborn and looking with contempt upon the peasantry.<sup>75</sup> At the formation of the United States, this “history” was fresh in the mind of the founders,<sup>76</sup> and so they crafted a broad and unyielding prohibition upon such favoritism through the Titles of Nobility Clauses.<sup>77</sup> As time passed and that history receded, we correspondingly accorded considerably less weight to it in our constitutional jurisprudence—ancestry (outside racial, ethnic, or national classifications) and nepotism are not considered to be a suspect classification.<sup>78</sup> Presumably, then, if we similarly managed to put some distance between our histories of racial and sexual discrimination, those histories would likewise play an increasingly minimal role in evaluating future distinctions based on those categories.

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<sup>71</sup> *Rodriguez*, 411 U.S. at 28.

<sup>72</sup> 458 U.S. 718 (1982).

<sup>73</sup> See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 212 (2011) (quoting Memorandum from Lewis F. Powell, Assoc. Justice, Supreme Court of the U.S., to the Justices of the Supreme Court of the U.S. 1 (June 7, 1982)).

<sup>74</sup> Cf. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2628 (2013) (stating, in the course of striking down the Voting Rights Act, that “history did not end in 1965,” and criticizing the government for failing to demonstrate the continued relevance of the voting formulas used in 1965).

<sup>75</sup> See Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH U. L. REV. 1375, 1384 (2006).

<sup>76</sup> See *id.*

<sup>77</sup> U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States . . . .”); *id.* § 10, cl. 1 (same for states). For a discussion of the broad range of classifications these clauses were understood to prohibit at the time of their adoption, see Larson, *supra* note 75.

<sup>78</sup> See *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 562-64 (1947) (rejecting the claim that nepotism should trigger heightened judicial review).

### 3. Immutability and Irrelevancy

The final two factors in suspect status analysis are the characteristic's immutability and its irrelevance to socially legitimate goals. Both of these criteria can be traced to Justice Brennan's plurality opinion in *Frontiero v. Richardson*,<sup>79</sup> where he advocated raising sex to suspect status because "sex, like race and national origin, is an immutable characteristic . . . [and] frequently bears no relation to ability to perform or contribute to society."<sup>80</sup>

#### a. *Immutability*

Immutability refers to characteristics describing an individual that the individual cannot change or control.<sup>81</sup> One's race is inborn; one cannot simply decide to no longer be black or white. Restrictions on discrimination based on immutable characteristics appeal to us because they track our belief in individual responsibility—we should not be burdened by that which we cannot change.<sup>82</sup> Even still, the Court has rejected the notion that immutability alone is sufficient for a classification to become suspect.<sup>83</sup>

As the name implies, immutability is the most stable criterion for suspect status—but not as stable as one might think. Though immutability implies that any given individual cannot change the characteristic, it is not the case that broad categories of characteristics remain permanently immutable or mutable. Indeed, when one canvasses many of the candidates for heightened judicial scrutiny, one is struck by the surprising amount of fluidity in whether they are changeable or not.

Race is considered to be an obvious instance of an immutable characteristic.<sup>84</sup> But this is perhaps too quick—the Supreme Court has in fact recognized considerable fluidity in the construction and understanding of racial categories.<sup>85</sup> Consider the question of the "racial" nature of being Jewish or Arab. The Supreme Court was forced to grapple with this question in *Saint Francis College v. Al-Khazraji*<sup>86</sup> and *Shaare Tefila Congregation v. Cobb*,<sup>87</sup> which presented the issue of whether or not Arabs and Jews could state a racial

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<sup>79</sup> 411 U.S. 677 (1973).

<sup>80</sup> *Id.* at 686.

<sup>81</sup> *Id.*

<sup>82</sup> See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[T]he basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility . . .").

<sup>83</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (conceding that disability is immutable but rejecting its elevation to heightened scrutiny status); ELY, *supra* note 2, at 150.

<sup>84</sup> See *Frontiero*, 411 U.S. at 686.

<sup>85</sup> See generally Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999).

<sup>86</sup> 481 U.S. 604 (1987).

<sup>87</sup> 481 U.S. 615 (1987).

discrimination claim under 42 U.S.C. §§ 1981 and 1982, respectively.<sup>88</sup> In both cases, the Court found that although Jews and Arabs are both considered Caucasian today, they were seen as a separate race of people at the time of §§ 1981 and 1982's passage, and that they were thus entitled to protection.<sup>89</sup> Both cases not only recognize, but are predicated on, the possibility that racial categories might shift, and that a group that was formerly seen as racial might in a later era be seen as something else entirely.

Of course, one could retort that while the racial status of a group might change over time, for any individual person its immutability remains. That is to say, regardless of whether being an Arab is seen as "racial" or not, it is not up to any individual person whether they are seen as an Arab or not—they cannot change the fact on their own initiative. But even this may sometimes shift. Take Jewishness again. Defined as a religion, it would seem to be mutable—one can convert into it or convert away from it. But Judaism has also been seen as an ethnicity, and there has been considerable variance about whether or not one ceases to be Jewish upon conversion.<sup>90</sup> The Spanish Inquisition saw Judaism not just as a matter of personal choice, but rather as a matter of blood.<sup>91</sup> Even converts from Judaism to Christianity were seen as permanently tainted—their Judaism was not something they could wash away.<sup>92</sup> This racialized understanding of Judaism reached its most horrifying apex with the Nazi Holocaust. I do not wish to say that the ethnic identification of Jewishness is solely a result of malignant prejudice—Jewish self-identity as a collective nation or people (not "just" a religion) also enters the picture, and there are plenty of historical examples where defining Jewishness in terms of religious conscience rather than as a collective people has been a tool of anti-Semitic domination.<sup>93</sup> The point is that there is a historically shifting

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<sup>88</sup> *Id.* at 618 (holding that Jews should be considered a race under 42 U.S.C. § 1982 because they were thought to be a racial group when the statute was passed); *Al-Khazraji*, 481 U.S. at 613 (holding that Arabs were considered a separate race for the purpose of 42 U.S.C. § 1981).

<sup>89</sup> *Cobb*, 481 U.S. at 617-18; *Al-Khazraji*, 481 U.S. at 610-13.

<sup>90</sup> See GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* 31 (2002).

<sup>91</sup> See *id.* at 32-33 ("[U]nder the doctrine of *limpieza de sangre* (purity of blood), [Christians of Jewish descent] could still become victims of a form of discrimination that appears to have been more racial than religious.").

<sup>92</sup> See *id.*

<sup>93</sup> See, e.g., DIDI HERMAN, *AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS, AND ENGLISH LAW* 53-55 (2011) (commenting on English cases where wills restricting inheritance to those who did not marry outside the "Jewish faith" or of "Jewish parentage" were held to be invalid due to the vagueness of ascertaining whether someone holds Jewish "beliefs"); Ruth Gavison, *The National Rights of Jews*, in *ISRAEL'S RIGHTS AS A NATION-STATE IN INTERNATIONAL DIPLOMACY* 9, 11 (Alan Baker ed., 2011) (observing that the argument "that Jews are not a nation" but merely a religious group has been deployed against Jewish efforts to secure communal self-determination).

understanding of the degree to which a person who is born Jewish can simply elect to no longer be so.

Sexual orientation would present another example of a class whose “immutability” is shifting. Historically, one’s sexual preference was understood as an individual (pathological) choice.<sup>94</sup> The gay rights movement has invested considerable energy in changing this perception, casting sexual orientation instead as inborn and outside the control of individuals.<sup>95</sup> Indeed, while much of the discourse surrounding immutability and Jews was used to foster oppression and discrimination against them, with sexual orientation it was generally the minority itself that pressed for the characteristic to be considered immutable on the premise that it would increase sympathy and protection for gay and lesbian individuals.<sup>96</sup>

Even sex—perhaps the paradigm case for immutability—is no longer unambiguously immutable. The growing visibility of the transgender population and the ability to undergo sex-reassignment surgeries mean that one’s decision to remain male or female is technically one of individual choice.<sup>97</sup> To be sure, it is a “choice” in the sense that one’s religious faith is a choice—that is, an aspect of one’s identity that most people feel very strongly about and believe they should be able to maintain without prejudice. But there is a difference between identity characteristics that we think are exceptionally central and personal, and those that are literally immutable.<sup>98</sup> Here too “immutability” seems to be doing less work in pushing our heightened scrutiny intuition than might be assumed at first glance. Even though many “immutable” characteristics actually see considerable variance across history and changing circumstances, this evolution has done little to alter our views regarding whether any particular classification should be considered suspect.

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<sup>94</sup> See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 517-19 (1994).

<sup>95</sup> See *id.* at 507 (“Gay rights advocates writing about equal protection . . . echoed a reassuring refrain: Since homosexuality is immutable, it qualifies as a suspect classification, or at least meets one of several criteria for suspect class status under equal protection analysis. Most often this argument depended on an empirical claim that sexual orientation is either hardwired into us at birth or branded upon us so soon thereafter that it cannot be altered.”).

<sup>96</sup> See *id.* (discussing gay rights advocates’ arguments that homosexuality is an immutable characteristic based on the perception that anti-gay legislation would be easier to attack on such grounds). *But see id.* at 516-17 (criticizing the view that homosexuality is immutable as essentialist and degrading to gay persons).

<sup>97</sup> See Anne Bloom, *Rupture, Leakage, and Reconstruction: The Body as a Site for the Enforcement and Reproduction of Sex-Based Legal Norms in the Breast Implant Controversy*, 14 COLUM. J. GENDER & L. 85, 87 (2005).

<sup>98</sup> *But see* Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 681 (2001) (arguing that a trait is “constructively immutable” if, though socially constructed, it is perceived by individual persons in a given cultural place and time as immutable).

b. *Irrelevancy*

Like immutability, irrelevancy also garners its appeal from an idea of individualism—we should be appraised on characteristics that actually affect our ability to participate. It often stands against political process theories of heightened protection—it matters not whether the group is politically influential, but rather whether the trait in question fairly relates to their ability to usefully contribute to society.<sup>99</sup>

But irrelevance, as Justice Brennan indicates, is a fickle thing.<sup>100</sup> While sex often does not bear any relationship to one's ability to perform or contribute, there certainly are contexts in which a person's sex is quite relevant to legislative classifications, and courts are willing to recognize them.<sup>101</sup> This makes sex little different from most other attributes of our identity, which likewise are relevant in some contexts and irrelevant in others. Race, too, might be asserted to be permanently irrelevant—and this would also be too quick. At the most mundane level, it is presumably not seriously disputed that Will Smith's race (compared to that of, say, Mark Wahlberg) is a relevant consideration in deciding whether he should play the role of Muhammad Ali.<sup>102</sup> More controversially, to the extent that race still demarcates an important point of social differentiation, maintaining racial heterogeneity in decisionmaking bodies may be quite important both for legitimacy purposes and for optimal performance.<sup>103</sup>

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<sup>99</sup> See William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 10-11 (2010) (arguing that political powerlessness plays a minimal role in heightened scrutiny analysis compared to whether the classification has historically been rationally related to the pursuit of legitimate public policies); Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Courts Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 39 (2010) (defending an "individual fairness rationale" for heightened scrutiny which permits classifications that fairly distinguish between persons on the basis of merit).

<sup>100</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>101</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53, 64 (2001) (observing that a mother is always present at the birth of her child, which justifies holding fathers to higher standards in proving parentage); *Michael M. v. Superior Court*, 450 U.S. 464, 471-73 (1981) (upholding sex distinctions in a statutory rape law on the grounds that women are differently situated from men with respect to the risks attached to sexual activity).

<sup>102</sup> Compare *ALI* (Columbia Pictures 2001) (casting Will Smith as Muhammad Ali), with *THE FIGHTER* (Paramount Pictures 2010) (casting Mark Wahlberg as "Irish" Micky Ward).

<sup>103</sup> See, e.g., IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* 59 (1997) ("Normative judgment is best understood as the product of dialogue under conditions of equality and mutual respect. Ideally, the outcome of such dialogue and judgment is just and legitimate only if all the affected perspectives have a voice."); Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16385, 16385 (2004) (asserting that at the margins a group member with a more diverse outlook vis-à-vis other members of the group improves performance more than a candidate

In general, as societies change and evolve, different characteristics rise and fall in salience. In medieval England, the ability to accurately fire a longbow was exceptionally relevant, so much so that laws mandated that all able-bodied men engage in regular archery practice.<sup>104</sup> Today, the importance of long-range archery has waned while the significance of other skills has waxed.<sup>105</sup> This demonstrates the first way in which irrelevance is transient—most attributes sometimes matter and sometimes do not, but what sorts of traits are salient, and in what contexts, varies drastically and dramatically over time. If a formerly unimportant trait suddenly rose in social value and significance, it would be strange to permanently forbid the polity from considering it because once upon a time it was typically irrelevant to major social functioning.

But the history of sex classifications also illuminates a second element of variation around the moniker “irrelevant.” What makes sex suspicious as a ground for classification is not that sex is actually *never* relevant to social interaction. Rather, it is the frequency with which we *misattribute* relevancy to it.<sup>106</sup> Stereotypical rendering of “natural” sex differences created a welter of burdens and restrictions upon women, which bore no resemblance to their actual abilities or capacities.<sup>107</sup> This pattern of error may reasonably justify casting a critical eye on other legislative classifications based on sex.

The degree to which society systematically misattributes relevancy to a given characteristic is not static. A society that once had robust and misguided beliefs about sex roles may, with the passage of time, cease to hold these beliefs. As with prejudice, it would be cynical and fatalistic to assert that irrational stereotyping is indelible once introduced into a polity. Assuming that is not the case, it is quite possible to imagine a society that is quite adept at only considering personal characteristics to the extent they are relevant to important social projects—and is capable of doing so even when these contexts are few and far between. Even if it is rare for a person’s sex to be relevant, a society that had proven itself attentive to these infrequent contexts and

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with individually superior qualifications but whose outlook is similar to persons already present); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608 (2006) (finding that racially diverse juries outperform their racially homogenous peers and that both minority and nonminority members of the group experience the performance boost).

<sup>104</sup> See Steven Gunn, *Archery Practice in Early Tudor England*, 209 PAST & PRESENT 53, 53 (2010).

<sup>105</sup> See *id.* at 70-73.

<sup>106</sup> See ELY, *supra* note 2, at 157 (“The cases where we ought to be suspicious are . . . those involving a generalization whose incidence of counter-example is significantly higher than the legislative authority appears to have thought it was.”).

<sup>107</sup> *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

sensitive to not overextend sexist stereotyping presumably should not find the few times they do utilize sex placed under the microscope.<sup>108</sup>

## II. TRANSIENT IN THEORY, CONCRETE IN FACT: WHY HAVEN'T CLASSES BEEN UNSUSPECTED?

Gerald Gunther famously characterized strict scrutiny as “‘strict’ in theory and fatal in fact.”<sup>109</sup> To that observation we might add another: a suspect classification decision seems to be transient in theory but concrete in fact. As demonstrated above, the vast majority of the factors the Court claims to be considering when determining whether a classification is suspect are impermanent in nature.<sup>110</sup> What’s more, the Court’s own rhetoric indicates a belief that suspect status is something “extraordinary”—a rare deviation from normal democratic processes that it should be eager to limit.<sup>111</sup> So why, upon a finding that a class is suspect, does that determination appear to immediately calcify? Three reasons spring to mind.

First, the Court may simply have lacked the opportunity to revisit a group’s suspect status. While it is true that any or all of the suspect-classification factors are capable of change, it may be that none of them have yet—at least, to the degree that would encourage the Court to seriously contemplate stripping suspect classification away. Second, there may be a lack of countervailing pressure encouraging the Court to reconsider suspectness. There may simply be no interest group that believes it to be in its interest for a currently-protected class to see that protection end. Third, the doctrine may be sufficiently amorphous so that the Court feels no pressure to follow it to any particular conclusion beyond its own raw preferences. The current arrangement aligns with the majority’s policy preferences, which may be unsettled by dramatically reshuffling which classifications are accorded heightened

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<sup>108</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-27, at 1073-74 (1978) (“[A] stubborn inattention to the facts of . . . sex when they *are* relevant . . . may be almost as pernicious if unintended a form of . . . sexism as a deliberate attention to . . . sex when [it is not] relevant at all.”).

<sup>109</sup> 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 has long objected to this characterization. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361-62 (1978) (Brennan, J., concurring in part and dissenting in part) (“[O]ur review under the Fourteenth Amendment should be strict—not “‘strict’ in theory and fatal in fact’ . . . but strict and searching nonetheless.” (footnote omitted)). Recent scholarship has also challenged the “strict in theory, fatal in fact” moniker, revealing that laws reviewed under strict scrutiny are upheld roughly thirty percent of the time. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006).

<sup>110</sup> See *supra* Part I.

<sup>111</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

scrutiny. Without a clear doctrinal compunction making it apparent that the current suspect classification set is inappropriate, the Court has little reason to adjust a doctrine whose results it finds ideologically satisfactory.

A. *Lack of Opportunity*

All that the prior Part demonstrated is that the various factors courts consider when deciding whether a classification should be suspect are capable of changing. But it did not demonstrate that circumstances actually have changed sufficiently such that a group that currently receives heightened scrutiny no longer should. The absence of an unsuspecting doctrine may simply reflect a lack of opportunity to create one.

Consider race. It is of course possible to imagine a world in which racial categories are not associated with deep-seated prejudice, lack of political power, or social disabilities (among other things). Indeed, the widespread aspiration for a “post-racial” America is predicated on the feasibility of this hope.<sup>112</sup> But possibility is one thing, and reality quite another. If one thinks that racial discrimination is still a significant player in American society, or that certain races remain disproportionately excluded from the reins of political influence, then it makes perfect sense for race to remain a suspect classification for the time being (though not indefinitely into the future).

There is a fair case to be made that none of the traditionally suspect classifications—race, sex, religion, national origin, or alienage—have seen such a transformational shift in their status so as to warrant dropping them down to rational basis scrutiny.<sup>113</sup> Even granting advances in egalitarian attitudes and treatment along all these axes, the absence of any serious thought over their continued suspect status may reflect nothing more than reasonable judgment that there still exists enough strife and conflict surrounding these matters so as to make questions about their future return to normal democratic politics purely academic.

This explanation seems obvious—bordering on banal. It does not argue against unsuspecting where appropriate; at most it argues that we should not be unsuspecting *yet*. But despite how obvious this point would seem, it cannot actually explain the absence of an unsuspecting doctrine. If unsuspecting occurs when a protected group is seen as no longer being sufficiently vulnerable so as to need heightened judicial solicitude, we should see

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<sup>112</sup> See David Schraub, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L.J. (forthcoming 2017).

<sup>113</sup> One exception might be illegitimacy. Classifications discriminating against illegitimate children receive intermediate scrutiny. See *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). However, the percentage of children born out of wedlock nearly tripled between 1970 and 2002, Shirley H. Liu & Frank Heiland, *Should We Get Married? The Effect of Parents' Marriage on Out-of-Wedlock Children*, 50 ECON. INQUIRY 17, 17 (2012), and it is difficult to imagine politicians seriously contemplating reinstating discriminatory conditions on such children given how common such births are.



unsuspecting once the courts begin concluding that the particular discrimination in question no longer remains a widespread and pervasive social problem. The Supreme Court's recent race jurisprudence falsifies this hypothesis—it includes both cases which express significant skepticism regarding the continuing prevalence of (state-sanctioned) racial oppression, while simultaneously retaining a firm commitment to applying strict scrutiny to racial classifications.<sup>114</sup> I label this inconsistency “partial racial politics,” and I discuss it more thoroughly in Part IV.

There is growing indication that important social, political, and legal figures are coming to believe that the era of race as a significant social problem is over.<sup>115</sup> This is hardly a new phenomenon—Darren Lenard Hutchinson has documented American “exhaustion” with race and a public desire to declare it no longer an issue dating back to Reconstruction.<sup>116</sup> Still, the drumbeat that we now live in an effectively “post-racial” America has increased in recent years, and threatens to overwhelm alternative accounts that still see racial inequality as a serious and salient feature of American life.<sup>117</sup>

The Supreme Court's recent decisions circumscribing the Voting Rights Act are instructive.<sup>118</sup> Congress's Section 5 power under the Fourteenth Amendment is congruent with the constitutional violation it is trying to remedy.<sup>119</sup> Whether a classification is “suspect” or not matters for this inquiry because it determines what sorts of government acts are considered unlawful.<sup>120</sup> In *Board of Trustees of the University of Alabama v. Garrett*,<sup>121</sup>

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<sup>114</sup> See *infra* notes 117-23 and accompanying text.

<sup>115</sup> See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2628 (2013) (“[H]istory did not end in 1965.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“In the eyes of government, we are just one race here. It is American.”); see also John McWhorter, *Racism in America Is Over*, FORBES (Dec. 30, 2008, 2:00 PM), [http://www.forbes.com/2008/12/30/end-of-racism-oped-cx\\_jm\\_1230mcwhorter.html](http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html) [perma.cc/27EJ-8PBC].

<sup>116</sup> See generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

<sup>117</sup> See generally Deborah Jones Merritt, *Piercing the Brilliant Veil: Two Stories of American Racism*, 85 IND. L.J. 1255 (2010).

<sup>118</sup> See, e.g., *Shelby Cty.*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>119</sup> *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

<sup>120</sup> See Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 605-06 (2013) (“In practice, the Court has found inadequate tailoring in every single case that does not implicate a fundamental right or suspect class (for example, race or gender) . . . [and] tends to distinguish instances in which *judicial* protection of a right is greatest (Congress can act) from instances in which judicial protection is slight (Congress is disabled).” (footnote omitted)).

<sup>121</sup> 531 U.S. 356 (2001).

for example, the Court considered the application of Title I of the Americans with Disabilities Act (“ADA”) to state actors.<sup>122</sup> Observing that disability is not a suspect classification,<sup>123</sup> the Court held that Congress’s Section 5 power could only be exercised if there was a pattern of the most egregious forms of discrimination against the disabled—that is, discrimination so overt as to be “irrational.”<sup>124</sup> The congressional record, the Court found, was insufficient to find such a pattern existed.<sup>125</sup>

Racial discrimination is supposedly different. Strict scrutiny outlaws a far wider range of government actions, and requires a much more invasive look at motivations and effects. For example, while a state body might rationally refuse to hire a disabled employee because of the financial impact of accommodating her,<sup>126</sup> such a justification would never pass muster under strict scrutiny analysis. Hence, while evidence of such conduct could support remedial authority in the racial context, it could not do so for legislation relating to disability. More generally, the lesson of *Garrett* is that the degree of power vested in Congress through Section 5 is directly proportional to the constitutional scrutiny directed at the classificatory schema it targets.<sup>127</sup>

For many years, this distinction was seemingly born out in the Court’s Section 5 jurisprudence. The Court upheld congressional proscriptions on literacy tests even though such tests were not inherently unconstitutional under the Fourteenth Amendment,<sup>128</sup> because Congress could on its own initiative decide that such tests posed a barrier to the equal participation of racial minorities.<sup>129</sup> The Court was considerably more skeptical of Congress’s effort to circumscribe generally applicable state laws that substantially burden

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<sup>122</sup> 42 U.S.C. §§ 12111-12117 (2012). The statute could not be justified on interstate Commerce Clause grounds because that grant of power is superseded by the Eleventh Amendment, which generally forecloses suits for monetary damages against non-consenting states. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000).

<sup>123</sup> *See Garrett*, 531 U.S. at 366 (reviewing the Court’s decision in *Cleburne* rejecting the argument that classifications based on disability are suspect, and therefore subjecting the classification to rational basis review).

<sup>124</sup> *Id.* at 367-68.

<sup>125</sup> *See id.* at 369-70.

<sup>126</sup> *See id.* at 372.

<sup>127</sup> *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (concluding that the power granted to Congress under Section 5 corresponds to the diminution of state power caused by the Reconstruction Amendments’ proscriptions); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1, 7 (2003) (arguing that *Garrett* defines the scope of the right Congress seeks to protect through Section 5 “as the standard that a litigant would have to satisfy in order to prevail in a lawsuit alleging a violation of the Equal Protection Clause”).

<sup>128</sup> *See Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (upholding the constitutionality of electoral literacy tests in certain circumstances).

<sup>129</sup> *See Katzenbach v. Morgan*, 384 U.S. 641, 654-56 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

religious practice,<sup>130</sup> as such laws are subject to only rational basis review.<sup>131</sup> It found that there had been no widespread pattern of legislation motivated by “religious bigotry,” and thus RFRA’s wide sweep could not be justified as a “preventive” measure.<sup>132</sup>

A similar division manifested in the Court’s ADA decisions. As noted above, the Court in *Garrett* struck down the application of Title I of the ADA as beyond Congress’s Section 5 authority given the paucity of irrational state discrimination against the disabled.<sup>133</sup> Three years later, however, the Court upheld the application of Title II<sup>134</sup> against the states in *Tennessee v. Lane*.<sup>135</sup> Unlike Title I, which concerned employment discrimination against the disabled, Title II dealt with access to government facilities.<sup>136</sup> Consequently, the targeted infringements included fundamental rights “subject to more searching judicial review” than that provided for in *Garrett*.<sup>137</sup>

Hence, the connection between the scope of Congress’s remedial authority and the level of scrutiny accorded to the protected right was seemingly well established. In *City of Boerne v. Flores*,<sup>138</sup> the Court noted that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>139</sup> The corollary, as expressed in *Lane*, is that “[w]hile § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent.”<sup>140</sup>

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<sup>130</sup> See Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>131</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 885-89 (1990) (rejecting the suitability of the compelling state interest test to free exercise claims); see also Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23, 24 (2006) (describing the holding in *Smith* as being that “free exercise challenges to neutral, generally applicable laws warrant only rational basis review”).

<sup>132</sup> *Boerne*, 521 U.S. at 530.

<sup>133</sup> See *supra* notes 121-25 and accompanying text.

<sup>134</sup> 42 U.S.C. §§ 12131-12165 (2012).

<sup>135</sup> 541 U.S. 509, 533-34 (2004).

<sup>136</sup> Compare 42 U.S.C. § 12112(a) (2012) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”), with 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

<sup>137</sup> *Lane*, 541 U.S. at 522-23.

<sup>138</sup> 521 U.S. 507 (1997).

<sup>139</sup> *Id.* at 530.

<sup>140</sup> *Lane*, 541 U.S. at 523.

This doctrinal framework has been seriously strained by the Court's recent decisions challenging the Voting Rights Act of 1965<sup>141</sup> ("VRA"). The Court's Section 5 analysis in *Shelby County*, for instance, bore more in common with *Garrett* and rational basis discrimination than it did with prior cases addressing Congress's remedial authority when the alleged wrong is subjected to strict scrutiny. The opening sentence of the majority opinion declares that "[t]he Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem."<sup>142</sup> The record compiled by Congress, the Court held, did not show "anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965."<sup>143</sup> But while the pattern of Jim Crow era discrimination certainly was extraordinary, strict scrutiny does not forbid just extreme or exceptional examples of racial discrimination. It forbids all racial discrimination, even that which is ordinary, benign, subconscious, mixed with valid motivations, or suffused with good intentions.<sup>144</sup>

The Court's decisions in *Shelby County* and *Northwest Austin v. Holder*<sup>145</sup> do not make any mention of the type of right protected by the VRA. Instead, they rely heavily on perceived changes in racial dynamics, particularly in the South, which materially altered the racial situation Congress was redressing through the VRA.<sup>146</sup> The Court conceded that many of the "great strides" in achieving racial parity in voting were attributable to the VRA, but complained that "the Act has not eased the restrictions in § 5 or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features . . . have grown even stronger."<sup>147</sup> "[H]istory," the Court admonished, "did not end in 1965."<sup>148</sup> The VRA "imposes current burdens and must be justified by current needs."<sup>149</sup>

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<sup>141</sup> Pub. L. No. 89-110, 79 Stat 437 (codified as amended in scattered sections of 52 U.S.C.).

<sup>142</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013).

<sup>143</sup> *Id.* at 2629.

<sup>144</sup> See, e.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2426-28 (2013) (Thomas, J., concurring) (contending that strict scrutiny bars the use of race even where it is arguably socially beneficial, motivated by good intentions, or advantageous to racial minorities); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (rejecting any constitutional distinction between benign and invidious use of race); *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (rejecting judicial deference to legislative enactments even partially motivated by race, even where there were other considerations also driving the action).

<sup>145</sup> 557 U.S. 193 (2009).

<sup>146</sup> *Northwest Austin*, 557 U.S. at 202 ("Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.").

<sup>147</sup> *Shelby County*, 133 S. Ct. at 2626.

<sup>148</sup> *Id.* at 2628.

<sup>149</sup> *Northwest Austin*, 557 U.S. at 203.

Regardless of whether one descriptively agrees with the Court, all of these arguments would apply with equal force against the continuing merit of strict scrutiny. Strict scrutiny, like the VRA, is acknowledged to be an “extraordinary” remedy that is reserved only for the gravest patterns of unconstitutional discrimination.<sup>150</sup> Despite the “great strides” in achieving racial parity, the Court has not eased the stringent criteria for withstanding strict scrutiny review—like Congress with the VRA, it has strengthened them instead.<sup>151</sup> Strict scrutiny imposes serious burdens on democratic legislative action, and these burdens, as much as any others, seemingly must be justified by “current needs.”<sup>152</sup>

Despite these parallels, the Court has given no indication that its narrow view of Congress’s authority to remedy racial discrimination foreshadows a similar narrowing of the strict scrutiny doctrine.<sup>153</sup> Even as the Section 5 and strict scrutiny doctrines have fallen out of alignment, the idea that race remains a suspect class because racial discrimination remains quite prevalent continues unabated. At the very least, the continued existence of racial prejudice can at least be asserted without embarrassment as a rationale to avoid the day of reckoning. But the problem with this argument is just that—unless one thinks that racial discrimination will be pervasive in perpetuity, it only forestalls the question of how courts will behave once they believe racial discrimination has sufficiently dissipated. The next two reasons why unsuspecting may not occur, by contrast, demonstrate why suspect classes may remain durable even in the face of a genuine and undisputed shift in the status and social salience of those classifications.

#### B. *Lack of Incentive*

A second reason why suspect status may appear permanent is the lack of incentive for motivated interest groups to support any given classification’s

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<sup>150</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445-46 (1985) (objecting to standards which would label too many classifications “suspect”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1972) (describing suspect status as an “extraordinary protection from the majoritarian political process”).

<sup>151</sup> See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (concluding that under strict scrutiny college administrations receive no deference as to whether the use of race is necessary to achieve their compelling interest in diversity); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225-26 (1995) (applying strict scrutiny to benign federal racial classifications, which previously received only intermediate scrutiny).

<sup>152</sup> See *infra* Section III.A.

<sup>153</sup> The Justices also do not seem to acknowledge the contradiction between their assessments of America’s racial situation in their Section 5 cases and their equal protection cases. Compare *Shelby County v. Holder*, 133 S. Ct. 2612, 2631-32 (2013) (Thomas, J., concurring) (declaring that America had left behind the era of Jim Crow), with *Fisher*, 133 S. Ct. at 2429-30 (Thomas, J., concurring) (accusing a sizeable portion of America’s political and legal elite of being neosegregationists due to their support for affirmative action).

removal. To be sure, conservative and reactionary political actors strenuously opposed the creation of enhanced protections for vulnerable minority groups.<sup>154</sup> But once these safeguards had been successfully entrenched in legal doctrine, this opposition has evaporated almost entirely—indeed, conservatives have come among the most vocal cheerleaders for aggressive implementation of suspect classification doctrine. What explains the shift?

The most straightforward answer is that the political constituency willing to support overt racial or sexual discrimination of the sort that still prevailed in America at the inception of our strict scrutiny regime has more or less disappeared.<sup>155</sup> Heightened scrutiny serves as a stand-in for enjoying substantive constitutional protection; an attack on the suspect status of race or sex would invariably be seen as an attack on the hard-won constitutional standing of women and racial minorities. Since there are no groups of note that wish to return to the days of Jim Crow or coverture marriage, there is no need to take down heightened scrutiny for classifications few Americans remain interested in making.

Still, it is not the case that there are no contemporary attacks on cherished elements of the civil rights legacy. The Court severely limited the scope of the VRA in *Shelby County*, for example, culminating years of attacks that the preclearance provisions were an anachronism whose time had passed.<sup>156</sup> But unlike the VRA, heightened scrutiny is not seen as posing a substantial bar to

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<sup>154</sup> See, e.g., Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179, 246 (1967) (characterizing *Brown v. Board* as “an unwarranted exercise of non-existent authority”); Sekou Franklin, *The Elasticity of Anti-Civil Rights Discourse: Albert Gore, Sr., Richard Russell, and Constituent Relations in the 1950s and 1960s*, 20 SOC. IDENTITIES 90 (2014) (documenting the variety of rationales given by Southern politicians in opposition to civil rights protections). Similar opposition can be seen today in debates over whether to promote sexual orientation to a suspect or quasi-suspect classification. See, e.g., Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 62-95 (making the case against providing suspect status to sexual orientation); George W. Dent, Jr., *Straight is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEXAS REV. L. & POL. 359 (2011) (arguing that discrimination against homosexuals is legally and morally valid).

<sup>155</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: 1960-1990*, at 117 (1994) (observing that outside certain sectors of the far-right there now exists a consensus amongst Americans of all persuasion in favor of the concept of racial equality).

<sup>156</sup> See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1730-31 (2004) (arguing that “the combination of section 2 of the Voting Rights Act, the protections of the Fourteenth Amendment, and the fact of being in the process and at the table” may be sufficient to protect minority voters even if section 5 of the VRA was allowed to lapse); Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J. L. & PUB. POL’Y 41, 42 (2007) (arguing that the current form of the VRA “rests on a racism-everywhere vision” and “[w]hile that perspective was accurate in the 1960s, it no longer is”).

conservative political priorities regarding racial or sexual politics. Sometimes it has proven positively useful to conservative ends, such as in affirmative action cases. But for the most part, it is simply irrelevant—by and large, racially-charged conservative priorities can be achieved without explicit racial classifications (think, for example, of felon disenfranchisement laws or voter identification regulations), and the same is true with respect to sex (particularly since pregnancy is not considered to be a sex-based classification).<sup>157</sup>

Overt classifications are necessary to maintain extremely prejudiced political institutions that cannot countenance a single member of a disfavored group breaching its walls. If the political demand is to preserve marriage as *purely* heterosexual, then it is necessary to have a blanket proscription on gay marriage; if the political demand is to preserve an *absolutely* lily-white college, then it is necessary for schools to be officially segregated. However, if one is willing to accept some amount of minority inclusion, then it is relatively easy to preserve at least a slant in favor of dominant majorities without resort to formal classificatory bars. Laws can be written along facially neutral and reasonable criteria, which nonetheless track preexisting in-group advantages.<sup>158</sup> Or lawmakers can rely on discretionary action, knowing that ambiguity is typically resolved in favor of dominant groups.<sup>159</sup>

And there is some measure of evidence indicating that this indeed is where the battle lines have shifted. Even internally, almost everyone believes in core liberal commitments regarding equal opportunity regardless of characteristics like race or sex.<sup>160</sup> Unfortunately, these are coupled with a lingering core of

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<sup>157</sup> See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>158</sup> See, e.g., Cheryl I. Harris, *What the Supreme Court Did Not Hear in Grutter and Gratz*, 51 *DRAKE L. REV.* 697, 708 (2003) (arguing that many colleges use “ostensibly race-neutral criteria that in effect overwhelmingly benefit whites” and that these criteria “are already built into the system in a way that makes them appear to be neutral and routine”); Deborah M. Kolb, *Negotiating in the Shadows of Organizations: Gender, Negotiation, and Change*, 28 *OHIO ST. J. ON DISP. RESOL.* 241, 255 (2013) (arguing that there are “powerful yet often invisible barriers to women’s advancement that arise from cultural beliefs about gender, as well as workplace structures, practices, and patterns of interaction that inadvertently favor men. [These] gender practices can appear neutral and natural on their face, but they can result in different experiences for, and treatment of, women and men, and, for different groups of women and men”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1142-43 (1997) (observing that once the Court began striking down status-based discriminatory classifications, lawmakers shifted to facially neutral legislation as a means of achieving the same results).

<sup>159</sup> See John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 *AM. PSYCH.* 867, 876 (1980) (“A great deal of research suggests that ambiguous behaviors tend to be perceived in a biased manner.”).

<sup>160</sup> See, e.g., OMI & WINANT, *supra* note 155, at 117; Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 *N.Y.U. L. REV.* 992, 999 (1997) (“[The] struggle [for racial equality] is far from over, but it has achieved a hard-won consensus among right-thinking

internalized prejudice.<sup>161</sup> The dissonance between these two sentiments is resolved when persons can find “neutral” reasons to cover for discriminatory behavior, convincing themselves and others that their decisions are not based on prejudice.<sup>162</sup> This phenomenon (dubbed “aversive racism” in the racial context, though it is not restricted to race)<sup>163</sup> not only does not need to utilize explicit discriminatory classifications, but it openly (and honestly) opposes them. More fundamentally, such classifications are the antithesis of the sort of credible, neutral rationales that can hold together both the true belief in liberal egalitarianism alongside the sustained subconscious prejudicial attitudes.

But a focus only on the political and legal right only provides half of the picture. What about liberals and progressives? In general, the main focus of these groups in equal protection is not unsuspecting but its opposite—attempting to secure currently unprotected groups the benefits and protections of strict or intermediate scrutiny. Voluminous literature exists supporting bringing in everyone from targets of economic regulation to the poor to those without access to adequate healthcare under the ambit of some form of heightened scrutiny.<sup>164</sup> Suspect status is the golden ticket out of minimal and relatively toothless rational basis review. Meanwhile, the Court’s continued retreat from meaningful disparate impact analysis—even in cases where it seems clear that race was part of the motivation for a law’s passage—has left suspect status as the rump remainder of a formerly robust array of Fourteenth Amendment protections.

Suspect status’s position as the highest-profile means of obtaining significant Fourteenth Amendment protection can cause advocates to return to

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Americans that racial discrimination is wrong, as slavery was before it.” (quoting Rep. Gerry Studds)).

<sup>161</sup> See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *PSYCHOL. SCI.* 315, 317-18 (2000) (noting a rise in levels of aversive racism corresponding to diminishing conscious prejudice).

<sup>162</sup> See, e.g., *id.* at 315; Samuel L. Gaertner & John F. Dovidio, *The Subtlety of White Racism, Arousal, and Helping Behavior*, 35 *J. PERS. SOC. PSYCHOL.* 691 (1977). For a sustained discussion, see Schraub, *supra* note 45, at 1294–96.

<sup>163</sup> See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 *ADV. EXPERIMENTAL SOC. PSYCHOL.* 1, 3 (2004).

<sup>164</sup> See, e.g., Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 *U. PA. L. REV.* 1277, 1279 (1993) (promoting heightened scrutiny for laws which discriminate against the poor); Wendy K. Mariner, *Access to Health Care and Equal Protection of the Law: The Need for a New Heightened Scrutiny*, 12 *AM. J.L. & MED.* 345, 361-68 (1986) (arguing for heightened scrutiny for laws creating inequitable access to health care). Conservatives, too, have been known to urge expanding suspect classification doctrine to encompass their particular interests. See *Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, J., concurring) (urging heightened scrutiny for economic regulations that “pillage” from one group to redistribute to another).



its ambit even where it would seem to be counterproductive.<sup>165</sup> Trained to think of suspect status as the pinnacle of equal protection and with few other judicial tools at their disposal, advocates for women, racial minorities, or immigrants are unlikely to support removing their constituents from its protection (though they might of course argue that it was wrongly extended to members of the majority).<sup>166</sup> In Part IV, I will argue that this judgment is becoming harder and harder to sustain as suspect status begins to cover nothing *but* inclusion-oriented legislation.<sup>167</sup> Nonetheless, it certainly is an understandable instinct.

The result is an uneasy doctrinal equipoise. Liberals view heightened scrutiny as the only way to secure meaningful equal protection review, and are justifiably apprehensive of what laws may be passed in a world where formerly-suspect classifications are only subjected to minimal rational basis review. Conservatives honestly oppose overt discriminatory classifications and find that they can pursue their preferred policies regarding racial or sexual issues without usually conflicting with heightened scrutiny review. With no one possessing any strong interest in opposing the perpetuation of heightened scrutiny, there is no occasion for the Court to revisit the issue.

### C. *Lack of Clarity*

A third reason why we do not see unsuspecting may be the opaque nature of suspect classification doctrine itself. As Part I alludes to, this doctrine is more or less an incomprehensible mess.<sup>168</sup> It is well-nigh impossible to determine what causes a classification to be properly categorized as suspect in the first place, much less what sort of evidence would clearly shift a currently-suspect class back into the realm of normal democratic politics. This is so even though seemingly all of the candidate-factors for suspect status are theoretically impermanent and would thus allow for such a change.

There is virtually no agreement as to which of the many stated suspect status factors are truly necessary or sufficient.<sup>169</sup> Moreover, the desire of the Court

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<sup>165</sup> See Schraub, *supra* note 45, at 1286-87 (“[L]egal argument is often metaphorical, and that attribute often intoxicates legal actors into forgetting the motivating vision for the claim in favor of superficial poetry. Where the idea or founding metaphor commands more loyalty than the ‘substantive vision’ that inspired it, a sticky slope may ensue.”); David A. Strauss, *The Supreme Court and the Social Bases of Self-Respect* (Jan. 31, 2015) (unpublished manuscript) (contending that *Carolene Products*-style judicial protection is the primary means through which a group can come to be “protected”). See generally Schraub, *supra* note 40.

<sup>166</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (dismissing as “untenable” the majority’s view that classifications burdening racial majorities should be treated identically to those burdening racial minorities); *infra* notes 303-05 and accompanying text.

<sup>167</sup> *Infra* Part IV.

<sup>168</sup> See *supra* Section I.A.

<sup>169</sup> See *supra* note 37.

for “symmetry” in its equal protection doctrine (protecting men in the same way as women, or whites in the same way as blacks) muddies the water even more.<sup>170</sup> If suspect status should fall away as groups gain sufficient political power, for example, how much more political power do *whites* need to demonstrate before they stop receiving strict scrutiny? And if political power is zero-sum, any gain in one group’s political power results in the diminution of others’—is there ever a stable equilibrium where no racial group is not politically powerless (or at least, less politically powerful than whites are now)? Perhaps the right approach is that, though the protections themselves are applied symmetrically, the decision as to whether protection exists at all tracks the status of the least-well-off group. This is undoubtedly how race received heightened scrutiny in the first place, though it also illuminates the sharp tension in the entire idea of equal protection symmetry.<sup>171</sup> In any event, these concerns demonstrate just how little the doctrine tells us about the proper resolution of these sorts of questions, and correspondingly the relative impotence of the supposed black-letter factors in imposing any serious constraints on future decisions.

The opaqueness of suspect classification doctrine blocks unsuspecting for two reasons. First, to the extent that legal doctrine can compel judicial actions, the existence of a clear disharmony between the current crop of suspect classifications and the surrounding legal doctrine could help overcome the “political” factors encouraging the maintenance of perpetual suspect classes.<sup>172</sup> It is widely, though not universally, believed that judges will take actions at odds with their own personal beliefs where they accept that the law requires it.<sup>173</sup> If it became apparent that a particular suspect classification no longer fit

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<sup>170</sup> See Hutchinson, *supra* note 37, at 638 (“[I]n recent case law, the Court has applied heightened scrutiny ‘symmetrically.’ In other words, once a subordinate class successfully establishes that the discrimination it faces warrants exacting judicial scrutiny, the Court applies heightened scrutiny symmetrically and extends judicial solicitude to any individual who encounters discrimination based on the ‘same’ trait as members of the subordinate class.” (footnote omitted)); Strauss, *supra* note 25, at 168 (“Under the doctrine of symmetry, African-Americans receive strict scrutiny but so do whites. Women receive intermediate scrutiny but so do men.”).

<sup>171</sup> See 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.”).

<sup>172</sup> See *supra* Part II.B.

<sup>173</sup> See, e.g., Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 992 (2009) (“Judges and justices are deeply socialized, beginning with their training as law students, to believe that there are legal norms independent of personal preference and that judges have an obligation to do what the law requires.”); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 786 (2008) (citing opinions where judges registered disgust at laws they felt compelled to uphold—such as the *Griswold* and *Lawrence* dissents—as examples of how “interpretive

within the broader understanding of the doctrine, a judge might be compelled to remove it (or at least articulate specific grounds for maintaining its inclusion).

This compulsion only exists, however, if the law is clear enough to impose a felt demand upon the judiciary. Where legal doctrine is ambiguous, it cannot compel determinate outcomes.<sup>174</sup> The ambiguous nature of suspect classification law prevents the emergence of a doctrinal *compulsion* to pull a group out of suspect status. The doctrine simply is not cohesive enough to render a prior decision that a class or classification is suspect obviously wrong (or no longer true)—there is not a stable doctrine to measure the current state of affairs against. If judges are content with the results of the current doctrine (or concerned enough about the fallout from any change), and black-letter rules are unable to provide much of a constraining force one way or the other, we should not expect to see unsuspecting occur.

Even if one does not believe that judges have any extra-legal preferences regarding the composition of our suspect classifications, the doctrinal ambiguity also bars unsuspecting because it weakens the case for overturning prior precedents. One prominent basis for overruling a precedent is that it has become inconsistent with other rulings by the same court.<sup>175</sup> A litigant seeking to unsuspect gender, for example, would want to argue that *Craig v. Boren*<sup>176</sup> is no longer compatible with the broader body of suspect classification doctrine. If the operative principles of suspect classification doctrine are not discernible, however, it will be hard to convince judges that there exists a “special justification” permitting deviation from stare decisis.<sup>177</sup>

To be sure, there are reasons to question whether normal principles of stare decisis should control in the suspect classification field, given that the

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theories sometimes make a difference.”). *But see* Lee Epstein & Jack Knight, *A Strategic Account of Judicial Decisions*, in *THE CHOICES JUSTICES MAKE* 1, 1–18 (1998) (offering a “strategic” account of judicial decision-making where judges sometimes sacrifice short-term policy objectives in order to achieve long-term goals); Richard A. Posner, *A Political Court*, 119 *HARV. L. REV.* 32, 50–51 (2005) (arguing that a judge might have a “major” preference in favor of a particular interpretative theory that overrides a “minor” preference for one policy outcome over another).

<sup>174</sup> Thus far, at least, there is agreement between legal indeterminists and legal positivists. Compare H.L.A. HART, *THE CONCEPT OF LAW* 126–32 (2d ed. 1994) (recognizing the existence of certain cases where straightforward application of legal rules is insufficient to yield a single, determinate outcome), with Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 18 (1984) (noting that high levels of ambiguity or abstraction within legal rules prevent them from directing legal outcomes).

<sup>175</sup> See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53, 68 (1982).

<sup>176</sup> 429 U.S. 190, 197–98 (1976) (applying heightened scrutiny to gender classifications).

<sup>177</sup> See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

determinative questions are factual rather than legal.<sup>178</sup> But bereft of the normal tools of legal analysis, judges are likely to fall back on what they know, and adherence to precedent provides a legalistic rationale for decisions even when intervening social or doctrinal developments would render the outcome incoherent if it were being announced in the first instance.<sup>179</sup>

### III. AGAINST PERPETUAL SUSPECT CLASSES

Despite the impermanence of nearly all of the factors that play into a determination of suspect status, there is no case that even suggests how a currently suspect classification might someday lose that designation. Rendering a classification suspect is by all appearances a permanent designation. This is a mistake. The existence of perpetual suspect classes is not just at odds with its own antecedent doctrine, it stands in sharp conflict with important constitutional values. Perpetual suspect classes are fundamentally undemocratic, permanently stripping certain social problems from democratic resolution without constitutional foundation. Moreover, if suspect classification is a permanent designation, it likely will hinder emergent claimants from securing heightened scrutiny review—even if they have a better claim to such review given contemporary circumstances than other groups already “grandfathered” in. Finally, the instinct behind perpetual suspect classes seems to presume that strict scrutiny is always superior to normal democratic processes in protecting “vulnerable” groups. This presumption is increasingly unsteady, as strict scrutiny doctrine regularly acts to countermand the fruits of minority groups’ otherwise successful integration into legislative politics.

#### A. *Democratic Tensions*

Suspect classes lead to strict (or sometimes intermediate) scrutiny. The result is that many laws, which likely would pass constitutional muster under normal, rational basis review, are instead struck down because of the particular classification they utilize. Of course, there is nothing inherently problematic about the federal judiciary striking down laws as unconstitutional. But it is generally believed that this power should be the exception, not the rule. American laws carry with them a “presumption of constitutionality,” whereby courts are instructed to lean in favor of allowing the democratic process to take its course, rather than imposing their own will through the power of judicial

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<sup>178</sup> See generally Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013) (identifying and criticizing the judicial practice of giving factual determinations precedential value).

<sup>179</sup> See Schraub, *supra* note 45, at 1303 (identifying how repeated use of precedent can “launder” legal decisions whose vitality would seemingly be imperiled by changes in surrounding doctrine).

review.<sup>180</sup> Recognizing that the creation of suspect classes will greatly elevate the judiciary's role at the expense of democratically accountable actors, the Supreme Court has described the creation of a suspect classification as something "extraordinary," a deviation from normal political processes that should be reserved only for exceptional cases.<sup>181</sup> The presumption is that aggrieved groups should generally find their redress through the ballot box, not the courthouse.<sup>182</sup>

Presumptions are just that—presumptions—and certainly can be rebutted given particular factual contexts that demonstrate a constitutional infirmity.<sup>183</sup> But that is not how modern suspect class doctrine operates. If a group is discrete and insular, but nonetheless happy, content, and well-liked by surrounding society, it is altogether unclear why they need any special shield from normal democratic politics. In a democracy, certain groups lose—sometimes even lose consistently—and it is unclear why that is worrisome unless they are losing not because of the merits of their position, but because they are the subject of irrational dislike or prejudice from their fellows. A history of discrimination, which does not translate into any present-day deprivation or social salience, is just that—history. One could tell similar tales for immutability and irrelevancy—either they are being utilized in ways that cause some sort of morally intolerable social stratification, or they are not. And in the latter case, it is unclear why they should be the source of any special judicial concern. It is only where there are deep and seemingly intractable barriers to a particular group securing equal status in the public sphere that there is an actual, extant problem that may demand judicial resolution.<sup>184</sup>

It is true that we can imagine forms of discrimination that are not currently occurring, nor seem seriously at risk of occurring, but which still would strike us as morally intolerable if they were to be enacted (a ban on college

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<sup>180</sup> *O'Gorman and Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931) (“[T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.”).

<sup>181</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (describing the creation of a suspect class as providing for “extraordinary protection from the majoritarian political process”). *See also* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

<sup>182</sup> *See Rodriguez, supra* note 50, at 48 (arguing that once demographics transition a group out of being a relatively powerless minority and into a relatively powerful political force, “it is on such power, rather than protection by the courts, that such groups should be expected to rely upon to advance their interests”).

<sup>183</sup> *See* Randy Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1483 (2008).

<sup>184</sup> *See* Alexander, *supra* note 16, at 155-56 (observing that the existence of widespread social deprivation sharply elevates, and possibly defines, the moral peril of discrimination, which reinforces this injustice).

attendance by redheads, for example).<sup>185</sup> But despite (or perhaps because of) the undoubtedly widespread agreement that such a policy would be a grave breach of egalitarian norms, we do not treat hair color classifications as on par with racial classifications.<sup>186</sup> Descriptively, theoretical concerns about potential discrimination are easily trumped by actual concerns about problems needing resolution right now.<sup>187</sup> And normatively, even theoretically wrongful discrimination is less likely to demand an official legal response when it occurs rarely or idiosyncratically, not in such a way that seriously threatens the victim's full inclusion in society.<sup>188</sup>

The current suspect classification doctrine is attentive to none of these concerns. It is maximalist—once a classification is elevated to suspect status, it is permanently accorded heightened scrutiny regardless of how social facts on the ground change. But the importance of these social facts to the suspect class inquiry counsels minimalist decisions, in order to give courts the flexibility to adopt their doctrine to changes in circumstances.<sup>189</sup> We have ample democratic reasons to be skeptical of judicial doctrines that permanently interpose aggressive judicial review into areas of law long after the original factual predicates for the intervention have faded.

The discussion over modern strict scrutiny doctrine, of course, has not been inattentive to the counter-majoritarian dilemma.<sup>190</sup> *Carolene Products* introduced the concept of suspect classifications, but it was explicitly framed

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<sup>185</sup> See *id.* at 159 (“When a person is judged incorrectly to be of lesser moral worth and is treated accordingly, that treatment is morally wrong regardless of the gravity of its effects.”).

<sup>186</sup> See Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 325-26 (2013).

<sup>187</sup> See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 113 (2000) (“[I]n political communication our goal is not to arrive at some generalities, certainly not generalizations about social interaction or principles of justice. Instead, we are looking for just solutions to particular problems in a particular social context.”).

<sup>188</sup> See Alexander, *supra* note 16, at 163 (“Where harmful social effects will ensue from bias, given the numbers and group characteristics, there is probably a case for legally prohibiting biased choices in certain realms otherwise left to private choice, particularly the economic realm.”).

<sup>189</sup> See Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 17 (1996) (“[M]inimalism might make special sense when circumstances will change in large and relevant ways in the near future. Facts and values can go in unanticipated directions, thus rendering anachronistic a rule that is well-suited to present conditions.” (footnote omitted)).

<sup>190</sup> Compare, e.g., Lino Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL’Y 165, 175-77 (2000) (criticizing modern Fourteenth Amendment jurisprudence as illegitimately usurping democratic authority), with Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1662-64 (2005) (defending strict scrutiny both because it reduces error costs for especially grave constitutional violations and because it targets a subset of governmental actions where there is a particularly robust pattern of unconstitutional behavior).

as an exception: ordinary regulations governing things like filled milk should be left to Congress's sound discretion.<sup>191</sup> Critics of the Warren Court's expansive view of the judicial role warned that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."<sup>192</sup> The major defenses of our civil rights jurisprudence similarly begin by noting the importance of respecting democratic values and the risks of permitting judges to substitute their own judgment for that of the popular majority.<sup>193</sup>

Judicial review may be inherently troublesome because, in a democracy, thwarting the will of the majority may be inherently troublesome.<sup>194</sup> But it is also problematic for a more practical reason: each time the judiciary chooses to invalidate legislation, it creates "new disabilities for democratic government."<sup>195</sup> Laws are enacted to solve problems, and judicial intervention restricts the avenues the legislature can use to pursue that goal. Strict scrutiny is by design broad in its sweep. It is a prophylactic doctrine that accepts the risk that necessary or beneficial laws will be struck down because of the perceived paramount necessity of blocking their malign or counterproductive counterparts.<sup>196</sup> That tradeoff might well be justified if hostile sentiment against the protected class is sufficiently pervasive.<sup>197</sup> But once the picture

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<sup>191</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (concluding that because the question of whether filled milk should be regulated is "at least debatable," it is a question for Congress).

<sup>192</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2nd ed. 1986).

<sup>193</sup> ELY, *supra* note 2, at 5 (stating that the claim that constitutional doctrine is inconsistent with democratic values "is a charge that matters").

<sup>194</sup> Sunstein, *supra* note 189, at 37 ("From the standpoint of deliberative democracy . . . courts should avoid foreclosing the outcomes of political deliberation if the preconditions for democratic deliberation have been met.").

<sup>195</sup> Robert H. Bork, Commentary, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 697.

<sup>196</sup> See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("[C]lassifying persons according to their race is *more likely* to reflect prejudice than legitimate public concerns . . ." (emphasis added)); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 941-42 (1999); Schraub, *supra* note 112 (manuscript at 40-45); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 204-05 (1988).

<sup>197</sup> See Roosevelt, *supra* note 190, at 1664 (noting that because racial classifications "have been used so frequently for improper purposes, a decision rule that strikes down almost all such laws will invalidate many unconstitutional laws and very few legitimate ones"); Schraub, *supra* note 112 (manuscript at 40-45) ("If racism is rampant in society, by contrast, it is far more likely that the average use of race by a decisionmaker will be malignant in motive or effect (regardless of whether it is publicly characterized as salutary or hostile).").

becomes complex enough to at least allow us to imagine a democratic body making legitimate legislative choices relating to suspect characteristics, courts who wish to maintain heightened scrutiny review “should provide some justification for why the elected bodies’ weighing of costs and benefits is not to be trusted.”<sup>198</sup>

The process-defect school of constitutional law allows for stringent judicial review and the reversal of majoritarian decisions because of blockages that are preventing the democratic process from functioning properly. Unless we think that a democracy will always be subject to these blockages (and the same types of blockages), though, this is a temporary justification—the goal of judicial review is to transition society into a position where democratic decisionmaking is no longer infected by process-destroying biases or prejudices.<sup>199</sup> Strict scrutiny is a means to that goal, but it cannot be an end without sacrificing the very representation-reinforcing justifications that give it life in the first place.

#### B. *Suspect Classification as Zero-Sum*

Since the mid-1970s, the list of suspect classifications “has been in stasis.”<sup>200</sup> After establishing that alienage,<sup>201</sup> sex,<sup>202</sup> and illegitimacy<sup>203</sup> (among others) all receive some form of heightened review, the Supreme Court stopped elevating new classifications to suspect status.<sup>204</sup> In theory, this should have nothing to do with suspect status being permanent. Old classifications can keep their perch while an indefinite number of new groups are granted heightened judicial review as circumstances warrant.<sup>205</sup> Indeed, at first blush

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<sup>198</sup> Daniel P. Tokaji, *Desegregation, Discrimination and Democracy: Parents Involved’s Disregard for Process*, 69 OHIO ST. L.J. 847, 850 (2008); see also Goldberg, *supra* note 41, at 504-05 (“If pursued to its logical end, [the political powerlessness] inquiry could actually support removal of traits such as race and sex from the list of suspect classifications, contrary to the Court’s expressed intent, in light of the substantial legislation prohibiting differential treatment based on race and sex.” (footnote omitted)).

<sup>199</sup> Cf. Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O’Connor’s Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 550-51 (2003) (arguing that *Grutter’s* 25 year “sunset” for affirmative action programs was an attempt to craft a “constitutional transition period” to move us from the status quo to an ideal constitutional state of affairs).

<sup>200</sup> EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 24 (1999).

<sup>201</sup> *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

<sup>202</sup> *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

<sup>203</sup> *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

<sup>204</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (deciding that the disabled do not receive heightened scrutiny); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (deciding that the elderly do not receive heightened scrutiny).

<sup>205</sup> See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 YALE L.J. 485, 562 (1998) (“[T]he fact that many groups are deserving of the courts’ protection is not, in itself, a



the permanent nature of suspect status might aid the claims of emergent groups. The fact that, for example, racial minorities have secured a great many political and social victories while maintaining suspect status would seemingly dissipate arguments against according strict scrutiny to anti-gay classifications based on the latter group's own increasing political clout.<sup>206</sup>

Yet, in practice, the permanency of suspect status likely does impede the elevation of new groups to the ranks for the simple reason that courts are quite reticent to admit too many groups to the suspect classification club at once. The Supreme Court in *City of Cleburne v. Cleburne Living Center*<sup>207</sup> denied intermediate scrutiny review to the disabled in part because it worried that they were not distinguishable from wide swaths of the populace that could also claim at least some level of discrimination, political disempowerment, or popular prejudice.<sup>208</sup> The Court cautioned that the judiciary must be wary of submitting too many legislative classifications to strict judicial oversight, lest it interfere with legitimate legislative policymaking and separation of powers.<sup>209</sup> Given this constraint, each classification that remains suspect takes up valuable real estate that could be used by a new claimant.

The reluctance to expand the suspect ranks can be explained in part by the counter-majoritarian considerations discussed above.<sup>210</sup> And when one considers the profile of the typical federal judge, it becomes clearer why suspect classes are likely to remain locked in place. The level of discrimination in society is not universally agreed upon—it is instead an assessment that is mediated by social position.<sup>211</sup> Judges are drawn from ranks of the already-powerful, and thus are relatively insulated from the newly politically

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principled reason for excluding any of them. It can also be criticized as leading to a 'first in time is first in right' jurisprudence, which privileges groups that made their claims before the judiciary imposed an arbitrary cutoff.").

<sup>206</sup> See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 440-41 (Conn. 2008) ("[C]ourts continue to apply heightened scrutiny to statutes that discriminate against women and racial minorities notwithstanding the great strides that both groups have made and continue to make in recent years in terms of their political strength."). *But see* Schraub, *supra* note 5, at 1464 (stating that "paralysis" in admitting new suspect classifications "results from the disjuncture between rhetoric and practice: the doctrine tells us that more [political] power should correlate with reduced protection, while the history indicates the reverse").

<sup>207</sup> 473 U.S. 432 (1985).

<sup>208</sup> *Id.* at 445.

<sup>209</sup> *Id.* at 441-42.

<sup>210</sup> See *supra* Section III.A.

<sup>211</sup> See, e.g., Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. PSYCHOL. SCI. 215, 216 (2011) (finding that whites believe that anti-white racism is more prevalent than anti-black racism, and that blacks think the opposite); Robinson, *supra* note 51, at 1106-17 (detailing race- and gender-based differences in how persons perceive the existence of racial and sexual discrimination).

influential.<sup>212</sup> In other words, a judge is someone who in all likelihood comes from the ranks of those already privileged by the current distribution of constitutional protections, and thus may be an unlikely candidate to rock the boat by allowing new entrants to secure similar protections.<sup>213</sup>

But even for the most socially-aware judge, there are cognitive limits that restrict the number of groups we can simultaneously label as worthy of receiving extraordinary judicial protection. To grant a group suspect status is to admit that there exists widespread, extensive discrimination against it, and one would hope that “only a few social groups will endure the pervasive, systematic harms” that would render it a viable candidate for suspect status.<sup>214</sup> This is more than a mere aspiration: as the list of suspect classifications grows, with it grows the instances where we are officially forced to admit that our society does not live up to basic meritocratic principles. The more the list expands, the harder it is to maintain faith in the basic justness of the underlying social and political system.<sup>215</sup> The result is that judges become more and more resistant to recognizing emergent discriminatory conditions.<sup>216</sup>

Each classification that is considered “suspect,” in short, represents a data point indicating a failure of the normal democratic and social processes. Individually, these failures can be isolated as particular aberrations of an otherwise just system. If there are too many, though, the entire foundation of our constitutional democracy is called into question. If courts are always forced to closely oversee legislative decisionmaking, and if time and again various groups are subjected to intolerable discrimination or political disempowerment, the problem can no longer be dismissed as a series of isolated failings.<sup>217</sup>

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<sup>212</sup> See Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1154 (2012) (“[A] traditional objection to the common law in early America was that common-law judges are elites untethered to the mass of society, in contrast to elected representatives.”).

<sup>213</sup> See Jack M. Balkin, *What Brown Teaches us about Constitutional Theory*, 90 VA. L. REV. 1531, 1549 (2004) (arguing that judges are lagging indicators vis-à-vis democratic actors in protecting newly assertive minority groups).

<sup>214</sup> Hutchinson, *supra* note 37, at 696.

<sup>215</sup> Cf. Katie R. Eyer, *That's Not Discrimination!*, 96 MINN. L. REV. 1275, 1306 (2012) (“For obvious reasons, discrimination—particularly if it is perceived to be common or systematic—calls into question the veracity of meritocratic belief systems.”).

<sup>216</sup> Cf. Schraub, *supra* note 45, at 1301 (noting that, as the weight of a given moral norm increases, the range of behavior it will be seen as encompassing correspondingly decreases because people resist viewing serious injustice as commonplace); see also David Schraub, *Playing with Cards: Discrimination Claims and the Charge of Bad Faith*, 42 SOC. THEORY & PRAC. 285 (2016) (exploring this dynamic as a mechanism for dismissing discrimination claims).

<sup>217</sup> Cf. Strauss, *supra* note 25, at 171-72 (explaining the argument that if the Court awards too many groups suspect status, the Court “will begin applying a watered-down version of strict scrutiny”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV.

Faced with this possibility, judges are likely to interpret subsequent controversies in ways that preserve the legitimacy of our society and our ability to consider our nation broadly fair and democratic.<sup>218</sup> Judges, of course, are members of our constitutional system and thus have a significant investment in viewing our society as at least *normally* just. A considerable body of research indicates that persons who have broadly meritocratic beliefs will be highly resistant to claims of widespread, systematic discrimination, and will look for reasons to discount evidence of such discrimination existing.<sup>219</sup> It stands to reason that as these claims begin to stack, resistance to the marginal claim of system-wide discrimination will also increase.<sup>220</sup>

Unsuspecting offers a potential pressure valve. It might not represent a declaration of victory, but it would signify that there is light at the end of the tunnel. That in turn could free up cognitive resources to attack new, emergent problems. With permanent suspect classes, however, at best we can stand still, and each new class only adds to the weight pressing down the integrity of the system.

### C. *The Double-Edged Suspect Sword*

For many, attaining suspect status is the holy grail of equal protection review. This is evidenced, if nothing else, by the plethora of articles and scholarship arguing that the authors' particular hobby-horses should join the ranks of suspect classifications.<sup>221</sup> To become a suspect class is to win the equal protection jackpot. Yet on closer review, it is apparent that the suspect designation can be considerably more perilous for its supposed beneficiaries than is often acknowledged.

We can think of the group-protecting function of suspect classifications in one of two ways. The first, more concrete way of thinking about suspect status is that it alters *what kind* of legislation is allowed to target the protected

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747, 762 (2011) (“But the Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny.”).

<sup>218</sup> See, e.g., Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1140–41 (2006) (explaining the “palliative” effect of rationalizing the justice of the status quo by removing the guilt and anxiety that members of an in-group might otherwise feel towards their advantaged state); Elizabeth L. Haines & John T. Jost, *Placating the Powerless: Effects of Legitimate and Illegitimate Explanation on Affect, Memory, and Stereotyping*, 13 SOC. JUST. RES. 219, 231 (2000) (finding that “[r]oughly a third” of subjects frequently misremember meritocracy-violating explanations for outcomes as, in fact, meritocracy-confirming).

<sup>219</sup> See Eyer, *supra* note 215, at 1304–10 (collecting and summarizing studies).

<sup>220</sup> See RICHARD THOMPSON FORD, *THE RACE CARD* 176 (2009) (“The good-natured humanitarian who listens attentively to the first claim of social injustice will become an impatient curmudgeon after multiple similar admonishments.”).

<sup>221</sup> See *supra* note 164.

group.<sup>222</sup> Under this view, the effect of strict scrutiny review is to enact something close to a per se rule against classifications which utilize the protected status as a basis for legislation. The linkage of racial strict scrutiny to “color-blindness” operates through this mechanic because strict scrutiny means that race can never (or almost never) be used as a basis upon which to enact policy.

The second, more abstract way of viewing suspect status is that it changes *who* gets to make decisions regarding legislation that targets the protected group.<sup>223</sup> Control of this arena shifts away from presumably untrustworthy legislators and into the hands of impartial judges.<sup>224</sup> Under this outlook, it is possible that a great many laws that are in one way or another based upon race or other suspect criteria may be approved; but strict scrutiny means that each of these decisions are subjected to stringent review with the judiciary effectively getting the final say.<sup>225</sup>

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<sup>222</sup> See Fallon, *supra* note 14, at 1303 (explaining the view that strict scrutiny represents a substantive rule which allows the challenged classification only to “avert imminent catastrophic harms”). Fallon also identifies several other possibilities for what strict scrutiny means, such as a somewhat more relaxed “weighted balancing test,” *id.* at 1306–07, or a blanket prohibition on certain illicit motivations, *id.* at 1308–11, but the essential point is that strict scrutiny represents a decisional rule that any branch of government could, in theory, apply.

<sup>223</sup> See Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366 (1984) (“[C]onstitutional law is best understood and evaluated by giving central attention to [the] allocation of decisionmaking and, therefore, to the relative attributes of the alternative institutional decisionmakers.”). I thank Michele Goodwin for alerting me to this line of research.

<sup>224</sup> See, e.g., *Fisher v. University of Texas*, 133 S. Ct. 2411, 2420 (2013) (“[I]t is for the courts . . . to ensure that ‘[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’”) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)); *University of California v. Bakke*, 438 U.S. 265, 299 (1978) (contending that when a governmental decision “touch[es] upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest”); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3 (8th ed. 2010) (“To the extent that the Court defers to the legislature’s choice of goals or its determination of whether the classification relates to those goals, the Justices have in fact taken the position that it is the function of the legislature rather than the judiciary to make the equal protection determination as to the particular law. To the extent that the Justices independently determine whether the law has a purpose which conforms to the Constitution and whether the classification in fact relates to that purpose, the Justices are taking the position that the Court is able to assess these issues in a manner superior to, or at least different from, the determination of the legislature.”).

<sup>225</sup> Of course the judiciary always gets “the final say” in a limited sense since judicial review remains available regardless of whether the challenged classification is suspect or not. The point is that strict scrutiny authorizes the judiciary to exercise its own searching and independent judgment, in contrast to the largely pro forma review of the rational basis

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Regardless of which perspective is adopted, however, suspect status does not always redound to the benefit of the group it purportedly protects. The utility of being labeled a suspect class rather depends on some highly conditional assessments.

### 1. Strict Scrutiny as a Substantive Rule

The more common way of viewing strict scrutiny is as a substantive rule that governs (and sharply limits) what sorts of classifications can be made along the protected axis. If strict scrutiny is understood as a hard rule against classifying on the basis of the protected trait, then it might not matter whether it is ultimately enforced by the judiciary or self-policed by the legislature. This understanding of strict scrutiny certainly accounts for some of its historical effectiveness. In the face of systematic, overt, and official systems of discrimination, a bright-line rule effectively forbidding racial classifications undoubtedly did much to break the back of Jim Crow politics.<sup>226</sup> Moreover, where it is overwhelmingly likely that any particular usage of race will be made in order to denigrate or discriminate, a flat prohibition on such classifications would generally be salutary regardless of whether the courts enforce it or the legislative branches voluntarily adopt it.

But the fact that strict scrutiny is sometimes an effective tool for protecting the interests of vulnerable groups does not mean it is always so. Once formal equality is achieved, remedies for continued inequality often do not fit within the traditional understanding of “discrimination.”<sup>227</sup> At that point, a legal rule which is solely predicated on maintaining formal neutrality along the protected axis may turn into a “sticky slope” for disadvantaged minority groups—an important victory at one stage of their political development that ends up foreclosing future agenda items down the line.<sup>228</sup>

A comparative analysis of different tiers of equal protection scrutiny must examine circumstances under which the different doctrines lead to different results. Laws which would be upheld or struck down under either regime (the upper-left and lower-right boxes, below) cannot illustrate the relative superiority of one over the other. For example, Justice O’Connor used the

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test. *See* Barnett, *supra* note 183, at 1484–85 (arguing that while rational basis review could preserve meaningful inquiry into the legitimacy of a law, it has been converted into an effective rubber-stamp).

<sup>226</sup> *See* Schraub, *supra* note 112 (manuscript at 40-45) (arguing that strict scrutiny is most justifiable when hostile usages of race overwhelmingly predominate over more benign or remedial usages); *see also* Landsberg, *supra* note 196, at 941-42.

<sup>227</sup> *See* Katie R. Evers, *Marriage This Term: On Liberty and the “New Equal Protection,”* 60 UCLA L. REV. DISCOURSE 2, 11 (2012) (describing the possibility that once “a group has secured formal equality protections, extra-discrimination remedies (claims not framed as classic discrimination claims) may become increasingly important as explicit discrimination declines”).

<sup>228</sup> *See generally* Schraub, *supra* note 45.

specter of *Korematsu v. United States*<sup>229</sup>—the Japanese internment case—to explain why it was essential for all racial classifications to receive strict scrutiny.<sup>230</sup> But *Korematsu* upheld Japanese internment under (a prototypical form of) strict scrutiny analysis.<sup>231</sup> *Korematsu* cannot properly be used to illustrate the dangers of applying a reduced form of scrutiny to racial classifications because strict scrutiny did not provide a differentiated outcome. Nor can laws that would seemingly fail rational basis as well as strict scrutiny—for example, those motivated by explicit racial animus as in the Jim Crow era—assist in determining what tier is superior.

**Table 1**

	<b>Struck Down Under Strict Scrutiny</b>	<b>Upheld Under Strict Scrutiny</b>
<b>Struck Down Under Rational Basis</b>	X	Null <sup>232</sup>
<b>Upheld Under Rational Basis</b>		X

The action is in the lower-left box of the table—laws that would be upheld under rational basis but struck down under strict scrutiny. It is fair to say that this box is relatively expansive because many laws would survive rational basis but fail strict scrutiny. Does that favor one tier of review over another? Consider an extremely stylized way of thinking about rational basis and strict scrutiny that abstracts away from analyzing the content of particular laws: each doctrine represents the *probability* that a given law will be invalidated. We know that strict scrutiny review will invalidate most laws while rational basis invalidates few. Under these circumstances, equal protection review is best understood as a form of lottery. A lottery exists where a person “does not know what the outcome of a process will be, but does know what the different possible outcomes are and what the probability of each is.”<sup>233</sup> Every law enters the equal protection lottery on equal terms, and we have no way of assessing

<sup>229</sup> 323 U.S. 214 (1944).

<sup>230</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

<sup>231</sup> *Korematsu*, 323 U.S. at 216 (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”).

<sup>232</sup> The set is null because presumably no legislation that would survive strict scrutiny review would be struck down under rational basis review. However, it is possible that the switch from strict scrutiny to rational basis could indirectly result in the invalidation of additional legislation if the courts use that doctrinal shift to justify further circumscribing Congress’s Section 5 authority as well. *See supra* notes 118-40 and accompanying text.

<sup>233</sup> *Jud Mathews, Deference Lotteries*, 91 TEX. L. REV. 1349, 1352 (2013).

how particular laws will be appraised under either doctrine outside the general probabilities of being upheld or struck down.<sup>234</sup>

Armed with this knowledge, the decision to favor rational basis versus strict scrutiny hinges primarily on how one appraises the content of the laws that are actually being passed. In situations where it seems like most laws passed regarding race are malicious or hostile, it makes sense to have a prophylactic rule that effectively bars such legislation.<sup>235</sup> By contrast, where much of the legislation in question is benign or even beneficial, it would be preferable for the judiciary to stay its hand rather than indiscriminately strike down virtuous enactments.<sup>236</sup> Indeed, the case for unsuspecting is in fact almost certainly better than the “lottery” model (which assumes no ability to differentiate between individual cases) gives credit for. Courts clearly can make some distinctions as between at least potentially justifiable racial classifications versus truly vicious and indefensible forms of discrimination; hence, the cluster of laws that would be invalidated under rational basis review is not wholly random but likely would encompass most of the worst offenders.

In any event, the critical variable for appraising what tier of scrutiny is appropriate is the distribution of “good” versus “bad” laws across any given classification. This is likely to vary over time, meaning that a perpetual suspect classification will almost certainly drift into suboptimal territory as political dynamics change. This concern—that “enhanced” constitutional protection for a given group may turn out to be counterproductive—was well understood by feminist activists ambivalent towards the Equal Rights Amendment (“ERA”), for example.<sup>237</sup> Whereas blacks may have had “nothing to lose” from the adoption of the Fourteenth Amendment, feminist skeptics of the ERA worried that it might lead to “actual retrogression” in the quest for sex equality.<sup>238</sup> Early 20<sup>th</sup>-century feminists fractured badly on whether the ERA was

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<sup>234</sup> Notably, an inability to effectively distinguish between benign and malign classifications is an incompetence the Supreme Court ascribes to itself. *See, e.g., Adarand*, 515 U.S. at 225 (criticizing proponents of applying intermediate scrutiny to “benign” classifications for failing to “explain how to tell whether a racial classification should be deemed ‘benign’”); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O’Connor, J., dissenting) (“The Court’s emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility.”).

<sup>235</sup> *See supra* notes 196-97, 226 and accompanying text.

<sup>236</sup> Of course, the strength of the preferences regarding the good versus bad laws matters too—if the bad laws are *really* bad, the consequences of overlooking them might be sufficiently grave to counsel rigorous judicial scrutiny even if most of the laws passed are (weakly) good. This complicates the mathematics but does not alter the general story that it is the content of the legislation being passed that determines what standard of judicial scrutiny is most optimal.

<sup>237</sup> Catherine J. Tilson, *The Equal Rights Amendment to the Federal Constitution—Opposed*, 20 CONN. BAR J. 66, 71-72 (1946).

<sup>238</sup> *Id.* at 71.

necessary to eradicate women's inequality or would instead serve primarily to eliminate protective pieces of legislation which insulated women from abuses in the workplace.<sup>239</sup> The worst case-scenario, articulated by anti-ERA feminist Catherine Tilson, was that the ERA would *only* be used to block legislation promoting female equality while leaving untouched the broad body of misogynistic legislation that still enjoyed widespread support (at least amongst men).<sup>240</sup>

For this reason, it is unclear whether or not a move from the current "intermediate scrutiny" accorded to sex classifications to "strict scrutiny" status would be an advance at all from a gender equality perspective. Intermediate scrutiny has been capacious enough to guard against paternalistic and patronizing laws predicated on sexual stereotyping, while still recognizing the endurance of structural barriers to women's advancement. As race was decoupled from sex as a matter of constitutional doctrine, the court became increasingly unable to see these same dynamics at work in the racial context.<sup>241</sup>

A doctrine of permanent suspect classes places legal reformers in a difficult predicament. While suspect status may be the optimal legal regime for a given social group in one set of circumstances, continuing advancements might cause it to lose much of its appeal. Successfully attaching strict scrutiny to particular group-based classifications would simultaneously be a short-term boom and a long-term hindrance to the goals of the group.<sup>242</sup> This problem only exists because the permanent nature of suspect classifications makes it impossible to retreat from heightened scrutiny once the doctrine has done its work.

## 2. Strict Scrutiny as Institution-Shifting

But perhaps strict scrutiny is less about *what* decision is made and more about *who* gets to make that decision. The judicial decision to either generally be deferential to legislative decisionmaking or regularly intervene by substituting its own judgment represents a choice regarding what branch of government is best positioned to fairly and beneficially resolve particular types

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<sup>239</sup> See MAYERI, *supra* note 73, at 12 (describing the conflict between the pro-ERA National Women's Party and labor-oriented women's advocates who had successfully pressed for and defended gender-specific minimum wage and maximum hour laws).

<sup>240</sup> See Tilson, *supra* note 237, at 68-69 (noting that precisely because the Fourteenth Amendment "ran counter to well-established prejudices against the negro," it was construed narrowly and "many of the fundamental injustices to the negro have been held to be unaffected"); see also Ian F. Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012) (contending that modern equal protection doctrine effectively only strikes down legislation which purportedly discriminates against whites, while ignoring claims of discrimination by non-whites).

<sup>241</sup> See MAYERI, *supra* note 73, at 128-30 (discussing the possibility of applying intermediate scrutiny to racial affirmative action programs, with advocates analogizing the situation to sex classifications).

<sup>242</sup> See Schraub, *supra* note 45, at 1277-90.



of social problems.<sup>243</sup> The necessity of permanent suspect classifications may rest in part on the presumption that judges are in a superior position compared to legislatures in protecting marginal or weak groups.<sup>244</sup> This idea is of course central to the logic of *Carolene Products*: that interventionist constitutional law “exists for those situations where representative government cannot be trusted, not those where we know it can.”<sup>245</sup> But as Pam Karlan observes, this does not describe every case—in some situations, it is legislatures which demonstrate that they are attentive to claims of excluded groups, and judicial interference with legislative efforts inappropriately prevents normal and salutary democratic processes from functioning.<sup>246</sup> A comparative institutionalist approach to tiered-scrutiny—one which “consider[s] the *relative* strengths and weaknesses of” the different institutions seeking to define and enforce equality guarantees—suggests that the uncritical belief in judicial superiority within the realm of minority rights ought to be tested against real-world practice and actual social conditions.<sup>247</sup>

There is nothing inherently progressive about judicial strict scrutiny.<sup>248</sup> Historically associated with cases which dismantled Jim Crow and affirmed a racially egalitarian America, in recent years the framework has been deployed most often in opposition to programs generally favored by civil rights organizations. Since *Loving v. Virginia*<sup>249</sup> in 1967, the Supreme Court has only dealt with one case where the plaintiff was a racial minority challenging an

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<sup>243</sup> See Komesar, *supra* note 223, at 366.

<sup>244</sup> See *id.* at 366-67 (describing the belief that judges are better than legislatures at appraising laws which appear to target marginalized minorities as among the “standard maxims about institutional competence”); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1405 (2006) (“The argument for giving final authority to judges is that elite sympathizers in the judiciary are better able than elite sympathizers in an elected legislature to protect themselves when they accord rights to the members of an unpopular minority. They are less vulnerable to public anger and they need not worry about retaliation. They are therefore more likely to protect the minority.”).

<sup>245</sup> ELY, *supra* note 2, at 183.

<sup>246</sup> Pamela S. Karlan, *Democracy and Disdain*, 126 *HARV. L. REV.* 1, 11 (2012) (“There are other occasions, however, in which representative government deserves heightened judicial confidence and trust: when the political process itself is responding actively to the claims of excluded groups. . . . In those circumstances, courts have a special responsibility to support and enforce the ensuing legislation that realizes constitutional values of liberty, equality, opportunity, and inclusion more fully than judicial opinions alone can.”).

<sup>247</sup> Komesar, *supra* note 223, at 366 (emphasis added); see also Robin West, *The Aspirational Constitution*, 88 *NW. U. L. REV.* 241, 247 (1993) (“[T]he ‘adjudicated Constitution,’ by which I mean the Constitution that has been construed and applied by the courts, has proven to be a markedly conservative foundational document, and for that reason alone, a rule of restraint looks desirable.”).

<sup>248</sup> See generally David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 *GEO. MASON L. REV.* 861 (2012).

<sup>249</sup> 388 U.S. 1 (1967).

explicit racial classification.<sup>250</sup> The other racial classification cases were all challenges by non-minorities protesting affirmative action and other similar programs.<sup>251</sup> Strict scrutiny privileges judges over legislatures, but whether that helps or hinders the cause of minority equality depends on the *distribution* of minority-protective beliefs amongst the two institutions.<sup>252</sup> While defenders of vigorous judicial oversight in this field act as though it is an empirical truth that judges are friendlier to minorities than popular majorities, it is considerably more likely that the distribution varies over time.<sup>253</sup>

Judges come from society and thus are likely to harbor prejudices similar to those held in society at large (or at least society's elite).<sup>254</sup> This, at the very least, neutralizes some of the purported benefits minorities receive when their flagship issues are controlled by the courts.<sup>255</sup> The fact that judges come from a

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<sup>250</sup> *Johnson v. California*, 543 U.S. 499 (2005) (applying strict scrutiny to racial segregation in California prisons). *Schuette v. Committee to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014), is an arguable case depending on whether one believes that a law that imposes a specific disability on race-based affirmative action programs should qualify as a racial classification. *See infra* Part IV.

<sup>251</sup> GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 553 (6th ed. 2009).

<sup>252</sup> *See* Waldron, *supra* note 244, at 1405; *see also* West, *supra* note 247, at 253 (“[I]t is not hard to imagine that a Congress composed of constitutional interpreters who are somewhat more progressive than the conservative Court could and very likely would interpret the Constitution so as to permit any number of progressive legislative initiatives that the Court in recent years has tended to view as constitutionally suspect.”).

<sup>253</sup> *See* JACK M. BALKIN, *LIVING ORIGINALISM* 19 (2011) (“[J]udges are subject to the same cultural influences as everyone else—they are socialized both as members of the public and as members of particular legal elites.”); Waldron, *supra* note 244, at 1405 (“I find it interesting that most defenders of judicial review, when they assume that there will be some support for minority rights in a society, are convinced that in all cases it will be found among elites if it is found anywhere.”); *see also* John Harrison, *Time, Change, and the Constitution*, 90 VA. L. REV. 1601, 1602 (2004) (“[N]o matter what one thinks the framers were seeking to accomplish with respect to public school segregation, the Court has spent a lot of time giving the wrong answer.”).

<sup>254</sup> *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987) (“Judges continue to come primarily from elite white backgrounds. They undoubtedly share the values and perceptions of that subculture, which may well be insensitive or even antagonistic toward the values, needs, and experiences of blacks and other minorities.” (footnote omitted)); Schraub, *supra* note 5, at 1463 (“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.”); *supra* notes 212-13 and accompanying text.

<sup>255</sup> *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2196 n.653 (2002) (noting that persuading judges to take the lead in promoting minority rights “was doubly difficult when (as was usually the case) the judges operated under some of the same prejudices and stereotypes as legislators and police officers”).

particular and distinct segment of society, moreover, means that there likely will be a gap between the level of sympathy that they have for a given marginalized group versus that of the polity as a whole. That gap may sometimes work to the advantage of a particular minority, but there is no reason to believe elites will systematically be more responsive to minority claimants than other social factions.<sup>256</sup> Once relatively marginal groups begin to successfully attain political influence and even control certain localities, it seems probable that democratic institutions will provide a friendlier climate to those groups compared to the rarified air of the judicial branch.

Even viewing judges in the best possible light, however, it is unlikely that long-term judicial oversight of deeply entrenched discrimination will result in optimal outcomes because judges are institutionally incapable of successfully engaging in these permanent managerial projects. Judicially-ordered desegregation decrees, for example, have been a prominent part of American racial jurisprudence since *Brown v. Board of Education*.<sup>257</sup> This makes sense from the institution-shifting perspective of strict scrutiny because these sorts of decrees place courts in a much more active position of oversight than judges typically enjoy—justified on the grounds that only judges can be trusted to remedy the results of legislatively-enacted racial segregation. Many commentators, however, have been skeptical of the judiciary’s ability to maintain such oversight or its effectiveness even if it tried.<sup>258</sup> In recent years, consequently, the Court has become considerably less invested in maintaining such decrees, lifting them upon the finding that “the vestiges of past discrimination had been eliminated to the extent practicable.”<sup>259</sup>

One could argue that this reticence to preserve stringent judicial oversight when remedying instances of alleged racial inequality is impossible to square

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<sup>256</sup> Cf. Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 6-7 (1924) (observing that judges lack any particular expertise in determining social facts, including those which are necessary predicates to legal determinations).

<sup>257</sup> 387 U.S. 483 (1954).

<sup>258</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O’Connor, J., concurring) (observing in the desegregation context that the judiciary has limited “institutional capacity to prescribe palliatives for societal ills”); William D. Ariaza, *Courts, Congress, and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199, 221-24 (2004) (identifying the limitations of using adjudicative processes to resolve systematic racial inequalities); Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 173 (1999) (reviewing GARY ORFIELD, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)) (“[T]he objectives attainable through desegregation litigation are dramatically underinclusive as a means for addressing racial disparities in public education.”).

<sup>259</sup> *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991); see also Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 582-83 (1997).

with maintaining strict scrutiny over racial classifications.<sup>260</sup> But it may simply be a reflection of the limits of the judicial role.<sup>261</sup> Again, there are solid democratic reasons for judges to be leery of endlessly managing the racial dynamics of American society. And to the extent judges are tasked as the primary arbiters of American racial politics, they will tend to circumscribe the conceptual models of what “counts” as discrimination so that they are more easily encompassed by normal judicial practices—discrete instances of individualized wrongs against particular parties.<sup>262</sup> The withdrawal of courts from the business of enforcing ongoing consent decrees is (or at least should be) a decision to allow democratic bodies to return to a position of primacy in controlling these arenas. Assuming that the Court is correct that vestiges of discrimination have been eliminated such that these legislative bodies are once more trustworthy, this may be a salutary reform.

The problem is that the Court has not followed through and allowed democratic bodies their full arsenal to attack ongoing racial problems. Once the effects of discrimination have dissipated enough so that judicial intervention is no longer necessary, the natural conclusion would be that future disputes be resolved through the same, normal democratic channels available to everyone else. This, after all, appears to be the delegation of the Fourteenth Amendment, which gives Congress the primary power to determine whether unconstitutional discrimination continues and, if so, how best to remedy it.<sup>263</sup> By maintaining heightened scrutiny indefinitely, the courts subject themselves to the same timeless intervention in racial politics that they claim to abhor.<sup>264</sup>

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<sup>260</sup> See *supra* note 153 and accompanying text.

<sup>261</sup> See West, *supra* note 247, at 254 (acknowledging that judges have an “institutional responsibility . . . to interpret the Constitution only in such a fashion as not to demand remedies beyond the realistic powers of the Court”).

<sup>262</sup> See Joondeph, *supra* note 258, at 217 (“One potential adverse consequence from the continuation of court-enforced desegregation is that it may foster an unhelpful and distorted conception of racial inequality in public education. Due to courts’ limited institutional capacities, they tend to create narrow conceptual models for addressing the issues that come before them . . . .”); cf. Schraub, *supra* note 216, at 290-91 (discussing the allure of narrow definitions of discrimination or bias).

<sup>263</sup> See U.S. CONST. amend. XIV, § 5 (granting to Congress the power to enforce the Fourteenth Amendment’s guarantees by “appropriate legislation”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022 (2003) (arguing that there are “strong independent reasons for affirming Congress’s authority to employ Section 5 power to enforce its own constitutional understandings”); John Paul Stevens, *The Court & the Right To Vote: A Dissent*, N.Y. REV. BOOKS, Aug. 15, 2013, at 38 (arguing that “members of Congress . . . are far more likely to evaluate correctly the risk that the interest in maintaining the supremacy of the white race still plays a significant role” in voting laws).

<sup>264</sup> Schraub, *supra* note 112 (manuscript at 61) (“[U]nlike other race-conscious remedies, the Supreme Court does not seem to have placed any temporal limit on the use of strict scrutiny—rendering it the epitome of one ‘that [is] ageless in [its] reach into the past, and

Indefinite strict scrutiny results in the worst of all worlds: a judiciary limited in its own ability to manage ongoing problems of racial discrimination but unwilling to revert the issue back to the democratic branches that can and should be ultimately responsible for crafting our anti-discrimination policies.

#### IV. TOWARD AN UNSUSPECTING DOCTRINE: *SCHUETTE* AND THE PROBLEM OF PARTIAL RACIAL POLITICS

The above sections make the case against perpetual suspect classifications both as a matter of black-letter constitutional doctrine and in terms of the underlying goals of the equal protection clause. While suspect status has a place in modern constitutional law, its purpose becomes distorted and its contours blurred when it is maintained as a perpetual endowment for particular classifications. Stuck in stasis, suspect classification doctrine has not kept up with the realities of contemporary discrimination.

Unsuspecting returns classifications that had previously been subjected to strict judicial scrutiny back to the normal rough-and-tumble of democratic politics. This can be justified on a variety of grounds, ranging from standard democratic concerns to specific worries about the willingness or capacity of the judiciary to protect marginalized groups in all circumstances.<sup>265</sup> Regardless, the debate over unsuspecting occurs on familiar ground—when is intensive judicial review appropriate, and when should democratic majoritarianism reign supreme?

Answering this question demands consideration of whether, in a particular social and political context, legislative and democratic bodies are better situated than courts to resolve questions of discrimination and inequality than are federal and state judges. In the racial context, recent Supreme Court decisions, most notably *Schuetz v. Coalition to Defend Affirmative Action*,<sup>266</sup> have brought this conflict into sharp relief and made evident a growing tension in the Court's race jurisprudence. The Supreme Court has seemingly begun to move away from the reflexive position that legislating on race is "play[ing] with fire,"<sup>267</sup> endorsing the legislature's ability to tackle difficult, racially-charged questions. The problem, though, is that this transition is occurring haltingly, inconsistently, and—in effect—only to the detriment of non-White citizens.<sup>268</sup> This is the problem of "partial racial politics." Where the political process supports programs promoting racial equality through integration initiatives or affirmative action programs, the Court continues to apply strict

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timeless in [its] ability to affect the future.'" (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)).

<sup>265</sup> See *supra* Part III.

<sup>266</sup> 134 S. Ct. 1623 (2014).

<sup>267</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring).

<sup>268</sup> See Haney-Lopez, *supra* note 240, at 1784.

scrutiny analysis and (typically) strikes down the laws.<sup>269</sup> Where the polity approves of initiatives that disfavor these goals, by contrast, the Court preaches deference and extolls the virtues of democratic authority.<sup>270</sup>

This inconsistency is unfortunate. However, it illuminates an effective doctrinal rationale for unsuspecting that sidesteps ongoing (and potentially intractable) disagreements regarding the state of American racial affairs. What matters is not whether we still labor under a system of significant racial injustice warranting continued suspicion of democratic institutions. What matters is whether the courts behave as though *they* believe such a system exists. Where they do not—and *Schuette* is powerful evidence of the Court's current views on the matter—continued suspect status is inappropriate regardless of whether the Court is correct or incorrect in its appraisal. Either the Court is right, and legislative bodies should reclaim their dominant role in our democratic system, or it is wrong, in which case it is hardly the sort of institution that should be given final and decisive authority over an arena it has so dramatically misjudged.

A. *Strict Scrutiny's Hollow Remains: Schuette and Democratic Authority over Racial Policymaking*

In *Schuette*, the Court considered a challenge to a Michigan constitutional amendment that prohibited state actors (particularly schools and universities) from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”<sup>271</sup> The amendment was passed to abrogate the Supreme Court's 2003 decision in *Grutter v. Bollinger*, which upheld the University of Michigan Law School's race-conscious admissions system.<sup>272</sup> The Court upheld the amendment in the face of a Fourteenth Amendment challenge.

Notably, the Court did *not* analyze the case under the tiered-scrutiny model that generally applies to laws making racial classifications. The reason is not self-evident. In *Washington v. Seattle School District No. 1*,<sup>273</sup> the Court made the seemingly straightforward point that “when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly ‘rests on distinctions based on race.’”<sup>274</sup> Other cases have likewise understood that laws which draw

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<sup>269</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>270</sup> See *Schuette*, 134 S. Ct. at 1638.

<sup>271</sup> MICH. CONST. art. I, § 26.

<sup>272</sup> See *Schuette*, 134 S. Ct. at 1629; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>273</sup> 458 U.S. 457 (1982).

<sup>274</sup> *Id.* at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)). *But see Schuette*, 134 S. Ct. at 1648 (Scalia, J., concurring) (“[A] law that prohibits the State from classifying

distinctions based on identity characteristics—even where they do not themselves discriminate in favor of a particular group within that classification—raise equal protection concerns cognizable under the traditional tiered-scrutiny model. In *Romer v. Evans*,<sup>275</sup> for example, the Court struck down (as failing the rational basis test, no less) a Colorado constitutional amendment which forbade the enactment of laws providing protection to gays, lesbians, or bisexuals by the state or any of its subdivisions.<sup>276</sup>

Likewise, in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>277</sup> the Court struck down school integration plans that contained a racial integration component but did not themselves favor any particular racial group.<sup>278</sup> The Seattle plan used race as a “tiebreaker” for oversubscribed schools, giving preference not to any specific racial group, but rather to students whose race would integrate schools with disproportionate racial compositions.<sup>279</sup> The program was thus characterized by the Washington Supreme Court as “race-cognizant but racially neutral.”<sup>280</sup> Yet the U.S. Supreme Court still applied strict scrutiny without hesitation.<sup>281</sup>

Perhaps *Parents Involved* can be brought back into the fold because the plans “distribut[ed] burdens or benefits on the basis of individual racial classifications,”<sup>282</sup> even though they did not actually favor a particular racial group. But imagine a law that required the race of all political candidates to be prominently displayed on the ballot. Such a law distributes no burdens or benefits to anyone; it uses race, but in a (facially) neutral way. Nonetheless, the Supreme Court found such a statute (enacted by Louisiana) to violate the equal protection clause in *Anderson v. Martin*.<sup>283</sup>

The *Schuette* majority hardly responds to these concerns. It does not cite *Romer* or *Anderson* at all, and its discussion of *Parents Involved* is largely contained to rationalizing the embarrassing inconsistency between the Court’s

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individuals by race . . . *a fortiori* does not classify individuals by race.”) (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997)). Simply put, this is incorrect: by definition, laws that prohibit racial classifications require a robust understanding of racial categorization both to justify and implement the prohibition—distinguishing forbidden “racial” classifications from other, tolerable forms of discrimination. *See Schraub, supra* note 112 (manuscript at 11) (“Maintaining a system of government mandated color-blindness requires a relatively thick social conception of race (else how would we know what is prohibited?) . . .”).

<sup>275</sup> 517 U.S. 620 (1996).

<sup>276</sup> *Id.* at 635.

<sup>277</sup> 551 U.S. 701 (2007).

<sup>278</sup> *Id.* at 748.

<sup>279</sup> *Id.* at 711-13.

<sup>280</sup> *Parents Involved in Cmty. Sch. v. Seattle School Dist., No. 1*, 72 P.3d 151, 166 (Wash. 2003) (parentheses omitted).

<sup>281</sup> *Parents Involved*, 551 U.S. at 720.

<sup>282</sup> *See id.*

<sup>283</sup> 375 U.S. 399, 401-02 (1964).

previous conclusion that “the Seattle school district was never segregated by law”<sup>284</sup> and its contention in *Schuette* that the outcome in *Seattle* was based precisely on such a history of de jure segregation.<sup>285</sup> As for *Seattle* itself, the majority does not quote the directly on-point language cited above (though Justice Scalia’s concurrence and Justice Sotomayor’s dissent both do).<sup>286</sup> It instead evades *Seattle* by stitching together passages across three pages of the opinion to create a straw man doctrine:

*Seattle* stated that where a government policy “inures primarily to the benefit of the minority” and “minorities . . . consider” the policy to be “in their interest,” then any state action that “place[s] effective decisionmaking authority over” that policy “at a different level of government” must be reviewed under strict scrutiny. In essence, according to the broad reading of *Seattle*, any state action with a “racial focus” that makes it “more difficult for certain racial minorities than for other groups” to “achieve legislation that is in their interest” is subject to strict scrutiny.<sup>287</sup>

Finding this constructed hodgepodge (unsurprisingly) unworkable, the Court rejected *Seattle*’s application and more broadly the notion that laws with a “racial focus” automatically receive strict scrutiny even where, as here, “race was an undoubted subject of the ballot issue.”<sup>288</sup>

Having removed the initiative from the domain of strict scrutiny, the Court’s remaining analysis was an ode to the virtues of democratic deliberation.<sup>289</sup>

Our constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. . . . Democracy does not presume that some subjects are either too divisive or too profound for public debate.<sup>290</sup>

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<sup>284</sup> *Parents Involved*, 551 U.S. at 737.

<sup>285</sup> *Schuette*, 134 S. Ct. at 1633 (“*Seattle* is best understood as a case in which the state action in question (the bar on busing enacted by the State’s voters) had the serious risk, if not purpose, of causing specific injuries on account of race. . . . Although there had been no judicial finding of *de jure* segregation with respect to Seattle’s school district, it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies that ‘permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.’”) (quoting *Parents Involved*, 551 U.S. at 807–08 (Breyer, J., dissenting)).

<sup>286</sup> *Id.* at 1648 (Scalia, J., concurring); *id.* at 1674 (Sotomayor, J., dissenting).

<sup>287</sup> *Id.* at 1634 (citations omitted) (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472, 474 (1982)).

<sup>288</sup> *Id.* at 1635.

<sup>289</sup> *Id.* at 1638 (“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”).

<sup>290</sup> *Id.* 1636–38.



The moral of this story is not that there is constant judicial vigilance regarding the public use of race, with *Schuette* standing out as an inexplicable exception. Much the opposite—the degree to which the Court sanctions democratic policymaking on racial matters, though deeply inconsistent, has been trending away from intensive judicial review for some time. Suspect classification doctrine in the racial context does not cover all laws that concern race, or even all laws which concern race explicitly. In practice, today it covers only programs designed specifically to combat ongoing racial inequality.<sup>291</sup> Within those confines, the Court continues to tighten the vise: “Strict scrutiny must not be strict in theory but feeble in fact.”<sup>292</sup> But outside that narrow subset, courts “infer[] innocence” and strike down arguably discriminatory laws only where plaintiffs can demonstrate actual, overt racial animus on the part of the decisionmaker—an impossibly high standard that in effect gives legislatures wide latitude to enact racially-driven policy.<sup>293</sup> The inability to demonstrate express malice ratified districting schemes that entirely shut out African-Americans from city governance,<sup>294</sup> street closures that cut off black communities from adjoining white neighborhoods,<sup>295</sup> and the use of the death penalty even in the face of rigorous statistical evidence demonstrating racially biased application.<sup>296</sup> *Schuette* is the natural conclusion of a lengthy journey to allow—with very few exceptions—legislatures a free hand to legislate on racial questions with minimal judicial oversight.<sup>297</sup>

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<sup>291</sup> See Haney-Lopez, *supra* note 240, at 1783 (arguing that constitutional colorblindness “covers affirmative action policies and little else”). I would argue that the integration programs at issue in *Parents Involved*, which do not favor particular racial groups and do not substitute for a non-racial “meritocratic” school assignment policy are not accurately described as affirmative action programs. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707 n.16 (9th Cir. 1997) (“Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.”).

<sup>292</sup> *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013). *Shelby County*, which was not a strict scrutiny case, but rather dealt with Congress’s Section 5 authority, further demonstrates that the instigator of judicial skepticism is the racially-remedial character of the legislation, not whether it is formally a “racial classification.” See *supra* Part II.A.

<sup>293</sup> See Haney-Lopez, *supra* note 240, at 1837-38 (tracing the shift to *Massachusetts v. Feeney*, 442 U.S. 256 (1979)); Yoshino, *supra* note 217, at 767-68 (“On the one hand, this jurisprudence invalidates affirmative action programs seeking to aid historically subordinated groups. On the other hand, it upholds second-generation discrimination that continues to subordinate those groups.” (footnotes omitted)).

<sup>294</sup> *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>295</sup> *City of Memphis v. Greene*, 451 U.S. 100 (1981).

<sup>296</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also Haney-Lopez, *supra* note 240, at 1839-47 (discussing *City of Mobile*, *City of Memphis*, and *McCleskey*).

<sup>297</sup> See Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1570 (2002) (“[S]trict scrutiny is

In other words, we have already moved to a system where racial politics are largely fought out in democratic, rather than judicial, forums—“suspect classification” notwithstanding. Suspect classification doctrine is a vestigial artifact that only comes into play when racial minorities appear to be winning the political game.<sup>298</sup> When Michigan voters decided to abolish affirmative action, the Court asserted that it would be “demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”<sup>299</sup> When voters come out the other way and support racial integration measures, by contrast, such deference is nowhere to be found—indeed, it is actively derided as “fundamentally at odds with our equal protection jurisprudence.”<sup>300</sup>

The lack of an unsuspecting doctrine leaves us with partial racial politics—government can legislate on race freely, except when it expressly seeks to combat ongoing racial inequality. This inconsistency cannot be derived from the jurisprudential origins of suspect classification doctrine, which are tightly bound up in specific views of group vulnerability that the Court adamantly insists are no longer relevant.<sup>301</sup> Nor can it be justified by a generalized suspicion of racial policymaking, for *Schuette* is just the latest in a long line of cases where the Court has applied exceedingly deferential review to laws and legal decisions with obvious racial components.<sup>302</sup> It is the perpetual nature of suspect classification doctrine that allows for the Court to uncritically demand the most stringent level of review for race-conscious programs even as it asserts that racial prejudice rarely is a motivating factor in even the most racially-fraught lawmaking.

The progressive response to judicial invalidation of affirmative action and racial integration programs has generally been to argue, strenuously, that race-conscious remedial measures should be afforded reduced scrutiny compared to

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generally superfluous to the kind of equal protection case minorities have brought in the strict scrutiny era. These cases usually involve challenges to facially neutral laws.”).

<sup>298</sup> See Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 7 (2013) (“Over the decades, the Court has restricted judicial oversight of minority claims as it intensified judicial oversight of majority claims . . .”).

<sup>299</sup> *Schuette v. Comm. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014).

<sup>300</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742-43 (2007) (“In keeping with his view that strict scrutiny should not apply, Justice Breyer repeatedly urges deference to local school boards on these issues. Such deference ‘is fundamentally at odds with our equal protection jurisprudence.’” (quoting *Johnson v. California*, 543 U.S., 499 (2005))); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”).

<sup>301</sup> See *supra* Part II.A.

<sup>302</sup> See generally Haney-Lopez, *supra* note 240 (evaluating Supreme Court jurisprudence to conclude a willful blindness toward the reality of continued racial prejudice).

laws that use race to oppress.<sup>303</sup> The Court should still cast a careful eye on some laws using race—it should just be more discerning about which. Perhaps so. But after hitting a high-water mark in *Metro Broadcasting v. FCC*,<sup>304</sup> the attempt to jurisprudentially distinguish benign and malign racial classifications has been soundly rejected time and again by the Supreme Court for the past twenty years.<sup>305</sup> The continued failure of this argument suggests the need for a new approach. With symmetrical treatment of all racial classifications now an article of faith, unsuspecting suggests that we level down rather than level up—putting race in general back in the hands of the legislative branches.

B. *Suspectness Is as It Does: Unsuspecting and Judicial Consistency*

The final and perhaps most difficult question raised by the idea of unsuspecting is simple: when and how to go about it. It is a difficult question because the most obvious approach to unsuspecting—simply inverting the suspect classification doctrine—is closed off. As argued in Part III.C, suspect classification doctrine is far too amorphous to actually demand specified, objective outcomes.<sup>306</sup> Directly tying unsuspecting to suspect classification doctrine will do no more than cause the former to suffer from the same opacity and incoherency as its progenitor.<sup>307</sup> It would be difficult under the best of

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<sup>303</sup> See, e.g., Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 36 (2004) (urging a “contextual” approach to strict scrutiny analysis); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 74 n.96 (1996) (contending that under the logic of *Carolene Products* strict scrutiny should not apply to affirmative action programs). This position can be traced back at least to *Regents of the University of California v. Bakke*, 438 U.S. 265, 358-59 (1977) (Brennan, White, Marshall, & Blackmun, J.J., concurring in part and dissenting in part) (urging that only intermediate scrutiny be applied to affirmative action programs).

<sup>304</sup> 497 U.S. 547 (1990) (holding that federal affirmative action programs would receive only intermediate scrutiny).

<sup>305</sup> See *Parents Involved*, 551 U.S. at 743 (“Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting* and declaring “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”); see also Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2491 n.9 (2003) (“Since 1989, the Court has moved the doctrinal framework on race-conscious remediation from tentative approval and intermediate review in split opinions to a solid majority in favor of strict scrutiny of affirmative action programs.”).

<sup>306</sup> See *supra* Section II.C (describing the doctrine as an “incomprehensible mess” that lacks sufficient clarity to meaningfully guide or constrain judges); see also *supra* Section I.A (documenting the “armada” of considerations the courts are to consider).

<sup>307</sup> See, e.g., Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 217 (2008) (observing that the Court “articulated the strict scrutiny standard of review despite its absence from the constitutional text”); Cass R. Sunstein, *The Importance of Political Deliberation and Race-Conscious Redistricting: Public Deliberation, Affirmative*

circumstances to craft a judicially-manageable standard governing, for example, the degree of political power necessary for a group to lose suspect status.<sup>308</sup> More generally, if the process of identifying suspect classifications is little more than a “mushy, gestalt-type analysis,”<sup>309</sup> it is unlikely that running the doctrine in reverse will produce more helpful or predictable outcomes.

If not explicitly guided by suspect classification doctrine, it seems at the very least clear that unsuspecting doctrine must be keyed to the actual political and social circumstances of the groups in question. Under this view, if the groups have successfully (or at least sufficiently) overcome the prior injustices that had prompted the original suspect classification decision, such that democratic policymaking can once again assume primacy, then we unsuspect. If not, then we do not. This understanding of unsuspecting is the linchpin of both the “lack of incentive” and the “lack of opportunity” explanations given in Part II, at least with respect to liberals.<sup>310</sup> Liberals deny that we have reached a point where we have successfully transcended past racial oppression; they would perceive unsuspecting race as a premature declaration of victory that wrongfully concedes that “racism is over” and thereby debilitates continued efforts to remedy ongoing racial injustice.<sup>311</sup>

But this reticence on the part of the liberals cannot be squared with Supreme Court practice. *Schuette* is replete with rhetoric applauding our nation’s growth away from the racial injustices of years past and pays stirring tribute to the idea that democratic branches are indeed trustworthy and capable of legislating on the topic of race. Yet there is no indication that *Schuette* will presage an unsuspecting of race. “Lack of opportunity” may explain the recalcitrance of the liberal minority, but it cannot explain the behavior of the governing faction of today’s Supreme Court. And more to the point, if liberals are afraid that

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*Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1189 (1996) (“The fact that the Constitution refers to ‘any person’ is utterly uninformative regarding whether any particular foundation for classification should, or does, meet heightened judicial scrutiny. The Court’s use of the constitutional text as a justification for heightened scrutiny is bad formalism . . .”).

<sup>308</sup> See Schraub, *supra* note 5, at 1453-60 (noting the sharp divergence in how different state courts treated the increasing political power of gays in assessing their claim to be a suspect or quasi-suspect class).

<sup>309</sup> *Supra* text accompanying note 36.

<sup>310</sup> See *supra* Sections II.A & II.B.

<sup>311</sup> See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347 (1988) (objecting to the practice of successfully declaring oneself egalitarian “by proclamation alone”); Teun A. van Dijk, *Denying Racism: Elite Discourse and Racism, in RACISM AND MIGRATION IN WESTERN EUROPE* 179, 181 (John Solomos & John Wrench eds., 1993) (arguing that effectively denying the ongoing presence of racism “debilitate[s] resistance” to it); Jacqueline K. Nelson, “Speaking” Racism and Anti-Racism: Perspectives of Local Anti-Racism Actors, 38 ETHNIC & RACIAL STUD. 342, 344 (2014) (characterizing the “denial of racism” as “a central feature of modern racism”).

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unsuspecting race will mean that the Court does not treat ongoing racial inequity with the requisite amount of seriousness, the obvious rejoinder is that maintaining race as a suspect classification has done nothing to prompt greater sensitivity to the problem.

All of this does much to clarify the key question. It is not whether racial inequality really is or is not a significant governing feature of American life. It is whether courts are acting as if *they* believe racial inequality retains such salience—at least in the arenas the judiciary feels empowered to police.<sup>312</sup> Cases such as *Schuette* are powerful indicators that the Supreme Court does not adhere to such a belief.<sup>313</sup> The Supreme Court’s race jurisprudence is as it does, and right now it does not act in accord with a doctrinal system that considers race to remain an exceptional barrier to political equality justifying “extraordinary” deviations from the democratic process.

Importantly, under this view it does not matter whether the Court is right or wrong in its appraisal. Either way, its conclusion should compel it to unsuspect race. If the Court is correct in its apparent view that racial inequality is no longer a serious political problem, then it is unclear why strict scrutiny’s “extraordinary” intervention into the democratic process remains justified. After all, the Court has refrained from adopting plausible bases for continued enforcement of racial remediation due to a fear of remedies “ageless in their reach into the past, and timeless in their ability to affect the future.”<sup>314</sup> What is a perpetual suspect classification decision but such an “ageless” remedy? And if the Court is incorrect, and racial discrimination does remain a serious barrier to equal citizenship in our nation? In that case, so much the better that control over racial politics be removed from such a myopic body! Democratic bodies may sometimes respond effectively to ongoing racial discrimination and other times may not, but there is scarcely a worse outcome—from a democratic standpoint and a racial equality standpoint—than a Court empowered to have the final say over all racial questions and which wrongfully views racial discrimination as the relic of a bygone era.

In the absence of objective criteria that might definitively establish whether a classification rightfully is or is not labeled suspect, the very least we can do

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<sup>312</sup> In workshop comments, Peter Schuck observed that the Court might believe that race is no longer politically salient while conceding that it remains relevant in social or economic contexts beyond judicial purview. This is a valid observation, but it strengthens the ultimate conclusion—if the Court does not believe that race remains an especially pernicious force in the democratic arenas it is tasked with policing, then it should give the legislative branches leeway to address their areas of expertise—social and economic regulation.

<sup>313</sup> *Shelby County* provides further support. See *supra* Section II.A; see also David E. Bernstein, “Reverse Carolene Products,” *the End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2014 CATO SUP. CT. REV. 261, 281 (“[F]or several decades, the Court has been controlled by a majority that implicitly believes that the so-called Second Reconstruction ended with the passage of broad-based civil rights legislation and the increased acceptance and assimilation of minority groups.”).

<sup>314</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

is render judgments consistently.<sup>315</sup> The question in *Schuette* was whether or not democratic bodies should be trusted to make fair decisions regarding the necessity and justness of race-conscious affirmative action programs.<sup>316</sup> As the Court put it: “This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”<sup>317</sup> It concluded that, despite the known sensitivities and the acknowledged history of racial division in America, the issue can and should be left in the hands of the voters.<sup>318</sup>

*Schuette* was unflinching in its assertion that, even when legislating on an overtly race-conscious topic, it is not (or at least is no longer) the province of the judiciary to second-guess the outcomes of the democratic process. Perhaps this analysis is wrong. But at the very least, it should be uniform. Once the Court has performatively demonstrated its view that democratic bodies can be trusted to legislate on racial topics, that should trigger a general unsuspecting of that classification. There is no rationale for the Court to defer to democratic institutions only when the latter concludes that racial interventionism is unnecessary.<sup>319</sup> And while there might be perfectly valid institutional constraints preventing the Court from rectifying “societal discrimination,”<sup>320</sup> there is no warrant for preventing democratic actors from taking up that project as they see fit.

Unsuspecting recognizes that the primary threat to racial equality today is not too little judicial oversight, but too much. Strict scrutiny is unnecessary to stymie a legislature attempting to explicitly restore Jim Crow—such laws would probably not even survive modern rational basis review.<sup>321</sup> But focusing

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<sup>315</sup> Cf. Bobby Jindal, *Justification of Justice: Intuitionism*, 59 LA. L. REV. 891, 917 (1999) (noting that “morality cannot be judged more than internally consistent without an external reference point” but that “[t]his lack of certainty should not be troubling” given the frequency with which people must accept some degree of objective uncertainty about governing normative conclusions).

<sup>316</sup> See *supra* notes 289-90 and accompanying text.

<sup>317</sup> *Schuette v. Comm. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1638 (2014).

<sup>318</sup> *Id.* (“Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.”).

<sup>319</sup> Justice Kennedy placed the Michigan decision to abolish the programs on equal footing with an alternative in which the voters conclude “that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.” *Id.* This breezy acceptance of a democratic decision to implement affirmative action stands in stark contrast with the intense scrutiny such programs have received in cases such as *Gratz*, *Parents Involved*, and *Fisher*.

<sup>320</sup> See *Wygant*, 476 U.S. at 276 (concluding that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”).

<sup>321</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down the Defense of Marriage Act on what appears to be rational basis grounds); *Romer v. Evans*, 517 U.S. 620,

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on such laws is a red herring anyway. Modern discrimination simply does not take the form of Jim Crow-style animus or overt, undisguised antipathy. Legislatures have long since learned that they can advantage or hinder particular groups without using the explicitly discriminatory criteria modern suspect classification doctrine is designed to target.<sup>322</sup> We already have a robust politics around race, but only a partial one that privileges policies which undermine racial equality while casting a critical eye on attempts to rectify it. Unsuspecting race would simply level the playing field and give proponents of racial inclusion equal access to the levers of the political process.

#### CONCLUSION

“The facts that we dislike we call theories; the theories that we cherish we call facts.”<sup>323</sup> But the facts and theories we truly venerate we no longer consider “facts” at all. They are simply considered enduring parts of our constitutional fabric. As our system of suspect classifications has grown more entrenched, the factual predicates that supposedly undergird the designation have grown less and less relevant. The problem is not that no group currently considered suspect still deserves the moniker; the problem is that we no longer *care* whether it does.

This is a mistake. The designation of a suspect classification comes with serious consequences: for democratic legitimacy, for other groups seeking heightened judicial protection, and for the group itself. These costs may be worthwhile given certain factual scenarios, but judges must be willing to reassess the validity of the original judgment as times change. Certain groups may face severe prejudices or barriers to political equality for long stretches of time, barriers that will require intensive intervention to overcome. But the ideal is that someday these barriers will be overcome. And the reality is that there is no reason to be confident that the judiciary, rather than the legislature, will always and in all cases be more motivated to assist the press for equality. Either way, we cannot and should not maintain an outdated constitutional doctrine past its point of expiration.

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632-33 (1996) (striking down a Colorado constitutional amendment forbidding localities from passing laws protective of gays and lesbians on rational basis grounds).

<sup>322</sup> See *supra* notes 158-59 and accompanying text.

<sup>323</sup> Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 250 (1950).