

## TAILORING EQUAL PROTECTION TO ADDRESS TODAY'S DEMOCRATIC DEFICIT

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Consider a law firm partner who ascribes a feminine identity script<sup>1</sup> to his female associate. That is to say, the partner assumes the associate conforms to notions of femininity, carrying herself softly and putting family commitments before career ambitions.<sup>2</sup> To advance her career, the associate will likely negotiate<sup>3</sup> that gender script by toeing a fine line—at times, rejecting the script to convey that she is assertive enough to compete in male-dominated environments and, at other times, performing the script to avoid stigma imposed on aggressive women.<sup>4</sup>

In a burgeoning body of legal scholarship, commentators have been explicating the harmful effects of such script negotiations and prescribing remedies accordingly.<sup>5</sup> While this scholarship has

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<sup>1</sup> This Article uses the term “identity script” to refer to actions and characteristics expected of an individual based on her perceived identity; these figurative scripts are developed by aggregating stereotypes regarding the script’s subject. See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 290 (1995) (defining identity scripts as “cluster[s] of expectations”).

Note that this definition of identity scripts is related to, but broader than, the definition adopted by Kwame Anthony Appiah in his seminal works. See *infra* Part II.A (discussing identity scripts and Appiah’s work); see also KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2004).

<sup>2</sup> See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1132 (2008) (“Female attorneys are often presumed to be softer, less aggressive, and burdened in their ability to put work first because of family commitments.”).

<sup>3</sup> This Article uses the term “negotiations” to refer to how one manages the identity scripts that others ascribe to her. Depending on context, an individual may manage her scripts by adhering to them; at other times, she may manage her scripts by rejecting them. For elaboration on negotiation processes, see *infra* Part II.B.i.

<sup>4</sup> See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 149 (2006) (describing pressures on women to both embrace and reject femininity while employed at traditionally male workplaces). Walking this fine line was demanded of Ann Hopkins in the landmark case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that employer’s sex discrimination violated Title VII).

<sup>5</sup> See, e.g., Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317 (2007) [hereinafter Lau, *Pluralism*]; Angela Onwuachi-Willig, *Volunteer*

generally focused on the harms suffered by individuals,<sup>6</sup> this Article takes a different tack, illuminating harms at a systemic level—harms to democracy. This Article posits that ascribed<sup>7</sup> identity scripts contribute to a democratic deficit and that equal protection doctrine should be

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*Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2007) [hereinafter Onwuachi-Willig, *Volunteer Discrimination*]; Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809 (2007) [hereinafter Robinson, *Uncovering Covering*]; Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2006); Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283 (2007); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873 (2006) [hereinafter Onwuachi-Willig, *Undercover Other*]; YOSHINO, *supra* note 5; Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lavisher and Jamal Are White*, 2005 WIS. L. REV. 1283 [hereinafter “Regarded as” Black]; Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination By Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004) [hereinafter Carbado & Gulati, *Race to the Top*]; Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000); Devon W. Carbado and Mitu Mulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2000) [hereinafter Carbado & Gulati, *Fifth Black Woman*]; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado & Gulati, *Working Identity*].

<sup>6</sup> See *supra* note 5; see also Tristin K. Green, *Discomfort at Work: Workplace Discrimination Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 382 (2008) (noting that literature on script negotiations “tends to frame the issue largely in terms of individual interests”). But see Green, *supra* note 6, at 383 (noting that pressures to negotiate identity scripts undermine not only individual interests, but also society’s collective interest in social equality).

<sup>7</sup> Note that this Article takes issue with *ascribed* identity scripts. Going forward, this Article uses the term “identity script” as shorthand for “ascribed identity script” unless otherwise stated. Arguably, identity scripts can be chosen. For example, an individual who self-identifies as Jewish may wish for others to impose on her certain expectations regarding the Jewish community. Part II.B.iii elaborates on the relationship between ascribed scripts and expectations attached to group identities that individuals voluntarily claim. Cf. Thuy N. Bui, *The Difference Between Race and Color: Implications for Changing Racial Discourse*, 38 SANTA CLARA L. REV. 629, 632-34 (1998) (discussing “ascribed” identity scripts); see also Carbado & Gulati, *Working Identity*, *supra* note 5, at 1261 n.2 (distinguishing “sense of self” identity from “attributional” identity, which is roughly synonymous to this Article’s notion of “ascribed” identity scripts).

Part II.B also discusses how an individual may be ascribed more than one script for any given axis of her identity. For example, someone perceived as being Asian American may be ascribed two scripts for Asian-American identity—one constructed by the self-identified Asian-American community and other constructed by American society at large.

tailored to ameliorate that deficit. To advance this claim, I propose a modified version of democracy reinforcement theory.

Before elaborating on identity scripts, a brief introduction to democracy reinforcement theory is in order. According to the theory, equal protection jurisprudence's goal should be to reinforce democracy.<sup>8</sup> A precondition for democracy is that people have relatively equal opportunity to influence politics.<sup>9</sup> Therefore, to the extent that certain political actors—such as racial minorities and women—have suffered significant power impairments, there has been a democratic deficit. Equal protection jurisprudence should redress that situation.

For years, democracy reinforcement theory legitimized courts' review of laws discriminating against racial minorities and women.<sup>10</sup> It did so by reconciling the tension between judicial scrutiny and democratic rule. Judicial review can be undemocratic because it allows unelected judges to override the judgment of elected policymakers.<sup>11</sup> However, because racial minorities and women have not wielded adequate influence in the political domain, laws discriminating against

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<sup>8</sup> This Article uses the term “democracy reinforcement theory” as an umbrella term for theories that share this goal, even though not all theorists under the umbrella have explicitly adopted the term. Commentators typically trace democracy reinforcement theory to John Hart Ely. See, e.g., Cass Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 13-14 (1996), citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). While this Article concentrates on equal protection jurisprudence, commentators have applied democracy reinforcement theory to constitutional jurisprudence more generally. For examples of democracy reinforcement theorists, see e.g., CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) [hereinafter *PARTIAL CONSTITUTION*]; Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004) [hereinafter *Idea of Democracy*].

<sup>9</sup> See, e.g., ELY, *supra* note 8, at 122; SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 8, at 137; Schacter, *supra* note 8, at 746. For background on equality as a precondition of democracy, see generally ROBERT DAHL, *ON POLITICAL EQUALITY* ix (2006) (“the existence of political equality is a fundamental premise of democracy”).

<sup>10</sup> As discussed in Part III.A, however, traditional democracy reinforcement theory has done a poor job of legitimating judicial review of discriminatory laws that disadvantage groups, such as white men, who are typically considered to be politically powerful.

Outside of democracy reinforcement theory, another major theoretical strand seeks to legitimize court's review of discriminatory law. This school of thought, which is examined in Part I.A, views equality as a principle that limits democracy instead of reinforcing it.

<sup>11</sup> This dynamic, often referred to as the “countermajoritarian difficulty,” has spawned a large body of commentary. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L.J. 153 (2002).

these groups may have resulted from deficient democracy.<sup>12</sup> Therefore, when courts intensely scrutinized such laws, they were not overriding democracy; instead, they were reviewing legislation that emerged from flawed democratic processes in the first place.<sup>13</sup> Indeed, in many regards, jurisprudence comports with democracy reinforcement theory. For example, courts often explicitly state that it is a group's "political powerlessness" that justifies heightened scrutiny of legislation concerning that group.<sup>14</sup>

Because 2008 has been a remarkable year in American politics, democracy reinforcement theory is ripe for reevaluation. In 2008, the Democratic Party nominated Barack Obama, an African-American, for President and the Republican Party nominated Sarah Palin for Vice President.<sup>15</sup> Hillary Clinton was also a key player in the presidential race. Although Obama defeated Clinton for the Democratic nomination, many commentators thought she had a credible shot at the presidency.<sup>16</sup> Before 2008, the political process had never yielded either a person of color or woman as one of the major parties' nominee and only once before had a woman been the nominee for Vice President.<sup>17</sup> Many commentators have opined that political glass ceilings are cracking and about to crumble.<sup>18</sup>

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<sup>12</sup> See ELY, *supra* note 8, at 153-70 (discussing the power disadvantage of blacks and women); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 151-55 (1976) (same).

<sup>13</sup> See Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 391 (1997) ("Seen in these terms, equality-enhancing judicial review *enables* democracy rather than applies a brake on it." (emphasis in original)) [hereinafter, *Democracy's Domain*].

<sup>14</sup> See generally WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1006-1011 (3d ed. 2003) (discussing the "political powerless" criterion for "suspect status").

<sup>15</sup> See Adam Nagourney & Mark Leibovich, *Clinton Ends Bid With Clear Call To Elect Obama*, NY TIMES, June, 8, 2008, at A1 (on Barack Obama); Elizabeth Bumiller & Michael Cooper, *On Center Stage, Pain Electrifies Convention*, NY TIMES, Sept. 4, 2008, at A1 (on Sarah Palin). At the time of this writing, the 2008 general election has yet to occur.

<sup>16</sup> See, e.g., John Harwood, *Democratic Primary Fight Is Like No Other, Ever*, NY TIMES, June 2, 2008, at A14 (describing Clinton as having had a "solid chance" at the nomination); Susan Faludi, *Think the Gender War Is Over? Think Again*, NY TIMES, Jun. 15, 2008, at 14 (describing Clinton's candidacy as "serious").

<sup>17</sup> See Harwood, *supra* note 16 (on presidential nominees); Bumiller & Cooper, *supra* note 15 (on vice presidential nominees).

<sup>18</sup> See, e.g., Deneen L. Brown, *Words Heard Like Never Before: 'Black President'*, WASH. POST., June 4, 2008, at B1; Scott Martelle, *Ohio Voters' Love is Tough to Win*, LA

As these glass ceilings crack, jurists need to understand the changing nature of the country's democratic deficit and tailor equal protection to fit it. The 2008 election year begs the question: If a woman or black man becomes President, reaching the pinnacle of political power, do women or blacks continue to have a power impairment justifying courts' intense scrutiny of laws based on sex or race?<sup>19</sup> Based on traditional democracy reinforcement theory, the answer is unclear, at best.<sup>20</sup> Opacity exists because, traditionally, democracy reinforcement theorists address power through a group-based paradigm;<sup>21</sup> yet it is unclear to what extent electing a female or black President—or any number of government officials, for that matter—would signal that women or blacks are empowered as groups.<sup>22</sup>

Such group-based analysis can generate nebulous results. As a threshold matter, it is unclear how to delineate group membership. (Should Barack Obama, a man with a white mother, be considered

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TIMES, Mar. 2, 2008, at 13; Editorial, *Despite Push, Obama Needn't Rush VP Pick*, STAR. TRIB., June 5, 2008, at 16A; see also Peter Baker & Jim Rutenberg, *Long Road to a Clinton Exit*, NY TIMES, June 8, 2008, at A1 (quoting Hillary Clinton in thanking her supporters for “cracking the glass ceiling”).

<sup>19</sup> Recall that courts usually justify heightened scrutiny of laws affecting a particular group by highlighting the group's “political powerlessness.” See *supra* note 14 and accompanying text. See also Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, NY TIMES, July 30, 2008, at A1 (stating that “whether Americans will elect a black president” may be the “ultimate test of racial equality”).

<sup>20</sup> When considering this hypothetical's significance for black women, the answer is even less clear. For a discussion of intersectional groups, such as black women, see *infra* Part II.A.

<sup>21</sup> Theorists typically analyze prejudice against groups and political underrepresentation of groups to determine the extent to which a democratic deficit exists. See, e.g., ELY, *supra* note 8; SUNSTEIN, *PARTIAL CONSTITUTION*, *supra*, note 8; Schacter, *Democracy's Domain*, *supra* note 13; Rebecca Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23 (2006).

<sup>22</sup> Even if blacks and women were proportionally represented in elected office, it would not necessarily follow that blacks and women are empowered as groups. It is difficult to assess whether any given individual represents a particular social group's interests. See Carol C. Gould, *Diversity and Democracy: Representing Differences*, in *CONTESTING THE BOUNDARIES OF THE POLITICAL* (Benhabib ed.) (1996). Indeed, individuals who supposedly belong to a particular demographic group may fail to represent their group's collective interests. Devon Carbado and Mitu Gulati have addressed this dynamic in workplaces, arguing that racial minorities who climb to the top of the corporate ladder tend not to represent the interests of their fellow minorities at the foot of the ladder. See Carbado & Gulati, *Race to the Top*, *supra* note 5. Part II explores this dynamic in the political sphere.

black?<sup>23</sup>) Moreover, it is unclear who legitimately represents a particular group.<sup>24</sup> (Does Sarah Palin represent women?<sup>25</sup>) Finally, comparing groups vis-à-vis one another oversimplifies power dynamics.<sup>26</sup> (Members of traditionally powerful groups—men, for example—can have their power unduly restricted by identity scripts.<sup>27</sup>)

Indeed, because traditional democracy reinforcement theory views democracy and power through a paradigm built around *identity groups*,<sup>28</sup> it has become somewhat impoverished. Although group-based analysis is helpful, it is insufficient; moreover, it obscures power impairments that do not map neatly on to group demarcations. To supplement group-oriented theory, this Article introduces a version of

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<sup>23</sup> See L.A. Johnson, *Obama Candidacy Raises Old Questions Regarding What is Black*, PITT. POST-GAZETTE, May 8, 2008 (questioning whether Barack Obama should be categorized as black), at A1; Karen J. Hunter, *Why Do We Call Obama Black?*, HARTFORD COURANT (Conn.), May 25, 2008, at C3 (same); Yasmin Alibhai-Brown, *Calling Obama Black Insults His Mother*, SEATTLE POST-INTELLIGENCER, June 10, 2008, at B6 (same).

<sup>24</sup> See William B. Rubenstein, *Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1623 (1997) (discussing group-based civil rights campaigns and noting that “groups are messy. They are, by definition, comprised of many individuals and thus encompass a range of desires and agendas.”). See also *supra* note 22.

<sup>25</sup> See Gloria Steinem, *Wrong Woman, Wrong Message*, L.A. TIMES, Sept. 4, 2008, at 29 (“Palin’s value to . . . patriarchy is clear: She opposes just about every issue that women support by a majority or plurality”). See also Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 35 SETON HALL L. REV. 1261, 1265 (2005) (explaining that Justice Clarence Thomas has been “ostracized by and alienated from large portions of the black community”); Gould, *supra* note 22, at 184 (“It would be odd indeed to think that Clarence Thomas could represent all African-Americans or that Margaret Thatcher could represent all women”); John Blake, *Can an Obama Presidency Hurt Black Americans?*, CNN.com, July 22, 2008, <http://edition.cnn.com/2008/POLITICS/07/22/obama.hurt.blacks> (suggesting that an Obama presidency might undermine the black community’s best interests).

<sup>26</sup> See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 16-17 (forthcoming 2008), available at [http://papers.ssrn.com/sol3/abstract\\_id=1131407](http://papers.ssrn.com/sol3/abstract_id=1131407) (arguing that privilege and disadvantage are not neatly distributed based on group statuses).

<sup>27</sup> Men are often stigmatized for breaching scripts for masculinity. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation- The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Nancy Dowd, see also Onwuachi-Willig & Barnes, “Regarded as” Black, *supra* note 5 (noting that whites suffer discrimination when they are regarded as black). But see Patricia J. Williams, *L’Etranger*, NATION, March 5, 2008, at 11 (noting that social stigma on blacks “acting white” is more severe than that on whites who “act black”).

<sup>28</sup> See *supra* note 21.

democracy reinforcement theory that views democracy and power through a paradigm built around *ascribed identity scripts*.

Script-oriented theory illuminates enduring power imbalances based on characteristics such as race and sex. As such, script-oriented theory sheds light on a continuing democratic deficit. This Article develops script-oriented democracy reinforcement theory by bridging literature on deliberative democracy with the aforementioned scholarship on identity scripts.

Constitutional law should support a form democracy commonly labeled “deliberative democracy,”<sup>29</sup> a mode of governing in which exercise of state power is authorized by collective decisionmaking among persons engaged in free and reasoned deliberation.<sup>30</sup> In deliberative democracy, majority rule exists not because legitimacy resides in sheer numbers.<sup>31</sup> Majority rule exists because, if a majority chooses one option over another, one generally presumes that a process of deliberation led the majority to view that option more favorably.<sup>32</sup> In other words, elections measure the outcomes of deliberation.

The deliberative process should be unhindered by ascribed identity scripts, such as those based on race and sex.<sup>33</sup> However, in actuality, script ascription still contaminates and stymies deliberation. Consider the example of Barack Obama. Commentators have persuasively argued that Americans typically perceive Obama as a black man and ascribe him corresponding scripts for “acting black,”<sup>34</sup> which Obama must carefully negotiate in order to attain and maintain power.<sup>35</sup> This negotiation entails playing up his blackness and downplaying his blackness in strategic fashion.<sup>36</sup>

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<sup>29</sup> On the desirability of deliberative democracy, see *infra* Part I.B. For background on deliberative democracy, see generally AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004).

<sup>30</sup> See Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy* 68, in *CONTESTING THE BOUNDARIES OF THE POLITICAL*, *supra* note 21. For a discussion of why this definition of democracy is superior to others, see *infra* Part I.B.

<sup>31</sup> See Benhabib, *supra* note 30.

<sup>32</sup> See *id.*

<sup>33</sup> For a discussion on the irrelevance of race and gender scripts, see Part II.B.i.

<sup>34</sup> See HENRY LOUIS GATES, JR., *LOOSE CANNONS: NOTES ON THE CULTURE WARS* 101 (1992) (stating that “[o]ne must learn to be ‘black’ in this society, precisely because ‘blackness’ is a socially produced category”).

<sup>35</sup> See, e.g., Marcus Mabry, *The Color Test: Where Whites Draw the Line*, *NY TIMES*, June 8, 2008, at 1; Devon Carbado, *What Voters Don’t ‘Ask’ but Can ‘Tell’ from Obama’s*

Ascribed identity scripts compromise deliberative democracy in at least three regards. First, it unreasonably limits the number of speakers in democratic deliberation. For example, only African Americans who associate and disassociate with black identity scripts in very particular ways can achieve standing on the political stage.<sup>37</sup> Second, among those individuals who manage to climb atop the political stage, expression is often not free but regulated by scripts that must be negotiated in order to maintain power.<sup>38</sup> Third, identity scripts distort the way messages and communicative signals are received during deliberation.<sup>39</sup>

In these three scenarios, scripts create inequalities in individuals' power to deliberate; however, these inequalities are often obscured by group-oriented analysis. Among individuals ascribed a particular identity script, inequalities exist because some individuals are more adept at script negotiations than others are.<sup>40</sup> Barack Obama, for example, may be more adept at negotiating scripts for blackness than other African Americans. Because people's negotiation capacity varies along a continuum—as opposed to neat group-based distributions—group-based analysis obscures this inequality.<sup>41</sup> Note also that some

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*Race*, LA DAILY J., Aug. 28, 2008, at 6 [hereinafter Carbado, *Obama's Race*]; Williams, *supra* note 27.

<sup>36</sup> See *supra* note 35.

<sup>37</sup> See Carbado, *Obama's Race*, *supra* note 35. Commentators have made similar arguments regarding racial minorities who attain positions of power in employment settings. See, e.g., Carbado & Gulati, *Working Identity*, *supra* note 5, at 1269-70.

<sup>38</sup> See Gould *supra* note 22; Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE, *supra* note 22; cf. also Carbado & Gulati, *Conversations at Work*, *supra* note 5 (discussing how identity scripts regulate expression in corporate settings).

<sup>39</sup> Cf. Carbado & Gulati, *Conversations at Work*, *supra* note 5 (discussing how, in corporate settings, identity scripts distort the reception of communications).

<sup>40</sup> Sometimes, this adeptness may arise simply from the fact that script negotiation feels natural for an individual. For example, consider that power adheres to men who conform to the masculine script ascribed to them; for many men, conforming to the script (by playing sports, speaking assertively, marrying a woman, being the breadwinner, etc.) will come naturally. However, for the man who self-identifies with effeminate traits, despite being labeled a man, such conformity will be a greater challenge. Cf. Carbado & Gulati, *Working Identity*, *supra* note 5, at 1306 (noting that the negotiation of an ascribed identity script can be "authentic" to one's sense of self, "politically principled," or simply "strategic").

<sup>41</sup> Group-based analysis tends also to look myopically at inequalities between groups, obscuring inequalities within groups. See, e.g., Victoria Choy, Note, *Perpetuating the Exclusion of Asian-Americans from the Affirmative Action Debate: An Oversight of the*

scripts are inherently more difficult to negotiate. For example, commentators have argued that scripts for blackness are more rigid than scripts for whiteness; therefore, individuals ascribed black scripts are disproportionately burdened.<sup>42</sup> Analysis oriented toward identity scripts most directly illuminates such disparity.

This Article argues that concentrating on identity scripts' regulation of deliberation helps to sharpen the focus on today's democratic deficit. The law should aim to rid political deliberation of ascribed identity scripts. Progress in such elimination should be measured by assessing the degree to which the script ascription still exists, rather than analyzing the demographics of political representatives.

It is worth highlighting that identity scripts and group-based power deficits are certainly related. For example, scripts regarding masculinity, femininity, blackness, whiteness, homosexuality, and heterosexuality all contribute to group hierarchies. One can think of power imbalances among groups as footprints of identity scripts. By concentrating on the scripts, however, this Article focuses on the beast that leaves the footprints as opposed to the footprints, which are multiple, muddied, and sometimes difficult to discern. For example, a footprint of gender scripts can take many forms, impairing various permutations of groups—such as women generally, working women, pregnant mothers, effeminate men, and transgender persons.<sup>43</sup> In short, script-oriented theory calls for greater attention to the cause of power impairments, rather than the impairments' ultimate manifestations.

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*Diversity Rationale in Grutter v. Bollinger*, 38 U.C. DAVIS L. REV. 545 (2005) (discussing how lawmakers tend to overlook inequalities among Asian Americans, especially those between Americans of East and Southeast Asian ethnicity); Susan Taing, Comment, *Lost in the Shuffle: The Failure of the Pan-Asian Coalition to Advance the Interests of Southeast Asian Americans*, 16 BERKELEY LA RAZA L.J. 23 (2005) (same).

<sup>42</sup> See Robinson, *Uncovering Covering*, *supra* note 5, at 1817 (asserting that “outsider” scripts are more burdensome than scripts are generally). Similarly, scripts for heterosexual identity are arguably less rigid than those for homosexual identity. See Janet Halley *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET* (Michael Warner ed., 1994).

<sup>43</sup> See Nan Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1553 (2004) (arguing that gender-based subordination amounts to more than simply discrimination “against women, or perhaps against men”); Elaine Craig, *Trans-Phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN'S L.J. 137, 138-139 (2007) (asserting that mainstream society disempowers individuals who breach gender scripts ascribed to them).

The remainder of this Article unfolds in three Parts. Part I provides more background on democratic reinforcement theory and on why democracy should be conceived of as deliberative. This section also explains why certain power imbalances are inimical to deliberative democracy.

Part II reorients democratic reinforcement theory, shifting its focus from groups to scripts. This section provides an introduction to theories on identity scripts and elaborates on how certain identity scripts contribute to today's democratic deficit.

Part III applies this Article's script-oriented theory to equal protection doctrine. This section proposes a new test for "suspect status" that preserves sex- and race-based laws' ability to trigger intense judicial scrutiny,<sup>44</sup> despite the rise of political actors such as Barack Obama, Hillary Clinton, and Sarah Palin. Under this new test, other statuses such as sexual orientation should also be deemed suspect. Part III continues by proposing new tests for impermissible "disparate treatment" and "disparate impact." These new tests work to undermine identity scripts and to correct laws that were products of flawed deliberation. The new tests are then applied to specific legal issues including same-sex marriage, racial profiling, and race-conscious funding of scientific research. Finally, this section will explain that constitutional jurisprudence has already begun to move toward this Article's proposed tests for suspect status and disparate treatment but, regrettably, has not done so with regard to the proposed test for disparate impact.

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<sup>44</sup> Here, the term "intense scrutiny" is used, as opposed to the terms "strict scrutiny" and "intermediate scrutiny"—which the Supreme Court typically uses—because this Article does not endorse the Court's current, tiered system of review. Specifically, this Article eschews strict scrutiny that is "fatal in fact." Part III.A elaborates on these points.