"UNEXPLAINABLE ON GROUNDS OTHER THAN RACE": THE INVERSION OF PRIVILEGE AND SUBORDINATION IN EQUAL PROTECTION JURISPRUDENCE

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In this article, Professor Darren Hutchinson contributes to the debate over the meaning of the Fourteenth Amendment's Equal Protection Clause by arguing that the Supreme Court has inverted its purpose and effect. Professor Hutchinson contends that the Court, in its judicial capacity, provides protection and judicial solicitude for privileged and powerful groups in our country, while at the same time requires traditionally subordinated and oppressed groups to utilize the political process to seek redress for acts of oppression. According to Professor Hutchinson, this process allows social structures of oppression and subordination to remain intact.

First, Professor Hutchinson examines the various meanings ascribed to equality, the difficulty in finding one meaning of equality under the Fourteenth Amendment, and how the Supreme Court has recognized that it should have a role in protecting subjugated groups. Second, the article presents Professor Hutchinson's inversion thesis, which argues that the Court has stopped acting as the protector of historically disadvantaged groups and now provides historically privileged classes judicial solicitude. Finally, this article recommends that,

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as an alternative, the Court should utilize an antisubordination theory of equality whereby the Court bases constitutional decisions on their demonstrable effect on politically vulnerable and historically oppressed classes.

I. INTRODUCTION

The Equal Protection Clause of the United States Constitution provides that "no state . . . shall deny to any person . . . equal protection of the laws."[1] The exact meaning of this ambiguous provision has been at the center of a contentious debate, which began in the Thirty-Ninth Congress (which drafted the Fourteenth Amendment), and which persists today among jurists, scholars, and attorneys.[2] The juridical articulation of the meaning of equality has evolved and shifted over time. In the late-nineteenth century, the Supreme Court construed equal protection solely as guaranteeing "political" as opposed to "social" equality,[3] thus settling a question that emerged in the Reconstruction-era Congress and that plagued contemporaneous state-court decisions addressing claims of impermissible governmental discrimination.[4] Under the political/social rights distinction, discrimination in the so-called social sphere was permissible as long as equal facilities were provided to the races.[5] While the Supreme Court would ultimately overrule the "separate-but-equal" doctrine,[6] it would still face the complicated task of deciding what definition of equality (or "equalities") the Fourteenth Amendment mandates. Today, this question remains open and subject to diverging views. At a

1. U.S. CONST. amend. XIV, § 1.

2. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976) (describing "text and history" of the Equal Protection Clause as "vague and ambiguous"); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) [hereinafter Sunstein, *Sexual Orientation and the Constitution*] ("The scope of the [Equal Protection] Clause and the precise content of the equality norm are of course deeply disputed.").

3. Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (arguing that "in the nature of things, [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either").

4. Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1697 (2000) (arguing that during the period of Reconstruction, "[t]he legal discourse of race rested . . . on the distinction between political and social rights"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1014–23 (1995) (discussing the historical relevance of the "social rights" and "political rights" distinction to the meaning of the Equal Protection Clause).

5. In *Plessy*, the Court held:

> Laws permitting, and even requiring, [the] separation [of blacks and whites], in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

Plessy, 163 U.S. at 544.

6. Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating state antimiscegenation law despite the fact that marriage was historically viewed as a social relation in the purview of states to regulate); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

minimum, most commentators agree that the Equal Protection Clause embodies an "antidiscrimination" principle, which requires that states treat "similarly situated" individuals in the same fashion.[7] Other scholars and jurists have argued that equal protection requires something more—that it secures not only formal, but substantive equality[8] and that it might impose upon governments an affirmative obligation to undo material inequality caused by subordination (such as racism and sexism).[9]

The issue of judicial restraint has also surfaced in debates over the meaning of equality.[10] The specter of *Lochner v. New York*[11] and charges of judicial overreach influence the Court's articulation of "equality."[12] To guard against the counter-majoritarian dilemma,[13] the Court has made a doctrinal choice to limit its most exacting scrutiny of equal protection claims to those laws that burden politically vulnerable—or "suspect"—classes.[14] Otherwise, courts will defer to the legislative wisdom by assuming the constitutionality of legislative enactments.[15] While the suspect class doctrine does not mean that members of politically powerful social groups cannot litigate equal protection claims, under heightened scrutiny review, claims brought by nonsuspect classes will not receive exacting review from the Court; these groups, according to the Court's logic, can adequately defend themselves against unfair legislation in the political branches of government.[16]

A minority of commentators has criticized the suspect class doctrine by arguing that the Equal Protection Clause is framed in general terms and that a single standard of judicial review should apply to each individual claim of impermissible governmental discrimination.[17] Despite these critiques, which contest the granting of enhanced judicial solicitude exclusively to vulnerable classes, no scholar has argued that the Court should construe the Equal Protection Clause as guaranteeing judicial solicitude exclusively or primarily for the discrimination claims brought by powerful social classes and that the discrimination claims of vulnerable groups should normally enjoy a presumption of constitutionality. In fact, most scholars and jurists would likely dismiss this argument as utterly inconsistent with the historical context surrounding the Fourteenth Amendment, the intentions of the Framers of the Fourteenth Amendment, and the judicial elaboration of the meaning of equality. Despite

7. *See infra* text accompanying notes 37–46.
8. *See infra* text accompanying notes 47–54.
9. *See infra* text accompanying notes 55–63.
10. *See infra* text accompanying notes 100–10.
11. 198 U.S. 45 (1905). *See infra* text accompanying notes 106–10 (discussing the impact of *Lochner* on the Court's Fourteenth Amendment jurisprudence).
12. *See infra* text accompanying notes 106–09.
13. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).
14. *See infra* text accompanying notes 128–34.
15. *See id.*
16. *See infra* text accompanying notes 205–11, 222–35.
17. *See infra* text accompanying notes 47–54.

the seemingly indefensible nature of this proposition, this anomalous principle accurately describes the nature of contemporary equal protection jurisprudence: by design or effect, the Court's equality doctrine reserves judicial solicitude primarily for historically privileged classes and commands traditionally disadvantaged groups to fend for themselves in the often-hostile majoritarian branches of government.[18] In its equal protection decisions, the Court has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude.[19] This paradoxical jurisprudence reinforces and sustains social subjugation and privilege.

This article expounds my thesis in three parts. Part II examines the various meanings of equality that scholars and jurists have advanced in the context of equal protection analysis.[20] Part II demonstrates the difficulty of assigning *one* meaning of equality to the Fourteenth Amendment either through an original intent analysis or a canvassing of Supreme Court precedent.[21] Part II also examines how counter-majoritarian criticism of the Court has influenced equal protection jurisprudence and demonstrates that the Court once responded to this criticism by ostensibly embracing an approach to equal protection which treats laws as presumptively constitutional unless they burden historically disadvantaged groups.[22] Court doctrine, as part II argues, has recognized an institutional role for the Court in protecting subjugated classes.[23]

Part III demonstrates that the Court has abandoned its role as "protector" of disadvantaged classes and now grants its most exacting scrutiny primarily to historically privileged classes.[24] Specifically, part III supports my "inversion thesis" by examining three areas of equal protection doctrine: the application of heightened scrutiny to laws that seek to remedy the effects of subjugation; the deferential treatment of laws that impose statistically measurable burdens upon subordinate classes; and the denial of judicial solicitude to presently nonsuspect, though vulnerable, classes such as gays and lesbians, the poor, and the developmentally disabled.[25] While several progressive scholars have criticized the Court's approaches in these three doctrinal areas, they have generally failed to engage in a collective reading of these doctrines in order to make more structural conclusions about the status of contemporary equal protection jurisprudence. I argue that viewing these doctrines in an integrated—

18. *See infra* text accompanying notes 219–25.
19. *See, e.g., infra* text accompanying notes 209–11.
20. *See infra* text accompanying notes 34–82.
21. *See infra* text accompanying notes 34–36.
22. *See infra* text accompanying notes 83–152.
23. *See infra* text accompanying notes 153–61.
24. *See infra* text accompanying notes 162–235.
25. *See infra* text accompanying notes 162–393.

rather than isolated—fashion, illuminates the extent to which the Equal Protection Clause, through judicial interpretation, fails to protect historically marginalized groups from legislatively imposed oppression.[26] As such, I see the Court as having an active role in the perpetuation of social inequality. Part III also considers whether any legitimate structural concerns justify the apparent inversion of privilege and subordination in equal protection jurisprudence.[27] Specifically, part III considers whether a legitimate desire to exercise judicial restraint or maintain institutional integrity could account for many of the doctrinal problems this article isolates.[28] Part III concludes that while institutional integrity and balance are important issues for the Court to consider in its Fourteenth Amendment jurisprudence, these concerns cannot completely account for the anomalous nature of contemporary equal protection theory.[29]

Part IV offers a doctrinal alternative to the inversion of privilege and subordination in equal protection jurisprudence.[30] Part IV argues that the Court should embrace an "antisubordination" theory of equality, which determines the constitutionality of a law or policy based on its measurable effect upon politically vulnerable and historically oppressed classes.[31] The antisubjugation approach has clear doctrinal and historical analogues, and this view overlaps substantially with the Court's well-established (even if inconsistently applied) suspect class doctrine.[32] Part IV concludes by considering some practical doctrinal implications associated with the implementation of an antisubjugation approach, particularly whether such an approach can function in the equal protection context without diminishing the institutional integrity of the Court.[33]

II. DOCTRINAL APPROACHES TO EQUALITY

A. Possible Meanings of Equality

Assigning a singular meaning to the phrase "equal protection" is a difficult, if not impossible, task.[34] Most observers agree, however, that the Equal Protection Clause prohibits states from engaging in certain

26. *See infra* text accompanying notes 377–93.
27. *See infra* text accompanying notes 394–99.
28. *See infra* text accompanying notes 394–429.
29. *See infra* text accompanying notes 430–46.
30. *See infra* text accompanying notes 447–555.
31. *See infra* text accompanying notes 449–69.
32. *See infra* text accompanying notes 507–11.
33. *See infra* text accompanying notes 470–555.
34. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 939–45 (1989) (discussing five different doctrinal approaches to "equality"); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1367 (1990) ("The urge to identify a single animating philosophy or an overarching theory of equal protection is understandable but misguided.").

types of discriminatory actions.[35] Yet, scholars and courts have not reached a consensus concerning what forms of discrimination would violate the Equal Protection Clause.[36] Despite the ongoing disagreement over the definition of equal protection, several themes contained in judicial precedent and American history offer several viable approaches to the meaning of equality. This part will discuss various doctrinal approaches to the question of equality. My analysis is not meant to stand as a comprehensive or exhaustive examination of potential definitions of equal protection, but rather to serve as a review of various ways the Court has elaborated the equal protection principle.

1. Antidifferentiation

At its most rudimentary level, the Equal Protection Clause prohibits states from differentiating among similarly situated groups or individuals.[37] The Court, for example, treats racial discrimination as presumptively unconstitutional.[38] Under this doctrine, the Court assumes that there are no meaningful differences among racial groups.[39] Gov-

35. Strauss, *supra* note 34, at 937 ("From the beginning, nearly everyone has agreed that the central purpose of the Equal Protection Clause is to outlaw certain kinds of discrimination.").

36. *See* David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 664–65 (arguing that "[t]he Equal Protection Clause, which by broad consensus creates a constitutional 'antidiscrimination' mandate, gives no substantive definition either to equality or discrimination" and that there is no clear "winner" in the debate over the potential meanings of equality); Sunstein, *Sexual Orientation and the Constitution*, *supra* note 2, at 1174 ("The scope of the [Equal Protection] Clause and the precise content of the equality norm are of course deeply disputed.").

37. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986) ("Under the anti-differentiation perspective, it is inappropriate to treat individuals differently on the basis of a particular normative view about race or sex."); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 228 (1997) (arguing that the antidifferentiation principle seeks to determine "whether those similarly situated had been treated similarly").

38. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); *see also* David Chang, *Selling the Market-Driven Message: Commercial Television, Consumer Sovereignty, and the First Amendment*, 85 MINN. L. REV. 451, 565 (2000) ("Racial classifications challenged under the Equal Protection clause are presumptively unconstitutional. The government bears a heavy burden to rebut that presumption."); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1926 (2000) [hereinafter Harris, *Equality Trouble*] ("Racial segregation is considered presumptively unconstitutional. And Justice Harlan's statement, '[o]ur constitution is colorblind,' now serves as a guiding principle in Supreme Court jurisprudence." (bracketed text in original)); Powell, *supra* note 37, at 262 (observing that "racial classifications are inherently suspect so that any use of race is presumptively unconstitutional").

39. In *Michael M. v. Superior Court of Sonoma County*, for example, the Court stated:

> The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated.

450 U.S. 464, 477–78 (1981) (Stewart, J., concurring); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("Social scientists may debate how peoples' thoughts and behav-

ernmental discrimination on the basis of race, therefore, violates the antidifferentiation principle because it makes artificial distinctions among presumably like classes or individuals.[40] The antidifferentiation approach is reflected in the contemporary "discriminatory intent" rule.[41] In the 1976 decision *Washington v. Davis*,[42] the Court began to require equal protection plaintiffs to demonstrate that governmental defendants acted with "discriminatory purpose" instead of showing that a law or policy has a disparate impact upon a disadvantaged social group.[43] Although one might argue that the Court has always required a showing of intent in an equal protection analysis, under the modern application of the rule, the Court effectively requires proof of specific intent through direct—rather than circumstantial—evidence.[44] Citing to the discriminatory intent rule, the Court has rejected as nonprobative of discrimination even the most sophisticated statistical analyses demonstrating the discriminatory effects of state action.[45] Although the discriminatory intent rule sets

ior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."); Rosemary Herbert, *Women's Prisons: An Equal Protection Analysis*, 94 YALE L.J. 1182, 1188 n.33 (1985) ("Where race is concerned, the courts have recognized that no differences could situate the races dissimilarly.").

40. *See* Strauss, *supra* note 34, at 940–41 (arguing that juridical approach construes equal protection as requiring "impartiality" when race is concerned); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 56 (1990) ("The central judicial presumption of the rationality model, that racial classifications always are irrational and that gender classifications usually are irrational, rests on a theory of equality grounded in a universalist vision of our shared human nature."); *id.* at 57 ("In all areas of life in which blacks and whites and women and men are the same, the legislator must treat them as the same."). Strauss traces the antidifferentiation approach to early Court precedent on race. Specifically, Strauss argues that *Strauder v. West Virginia*, 100 U.S. 303 (1879) (declaring unconstitutional a West Virginia law that excluded blacks from service), embodies an "impartiality" or antidifferentiation approach because it held that "the law in the States shall be the same for the black as for the white." Strauss, *supra* note 34, at 941 (quoting *Strauder*, 100 U.S. at 307).

41. *See* Strauss, *supra* note 34, at 958 ("[T]he discriminatory intent standard expresses an ideal of impartiality or neutrality.").

42. 426 U.S. 229, 245–48 (1976) (finding that aptitude test required of applicants to Washington, D.C., police department did not deny equal protection to blacks despite the test's racially disparate impact).

43. *See* Barbara J. Flagg, "*Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961 (1993) [hereinafter Flagg, *White Race Consciousness*] ("The Supreme Court first set forth the discriminatory intent requirement in [*Davis*]."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987) (arguing that in *Davis*, the Court began to "require[] plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration"); Strauss, *supra* note 34, at 939 (tracing discriminatory intent rule to *Davis*); *see also infra* text accompanying notes 337–61 (discussing the discriminatory intent rule).

44. *See infra* text accompanying notes 344–61.

45. Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1144–61 (1998) (criticizing the Court's dismissal of discriminatory impact statistics in equal protection litigation); Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years after the 1963 March On Washington*, 19 HARV. C.R.-C.L. L. REV. 469, 476 (1984) (arguing that "the Court has imposed on the aggrieved party an almost insurmountable burden of proving discriminatory intent"); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1405 (1988) (arguing that the discriminatory intent rule requires plaintiffs in ra-

forth an evidentiary standard for proving an equal protection violation, the rule also deploys the antidifferentiation meaning of equality. The intent doctrine treats as unconstitutional those governmental actions that make explicit and purposeful distinctions between similarly situated groups.[46]

2. Antisubordination

Constitutional law scholars have advocated alternative approaches to equal protection that focus more (but not necessarily exclusively) on the discriminatory effects of state action, rather than upon the motivation of the policymakers. "Antisubordination,"[47] "antisubjugation,"[48] "anticaste,"[49] and "antidomination"[50] theories of equality all emphasize the impact of governmental actions upon historically subordinate groups. Under the antisubordination construction of equality, the constitutionality of a law is not determined by simply examining whether it differentiates among similarly situated classes; instead, a law unlawfully discriminates if it reinforces the marginalized social, economic, or political status of historically disadvantaged classes.[51] Antisubordination equal protec-

cial discrimination cases to prove "that officials were 'out to get' a person or group on account of race"); Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 136 (1987) ("Because a discriminatory intent standard has led to insurmountable barriers against equal protection relief, and does not even measure unconscious motivation, a new test for calibrating the appropriate level of judicial review may be indispensable for security against modern wrongs."); *see also infra* text accompanying notes 327–61.

46. *See* Colker, *supra* note 37, at 1005 (arguing that the antidifferentiation or discriminatory intent approach "focuses on the motivation of the individual institution that has allegedly discriminated, without attention to the larger societal context in which the institution operates"); Strauss, *supra* note 34, at 959 ("The discriminatory intent standard requires governments to be neutral or impartial . . . among racial groups and between men and women. The underlying premise of the discriminatory intent standard is that race and gender are corrupting factors, factors that properly should not influence a governmental decision, except in extraordinary circumstances.").

47. *See* Colker, *supra* note 37, at 1007 (advocating antisubordination theory of equality which deems it "inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole" and which "seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities"); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454 (1991) (advocating an antisubordination theory of equality which "considers the concrete effects of government policy on the substantive condition of the disadvantaged"); West, *supra* note 40, at 71 (advocating an "antisubordination model, which targets legislation that substantively contributes to the subordination of one group by another").

48. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1515 (2d ed. 1988) (advocating an "antisubjugation principle, which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens").

49. *See* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) [hereinafter Sunstein, *Anticaste Principle*] (advocating an "anticaste" view of equal protection which "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").

50. *See generally* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED 32 (1987) (developing "dominance approach" of equality which seeks to undo gender hierarchy rather than fixating upon "sameness" or "difference").

51. *See, e.g.*, sources cited *supra* notes 47–50.

tion theories advance substantive equality over the achievement of formal equality norms.[52] Scholars have justified antisubordination equality theories by tracing them to constitutional history[53] and precedent.[54]

3. Distributive Justice

A few commentators have argued that the Equal Protection Clause embodies a concern for "distributive justice," which imposes upon governments an affirmative duty to dismantle the unequal conditions created by historical systems of domination or inequities that deny to poor individuals access to important societal resources. Frank Michelman, for example, proposes a vision of social justice that requires governments to fund certain important needs, or "just wants,"[55] "free of any direct charge over and above the obligation to pay general taxes (and perhaps free of conditions referring to past idleness, prodigality, or other economic 'misconduct')."[56] Although Michelman does not describe a "just want" with particularity, he considers as instructive case law where the Court has invalidated financial burdens placed upon the poor which restrain their opportunity to vote (e.g., poll taxes) and to utilize the criminal justice system (e.g., charging a fee to appeal a conviction).[57]

Cheryl Harris links distributive justice to antiracist theories of equality.[58] Harris argues that "distributive justice as a matter of equal protection requires that individuals receive that share of the benefits they

52. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978) (encouraging courts to recognize the "victim's perspective" which sees "racial discrimination [as] those conditions of actual social existence as a member of a perpetual underclass"); Roberts, *supra* note 47, at 1453–54 ("Rather than requiring victims to prove distinct instances of discriminating behavior in the administrative process, the anti-subordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged."); West, *supra* note 40, at 60 (arguing that the "antisubordination model of equal protection . . . perceives the equality that equal protection guarantees as substantive, not formal").

53. *See* TRIBE, *supra* note 48, at 1516 ("The antisubjugation principle is faithful to the historical origins of the Civil War amendments."); Sunstein, *Anticaste Principle*, *supra* note 49, at 2435 ("The Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy.").

54. Most commentators point to *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (holding that the Equal Protection Clause provides an "exemption from legal discriminations implying inferiority" which are "steps toward reducing [blacks] to the condition of a subject race"); Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (arguing that the Constitution recognizes "no superior, dominant, ruling class of citizens" and that "[t]here is no caste here"); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (concluding that racially segregated public schools violate equal protection because they "stigmatize" black children); and *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating antimiscegenation laws on equal protection grounds because they seek to protect "White Supremacy"). *See, e.g.*, TRIBE, *supra* note 48, at 1516–17 (discussing precedent implying an antisubjugation equal protection theory).

55. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969).

56. *Id.*

57. *See id.* at 24–33 (discussing case law concerning the poor).

58. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1783 (1993) [hereinafter Harris, *Whiteness as Property*] (arguing that distributive justice should inform antiracist debates).

would have secured in the absence of racism."[59] Although the distributive justice scholars, like the antisubordination theorists, find equal protection violations in the negative distributional effects of "facially neutral" laws or policies, I treat these groups separately (though not as entirely distinct) because the former have emphasized that governments have an affirmative obligation, under an equal protection analysis, to provide resources to poor individuals so that they can exercise certain rights or to have a minimum level of well-being.[60] The distributive justice and antisubordination scholars support efforts, like affirmative action, which aim to redistribute societal resources to oppressed classes.[61] They also find constitutional violations in policies that do not explicitly differentiate on the basis of some impermissible characteristic, but which, nevertheless, deprive oppressed classes of important social resources.[62] For a brief constitutional moment, the Supreme Court embraced an equal protection analysis that protected the ability of poor persons to enjoy certain fundamental rights, but the Court has subsequently abandoned this approach.[63]

4. Equal Citizenship

Another strand of equality jurisprudence construes the Fourteenth Amendment as prohibiting laws or policies that reduce groups to "sec-

59. *Id.*

60. *See, e.g.*, C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 959–98 (1983) (advocating "equality of respect" "designed to provide everyone the opportunity fully to participate in community life and to have a meaningful life as understood by their community"); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 888–901 (1976) (arguing "that individuals who cannot meet their essential material needs through free transactions have a right, which should be enforceable through law, to have these needs met out of the assets of others"); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 37 (1985) (advocating the development of "doctrines that acknowledge the importance of need as a distributive principle and design programs that adequately respond to need").

61. *See, e.g.*, Harris, *Whiteness as Property*, *supra* note 58, at 1784.

> The distributive justice lens, then, would refocus the question of affirmative action on what would have been the proper allocation in the absence of the distortion of racial oppression. By not descending into the warp of sin and innocence, doctrine and legal discourse would be redirected toward just distributions and rights rather than punishment or absolution and wrongs.

62. *See, e.g.*, Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99 (2001) (criticizing "corrective justice" approach to educational discrimination, which searches for intentional wrongdoing, and advocating a distributive equal protection analysis).

63. *See* James G. Wilson, *Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children*, 38 CLEV. ST. L. REV. 391, 402–11 (1990) (discussing momentary protection of poor people under equal protection analysis and subsequent departure from this doctrinal path). Recent case law, however, suggests a potential revitalization of this jurisprudence. *See* Saenz v. Roe, 526 U.S. 489, 511 (1999) (holding under the Fourteenth Amendment Privileges and Immunities Clause that "[c]itizens of the United States, whether rich or poor, have the right to choose to be citizens 'of the State wherein they reside'"). *But see* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 182 (describing *Saenz* as a "modest" decision).

ond-class citizenship."[64] Under this theory, equal protection means that states cannot "create superior and inferior classes of people in 'civil society.'"[65] Equal citizenship might imply a broad equity in all dimensions of social and political life.[66] Kenneth Karst's equal protection scholarship advocates such a wide conception of citizenship.[67] Karst rejects a narrow version of citizenship limited to describing the "legal status" of individuals. Instead, Karst argues that

> [t]he essence of equal citizenship is the dignity of *full membership in the society*. Thus, the principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a *social fact*—namely, one's rank on a scale defined by degrees of deference or regard. The principle embodies "an ethic of mutual respect and self-esteem"; it often bears its fruit in those regions where symbol becomes substance.[68]

Karst's liberal construction of citizenship brings his approach close to anticaste and antisubordination theories.[69] By contrast, a narrow view of citizenship would guard only against those oppressions that create inequality in political participation.[70] This perspective would potentially mirror the approach to equality deployed in *Plessy v. Ferguson*,[71] in which the Court held that equal protection only mandates equity in political activities, rather than equality of social status.[72] Though supported by Fourteenth Amendment history, the political and social rights distinction legitimized a hierarchical system of racial segregation and subjugation.[73] Starting with the dismantling of *Plessy* in *Brown*,[74] the Court

64. *See* Strauss, *supra* note 34, at 943–44 (discussing citizenship theories of equality).

65. *Id.* at 943 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

66. *Id.*

67. *See, e.g.*, Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977) (advocating broad construction of citizenship equality).

68. *Id.* at 6 (quoting JOHN RAWLS, A THEORY OF JUSTICE 256 (1971)).

69. *Id*. at 6. Karst argues:

> The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who "belongs." Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of *an inferior or dependent caste* or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma.

Id. (emphasis added) (footnotes omitted); *see also* Strauss, *supra* note 34, at 943 ("If 'civil society' were broadly understood to include all aspects of social life, the principle that the government may not relegate blacks to second-class citizenship would be essentially equivalent to the principle that blacks may not be subordinated.").

70. *See* Strauss, *supra* note 34, at 943 (discussing political equality theories).

71. 163 U.S. 537 (1896) (sustaining state-mandated racial segregation in places of public accommodation).

72. The Court reasoned that

> [t]he object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544.

73. As Kendall Thomas argues,

> The *Plessy* decision marked the Court's ratification of a national retreat from policies associated with the post–Civil War Reconstruction that had begun several years before. The decision served

would suggest a new theory of citizenship that would blend its political and social dimensions to provide for a more expansive conception of equality. Several Court decisions, for example, hinted that states violated equal protection (or due process) requirements when they denied certain classes the equal opportunity to enjoy "social" rights or interests (like education) that are necessary for the meaningful exercise of political freedoms.[75] Under this broader conception of political citizenship, rights traditionally marked as "social" are recognized for their important connection to the democratic process.[76]

5. *Preventing Stigmatic Harm and Stereotypic or Animus-Driven Decision Making*

Final versions of equal protection view the Fourteenth Amendment as prohibiting governmental decisions that stigmatize certain classes or that rest on bald prejudice or gross stereotypes. In *Brown*, for example, the Court grounded its decision, in part, on a finding that racial segregation in public schools imposed a stigmatic harm upon black children.[77]

In addition, the Court has invalidated laws based on stereotypes or prejudice in its equal protection jurisprudence. In sex discrimination cases, for example, the Court has frequently held that laws that rest on stereotypic notions about the capabilities of men and women violate equal protection.[78]

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as a crucial cornerstone around which state and local governments (not only in the South) constructed a comprehensive system of legalized racial segregation. In the years after *Plessy*, the reach of racial apartheid would extend into almost every area of American life.

Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. E. EUR. L. 329, 332 (1999).

74. Brown v. Bd. of Educ., 347 U.S. 483, 492–96 (1954).

75. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (recognizing "pivotal role of education in sustaining our political and cultural heritage"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 113 (1973) (Marshall, J., dissenting) (discussing "the relationship between education and the political process" and arguing that "[e]ducation serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes" and that "[e]ducation may instill the interest and provide the tools necessary for political discourse and debate"); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.") (Brennan, J., concurring); *Brown*, 347 U.S. at 493 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship."); *see also* Karst, *supra* note 67, at 26–33 (discussing the importance of "fundamental" rights to citizenship status and the role of the Warren Court in elaborating this relationship).

76. *See* Strauss, *supra* note 34, at 943–44 (discussing linkage of political and social rights).

77. *See Brown*, 347 U.S. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); *see also* Strauss, *supra* note 34, at 942–43 (discussing stigma-preventing function of equal protection).

78. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130–31 (1994) (holding that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women").

Finally, in several decisions the Court has held that the Equal Protection Clause prohibits laws based on "animus." In *Romer v. Evans*,[79] for instance, the Court held that a state constitutional amendment (Amendment 2) violated the Equal Protection Clause because it rested solely on "animus toward the class it affects."[80] The Court explicitly grounded its animus-prohibiting interpretation of equality in established jurisprudence which requires that, at a minimum, laws must bear a rational relationship to a legitimate governmental interest.[81] Because animus is an illegitimate interest, the Court invalidated Amendment 2.[82]

B. Institutional Concerns and the Scope of Equality

1. Slaughter-House

As the foregoing discussion illustrates, several values have prevailed in equal protection jurisprudence. The various doctrinal approaches find support in precedent and constitutional history.[83] In its efforts to delineate the meaning of equality, however, the Court has also accounted for "institutional" concerns. The Court has not elaborated the meaning of "equal protection" without paying attention to its role in a federal system of government. In the *Slaughter-House Cases*,[84] for example, the Court considered for the first time whether a state law violated the newly enacted Civil War Amendments.[85] The *Slaughter-House Cases* involved a challenge to a Louisiana law that incorporated a company and extended to it the exclusive right to operate a slaughter-house business within the city of New Orleans.[86] The statute required all existing slaughter-houses

79. 517 U.S. 620 (1996) (finding unconstitutional a Colorado constitutional amendment that prevented the enactment of laws prohibiting discrimination against gays, lesbians, and bisexuals).

80. *Id.* at 632; *see also* USDA v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). Several scholars have responded to criticism of the majority's decision in *Romer* by attempting to place the decision within constitutional traditions. *Compare Romer*, 517 U.S. at 653 (arguing that the majority decision "has no foundation in American constitutional law, and barely pretends to") (Scalia, J., dissenting), *with* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996) (arguing that constitutional prohibition of bills of attainder provides alternative textual justification for *Romer* and that bill of attainder prohibition sheds light on meaning of equal protection).

81. *See Romer*, 517 U.S. at 635 ("We conclude that . . . the principles [Amendment 2] offends . . . are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose . . . ." (citing Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462 (1988)).

82. *Romer*, 517 U.S. at 632 ("[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

83. *See* Strauss, *supra* note 34, at 940–46 (discussing similar list of doctrinal approaches to equal protection and linking each to history and precedent).

84. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

85. *Id*. at 67 (stating that the Court "is . . . called upon for the first time to give construction to [the Civil War Amendments]").

86. *Id.* at 59–60.

to close.[87] A group of white business owners filed a lawsuit arguing that the statute violated the Thirteenth Amendment and the Fourteenth Amendment, namely, the Privileges and Immunities Clause, Due Process Clause, and Equal Protection Clause.[88] The decision is known primarily for its narrow construction of the Privileges and Immunities Clause.[89] The Court rejected the petitioners' argument that the Privileges or Immunities Clause incorporated a broad basket of "fundamental" rights that were "heretofore belonging exclusively to the States."[90] Instead, the Court held that privileges and immunities included only those rights implied by national citizenship—or those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[91] Justice Miller's opinion proceeds to list a narrow collection of rights that seem implicit in the structure of the Constitution.[92] The narrowness of Miller's reasoning rendered the Privileges and Immunities Clause virtually superfluous:[93] the clause did not protect any new rights but only recognized those rights that were either mentioned elsewhere in the Constitution or implied in the structure of the federal government.[94]

The Court also rejected plaintiffs' remaining claims.[95] With respect to the Thirteenth Amendment and equal protection claims, the Court emphasized that ending black racial subjugation was the "pervading purpose" of the Civil War Amendments.[96] The economic liberty and discrimination claims of the white business owners were too distant from the compelling factual context of Reconstruction.[97]

87. *Id.* at 60.

88. *Id.* at 66.

89. Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 646 (2000) ("In contemporary constitutional discourse, *Slaughter-House* stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work in the protection of individual rights against state interference, and that any argument premised on the Clause is therefore a constitutional non-starter.").

90. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77.

91. *Id.* at 79.

92. *Id.* at 79–80.

93. Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1547 (1983) (arguing that "the most common criticism of *Slaughter-House* is that it rendered the privileges or immunities clause superfluous").

94. *Id.* at 1546–47.

95. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 71.

96. *See id.* The Court held:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

Id. at 71–72.

97. *See id*. at 81 ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within

Federalism and separation of powers concerns permeated the *Slaughter-House Cases*, and these issues continue to influence the Court's interpretation of the Fourteenth Amendment. The Court, for example, rejected plaintiffs' construction of the Privileges and Immunities Clause because it would have, the Court believed, unduly expanded the scope of federal judicial review of state governmental actions.[98] The Court did not view the Civil War Amendments as disturbing the balance of federal and state powers.[99]

2. From Lochner *to* Brown

As the *Slaughter-House Cases* indicated, the Court has always reflected upon institutional concerns in its efforts to define the scope and content of the Fourteenth Amendment. That concern with federalism, separation of powers, and judicial integrity was forcefully debated in the early twentieth century as a result of doctrinal developments. Specifically, *Lochner v. New York*[100] and its progeny would spark a contentious debate over the proper role of the Court in a democratic society.[101] In *Lochner*, the Court invalidated a New York statute that limited the amount of daily and weekly hours of workers in the baking industry.[102] The Court, embracing free-market economic theories, held that the economic regulation constituted a deprivation of liberty without due process of law.[103] *Lochner* and the case law it produced received wide criticism from scholars and jurists who argued that the Court wrongfully substituted its own value judgments for those of the democratic branches of

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the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."); *see also* Newsom, *supra* note 89, at 685 (arguing that the Court's focus on slavery and black subjugation in *Slaughter-House* was intended to show "why the plaintiffs—white butchers claiming absolute constitutional protection for ordinary common-law rights—could not prevail.").

98. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78 (holding that plaintiffs' views of the Privileges and Immunities Clause "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment").

99. The Court held that

> whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Id. at 82.

100. 198 U.S. 45 (1905) (finding a right of economic liberty protected by the Due Process Clause).

101. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 985 (2000) ("During the Populist/Progressive, or *Lochner*, era, the criticism of constitutional courts was akin to that described by Bickel's 'counter-majoritarian difficulty.' . . . Courts regularly were attacked as interfering with, or frustrating, popular will.").

102. *See Lochner*, 198 U.S. at 59–64.

103. *See id.* at 64 (holding that under the circumstances of the case, "the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution").

federal and state governments.[104] Justice Holmes, for example, criticized the *Lochner* majority in a vigorous—and now famous—dissent:

> [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[105]

The Court would later repudiate *Lochner* and the invasive judicial scrutiny of economic regulations it justified.[106] *Lochner*, nevertheless, stands as a reminder of judicial overreaching to commentators who are suspicious of what they perceive as judicial activism.[107] Furthermore, in due process jurisprudence, the Court continues to apply a high level of scrutiny to *noneconomic* regulations that infringe upon certain "fundamental rights."[108] Several Justices and commentators view the substantive due process jurisprudence as both a return to *Lochner*[109] and as a repudiation of the *Slaughter-House Cases* (which narrowly construed the Fourteenth Amendment as securing only those rights associated with national citizenship).[110]

In the area of equal protection, the *Brown* decision generated a substantial amount of criticism; this criticism interjected institutional

104. *See, e.g.*, *id.* at 74–76 (Holmes, J., dissenting) (criticizing *Lochner* majority for supplanting legislative judgment).

105. *Id.* at 75–76 (Holmes, J., dissenting).

106. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("[L]iberty does not withdraw from legislative supervision . . . activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.").

107. *See* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 222 (1991) ("While *Lochner* was laid to rest doctrinally . . . its ghost has lived on, haunting the Court's constitutional conscience for the next fifty years. Most debatable instances of judicial review since 1937 have had to endure the criticism of reincarnating *Lochner* in a different guise.").

108. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."); Roe v. Wade, 410 U.S. 113, 152–54 (1973) (holding that the Due Process Clause confers a right to terminate a pregnancy); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the Due Process Clause confers a right of marital privacy).

109. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 407–11 (1978) (Rehnquist, J., dissenting) (accusing Court of *Lochner*ism in recognizing right to marry); *Griswold*, 381 U.S. at 514, 523–24 (Black, J., dissenting) (arguing that majority returned to the repudiated principles of *Lochner* in concluding that the Fourteenth Amendment guaranteed a right of married couples to have privacy in their intimate sexual relations); *see also* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 802 (1989) (arguing that "the right to privacy has simply invited critics to expose it—and to brand it, of course, with the scarlet letter of *Lochner*ism").

110. *See* Newsom, *supra* note 89, at 665 (arguing that substantive due process doctrine repudiates majority view in *Slaughter-House*).

concerns into modern equal protection analysis.[111] *Brown* marked a departure from the "separate-but-equal" doctrine that had dominated equal protection jurisprudence since *Plessy*.[112] Critics of *Brown*, many of whom claimed to be sympathetic to the outcome of the case, argued that the decision lacked a sound theoretical basis[113] and thus threatened the Court's legitimacy and the operation of the democratic branches of government.[114] The so-called liberal critiques of *Brown*, however, failed to recognize that racial segregation maintained and reinforced white supremacy and racial domination.[115]

Michael Klarman offers an interesting interpretation of *Brown*, which reads the decision in a more modest fashion than its critics.[116] Klarman persuasively argues that *Brown* did not establish a presumptive rule against racial classifications and that the Court instead justified its dismantling of de jure public school segregation on the important function of education in a democratic society.[117] The Justices "limited" their decision because they catered to the racial politics of the era,[118] realized the difficulty of justifying desegregation under an original intent analy-

111. *See* Klarman, *supra* note 107, at 248 (observing that as a result of *Brown*, "the Court endured some vicious academic criticism, much of it emanating from commentators sympathetic to the result in *Brown*").

112. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

113. Alexander Bickel and Harry Wellington, for example, included *Brown* on a list of cases that they found troubling for the following reasons:

> The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.

Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957); *see also* Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959) (questioning the existence of a theoretical basis for desegregation jurisprudence).

114. *See generally* Weschler, *supra* note 113, at 16–20 (arguing that courts should justify their decisions with "neutral principles" to avoid intrusion upon the legislative role). Several commentators responded to these critiques. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

115. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown*, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 124 (1998) ("Pre-*Brown*, white supremacy manifested itself in the system of segregation supported by an ideology of biological determinism."); Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 76 (1998) (arguing that *Brown* "has been most persuasively defended as the Court's recognition that, as actually practiced, American segregation was a crucial piece of a system of racial subordination"); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2395 (2000) ("Segregation designed to exclude blacks from equal citizenship was wrong because of its motivating ideology—white supremacy.").

116. *See* Klarman, *supra* note 107.

117. *See id.* at 238–39 ("Finally, the rationale of *Brown v. Board of Education* confirms the Court's commitment to the limited fundamental rights approach to equal protection rather than to the racial classification rule ostensibly embraced in [earlier precedent].").

118. *See id.* at 241–43.

sis,[119] and wanted to avoid "bifurcating" equal protection analysis into tiers with differing standards of review.[120] The Court might have avoided a bifurcated equal protection analysis in order to appear faithful to post-*Lochner* due process analysis; after the Court abandoned *Lochner*, it settled upon a deferential review standard.[121] Perhaps the Court, wanting to remain consistent with this approach, allowed a concern for institutional balancing to shape—and limit—the *Brown* decision.[122] "Guarded" racial politics and institutional concerns would deny the implementation of desegregation, thus sustaining white supremacy, as the Court declined to issue a remedy in *Brown* and subsequently passed the matter to the lower courts.[123] Thus, while institutional concerns might have some legitimacy in an equal protection analysis, they could constitute judicial abdication to and alignment with oppressive social hierarchies.[124]

The Court's equal protection doctrine has taken federalism and separation of powers concerns into consideration. Although equal protection contains, at a minimum, an antidiscrimination component, the Court cannot treat all forms of discrimination as constitutionally suspicious; otherwise, it would paralyze governance.[125] Thus, the Court has

119. *See id.* at 243–45.

120. *See id.* at 245–46.

121. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." (citing numerous cases)).

122. *See* Klarman, *supra* note 107, at 246 ("Perhaps, then, the Court during the early years of modern equal protection, having firmly embraced a deferential approach towards economic regulation, considered it anomalous simultaneously to construe the equal protection guarantee as presumptively invalidating racial classifications."). Furthermore, several Justices have questioned the tiered approach that currently governs equal protection analysis. *See id*. at 245–46.

123. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (declining to issue a particular remedy one year after finding public school racial segregation unconstitutional but directing lower courts to act with "all deliberate speed" to construct such a remedy); Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954) (directing further briefing on the question of proper remedial decrees); *see also* Michele Deitch, *Rights, Remedies, and Restrained Reform*, 70 TEX. L. REV. 521, 527 (1991) (reviewing COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS (John J. Dilulio ed., 1990)) (criticizing "all deliberate speed" approach as delaying justice); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1329 (1991) ("The requirement of desegregation 'with all deliberate speed' further couched the new model of equal protection in terms of sensitivity to the dominant culture."); Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFF. L. REV. 450, 457–59 (1964) (criticizing the delaying of a remedy in the *Brown* decisions); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 25–26 (1990) (conceding that there were "powerful pragmatic arguments" for delaying the implementation of desegregation but questioning ultimate decision because "[t]o permit some period of time for families to adjust to a new way of life is one thing[, but] to permit racists a period of continued expression of their racism out of fear of their resistance and lawlessness is another thing").

124. *See, e.g.*, *infra* text accompanying notes 194–211.

125. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 138 (1988). Nelson argues that

> [t]he very essence of all law is to discriminate—to separate out the occasions on which one legal consequence rather than an opposite one will obtain. A theory that the state should treat all people equally cannot mean that the state may never treat two people differently, for such a theory would mean the end of all law. In order to sustain a principle of equality under law—the

faced the complicated task of articulating categories of discrimination that violate the equal protection principle, but which do not impede legitimate governance. The next subpart describes the prevailing theory of judicial review which seeks to balance judicial enforcement of equal protection with institutional and democratic concerns.

C. A Theory of Judicial Review: Heightened Protection of "Vulnerable Classes"

The institutional critiques of *Brown* (and other Warren Court decisions) sent scholars sympathetic to the decision scrambling to search for a post hoc justification.[126] These scholars sought to elaborate a constitutional principle that could both justify the Court's growing suspicion of governmental classifications that harm persons of color and respond to questions of institutional legitimacy.[127] The Court's "tiered" equal protection framework grew, in part, out of these efforts.

1. "Tiered" Equal Protection Analysis

The Supreme Court has set forth a doctrinal test to determine what level of scrutiny it will apply in equal protection litigation. This doctrinal test establishes a "tiered" approach, under which certain governmental classifications receive exacting scrutiny, while others only warrant a deferential analysis.[128] The three levels of scrutiny, starting with the most invasive, are "strict,"[129] "intermediate,"[130] and "rational basis."[131] Most

> principle for which the framers of the Fourteenth Amendment were striving, it is necessary to have some theory about when discrimination is appropriate and when it is not.

Id.

126. Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1929 (1995) (discussing attempts by liberal scholars to defend the *Brown* decision). Today, however, conservatives have passionately attempted to defend *Brown* to appear "correct" on matters of race. *See generally id.* at 1929–30 (discussing conservative efforts to defend *Brown*).

127. *Id.* at 1929–30.

128. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 3 n.1 (discussing various levels of judicial review).

129. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1966) ("[T]he Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny . . . .'").

130. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (stating that Supreme Court decisions hold that to "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing . . . at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'").

131. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (declining to apply heightened scrutiny to discrimination against the poor and holding, therefore, that "[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest").

laws fail under the rigidity of a strict scrutiny approach,[132] while the highly deferential rational basis review tends to legitimize the challenged policy.[133] Intermediate scrutiny lies somewhere in between, but recent case law suggests both a toughening *and* weakening of this standard.[134]

2. *Representation-Reinforcement*

Scholars and jurists have justified the tiered approach using a "representation-reinforcement" rationale.[135] Constitutional law scholar John Hart Ely elaborated this principle in his influential book *Democracy and Distrust.*[136] In his analysis, Ely accepts the proposition that judicial activism can present a countermajoritarian dilemma, as courts replace legislative judgment with their own values.[137] Nevertheless, according to Ely, there are certain circumstances in which the democratic process operates unfairly, or where there is a "process failure."[138] Of particular significance to Ely are laws that impede rights closely connected to the political process, like speech and suffrage.[139] Ely, however, also argued that a malfunctioning political process—particularly legislative action tainted by bald prejudice—likely explains why laws burden certain politically vulnerable classes.[140] Under such circumstances, courts should apply a more probing analysis to "reinforce" the political representation of these despised classes.[141]

Ely's analysis relies upon constitutional text and structure, political theory, and upon law's most famous footnote: footnote four of *United States v. Carolene Products*.[142] *Carolene Products*, a case in the line of precedent retreating from *Lochner*'s stringent review of legislative ac-

132. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny during Warren Court as "'strict' in theory and fatal in fact").

133. In some "rational basis review" cases, the Court has exhibited an extreme amount of deference to legislatures. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

134. *See* Nguyen v. INS, 533 U.S. 53, 61 (2001) (plurality opinion) (upholding under "intermediate scrutiny" analysis explicit gender classification within immigration statute). *But see* Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1226 (2000) (observing that recent case law "suggests to some commentators and members of the Court that the [intermediate] standard of review [in sex-discrimination cases] may be moving toward strict scrutiny").

135. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

136. *Id.*

137. *See id.* at 43–72 (discussing dangers of judicial review in a democracy).

138. *Id.* at 73–106 (discussing role of courts in ensuring fair legislative process).

139. *See id.* at 73–134 (discussing role of judiciary as protector of political freedom).

140. *Id.* at 135–79 (discussing prejudice against "minority" groups as a political process failure).

141. *See id.*

142. 304 U.S. 144, 153 n.4 (1938); *see* ELY, *supra* note 135, at 73–100 (discussing constitutional text, political history, and *Carolene Products* as sources of process theory).

tion,[143] held that courts should generally assume the constitutionality of governmental enactments.[144] Yet, in footnote four, Justice Stone suggested that certain circumstances might arise in which the Court should not adhere to such a deferential approach.[145] As Justice Stone explained:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular *religious . . . or national . . . or racial minorities . . .; whether prejudice against discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . .[146]

Carolene Products (and an amalgamation of constitutional text and history) provides precedential support for abandoning judicial deference and the presumption of constitutionality in cases involving governmental discrimination against religious, national, or racial minorities or discrimination against "discrete and insular" minorities. Prejudice against these classes requires a "more searching" judicial inquiry. In theory, the tiered suspect class doctrine, building upon *Carolene Products*, offers judicial solicitude to historically subordinate groups.[147]

3. Indicia of Political Vulnerability

The Court has announced, without much elaboration, a list of factors that determine whether a group, due to its despised status, deserves

143. *See* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 658 (2000) (describing *Carolene Products* as a "crucial departure[] from *Lochner*").

144. The Court held that

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

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

145. *See id.* at 153 n.4.

146. *See id.*

147. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 465 (1997) [hereinafter Rubenfeld, *Affirmative Action*] (arguing that the Court's application of heightened scrutiny in the equal protection context developed originally to protect politically vulnerable classes).

a more exacting judicial inquiry.[148] To obtain suspect class status, a group must demonstrate that it has suffered a "history of discrimination," that it is "politically powerless," and that it faces discrimination on the basis of an "immutable," "obvious," or "visible" characteristic.[149] Although all of these factors have appeared in cases discussing the standards for heightened scrutiny, courts (as discussed below) have often disregarded some or all of them in their analysis.[150] In addition, the presence of these (or most of these) factors has not necessarily resulted in the application of heightened scrutiny.[151] Furthermore, a host of constitutional law scholars have criticized the effectiveness of focusing upon these particular concerns as a method for measuring the vulnerability of social classes.[152] Nevertheless, federal courts continue to apply these factors in equal protection litigation.

D. Doctrinal Options

The foregoing discussion has attempted to demonstrate that the Court has several doctrinal options at its disposal in its ongoing effort to elaborate the scope and meaning of equal protection. The Court could construe the Equal Protection Clause as forbidding differential treatment of like classes.[153] On the other hand, the Court could examine the harmful "effects" of legislative enactments and interpret equal protection as placing a constitutional barrier to laws that reinforce the subordination, second-class citizenship, or stigmatization of historically disadvantaged groups or that reflect an irrational desire to harm a subjugated class.[154] The Court could also construe equality as imposing upon governments an affirmative obligation to diminish or eradicate material deprivation to the extent that economic inequality hinders the ability of poor individuals to exercise certain important liberty interests.[155] The Court has, in fact, advanced each of the above meanings of equality in its equal protection jurisprudence,[156] and the above approaches are not, necessarily, exclusive of one another.

The Court has also attempted to balance its equal protection jurisprudence by considering its role in the federal system of government and in a manner that recognizes the division of national powers among three

148. 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, 489 (1998) (arguing that the Court has "deployed . . . without much explanation, a set of factors to determine whether a group is worthy of heightened scrutiny").

149. *Id*. (citation omitted).

150. *See infra* text accompanying notes 524–29.

151. *See infra* text accompanying notes 236–38.

152. *See infra* text accompanying notes 362–75.

153. *See supra* text accompanying notes 37–46.

154. *See supra* text accompanying notes 47–54.

155. *See supra* text accompanying notes 55–63.

156. *See supra* text accompanying notes 37–63.

coequal branches of government.[157] To effectuate this end in equal protection jurisprudence, the Court has held that it will limit its second-guessing of the legislative wisdom by presuming the constitutionality of governmental enactments—unless these laws impede the enjoyment of a fundamental right or disadvantage a suspect class.[158] Although institutional restraint can serve as a pretext for legitimizing discrimination,[159] this article takes the position that courts can appropriately consider structural matters in their exercise of judicial review.

Although the "process theory" of equal protection continues to generate criticism, *no* serious constitutional commentator has argued that the Court should invert the suspect class doctrine and reserve its most stringent level of review for laws that "disadvantage" historically privileged or politically powerful classes and defer to the legislative wisdom when it examines laws that harm historically oppressed or vulnerable classes. Such a theory of judicial review would find no support in the history of the Fourteenth Amendment or in the *explicit* doctrinal framework applied in the body of equal protection case law. Despite the indefensible nature of an argument that would have the Court invert the *Carolene Products* rationale and, correspondingly, the meanings of privilege and subordination, contemporary equal protection jurisprudence has led to such a result.[160] By design or effect, the Court has inverted the concepts of privilege and subordination; this indefensible jurisprudence has resulted in a denial of "equal" protection and in the perpetuation and fortifying of social hierarchy and caste.[161] Part III of this article explicates this thesis.

III. INVERSION IN PROCESS: EQUAL PROTECTION THEORY AND THE INVERSION OF PRIVILEGE AND SUBORDINATION

This part argues that contemporary equal protection analysis inverts the concepts of privilege and subordination, such that courts now reserve their most exacting level of scrutiny for laws that "burden" historically privileged groups but assume the constitutionality of enactments that harm historically disadvantaged groups. To support my thesis, this part examines three areas of equal protection jurisprudence: the embrace of "colorblindness" in the context of affirmative action and other remedial usages of race; the deployment of a stringent "discriminatory intent" rule as a requirement to proving an equal protection violation; and the usage

157. *See supra* text accompanying notes 99–125.

158. *See e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) as reaffirming that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class").

159. *See supra* text accompanying notes 142–47.

160. *See infra* text accompanying notes 327–36.

161. *See infra* text accompanying notes 439–46.

of *Carolene Products* to deny heightened scrutiny to nonsuspect, but vulnerable, classes (such as gays, lesbians, bisexuals, and transgender plaintiffs) who seek judicial solicitude from oppressive state action.

A. Colorblindness and the Symmetrical Application of Heightened Scrutiny

The Court has exhibited extreme skepticism of "affirmative action"—or governmental policies that utilize racial classifications to distribute important societal resources in a more egalitarian fashion.[162] The Court's embrace of colorblindness in the context of affirmative action litigation has sparked commentary along various ideological perspectives.[163] Progressive scholars have been particularly critical of the colorblindness doctrine, arguing that it reinforces social inequality.[164] I will not repeat these arguments here, but will instead demonstrate how the Court's affirmative action jurisprudence treats whites (who possess racial privilege) as politically vulnerable and persons of color (who are socially subordinate) as politically dominant, thereby inverting the concepts of privilege and subordination.

1. Symmetry and the "Class-to-Classification" Doctrinal Shift

Although the Court has relied upon the *Carolene Products* "suspect class" doctrine as a justification for rejecting or questioning the legislative process,[165] in recent case law, the Court has applied heightened scrutiny "symmetrically."[166] 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.[167] The Court's doctrine shifts from one that protects suspect "classes" to one

162. *See* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 5 (1995) (defining affirmative action as "the race-conscious allocation of resources motivated by an intent to benefit racial minorities").

163. *See id.* at 5–13 (summarizing arguments of advocates and opponents of affirmative action).

164. *See id.* at 9–10 (arguing that proponents of affirmative action believe that "[m]ere prospective racial neutrality does not provide adequate compensation for past inequities but simply freezes the existing advantages that the white majority has over racial minorities").

165. *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." (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, n.4 (1938))).

166. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) ("'[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." (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion))).

167. *See Adarand*, 515 U.S. at 223–24; *see also* Yoshino, *supra* note 148, at 563 ("The class-based view of equal protection states that the courts should focus on disempowered classes, like blacks, women, or gays. The classification-based view states that courts should focus not on classes but on the classifications that create the classes—such as race, sex, or sexual orientation.").

that presumes the unconstitutionality of certain suspect "classifications."[168] Thus, while blacks or women might constitute suspect classes due to their socially disadvantaged statuses, whites and men receive heightened scrutiny when they challenge laws that classify on the basis of race or gender.[169]

The class-to-classification shift has taken place primarily in the context of race-based affirmative action cases.[170] The application of heightened scrutiny to white plaintiffs is impossible to justify under the *Carolene Products* formulation.[171] Whites are not a politically vulnerable class by any serious theory of political power.[172] In shifting to the classification analysis, the Court explains that racial classifications are universally stigmatizing, injurious, and worthy of exacting scrutiny.[173] Notwithstanding the possible merits of this argument, the "inherently" injurious nature of race cannot account completely for the Court's application of strict scrutiny in affirmative action cases. The Court's colorblindness doctrine also rests on implicit and explicit portrayals of whites as politically vulnerable and in need of elevated scrutiny.

The Court implicitly treats whites as vulnerable when it applies strict scrutiny to their claims of discrimination. The *Carolene Products*

168. *See* Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1400 (2000) (discussing "the shift [in equal protection doctrine] from protecting classes of people who suffer prejudice, such as African Americans or females, to prohibiting any use of classifications, such as race or sex, thus extending protection to dominant classes that historically have not suffered prejudice (such as whites and males)"); Rubenfeld, *Affirmative Action*, *supra* note 147, at 465 (discussing "shift in the Court's equal protection jurisprudence . . . from classes to classifications"); Schwartz, *supra* note 36, at 657 ("The courts used to talk about the idea of a 'protected class' . . . ."); Yoshino, *supra* note 148, at 563 (arguing that the Court has adopted "the classification-based approach" to equal protection).

169. *See, e.g.*, Yoshino, *supra* note 148, at 563 (distinguishing the class and classification approaches).

170. *See* Rubenfeld, *Affirmative Action*, *supra* note 147, at 465–66 (discussing usage of classification approach in affirmative action jurisprudence); Schwartz, *supra* note 36, at 657 (arguing that what classification approach "really means is that white males can bring 'reverse discrimination' cases and that 'reverse civil rights' lawyers are on the ascendancy in attacking affirmative action"); Yoshino, *supra* note 148, at 563 (linking classification approach to affirmative action decision).

171. Jed Rubenfeld observes that

> whites never could have been deemed a suspect class under equal protection doctrine as that concept was consistently developed and articulated prior to the affirmative action cases. Today, in effect, whites are a suspect class—even though the Court has never explained this result, which contradicts everything the Court ever said about the criteria necessary to establish a class as suspect for equal protection purposes.

Rubenfeld, *Affirmative Action*, *supra* note 147, at 465.

172. *Id*. (criticizing the implicit treatment of whites as a suspect class).

173. In *Adarand Constructors, Inc. v. Peña*, for example, the Court argued:

> Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate. . . . [R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

515 U.S. 200, 236 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 533–35, 537 (1980) (Stevens, J. dissenting)); *see also* Rubin, *supra* note 128, at 18–19 ("The only adequate explanation—as both a descriptive and a normative matter—for application of strict scrutiny to classifications based on race must be that the government's use of race is frequently inconsistent with notions of human dignity.").

rationale has a significant place in legal and political culture. The assumption that civil rights jurisprudence protects vulnerable social groups has so much currency[174] that even after courts had abandoned the concept of suspect classes in favor of suspect classifications, they still spoke in the language of former doctrine.[175] Similarly, opponents of civil rights often argue that these provisions provide "special rights" or "special protection" to disparaged groups.[176] The structure of civil rights and equal protection, therefore, has a particularized resonance in our legal culture; it implies the implementation of specialized measures designed to assist classes who face social domination. Given this cultural backdrop, the extension of judicial solicitude to privileged classes falsely implies that these groups are politically vulnerable and deserve judicial solicitude like historically oppressed groups.

More importantly, however, the Court also explicitly describes whites as politically disadvantaged in its symmetrical application of heightened scrutiny. The Court has deployed a narrative of white victimization and oppression to justify the application of strict scrutiny in litigation challenging race-based affirmative action, which has resulted in the dismantling of policies designed to mitigate racial subordination. I will analyze two cases that illustrate this proposition.

2. Regents of the University of California v. Bakke

In *Regents of the University of California v. Bakke*,[177] the Court, for the first time, invalidated an affirmative action program.[178] Writing for the plurality, Justice Powell rejected the petitioner's argument that the Court should not apply strict scrutiny to "benign" racial discrimination which burdens whites in order to remedy racial inequality.[179] Justice Powell contested this argument—which simply urged the Court to apply honestly the *Carolene Products* framework—stating that it would produce a host of "intractable" difficulties.[180] These "difficulties" would arise, according to Justice Powell, because whites, like persons of color,

174. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2 (1996) (arguing that a common understanding of the Court as a guardian of "minority rights from majoritarian over-reaching . . . exercises a powerful hold over our constitutional discourse").

175. *See* Schwartz, *supra* note 36, at 657 (arguing that courts continued to discuss the notion of a "protected group" even after the class approach was abandoned).

176. *See* Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1372 (2000) [hereinafter Hutchinson, *Gay Rights*] (observing that opponents to gay and lesbian equality describe "gay rights" as "special rights").

177. 438 U.S. 265 (1978) (plurality) (invalidating race-based affirmative action measure employed by state medical school).

178. *See id.*

179. *See id.* at 290 (rejecting petitioner's argument "that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a 'discrete and insular minority' requiring extraordinary protection from the majoritarian political process").

180. *See id.* at 295.

have suffered from a history of subjugation, thus complicating the traditional notions of power and disempowerment.

> The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.[181]

Justice Powell, in postmodern fashion, deconstructs the population of whites and re-describes this class as historically subordinate and, thus, in need of the very protections that the Court affords to persons of color under an equal protection analysis.[182]

At first glance, Justice Powell's analysis might appear to support *and* complicate my claim that equal protection theory inverts the concepts of privilege and subordination. On the one hand, Powell explicitly articulates the idea that the population of whites consists of historically oppressed classes.[183] Yet, Powell seemingly rejects the notion that the level of judicial scrutiny in equal protection cases should depend at all upon an adjudication of which groups are "oppressed" *or* "privileged."[184] According to Powell, the "shifting" nature of political vulnerability and domination renders such a framework unstable and impractical.[185] Pow-

181. *Id.* at 295–97 (footnotes omitted).

182. *See* Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1771 (2001) [hereinafter Harris, *Equal Treatment*] ("Powell's argument is a classic invocation of social constructionism: 'white' is not a monolithic category fixed by biology; it is a 'majority composed of various minorit[ies].'") (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 295 (1978)).

183. *See Bakke*, 438 U.S. at 295.

184. *Id.* at 297 (arguing that courts are incompetent to determine which classes are vulnerable and in need of judicial solicitude).

185. *See id.* at 296–97.

ell also argues that the Court should apply a uniform level of scrutiny to racial classifications because the Equal Protection Clause is framed in general terms and applies to all individuals, rather than to certain classes.[186] Justice Powell argues that

> [t]he guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[187]

Thus, Justice Powell's analysis implies a desire to retire the very notions of privilege and subordination, rather than simply to assign to whites the indicia of vulnerability. Nevertheless, for several reasons, Powell's analysis serves as a compelling example of the process of inversion that is the subject of this article. First, although Powell argues against an equal protection theory that applies a differing level of scrutiny to particular classes of individuals, the narration of white victimization is a critical component of his analysis.[188] Powell's description of whites as a population of subjugated groups serves to strengthen whites' "moral" claim against affirmative action,[189] place whites within the strict scrutiny framework,[190] and portray whites as "innocent" victims of affirmative action policies.[191] Powell's analysis, therefore, derives its force from the process of inversion. The denial of white privilege and the recasting of whites as a class of historically oppressed groups allow for Powell's resolution of the most complicated and critical question the case presented: should the Court extend heightened judicial scrutiny to the equal protection claims of historically privileged classes? Once Powell reconstructs whites as oppressed, this question becomes irrelevant.

186. *See id.* at 289–90 (arguing for a uniform construction of equal protection).

187. *Id*.

188. *See* Harris, *Equal Treatment*, *supra* note 182, at 1771–72 (arguing that under Powell's analysis "[t]he white majority . . . disintegrates into a group of ethnic minorities, each of which has equal moral claim to remediation for historic subordination").

189. *See Bakke*, 438 U.S. at 295 (arguing that whites can "lay claim to a history of prior discrimination").

190. *See id.*

191. *See id.* at 295 n.34. Powell argues that

> [t]he denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others.

Id.; *see also* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (discussing the rhetoric of "white innocence" in anti-affirmative action discourse); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 398 (1989) (same).

Furthermore, Justice Powell does not really wish to abandon entirely the *Carolene Products* rationale for heightened scrutiny. Instead, he complicates process theory to achieve the singular purpose of applying strict scrutiny to all race-based classifications. Powell argues that the Court should maintain the *Carolene Products* formulation to determine what "new" categories of discrimination require heightened scrutiny.[192] Powell's analysis, which would require presently nonsuspect, vulnerable groups, but not white males, to undergo the rigors of the *Carolene Products* formulation, further supports my thesis that the Court has become a protector of privileged classes. Discriminatory state action against disadvantaged, nonsuspect classes is presumed constitutional (unless they meet the difficult *Carolene Products* test), but privileged classes, under the classification approach, have the opportunity to receive judicial solicitude without having to satisfy the stringent heightened scrutiny requirements.[193]

3. City of Richmond v. J.A. Croson Co.

The plurality opinion in *City of Richmond v. J.A. Croson Co.*[194] more vividly inverts the concepts of racial privilege and subordination. In *Croson*, a white contractor challenged a municipal ordinance that required prime contractors awarded city contracts to subcontract at least thirty percent of the value of the prime contract to "Minority Business Enterprises" (MBEs).[195] The ordinance defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members."[196] The ordinance further defined "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[197] The City of Richmond adopted the program to "promot[e] wider participation by [MBEs] in the construction of public projects."[198] The city council implemented the program after a study showed that in the five years prior to the implementation of the plan, MBEs received only 0.67 percent of the city's prime construction contracts although blacks constituted fifty percent of the city's population.[199] The city council also considered testimony of a council member who attested that racial discrimination was a

192. *See Bakke*, 438 U.S. at 290 ("These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics." (citations omitted)).

193. *See infra* text accompanying notes 194, 203–11 (discussing how "return" to class-based equal protection inverts privilege and subordination).

194. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion).

195. *Id.* at 478.

196. *Id*. (alterations in original).

197. *Id*. (alterations in original).

198. *Id.*

199. *Id.* at 479–80.

problem in the local construction industry,[200] and it relied upon various congressional studies that documented the existence of nationwide racial discrimination in the procurement industry.[201] The Court applied strict scrutiny and invalidated the ordinance.[202] The analysis in *Croson* powerfully illustrates the process of inversion.[203]

The Court addressed Justice Marshall's contention in his dissenting opinion that the Court should apply a lower level of scrutiny to remedial usages of race.[204] Justice Marshall argued that whites could not meet the requirements of heightened scrutiny set forth in the representation-reinforcement rationale for elevated judicial review.[205] The Court's response to Marshall's analysis explicitly inverts the concepts of privilege and subordination. Writing for the plurality, Justice O'Connor argues that heightened scrutiny is necessary in this case to protect whites from oppressive black conspiratorial action:

> Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference . . . some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. *In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.*[206]

200. *Id.* at 480.

201. *See id.* at 533–34 (Marshall, J., dissenting).

202. *Id.* at 508.

203. *See supra* notes 162–76 and accompanying text (discussing the process of inversion in the equal protection context).

204. *Croson*, 488 U.S. at 494–95 (addressing arguments of Justice Marshall).

205. *See id.* at 495–96 (discussing process theory approach to equal protection). Justice Marshall argued that

> [i]t cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears.

Id. at 553–54 (Marshall, J., dissenting) (citation omitted).

206. *Id*. at 495–96 (emphasis added) (citations omitted).

Under Justice O'Connor's analysis, Richmond blacks—who are clearly historically oppressed[207]—become the oppressors, while whites need the framework of heightened scrutiny to protect them from a prejudicial black city council.[208]

Justice O'Connor's reasoning inverts the concepts of privilege and subordination by ignoring, as does Justice Powell in *Bakke*, the social, economic, and political domination of whites.[209] Although blacks constituted fifty percent of the Richmond population (which is not a majority), whites remained dominant statewide, nationally, and likely at the municipal level, due to their wealth, political representation, immunity from social discrimination, and the subordinate status of persons of color.[210] Justice O'Connor's analysis thus obscures the reality of white supremacy and falsely constructs whites as disadvantaged and blacks as dominant, thus inverting the social reality of racially linked privilege and subordination.[211]

207. Justice Marshall contextualizes the affirmative action program within Richmond's racist history. *See id.* at 528 ("It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst.") (Marshall, J., dissenting).

208. *See* Powell, *supra* note 37, at 255 (arguing that in *Croson*, the Court "utilizes colorblindness to turn the Fourteenth Amendment on its head—African-American city officials are now the oppressors").

209. *See* HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS & WHITES 110 (1995) ("White skin privilege is a birthright, a set of advantages one receives simply by being born with features that society values especially highly."); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, *in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22–23 (Leslie Bender & Daan Braveman eds., 1995) (discussing existence of white racial privilege).

210. *See* Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 55 (1989) (criticizing *Croson* and arguing that "[t]he fact that Justice O'Connor implicitly regarded a white population of almost fifty percent as "discrete and insular" reveals how much the current Court has shifted from the *Carolene Products* approach"); Klarman, *supra* note 107, at 314 (criticizing *Croson* and arguing that "while whites possibly constituted a slight minority of Richmond's population, they enjoyed a secure majority in the state of Virginia, which could amply defend their interests by restricting, or even banning, local affirmative action plans" and characterizing Justice O'Connor's argument as "more of a make-weight than a genuine political process insight with which to analyze the constitutionality of affirmative action"); Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1777 (1989) (criticizing *Croson* and arguing that "[e]ven if [whites] were always to lose in local municipal politics . . . they would still retain a high degree of leverage at the state and national levels where they are unquestionably dominant"); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 355 (1991) (arguing that the application of strict scrutiny in *Croson* was based, in part, on the "perception that the [affirmative action program] was nothing more than racial pork barrel for the politically *dominant* black majority in Richmond" (emphasis in original)).

211. *See* Rosenfeld, *supra* note 210, at 1773–77 (arguing that Justice O'Connor's description of whites as politically vulnerable in *Croson* results from a decontextualized and abstract analysis of race). Justice Marshall's dissenting opinion eloquently isolates the inefficiencies of Justice O'Connor's analysis:

> While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified *other* "traditional indicia of suspectness": whether a group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated

4. The Impact of Symmetry upon Remedial Legislation

The Court's symmetrical application of heightened scrutiny inverts privilege and subordination in another way: it complicates—if not precludes—governmental efforts to address the material effects of racial subjugation, but would potentially treat as presumptively constitutional governmental policies that shift societal resources toward privileged social groups. Because the Court applies heightened scrutiny symmetrically, governmental policies that benefit historically oppressed groups receive the same level of scrutiny as those that intentionally harm them.[212] In the context of race-based affirmative action, this jurisprudence has, more often than not, resulted in the invalidation of governmental policies chosen to distribute social resources in a more egalitarian fashion.[213] The application of "strict scrutiny" has been strict in "theory" but "fatal in fact."[214] Under symmetrical equal protection theory, once a marginalized group successfully litigates its political vulnerability, governmental efforts to alleviate the group's socially unequal status become substantially more difficult, if not impossible, to pursue. By contrast, if a class possesses a greater measure of social privilege than "suspect classes" and therefore occupies a lower rung on the tiered equal protection framework, then governmental efforts to distribute social resources to this class become easier to justify.

The Court, for example, would probably treat the classes of "farmers" (or "nonfarmers") as nonsuspect groups because farmers do not possess the indicia of suspicion that the Court has elaborated. Consequently, governmental efforts to distribute social resources to either of these groups would generally survive a constitutional challenge—particularly an equality-based claim.[215] In fact, Congress provides a large

> to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."
>
> It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women . . . stand on extremely shaky ground.

Croson, 488 U.S. at 553–54 (Marshall, J., dissenting) (citations omitted).

212. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (arguing that the symmetrical application of heightened scrutiny "assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority").

213. *See* Spann, *supra* note 162, at 65–66 ("Justice O'Connor and the other members of the *Adarand* majority virtually always vote to invalidate an affirmative action program if they reach the merits of the constitutional issues presented by that program.").

214. *See* Gunther, *supra* note 132, at 8 (observing the fatal nature of strict scrutiny).

215. Most legislation is analyzed under the "rational basis" test. *See supra* note 131 and accompanying text.

quantity of resources to "farmers" each year, and these "preferential" programs do not provoke the ire of the dominant culture as does race-based affirmative action.[216] Yet, if the class of "persons of color" is generally more subordinate than the class of "farmers" (as indicated by the application of strict scrutiny to the former's equal protection claims), then this result seems counterintuitive.[217] Governmental efforts to undo the social marginalization of historically oppressed (or suspect) groups should enjoy the same *or higher* level of permissibility as policies that distribute resources to nonsuspect classes. Under the prevailing equal protection jurisprudence, however, such parity does not exist. Instead, governments could more easily justify the direct distribution of societal resources to historically privileged, as opposed to oppressed, social groups.[218] The Court's jurisprudence in this regard further treats politically vulnerable groups as privileged and advantaged groups as oppressed.[219]

5. Doctrinal Hurdles for the Vulnerable/Green Lights for the Privileged

Although the Court has ostensibly shifted to a "classification" approach, it also shifts back to class-based equal protection theory when nonsuspect, but vulnerable, groups seek heightened judicial scrutiny of their equal protection claims. The class-to-classification shift has often placed insurmountable hurdles in the path of vulnerable classes seeking heightened scrutiny.

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216. For examples of the many aid programs provided to farmers, see the news releases at the United States Department of Agriculture's (USDA's) "Newsroom" *at* http://www.usda.gov/newsroom.html (last visited Mar. 18, 2003).

217. This argument typically involves a hypothetical involving race and gender. *See, e.g.*, *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting) (arguing that the application of strict scrutiny to race-based affirmative action "will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves"). I have resisted this analysis to avoid suggesting that racism and patriarchy are unconnected. *See* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the relationship between racism and sexism). The irony in the Court's approach, however, seems obvious when one considers that the Fourteenth Amendment was ratified primarily to address the subjugation of blacks. *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting) (discussing paradoxical nature of Court's heightened scrutiny approach). As Roy Brooks has argued:

> To the extent that gender-based affirmative action programs are easier to defend than race-based affirmative action programs under the equal protection clause, we may have a bizarre state of affairs on our hands. Females and minorities will receive *unequal* treatment under the equal protection clause, with females enjoying *better* treatment than black Americans, the intended primary beneficiary group of the equal protection clause.

Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 350 (1990) (emphasis in original).

218. Admittedly, this proposition would not stand if the privileged class received heightened scrutiny under the classification shift. It only works with privileged classes for whom heightened scrutiny is not yet available.

219. *See supra* notes 209–11 and accompanying text.

Justice Powell's opinion in *Bakke* lays the foundation for the classification-to-class shift. Powell argues that whites should qualify for strict scrutiny without showing that they possess the indicia of political vulnerability but that the *Carolene Products* formula could still apply when additional groups seek judicial solicitude.[220] Ironically, Powell embraces this discriminatory approach despite his explicit opposition to differential equal protection analysis.[221] The Court's "return" to a class-based equal protection analysis has meant an almost complete denial of heightened scrutiny for socially vulnerable classes. The poor,[222] elderly,[223] mentally disabled,[224] and gays and lesbians[225] have all labored unsuccessfully to meet the requirements of heightened scrutiny, despite their precarious political statuses and undisputed histories of discrimination. Privileged classes like whites and males, however, receive heightened scrutiny despite their inability to satisfy the *Carolene Products* formulation; they are able to take advantage of the litigative efforts of socially disadvantaged groups to sensitize courts and legislatures to discrimination. This bizarre result implies that the Court is suspicious of claims of historically disadvantaged classes that they suffer from political vulnerability and is, concomitantly, convinced that historically advantaged classes require judicial solicitude. The application of the rigid *Carolene Products* formula serves to weed out disadvantaged groups from the heightened scrutiny frame-

220. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) ("These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics." (citations omitted)).

221. *See id.* at 289–90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.").

222. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1978) ("The . . . class [of poor individuals] is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

223. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) ("[O]ld age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.'" (citation omitted)).

224. City of Cleburne v. Cleburne Living Ctr., Inc., 472 U.S. 432, 445 (1985) (denying heightened scrutiny to developmentally disabled class because existence of scattered antidiscrimination laws to protect this class "negates any claim that [they] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers").

225. Although the Supreme Court has not resolved the question of heightened scrutiny for gays and lesbians, the federal courts of appeals, applying the suspect class doctrine, have uniformly held that gays and lesbians do not qualify for heightened scrutiny. *See* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 60 (1999) ("The appellate courts have consistently rejected the argument that gays and lesbians are a suspect class. . . . Every court that has considered the issue has stated that gays and lesbians simply do not meet the criteria for a suspect class."). The Ninth Circuit, in a divided opinion, once held that gays and lesbians constituted a "suspect class," but that opinion was vacated. *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *vacated by*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

work;[226] the automatic extension of exacting scrutiny to historically advantaged classes seems to accept uncritically the notion that they are marginalized.

Even those Justices who are most unwavering in their embrace of symmetrical heightened scrutiny would utilize the *Carolene Products* formula to deny judicial solicitude to subjugated classes. In his lone dissent in *United States v. Virginia*,[227] Justice Scalia argued that the majority erred in ordering the desegregation of the Virginia Military Institute on equal protection grounds because "the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat."[228] Justice Scalia offers an additional basis for his disagreement with the majority: the political power of women.[229] He argues that if the Court reconsiders the level of scrutiny it applies to the equal protection claims of women, the Court should apply *only rational basis review*:

> [I]t is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's. And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in [*Carolene Products*]. . . .
>
> It is hard to consider women a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be

226. *See* Yoshino, *supra* note 148, at 562 (arguing that the Court is "loath to extend protection beyond [race and sex]" and that the heightened scrutiny formula "perform[s] the gatekeeping function of limiting the number of groups protected").

227. 518 U.S. 515 (1996) (finding that exclusion of women from state-sponsored military-style academy violated equal protection).

228. *Id.* at 569 (Scalia, J., dissenting). Justice Scalia's arguments dangerously—and inappropriately—invoke a rigid analysis of tradition in the context of equal protection. *See* Sunstein, *Sexual Orientation and the Constitution*, *supra* note 2, at 1174. Sunstein argues that

> [i]t is implausible to describe the role of the Supreme Court, under the Equal Protection Clause, as the provision of a sober second thought to legislation or the defense of tradition against pent-up majorities. The clause is not backward-looking at all; it was self-consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure.
>
> The function of the Equal Protection Clause is to protect disadvantaged groups, of which blacks are the most obvious case, against the effects of past and present discrimination by political majorities. The scope of the Clause and the precise content of the equality norm are of course deeply disputed. But on any view, the Equal Protection Clause is not rooted in common law or status quo baselines, or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.

Id.

229. *Id*. at 575 (Scalia, J., dissenting).

> relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of legislation proves the proposition false.[230]

Justice Scalia's arguments falsely portray women as a politically dominant group by ignoring the current and historical subordination they face.[231] Scalia has, conversely, portrayed white males as politically impotent in a case challenging an affirmative action policy under Title VII.[232] Scalia never reconciles his vigorous application of strict scrutiny to claims brought by whites as a class[233] with his conclusion that the equal protection claims of women should receive only rational basis review. He explicitly treats whites and males as marginalized and women as if they

230. *Id.* at 574–76 (Scalia, J., dissenting) (citations omitted).

231. On the social and legal subordination of women, see Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

232. Justice Scalia argues that

> [i]t is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as amici in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists.
>
> In fact, the only losers in the process are the Johnsons of the country [white males who oppose affirmative action], for whom Title VII has been not merely repealed but actually inverted. *The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.*

Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (emphasis added).

233. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." (citation omitted)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'. . . ." (citation omitted)).

have a dominant political voice.[234] Scalia's "logic" inverts social hierarchy.[235]

6. Retreat from Colorblindness: "Seeing" Race to Harm Persons of Color

Although the Court has grown extremely skeptical of race-conscious remedies, it has not held that all forms of race-consciousness are unconstitutional.[236] Although the application of "strict scrutiny" tends to result in the judicial invalidation of the statute at issue (leading commentators to describe it as "strict in theory, fatal in fact"), the strict scrutiny framework theoretically allows room for governments to utilize race to remedy the oppression of racially subjugated classes.[237] The Court, however, has not generally approached the issue of affirmative action with flexibility, and the current Court has grown steadfast in its suspicion of and opposition to race-conscious remedies.[238] Consequently, the potential for a disturbing double-standard exists within equal protection jurisprudence. While courts now typically invalidate governmental recognition of race taken to advance the social position of historically marginalized racial groups, in some precedent, they have not exhibited the same degree of skepticism toward governmental policies— particularly in the law enforcement context— that explicitly consider race to the detriment of persons of color.

In *United States v. Martinez-Fuerte*,[239] for example, the Court rejected a Fourth Amendment challenge to a Border Patrol practice of operating fixed "checkpoints" at the Mexico-United States border.[240] Although the Mexican American defendants, who were convicted of

234. In *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating on equal protection grounds a statute that established gender-based age disparity for legal access to "two-percent beer"), Justice Rehnquist filed a dissent that contested the application of intermediate scrutiny to equal protection claims brought by men. Justice Rehnquist argued that

> it is true that a number of our opinions contain broadly phrased dicta implying that the same test should be applied to all classifications based on sex, whether affecting females or males. . . . However, before today, no decision of this Court has applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution.

Craig, 429 U.S. at 219 (citation omitted). Justice Rehnquist has abandoned his skepticism of symmetry in the context of deciding race-based affirmative action claims. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 907 (1996) (Rehnquist, C.J., majority opinion) (arguing that "[r]acial classifications are antithetical to the Fourteenth Amendment" and invalidating voting district designed to remedy prior discrimination against blacks). Chief Justice Rehnquist, however, has not reconciled his disparate approaches.

235. For a more extensive discussion of this issue, see *infra* text accompanying notes 562–63.

236. *See Adarand*, 515 U.S. at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980))).

237. *See id.* ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

238. *See supra* notes 177–235 and accompanying text.

239. 428 U.S. 543 (1976).

240. *Id.* at 566.

illegally transporting aliens, framed their petition in the language of the Fourth Amendment, equality concerns also shaped the substance of their argument.[241] Specifically, the defendants asserted that the Border Patrol had a policy of singling out persons of Mexican ancestry for investigative detention and that this action stigmatized them and reduced the likelihood of "equal treatment of all motorists."[242] The Supreme Court, however, upheld the convictions and explicitly legitimated the usage of race and ancestry by the Border Patrol.[243]

The Court first ruled that the defendants "overstate[d] the consequences" of racially disparate treatment.[244] The Court, unlike the defendants, effectively viewed the Border Patrol's race-conscious decision making as a benign form of discrimination taken to benefit the public at large:

> Referrals are made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy. The objective intrusion of the stop and inquiry thus remains minimal. *Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature. Moreover, selective referrals—rather than questioning the occupants of every car—tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public*.[245]

Justice Powell, who passionately expounded the stigma experienced by whites who suffer "discriminatory" treatment as a result of affirmative action programs,[246] dismissed the defendants' arguments concerning the racial stigma experienced by persons of color who are victims of race-based decision making among law enforcement officers.[247] Justice Powell, instead, described the racially discriminatory treatment as a minor inconvenience:

> Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. . . . As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows

241. *See id.* at 560.

242. *Id*.

243. *See id.* at 566 ("In summary, we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."); *see also id.* at 564 n.17.

244. *Id*. at 560.

245. *Id*. (emphasis added).

246. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (discussing injury of affirmative action to "innocent" whites and arguing that "[o]ne should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin").

247. *Martinez-Fuerte*, 428 U.S. at 560.

that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.[248]

Racial discrimination in the context of law enforcement is a long-standing source of racial disharmony and subjugation, Justice Powell's reasoning notwithstanding.[249] The Court's ruling in *Martinez-Fuerte* ignores this history by dismissing the claims of the Latino defendants as "overstated."[250] Under the Court's analysis, the defendants' concern for equality must be submerged to achieve the public good of law enforcement.[251] As such, the Court reconstructs the defendants' argument, transforming it from a claim of racial subjugation into an argument against benign racial discrimination.[252] This time, however, the benign racial classification survived a constitutional challenge.[253] The social value of law enforcement outweighed the "minimal" inconvenience to the defendants.[254] Although the *Martinez-Fuerte* Court never ruled out the possibility of an equal protection challenge of racial discrimination in law enforcement, its dismissal of racial stigma differs substantially from its portrayal of racial history in affirmative action jurisprudence.[255]

Martinez-Fuerte inverts historical domination and privilege. Under the Court's reportrayal of the defendants' argument, their interest in combating racial inequality was exaggerated because they were not victims of racial domination in any meaningful or significant way. The United States needed, however, the "special" opportunity to utilize race-based policies to enhance its law enforcement activities. While the claims of the racially subordinate defendants appeared hollow to the Court, it found that the United States needed wide latitude to single out

248. *Id.* at 563–64.

249. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding imprisonment of Japanese-Americans during World War II based on race alone); Powell v. Alabama, 287 U.S. 45 (1932) (reversing conviction of black males accused of raping white women where defendants convicted and received death penalty after one day trial, with all-white jury, and without assistance of counsel); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating criminal ordinance that was enforced in a strikingly racist fashion to the detriment of Chinese-Americans and to the advantage of whites); *see also* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 75 (1973) (observing that 405 of 455 men executed in the United States for rape were black and all victims were white); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 984 (1992) ("Characterizing the judiciary's treatment of slaves and free blacks as a 'system of justice' is almost a semantic illusion. Free whites were guaranteed an elaborate system of procedural rights and protections, but blacks suffered under an equally elaborate regime of injustice and harsh penalties.").

250. *Martinez-Fuerte,* 428 U.S. at 560.

251. *Id.* at 562.

252. *See, e.g.*, *id.* at 563 (holding that automobile stops can be made "on the basis of apparent Mexican Ancestry").

253. *Id.*

254. *Id.* at 560.

255. *Compare id*. at 563–64 (finding no racial discrimination problem without discussion), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (discussing injury to whites from affirmative action).

persons of Mexican descent for disparate treatment.[256] Despite the unwillingness of courts to permit state governments and Congress to utilize race to remedy the deprivation of persons of color, the Supreme Court and several lower courts have immunized law enforcement practices that take race, along with other factors, into account to burden persons of color in a way that replicates their historical domination.[257]

The symmetrical application of heightened scrutiny in the equal protection context has led to the evolution of a colorblindness jurisprudence that reinforces social domination and privilege. Equal protection jurisprudence sustains social hierarchy by inverting the concepts of privilege and subordination; policies that benefit historically disadvantaged groups trigger judicial skepticism, suggesting that these policies result from a failing of the political process and that politically vulnerable groups possess sufficient political power to harm socially advantaged classes. At times, however, courts have allowed policymakers to "see" race when their race consciousness stigmatizes persons of color and replicates their historical marginalization.[258]

As the next subpart demonstrates, the inversion of privilege and subordination occurs in another manner: courts continue to require vulnerable social classes to satisfy the rigors of the *Carolene Products* suspect class doctrine, while privileged groups receive heightened scrutiny without having to make such efforts. This "return" to class-based equal protection has resulted in the denial of judicial solicitude to historically oppressed groups and in the judicial portrayal of these groups as socially advantaged.

256. *See Martinez-Fuerte*, 428 U.S. at 564 (holding that Court should extend "wide discretion" to Border Patrol); *see also* Whren v. United States, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). On the difficulty of proving racial profiling under an equal protection framework, see generally Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

257. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225 (1983) ("Law enforcement officers routinely use race as a detention factor when a victim or witness has described the perpetrator of a particular crime; such descriptions almost always include the perpetrator's race. Courts reject objections that race should be ignored in this situation.") (citing numerous cases); Randall L. Kennedy, *Conservatives' Selective Use of Race in the Law*, 19 HARV. J.L. & PUB. POL'Y 719, 721 (1996) (criticizing *Martinez-Fuerte* and arguing that "[t]he inconsistency in conservatives' approach toward public officials' use of race is striking. It lends credence to the belief of many observers that conservatives tend to be fervent opponents of racial discrimination only when it is perceived to harm the interests of whites."); *cf.* Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000) (discussing diverging arguments for race consciousness among conservative and liberal scholars).

258. *See Martinez-Fuerte*, 428 U.S. at 563.

B. Back to Class: Inversion in the "Return" to Class-Based Equal Protection

As the foregoing discussion indicates, the Court has apparently departed from the *Carolene Products* framework, which protects vulnerable *classes*, and now extends heightened scrutiny to suspect *classifications*. This class-to-classification shift, however, is episodic. The Court returns to a discussion of suspect classes when presently nonsuspect, vulnerable groups seek heightened scrutiny.[259] This classification-to-class shift has resulted in a denial of equal protection to disadvantaged and historically oppressed classes. Although whites and men (often white males) receive heightened scrutiny of their claims of discrimination, the poor, gays and lesbians, the elderly, and the mentally disabled have failed to satisfy the *Carolene Products* test.[260]

In part III.A.5, I argued that the "return" to class-based equal protection favors privileged classes over subordinate groups because the Court treats claims of the latter with skepticism.[261] Although socially marginalized groups must labor extensively (and usually unsuccessfully) to demonstrate their political vulnerability, privileged classes, in a suspect classification analysis, do not face such requirements.[262] The Court's differential treatment of vulnerable and privileged classes in its equal protection analysis subtly inverts the social reality of privilege and subjugation: "truly" subjugated classes must prove their vulnerability in a rigorous equal protection framework, while privileged classes receive heightened scrutiny without facing these obstacles. Under the Court's analysis, privileged groups receive the expedient solicitude that one would expect the Court to extend to historically vulnerable groups, while the Court confronts the claims of historically disadvantaged groups with skepticism and inflexibility. The Court explicitly and blatantly inverts the social reality of privilege and subjugation in its return to a class-based equal protection analysis. Several cases demonstrate the judicial portrayal of disadvantaged, nonsuspect classes as politically powerful.

1. Cleburne v. Cleburne Living Center

In *Cleburne v. Cleburne Living Center*,[263] operators of a group home for the "mentally retarded" challenged a city ordinance that required a permit for such homes.[264] The group home argued that the ordinance discriminated on the basis of the developmentally disabled status of its

259. *See infra* text accompanying notes 263–307.
260. *See supra* text accompanying notes 142–47.
261. *See supra* text accompanying notes 220–35.
262. *Id.*
263. 473 U.S. 432 (1985).
264. *Id.*

residents.[265] The court of appeals held that the mentally retarded constitute a quasi-suspect class and, applying intermediate scrutiny, invalidated the ordinance.[266] The Supreme Court reversed the lower court's ruling that the mentally retarded constitute a quasi-suspect class, but it, nevertheless, held that the ordinance was unconstitutional under a rational basis analysis.[267] The Court declined to apply heightened scrutiny in part because it found that the class of mentally retarded persons failed to demonstrate that they were sufficiently politically vulnerable and therefore in need of judicial solicitude.[268] The Court observed that Congress and a few states had passed legislation protecting developmentally disabled individuals from certain forms of discriminatory treatment and providing for assistance to this class in discrete instances.[269] The existence of these statutes disqualified developmentally disabled individuals from heightened scrutiny; the protective measures demonstrated the political power of the class:

> [T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.[270]

The Court's conclusion that the "political power" of developmentally disabled individuals precludes heightened scrutiny of their equal protection claims suffers in several respects. The Court's political power analysis, for example, narrowly measures political power by examining whether lawmakers have extended protection to a vulnerable class.[271] Rather than indicating political power, these protective measures actually demonstrate the vulnerability of the class and a growing recognition that lawmakers and courts should remedy the harms inflicted upon the class.[272]

265. *Id*. at 437.

266. *See* City of Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *rev'd,* 473 U.S. 432 (1985).

267. *See Cleburne*, 473 U.S. at 432. Although the Court used the language of rational basis review, it has been criticized for applying a more stringent analysis. *See, e.g.*, *id.* at 456 (Marshall, J., concurring in the judgment, dissenting in part) ("The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation.").

268. *Id.* at 445 (dismissing claim that developmentally disabled lack political power).

269. *Id*. at 443–45.

270. *Id*. at 445.

271. *See* Yoshino, *supra* note 148, at 565 (criticizing narrowness of political power analysis in *Cleburne* and arguing that "[n]o social scientist would determine a group's political power by looking at only one criterion"); *id*. at 566 (advocating a "thicker conception of political power").

272. Justice Marshall's dissenting opinion makes this point:

Cleburne also establishes a discriminatory framework for equal protection review which discriminates among already-suspect classes and new groups seeking heightened scrutiny and among these new groups and privileged classes.[273] *Cleburne* discriminates among socially vulnerable groups because existing suspect and quasi-suspect classes, such as persons of color and women, are not disqualified from heightened scrutiny despite the existence of a variety of statutory enactments that protect them from discrimination.[274] *Cleburne* also discriminates among privileged classes and subordinate groups. As I argued previously, the symmetrical application of heightened scrutiny allows privileged groups, such as whites and males, to receive heightened scrutiny of their discrimination claims without undergoing the rigors of the *Carolene Products* analysis.[275] Instead, once a vulnerable class persuades the Court to analyze its discrimination claims under a heightened scrutiny framework, the Court applies heightened scrutiny symmetrically such that any person who shares a "trait" with that class, irrespective of that person's political or social power, can qualify for judicial solicitude.[276] As *Cleburne* demonstrates, however, new vulnerable groups must satisfy the rigors of the *Carolene Products* framework to receive heightened judicial scrutiny.[277] This "return" to class-based analysis has resulted in the anomalous situation where courts apply strict or intermediate scrutiny to the equal protection claims of historically privileged classes such as whites and males but only applies rational basis review to the claims of vulnerable classes—on the questionable ground that these groups are not "without political power."[278] The Court's jurisprudence again inverts the concepts

> Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.

Cleburne, 473 U.S. at 466 (Marshall, J., concurring in the judgment and dissenting in part).

273. *See* Yoshino, *supra* note 148, at 565 (arguing that the political powerlessness "standards are applied inconsistently across contexts").

274. *See Cleburne*, 473 U.S. at 467 ("Moreover, even when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject." (emphasis in original)) (Marshall, J., concurring in the judgment in part and dissenting in part); *see also* GERSTMANN, *supra* note 225, at 82–83 (criticizing as discriminatory criteria utilized to evaluate "political power" of new groups seeking heightened scrutiny); Hutchinson, *Gay Rights*, *supra* note 176, at 1383 n.119 ("Furthermore, if the mere existence of statutory prohibitions of discrimination against a particular group disqualifies that group from suspect or quasi-suspect status . . . then none of the existing suspect classes would receive heightened scrutiny, because civil rights legislation seeks to protect each of them.").

275. *See supra* text accompanying notes 222–26.

276. *Id.*

277. *See Cleburne*, 473 U.S. at 442–47 (analyzing case using *Carolene Products*—like structure).

278. *See* GERSTMANN, *supra* note 225, at 83. Gerstmann makes the following observation:

> In the context of affirmative action and in other cases, the courts have applied strict scrutiny to laws that discriminate against *whites* and *males*. This has produced the bizarre result that gays and lesbians are considered too politically powerful to receive the benefit of strict scrutiny, but whites and males are not.

of privilege and subordination. The Court explicitly depicts socially disadvantaged classes as "powerful," while historically powerful classes easily qualify for the heightened scrutiny framework developed to provide judicial solicitude to vulnerable groups.[279] The Court's discriminatory treatment of privileged and subordinate classes in the equal protection context implies that advantaged classes lack political power and therefore warrant heightened scrutiny and that marginalized groups should protect themselves in the political process (where they have "achieved" measurable success).

2. Gay and Lesbian "Power"

The juridical distortion of subjugation and privilege has been particularly acute in the context of gay, lesbian, bisexual, and transgender equality claims. Although the Supreme Court has evaded the question of whether gays and lesbians qualify for heightened scrutiny,[280] the federal courts of appeals stand in unanimity with respect to this issue: no federal court of appeals has held that gays and lesbians satisfy the *Carolene Products* standard.[281] Typically, courts cite to the "immutability" and "political powerlessness" prongs of the *Carolene Products* formula when they deny heightened scrutiny to gays and lesbians.[282] My analysis here will focus on the courts' political power discussions because it vividly illustrates the problem of inversion.

Courts often conclude that gays and lesbians possess political power and therefore do not qualify for heightened judicial scrutiny.[283] As I have argued elsewhere, the courts' arguments echo a harmful and ubiquitous "special rights" political discourse that portrays gays and lesbians as wealthy, powerful and, therefore, unfit for civil rights protection.[284] In

Id. (emphasis in original).

279. *See, e.g.*, *infra* text accompanying notes 280–307.

280. *See* Romer v. Evans, 517 U.S. 620, 631–36 (1996) (applying rational basis review to heterosexist state constitutional provision and not considering question of heightened scrutiny).

281. *See* GERSTMANN, *supra* note 225, at 60 ("Every court that has considered the issue has stated that gays and lesbians simply do not meet the criteria for a suspect class."). The Ninth Circuit Court of Appeals once held that gays and lesbians constituted a quasi-suspect class, but it later vacated that holding. *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (finding that gays and lesbians constitute a suspect class), *vacated*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

282. *See* Hutchinson, *Gay Rights*, *supra* note 176, at 1378–81 (discussing the failure to apply heightened scrutiny to the discrimination claims of gays, lesbians, bisexuals, and transgendered persons).

283. *See id.*

284. *See id.* at 1372–75 (discussing the "special rights" rhetoric and arguing that the rhetoric constructs gays and lesbians as white, wealthy, and powerful); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 68–79 (1999) [hereinafter Hutchinson, *Ignoring the Sexualization of Race*] (analyzing role of special rights in anti-gay discourse); *see also* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 291–92 (1994) (arguing that "opponents of gay civil rights claim that gay men and lesbians are economically well-off and therefore do not need legal protection"); *id.* at 293 ("'Special rights' has become the central slogan for

High Tech Gays v. Defense Industrial Security Clearance Office,[285] for example, the Ninth Circuit concluded that the representation-reinforcement rationale could not justify the application of heightened scrutiny to heterosexist discrimination claims because gays and lesbians are not politically vulnerable.[286] The court reasoned that:

> [l]egislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do "attract the attention of the lawmakers," as evidenced by such legislation.[287]

The court's analysis obscures the history of discrimination and ongoing discrimination that gay, lesbian, bisexual, and transgender individuals suffer. Under the court's distorted reasoning, gays and lesbians are a powerful class that can seek to overturn oppressive legislation in the political process.

In *Ben-Shalom v. Marsh*,[288] which involved an unsuccessful challenge to the military's heterosexist discrimination, the Seventh Circuit also concluded that gays and lesbians are too powerful to qualify for heightened scrutiny.[289] The court relied upon salacious evidence for its finding:

> Homosexuals are not without political power. *Time* magazine reports that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual. . . . Support for homosexuals is, of course, not limited to other homosexuals. The *Chicago Tribune* . . . reported that the Mayor of Chicago participated in a gay rights parade . . . .[290]

The court's "evidence" proves, rather than disproves, the vulnerability of gays, lesbians, bisexuals, and transgender individuals.[291] The existence of one known or avowed homosexual in Congress does not translate into political power in any significant way, and does not indicate political power under Court precedent.[292] Indeed, the fact that gay and lesbian individuals in Congress might hide their sexual identity substantiates the despised social and political status of gays and lesbians; reasonable per-

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the anti-gay movement, appearing regularly in the names of organizations opposing gay civil rights and in their media campaigns." (citation omitted)).

285. 895 F.2d 563 (9th Cir. 1990) (denying equal protection challenge to Department of Defense policy of discriminating against gay and lesbian applicants for security clearance).

286. *Id.* at 574 (finding that gays and lesbians were not sufficiently powerless so as to warrant heightened scrutiny).

287. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985)).

288. 881 F.2d 454 (7th Cir. 1989).

289. *Id.* at 465–66.

290. *Id.* at 466 n.9.

291. *See infra* note 292–94 and accompanying text.

292. *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion) (arguing that women are politically powerless because they are "vastly underrepresented in this Nation's decision-making councils," while noting that only "14 women hold seats in the House of Representatives").

sons would conceal traits that engender social hostility, violence, and political inequality. In addition, the "closeting" of gay and lesbian status impedes pro-gay and lesbian political unity and advocacy.[293] Furthermore, the court's recounting of "charges" that members of Congress are gay (but closeted)[294] linguistically implies that gay and lesbian status is criminal or improper—and further demonstrates the vulnerability of gay and lesbian individuals.

As *Ben-Shalom* and *High Tech Gays* demonstrate, courts invert the reality of heterosexist discrimination so that gays and lesbians become politically dominant and unfit for heightened judicial scrutiny of their equal protection claims. Under the classification shift, however, whites and males qualify for judicial solicitude, despite their political power and histories of social advantage. Although the Supreme Court has not yet decided whether gays and lesbians qualify for heightened scrutiny, three Justices—Justices Scalia and Thomas and Chief Justice Rehnquist—would undoubtedly deny heightened scrutiny to gays and lesbians and rest their decision, in part, on the false notion of gay and lesbian power.[295] In *Romer v. Evans*,[296] for instance, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, passionately dissented from the majority's ruling that invalidated Amendment 2 to the Colorado constitution.[297] Amendment 2 repealed and banned the enactment of laws that prohibited discrimination against gays, lesbians, and bisexuals.[298] The Court did not discuss the question of heightened scrutiny for gays

293. *See* SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 52 (1994) (describing "coming out" as resistance to "patriarchal heterosexuality"); William N. Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2443 (1997) ("The closet . . . disabled gay people from forming social and political groups."); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 970–71 (1989) ("Public homosexual identity is so volatile, so problematically referential to a history of genital homosexual conduct, and so relentlessly controversial that it has become an element of political discourse distinguishable from the conduct that, *Hardwick* informs us, states may constitutionally criminalize."); Darren Lenard Hutchinson, *Accommodating Outness:* Hurley*, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 121 (1998) [hereinafter Hutchinson, *Accommodating Outness*] ("The closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality.").

294. *See Ben-Shalom*, 881 F.2d at 466 n.9.

295. Darren Lenard Hutchinson, *"Closet Case":* Boy Scouts of America v. Dale *and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 86 (2001) ("Several members of the [Court], in particular Chief Justice Rehnquist and Justices Scalia and Thomas, have fervently voiced their disapproval of even minimal constitutional protection for gays and lesbians.").

296. 517 U.S. 620 (1996).

297. *Id.* at 636–53 (Scalia, J., dissenting).

298. The now-invalidated amendment provided that

> [n]either the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

See id. at 624.

and lesbians and instead invalidated the amendment utilizing a "strong" rational basis review.[299] Justice Scalia, nevertheless, offered a preview of his views on heightened scrutiny for gay and lesbian equal protection plaintiffs.[300] He would deny heightened scrutiny to gays and lesbians on the grounds that they are endowed with an extreme amount of political power:

> [B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.[301]

Justice Scalia also characterized Amendment 2 as a "modest attempt by seemingly tolerant Coloradans to preserve traditional mores against the efforts of a politically powerful minority to revise those mores through the use of the laws."[302] His arguments deny the existence of heterosexist domination.[303] Under Justice Scalia's logic, Amendment 2 mutates into a benign measure enacted by a "tolerant" electorate who simply sought to remedy the distorted sexual social structure caused by the domination of a "politically powerful minority."[304] Colorado's heterosexist electorate is politically vulnerable, while gays and lesbians are an extremely powerful—and self-dealing—class, one that does not deserve heightened judicial scrutiny.[305] Justice Scalia has not even attempted to reconcile his distorted depiction of gays and lesbians as a powerful class with his embrace of strict scrutiny for whites in the context of affirmative action[306] and his argument that women[307] and gays and lesbians should only receive rational basis review of their discrimination claims. By falsely portraying

299. *See id.* at 635 (holding that "a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not" (citation omitted)). Several commentators have argued that the Court applied a level of review that is "stronger" than traditional rationality analysis. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 327 (1997) (including *Romer* on a list of cases representing "rational basis review with a bite"); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 399 (1998) (same). For a general discussion of "rational basis with bite," see Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

300. *See Romer,* 517 U.S. at 636–52 (Scalia, J., dissenting) (arguing against judicial protection of gay and lesbian identity).

301. *Id.* at 645–46 (Scalia, J., dissenting) (citations omitted) (emphasis added).

302. *Id.* at 636 (Scalia, J., dissenting).

303. *See* Hutchinson, *Accommodating Outness*, *supra* note 293, at 124 ("Justice Scalia's arguments [in *Romer*] deny the existence of gay and lesbians subordination, and they invert the social reality of heterosexist domination.").

304. *Id.*

305. *See id.* at 124–25 ("Justice Scalia's erasure and denial of homophobic subjugation allows him to misportray the heterosexist law as an innocent and constitutionally permissible attempt to restore balance in the democratic process.").

306. *See supra* text accompanying notes 232–35.

307. *See supra* text accompanying notes 227–35.

disadvantaged classes as politically powerful, Justice Scalia's equal protection jurisprudence extends the greatest judicial protection to historically privileged classes and legitimizes state action that perpetuates the subordination of historically oppressed groups. Justice Scalia's equal protection analysis powerfully illustrates the process of inversion.

Equal protection jurisprudence applies a shifting class and classification approach to the question of heightened scrutiny. This inconsistent approach has resulted in the denial of heightened scrutiny to vulnerable social groups and the exercise of the most stringent judicial scrutiny to privileged classes who could not satisfy an honest and consistent application of the governing criteria. The Court's discriminatory standards for applying heightened scrutiny creates a doctrine that protects privilege and constitutionalizes subjugation. The extension of greater judicial protection to privileged classes under an equal protection analysis has no basis in the history surrounding the Fourteenth Amendment—which more strongly suggests the opposite conclusion.

At this point, one might attempt to dispute or limit my conclusion by arguing that subordinate classes that already receive heightened scrutiny still obtain judicial solicitude for any discrimination they face. Thus, while the Court might approach with skepticism legislative measures that seek to benefit marginalized groups, the Court would certainly intervene to protect these classes from invidious or harmful governmental discrimination. Such a conclusion would be premature. As the next section demonstrates, the Court has developed an equal protection doctrine that fails to protect "suspect classes" from contemporary—and the most pervasive—forms of governmental discrimination. Instead, the Court instructs these groups to pursue their claims of injustice in the democratic branches of government, which is precisely the opposite conclusion that *Carolene Products* theorizes.

C. What Were They Thinking?: Intent and Inversion

Prior to Reconstruction and the Civil Rights Movement, racial and gender discrimination was largely explicit and blatant.[308] State and private actors subjugated persons of color and women through overt policies of exclusion. The implementation of formal rules prohibiting governmental and private discrimination in certain contexts has elevated the status of oppressed groups. Formal equality has allowed for the educational and economic advancement of individuals from oppressed social groups.[309]

308. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988) ("Prior to the civil rights reforms, Blacks were formally subordinated by the state."); Kennedy, *supra* note 45, at 1411 (discussing the overt racial discrimination in criminal law prior to Civil War).

309. *See* Crenshaw, *supra* note 308, at 1378 ("Removal of these public manifestations of subordination was a significant gain for all Blacks, although some benefitted more than others.").

The attainment of formal legal equality, however, has not completely eradicated discrimination or inequality.[310] After *Brown*, for example, states first resisted desegregation with outward and violent defiance.[311] Later, they would adopt racially "neutral" policies such as "freedom-of-choice"[312] and busing prohibitions[313] that had the effect of maintaining racially segregated schools. States also adopted facially neutral—yet discriminatory—policies in the context of jury service[314] and voting.[315] Furthermore, after the passage of employment discrimination legislation, private employers began requiring new credentials of employees, which negatively affected the employment opportunities of protected classes.[316] These policies replicated the historical discrimination of subordinate groups.[317]

Courts initially responded to these neutral policies by unmasking their racial origins and effects.[318] Furthermore, as early as 1886, the Supreme Court had accommodated theories that the enforcement of facially neutral laws could produce racial harms and emanate from racial antagonism in violation of equal protection.[319] Today, critical scholars and social scientists argue that overt, outward racial hostility is largely a relic of a pre–Civil Rights era.[320] Because the social structure, including legal proscriptions, disparages outward racial antagonism, racial biases are submerged to the level of unconsciousness—rather than purged from

310. *See id.* ("Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people.").

311. *See* Cooper v. Aaron, 358 U.S. 1 (1958) (ordering district court to reinstate desegregation plan lifted due to white hostility).

312. Green v. County Sch. Bd., 391 U.S. 430, 433, 440–42 (1968) (invalidating policy which allowed parents to choose school assignment because it produced gross racial disparity and maintained dual school system).

313. *See* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45–46 (1971) (invalidating statute prohibiting busing on the grounds that it was designed to hinder integration).

314. *See* Castaneda v. Partida, 430 U.S. 482, 484–85, 500–01 (1977) (finding facially neutral grand jury selection practices unconstitutional due to disparate racial effect upon Mexican Americans).

315. *See* Gomillion v. Lightfoot, 364 U.S. 339, 341, 347–48 (1960) (invalidating facially neutral Alabama law that redrew municipal boundaries so as to exclude all but four black voters and no white voters from city).

316. *See* Griggs v. Duke Power & Co., 401 U.S. 424, 427–28, 436 (1971) (invalidating facially neutral employment requirements, implemented after the passage of federal civil rights legislation, that operated to exclude blacks from employment).

317. *See id*. at 426–27 (noting that prior to enactment of federal employment discrimination law, defendant "openly discriminated on the basis of race in the hiring and assigning of employees"); Brown v. Bd. of Educ., 347 U.S. 483, 500 (1954) (invalidating state-mandated racial segregation in public schools); Strauder v. West Virginia, 100 U.S. 303, 310, 312 (1879) (invalidating statute that explicitly excluded nonwhites from jury service).

318. *See, e.g.*, *Swann*, 402 U.S. at 46; Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968).

319. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (invalidating facially neutral criminal ordinance administered in a statistically racist fashion).

320. *See, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819–20 (1991) (discussing subtle disparities in treatment of persons of different races); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902–15 (1993) (examining data regarding subtle forms of racism).

the psyche altogether.[321] Statistical studies and psychological data document the existence of pervasive—yet subtle—racial and gender stereotyping.[322] Furthermore, as the Court recognized in an era where it questioned the relevance of governmental motivation in constitutional litigation,[323] legislatures are adept at offering "alternative" motivations for legislation to cover improper purposes.[324] State and private actors can cover their biases by advancing "legitimate" purposes for their discriminatory actions.[325] Accordingly, equal protection plaintiffs will typically not possess explicit and blatant evidence of discrimination.[326]

Contemporary Supreme Court doctrine, in a departure from some prior precedent, has centralized specific intent or malice in equal protection litigation. Beginning with the 1976 decision in *Washington v. Davis*,[327] the Court has held that equal protection plaintiffs cannot rely primarily upon statistical evidence that attempts to prove intent by demonstrating the discriminatory effects of laws or policies.[328] Instead, these plaintiffs must produce direct evidence that defendants acted with "discriminatory intent."[329] Citing to the discriminatory intent rule, the Court has rejected as nonprobative very elaborate statistical studies which demonstrate the likely operation of intentional discrimination in contexts where oppressed populations have historically endured mistreatment.[330] Once it rejects statistical evidence of discrimination, the Court applies

321. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1169 (1991) ("Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (arguing that the Court has "defined discriminatory purpose in terms that are extraordinarily difficult to prove in the constitutional culture its modern equal protection opinions have created—a culture that now embraces 'equal opportunity' and 'nondiscrimination' as a form of civic religion").

322. *See, e.g.*, Ayres, *supra* note 320, at 819 (discussing statistical patterns of racial and gender discrimination in consumer markets); Lawrence, *supra* note 43, at 326–27 (discussing psychology of racism); Oppenheimer, *supra* note 320, at 902–15 (discussing host of social science and psychological data on the pervasiveness of racial prejudice and racial discrimination).

323. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970) (discussing Court's confusion over relevance of motive in constitutional law).

324. For example, in *Palmer v. Thompson*, the Court held:

> It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

403 U.S. 217, 225 (1971).

325. *Id.*

326. *See id.*

327. 426 U.S. 229, 246–48 (1976) (rejecting equal protection challenge to an employment exam that excluded black job applicants).

328. *Id*. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

329. *Id*. (requiring a showing of discriminatory purpose in equal protection cases).

330. *See* Foster, *supra* note 45, at 1073 (criticizing Court's rejection of "sophisticated and comprehensive statistical evidence" in equal protection cases).

ordinary rational basis review to the policies at issue, which results, inevitably, in judgments favoring the defendants.[331] In these cases, the Court fails to recognize the subtle and evolving forms of discrimination; it instead isolates the most narrow and archaic manifestation of discrimination and treats it as the *exclusive* basis for a constitutional violation.[332] Additionally, contrary to the purposes of the *Carolene Products* doctrine, the Court directs suspect classes to pursue a legislative remedy for the harms they endure from facially neutral, yet discriminatory, legislation.[333] This restrained judicial stance differs strikingly from the Court's activist position in affirmative action litigation.[334] White and male litigants in the affirmative action context receive exacting analysis from the Court even though they are well-represented in the political branches and do not have histories of public and private oppression and exclusion.[335] Furthermore, the Court has construed actions by predominately black legislative bodies as prejudicial,[336] but, under the intent rule, refuses to infer discriminatory motivation on the part of predominately white decision-making councils.

The discriminatory intent doctrine, together with symmetrical heightened scrutiny, inverts the *Carolene Products* rationale: vulnerable classes receive rational basis review of the primary discrimination they suffer; privileged classes, under the "classification shift," receive the most exacting judicial analysis of their discrimination claims. I will now expound this thesis by examining pertinent case law.

1. Proving Intent

The Court has not completely ruled out the possibility of showing intent through the usage of impact data. In *Davis*, for example, the Court indicated that discriminatory effects might help establish intent in certain circumstances:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neu-

331. *See, e.g.*, *Davis*, 426 U.S. at 250–52 (applying rational basis review and ruling for defendant after rejecting statistical evidence of discrimination).

332. *See* Strauss, *supra* note 34, at 953 (arguing that the Court has "rejected all of the more far-reaching, effects-based conceptions of discrimination" and that the "sole test . . . is whether the government acted with discriminatory intent").

333. *See infra* text accompanying notes 380–81.

334. *See generally* David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 809–21 (1991) (arguing that the Court cannot justify its contradictory activism in the affirmative action context with its appeal to judicial restraint in the disparate impact setting).

335. *See supra* text accompanying notes 165–76.

336. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (holding that strict scrutiny of affirmative action plan warranted because blacks constituted a majority of the city council that implemented the plan).

> tral on its face, must not be applied so as invidiously to discriminate on the basis of race. It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination . . . ." Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.[337]

Thus, the Court has consistently held that plaintiffs can prove discriminatory intent with circumstantial evidence drawn from the totality of the circumstances. As the Court explained in *Arlington Heights v. Metropolitan Housing Development Corp.*,[338] circumstantial evidence can prove intentional discrimination: "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[339] In the absence of a "stark"[340] pattern of discrimination, however, the "historical background"[341] of the policy can illuminate intent:

> Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.[342]

Despite its statements to the contrary, the Court has essentially treated circumstantial evidence of discriminatory intent as nonprobative in cases involving plaintiffs from suspect classes—even those cases involving laws

337. Davis v. Washington, 426 U.S. 229, 241–42 (1976) (citations omitted).

338. 429 U.S. 252, 270–71 (1977) (holding that municipal zoning decision which had racially disparate effects did not violate equal protection).

339. *Id*. at 266.

340. *Id.*

341. *Id.* at 267.

342. *Id.* at 267–68.

giving rise to "stark patterns" of discrimination and where the historical context suggests discriminatory motivation.[343] Furthermore, doctrinal explications of "discriminatory intent" subsequent to *Davis* and *Arlington Heights* seem to close whatever room these cases provided for utilizing impact evidence to prove intent.

In *Personnel Administrator v. Feeney*,[344] for example, the Court rejected the plaintiff's contention that a Massachusetts preference for veterans in civil service employment deprived women of equal protection.[345] The veterans preference operated to exclude women almost entirely from upper-level civil service employment.[346] The plaintiff argued that the gender impact was "foreseeable" because the military had a long history of discriminating against women; as a result of this discrimination, when the litigation commenced, only 1.8 percent of the veteran population in Massachusetts was female.[347] The Court deemed this pattern insignificant for proving an equal protection violation.[348] Instead, it required evidence that appears more in the form of specific intent or malice.[349] The Court held that: "'Discriminatory purpose'. . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *'because of,' not merely 'in spite of,'* its adverse effects upon an identifiable group."[350] This standard is extremely difficult—if not impossible—to meet.[351]

The *Feeney* standard seemingly undercuts altogether the usage of circumstantial evidence in the equal protection context; however "stark" the discriminatory pattern, the plaintiff must still prove that the defendant acted with an impure motivation and with the purpose of achieving the discriminatory result (rather than "in spite" of this result). Because such striking evidence is typically unavailable to victims of discrimination, plaintiffs will have difficulty prevailing in equal protection litigation.

In *McCleskey v. Kemp*,[352] for example, the Court denied petitioner's equal protection challenge to the Georgia death penalty.[353] The petitioner relied upon the Baldus Study, an elaborate study that sought to demonstrate racial bias in the imposition of capital punishment in the

343. *Id.* at 266–67.

344. 442 U.S. 256 (1979).

345. *See id.* at 280–81.

346. *See id.* at 271 ("The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe.").

347. *Id.* at 270.

348. *Id.* at 279 (rejecting plaintiff's statistical evidence as nonprobative of intent to discriminate).

349. Siegel, *supra* note 321, at 1135 ("[I]n *Feeney*, the Court asked plaintiffs to prove that legislators adopting a policy that would foreseeably injure women or minorities had acted with the express purpose of injuring women or minorities—in short, a legislative state of mind akin to malice.").

350. *Feeney*, 442 U.S. at 279 (citations omitted) (emphasis added).

351. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989) ("Given this standard of specific intent, evidence of disparate effect proves of little help to plaintiffs.").

352. 481 U.S. 279 (1987).

353. *Id.* at 319.

state of Georgia.[354] The Baldus Study examined over 2,000 murders committed in Georgia during the 1970s.[355] In order to rule out the operation of race-neutral variables as determinants for when prosecutors pursued or when juries imposed death sentences, the Baldus Study controlled for 230 nonracial variables but still found a strong racial correlation—particularly that the race of the victim strongly influenced when juries would impose a death sentence.[356] Taking these nonracial variables into account, Baldus concluded that defendants accused of killing whites were more than four times as likely to receive a death sentence than defendants charged with killing blacks.[357] Also, interracial crimes involving black defendants and white victims produced the strongest racial correlation.[358] The petitioner argued that the Court should consider his statistical evidence together with Georgia's long history of racial discrimination in the context of criminal procedure.[359] The Court rejected McCleskey's petition and reaffirmed the *Feeney* standard.[360] Assuming the accuracy of the Baldus Study, the Court held that petitioner had not shown that Georgia maintained the death penalty "because of" rather than "in spite of" its racially discriminatory application.[361]

2. *How Intent Ignores* Carolene Products

In this subpart, I argue that the discriminatory intent rule—which immunizes from judicial invalidation facially neutral state action that harms oppressed populations—marks a further doctrinal departure from the spirit of *Carolene Products*. This conclusion will diverge from the analysis of other critical scholars (including those who disapprove of the intent rule), who attribute the requirement of discriminatory intent to the domination of processual theories of judicial review. Barbara Flagg, for example, argues that process theory legitimizes or acquiesces in arguments that criticize judicial review as a countermajoritarian enterprise.[362] To escape countermajoritarian criticism, process theory assumes

354. *Id*. at 286 (discussing petitioner's use of Baldus Study and describing the study as "sophisticated").
355. *Id.*
356. *Id.* at 287.
357. *Id.*
358. *Id.*
359. *Id*. at 298 n.20.
360. *Id*. at 298–99.
361. *Id.* at 297–98.
362. *See* Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 951 (1994) [hereinafter Flagg, *Enduring Principle*] ("One of the central legacies of the process perspective is the perception that judicial review requires justification because the judiciary is a 'counter-majoritarian' institution.").

the constitutionality of legislative enactments.[363] Consequently, in its Fourteenth Amendment jurisprudence, the Court seeks to restrain its analysis to maintain its own institutional legitimacy.[364] And in equal protection cases, the Court has repeatedly cited to institutional concerns as a justification for requiring discriminatory intent: a "lesser" standard would unduly restrict the operation of the democratic branches of government.[365] While these scholars are correct in noting the Court's recitation of institutional arguments in discriminatory intent cases, I am not persuaded that processual theories of judicial review necessarily compel adherence to the discriminatory intent rule. First, as I will discuss in part III.D, the Court's appeal to institutional concerns, though valid in the abstract, occurs in a shifting and discriminatory fashion.[366] When oppressed groups bring equal protection challenges of laws that collectively harm them—explicitly[367] or implicitly[368]—the Court acts in a restrained fashion. On the other hand, the Court readily abandons institutional arguments when it confronts laws that seek to undo or dismantle the material legacy of oppression.[369] In affirmative action cases involving both state and federal actors, the Court has expressed inflexibility on the constitutional question of race-consciousness: all race-based affirmative action programs will receive strict scrutiny.[370] The Court's willingness to overlook its institutional limitations in the context of affirmative action complicates its institutional paralysis in the face of stark patterns of discrimination caused by facially neutral statutes.[371] Consequently, the Court's institutional arguments, though legitimate on their face, seem pretextual as they appear in equal protection litigation.

More importantly, however, the critics of process theory narrowly construe its potential usages. Processual theories of judicial interpretation can support a broader interpretation of equality and an expanded role of the Court in adjudicating equal protection claims. At the heart of *Carolene Products* and subsequent representation-reinforcement analy-

363. *Id*. ("From this perspective, one begins the constitutional analysis with a presumption of legislative regularity: some special circumstance is required to validate a stance other than judicial deference to the legislature's judgment.").

364. *Id*. ("[T]he concern over institutional legitimacy exerts a restrictive influence on the scope of substantive due process doctrine. Because judicial intervention is seen as inherently problematic, limiting the number of instances in which it is exercised promises to place the judiciary in a more institutionally appropriate light.").

365. *See id.* at 954 (arguing that institutional concerns lead to intent rule). *But see infra* text accompanying notes 369–71 (arguing that institutional concerns are pretextual in the context of equal protection litigation).

366. *See infra* text accompanying notes 400–29.

367. *See supra* text accompanying notes 256–57 (discussing judicial deference to law enforcement policy that explicitly discriminates against Mexican Americans).

368. *See infra* text accompanying notes 394–99 (discussing how the Court attempts to justify intent rule by raising institutional concerns).

369. *See supra* text accompanying notes 308–36.

370. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) (holding that all race-based affirmative action programs receive strict scrutiny).

371. *See infra* text accompanying notes 394–446.

ses lies a concern for protecting vulnerable social groups.[372] Institutional prejudice constitutes a process failure correctable by judicial review.[373] By deploying the discriminatory intent doctrine, the Court has limited plaintiffs to only one avenue for demonstrating the existence of prejudicial legislation.[374] In a thoughtful analysis, Charles Lawrence reconciles processual and impact theories of equality. Lawrence argues:

> Under present doctrine, the courts look for [a] process defect only when the racial classification appears on the face of the statute or when self-conscious racial intent has been proved under the *Davis* test. But the same process distortions will occur even when the racial prejudice is less apparent. Other groups in the body politic may avoid coalition with blacks without a conscious awareness of their aversion to blacks or of their association of certain characteristics with blacks. They may take stands on issues without realizing that their reasons are, in part, racially oriented. Likewise, the governmental decisionmaker may be unaware that she has devalued the cost of a chosen path, because a group with which she does not identify will bear that cost. Indeed, because of her lack of empathy with the group, she may have never even thought of the cost at all.
>
> Process distortion exists where the unconstitutional motive of racial prejudice has influenced the decision. It matters not that the decisionmaker's motive may lie outside her awareness.[375]

If we accept the existence of unconscious or subtle bias or prejudice, then impact data should have relevance in equal protection litigation. When laws dramatically impact vulnerable social groups, then this impact may result from prejudice (as in the era of overt race classifications) against those groups or from a deliberate indifference to their well-being. Accordingly, identifying *when* impact matters, rather than dismissing it altogether,[376] stands as a compelling judicial task either under processual theories or theories that emphasize substantive outcomes.

This expanded reading of process theory—which accepts prevailing insights concerning the operation of prejudice and discrimination—illuminates the inversion of *Carolene Products* in cases requiring discriminatory intent. Under the intent rule, the Court examines pervasive forms of discrimination against suspect classes with rational basis review; it defers to the legislative judgment, rather than exercising the elevated analysis intimated by the *Carolene Products* heightened scrutiny doctrine.[377] Yet, the primary forms of discrimination (affirmative action) against privileged classes, such as whites and men, receive searching judi-

372. *See supra* text accompanying notes 142–47.

373. *See supra* text accompanying notes 126–61.

374. *See* Strauss, *supra* note 34, at 953 (arguing that the Court treats discriminatory intent as the exclusive method of proving an equal protection violation).

375. Lawrence, *supra* note 43, at 347.

376. Although the Court has not literally dismissed impact altogether, its case law leaves very little, if any, room for proving intent with circumstantial evidence.

377. *See supra* note 131 and accompanying text.

cial inquiry.[378] Reading intent together with the class-to-classification shift establishes a clear pattern in equal protection jurisprudence: privileged classes receive the most serious scrutiny of their equal protection claims while the Court doubts and dismisses the equal protection claims of members of protected classes. A comprehensive reading of equal protection analysis fortifies this claim. While suspect classes generally receive rational basis review under an intent framework, privileged groups obtain exacting analysis of their discrimination claims (which are primarily "reverse discrimination" claims) under a classification approach.[379] The Court also inverts *Carolene Products* when it, returning to a class-based approach, denies heightened scrutiny to oppressed classes, such as gays and lesbians and the poor, who clearly suffer from discrimination and, as a result, face prejudice in the democratic branches of government.[380]

Adhering to the intent rule, the Court has even explicitly instructed vulnerable classes to pursue legislative remedies against harmful legislation, a result that directly contradicts heightened scrutiny rationale. In *McCleskey*, for example, the Court held that

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."[381]

To say that the Court failed to appreciate the utter futility of directing a southern black male convicted of murdering a police officer to seek redress in his state legislature for a claim of racial subjugation grossly understates the abdication of the judicial role in *McCleskey*. The Court treated pervasive racial discrimination in criminal law—a historic site of egregious racial subjugation—as a mere "discrepancy,"[382] rather than as a

378. *See supra* notes 177–211 and accompanying text.

379. *See supra* notes 220–58, 308–61 and accompanying text.

380. *See supra* notes 263–307 and accompanying text.

381. McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (citations omitted).

382. *Id.* at 312 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race."). The Court reduced McCleskey's arguments concerning the history of racial discrimination in criminal law to a footnote and dismissed it summarily. *See id.* at 298 n.20 ("Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent."). In his dissenting opinion, Justice Brennan challenged the majority's flip dismissal of McCleskey's historical account of racism in the Georgia penal system:

> Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.

sign of racial subordination triggering heightened scrutiny. The fact that legislative efforts by blacks on this issue have proved unavailing[383] counsels against the Court's callous dismissal of the Baldus Study. Because the study demonstrates entrenched racial antagonism, the oppressed class will have difficulty securing a legislative correction. This is precisely the moment when *Carolene Products* calls for heightened judicial review.[384] The Court, however, has inverted the concerns of *Carolene Products* such that privileged, rather than subordinate, classes receive its most exacting review; therefore, equal protection jurisprudence no longer protects.[385]

Recent case law makes the process of inversion in the intent context even more blatant. The Court has, in a series of cases, blocked governmental efforts to preserve the meaningful political participation of black voters.[386] The Court has held that if race is the "predominant factor" in the formation of electoral districts, then these districts will trigger a strict scrutiny analysis;[387] this analysis has inevitably led to the judicial invalidation of "majority-minority" electoral districts.[388] In sustaining equal protection challenges by white members of these districts, the Court has shown a great willingness to infer racial consciousness from the shape of

Id. at 328–29 (Brennan, J., dissenting).

383. Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1057 n.188 (reporting defeat in Congress of proposed "Racial Justice Act" which would have established that "[t]he Constitution's guarantee of equal justice for all is jeopardized when the death penalty is imposed in a pattern in which the likelihood of a death sentence is affected by the race of the perpetrator or the victim" (quoting Hearings Before Subcommittee on the Judiciary House of Representative, 101st Cong., 2d Sess. 3 (1990)); Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 714 n.39 (1999) (describing repeated defeat of the Racial Justice Act); Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 216–17 (1999) ("The Supreme Court rejected an equal protection challenge to Georgia death penalty proceedings. . . . Congress thereafter considered several 'Racial Justice' or 'Fairness in Death Sentencing' bills, but has consistently refused to pass such legislation.").

384. *See supra* text accompanying notes 143–47.

385. *See generally* Siegel, *supra* note 321, at 1113–14, 1134 (arguing that intent rule and color-blindness reinforce racial and gender hierarchies).

386. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

387. *See Miller*, 515 U.S. at 916. The Court held:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id.

388. *See* Rubin, *supra* note 128, at 91 ("Nonetheless, in the series of decisions that began with *Shaw I* . . . the Supreme Court has subjected to strict scrutiny and invalidated every districting plan to come before it in a fully briefed and argued case in which race was used in drawing district lines . . . ."). In a recent case, however, a slim majority of the Court affirmed an electoral district under challenge by white voters. *See* Easley v. Cromartie, 532 U.S. 234, 257–58 (2001) (holding that electoral district did not violate equal protection because race was not the predominant factor in its formation).

the district: the Court has held, under much criticism, that the "bizarre" shape of a district can support an inference of racial consciousness.[389]

Marking a dramatic departure from the impact cases involving historically disadvantaged plaintiffs, the Court has recognized the equal protection claims of white voters in redistricting cases despite the fact that they are not victims of purposeful discrimination and are not disenfranchised or disempowered by the state action.[390] As the foregoing discussion indicates, however, the Court has consistently rejected the equal protection claims of women and persons of color who point to the discriminatory effects of "facially neutral" state action on the grounds that plaintiffs in these cases failed to prove that the state specifically intended to harm that particular plaintiff. By contrast, in the voter districting cases, the Court has credited the racial narrative of the white plaintiffs who allege that facially neutral districts were drawn with race as a predominant factor and has not required these plaintiffs to prove that the State engaged in unlawful discrimination directly against them.[391] Thus, the Court has abandoned its inflexible stance toward impact evidence in affirmative action cases involving white plaintiffs[392] and has even loosened standing requirements to effectuate the adjudication of these claims.[393] The doctrinal shift toward recognizing a racial mental state (if not intent) in the "white impact" cases provides further support for my theory that the Court has inverted the heightened scrutiny framework and treats advantaged groups as if they need special protection from state actors, while disadvantaged groups have sufficient power to protect themselves in the political process.

D. Institutional Concerns as an Explanation for Status of Equal Protection Doctrine

This subpart considers one of the central set of arguments the Court advances to justify the jurisprudence this article criticizes. I consider in particular whether institutional concerns explain the Court's contradictory equal protection jurisprudence. I find none of the Court's arguments sufficiently persuasive to justify its inconsistent holdings or to

389. *See Miller*, 515 U.S. at 917–18 (discussing shape of electoral districts).

390. *See* Foster, *supra* note 45, at 1162 ("[T]here is no claim that district lines have been redrawn specifically to disenfranchise a particular ethnic or gender group. Nor do the claimants assert that the gerrymandering has affected their right to vote or otherwise diluted their vote.").

391. *See id.*; *see also* Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J.L. & POL. 591, 622 (1998) (arguing that in the redistricting cases, "the Court nowhere asks whether the government's creation of bizarre looking majority-minority districts is motivated by the purpose of discriminating against whites (or, for that matter, anyone else). Much less does the Court anywhere find such a purpose ever existed." (emphasis omitted)).

392. *See* Foster, *supra* note 45, at 1089–92 (arguing that voter district cases mark an exception to the rigid intent requirements of *Feeney*).

393. *See* Raskin, *supra* note 391, at 629–30 (arguing that standing doctrine in redistricting cases is much more lenient than in cases where persons of color challenge racial discrimination).

overcome my conclusion that the Court has inverted the concepts of privilege and domination that underlie the *Carolene Products* formulation.

1. Institutional Concerns and Equal Protection

The Court frequently cites to institutional integrity to justify some of the doctrines I have analyzed. Of the three doctrinal areas I have examined, the Court raises institutional legitimacy most often in the context of the discriminatory intent rule.[394] The Court justifies its deployment of the intent standard in the language of institutional competency and legitimacy: an impact standard, it argues, would subject a host of legislative regimes to judicial invalidation.[395] For example, in *Davis*, the Court held:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.[396]

The Court expressed similar concerns in *McCleskey*:

> [T]he claim that [McCleskey's] sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges.[397]

Thus, institutional concerns have clearly appeared in cases involving the deployment of the discriminatory intent rule.

Furthermore, institutional concerns surround the usage of the *Carolene Products* formulation itself.[398] To limit its disruption of the legislative process, the Court applies heightened scrutiny only in those in-

394. *See supra* text accompanying notes 327–36.

395. Flagg, *Enduring Principle*, *supra* note 362, at 951–55 (arguing that institutional concerns lead to intent rule).

396. Washington v. Davis, 426 U.S. 229 (1976).

397. McCleskey v. Kemp, 481 U.S. 279, 315–17 (1987).

398. *See supra* text accompanying notes 143–47.

stances where clear constitutional provisions have been violated or where vulnerable classes have suffered injustice in the political process.[399] Thus, the denial of heightened scrutiny to groups such as gays and lesbians and the poor *could* be justified, in theory, on institutional grounds. For the reasons stated below, however, institutional concerns alone cannot explain the Court's equal protection jurisprudence.

2. Inconsistent Invocation of Institutional Issues

The Court's inconsistent invocation of institutional issues suggests that these matters cannot credibly serve as a justification for the doctrines I have examined. While the Court has repeatedly cited to institutional matters when assessing impact evidence brought by suspect classes, it has abandoned these concerns altogether when reviewing the claims of privileged classes challenging affirmative action programs.

For example, the application of heightened scrutiny to claims of discrimination brought by whites and males challenging affirmative action programs[400] departs from the institutional restraint that provides the context for the *Carolene Products* doctrine. Although the Court has elaborated the heightened scrutiny rationale in order to allow for limited and concrete intrusion into the legislative arena,[401] the symmetrical application of heightened scrutiny ignores these concerns altogether. The classification shift permits a broadly invasive equal protection analysis; once a single group qualifies for heightened scrutiny based on its own history of discrimination and political powerlessness, the Court applies heightened scrutiny symmetrically and outwardly—to any individual who can claim discrimination based on a shared classification, rather than shared class membership—with the oppressed group.[402] Instead of adhering to the restrained approach set forth in *Carolene Products*, the classification shift applies heightened scrutiny broadly, placing many governmental policies in jeopardy of judicial invalidation.

The Court has also explicitly disparaged legislative choices in the affirmative action context. In *Croson*, for example, the Court forcefully disagreed with every asserted basis the City of Richmond advanced to justify the affirmative action plan.[403] For example, the Court dismissed as "sheer speculation" the city's conclusion that statistical patterns of discrimination in the local construction industry demonstrate racial bias.[404] Furthermore, despite the city's attempts to justify the affirmative action

399. *See supra* text accompanying notes 146–47.

400. *See, e.g.*, *supra* text accompanying notes 177–87.

401. *See, e.g., supra* notes 145–47 and accompanying text.

402. *See supra* text accompanying notes 165–68.

403. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–500 (1989).

404. *Id*. at 499 ("It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities.").

plan with statistical evidence and testimony, the Court determined that "[t]he city points to *no evidence* that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case."[405] Justice O'Connor even engaged in pure "speculation" herself, as she attempted to explain away the statistical evidence the city offered. Justice O'Connor argued that the statistics which seem to indicate discrimination against blacks in the construction industry might result from the racialized career choices of blacks: "Blacks *may be* disproportionately attracted to industries other than construction"[406] (a peculiar conclusion to make in a decision touting the virtues of colorblindness). Although the *McCleskey* Court claimed incompetence to review broad statistical patterns of discrimination,[407] the Court in *Croson* substituted its own judgment for that of the legislature on the meaning of statistical patterns of racism.

The Court has also marginalized Congress's legislative choice in the affirmative action context. In a series of cases, the Court had given Congress greater latitude than the states in the implementation of affirmative action programs.[408] The current Court, however, has overruled this precedent.[409] In *Adarand*, the Court held that Congress and the states would stand on equal footing in the affirmative action context: the Court would apply strict scrutiny to both state and federal affirmative action programs.[410] Furthermore, in the electoral redistricting cases, the Court interferes with the Justice Department's enforcement of the Voting Rights Act and strikes down congressional and Executive efforts to protect blacks from disenfranchisement.[411] Thus, the Court has disregarded

405. *Id.* at 510 (emphasis added).

406. *Id.* at 503 (emphasis added); *see also*, Chang, *supra* note 334, at 827–31 (discussing Justice O'Connor's speculation concerning statistical patterns of discrimination in affirmative action decisions).

407. *See infra* text accompanying notes 413–18.

408. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564–65 (1990) (applying intermediate, rather than strict, scrutiny to Congressional race-based affirmative action plan); *Croson*, 488 U.S. at 490 (plurality opinion) (arguing that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment" and that "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (plurality opinion) (holding that in reviewing congressional affirmative action plans, "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment" (citations omitted)).

409. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting*).

410. *See id.*

411. *See* Foster, *supra* note 45, at 1167–71 (questioning the Court's competence to dictate the shape of electoral districts); Rubin, *supra* note 128, at 55–67 (discussing racial discrimination against blacks in the electoral context and the constitutional, legislative, and executive remedies designed to protect them from such abuses).

the institutional concerns of coordinate branches of government in its quest to challenge the legitimacy of affirmative action programs.[412]

The Court's disregarding of institutional concerns in the affirmative action context becomes especially troubling when one considers the "guarded" approach it takes in the context of equal protection cases involving broad patterns of discrimination. In *McCleskey*, for example, the Court declared that it was institutionally incompetent to assess the fairness of broad statistical patterns of subjugation, arguing that such concerns were better addressed by legislatures.[413] Yet, in the affirmative action context, the Court has created a doctrine that assesses, questions, and overrules the legislative evaluation of statistical patterns of discrimination.[414] When states and Congress rely on statistical studies and other evidence to document the need for affirmative action plans, the Court has disparaged this evidence in its strict scrutiny analysis and has invalidated the affirmative action plan at issue.[415] The Court has also concluded that neither Congress nor the states can remedy the broadest and most pervasive form of discrimination—"societal discrimination"—through the usage of race-based affirmative action.[416] If the Court was correct in *McCleskey* concerning the limitations of its institutional competence, it should take a more deferential approach when considering what remedies are appropriate for alleviating the structural inequities associated with race.[417] The Court's shifting approaches to its institutional role call into question the sincerity of its appeal to institutional competence as a justification for its fatal application of the intent rule.[418]

412. Girardeau Spann offers the following critique of *Adarand*:

> Although the Court disagreed with the legislative policy preference that was embodied in the congressional presumption, Supreme Court disagreement should be inconsequential. The policy preference underlying the congressional presumption is legislative rather than judicial in nature; it concerns the politically appropriate allocation of societal resources, which is an issue over which the politically accountable Congress has greater relative institutional competence than the politically insulated Supreme Court.

See Spann, *supra* note 162, at 52.

413. McCleskey v. Kemp, 481 U.S. 279, 319 (1987) ("Legislatures also are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." (citations omitted)).

414. *See generally* Chang, *supra* note 38, at 565.

415. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) ("None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.'").

416. *Id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group.").

417. *See* Spann, *supra* note 162, at 52 (arguing that the legislature is more competent to assess the need for race-conscious remedies).

418. The Court's approaches to statistical data in the intent and affirmative action cases might appear consistent to some readers. In both contexts, the Court dismisses discriminatory impact data as probative of actual discrimination. Nonetheless, the Court's approach to legislative judgment differs in both contexts. In the intent cases, the Court defers to the legislature; it claims incompetence to evaluate the fairness of statistical patterns of discrimination and argues that it fears a dangerous slippery slope. In the affirmative action cases, however, the Court does not "fear" the institutional impli-

The Court's inconsistent approach to institutional concerns in the affirmative action and discriminatory intent cases cannot rest on the grounds that affirmative action involves clear discrimination whereas the intent cases involve situations where discriminatory motive is questionable. First, the dismissal of impact evidence as a statistical "discrepancy" reflects the inversion of privilege and subordination. Because the Court has decided to take a *deferential* approach with respect to discrimination that oppressed classes endure,[419] it is reluctant or unwilling to view stark patterns of discrimination against them as probative of discriminatory intent. Furthermore, and most importantly, even in cases involving the explicit use of race to burden subordinate classes, the Court has not ignored institutional concerns as it does in affirmative action cases; instead, it has deferred to the judgment of the political branches of government. For instance, in upholding law enforcement consideration of racial status as indicative of criminal propensity in *Martinez-Fuerte*, the Court expressly couched its ruling in judicial restraint:

> Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.[420]

While the Court approved racial profiling in *Martinez-Fuerte*, it has vigorously questioned the motives of lawmakers in the context of affirmative action.[421] Far from extending "wide discretion" to governmental affirmative action plans, the Court has rejected statistical evidence demonstrating discrimination in the industry subject to the affirmative action plan, narrowly defined the types of discrimination governments can remedy, and refused to recognize the more compelling role that Congress has, relative to the states, in remedying past discrimination.[422] Thus, I remain unconvinced that institutional concerns—rather than inversion of privilege and subordination—explain the anomalous nature of equal protection jurisprudence.

The inconsistencies in the Court's approach to institutional concerns become more apparent when one looks beyond class-based equal protection theory. In many other areas of law, the Rehnquist Court has disregarded institutional concerns in order to narrow the protection of vulnerable classes. For example, the Court has disregarded Congress's

cations of its strict scrutiny framework; the Court, instead, substitutes its admittedly inferior judgment concerning the meaning of statistical studies for the legislative assessment.

419. *See, e.g., supra* notes 381–85 and accompanying text.

420. Martinez-Fuerte v. United States, 428 U.S. 543, 563–64 (1976) (citations omitted).

421. *See, e.g., Croson*, 488 U.S. at 493 (commenting on the need for judicial inquiry to determine if the justifications of the law are legitimate or "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics").

422. *See supra* text accompanying notes 194–211, 403–12.

textual roles in regulating "interstate commerce" and enforcing the Fourteenth Amendment and has invalidated a statutory right of action created by the Violence Against Women Act[423] on the grounds that it does not relate to interstate commerce or remedy a gendered failure of the state political process.[424] Congress, however, commissioned lengthy studies and held exhaustive testimony on the relationship among gendered violence, interstate commerce, and equality.[425] The Court ignored this record and invalidated the remedial statute.[426] Furthermore, in the Eleventh Amendment context, the Court has broadly construed the scope of state sovereignty to limit the operation of democratically enacted federal civil rights laws against state actors.[427] Thus, while the Court claims that the discriminatory intent rule will guard against judicial activism, the contemporary Court has remained indisputably activist in its invalidation or limitation of civil rights legislation.[428] This shifting approach to institutional concerns makes the Court's reliance upon institutional concerns problematic when used to justify the discriminatory intent doctrine. The Court has exhibited a willingness to disregard institutional issues in order to protect privileged classes and to invalidate or limit the operation of laws that remedy subjugation.[429] The inconsistent nature of the Court's record on institutional concerns severely undermines the legitimacy of these matters as a justification for the discriminatory intent rule.

3. Institutional Concerns Cannot Legitimize the Subjugation of Oppressed Classes

Even assuming the Court genuinely considers institutional integrity in its equal protection jurisprudence, such concerns should not immunize the operation of laws that subjugate oppressed communities. The Court's equal protection doctrine, however, suggests that democratic

423. 42 U.S.C. § 13981 (2000) (held unconstitutional by Brzonkala v. Va. Polytechnical & State Univ., 169 F.3d 820, 826 (4th Cir. 1999) (en banc), *aff'd*, United States v. Morrison, 529 U.S. 598, 627 (2000)).

424. *See Morrison*, 529 U.S. at 617–27 (invalidating civil remedy provision in Violence Against Women Act).

425. *Id.* at 628–36 (Souter, J., dissenting) (discussing evidence that Congress considered before implementing the Violence Against Women Act); *id*. at 666 (Breyer, J., dissenting) (same).

426. *See id.* at 598.

427. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that state sovereign immunity bars suits to recover money damages due to state failure to comply with Americans With Disabilities Act); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) (overruling prior precedent and holding that Congress cannot abrogate state sovereign immunity through Article I and dismissing complaint against state pursuant to Indian Gaming Regulatory Act).

428. For a sampling of literature criticizing the activism of the Rehnquist Court, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 675–80, 683–84 (1991); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 6 (1992); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 128–69 (2001); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091 (2000).

429. *See supra* notes 394–402 and accompanying text.

values can immunize state-imposed subjugation from judicial review. *McCleskey* vividly illustrates this problem.[430] Justice Powell's decision expressed a concern that if the Court were to recognize McCleskey's claim of racial discrimination, a host of practices in the criminal law setting would become susceptible of judicial invalidation—including practices rooted in gender discrimination.[431] As Justice Brennan's dissent succinctly explains, Powell's concerns border upon a "fear of too much justice."[432] That the implementation of the requirements of equal protection implicates a host of practices in the criminal law system should not determine the legitimacy of an equal protection claim; instead, it speaks to the pervasive discrimination that exists in society, including within legal structures. The Court's equal protection jurisprudence does not provide lawmakers with any incentives to address these problems.[433] Instead, the Court immunizes these inequities from judicial review by shielding them behind the language of legislative and executive autonomy.

Equal protection has always involved a break from traditional practices[434]—many of which had broad popular support. The Equal Protection Clause was indeed ratified to end antiblack subjugation that was rampant in the postbellum South.[435] In *Brown*, the Court recognized, perhaps even catered to, the institutional and cultural difficulty of desegregation,[436] and the violent uprising in many southern states after the decision vindicates, in part, the Court's concerns.[437] Yet, the institutional and democratic commitment to segregation in the South did not render desegregation a flagrant abuse of judicial power.[438]

430. *See infra* notes 431–33 and accompanying text.

431. *See* McCleskey v. Kemp, 481 U.S. 279, 315–17 (1987) (embracing intent rule because "the claim that [McCleskey's] sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender").

432. *Id.* at 339 (Brennan, J. dissenting).

433. *See* Flagg, *Enduring Principle*, *supra* note 362, at 967–68 (criticizing the intent rule and offering an alternative jurisprudence that encourages state actors to take "responsibility" to eradicate pervasive racial inequality).

434. *See* Sunstein, *Sexual Orientation and the Constitution*, *supra* note 2, at 1163 (arguing that "the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure").

435. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70–71 (1872) (discussing abusive state practices that led to the ratification of the Fourteenth Amendment).

436. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (declining to issue a particular remedy one year after finding public school racial segregation unconstitutional but directing lower courts to act with "all deliberate speed" to construct such a remedy); Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954) (after holding public school racial segregation unconstitutional, declining to offer remedy and directing further briefing on the question of remedy).

437. *See* Ross, *supra* note 123, at 26 (conceding that there were "powerful pragmatic arguments" for delaying the implementation of desegregation but questioning ultimate decision because "[t]o permit some period of times for families to adjust to a new way of life is one thing[, but] to permit racists a period of continued expression of their racism out of fear of their resistance and lawlessness is another thing").

438. *See* Black, *supra* note 114 (arguing that *Brown* is consistent with Fourteenth Amendment's purpose of dismantling white supremacy).

Presently, the Court's equal protection jurisprudence sets aside institutional concerns when advantaged classes challenge governmental affirmative action programs, but defers to legislatures when historically oppressed groups present stark patterns of discrimination to the Court for review. This inconsistent doctrine denies equal protection to historically oppressed classes and inverts the theory underlying *Carolene Products*.[439] In an earlier era, the Court also placed institutional matters above the betterment of marginalized social groups. In *Plessy*, for example, the Court offered judicial restraint arguments as a reason for allowing American apartheid to persist.[440] The *Plessy* Court held that it should not invalidate state-mandated segregation because such policies were "within the competency of the state legislatures in the exercise of their police power."[441] The Court, questioning the notion that the law could even bring about racial equality in the "social sphere,"[442] held that it must defer to the legislative wisdom on the subject of racial apartheid: "the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature."[443] The Court, however, had taken a more invasive approach toward Reconstruction era statutes that attempted to end the subjugation of blacks.[444] As the Court questions the legacy of *Plessy* today,[445] it should also evaluate the negative impact of its doctrines upon subjugated groups.[446]

IV. RECONSTRUCTING EQUAL PROTECTION THEORY

Contemporary equal protection analysis denies the promises of equality to vulnerable social groups, despite the anticaste origins of the Fourteenth Amendment.[447] While scholars continue to consider the appropriate meaning of equal protection,[448] the idea that equal protection

439. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

440. Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (discussing legislative competence to mandate segregation).

441. *Id.*

442. *Id*. at 551–52.

443. *Id*. at 550.

444. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883) (invalidating federal law banning discrimination in places of public accommodations by nonstate actors as exceeding scope of congressional power).

445. *See* Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992) (expressing the view that "*Plessy* was wrong the day it was decided"). *But see* Klarman, *supra* note 174, at 26–27 (observing that most commentators approved of *Plessy* when it was decided); Siegel, *supra* note 321, at 1112 (observing that "*Plessy* was approved by the vast majority of white Americans at the time it was decided").

446. *See* Siegel, *supra* note 321, at 1147–48 ("Once we appreciate that forms of status-enforcing state action we now deem morally reprehensible were once understood as morally defensible, it would seem to follow that we should evaluate the justifications for our current practices with a certain skepticism."); Strauss, *supra* note 34, at 955 (arguing that *Davis*, like *Plessy,* "signaled a withdrawal from the front lines of social change").

447. *See generally* Sunstein, *Anticaste Principle*, *supra* note 49.

448. *See supra* text accompanying note 2.

compels more invasive judicial review of discrimination claims brought by privileged plaintiffs, rather than subordinate groups, finds no support in the historical circumstances surrounding the Fourteenth Amendment. Yet, this insupportable proposition describes contemporary equal protection jurisprudence, which is marked by contradictory, inconsistent, and indefensible applications of doctrine. This part fleshes out an alternative to the current equal protection morass. I do not intend that my suggestions will exhaust debate over the direction of equal protection; on the contrary, I hope to provoke further critical analyses of equal protection theory and of my own work.

A. Antisubordination Theory as an Alternative to the Doctrinal Protection of Privilege

Part I of this article argues that the Court has doctrinal options in the equal protection context.[449] There are various principles that have defined and that could shape the Court's elaboration of equality. Of the possible equal protection theories, the antisubordination or anticaste theories do more to dismantle the historical legacy of racial and other forms of domination.[450] Many scholars have advocated antisubordination theories.[451] A concern that the law promote substantive equality by considering "the concrete effects of government policy on the substantive condition of the disadvantaged"[452] unifies their analyses. Some scholars have argued that the materialist focus of the antisubordination model makes this approach more consistent with the original understanding of the framers of the Fourteenth Amendment.[453] This article, however, does not rest on originalist interpretations, given the difficulty of discerning a strict understanding of "the" original meaning of equality and the devastating implications strict originalism would have for combating nonracial forms of inequality.[454] Nevertheless, the antisubordination approach does not lie *outside* the boundaries of precedent and historical concerns.[455] On the contrary, as many scholars have demonstrated, antisubordination theories of equality find strong support in precedent and in the surrounding historical context of the Fourteenth Amendment.[456]

449. *See supra* text accompanying notes 34–82.

450. *See supra* text accompanying notes 47–54.

451. *See supra* text accompanying notes 47–50.

452. *See* Roberts, *supra* note 47, at 1454.

453. *See generally* TRIBE, *supra* note 48, at 514–17; Sunstein, *Anticaste Principle*, *supra* note 49.

454. Under a strict originalist approach, for example, one could argue that equal protection does not prohibit heterosexist or sexist state action. *See, e.g.*, Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988) (attempting to rebut the wide consensus that gender-based discrimination is not unconstitutional under original understanding of the Fourteenth Amendment).

455. *See supra* text accompanying notes 47–54.

456. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (invalidating state ban on interracial marriage upon finding that law was intended "as measures designed to maintain *White Supremacy*" (emphasis added)); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding public school racial seg-

Undoing racial and other forms of injustice requires more than the implementation of mere formal equality and compels a closer scrutiny of structures of inequality. Whereas *Plessy* refused to examine (or willfully ignored) how white supremacy was imbedded in "separate but equal" social structures,[457] *Strauder*, *Brown*, *Loving*, and other precedent persuasively challenge this incorrect approach.[458] Antisubordination theories, therefore, fit comfortably within the traditional elaboration of equal protection. Furthermore, as this part examines, the antisubordination theory overlaps substantially with the *Carolene Products* justification for applying heightened scrutiny, giving it additional precedential support.[459]

1. Antisubordination Theories and Discriminatory Effects

Antisubordination theory (and related models) recognizes the various permutations of hierarchy. An antisubordination approach, for example, places greater doctrinal significance upon pattern evidence of discrimination, which the Court currently dismisses as mere statistical "discrepancies."[460] Antisubordination theories would render these patterns actionable under an equal protection analysis when they likely reflect impermissible prejudice against historically disparaged groups or when they reinforce the subordinate status of these groups.[461] This interpretation of equality recognizes that inequality and methods of subordination are not static. Because discrimination has mutated into subtle forms, a rule requiring that plaintiffs possess "smoking gun" evidence to

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regation unconstitutional because it diminishes the educational opportunities of black children and "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here*." (emphasis added)); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (arguing that the Fourteenth Amendment was intended to provide to blacks "exemption from legal discriminations, *implying inferiority* in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a *subject race*" (emphasis added)); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872) (holding that the "pervading purpose" of the Civil War Amendments is "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him"). For legal scholarship on this subject, see generally TRIBE, *supra* note 48; Sunstein, *Anticaste Principle*, *supra* note 49, at 2428–36.

457. *See Plessy*, 163 U.S. at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

458. *See Loving*, 388 U.S. at 1; *Brown*, 347 U.S. at 483; *Strauder*, 100 U.S. at 303.

459. *See infra* text accompanying notes 515–21.

460. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (dismissing stark pattern of racial discrimination in administration of Georgia death penalty as "a discrepancy that appears to correlate with race").

461. *See, e.g.*, Colker, *supra* note 37, at 1007–08 ("From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy."); Sunstein, *Anticaste Principle*, *supra* note 49, at 2411 (advocating an "anticaste" approach to equal protection that prohibits "social and legal practices" that result in "systemic social disadvantage").

prove an equal protection claim will place insurmountable barriers to the litigation of such claims, permit pervasive subjugation to escape a judicial remedy, and provide absolutely no incentives for governments to take care that their own policies do not exacerbate and replicate historical forms of injustice.[462] Because oppression evolves and assumes new forms over time, civil rights law must take a flexible approach toward questions of inequality and discrimination.[463] The antidifferentiation model—which the discriminatory intent rule embodies—fails to appreciate the complexity and subtlety of subordination.[464]

2. Antisubordination Theories and Legislative Remedies for Discrimination

Antisubordination theories also permit state and federal governmental actors to remedy entrenched forms of discrimination through their own affirmative efforts. Contemporary equal protection doctrine, however, discourages such efforts because it utilizes a strict antidifferentiation approach: only those laws that explicitly and purposefully differentiate on certain "impermissible" classifications constitute a violation of equal protection principles.[465] This narrow framework undermines the protection of vulnerable social groups; it treats group harm to vulnerable classes as irremediable through the intent rule but gives exacting analysis to privileged class members who challenge legislative remedies for subjugation under the classification shift.[466] Under an antisubordination approach, the Court would view remedial usages of a disfavored category in a different fashion: governmental efforts to dismantle entrenched patterns of inequality and discrimination would not trigger the heightened (and fatal) sensitivity that invidious and oppressive purposes warrant.[467] As such, the antisubordination theory reflects the contemporary understanding of race, gender, sexuality, and class as "socially constructed"

462. *See supra* text accompanying notes 321–26.

463. *See* Schacter, *supra* note 284, at 296 (criticizing view of civil rights as "fixed and static" and arguing that "[c]ivil rights laws have changed and expanded over time to accommodate new conceptions of equality and the expanding social boundaries of community").

464. *Compare McCleskey*, 481 U.S. at 312 (dismissing pattern of racial discrimination as a "discrepancy"), *with* Colker, *supra* note 37, at 1028–35 (contrasting analysis under antidifferentiation model with analysis under antisubordination model in hypothetical), *and* Sunstein, *Anticaste Principle*, *supra* note 49, at 2428–33 (suggesting equal protection principles based on the elimination of "caste").

465. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (requiring plaintiffs in disparate impact cases to demonstrate lawmakers "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

466. *See* Colker, *supra* note 37, at 1058–62 (stating that the antisubordination approach, as opposed to antidifferentiation, permits affirmative action and usage of impact data).

467. *See id.*

categories, rather than as fixed, biological impositions.[468] For example, a proper understanding of race as a social construct with malleable and contextual meanings casts doubt upon a blanket, undifferentiated rule that treats all usages of race as presumptively stigmatic, oppressive, malicious and unconstitutional. Instead, courts can measure the value of race by examining the manner in which it is used.[469]

B. Implementing Antisubordination Theories of Equality: Institutional Concerns

1. Critical—Yet Accommodating—Stance Toward Institutional Concerns

The task remains to articulate a theory of equality that does not erode the historic concerns over institutional balance that the Court has always taken into account in its Fourteenth Amendment analysis. Scholars should take a cautious approach to balancing institutional concerns with equality issues. The Civil War Amendments implied a departure from very popular—yet abusive—legislative action.[470] And the Court has a history, even if too narrow, of invalidating laws that replicate impermissible, yet democratically implemented, discrimination.[471] As Ely's important work on democracy demonstrates, the Constitution contains many countermajoritarian provisions designed to guard against tyranni-

468. For a sampling of scholarship on social constructivist theories of identity, see generally JUDITH P. BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Hutchinson, *Accommodating Outness*, *supra* note 293, at 116–23; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 54–62 (1994).

469. *See* Darren Lenard Hutchinson, *Progressive Race-Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1466 (2002) [hereinafter Hutchinson, *Progressive Race Blindness*] ("If race is truly socially constructed . . . then we can evaluate race consciousness in the context of its usage, rather than believing the metanarrative that race is bad."); Rubin, *supra* note 128, at 113 (arguing that the Court's remedial race redistricting opinions "suggest a new and troubling conception of equal protection, one that appears to be unable to take account of the different ways and contexts in which government may seek to use race, particularly in order to combat discrimination"); Jayne Chong-Soon Lee, Review Essay, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 772 (1994) ("If race is always dangerous, regardless of its meaning within a specific and historical and social context, the result is an abstract and unitary conception of race.").

470. *See* Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426 (1990) (arguing that "the due process clause of the fourteenth amendment was intended to expand federal power by investing the federal government with complete authority to require, at the very least, that a state ensures stringently fair procedures are followed prior to any deprivation of the 'life, liberty, or property' of any United States citizen within its boundaries"); A. C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 479 (2000) ("The Civil War amendments establish a special area where the national government can control state conduct to preserve liberty.").

471. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (invalidating public school racial segregation); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (invalidating racially discriminatory jury service statute).

cal practices and to extend liberty to all citizens.[472] Furthermore, separation of powers, federalism, and judicial competence arguments have often served to mask judicial and political hostility to civil rights efforts.[473] The inconsistent invocation of institutional integrity by the Rehnquist Court—and the negative effects these shifts have had upon civil rights enforcement and remedies—demonstrates the likely pretextual usage of structural arguments in constitutional law.[474] Under contemporary equal protection jurisprudence, the Court narrowly construes its institutional role when socially despised and politically vulnerable plaintiffs seek judicial redress, and it broadly construes its institutional rule when members of dominant classes or discriminating state governments seek judicial invalidation of civil rights measures aimed at combating pervasive conditions of inequality on the basis of race, gender, sexuality, and physical ability.[475] The discriminatory appearance and disappearance of institutional matters in the Court's jurisprudence, however, does not delegitimize these concerns; they remain important questions for the Court to consider in the articulation of doctrine.[476] Instead, the shifting nature of these concerns suggest that critical scholars should have a nuanced approach to institutional concerns in equal protection jurisprudence, one that recognizes their function as a barrier to social change, but which also has a legitimate role in a federal system of governance.

2. Discriminatory Impact and Institutional Competence: Context as a Limiting Principle

The Court frequently raises institutional concerns to justify its passive review of equal protection cases premised upon discriminatory impact.[477] The Court requires that plaintiffs present direct evidence of discriminatory intent, rather than resting solely upon circumstantial evidence in the form of impact data.[478] Because evidence of specific intent or malice is typically unavailable to equal protection plaintiffs, the Court's intent doctrine allows institutional and subtle forms of invidious discrimination to escape judicial correction.[479] The Court, however, has argued that replacing an intent standard with an impact rule would impede legitimate efforts at governance and place in jeopardy of judicial

472. *See* ELY, *supra* note 135, at 88–101 (making textual argument to support "process theory").
473. *See supra* text accompanying notes 423–29.
474. *See supra* text accompanying notes 400–29.
475. *See supra* text accompanying notes 422–29.
476. In fact, many critical scholars are now raising institutional issues in their own arguments against the conservative doctrine of the Rehnquist Court, arguing that the Court oversteps judicial boundaries to dismantle legislative civil rights policies. *See* sources cited *supra* note 468; *see also* Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 247–66 (1993) (advocating stronger role for Congress and a more limited institutional role for the Court).
477. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 319 (1987).
478. Washington v. Davis, 426 U.S. 229, 239 (1976).
479. *See supra* text accompanying notes 327–31.

invalidation a host of proper governmental policies.[480] While it is important to unveil, as this article has, the discriminatory invocation of institutional concerns in the equal protection context, scholars must also address these concerns as legitimate factors for judicial examination. In the context of antisubordination or "impact" theories of equality, several scholars have offered practical approaches that attempt to answer the Court's "slippery slope" arguments and that seek to establish a practical framework for determining when discriminatory patterns constitute or reveal a deprivation of equal protection.[481] The intent doctrine itself invites such efforts; the Court has consistently held that impact is not completely irrelevant and that it might sometimes establish a claim of unconstitutional discrimination.[482] The work of these scholars, therefore, gives the Court the opportunity to consider seriously its own doctrinal assertion that impact matters.

A central mistake in the Court's equal protection analysis is the failure to appreciate the contextual meaning of identity. Race, gender, sexuality, and class derive their meanings from the setting in which they are used.[483] Accordingly, all patterns of discrimination will not have the same social implications.[484] Thus, the constitutional significance of statistical patterns of discrimination will depend upon the severity of the statistical pattern, the proximate circumstances surrounding the policy causing the discriminatory pattern, the historical or cultural meaning of the type of discrimination the pattern reflects, and the material impact of the statistical pattern upon subordinate classes.[485] Several scholars have elaborated these approaches in their work, which I will now briefly consider.[486] My goal here is not to provide a comprehensive sketch or critique of this scholarship, but rather to isolate some of the strengths and weaknesses of this literature, identify the unifying principles it contains,

480. *See Davis*, 426 U.S. at 248 (stating that "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription"); *see also* Flagg, *Enduring Principle*, *supra* note 362, at 954.

481. *See infra* text accompanying notes 487–506.

482. *See supra* text accompanying notes 337–43.

483. *See* Hutchinson, *Progressive Race Blindness*, *supra* note 469, at 1456–65 (discussing contextual meaning of race); Lee, *supra* note 469, at 772 (same).

484. Justice Stevens criticizes the Court for obscuring the different contextual meanings of race consciousness in his dissent in *Adarand*:

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

485. *See* TRIBE, *supra* note 48, at 1520 (discussing situations when impact evidence would trigger heightened scrutiny).

486. *See generally id.* at 1514–21; Lawrence, *supra* note 43.

and demonstrate how it might function to reverse the problematic inversion of equal protection.

Under an antisubordination approach, the Court would pay closer attention to the historical context in which the discriminatory pattern emerged. In his critique of the intent rule, for example, Charles Lawrence advocates a "cultural meanings test" to determine when impact matters:

> I propose a test that would look to the "cultural meaning" of an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly. This test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.[487]

While Lawrence's approach allows for a closer analysis of statistical evidence by the courts, it seems to ignore the complex cultural meanings that might attach to a discriminatory pattern. An individual's perception of the existence of discrimination depends upon her or his racial or gender status. Studies, for example, reveal that whites tend to have an extremely positive view of society's antidiscrimination efforts; most whites believe that America is largely a postracist society.[488] Persons of color, on the other hand, hold less-optimistic views of racial discrimination; to persons of color, race and racism remain salient features of American culture.[489] Consequently, "a significant portion" of the population might view acts as nonracial when history and present practices might indicate the contrary. Nevertheless, Lawrence's theory provides a helpful model for determining when statistical patterns of discrimination might result from improper governmental motivation.[490] Lawrence's emphasis on the historical and cultural context of discrimination can supply a limiting

487. Lawrence, *supra* note 43, at 356–57.

488. *See* JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS UNIV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB (Jan. 17, 2002) [hereinafter HELDRICH CTR., A WORKPLACE DIVIDED] (discussing highly divergent views as to the existence of workplace discrimination among whites and persons of color); Flagg, *White Race Consciousness*, *supra* note 43, at 981 (arguing that "whites tend to adopt the 'things are getting better' story of race relations, which allows us to suppose that our unfortunate history of socially approved race discrimination is largely behind us").

489. *See generally* HELDRICH CTR., A WORKPLACE DIVIDED, *supra* note 488.

490. *See* McCleskey v. Kemp, 481 U.S. 279, 332–33 (1987) (Brennan, J. dissenting) (discussing "unconscious racism" and citing to Lawrence's work).

doctrinal principle in a reconstructed jurisprudence that seriously scrutinizes evidence of discriminatory impact. Only certain discriminatory patterns will raise the specter of historical discrimination.[491] As Lawrence explains, there are some easy cases such as "the segregated beach, which clearly has racial meaning, and the increased bridge toll, which clearly does not."[492] Lawrence also discusses more "difficult" cases like *Arlington Heights*, in which the Court held that a predominately white suburb's denial of a zoning waiver to establish multiple family housing did not violate equal protection, despite its disparate racial effect and the tradition of residential racial segregation in the city.[493] The history of residential racial segregation in Arlington Heights and nationwide counsel against a summary dismissal of the plaintiffs' claim.[494] As Lawrence argues, several social science and historical texts could have informed the Court's analysis and pushed it to a different conclusion.[495]

Other scholars have attempted to build upon Lawrence's analysis. Flagg, for example, offers an approach that adds to Lawrence's work in two important ways.[496] First, Flagg takes into account the ways in which identity and social position affect an individual's perception of discriminatory acts.[497] Flagg argues, for instance, that hidden cultural norms as-

491. Tribe offers a similar approach. *See generally* TRIBE, *supra* note 48, at 1514–21. Tribe argues that antisubordination theories do not require strict scrutiny each time a plaintiff presents impact evidence. Instead, he explains

> strict judicial scrutiny would be reserved for those government acts that, *given their history, context, source, and effect*, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group.

Id. at 1520 (emphasis added); *see also* Sunstein, *Anticaste Principle*, *supra* note 49, at 2429 (arguing that anticaste principle combats "systemic disadvantage" which "operates along standard and predictable lines in multiple and important spheres of life and that applies in realms that relate to basic participation as a citizen in a democracy").

492. Lawrence, *supra* note 43, at 362.

493. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

494. *See* Lawrence, *supra* note 43, at 366–67 (discussing historical context of racial segregation).

495. Lawrence argues that

> [s]everal kinds of evidence would be available to demonstrate that denying the zoning variance in these circumstances has a cultural meaning that demeans blacks. Initially, plaintiffs could present evidence of the historical and contemporaneous meaning of residential segregation in the culture as a whole. This would include the history of statutorily mandated housing segregation as well as the use of restrictive covenants among private parties that aim to prevent blacks from purchasing property in white neighborhoods. Studies of racially segregated housing patterns throughout the United States and in the areas surrounding Arlington Heights as well as data and attitudinal surveys on residential segregation and "white flight" would also be relevant. Such studies have indicated that collective and individual tolerances for black neighbors vary from community to community. While they ascribe the intolerance to different causes, they agree substantially on the prominence of race in the minds of both those who flee and those who stay. They also note whites' continuing aversion to housing integration.

Id. (citations omitted). Lawrence also canvasses the facts in *Arlington Heights* for "direct evidence" of discrimination. *See id.* at 367.

496. *See* Flagg, *White Race Consciousness*, *supra* note 43, at 953.

497. *See id*. at 957 (1993) (examining the "transparency phenomenon" or "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific" (emphasis omitted)); *see also* DALTON, *supra* note 209, at 109 ("For most Whites, race—or more precisely, their own race—is simply part of the unseen, unproblematic background."); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1989) ("In male supremacist

sociated with white identity form the basis for facially neutral social policy and create many of the discriminatory patterns that the Court rejects as constitutionally insignificant in disparate impact litigation.[498] Courts should, therefore, consider whether invisible cultural biases operate to exclude marginalized groups through facially neutral laws.[499] While Flagg's proposal is somewhat abstract and, due to the indeterminacy of legal analysis,[500] might not produce results she desires, her approach, nevertheless, provides a useful model to help courts realize that facially neutral governmental policies can injure and stigmatize vulnerable communities in the same fashion as policies that contain explicit declarations of harmful motivation.[501] Flagg's approach can push the Court beyond its mechanical application of the intent rule and permit a conversation on how improper biases can be imbedded in neutral policies.[502]

Flagg also proposes a more practical model for implementing an impact standard: a burden-shifting analysis.[503] Such an approach requires the government, upon a sufficient showing of discriminatory effect by the plaintiff, to articulate a permissible basis for its facially neutral policies; plaintiffs would still have the opportunity to argue that the legitimate purpose could be achieved through less-discriminatory means.[504]

societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all."); Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 316–17 (1993) ("[T]he law's incorporation of a male normative standard may be invisible but it is not inconsequential." (footnote omitted)); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 284, at 15–17 (discussing how hidden racial, gender, sexuality, and class norms impact progressive theory); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 133 (1998) (defining heteronormativity as "the largely unstated assumption that heterosexuality is the essential and elemental ordering principal of society"); Michael Warner, *Introduction to* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY, at xxi (Michael Warner ed., 1993) ("Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist.").

498. *See* Flagg, *White Race Consciousness*, *supra* note 43, at 958 (arguing that the discriminatory intent rule "provides an excellent vehicle for reconsidering white race consciousness, because it perfectly reflects the prevailing white ideology of colorblindness and the concomitant failure of whites to scrutinize the whiteness of facially neutral norms.").

499. *Id.* at 997 ("Heightened, transparency-conscious scrutiny of governmental purposes requires the reviewing court to construe those purposes in a manner that does not perpetuate the covert imposition of white norms.").

500. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 89 (1995) (observing that the legal realist indeterminacy thesis "implied that the rules of law could not constrain judges' choices since it was the judges who chose which rules to apply and how to apply them" and that "since such choices were necessarily based on the judges' beliefs about what was right, it was the judges' personal value judgments that consciously or unconsciously formed the basis of their decisions").

501. Flagg, *White Race Consciousness*, *supra* note 43, at 989 ("The position implied by the discriminatory intent rule, that conscious discrimination is blameworthy but unconscious discrimination is not, is counterproductive of the ultimate goal of racial justice. Invalidating only conscious racism provides an incentive for whites to repress and deny whatever racist attitudes they in fact harbor.").

502. *Id.* at 1017.

503. *Id.* at 992–1005 (advocating usage of burden-shifting analysis in discriminatory impact equal protection cases).

504. *Id.* (discussing the mechanics of the burden-shifting approach).

Because the burden-shifting standard governs many statutory antidiscrimination contexts, courts are competent to administer this test in equal protection litigation.[505] Furthermore, the fact that statutorily imposed impact standards apply in cases where states are defendants, courts have already encountered institutional concerns in these settings; thus, Flagg's approach provides an analysis with which courts are already familiar.[506]

The solution that I and other antisubordination theorists propose for the problematic dismissal of discriminatory impact evidence in equal protection jurisprudence seeks to respond to the institutional concerns the Court raises by (1) suggesting discrete circumstances in which intent would matter from a constitutional perspective; and (2) urging the Court to draw from well-established civil rights models that employ a burden-shifting analysis in antidiscrimination cases. While these models leave some questions unanswered and do not guarantee any fixed results, they provide a better approach than the current regime, which precludes a substantial discussion concerning the material harms caused by facially neutral policies.

C. On Classes and Classifications

Institutional concerns also inform the "suspect class" and "classification" doctrines. The Court has created a tiered equal protection analysis which reserves its most exacting equal protection analysis for state action that burdens politically vulnerable classes.[507] The Court, however, departs from this approach in the affirmative action context and applies heightened scrutiny symmetrically—irrespective of the class membership of the plaintiffs.[508] Although the Court advocates the heightened scrutiny test as a method of judicial restraint,[509] the classification shift is inconsistent with such concerns because it increases the potential for an invasive review. Perhaps because a majority of the Justices generally disagree with affirmative action, the Court has generally refrained from raising questions of institutional restraint in the affirmative action context.[510] Instead, the Court has assumed *the* central role in examining the need for

505. *Id*. at 992 ("Borrowing the familiar doctrinal concepts of heightened judicial scrutiny (from existing equal protection jurisprudence) and burdens of production and persuasion (from judicial interpretations of Title VII), the rule aims to reach government decisions that carry racially disparate consequences and would likely not have been adopted but for the transparency phenomenon.").

506. Others scholars have advocated usage of the burden-shifting test in equal protection jurisprudence on these grounds. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1318–20 (1995) (advocating burden-shifting analysis in equal protection discriminatory impact cases).

507. *See supra* text accompanying notes 128–34.

508. *See supra* text accompanying notes 165–70.

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

510. *See* Chang, *supra* note 334, at 794 (suggesting that "personal values of political conservatism have pervaded the Supreme Court's decisions constraining legislative discretion to redress perceived racial inequity").

and the constitutionality of affirmative action programs.[511] Given the traditional importance the Court has placed on institutional concerns, it should consider whether in its opposition to affirmative action it has acted in a fashion that marginalizes Congress's historical role in ending racial subjugation and in a way that detracts from the credibility of its appeals to judicial restraint in discriminatory intent cases.

1. Antisubordination and Classification Approach

An antisubordination approach to equal protection would not treat remedial usages of race or gender as invidious discrimination.[512] Instead, antisubordination theory looks toward ending only those governmental practices that reinforce caste.[513] Because affirmative action measures seek to dismantle caste, they are not treated as presumptively unconstitutional under antisubordination theories.[514] In this respect, antisubordination theory is much closer to the *Carolene Products* formula than many of the former's advocates might concede.[515] Indeed, several antisubordination theorists have specifically linked their work to *Carolene Products* or the suspect class doctrine[516] or have otherwise examined the ways in which their work overlaps with process theory.[517] The similarities between the antisubordination analysis and the *Carolene Products* heightened scrutiny doctrine provide added precedential support for employing the former as a theory of equality.

Because antisubordination theory considers the effect of laws upon vulnerable groups, it, like the *Carolene Products* rationale, conflicts with the symmetrical application of heightened scrutiny—or the classification approach to equal protection. The classification approach does not contextualize a government's usage of a particular category. Instead, it treats all instances of certain classifications as constitutionally suspect.[518] In the affirmative action context, this has led the Court to obscure the most important distinction between affirmative action and invidious dis-

511. *Id.* at 830.

512. *See* Colker, *supra* note 37, at 1014–15 (explaining that antisubordination theory permits affirmative action and treats significant discriminatory patterns as actionable).

513. *See supra* text accompanying notes 51–54.

514. *See* Colker, *supra* note 37, at 1016 (discussing permissibility of affirmative action under antisubordination theory).

515. *See* Flagg, *White Race Consciousness*, *supra* note 43, at 968 (linking intent rule to process theory).

516. *See* Colker, *supra* note 37, at 1016 n.39 (describing *Carolene Products* as "[o]ne of the most important moments in the development of both heightened scrutiny and the anti-subordination principle"); Lawrence, *supra* note 43, at 347 (linking impact standard with process theory).

517. *See, e.g.*, Sunstein, *Anticaste Principle*, *supra* note 49, at 2441 (discussing similarities and distinctions among "suspect class" approach and "anticaste" theory). Similarly, scholars who advocate process theory have argued that their work should appeal to antisubordination theorists. *See* Yoshino, *supra* note 148, at 558–59 (discussing how the author's approach to process theory would permit an antisubordination view of equality).

518. *See supra* text accompanying notes 212–19.

crimination—the remedial purpose of the former.[519] Although my approach would have the Court take a more permissive view of affirmative action—including allowing Congress and states to remedy societal discrimination—it does not necessarily imply that courts passively validate every affirmative action program.[520] Instead, to give states and Congress greater flexibility to remedy the problem of historical and ongoing subjugation of vulnerable groups, the Court could either apply something less than strict scrutiny—a result implied by the *Carolene Products* formula—or apply heightened scrutiny with greater flexibility, particularly, once the Court "smokes out" the legitimate and compelling purposes behind the affirmative action plans. Currently, the application of strict scrutiny tends to signal the invalidation of the challenged plan.[521] The Court fails to take context into account.

2. Antisubordination and Nonsuspect Oppressed Groups

Although the Court presently abandons the *Carolene Products* approach in the affirmative action context, it returns to class-based scrutiny when nonsuspect, but historically marginalized, classes seek judicial review of their claims of unconstitutional discrimination.[522] As this article reveals, the Court has deemed many subordinate classes "too powerful" to qualify for heightened scrutiny.[523]

Court doctrine, however, has elaborated a formula for determining heightened scrutiny which takes three factors into account: the group's history of discrimination, political powerlessness, and immutable or visible nature.[524] The Court's application of this formula suffers because it is inconsistently applied. Although courts have denied heightened scrutiny to the developmentally challenged, the poor, gays and lesbians, and the elderly on the grounds that they are too powerful to warrant heightened scrutiny, courts have not even considered whether whites and males as classes meet the heightened scrutiny criteria.[525]

The individual components of the suspect class test are also applied inconsistently. Immutability is sometimes a factor but sometimes it is not.[526] The Court has denied heightened scrutiny to groups that have

519. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) (criticizing the Court's failure to contextualize governmental usage of race); *see also* Spann, *supra* note 162, at 65 ("The Supreme Court has declined to treat motive as relevant in its affirmative action cases, thereby disregarding the only distinction that exists between affirmative action and discrimination.").

520. Such a result would push institutional concerns to the opposite extreme—judicial abdication.

521. *See* Rubin, *supra* note 128, at 123–24 (criticizing rigid strict scrutiny analysis in the context of remedial usages of race).

522. *See supra* text accompanying notes 220–25.

523. *See supra* text accompanying notes 227–35.

524. *See supra* text accompanying notes 148–49.

525. *See supra* text accompanying notes 192–93.

526. *See* Hutchinson, *Gay Rights*, *supra* note 176, at 1379–80 (arguing that "permanent residents" and "non-marital children" receive heightened scrutiny despite the mutability of their statuses); *see*

managed to secure some statutory safeguards against discrimination, while women and persons of color still theoretically qualify for heightened scrutiny despite the statutory enactments that prohibit racial and gender discrimination.[527] Once the Court settles upon a heightened scrutiny standard, it should apply that approach consistently.

Several scholars have argued that the Court rigidly applies the suspect class doctrine to avoid judicial overreach.[528] The Court, thus, uses the *Carolene Products* doctrine to exclude groups from, rather than to include them among, suspect classes.[529] Even assuming the accuracy of these assertions, institutional concerns cannot justify the inconsistent application of the criteria the Court uses to determine when heightened scrutiny should apply. The appearance of judicial discrimination detracts from the Court's institutional legitimacy. At a minimum, the Court should find and adhere to a workable standard for deciding when to discard the presumption of constitutionality in equal protection cases.

Antisubordination theory, which overlaps significantly with the *Carolene Products* rationale, can help identify what criteria the Court should examine in a heightened scrutiny analysis. While a comprehensive examination of the appropriate contours of a reformulated heightened scrutiny doctrine is beyond the scope of this article, I will briefly address some implications that an antisubordination approach has for that doctrine.

a. Retirement of the "Immutability" and "Visibility" Factors

The Court focuses, albeit inconsistently, upon "immutability" and "visibility" in its heightened scrutiny doctrine.[530] As several scholars have recognized, these factors do very little to isolate the extent of a group's political power.[531] While the theory behind immutability posits that maltreatment on the basis of a "biological" and immutable trait is particularly disabling, recent scholarship demonstrates that mutable or invisible groups also suffer from political vulnerability because their

also Halley, *supra* note 468, at 507–16 (discussing inconsistent appeal to immutability); Yoshino, *supra* note 148, at 490–93 (same).

527. *See supra* text accompanying notes 212–19.

528. *See* GERSTMANN, *supra* note 225, at 39 ("Conservative justices developed the three-tiered framework to beat back the then-rapid expansion of the equal protection clause."); Yoshino, *supra* note 148, at 562–63 (discussing "gatekeeping" role of heightened scrutiny test); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985) (declining to apply heightened scrutiny to equal protection claim of the "mentally retarded" because it would be "difficult to find a principled way to distinguish a variety of other groups" such as "the aging, the disabled, the mentally ill, and the infirm").

529. *See supra* text accompanying notes 146–76.

530. *See generally* Yoshino, *supra* note 148 (discussing the inclusion of immutability and visibility in heightened scrutiny analysis).

531. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 728–31 (1985) (critiquing "discreteness" prong of *Carolene Products*); Yoshino, *supra* note 148, at 509–57 (demonstrating the incorrectness of the assumption that visibility and immutability lead necessarily to political powerlessness).

members, seeking to evade discrimination, can "opt out" of the class and deprive the group of a political voice.[532] Furthermore, the requirement of immutability actually reinforces subordination because it fails to question the legitimacy of discriminatory acts; instead, marginalized groups are asked to "change"—or assimilate dominant cultural norms—in order to escape subordination.[533]

The immutability and visibility tests reflect the comparative nature of heightened scrutiny review;[534] because courts view race and sex as biological—rather than social—characteristics, groups seeking heightened scrutiny must show that they, like women and persons of color, experience discrimination based on an immutable and visible trait.[535] Not only does this thinking contradict contemporary understandings of identity as socially constructed,[536] it obscures salient differences within and among socially marginalized communities and prevents antidiscrimination law from accommodating these differences.[537] Immutability no longer serves a useful purpose in a heightened scrutiny analysis. The discarding of immutability would leave only political powerlessness and history of discrimination as factors in the Court's heightened scrutiny doctrine. Application of these two factors would bring the test more in line with anti-

532. *See* Ackerman, *supra* note 531, at 728–31 (arguing that groups without readily identifiable traits might lack a political voice because their members conceal these traits or exit the group rather than seeking political change); Yoshino, *supra* note 148, at 509–68 (examining how invisibility and mutability might diminish political power).

533. *See* Hutchinson, *Gay Rights*, *supra* note 176, at 1380 ("[A] doctrinal requirement of immutability compels homogeneity. Rather than questioning the legitimacy or value of discriminatory practices, it demands that oppressed people 'change' to fit within a presumably 'valid' social structure that, in reality, embraces oppressive hierarchies."); Yoshino, *supra* note 148, at 502 ("The immutability factor withholds protection from groups that can convert, leaving them susceptible to legislation that pressures them to do so. The visibility factor similarly withholds protection from groups that can hide their defining trait, making them vulnerable to legislation that induces them to pass.").

534. *See generally* Hutchinson, *Gay Rights*, *supra* note 176 (critiquing comparative nature of heightened scrutiny doctrine); Schacter, *supra* note 284 (same).

535. *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (denying heightened scrutiny to gays and lesbians on the grounds that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.").

536. *See* sources cited *supra* note 468.

537. Jane Schacter has offered the following criticism of the strict comparative framework in civil rights discourse:

> The focus on sameness also erases complexity and difference, in both vertical and horizontal ways. By positing that each group protected by civil rights law has a single group experience that describes the multiple experiences of its members, the discourse erases "vertical" differences within a group. By imagining a single experience of inequality and disadvantage that can adequately capture the history and experience of all groups legitimately in need of civil rights legislation, the discourse erases "horizontal" differences across the spectrum of legally protected groups. This crude leveling impulse provides a poor foundation for civil rights law, where the forms of social subordination and stigmatization that our laws address are multiple and diverse.

See Schacter, *supra* note 284, at 297.

subordination theory and make heightened scrutiny analysis more precise in its isolation of disempowered groups.[538]

b. Multidimensionality of Subordination

The Court's heightened scrutiny jurisprudence also suffers because it has rigidly deployed just three identifiable standards for determining the level of a group's political power: whether the class is a "discrete and insular minority,"[539] whether the class lacked the ability to "attract the attention of the lawmakers,"[540] and whether the group is underrepresented in the "nation's decisonmaking councils."[541] Yet, there are many axes of oppression. An approach that is more sensitive to the plight of marginalized groups would examine multiple factors, such as the group's wealth, health, current and historical experiences with public and private violence and discrimination, lack of political representation, size, and ability to exercise important social or political rights.[542] This multifactor approach better isolates the diverse forms of disempowerment that oppressed groups endure.[543] It also places boundaries around heightened scrutiny because only a few social groups will endure the pervasive, systematic harms that this test recognizes—and heightened scrutiny would not apply symmetrically.[544]

Subordination is complex in another way: systems of subordination interact and do not stand in isolation from one another.[545] A rich body of scholarship demonstrates the interlocking nature of social hierarchies and identity categories.[546] Sexual and gender hierarchies, for example,

538. *See* Yoshino, *supra* note 148, at 558 (arguing that elimination of visibility and immutability requirements "clears the doctrinal path toward a reconsideration of the antisubordination interpretation of the equal protection guarantee").

539. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

540. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985).

541. Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion). Yoshino has collected these standards in his work. *See* Yoshino, *supra* note 148, at 565.

542. *See* Sunstein, *Anticaste Principle*, *supra* note 49, at 2430 (using a host of factors to define disempowerment); Yoshino, *supra* note 148, at 565 (same); *see also* Hutchinson, *Gay Rights*, *supra* note 176, at 1387 (advocating an approach to heightened scrutiny that isolates the several pervasive harms of inequality).

543. *See* Yoshino, *supra* note 148, at 566 (arguing that multidimensional test allows for a "thicker" conception of power and for an understanding that "different kinds of power may be interconnected").

544. *See id.* at 564 ("Merely rejecting a classification-based analysis in favor of a class-based analysis, of course, mitigates the problem of limitation by eliminating all groups that are deemed not to be politically powerless and to have suffered a history of discrimination.").

545. For a survey of literature on the relationships among systems of oppression, see Crenshaw, *supra* note 217 (discussing racism and sexism); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (discussing racism, heterosexism, and economic disadvantage); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183 (1991) (discussing racism and sexism); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation"*, 48 HASTINGS L.J. 1293 (1997) (discussing racism and heterosexism).

546. *See* sources cited *supra* note 545.

have facilitated a history of racial subjugation (as the history of lynching so vividly demonstrates).[547] Accordingly, courts in a heightened scrutiny setting should also consider whether the system (or systems) of domination that affects the class seeking heightened scrutiny is so connected to types of subordination that the Court already disfavors (such as racism and sexism) so as to warrant heightened sensitivity. For example, because poverty and material deprivation are closely linked to racial domination, courts should closely scrutinize state action that discriminates against the poor because these policies will likely reinforce the subordinate status of persons of color (who already constitute a suspect class and who are disproportionately poor).[548] The Court missed an opportunity to apply such a nuanced approach in *Rodriguez v. San Antonio Independent School District*.[549] In *Rodriguez*, the Court declined to apply heightened scrutiny to a state school-financing statute that relied largely upon neighborhood property taxes for education funding yet grossly discriminated against persons in poor neighborhoods.[550] The Court held that the discriminatory policy did not violate a fundamental right or discriminate against a suspect class, effectively concluding that the poor do not constitute a suspect class.[551] The Court, however, obscured the relationship between poverty and racism. As social scientists have painstakingly documented, racial deprivation causes material inequality.[552] Furthermore, the facts of the case clearly demonstrate the linkage of poverty and race: in the poverty-stricken district which brought the lawsuit, the student population was comprised overwhelmingly of persons of color.[553] By legitimizing discrimination against poor people, the Court further reinforced the subordinate status of poor persons of color.[554] The Court's failure to recognize the closeness of race and class prevented it from adequately protecting Mexican Americans and blacks—who already constitute suspect classes—from state-enforced subordination.[555] The anti-

547. *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 284, at 20–40, 79–97 (discussing role of sexuality as an instrument of racial domination); Naomi Zack, *The American Sexualization of Race, in* RACE/SEX: THEIR SAMENESS, DIFFERENCE, AND INTERPLAY 145 (Naomi Zack ed., 1997) (discussing "sexualization of race").

548. On the relationship between poverty and race, see DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

549. 411 U.S. 1 (1973).

550. *See id.*

551. *See id.* at 40.

552. *See* sources cited *supra* note 548.

553. *See Rodriguez*, 411 U.S. at 12 ("The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro.").

554. *See, e.g.*, Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 843–61 (1996) (discussing devastating impact upon educational and economic opportunities of concentrated poverty in communities of color).

555. Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 315 (2001) ("By settling on a differing legal status for racial and sexual orientation discrimination, courts imply that the two forms of oppression exist in completely separate spheres and that the law can undo racism while

subordination approach I propose recognizes the multidimensional and complex nature of oppression and protects classes whose experiences with subordination are sufficiently linked to an existing suspect class so as to mandate their treatment as suspect classes as well.

V. CONCLUSION: UNEXPLAINABLE ON GROUNDS OTHER THAN RACE, GENDER, SEXUALITY, AND CLASS?

This article has argued that in equal protection jurisprudence, the Supreme Court protects privileged classes with more vigor and force than subordinate classes. The Court attempts to justify the specifics of this counterintuitive jurisprudence by appealing to institutional concerns and by implicitly and explicitly describing privileged classes as victims of domination and subordinate classes as politically powerful. Although it is difficult to determine with certainty whether the Court's actions are deliberate, the impact is clear: historically oppressed groups are marginalized in the Court's equal protection jurisprudence.

Some scholars have argued that equal protection jurisprudence intentionally sustains social hierarchy. Reva Siegel, for example, contends that in its equality doctrine, the Court engages in "preservation-through-transformation": it maintains social hierarchy by shifting its jurisprudence to weaken social justice efforts.[556] *Plessy* and the *Civil Rights Cases* neutralized Reconstruction,[557] while *Davis* and *Feeney* weakened the modern Civil Rights Movement.[558] Siegel offers powerful insights into the limitations and contradictions of contemporary equal protection jurisprudence.

One might also evaluate the meaning of the Court's jurisprudence by utilizing the very framework the Court has announced to determine the relevance of impact evidence in equal protection cases.[559] The Court's equal protection doctrine contains numerous "departures" from "substantive" and "procedural" standards[560]—like the class-to-

leaving sexuality hierarchies untouched."); *id.* at 316 ("[A] progressive sexual politics becomes critical to the advancement of persons of color because heterosexism contributes to the subordinate status of racially oppressed communities.").

556. *See* Siegel, *supra* note 321, at 1113 ("Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric—a dynamic I have elsewhere called 'preservation-through-transformation.' In short, status-enforcing state action evolves in form as it is contested." (citation omitted)).

557. *Id.* at 1119 ("The concept of preservation-through-transformation provides a framework for thinking about the evolution of racial status law during the Reconstruction era. The regime of segregation sanctioned in *Plessy* was, after all, the result of efforts to disestablish slavery."); *id.* at 1125 (discussing role of *Civil Rights Cases* in impeding Reconstruction); *see also* Strauss, *supra* note 34, at 946–47 (arguing that *Plessy* "tamed" Reconstruction and more progressive equal protection precedent).

558. *See* Siegel, *supra* note 321, at 1131–46 (arguing that *Davis* and *Feeney* weakened the Civil Rights Movement); *see also* Strauss, *supra* note 34, at 951–54 (arguing that *Davis*, like *Plessy*, obstructed progressive social change).

559. *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (discussing relevance of impact evidence); Washington v. Davis, 426 U.S. 229, 241–42 (1976) (same).

560. *Arlington Heights*, 429 U.S. at 267.

classification and classification-to-class shifts, the inconsistent appeal to and abandonment of institutional concerns, and the inconsistent adherence to stated criteria for determining a "suspect class"—that "bear more heavily" on oppressed classes (as compared to privileged groups).[561] Members of the Court, such as Justices O'Conner, Powell, and Scalia have also made "contemporary statements"[562] that strongly suggest a judicial inversion of social hierarchy; women, the developmentally disabled, and gays and lesbians, for instance, are considered "too powerful" for heightened scrutiny, whereas whites and males are unrepresented and powerless. Thus, using the Court's own doctrine, one could reasonably argue that the impact of the Court's jurisprudence, combined with its inconsistent application, suggests a bare desire to deny equal protection to vulnerable classes through the process of inversion. Yet, this circumstantial evidence would likely fall short of illuminating the actual mental state of the Court; it does not necessarily demonstrate that the Court has crafted an equal protection jurisprudence "because of," not simply "in spite of," its negative effects on efforts to dismantle subordination.[563]

I have not offered the foregoing intent-impact exercise in order to sketch out a cause of action against judicial bias; instead, I wish to illuminate the bankruptcy of the Court's rigid and often fatal application of the discriminatory intent rule: regardless of the "good intentions" of the Court, the harmful impact of its jurisprudence remains the same. The Court's elaboration of equality has transformed the Equal Protection Clause from a beacon of hope for oppressed communities into a document that blocks governmental efforts to remedy subjugation and that effectively requires governmental actors to treat oppressed classes maliciously in order to violate its provisions. The Court's construction of equality sustains social hierarchies of race, gender, sexuality, and class and erodes the very institutional legitimacy the Court claims to pursue in articulating its doctrine.[564]

The antisubordination model requires reconsideration by the Court and scholars in light of the emptiness of contemporary equal protection theory. Antisubordination theory provides a useful model for ensuring that equal protection remains true to its anticaste roots. Under an antisubordination framework, governmental efforts to dismantle subordination would command judicial respect (but not abdication), while policies that reinforce subjugation would trigger a heightened review. The cur-

561. *See Davis*, 426 U.S. at 240–41.

562. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996); *Arlington Heights*, 429 U.S. at 268.

563. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

564. As Peggy Davis has argued:

> [T]he *McCleskey* decisions strike the black reader of law as microaggressions—stunning, automatic acts of disregard that stem from unconscious attitudes of white superiority and constitute a verification of black inferiority. The Court was capable of this microaggression because cognitive habit, history, and culture left it unable to hear the range of relevant voices and grapple with what reasonably might be said in the voice of discrimination's victims.

Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559, 1576 (1989).

rent framework, which performs the reverse of this analysis, rests on a distorted view of society that assumes the marginalization of privileged classes and the power of the subordinate. This doctrine sustains historically constructed inequities and hierarchies and denies to oppressed classes the promise of "equal protection of the laws."