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Ely at the Altar: Political Process Theory through the Lens of the Marriage Debate

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ELY AT THE ALTAR: POLITICAL PROCESS THEORY THROUGH THE LENS OF THE MARRIAGE DEBATE

Jane S. Schacter*

Political process theory, closely associated with the work of John Hart Ely and footnote four in United States v. Carolene Products, has long been a staple of constitutional law and theory. It is best known for the idea that courts may legitimately reject the decisions of a majority when the democratic process that produced the decision was unfair to a disadvantaged social group. This Article analyzes political process theory through the lens of the contemporary debate over same-sex marriage. Its analysis is grounded in state supreme court decisions on the constitutionality of barring same-sex marriage, as well as the high-profile, recent trial in federal court on the constitutionality of California's Proposition 8, which featured extended testimony by opposing political scientists on gay and lesbian political power. The Article argues that the marriage debate reveals deep conceptual problems with process theory as it has been conventionally understood, and that looking at the theory through this lens can point the way to refashioning it in both doctrinal and conceptual terms. It calls for a more substantive and nuanced conception of democratic equality, as well as a more realistic institutional understanding of courts and the political process.

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INTRODUCTION

John Hart Ely's *Democracy and Distrust*¹ and the iconic footnote four in *United States v. Carolene Products*² ("footnote four") are the most well-known exemplars of a genre of constitutional theorizing that goes by the name of "political process theory." This approach has given constitutional law a simple, but central, principle of institutional architecture: the idea that a court's ability to override a legislative judgment ought to be calibrated based on the fairness of the political process that produced the judgment. Stated at a high level of generality, the theory has a long lineage, traceable to, among others, *McCulloch v. Maryland*.³ In its contemporary form, however, the principle has been most prominently associated with the more specific idea that judicial scrutiny should increase when a socially subordinated group cannot compete fairly in the political process. That version of the idea was famously framed in terms of "discrete and insular minorities" in footnote four,⁴ and was raised to a new level of scholarly prominence by Ely's theory of representation reinforcement.⁵ The process-based logic of the argument has been offered as an appealing way to operationalize equal protection guarantees without dragging courts into endlessly contested debates about substantive values and ideas.

Ely's book has celebrated its thirtieth year in print, and footnote four is well past its seventieth birthday. Despite the passage of time, however, political process theory remains a subject of academic fascination. It is a staple of constitutional law casebooks and classes, and thousands of law review articles have cited Ely or footnote four.⁶ Perhaps process theory

1. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

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

3. *McCulloch v. Maryland*, 17 U.S. 316, 428–29 (1819) (reasoning that the state of Maryland could not impose a tax on a national bank where the federal government was not represented in the state legislature).

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

5. ELY, *supra* note 1, at 101–04.

6. A LexisNexis search of the American Law Journals database for <"Democracy and Distrust"> on September 5, 2010 yielded more than 3,000 articles. A LexisNexis search of the Supreme Court database for <"Democracy and Distrust"> on September 5, 2010 yielded 18 cases since the book was first published in 1980. An identical search in the LexisNexis Courts of Appeals database yielded 53 cases, and the same search yielded 33 cases in the U.S. District Courts database. A

lingers because of the sheer elegance of the idea that majoritarian malfunctions rightly demand a nonmajoritarian correction. Or perhaps the longevity is better attributed to the magnetic normative appeal of a principle that is grounded in fairness, dispenses with the need for elaborate institutional analysis, and claims to resolve the countermajoritarian difficulty—all without breaking a sweat. Not bad for an idea that can be stated in a sentence or two.

The canonical status of the idea notwithstanding, however, an earnest observer could be forgiven for concluding that process theory has not turned out to matter all that much in constitutional theory or law. Its signature claim—to be about process and not substance—has long since been eviscerated. In the same year that Ely's book appeared, his then-colleague Laurence Tribe published a fairly devastating takedown of the idea that process theory could deliver on its eponymous promise to eschew controversial substantive questions.⁷ Tribe argued that “[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”⁸ This critique went squarely to the heart of process theory, and other scholars offered powerful critiques of their own.⁹

Moreover, there is little evidence that process theory has powerfully influenced constitutional decisions. Footnote four, and Ely's embrace of it as an aspect of representation-reinforcement theory,¹⁰ show up most clearly in the law of equal protection. In that context, the Court has traditionally pursued separate tiers of scrutiny in analyzing governmental classifications. One of the several factors that the Court has identified as relevant to determining whether a group merits special judicial solicitude is whether the group has been relegated to “such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹¹ Notwithstanding the prominent doctrinal place occupied by the idea of political powerlessness, however, it has mostly fizzled in the case law. In those cases in which the Supreme Court has adopted a standard of heightened scrutiny, it has almost never made a finding of political

LexisNexis Shepard's Report for *Carolene Products* generated on September 5, 2010 yielded 3,883 law review articles, 90 U.S. Supreme Court cases, and 581 cases from the lower federal courts.

7. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063–64 (1980).

8. *Id.* at 1064.

9. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 716–17 (1985); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 722 (1991).

10. In *Democracy and Distrust*, Ely set out two principles of representation reinforcement, one concerning the problem of entrenchment and the other the problem of bias. See *infra* text accompanying note 41. Only the latter is at issue in this Article.

11. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The other standard factors are a history of discrimination, the imposition of disabilities based on stereotypes and unrelated to merit, and (sometimes) a group disadvantage based on an immutable characteristic. See *id.*

powerlessness.¹² Indeed, the cases raising scrutiny in the areas of race and gender do not even invoke the idea of political powerlessness.¹³ Moreover, the use of strict scrutiny to strike down affirmative action programs challenged by whites has called sharply into question the notion that such scrutiny is plausibly connected to protecting groups lacking power in the political process.¹⁴ And the Court has not, in any event, heightened scrutiny for any new classification in decades.¹⁵

Notwithstanding these signs of dormancy, if not decimation, process theory seems to have made something of a splashy comeback in one of the most salient socio-legal debates of the day—the debate over same-sex marriage. The question whether members of the lesbian, gay, bisexual, and transgender (“LGBT”) community are candidates for heightened scrutiny under equal protection principles has been framed as a central question in many lawsuits on the issue, and the “political powerlessness” idea has drawn sustained analysis.¹⁶ As they have applied state law analogues of the Equal Protection Clause, several state supreme court opinions—on both sides of the marriage question—have probed the question whether LGBT persons lack political power in the ways deemed significant by process theory.¹⁷

More recently, the issue came to the fore in Judge Vaughn Walker’s courtroom, as part of the high-profile trial on the constitutionality of California’s Proposition 8 (“Prop. 8”), a measure that reversed a state supreme court decision in favor of marriage equality.¹⁸ In August 2010, Judge Walker ruled Prop. 8 unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁹ He did so after holding a twelve-day trial at which several witnesses testified on questions raised by conventional equal protection doctrine, including the history of discrimination

12. For an exception, see *infra* Section I.B.1 and its discussion of *Graham v. Richardson*.

13. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (gender); *Korematsu v. United States*, 323 U.S. 214 (1944) (race). Note that Justice Brennan’s plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677, 685–87 (1973) (plurality opinion), would have been the counterexample had it secured a fifth vote. See discussion *infra* Section I.B.1.

14. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

15. Birth outside wedlock was the last. See *Clark v. Jeter*, 486 U.S. 456 (1988); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977). For a discussion of “heightened rational basis,” see *infra* Section I.B.2.

16. The issues addressed in this Article concern members of the LGBT community. In their opinions, courts that have grappled with these issues frequently refer only to “gay” or “gay and lesbian” persons, and have not separately analyzed at any length the implications for bisexual or transgendered persons. The issues of political power discussed here, however, implicate the broader LGBT community. For ease of reference, I use both the terms commonly used by courts—“gay” or “gay and lesbian”—and the broader term “LGBT.” I intend no substantive distinction between the terms.

17. See *infra* Section I.B.2.

18. See generally Jesse McKinley & John Schwartz, *California’s Ban on Gay Marriage is Struck Down*, N.Y. TIMES, Aug. 5, 2010, at A1.

19. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal.), *stay denied*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), and *certifying question to the Supreme Court of California*, 628 F.3d 1191 (9th Cir. 2011).

against gay people, the origins of sexual orientation in individuals, and the extent to which gay people do (or do not) possess sufficient political power to protect themselves in the political process.²⁰ The testimony offered on the absence or presence of gay political power was especially striking. It pitted two political scientists against one another—Gary Segura of Stanford for those challenging Prop. 8, and Kenneth Miller of Claremont McKenna for those defending it.²¹ Over the course of many hours and more than 600 combined pages of trial transcript, the dueling experts debated in great detail the quality and quantity of gay political power, with Segura emphasizing the gay community's political vulnerabilities and Miller its political strengths.²² Notably, the proponents of Prop. 8 elected to offer only two witnesses at the trial (as against the plaintiffs' seventeen), and one of them was on the political power question.²³

In his lengthy opinion, Judge Walker parsed the testimony on political power at length and ultimately found the prerequisites for heightened scrutiny to be satisfied. Nevertheless, he also found that even the more minimal scrutiny of rationality review was not satisfied in the case of Prop. 8, and he struck down the measure on that basis. It thus remains to be seen whether and how the evidence on political power will figure in appellate decisions on the constitutionality of Prop. 8. Whether or not this testimony takes center stage in that case, however, it is likely that questions about gay political power in particular, and process theory in general, will persist in the same-sex marriage debate. That debate has long been characterized by a sharp clash between the courts and the political process. It was a court—the Hawaii Supreme Court—that ignited the current controversy in 1993 with a decision portending the imminent legalization of same-sex marriage in that state.²⁴ Since then, the controversy has been shaped and structured by the ongoing actions and reactions of courts, legislators, and voters acting on ballot measures.²⁵ Seven states have at some point allowed same-sex couples

20. The American Foundation for Equal Rights has compiled a day-by-day set of trial transcripts for *Perry v. Schwarzenegger*. *Transcripts*, AM. FOUND. FOR EQUAL RIGHTS, <http://www.equalrightsfoundation.org/our-work/hearing-transcripts/> (last visited Feb. 21, 2011).

21. Segura testified on Days 7 and 8 of the trial. Transcript of Proceedings at 1523–736, 1747–881, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW). Miller testified on Days 10 and 11. *Id.* at 2414–579, 2587–715. This was not the first faceoff of expert witnesses on this question, but it was the most detailed and protracted. Competing political scientists testified as expert witnesses in the trial of Amendment 2, the anti-gay rights initiative ultimately struck down by the Supreme Court in *Romer v. Evans*, 516 U.S. 620 (1996). See LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* 105–31 (1998) (reviewing the Amendment 2 testimony on gay political power offered by Professors Kenneth Sherrill, for the plaintiffs, and James David Woodard, for the state of Colorado).

22. See *supra* note 10 and accompanying text.

23. Plaintiffs offered eight lay witnesses and nine experts. *Perry*, 704 F. Supp. 2d at 944–53.

24. *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993), *appeal after remand sub nom.*, *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), *and order aff'd*, 950 P.2d 1234 (Haw. 1997).

25. The history is laid out in Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation Then and Now*, 82 S. CAL. L. REV. 1153 (2009).

to marry: Massachusetts (2003),²⁶ California (2008),²⁷ Connecticut (2008),²⁸ Iowa (2009),²⁹ New Hampshire (2009),³⁰ Vermont (2009),³¹ and Maine (2009).³² Voters in California and Maine rejected marriage equality at the ballot box,³³ while the other five states still allow same-sex marriage.³⁴ Of the seven states, four acted by judicial decisions requiring marriage equality (Massachusetts, California, Connecticut, and Iowa); one acted by legislation that was preceded by a judicial decision requiring, at a minimum, comprehensive civil unions in the state (Vermont); and two acted by legislation with no judicial role (New Hampshire and Maine). Nor has activity been confined to these seven states. Several additional states have extended civil union or domestic partnership protections to same-sex couples.³⁵ On the other hand, forty-one states have passed anti-same-sex marriage measures, including thirty that have banned same-sex marriage in their state constitu-

26. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (finding that the Massachusetts Constitution protects the right of same-sex couples to marry).

27. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (applying strict scrutiny to find that laws preventing same-sex couples from marrying violated the California Constitution).

28. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (finding that the Connecticut Constitution protects the right of same-sex couples to marry).

29. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (upholding lower court's ruling that a statute banning same-sex marriages violated the Iowa Constitution).

30. On June 3, 2009, New Hampshire Governor John Lynch signed a bill legalizing same-sex marriage, codified as R.S.A. 457:1-457:3. N.H. REV. STAT. ANN. §§ 457:1-3 (2004 & Supp. 2010); Eric Moskowitz & Martin Finucane, *N.H. becomes sixth state where gays can marry*, BOS. GLOBE, June 7, 2009, http://www.boston.com/news/local/breaking_news/2009/06/nh_legislature.html.

31. Same-sex marriage became legal in Vermont on September 1, 2009, after both houses of the legislature voted to override Governor Jim Douglas's veto. See David Abel, *Vermont lawmakers legalize gay marriage*, BOS. GLOBE, Apr. 7, 2009, http://www.boston.com/news/local/breaking_news/2009/04/vermont_lawmake.html.

32. A bill allowing same-sex marriage passed the Maine legislature and was signed into law in early 2009; the law was put on hold, however, because opponents successfully petitioned for a statewide referendum. Maria Sacchetti, *Maine voters overturn state's new same-sex marriage law*, BOS. GLOBE, Nov. 4, 2009, http://www.boston.com/news/local/maine/articles/2009/11/04/maine_voters_overturn_states_new_same_sex_marriage_law/.

33. The voters in California and Maine have voted down same-sex marriage through statewide ballot measures. For discussion of the California initiative, known as Proposition 8, see *infra* note 105. For more information on the Maine referendum, known as Question 1, see Kevin Miller & Judy Harrison, *Gay marriage repealed in Maine*, BANGOR DAILY NEWS, Nov. 3, 2009, <http://www.bangordailynews.com/detail/128048.html>.

34. The District of Columbia also allows same-sex marriage, having enacted legislation. See Ann E. Marimow & Keith L. Alexander, *First gay marriages in District performed*, WASH. POST, Mar. 10, 2010, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030901904.html>.

35. See *Relationship Recognition for Same-Sex Couples in the U.S. Map*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_9_10_color.pdf (last updated Sept. 13, 2010).

tions.³⁶ Thus, from an early point, the debate has featured a pitched institutional battle about which body—courts? legislatures? the electorate?—should decide who may marry.

Rather than considering the effect of political process theory on the constitutionality of banning same-sex marriage, however, I would like to look from the other end of the telescope. The question I take up in this Article is what can we learn about political process theory—its status, its conceptual coherence, its viability—from the same-sex marriage controversy. Quite a lot, I will suggest. The theory is, on close examination, riddled with uncertainties, vacuities, anachronisms, internal contradictions, empirical implausibilities, and assorted other difficulties, large and small. I will argue that process theory is grounded in thin and sometimes caricatured ideas about courts and politics that, in turn, misunderstand the dynamics of equality movements. I will emphasize that process theory lacks the internal normative apparatus to answer the very question it makes central—whether a group is sufficiently disadvantaged in the political process to warrant special judicial solicitude. The theory also makes problematic categorical assumptions about the extent to which courts can and will stand apart from the biases that suffuse the political process and the larger social forces that shape that process. The flaws in these assumptions are particularly visible in the marriage debate, where it is—paradoxically—courts in states that have *already* legislated in favor of gay rights that have been willing to find the LGBT community to be politically powerless, rather than courts in states where the legislative process has been unremittingly hostile to those rights.

Identifying where process theory goes wrong can help to bring into focus a better picture of the institutional dynamics at work in these movements, and can suggest how the inquiries launched by process theory can and should be reframed. In particular, analyzing process theory from this perspective can point the way toward both doctrinal revisions and a more fundamental rethinking of the idea of democratic equality that animates Ely, footnote four, and the approach that they have both come to represent. I argue that a normatively important core principle can be extracted from process theory, but only at a high level of abstraction. The point worth salvaging is that animus and hierarchy compromise democratic equality in ways inconsistent with the principle of equal protection. But this ought to be an unapologetically substantive ideal of democratic citizenship, not a principle claiming to find justification in the logic of value-free proceduralism.

36. For more detailed information, see *State Laws Prohibiting Recognition of Same-Sex Relationships Map*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/samesex_relationships_7_09.pdf (last updated June 30, 2009).

I. A BRIEF TOUR OF PROCESS THEORY

A. *Foundations of Process Theory*

The origins of process theory, as it is conventionally understood, trace to the famous footnote in *United States v. Carolene Products*.³⁷ In *Carolene Products*, the Court upheld regulation of filled-milk products in what would otherwise be a mundane decision seldom read or remembered. Justice Stone put the case on the map when he dropped a footnote sketching out three categories of circumstances that warrant judicial review more aggressive than what the Court gave the milk regulation it upheld in the case. The footnote said:

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 [going on to cite cases involving restrictions upon the right to vote, restraints upon the dissemination of information, interferences with political organizations, and prohibition of peaceable assembly].

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*.³⁸

The third category—and especially the language about the democracy-corroding effects of prejudice against discrete and insular minorities—launched political process theory in its now-recognizable form. While the footnote identified prejudice against discrete and insular minorities as a pivot point, it did not try to offer any crisp rule or clearly enforceable doctrine. Instead, the language was couched in notably contingent, even speculative, prose. This was consistent with the footnote's relatively modest aspiration, according to Justice Stone's law clerk at the time, to offer "a starting point for debate," with the hope of generating "thoroughgoing analysis and discussion by bar, bench, and academe."³⁹ What—if anything—

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

38. *Id.* (emphasis added) (citations omitted).

39. Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1098–99 (1982).

would become of the invitation was not immediately clear. A historical analysis of the footnote suggests that it was, in fact, decades before it came to be used in support of the basic principles of process theory.⁴⁰

The meaning and significance of the “discrete and insular minorities” language was most influentially developed and drawn out in Ely’s 1980 book, *Democracy and Distrust*. In the book, Ely identified two central political malfunctions that he saw courts as equipped to address through judicial review, the second of which is pertinent to this Article. According to Ely, courts are equipped to review malfunctions when:

(1) [T]he ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.⁴¹

Ely justified singling out these as the two central malfunctions to be addressed by courts through judicial review based on ideas about the centrality of protecting fair process and participation. And his defense of these principles showed that the resemblance between them and paragraphs two and three of the footnote was not coincidence:

I have suggested that both *Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.⁴²

Ely was animated by a desire to avoid constitutional rules that placed judges in what he regarded as the democratically dangerous position of making contested choices based on the open-textured language in the Constitution. Thus, he offered up his principles as matters of neutral process that could be employed without the need to adjudicate controversial normative debates. Ely’s proposition was that “prejudice is a lens that distorts reality” and thus makes it impossible for chronic victims of prejudice to get a fair shake in the “pluralist’s bazaar” of politics.⁴³ His antidote was to enlist judges as democratic referees of a sort who could reinforce the deficient representation rendered to disadvantaged groups through appropriately skeptical judicial review. As Tribe’s critique exemplifies, Ely’s aggressive flight from substance proved to be the part of his approach that drew the

40. Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 166–67 (2004).

41. ELY, *supra* note 1, at 103.

42. *Id.* at 77.

43. *Id.* at 152–53.

most stinging criticism.⁴⁴ Critiques notwithstanding, however, his principle of representation reinforcement took its place in the constitutional canon.

B. Courts and the Political Powerlessness Factor

1. Doctrinal Evolution in the Supreme Court

The ideas spawned by footnote four and Ely are embedded in the Supreme Court's equal protection doctrine.⁴⁵ The idea of a group's "political powerlessness" appears among the multiple factors identified by the Court as relevant to the determination of whether to apply heightened scrutiny. There has been some variability in how the doctrinal test for heightened scrutiny has been articulated and applied over time, and a majority of the Court has never squarely said that a finding of political powerlessness is an absolute sine qua non for heightening scrutiny, but the "traditional indicia of suspectness" are regularly said to include whether the affected class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁴⁶ On occasion, the Court has suggested that the class-based "disability" that has saddled members of the group must be based on "obvious, immutable, or distinguishing characteristics that define them as a discrete group."⁴⁷

Although African Americans are often regarded as the paradigmatic footnote four group,⁴⁸ the application of strict scrutiny to race in foundational cases like *McLaughlin v. Florida* (1964) and *Loving v. Virginia* (1967) did not, in fact, employ the political process rationale or refer to the foot-

44. See, e.g., Ortiz, *supra* note 9, at 721–22; Tribe, *supra* note 7.

45. At a high level of generality, the theory of representation reinforcement proceeds from the assumption that structural defects in the political process justify greater judicial solicitude. For accounts considering the relevance of representational safeguards beyond the realm of equal protection, see, for example, Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Limits: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185 (2007).

46. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 672 (3d ed. 2006) (stating that courts determine the applicable level of scrutiny based on "immutable characteristics," "the ability of the group to protect itself through the political process," the "history of discrimination against the group," and the "likelihood that the classification reflects prejudice as opposed to a permissible governing purpose").

47. See *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (internal quotation marks omitted)). The Court has not made immutability a strict requirement. See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 923–32 (1989).

48. See *infra* note 52 and accompanying text.

note.⁴⁹ Those cases instead stressed the unique history and odiousness of racial classifications.⁵⁰ As a matter of post hoc characterization, the Court has on occasion suggested a political process justification for the treatment of race under equal protection. In its 1976 decision in *Mathews v. Lucas*, for example, the Court applied intermediate scrutiny to a law that disadvantaged nonmarital children,⁵¹ relying principally on the history of discrimination against such children and the immutability of the characteristic. In declining to ratchet up further the level of scrutiny, however, the majority alluded to process theory, asserting that “this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.”⁵²

In fact, the first time the Court expressly linked the application of strict scrutiny to footnote four’s language about discrete and insular minorities came in *Graham v. Richardson*, a 1971 decision in which the Court struck down laws conditioning welfare benefits on U.S. citizenship and called aliens “a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”⁵³ In later cases, the Court characterized its jurisprudence about alienage as “treat[ing] certain restrictions on aliens with ‘heightened judicial solicitude,’ a treatment deemed necessary since aliens—pending their eligibility for citizenship—have no direct voice in the political processes.”⁵⁴ Aliens, of course, present a distinctively strong case because their inability to vote presents an explicit case of political powerlessness, at least to the extent that political power is equated with voting. In light of *Graham*, the Court going forward might have narrowed its focus to instances of literal disenfranchisement. As framed by Ely and footnote four, however, such disenfranchisement had never been required, and later cases did not newly narrow the idea of political powerlessness in this way.

Two years after *Graham*, Justice Brennan offered a relatively sustained analysis of the political powerlessness idea in his 1973 plurality opinion in *Frontiero v. Richardson*, in which four justices were ready to apply strict scrutiny in cases involving gender classifications.⁵⁵ In that plurality, Justice

49. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). This point is nicely developed in EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 40–42 (1999).

50. Similarly, *Brown v. Board of Education*, 347 U.S. 483 (1954), did not focus on level of scrutiny or process theory at all.

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

52. *Id.* at 506 (emphasis added).

53. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citation omitted). For a history of when and how courts have used the footnote, see Gilman, *supra* note 40.

54. See, e.g., *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (citations omitted) (citing *Graham*, 403 U.S. at 372, and *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). In *Foley* and in other alienage cases, the Court carved out a “political functions” exemption that, notwithstanding the application of strict scrutiny, permitted the exclusion of aliens from certain kinds of programs in which citizenship could legitimately be required. See, e.g., *id.* at 294–95.

55. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

Brennan noted that women had long suffered discrimination, “perhaps most conspicuously, in the political arena.”⁵⁶ Brennan’s opinion acknowledged that women did not constitute a minority, but countered by detailing and emphasizing the underrepresentation of women in the “Nation’s decision-making councils.”⁵⁷ The opinion went on to note that Congress had enacted multiple statutory protections based on gender and had approved the Equal Rights Amendment. As we will see in tracing political powerlessness doctrine, the very fact that Congress had enacted measures to combat gender discrimination might have posed an obstacle to finding that women lacked meaningful political power. Far from seeing any tension between the underrepresentation of women in the legislative branch and the ability to secure some legislative relief, however, Brennan instead cited these legislative measures *in support of* raising judicial scrutiny. His justification was that “Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”⁵⁸

At the time of *Graham* and *Frontiero*, it was still an open question how long a list of suspect or quasi-suspect classifications the Court might permit. While the Court later settled on intermediate scrutiny for gender in *Craig v. Boren*,⁵⁹ its opinion in *Craig*, unlike the Brennan plurality in *Frontiero*, did not engage political process theory. And the Court declined other opportunities to extend heightened scrutiny to further classifications. For example, the Court is understood to have declined to heighten scrutiny based on poverty in *San Antonio Independent School District v. Rodriguez*,⁶⁰ notwithstanding that poor people might be regarded as exemplifying the very essence of political powerlessness. To some degree, the facts of *Rodriguez*, a challenge to a Texas school-finance plan, allowed the Court to dodge the central question of the utter political marginalization of the poor. Because of the way the finance plan worked, it arguably did not reflect a clear classification based on wealth.⁶¹ Still, the broad language the Court used in disposing of the level-of-scrutiny issue has been widely regarded as rejecting heightened scrutiny based on poverty.⁶² Ironically, because of its factual quirks, the *Rodriguez* majority opinion did not itself analyze the powerlessness issue, even though it has become the leading citation for the idea that judicial skepticism should

56. *Id.* at 686.

57. *Id.* at 686 n.17.

58. *Id.* at 687–88.

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

60. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

61. *Id.* at 22–23.

62. See CHEMERINSKY, *supra* note 46, at 786 (citing *Rodriguez* for the proposition that the Court “held that discrimination against the poor does not warrant heightened scrutiny” but noting that the Court “also rejected the claim that the [Texas] law should be regarded as discriminating against the poor as a group”).

increase when a group has been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁶³ A few years after *Rodriguez, Massachusetts Retirement Board v. Murgia* rejected heightened scrutiny for age.⁶⁴ The Court emphasized the universality of aging:

The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a “discrete and insular” group, *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153, n. 4 (1938), in need of “extraordinary protection from the majoritarian political process.” Instead, it marks a stage that each of us will reach if we live out our normal span. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.⁶⁵

In the mid-1980s, the Court likewise declined to heighten scrutiny for mental retardation, at least as a nominal matter. In *City of Cleburne, Texas v. Cleburne Learning Center*, the Court ruled that rational basis was the appropriate level of scrutiny to apply to a local ordinance that disadvantaged people with mental retardation.⁶⁶ Departing from the language of *Frontiero*, which had suggested that the extension of antidiscrimination legislation to a group might, in fact, *strengthen* the case for heightened scrutiny, the Court noted that rational basis review was appropriate, in part, because advocates for the mentally retarded had been able to “attract the attention of . . . lawmakers” and secure some protective legislation.⁶⁷ In that case, process theory functioned as a reason to ratchet down the level of scrutiny. On the other hand, *Cleburne* is well known for employing an unusually demanding form of rationality review that invalidated the challenged ordinance, suggesting that the Court was not as willing as it ordinarily is on rationality review to defer to the operation of a well-functioning political process.

As *Rodriguez, Murgia*, and *Cleburne* reflect, the Burger Court signaled its reluctance to extend heightened scrutiny to further classifications. Other than deciding to apply intermediate scrutiny to classifications based on birth outside wedlock,⁶⁸ the Court consistently declined the opportunities

63. *Rodriguez*, 411 U.S. at 28.

64. *Mass. Ret. Bd. v. Murgia*, 427 U.S. 307 (1976).

65. *Id.* at 313–14.

66. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

67. *Id.* at 445. There were other factors cited that were not relevant to political process theory. For example, the Court said that heightened judicial skepticism would be appropriate because it was sometimes sensible for government to treat people with retardation differently than those without it. *See id.* at 444–45.

68. After some inconsistent decisions, the Court applied a form of intermediate scrutiny in *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Lalli v. Lalli*, 439 U.S. 259 (1978). A few years later, the Court explicitly erased any doubt about standard of review that might have lingered. *See Clark v. Jeter*, 486 U.S. 456 (1988).

presented to it. Thus, when all was said and done, before deciding the major contemporary gay rights cases, the Court had settled on strict scrutiny for race, national origin, and alienage (with the latter subject to exceptions); intermediate scrutiny for gender and birth outside marriage; and rational basis—of some sort—for poverty, mental disability, and age.

In the course of making political powerlessness an element of equal protection doctrine, the justices have had very little to say about what the idea of political powerlessness means and requires, and even less to say about the underlying idea of democracy informing the Court's assessment of the political process. Supreme Court opinions simply contain very little by way of exposition. Nevertheless, a few points can be distilled.

First, various members of the Court have expressly linked the idea of political powerlessness to the language of footnote four,⁶⁹ thus at least confirming that the intellectual blueprint for the doctrinal element of powerlessness is the idea that "prejudice against discrete and insular minorities" can cause a political malfunction warranting close judicial scrutiny. This linkage, however, operates at a high level of generality, for the Court, in turn, has not said much about what constitutes either the "prejudice," "discreteness," or "insularity" contemplated by the footnote.⁷⁰

Second, over time, the Court has considered how much weight should be given a group's numerical status in the population, but no clear principle has emerged. Several opinions suggest that mathematical majority status does not preclude a finding of political powerlessness. For example, as noted earlier, the Court has accorded heightened scrutiny to women, notwithstanding the fact that women comprise a numerical majority, on occasion citing factors like the underrepresentation of women in elected office.⁷¹ Justice Scalia has objected to this as inconsistent with footnote four, but has not prevailed.⁷² Similarly, the justices have extended strict scrutiny to the context of affirmative action. To the extent that a finding of political powerlessness is thought to be required to support heightened scrutiny, this heightening of scrutiny is puzzling because it suggests—implicitly, but improbably—that aggrieved whites meet the test of political powerlessness.⁷³ This line of cases raises the question whether the Court is and should be focusing on suspect *classes* (as suggested by the powerlessness factor) or suspect *classifications*

69. This is done in different ways and doctrinal contexts. See *United States v. Virginia*, 518 U.S. 515, 575–76 (1996) (Scalia, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 317 n.10 (1986) (Stevens, J., dissenting) (citing footnote four and Ely); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–87 (1982); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 801 n.8 (1980) (citing footnote four); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (citing footnote four).

70. On occasion the Court's reasoning has suggested that "discrete and insular," or "subject to prejudice," is a term of art. In *O'Bannon*, 447 U.S. at 786–90, for example, the Court held that nursing home residents disadvantaged by certain rules might be a minority and victims of physical infirmity and neglect, but were not objects of footnote four–type prejudice.

71. See *supra* Section I.B.1.

72. See *Virginia*, 518 U.S. at 575 (1996) (Scalia, J., dissenting).

73. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 553–55 (1989) (Marshall, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–402 (1978) (Marshall, J., concurring in part).

(as suggested by the affirmative action cases).⁷⁴ In some instances, though, it has been contested whether it is accurate to treat whites as the numerical majority. For example, in dueling opinions in *City of Richmond v. J.A. Croson Co.*, the majority and dissent debated the relevance of the fact that African Americans held a majority on the city council that enacted an affirmative action program for city contractors.⁷⁵ The majority noted that “one aspect of the judiciary’s role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ from majoritarian prejudice or indifference,”⁷⁶ and argued that this protective judicial function was appropriate in that case because:

[B]lack[s] 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.⁷⁷

Justice Marshall’s dissent, by contrast, argued that “this Court has never held that numerical inferiority, standing alone, makes a racial group ‘suspect’”; that “[i]t cannot seriously be suggested that nonminorities in Richmond have any ‘history of purposeful unequal treatment’”; and that “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.”⁷⁸

Finally, as alluded to earlier, the Court has briefly considered on a few occasions whether the fact that a group has achieved some legislative success should bar a finding of political powerlessness. Recall the contrast between the *Frontiero* plurality (suggesting that the achievement of such protective legislation does not preclude a finding of political powerlessness) and *Cleburne* (suggesting that such legislation can exercise some preclusive effect).⁷⁹ But the Court has not been consistent or categorical on this point, nor has it probed the issue in any systematic way.

74. See GERSTMANN, *supra* note 49.

75. Compare *J.A. Croson Co.*, 488 U.S. at 495–96, with *id.* at 553–55 (Marshall, J., dissenting).

76. *Id.* at 495 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

77. *Id.* at 495–96.

78. *Id.* at 553–54 (Marshall, J., dissenting) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

79. Cf. *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (declining to find conscientious objectors to be a suspect classification, citing the fact that Congress chose to recognize a conscientious-objectors exemption for military training, and suggesting that conscientious objectors were not politically powerless).

2. Sexual Orientation and Political Powerlessness in Supreme Court Opinions

The Supreme Court has never squarely framed and analyzed whether sexual orientation classifications should be subject to heightened scrutiny, nor has a majority of the Court analyzed the political power of LGBT people as that power may be relevant to equal protection doctrine. The clearest opportunity for the Court to have done so was the 1996 decision in *Romer v. Evans*, striking down Colorado's Amendment 2, a ballot initiative that would have wiped out, and preemptively banned the future enactment of, antidiscrimination protections for gay, lesbian, and bisexual people.⁸⁰ The case presented the opportunity to apply standard political powerlessness analysis, as well as a specialized doctrine, associated with *Hunter v. Erickson*,⁸¹ that closely scrutinizes acts of "political restructuring" that adversely affect minority groups by relegating certain policy questions to the realm of statewide direct democracy.⁸² The state supreme court had relied on the *Hunter* doctrine in striking down Amendment 2.⁸³ Many of the briefs in the case addressed the *Hunter* theory, but that argument was explicitly set aside by the high Court without comment.⁸⁴ Likewise, though the Court had been asked by amici in the case to make sexual orientation a suspect or quasi-suspect classification, it also declined to address that question.⁸⁵ In striking down the Colorado measure, the Court applied a version of rationality review that was, as in *Cleburne*, far from the standard rubber stamp. Most pertinent for our purposes, while the Court stressed the centrality of anti-gay animus in its analysis, the opinion did not discuss the relevant level of scrutiny. Proceeding in this fashion enabled the majority to remain silent on the political powerlessness issue as it concerned LGBT people.

On other occasions, the Supreme Court has been presented with arguments in favor of heightened scrutiny for sexual orientation, including claims grounded in process theory. In *Bowers v. Hardwick*, the Court upheld the constitutionality of Georgia's ban on sodomy.⁸⁶ The Court decided the case on substantive due process grounds, though political power arguments in favor of heightened scrutiny were also made to the Court by amici.⁸⁷

80. 517 U.S. 620 (1996).

81. 393 U.S. 385 (1969).

82. See Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587 (1999).

83. *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994), cert. granted, 513 U.S. 1146 (1995), aff'd, 517 U.S. 620 (1996).

84. See *Romer*, 517 U.S. at 626 ("We . . . now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.").

85. See, e.g., Brief of the Human Rights Campaign Fund et al., as Amici Curiae in Support of Respondents, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 17008436.

86. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

87. See Brief of the National Organization for Women as Amicus Curiae in Support of Respondents, *Bowers*, 478 U.S. 186 (No. 85-140), 1986 WL 720446 (citing footnote four); cf. Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund et al.,

When the Court reversed *Bowers* in *Lawrence v. Texas*, it once again ruled on due process grounds, but Justice O'Connor would have struck down the Texas ban on same-sex sodomy as a matter of equal protection,⁸⁸ and the Court was again asked by amici to raise the level of scrutiny.⁸⁹

Notwithstanding the Court's choice to avoid directly engaging the issue of LGBT political power, individual justices have opined on the question. Justice O'Connor's concurrence in *Lawrence* suggested that political process themes that have shaped the application of heightened scrutiny might likewise have a role to play in what some have called heightened rational basis.⁹⁰ She noted that rational basis cases ordinarily involve judicial deference to the political process because of the assumption that "even improvident decisions will eventually be rectified by the democratic processes."⁹¹ In the case of a sodomy law applying only to same-sex partners, however, she suggested that a "bare desire to harm the group" might be all that the state could plausibly marshal to defend the law,⁹² thus necessitating a "more searching form of rational basis review."⁹³ If a law like the Texas provision applied equally to heterosexuals, she suggested, it "would not long stand in our democratic society."⁹⁴ Its targeted imposition of a stigma, she argued, blunted those political safeguards and "threaten[ed] the creation of an underclass."⁹⁵

Years earlier, Justice Brennan dissented from the denial of certiorari in a case involving a guidance counselor terminated based on her sexual orientation.⁹⁶ In his opinion, he argued that:

[H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination

Bowers, 478 U.S. 186 (No. 85-140), 1986 WL 720449 (citing process theory as part of substantive due process analysis).

88. 539 U.S. 558, 579-85 (2003) (O'Connor, J., concurring).

89. See Brief of the National Lesbian and Gay Law Association, et al. as Amici Curiae in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152348.

90. See *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring); see also CHEMERINSKY, *supra* note 46, at 844-46.

91. *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440) (internal quotation marks omitted).

92. *Id.* at 582.

93. *Id.* at 580.

94. *Id.* at 584-85.

95. *Id.* at 584 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)) (internal quotation marks omitted).

96. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985) (Brennan, J., dissenting).

against homosexuals is “likely . . . to reflect deep-seated prejudice rather than . . . rationality.”⁹⁷

The most extended arguments in a recent Supreme Court opinion about LGBT political power, however, appear in a very different context—Justice Scalia’s dissent in *Romer*. Scalia was, in a word, scathing about the idea that gay people might be thought to lack political power, calling it:

[N]othing short of preposterous to call “politically unpopular” a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.⁹⁸

In more measured prose, the Colorado state trial court judge in *Romer*, who had denied heightened scrutiny for sexual orientation, similarly noted the percentage of voters who were against Amendment 2, as well as the fact that an increasing number of states and localities had enacted measures shielding gay people from discrimination.⁹⁹ Scalia, however, went further and argued that gay people had not a deficit, but a surfeit, of political power. He asserted that gay people have not only “high disposable income,” but “political power much greater than their numbers, both locally and statewide.”¹⁰⁰ “Quite understandably,” he went on, “they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.”¹⁰¹ The premise that local concentrations of gay people were able to wield outsize political power became central to Scalia’s defense of the Colorado constitutional amendment struck down by the majority:

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given

97. *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting) (footnote omitted) (quoting *Plyler*, 457 U.S. at 216 n.14).

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

99. See GERSTMANN, *supra* note 49, at 80 (quoting Judge Bayless’s opinion in C-18 of Colorado’s petition for certiorari). Six years before *Romer*, the Ninth Circuit had rejected the idea of strict scrutiny for gay people in a case involving a challenge to a Department of Defense policy of conducting enhanced security checks on gay and lesbian job applicants. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990). In doing so, the court cited *Cleburne* and foreshadowed the idea that a group’s ability to secure antidiscrimination legislation ought to preclude a finding of political powerlessness. *Id.* at 574. Citing the political powerlessness criterion, the Circuit Court concluded that “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through passage of antidiscrimination 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.” *Id.* (internal quotation marks omitted); see also GERSTMANN, *supra* note 49, at 81.

100. *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting).

101. *Id.* at 646 (characterizing gay rights efforts as the “homosexuals’ quest for social endorsement”).

special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional.¹⁰²

Scalia's claims have come in for empirical critique,¹⁰³ but he has apparently not backed off his view of gay people as a powerful force with which to be reckoned.¹⁰⁴

3. Same-Sex Marriage Cases in State Supreme Courts

State courts ruling in favor of marriage equality have been all over the map in terms of level of scrutiny. Of the seven that have ruled in favor of same-sex couples, two (Hawaii and California) applied strict scrutiny,¹⁰⁵ two (Connecticut and Iowa) applied intermediate scrutiny,¹⁰⁶ one (Massachusetts) applied rational basis,¹⁰⁷ one (New Jersey) applied a distinctive state law hybrid standard,¹⁰⁸ and the final state (Vermont) interpreted its "common benefits clause" in a way that does not readily map onto tiers of scrutiny.¹⁰⁹ Each of the three states rejecting the same-sex couples' claims (Maryland, New York, and Washington) employed rational basis.¹¹⁰

Several of these opinions, on both sides of the question, address the issue whether gays and lesbians are politically powerless as that term has been used in equal protection case law.¹¹¹ The question on which the opinions most sharply disagree is what we might call the preclusion thesis: when a group shows itself able to secure some legislative or other policy victories, or to elect some of its members to office, a finding of political powerlessness is precluded.

102. *Id.* at 647.

103. M.V. LEE BADGETT, *INCOME INFLATION: THE MYTH OF AFFLUENCE AMONG GAY, LESBIAN, AND BISEXUAL AMERICANS 4* (1998), available at <http://www.thetaskforce.org/downloads/reports/reports/IncomeInflationMyth.pdf>.

104. See *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) (arguing that the fact that Texas was one of few states with a sodomy law reflected gay political success, and asserting that the legal profession had embraced the homosexual "agenda").

105. *In re Marriage Cases*, 183 P.3d 384, 401, 441–42, 444, 446 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993), *appeal after remand sub nom.*, *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), and *order aff'd*, 950 P.2d 1234 (Haw. 1997).

106. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412, 432, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 895 (Iowa 2009).

107. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

108. *Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006).

109. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

110. *Conaway v. Deane*, 932 A.2d 571, 605–06 (Md. 2007); *Hernandez v. Robles*, 885 N.E.2d 1, 12 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 969 (Wash. 2006).

111. *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan*, 957 A.2d at 440–44; *Varnum*, 763 N.W.2d at 893–95; *Conaway*, 932 A.2d at 609–14; *Andersen*, 138 P.3d at 974–75.

In rejecting the state constitutional claims of same-sex couples, the Washington and Maryland courts seemed to embrace a version of the preclusion thesis. Both opinions cited legislative victories as disqualifying for purposes of satisfying the political powerlessness criterion. The Maryland court emphasized that “at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based on their sexual orientation has met with growing successes in the legislative and executive branches of government,”¹¹² and listed a series of statutes reflecting these victories.¹¹³ The Washington court similarly enumerated gay legislative successes on the state and municipal levels as an argument against heightening scrutiny.¹¹⁴ These courts likewise cited other measures of contemporary political power, such as the election of openly gay candidates (Washington),¹¹⁵ and the general “political coming of age” of the organized gay rights movement (Maryland).¹¹⁶

By contrast, the Connecticut, Iowa, and New Jersey opinions, as well as dissenting opinions in other states, took issue with the preclusion thesis.¹¹⁷ The California court, for example, contested the temporal premise of the thesis, arguing at some length that historical—not contemporary—political powerlessness is the appropriate frame of reference.¹¹⁸ The New Jersey court took a different tack, arguing that the analysis ought to be issue-specific, and noting that success in giving *individuals* some statutory protections against certain forms of discrimination had not prevented continuing discrimination

112. *Conaway*, 932 A.2d at 611.

113. The court listed statutes banning sexual orientation–based discrimination covering public accommodations, employment, housing, and education. *Id.* at 611–12.

114. *Andersen*, 138 P.3d at 974.

115. *Id.*

116. *Conaway*, 932 A.2d at 613.

117. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 444 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Lewis v. Harris*, 908 A.2d 196, 199 (N.J. 2006).

118. In relevant part, the majority opinion asserted:

Although some California decisions in discussing suspect classifications have referred to a group’s political powerlessness, our cases have not identified a group’s *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class. Indeed, if a group’s *current* political powerlessness were a prerequisite to a characteristic’s being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications. Instead, our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual’s ability to perform or contribute to society. Thus, courts must look closely at classifications based on that characteristic lest *outdated* social stereotypes result in invidious laws or practices. This rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation.

In re Marriage Cases, 183 P.3d 384, 443 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (footnotes omitted) (citations omitted) (internal quotation marks omitted).

against same-sex *couples*.¹¹⁹ The Connecticut Supreme Court's analysis was the most developed and extended. Its majority characterized the historic discrimination against gay people as "pervasive and severe," and then cited evidence of continuing hate crimes and negative sentiment toward gay people in public opinion polls to contest any idea that anti-gay discrimination was a thing of the past.¹²⁰ In light of the deep-seated animosity toward gay and lesbian people, the Court reasoned, the question is not whether gay people have been able to win some legislative protections against continuing discrimination or elect a relatively small number of openly gay candidates.¹²¹ Instead, the Court said the inquiry should be:

[W]hether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means. Consequently, a group satisfies the political powerlessness factor if it demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process.¹²²

Note that the Connecticut court expressly changed the frame of reference from the *enactment* to the *likely effects* of antidiscrimination statutes. The Iowa court relied heavily on this approach in its own decision.¹²³ These courts thus emphasize the historical context that generated antidiscrimination legislation, rather than the fact of enactment alone.

4. *The Prop. 8 Trial: The Experts Face Off*

The state court decisions reviewed above probe and elaborate the meaning of the political powerlessness criterion more extensively than the Supreme Court. But their depth of analysis is, in turn, widely exceeded by the extended trial testimony on this point in the *Perry v. Schwarzenegger* litigation challenging Prop. 8. The combined testimony of political scientists Gary Segura and Kenneth Miller consumed many hours and hundreds of transcript pages.

119. The New Jersey court stated:

The statutory and decisional laws of this State protect individuals from discrimination based on sexual orientation. When those individuals are gays and lesbians who follow the inclination of their sexual orientation and enter into a committed relationship with someone of the same sex, our laws treat them, as couples, differently than heterosexual couples. As committed same-sex partners, they are not permitted to marry or to enjoy the multitude of social and financial benefits and privileges conferred on opposite-sex married couples.

Lewis, 908 A.2d at 200.

120. *Kerrigan*, 957 A.2d at 444.

121. *Id.* at 446.

122. *Id.* at 444.

123. See *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

a. *Testimony of Gary Segura*

Segura identified several factors that he thought evidenced the inability of gays and lesbians to protect themselves in the political process. He summarized his opinion as follows:

My opinion is that when we take together the moments of legislative victory, the moments of legislative defeat, the presence of ballot initiatives, the absence of statutory or constitutional protection, the presence of statutory or constitutional disadvantage, and a host of circumstances, including small numbers, public hostility, hostility of elected officials, and a clearly well-integrated, nationally prominent, organized opposition, I conclude that gays and lesbians lack the sufficient power necessary to protect themselves in the political system.¹²⁴

He stressed several themes in his testimony. First, he argued that gay men and lesbians lack the numbers to be effective advocates in a political arena dominated by heterosexual norms.¹²⁵ Second, and relatedly, he suggested that gay men and lesbians are at a particular disadvantage in direct democracy because they do not constitute a sufficient portion of the population “in any jurisdiction of any size to shape outcomes.”¹²⁶ Noting that “[t]here is no group in American society who has been targeted by ballot initiatives more than gays and lesbians,” he emphasized that the group has essentially lost 100 percent of ballot initiatives on same-sex marriage, and has lost 70 percent of contests over other matters (including Amendment 2, struck down in *Romer*).¹²⁷ Segura also suggested that the initiative process tends to “nationalize issues,” by enmeshing state legal questions in a broader “culture war” in ways that mobilize political opponents and activate formidable oppositional resources.¹²⁸ And he testified that ballot initiatives have frequently overturned legislative gains made by LGBT advocates, compelling members of the community to refight the same battles, requiring them to expend enormous resources without making much progress, and “chill[ing] legislatures” by dissuading them from pursuing legislative remedies for discrimination that may spark voter reversal.¹²⁹

Third, Segura emphasized the array of formidable political obstacles confronting LGBT rights advocates. In addition to the community’s small size and the well-organized and well-funded national opposition to same-sex marriage, Segura identified several other relevant forces. One is the relatively low scores achieved by gay men and lesbians on “feeling

124. Transcript of Proceedings, *supra* note 21, at 1646.

125. *Id.* at 1560; *see also id.* at 1556–57, 1582–83, 1660, 1709, 1721. In this connection, Segura also mentioned the devastating impact HIV/AIDS has had on the gay community, noting that it reduced the gay population and shifted political resources to public health and prevention efforts. *Id.* at 1583–84, 1819.

126. *Id.* at 1560.

127. *Id.* at 1552.

128. *Id.* at 1552–53.

129. *Id.* at 1556.

thermometer[s],” which are used by political scientists to capture public sentiment by asking “[o]n a scale from zero to 100, how warmly do you feel about [group X].”¹³⁰ Gay men and lesbians received a mean score of 49.4, in comparison to scores somewhere between 65 and 69 for religious and racial minorities subjected to historical discrimination.¹³¹ Segura thought these numbers evidenced “profound” prejudice that permeates the political process and severely disadvantages gay men and lesbians in the “pluralist . . . contest of ideas.”¹³² In Segura’s words, “It’s very difficult to engage in the give-and-take of the legislative process when I [or a majority of a legislator’s constituents] think you are an inherently bad person.”¹³³ Segura emphasized the rising numbers of anti-gay hate crimes, noting an increase in violence directed at gay men and lesbians between 2003 and 2008, with a “substantial” jump in 2007.¹³⁴ He also testified that hate crimes targeting LGBT people are making up an increasingly larger share of total hate crimes.¹³⁵ Disapproval and the threat of violence, Segura suggested, undermines political power by encouraging gays and lesbians to remain “invisible.”¹³⁶

Another obstacle that Segura identified is the lack of “descriptive representation”—that is, the underrepresentation of gays and lesbians in political office.¹³⁷ Segura saw the meager numbers of openly gay officials in a range of settings as having two main consequences: first, requiring the LGBT movement to rely heavily on the support and steadfastness of allies;¹³⁸ and second, leaving legislators, in the absence of gay colleagues, free to engage in “thoughtless or disparaging behavior. . . . [I]n many parts of the country elected officials have absolutely no problem speaking about gays and lesbians in a way that you could not imagine them speaking about any other member of the electorate.”¹³⁹ Segura argued that political discourse of this kind works to communicate the acceptability of discriminatory treatment.¹⁴⁰

Finally, Segura addressed head-on what I have called the preclusion thesis. Acknowledging some gains in the areas of antidiscrimination and anti-hate crime legislation, he nevertheless likened the argument that passage of

130. *Id.* at 1562.

131. *Id.* at 1563–64.

132. *Id.* at 1560.

133. *Id.* at 1561.

134. *Id.* at 1569.

135. *Id.*

136. *Id.* at 1574.

137. *Id.* at 1556–57. Along these lines, only six openly gay individuals have ever served in the House of Representatives, and only two of those were openly gay when elected. No openly gay individuals have ever served in the Senate, Cabinet, or Presidency. Only about 1 percent of state legislators nationwide are openly gay, and this number is far lower among local government officials (estimated at .05 percent). *Id.*

138. *Id.* at 1582, 1660.

139. *Id.* at 1558–59.

140. *Id.* at 1560.

antidiscrimination legislation demonstrates political power to the notion that that the more prescription medications a person takes, the healthier that patient must be.¹⁴¹ He also emphasized that statutory protections have been vulnerable to repeal by hostile legislators and by ballot measures.¹⁴² And he noted that twenty-nine states still offer no statutory protection at all against discrimination based on sexual orientation,¹⁴³ nor does federal antidiscrimination legislation cover sexual orientation.¹⁴⁴ Beyond this gap in federal coverage, moreover, Segura noted that significant federal statutes, in fact, affirmatively discriminate based on sexual orientation, such as the Defense of Marriage Act (“DOMA”) and the military’s “don’t ask, don’t tell” policy.¹⁴⁵ Segura compared the current level of gay and lesbian political power with that of women in the 1970s, and African Americans in the 1960s.¹⁴⁶ He argued that, in some respects, gay men and lesbians as a group are worse off now than both of those groups were at the time heightened scrutiny was extended to them, because gay men and lesbians today have fewer statutory protections and lower descriptive representation than the other groups had at comparable periods.¹⁴⁷ Segura also noted that, “as a constitutional matter, gays and lesbians are moving in the opposite direction than African Americans were in the 1940s.”¹⁴⁸ He pointed to the fact that “in 1990, there was not a single constitutional establishment of inequality for gays and lesbians, and today there are—in about three-fifths of the states, there is constitutionally-established inequality.”¹⁴⁹

141. *Id.* at 1548–49.

142. *Id.* at 1548–50.

143. *Id.* at 1655.

144. *Id.* at 1546. The only protection in federal statutory law is the recent addition of sexual orientation to law banning hate crimes. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C.S. § 249 (LexisNexis 2009 & Supp. 2010).

145. Transcript of Proceedings, *supra* note 21, at 1581. Two significant developments took place several months after Segura testified. First, Congress passed and the President signed a bill authorizing the repeal of the “don’t ask, don’t tell” policy, once certain certifications are made by military officials and the President. Sheryl Gay Stolberg, *Obama Signs Away ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html>. Second, as this Article was being completed, the Department of Justice announced that, in circuits that had not already determined that rational basis review is the correct level of scrutiny to apply to sexual orientation–based claims, it would no longer defend the portion of DOMA that bars the federal government from providing benefits to couples legally married under state law. The Department reasoned that the law could not survive the heightened scrutiny it believed appropriate for sexual orientation–based classifications. Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

146. Transcript of Proceedings, *supra* note 21, at 1647–52.

147. *Id.*

148. *Id.* at 1650.

149. *Id.*

b. *Testimony of Kenneth Miller*

Testifying on behalf of those defending Prop. 8, Professor Kenneth Miller identified five key determinants of political power: money, access to lawmakers, size and cohesion of a group, the ability to attract allies and form coalitions, and the ability to persuade. Citing language from the Supreme Court's decision in *Cleburne*, Miller concluded that gay men and lesbians are not politically powerless because they "have the ability to attract the attention of lawmakers."¹⁵⁰

In unpacking his conclusion, Miller identified money as "a critical asset for achieving political power," suggesting that the ability of the "No-on-Prop.-8" campaign to raise more than forty-three million dollars signified a "striking" degree of power.¹⁵¹ He noted that no other social issue voted on by ballot initiative ever involved that that much money.¹⁵²

Miller also testified at some length about the political support LGBT rights advocates have had in California, both in the unsuccessful campaign to defeat Prop. 8 and in other battles. He identified a wide array of powerful allies, including powerful legislators, unions, corporations, figures on the entertainment industry, academics, various professional associations, and members of the Bar.¹⁵³

Miller also counted among indicia of political power the ability of gay and lesbian political groups to elect candidates of choice.¹⁵⁴ He noted, for example, that in the last statewide election, Californians elected 95 percent of the candidates endorsed by Equality California's Political Action Committee (fifty-nine out of sixty-two candidates).¹⁵⁵ Additionally, legislators suffered "no political price" for their legislative votes supporting same-sex marriage, as all twenty-three incumbents who supported same-sex marriage ran for reelection and won.¹⁵⁶ And, on the related issue of descriptive representation, he testified that California was the first state to have an official caucus for openly LGBT state legislators.¹⁵⁷ Miller also emphasized what he saw as the "trajectory of increasing success" of openly gay politicians on a national level.¹⁵⁸

In contrast to Segura, Miller pressed the preclusion thesis. He noted that gay men and lesbians have attained "over 50 legislative victories" in the California state legislature on hate crime laws; laws prohibiting sexual

150. *Id.* at 2486–87.

151. *Id.* at 2437–38.

152. *Id.* at 2438–39.

153. *Id.* at 2447–68.

154. *Id.* at 2470.

155. *Id.* at 2470–71.

156. *Id.* at 2471.

157. *Id.* at 2453.

158. Relying on data from the Gay and Lesbian Victory Fund, he noted that, in 2008, 80 out of 111 openly LGBT candidates were elected to office, and at least 49 out of 79 were elected in 2009. *Id.* at 2480.

orientation discrimination in the areas of “employment, housing, public education, and labor organizations, with respect to adoption, foster care, public contracting, insurance, state-funded programs and business services”; and domestic partnership laws.¹⁵⁹ Additionally, several municipalities have passed domestic partnership ordinances.¹⁶⁰ Looking to the law in other states, Miller noted that many have adopted hate crime legislation,¹⁶¹ or some form of protection against employment discrimination based on sexual orientation.¹⁶² He also emphasized that many local governments and major corporations have taken steps to protect against employment discrimination and, in some cases, to extend benefits to domestic partners.¹⁶³

Miller rejected Segura’s opinion that gay men and lesbians lacked political power at the national level, pointing to recent enactment of federal hate crime legislation and rising levels of support in Congress to repeal “don’t ask, don’t tell” and DOMA, and to enact the Employment Nondiscrimination Act and legislation providing some domestic partnership benefits.¹⁶⁴ Along similar lines, Miller characterized President Obama and then-Speaker Pelosi as powerful supporters of the LGBT community.¹⁶⁵

Miller sharply diverged from Segura on the issue of the initiative process. While acknowledging defeats on marriage in 2000 and 2008, Miller insisted that “California voters have not used the initiative process, nor the popular referendum, to repeal or limit the legislature’s other broad expansions of LGBT rights.”¹⁶⁶ He noted that, in fact, some ballot measures adverse to LGBT interests had been defeated by voters in the 1970s and 1980s,¹⁶⁷ and that there had been no initiative to repeal the statewide domestic partnership law.¹⁶⁸

Miller concluded by noting substantial improvements in public opinion trends toward LGBT issues.¹⁶⁹ He noted the substantial shift in support for same-sex marriage from 2000, when the voters enacted Prop. 22 (the statutory predecessor of Prop. 8) by a margin of twenty-two points, to 2008 when

159. *Id.* at 2472.

160. *Id.* at 2473–74.

161. *Id.* at 2478.

162. *Id.*

163. *Id.* at 2479.

164. *Id.* at 2482–83. Legislation setting in motion the process to repeal “don’t ask, don’t tell” has since been enacted. *See* Stolberg, *supra* note 145.

165. Transcript of Proceedings, *supra* note 21, at 2483–84.

166. *Id.* at 2475.

167. He testified that, in 1978 voters rejected Proposition 6—which would have allowed public schools to fire teachers and other personnel found to be advocating, imposing, encouraging or promoting homosexual activity—by a “decisive” 58% “no” vote. *Id.* at 2475–76. Similarly, in the 1980s Californians rejected three measures that sought to make persons with HIV subject to quarantine and isolation, and require doctors to report suspected HIV carriers, all by very decisive margins (between 65.6% and 71%). *Id.* at 2476–77.

168. *Id.* at 2478.

169. *Id.* at 2485.

Prop. 8 passed by only four points.¹⁷⁰ In general, Miller viewed “the public [as now] demonstrat[ing] increasing support for political objectives of LGBT persons.”¹⁷¹ Ending where he began, Miller reiterated that political powerlessness means having “no ability to attract the attention of the law-makers.”¹⁷² Because gay men and lesbians had shown themselves able to attract legislators’ attention both in California and on the federal level, Miller’s opinion was that the standard for demonstrating powerlessness could not be satisfied.¹⁷³

c. The District Court’s Assessment of the Testimony

In his decision striking down Prop. 8, Judge Walker reviewed the dueling experts’ testimony at length.¹⁷⁴ He characterized Segura’s three opinions in these terms: “(1) gays and lesbians do not possess a meaningful degree of political power; (2) gays and lesbians possess less power than groups granted judicial protection; and (3) the conclusions drawn by proponents’ expert Miller are troubling and unpersuasive.”¹⁷⁵

As part of a blanket conclusion made about all nine expert witnesses offered by the plaintiffs, the judge found Segura to be “amply qualified” and his opinions to be credible.¹⁷⁶ He later summarized Miller’s conflicting opinion in these terms:

Miller testified that factors determining a group’s political power include money, access to lawmakers, the size and cohesion of a group, the ability to attract allies and form coalitions and the ability to persuade. Miller explained why, in his opinion, these factors favor a conclusion that gays and lesbians have political power.¹⁷⁷

After reviewing the basis for Miller’s opinion in detail, the judge determined that his testimony was “entitled to little weight and only to the extent

170. For the Prop. 22 voting results, see *Statewide Election Results*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/elections_elections.htm (follow “March 2000 Primary Election” hyperlink; then follow “Summary of Votes on Statewide Measures” hyperlink) (last visited Mar. 15, 2011). For the Prop. 8 voting results, see *Statewide Election Results*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/elections_elections.htm (follow “November 2008 General Election” hyperlink; then follow “Votes For and Against State Ballot Measures”) (last visited Mar. 15, 2011).

171. *Id.*

172. *Id.* at 2486–87.

173. *Id.* at 2487.

174. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 943–44, 950–52, 986–91 (N.D. Cal.), *stay denied*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), and *certifying question to the Supreme Court of California*, 628 F.3d 1191 (9th Cir. 2011).

175. *Id.* at 943.

176. *Id.* at 940 (concluding that all of the plaintiffs’ nine expert witnesses were “amply qualified to offer opinion testimony on the subjects identified”; had the appropriate “demeanor and responsiveness”; and “offered credible opinion testimony”); see also *id.* at 943 (reviewing Segura’s testimony and credentials).

177. *Id.* at 951 (citations omitted).

[it is] amply supported by reliable evidence."¹⁷⁸ The opinion identified a number of bases for the court's adverse credibility determination, including the fact that Miller had not focused on gay and lesbian issues in his scholarship, had not read the works of many experts on gay political power, lacked a basis for comparing gay political power to that of other groups, conceded significant gaps in gay political power, and had taken positions contrary to his testimony in prior scholarship.¹⁷⁹

While the judge explicitly credited Segura's testimony over Miller's, he did not have occasion to parse the conflicts in their testimony in greater detail, nor to resolve associated questions about the doctrinal meaning of political powerlessness. On the issue as to which the evidence on gay political power was offered—heightened scrutiny—the judge summarily decided that the prerequisites for finding gays and lesbians to be a suspect classification were met.¹⁸⁰ He also found, however, that Prop. 8 could not satisfy the lesser demands of rational basis scrutiny.¹⁸¹ Thus, notwithstanding the extended testimony on political power, heightened scrutiny did not figure centrally in the district court's resolution of Prop. 8's constitutionality. Still, the judge did make numerous references to the evidence offered by the political scientists as he assessed the substantive question whether Prop. 8 was supported by any rational basis.¹⁸² As we will see in the concluding Section, close analysis of the evidence introduced on the question of how the LGBT community has fared in the political process suggests some ways in which political process theory might be reconceived.¹⁸³

II. ASSESSING PROCESS THEORY THROUGH THE LENS OF THE MARRIAGE DEBATE

Having reviewed the disparate approaches taken by the experts in *Perry* and by the various state marriage opinions, we are in a position to assess what the same-sex marriage debate tells us about political process theory. I want to press three interrelated points. First, process theory is tissue-thin. In the absence of clearer substantive commitments about what makes a political process fair and how much/what kind of political power a group "should" have, the theory offers little to resolve questions of application like those raised in the marriage debate. Second, process theory is also thin in its institutional assumptions. It makes reductive and stylized assumptions about

178. *Id.* at 952.

179. *Id.*

180. *Id.* at 997 ("[T]he evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.").

181. *Id.* ("The trial record shows that strict scrutiny is the appropriate standard of review to apply . . . Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.").

182. *Id.* at 956, 960–61, 967, 982–83, 985–89. For discussion of how the court used the evidence on political power, see *supra* Section I.B.4.

183. See *infra* Section III.A.

courts and legislatures that do not stand up well to empirical scrutiny and that distort the roles of legal institutions in social change. Third, process theory does not live up to its animating aspiration to be meaningfully separate and distinct from substantive equality analysis itself. Dating to the work of Tribe and others, critics of process theory have long stressed the theory's inability to avoid substantive judgments.¹⁸⁴ Analyzing the theory through the lens of the marriage debate reveals new dimensions of this problem.

A. *Missing Metrics, Missing Values*

Let us begin with a fact that could easily be missed in the fog of hundreds of pages of transcript testimony given by the two trial experts. Professors Segura and Miller came to diametrically opposite conclusions about gay political power, but they did not dispute the underlying facts. They disagreed profoundly about what inferences and conclusions legitimately followed from those facts, but not about the facts themselves.

Recall Miller's bottom line that "gays and lesbians have the ability to attract the attention of lawmakers in California. . . . [and] at the federal level, as well,"¹⁸⁵ and contrast Segura's conclusion that "gays and lesbians lack the sufficient power necessary to protect themselves in the political system."¹⁸⁶ The thematic fault line separating the experts' views matches some of the divergence in the views of state supreme courts. The Maryland and Washington courts, for example, embraced the preclusion thesis and thought the ability of gay rights advocates to secure passage of antidiscrimination legislation ought to bar a finding of political powerlessness,¹⁸⁷ while the Connecticut and Iowa courts focused, instead, on whether resorting to the political process could be expected to bring a swift end to historical discrimination.¹⁸⁸ As this juxtaposition makes clear, one camp emphasizes access to the political process and the other stresses the limitations on what that process can achieve in the face of entrenched discrimination.

This is no minor or marginal disagreement. The gap, instead, reflects the use of fundamentally different metrics to assess political power. Significantly, the normative apparatus of process theory does not, itself, tell us which metric is the correct one. In fact, the core postulates of process theory are strikingly crude and underspecified. This is true whether process theory finds expression in footnote four's "prejudice against discrete and insular minorities,"¹⁸⁹ Ely's representation reinforcement,¹⁹⁰ the Supreme Court's "political powerlessness" that "command[s] extraordinary protection from

184. See *supra* notes 7, 9.

185. Transcript of Proceedings, *supra* note 21, at 2487.

186. *Id.* at 1646.

187. See *supra* notes 112–116 and accompanying text.

188. See *supra* notes 117–123 and accompanying text.

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

190. ELY, *supra* note 1, at 101–04.

the majoritarian political process,”¹⁹¹ or some combination of them. It is difficult to extract from any of these formulations an operative concept of political power that offers definitional guidance or identifies the criteria that should be used to determine whether a group falls above or below the line marking a political malfunction.¹⁹²

Beyond the conceptually different ways that the opposing experts and state courts frame the political power inquiry, the same-sex marriage debate presents two central issues as to which there is particularly sharp disagreement: the preclusion thesis (if the LGBT community can secure legislative redress against discrimination, does that negate the possibility of a political malfunction?) and the relevance of direct democracy (how does the frequent use of direct democracy against LGBT interests factor into the analysis of political power?). Here again, arguments can be—and have been—made on either side of these issues in the vocabulary of process theory, but the initial point I want to emphasize is that the internal logic of the approach does not give us any singular way to arbitrate between these arguments.

The preclusion thesis, in particular, implicates a key baseline question. Process theory essentially asks whether LGBT people—or other disadvantaged groups—have “sufficient” power to be left to their own political devices, rather than receiving solicitous treatment from a court. Answering this question depends not only on how political power is defined, but on how *sufficiency* is understood. Therein lies the baseline question. To assess meaningfully whether historical prejudice undermines a group’s power, we, presumably, need to know something about what the group’s political power would look like in a properly functioning political process.¹⁹³ In other words, if Ely’s distorting lens of prejudice had been removed or never been in place, what would the undistorted, “natural” political process have produced for gay people?

191. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

192. Nor is this conflict resolvable at the doctrinal level. It would overstate things by a considerable margin to regard the language in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985), about the “ability to attract the attention of the lawmakers” as having settled the standard for political powerlessness claims. The Supreme Court’s pronouncements are far too scattered, scant, and inconsistent to support that idea. Moreover, were the *Cleburne* language regarded as some kind of definitive test, the heightened scrutiny accorded race and gender would be called sharply into question, given the demonstrated ability of racial minorities and women to “attract the attention of the lawmakers.” *Id.* In short, the doctrine remains undeveloped and uncertain because there are deeper conceptual questions at work. For an argument that an overreliance on the *Cleburne* language has led courts astray, see Mark Strasser, *Unconstitutional? Don’t Ask; if It Is, Don’t Tell: On Deference, Rationality and the Constitution*, 66 U. COLO. L. REV. 375, 407–11 (1995).

193. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring) (identifying “the lack of comprehensive and neutral principles for drawing electoral boundaries” as an obstacle for courts addressing claims of gerrymandering). On the role of baseline questions in voting rights jurisprudence, see, for example, Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 741–45 (1998); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 58–59 (2004). On the recurrence of baseline questions in public law, see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1993).

If the idea is that a group suffering bias sufficiently substantial to warrant judicial intervention could expect to secure *no* legislative victories and *no* political support for its priorities, then the ability of LGBT rights advocates to secure antidiscrimination legislation in California and beyond would rightly undercut any finding of a political malfunction. But there is no obvious reason to suppose that the relevant idea of political power ought to be all or nothing in this way. Nor would such a categorical understanding have much purchase as a purely descriptive matter, given the proliferation of antidiscrimination legislation protecting racial minorities and women.

Moreover, identifying the relevant baseline begins to get both enigmatic and interesting when we recognize that there is no particular reason to believe that LGBT people would be politically organized and active as LGBT people in the way that has become familiar *but for* the phenomena that called into being the organization of their social movement.¹⁹⁴ The animating goal that gave rise to the gay rights movement was, precisely, to dislodge longstanding structures of discrimination—that is, to bring about the end of criminal bans on consensual sexual activity, pervasive job and other kinds of discrimination, violent hate crimes, the lack of any legal infrastructure to protect gay couples and families, and, more broadly, a social regime that policed traditional gender roles and asked people to hide important aspects of their identity. The dilemma is this: if the need to politically organize is itself generated by long-term historical subordination, it is difficult to conjure the untainted baseline political process against which to measure the current process, because there are good grounds to wonder whether LGBT people would be legislatively active as LGBT people in the absence of that subordination.

To come at the same basic idea from a different angle, it is similarly not obvious, within the framework of political process theory, how to account for the fact that the political power that exists is being devoted in a targeted way to combating longstanding discrimination. It hardly follows that a group is politically “powerful” because it has achieved some success in securing legal remedies against some of the formal and informal discrimination that has long burdened the group.¹⁹⁵ Recall Segura’s analogy to the

194. For a comprehensive history of how not only gay people but other minority groups have organized in response to “pervasive state exclusion, discrimination, and violence,” see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2072–194 (2002) [hereinafter Eskridge, Jr., *Constitutional Law in the Twentieth Century*].

195. In his work on the rise of social movements asserting civil rights claims of various sorts, Bill Eskridge suggests that movements pass through different phases as they achieve successes and their political needs and identities change, with some movements and groups being absorbed into what he calls “normal politics,” and others—like the gay rights movement—struggling longer against the resistance of traditionalist groups. *Id.* at 2373; see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 475–76 (2001) [hereinafter Eskridge, Jr., *Public Law*]. His account, while comprehensive and careful in many ways, is somewhat sanguine in generally placing rights movements on a trajectory toward assimilation into a realm of prosaic politics. Even with this optimism, Eskridge does not suggest that groups reaching the “normal politics” stage in his model are thereby rendered powerful, nor that reaching that stage means that the group’s legacy of discrimination is left behind. See *id.* at 476 (noting that

patient with prescriptions. It is better, most would presumably agree, for someone who is sick to have the prescriptions than to be left to suffer without them, but the patient still does not compare favorably to the healthy person in need of no treatment at all. It also seems worth noting that the money, endorsements, allies, and other political resources that Miller emphasized in his testimony were hardly used to engage in rent seeking. The resources used to fight Prop. 8 were used to try to avoid the constitutionally codified exclusion of same-sex couples from a social institution to which many LGBT people seek access. Indeed, the inherently *defensive* quality of LGBT political efforts is embedded in the very question whether members of the LGBT community can “protect themselves” in the legislative process. Academic notions of a Hobbesian war of all against all notwithstanding, the need for political self-protection is hardly universal.

Another way to express this is to say that what should stand out most about the fact that LGBT people have secured multiple pieces of antidiscrimination legislation is not necessarily the political success it signifies, but the extent and continuation of discrimination that makes these laws necessary in the first instance. The passage of legislation outlawing sexual orientation-based discrimination in, say, employment or housing presumably reflects a legislative belief that there is sufficient anti-gay bias to warrant protection from adverse decisions born of that bias. Nor is it credible to believe that the enactment of antidiscrimination laws alone spells the end of the underlying discrimination.¹⁹⁶ It seems perverse, then, to say that, under process theory, the fact that sexual orientation-based antidiscrimination legislation has been deemed necessary by a majority of legislators on numerous occasions in California is the smoking gun that demonstrates that excluding same-sex couples from marriage in the state does not warrant close judicial review. Viewed in this way, the need to resort repeatedly to the political process—as heterosexuals qua heterosexuals do not—is the important signal not of political power, but of social antipathy of sufficient magnitude to warrant legal redress.

All of this is not an argument that LGBT people lack any political power at all—a principle that, so stated, is plainly wrong and oversimplified. It is instead an argument that process theory does not and cannot tell us how much, or what kind of, political power LGBT people “ought” to have in a nondiscriminatory world. And it is also an argument that process theory is misguided if it looks to the enactment of legislation alone, without asking what kind of legislation exists, what gave rise to the need for that legislation, or what effect the legislation has had.

while successful social movements ultimately join the fray of ordinary pluralist politics, they are distinct in “that they deploy classifications that remain charged criteria of normative decisions in our polity,” and suggesting that the success of such movements “does not ensure the eradication of prejudice against or stereotypes about the minority group,” though it does change the nature of countermovements against it).

196. On the limits of antidiscrimination laws as a general matter, see Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 719 (1997) (book review).

Just as process theory does not, on its own terms, clearly resolve questions about the preclusion thesis, so it fails to speak clearly to the frequent use of direct democracy in challenging gay equality claims. Once again, baseline questions lurk—this time about the number and kind of ballot initiatives, and the dynamics of initiative campaigns, that a fair and properly functioning political process would tolerate or expect.

As Segura testified, the use of ballot measures to reverse or preempt gay rights legislation has been a mainstay not only in the same-sex marriage debate, but in the larger debate about gay rights over the last several decades. Indeed, from the time Anita Bryant led a referendum campaign to repeal a gay civil rights ordinance enacted in Dade County, Florida in the 1970s, ballot measures have been put forward consistently by those opposing gay rights. *Romer*, the Supreme Court's leading case on sexual orientation and equal protection, involved a statewide amendment enacted to reverse and preempt antidiscrimination measures in Colorado that would protect gays, lesbians, and bisexuals. Since the mid-1990s, thirty states have used the ballot box to amend their state constitutions to bar same-sex marriage.¹⁹⁷ No statewide ballot measure asking voters about same-sex marriage has ever been voted down.¹⁹⁸ Nor are the high success rates on anti-same-sex marriage measures unique to the context of marriage. Various scholars have documented the substantial success rate of initiatives and referenda restricting gay rights.¹⁹⁹ All in all, direct democracy has been a formidable force in blocking gay rights measures.

There are relatively straightforward arguments that the frequent and effective use of direct democracy to counter gay rights should be regarded as a political process failure. Given the emphasis of process theory on, in

197. The *Los Angeles Times* has created an interactive map detailing the past decade of electoral activity. *Interactive: Gay marriage chronology*, L.A. TIMES, <http://www.latimes.com/news/local/la-gmtimeline-fl,0,5345296.htmlstory> (last visited Feb. 21, 2011). For a discussion of how the structure of state governments has affected same-sex marriage laws, see Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1674–91 (2010). Note that some ballot measures have been enacted by voters acting alone (as in California), while others have been enacted with legislative approval.

198. The only statewide measure to go down was an Arizona measure restricting both marriage and domestic partnerships. The initiative apparently aroused the ire of retirees who did not want to lose domestic partnership status. A marriage-only ban was promptly passed by Arizona's voters after this initial loss. See Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16, available at <http://www.nytimes.com/2006/11/09/us/politics/09ballots.html>; Jesse McKinley & Laurie Goodstein, *Bans in 3 States On Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, available at <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>.

199. See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 253, 257–60 (1997); Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 306–11 (2007). For a perspective more skeptical of the idea that direct democracy necessarily harms minorities in general, see Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154 (2002). Cf. ARTHUR LUPA ET AL., WHY STATE CONSTITUTIONS DIFFER IN THEIR TREATMENT OF SAME-SEX MARRIAGE (Munich Personal RePEC Archive, Paper No. 15096, 2009), available at http://mpira.ub.uni-muenchen.de/15096/1/MPRA_paper_15096.pdf (stressing importance of procedural variations in how state constitutions can be amended).

Ely's words, reinforcing *representation*, the absence of representation itself in the sphere of direct democracy poses an immediate problem. Moreover, normative arguments faulting direct democracy for selectively harming small disadvantaged groups have long been pressed by legal scholars, most prominently by Derrick Bell and the late Julian Eule.²⁰⁰ These arguments emphasize numerous factors, including the vulnerability of numerical minorities in ballot elections; the absence of representational safeguards, such as bicameralism and presentment, vetogates, and opportunities for amendment, compromise, coalition building, and logrolling; and the loss of public deliberation and electoral accountability. These arguments seem especially powerful when a ballot measure is used to amend a state constitution and thus to embed unequal treatment of a minority in the state's foundational political commitments.

Even assuming that direct democracy poses substantial political risks for minorities, however, it is not entirely clear how process theory ought to treat ballot measures. Questions remain, for example, about how often gay rights ballot measures must lose ballot elections in order for these structural disadvantages to be realized and to count as process failures. What, for example, is the relevance of the fact that gay rights advocates have consistently lost on marriage, but have sometimes prevailed on other occasions? (For example, California measures targeting gay teachers and HIV-positive persons were rejected by voters at the ballot box, and Washington voters recently declined to repeal domestic partnerships.) Must every gay rights victory in the legislative arena be subject to a ballot measure in order to reach the conclusion that the process is malfunctioning? (In California, most antidiscrimination laws, as well as domestic partnership legislation, have not been subjected to a popular vote.) Does it matter how much support the LGBT community has received from legislators and elites? (Quite a lot in the Prop. 8 campaign.) Does it matter if a disadvantaged group that loses a ballot campaign nevertheless secures the support of a significant minority? (Some 47 percent of voters statewide opposed Prop. 8.) Once again, process theory lacks the conceptual tools to resolve questions like these in assessing whether there is a political malfunction.²⁰¹

200. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14–15 (1978); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1526–28, 1551–56 (1990); see also *supra* note 198.

201. Claims about the the risks that direct democracy poses for those *opposing* same-sex marriage have been suggested in *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Thomas, J., dissenting) (addressing the risks of disclosing the identities of petition-signers), and *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (citing seventy-one newspaper articles describing harassment of Prop. 8 supporters as evidence in favor of blocking any live broadcast of the resulting trial). In these contexts, opponents of same-sex marriage seek judicial protection, expressing fears of harassment. These are not traditional equal protection arguments, but might be assimilated to a version of process theory. For a critique of these claims, see Pamela S. Karlan, *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage* (forthcoming 2011).

B. Institutional Caricatures

A second set of problems with process theory that the marriage debate reveals—and a second way in which process theory is thin—relates to its institutional assumptions. There is a distinctly caricatured quality to the roles that process theory assigns to courts and to legislatures.

Process theory is built on the assumption that, while legislatures will predictably fall prey to—and remain mired in—forms of prejudice that will skew and distort their approach to public policy, courts can and will overcome such prejudice in adjudication. In this way, process theory embraces what we might call separate spheres²⁰²—separate institutional spheres, that is. The dichotomy it sets up is a simple one: Either the political process operates fairly and can be trusted to sort out social issues, or the political process malfunctions based on bias and courts must step in to rescue the populace and its representatives from themselves. It is one or the other.

There is nothing terribly unfamiliar about this idea, which suffuses and shapes traditional thinking about the roles to be played by different institutions of government within a system of divided power and checks and balances. But a core empirical problem with this view is that, while the vision of courts as consistent countermajoritarian forces has deep and enduring normative appeal, it is not empirically well supported. Various scholars, including Barry Friedman in a recent book, have shown that courts, across the long march of history, are not often all that far out of step with popular opinion or out front on controversial social issues.²⁰³ In fact, courts typically do not act before the broader society of which they are a part has taken some significant steps.²⁰⁴ Elected judges may be especially likely to align their decisions with broad currents of public opinion, but appointed judges, too, typically act only after processes of social change are underway and there is a broader sense in society that traditional attitudes toward a group are unfair and may be antiquated. A striking example of this general idea in the realm of LGBT rights is the shift in the Supreme Court's evaluation of the constitutionality of criminalizing sodomy. This shift is

202. On the idea of separate spheres in the domain of gender, see the classic description in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139–42 (1872) (Bradley, J., concurring). *But see* NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1730–1835*, at 197–206 (2d ed. 1997); Martha Minow, "Forming Underneath Everything That Grows: Toward a History of Family Law," 1985 WIS. L. REV. 819 (1985).

203. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 364–65 (2009); *see also* Gregory A. Caldeira, *Courts and Public Opinion*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 303, 313–19 (John B. Gates & Charles A. Johnson eds., 1991); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) (arguing that neither the countermajoritarian arguments nor the noncountermajoritarian arguments are completely correct and that the truth is in the middle).

204. *See* Klarman, *supra* note 203. In adopting what I see as a realistic picture of courts, one need not go quite as far as Gerald Rosenberg does in his classic book; Rosenberg is deeply skeptical that courts *can* produce meaningful reform and views them as only a dangerous distraction for those seeking genuine social change. *See* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

reflected in the *Lawrence v. Texas* decision overruling *Bowers v. Hardwick*—a shift more plausibly attributed to surrounding social change than to any doctrinal niceties.²⁰⁵ Viewed in this light, then, process theory is premised on the faulty notion of courts as a leading, not trailing, indicator.

In the context of same-sex marriage, the institutional role of courts vis-à-vis legislatures is mixed.²⁰⁶ On the one hand, it is important to recognize that courts ruling in favor of same-sex marriage *were* the first movers. The Hawaii court in 1993 and the Massachusetts court in 2003, for example, acted on marriage before any state legislatures did, and they issued opinions that were ahead of extant public opinion on marriage. In some sense they provide support for the idea, grounded in process theory, that courts can and should act when the political process will not.

But there is an important caveat. It strikes me as no accident that no state supreme court was prepared to accept a marriage equality claim before the gay rights movement had advanced its cause significantly. In fact, three early marriage equality cases brought in the early 1970s, shortly after the birth of the modern gay rights movement, were rejected rather dismissively by appellate courts.²⁰⁷ It was not until 1993—nearly twenty-five years into the modern gay rights movement—that Hawaii signaled its readiness to move on same-sex marriage under that state's constitutional equal rights amendment,²⁰⁸ and ten years later that the Massachusetts court actually became the first to legalize same-sex marriage.²⁰⁹ By this time, there had been many significant advances in social attitudes about homosexuality and many prior legislative steps toward equality.²¹⁰

Indeed, in every state whose supreme court issued a judicial decision favorable to same-sex couples, the political process had taken significant strides toward recognizing gay civil rights by the time the court ruled. Recall that seven state supreme courts in all have issued a ruling favorable to same-sex couples.²¹¹ When six of these state supreme courts—all but Hawaii's—ruled, their states had *already* enacted at least three kinds of statewide legislation—an antidiscrimination law in employment and/or

205. See FRIEDMAN, *supra* note 203, at 358–60.

206. For an account that traces in careful detail the relative positions of courts and legislatures in states with judicial rulings on same-sex marriage, see Scott Barclay, *In Search of Judicial Activism in the Same-Sex Marriage Cases: Sorting the Evidence from Courts, Legislatures, Initiatives and Amendments*, 8 PERSP. ON POL. 111 (2010).

207. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

208. See *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993), *appeal after remand sub nom.*, *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), and *order aff'd*, 950 P.2d 1234 (Haw. 1997).

209. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

210. For an overview, see Schacter, *supra* note 25. For an advocate's perspective on how the accretion of favorable law shapes litigation decisions, see Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005).

211. See *supra* Section I.B.3.

housing that extended to sexual orientation;²¹² a hate crime law that extended to sexual orientation;²¹³ and a law regulating bullying, harassment, or discrimination against LGBT youth in schools.²¹⁴ And when the Hawaii Supreme Court ruled, that state had already enacted statewide antidiscrimination legislation and promulgated an ethical code regarding anti-gay bullying/harassment in schools.²¹⁵ In addition, some of these states had already extended some adoption rights for same-sex couples, either statewide or in some jurisdictions within the state, and all seven have extended some adoption rights today.²¹⁶ None of these state courts, in other words, was situated in a social or legal context of special hostility to gay rights.²¹⁷

There are, of course, many states that can be fairly characterized as broadly hostile to gay rights. Take Mississippi and Alabama as examples. These are states with plenty of statewide legislation restricting LGBT rights and no sexual orientation–based nondiscrimination legislation.²¹⁸ These are states with a political process deeply inhospitable to any idea that LGBT equality claims might legitimately trump traditional cultural values. Yet, contrary to the assumption of process theory, it is strikingly implausible to think that judges in these states can or will stand apart from prevailing public opinion and take action to compensate for anti-gay bias decades before the political process shows movement on marriage or other issues of concern to LGBT citizens of the state. Such a prospect, indeed, depends in the first instance on the improbable notion that courts in these states would

212. See CAL. CIV. CODE § 51 (West 2007); CAL. GOV'T CODE § 12920 (West 2005); CONN. GEN. STAT. §§ 46a-81c to -81m (2007); IOWA CODE § 216.6 (2009); MASS. ANN. LAWS ch. 151B, §§ 3–4 (LexisNexis 2008); N.J. STAT. ANN. § 10:2-1 (West 2002); VT. STAT. ANN. tit. 9, § 4503 (2006).

213. See CAL. PENAL CODE § 422.55 (West 2010); CONN. GEN. STAT. § 53a-181j (2007); IOWA CODE §§ 729A.1–2 (2009); MASS. ANN. LAWS ch. 265, § 39 (LexisNexis 2010); N.J. STAT. ANN. § 2C:16-1 (West 2005); VT. STAT. ANN. tit. 13, § 1455 (2009).

214. See CAL. EDUC. CODE § 220 (West 2002); CONN. GEN. STAT. § 10-15c(a) (2007); IOWA CODE § 280.12(2)(c) (2010); MASS. ANN. LAWS ch. 76, § 5 (LexisNexis 2003); N.J. STAT. ANN. §§ 18A:37-13 to -17 (West 1999 & Supp. 2010); VT. STAT. ANN. tit. 16, § 14 (2006).

215. See HAW. CODE R. § 8-19-2 (LexisNexis 2006) (defining “harassment” as “[m]aking verbal or non-verbal expressions that causes others to feel uncomfortable, pressured, threatened, or in danger because of . . . gender identity and expression . . . or sexual orientation”).

216. See CAL. FAM. CODE § 9000(b) (West 2004); CONN. GEN. STAT. § 45a-726a (2007); HAW. REV. STAT. ANN. § 578-1 (LexisNexis 2010); IOWA CODE § 600.4 (2009); MASS. ANN. LAWS ch. 210, § 1 (LexisNexis 2003); N.J. STAT. ANN. § 9:3-43 (West 2002); VT. STAT. ANN. tit. 15A, § 1-102 (2002).

217. Recent events in Iowa suggest that the adoption of gay rights measures in a state does not necessarily equate to acceptance of same-sex marriage. In November 2010, the three Iowa Supreme Court justices who faced a retention election were ousted by voters because of their votes in 2009 in favor of marriage equality. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

218. See *State Laws*, HUM. RTS. CAMPAIGN, http://www.hrc.org/laws_and_elections/state.asp (last visited Feb. 21, 2011) (noting that Mississippi and Alabama have no such protective legislation); *State Nondiscrimination Laws in the U.S. Map*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf (last updated July 1, 2009) (indicating those states without sexual orientation–based protective legislation).

characterize as anti-gay bias the resistance of legislators and citizens to gay equality claims.²¹⁹

The courts that moved on same-sex marriage were, in short, located in states that had already made significant strides in some areas of LGBT rights.²²⁰ This was not, of course, mere coincidence. These states were chosen, strategically, by litigators seeking a favorable forum.²²¹ But contrasting Massachusetts with Mississippi does underscore the problems with any categorical notion that courts, as institutions, can and do stand meaningfully apart from their social circumstances.

It is worth noting that, in other contexts, courts are also unlikely to be first movers in acting against particular kinds of discrimination. When the Supreme Court heightened scrutiny based on gender in 1976, for example, numerous federal statutes already protected women against discrimination.²²² Or, consider the case of disability. In 1985, the *Cleburne* case accorded rational basis review—albeit in muscular form—to a classification based on mental disability,²²³ and the Court has not heightened scrutiny for disability-based claims since then. Yet Congress and many states have accorded a far greater degree of *statutory* protection to people with disabilities. In fact, by 1985, federal legislation had already banned recipients of federal funds from discriminating based on disability for several years.²²⁴ A few years after *Cleburne*, in 1990, Congress passed the more broadly applicable Americans with Disabilities Act of 1990 (“ADA”).²²⁵ Indeed, when the ADA was passed, it contained an express finding in its preamble stating—with no apparent irony—that people with disabilities are “in a position of political powerlessness.”²²⁶ This is a pointed reminder that

219. On the question of judges sharing broader social biases in the gay rights arena, see Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 986–88 (2011).

220. This is consistent with Scott Barclay’s analysis disputing the idea that state courts ruling in favor of same-sex marriage have been activist, and finding that courts in this area have very rarely acted “in direct contradiction of [recently expressed legislative] preferences.” Barclay, *supra* note 206, at 122–23.

221. See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (chronicling the strategic choices of lawyers in the same-sex marriage movement).

222. Patsy Takemoto Mink Equal Opportunity in Education Act, 20 U.S.C. § 1681(a) (2006); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 to -3 (2006).

223. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); see *supra* note 66 and accompanying text.

224. See Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794 (2006).

225. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

226. In the Act, Congress explained as follows:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

courts have no necessary monopoly on the ability to identify and to try to rectify persistent bias that can limit and burden historically disadvantaged groups.

This observation, moreover, takes us back to the preclusion thesis discussed earlier, and suggests a different way to understand the enactment of antidiscrimination legislation in the context of process theory. It suggests that, in fact, enactment of prior legislation protecting groups may be a signal to courts that the group is a plausible candidate for protection. Organizing and political success, in other words, can do the normative work of legitimating a group for the purposes of process theory by signaling that the group is entitled to fair treatment in the political process.²²⁷ To go back to a point made years ago by Laurence Tribe in contesting Ely's claim that process theory could be value-neutral, the court deciding whether to heighten scrutiny needs a way to know whether a minority group should be protected or should be treated like, say, burglars, who do not pose a credible case for judicial protection because the social opprobrium that is directed toward them is perceived to remain legitimate.²²⁸ Legislative passage of antidiscrimination legislation, as a descriptive matter, might be seen as providing that sort of cue to courts.

Notice, however, the catch-22 that is at work here. On the one hand, a group seeking judicial protection under process theory must demonstrate its legitimacy for judicial protection; it must show, as Tribe suggested, that it is not like the group "burglars." Having secured the passage of antidiscrimination legislation may be seen as evidence of that approval. On the other hand, however, the enactment of antidiscrimination legislation may trigger assertion of the preclusion thesis and be offered up as proof that, far from being analogous to burglars, the group is a potent political interest group. Either way, the arrow points to disqualification from enhanced judicial solicitude.

All of this suggests that it is problematic to regard courts and legislatures as occupying sharply separated spheres. There are also other aspects of the marriage debate that suggest another problem with the separate spheres idea: the idea obscures the fact that courts and legislatures stand in an interactive relation to one another. Since its inception in 1993, in fact, the same-sex marriage debate has featured an ongoing set of actions and reactions among courts, elected officials, and voters.²²⁹ Once courts took early steps in favor of same-sex marriage, severe and pervasive backlash followed in the form of statutory and constitutional measures against marriage equality

Id. § 2(a)(7), 104 Stat. at 329 (amended 2008).

227. On the need for social ratification before the extension of heightened scrutiny, see Eskridge, Jr., *Constitutional Law in the Twentieth Century*, *supra* note 194, at 2064–66; Eskridge, Jr., *Public Law*, *supra* note 195, at 513; Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1314 (2004). Eskridge's analysis aptly dubs this dynamic the "paradox of the tiers." See Eskridge, Jr., *Constitutional Law in the Twentieth Century*, *supra* note 194, at 2267.

228. Tribe, *supra* note 7, at 1075 (noting that burglars are denied heightened constitutional scrutiny because burglary is judged to merit social disapproval).

229. See Barclay, *supra* note 206; Schacter, *supra* note 25.

passed in more than forty states after 1993,²³⁰ enactment of DOMA by Congress in 1996,²³¹ a proposed federal constitutional marriage amendment endorsed by a sitting president in 2004,²³² and more recently the ouster of three Iowa justices who voted in favor of marriage equality.²³³ But alongside that backlash also came substantial progress. Five states and the District of Columbia now recognize marriage equality;²³⁴ two states recognize same-sex marriages performed elsewhere, even though they do not themselves allow same-sex residents to marry;²³⁵ and ten states offer some form of civil union/domestic partnership benefits, some of which are comprehensive and others of which are quite narrow.²³⁶ The picture is, thus, complex, with multidirectional causal arrows making it difficult to tell any simple story. The significant point to see for our purposes is that courts and the political process are influenced by, and responsive to, one another. This is a very different idea than the one embraced by classic process theory, in which the institutional choice is framed in either/or terms, and courts are seen as standing apart from the political process and as immune from the forces that shape it.

III. IMPLICATIONS: MAPPING A ROAD TO FOOTNOTE 4.1

A. Doctrinal Reform

Where does this all lead? One response might be to recalibrate the doctrine to try to address the problems identified here. First, and most modestly,

230. See Schacter, *supra* note 25, at 1155 (citing *Anti-Gay Marriage Measures in the U.S. Map*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_05_09.pdf (last updated May 6, 2009)).

231. Defense of Marriage Act, 28 U.S.C. § 1738C (2006).

232. See Schacter, *supra* note 25, at 1188 ("President George W. Bush endorsed a federal constitutional amendment to outlaw same-sex marriage, and the issue became a salient one in the 2004 presidential election." (citing President's Radio Address, 2 PUB. PAPERS 1286 (July 10, 2004))).

233. See Sulzberger, *supra* note 217.

234. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). New Hampshire and the District of Columbia went on to legislate in favor of full marriage equality. See Schacter, *supra* note 25, at 1189 n.225.

235. The states are New York and Maryland. See Schacter, *supra* note 25, at 1189-90 & n.225. New York began to recognize same-sex marriages performed in other states after an executive order issued by then-Governor David Paterson on May 14, 2008. See Jeremy Peters, *New York to Back Same-Sex Unions Performed Elsewhere*, N.Y. TIMES, May 29, 2008, at A1. Maryland began recognizing same-sex marriages performed elsewhere after state Attorney General Douglas Gansler issued an opinion on February 24, 2010. See John Wagner, *Gansler: Effective Immediately Md. Recognizes Same-Sex Marriages Performed Elsewhere*, WASH. POST, Feb. 24, 2010, http://voices.washingtonpost.com/annapolis/2010/02/gansler_marylands_high_court_1.html; Schacter, *supra* note 25, at 1189-90 & n.225.

236. New Jersey, California, Oregon, Washington, and Nevada (broad laws); Colorado, Maryland, Wisconsin, Maine, and Hawaii (narrow laws). *Id.* Illinois will soon be added to the list of states with broad laws; its comprehensive civil unions bill, passed in December 2010, is scheduled to take effect in June 2011. *Understanding Civil Unions in Illinois*, EQUALITY ILL., 1, http://www.equalityillinois.org/cmsdocuments/Civil_Unions_FAQs.pdf (last visited Feb. 21, 2011).

we might revisit the criteria used by courts to decide whether heightened scrutiny is appropriate. Recall that the Supreme Court's current case law generally asks groups seeking heightened scrutiny to show past discrimination, political powerlessness, common use of a stereotype or trait unrelated to merit, and, perhaps, immutability. Spurred by the complexities we have seen, we might refashion these criteria. Looking closely at LGBT political power has suggested that it is both problematic and unwise to try to disentangle political power from past discrimination because the two are so thoroughly entwined.²³⁷ Thus, the powerlessness criterion might be better conceptualized as something to be assessed, explicitly, as an aspect of past discrimination—that is, as a continuing manifestation of past discrimination that has impaired the group in the political process, as it has impaired the group in other domains. Seeing the political process question as something related to past discrimination, as opposed to something independent of it, could allow a court to account for when the political “power” a disadvantaged group might have displayed has, crucially, arisen and developed in the face of pervasive past discrimination.

There are two other plausible doctrinal reforms suggested by the same-sex marriage debate, but they would—paradoxically—cut in opposite directions. One would be to extend the tiers of scrutiny, and the other would be to eliminate them. The case for extending the tiers of scrutiny would proceed from the observations made earlier about the crudity of political process analysis and the associated need to disaggregate and particularize the concept of political power. Rather than asking, in a generalized fashion, about a group's power across the political process, the inquiry might instead consider whether there are any specific democratic venues in which the political process poses particular fairness challenges. Heightened scrutiny could then be triggered in any such problematic area. The use of direct democracy against minority interests might reasonably be subject to such skeptical review by courts. For reasons discussed earlier, the persistent practice of countering LGBT rights gains with popular initiatives raises distinctive and substantial questions of democratic fairness, given the informational dynamics that shape ballot campaigns and the representational safeguards that the process lacks.²³⁸ An approach attuned to the distinctive risks posed by direct democracy would offer a more fine-grained approach to tiered scrutiny by framing not an undifferentiated inquiry about groups, but a more targeted analysis about how groups have fared in particular political venues or institutions.

On the other hand, one might well think the sensible thing to do in light of the problems we have seen with process theory is not to extend, but to eliminate, levels of scrutiny. As I hope I have shown, the marriage debate casts

237. See *supra* Section II.A.

238. See *supra* notes 199–200 and accompanying text. On the informational dynamics in the Prop. 8 campaign, see Ruth Butterfield Isaacson, Comment, “Teachable Moments”: *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CALIF. L. REV. 121, 148–52 (2010) (describing in detail the advertising campaign in support of Prop. 8 and arguing that it sent a “powerful and fearful message” to voters).

serious doubt on the very project of calibrating judicial review according to how fair a political shake a group is able to receive. And, as we have seen, some of the same line-drawing questions and issues of scope and application that plague standard process theory are likely to recur in a more contextualized inquiry focused on direct democracy.²³⁹ Moreover, the marriage debate casts a more general shadow of skepticism over the tiers of scrutiny themselves.²⁴⁰ The extent to which the levels of review are imprecise and elastic is nicely illustrated by the state supreme court rulings on same-sex marriage. Recall that the courts ruling in favor of marriage equality have done so under every standard of review, suggesting that the formal tiers may be of more rhetorical than substantive significance. *Romer* and *Lawrence*, both decided under a form of rational basis review, point in the same direction. All of this suggests that standard political process analysis, tied as it is to levels of scrutiny, is something of a distracting sideshow—one that might be avoided by deploying a singular standard that takes into account, as appropriate, a range of factors, including objections to the underlying political process that generated a challenged law.

The road to rechanneling process theory might begin with Justice O'Connor's concurrence in *Lawrence*. Recall that O'Connor used a muted form of process theory in her argument that the Texas sodomy law ought to be struck down under the protean version of contemporary rational basis review that she deployed in her equal protection analysis.²⁴¹ The gist of her argument was to connect the fact that Texas only banned conduct involving same-sex partners with the conclusion that the sodomy law reflected a "bare . . . desire to harm a politically unpopular group."²⁴² Whereas the ordinary democratic process can usually be counted on to correct flawed public policy, she suggested, that assumption is inoperative where, as in Texas, the majority has exempted itself from the restriction imposed on an unpopular group.²⁴³ Under O'Connor's analysis, the idea that the majority lacked any legitimate reason to ban only the minority's sexual conduct was a substantive conclusion that was informed by ideas about the circumstances in which the political process is most likely to deliver a biased result. She thus considered the political process as it bore on the substantive question of rationality, not for its own sake or as it related to the analytically discrete question of standard of review. True, her analysis maps on to a more demanding version of rationality review. Her approach might thus be read to ask whether "heightened rational basis" is the appropriate level of review to

239. See *supra* notes 199–200 and accompanying text.

240. For an incisive critique of the tiers of scrutiny and a suggested revamping, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

241. See *supra* notes 90–95.

242. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (quoting U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

243. *Id.* at 584–85 ("I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.").

apply in light of the political process malfunctions she finds. But understood in that way, O'Connor's inquiry simply reproduces a version of tiered scrutiny within the framework of rational basis. That is not, I believe, the best reading of O'Connor's concurrence, nor is it the only one. The better reading is one that connects evidence about a group's experience in the political process directly to the question of substantive rationality.

Indeed, an approach roughly of this sort might be distilled from Judge Walker's decision on Prop. 8 and, more specifically, in how it used the evidence from the political scientists in that case. Recall that Walker carefully parsed the testimony relevant to the criteria for heightened scrutiny and asserted that he thought those criteria had been met, yet ultimately dispensed with the application of heightened scrutiny because he concluded that even rationality review could not be satisfied.²⁴⁴ In assessing whether a rational basis could support Prop. 8, however, Walker cited testimony relating to the political process. He cited it, though, as it bore directly on rationality, not as it bore on level of scrutiny. Walker made four findings of fact that drew on the testimony of Segura and/or Miller, and each offered support for the opinion's core finding that no rational justification supported Prop. 8. The opinion cited testimony that was originally elicited on LGBT political power in support of the findings that "[p]ublic and private discrimination against gays and lesbians occurs in California and in the United States";²⁴⁵ that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians";²⁴⁶ that "[s]tereotypes and misinformation have resulted in social and legal disadvantages for gays and lesbians";²⁴⁷ and that "[t]he Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian."²⁴⁸

This cross-contextual use of evidence underscores that many of the matters framed by process theory are centrally relevant to the equal protection question raised by the marriage debate, but not in the form that process theory conventionally dictates. The core equality question in the case is whether there is any legitimate reason to exclude same-sex couples from a

244. See *supra* Section I.B.4.c.

245. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981–82 (N.D. Cal.) (citing, in finding of fact number 75, testimony by Segura on anti-gay violence and Miller on anti-gay bias, stereotypes, and job discrimination), *stay denied*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), and *certifying question to the Supreme Court of California*, 628 F.3d 1191 (9th Cir. 2011).

246. *Id.* at 985–86 (citing, in finding of fact number 77, testimony by Segura on the powerful effect on political debates of the "teaching" by organized religious entities "that gays are morally inferior").

247. *Id.* at 986–88 (citing, in finding of fact number 78, testimony by Segura and Miller on the frequent passage of anti-gay rights initiatives, by Miller on the existence of anti-gay prejudice among some Prop. 8 voters, and by Segura on the low scores earned by gays and lesbians on feeling thermometers used to measure public opinion toward social groups).

248. *Id.* at 988–90 (citing, in finding of fact number 79, testimony by Miller on the fact that some Prop. 8 voters were motivated by prejudice and by Segura that one "enduring . . . trope[] of anti-gay argumentation has been that gays are a threat to children" (first omission in original)).

public institution otherwise open to all.²⁴⁹ The court is at pains to identify this question in its opinion as the one on which the case hinges.²⁵⁰ Evidence about the experience of LGBT people in the political process bears on this question, writ small because it elucidates the particular environment in which Prop. 8 was passed, and writ large because it elucidates the more general dynamics that shape and structure collective judgments about sexual orientation.

More specifically, the experience of LGBT people in the political process sheds light on the core issue of public justification because persistent anti-gay bias is reflected both *by* and *in* that process. It is reflected *by* the political process to the extent that the group has repeatedly had to try to use the political process to repeal laws that codify governmental discrimination (not only marriage laws, but also bans on military service and parenting rights, for example) and to seek new laws to address persistent social problems, such as hate crimes and discrimination in employment, housing, and various other arenas. Continuing bias is reflected *in* the process by evidence of how the group has been treated. Here is where the frequent, selective use of ballot measures to defeat pro-gay measures or enact anti-gay ones is most plainly relevant—not because it supports heightening scrutiny, but because it reflects persistent public hostility on gay issues. Similarly relevant are the low readings achieved by gay people on the “feeling thermometer[s]” that political scientists employ to measure public affect toward various groups.²⁵¹ The low thermometer readings in and of themselves provide evidence of the kind of public animus emphasized by the Supreme Court in *Romer*. Beyond that general relevance, there is a significant correlation between negative attitudes on same-sex marriage and low thermometer scores given to gay people. This correlation was observed by Nathaniel Persily, Patrick Egan, and Kevin Wallsten in their analysis of public opinion on same-sex marriage.²⁵² This evidence surely does not mean that every voter opposed to same-sex marriage bears animosity toward gay people, for there are undoubtedly different reasons in play for different voters. Indeed, one of the difficult challenges in case like this one is how to impute a collective intent or purpose to the large electorate.²⁵³ The correlation observed by Persily,

249. Because the state itself is not defending Prop. 8, ballot sponsors, acting as intervenors, have asserted interests on behalf of the state. The standing of intervenors to appeal the district court's decision is being contested in the Ninth Circuit and will be resolved by that court with assistance from the California Supreme Court, the views of which the federal appellate court has sought. See Jesse McKinley, *California: Judges Ask for Clarity On Same-Sex Marriage Measure*, N.Y. TIMES, Jan. 5, 2011, at A13, available at http://www.nytimes.com/2011/01/05/us/05brfs-JUDGESASKFOR_BRF.html?scp=1&sq=9th%20circuit%20standing&st=cse. On the problems with allowing intervenors to speak on behalf of the state in defending Prop. 8, see Pamela S. Karlan, *Old Reasons, New Reasons, No Reasons* 13–16 (draft on file with author).

250. See *Perry*, 704 F. Supp. 2d at 973–91, 995–1003.

251. See *supra* notes 130–132 and accompanying text.

252. See Patrick J. Egan, Nathaniel Persily & Kevin Wallsten, *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234, app. B at 260 (Nathaniel Persily et al. eds., 2008).

253. See generally Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

Egan, and Wallsten does, however, suggest a link between *Romer*-style animus and attitudes on the marriage question. That inference, in turn, comes directly into play on rationality review and casts significant doubt on the reasons offered to support the ban.

In sum, whether arguments like these do or do not carry the day for those challenging Prop. 8, there are good reasons to reframe the inquiry away from the satellite question of political powerlessness as it relates to the level of review, and toward the core equality questions at stake.

B. *Equality and Democracy Reconsidered*

Doctrinal reforms of the sort just canvassed are worth considering, but the problems with process theory go beyond the domain of doctrine and strike at the theory's central conceptual aspiration—to reconcile controversial judicial decisions with the dictates of democracy. As we have seen, process theory never really undertakes to define and elaborate democracy, or to explain with any particularity why and when entrenched disadvantage is inconsistent with democracy. In terms of its central premise, it should not be a surprise that process theory sidesteps thorny definitional questions. Recall, for example, Ely's animating claim that his rules of representation reinforcement allow courts to avoid controversial normative choices. It would be starkly at odds with that claim to enlist judges in identifying, articulating, and applying specific criteria about precisely what democracy requires. Yet, in drawing key lines and selecting from among the many norms that inspire different understandings and theories of democracy (pluralist vs. deliberative, participatory vs. elite, direct vs. representative, etc.), contestable substantive choices cannot be avoided.²⁵⁴

The failure to develop a more specific theory of democracy is no small omission. As we have seen, it is an important part of what gives process theory a certain emptiness at its core.²⁵⁵ While process theory's signature flight from substance is unsuccessful for all the reasons we have seen, there is, at a high level of abstraction, a principle of democratic equality that can be salvaged from the theory—though, concededly, this salvaged enterprise has somewhat the feel of killing something to save it. The idea of democratic equality I have in mind is unabashedly substantive, not procedural. It is less about institutions (courts vs. legislatures) than it is about the culture and fabric of democracy. It implicates the broader conditions of democratic citizenship, not the formal political process alone. And it is well illustrated by the same-sex marriage debate.

Several of the findings in the *Perry* decision mark the path to a different understanding of democratic equality. In addition to finding the state's

254. For a discussion of these choices and the particular problems they pose for Ely, see Jane S. Schacter, *Ely and the Idea of Democracy*, 57 *STAN. L. REV.* 737 (2004).

255. It also leaves process theory vulnerable to critiques like that offered by Bruce Ackerman, who pointed out that, for various reasons, diffuse and anonymous minorities may actually have a harder time in the political process than do discrete and insular minorities. See Ackerman, *supra* note 9.

justifications inextricably intertwined with bias and stereotypes, and thus lacking a rational basis, the opinion launches a second—though plainly related—line of analysis. Several findings fault Prop. 8 for unconstitutionally “enshrin[ing] in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.”²⁵⁶ The court also seized, in particular, on the expressive implications of the state enacting Prop. 8 while relegating same-sex couples to what the court saw as the less socially valued institution of domestic partnership. Along these lines, the court made findings, for example, that “Proposition 8 places the force of law behind stigmas against gays and lesbians”;²⁵⁷ that “Proposition 8 singles out gays and lesbians and legitimates their unequal treatment”;²⁵⁸ that “Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples”;²⁵⁹ and that “[t]he availability of domestic partnership does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships.”²⁶⁰

The significance of these findings is that they present Prop. 8 as undermining democracy by unsubtly and unmistakably codifying a social hierarchy. The findings cast Prop. 8 as inscribing in the state constitution a principle of stratification that disadvantages a small numerical minority in relation to a significant public institution, disparages that minority in so doing, and cuts off the group’s means of ordinary political recourse. This principle, in turn, stands at odds with what ought to be central to democratic theory—the basic ideal of equal citizenship.²⁶¹

One might argue that, because California grants almost all the rights of marriage to same-sex couples through domestic partnership, there is, in fact, no problematic hierarchy of citizens. The question of how to understand and give meaning to the state’s comprehensive partnership protections is one

256. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002–03 (N.D. Cal.) (“Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. . . . [T]his belief is not a proper basis on which to legislate.” (citations omitted)), *stay denied*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), and *certifying question to the Supreme Court of California*, 628 F.3d 1191 (9th Cir. 2011) *Perry* mentions ballot proponents’ desire to “advance the belief that opposite-sex couples are morally superior to same-sex couples.” *Id.*

257. *Id.* at 973.

258. *Id.* at 979.

259. *Id.* at 974.

260. *Id.* at 971.

261. On sexual orientation and hierarchy, see *Romer v. Evans*, 517 U.S. 620, 623 (1996) (“One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))). On sexual orientation inequality and democracy, see Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733 (2004); Jane S. Schacter, *Romer v. Evans and Democracy’s Domain*, 50 VAND. L. REV. 361 (1997). On the ways in which hierarchies undermine equal citizenship, see KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1991); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

that I regard as quite complex. It implicates difficult questions about social meaning and the complex dynamics that shape it.²⁶² It is possible to imagine, in the manner of a thought experiment, a world in which the creation of a distinctive institution for same-sex relationships did not necessarily connote and communicate a stigmatizing meaning.²⁶³ As I have suggested elsewhere, had same-sex couples and the larger LGBT movement *chosen* to pursue and shape an alternative institution in an affirmative embrace of difference, the constitutional issues might have unfolded differently.²⁶⁴ But that hypothetical world is not the world in which we live. In the real world, same-sex couples have, in great numbers, sought to marry and often encountered harsh and demeaning denial.

It also bears noting that some nineteen of the thirty states with anti-marriage constitutional amendments²⁶⁵ much more pervasively disadvantage same-sex couples than do states, like California, that recognize civil unions or broad domestic partnership rights. These nineteen states more broadly deny legal protections to same-sex couples. In such states, the constitutional codification of inequality is subordinating in both a functional *and* an expressive sense. It might thus seem paradoxical and perverse to focus on California's choice to pursue functional but not expressive equality. While California's choice to protect same-sex couples has undeniable virtues, the state's extension of robust domestic partnership rights is nevertheless a two-edged sword in ways illustrated by the *Perry* litigation. If California is willing to grant virtually all the substantive rights and responsibilities of marriage, the question remains what interest could plausibly justify withholding the more valued name from only one group that wishes to use it—other than a communal desire to mark, precisely, the superiority of one set of unions over the other. In other words, once the functional justifications are taken out of play by the grant of domestic partnership rights, the justification for differentiating the two institutions, and for denying LGBT people the choice of which institution to enter, must lie elsewhere. And there is no compelling competition for the codification-of-inferiority hypothesis to explain it.

On this view, then, it is particular relations of codified hierarchy that undermine democratic citizenship and equality. Constitutional rejection of

262. See Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 394–98 (2009) (probing the extent to which “social groups, especially historically subordinated ones, can shape the social meaning of their own choices and struggles”). See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

263. See Schacter, *supra* note 262 (arguing that marriage has become a showdown question on gay equality for both proponents and opponents of gay rights in ways that further the idea of domestic partnerships as second class, but exploring as counterfactual whether debate over domestic partnerships might have unfolded differently had gay community expressed more affirmative interest in shaping a separate institution rather than in gaining access to marriage).

264. See *id.* at 396–97.

265. Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. See *State Laws Prohibiting Recognition of Same-Sex Relationships Map*, *supra* note 36.

such relations promotes a set of democratic values and, in this sense, connects to the normative ambitions of process theory. The connection exists, however, only at a high level of abstraction. Unlike process theory, this approach to democracy and disadvantage makes no claim to be a value-free species of proceduralism. It embraces the need to make contested substantive choices in giving meaning to the constitutional idea of equal protection. But it does not—and cannot—make strong claims of determinacy in its application. There is no singular answer to the question of what kind of democracy the Constitution creates or demands. But this approach does productively rechannel the debate in the vocabulary of democracy. Underscoring the powerful legitimating effect of the idea of democracy, the approach outlined here rejects the simple normative equation of majoritarianism with democracy and presses those engaged in debates about same-sex marriage—and beyond—to consider the distinctively *democratic* dimensions of core constitutional values, such as equality, liberty, and citizenship.²⁶⁶

Similarly, this approach is not principally *institutional* in nature. That is, the principle of democratic equality suggested here is not one limited to identifying the circumstances in which courts can legitimately be aggressive. As we have seen, courts often do not act alone, and are not necessarily more likely, or better able, to act against relations of antidemocratic hierarchy than are legislatures. Elected officials, too, can pursue marriage equality in the name of equal citizenship, and legislative appeals have frequently been framed in these terms.²⁶⁷ Thus, rather than being an idea designed only to divide labor between courts and political bodies, this approach reflects an unabashedly substantive principle about the importance of a multi-institutional commitment to equal democratic citizenship, broadly understood. Courts have a role to play, and the Prop. 8 case illustrates what that role might look like. But other institutions also have, and must have, a role.

One last point grows out of this emphasis on multiple institutions, and it bears emphasis. Laying out the ways in which Prop. 8 undermines democratic equality in ways inconsistent with the Equal Protection Clause does not resolve the question whether it was a wise course to litigate the issue in fed-

266. For a collection of sources setting out some aspects of the general approach in greater detail, see *supra* note 261.

267. See, e.g., John M. Hubbell, *Gay marriage bill fails by 4 votes in state Assembly*, S.F. CHRON., June 3, 2005, at A-1 (reporting that the legislative sponsor of a failed marriage-equality legislation said that if “this [legislature] can’t pass [the bill], it should clarify its position and say we do believe that gay and lesbian couples are second-class citizens”); Norma Love, *N.H. becomes latest state to legalize gay marriage*, NEWSDAY, June 4, 2009, at A35 (reporting that a prominent advocate of same-sex marriage characterizes passage of marriage equality legislation as “about being recognized as whole people and whole citizens”); Tom Suozzi, Op-Ed., *Why I Now Support Gay Marriage*, N.Y. TIMES, June 13, 2009, at A19 (announcing his support for marriage equality legislation in New York, saying that same-sex couples are “entitled to clear recognition of their equal status as citizens of a country that is founded on the principle that we are all inherently worthy”).

eral court in 2010.²⁶⁸ Tactical questions of timing and strategy remain, and the issue of who decides those questions is complex.²⁶⁹ Litigating a politically volatile issue like marriage equality is fraught with risks. Consistent with everything I have suggested about the interactive and dynamic relations between courts and the political process, a loss at the Supreme Court might well set back political efforts that have long been underway and that are, presumably, one force responsible for producing dramatic shifts in public opinion on same-sex marriage.²⁷⁰ The idea of an energetic multi-institutional effort against relations of hierarchy, carried on under the banner of the Constitution's commitment to democratic equality, means at least taking seriously the possibility that working through political institutions might sometimes be preferable, even if frustratingly slow. That idea might be rejected by process theory because of its court-venerating tendencies, but it merits consideration under a view of democratic equality that is committed to a meaningful institutional pluralism and that focuses on identifying conditions of hierarchy and animus that are inconsistent with the idea of democratic equality. On this view, in other words, if there is to be a new canonical footnote placing democratic equality at the center of equal protection analysis, it ought to identify substantive conditions that are inconsistent with equal citizenship, and it ought to inform not only judicial opinions but legislative deliberations and public debates as well.

CONCLUSION

Political process theory has long been both central to constitutional law, and controversial within it. The same-sex marriage debate has brought the principle front and center, as state—and now federal—courts have struggled to measure and define the political power of the LGBT community. The complexities of that enterprise offer a rich, contemporary opportunity to reassess the postulates of process theory. That reappraisal suggests that the theory is unsustainable in its conventional form, but can and should be an important point of departure for developing a more nuanced, institutionally realistic, and institutionally pluralistic principle of democratic equality to guide constitutional norms.

268. Controversy surrounded the decision of the high-profile legal team of Theodore Olson and David Boies to file a federal court challenge after gay rights groups had declined to file. See Jesse McKinley, *Bush v. Gore Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1.

269. On these complexities, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

270. See Andrew Gelman et al., *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3.

