

THE SIREN SONG OF STRICT SCRUTINY

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The past few years have seen a trickle of pro-gay rights judicial decisions turn into a flood. Yet gay rights advocates have been perplexed by one doctrinal oddity in the Court's decision-making: even as it has delivered a consistent stream of favorable decisions dating from the 1990s, it has displayed no interest in declaring sexual orientation to be a "suspect classification." This determination, which would require that sexual orientation classifications satisfy strict scrutiny, has long been high on the objective list for the LGBT movement—representing an official determination that sexual minorities are a politically marginalized group that faces systematic, unjustified discrimination. With the Supreme Court poised to strike down gay marriage bans in Obergefell v. Hodges, it now seems clear that the Court will not elevate sexual orientation to the ranks of the suspect. This, for many, has been a bitter pill to swallow.

In this contribution to the "After Obergefell" symposium, I argue otherwise. Suspect status is effective at attacking explicit classificatory bars (such as the ban on gay marriage). But it takes as its price equal skepticism towards identity-conscious remedies (as civil rights campaigners have discovered in the affirmative action context). Making sexual orientation "suspect" would similarly burden gay rights campaigners in the legislature, whether their goals be affirmative action programs or (more likely) forms of identity-conscious protections for LGBT inmates facing prison violence. By striking down anti-gay classifications on rational basis or due process grounds, the Court has given the LGBT movement the advantages of significant, serious judicial protection without the drawbacks of modern strict scrutiny doctrine.

It is hard to remember that, until relatively recently, the United States judicial system was not a friendly forum for presenting LGBT rights claims. The Court affirmed that homosexual sodomy could be criminalized in *Bowers v. Hardwick*,¹ turning aside suggestions that sexual autonomy rights should be seen as fundamental.² The Court's single-sentence rejection of a challenge to Minnesota's gay marriage ban in 1972 wreaked havoc on litigation strategy for years to come because it was technically binding precedent constraining lower courts.³ Up through the 1980s, the judiciary primarily interacted with the gay and lesbian community by casually, even cavalierly, upholding democratically-enacted discriminatory policies.

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

² See, e.g., *id.* at 199 (Blackmun, J., dissenting); Whisenhunt v. Spradlin, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting from the denial of certiorari).

³ Baker v. Nelson, 409 U.S. 810, 810 (1972) (dismissing appeal for lack of "a substantial federal question"). See also DeBoer v. Snyder, 772 F.3d 388, 400–02 (6th Cir. 2014) (articulating the continued validity of *Baker* as binding precedent).

Advocates seeking to arrest this trend seized on the argument that sexual orientation ought to join the ranks of “suspect classifications.”⁴ Laws which target such classifications are accorded heightened judicial scrutiny⁵ compared to what is normally perceived as a “toothless” rational basis test.⁶ Even defendants in the gay marriage challenges, for example, conceded that such bans could not survive heightened scrutiny review.⁷ Becoming a suspect classification was the “holy grail” of equal protection analysis,⁸ and gay rights proponents were confident that “it is clearly in the interest of gay people to be deemed a suspect class.”⁹

Starting in the mid-1990s, the fortunes of gay rights litigants began to turn. Yet the Court stubbornly refused to declare sexual orientation suspect. *Romer v. Evans* invalidated a discriminatory Colorado constitutional amendment under a muscular formulation of rational basis.¹⁰ *Lawrence v. Texas* reversed *Bowers* using a hybrid equal protection/fundamental rights analysis, but likewise did not alter sexual orientation’s equal protection standing.¹¹ The same can be said for *United States v. Windsor*.¹² With *Obergefell v. Hodges*¹³ having finally resolved the gay marriage question—again with scarcely a word about tiered scrutiny review—it has become increasingly clear that the Court neither sees the need nor feels the inclination to move sexual orientation into the suspect ranks.

For gay rights advocates who argued passionately that anti-gay prejudice and discrimination is a systematic presence in American society, this may be a bitter pill to swallow. However, I suggest otherwise. The contemporary

⁴ See, e.g., Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL’Y 385, 386 (2010) (arguing that proper appraisal of gay political power should render them a suspect group); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1753 n.2 (1996) (urging intermediate scrutiny for gays and lesbians); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297–1305 (1985) (arguing, pre-*Bowers*, that sexual orientation ought to be viewed as suspect) [hereinafter *Constitutional Status*].

⁵ There are two “tiers” of heightened scrutiny, “strict” and “intermediate.” Strict scrutiny, paradigmatically applied to racial classifications, requires that the classification be “narrowly tailored . . . [to] further compelling governmental interests.” *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995). “Intermediate scrutiny,” which primarily applies to gender, requires that the law be “substantially related” to attaining “important governmental objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁶ *Constitutional Status*, *supra* note 4, at 1298 (“[S]trict’ scrutiny has generally been fatal to legislation, while ‘minimal’ [rational basis] scrutiny has generally been toothless.”).

⁷ See David Schraub, *The Perils and Promise of the Holder Memo*, 2012 CARDOZO L. REV. DE NOVO 187, 190, n.14 (citing *Hernandez v. Robles*, 855 N.E.2d 1, 27 (N.Y. 2006) (Kaye, C.J., dissenting)) [hereinafter Schraub, *The Perils and Promise*].

⁸ David Schraub, *Unsuspecting*, 96 B.U. L. REV. (forthcoming 2016) [hereinafter Schraub, *Unsuspecting*].

⁹ *Constitutional Status*, *supra* note 4, at 1297.

¹⁰ 517 U.S. 620, 623 (1996).

¹¹ 539 U.S. 558 (2003).

¹² 133 S. Ct. 2675 (2013).

¹³ 135 S. Ct. 2584 (2015).

evolution of suspect classification doctrine has converted it into a decidedly mixed blessing for its supposed beneficiaries. Once overt discriminatory classifications (such as marriage bans) have been abolished, the suspect classification determination is most often used to challenge identity-conscious remedies for ongoing social discrimination. By failing to convince the Court that sexual orientation ought to be viewed as suspect, advocates may well have dodged a bullet.

I. WINNING RATIONALLY: THE GAY RIGHTS MOVEMENT SO FAR

While advocates have sought to characterize gays and lesbians as suspect classes since at least the mid-1980s, the path gay rights claims have taken through the judiciary has largely bypassed this possibility. Initially, this can be blamed on *Bowers*—courts observed that it would be curious if a classification defined by a criminally proscribable activity could nonetheless be entitled to heightened judicial review.¹⁴ But the resulting precedents were relied upon even after *Bowers* was overruled to maintain the status quo wherein discrimination based on sexual orientation received only rational basis review.¹⁵

The first significant Supreme Court victory for gay rights litigants came in the 1996 case of *Romer v. Evans*.¹⁶ *Romer* concerned a Colorado constitutional amendment forbidding any element of the Colorado government from enacting “any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”¹⁷ The Court did not declare that sexual orientation was a suspect

¹⁴ See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (arguing that because gays and lesbians are identified by their propensity to engage in behavior that can legally be criminalized, that identity cannot be the basis for heightened scrutiny); *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266 (6th Cir. 1995) (“Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.”); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (“It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”).

¹⁵ See, e.g., *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (relying on pre-*Lawrence* precedent to reaffirm that gays and lesbians do not constitute a suspect class). See also David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1303 (2013) [hereinafter Schraub, *Sticky Slopes*] (noting that the pre-*Lawrence* cases concluding that sexual orientation was not suspect, “have been given a new lease on life by lower court decisions that continue to accord them precedential authority at the precise moment when the doctrine seemed most vulnerable”).

¹⁶ 517 U.S. 620 (1996).

¹⁷ *Id.* at 624.

classification.¹⁸ Rather, applying rational basis review, the Court concluded that the Amendment lacked even a “rational relationship to legitimate state interests.”¹⁹ The Amendment swept so broad, and its effects were so “discontinuous” with the state’s proffered reasons, that the Court concluded that the Amendment’s adoption could only have been motivated by animus towards the targeted class.²⁰

Romer’s rationale was met with “puzzlement” by many legal professionals, who wondered why the Court had avoided the far more straightforward route of simply declaring sexual orientation suspect.²¹ “Real” or “normal” rational basis review acts to uphold even the most ridiculous statutes because one can always come up with an at least conceivable “rationale” legitimating the law.²² To be sure, *Romer* can be defended doctrinally as an example of an anti-“pariah principle” or as a form of “rational basis with bite.”²³ But such defenses are at the very least less direct, and serve to further fragment tiered-scrutiny review.²⁴ They also suffer from the fact that the Supreme Court has never admitted that there is such thing as “rational basis with bite.”

Lawrence offered the Supreme Court a chance to clarify the constitutional status of sexual orientation. It did not take it. Applying a confusing hybrid of equal protection and substantive due process analysis, the Court overturned *Bowers* and struck down state laws prohibiting sodomy (regardless of whether the laws were restricted to same-sex couples).²⁵ While *Lawrence* was even less clear than *Romer* regarding what standard of scrutiny it

¹⁸ *Id.* at 631. See also *id.* at 640 n.1 (Scalia, J., dissenting) (noting that the trial court had rejected the claim that sexual orientation constituted a suspect classification, that the plaintiffs had failed to appeal that ruling, and that the Court implicitly accepted that the classification was non-suspect).

¹⁹ *Id.* at 632.

²⁰ *Id.* See also *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stating that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (stating that rational basis is not satisfied where an ordinance was based on “irrational prejudice”).

²¹ Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257 (1996) (defending *Romer* as a legitimate decision under rational basis principles). Some were less puzzled and more despondent, characterizing the decision as a dramatic defeat for the gay rights movement precisely because it failed to establish sexual orientation as suspect. See, e.g., Mark E. Papadopoulos, Note, *Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J. L. & PUB. POL’Y 165, 169 (1997).

²² See Farber & Sherry, *supra* note 21, at 262 (presenting “rational basis” arguments for laws requiring all cars to be painted blue, allocating benefits based on astrology, and requiring legal documents to be written in Sanskrit).

²³ See, e.g., *id.* at 278–80; Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 222 (1996) (“Justice Kennedy’s opinion reaches the right result, and for the right reason.”). See generally Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–80 (1987) (stating that while cases like *Romer* “represent an effort by the Court to put more ‘teeth’ in the rational basis test,” they really stand for a “less-than-candid use of intermediate scrutiny”).

²⁴ See Darren Lenard Hutchinson, “Not Without Political Power”: *Gays And Lesbians, Equal Protection and The Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1023–25 (2014).

²⁵ *Lawrence*, 539 U.S. at 574–75.

was applying, the rhetoric it used sounded in rational basis terms (and certainly the Court declined to declare either that sexual orientation was suspect or that there was a fundamental liberty principle at stake).²⁶ When the Supreme Court struck down portions of the Defense of Marriage Act in *United States v. Windsor*, it similarly evaded the heightened scrutiny determination and once again adopted language grounded in its rational basis decisions.²⁷ This approach is particularly notable in *Windsor* since the Second Circuit opinion explicitly accorded intermediate scrutiny to sexual orientation classifications.²⁸

Obergefell represented the culmination of this story. The Supreme Court struck down as unconstitutional state prohibitions on gay marriage, relying on a “right to marry” derived from the doctrine of substantive due process.²⁹ The equal protection clause is barely an afterthought in Justice Kennedy’s majority opinion; he deploys it not on its own terms, but to illustrate the “synergy” between equality- and liberty-based constitutional protections.³⁰ The majority does not even address the issue of tiered-scrutiny review, much less move to alter the position of sexual orientation within the traditional model.³¹ Nonetheless, it invoked the constitutional value of equality in order to buttress and invigorate the due process concerns implicated when gay and lesbian individuals are excluded from the institution of marriage.³²

After *Obergefell*’s invalidation of bans on gay marriage, the striking conclusion is this: at least as a matter of federal law, virtually all significant anti-gay classifications will have been struck down as unconstitutional without the Court ever having extended beyond rational basis review. Indeed, the Supreme

²⁶ See *id.* at 578 (“The Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual.”) (emphasis added). See also Randy Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1583 (2005) (noting that *Lawrence* did not cast itself as an equal protection doctrine, nor did it identify the right in question as fundamental, thus rendering it a rational basis opinion); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 777 (2011) (arguing that *Lawrence* evaded a straight-forward equality rationale for its decision, instead relying on a more “arduous” liberty-based reasoning which presaged a broader shift away from “traditional” equal protection principles).

²⁷ 133 S. Ct. at 2693 (citing *Moreno* and *Romer* to articulate an animus-based objection to DOMA’s constitutionality).

²⁸ *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (stating that an analysis of the four factors that justify heightened scrutiny, “supports [the Court’s] conclusion that homosexuals compose a class that is subject to heightened scrutiny”).

²⁹ *Obergefell*, 135 S. Ct. at 2604.

³⁰ *Id.* at 2623.

³¹ Chief Justice Roberts’ dissent summarily declares that “the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage.’” *Id.* (Roberts, C.J., dissenting) (quoting *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring in judgment)).

³² *Id.*

Court hasn't upheld an anti-gay legislative classification since *Bowers* itself.³³ History has confirmed a prediction Andrew Koppelman made only a year after *Romer*, and well before *Lawrence v. Texas*: "Laws that discriminate against gays will always be constitutionally doubtful, [even under rational basis], because they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group."³⁴ The key question, then, is whether the lack of heightened scrutiny review is a loss for LGBT interest groups going forward.

II. DODGING THE STRICT SCRUTINY BULLET: NEXT GENERATION DISCRIMINATION AND IDENTITY-CONSCIOUS REMEDIES

Because they represent an explicit classificatory bar, gay marriage bans would have been acutely vulnerable if they were subjected to strict scrutiny. Even persons who argued such bans might satisfy rational basis admit that the arguments against marriage equality are not narrowly tailored to a compelling governmental interest.³⁵ Yet in law as in anything else, advocates should not be caught fighting the last war. While marriage law is not the only area of American law that sees explicit anti-gay discrimination,³⁶ it is likely that sexual orientation—like race—will see a move towards subtler (or simply private) forms of discrimination which may demand identity-conscious remedies to effectively redress.

In this context, being a suspect classification often does more harm than good. On the one hand, suspect classification is of minimal use in disparate impact challenges, where the Court's rigid "because of, not in spite of" framework screens out all but the most egregious motivations.³⁷ Likewise, because the equal protection clause operates as a limit on state action, it has little bearing on the legal rules governing private actors (for example, proscribing

³³ It has ruled against LGBT litigants in two cases seeking to apply anti-discrimination principles against private discriminators asserting First Amendment free association rights. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000).

³⁴ Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J. 89, 89-90 (1997).

³⁵ See Schraub, *The Perils and Promise*, *supra* note 7, at 190.

³⁶ See *Lofton*, 358 F.3d at 827 (upholding a law banning gay couples from adopting children); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (striking down a state law which did not extend the marital presumption of parentage to same-sex couples who conceived a child through artificial insemination).

³⁷ See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). See also Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1837-38 (2012) (identifying *Feeney* as the key case elevating the burden plaintiffs had to meet in order to demonstrate racial animus); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1134 (1997) ("[*Feeney*] made clear that [the Court] had raised quite a formidable barrier to plaintiffs challenging facially neutral state action.").

discrimination in employment or housing).³⁸ On the other hand, where a polity elects to use a suspect classification as a means of directly addressing ongoing inequalities, the Court has been exceptionally unsympathetic. It has consistently held that strict scrutiny does not distinguish between “benign” and “malign” uses of race, but rather that any use of race, regardless of motivation, must satisfy strict scrutiny.³⁹ Moreover, the Court has rejected that remedying “social” (that is to say, non-governmentally sponsored) discrimination qualifies as a compelling state interest.

In the race context, these debates have primarily played out in the affirmative action and desegregation context.⁴⁰ Some scholars sympathetic to the LGBT cause, noting that such issues seem to be of marginal importance in the gay rights context, have accordingly concluded that the risks of a strict scrutiny finding are minimal compared to the benefits.⁴¹ Of course, that such possibilities

³⁸ *Compare Cleburne*, 473 U.S. at 446 (applying rational basis review to disability-based classifications) with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, (codified as amended at 42 U.S.C. § 12101 *et seq.* (2015)) (providing statutory protections against discrimination to the disabled).

The possible exception is when Congress rests an anti-discrimination provision applicable against the states on its Section 5 authority. The Court has in the past indicated that the latitude Congress has in crafting such remedies is directly related to the degree of scrutiny. *Compare* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367–68 (2001) (striking down the application of Title I of the ADA to the states because Congress had not shown a pattern of “irrational” discrimination against the disabled) with *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004) (upholding the application of Title II of the ADA against the states because it focused on fundamental rights, which are accorded more intensive judicial protection). However, the recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which sharply constrained Congress’ remedial authority under Section 5 even though the subject of congressional regulation was racial discrimination, casts doubt on whether this advantage of strict scrutiny remains viable. See Schraub, *Unsuspecting*, *supra* note 8.

³⁹ See *Adarand* 515 U.S. at 227 (concluding that treating “‘benign’ state and federal racial classifications to different standards does not square” with equal protection principles).

⁴⁰ See, e.g., *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 477 (1989) (municipal affirmative action plan for contractors); *Adarand*, 515 U.S. at 205–06 (federal affirmative action program for contractors); *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (affirmative action program for a state university); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 701 (2007) (integration program for public schools in Seattle and Louisville).

⁴¹ Michael Dorf, *What’s at Stake in Next Week’s SSM Oral Argument?*, DORF ON LAW (Apr. 22, 2015), <http://www.dorfonlaw.org/2015/04/whats-at-stake-in-next-weeks-ssm-oral.html>.

To be sure, as David Schraub noted . . . there is a risk that heightened scrutiny for sexual orientation could end up doing more harm than good for LGBT Americans because the Court’s ‘symmetry’ principle means that then laws *advantaging* them would also be subject to heightened scrutiny. That’s a real risk, but a small one, I think: There is very little need for affirmative action or the like for LGBT Americans, so more to gain than to lose from suspectness or quasi-suspectness.

Id. But see Alexander Bondarenko, Note, *Between a Rock and a Hard Place: Why Rational Basis Scrutiny for LGBT Classifications is Incompatible with Opposition to LGBT Affirmative Action*, 79 BROOK. L. REV. 1703, 1741–42 (2014) (defending continued application of “rational basis with bite” because it would permit LGBT affirmative action programs while striking down most forms of discriminatory legislation).

seem distant now may only be a function of the times—if one told the litigants in *Brown v. Board* that fifty years later the Court would have to decide if a major city in a former slave state could voluntarily pursue the racial integration of its elementary schools, they would have been surprised too.⁴²

But even if it is fair to say that a sexual orientation-conscious affirmative action program is improbable, that hardly exhausts the issue of identity-conscious remedies. The more likely forum for using sexual identity as a remedy for discrimination is in the prison context. The Supreme Court has already ruled in *Johnson v. California* that strict scrutiny still applies to racial classifications in prisons, and cast considerable suspicion on the use of race as a means of protecting inmates from race riots and other instances of racially-motivated violent activity while incarcerated.⁴³ Presumably, if sexual orientation was likewise granted suspect status, *Johnson* would equally apply to prison efforts to utilize sexual orientation as a means of combatting violence in that community.

LGBT prisoners are at a severely heightened risk of violence in American prisons; it is not unfeasible to imagine wardens implementing some form of identity-conscious segregation or other like remedies as a means of stemming the threat.⁴⁴ Some scholars have criticized such policies as one-size-fits-all, constructing a hegemonic representation of gay identity and thereby both excluding other vulnerable populations and heightening the salience (and vulnerability) of those effectively coerced into “coming out.”⁴⁵ But even the proposed alternatives ask for a more nuanced and context-sensitive approach to sexual identity; they do not propose eliminating its salience altogether.⁴⁶ No matter where one falls in this debate, it is unlikely that the imposition of strict scrutiny review—a notoriously inflexible and rigid form of judicial oversight—would be effective in allowing for the sort of nuanced usage of sexual orientation reformers might desire.

⁴² See *Parents Involved*, 551 U.S. at 715–18 (challenge to a voluntary race-conscious integration program in Louisville, Kentucky). See also Schraub, *Sticky Slopes*, *supra* note 15, at 1280–87 (noting the problem of “miscalculated arguments” wherein social movement litigants do not anticipate how a given doctrinal victory will play out in future social contexts).

⁴³ *Johnson v. California*, 543 US 499, 515 (2005) (noting that strict scrutiny applies to racial segregation in prison and remanding the case for review under that framework).

⁴⁴ See Alexander Lara, Note, *Forced Integration of Gay, Bisexual and Transgendered Inmates in California State Prisons: From Protected Minority to Exposed Victims*, 19 S. CAL. INTERDISC. L.J. 589, 591 (2010) (noting Los Angeles’ policy of automatically segregating new lesbian, gay, and transgender inmates as a means of protecting them from violence); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 87–91 (2011) (assessing the possibility of replicating this model in other prisons).

⁴⁵ See Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1313 (2011).

⁴⁶ See *id.* at 1403–05 (arguing for reforms which put other vulnerable characteristics on a level plane with homosexuality, and for rejecting the notion that being gay or lesbian automatically increases one’s vulnerability to violence). But see Dolovich, *supra* note 44, at 7 (urging that “this model should be available as a tool in the toolkits of officials seeking to reduce the incidence of victimization in their facilities”).

More broadly, the history of equal protection law in the sexual orientation context suggests that we have already passed the tipping point where strict scrutiny would be more of a burden than a benefit. Strict scrutiny is most effective at attacking explicit discriminatory classifications, taking as its price a skeptical eye towards remedial classifications as well. But the status quo has already given us a “level of scrutiny capable of striking down discriminatory laws but seemingly powerless against sexual orientation-based affirmative action programs” and other remedial or otherwise beneficent usages of sexual identity.⁴⁷ Even the straggler cases of explicit discrimination against gays *qua* gays would seem to be vulnerable to constitutional challenge without resort to heightened scrutiny. A law declining to extend the “marital presumption” of parentage to same-sex couples who conceived through artificial insemination, for example, would fail under heightened scrutiny;⁴⁸ but it would also appear to rest uneasily with *Obergefell*’s invocation of “equal dignity” between gay and heterosexual relationships.⁴⁹ Hence, it is unclear what *comparative* benefit strict scrutiny can claim over rational basis review when the latter is proving surprisingly robust as a means of protecting sexual minorities from overt discrimination.⁵⁰

III. THE SIREN’S ALLURE: SUSPECT INPUTS VERSUS SUSPECT OUTPUTS

The double-edged sword of suspect classification doctrine has been recognized for some time now.⁵¹ So why is it the case that the suspect designation is pursued with such vigor, given its known drawbacks? Answering this question requires pulling apart a sharp inconsistency within the doctrine itself—the difference between suspect inputs (the factors the court considers in deciding who becomes “suspect”) and suspect outputs (the doctrinal results that flow from a determination of suspectness).⁵²

⁴⁷ Bondarenko, *supra* note 41, at 1742.

⁴⁸ See *Gartner*, 830 N.W.2d at 354 (striking down such a policy under heightened scrutiny review).

⁴⁹ *Obergefell*, 135 S. Ct. at 2608.

⁵⁰ See Schraub, *Unsuspecting*, *supra* note 8 (noting that only by comparing the laws which would be upheld under rational basis but struck down under strict scrutiny can one appraise the benefits and costs of the suspect classification decision). Cf. Reva B. Siegel, Foreword: *Equality Divided*, 127 HARV. L. REV. 1, 5 (2013) (noting that the “minority-protective” jurisprudence of the Supreme Court in the sexual orientation context provides a “striking” contrast to its race jurisprudence).

⁵¹ See, e.g., Schraub, *Unsuspecting*, *supra* note 8; Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1757–58 (2001) (arguing against the conflation of “equal treatment” and “equal protection,” and noting that this discourse threatens the political legitimacy of all forms of group-identity); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2334 (2000) (“[T]aken to its logical end, the Equal Protection Clause [as presented by the Court] presumptively forbids all governmental efforts to address the stark social and economic disparities that persist between racial groups.”).

⁵² See Schraub, *Unsuspecting*, *supra* note 8.

In a forthcoming article, I explore the allure of suspect status from the perspective of doctrinal outputs. Advocates view suspect classification as “the golden ticket out of minimal and relatively toothless rational basis review.”⁵³ Hence, social movements view suspect status as hitting “the equal protection jackpot.”⁵⁴ History has taught civil rights advocates that robust judicial oversight is the primary line of defense against antagonistic democratic legislation. This history carries continued weight even though, in recent decades, the Court has been inconsistent, at best, compared to the legislative branches.⁵⁵

The retreat of the judiciary from aggressive protection of racial minorities even though race remains under the guardianship of “strict scrutiny” illuminates an important, but overlooked function of the suspect classification doctrine: suspect classification is *institution-shifting*.⁵⁶ When a given classification is labeled “suspect”, primary decision-making authority over that area shifts away from (presumably untrustworthy) legislatures and into the hands of (presumably neutral) judges. Yet there is no reason to think that always and in all circumstances will judges actually be superior—more sensitive, more progressive, or more attuned to the needs of minority groups—than the democratic branches.⁵⁷ Implicit in declaring rational basis to be “toothless” review or strict scrutiny to be “robust” protection is the presumption that legislatures will often make poor decisions and judges will usually make good ones. Where that assumption is unsettled, the outputs of suspect classification doctrine—placing more power in the hands of the judiciary at the expense of the legislature—will be less than salutary.

Hence, on the output side the allure of strict scrutiny rests on the Warren Court glory days where transferring power from legislatures to judges yielded a sizeable net-benefit in terms of minority-protective outcomes. But there is also a less-noticed temptation lurking on the input side. Consider the sorts of conclusions a court would need to draw about gays and lesbians in order to label them “suspect.” Originally derived from the famous *Carolene Products* concern about “discrete and insular minorities,”⁵⁸ the Court in *San Antonio Independent School District v. Rodriguez* identified “the traditional indicia of suspectness,” as whether “the class is . . . saddled with such disabilities, or subjected to such a

⁵³ See *id.*

⁵⁴ *Id.*

⁵⁵ See Schraub, *Sticky Slopes*, *supra* note 15, at 1286–87 (noting the dangers where the appeal of an “idea or founding metaphor commands more loyalty” than the underlying social goal being pursued).

⁵⁶ Schraub, *Unsuspecting*, *supra* note 8. See Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366 (1984) (articulating a comparative institutionalist approach to constitutional law which “consider[s] the relative strengths and weaknesses” of the various branches of government as potential prime decision-makers in given policy areas) (emphasis added).

⁵⁷ See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1405 (2006).

⁵⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁵⁹ Other cases have added on to this query whether or not the status is “immutable” or bears a “relation to ability to perform or contribute to society.”⁶⁰

At the input stage—determining whether or not sexual orientation should become suspect—these are the questions the court needs to answer. And it is abundantly clear why the LGBT movement is highly invested in the judiciary answering correctly. These are the sorts of determinations that one would hope (if not demand) from a court that really *was* sensitive to the precarious and disadvantaged social circumstances of the LGBT community. Conversely, a court which explicitly rejected suspect classification for sexual orientation would presumably have to reject that these factors (political powerlessness, existence of prejudice, and so on) characterized the LGBT experience—a determination which would do great damage to further efforts to present anti-gay discrimination as a real problem demanding real redress.

The content of suspect-inputs implies that suspect-outputs should carry a similar focus on remedying the actual disadvantages faced by the now-protected groups, rather than generically opposing any political reliance on the “classification.” After all, while “gays and lesbians” may be politically powerless, be subjected to significant prejudice, or be a discrete and insular minority, “sexual orientation” cannot be any of these things.⁶¹ That the classification-based approach makes so little sense from the vantage of suspect-status’ doctrinal inputs obscures the fact that as things stand, something akin to “orientation-blindness” would be the actual doctrinal result—regardless of whether such an ideology comports with the political and social needs of sexual minorities.

Hence, even if we acknowledge the risks latent in the outputs of the suspect-status doctrine, gay rights advocates are still faced with a trap: a decision *rejecting* suspect-status would itself have significant negative consequences for the movement even as it formally preserved the movement’s democratic options. Yet whether by accident or design, the Court has charted a path that manages to evade this pitfall, simply by refusing to answer the question altogether. It has successfully expressed real concern about the situation and prejudice faced by gay and lesbian Americans, and given them viable judicial remedies, without locking the Court into an inflexible and often counterproductive heightened scrutiny regime. Indeed, particularly for those scholars who have urged the

⁵⁹ 411 U.S. 1, 28 (1973).

⁶⁰ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (reiterating the importance that the subject class have faced stereotyping unrelated to its ability to contribute to society); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (declaring that the class in question does not “exhibit obvious, immutable, or distinguishing characteristics”).

⁶¹ Schraub, *Unsuspecting*, *supra* note 8.

dismantling of the rigid tiered-scrutiny model altogether,⁶² this may be the most encouraging outcome of all. It suggests that the judiciary can do work—real, serious work—in protecting minority rights from majority deprivation without ever even referencing the suspect classification conundrum.

IV. CONCLUSION

Being a suspect classification is of great use when discrimination takes the form of explicit bars and overt prejudices. The trade-off is that the doctrine threatens second-generation legislative remedies to ongoing discrimination, on the presumption that *all* legislative uses of the classification are inherently untrustworthy. For the gay rights movement, the former type of wrong represented the heart of the struggle and the latter risk was a problem they could only dream of having in the distant future. Under those circumstances, it made perfect sense for gay and lesbian groups to pursue a suspect designation.

Yet the Supreme Court's jurisprudence in this field has taken an unexpected course. Since *Bowers*, the Court has slowly but consistently struck down anti-gay classifications without ever relying on suspect classification doctrine. *Obergefell* eliminated one of the last major explicit status-based restriction on gay and lesbian Americans—and it did so without ever having removed sexual orientation from the domain of rational basis.

Many advocates have lamented the failure of the judiciary to declare sexual orientation a suspect classification. But the loss is largely illusory. Gay marriage represented one of the last significant scenarios where presenting sexual orientation as suspect would have been an unadulterated benefit for the gay rights movement. Going forward, it is far from clear that the median usage of sexual orientation by democratic branches will be in furtherance of discrimination. Policymakers may well instead attempt to use sexual orientation in ways that promote equality and redress ongoing forms of social bias, discrimination, or violence, and seek deference from the courts as they pursue these goals. Under such circumstances, advocates may well be glad that the Court resisted strict scrutiny's siren song.

⁶² See, e.g., James E. Fleming, "There is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence, 74 *FORDHAM L. REV.* 2301, 2305 (2006); Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. CAL. L. REV.* 481, 482 (2004).