

9-1-1990

## Suspect Class Democracy: A Social Theory

Thomas W. Simon

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# ARTICLE

## Suspect Class Democracy: A Social Theory

THOMAS W. SIMON\*

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### I. INTRODUCTION

The word "democracy" stems from the Greek "demos," meaning "the people."<sup>1</sup> "The people" supposedly rule in a democracy, but who are the people? "The people" come divided, by social stratifica-

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1. The etymology of "demos" follows a circuitous path. "Demos" relates, in part, to demes, non-tribal political divisions of the electorate devised by Cleisthenes in 510-508 B.C. See J. OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS* 68-71 (1989). Historians disagree over whether demes meant all citizens or the lower class. *Id.* at 3-17.

tion, into various groups, some of which, by virtue of this stratification, do little or none of the "ruling." Thus, if some individuals set out to start a democratic society, they must first take into account the social stratification in their existing society. If they carry the remnants of the old social hierarchy into their new democracy, they risk the destruction of that democracy. If the concept of "the people" is to have any meaning, *all* groups must participate in some fashion. The alternative is that the "democracy" does not recognize them as "people."

A democratic system can tolerate some degree of disparity between individuals (tolerable gaps in income level for example), and some types of differences among groups of people (good looks for example). Other types of differences between groups, however, are antithetical to democracy. This Article will explore group differences where, due to an individual's membership in a disadvantaged group, that person's democratic activities are curtailed. The problem of wide disparity between social groups infects the very core of democracy because all versions of democracy must presuppose enough leveling among social groups to assure the opportunity for some type and degree of political participation by the people. If the newly formed society consists of two groups, those completely disenfranchised and those completely favored in the old society, then the new society needs to take action to counter the adverse effects of the group differences. Otherwise, democracy will remain beyond reach.

With democracy supposedly blossoming throughout the world, there is no better time than the present for "We the people" in the United States to critically examine our democracy. We need to evaluate our own social stratification and its effect on democratic governance. The critique becomes all the more valuable if conducted within the context of our traditions because we can too easily dismiss external analyses as foreign or alien. The analysis offered in this Article draws upon past and present political theories, theoretical commentary, and the jurisprudence of the United States Supreme Court—all part of our tradition.

This Article attempts to construct an adequate theory of social grouping to buttress democratic theory through a reconstruction of Supreme Court opinions that examine suspect classifications for violations of the equal protection clause of the fourteenth amendment.<sup>2</sup> The judiciary often uses the term "suspect classes" generically to refer

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2. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

to the disadvantaged groups in our society.<sup>3</sup> Criticism of the Court's suspect class analysis comes fairly easily because it fails to create a unified scheme. The challenge, however, lies in constructing a more justifiable and more unified method for categorizing social groups and for determining which groups qualify for suspect (in the sense of making the judiciary suspicious enough of the legislation to warrant judicial protection of the referenced group) class<sup>4</sup> status. This ambitious undertaking results in suggestions,<sup>5</sup> which I believe fare better than the Court's justifications, for judicial review of legislation regarding suspect classes.

This Article sits somewhat precariously between Supreme Court jurisprudence and democratic theory. My analysis may not satisfy experts in legal or political theory because the proposals I make do not provide a complete prescription for how courts should undertake suspect class analysis,<sup>6</sup> nor do they furnish the necessary components for a democratic theory. Situating the analysis at the interface of legal and political theory, however, has distinct advantages. The analysis offered should enrich both legal and political theory, in spite of any perceived deficiencies from either perspective.

Legal and democratic theorists tend to ignore the broad implications of the role of suspect classes, i.e., disadvantaged groups, in a democratic system. My task is to make a persuasive case for the significance of suspect class analysis for democracy and for the importance of democratic theory to suspect class analysis. Democratic theory requires a normative theory of suspect classes. Suspect class analysis by the Supreme Court, in turn, needs a more viable social theory of democracy.<sup>7</sup> Democratic theory should precede the Court's suspect class analysis.

Section I of this Article offers a brief survey of the history of democratic theory to illustrate that democratic theorists, sometimes unwittingly, have either disfavored disadvantaged groups, or have favored certain other groups, or both. Their references to "the people" have proven to be underinclusive. The illustrations provided in

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3. See *infra* notes 136-74 and accompanying text.

4. "Class" and "group" are used interchangeably throughout this Article. "Disadvantaged groups" would be a better label than "suspect classes," but I shall continue to use the latter term since that is the term the courts use.

5. Time, space, and modesty preclude me from labeling the suggestions as a fully developed theory, although I shall freely employ the term "theory" (at times, interchangeably with "model" and "analysis") throughout this Article for lack of a better term.

6. For example, I do not discuss the level of scrutiny needed for each suspect classification.

7. A "social theory" consists of normative claims about the disparate status of groups within a society with respect to their social, economic, political, and cultural power.

this Article will demonstrate that democratic theorists made, and still make, explicit or implicit claims about social groups. The democratic theorists included in anthologies of political theory make objectionable, and mostly implicit, value judgments about certain social groups<sup>8</sup>—be they slaves, women, or the poor. Social groupings have apparently become more complex in this century, but the problem of the devaluation of those less powerful in the political/social arena has not dissipated.

The historical survey of democratic theory should highlight, without any pretensions to completeness, the fact that democratic theorists seldom addressed directly the problem of social hierarchy, even though they made telling assumptions about social stratification. For example, the seventeenth century philosopher, John Locke, devised a democratic system that favored the then-rising middle class and disfavored the poor, even though Locke and most of his subsequent commentators did not and do not explicitly acknowledge this.<sup>9</sup> Locke, and the other theorists considered in Section I, have seriously compromised their democratic theory by allowing for wide gaps between social groups.

The existence of a social hierarchy, depending upon its severity, violates a certain degree of leveling between social groups presupposed by any democratic theory. If reference to "the people" has any meaning within the definition of "democracy," it cannot imply that certain social groups are so disadvantaged that they become effectively excluded from, or ignored by, the democratic system—in other words, are not "people." Democratic theory, then, regardless of its particular formulation, needs a social theory—a theory about how social groups can be brought to a relatively even level. A social theory must include an analysis that prescribes conditions assuring that the disparity between social groups does not seriously undermine the workings of the democracy.

While Section I spells out the problem, namely, the detrimental effect of social hierarchy on democracy, Section II searches for a solution to the problem of social hierarchy. The search for a solution begins in a rather odd place—in the literature surrounding the Supreme Court's use of suspect classes in its interpretation of the equal protection clause of the fourteenth amendment.<sup>10</sup> The Court, at

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8. I use "social" as a shorthand for "social, political, economic, and cultural." Social groups include classifications along a number of different dimensions. Republicans fall under a political grouping; the poor, under an economic grouping; and so forth. Suspect classes make up a subclass of social groups.

9. See *infra* notes 57-61 and accompanying text.

10. U.S. CONST. amend. XIV, § 1; see *supra* note 2.

least in its majority opinions, has not devised an adequate social theory.<sup>11</sup> This failure is due, in part, to its reliance on a problematic version of pluralism.<sup>12</sup> The version of pluralism adopted by the Court relies on a political process justification for judicial review, whereby the judiciary fixes malfunctions in the legislative process. This method of analysis is known as the process model.<sup>13</sup> According to the process model, the legislative process fails adequately to consider the interests of certain social groups, namely, the ones qualifying as suspect classes, so the courts must assure that these groups get some representation.<sup>14</sup>

Section III illustrates that despite its noble democratic intentions, the Court does not set forth any defensible standards to determine which social groups qualify as suspect classes, thereby triggering judicial intervention in the legislative process, and which do not.<sup>15</sup> However, from the majority and dissenting opinions, and the literature surrounding candidates for suspect class status, a theoretically sound proposal emerges.<sup>16</sup> Group identity, group harm, and political/social powerlessness provide the elements needed to construct a successful case for suspect class status. Further, a social theory, glued together by an anti-subjugation principle, also provides a stronger justification for judicial review than the one given by the process model.<sup>17</sup>

Of the many candidates for suspect class status, only four have qualified: race,<sup>18</sup> gender,<sup>19</sup> alienage,<sup>20</sup> and illegitimacy.<sup>21</sup> This Article

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11. See *infra* notes 136-81 and accompanying text. See generally Note, *Suspect Classification: A Suspect Analysis*, 87 DICK. L. REV. 407, 427-34 (1982) (discussing the inconsistencies of the Supreme Court's rulings on suspect classes).

12. See, e.g., Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981) (criticizing the unduly constrained democratic theories found in J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); and J. ELY, *DEMOCRACY AND DISTRUST* (1980)). Both works attempt to present a scheme for unifying many disparate Supreme Court decisions). For a criticism of Parker's views, see Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1986).

13. See J. ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980); *infra* notes 79-92 and accompanying text.

14. See J. ELY, *supra* note 13, at 73-104.

15. See *infra* notes 93-122 and accompanying text.

16. See *infra* notes 123-68 and accompanying text.

17. See *infra* notes 123-68 and accompanying text.

18. *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *reh'g denied*, 324 U.S. 885 (1945).

19. *Craig v. Boren*, 429 U.S. 190, 197 (1976), *reh'g denied*, 429 U.S. 1124 (1977). Gender is a quasi-suspect classification, which calls for a lesser, intermediate level of scrutiny.

20. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *Hernandez v. Texas*, 347 U.S. 475, 480-81 (1954) (national origin).

21. *Levy v. Louisiana*, 391 U.S. 68, 71-72, *reh'g denied*, 393 U.S. 898 (1968). Illegitimacy is also a quasi-suspect classification.

will espouse an expansive interpretation, far beyond the Court's acceptance of these four candidates, of what constitutes a suspect class. It shall propose that suspect classes should include the physically handicapped, the mentally retarded and mentally ill, homosexuals,<sup>22</sup> the aged, and the poor.<sup>23</sup>

The process model promotes judicial activism only when discrimination keeps a group out of the legislative process. In contrast, a social theory encourages judicial involvement whenever a group suffers from oppression or subjugation. A justification for judicial review does not, however, imply a complete theory of judicial review. For example, the justification says little about what level of analysis or scrutiny courts should employ in evaluating legislation.<sup>24</sup> It does not offer ready solutions to problems such as benign racial classifications.<sup>25</sup> In fact, some may see only a faint resemblance between the end product of my proposal and the Court's suspect class analysis.

The difference may appear more pronounced, however, in light of the Court's recent move closer to a suspect *classification* analysis in contrast to a suspect *class* analysis.<sup>26</sup> It will prove helpful to draw out the distinction between suspect classifications and suspect classes, even though these terms are used loosely, and sometimes interchange-

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22. I use the term "homosexual" and not the term "gay" throughout the Article only to conform to the Court's usage.

23. See *infra* notes 232-39 and accompanying text.

24. Under a rational basis test, a classification is valid if it is rationally related to any legitimate governmental interest. *Foley v. Connelie*, 435 U.S. 291 (1978). At the opposite end of the spectrum, under the strict or heightened scrutiny test, a suspect classification violates equal protection unless the classification is necessary to further a compelling state interest. *Trimble v. Gordon*, 430 U.S. 762 (1977). In between these two lies an intermediate level whereby a classification must serve an important governmental objective and must be substantially related to the achievement of that objective. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

25. See, e.g., Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 115 (1984).

It is important to differentiate between negative stereotypes based on inherent characteristics of the class and negative stereotypes based on the relative position of the class in society. A stereotype based on an inherent characteristic—"women are passive"—suggests the sort of prejudice that heightened scrutiny is designed to identify and forbid. A stereotype based on societal status "Blacks are socially disadvantaged" does not stigmatize the object of the generalization as inherently inferior and thus is not evidence of prejudice.

*Id.*

26. See *id.* at 105-25 (providing an excellent discussion of the difference between classification-based and class-based judicial review). I do not mean to imply that the Court never employs a class-based analysis. As Sherry points out, the Court has used classification- and class-based interpretations in a confused way. *Id.* at 109. Recently, however, the Court has clearly swung over to the classification-based side of the spectrum. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating a local minority set-aside program). This is the leading case that signals this shift.

ably. A classification analysis focuses on whether the legislation in question makes explicit classifications along group lines.<sup>27</sup> A class analysis, by contrast, focuses on whether the legislation has a negative or impermissible, versus a benign, effect on the group itself.<sup>28</sup> The Court, at least in its recent theoretical formulations, seems more concerned with "smoking out," in an apparently neutral fashion, the legislature's prejudice by examining the classifications employed in legislation.<sup>29</sup> The Court has become highly suspicious, as evidenced by *City of Richmond v. J.A. Croson Co.*,<sup>30</sup> of any legislative classification along racial lines, even if that classification benefits racial minorities.

In contrast, I propose a categorization process of those suspect classes that warrant heightened judicial (and democratic) concern, which is much broader than the Court's.<sup>31</sup> The social theory provides a standard by which to begin to evaluate the Court's analysis. The Court's promotion of neutrality leads it in the direction of judicial restraint, whereas the model I propose implies far greater judicial activism and more normative decisionmaking on the part of the Court.<sup>32</sup> Under my proposal, the judiciary would become an important guardian of disadvantaged groups, fulfilling a democratic role. Although, I must again emphasize that the Court has not completely abandoned suspect class analysis, the Court has recently retreated from it to more of a classification analysis.

Section IV attempts to construct a social theory which is stronger than that found in the Court's analysis; one that draws, in a more defensible way, the boundaries around what social groups qualify as suspect classes. The Justices of the Supreme Court have referred to a wide array of factors to evaluate in these cases. These factors constitute a hodge podge, with little or none of the unifying

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27. See Sherry, *supra* note 25, at 105-06.

28. *Id.*

29. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

30. 488 U.S. 469 (1989).

31. In other words, I am not so much interested in classifications along racial lines as I am in the impact of legislation on disadvantaged groups, even in the absence of an explicit classification.

32. The problem of judicial activism has spawned a plethora of commentary. Originalists, for example, argue that confining judicial interpretation to the framers' intent helps to prevent judicial tyranny. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). Non-interpretativists, on the other hand, fear legislative, more than judicial, tyranny. See, e.g., M. TUSHNET, *RED, WHITE, AND BLUE* (1988).

While my proposals have some implications for the debate over judicial activism, I am not committed to the claim that the judiciary is the only, or even the best, guardian of the interests of disadvantaged groups. These broader topics relate to problems of separation of powers, which I do not address in this Article.



framework needed for a suspect classification.<sup>33</sup> Under the principle of anti-subjugation, I group these factors together into the following: group identity, group harm, and social/political powerlessness.<sup>34</sup> These factors do not yield a simple step-by-step algorithm for unambiguously determining whether a social group equals a suspect class. Nor does each factor stand alone as an isolated unit. Rather, the factors depend upon one another, forming heuristics for deciphering suspect classes. The resulting organic constellation of factors draws fairly sweeping, but nonarbitrary, lines around suspect classes, thus encompassing more social groups than the Court currently recognizes. In Section V, I conclude that the grounds for adopting a social model of suspect classes are set forth within democratic theory, and that the Court should adopt a methodology such as the one I proposed in Section IV in order to realize fully the promise of democracy contained in the Constitution.

## II. UNSOCIAL DEMOCRATIC THEORIES

A typical survey of democratic theory, old and new, begins with Ancient Athens where democracy first flourished, leaps across history landing in the seventeenth century England of John Locke, takes a side-trip to Jean-Jacques Rousseau's Europe and James Madison's America, and makes a brief stop at the writings of John Stuart Mill, before finally settling in on two prominent twentieth century theories, namely, the competitive elitism of Joseph Schumpeter and the plural-

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33. The following examples illustrate the Court's wide array of factors contributing to a classification's suspectness. A class cannot be suspect if it possesses "none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28, *reh'g denied*, 411 U.S. 959 (1973). Regarding gender as a suspect classification, the Court noted that the "high visibility of sex characteristic," its immutability, and the fact "that the sex characteristic frequently bears no relation to ability to perform or contribute to society," justified its status as quasi-suspect. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In rejecting age as a suspect classification, the Court emphasized the stereotypic nature of suspect characteristics. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*). Furthermore, the Court noted that age did not define a discrete and insular group. *Id.* (citing *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)). Yet, the Court has, on occasion, rejected discreteness and insularity as prerequisites to suspect status. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978). In considering illegitimacy, the Court spoke of the "obvious badge" of identity worn by a suspect class. *Mathews v. Lucas*, 427 U.S. 495, 506 (1976).

So, some of the factors the Court includes are: a history of unequal treatment, political powerlessness, immutable and stereotypic traits, discrete and insular characteristics (both rejected and accepted by the Court), and badges of inferiority. *See generally* Note, *supra* note 11, at 413 n.45.

34. *See infra* notes 195-239 and accompanying text.

ism of Robert Dahl.<sup>35</sup> Problems proliferate in such a survey.<sup>36</sup> This Article focuses on just one set of difficulties within a sample of this survey: the issue of which *social* theory the various democratic theorists adopt, either explicitly or implicitly. Democratic theorists have rather consistently promoted the interest of those higher in the social hierarchy at the expense of those at the lowest levels without advancing any justification for the disparity. This is in part because of the tendency to ignore existing hierarchies, or to acknowledge only some aspects of them and not others.

Ignoring certain aspects of social hierarchy which work to exclude certain groups and invoking others violates basic presuppositions of democratic theory. For example, a political theory that limits democratic participation to only rich White heterosexual males who graduated from Yale University would hardly qualify as democratic since it unjustifiably excludes other members of the *demos* or "the people." Therefore, to qualify as a democratic theory, a theory needs to make allowances for some effective action on the part of *all* of the people.<sup>37</sup> If the terms of the theory exclude, either explicitly or effectively, certain social groups from that action, then it has failed as a democratic theory. A brief analysis of some members of the survey will illustrate the need for democratic theorists to include a social theory.

Four approaches to democracy will be discussed: 1) Athenian democracy; 2) the philosophy of Locke; 3) Schumpeter's competitive elitism; and 4) Dahl's pluralism. Each one illustrates a point. The first two explicitly exclude specific social groups. Athenian democratic practice, so often eulogized in discussions of democracy, excluded specific social groups—slaves, women, and foreigners such as the resident aliens (*metics*).<sup>38</sup> Lockean political theory, seen by many as the precursor of the philosophy underlying the founding doc-

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35. See, e.g., D. HELD, *MODELS OF DEMOCRACY* (1987). While highly critical of various democratic theories, Held adopts the canon, beginning with ancient Athens and ending at Dahl. Among the most influential surveys along these lines are C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* (1966); and C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (1977).

36. Political scientists have begun to raise serious questions about how a theorist qualifies for the list of worthy political philosophers. Why, for example, do few lists include Gerrard Winstanley, a seventeenth century radical thinker and activist? See, e.g., C. CONDREN, *THE STATUS AND APPRAISAL OF CLASSIC TEXTS* (1985); J. GUNNELL, *BETWEEN PHILOSOPHY AND POLITICS* (1986).

37. Sartori, an influential contemporary democratic theorist, rejects five senses of "the people"—"everybody," "a great many," "the lower class," "an organic whole," and "an absolute majority"—in favor of a "limited majority principle." See G. SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 22-25 (1987).

38. See *infra* notes 43-51 and accompanying text.

uments of the United States,<sup>39</sup> omitted another social group, the poor.<sup>40</sup>

In contrast, the last two democratic approaches from the twentieth century list illustrate formulations that exclude groups by implication. Exclusion by implication is effective exclusion. Schumpeter's competitive elitism (democracy for politicians) illustrates that even the most restrictive democratic theory needs a certain degree of leveling between social groups because a person's group status affects not only the probability of that person becoming a democratic leader in Schumpeter's system, but also whether the person will have any say over the choice of those leaders.<sup>41</sup> Dahl's pluralism (democracy by minorities, i.e., interest groups), the final approach surveyed,<sup>42</sup> sets the broad outlines of the democratic theory relied upon by the Supreme Court in the commonly accepted version of its analysis of suspect classes. However, within even a pluralistic system, a person's group status can affect the ability to form the interest groups so essential to Dahl's theory. A person's group identity can raise barriers to her or his entrance into interest group politics. Each of these problems will now be examined.

#### A. *Athenian Democracy: The Social Costs of Participation*

The average citizens of ancient Athens participated directly in legislative and judicial functions on an immense scale. The Assembly, with a quorum of 6,000, met over forty times per year in order to decide all major issues.<sup>43</sup> The president of the Assembly and most major office holders were chosen by lot.<sup>44</sup> The Athenian system is often portrayed as a truly participatory democracy.<sup>45</sup> Yet, Athenian democracy had a dark side. Not everyone could qualify for citizenship.

No scholar disputes that there were a number of oppressed, or at least less well-off, groups in ancient Athens. These groups are generally acknowledged to be women, slaves, and foreigners—none of whom qualified for citizenship.<sup>46</sup> The problem is what to do with this

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39. See, e.g., C. BECKER, *THE DECLARATION OF INDEPENDENCE, A STUDY IN THE HISTORY OF POLITICAL IDEAS* 24-79 (1942). But cf. G. WILLS, *INVENTING AMERICA* (1978) (arguing that Thomas Reid left more of a legacy on American views of democracy, by virtue of his influence on Thomas Jefferson's thought, than did John Locke).

40. See *infra* notes 52-61 and accompanying text.

41. See *infra* notes 62-70 and accompanying text.

42. See *infra* notes 71-76 and accompanying text.

43. See D. HELD, *supra* note 35, at 20-22.

44. *Id.*

45. See, e.g., J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 13-14 (1983).

46. See, e.g., J. DAVIES, *DEMOCRACY AND CLASSICAL GREECE* (1978); M. FINLEY,

knowledge. How critical to the vitality of Athenian democracy was the relegation to noncitizenship of these various groups?<sup>47</sup> The Athenian Assembly had no special mandate to look out for the welfare of women or slaves. Does their oppression mean that the Athenian democratic system must be rejected, despite its highly participatory qualities? Rather than trying to answer those questions it is more important here to note that this exclusivity of democratic rule existed in ancient Athens. As a result of their explicit exclusion from the Athenian democratic process, women and slaves had statuses lower than that of a suspect class today. Minimally, exclusivity creates a problem for Athenian democracy. On what grounds can a proponent of democracy exclude certain social classes? I will assume that no one in today's world would try to defend the exclusion of women, nor to defend slavery, in a democracy. From our vantage point, the totally excluded groups—slaves and women—should have qualified as members of the Athenian *polis*. Our democracy, unlike that of Athens, does not *officially* exclude any social group.<sup>48</sup> The question is: Do we effectively exclude certain social groups?

Condemnation of a society that explicitly excludes social groups and still proclaims itself a democracy comes easily. However, effective exclusion is equally unjustified and presents a more difficult and pertinent concern for the modern era. For example, a group that often suffers effective exclusion is the poor.<sup>49</sup> Citizens, by the very fact of their citizenship, would seem eligible for participation in the democratic process and the poor are citizens.<sup>50</sup> Nevertheless, they often suffer from effective exclusion.<sup>51</sup> For an example of a theory

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ANCIENT SLAVERY AND MODERN IDEOLOGY (1980); A. JONES, *ATHENIAN DEMOCRACY* (1977).

47. This question is extensively treated in J. OBER, *supra* note 1, at 27 ("In sum, while the importance of slavery to Athenian society and economy should not be underestimated, no direct, causal relationship between chattel slavery and social stability or democratic decision making is demonstrable at Athens.").

48. Our view of democracy *does* explicitly exclude aliens, children, and persons convicted of certain crimes, by denying them the right to vote. The theories which underlie these explicit exclusions will not, for the most part, be challenged or examined in this Article.

49. The Athenians did make some effort to include a segment of the poor by compensating citizens for participating in the Assembly. See A. JONES, *supra* note 46, at 4-5. It was not necessary to have an independent income to participate in the democratic process; therefore, the poor of Athens were not barred from democratic participation merely because of their poverty. *Id.* But see generally J. OBER, *supra* note 1 (revealing the complexity of trying to assess the role of wealth in Athenian democracy).

50. Actually, many of the poor may *not* be citizens but rather illegal aliens, a status which may help to contribute to their poverty. However, for purposes of clarity in this discussion, I shall use the term "the poor" to refer only to those who are economically, and not dually, disadvantaged.

51. For an excellent description of how poor Appalachians were effectively excluded from

which allows for their explicit exclusion, we turn to Locke.

### B. *Lockean Democracy: Representation for the Middle Class*

According to the conventional surveys of democratic theory, democracy "slept" for many years after the demise of Athenian democracy until it slowly awakened to the light of John Locke in the seventeenth century.<sup>52</sup> For Locke, government served a protective function by safeguarding the "natural right" of individuals to their property.<sup>53</sup> According to Locke, sovereign power ultimately resided in the people, who had the power to withdraw their consent from the government and to dissolve it.<sup>54</sup> Locke's faith in "the people" seems to place him firmly within the democratic tradition. Yet, who actually were "the people" for Locke? His vision of democracy does not seem very democratic to modern eyes. For example, in promoting the Convention Parliament (1688-1689) when James II withdrew from the throne, Locke had no difficulty in supporting a "representative" legislative body that had not actually been elected.<sup>55</sup>

Locke saw the political world as classified along social lines.<sup>56</sup> Property ownership placed a person within the realm of political legitimacy, and thus allowed males, but not females, to vote because women could not own property.<sup>57</sup> Yet, while property ownership constituted a sufficient condition for political involvement under Locke's scheme, it was not a necessary condition. Locke wanted also to make room for the nonproperty-owning merchants, tradesmen, and artisans.<sup>58</sup> Nevertheless, despite Locke's inclusion of the above social groups beyond property owners, he still cut out the "idle poor" because in his view they violated his injunction to labor and to pursue

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the electoral process, see J. GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* 141-64 (1980).

52. See *supra* note 35; cf. C. CONDREN, *supra* note 36; J. GUNNELL, *supra* note 36.

53. J. LOCKE, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* § 9, at 184 (T. Cook ed. 1947). To Locke, "property" included "li[fe], liberties, and estates." *Id.*

54. *Id.* ch. XIX.

55. R. ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT* 568-69 (1986). Ashcraft tries to interpret Locke as a radical by revealing Locke's involvement with the radical Whigs. Ashcraft presents evidence designed to show that Locke's political writings, far from being abstract philosophical treatises, were, in fact, political manifestoes. *Id.*

56. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 222-38 (1962).

57. J. LOCKE, *supra* note 53, § 140, at 193. Representation was proportional to taxes paid by those with property.

58. See, e.g., R. ASHCRAFT, *supra* note 55, at 263-74.

the common good.<sup>59</sup> Viewed through the lens of a social theory, Locke's democracy looks like a democracy largely for the then-rising middle class,<sup>60</sup> rather than a democracy for all.<sup>61</sup>

Sensitivity to which social groups a model or theory excludes should induce skepticism whenever someone, even obliquely, refers to ancient Athens as an exemplar of a participatory democracy, or to Locke as the theoretical founder of representative democracy. The exclusions in Athenian practice were explicit and glaring, whereas those in Locke's writings need some explication to be exposed. It is even more difficult to uncover implicit exclusionary claims among twentieth century democratic theorists. Two of these theories—competitive elitism and classical pluralism—do not explicitly exclude disadvantaged social groups, but their structures can be read as excluding certain social groups by implication. If this is so, then the proponents of these theories need to make positive proposals to assure the inclusion of these excluded groups.

### C. *Competitive Elitism: Constricted Democracy*

Schumpeter, the leading proponent of competitive elitism,<sup>62</sup> restricts the governing structure as far as is possible while still calling his theory democratic. However, as I shall show, even Schumpeter's highly restrictive version of democracy requires some degree of leveling between social groups in order for it to work as envisioned.

Schumpeter defines democracy as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the peo-

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59. *Id.* In all fairness, as Ashcraft emphasizes, Locke also had harsh words for the "idle gentry," whom Locke thought contributed little to the wealth of society. *Id.* at 269-70.

60. However, Locke's exclusion of the poor may have been more a product of the prevailing socio/economic bias than a conscious decision. Locke wrote during the 1660-1690 period, just after the 1640-1660 period when the lower strata of English society had vehemently asserted itself. See generally C. HILL, *THE WORLD TURNED UPSIDE DOWN* (1975) (Hill argues that the 1640-1660 period saw all the major institutions of British society attacked from below by the lower classes.). From 1640-1660, almost every institutional structure in England, including churches and scientific establishments, felt challenges emanating from the lower classes. *Id.* Various forces combined to stamp out the voices of protest that proliferated throughout English society during this period. Locke's exclusion of the poor, or at least his relegation of them to secondary status, may well reflect the dominant attitude towards the voices of the dissenting poor, whose sounds had been stifled, but had not been forgotten by the time Locke wrote.

61. The poor, however, pose a particularly difficult challenge, not only for Locke, but for any democratic theorist. The theorist faces the quandary that while nothing seems to justify excluding the poor from democratic activities, their poverty acts as an effective bar to a great deal of their participation in the governance of society, whether they are included in the theory or not. See *supra* notes 49-51 and accompanying text.

62. See D. HELD, *supra* note 35, at 164-85.

ple's vote."<sup>63</sup> Schumpeter unabashedly advocates a democracy for the politicians.<sup>64</sup> He begins with the premise that we live in a bureaucratic state,<sup>65</sup> where talk of participation by the people is at best unrealistic.<sup>66</sup> Only a well-trained elite, he claims, qualifies to rule over the large, complex modern state.<sup>67</sup> Schumpeter divides the political world between an elite cadre of technocrats and everyone else.<sup>68</sup> While Schumpeter's theory may appear non-democratic, he proposes that through elections "the people" have the opportunity to accept or to reject the ruling elite, and thus have a sort of ultimate control over the democratic process.<sup>69</sup>

However, this theory presupposes a minimal ability among the electorate to make informed decisions about the politicians/rulers. Schumpeter must therefore acknowledge that a leveling, in terms of levels of information, is necessary with respect to the social groups involved in the democratic process of electing rulers out of office, if the process is not to be effectively controlled by an informed elite, rather than by "the people" as a whole. If certain social groups are either completely misinformed, or uninformed, about the policies and qualifications of the ruling elite who compete for their vote, then the elite are not really "chosen" by "the people" in any meaningful sense of the word.

Schumpeter assumes that citizens exhibit at least a modicum of intelligence in choosing their political leaders. He takes it for granted that the electorate actually responds to factors such as the training, qualifications, and policies of the political candidates rather than, for example, their good looks.<sup>70</sup> This may not be a valid assumption. Social stratification, particularly along economic lines, can seriously undermine the goal of an informed citizenry. Where it exists, it can make a mockery of the idea of "choice." For example, the homeless and the hungry encounter difficulties in becoming fully informed about the drawbacks of particular politicians, thereby placing them at considerable disadvantage relative to other voters (assuming that they even vote). So, while Schumpeter does not explicitly exclude social groups from participation, his system is distorted if he implicitly

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63. J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1976).

64. *Id.* at 285. Schumpeter's democracy for the politicians stands at the opposite end of the spectrum from the ancient Athenian sense of democracy as a way of life.

65. *Id.* at 206.

66. *Id.* at 256.

67. *Id.* at 282.

68. *Id.* at 295.

69. *Id.* at 282.

70. For a similar criticism, see D. HELD, *supra* note 35, at 180.

allows for the exclusion of some social groups, or if he proposes no mechanism by which to assure the full participation of the eligible electorate.

D. *Pluralism: Rule by Non-Disadvantaged Minorities*

Consideration of classical pluralism, the second twentieth century theory, highlights the inadequacies of the democratic theory adopted by the courts in equal protection analysis. Robert Dahl, the most notable champion of pluralism,<sup>71</sup> characterizes democracy as the rule of minorities.<sup>72</sup> Dahl divides the political world into many interest groups which he claims compete with one another.<sup>73</sup> Rule, or even tyranny, by the majority is therefore less of a threat in Dahl's system because of this competition. Furthermore, under his theory, competition among interest groups creates fluidity as interest groups form alliances. These shifting alliances mean that any one group is sometimes with the majority and sometimes with the minority.<sup>74</sup> Disadvantaged groups only become a concern for Dahl to the extent that their status impedes the political process.<sup>75</sup> Accordingly, to Dahl, the political process is a dynamic which is basically sound, but occasionally in the need of adjustment. In this version of classical pluralism, disadvantaged groups are not explicitly excluded from the political process; they, like any others, can form interest group organizations and enter into alliances.

The pluralist's analysis seriously underestimates the capabilities of disadvantaged social groups. Some groups have little access to resources that would enable them to form an interest group. Furthermore, far less fluidity seems to exist between social groups than the pluralists assume, especially when we start thinking of groups in terms of racial and ethnic minorities. Dahl, however, continues to view minorities as a quantitative minority without fully acknowledg-

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71. *Id.* at 192.

72. See R. DAHL, A PREFACE FOR DEMOCRATIC THEORY 133 (1956).

73. R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 5, 28 (1982) (defining pluralisms in terms of relatively autonomous organizations).

74. R. DAHL, DEMOCRACY IN THE UNITED STATES 59 (1976).

75. Dahl's writings actually exhibit a broader concern. Dahl noted the distorting effects of extreme inequalities and subculture pluralism (social groups, in terms of this Article). R. DAHL, POLYARCHY 81-104 (1971). His most recent writings indicate a considered sensitivity to the problems of inequality, especially economic inequality, and disadvantaged groups. See R. DAHL, *supra* note 72; R. DAHL, DEMOCRACY AND ITS CRITICS (1989). "[T]he existence of sizable inequalities in political resources among the citizens should be disturbing to anyone who places a high value on political equality." R. DAHL, *supra* note 72, at 53. However, it is the classical formulation of pluralism that the Court seems to adopt and that therefore concerns us here.



ing varying capabilities within these distinct groups to form interest groups. So, "rule by minorities" could mean rule by certain, more socially advantaged interest groups, to the exclusion of disadvantaged social groups, unless Dahl provides assurances to the contrary. Although there is much more to classical pluralism, such as its reformulations in neo-pluralism,<sup>76</sup> the above description should suffice for understanding the judiciary's reliance on it. The Court's development of a suspect classification analysis takes place against the background of this theory of democracy.

As I have demonstrated in this Section, democratic theories come in many varieties. All democratic theories, however, make, or should make, some claim about social groups and how they ought to be situated relative to one another. In the next Section, I will show how the Court and some legal theorists have worked within the confines of a particular version of democratic theory, namely, classical pluralism. As we have seen, classical pluralism recognizes a narrow set of inequalities, i.e., those that directly infect the political process. Before demonstrating the need to broaden the list of disadvantaged groups so as to expand the types of inequalities considered, and describing the Court's current treatment of suspect classes, I want to describe the history of the Court's development of suspect class analysis. First, I explore the Court's early formulations. Then I turn to attempts by commentators to find a unified treatment, before I go on to describe the Court's current treatment.

### III. SUSPECT CLASS JURISPRUDENCE

Three domains of suspect class analysis are investigated in this Section: (1) whether any social group should get judicial protection; (2) how the Court justifies its protection of certain groups; and (3) which specific groups qualify as suspect classes. The discussion below roughly follows a historical development beginning with the Court's first formulation in 1938 and ending with the Court's current construction of suspect classes.

In 1938, the Court began to lay the groundwork for suspect class analysis through the *Carolene Products*<sup>77</sup> doctrine. Ely proposed the process model as a bold attempt to unify Supreme Court opinions and to prescribe future directions for the Court on suspect classes and

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76. See, e.g., R. DAHL, *supra* note 72. Dahl argues that the economic inequalities of corporate capitalism undermine the democratic process. Dahl proposes worker control, through participation, as one way of leveling the playing field. *Id.* at 52-110.

77. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

other matters.<sup>78</sup> As we shall see below, neither the *Carolene Products* approach, nor Ely's process model, proved a completely accurate depiction of how the Court rules or of how the Court should rule on suspect classes. They do, however, provide steps toward a unified theory, as well as invaluable insights.

#### A. *The Carolene Products*<sup>79</sup> Doctrine

During the *Lochner*<sup>80</sup> era, an activist judiciary invalidated numerous pieces of social legislation in order to protect freedom of contract.<sup>81</sup> That era came to an abrupt end in 1937.<sup>82</sup> On the tail of the winds of change came a seemingly unremarkable decision, *United States v. Carolene Products Co.*,<sup>83</sup> which dealt with a rather mundane subject, a Congressional ban on the interstate shipment of skimmed milk mixed with nonmilk fats.<sup>84</sup> The decision itself hardly qualifies as historical, to say nothing of noteworthy,<sup>85</sup> but Justice Harlan Fiske Stone's Footnote 4<sup>86</sup> has taken on a notorious life of its own, becom-

78. See J. ELY, *supra* note 13.

79. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

80. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a New York statute setting maximum hours for bakers on grounds that the statute violated the freedom of employers and employees to contract with each other). For a period of time following the *Lochner* decision, the Court invalidated many similar statutes. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating Oklahoma attempt to make ice manufacturing a public utility); *Williams v. Standard Oil Co. of La.*, 278 U.S. 235 (1929) (invalidating state's attempt to regulate commodity prices); *Adkins v. Childrens Hospital*, 261 U.S. 255 (1923) (invalidating District of Columbia minimum wage); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state law prohibiting "yellow dog" contracts); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating similar federal law). The *Lochner* era illustrated the Court's marked insensitivity to the power relations between two social groups: employers and employees. "Freedom of contract" becomes problematic in light of the differential bargaining power between employers and employees.

81. See *supra* note 80.

82. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (sustaining state regulation of women's wages).

83. 304 U.S. 144 (1938).

84. *Id.* at 145-46.

85. However, in a day of anti-cholesterol sentiment, a decision invalidating a statute that proclaimed milk without butterfat to be "an adulterated article of food, injurious to the public health" might well qualify as noteworthy. See Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

86. Footnote 4 provides in full:

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. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of

ing "the most celebrated footnote in constitutional law."<sup>87</sup> Although commentators may exaggerate the impact of the *Carolene Products* footnote, for no sound theoretical edifice is built upon commentaries to a footnote, a great deal of contemporary constitutional jurisprudence stems from this seemingly innocuous footnote.<sup>88</sup>

Footnote 4 contains a very clear structure, with each of its three paragraphs spelling out a distinct jurisprudential doctrine. Paragraph 1, as modified by Chief Justice Hughes,<sup>89</sup> encapsulates the debate between those who, like Hughes, advocated complete incorporation of the Bill of Rights,<sup>90</sup> thereby making it binding on the states as well as the federal government, and those (the eventual winners in the debate) who proposed selective incorporation.<sup>91</sup> Paragraph 2 proposes a more exacting form of scrutiny when legislation directly impedes the political process. The Court, acting within the tradition

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undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibition of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with political organizations, see *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lounry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. [2]84, or racial minorities, *Nixon v. Hendron*, *supra*; *Nixon v. Condon*, *supra*: 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. Compare *McCulloch v. Maryland*, 4 Wheat 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n. 2, and cases cited.

304 U.S. at 152 n.4.

87. Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982). Justice Powell "counted at least 28 cases in which Footnote 4 has been cited in either a majority, concurring, or dissenting opinion of the Supreme Court." *Id.* at 1087 n.4; see also J. ELY, *supra* note 13, at 148 ("In fact Justice Blackmun was the first ever—apart, of course, from Justice Stone's original *Carolene Products* footnote—to indicate in an Opinion of the Court that 'discrete and insular' minorities are entitled to special constitutional protection from the political process.").

88. Cf. *Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1941) (Frankfurter, J., concurring) ("A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine.").

89. Professor Louis Lusky, Justice Stone's law clerk at the time *Carolene Products* was decided, describes how Justice Stone modified Paragraph 1 in response to a letter from Chief Justice Hughes. See Lusky, *supra* note 85, at 1096-100.

90. *Id.* at 1100-02.

91. *Id.* at 1102-03.

of classical pluralism, adopted the principle of Paragraph 2 almost immediately.<sup>92</sup> The underlying theory of Paragraph 3, strict scrutiny of legislation affecting "discrete and insular minorities," took many more years to settle in, with that process finally culminating in *Brown v. Board of Education*.<sup>93</sup> Although Paragraphs 2 and 3 relate to each other,<sup>94</sup> I will focus primarily on Paragraph 3, while alluding to Paragraph 2 at various points.

What is the story behind the adoption of Footnote 4, and why has it generated such an intense interest among jurists? Professor Cover's analysis in tracing the history of Footnote 4 provides an apt example of the use of a social theory to help answer these questions.<sup>95</sup> Cover argues that the adoption of Footnote 4 brought the first full-fledged judicial recognition of a social sense of "minorities."<sup>96</sup> Prior to that time, he claims, the classical pluralist sense of quantitative minorities predominated and minorities did not possess, at least in the eyes of the judiciary, any qualities indicative of disadvantaged groups.<sup>97</sup> I disagree with Cover's overall assessment. There is ample evidence to suggest that an implicit official use of a social sense of minorities existed throughout the history of the United States.<sup>98</sup> However, his dating of the official recognition of socially construed minorities dovetails nicely with a theme of this Article that the judiciary should continue to give more expansive treatment to a social

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92. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); see also Lusk, *supra* note 85, at 1103-04 (showing how the then current members of the Court recognized that the Court had been using the precepts of Paragraph 2 all along).

93. 347 U.S. 483 (1954). For a more detailed discussion along the lines set forth in this paragraph, see Lusk, *supra* note 85, at 1104.

94. Brilmayer, Carolene, *Conflicts, and the Fate of the "Insider-Outsider,"* 134 U. PA. L. REV. 1291, 1296 (1986) (portraying Paragraph 3 as a collateral attack on what Paragraph 2 attacks directly, viz., legislative proceedings).

95. See Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1294-97 (1982).

96. *Id.* at 1294.

97. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (including cases cited within Paragraph 2).

98. In THE FEDERALIST NO. 10, at ¶ 1 (J. Madison) (M. Beloff ed. 1987) Madison may well have had in mind debtors such as those led by Daniel Shay, who led a rebellion in Massachusetts, when he warned against the disruptive influence of minority factions. In other words, Madison was not simply concerned with the power of any special interest group but rather, he was particularly disturbed by the rebellious group of small farmers who were demanding the abolition of their debt following the Revolution in return for their participation in the Revolution. See Cover, *supra* note 95, at 1294 n.46; see also C. FROMAN, THE TWO AMERICAN POLITICAL SYSTEMS 5-14 (1984); D. SZATMARY, SHAY'S REBELLION 121-34 (1980); H. ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 92-101 (1980). But cf. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29-45 (1985). Madison "saw the 'corruption' that created factions as a natural, though undesirable, product of liberty and inequality in human faculties." *Id.* at 39.

interpretation of minorities.<sup>99</sup>

In contrast to Cover's sympathetic reading of Footnote 4, Chief Justice Rehnquist raised the specter of arbitrariness with respect to "discrete and insular minorities."<sup>100</sup> According to Rehnquist, the Court can freely create suspect classes under this standard, unfettered by any standards.<sup>101</sup> Given the contorted way in which the Court has drawn the boundaries around "discrete and insular" minorities, Rehnquist's reservations seem well founded. What factors could possibly unite race, alienage, gender, and illegitimacy?<sup>102</sup> However, to admit to the arbitrary nature of current boundaries does not imply that defensible line-drawing shall forever remain beyond reach. Nevertheless, before meeting that challenge,<sup>103</sup> we need to examine the terrain as set out by the Court. Upon what theory does the Court rely in differentiating "discrete and insular minorities" from other minorities, and has that theory outlasted its usefulness?

In a recent article, Professor Ackerman<sup>104</sup> applauds the past use of Footnote 4 in dealing with racial problems but sees it of limited value in dealing with the most critical social problems of the future.<sup>105</sup> I contend that even its former utility warrants reassessment. Ackerman argues that the terms "discrete," "insular," and "prejudice" do not adequately protect those groups most in need of protection in today's society.<sup>106</sup> According to Ackerman, Blacks qualify as discrete and insular; women only as discrete and diffuse, but not insular; homosexuals as anonymous, and not discrete but insular; the poor as neither discrete nor insular.<sup>107</sup> While conceding that Blacks still suffer from discrimination, Ackerman distinguishes Blacks from these other groups, which he says have not achieved the degree of represen-

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99. For proponents of the argument for judicial restraint, see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (2d ed. 1978); Thayer, *The Origin and Scope of the Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For classical defenses of judicial activism, see C. BLACK, *THE PEOPLE AND THE COURT* (1960); Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

100. *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) ("It would hardly take extraordinary ingenuity for lawyers to find 'insular and discrete' minorities at every turn in the road.").

101. *Id.* at 651-57.

102. Race, alienage, gender, and illegitimacy are the four categories of disadvantaged social groups given protection by the Court. See *infra* notes 136-74 and accompanying text.

103. See *infra* notes 182-239 and accompanying text.

104. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

105. *Id.* at 717-18.

106. *Id.* at 742.

107. See *id.* at 729. The courts have never defined "discrete" or "insular" in the narrow and literal way that Ackerman treats them. Ackerman seems to admit as much. See *id.* at 729 n.27.

tation which Blacks have at the pluralist bargaining table.<sup>108</sup> Despite my agreement with the groups Ackerman wants to include for protection, he appears too closely wedded to the pluralist underpinnings of the *Carolene Products* analysis.<sup>109</sup>

Nonetheless, Ackerman finds two insights gleaned from a *Carolene Products* approach.<sup>110</sup> The first is a procedural insight which concerns the relatively weak bargaining power of certain social groups.<sup>111</sup> The second is a substantive insight which centers on a moral judgment denouncing prejudice against disadvantaged groups.<sup>112</sup> Ackerman applauds the first insight, protection of disadvantaged groups, at the pluralist bargaining table.<sup>113</sup> However, Ackerman's sympathetic treatment of Footnote 4 cannot hide one of its glaring defects: even on its own terms the *Carolene Products* analysis fails. Black representation at the pluralist bargaining table does not directly correlate with the improvement of Blacks as a social group. Although Ackerman seems to recognize its difficulties, he refuses to discard *Carolene Products* in its allegedly successful application to racial minorities. This leads him to imply that "the anonymous and diffuse victims of poverty and sexual discrimination,"<sup>114</sup> and not Blacks, have "the most serious complaints"<sup>115</sup> today. Contrary to Ackerman's claim, Blacks still have very serious complaints at the pluralist bargaining table.<sup>116</sup> However, this does not imply a complete rejection of the *Carolene Products* analysis because it has opened some important seats to, and for, racial minorities at the pluralist bargaining table. But, it does imply that the progressive scope of *Carolene Products* is far more limited than Ackerman's interpretation permits.

Ackerman's ambivalence over *Carolene Products* also manifests a deeper problem. While Justice Stone cast Footnote 4 in terms of social groups (racial, religious, and national minorities),<sup>117</sup> *Carolene Products* only becomes fully operable when the concepts "social

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108. According to Ackerman, the pluralist "bargaining model captures an important aspect of American politics." *Id.* at 743. Blacks, having taken advantage of their position at the pluralist bargaining table, "can deal with the problem [of prejudice] politically in ways that other victims of prejudice may be powerless to match." *Id.* at 737.

109. *Id.* at 742.

110. *Id.* at 740-41.

111. *Id.* at 740.

112. *Id.* at 741.

113. *Id.* at 742.

114. *Id.* at 745.

115. *Id.*

116. For an excellent collection of studies describing the electoral problems confronting Blacks, see JOINT CENTER FOR POLITICAL STUDIES MINORITY VOTE DILUTION (C. Davidson ed. 1984).

117. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (paragraph 3).

group" and "interest group" completely mesh. Racial minorities also deserve judicial protection when the legislative system precludes them from becoming interest groups. It is only when a disadvantaged group, such as a racial minority, solidifies into an interest group capable of political negotiation and bargaining, that it has a lesser claim on protection under *Carolene Products*.

In order to revitalize *Carolene Products*, the doctrine cannot be made to draw an inextricable connection between social groups and interest groups. If the doctrine is to be reformulated so as to admit past failures, even with respect to Blacks, it must be re-cast in terms of social groups. Interest groups and social groups are not equivalent. All interest groups are not social groups. All social groups are not interest groups. However, even if a social group achieves representation in the political process through the formation of an interest group, the social group may still need judicial protection.

John Hart Ely provides the most complete reformulation of *Carolene Products* in his seminal work, *Democracy and Distrust*.<sup>118</sup> He reforms it in terms of the process model but, as will become apparent below, Ely's failure to construct his theory in terms of social groups also makes it vulnerable to attack.

### B. *Ely and the Process Model*

Judges and defenders of the judiciary worry about the countermajoritarian argument.<sup>119</sup> According to this argument, democracy goes hand-in-hand with majority rule. The judiciary can only play a precarious role in majoritarian politics. Majoritarians cannot countenance a judiciary of the few imposing its substantive values on the majority.<sup>120</sup> Nevertheless, the process model finds a role for the judiciary, a role not only compatible with majoritarian democracy, but one that serves to protect that democracy.

According to the process model, the judiciary helps to assure the smooth functioning of pluralist democracy.<sup>121</sup> Pluralists readily admit to glitches in the democratic operations. On the pluralist model, democracy involves the competition between various interest groups. The interests of some individuals are not considered because

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118. J. ELY, *supra* note 13.

119. See, e.g., *id.* at 4-5. The counter-majoritarian argument can be summed up as follows: "[The concern is that a] body that is not elected, or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like." *Id.*

120. See J. THAYER, JOHN MARSHALL 103-07 (1901) for a classical statement of the counter-majoritarian concern.

121. See J. ELY, *supra* note 13, at 80.

they belong to relatively powerless groups, which cannot or have not formed coalitions with more powerful interest groups. The ordinary political process cannot, therefore, be relied upon to protect their interests.<sup>122</sup> Prejudice directed at these minorities diminishes their ability to form coalitions.

Cracks in the political process, caused by prejudice, create openings for the courts. When the political process malfunctions, by either restricting the voice and vote of those not adequately represented, or by prejudicially ignoring the interests of "discrete and insular minorities," the judiciary can correct these malfunctions by invalidating the legislation that was distorted by these improper processes.<sup>123</sup> According to Ely, judicial review is justified when it yields representation-reinforcing action.<sup>124</sup> The Court thereby merely protects the political process and the role of minorities within that process. Thus, a process justification for judicial review should not give rise to any majoritarian complaints.<sup>125</sup>

However, the troublesome nature of the counter-majoritarian argument begins to deflate in light of other areas where it does not operate with the same force. What justifies the process model from getting off the ground in the first place? The process model answers the counter-majoritarian difficulty, but where does the hypersensitivity to judicial assaults on majority rule come from? Although the Court is severely criticized when it invalidates legislation, administrative agencies, or seldom scrutinized organizations such as the American Law Institute,<sup>126</sup> are not subjected to the same counter-majoritarian critique as that launched against the Court.<sup>127</sup> Bureaucratic complexity in the modern state makes *all* branches of government vulnerable to counter-majoritarian concerns. Yet, not only do the counter-majoritarians keep silent when a candidate wins an elec-

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122. *See id.* at 135 ("In 1957 the Alabama Legislature redrew, by statute, the boundary lines of the City of Tuskegee so as to change its shape from a square to an 'uncouth twenty-eight-sided figure' and, in the process, to exclude all but a handful of the city's four hundred previously resident black voters."). *Id.* at 139-40.

123. *Id.* Ely draws an analogy here between the judiciary and a referee, who intervenes, "only when one team is gaining an unfair advantage, not because the 'wrong' team has scored." *Id.*

124. *See id.* at 86.

125. However, the process model has given rise to a cottage industry of critiques. *See, e.g.,* Ackerman, *supra* note 104; Brilmayer, *supra* note 94; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

126. *See, e.g.,* J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 139 (1986).

127. *Cf. M. PARENTI, DEMOCRACY FOR THE FEW* 255-74 (1988) (criticizing the federal bureaucracy as anti-democratic).



tion with less than either a majority of the votes cast, or of the eligible votes, but also, candidates often claim they have a "mandate" from the voters, whether or not they command a majority of those voters.<sup>128</sup> All this casts some doubt on whether the counter-majoritarian critique has any solid basis.

Nevertheless, a *tu quoque* ("you too") argument should not carry the day. Like its *Carolene Products* counterpart, which analyzes legislation in terms of its impact on discrete and insular minorities, the process model has some valuable insights; it simply needs redirection. The judiciary should exercise concern for the malfunctioning of the political process, but the definition of the "political process" needs expanding beyond the process model's narrow interpretation as merely the legislative process.<sup>129</sup> Grave disparities between the power of various social groups undermine the social process, which, in turn, affects the overall political process.<sup>130</sup> The political process should account for those social dynamics which eventually culminate in formal electoral politics. If a social group is so powerless that it cannot even get on the legislative agenda (if only to give the legislature a chance to exercise prejudice against it), then democracy is enfeebled.

Ely's process model is simply not rich enough to incorporate the social inequities underlying his narrow sense of the "political." For example, according to Ely, suspect classifications are rooted in "we/they" generalizations whereby the legislators perceive the subject class of the legislation as the "they's" in contrast to the "we's" in the legislature.<sup>131</sup> A legislatively drawn classification between Blacks and

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128. J. COHEN & J. ROGERS, ON DEMOCRACY 33 (1983) ("In winning the [1980] victory that continues to be labeled a 'mandate' and a 'landslide' by the national press, Ronald Reagan gained a smaller percentage of the eligible electorate than did Wendell Wilkie in his decisive 1940 loss to Roosevelt.").

129. See J. ELY, *supra* note 13. Throughout his book, Ely talks about legislative process.

130. At one point, Ely explicitly recognizes the distinction between the political and the social. See J. ELY, *supra* note 13, at 161. However, the social becomes important for Ely only insofar as it serves as a breeding ground for prejudice that blocks the roads to the political process. *Id.* So, for Ely, the social plays a secondary role, one on which he does not place very much emphasis.

131. See *id.* at 159-60 ("By seizing upon the positive myths about the groups to which they belong and the negative myths about those to which they don't, or for that matter the realities respecting some or most members of the two classes, legislators, like the rest of us, are likely to assume too readily that not many of 'them' will be unfairly deprived, nor many of 'us' unfairly benefited, by a classification of this type."). But cf. Tushnet, *supra* note 125, at 1053. Tushnet provides some trenchant criticisms of Ely's "we/they" analysis. Whether the situation falls into the "we/they" or the "they/they" classification depends on the level of analysis. Almost any situation can be defined as "they/they" and thus avoid strict scrutiny. For example, in *Trimble v. Gordon*, 430 U.S. 762, 766 (1977), the Court held unconstitutional a statute that discriminated against illegitimates by prohibiting inheritance through intestate succession in situations where legitimate children could inherit. On one level, this situation reflects the "we/

Whites, he claims, "has its root in a comparison between a 'we' stereotype and a 'they' stereotype."<sup>132</sup> In contrast, a legislative classification on the basis of gender, does not arise out of a "we/they" generalization.<sup>133</sup> Ely limits his use of social theory largely to an analysis of the legislative process. He must assess whether the legislators traditionally have been Black<sup>134</sup> or whether women have ready ways to become legislators or to attain representation.<sup>135</sup> Although the social matrix outside of the legislature plays a role in the process model, it is only a derivative one because the process model is designed to tease out only one kind of social disparity, that reflected in legislative stereotypes.

Ely tries to level the playing field vis-a-vis prejudice against certain groups, but his process model nevertheless views that playing field as a narrow one, leaving little room in which the judiciary can referee. The process model merely tries to winnow out *legislative* prejudice, prejudice which constitutes only a small obstacle blocking the development of certain social groups such as Blacks. Blacks face many other kinds of prejudice and structural forms of discrimination that stymie their role as citizens. Ely has identified a problem, but the legislature's perception of itself as a unified "us" against a discrete and insular "them" seems to play only a small role in the overall scheme of political power.

If the process model tries to justify a form of judicial review within democratic theory, it fails. Far worse threats than representational failure threaten democracy. Significant proportions of certain social groups do not even have enough resources to suit up players for the process model game, despite the fact that some of their "own kind" may already be playing. Social hierarchy can garner enough force to cause serious earth tremors underneath the playing field. For this reason, perhaps the judiciary's role is more aptly compared to that of a seismologist, rather than to that of a referee. Fairness on the political field pales in comparison to the social ground crumbling beneath our feet.

The basis for an expanded judicial role, though, lies directly

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they" dichotomy since legislators will likely be legitimates. However, on another level, the statute reflects the "they/they" dichotomy since legislators are likely to have written wills.

132. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 732 (1974).

133. See J. ELY, *supra* note 13, at 164. Why the impact of the vote should nullify the effect of women's under-representation in the legislature for women, and Black emancipation should not, is not clear.

134. *Id.*

135. *Id.* at 164-70.

within the judiciary's own opinions to which I now turn. So far, I have examined the underlying democratic theory put forth by the Court following the *Lochner* era, as well as that by commentators such as Ely, who have tried to improve upon the Court's own pronouncements. Now I look at the cases themselves.

### C. *Suspect Classes*

The Court has considered a number of social groups as candidates for suspect classes.<sup>136</sup> The list includes racial minorities, aliens, women, illegitimates, the mentally retarded, the poor, homosexuals, the aged, and the children of illegal aliens.<sup>137</sup> In the order used here, the cut off line hovers around illegitimates.<sup>138</sup> The groups above the illegitimacy classification have attained suspect class status; those below have failed to qualify.

Because of our long and sordid history of privately and publicly sanctioned racism in the United States, racial minorities serve as the paradigmatic suspect class, triggering strict scrutiny by the Court. Strict scrutiny means that the Court will invalidate any piece of legislation that involves a racial or otherwise suspect classification unless the state can show that the classification is a necessary means to serve a compelling interest.<sup>139</sup> In short, the state will almost always lose when the Court finds a suspect classification worthy of strict

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136. The Court first explicitly used suspect classification analysis in the now infamous *Korematsu v. United States*, 323 U.S. 214 (1944) (holding constitutional the relocation of Japanese residents on the West Coast), *reh'g denied*, 324 U.S. 885 (1945). *Korematsu* was the first case to explicitly refer to race as a suspect classification, and it was the last case in which a racial or ethnic classification survived strict scrutiny. The Court had previously referred to suspect classes, though less explicitly, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating an ordinance that unduly burdened a racial minority in its application).

137. *See supra* notes 18-21.

138. In *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court returned to an intermediate level of scrutiny, thus retreating from the strict scrutiny for illegitimates established in *Levy v. Louisiana*, 391 U.S. 68, *reh'g denied*, 393 U.S. 898 (1968). Despite giving illegitimates a higher level of scrutiny than the rational basis test given to other groups, such as the aged, the Court has refused to treat illegitimacy as a suspect classification.

139. The Court, in *Korematsu*, held that racial classifications should be held to the "most rigid scrutiny." *Korematsu*, 323 U.S. at 216. It noted that although "[p]ressing public necessity may sometimes justify the existence of [legislative] restrictions; racial antagonism never can." *Id.* Under strict scrutiny, the Court requires not only a "pressing public necessity," but also a tight fit between the means and the ends. *See, e.g.*, *In Re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973). The Court accepted the judgment of military authorities that the incarceration and dispossession of Japanese living in the United States was a military imperative. *Korematsu*, 323 U.S. at 217-20. In *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964), the Court held that a racial classification must "bear[] a heavy burden of justification . . . and will be upheld only if it is necessary and not merely rationally related, to the accomplishment of a permissible state policy."

scrutiny.<sup>140</sup>

Race, alienage, ancestry,<sup>141</sup> and to a lesser extent, gender and illegitimacy constitute the other accepted suspect classes.<sup>142</sup> Unfortunately, the Court never clearly delineates the criteria for differentiating these classes from other candidate classes. The most complete set of standards the Court has ever offered was in *San Antonio Independent School District v. Rodriguez*.<sup>143</sup> There, in rejecting poverty as a suspect classification, the Court stated that it had "none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>144</sup>

In the discussion below, I offer a brief analysis of four accepted suspect classifications: race, alienage, gender, and illegitimacy. Here I draw freely on material treated more fully in the next Section. The discussion serves more as a bridge between the pitfalls of the process model and the virtues of the social model, than as a complete survey of the Court's treatment of suspect classes. The critique raises a number of questions about the current status of suspect classification analysis which the proposed social model should answer.

## 1. RACE

Race presents the least problematic suspect classification, and rightfully so. Given the sordid history in this country of institutionalized racism and modern problems of de facto segregation, race serves as the paradigm suspect class both under current jurisprudence and

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140. Strict scrutiny has been for the most part aptly described as "strict in theory and fatal in fact." Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In contrast, the state will almost always win if the Court employs a rational basis test, whereby a statute will be upheld so long as the means used by the legislature is reasonably related to the legislature's purpose. *Id.* While the Court has, at times, loosely construed the rational basis test as nonarbitrary, it has also accepted a stricter formulation: "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

141. I have not included a separate treatment of ancestry and national origin. For purposes of this Article, they can be included under race.

142. See *supra* notes 18-21.

143. 411 U.S. 1, *reh'g denied*, 411 U.S. 459 (1973).

144. *Id.* at 28. Before turning to problems in applying these criteria, I would just like to note that apparently the Court refuses, except in certain circumstances, to acknowledge that the poor, in fact, *do* have these traditional indicia of suspectness. I find that refusal baffling.

under the proposed social theory.<sup>145</sup> Even those wishing to see a colorblind Constitution, with no "special treatment" for any one group, accept the importance of race.<sup>146</sup> Few would argue that Blacks place, as a group, very high along the hierarchy of well-off social groups. The electoral success of a few Blacks has not radically altered this reality of social ranking for Blacks, even though it admittedly has had some impact.<sup>147</sup>

Official subjugation of peoples into slavery, irrespective of their racial characteristics, deserves condemnation. However, the effective enslavement of a people, on the basis of their racial characteristics, is even more abhorrent and creates a national wound from which this nation may never recover. The horrors of that subjugation should not, however, blind us to the drawbacks of treating race as *the* paradigm suspect class. One of those drawbacks is that all other disadvantaged groups may not share the characteristics of race. Many disadvantaged groups do not wear the badge of subjugation as prominently as do racial minorities. Alienage illustrates this point.

## 2. ALIENAGE

The Court has regarded aliens as a discrete and insular minor-

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145. While the Court and I accept race as a suspect classification, we differ on the next phases of the analysis. The Court looks primarily at the suspect classification and downplays or rejects any focus on the disparate impact of legislation on members of the race. See *Washington v. Davis*, 426 U.S. 229 (1976). But cf. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (noting that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose"), *reh'g denied*, 444 U.S. 887 (1979). I, however, concentrate on the disparate impact on suspect classes.

146. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Justice O'Connor concedes that a strong evidentiary showing of past private racial discrimination might be sufficient to get a benign racial classification past the strict scrutiny test. *Id.* at 497-506. So O'Connor, even though she advocates a colorblind Constitution, would allow for some benign racial classifications.

147. Ackerman cites a number of statistics to illustrate the political success of Blacks. For example, in the 1982 congressional elections, voting participation among Blacks was 43%; among Whites, 50%. The number of Blacks elected to public office increased tenfold from 1965 to 1982. See Ackerman, *supra* note 104, at 744 n.56 & 745 n.57. However, Parenti argues:

The infant mortality rate in the United States is worse than in twenty other western nations, and twice as bad for Black infants as for White ones, because of poverty and the relative inaccessibility of prenatal and postnatal care. In eleven countries women have a better chance to live through childbirth than in the United States. According to the Bureau of Labor Statistics, the number of people who live below the poverty level climbed from 24 million in 1977 to about 35 million in 1986, making the poor the fastest growing demographic group in the United States . . . .

M. PARENTI, *supra* note 127, at 30. In 1987, 11% to 15% (depending on the measure used) of all Whites fell below the poverty income line, whereas 33% to 40% of all Blacks fell below that line. J. HENSLIN, *SOCIAL PROBLEMS* 256 (2d ed. 1990).

ity,<sup>148</sup> yet, on what basis do aliens qualify as a suspect class? Arguably, alienage, unlike race, does not socially stigmatize in such a way that a person cannot readily strip herself of the bondage.<sup>149</sup> Also contributing to the uncertainty of aliens' qualification as a suspect class is the question of whether aliens really constitute an identifiable group.<sup>150</sup> For example, both the Dutch and Hispanics help to make up the alien class, but in general, they receive very different treatment at the hands of the government and society.<sup>151</sup> This does not mean that Dutch aliens do not experience any problems, but as a group their difficulties pale in comparison to that of Hispanics.<sup>152</sup> Prejudice and discrimination, therefore, seem to attach most readily, not to alienage, but to place of national origin and ethnicity.<sup>153</sup>

The process theory provides a ready justification for including aliens as discrete and insular minorities. Aliens, since they cannot

148. [T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority [citing Footnote 4 from *Carolene Products*] for whom such heightened judicial solicitude is appropriate . . . .

*Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (footnote omitted); see also *In re Griffiths*, 413 U.S. 717 (1973) (invalidating a state court requirement of citizenship for admission to the bar); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (invalidating a citizenship requirement for jobs in a state civil service).

149. "[D]iscrete" means separate or distinct and "insular" means isolated or detached. The words do not describe aliens as such . . . . [T]he phrase "discrete and insular" applies to groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power.

Lusky, *supra* note 89, at 1105 n.72. Ackerman accepts Lusky's characterization of "discrete and insular" while objecting to Lusky's dismissal of *Carolene Products*' protection to aliens. Ackerman sees aliens as covered by Paragraph 2 of Footnote 4 of *Carolene Products*. See Ackerman, *supra* note 104, at 729 n.27.

150. See Lopez, *Mexican Migration*, 28 UCLA L. REV. 615, 698-700 (1981) (arguing that the United States government owes a special obligation to Mexicans that it does not owe to other groups, such as citizens from Pakistan).

151. See J. HENSLIN, *supra* note 147.

Hispanics are about two and a half times as likely as Anglos to be poor. The median income of Hispanic families is only about two thirds that of Anglos, their unemployment rate is a third higher, and, compared with the general population, Hispanics are only half as likely to work at white-collar jobs. In addition, they are about four times as likely to live in overcrowded and deteriorating housing.

*Id.* at 107.

152. *Id.*; see also HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS (1980).

153. Note that a similar argument could apply, in part, to any social group. A social group consists of many subgroups, some of which are more subjugated than others. Race differs in degree, if not in kind, from alienage since it is difficult to imagine any subgroup among Blacks, in contrast to aliens, which does not experience some form of subjugation, other than that affecting voting rights.

vote,<sup>154</sup> by definition have no direct representation in the legislative process. Therefore, the theory goes, the courts should take special pains to protect aliens who have no opportunity to protect their own interests within the legislative process.<sup>155</sup> Aliens present a near perfect example of a minority left out of the electoral process.

Nevertheless, the argument reveals problems (none of which are fatal) in the process model; in specific instances aliens may, as a matter of fact, have certain of their interests represented by legislators who may be sympathetic to their plight.<sup>156</sup> Furthermore, the process model may base aliens' protection on too general of a principle by treating the group as a whole rather than as a divisible entity. For example, the harm may occur at a lower level of group abstraction, affecting only certain kinds of aliens, e.g., Cambodian boat people, rather than aliens in general. In other words, the alienage problem may need more of the tools of social analysis. To understand fully the plight of aliens, it may help to subdivide the alien class into social subgroups.

In *Plyer v. Doe*,<sup>157</sup> the Court struggled with the problem of how fully to analyze the concept of aliens. The Court struck down a Texas statute that denied educational funding for illegal aliens.<sup>158</sup> Although the Court rejected treating all illegal aliens as a suspect class,<sup>159</sup> it toyed with the idea of placing illegal alien children under that rubric.<sup>160</sup> This middle level of abstraction, halfway between aliens in general and specific members of the alien class, may serve as the optimal place to invoke the social analysis. The middle level strategy would be to find the lowest level of group abstraction (for example, illegal alien children in *Plyer*) that includes those group members suffering the most group harm. Accordingly, the Court could offer protection to those most harmed by the classification.

Despite the above problems, the Court should retain alienage as a suspect class because aliens do make up a group that cannot protect themselves in certain ways from the majoritarian or interest group

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154. Brilmayer notes that several states allowed aliens to vote early in this country's history but that by 1928 aliens could not vote in any state. See Brilmayer, *supra* note 94, at 1318 n.83.

155. See generally Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275.

156. In 1986, Congress enacted a number of immigration reforms. See Immigration Reform and Control Act of 1986, P.L. 99-603, § 102, 100 Stat. 3359. For example, "intending citizens" are protected against employment discrimination based on their lack of citizenship. For a discussion, see M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 237-39 (1988).

157. 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982).

158. *Id.* at 230.

159. *Id.* at 219.

160. *Id.* at 219-23.

political process, as they are barred by virtue of their group identity. However, if alienage remains a suspect class, then many other groups should also qualify. While the process model provides a fair defense for retaining alienage as a suspect class, it does a less admirable job in its treatment of gender. Perhaps this explains why, with gender, the Court has deviated from the process model.

### 3. GENDER

Gender creates problems for the process model because women constitute a majority, or, at least a near majority, of the electorate.<sup>161</sup> Protecting a majority with a doctrine that seems to require that the protected group be a "discrete and insular" minority presents a problem for the Court. This paradox offers the clearest proof yet that protection should be based on a social theory rather than on a process theory. Women deserve special concern *not* because of their minority status, provided that case could be made, but because of their status as a social group.

The Court's recognition of gender as a suspect classification still does not guarantee a great deal of judicial protection. The Court's analysis in *Geduldig v. Aiello*,<sup>162</sup> illustrates the limits of judicial protection for gender. It also demonstrates the problems the Court creates when it focuses on suspect classifications rather than suspect classes. In *Geduldig*, the Court held that exclusion of "disability that accompanies normal pregnancy and childbirth" from California's disability insurance system "does not exclude [anyone] because of gender."<sup>163</sup> The Court reasoned that the insurance plan divided recipients into two groups, pregnant women and nonpregnant persons.<sup>164</sup> Because women fell on both sides of the divide, the Court concluded that this case failed to demonstrate discrimination against women.<sup>165</sup> The discrimination may more properly lie with the Court's failure to acknowledge that only women get pregnant.<sup>166</sup>

Furthermore, suspect class status came rather recently for women; the Court did not recognize the suspect status of gender until

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161. For example, in the 1976 presidential election, more women voted than men. See J. EVANS, USA, IN THE POLITICS OF THE SECOND ELECTORATE 40 (J. Lovenduski & J. Hills eds. 1984 at 40).

162. 417 U.S. 484 (1974).

163. *Id.* at 496 n.20.

164. *Id.*

165. *Id.*

166. Congress subsequently amended Title VII in order to prohibit discrimination on the basis of pregnancy. See Act of Oct. 31, 1978, Pub. L. 95-555, 92 Stat. 2076-77.



the 1970's.<sup>167</sup> Although gender does not fit as neatly under the suspect class label as does race, it does merit at least quasi-suspect class status in the eyes of the Court.<sup>168</sup>

One positive aspect of the otherwise indefensibly belated recognition of suspect class status for women lies in the Court's implicit acknowledgment that suspect classes have some fluidity to them. This acknowledgment not only permits new classes, such as gender, to emerge, but also raises many questions: How much social turmoil and disruption is needed before a group may be given suspect class status? Do social groups currently excluded from this protection, such as homosexuals and the mentally retarded, need to exercise more militancy or experience greater harm before they attain judicial protection? Or, can the Court ease social/political tension by granting suspect class status before a great deal of social disruption has taken place? Furthermore, do these inquiries take the Court far beyond its legitimate role? In contrast to gender, illegitimacy does not raise such troublesome questions, but its acceptance as a suspect class raises other troubles.

#### 4. ILLEGITIMACY

The term "illegitimacy" is value laden. For some, an illegitimate child is living evidence of its parents' failure to live up to the moral standard set by society. Accordingly, some commentators have adopted the more neutral label, "nonmarital child."<sup>169</sup> The Court, however, persists in using the term illegitimacy.<sup>170</sup> The value laden nature of the term should lend some force to the Court's treatment of it as a suspect class. Presumably, the label "illegitimate" has a negative ring to it, *because* of how society discriminates against illegitimates.

The Court, however, has vacillated on its treatment of illegitimacy as a suspect classification. It inches toward strict scrutiny in

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167. See *Reed v. Reed*, 404 U.S. 71 (1971); see also *Craig v. Boren*, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

168. Although the [intermediate scrutiny] test [is] straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females . . . . [Thus], if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).

169. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 667-75 (1986).

170. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977).

some cases<sup>171</sup> and retreats toward a rational basis review in others.<sup>172</sup> The Court never reaches the heights or depths of either level of analysis, and never fully treats illegitimacy as a suspect classification. This ambivalence may in part be explained by the fact that the bearer of the illegitimacy trait has no control over that trait, a factor which argues for suspect class protection. And yet, illegitimates, unlike racial minorities, women, and aliens,<sup>173</sup> have never formally been excluded from the legislative process, a factor which argues against it.<sup>174</sup> Thus, illegitimates, having an uncontrollable trait, and yet not having been completely excluded from the political process, do not quite fit under the process model's criteria of suspectness. However, even within the terms of the process model, is illegitimacy any more of an uncontrollable trait than, let us say, homosexuality or aging? Arguably, it is not.

Illegitimacy defines the boundary line between what the Court considers suspect (race, alienage, and gender) and what it classifies as non-suspect. How justifiable is the Court's line of demarcation between suspect and non-suspect classes? Does it make any sense to draw the line at illegitimacy? I argue that if we accept the Court's three or four suspect, or quasi-suspect, classifications, then we must extend the list to include many more disadvantaged groups. What other groups make good candidates for suspect class status despite the Court's rulings?

## 5. NON-SUSPECT CLASSES

The Court has explicitly denied, or tacitly refused to consider, the suspect class status of a number of social groups: the physically

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171. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down a Louisiana statute that prohibited unacknowledged illegitimate children from bringing a wrongful death action for their mother's death).

172. See, e.g., *Labine v. Vincent*, 401 U.S. 532 (1971) (upholding an intestate succession scheme that prevented even acknowledged illegitimate children from sharing in their father's estate with legitimate children).

173. See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 169, at 658.

174. *Id.* at 668-69.

handicapped,<sup>175</sup> the mentally retarded,<sup>176</sup> the mentally ill,<sup>177</sup> homosexuals,<sup>178</sup> the aged,<sup>179</sup> and the poor.<sup>180</sup> Given the non-suspect status of these groups and the contrary suspect classification of race, alienage, gender, and illegitimacy, the suspect/non-suspect class demarcation makes little sense. For example, the mentally retarded fare as badly, if not worse than aliens, on any indicia of suspectness. The

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175. The Court has not discussed whether or not the physically handicapped qualify as a suspect class. See, e.g., *Alexander v. Choate*, 469 U.S. 287 (1985) (holding that a reduction in hospital benefit coverage did not discriminate against the handicapped); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (holding that school need not provide a hearing-impaired student with a sign-language interpreter); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (noting that college could refuse to admit a prospective nursing student with a hearing impairment when it would not be possible for her to participate without the school taking affirmative steps). These cases involved meaningful access and equalization of burdens questions, but these issues may be only symptomatic of biases against the handicapped. For an excellent argument in favor of giving the handicapped suspect class status, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-31, at 1594-98 (2d ed. 1988).

176. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444-45 (1985) ("[L]egislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others [and] it would be difficult to find a principled way to distinguish a variety of other groups . . . who can claim some degree of prejudice."). It is clear that the Court fears a "slippery slope," i.e., that admitting too many groups as suspect classes would open the floodgates. I offer an analysis that expands the list of suspect classes, but in a way that sets limits on the number qualifying.

177. Although the problem of the suspect class status of the mentally ill has been raised in cases such as *Schweiker v. Wilson*, 450 U.S. 221 (1981), the Court has refused fully to consider the issue. See Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974). The Court, in *City of Cleburne*, mentioned "the aging, the disabled, the mentally ill, and the infirm" as examples of candidates for suspect class analysis that the Court would have to consider if it accepted mental retardation as a suspect class. *City of Cleburne*, 473 U.S. at 444. While this is dicta, it does indicate that the Court will probably not grant the mentally ill, or any of the others mentioned, suspect class status.

178. The Court, in *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986), devoted a great deal of the opinion to the historical disapproval of homosexuality. This history would seem to justify *according* suspect class status, rather than to justify *denying* it. The Court's acceptance of this history of disapproval as valid does not bode well for the prospects of having homosexuals deemed a suspect class.

179. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (finding old age not to be a suspect classification, since most legislators and voters will someday be old). "[Old age] marks a stage that each of us will reach, if we live out our normal life span." *Id.* at 313-14.

180. See, e.g., *Maier v. Roe*, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."). In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, *reh'g denied*, 411 U.S. 459 (1973), the Court described the alleged suspect class as "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts." *Id.* at 28. Given that these were inner city residents of San Antonio in the poorest school districts, with a student population of 90% Mexican-American and 6% Negro, I, unlike the Court, have no hesitancy in calling these residents "poor." But the Court found that the poor in this case had none of the traditional indicia of suspectness. *Id.* at 19 & 28. The Court found that these groups had no disabilities, no history of unequal treatment, and no political powerlessness. *Id.* at 28. Such a finding is startling. Furthermore, with these statistics, it seems that the Court could have found that the legislation had a racial motivation.

mentally retarded have a long history of discrimination and oppression,<sup>181</sup> whereas not all aliens, e.g., the Norwegians, can justifiably construct a social history of group harm. Further, retardation can more easily meet the standards of immutability than can alienage.

The Court has failed to develop a single, coherent theory to determine suspect class status. However, a plausible set of suspect classes may be gleaned from the opinions of the various Justices, writing both for the majority and for the dissent. In the next Section, I have freely drawn upon these opinions to construct a theory of suspect classification and classes which may be used more fairly and coherently than the Court's theories. The objective is not to criticize the Court from a higher moral plateau, but rather to suggest some concerns critical for democracy itself.

#### IV. CONSTRUCTING A SOCIAL THEORY

The various cases in which the Court has considered whether or not a class qualifies as suspect leave the Court's analysis in disarray. The Court uses a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and non-suspect classes is drawn in a haphazard way. Thus, the process model fails to provide a coherent and viable framework for the Court's suspect class analysis. Perhaps we should look at attempts to unify the morass by adopting some principles that, consistent with many of the Court's opinions, prescribe what the Court ought to do. No one philosophy or analysis *exclusively* dominates the Court's opinions in the equal protection area (although the process model comes closest). Yet, a look at the Court's opinions reveals some dominant strains. I want to examine two influential proposals, namely, the anti-discrimination and the anti-subjugation principles. The arguments will show the merits of adopting the latter.

Professor Brest sees the Court as going beyond the neutral principles mandated by the process model<sup>182</sup> and adopting a substantive anti-discrimination principle,<sup>183</sup> which "disfavors race-dependent

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181. See *City of Cleburne*, 473 U.S. at 461-65 (Marshall, J., concurring in judgment and dissenting in part) (describing the history of discrimination suffered by mentally retarded).

182. Brest, *Forward: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976). It is somewhat misleading to describe the process model as advocating neutrality for it does promote at least one positive value, participation in the governmental system through electing representatives. See J. ELY, *supra* note 13, at 74-75.

183. The classical formulation of the anti-discrimination principle is found in Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). For an exhaustive critique of this use of the anti-discrimination principle, see Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108-46 (1976).

decisions and conduct—at least when either selectively disadvantages the members of minority groups.”<sup>184</sup> The anti-discrimination principle shares some things with the process model.<sup>185</sup> Like the process model, the anti-discrimination principle places the focus on the perpetrator of the discrimination and not on the disparate impact felt by the disadvantaged group.<sup>186</sup> Unlike the process model, the anti-discrimination principle makes no pretense of neutrality.

In contrast to Brest’s anti-discrimination principle, Professor Tribe proposes an anti-subjugation principle,<sup>187</sup> “which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens.”<sup>188</sup> The anti-discrimination principle emphasizes the biased mind of the perpetrator, whereas the anti-subjugation principle looks at the burdens placed upon suspect groups.<sup>189</sup> The moral justification for the anti-subjugation principle lies in the claim that it is wrong to have entire social groups subjugated, whether or not that subjugation is the result of bias.

The following discussion illustrates the differences between the anti-discrimination and anti-subjugation principles. If a legislature implemented a reapportionment plan that seriously diluted Black voting strength, the anti-discrimination principle would support a finding that was unconstitutional only if racial prejudice on the part of legislators could be shown. By contrast, if the plan closed out the election of minority candidates, the anti-subjugation principle would hold the plan unconstitutional, irrespective of the legislators’ intent. In *City of*

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184. See Brest, *supra* note 182, at 7.

185. See *id.* at 1-5. Brest provides a number of examples of cases decided according to the anti-discrimination principle, beginning with *Brown v. Board of Educ.*, 347 U.S. 483 (1954). He also cites *Hills v. Gautreaux*, 425 U.S. 284 (1976) (“requiring that government agencies remedy their past discriminatory selection of public housing sites by consciously locating future projects in predominantly White neighborhoods”). Brest, *supra* note 182, at 3.

186. *Washington v. Davis*, 426 U.S. 229 (1976), nicely illustrates the Court’s adoption of the anti-discrimination principle. In that case, the Court upheld an employment testing device, because discriminatory intent was not proven, despite the test’s disparate impact on Black candidates for jobs as police officers in Washington, D.C. *Id.* at 245-46.

187. See also Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

188. L. TRIBE, *supra* note 175, at 1515.

189. *Id.* at 1516-19. According to Tribe:

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

*Id.* at 1520.

*Mobile v. Bolden*,<sup>190</sup> the Court adopted the anti-discrimination approach and upheld a multimember district apportionment plan, the effect of which was to freeze out Blacks, because no discriminatory intent on the part of the legislators could be found.<sup>191</sup>

This case illustrates that the anti-subjugation principle has distinct advantages over the anti-discrimination principle, primarily because the former has a greater positive effect on democracy than the latter. Subjugation covers a broader array of harms that are relevant to democratic participation than does discrimination. Without a doubt, discrimination on the part of legislators undermines democracy, for their legislation becomes tainted by their prejudice; however, the subjugation of certain social groups poses even more serious challenges to democracy than does legislative discrimination. Democracy presupposes first-class citizenship for *all* of "the people." Second-class citizens are not fully "citizens" of the society. The sheer fact of their existence as second-class citizens undermines the very essence of democracy. Even if legislative discrimination disappeared, subjugation would remain and no true democracy can tolerate this.

Moreover, the anti-subjugation principle serves to unify what might seem like widely disparate factors used by the Court in determining the existence of a suspect class. Before showing the unifying effect of the anti-subjugation principle, the factors need to be combined into more manageable sub-categories. The Court has referred to various criteria that a social group needs to satisfy in order to qualify for suspect class status, including discreteness and insularity, immutability, political powerlessness, stereotypes, and obvious badges of inferiority.<sup>192</sup> The factors lie about in a hodgepodge within the various opinions of the Justices. None of the factors cited are alone sufficient conditions for suspectness. However, if the factors are put together in a unifying framework, their constellation constitutes an adequate set for suspect class analysis. One point that has befuddled the Court and its analysts is that these factors do not seem to fit into a clear and neat analytical framework.<sup>193</sup> However, group identity, group harm, and political/social powerlessness provide that clear-cut analytical framework.<sup>194</sup> Still, the main factors do not separate out

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190. 446 U.S. 55 (1980).

191. *Id.* at 65.

192. See *supra* notes 83-144 and accompanying text.

193. See, e.g., Note, *Suspect Classifications*, *supra* note 11, at 428 ("Although the Court has provided an inexhaustive list of factors that indicate suspectness, it has never enunciated a workable definition. Nor has the Court stated the method by which these factors determine suspectness.").

194. These factors parallel those set forth in Fiss, *supra* note 183, at 154-55. A great deal of

into isolated units. Rather, they are interdependent and mutually reinforcing.

Group identity transpires through the largely negative social recognition of relatively immutable and irrelevant traits. Group identity and its aspects, immutability and irrelevancy, cannot be analytically separated from group harm and political/social powerlessness. All three factors—group identity, group harm, and political/social powerlessness—combine through the force of the anti-subjugation principle. A group attains aspects of its identification, gets harmed by, and fails to attain political/social power—all through the forces of subjugation.

### A. *Group Identity*

#### 1. GROUP MEMBERSHIP

Discrete and insular minorities should be interpreted in terms of social groups. Professor Fiss proposes to interpret the equal protection clause not in terms of unfair treatment but rather in terms of group disadvantaging.<sup>195</sup> In some sense, my proposal extends the Fiss formula. What is a social group? Fiss characterizes a social group as an interdependent entity, such that the identity and well-being of its members are linked to the identity and well-being of the group.<sup>196</sup> While Fiss admits that working with a concept of groups is "problematic" and "messy,"<sup>197</sup> he overestimates the difficulty, for society in many respects has already done some of the "messy" work by defining disadvantaged groups. In many ways, the members of a social group define their own group. However, the group's own means of group identification should not be the Court's primary focus. The Court's concern should not center around the positive modes of group identification, but should focus rather on the negative ways in which *outsiders* define the group in question. Blacks, women, and gays, for example, often do define themselves in terms of group membership, sometimes negatively, sometimes positively. There is, however, another dynamic of group definition at work, coming in negative ways, from outside the group. The Court's role operates foremost with respect to this latter force.

The Court should concentrate on group harm, not on group development. The phenomenon of group development begins when

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the discussion in this Section could be seen as an elaboration on the Fiss formulation, although there are some important differences.

195. *See id.* at 147.

196. *See id.* at 148.

197. *Id.* at 149.

members of a group engage in a search for a group identity. Should the Court aid this process? The group development strategy places the Court on a slippery slope that the group harm strategy largely can avoid. By focusing on group development, courts face insuperable difficulties in differentiating those groups worthy of development, from those not worthy, and in deciphering the degree of protection needed. If they used a group harm analysis, the courts would engage in a far simpler assessment, by determining which groups occupy the bottom rungs of the social hierarchy.

For example, under a group development scheme, a group forming an intentional community would warrant considerable judicial concern with respect to certain types of zoning ordinances. This creates problems. How does a court choose *which* groups deserve protection? For example, would the Survivalist qualify for any more protection than the Anti-Vivisection League?<sup>198</sup> The group development strategy would seem to require courts to make fine distinctions between groups without providing any criteria for those distinctions. On the group harm analysis, by contrast, more than a few instances of group harm would be required in order for a group to qualify for special protection. Accordingly, the courts might step in to prevent further harm against a lesbian separatist commune based on levels of harm experienced, but not to prevent impediments to the group formation of the Survivalist or Anti-Vivisection League.

The distinction between the group development analysis and the group harm analysis reveals itself as problematic in Professor Michelman's recent analysis of *Bowers v. Hardwick*.<sup>199</sup> According to Michelman, the Georgia anti-sodomy law, in effect, denies citizenship to homosexuals.<sup>200</sup> The Court, according to Michelman, should have listened in that case to the highly audible sounds of a group undertaking its own definition. In that manner, the Court, by affirming the virtues of group identity, would validate group identity.<sup>201</sup>

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198. For purposes of these examples, we need not know very much about the Survivalist or the Anti-Vivisectionist. That is part of the point of the analysis. The past and current notoriety of harm done to homosexuals makes them easier to identify as a group than the Survivalists or Anti-Vivisectionists.

199. See Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (analyzing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

200. *Id.* at 1533.

201. Michelman speaks of homosexuality as a "personally constitutive and distinctive way, or ways, of being." See *id.* at 1533. I would defend this reading of Michelman's article, but his claim is taken somewhat out of context. Similar to mine, Michelman's analysis resides within a democratic theory. His concern is to counter the privacy rationale for homosexuality. He overemphasizes the group identity aspect of homosexuality in order to show the limits of a privacy justification for homosexuality wherein homosexuality is treated as a matter of subjective taste; Michelman wants to demonstrate that homosexuality is more than a matter of



Yet, group harm, not group identity, should have been the main concern of the Court in *Bowers*. Outsiders, including the Georgia legislature, have helped to define homosexuality, at least that portion of homosexuality that should concern the Court.<sup>202</sup> Whatever the Georgia legislature has said about homosexual identity, its statement about group disadvantage rings loud and clear. The Court, in general, needs to interpret the legislation in light of its disparate impact on disadvantaged social groups.<sup>203</sup> People should be able to engage in sexual practices with members of their own gender "so that they may *avoid being forced into an identity*, not because they are defining their identities through the decision itself."<sup>204</sup>

Nevertheless, a number of commentators employ the group development or identity strategy. For example, in defending homosexuality as a suspect class, one analyst writes: "the group's defining characteristic must be one essential to personhood."<sup>205</sup> Yet, members of a suspect class need not view their group membership as important to their own personal identity.<sup>206</sup> What of those members of groups, as defined by outsiders, who do not *want* to identify with the group? If they do not take pride in their group identity, does that disqualify them from the protection of suspect class status? Surely not. While Black or gay pride may have positive aspects of group identification for many members of those groups, for others, the pride may serve more as a defensive shield than as a positive value.

Group identity, at least with respect to those groups making up the suspect classes, is socially determined, and that social "judgment" is primarily a negative one. Thus, for example, a Black child finds herself defined as part of a "group," the contours of which are exter-

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individual whim. *Id.* My point is that it should not matter for a suspect class analysis whether homosexuality is a matter of subjective preference, or whether it is a matter of group identity.

202. The Georgia Code interpreted by the Court in *Bowers*, read in pertinent part, as follows:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of [another].

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 [years].

*Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986) (quoting GA. CODE ANN. § 16-6-2 (1984)).

203. The Court in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979), allowed for disparate impact as proof of intent. If no other proof is required, that would presage the merging of the two.

204. Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 782 (1989) ("Resisting an enforced identity is not the same as defining oneself.").

205. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1300 (1985).

206. See, e.g., Rubinfeld, *supra* note 204, at 780 ("Homosexuality is first understood as a central, definitive element of a person's identity only from the standpoint of its 'deviancy.'").

nally described and therefore generally negative. What makes group identification within a suspect class unique is that group membership considerations do not stand alone. It is directly relevant to the harm, or the negative forces to which members are subjected. It may be accurate to say that a sign of a suspect class is when the process of group identification is part and parcel of the process of group harm. In addition, her group membership makes little sense to her when severed from considerations of the political and social powerlessness, which are also the consequences of membership in that group. Labeling groups and subjugating groups thus begins to merge. So, what makes group identity unique in the context of a suspect class is, in part, the connection between group identity and the other factors, group harm and social/political powerlessness.

## 2. IMMUTABILITY

At times, various members of the Court have emphasized the immutable nature of a particular trait in terms of whether the possessors of such a trait deserve suspect class status.<sup>207</sup> A trait is immutable if the individual has little or no control over it.<sup>208</sup> Thus, racial and gender characteristics constitute immutable traits, whereas, for example alienage does not. A person cannot change her race, but, presumably an individual can become a citizen. Once an individual is placed in a racial social group, there is little that the individual can do to disconfirm the classification.

However, like any of the factors enumerated here, immutability is not a sufficient condition for qualifying a group as a suspect class.<sup>209</sup> Eye color is immutable, and yet the blue-eyed hardly qualify as a discrete and insular minority. Nor, strictly speaking, does immutability constitute a necessary condition of suspectness. The Court accepts

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207. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360-61 (1978) (plurality opinion) (Brennan, J.); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 108-09 (1973) (Marshall, J., dissenting); *Korematsu v. United States*, 323 U.S. 214, 243 (1944), *reh'g denied*, 324 U.S. 885 (1945); see also Sherry, *supra* note 25, at 113-14.

208. The Court, in rejecting strict scrutiny for illegitimacy, nevertheless stated that "the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). However, this seems to confuse the cause of the trait with the trait itself. Control over the cause of the trait is not critical for race as a suspect classification. If that were the concern, then many more traits would factor into a suspect class analysis. Few of us have much control over many of our traits. The important factor is the immutability of the trait itself, not the immutability of the causes of the trait.

209. *L. TRIBE*, *supra* note 175, at 1073. Tribe lists "intelligence, height, and strength" as immutable characteristics for a given individual.

alienage as a suspect class,<sup>210</sup> and yet, a person can change her status as an alien, at times with relative ease.

The existence of immutable traits such as physical strength, height, and intelligence,<sup>211</sup> that seem inapplicable to suspect class analysis, do not, however, necessarily undermine the use of other, relevant immutable traits, such as race, for purposes of suspect class determinations. Immutability is both a factor in determining suspectness and is, in turn, determined by suspectness. Racial characteristics, for example, become more intelligible when placed in the context of the harm and oppression experienced by the racial minority. Similarly, treating intelligence as an immutable characteristic takes on a new meaning in light of the racism often associated with proposals pushing the virtues of intelligence measures.<sup>212</sup> Race and intelligence are not easily isolated, scientific concepts. Race does not provide a value-free, objective, biological means of identifying an individual. Race comes complete with its value laden, social baggage, which science cannot discard. So, the immutability of a trait is, in part, determined by its social entrenchment.

Moreover, immutability comes in degrees. This statement may seem odd, for "immutable" implies incapable of change. However, very few traits are immutable in the strict sense of the word. Most traits, including sex, are subject to change; some more than others. Furthermore, some traits, such as age, may be immutable in one sense (one can never grow younger), and not in another (one does *continue* to age, so no one is fixed at a particular age).

Because immutability fails as a sufficient and necessary condition of suspectness, some commentators have tended to dismiss it altogether.<sup>213</sup> But because immutability cannot do the job alone does not imply that it cannot do any job at all. Immutability plays an important role in suspect class analysis. Intuitively, all other things being equal, a person who is harmed because of an immutable trait deserves more moral and legal concern than one harmed because of a mutable trait. In general, Blacks are worse off than members of the Communist Party because of the immutability of racial characteristics relative

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210. See *supra* notes 148-60 and accompanying text.

211. L. TRIBE, *supra* note 175, at 1073 n.51; see also J. ELY, *supra* note 13, at 150. Tribe and Ely both use physical strength, height, and intelligence as examples of immutable characteristics that fail as unconstitutional bases for classification. In a strict sense, I find it difficult to accept all but gross phenotypic traits as immutable. One would be hard pressed to find any clear and uncontroversial sense of intelligence. But cf. Note, *Equal Protection and Intelligence Classifications*, 26 STAN. L. REV. 647, 650 (1974) (discussing "potential standards for the adjudication of equal protection challenges to intelligence classifications").

212. See S. ROSE, L. KAMIN & R. LEWONTIN, NOT IN OUR GENES 83-129 (1984).

213. See L. TRIBE, *supra* note 175, at 1073 n.51.

to the mutability of political affiliation.<sup>214</sup> A person can change political affiliation with much greater ease than race. Thus, immutability helps grade social groups in terms of the degree of protection they may require.

### 3. IRRELEVANCE

In assessing the potential suspect nature of a social group, the Court may also consider the irrelevance of the distinguishing trait.<sup>215</sup> There is a great deal of ambiguity in the meaning of irrelevancy, including the following two senses: whether a trait is relevant or irrelevant to a classificatory scheme, versus whether a trait is relevant or irrelevant to a legislative purpose or public policy.<sup>216</sup> When invoking the first sense of irrelevancy, the Court sometimes discusses the relevance of a characteristic to the classification drawn in the legislation under review.<sup>217</sup> Professor Sherry contends that this accounts for the debate between Justice Rehnquist and Justice Blackmun in *Toll v. Moreno*<sup>218</sup> over whether "the characteristic of alienage was relevant to the statutory purpose of providing educational benefits to residents."<sup>219</sup>

The classification sense of irrelevancy, however, runs into problems. For example, mental retardation may be highly relevant to a zoning classification. Yet, as Justice Marshall noted in *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>220</sup> a case involving just such a classification, retardation should not be relevant to whether a person can live in a certain area. To support this we might appeal to the empirical claim that there is no evidence that the presence of mentally retarded people makes a neighborhood more unsafe. Similarly, race and gender are irrelevant to the question of voting.

The second, more empirically defensible sense of irrelevancy is that characteristics used in defining group membership are irrelevant to the determination in question. Even this sense of irrelevancy, how-

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214. This statement says nothing about first amendment protections for political activists and others. I think that these protections should be considerably stronger than they are at present. Suspect class analysis, however, does not address these concerns.

215. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting); see also Sherry, *supra* note 25, at 111-13.

216. See Sherry, *supra* note 25, at 111-13.

217. *Id.*

218. *Toll v. Moreno*, 458 U.S. 1 (1982).

219. See Sherry, *supra* note 25, at 111. Justice Rehnquist asked whether alienage was a constitutionally relevant classification. *Toll*, 458 U.S. at 41-42. Justice Blackman inquired whether alienage was relevant to the purpose of the legislation. *Id.* at 22.

220. 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part).

ever, does not adequately differentiate between, for example, plumbers, aliens, and Blacks, each being denied some public good such as in-state tuition. There is something worse about denying the benefit to Blacks than to plumbers, even though race and occupation are equally irrelevant in determining eligibility for the benefit.

This example, however, highlights the real issue which the Court, in its discussion of irrelevance, seeks to counter. There is an implicit judgment about the moral worth of the members of the group in question on the basis of their group identity when legislation is intended to have a discriminatory impact. The irrelevancy of the characteristic in question to the discriminatory purpose demonstrates the negativity of the group identification. When, as in *Cleburne*, a law discriminates against the mentally retarded by making it legal to bar them from a particular neighborhood, it implies a moral judgment that the retarded are lesser human beings, unworthy of living next door to the rest of us. This third, moral sense of irrelevancy should play a critical role in evaluating a piece of legislation. Legislation that has more of a negative impact on Blacks than on plumbers says something about how legislators judge the moral worth of Blacks. The irrelevance inquiry provides a means for challenging such improper moral evaluations. Denigration of a person's moral worth because of that person's group identity helps unleash the forces of subjugation.

### B. "Group" Harm

Individuals experience harm in the context of forces operating externally to the group. Those external forces consist, in part, of people outside the group who have defined the group. When outsiders define the group in exclusively negative ways, and when membership in a particular group is not self-determined but other-determined, individual members are wronged. The wrong may occur either through physical violence or through thwarting the individual's aspirations. Those aspirations are best understood in the context of that person's group identity. This does not mean that the aspirations of members of racial minorities are different in kind than those of other social groups. Their aspirations, however, cannot avoid being intermingled with the group identity society has forced upon them.<sup>221</sup>

While the harm has immediate impact on the individual, the harm also connects with the oppression of the group. Oppression has structural features including the "vast network of everyday practices, attitudes, assumptions, behaviors, and institutional rules."<sup>222</sup> The

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221. See, e.g., Michelman, *supra* note 199, at 1532-37.

222. Young, *The Five Faces of Oppression*, 14 PHIL. F. 273, 275 (1988).

harm that befalls the individual gets entangled in structural features involving the group.<sup>223</sup> These structural features, in turn, become more deeply embedded through the passage of time.<sup>224</sup> Thus, a history of oppression exacerbates the harm. Although one can conceive of animosity against a group suddenly springing up, despite very little historical precedent, a far more likely scenario comes from the now all too familiar account of a social group's oppression throughout a historical period. The case for a group's harm depends upon how good a case one can make for the historical and structural features of the group's suffering.

Group harm is a comparative concept. The group harm of a suspect class exists relative to its opposite social group. The disadvantage of homosexuality only becomes apparent relative to the privilege of heterosexuality. The Court needs to take into account the disparity between the privilege of heterosexuality and the harm perpetrated against homosexuals. It may be that the disparity between heterosexuals and homosexuals is greater than the disparity between citizens and resident aliens. Homosexuals often face considerable hostility.<sup>225</sup> In contrast, many aliens, particularly those with green cards, suffer fewer disabilities and little or no hostility relative to the status of citizens.<sup>226</sup> Groups become stigmatized by and with an identity attached to them through the harm perpetrated on them. This occurs within a political and social context.

### C. *Political/Social Powerlessness*

A member of a social group eligible for suspect class status not only finds herself socially stigmatized, but also having few, if any, avenues of rectification. As discussed above,<sup>227</sup> process model theorists have followed the lead of democratic theorists in narrowly construing the avenues of rectification. For them, the political process becomes primarily associated with electoral politics. Yet, the power to subju-

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223. See, e.g., Cover, *supra* note 95. "But when the oppression of a minority comes to constitute the essence of those politics or—still worse—when the constitutional structure for political activity has been arranged to facilitate the pattern of oppression, judicial intervention will necessarily entail inefficacy or a compromise of the constitutional structure itself." *Id.* at 1304. See *id.* at 1304 n.54 for examples of structural patterns of racism.

224. The Court has occasionally used history as a standard for determining suspect classifications. See, e.g., Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

225. "There are indications that homosexuals face increasing hostility and even violence." J. HENSLIN, *supra* note 147, at 81. An understatement, to say the least.

226. For a detailed comparison of different types of aliens, see HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS (1980).

227. See *supra* notes 119-35 and accompanying text.

gate does not operate only through the legislature. Power diffuses throughout society. Correlatively, powerlessness takes hold in the same diffuse manner.<sup>228</sup>

The process model characterizes the role of the judiciary as that of freeing the bottlenecks in the political, electoral process.<sup>229</sup> The social model, in contrast, incorporates that aspect of the process model while recognizing the limitations of that model in narrowly construing what constitutes the "bottlenecks," i.e., the obstacles to democracy. Viewed from the perspective of the social model, these bottlenecks operate far in advance of those most immediately blocking the electoral process, because the "social" incorporates the whole terrain in front of the political process—the social, economic, and cultural turf that one must cross before getting to formal government structure or matters such as voting. That terrain becomes clearer when seen through the eyes of group identity and group harm.

In sum, rough measures exist for each group factor: identity, harm, and powerlessness. Yet, final judgment concerning a group's suspectness must await the composite, when all of the factors interact. The composite of factors does not provide any mechanical test. Rather it provides a narrative. Calling it a "narrative," however, does not thereby imply that it is entirely arbitrary. The narrative that emerges, for example, with respect to the Jewish people is far stronger than one constructed about the Neo-Nazis. After analyzing and accepting the narrative, the judge, or trier of fact, should need little more convincing beyond admitting the variable factors discussed below.

#### D. *Mitigating Factors*

Each of the above characteristics—group identity, group harm, and political/social powerlessness—manifests itself to varying degrees. The ties of the first, group identity, vary depending on the group. The key amplifying factor with respect to group identity lies in the immutability factor. The less control an individual has over the trait used to pinpoint group identity, the more concern, other things being equal, the courts should have for the suspect class in question.

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228. Power and powerlessness can operate at a psychological level through the use of language. An adult women called "girl," or an adult Black male called "boy," can internalize that label in a way that will seriously mold subsequent action. Power can also manifest itself both internally and externally. Individuals or groups may conform their behavior according to how any external threat is perceived or misperceived. This internalization of a sense of powerlessness may or may not be the product of conscious thought. See, e.g., M. FOUCAULT, *POWER/KNOWLEDGE* (1980).

229. See *supra* notes 119-35 and accompanying text.

An individual has less control over racial characteristics than over those involving sexual preference or political affiliation.<sup>230</sup> Courts should therefore manifest greater concern for legislation impacting on racial minorities than on homosexuals or communists.<sup>231</sup>

The underlying proposition at stake here is that we ought to give more protection to people who suffer due to traits over which they have little or no control than to people who suffer because of a trait over which they do have some degree of control. In making this assessment, it is important to hold other things equal. That is to say, if Group A was identified in terms of immutable traits and Group B was not, but Group B suffered far more harm than Group A, then, since other things would not be equal, the above analysis would not apply. This does not imply that immutability is a more important factor than group harm. It does mean that when group harms are roughly equivalent with respect to two groups, then (and only then) would immutability come into play as a means of relegating more judicial concern to one group than to the other.

In addition, group harm can also vary from group to group. Groups that can make a case for deeply embedded structural oppression that has a long, sordid history, such as Blacks, should be raised along the degrees of suspectness. In contrast to racial minorities, illegitimates would be hard pressed to make *as* telling a case of structural oppression over the centuries.

Groups also vary with respect to their political and social powerlessness. Jews probably wield considerably more political power than, for example, the mentally retarded. Differential power relations would not thereby exclude Jews in this example from suspect class status, but relative power does need to be taken into account. Moreover, this part of the analysis would necessarily assess the relationship between political and social powerlessness.

The final varying factor is the polycentric nature of some suspect classes. Some individuals qualify for higher levels of suspectness because they belong to overlapping suspect classes, for example, race and gender.<sup>232</sup> Another factor that has a particularly strong amplify-

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230. I do not mean to imply that sexual preference is simply a matter of taste and inclination, which an individual can easily modify. An individual may well have little control over homosexuality. The point is, however, that an individual can usually mask or change sexual preference effectively in a way that she could not change her race. If I am wrong on this assessment, then homosexuality begins to look more like race. This admission, however, would not affect the overall framework of the analysis.

231. Again, this statement is not intended to apply to first amendment protections for political activists and others.

232. Hochschild, *Race, Class, Power, and the American Welfare State*, in DEMOCRACY AND



ing effect is poverty.<sup>233</sup> One's ability to control the group identifying trait, to thwart the externally imposed group "identity," to offset political and social powerlessness, relates directly to poverty.<sup>234</sup> Moreover, for some, poverty closely resembles an immutable characteristic in that for generations certain subclasses have been unable to escape the pernicious effects of poverty. While the courts have been adamantly opposed to treating wealth classifications as suspect,<sup>235</sup> the amplifying effects of poverty cannot be denied.<sup>236</sup>

Poverty presents an interesting problem, as was noted in the discussion of Locke, who like so many democratic theorists excluded the poor from effective political participation.<sup>237</sup> Poverty can infect every other suspect class, regardless of which social groups make the suspect class list. The situation of racial minorities, aliens, women, homosexuals, and the mentally retarded, can only become worse through poverty. Poverty makes it more difficult to escape group identity, to avoid group harm, and to rectify political and social powerlessness.<sup>238</sup> Thus, even if poverty is kept off the list of suspect classes,<sup>239</sup> its role as an amplifier makes it a subject of grave concern.

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THE WELFARE STATE 157, 159 (A. Gutmann ed. 1988) ("Inequalities of race, class, and power cumulate, and their combination worsens the disparities created by each dimension alone.").

233. See *supra* notes 49-51 and accompanying text.

234. See *supra* notes 49-51 and accompanying text.

235. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

236. During the Warren Court era, it seemed likely that wealth would be treated as a suspect classification. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (ruling that once a state granted a right to vote, it could not impair that right through a poll tax, since the ability to vote has no relationship to wealth). However, in *James v. Valtierra*, 402 U.S. 137, 141 (1971), the Court explicitly denied that a wealth classification would trigger heightened scrutiny.

237. See *supra* notes 49-51 and accompanying text.

238. See J. HENSLIN, *supra* note 147, at 256-57.

239. The issue hinges on group identity, i.e., whether those in poverty constitute a cohesive group. See, e.g., Kalven, *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 129 (1972) ("The poor seem to be a less cohesive and less readily identifiable group than are racial minorities. Because the class of 'poor' is constantly in flux, the reinforced sense of stigma which characterizes de jure racial classifications is probably mitigated even where explicit wealth classifications are concerned."). Clune, however, states:

[Poverty] is one of the most startlingly stable social phenomena (the stroke of personal income have remained in uncannily stable ratios to each other for decades); it seems totally immune to political attack or even war; the disabilities and abilities associated with wealth are pervasive and among the most highly important on our scale of values. [Whether] or not some individuals escape is insignificant compared to those who do not. If the non-escapees are vulnerable and weak economically, socially, and politically, their situation is identical to another class whose individual members are less able to escape.

Clune, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, cited in W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, *CONSTITUTIONAL LAW* 1272 n.G (1988).

### E. *Applications*

The individual factors—group identity, group harm, and political/social powerlessness—do not provide a precise formula for clearly determining if and when a social group qualifies as a suspect class. Instead, the factors, along with the mitigating concerns, interrelate. The case or narrative for suspect class status must be constructed from the sum of these factors. The factors making up the social model do not differ from those considered at one time or another by the Court, but they do provide a different kind of unified theory, namely, anti-subjugation, than that offered by the Court. How does the suspect class analysis in terms of a social theory differ from that now accepted by the courts? I have already provided some examples. Here I can only indicate the general direction of a social analysis.

Race serves as the paradigmatic suspect class under both analyses. Race gets an even higher degree of concern under the proposed suspect class analysis than under the Court's interpretation, since poverty, so often directly linked with race, serves as a factor amplifying suspectness. In fact, poverty often serves as a surrogate for racial classifications.

Gender attains a more solid place amongst the suspect classes under the social model than under the process model because of a history of structural oppression. Feminist scholarship has played a major role in revealing this history of the structural oppression of women.<sup>240</sup> Furthermore, the feminist movement has caused many males to rethink their power relations to women. The presence of political power denies the claim for a suspect class status for gender in the process model. The social model interprets powerlessness more broadly than the process model so that *social* powerlessness and the lack of effective political representation offset any reputed gains in opening up the political process for women.

Alienage and illegitimacy become more difficult to justify under the social model than under the Court's analysis. Alienage fits quite naturally under the process model since aliens, by definition, will be unrepresented in the legislature to the extent that aliens cannot serve in the legislature or vote for legislators. So, currently, the courts need to treat any legislation dealing with alien classification with a high degree of suspicion.<sup>241</sup> Under the proposed suspect class analysis, aliens do not get such a high level of judicial concern. Lack of

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240. See, e.g., S. ROTHMAN, *WOMEN'S PROPER PLACE* (1978).

241. See *supra* notes 148-60 and accompanying text.

involvement in the political process—critical under the process model<sup>242</sup>—becomes only one factor among many others under the social model. Nevertheless, the process model does provide a solution to the problem of aliens not having immediate access to the legislature. Under the process model aliens need special judicial protection because they are, by definition, excluded from the political process. The social model would do well to heed the progress made for aliens under the process model.

Illegitimacy, on the other hand, seems very difficult to defend within the social model, even as a quasi-suspect class. In the eyes of the process model, illegitimates can become involved in the political process,<sup>243</sup> and today the label of illegitimacy has less stigma attached to it than was true previously.<sup>244</sup> A social analysis of illegitimacy may be even less receptive to illegitimates as a suspect class. The group identity of illegitimates is not particularly strong, nor is the group harm especially devastating. Illegitimacy takes on more of the characteristics of a suspect class in light of its overlap polycentricity with other, more clearly designated, suspect classes, e.g., race, and relative to mitigating factors such as poverty. A social analysis would readily adopt poor, Black, illegitimates as a suspect class, but not wealthy, White, illegitimates.

Rather than develop a detailed critique of each candidate for suspect class status, a more general argument can be formulated: If alienage qualifies as a suspect class under both the process and the social model, then many other candidates qualify. Any class involving the physically or mentally handicapped qualifies in terms of group identity, harm, and powerlessness. While homosexuals do not have as immutable characteristics as racial minorities,<sup>245</sup> the often officially sanctioned group harm inflicted upon homosexuals would raise them to a suspect class level. A similar line of reasoning applies to poverty analysis.<sup>246</sup> Within the context of poverty, the Court may come to recognize newly formed suspect classes such as the homeless, before the state has to feel the forces of social disruption. Finally, children and the aged would come under a suspect class heading in the social

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242. See *supra* notes 119-35 and accompanying text.

243. See J. ELY, *supra* note 13, at 148-49.

244. See H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 151 (1988) ("At least the law is now doing much to remove the social stigma with which the illegitimate child used to be regarded in society.").

245. One way to assess the immutability issue here would be to determine whether or not a person can plausibly stop being a homosexual by his or her own choice.

246. Cf. Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (offering a different rationale for protecting the poor).

model. The transitory nature of these groups should not detract from judicial concern for the harm inflicted upon them in light of their relative powerlessness.<sup>247</sup>

While the social model does provide a more coherent framework for suspect class analysis than that currently employed by the Court, the social model still needs to face the charge that the analysis engenders an impractical and unwieldy quagmire in its application. Surely Justice Rehnquist's admonition<sup>248</sup> applies with full force to the social model: any ingenious lawyer can construct suspect classes at will. Admittedly, the social model does not provide razor sharp distinctions or bright-line tests, but then no analysis in this area does. The subject is inherently fuzzy and defies attempts to establish such bright-lines.

Nevertheless, the social model provides some powerful heuristics for recognizing those most in need of recognition—those at the bottom of the social hierarchy. In fact, the social model makes stringent demands: point to a negative, socially constructed identity; construct a convincing historical narrative describing oppression; and muster evidence of the harm. Not every social group can meet these demands. What remains clear is that far more social groups can, and indeed do, meet these demands than are currently given judicial concern and protection.

## V. CONCLUSION

The process model points to the right kind of justification for suspect class analysis—to a justification within democratic theory—but adopts a far too restrictive version of democracy. All theories of democracy, even narrow ones like Schumpeter's competitive elitism,<sup>249</sup> make some positive reference to control by "the people." A democratic theory cannot countenance widespread disparity among its social groups lest it undermine any meaningful reference to rule by "the people." Whatever form of rule the particular version of democracy adopts, be it electoral control or widespread popular participation in governance, that rule presupposes at least a minimum amount of leveling among the social groups. In order for the theory to be realized in practice, that leveling must occur.

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247. Tribe proposes to treat children and the elderly as semi-suspect classes. L. TRIBE, *supra* note 175, at 1588-601. For this classification "there must be an opportunity, absent strong justification for denying it, for a child to *rebut* any implied or asserted age-based incapacity." *Id.* at 1592.

248. See *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting) (noting the arbitrary nature of "discrete and insular minorities").

249. See *supra* text accompanying notes 63-68.

The legislative arena occupies but a small, however critical, segment of the overall democratic playing field. Judicial review operates as a leveler on the playing field of democracy, assuring some minimum degree of control for and by *all* of the people. As an amplifier of the voice of subjugated social groups, the judiciary, far from acting anti-democratically, acts as a critical protector and promulgator of democracy when it provides special protection for a wide spectrum of disadvantaged groups.

Admittedly, in an age when some regard far less judicial activism than that currently undertaken by the Court as too much, the social model only exacerbates that perceived problem.<sup>250</sup> The social model may be seen as allowing the judiciary too much leeway in imposing its own substantive values. Yet, can there be any doubt that this occurs in any case? Carving out a place for judicial protection of suspect classes in order to counter subjugation promotes substantive values. The problem is not whether to impose substantive values; the problem is *which* values to promote. The key value consists, not in how a particular judge interprets "the good," but rather, in how the judiciary protects democracy by countering the forces of subjugation which threaten to undermine it.

Furthermore, suspect class analysis need not be a tool solely for the use of the judiciary. A social theory calls for not only judicial, but also executive, legislative, individual, and institutional activism on behalf of suspect classes. Indeed, a social theory demands a rethinking of democratic theory and practice.

Ideally, democracy should be blind to social groups. The people should not come hierarchically ranked. To achieve that ideal, democracy must be highly sensitive to the hierarchy of social groups. Wide disparity between social groups makes a mockery of "We the people." To effect a reduction in the gross disparity between social groups, a pluralist approach needs to be adopted. Pluralism in this context does not mean a variety of interest groups vying for legislative power.<sup>251</sup> Rather, pluralism implies a multi-faceted attack on the problem of disadvantaged social groups. The courts should not be the only guardians of democracy. That is a task worthy of all of our institutions—and of all of us.

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250. See *supra* notes 32 & 99.

251. See S. BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* 348-49 (1986) (a communitarian sense of pluralism); see also Michelman, *supra* note 199, at 1526-28.