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PERSONAE NON SUSPECT: SEXUAL ORIENTATION DISCRIMINATION UNDER THE SUPREME COURT'S NEW ANTICLASSIFICATION REGIME

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INTRODUCTION

In the early-morning hours of June 28, 1969, a phalanx of police stormed the Stonewall Inn, a popular gay and lesbian bar in New York City's Greenwich Village, and demanded proof of identification from the bar's patrons.[1] On this particular occasion, the NYPD was met with a different response than it had encountered during previous raids of Stonewall;[2] this time the crowd of patrons fought back.[3] They rained down a torrent of coins, rocks, parking meters, and trashcans on the NYPD, anything in sight.[4] The crowd at Stonewall galvanized around something larger than that particular raid of that particular bar; they galvanized around the legal discrimination that had increasingly targeted lesbian, gay, bisexual, and transgendered ("LGBT") individuals.[5]

Almost forty-years later, that "something" again galvanized the LGBT community. In 2008, California voters amended their state's constitution to prohibit same-sex marriage[6] after

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[1] ERIC MARCUS, MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS 127 (HarperCollins Publishers 2002).

[2] *Id*. at 130.

[3] *Id*. at 128 ("This is what we learned to live with at that time. Until that day.").

[4] *Id*. at 128-29.

[5] *Id*. at 127-31. "When Martha Shelley found out the nature of the riot she'd witnessed, she decided that something had to be done. 'I thought, we've got to do something! We can't just let this pass. So I … said, we should have a march.'" *Id*. at 131. The following year, on the anniversary of the Stonewall Riots, the first Gay Pride march in U.S. history took place simultaneously in New York City, Los Angeles, and Chicago. *See* Elizabeth A. Armstrong & Suzanna M. Crage, *Movements and Memory: The Making of the Stonewall Myth*, 71 AM. SOC. REV. 724, 724-52, (2006).

[6] CAL. CONST. art. I, § 7.5. The California Marriage Protection Act (the ballot proposition and constitutional amendment referred to as "Proposition 8") ("Prop. 8") passed in the 2008 state elections. Prop. 8 added a new provision, Section 7.5 of the Declaration of Rights, to the California Constitution, which provides that "only

the California Supreme Court had held that same-sex couples have a constitutional right to marry.[7] The LGBT community took to the streets in protest.[8] Shortly thereafter, in *Perry v. Schwarzenegger*, a federal district court invalidated the amendment as violative of the United States Constitution,[9] giving LGBTs hope that sexual orientation-based discrimination would no longer be tolerated.

As *Perry* seemingly makes its way to the Supreme Court, LGBT advocates are staking their legal claims around the Fourteenth Amendment's Equal Protection Clause, which forbids state governments from denying any person "the equal protection of the laws,"[10] arguing for the designation of sexual orientation as a suspect[11] or quasi-suspect class.[12] The Court has never

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marriage between a man and a woman is valid or recognized in California." The Initiative filed with the California Attorney General's Office is available at http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf.

[7] In re Marriage Cases, 183 P.3d 384 (Cal., 2008). *See also* Maura Dolan, *Gay Rights Groups Lose a Round*, L.A. TIMES, July 17, 2008, http://articles.latimes.com/2008/jul/17/local/me-gaymarriage17.

[8] Jessica Garrison and Joanna Lin, *Mormons' Prop. 8 aid protested*, L.A. TIMES, Nov. 7, 2008, http://articles.latimes.com/2008/nov/07/local/me-protest7. More accurately, the LGBT community took to the streets outside the Mormon temple in Westwood, California to protest the role that the Church of Jesus Christ of Latter-day Saints played in passing Prop. 8. *Id*.

[9] Perry v. Schwarzenegger, 704 F. Supp. 2d 921(N.D. Cal. 2010) (holding that Prop. 8 violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution since California had no rational basis for denying gays and lesbians marriage licenses). Chief Judge Walker further noted that gays and lesbians are exactly "the type of minority strict scrutiny was designed to protect." *Id*. at 997. The Ninth Circuit Court of Appeals subsequently ordered the judgment stayed pending appeal. *See* Perry v. Schwarzenegger, 602 F.3d 976 (9th Cir. 2010).

[10] *Infra* note 29. Note that the federal government is also forbidden from denying equal protection, not by the Fourteenth Amendment but, rather, by the equal protection component of the Fifth Amendment's due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

[11] "Suspect," as used in this Note, connotes the idea that certain types of discrimination are in most circumstances irrelevant to the achievement of any permissible governmental objective, that certain kinds of discrimination automatically raise suspicion. *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 432 (4th ed. 2009) (discussing the basis for the "strict scrutiny" tests that emerged from the Supreme Court's decisions in *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

[12] *See, e.g.*, Brief for Appellees at 55-56, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (09-CV-2292 VRW), *available at* http://www.afer.org/wp-content/uploads/2010/10/Brief.pdf (arguing that Prop 8 violates the Equal Protection Clause); Brief for American Civil Liberties Union, Lamda Legal Defense and Education Fund, Inc., and National Center For Lesbian Rights as Amici Curiae Supporting Plaintiffs at 7, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (09-CV-2292 VRW), *available at* http://www.aclu.org/files/images/asset_upload_file192_40063.pdf ("*Amici* agree with plaintiffs that Proposition 8 should be subjected to the strictest form of constitutional scrutiny because it discriminates on the basis of sexual orientation and gender, and infringes on the fundamental right to marry. Under applicable Ninth Circuit precedent, discrimination against same-sex couples should be reviewed under heightened scrutiny."). Note, however, that LGBT groups are also making Fourteenth Amendment Due Process claims. *See, e.g.*, *id.* at 39-40.

directly addressed the question of whether discrimination against LGBTs qualifies as suspect, but it has suggested in dicta that differential treatment of LGBTs may in certain instances be permissible.[13]

In determining whether a minority group is entitled to suspect or quasi-suspect class designation, the Supreme Court considers several factors, which it articulated in *United States v. Carolene Products*, footnote four, ("Footnote Four").[14] If, however, a group does not qualify for this higher degree of judicial protection, the Court will review the group's equal protection claims deferentially, under rational basis review.[15] Until LGBTs achieve suspect or quasi-suspect class status, laws that classify on the basis of sexual orientation will continue to receive minimal judicial scrutiny.[16]

However, LGBT advocates' quest for suspect class designation may be in vain. In the late 1970s, the Supreme Court closed the set of suspect and quasi-suspect classifications, and the set will likely remain closed.[17] Around that time, the Court faced a series of affirmative action cases in which it was forced to choose between two approaches to equal protection: antisubordination

[13] See Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) where Justice O'Connor would have invalidated the Texas criminal statute on equal protection grounds, but noted that her decision "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *But cf.* Romer v. Evans, 517 U.S. 620 (1996) (holding that the Colorado constitutional amendment at issue which targeted LGBT for discrimination was unconstitutional); *Lawrence*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) but ultimately ruling in this specific case on Due Process grounds).

[14] *See infra* note 67 and accompanying text.

[15] *See infra* notes 46-48, 78-80 and accompanying text.

[16] *Id*.

[17] Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 503-04 (2004) ("[T]he set of classifications … has remained largely unchanged for more than a quarter century … suggest[ing] that the indicia themselves have become ossified."). *See also id*. at 503 n.88 ("The point in time at which the set actually closed is somewhat debatable. The Court's decision to apply intermediate scrutiny to a sex-based classification in *Craig* was arguably the last time the Court altered its method of analyzing a particular classification.").

and anticlassification.[18] The Court chose to elevate the anticlassification approach, and it now controls the Court's equal protection jurisprudence.

Antisubordination theory is concerned with inequalities in group status, positing that equality is achieved only when an historically disadvantaged group is no longer subordinate to the dominant class.[19] Antisubordination theory is grounded in the idea that discrete and insular minorities are often disenfranchised from effectively participating in the democratic political processes, requiring the Court to play a more active role in safeguarding their rights.[20] Under this theory, the degree of deference courts apply to a challenged statute depends on the group to which the individual complainant belongs. For instance, a white man who challenges a law as racially discriminatory will not receive the highest level of review because he does not belong to a suspect group, whereas a black man challenging the same law would. "Anticlassification," on the other hand, is concerned with individualism; it is concerned not with the group to which an individual belongs but, rather, with the classification of an individual along impermissible grounds.[21] Under this approach, both the black man and the white man would receive the highest level of scrutiny, because the law discriminates on the basis of race, an irrational classification. In other words, as Justice Sandra Day O'Connor stated, "The Fourteenth Amendment 'protect[s] *persons*, not *groups*.'"[22]

This Note will argue that the Supreme Court's choice to elevate the anticlassification principle above the antisubordination principle, and the Court's recent refusal to designate any more groups as suspect or quasi-suspect, were not mutually exclusive events; the former caused the latter. The Court's process of designating a group as suspect or quasi-suspect has always

[18] See *infra* Part III.A, pp. 19-22.
[19] *See infra* Part I for this paragraph.
[20] See *infra* Part I.A.
[21] See *infra* Part I.B.
[22] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

required analysis of one particular group's historical narrative and the extent to which that narrative satisfies Footnote Four's "suspect" criteria.[23] Anticlassification theory, however, divorces the classification from its historical moors and directs courts to analyze the law at issue without regard to the groups involved. As a result, each time the Court has considered the suspectness of a (non-suspect) group since the late 1970s, it has refused to add the group to the existing set;[24] this will necessarily always be the outcome of suspect class analysis under an anticlassification-dominant approach.

With *Perry v. Schwarzenegger* in mind, this Note offers the LGBT community an alternative way of thinking about litigation strategies by casting light on the Supreme Court's new approach to equal protection. Part I briefly sketches the history of the Court's antisubordination and anticlassification approaches to equal protection. Part II analyzes the necessary dependence of suspect class analysis on antisubordination theory. Part III demonstrates that, in the wake of desegregation and affirmative action, the Court cast aside antisubordination theory in favor of an anticlassification-dominant approach to equal protection; this choice has caused the Court to close the set of suspect and quasi-suspect classifications. Part IV concludes that LGBT groups may nevertheless successfully advocate for equality without achieving suspect-class designation.

I. STRANGE BEDFELLOWS: A BRIEF HISTORY OF EQUAL PROTECTION'S TWO THEORIES

With its injunction that "all men are created equal," the Declaration of Independence captured the Spirit of 1776 and enshrined equality in the Nation's founding.[25] By 1789, however, that egalitarian spirit had been silenced after the Constitution's framers openly compromised the

[23] See *infra* Part II.B, pp. 14-17.
[24] *See infra* Part III.B.
[25] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

principle of equality with its antithesis: slavery.[26] The result was to omit from the Constitution any explicit reference to equality. It would take nearly another century of human enslavement and the Civil War to finally blot out this compromise and establish a legal right to equality in the Constitution.[27]

In the period following the Civil War, Congress drafted the Reconstruction Amendments out of fear that former slave states would subject the newly freed slaves to partial and unjust laws.[28] The Fourteenth Amendment became the law of the land in 1868; its "equal protection" clause commands that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[29] The phrase "equal protection of the laws" is susceptible to varying interpretations for as Justice Oliver Wendell Holmes declared, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[30] The Supreme Court thus began immediately to flesh out a doctrine for the Equal Protection Clause.[31]

Equal protection doctrine began its development in Justice John Marshall Harlan's lone dissent from the separate-but-equal holding in *Plessy v. Ferguson*, in which he emphasized two different understandings of "equal protection:" antisubordination and anticlassification.[32] On the

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[26] The word "slavery" appeared nowhere in the Constitution, but three provisions recognized and arguably legitimated the practice: (1) Article I, section 2, clause 3's three-fifths compromise; (2) Article I, section 9, clause 1's prohibiting of Congress from outlawing the "Importation of such Persons as any of the States now existing shall think proper" until 1808; (3) Article IV, section 2, clause 3's requirement that states deliver up any "Person held to Service or Labour in one State" who escaped into their territory. *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 442 (6th ed. 2009).

[27] The Thirteenth Amendment to the Constitution was ratified in 1865, the Fourteenth Amendment was ratified in 1868, and the Fifteenth Amendment was ratified in 1870 (collectively referred to as the "Reconstruction Amendments"). FARBER, *supra* note 10, at 22.

[28] William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1245-46 (2009).

[29] U.S. CONST. amend. XIV, § 1.

[30] Towne v. Eisner, 245 U.S. 418, 425 (1918).

[31] Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One*," 89 KY. L.J. 69, 70 (2000-2001).

[32] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

one hand, Justice Harlan asserted that the "[C]onstitution is color-blind, and neither knows nor tolerates classes among citizens,"[33] suggesting that race is never a proper classification upon which to base public policy. Equality is achieved under this anticlassification approach when irrational classifications are purged from the law and individuals are no longer treated differently across irrelevant criteria.[34] Under this understanding, equality is formal. On the other hand, Justice Harlan suggested that the Constitution embodies an antisubordination principle—equal protection seeks to lift vulnerable groups from their subordinate legal status. In other words, equality is substantive; the Equal Protection Clause is understood to prohibit policies that enforce group subordination.[35] This idea is captured in Justice Harlan's sentiments that "in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."[36]

A. Anticlassification Approach to Equal Protection

From the outset, the Supreme Court settled on anticlassification as the mediating principle by which it would interpret the Equal Protection Clause into an intelligible rule for subsequent decisions.[37] For example, when asked what the Equal Protection Clause means, a lawyer does not merely repeat the words of the Clause—a prohibition of the denial of equal protection. Rather, he or she is likely to respond that the clause prohibits discrimination.[38] This is

[33] *Id.*
[34] *See* FARBER, *supra* note 10, at 196.
[35] Kathleen M Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 750 (2002).
[36] *Plessy*, 163 U.S. at 559. Justice Harlan demonstrated his antisubordination view of the Reconstruction amendments in several other civil rights opinions. *See, e.g.*, Civil Rights Cases 109 U.S. 3, 35 (1883) (Harlan, J., dissenting). Unfortunately, though, Justice Harlan was not completely above the times in which he lived. He conceded, in his *Plessy* dissent, that the white race is the dominant race "in prestige, in achievements, in education, in wealth, and in power," and that "it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." *Plessy*, 163 U.S. at 559.
[37] For the seminal articulation of an "antidiscrimination" reading of the Fourteenth Amendment, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108-09 (1976).
[38] *Id*. at 108.

the "color-blind" understanding that has generally underscored the Court's equal protection jurisprudence.

The anticlassification structure underlying the Equal Protection Clause is composed of three parts.[39] First, the Court concedes that "equal protection of the laws" cannot in practice be a requirement that states treat all persons the same.[40] For reasons of administrative convenience, among other things, most laws must single out certain classes of individuals for burdens and benefits, lest legislatures be unable to act.[41] To find a middle ground between the demand for absolute equality and the need for legislatures to classify, the Court limited the scope of the Equal Protection Clause, requiring that it provide equal treatment for only "those who are similarly situated [in relation to the purpose of the legislation]."[42] Second, states are permitted to draw lines when legislating but are prohibited from drawing lines that are arbitrary or invidious.[43] Third, the anticlassification principle guides the Court in determining which classifications are permissible and which are arbitrary.[44] The Court seeks to determine, first, the classification made by the law and, second, the law's purpose.[45] As to the latter, the Court requires that the purpose be legitimate or reasonable.[46] Then, the degree of relatedness (the fit) between the classification and the purpose determines whether the law is arbitrary or not.[47] Early on, the Court gave wide latitude to over- and under-inclusive classifications.[48]

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[39] Id. at 108-09.
[40] This understanding of the Equal Protection Clause was articulated in Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-46 (1949).
[41] *Id.*
[42] *Id*. *See also* Aristotle, *Nichomachean Ethics bk. V* (c. 384 B.C.E.), *reprinted in* THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE, 18-21 (Clarence Morris ed., 1959) (discussing the first principle that "equality" and "rationality" mean treating like things alike).
[43] *See* Fiss, *supra* note 37, at 109.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 111.
[48] *See* Tussman, *supra* note 40.

The anticlassification approach, however, rendered the Equal Protection Clause a feeble tool with which to eradicate discrimination – laws that were challenged under the Equal Protection Clause almost inevitably survived constitutional muster – undercutting the purpose for its existence: to provide real equality for African-Americans.[49] Nevertheless, the Court remained deferential to the legislative process throughout equal protection's infancy, where, for the most part, the Equal Protection Clause lay dormant as "the usual last resort of constitutional arguments."[50]

B. Antisubordination Approach to Equal Protection

In the most innocuous of places the Supreme Court finally breathed substance into the Equal Protection Clause: a footnote in *United States v. Carolene Products*.[51] In this otherwise unremarkable case, Justice Harlan Stone inserted the now-famous Footnote Four containing dictum about a potential new judicial role:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears … to be within a specific prohibition of the Constitution . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political

[49] *See*, *e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (Court applied a lenient version of the rational-basis test, upholding an ordinance that was highly underinclusive and entailed lines drawn to avoid hurting powerful interests).

[50] Stephen A. Siegel, *Justice Holmes,* Buck v. Bell*, and the History of Equal Protection*, 90 MINN. L. REV. 106, 108 (2005) ("Unlike anything else in Buck v. Bell, Holmes's demeaning depiction of equal protection is taken as gospel truth. It is quoted frequently as an accurate, pithy statement of equal protection's desuetude before the Supreme Court systematically began remedying racial discrimination in the 1950s."). There were, however, some early promising exceptions when the Equal Protection Clause rendered legislation unconstitutional. *See*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down a law whose enforcement discriminated on the basis of (Chinese) ethnicity); Strauder v. State of West Virginia, 100 U.S. 303 (1879) (striking down a law excluding any but "white persons" from juries).

[51] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Footnote four's portent for a more active and effective Equal Protection Clause would not bear fruit, however, until the "Second Reconstruction" that was initiated by the desegregation cases of the 1950s. *See* FARBER, *supra* note 8, at 196.

> processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[52]

Footnote Four grafted onto equal protection doctrine the notion that the Court will intervene to protect the equal rights of disadvantaged minorities when the group is so prejudiced that legislation tends to evade repeal through the political channels.[53] Essentially, Footnote Four carved out of the overarching anticlassification structure of the Court's equal protection doctrine outlined above a space for the antisubordination principle, to apply when legislation targets a "suspect" group.[54]

II. THE DEPENDENCE OF SUSPECT CLASS ANALYSIS ON ANTISUBORDINATION THEORY

A. Footnote Four's Purpose

Justice Stone, the author of Footnote Four, intended to bind the Court's use of heightened protection to the antisubordination principle. In the third paragraph of Footnote Four, Justice Stone tendered the proposition that "more exacting judicial scrutiny is appropriate if statutes affect socially isolated *minorities* which have no reasonable form of redress through the (formally available, but to them useless) political processes."[55] Unfortunately, Justice Stone, who became Chief Justice three years after his opinion in *Carolene Products*, had little opportunity to expand much on the third paragraph of the Footnote, as the Court would shelve the suspect class test for the next twenty years,[56] and Justice Stone would die in 1946.[57]

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[52] *Carolene Products*, 304 U.S. at 153 n.4 (citations omitted).
[53] *Id*.
[54] *See* Fiss, *supra* note 37, at 123-24, ("The foundational concept – means-end rationality – is individualistic. It is not dependent on the recognition of social groups. On the other hand, elements of groupism appear as one moves up the superstructure [of the antidiscrimination principle]. For one thing, the recognition and protection of social groups may be required to determine which state purposes are legitimate, or even to rank state purposes to apply the compelling state-interest doctrine. …. The suspect-classification doctrine also affords some recognition to the role or importance of social groups or natural classes.").
[55] Louis Lusky, *Footnote Four Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982) (parenthetical phrase in original).
[56] *Id*. at 1104.
[57] *Id*.

Perceiving that Footnote Four had not yet made its way, Justice Stone's law clerk, Louis Lusky, wrote an article in 1942 explaining the background and underpinning of Footnote Four.[58] Lusky claims that before *Carolene Products,* "the Court's thinking was in terms of the unjust treatment of individuals; there seems to have been no effort to trace individual injustices to the social attitude toward the minority groups to which the injured individuals belonged, or to give any weight to the fact of minority status."[59] Footnote Four had the catalytic effect of changing this focus.[60] The Footnote, Lusky explains, crystallized equal protection doctrine by focusing the Court's attention on the special reasons for judicial intervention.[61]

Footnote Four displayed an undisguised interest in what Lusky calls the "minorities problem."[62] Here is where Lusky's explanation of the motivation behind Footnote Four most illuminates the Footnote's necessary dependence on antisubordination theory:

> [D]islike [of outgroups] arises not because the members of the groups have done or threatened acts harmful to the community, but because membership in the group is itself considered a cause for distrust or even hostility. . . . The official aspect of the minorities problem, since it involves the question whether and how far the government should hurt men and women, or allow them to be hurt, *by reason of their membership in minority groups*, must be analyzed in terms of the basic problem of political administration: under what circumstances the government should hurt, or allow to be hurt, anyone within its jurisdiction.[63]

According to Louis Lusky, Footnote Four is interested in throwing the Court's weight behind members of unpopular groups who are disliked simply because of their membership in the group.[64]

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[58] *Id*. Only one year removed from law school at the time of *Carolene Products*, Louis Lusky drafted the first draft of footnote four. *See* Jack Greenberg, *In Memoriam: Louis Lusky*, 101 COLUM. L. REV. 977, 977-78 (2001).
[59] Louis Lusky, *Minority Rights and the Public Interest*, 52 Yale L.J. 1, 25 (1942).
[60] *Id*. at 26.
[61] *Id*.
[62] *Id*.
[63] *Id*. at 2 (emphasis added).
[64] *Id*.

In short, Footnote Four was crafted as a fail-safe for an individual who, solely because of his or her membership in a minority group, has been discriminated against, but who cannot seek repeal of the discriminatory law through the normal political channels because his membership in the minority group makes it difficult to influence voting. Suspect group designation serves the same end—to identify and protect certain minority groups that are historically unpopular and historically discriminated against. This is the role that Justice Stone envisioned for the judiciary. After a slow start, the Supreme Court would make Justice Stone's vision a reality.[65]

B. Suspect Class Doctrine

In the decades following *Carolene Products*, the Supreme Court developed from Justice Stone's Footnote Four a method to determine which groups qualify as suspect.[66] The Court, first, identifies a suspect group and, then, subjects to heightened judicial scrutiny all classifications based on the group's suspect trait.[67] The Court's determination of whether to deem a group suspect is guided by the extent to which the group at issue satisfies the indicia listed in Footnote Four: (1) the group has suffered a history of discrimination; (2) the group exhibits an obvious, immutable or distinguishing trait; (3) the trait bears no relation to the group's ability to perform

[65] In the years following *Carolene Products*, the Court invoked language of strict scrutiny in *Korematsu v. United States*, 323 U.S. 214 (1944),, and *Hirabayashi v. United States*, 320 U.S. 81 (1943), where Japanese-Americans were singled out for differential treatment during World War II, but the Court ultimately upheld the ordinances in both cases since the government's purpose – national security – was deemed compelling. The Court also made comments in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), about a heightened standard of scrutiny applicable to fundamental interests but, for the most part, the Court's strict scrutiny test in equal protection jurisprudence took a hiatus for twenty-years until the Warren Court cases. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. OF LEGAL HIST. 355, 356, 381 (2006).

[66] Adarand v. Pena, 515 U.S. 200, 227 (1995). In addition to generating the idea of suspect groups, Footnote Four produced a multi-tiered doctrinal framework wherein not all classifications are created equal. *See infra* notes 69-77 and accompanying text, where, for instance, racial classifications are the most suspect and receive strict scrutiny, sex-based classifications are quasi-suspect and receive intermediate scrutiny, and sexual-orientation classifications are not suspect and thus receive rational-basis review (but are often times driven by animus, in which case "rational-basis-with-bite" is applied). Lastly, Footnote Four encapsulates representation-reinforcement theory – the idea that the Court should intervene when the majority is disadvantaging a discrete and insular minority out of prejudice and thus blocking the channels of change or liberation. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88-103 (Harvard Univ. Press 1980).

[67] *Adarand*, 515 U.S. at 227.

or contribute to society; and (4) the group is a politically powerless minority.[68] These indicia are aimed to identify traits that are "so seldom relevant to the achievement of any legitimate state interest and, thus, expose official attempts to inflict inequality for its own sake."[69]

Laws that single out a suspect group for differential treatment merit strict scrutiny.[70] To survive this most exacting form of judicial review, the challenged governmental action must be narrowly tailored to achieve a compelling governmental interest.[71] The Supreme Court has identified race, [72] national origin,[73] and alienage[74] as suspect classifications. In the interstices between strict scrutiny and deferential review, the Court eventually wedged an intermediate tier of review.[75] Under intermediate scrutiny, laws that discriminate on the basis of a quasi-suspect classification must be substantially related to an important governmental interest.[76] The Court has held sex[77] and illegitimacy[78] to be quasi-suspect classifications. Finally, the most deferential level of judicial review—rational basis—applies to all groups not considered suspect or quasi-suspect.[79] "The general rule is that legislation is presumed to be valid and will be sustained if the

[68] Summarized succinctly in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).
[69] *See* Goldberg, *supra* note 21, at 502.
[70] Facially neutral laws that disproportionately impact a suspect group do not merit strict scrutiny unless the challenger can establish an intent to discriminate. *See* Washington v. Davis, 426 U.S. 229 (1976).
[71] *Adarand*, 515 U.S. at 227.
[72] *See, e.g., Adarand*, 515 U.S. 200; Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).
[73] *See*, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
[74] *See* Graham v. Richardson, 403 U.S. 365 (1971) (providing strict scrutiny for state law alienage classifications). *But see* Plyler v. Doe, 457 U.S. 202 (1982) (applying strict scrutiny only for lawfully residing non-citizens, and applying rational basis review for undocumented non-citizens but strict scrutiny for their children). *See also* Matthews v. Diaz, 426 U.S. 67 (1976) (applying rational basis review for federal law alienage classifications).
[75] Arguably, the Court also added a gloss to the intermediate scrutiny test. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (requiring the state to proffer an "exceedingly persuasive" justification, and requiring the justification to be genuine rather than hypothesized or "invented *post hoc* in response to litigation").
[76] Craig v. Boren, 429 U.S. 190, 197 (1976).
[77] *See id.* at 197-98.
[78] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (summarizing previous illegitimacy cases as enunciating an intermediate scrutiny standard). *See also* Mathews v. Lucas, 427 U.S. 495 (1976).
[79] City of Cleburne v. Cleveland Living Center, 473 U.S. 432, 442 (1985).

classification drawn by the statute is rationally related to a legitimate state interest."[80] Legislation that classifies a group on the basis of sexual orientation currently receives rational basis review.[81]

1. Race & National Origin

Each time the Supreme Court has designated a group as suspect and quasi-suspect, the designation was powered by antisubordination theory. During World War II, the U.S. government was concerned with disloyalty from citizens of Japanese ancestry;[82] President Roosevelt issued Executive Order 9066, which enabled military commanders to curfew and intern Japanese-Americans on the West Coast.[83] This gave the Supreme Court an opportunity to review race-based discrimination in *Hirabayashi v. United States* and *Korematsu v. United States*. In *Korematsu*, Justice Black noted, "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[84] In his dissenting opinion, Justice Murphy suggested a narrower focus for suspect class designation than did the majority, arguing that the law is unconstitutional because its purpose "appear[s] … to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices…"[85] In other words, Justice Murphy found the law to be unconstitutional not simply because it discriminated on the basis of race, but because it discriminated against a racial group that had historically suffered prejudice.

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[80] *Id*. The Court also created a beefed-up version of rational-basis review (sometimes referred to as "rational-basis-with-bite") where it will employ closer scrutiny when the government's interest is merely "a bare … desire to harm a politically unpopular group." *Romer* v. Evans, 517 U.S. 620, 634-35 (1996) (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)). The "bite" phrase originated in Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 12 (1972), which was the first law review article to identify heightened rational basis as an operating principle in equal protection law.

[81] *See Romer*, 517 U.S. at 632. The Court has suggested that sexual orientation classifications receive rational-basis-with-bite. *See id*. at 634; Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

[82] *See* FARBER, *supra* note 10, at 194.

[83] *See* STONE, *supra* note 26, at 514.

[84] *Korematsu* v. United States, 323 U.S. 214, 216 (1944)..

[85] *Id*. at 239.

While not yet at its peak, antisubordination theory gained a foothold on the Court's equal protection jurisprudence with these two cases.

With its opinions in *Korematsu* and *Hirabayashi*, the Court signaled its growing commitment to the dictates of Footnote Four, and necessarily to antisubordination theory. Accordingly, civil rights movement lawyers and their allies began to pave a road that would lead to *Brown v. Board of Education*[86] with a focus on antisubordination theory.[87] Thurgood Marshall and his colleagues at the NAACP understood that to attain substantive racial equality and receive heightened protection from racial discrimination, they would have to convince the Supreme Court, incrementally, to affirmatively lift blacks from the ranks of second-class citizens.[88] More importantly, civil rights lawyers were confident that, with changes to the Court's composition, the Court *could* be convinced.[89] That change came in 1953 when President Eisenhower appointed California Governor Earl Warren to replace Fred Vinson as Chief Justice.

A year later, Chief Justice Warren wrote the opinion for the Court's desegregation decision in *Brown I*,[90] beginning the process of providing substantive equality for blacks, and the process picked up momentum the following year when the Court commanded public schools to affirmatively dismantle their systems of segregation.[91] In *Brown I*, the Supreme Court made explicit its antisubordination approach to suspect class designation, holding that segregation in

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[86] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).
[87] *See* FARBER, *supra* note 10, at 196. Although the NAACP pursued a variety of litigation strategies, each method was underscored by antisubordination theory. *See* Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693 (2004). *See also* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (civil rights lawyers brought claims of racial discrimination involving black plaintiffs who challenged their exclusion from state institutions of higher education on the grounds that facilities provided for blacks are subordinate to those for whites).
[88] FARBER, *supra* note 10, at 196.
[89] *Id*.
[90] *See* 347 U.S. at 483.
[91] Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) ("*Brown II*") (remanding *Brown I* to the lower courts to fashion equitable relief, namely, injunctions requiring the school boards to make a "prompt and reasonable start toward full compliance" with *Brown I*).

public education violates the Equal Protection Clause because separate facilities are inherently unequal.[92] The NAACP filed briefs for the appellants, arguing that "law-endorsed segregation undermines the dignity of those stigmatized, contribute[s] to rigid and authoritarian personalities among white children, and perpetuate[s] stereotypes and racial animosity among all children."[93] The Court echoed the same argument; Chief Justice Warren's opinion relied on sociological "doll tests" to support the argument that de jure segregation has a detrimental effect on black children,[94] explaining that "separat[ing] [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[95]

2. Alienage

In 1971, alienage achieved suspect class designation in largely the same way as race.[96] In *Graham v. Richardson*, the Supreme Court granted aliens suspect class status because, as Justice Blackmun stated, "[a]liens as a class are a prime example of a 'discrete and insular' minority," and classifications based on alienage are "subject to close judicial scrutiny."[97] Nine-years later, in *Plyler v. Doe*, the Court clarified its *Graham* holding, noting that the suspect class designation applies only to legal aliens.[98] The Court rejected the assertion that "illegal aliens" are a suspect class because, the Court noted, unlike legal aliens who are able to change their distinguishing characteristic but should not have to, the entry of undocumented aliens "into the class is itself a

[92] *See generally id*.
[93] FARBER, *supra* note 10, at 82.
[94] *Id*. at 88-89.
[95] *Brown I*, 347 U.S. at 494. The same Warren Court did, however, continue to rely on the anticlassification principle as well. *See generally Loving*, 388 U.S. 1. *See also*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 12 (2003) (arguing that the segregation cases rested on both antisubordination and anticlassification theories).
[96] *See supra* note 73.
[97] *Graham* v. Richardson, 403 U.S. 365, 371-72 (1971).
[98] *Plyler* v. Doe, 457 U.S. 202, 202 (1982).

crime," and thus is not only mutable but should be changed.[99] This narrowing of the *Graham* holding was a result of the Court's use of antisubordination theory. That is, anticlassification theory would not distinguish between legal and illegal "aliens," but would forbid all discrimination based on alienage; Antisubordination theory, however, would make this distinction.

3. Illegitimacy

Antisubordination theory powered the Supreme Court's quasi-suspect designations too. In 1968, the Court began to speak in antisubordination tones about discrimination against children born out of wedlock,[100] particularly in such areas as inheritance rights.[101] In *Weber v. Aetna Casualty*, the Court spoke more explicitly about the "social opprobrium" historically attendant to "illegitimate" children,[102] *en route* to granting them quasi-suspect class status.[103]

4. Sex

In 1973, the Court extended quasi-suspect status to women in *Frontiero v. Richardson*.[104] Women, Justice Brennan remarked, had traditionally been subjected to discrimination rationalized by an attitude of "romantic paternalism" which put women "not on a pedestal, but in a cage."[105] Justice Brennan then ticked through the Footnote Four criteria and rested women's

[99] *See* STONE, *supra* note 28, at 691.
[100] *See generally* Levy v. Louisiana, 391 U.S. 68 (1968) (equal protection violated when state allowed marital, but not nonmarital, child to sue for damages for wrongful death of their mother).
[101] FARBER, *supra* note 10, at 344.
[102] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-76 (1972).
[103] *Mathews*, 427 U.S. at 510 ("[W]hile the scrutiny by which [the laws at issue are] to be judged is not a toothless one, the burden remains upon the appellees to demonstrate the insubstantiality of [the relation between the law and the law's purpose].") (Citations omitted).
[104] 411 U.S. 677 (1973). Granted, only a plurality of the Court voted to extend quasi-suspect status to women (reiterating explicitly what the Court in *Reed v. Reed*, 404 U.S. 71 (1971), had implicitly suggested), but the holding would be embraced three years later by a majority in *Craig*, 429 U.S. at 197-98.
[105] *Frontiero*, 411 U.S. at 685 (Brennan, J., plurality).

quasi-suspect designation on the antisubordination premise that such legislative attitudes have "the effect of invidiously relegating the entire class of females to inferior legal status."[106]

III. BEDFELLOWS NO MORE: THE SUPREME COURT SUBORDINATES ANTISUBORDINATION THEORY

Suspect or quasi-suspect class designation remains the touchstone generally for minority groups seeking protection from discrimination[107] and specifically for LGBTs.[108] But, in light of the Supreme Court's choice to elevate the anticlassification principle above the antisubordination principle and, consequently, the its recent refusal to extend suspect or quasi-suspect class status to any more minority groups, sexual orientation discrimination will likely remain subject to minimal scrutiny. This Part of the Note will detail the Court's retreat from antisubordination theory, with a particular focus towards explaining the root causes of the Court's decision to close the set of suspect classifications.

A. Affirmative Action Forces the Court to Make a Choice

Although antisubordination theory gained prominence in the Court's equal protection jurisprudence, most notably in *Brown v. Board of Education* and the early sex-discrimination cases,[109] its prominence was short-lived. The Court began to retreat from the antisubordination principle in the late 1970s. Consequently, the Court also stopped granting suspect or quasi-suspect class status to any new groups at this time. However, some commentators do disagree about whether the Supreme Court has retreated from the antisubordination principle, arguing that

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[106] *Id*. at 686-87.
[107] *See* FARBER, *supra* note 10, at 412 ("[A] group could sweep away almost all formal state discriminations stigmatizing its members if social movement lawyers could persuade the Supreme Court to recognize the trait marking the group's members as a 'suspect' or 'quasi-suspect' classification."). *See*, *e.g.*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (the Court refused to designate the poor – and wealth-based classifications – as suspect); City of Cleburne v. Cleveland Living Center, 473 U.S. 432 (1985) (the Court refused to designate the physically or mentally disabled as suspect); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (the Court refused to designate age as a suspect classification).
[108] *See supra* note 19 and accompanying text.
[109] *See supra* Part II-B.

the Court has never elevated one theory over the other.[110] As this Note will argue below, the Court has in fact come to prefer the anticlassification approach to suspect class designation.

Until the late 1970s, the principles of antisubordination and anticlassification were able to coexist as integral components of equal protection law.[111] To this point, race discrimination cases (along with the other suspect and quasi-suspect class discrimination cases) involved only discrimination against minority groups. In the 1970s, however, the Court faced a series of cases in which overt race discrimination was used to *benefit* racial minorities, arguably to the detriment of the racial majority.[112] These cases developed off the heels of the Supreme Court's desegregation decision in *Brown I*[113] and its command in *Brown II* for public schools to affirmatively dismantle systems of segregation.[114] In reaction to *Brown II*, many public institutions began to focus their attention on racial integration, albeit reluctantly at first.[115] Particularly, colleges and universities implemented programs designed to achieve racial diversity—so-called "affirmative action."[116]

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[110] *See* Symposium: Brown at Fifty, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1537-41 (2004) (arguing that the Court never embraced one understanding of equal protection to the exclusion of the other but, rather, that the Court's language of a "deep desire to shield interpretations of the Equal Protection Clause from concerns about groups, social structure, caste, and subordination" belies the values that certain decisions actually vindicate. For instance, Justice O'Connor's opinion in *Grutter v. Bollinger*, emphasizes that the "[F]ourteenth Amendment 'protect[s] persons, not groups'" and repeatedly distances itself from group-based justifications for affirmative action, but it then openly acknowledges that the state has a compelling interest in considering the race of applicants to a public university to ensure that no group will be systematically excluded from positions of civic leadership and influence).

[111] *See supra* Parts I-A and I-B.

[112] *See* FARBER, *supra* note 10, at 253.

[113] *See supra* Part II-B at 15-16.

[114] Brown v. Board of Ed. of Topeka, 349 U.S. 294 (1955) ("*Brown II*") (remanding *Brown I* to the lower courts to fashion equitable relief, namely, injunctions requiring the school boards to make a "prompt and reasonable start toward full compliance" with *Brown I*).

[115] *See* Marvin Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994).

[116] *See* Peter Schuck, *Affirnative Action: Past, Present, and Future*, 20 YALE L. & POL. REV. 1 (2002).

Within this crucible, the principles of antisubordination and anticlassification finally clashed.[117] The Court was forced to choose and selected the latter interpretation, effectively crowding out antisubordination theory from the Court's equal protection jurisprudence.

In 1978, for the first time, the Supreme Court substantively addressed the constitutionality of affirmative action.[118] In *Regents of the University of California v. Bakke*, the Court struck down the University of California Davis medical school's affirmative action program by a sharply divided 5-4 vote that produced no majority opinion.[119] Justice Powell held in his plurality opinion that strict scrutiny applies to all racial classifications regardless of the extent to which the burdened group meets the suspectness indicia, and noted:

> [P]etitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males … are not a 'discrete and insular minority' requiring extraordinary protection from the majoritarian political process … This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny … Racial and ethnic classifications … are subject to stringent examination without regard to these additional characteristics.[120]

Justice Powell neglected, however, to recall the antisubordination reasoning Chief Justice Warren employed to reach the Court's decision some twenty-years earlier in *Brown I*.[121] The effect of Powell's *Bakke* opinion was essentially to extend suspect class status to whites under the anticlassification theory that "[t]he guarantee of equal protection cannot mean one thing

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[117] Note that the Court was faced with this conflict in two affirmative action cases that came before *Brown I*, but avoided answering the substantive question of affirmative action's constitutionality. *See* Morton v. Mancari, 417 U.S. 535 (1975) (case dismissed on mootness grounds); DeFunis v. Odegaard, 416 U.S. 312 (1974) (case dismissed on *sui generis* grounds).

[118] Symposium, *Race. Jurisprudence and the Supreme Court: Where Do We Go From Here?*, 7 U. PA. J. CONST. L. 721, 734 (2005).

[119] Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The Court actually fractured into two 5-4 decisions – one upholding some use of race in admissions, the other striking racial quotas and separate admissions pools – and also into a 4-1-4 split in its rationale. The Court was so severely fractured that the precedential value of *Bakke* remains questionable, but the plurality's anti-classification rationale has endured. *See* Symposium *supra* note 116, at 734.

[120] *Regents of the University of California v. Bakke*, 438 U.S. at 290 (citations omitted).

[121] *See supra* notes 92-93 and accompanying text.

when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[122]

Justice Powell's opinion marks the first time that the Court, albeit by a plurality, explicitly chose to approach suspect class analysis with an anticlassification understanding rather than antisubordination. Justice Powell noted that "[t]he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class' theory," that is, based upon differences between white and black.[123] Once the "'two-class theory' of the Fourteenth Amendment" is put aside, the difficulties entailed in varying the level of judicial review according to a particular group's suspect-class status will fall by the wayside.[124]

The Court remained fractured. Justice Thurgood Marshall delivered a soaring dissent in *Bakke*, determined not to allow the Court's reliance on the antisubordination principle to end without a fight:

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. …. The status of the Negro as property was officially erased by his emancipation at the end of the Civil War, but the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. …. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to Slave Codes. …. The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. …. I do not believe that the Fourteenth Amendment requires us to accept that fate. … *Such ... would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve*.[125]

[122] *Id*. at 289-90.
[123] *Id*. at 295.
[124] *Id*.
[125] *Id*. at 387-99 (Marshall, J., dissenting) (emphasis added).

Four other justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes."[126]

Two years later in *Fullilove v. Klutznick*, when faced with another challenge to remedial race-based action, a plurality of the Court reaffirmed its refusal to interpret "equal protection" to require anything more than formal equality.[127] The Court upheld Congress' ten-percent set-aside for minority-owned businesses in the Public Works Employment Act of 1977,[128] but Chief Justice Burger disavowed the antisubordination approach, remarking that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."[129] However, this position again did not receive majority approval.[130]

After *Bakke*, Harlan's color-blind, anticlassification position in *Plessy* was used as a rallying cry for opposition to affirmative action.[131] Over the next two decades, the Court increasingly came to embrace the anticlassification principle.[132] By 1995, the Court

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[126] *See id.* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).
[127] Fullilove v. Klutznick, 448 U.S. 448 (1980).
[128] *Fullilove*, 448 U.S. at 491.
[129] *Id*.
[130] *Id.* Note also that around this time, not coincidentally, the burgeoning change in the Supreme Court's approach to equal protection jurisprudence reached sex discrimination too. In *Mississippi University for Women v. Hogan*, a male plaintiff brought suit against Mississippi University for Women, challenging its policy of excluding men from its nursing program. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). Without consideration of the plaintiff's sex, Justice Sandra Day O'Connor opined that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification for the classification.'" *Id*. at 724. It mattered not that the "exceedingly persuasive" standard was developed in reaction to the second-class status of women; nor did it matter to the Court that men as a group fail to satisfy the Footnote Four criteria. In this case, the Court extended to men the same quasi-suspect class status it had granted women a decade earlier. *Id*.
[131] *See generally* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (discussing the several post-*Bakke* opinions of Chief Justice Rehnquist, and Justices Stewart, O'Connor, and Scalia).
[132] *See, e.g.*, Wygant v. Jackson Bd. Of Ed., 476 U.S. 267, 273 (1986) (holding that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.") (Powell, J., plurality); *Richmond*, 488 U.S. at 493-94 (The Court finally cobbled together a majority to hold that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that strict scrutiny applies to all race-based action taken by state and local governments, though the Court did not have the occasion here to declare the standard of review under the Fifth Amendment applicable to actions taken by the Federal Government). *But cf.* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990) (holding that certain affirmative action taken by the Federal

unequivocally declared the triumph of anticlassification over the antisubordination principle with its holding in *Adarand Constructors, Inc. v. Pena*.[133] Justice O'Connor delivered the Court's opinion in *Adarand*, this time speaking for a majority, in which the Court held that "all governmental action based on race … should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."[134] The Court's holding rested on the anticlassification notion that that "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*."[135]

Anticlassification theory has, indeed, come to guide the Court's approach to suspect class designation, but antisubordination theory maintains a modicum of relevance in other areas of the Court's equal protection jurisprudence. In other words, not all racial classifications are created equal. The Supreme Court applies strict scrutiny quite differently to racial classifications in different contexts. Unlike a race-based policy aimed at minorities, which may survive strict scrutiny only if it serves the compelling governmental interest of national security, discrimination that benefits racial minorities and burdens the racial majority may be justified not only by a national security purpose but also by racial diversity in higher education[136] and remedying past racial discrimination.[137]

Consequently, some constitutional law scholars argue that the distinction the Supreme Court draws between benign racial classifications and invidious racial classifications signals the continued vitality of antisubordination theory. In particular, Professor Reva Siegel contends that

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Government should be treated less skeptically than others, and the race of the benefited group is critical to the determination of which standard of review to apply).

[133] 515 U.S. 200 (plaintiffs challenged a federal contracting scheme that gave preference to bids from businesses that are owned by racial minorities).

[134] *Id*. at 227.

[135] *Id*.

[136] *Supra* note 108.

[137] *See* STONE, *supra* note 26, at 569-70, 583. If a law or policy seeks to remedy past racial discrimination, such a goal is compelling only where past racial discrimination actually existed at the institution or location where the law or policy has been implemented. Grutter, 539 U.S. 306.

"neither understanding of [equal protection] has ultimately proven powerful enough wholly to displace the other from our law."[138] She argues, rather, that a third perspective called antibalkanization has emerged, and that the oft-necessary swing vote in several of the Supreme Court's race-discrimination cases post-*Brown* was cast on antibalkanization grounds.[139]

Professor Siegel explains that an "antibalkanization" approach is concerned with threats to social cohesion, focusing "on the forms of estrangement that both racial stratification and practices of racial remediation may engender."[140] In essence, antibalkanization strikes a middle ground between anticlassification and antisubordination, maintaining the validity of both theories. For two reasons, Professor Siegel's antibalkanization theory misses the point.

First, antibalkanization theory is not an interpretation of "equal protection;" it serves as a gloss on the two established theories. Professor Siegel offers Justice Kennedy's concurring opinion in *Parents Involved v. Seattle School District*[141] as the paragon of antibalkanization theory.[142] In his opinion, Kennedy explained:

> The statement by Justice Harlan that "our Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy v. Ferguson*. The Court's decision in that case was a grievous error it took far too long to overrule …. [A]s an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.[143]

Professor Siegel situates this statement within the context of Justice Kennedy's statement that "the schools [in this case] could have achieved their stated ends through different means… includ[ing] the facially race-neutral means set forth [in *Grutter*]."[144] Professor Siegel contends

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[138] Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1292-93 (2011).
[139] *Id*. at 1300.
[140] *Id*.
[141] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).
[142] Siegel, *supra* note 136 at 1305.
[143] *Parents Involved*, 551 U.S. at 787.
[144] *Id*. at 788.

that Justice Kennedy's position makes sense in neither an anticlassification nor an antisubordination framework; it makes sense only in an antibalkanization framework.[145]

Closer analysis shows, however, that Justice Kennedy's opinion is a tempered version of antisubordination theory. Where, as noted above, Justice Kennedy stated that the schools could have achieved their goal through race-neutral means,[146] he wrote further, in the same sentence no less, that the schools also could have achieved their goal of integration with "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[147] Thus, Justice Kennedy does not abandon the idea that race matters; he instead advocates that such considerations depend not on race in a vacuum but rather in context. The point is this: social cohesion—the goal of antibalkanization theory—is not an understanding of equal protection. Rather, it is a limit on how far the two existing understandings of equal protection are permitted to go in achieving their goals.

The second point is that antibalkanization theory is not inapposite to the claims of this Note. Professor Siegel is correct that neither antisubordination nor anticlassification has displaced the other; so too are constitutional scholars who contend that antisubordination theory continues to resonate in the Court's equal protection jurisprudence. This Note does not claim otherwise.[148] Rather, this Note applies only to the wing of equal protection jurisprudence where the Supreme Court *initially* decides whether to grant suspect class status to a group of individuals, not to the wing where the Court determines how to review a particular law that discriminates against a group already deemed suspect or quasi-suspect.

B. Consequence of the Court's Choice: No New Suspect or Quasi-Suspect Classifications

[145] Siegel, *supra* note 136 at 1307-08.
[146] *Supra* note 142.
[147] *Id*.
[148] *See supra* Part I where the two theories coexisted.

A central lesson of the race discrimination cases, amplified in the sex discrimination cases, was that a group could sweep away virtually all formal state discriminations stigmatizing its members if social movement lawyers could persuade the Supreme Court to recognize the trait marking the group's members as a suspect or quasi-suspect classification. As a result of its choice to interpret the Equal Protection Clause through an anticlassification lens, as detailed above, the Court in the late 1970s became unwilling to create more such classifications. Thus, persuasion by social movement lawyers now is an endeavor doomed to fail.

The logical consequence of the Supreme Court's subordination of antisubordination theory played out in 1976, in *Mass. Bd. of Ret. v. Murgia* where the Court refused to grant suspect or quasi-suspect class status to the elderly,[149] and again in 1985 when the Court in *City of Cleburne v. Cleburne Living Center* refused to designate the mentally disabled as a suspect or quasi-suspect group.[150] In each case, the Court supported its refusal with anticlassification justifications. If *Perry v. Schwarzenegger* reaches the Supreme Court, and the Court addresses the issue of whether LGBTs are a suspect group, the same consequence will likely result.

In light of the foregoing discussion, the Supreme Court will likely deny LGBTs suspect or quasi-suspect class designation. As explained above, to arrive at such a designation the Court would have to assess the disadvantage that the "sexual orientation" classification has inflicted on LGBTs over the past century, but such an historical assessment can happen only by reference to antisubordination principles. But, as is also explained above, antisubordination theory has fallen into disfavor, rendering the designation of LGBTs as suspect or quasi-suspect unlikely.

[149] 427 U.S. 307 (1976).
[150] 473 U.S. 432 (1985).

IV. CONCLUSION

Suspect class designation is dead. But the Supreme Court's equal protection jurisprudence has become robust enough, and LGBT advocacy groups are creative enough, to persuade the Court that sexual orientation discrimination of the kind at issue in *Perry v. Schwarzenegger* is almost always impermissible. As such, LGBT groups should shift their focus away from the desire for suspect designation and, instead, toward alternative paths to equality.

LGBT groups can continue down the path to equality paved by the Court in *Romer v. Evans* and *Lawrence v. Texas*. The rational-basis-with-bite review that emerged from these two cases proved toothy enough to invalidate the anti-gay laws at issue.[151] Additionally, legal strategies crafted around the "privileges or immunities" clause of the Fourteenth Amendment may make inroads where the Equal Protection Clause cannot.[152] With the potential precedential value of *Perry v. Schwarzenegger* so high (i.e., the potential for the Court to hold that sexual orientation discrimination is subject only to traditional rational basis review), and the current Court composition as conservative as it is today, this Note cautions LGBT groups against pushing the suspect-class envelope.

[151] *See supra* note 12.

[152] Many LGBT groups hope (though less so after the Court's decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (Consider inserting the holding of McDonald here for reference?), that "the Privileges or Immunities Clause … become[s] a fountain for new constitutionally-protected rights, like … a fundamental right to marriage that includes same-sex couples." Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 393 (2010).