

Lifting the Veil on Rigorous Rational Basis Scrutiny

Miranda Oshige McGowan

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LIFTING THE VEIL ON RIGOROUS RATIONAL BASIS SCRUTINY

MIRANDA OSHIGE MCGOWAN*

In many different cases, the Supreme Court and lower courts have used a rigorous form of rational basis scrutiny very different from the ordinary, deferential rational basis scrutiny taught in constitutional law courses. When invoked, this more rigorous form of rational basis scrutiny has proven fatal to statutes and regulations. Many scholars and courts have described how courts apply it and have defended particular cases in which it has been used. No one, however, has explained just why and when courts will or ought to apply it. This gap is troublesome and pressing. Rigorous rational basis scrutiny is an important part of the constitutional toolkit, and courts have increasingly applied it to a wide variety of circumstances—including same-sex marriage, adoption by gay men and lesbians, and intimate sexual relations. This term, the Supreme Court will be hearing argument on—and presumably deciding—two same-sex marriage cases. Which level of scrutiny the Court applies to the laws challenged in these lawsuits will likely determine whether same sex marriage will be legal in California and whether the federal Defense of Marriage Act’s definition of marriage is constitutional. The issue of same-sex marriage is one of the most important civil rights issues today, and these cases should be decided by principle, not by a judge’s personal

* Professor of Law, University of San Diego Law School. Many thanks to Larry Alexander, Carl Auerbach, Dale Carpenter, Guy Charles, Bill Eskridge, Dan Farber, Kenneth Karst, David McGowan, and Naomi Mezey for helpful comments and criticism. I feel deep gratitude toward my mentor and dear friend, the late Phil Frickey, who also commented on this draft. This article springs from the questions raised by his work with Bill Eskridge. Phil’s friendship and example inspired—and inspires—me. I dedicate this article to him.

preferences. This article traces the history of rigorous rational basis scrutiny and shows that courts use it to protect groups from majority overreaching but do not want to invoke intermediate or strict scrutiny. That courts apply it to protect groups raises the question of what makes a group a group, not merely a collection of people who share a common interest or characteristic. This article explains the conditions necessary and sufficient to distinguish groups. Drawing on behavioral economics and psychology, it also explains why rigorous rational basis scrutiny is the right tool for protecting such groups from majority overreaching. Indeed, rigorous rational basis scrutiny may be a more effective tool than intermediate or strict scrutiny for protecting group interests in the long term. Unlike strict scrutiny, it does not effectively forbid majorities from regulating groups. Instead, it gives group members a seat at the political table, which forces majorities to take groups and their members into account when making decisions and providing reasons for those decisions. Rigorous rational basis scrutiny therefore reinforces democratic political processes by ensuring that minority group members are taken into account as members both of their group and of the polity, without depriving majorities of the right to govern the polity as a whole.

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I. INTRODUCTION

This term the Supreme Court will be hearing argument on two cases that affect the constitutional rights of same-sex partners to marry. The first is *Hollingsworth v. Perry*,¹ the appeal from the Ninth Circuit decision that declared California's Proposition 8 unconstitutional.² Proposition 8 amended California's constitution to limit marriage to opposite-sex couples and overturned the California Supreme Court's earlier ruling that the California Constitution gave gay men and lesbians the right to marry.³ The second is *United States v. Windsor*,⁴ the appeal from the Second Circuit decision that declared unconstitutional the federal Defense of Marriage Act's (DOMA) definition of marriage as those unions between opposite-sex couples.⁵ DOMA denies federal benefits that accrue to marriage (such as social security survivors' benefits) to same-sex couples who are legally married in their home states. It precludes these couples from filing joint income tax returns, and it denies federal employees dependent benefits for their same-sex spouses.⁶

The circuit courts in *Hollingsworth* and *Windsor* took different routes to arrive at the conclusion that these restrictions on the rights of same-sex partners were unconstitutional. *Windsor* held that gay men and lesbians were a suspect group, and it used intermediate scrutiny to determine that DOMA was unconstitutional.⁷ The Supreme Court, however, has long avoided declaring new suspect classifications⁸ or new

1. *Hollingsworth v. Perry*, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

2. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

3. See *Strauss v. Horton*, 207 P.3d 48, 66-68 (Cal. 2009) (describing the history of Proposition 8 from its creation during the California Supreme Court's proceedings in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), superseded by constitutional amendment, CAL. CONST. art. I, § 7.5, to its passage by ballot initiative on November 4, 2008).

4. *United States v. Windsor*, No. 12-307, 2012 U.S. LEXIS 9413 (Dec. 7, 2012).

5. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), cert. granted, No. 12-307, 2012 U.S. LEXIS 9413; see Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

6. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012).

7. *Windsor*, 699 F.3d at 176; see Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

8. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635-36 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985) (holding that persons with disabilities were not a suspect class because when "individuals . . . have distinguishing characteristics relevant to" state interests courts are, and should be, "very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued");

fundamental rights.⁹ Most likely it will decline to do so in these cases.

The Ninth Circuit's reasoning in *Hollingsworth* provides a surer roadmap for a Supreme Court decision that upholds the rights of gay and lesbian couples. There, the Ninth Circuit used a rigorous form of rational basis scrutiny to strike down California's ban on same-sex marriage.¹⁰ The First Circuit also used this rigorous form of rational basis scrutiny in *Massachusetts v. United States Department of Health and Human Services* to declare unconstitutional DOMA's restrictive definition of marriage.¹¹ (The Supreme Court has not granted certiorari in this case.) Both the Ninth Circuit and First Circuit disclaimed that they were recognizing a constitutional right to same-sex marriage.¹² Instead, both claimed to strike down discrete restrictions on same-sex partners, nothing more.

This stringent form of rational basis scrutiny has a curious history. Some lower courts have explicitly injected rigor into rational basis analysis to strike down laws because the law restricted the liberties of certain groups; such laws would have been upheld under more lenient conceptions of rationality.¹³ The Supreme Court, however, has never

Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976) (“[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class,” and a mandatory retirement age of 50 “involves neither situation.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to hold that indigent persons were a suspect classification because such a class has “none of the traditional indicia of suspectness”).

9. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (describing the right of same-sex partners to engage in intimate sexual conduct as a “protected” liberty interest, not a fundamental right); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (noting that the Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended” and refusing to declare fundamental the right of terminally ill patients to end their lives); *Rodriguez*, 411 U.S. at 37 (finding that the arguments in favor of education being deemed a “fundamental right” are “unpersuasive”).

10. *Perry*, 671 F.3d at 1089 (“While deferential, the rational-basis standard ‘is not a toothless one.’” (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976))).

11. *Massachusetts*, 682 F.3d at 1.

12. See *id.* at 8 (explaining that precedent does not “mandate[] that the Constitution require[] states to permit same-sex marriages”); *Perry*, 671 F.3d at 1082 (“There is no necessity in either case that the privilege, benefit, or protection at issue be a constitutional right.”).

13. In addition to *Perry*, 671 F.3d 1052, and *Massachusetts*, 682 F.3d 1, this trend can also be seen in cases such as *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008). See also *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1292 (11th Cir. 2004)

squarely admitted—and indeed, has sometimes denied—that a rigorous form of rational basis scrutiny exists.¹⁴ But exist it does, whether or not the Court admits it: several Supreme Court decisions have squarely placed the burden on the government to justify a challenged legal restriction, while either purporting to apply the usual, deferential rational basis test or reciting that test.¹⁵ Unfortunately, the Court's refusal to admit the existence of this form of scrutiny means that the Court has never explained what triggers it or what satisfies it.

The Supreme Court most recently used rigorous rational basis scrutiny was in *Lawrence v. Texas*, in which the Supreme Court struck down Texas's ban on same-sex sodomy.¹⁶ Other examples include *Romer v. Evans*, which struck down a Colorado constitutional amendment that forbade state and local governments from outlawing discrimination on the basis of sexual orientation;¹⁷ *City of Cleburne v. Cleburne Living Center*, which struck down a city zoning regulation that required a special use permit before a group home for persons with mental disabilities could operate;¹⁸ *Plyler v. Doe*, which struck down Texas's ban on school funding for illegal immigrant children;¹⁹ and *United States Department of Agriculture v. Moreno*, which struck down a federal regulation that denied food stamps to households that contained unmarried adults.²⁰

Lower courts have been injecting rigor into rational basis scrutiny as well. As mentioned above, the Ninth Circuit did so when it declared Proposition 8 unconstitutional,²¹ and the First Circuit did so when it struck down DOMA's restrictive definition of marriage.²² The Ninth

(Barkett, J., dissenting) (“[T]he classification at issue . . . burdens personal relationships and exudes animus against a politically unpopular group,” and such “statutes have consistently failed rational basis review.” (emphasis added)).

14. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367–68 (2001).

15. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528–29, 538 (1973).

16. *Lawrence*, 539 U.S. at 578–79.

17. *Romer*, 517 U.S. at 635–36.

18. *City of Cleburne*, 473 U.S. at 450.

19. *Plyler*, 457 U.S. at 230.

20. *Moreno*, 413 U.S. at 529, 538.

21. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

22. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir.

Circuit also used rigorous rational basis scrutiny to vacate and remand a district court decision that had upheld “Don’t Ask, Don’t Tell.”²³ Judges on the Eleventh Circuit have tussled over whether the standard should apply to laws preventing gay men and lesbians from adopting children²⁴ or banning sex toys.²⁵

Two analytic moves characterize rigorous rational basis scrutiny. As with strict and intermediate scrutiny, when the Court applies rigorous rational basis scrutiny it presumes that the legislation is unconstitutional.²⁶ The state must prove that the law has a legitimate state purpose and that the classification furthers the state interest.²⁷ As

2012) (“Supreme Court equal protection decisions have both intensified scrutiny of purported justifications *where minorities* are subject to discrepant treatment and have limited the permissible justifications.” (emphasis added)).

23. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (“Lawrence requires something more than traditional rational basis review and that remand [of the district court’s decision dismissing the plaintiff’s challenge to ‘Don’t Ask, Don’t Tell’] is therefore appropriate.”).

24. *See Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004). In a dissent from a denial of rehearing en banc, Judge Barkett, who would have declared unconstitutional the Florida law forbidding gay men and lesbians from adopting children, writes that she would have applied a more searching form of rational basis review. In this case, Judge Barkett explained, “the classification at issue . . . burdens personal relationships and exudes animus against a politically unpopular group. Under these circumstances, statutes have consistently failed rational basis review.” *Id.* at 1292 (Barkett, J., dissenting). The panel, however, had used the deferential version of rational basis scrutiny. The panel explained that, under the “deferential standard [of rational basis review], a legislative classification ‘is accorded a strong presumption of validity,’ and ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Id.* at 1277 (majority opinion) (citations omitted) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

25. *Compare Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004) (reversing district court’s decision that the sex toy ban was unconstitutional because there was no general liberty in sexual expression that justified any measure of heightened scrutiny), *with Lofton*, 377 F.3d at 1284 (Barkett, J., dissenting) (noting that in *Lawrence v. Texas*, the Court held that an interest in public morality is not a “legitimate state interest which can justify its intrusion into the personal and private life of the individual” (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))).

26. *Lawrence*, 539 U.S. at 578 (holding that because the statute furthered “no legitimate state interest,” the statute must be declared unconstitutional); *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (explaining that in order to be constitutional the statute must “further[] some substantial goal of the State”).

27. *See, e.g., Lawrence*, 539 U.S. at 577 (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), *overruled by Lawrence*, 539 U.S. at 578)); *City of Cleburne v. Cleburne Living Ctr.*,

with strict and intermediate scrutiny, not all state interests suffice to discharge the state's burden. Moral objections to the group's conduct or to the group itself,²⁸ under-inclusive²⁹ or over-inclusive³⁰ justifications will not discharge the state's burden.

In contrast, under regular rational basis analysis the challenger, not the state, bears the burden of proof. The challenger must "negative every conceivable basis which might support [the law]."³¹ The state has free rein to define its purposes. Moral reasons alone defeat challenges to the legitimacy of the state's interest—as *Barnes v. Glen Theatre*³² and *City of Erie v. Pap's A.M.*³³ attest. A bare assertion by the state that the classification furthers the state interest can defeat claims that the means a law employs fit poorly with its stated justification—as *McGowan v. Maryland*³⁴ and *United States Railroad Retirement Board v. Fritz*³⁵ show. The Court generally defers to the state's assertions about how the classification furthers the state's purported interest, and it tolerates a

Inc., 473 U.S. 432, 449 (1985) ("[The city's] concern with the possibility of a flood . . . can hardly be based on a distinction between the Featherston home [for persons with mental disabilities] and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit"); *Plyler*, 457 U.S. at 228 (finding that barring undocumented alien children from public school is unconstitutional where "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.").

28. See *Lawrence*, 539 U.S. at 577–78 (citing *Bowers*, 478 U.S. at 216).

29. See *Cleburne*, 473 U.S. at 449.

30. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that the Colorado constitutional amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

31. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

32. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

33. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301–02 (2000) (upholding a statute prohibiting fully nude dancing similar to the statute in *Barnes* because it is sufficiently related to asserted governmental interests in morality).

34. See *McGowan v. Maryland*, 366 U.S. 420, 450–52 (1961) (accepting at face value state's justification that store-closing laws on Sunday, the traditional Christian day of Sabbath, provided citizens with a day of rest and recreation rather than arriving at the obvious conclusion, which is that such laws are based in sectarian, moral concerns).

35. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177, 179 (1980) (upholding government board's decision to eliminate dual, "windfall" retirement benefits for only one class of railroad retirees—those who had worked fewer than twenty-five years for a railroad and who were not currently connected with any railroad).

fair degree of both over- and under-inclusivity.³⁶

These analytic differences decide cases. Regular rational basis scrutiny is scrutiny in name only, and laws virtually always survive its gaze.³⁷ In every case in which courts have applied rigorous rational basis scrutiny, however, the added rigor has proved fatal to the challenged law.³⁸

Given that cases turn on whether rigorous or regular rational basis scrutiny is employed, it would be useful to know what criteria lead courts to opt for rigor. The Court has never addressed what triggers the fatal form of rational basis scrutiny, however. It has often tried to conceal that it is applying a heightened form of scrutiny. *Moreno*³⁹ and *Cleburne*⁴⁰ parroted the regular rational basis standard, while at the same time shifting the burden of proof to the state and insisting on a tailored fit between the statute's classification and purpose. In *Garrett*, the Court's majority opinion denied that *Cleburne* had applied anything

36. See *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110–11 (1949) (upholding ban on advertising trucks in New York despite significant over- and under-inclusivity).

37. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9, 14 (1st Cir. 2012) (“Equal protection claims tested by this rational basis standard, famously called by Justice Holmes the ‘last resort of constitutional argument,’ rarely succeed.” (citation omitted) (quoting *Buck v. Bell*, 274 U.S. 200, 208 (1927))); *McGowan*, 366 U.S. at 425–26 (“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. [As such, a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 724 (3d ed. 2009) (observing that it is “rare” that a law will ever fail rational basis scrutiny and citing only *Romer v. Evans* and *City of Cleburne v. Cleburne Living Center, Inc.* as exceptions to that rule); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing rational basis review as “minimal scrutiny in theory and virtually none in fact”).

38. Some state courts have followed this lead. Rigorous rational basis scrutiny also served as the basis for the Supreme Judicial Court of Massachusetts's decision in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960–61, 968 (Mass. 2003), and as one basis for the San Francisco Superior Court's decision in *In re Marriage Cases*. *In re Coordination Proceeding*, Special Title [Rule 1550(c)], *Marriage Cases*, No. 4635, 2005 WL 583129, at *4–5 (Cal. Superior Mar. 14, 2005), available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/in-re-marriage_ca_20050413_decision-ca-superior-court.pdf. Both cases held unconstitutional state bans on same-sex marriage. See *Goodridge*, 798 N.E.2d 941; *In re Marriage Cases*, No. 4635, 2005 WL 583129.

39. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–36 (1973).

40. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (“[L]egislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”).

but regular rational basis scrutiny.⁴¹ Both *Lawrence* and *Romer* sidestepped the issue of standard of review entirely while placing the burden of justifying the law on the state and condemning some state interests as irrational animus.⁴²

This article identifies and analyzes the circumstances that lead courts to inject rigor into rational basis analysis.⁴³ This analysis rationalizes the Supreme Court's doctrine and thus may provide guidance to judges and litigants operating in this quickly evolving area of law. This article also breaks new ground in two areas. First, it explains why and the conditions under which the Constitution should be read to provide to *groups* greater protection than it provides to persons not considered group members. Second, drawing on the recent literature on "nudges," it explains why rigorous rational basis scrutiny, rather than intermediate or strict scrutiny, has been the appropriate response to the discriminations experienced by gay men and lesbians, persons with

41. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

42. *See Romer v. Evans*, 517 U.S. 620, 632–33 (1996). To the extent the Court has said anything on this topic it has limited the scope of scrutiny by fiat. *Lawrence*, for example, holds that gay men and lesbians have the right to pursue same-sex relationships free of criminal stigma. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). This holding could imply a principle of relational autonomy that commits the Court to striking bans on same-sex marriage. The majority, however, declares that the principle applied in *Lawrence* extends no further than the sexual privacy rights of gay men and lesbians. *See id.*

43. Others have ably documented both rigorous rational basis scrutiny's existence and strength. *See, e.g.,* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 233 (2002) ("In some cases, a 'third-order' rational review is also used by the Court[, and] . . . in these cases the burden shifts to the government to prove that the governmental action is constitutional."); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1264–65 (2008) ("[T]he equal protection context, [the Court] has sometimes required 'rationality with bite' in place of the traditional rationality test." (citing *Romer*, 517 U.S. at 631–33; *Cleburne*, 473 U.S. at 440–42, 447; *Plyler v. Doe*, 457 U.S. 202 (1982))); Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH. & LEE L. REV. 165, 194–96 (2007) (describing how the Court has refused to accept as true the state's stated purpose for the law and searched for the "actual purpose"); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59 (1996) (arguing that "[i]n a handful of cases, rationality review has actually meant something" (citing *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534–35)). As a result, this article will not dwell on the Court's implausible denials to the contrary. *But see* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 264 (1996) ("We would like to explore a third possibility: that the [*Romer*] majority was correct to invalidate the law without using heightened scrutiny.").

disabilities, illegal aliens, and hippies.⁴⁴ It also explains how these two circuit court cases exemplify the best kind of “nudge” and are likely to be upheld by the Supreme Court.⁴⁵

This article will proceed as follows. Part II demonstrates how the Court’s conclusion that a group has been the target of discrimination triggers rigorous rational basis scrutiny. Part III shows that previous attempts to define groups for the purpose of constitutional protection do not work in this context. Part IV provides an alternative understanding that both makes sense and fits the case law better than competing explanations. Part V explains why protecting groups and treating them as the unit of analysis is desirable and why rigorous rational basis scrutiny is the appropriate level of scrutiny for restrictions on most groups.

This analysis yields three important conclusions. First, it is pointless to ask, “What is a group?” without also asking, “Why do you care?” What counts as a group depends on the purposes served by extending constitutional protection to groups. Efforts to create universal principles for constitutional protection, such as “discreteness and insularity,” will always prove unsatisfactory because guaranteeing the equal protection of the laws to different groups of people require protections from different kinds of harm. The context of heightened rational basis scrutiny suggests that the definition of groups under this doctrine will be a function of the reasons why animus against groups is distinct from moral disapproval of certain conduct.

Second, the Court’s substantive due process and equal protection jurisprudence may be reconciled with the leading normative justifications for the Court’s power to strike legislation. These doctrines have been persuasively attacked as inconsistent with the leading normative justification for the Court’s power to negative legislation—John Hart Ely’s theory of representation reinforcement.⁴⁶ This paper resolves this apparent inconsistency. The Court has used rigorous rational basis scrutiny to protect groups when they are particularly vulnerable to political backlash based on beliefs about a group’s lesser

44. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608 (2000).

45. *See id.*

46. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 54 (1994) (arguing that “the Court’s equal protection jurisprudence has shown an ‘inverted *Carolene*’ quality”).

moral worth that is likely to indefinitely cement a group's subordinate status.

Third, rigorous rational basis scrutiny can be defended as enhancing democratic values. Unlike strict scrutiny, rigorous rational basis scrutiny is not a trump card that can be played to insulate a group generally from group-based restrictions. Instead, it is a thin measure of constitutional protection. It requires others to tolerate the group's existence and engage them in rational political debate about the costs and benefits of laws that restrict group members' ability to exercise liberties and privileges that are generally available to others. Ironically, this thin measure of protection can prove to be more effective in increasing the rights of such groups by avoiding the kind of political and social backlash that harsher medicine like strict scrutiny can provoke.

II. THE HISTORY OF RIGOROUS RATIONAL BASIS SCRUTINY

A. *The Development of the Doctrine*

Since its debut in *United States Department of Agriculture v. Moreno*⁴⁷ rigorous rational basis scrutiny has protected some groups from discriminatory treatment by the state. *Moreno* arose when, in the late 1960s, Congress denied food stamps to individuals who lived in households with other unmarried, unrelated adults.⁴⁸ The law's target was clear: Congress did not want hippies in communes to live off the government's largesse.⁴⁹ The Court struck down this food stamp restriction, purportedly on rational basis grounds. The Court held:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular *group* cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify

47. See *Moreno*, 413 U.S. at 534, 538 (holding that, despite the multiple reasons given by the Government, the food stamp exclusion was still "without any rational basis" because it did not "further some legitimate governmental interest").

48. *Id.* at 529.

49. *Id.* at 534 (citing H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.)); 116 CONG. REC. 44,439 (1970) (statement of Sen. Spessard Holland).

the 1971 amendment.⁵⁰

The Court uses the word “legitimate”—a rational basis concept—but its use is misleading.⁵¹ Under standard rational basis analysis, this restriction on food stamps would have been easily upheld. Laws satisfy rational basis if “any state of facts reasonably may be conceived to justify” a law, regardless whether that “reasoning . . . in fact under[ies] the legislative decision.”⁵² Congress could permissibly solve just part of the problem of hunger and distinguish among subclasses of low-income people.⁵³ It might have concluded, as the appellate brief argued, that including households comprised of unmarried, unrelated adults could facilitate food stamp fraud.⁵⁴ It could rationally posit that households comprised of unmarried adults are more likely to move or break up than households made up of married couples or relatives.⁵⁵ Such households also might skirt income restrictions more easily by concealing financial support from parents.⁵⁶ These concerns are at least as plausible as New York City’s supposed concern, accepted by the Court in *Railway Express Agency, Inc. v. New York*, that vehicles bearing advertisements would distract other drivers and pedestrians from safe passage on city streets and sidewalks and create worrisome levels of noise and visual pollution.⁵⁷

The rational basis doctrine does no work in *Moreno*.⁵⁸ Rather, the critical language is “a bare . . . desire to harm a politically unpopular

50. *Moreno*, 413 U.S. at 534–35 (alterations in original) (first emphasis added) (quoting *Moreno v. U.S. Dep’t of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

51. *See Moreno*, 413 U.S. at 534.

52. *See* Brief for the Appellants at 11–12, *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (No. 72-534), 1973 WL 173826, at *6 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

53. *See, e.g., Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (holding that regulation of only some of the causes of traffic distractions was allowable because equal protection does not require that “all evils of the same genus be eradicated or none at all”).

54. *See* Brief for the Appellants, *supra* note 52, at 14–15.

55. *See id.* at 16.

56. *See id.*

57. *Ry. Express Agency, Inc.*, 336 U.S. at 107, 110 (stating that the city’s conclusion that “advertising vehicle[s]” should be regulated because of the noise and traffic problems they cause is “an allowable one” even though city regulation left untouched “even greater ones . . . such as the vivid displays on Times Square”).

58. *See U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533–36, 538 (1973) (analyzing Congressional justification for the 1971 amendment to the food stamp law and dismissing all reasons given as being “wholly without any rational basis”).

group cannot constitute a *legitimate* governmental interest.”⁵⁹ Here, the plaintiffs showed that Congress objected to supporting commune-dwelling hippies.⁶⁰ Conjectures about other conceivable purposes Congress *could have* had in mind could not dispel the evidence that “a bare . . . desire to harm “hippies spurred Congress to impose the food stamp restriction.⁶¹ Only *proof* that another reason, free of group animus, actually impelled Congress’s restriction could dispel that conclusion.⁶² Consequently, the Court shifted the burden of justifying the restriction to the government.⁶³ The government thus had to prove that, aside from disapproval of hippies and the hippie lifestyle, some *additional* reason genuinely accounted for the food stamp restriction.⁶⁴ The government could not produce some other genuine reason for Congress’s restriction, so the law failed.⁶⁵

The Court next used heightened rational basis scrutiny in *Plyler v. Doe* to strike a Texas law that prohibited school districts from admitting undocumented alien children or using state funds to educate them.⁶⁶ It would have sufficed under regular rational basis scrutiny for the state to assert that it restricted illegal aliens in order to husband scarce

59. *Id.* at 534 (first emphasis added).

60. See Brief for Appellees at 19–20, *Moreno*, 413 U.S. 528 (No. 72-534). The brief for the appellees highlighted the few pieces of evidence from the legislative history indicating that the restriction was targeted at hippies and communes. *Id.* First, the Chair of the Senate Agriculture Committee and another Senator on the Conference Committee explained that excluding “hippy communes” was the purpose of the restriction. *Id.* at 19. Second, several members of the Senate Select Committee on Nutrition and Human Needs later bemoaned that the “‘the so-called “anti-hippie commune” provision’ . . . was being used to cut off families ‘who might happen to have “taken in” a friend out of kindness.’” *Id.* at 19 n.9 (quoting 117 CONG. REC. 14,027 (1971) (letter from Sens. Henry Bellmon, Marlow Cook, Robert Dole, Charles Percy, Richard Schweiker, and Robert Taft, Jr., to Secretary Clifford Hardin)). Finally, one other piece of evidence exists—the Statement of Managers on the Part of the House included in the Conference Report explains that the restriction was intended to “prohibit food stamp assistance to *communal* ‘families’ of unrelated individuals.” See H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.) (emphasis added).

61. *Moreno*, 413 U.S. at 534.

62. See *id.* at 534–35.

63. See *id.*

64. See *id.*

65. See *id.* at 538. Such a reason was not difficult to produce as Congress could have worried quite rationally that such households could commit fraud more easily, as individual members of the household might each be receiving support money from their parents that went unreported. Had the Court been in its usual deferential rational basis frame of mind, it surely could have drummed up this reason or a similar one.

66. *Plyler v. Doe*, 457 U.S. 202, 205, 229–30 (1982).

educational resources and enhance educational opportunities for Texas citizens and legal aliens and to discourage the migration of illegal aliens to Texas.⁶⁷ Illegal aliens, like hippies, are not a suspect class, and education is not a fundamental right.⁶⁸ Just as zero plus zero equals zero, usually states have a free hand to regulate an unprotected class's unprotected rights.⁶⁹

The *Plyler* Court did its math differently. Under the “new math” of heightened rational basis scrutiny, Texas's flimsy assertions did not justify its restriction.⁷⁰ As the Court saw it, Texas's restriction on illegal alien children did not save all that much money.⁷¹ Texas also failed to prove how excluding undocumented children either improved education for other students or discouraged illegal migration to Texas.⁷² Excluding these children from public school, however, did ensure their illiteracy and condemn them as permanent outsiders in America. Grim consequences, indeed, though perhaps Texas's policy should not have gotten all the blame. Undocumented alien children already *were* and would remain outsiders. Federal law, not Texas law, forbade their presence in the United States, making them outsiders and pushing them to the margins of society.⁷³ Learning to speak, read, and write English in Texas schools would not change this legal status.

Plyler's heightened rational basis scrutiny bit even harder than *Moreno's*. Texas demonstrated *some* cost savings and *some* benefits to its educational system.⁷⁴ It estimated that the Houston public schools alone enrolled between 4210 and 5625 undocumented alien children at a cost between \$500 and \$700 per child per year.⁷⁵ Many schools were tremendously overcrowded⁷⁶ and thousands of students attended school

67. *See id.* at 228–30.

68. *See id.* at 223.

69. *See id.* at 216–17.

70. *Id.* at 230.

71. *Id.* at 229–30.

72. *Id.* at 228–29.

73. *Id.* at 223.

74. In contrast, in *Moreno*, the Government did not argue that denying food stamps to an entire class of people would save the government money. *See generally* U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973). That it would save money was obvious and perhaps offering that as a justification would have been tautological.

75. Brief for the Appellants at 8, *Plyler v. Doe*, 457 U.S. 202 (1982) (Nos. 80-1538 & 80-1934), 1981 WL 389967, at *6.

76. *Id.* at 10.

in small, stifling portable classrooms because voters refused to approve school bonds and tax increases.⁷⁷ Keeping illegal immigrant children out of its schools would save Texas over \$2 million per year and alleviate at least some overcrowding. Such evidence would have easily satisfied regular rational basis scrutiny,⁷⁸ but it was not enough to discharge Texas's burden under this more rigorous form.⁷⁹

In fact, *Plyler's* rigorous rational basis scrutiny has more in common with the heightened scrutiny that the plurality applied in *Frontiero v. Richardson*,⁸⁰ one of the early sex discrimination cases. There, the plurality rejected the government's reasons for its requirement that married women in the armed services prove that their husbands were dependent on them before they were eligible to receive increased housing allowances and medical and dental coverage for their spouses; married men in the armed services automatically received these benefits.⁸¹ This practice, just like Texas's, saved the government money over a requirement that automatically granted these benefits to all married members of the armed services.⁸²

Rigorous rational basis scrutiny also doomed a city zoning restriction that blocked Cleburne Living Center, a group home for persons with mental disabilities, from opening in a neighborhood in the city of Cleburne.⁸³ A city ordinance required special use permits for homes for

77. *Id.* at 6–7.

78. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9, 14 (1st Cir. 2012) (observing that Congress's belief that a program would save the government money would satisfy traditional rational basis scrutiny, even if it turned out that Congress miscalculated).

79. *Plyler*, 457 U.S. at 223–24; *see also Massachusetts*, 682 F.3d at 9, 14 (observing that when the desire to husband scarce resources “is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction” (citing *Plyler*, 457 U.S. at 227)); *Moreno*, 413 U.S. at 533–36 (rejecting the government's contention that avoiding food stamp fraud justified the restrictions on eligibility).

80. *See Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (explaining that the classification in question can only be upheld if the government can demonstrate with “concrete evidence” that the differential treatment saves money).

81. *Id.* at 690–91.

82. *Cf. id.* at 689 (holding that to justify its differential treatment of women, the government would have to prove something impossible: that its current scheme of granting benefits automatically to married men saved it more money than a gender neutral scheme that would require both men and women to prove a spouse's dependency to be eligible for extra benefits).

83. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (reasoning

“the insane or feeble-minded,” “alcoholics,” and “drug addicts,” and it had denied one to Cleburne Living Center.⁸⁴ City law, however, permitted fraternity houses, hospitals, and old-folks’ homes in this neighborhood without special permits.⁸⁵

People with mental disabilities were not a suspect category, the Court held.⁸⁶ The Court recited the rational basis test, but it scrutinized the City’s action more closely.⁸⁷ The City denied the permit because it worried about the “negative attitudes” of nearby property owners and of students at a nearby junior high school,⁸⁸ and about possible injuries to the home’s residents in the case of a flood.⁸⁹ Fraternity houses, hospitals, and nursing homes could certainly provoke the same concerns, but the City permitted them, and rational basis analysis often tolerates under-inclusive regulations.⁹⁰ In this case, though, the Court held that under-inclusivity proved that the city had violated the Equal Protection Clause.⁹¹ Fraternity houses, hospitals, and nursing homes could also drive down property values, and their residents would be as vulnerable as persons with mental disabilities in the event of a flood.⁹² Yet the City put no restrictions on these establishments.⁹³ City concerns about the neighborhood’s negative attitudes toward Cleburne Living Center merely proved the City’s “irrational prejudice against the mentally retarded.”⁹⁴ Echoing *Moreno*, the Court concluded that nothing more than “a bare . . . desire to harm a politically unpopular group” drove the City’s restriction.⁹⁵

The Court’s opinion in *Bowers v. Hardwick* demonstrates the force

that because the City cannot justify its view that mentally retarded individuals cannot live in crowded conditions while others can the ordinance is an “irrational prejudice”).

84. *Id.* at 436–37 & n.3.

85. *Id.* at 474–75.

86. *Id.* at 442–43, 446.

87. *Id.* at 442, 446.

88. *Id.* at 448–49.

89. *Id.* at 449 (noting that the home was situated on a “five hundred year flood plain”).

90. *See Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (“It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”).

91. *City of Cleburne*, 473 U.S. at 449.

92. *See id.* at 450.

93. *Id.*

94. *Id.*

95. *Id.* at 447 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

of rigorous rational basis scrutiny in *Moreno*, *Plyler*, and *Cleburne*.⁹⁶ Just one year after *Cleburne*, the Court held that Georgia's ban on homosexual sodomy easily met rational basis scrutiny, though Georgia offered no reasons besides moral disapproval of gay men and lesbians.⁹⁷ Let me turn now to discussing that case and the cases that ultimately overruled it.

B. Homosexuality and Rigorous Rational Basis Scrutiny—When Does a Law Restrict Acts, and When Does It Target a Group?

The previous section showed how rigorous rational basis scrutiny forces states to justify the rationality of treating one group of persons differently than others. For some groups, then, the Court has created a prima facie freedom from government regulation.⁹⁸ Not all groups or classifications possess this prima facie right. Soon after *Cleburne*, the Court heard Mr. Hardwick's claim that Georgia's anti-sodomy law violated his liberty to engage in private, intimate conduct within his home without due process law.⁹⁹ He had been arrested in his bedroom for having sex with another man.¹⁰⁰ (He did not claim that the law violated his equal protection rights, though Georgia conceded that it would not enforce the law against married, heterosexual persons.)¹⁰¹

The Court reviewed Georgia's anti-sodomy law under regular rational basis scrutiny. Mr. Hardwick bore the burden of establishing the law's illegitimacy.¹⁰² The Court characterized Mr. Hardwick's argument that his arrest violated his privacy and liberty rights as

96. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that "the presumed belief . . . that homosexual sodomy is immoral and unacceptable" satisfies rational basis review, and therefore, the Georgia law is constitutional), *overruled by* *Lawrence v. Texas*, 539 U.S. 559, 578 (2003).

97. *Id.*

98. See *Lawrence*, 539 U.S. at 578.

99. *Bowers*, 478 U.S. at 190.

100. *Id.* at 187–88.

101. See *id.* at 201 (Blackmun, J., dissenting) (explaining that while Hardwick's standing may rest on the state's unequal enforcement of the law, his claim "involves an unconstitutional intrusion into his privacy and his right of intimate association").

102. See *id.* at 196 (majority opinion). The Court reasoned that there was no history and tradition of such a right because laws prohibiting sodomy had "ancient roots." *Id.* at 192. The common law had criminalized it; all of the original thirteen states had forbidden it at the time they ratified the Bill of Rights, and "until 1961, all 50 states [had] outlawed sodomy." *Id.* at 192–93.

“facetious.”¹⁰³ No fundamental right to engage in “homosexual sodomy” existed.¹⁰⁴ The law easily met regular rational basis scrutiny even though Georgia had no reason to restrict homosexual sodomy “other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”¹⁰⁵ Morality was just fine by the Court: “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”¹⁰⁶

Both *Bowers* and *Cleburne* reviewed restrictions on the rights of a non-suspect class, but *Bowers*’s brand of rational basis could not have been more different than *Cleburne*’s.¹⁰⁷ Georgia’s moral objections to the conduct of gay men and its concerns about the spread of AIDS and Hepatitis¹⁰⁸ satisfied the rational basis standard. The City of Cleburne’s fears about persons with mental disabilities, however, did not. Fears about persons with disabilities were just impermissible group animus, and they doomed the regulation.

Bowers was not the last word on gay men, lesbians, rational basis scrutiny, and the Constitution, of course. Ten years later, the Court struck down a 1992 Colorado constitutional amendment that forbade the State of Colorado and local governments from enacting laws aimed at protecting people from sexual orientation discrimination.¹⁰⁹ Amendment 2 meant that if gay men and lesbians wanted legal protection from sexual orientation discrimination, they would have to amend the state constitution.¹¹⁰ Colorado tried to downplay the effect of Amendment 2: it just “put[] gays and lesbians in the same [legal] position as all other persons.” After all, people may freely discriminate

103. *Id.* at 194.

104. *Id.* at 196.

105. *Id.*

106. *Id.*

107. Compare *Bowers*, 478 U.S. at 196 (finding that moral justifications satisfy rational basis scrutiny), with *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (holding that a legitimate governmental purpose must be behind discriminatory statutes and that “bare . . . desire to harm” unpopular groups does not suffice) (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

108. Brief of Petitioner at 37, *Bowers*, 478 U.S. 186 (No. 85-140), 1985 WL 667939, at *17.

109. *Romer v. Evans*, 517 U.S. 620, 623, 627, 635–36 (1996).

110. *Id.* at 627 (citing *Evans v. Romer*, 854 P.2d 1270, 1284–85 (Colo. 1993)).

against one another on any basis except for special, prohibited bases, such as race, sex, national origin, religion, and color.¹¹¹

The Court would have none of that. Amendment 2 “deni[ed] . . . equal protection of the laws in the most literal sense” by making it harder “for one *group* of citizens than for all others to seek aid from the government.”¹¹² This hostility to Colorado’s characterization of the law set the tone for the rest of the Court’s analysis.

The Court never stated the standard of review that it was applying, but it appeared to place the burden of proving the law’s rationality and legitimacy squarely on Colorado. Amendment 2, Colorado argued, was meant to protect the rights of religious persons and to preserve scarce state resources for fighting more pressing kinds of discrimination.¹¹³ These reasons did not justify the law, the Court held, because Amendment 2 bore no “rational relationship” to these interests.¹¹⁴ The breadth of the legal disability imposed by the amendment on gay men, lesbians, and bisexuals was completely “discontinuous with the reasons offered for . . . the amendment.”¹¹⁵ So discontinuous, the Court found that only “animosity” toward gay men, lesbians, and bisexuals could explain it.¹¹⁶ Animus towards a group is never a “legitimate” reason for state regulation.¹¹⁷ “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular *group* cannot constitute a *legitimate* governmental interest.”¹¹⁸

The Court’s analysis in *Romer* tracks *Cleburne*, *Moreno*, and *Plyler*, not *Bowers*.¹¹⁹ Colorado could not make it harder for gay men and

111. *See id.* at 626 (“[T]he State says[] the measure does no more than deny homosexuals special rights.”).

112. *Id.* at 633 (emphasis added).

113. *Id.* at 635.

114. *Id.* at 632.

115. *Id.*

116. *See id.* at 634.

117. *Compare id.* (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (“[D]esire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”), with *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that the “belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” constitutes a rational, legitimate state interest), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

118. *Romer*, 517 U.S. at 634 (alteration in original) (first emphasis added) (quoting *Moreno*, 413 U.S. at 534).

119. *Compare id.* at 635 (ruling that Amendment 2 and the rationale given for it neither

lesbians to get anti-discrimination laws passed because some objected to homosexuality for religious reasons, while Georgia could arrest and jail gay men because some believed same-sex sodomy was immoral.

Was *Bowers's* regular rational basis the exception and the rigorous rational basis of *Romer*, *Cleburne*, *Plyler*, and *Moreno* the rule for discrimination against groups? In *Lawrence v. Texas*, the Court answered that question in the affirmative.¹²⁰ John Lawrence and Tyron Gardner were charged and convicted under a Texas state law prohibiting same-sex sodomy after police said that they discovered them having consensual sex in Mr. Lawrence's bedroom.¹²¹ *Lawrence* struck down that law, holding that bans on same-sex sodomy and bans against sodomy more generally between consenting adults violated the Fourteenth Amendment.¹²²

Lawrence said nothing about the standard of review. The Court's reasoning, however, hewed to the rigorous rational basis review cases: the State of Texas, not the challengers, shouldered the burden of justifying the law, and an interest in morality could not discharge that burden.¹²³ The Court concluded that the law was unconstitutional because it invaded liberty interests protected by the Fourteenth Amendment.¹²⁴ *Griswold v. Connecticut*,¹²⁵ *Eisenstadt v. Baird*,¹²⁶ *Roe v. Wade*,¹²⁷ and *Planned Parenthood of Southeastern Pennsylvania v.*

state nor are sufficiently related to a legitimate state interest), *with* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (holding that a legitimate governmental purpose must be behind discriminatory statutes and that “bare . . . desire to harm” unpopular groups does not suffice (citing *Moreno*, 413 U.S. at 534)), *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that the State's goal of lowering education costs did not suffice as “further[ing] some substantial state interest”), *Moreno*, 413 U.S. at 538 (holding that every law need not “be drawn with precise ‘mathematical nicety’” but that any reasons the state gave for the food stamp law revision were “imprecise” and “wholly without any rational basis” (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970))), and *Bowers*, 478 U.S. at 196 (holding that the “belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” constitutes a rational legitimate state interest).

120. *Lawrence v. Texas*, 539 U.S. 559, 577–78 (2003).

121. *Id.* at 562–63; DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS*, at xi–xii (2012).

122. *Lawrence*, 539 U.S. at 578.

123. *Id.* at 577–78.

124. *Id.* at 578.

125. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

126. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

127. *Roe v. Wade*, 410 U.S. 113, 155, 164 (1973).

*Casey*¹²⁸ were the most relevant precedents to this case—not *Bowers*.¹²⁹ These cases established that individuals were free to have private sexual relationships without government interference, even with same-sex partners. The Court explained:

[A]dults may choose to enter [into sexual relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.¹³⁰

On this basis, the Court held that laws prohibiting same-sex sodomy and laws prohibiting sodomy more generally violated the due process clause of the Fourteenth Amendment.¹³¹

Standing *Bowers*'s reasoning on its head, the Court also concluded that Texas's moral objections to same-sex sodomy compounded the constitutional violation.¹³² Prohibiting an activity because the state deems it immoral and deviant inevitably stigmatizes and demeans the people who engage in it. Gay men and lesbians, like people with mental disabilities¹³³ and illegal immigrant children,¹³⁴ have the right not to be made into legal or social outsiders.

128. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874, 877, 893–95 (1992).

129. *See Lawrence*, 539 U.S. at 564–79 (2003) (discussing at length why *Griswold*, *Eisenstadt*, *Roe*, and *Casey* control, rather than *Bowers*).

130. *Id.* at 567.

131. *Id.* at 578. Texas's ban on same-sex sodomy had an additional flaw, because it deprived gay men and lesbians of the equal protection of the laws.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

Id. at 575.

132. *See id.* at 578.

133. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (holding that excluding mentally retarded individuals from certain areas constitutes an irrational prejudice against that group of individuals).

134. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that a statute denying immigrant children access to free public education isolates a “discrete group of innocent children” and without a substantial state interest the statute is unconstitutional).

In sum, several different Supreme Court cases have forbidden states from restricting the rights or liberties of some groups based solely on the community's moral distaste for some conduct that is closely associated with some particular group or out of dislike for or disapproval of the group itself. This burden of proof inverts rational basis scrutiny. Under that test, challengers (here the affected groups) shoulder the Herculean task of proving a negative—that the state's regulation serves no purpose at all, including the moral welfare of the citizenry.¹³⁵ In contrast, when states regulate rights or liberties of some groups, states must, at a minimum, prove that the exercise of these rights or liberties—generally or when exercised by members of this group—cause some identifiable harm to the persons or property of third parties.¹³⁶

In essence, by reversing the burden of proof ordinarily employed in rational basis scrutiny, rigorous rational basis scrutiny forces the state to treat these groups as members of the political community. These groups have a *prima facie* right to exist and a *prima facie* right to exercise rights and liberties that are generally available to others. These *prima facie* rights attach to individuals, without regard to their membership in a group or class, but their membership in a group is relevant to the extent that they cannot be singled out for disadvantageous treatment by reason of that membership. The state can only rebut this *prima facie* right by proving that group members' exercise of some right or liberty actually harms the persons or property of third parties. Fears that a group's activities *might* cause some harm will not do. The state must act dispassionately and based on proof that the group and its activities *do* or *will* cause some harm to third parties. The state must also establish that lesser restrictions or generally applicable restrictions cannot avoid those harms.

Recent circuit court decisions regarding the rights of gay men and lesbians have identified discrimination against certain social groups as the key factor triggering rigorous rational basis scrutiny.¹³⁷ The circuit judges have echoed the Court's suspicion about singling out groups for disfavored treatment and applied rigorous rational basis scrutiny.¹³⁸

135. See *supra* notes 31–38 and accompanying text.

136. *Lawrence*, 539 U.S. at 567, 572, 578 (2003); *Plyler*, 457 U.S. at 223, 228.

137. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012); *Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012), *cert. granted sub nom.*, *Hollingsworth v. Perry*, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

138. See *Massachusetts*, 682 F.3d at 11; *Perry*, 671 F.3d at 1089.

First, discussing the line of cases running from *Moreno* to *Lawrence*, the First Circuit observed, “[T]he Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible.”¹³⁹

The First Circuit concluded that through these cases the Court has tightened up rational basis scrutiny: “The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.”¹⁴⁰

Second, in *Witt v. Department of the Air Force*, the Ninth Circuit remanded a district court’s decision upholding the “Don’t Ask, Don’t Tell” policy for reconsideration because the district court had upheld the policy under traditional deferential rational basis review.¹⁴¹ The court wrote, “We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review[.]” and so “something more than traditional rational basis review” must apply to discrimination based on sexual orientation.¹⁴²

Finally, *Perry v. Brown* also tightened up rational basis scrutiny because California’s Proposition 8 withdrew “a privilege or protection . . . from a class of disfavored individuals.”¹⁴³ When a law burdens such a group, rational basis scrutiny is not “toothless” and requires that the restriction “must find some footing in the realities of the subject.”¹⁴⁴ Moral disapproval of the group and its practices does not satisfy this burden.¹⁴⁵ The *Perry* court concluded, “we must infer from Proposition 8’s effect on California law that the People took away from gays and lesbians the right to use the official designation of ‘marriage’—and the societal status that accompanies it—because they disapproved of these

139. *Massachusetts*, 682 F.3d at 10.

140. *Id.* at 11.

141. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 820–22 (9th Cir. 2008).

142. *Id.* at 816–17; *see also* *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1292 (11th Cir. 2004) (Barkett, J., dissenting) (“[T]he classification at issue . . . burdens personal relationships and *exudes animus against a politically unpopular group*,” and such “statutes have consistently failed rational basis review.” (emphasis added)).

143. *See Perry*, 671 F.3d at 1085.

144. *Id.* at 1089 (quoting *Matthews v. Lucas*, 427 U.S. 495 (1976); *Heller v. Doe*, 509 U.S. 312, 321 (1993)).

145. *Id.* at 1092–93.

individuals *as a class*.”¹⁴⁶ The majority’s disapproval of gay men and lesbians rendered Proposition 8 unconstitutional.

III. EXPLAINING THE EVOLUTION OF THE DOCTRINE

Though the results of the cases are clear enough, the reasoning behind them is not. What are the foundations of rational basis review? The Court’s rigorous rational basis cases seemingly have presumed that it is self-evident when a law targets a group. This next part will demonstrate that it is incorrect to presume that the existence of a group is self-evident. Instead, the conclusion that a group exists is a conclusion that must be justified relative to the laws at issue in particular cases and the purposes served by rigorous exercise of rational basis analysis more generally.

A. *Here’s the Rub: All Laws Stigmatize and Restrict the Liberties of Groups*

Justice Scalia’s dissent in *Lawrence* nailed this problem on the head—all criminal laws stigmatize the prohibited conduct and by extension stigmatize people who do the prohibited act.¹⁴⁷ That the Court considered this kind of stigma unconstitutional in *Lawrence* led Justice Scalia to believe that the Court had adopted the harm principle.¹⁴⁸ Justice Scalia’s conclusion is too quick. This part will explain how centrally important it is to *Lawrence* that Texas singled out gay men and lesbians and sought to control the sexual relationships of this group alone. Contrasting *Barnes v. Glen Theatre, Inc.*¹⁴⁹ and *Gonzales v. Carhart*¹⁵⁰ with *Lawrence* will demonstrate this point.¹⁵¹

146. *Id.* at 1093.

147. See *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (arguing that laws that regulate sexual behavior reflect “society’s belief that certain forms of sexual behavior are ‘immoral and unacceptable’” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. at 578)); cf. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“I had thought that one could consider certain conduct reprehensible—murder, . . . or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”).

148. See *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (stating that the Court has “effectively decree[d] the end of all morals legislation”).

149. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

150. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

151. *Lawrence*, 539 U.S. 558. Part III.A draws from my earlier article on this subject. See Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1321, 1325–29 (2004).

In *Barnes*, Indiana defended the application of its public indecency law to nude dancers in adults-only strip clubs.¹⁵² Chief Justice Rehnquist's plurality opinion for the Court held that the dancer's naked gyrations were First Amendment expression.¹⁵³ Over Justice Scalia's vituperative concurrence,¹⁵⁴ the plurality required Indiana to justify the public indecency statute under intermediate scrutiny.¹⁵⁵ The "statute's purpose," Chief Justice Rehnquist observes, is to "protect[] societal order and morality;" statutes like this one plainly "reflect moral disapproval of people appearing in the nude among strangers in public places."¹⁵⁶ The plurality concludes without any fuss, that bans on public indecency fit well within the "traditional police power of the States . . . to provide for the public health, safety, and morals" of their citizens.¹⁵⁷ Consequently, Indiana's requirement that nude dancers wear pasties in strip clubs "furthers a substantial government interest in protecting order and morality."¹⁵⁸

Indiana's reason for prohibiting public nudity closely resembles Texas's reason for banning same-sex sodomy—to stigmatize nude dancers and people who frequent nude clubs as criminals and brand their conduct as indecent and immoral.¹⁵⁹ *Barnes*, however, upholds Indiana's restriction, even though the reasoning linking the statute and public decency was more opaque than the pasties Indiana law forced dancers to wear.¹⁶⁰ Lap dances with pasties are not much more decent than lap dances without pasties.

152. See *Barnes*, 501 U.S. at 566 (explaining Indiana's contention that the "restriction on nude dancing is a valid 'time, place, or manner' restriction").

153. See *id.* at 565–66 (summarizing past decisions and ultimately finding nude dancing to be on the "outer perimeters" of First Amendment expression).

154. Justice Scalia would only have required Indiana to demonstrate that the law had a rational basis. *Id.* at 580 (Scalia, J., concurring).

155. *Id.* at 567 (plurality opinion) (holding that Indiana's public indecency statute "furthers substantial governmental interests"); see also *id.* at 579 (Scalia, J., concurring) ("The plurality purports to apply . . . an intermediate level of First Amendment scrutiny . . .").

156. *Id.* at 568 (plurality opinion). To be fair, Indiana likely disapproves of people in public being nude around their friends, too.

157. *Id.* at 569.

158. *Id.*

159. Compare *id.* at 568, with *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (explaining the traditional moral disapproval influencing laws such as the one at issue in the case).

160. See *Barnes*, 501 U.S. at 571–72 (upholding Indiana law on the basis that it was narrowly tailored and was "modest, and the bare minimum necessary to achieve the State's purpose").

Though it is true that nude dance clubs are public accommodations, it is harder to say that the dancing occurs *in public*. Parents do not have to worry that, while out in public, their children might accidentally glimpse an erotic dancer gyrating in the nude. (That a child might instead glimpse an erotic dancer in pasties is cold comfort indeed.) The only “public” that ever saw nude dancers at the Kitty Kat Lounge (the Indiana strip club in *Barnes*) were people who knew what they would find when they walked in off the street—and they would only be offended by the club’s decency, not its *indecenty*.¹⁶¹ The Court ignored these problems.¹⁶² Patrons wanted to see what Indiana did not want them to see, and the Court let Indiana impose its moral preference that the patrons’ preferences be made illegal.¹⁶³

How can Indiana’s moral preferences outweigh the free expression rights of nude dancers and the liberty interests of their patrons, but Texas’s moral preferences do not outweigh the liberty interests of gay men and lesbians? As a legal matter, *Barnes* would seem to present the more compelling constitutional case.¹⁶⁴ The Court assumed that the dancing was protected expression, so the Indiana law had to satisfy intermediate scrutiny.¹⁶⁵ Indiana justified the statute solely on grounds of morality, and the evidence linking the statute to any improvement in South Bend’s moral tone was at best diaphanous.¹⁶⁶ Nevertheless, the strip club goes and nude dancers lost. The Court merely asserted without reasoning that Indiana’s interest in morality was substantial.¹⁶⁷

161. *See id.* at 563, 566.

162. *See id.* at 566, 569 (finding that the public indecency statute “furthers a substantial government interest” but failing to address the Respondent’s contention that there is no “nonconsenting” public nudity).

163. *Id.* at 569.

164. *See id.* at 565–66 (finding that exotic dancing is a form of First Amendment expression).

165. *Id.* at 565–67.

166. *Id.* at 569.

167. *Id.* *But see* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1270–71 (2004) (arguing that *Barnes* signals the Court’s increasing acceptance of the harm principle because only four justices accepted the proposition that morality standing alone could justify limits on expression). In McGowan, *supra* note 151, at 1327 n.91, I explain that Professor Goldberg’s count omits Justice Thomas, who replaced one of *Barnes*’s dissenters. Justice Thomas dissented in *Lawrence* because—though “silly”—morality-based statutes are constitutional. *See Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965)). Furthermore, *Gonzales v. Carhart*, 550 U.S. 124, 158–59 (2007), supports the conclusion that states and the federal government can

Similarly, Justice Kennedy—the author of *Lawrence* and *Romer*—authored an opinion for the Court in *Gonzales v. Carhart*¹⁶⁸ that upholds bare disgust as a valid justification for a federal law that bans one type of late-term abortion—dilation and extraction (D&X)—while permitting another—dilation and evacuation (D&E)—in which the fetus is removed from the uterus piece by piece.¹⁶⁹ On its face, *Carhart* is flatly inconsistent with *Lawrence* and the other rigorous rational basis cases.¹⁷⁰ Supreme Court precedent prior to *Gonzales* puts abortions and women on different footing than same-sex sodomy and gay men and lesbians were on prior to *Romer* and *Lawrence*: abortion restrictions receive heightened scrutiny and women are a protected class under Supreme Court precedent.¹⁷¹

Nevertheless, Congress's moral conclusions—that the brutality and grisliness of the D&X procedure assaulted the dignity of human life—was enough to sustain the law.¹⁷² The United States offered nothing else to support it. There was no evidence that the D&X ban would preserve fetal life by reducing the overall number of abortions performed.¹⁷³ Federal law still permits late-term D&E abortions, which are similarly gruesome and end fetal life just as conclusively.¹⁷⁴ Furthermore, *Carhart* upheld this ban despite plausible objections that the ban on D&X abortions imposed an undue burden on a woman's right to abortion,¹⁷⁵ because D&E abortions may be more dangerous for many women.¹⁷⁶ *Carhart's* failure to justify why morality trumps the rights of women who wish to have the safest type of late-term abortion demonstrates how

still pass laws that satisfy moral preferences standing alone. See *supra* text accompanying notes 155–163.

168. *Gonzales*, 550 U.S. at 130.

169. *Id.* at 160.

170. Compare *id.* at 158–61 (reasoning that moral distaste and a view that a certain procedure is “brutal” suffices to establish legitimate government interest), with *Lawrence*, 539 U.S. at 577–78 (incorporating Justice Stevens’ dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), overruled by *Lawrence*, 539 U.S. at 578).

171. See *Lawrence*, 539 U.S. at 576–77; *Roe v. Wade*, 410 U.S. 113, 155–56 (1973).

172. *Gonzales*, 550 U.S. at 158, 160; see also *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J. dissenting) (arguing that Nebraska’s ban on D&X abortions should be sustained because Nebraska has the “right to declare a moral difference between” D&X and D&E abortion procedures).

173. See *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting).

174. See *id.* at 182.

175. *Id.* at 147 (majority opinion).

176. See *id.* at 176 (Ginsburg, J., dissenting).

pressing the need is for guiding principles rather than mere judicial intuition to guide this area of equal protection and substantive due process doctrine.

The Court appears to believe that the stigma of same-sex sodomy laws is notable because it is directed toward gays and only gays. Unfortunately, this objection does not really distinguish same-sex sodomy laws from other laws.¹⁷⁷ The public indecency statute in *Barnes* surely stigmatized the men who visited totally nude clubs and the dancers who performed in the nude for them.¹⁷⁸ The public indecency statute and the prosecution of the Kitty Kat Lounge reflected the state's moral distaste for the kinds of people who would like to appear nude in public and who frequent totally nude clubs; Indiana offered no other justification for its statute.¹⁷⁹ The federal late-term abortion restrictions

177. This distinction may not be true as a factual matter, either. People who do not identify as gay, lesbian, or bisexual sometimes experiment with having sex with partners of the same sex. In a 1992 survey of Americans about sexuality, about 4% of women surveyed reported that they had had sex with a woman at some point in their lives, 2% said that they had had sex with a woman in the last year, but only 1.4% of women identified themselves as lesbian or bisexual. ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 174–77 (1994). The survey also found that about 3% of men had sex with men but did not identify as gay. *Id.* A 2009 study found that 8.4% of girls 15–17, 13.8% of girls 18–19, and 14.2% of women 20–24 responded that they had had a sexual experience with a same-sex partner, which is above the generous estimate that about 10% of the population is gay or lesbian. Lorrie Gavin et al., Dep't of Health & Human Servs., *Sexual and Reproductive Health of Persons Aged 10–24 Years—United States, 2002–2007*, 58 MORBIDITY AND MORTALITY WKLY. REP., July 17, 2009, at 1, 19 tbl.2, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5806a1.htm>. Boys and men were less likely to report same-sex encounters (3.9% of boys 15–17, 5.1% of boys 18–19, 5.5% of men 20–24), *id.* at 21 tbl.3, and it is likely their lower rate of response was because males and females were asked different questions. Girls and women read the following from a computer screen: “The next question asks about sexual experience you may have had with another *female*. Have you *ever* had any sexual experience of any kind with another *female*?” *Id.* at 20 tbl.2 n.¶¶. Boys and men read:

The next questions ask about sexual experience you may have had with another *male*. Have you *ever* done any of the following with another male? Put his penis in your mouth (oral sex)? Put your penis in his mouth (oral sex)? Put his penis in your rectum or butt (anal sex)? Put your penis in his rectum or butt (anal sex)?

Id. at 22 tbl.3 n.¶¶; see also Deirdre Dolan, *Lesbian Lolitas: High-School Girls Want to Be Gay-ish*, N.Y. OBSERVER, Dec. 16, 2002, at 1 (explaining a trend among some high school girls to experiment sexually with other girls), available at <http://www.nyobserver.com/pages/story.asp?ID=6716>; Alex Morris, *The Cuddle Puddle of Stuyvesant High School*, N.Y. MAG. (Jan. 28, 2006), <http://nymag.com/news/features/15589/> (describing the “social rituals of the pansexual, bi-queer, metroflexible New York teen”).

178. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571–72 (1991).

179. See *id.* at 568 (describing the statute's “clear” purpose as “protecting societal order

also stigmatized doctors who performed and women who had late-term abortions.¹⁸⁰ Testimony before Congress likened D&X abortions to infanticide.¹⁸¹

B. Toward a Workable Distinction Between “Groups” and “Classifications”

Why does morality trump the liberties of nude dancers and strip club-goers but not the liberties of gay men and lesbians? Because the Court thinks (and I would agree) that gay men and lesbians as a set are a *group*, while the sets of nude dancers and people who go to strip clubs are not a group in the Equal Protection Clause sense.¹⁸² It is therefore more accurate to say that the Court will strike state statutes that restrict the liberties of certain *groups*, if the state’s reason for the regulation is grounded in moral distaste. The relevant question, then, is what facts justify treating a collection of people as a group rather than just as individuals who engage in conduct properly subject to plenary regulation by the state.

1. Judges and Cases

It is best to begin by acknowledging that in many cases it will seem obvious that a group exists and that a law limits the rights or liberties of that group’s members out of simple spite. Gay men and lesbians are undeniably a social and political group. They have their own version of the National Association for the Advancement of Colored People (NAACP) in the Lambda Legal Defense and Education Fund.¹⁸³ There are gay and lesbian organizations within both the Democratic and Republican parties, and lobbyists advocate gay and lesbian rights on Capitol Hill and in state legislatures across the nation.¹⁸⁴ Every year gay

and morality”); *see also id.* at 569 (holding that the statute was constitutional on the sole grounds that “order and morality” further a “substantial government interest”).

180. *See Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

181. *Id.* at 959–60.

182. *See Barnes*, 501 U.S. at 567–72 (revealing the heart of the Court’s analysis); *see also Romer v. Evans*, 517 U.S. 620, 633–34 (1996) (explaining that “laws singling out a certain class of citizens for disfavored legal status . . . are rare” because such laws are “denial of equal protection . . . in the most literal sense”).

183. *See* LAMBDA LEGAL, <http://www.lambdalegal.org> (last visited Dec. 2, 2012).

184. *See, e.g.*, LOG CABIN REPUBLICANS, <http://www.logcabin.org/site/c.nsKSL7PMLpF/b.5468093/k.BE4C/Home.htm> (last visited Dec. 2, 2012); NATIONAL STONEWALL DEMOCRATS, <http://www.stonewalldemocrats.org/about/who> (last visited Dec. 2, 2012);

men and lesbians hold huge “Pride” parades in cities across the United States.¹⁸⁵ Law students can join gay and lesbian groups at most colleges and law schools, and bar associations in many cities have gay and lesbian sections, as does the Association of American Law Schools (AALS). Sexual orientation also matters to a person’s self-perception. Indeed, that is one reason why gay men and lesbians have created political and legal organizations to represent their interests.¹⁸⁶ How could it be otherwise? By definition, sexual orientation affects a person’s choice of sexual and life partners and whether and how someone will have children.¹⁸⁷ It affects how others perceive that person, too.

Persons with disabilities are also an identity group. Like gay men and lesbians, individuals with disabilities have created social, political, and legal organizations, and employ lobbyists to represent their interests in Congress and in statehouses. Disability shapes people’s perceptions of and experiences in the world. It can affect a person’s opportunities and life plans, depending on the extent to which a person requires and receives reasonable accommodations. Knowing that a person has a disability can also alter others’ view of that person. All of these factors can contribute to a person’s self-identity and to the persona projected in public.

185. See, e.g., John Leland, *Cheering a Gay Marriage Law, and Its Champions*, N.Y. TIMES, June 27, 2011, at A15; Tony Perry, *Now it’s History: San Diego Gay Pride Parade 2012*, L.A. TIMES (July 22, 2012, 4:27 PM), <http://latimesblogs.latimes.com/lanow/2012/07/now-its-history-san-diego-gay-pride-parade-2012.html>.

186. For example, Lambda Legal Defense and Education Fund, Inc., the Human Rights Campaign, and the Log Cabin Republicans exist to represent the interests of the gay, lesbian, and bisexual community. See *supra* notes 183–84.

187. Same-sex couples obviously can and do raise families. The California Supreme Court noted that based on the 2000 Census, in California alone, over 70,000 children were being raised by same-sex couples. *In re Marriage Cases*, 183 P.3d 384, 433 n.50 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5. The 2010 American Community Survey Data (produced by the U.S. Census Bureau) estimates that 17.5% of same-sex couples have children, which is about 104,000 families in total. See *American Community Survey Data on Same Sex Couples*, U.S. DEP’T OF COMMERCE, tbl.1 (2010), <http://www.census.gov/hhes/samesex/files/sssex-tables-2010.xls>. The Williams Institute at the University of California, Los Angeles, reports a slightly higher number of same-sex couples raising children—about 110,000, which may simply reflect an increase in numbers between 2010 and 2012. Press Release, The Williams Institute, *As Overall Percentage of Same-Sex Couples Raising Children Declines, Those Adopting Almost Doubles – Significant Diversity Among Lesbian and Gay Families* (Jan. 25, 2012), <http://williamsinstitute.law.ucla.edu/press/press-releases/as-overall-percentage-of-same-sex-couples-raising-children-declines-those-adopting-almost-doubles-significant-diversity-among-lesbian-and-gay-families/> (reporting that there are now “more than 110,000” same-sex couples raising children).

It is tempting to conclude from these two examples that the Court extended constitutional protection to existing “identity groups.” This conclusion proves too much. People constitute their identities in all sorts of ways the Court would not and should not protect. A purely descriptive notion of identity group could suggest that classes of people like “Chicago Cubs fans” are an identity group deserving constitutional recognition. Such a result would seem odd, just as it would seem odd for a person to insist on choosing her spouse from only the pool of existing Cubs fans—partly because she could well persuade her spouse to become a Cubs fan, and partly because she might not always be a Cubs fan. Even with regard to sexual identity, a purely descriptive notion of a group seems unlikely to predict when the Court would apply rigorous rational basis scrutiny. If it strikes you as unlikely that the Court would today declare unconstitutional legislative efforts to discourage the practice of the “furry” fetish or the “furry” lifestyle,¹⁸⁸ then it cannot be that the Court grants protection to some groups from restrictions based in animus because they are identity groups. Subjective “identity” may therefore be a *necessary* condition for a group to constitute itself. Standing alone it is not a *sufficient* condition for constitutional protection.

The First Circuit has said that “historic . . . disadvantage” and unpopularity explain the *Moreno-to-Lawrence* line of cases.¹⁸⁹ While some of the groups in that line of cases have historically been disadvantaged, it does not explain all of these cases.¹⁹⁰ Hippies—the group that sparked rigorous rational basis scrutiny in *Moreno*¹⁹¹—were too new a group to be historically disadvantaged. Historic disadvantage also does not explain rigorous rational basis scrutiny’s extension to illegal aliens in *Plyler*.¹⁹² It is true that undocumented aliens are disadvantaged and provoke feelings of prejudice and suspicion in many, but their undocumented status causes most of their difficulties. Lack of popularity is too powerful an explanation. Groups or members of

188. For more on “furrries,” see Dan Savage, *Savage Love: Furry Friends*, THE STRANGER (Aug. 8, 2002), <http://www.thestranger.com/seattle/SavageLove?oid=11570>.

189. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (2012).

190. *Id.*

191. *See id.*; *see also* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 537–38 (1973) (noting that the food stamp regulations at issue in the case were “aimed at the ‘hippies’ and ‘hippie communes’”).

192. *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (extending rigorous rational basis to laws restricting rights to undocumented aliens).

classes who are challenging a law are unpopular enough that a majority has been willing to disadvantage them.

The Court's decisions also belie its assertion that "animus" towards a group or a group's political unpopularity triggers rigorous rational basis scrutiny.¹⁹³ Indeed, the Court's decisions have protected groups that—even if unpopular in many ways—have amassed significant political power.¹⁹⁴ Gay men and lesbians were more politically vulnerable in the years leading up to 1986 than in 1996 or 2003.¹⁹⁵ Most states were in the process of repealing their anti-sodomy laws in the 1990s, and only eighteen still banned it when *Lawrence* held them to be unconstitutional.¹⁹⁶ Today gay men and lesbians may marry in nine states and the District of Columbia.¹⁹⁷ Same-sex couples have the right to enter into relationships with the same rights and privileges that attach to marriage in several other states.¹⁹⁸ In some states, courts granted same-sex partners the right to marry,¹⁹⁹ but in others, the right to marry has been extended by state legislatures²⁰⁰ or by state initiatives.²⁰¹

Furthermore, several states prohibited sexual orientation

193. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that Colorado constitutional amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

194. See *supra* note 184.

195. See *id.*

196. *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision*, AM. CIV. LIBERTIES UNION (June 26, 2003), http://www.aclu.org/lgbt-right_hiv-aids/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision; Carlos Maza, *State Sodomy Laws Continue to Target LGBT Americans*, EQUALITY MATTERS BLOG (Apr. 08, 2011, 3:26 PM), <http://equalitymatters.org/blog/201108080012>.

197. *Winning the Freedom to Marry: Progress in the States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last updated Nov. 8, 2012) (showing a state-by-state breakdown of marriage laws in the United States).

198. *Id.*

199. See, e.g., *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407 (Conn. 2008) (holding that restrictions on same-sex marriage are unconstitutional); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (same); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960–61, 968 (Mass. 2003).

200. See D.C. CODE § 46-401 (Supp. 2012); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2012); N.Y. DOM. REL. § 10-a (Supp. 2012); VT. STAT. ANN. tit. 18, § 5131 (2012).

201. In November 2012, Maine, Maryland, and Washington voters passed initiatives granting same-sex couples the right to marry. *Same Sex Marriage and Domestic Partnership on the Ballot*, NAT'L CONF. ST. LEGISLATURES (Nov. 7, 2012), <http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx?stateid=wa#data>.

discrimination in 2003, and several more have since.²⁰² Persons with disabilities were more vulnerable in the 1930s when Justice Holmes wrote his infamous opinion in *Buck v. Bell* than they were in 1985 when the Court decided *Cleburne*.²⁰³ *Cleburne* followed the Rehabilitation Act and the Education for All Handicapped Children Act by about a decade and preceded the Americans with Disabilities Act by five years.²⁰⁴ And just four years after *Plyler*, Congress granted many illegal aliens amnesty through the Immigration Reform and Control Act.²⁰⁵

At the same time, the Court has *expressly* refused to apply heightened scrutiny to laws that disadvantage two of the groups with the least political clout—felons²⁰⁶ and poor people.²⁰⁷ Several states, in fact, render even non-violent felons politically powerless by denying them the right to vote after their prison sentences have been completed.²⁰⁸

202. *Non-Discrimination Laws: State by State Information-Map*, ACLU (Sep. 21, 2011), <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>.

203. Compare *Buck v. Bell*, 274 U.S. 200, 207 (1927), with *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

204. See *Cleburne*, 473 U.S. at 450 (1985); see also Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. (2006)); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C. (2006)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. (2006)).

205. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3394 (codified as amended in scattered sections of 8 U.S.C. (2006)).

206. See *Richardson v. Ramirez*, 418 U.S. 24, 55–56 (1974) (holding that statutory exclusion of felons from standard voting rights does not violate the Fourteenth Amendment Equal Protection Clause despite argument that it doesn't further legitimate state interest).

207. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973) (declining to find that poverty was a suspect class). An illustration from tax policy shows how difficult it is to move congress to address issues affecting the poor. In 2003, as part of a general tax cut, Congress increased the tax credit for children for most middle-class families but failed to extend that tax credit to poor families who were eligible for the Earned Income Tax Credit. See David Firestone, *DeLay Rebuffs Move to Restore Lost Tax Credit*, N.Y. TIMES, June 4, 2003, at A1 [hereinafter Fireston, *Delay*]. This failure appeared to have been an error, as President George W. Bush said that he would have supported extending the credit increase to working poor families. See David Firestone, *Bush Presses House Republicans on Credits for Poor*, N.Y. TIMES, June 10, 2003, at A26 [hereinafter Firestone, *Bush Presses*] (reporting that “[t]he White House all but demanded today that House Republicans quickly approve a Senate bill to increase the child tax credit for 6.5 million low-income families” but the President’s demands “did not immediately persuade House leaders to” do so). Nevertheless, even with the President’s support, it took several months for Congress to fix this problem. See Firestone, *Bush Presses*, *supra*; Firestone, *Delay*, *supra*.

208. See *Richardson*, 418 U.S. at 56; Michael McLaughlin, *Felon Voting Laws*

Many others suspend felons' rights for several years or require felons to petition to have their rights restored.²⁰⁹ Recall as well that the *Lawrence* Court said explicitly that the logic of *Lawrence* would not extend to granting rights to such politically unpopular groups as prostitutes, polygamists, or practitioners of adult incest.²¹⁰

Maybe, when the Court says "politically unpopular," it means that the group is a minority and that animus toward the group motivated the legislation.²¹¹ Animus, the Court has emphasized, is not a sufficient or rational basis for imposing greater burdens on a group or denying liberties to its members.²¹² The problem with this spin on the Court's meaning is that it makes the heightened rational basis standard dizzyingly circular: Groups merit heightened rational basis if they have been treated malevolently by law or government actors, but it is only heightened scrutiny, rather than the hypothetical justifications that suffice for ordinary rational basis scrutiny, that will uncover malevolent purposes concealed behind the assertion of neutral ones.

Nor is "animus" shorthand for *Carolene Products*' "discrete and insular minorities."²¹³ A group is "discrete" and "insular" if it is unable to bridge its gap with other members of society to form effective political alliances that might better its members' position.²¹⁴ Some of the

Disenfranchise 5.85 Million Americans with Criminal Records: The Sentencing Project, HUFFINGTON POST (July 12, 2012), http://www.huffingtonpost.com/2012/07/12/felon-voting-laws-disenfranchise-sentencing-project_n_1665860.html.

209. See *supra* note 208.

210. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case does not involve minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[,] . . . public conduct or prostitution[, or] . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

211. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that Colorado constitutional amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1292 (11th Cir. 2004) (Barkett, J., dissenting) ("[T]he classification at issue . . . burdens personal relationships and *exudes animus against a politically unpopular group*," and such "statutes have consistently failed rational basis review." (emphasis added)).

212. See *Romer*, 517 U.S. at 632 (holding that Colorado constitutional amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

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

214. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that the law at issue works to isolate and deny "a discrete group of innocent children the free public education that it offers

Court's rigorous rational basis decisions can surely be explained as attempts to protect "discrete and insular minorities." *Plyler v. Doe*, which struck down Texas's decision to bar illegal immigrant children from public schools, makes perfect sense as a case of protecting discrete and insular minorities from harm at the hands of the majority.²¹⁵ If, as the late John Hart Ely argued, Justice Stone's reference to discrete and insular minorities referred to "the sort of 'pluralist' wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests,"²¹⁶ there is probably no more discrete and insular minority than illegal immigrant children. By definition, they cannot protect—or even voice—their interests in the political process and are at the complete mercy of those with political power.

As an explanation for other cases, however, discreteness and insularity simply replicates many of the same problems that there were with using political unpopularity as the criterion triggering group status and rigorous rational basis scrutiny. Gay men and lesbians probably were a discrete and insular group when Professor Ely argued in *Democracy and Distrust* that the Court should hold that gay men and lesbians are a suspect class.²¹⁷ In the late 1970s and early 1980s, many (if not most) gay men and lesbians lived closeted lives and only expressed their sexual identities when they were safe in gay and lesbian neighborhoods and bars.²¹⁸ Of course, that was when the Court handed down *Bowers*, not *Lawrence*.²¹⁹ Today, it is harder to make the case that gay men and lesbians are a discrete and insular minority. Gay men and lesbian women came out in large numbers during the 1980s and 1990s.²²⁰ In doing so, gay men and lesbians engaged their communities, and the

to other children" because they come from undocumented immigrant families).

215. *Id.*

216. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 151 (1980).

217. *Id.* at 163.

218. Richard Socarides, *Is The Battle For Gay Rights Over?*, *NEW YORKER* (June 22, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/06/is-the-battle-for-gay-rights-over.html>.

219. *Compare* *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003), *with* *Lawrence*, 539 U.S. 558 (noting the dates of the decisions).

220. Michael Levy, *Gay Rights Movement*, *BRITANNICA ONLINE ENCYCLOPEDIA*, <http://www.britannica.com/EBchecked/topic/766382/gay-rights-movement> (last visited Dec. 2, 2012).

political processes of those communities, as group members rather than simply as individual members of the broader community. That engagement, I argue below, is an important part of the justification for rigorous rational basis scrutiny.

Persons with disabilities also illustrate the problems with using the discrete and insular concept to define group status. In some respects, persons with disabilities are discrete and insular. The majority of persons with serious disabilities do not have jobs,²²¹ which cuts them off from the regular social contact that comes with work. From this perspective, persons with disabilities seem “discrete and insular.”²²² From the perspective of the ability of persons with disabilities to protect their rights and interests, however, they have political clout.²²³ Members of the disabilities rights community worked closely with Congress in drafting, revising, and shepherding the Americans with Disabilities Act through Congress in 1990 and in passing amendments in 2008 to strengthen its protections.²²⁴ In Congress’s deliberations over the original ADA, many members of Congress spoke of the possibility that anyone could become a person with a disability because of mishap and

221. In 2012, a little over 20% of persons with disabilities were in the labor force, compared with about 70% of persons without disabilities. See U.S. Bureau of Labor Statistics, *Economic News Release*, U.S. DEP’T OF LABOR, tbl.A-6, <http://www.bls.gov/news.release/empst.t06.htm> (last modified Oct. 5, 2012). Among those in the labor force, about 13% of persons with disabilities were unemployed, compared with about 8% those without disabilities. *Id.* In 2000, the Census reported that about half of persons with a sensory disability were employed, only a third of persons with a physical disability were, as were about 30% of persons with mental disabilities. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *DISABILITY STATUS OF THE CIVILIAN NONINSTITUTIONALIZED POPULATION BY SEX AND SELECTED CHARACTERISTICS FOR THE UNITED STATES AND PUERTO RICO* tbl.2 (2000), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t32/tables/tab02-US.pdf>.

222. One of the most striking things about the passage of the Americans with Disabilities Act was that many members of Congress and members of the executive branch felt personally invested in the cause of civil rights for persons with disabilities. Many of the ADA’s congressional supporters either had disabilities themselves or had family members who had disabilities. See Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 33 (2000). Every member of congress had colleagues who had disabilities. *Id.* Just to name a few—Bob Dole, then Senate Minority Leader, had lost use of his arm in World War II and Senator Daniel Inouye had lost his arm in the same war. *Id.* Tony Coelho, the bill’s original House sponsor, had epilepsy. *Id.* Richard Thornburgh, then Attorney General, had a child with mental disabilities, and President George H.W. Bush had a son with learning disabilities and an uncle who was a quadriplegic. *Id.*

223. *Id.*

224. See *id.*

the likelihood that they would each become disabled with age.²²⁵ A group of persons that others risk (and know they risk) joining is far less discrete and far less insular than Blacks or gay men and lesbians.

Even worse, the Court often refuses to protect other groups that *are* discrete and insular.²²⁶ Bill Eskridge and the late Phil Frickey have argued that the Court's actual practice stands *Carolene Products* on its head.²²⁷ Constitutional protection follows after a group has already amassed some political clout. "So long as a group really is politically marginalized," however, "the Court will tolerate virtually any action by Congress or the states that adversely affects the minority."²²⁸ The foregoing analysis certainly supports their conclusion. Their conclusion, however, strips the Court of its leading normative justification for its authority to negative legislation—John Hart Ely's elaboration of Chief Justice Stone's footnote in *Carolene Products*—and leaves the Court with something that looks more like might makes right.²²⁹

225. *Id.* at 34.

226. *See, e.g.,* *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that the statutory provision does not violate the Equal Protection Clause of the Fourteenth Amendment, and, therefore, people with a felony record are not a suspect class); *James v. Valtierra*, 402 U.S. 137, 141 (1971) (holding that poverty is not a suspect class).

227. Eskridge & Frickey, *supra* note 46, at 54–55 (observing that "the Court's equal protection jurisprudence has shown an 'inverted *Carolene*' quality"); *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2371–72 (2002) [hereinafter Eskridge, *Effects*] (describing how "constitutional protection" is "primarily a function of the political progress a minority group has made," and if "socially despised and not politically organized, [the minority group] will be subject to pervasive state segregation into inferior spheres of the culture").

228. Eskridge & Frickey, *supra* note 46, at 54. Eskridge and Frickey give *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), as an example. Eskridge & Frickey, *supra* note 46, at 55. That case involved members of the Satmara sect of Judaism, who lived together in isolated religious communities and educated their children in private, religious schools. *Id.* Frickey and Eskridge characterize the Satmara as "the classic 'discrete and insular minority.'" *Id.* The Satmara who lived in the Village of Kiryas Joel could not provide adequate educational services to children with learning disabilities. *Id.* New York passed a special statute making Kiryas Joel its own school district so that Satmar children with learning disabilities could receive special education services. *Id.* The Supreme Court, however, struck the New York statute as amounting to an establishment of religion in violation of the First Amendment. *Id.*; *see also* Eskridge, *Effects, supra* note 227, at 2372 (explaining that if a group is "completely powerless, the Supreme Court will not protect it against suppression," but may protect "individual victims under the libertarian provisions of the Constitution").

229. *See* ELY, *supra* note 216, at 151 (explaining that the group we should be protecting are those that legislatures won't necessarily have incentive to protect.); Eskridge, *Effects*,

2. Legal Scholars' Attempts to Describe "Groups" Fall Short

Scholars have offered various answers to this question, none of them wholly satisfactory. In a famous article directed at equal protection (not rigorous rational basis scrutiny), Owen Fiss advocated a group-based approach to equal protection.²³⁰ Although his argument was not directed at the cases I analyze here, it is the clearest and best defense of the proposition that the concept of a group is legally cogent and useful, if not strictly necessary.

Fiss distinguished between groups and classifications, or, in his terminology, between "artificial classes"—"those created by a classification or criterion embodied in a state practice or statute"—and social groups, which had an independent social identity.²³¹ A "social group" was "more than a collection of individuals, all of whom . . . happen to arrive at the same street corner at the same moment."²³² A social group is "an entity" that "has a distinct existence apart from its members" and "an identity."²³³ In other words, Fiss said, other people understand what you are talking about when you "talk about the group," and you can do so "without reference to the particular individuals" who are its members.²³⁴

Fiss's social-recognition approach introduces an element of subjectivity to deciding whether a collection of persons is a group, and some scholars find that subjectivity fatal to any group-based approach to constitutional law.²³⁵ Larry Alexander, for example, has argued that it is a fool's errand to base equal protection on the concept of social groups because the concept is impossible to define and apply with any precision.²³⁶ Defining the paradigmatic social group of "Blacks" is

supra note 227, at 2371–72 (describing how "constitutional protection" is "primarily a function of the political progress a minority group has made," and if "socially despised and not politically organized, [the minority group] will be subject to pervasive state segregation into inferior spheres of the culture").

230. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUBL. AFF. 107, 108 (1976).

231. *Id.* at 156.

232. *Id.* at 148.

233. *Id.* (emphasis omitted).

234. *Id.*

235. *See id.* at 148 (describing a social group as an entity with a "distinct existence apart from its members" and that people subjectively "know" and recognize it's a group).

236. *See, e.g.,* Lawrence A. Alexander, *Equal Protection and the Irrelevance of "Groups,"* 2 ISSUES LEGAL SCHOLARSHIP, no. 1, art. 1, Aug. 2002, at 1, 6, available at

impossible, he argues.²³⁷ Race cannot be determined biologically or genetically. Appearance does not work either—some people who look white consider themselves Black. One might also ask whether recent immigrants from Africa or the Caribbean are “Black.” What race are children born to Asian American and Black parents? Any answer to these questions provokes disagreement.

Others have argued that extending constitutional protection to groups as opposed to prohibiting certain general classifications is that group protection will promote group separatism as opposed to assimilation into the larger American culture.²³⁸ The argument goes that separatism, in turn, will kindle identity politics, with different groups competing for their share of political goodies rather than being interested in policies that promote the broader good.

Notwithstanding the presence of borderline cases, the element of subjectivity they entail, and the danger of group protection kindling separatism, Fiss’s work has been influential. His influence can be seen in the work of later scholars who have attempted to explain and justify the rigorous rational basis cases without defining or defending a concept of groups. For example, Cass Sunstein has argued that in the laws challenged in these cases the government singled out certain classes of people—gay men and lesbians, persons with mental disabilities, and (perhaps) hippies—because of their *status*.²³⁹ Particularly in *Cleburne* and *Romer*, Sunstein argues:

[W]e can find a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive. In its most virulent forms, this desire is rooted in a belief that members of the relevant group are not fully human.²⁴⁰

But Sunstein does not explore how to distinguish discrimination

<http://www.bepress.com/ils/iss2/art1>.

237. *See id.*

238. *See* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 82 (2000) [hereinafter YOUNG, INCLUSION] (discussing how some object to group representation because “group-specific political movements endanger democracy and make meaningful communication impossible” by “divid[ing] and destroy[ing] public discussion, creating bickering and self-interested enclaves with no orientation towards transformative deliberation or co-operation”).

239. Sunstein, *supra* note 43, at 62.

240. *Id.* at 62–63.

based on status from discrimination based on conduct.²⁴¹ How does the Court know whether a law aims at people because of what they do rather than because they are the type of person who would do such things? He therefore does not resolve the question whether bans on same-sex sodomy and general bans on sodomy, struck down by *Lawrence* under rigorous rational basis scrutiny, are impermissible bans on status or merely bans on conduct.²⁴²

Daniel Farber and Suzanna Sherry have also argued that *Romer*, *Cleburne*, and *Plyler*²⁴³ (and perhaps *Moreno*)²⁴⁴ might be best explained by what they call the “pariah principle.”²⁴⁵ This principle forbids the government from “brand[ing]” a group “as inferior and encourag[ing] others to ostracize them.”²⁴⁶ Colorado’s Amendment 2, at issue in *Romer v. Evans*, provides their main example.²⁴⁷ Under that Amendment, gay men and lesbians, unlike any other group of persons in Colorado, were “permanently disbarred from seeking . . . protection” against discrimination based on their sexual orientation.²⁴⁸ Farber and Sherry also read the Court’s prohibition on laws motivated by “a bare . . . desire to harm a politically unpopular group” as prohibiting government from enacting laws that solely or primarily embody the purpose “to brand [a group] as outcasts,”²⁴⁹ which Colorado’s Amendment 2 did. In short, the Constitution prohibits the state from passing laws that create legal castes.

Farber and Sherry do not just assert the distinction between status and conduct.²⁵⁰ They explain that Amendment 2 targeted status because it applied to gay men and lesbians regardless whether any particular individual was or ever had been sexually active.²⁵¹ Similarly, the children in *Plyler* were barred from school because of their status: they were not

241. See generally *id.*

242. *Id.*

243. Farber & Sherry, *supra* note 43, at 280, 284.

244. See *id.* at 276. Farber and Sherry quote from *Moreno* when describing the pariah principle, but they do not argue that the food-stamp restriction reflects a desire to brand hippies as pariahs. *Id.*

245. *Id.* at 284.

246. *Id.* at 267.

247. See *id.* at 270–71.

248. *Id.* at 278–79.

249. *Id.* at 276 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

250. See *id.* at 279.

251. *Id.*

responsible for their status as illegal aliens, their parents were.²⁵² And though the City of Cleburne couched some of its arguments for restricting the group home in terms of conduct (persons with mental disabilities might have trouble evacuating the home in case of a flood), others sounded in status (neighboring middle-schoolers might harass residents because of their disabilities and property values would decline in and around the group home).²⁵³

Though the distinctions they draw in these cases appear sound, the status–conduct distinction cannot provide a principle to justify the rigorous rational basis cases. First, *Lawrence* protects conduct, full stop.²⁵⁴ A person need not identify as gay or lesbian to have his or her right to engage in same-sex sodomy protected.²⁵⁵ Farber and Sherry do not discuss sodomy prohibitions, and this reason may be why.

Second, the status–conduct distinction is too slippery to be useful. One may become addicted to drugs through conduct but addiction itself would seem to be a status, one that compels you to take drugs. One *takes* drugs and one *is* addicted, but divorcing the two is hard and may not be useful for many purposes. Like the speech–conduct distinction that cannot explain free speech doctrine, the status–conduct distinction cannot be the basis for a workable constitutional principle. Most troublingly, one’s moral view of a group and its conduct strongly influences the classification. Even if a clear line could be drawn, the status–conduct distinction is a pallid principle for rigorous rational basis cases. For gay men and lesbians, the status–conduct distinction withholds their “right to engage” in conduct that “express[es] . . . love and thus . . . their sense of self.”²⁵⁶

Apart from the status–conduct distinction, the pariah principle does not explain the rigorous rational basis cases. Farber and Sherry candidly admit that the pariah principle does not fully protect the rights of gay men and lesbians.²⁵⁷ That principle would allow states to ban same-sex

252. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

253. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449 (1985).

254. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (incorporating into its holding Justice Stevens’s dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), *overruled by Lawrence*, 539 U.S. at 578).

255. *Id.* at 578.

256. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 210, 253 (1989) [hereinafter KARST, *BELONGING*].

257. Farber & Sherry, *supra* note 43, at 280–81.

marriage,²⁵⁸ restrict gay men and lesbians' receipt of top secret security clearances, and generally restrict their service in the military under "Don't Ask, Don't Tell."²⁵⁹ Lower courts have held, however, that rigorous rational basis scrutiny's prohibition against laws based solely on moral objections to gay men and lesbians cuts the other way.²⁶⁰

More recently, Kenneth Karst has argued that the Court's concern about the subordination of minority groups animates most if not all of the substantive due process cases.²⁶¹ *Meyer v. Nebraska* protected the rights of German immigrants to pass on the German language to their children.²⁶² *Pierce v. Society of Sisters* protected the rights of Catholics, a religious minority in Oregon, to educate their children consistent with their religious beliefs.²⁶³ *Loving v. Virginia* recognized the fundamental right to marriage to dismantle an essential legal pillar of racial apartheid.²⁶⁴ *Griswold*, *Eisenstadt*, and *Roe* recognized the right to contraception and abortion, providing women with the control over their reproduction that is necessary to their equal citizenship.²⁶⁵ *Lawrence* recognized the right of gay men and lesbians to have sex in order to secure their equal right to pursue intimate relationships with others.²⁶⁶

Professor Karst's essential insight is undeniable—that majorities often restrict the liberties of minority groups in order to preserve the

258. *Id.* at 281–82.

259. *Id.*

260. *See, e.g.,* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) (invalidating federal Defense of Marriage Act using rigorous rational basis scrutiny); Perry v. Brown, 671 F.3d 1052, 1093–94 (9th Cir. 2012) (invalidating a California constitutional amendment banning same-sex marriage using rigorous rational basis scrutiny), *cert. granted sub nom.* Hollingsworth v. Perry, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (invalidating Massachusetts ban on same-sex marriage using rigorous rational basis scrutiny).

261. Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007).

262. *Meyer v. Nebraska*, 262 U.S. 390, 396, 403 (1923).

263. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532, 534–35 (1925).

264. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

265. *See Roe v. Wade*, 410 U.S. 113, 164 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Connecticut's law permitted men but not women to use birth control—it expressly permitted the use of condoms to prevent disease. *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring).

266. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

power and dominant social position of majority group members.²⁶⁷ That insight rings true in the context of the rigorous rational basis scrutiny, as well. The Court has said in each of the rigorous rational basis cases that it is protecting a minority group from being singled out for ill treatment.²⁶⁸ Groups matter to the Supreme Court. They have mattered in the past, and they will matter in the future. But this explanation for rigorous rational basis does not explain how to identify a group for purposes of constitutional protection. It therefore leaves unanswered an essential step in this analysis.

Using the examples of Blacks, women, gay men, lesbians, and persons with disabilities, Professor William Eskridge has described how identity-based social movements have persuaded the Supreme Court that the traits they possess are tolerable or benign variations from the norm.²⁶⁹ The Court thus forbids majorities from using the traits to justify laws that stigmatize those who possess it or laws that limit the civil rights of such persons.²⁷⁰ Professor Eskridge, however, does not explain why identity *groups* deserve more protection from state regulation of morality than individuals whose identities are constituted by legally forbidden conduct.²⁷¹

The shortfalls in these theories suggest that to understand rigorous rational basis scrutiny, we must understand what groups are from the perspective of that doctrine.

It is tempting to argue that “groups” share immutable characteristics while members of disadvantaged classes do not, but some features that intuitively seem to define groups are mutable—people change religious affiliations and learn new languages, after all—and some features of classes would be hard to change. For example, a liquor store owner whose business will go under because of restrictions on Sunday sales may have no easy way to shift to a new line of work.

The distinction between status and conduct also presents a superficially appealing but ultimately inadequate justification for rigorous rational basis scrutiny. For example, the *Lawrence* and *Bowers* Courts’ divergent characterization of the same facts drove their

267. See KARST, *BELONGING*, *supra* note 256, at 1–2.

268. See generally *supra* Part II.

269. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 467–68 (2001) [hereinafter Eskridge, *Channeling*].

270. See *id.* at 438.

271. See generally *id.*

conclusions about whether those facts presented cognizable claims under the Constitution.²⁷² Under the *Bowers* Court's view that sodomy was a deviant *act*, Georgia's decision to ban sodomy was similar to its decision to ban the use of marijuana at home.²⁷³ Moral objections are a perfectly sensible reason for such bans, as criminal laws often reflect society's moral disapproval of the proscribed acts more than they reflect concerns about the harm to third parties. Under the *Lawrence* Court's view that gay men and lesbians had similar moral worth as heterosexuals, to characterize the right at stake as the act of "homosexual" sodomy insults and degrades gay men and lesbians.²⁷⁴ Sexuality—for all of us—"can be but one element in a personal bond that is more enduring."²⁷⁵ In this light, Texas's law against same-sex sodomy looks more like a desire to stigmatize gay men and lesbians as deviant outsiders, akin to *Cleburne's* requirement of a special use permit for group homes for persons with mental disabilities and *Plyler's* restrictions on illegal immigrant children's public school attendance.²⁷⁶ In these cases, the Court held that the state restricted a group's rights or liberties because it disliked that group. Dislike does not sound rational. It sounds mean.

This conclusion has some intuitive appeal, and it undergirds all of the rigorous rational basis cases: hatred of a group of people hardly qualifies as a "rational" reason, and laws that target groups seem more suspicious than laws that target conduct because that conduct is deemed objectionable.²⁷⁷ If correct, then fashioning a principle for these cases could be as simple as distinguishing between laws that target groups or status and laws that merely target conduct.

As noted above, however, distinguishing regulations based on status

272. See *Lawrence v. Texas*, 539 U.S. 558, 566–67 (2003); see also *Bowers v. Hardwick*, 478 U.S. 186, 190, 196 (1986), *overruled by Lawrence*, 539 U.S. at 578.

273. See *Bowers*, 478 U.S. at 192–94 (explaining that there is no "fundamental right" to engage in "acts of consensual sodomy" because a ban on such acts is "deeply rooted" in national history), *overruled by Lawrence*, 539 U.S. at 578.

274. *Lawrence*, 539 U.S. at 566–67.

275. *Id.* at 567.

276. Compare *id.* at 575, with *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (describing the special permit requirement as an "irrational prejudice against the mentally retarded"), and *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that the law at issue works to isolate and deny "a discrete group of innocent children the free public education that it offers to other children").

277. See *Cleburne*, 473 U.S. at 450 (describing the law being overturned as an "irrational prejudice" and therefore unconstitutional).

from those aimed at conduct is much harder than it sounds. Cass Sunstein, for example, argued that *Cleburne* and *Romer* (and to a lesser extent *Moreno*)²⁷⁸

reflect sharp “we-they” distinctions and irrational hatred and fear, directed at who they are as much as what they do. . . . It would be hard to imagine a similar measure directed against polygamists, adulterers, or fornicators. Polygamists, adulter[er]s, and fornicators are punished through law or norms because of what they *do*.²⁷⁹

But both polygamists and fornicators have been punished *both* for what they do and who they are. During the nineteenth century, Mormon polygamists were vilified both for what they did (engage in plural marriage) and for who they were—Mormons. Polygamy was associated with heathen cultures—“almost exclusively” with “Asiatic and . . . African people,” as the Court put it in *Reynolds v. United States*.²⁸⁰ Western civilization had always considered it “odious.”²⁸¹ Even after the Mormon Church reversed its position on polygamy and forbade it, Mormons have long continued to be regarded with suspicion.²⁸² Furthermore, both fornication and polygamy depend on a person’s marital status. Only unmarried people can commit fornication, and only married people can be polygamous. Both who a person is—status—and what a person does—conduct—underlie these crimes.²⁸³

278. Sunstein, *supra* note 43, at 62.

279. *Id.* (emphasis added).

280. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

281. *Id.*

282. Ross Douthat, Op-Ed., *Divided by God*, N.Y. TIMES, April 8, 2012, at SR1 (observing that “the Church of Jesus Christ of Latter-day Saints, is the ultimate outsider church, persecuted at its inception and regarded with suspicion even now” and “Christian theologians” even “wrangle over whether Mormon beliefs should be described as Christianity”); Laurie Goodstein, *Mormons’ Ad Campaign May Play Out on the ’12 Campaign Trail*, N.Y. TIMES, Nov. 18, 2011, at A1 (reporting that an advertising agency hired by the Church of Jesus Christ of Latter-day Saints discovered through “focus groups and surveys . . . that Americans who had any opinion at all used adjectives that were downright negative: ‘secretive,’ ‘cultish,’ ‘sexist,’ ‘controlling,’ ‘pushy,’ ‘anti-gay’”); see also J. Spencer Fluhman, Op-Ed., *Why We Fear Mormons*, N.Y. TIMES, June 4, 2012, at A25 (observing that “[m]ockery of Mormonism comes easily for many Americans” and “many rank-and-file evangelical Protestants call Mormonism a cult”).

283. The distinction between status and conduct is famously elusive, and I wonder whether it is worth the candle. Judge Richard Posner argues forcefully that discrimination against gay people boils down to status:

This objection to Sunstein's distinction (and to the status-conduct distinction generally) is more generalizable. It can be difficult to distinguish laws that are motivated by animus toward a *group* from laws that are motivated by disapproval of some conduct. All criminal laws stigmatize the prohibited conduct and, by extension, stigmatize the class of people who do the prohibited act.²⁸⁴ That is Justice Scalia's objection to *Romer*: "I had thought that one could consider certain conduct reprehensible . . . and could exhibit even 'animus' toward such

[I]f you (being male) say that you'd like to have sex with that nice-looking young man but of course will not because you are law-abiding, afraid of AIDS, or whatever, you will stand condemned in the minds of many as a disgusting faggot. Homosexual acts are punished in an effort, however futile, to destroy the inclination.

RICHARD A. POSNER, *SEX AND REASON* 233 (1992). While Judge Posner must be correct that many who claim to hate the sin but love the sinner are hypocrites, his argument requires that all who so claim are. As a general matter, I am leery of arguments that are based on the proposition of hypocrisy.

Janet Halley has argued persuasively that the distinction between status and conduct simply collapsed under the military's "Don't Ask, Don't Tell" policy when the military drummed many gay people out of the service based on evidence of non-sexual acts that only subtly suggested a person's sexual orientation. She says that supporters of "Don't Ask, Don't Tell" said it was "supposedly fairer" than the military's outright ban on gay men and lesbians "because it sanctions servicemembers not for 'who they are' but for 'what they do.'" JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* 1 (1999). Professor Halley says that spin was, "Wrong, wrong, and wrong again." *Id.* "Every moving part of the new policy is designed to *look like* conduct regulation in order to *hide* the fact that it turns decisively on status." *Id.* at 2. Consequently, status protections for gay men and lesbians without protections for same-sex sexual conduct provide no real protection from sexual orientation discrimination.

The gay rights movement also has more ambitious aims: to eradicate the entire spectrum of discrimination against gay men and lesbians and for gay men and lesbians to achieve equal legal and social status for themselves and their intimate relationships. Bill Eskridge argues that for gays and lesbians to become full-fledged members of our pluralistic democracy, they will have to persuade other Americans that their same-sex sexual orientation is merely a "benign variation from the [heterosexual] norm." Eskridge, *Channeling*, *supra* note 269, at 467. At this point in history, however, many Americans have accepted at most that gay people are a "tolerable" variation from the norm. "Gay people ought not be imprisoned but neither should the state promote homosexuality." *Id.* at 468.

284. See *Lawrence v. Texas*, 539 U.S. 558, 599 (Scalia, J., dissenting) (arguing that laws that regulate sexual behavior reflect society's belief "that certain forms of sexual behavior are 'immoral and unacceptable'" (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. at 578)). Cf. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) ("I had thought that one could consider certain conduct reprehensible—murder, . . . or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct.").

conduct.”²⁸⁵

Justice Scalia’s premise is correct (though his illustrations are invalid)²⁸⁶—the point of moral objections is to stigmatize the persons who engage in such conduct. The Court has had little problem finding some other laws constitutional though nothing but morality justifies them. *Barnes v. Glen Theatre, Inc.* is one such example.²⁸⁷ Indiana offered no justification for its ban on nude dancing besides its moral distaste for the dancers who would like to appear nude in front of other people and the patrons who frequent totally nude clubs.²⁸⁸ The point of the public indecency statute was to discourage nude dancing by stigmatizing as criminals nude exotic dancers and the individuals who like to watch them.²⁸⁹ Polygamy laws are also grounded solely in moral concerns—the belief that marriage between just two people is a better form of relationship than plural marriage. Such laws stigmatize both polygamy and polygamists. Similarly, laws that ban the sale of sex toys demean or stigmatize the people who want to use them and the people who want to sell them.²⁹⁰

“Animus” alone cannot be the variable that triggers rational basis scrutiny. Animus toward a *group* triggers it. Unfortunately, this conclusion does not solve the puzzle of rigorous rational basis scrutiny. Any *class* of people can also be referred to as a *group*—for example, “the group of nude dancers,” “polygamists,” “the group of married couples,” “ex-cons.” That the Court might strike down bans on public nudity or distinctions between married and unmarried couples in the tax code is pure fantasy. Moral disapproval of only *some* groups, therefore, must be the trigger for heightened rational basis scrutiny. The Court,

285. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

286. Justice Scalia unnecessarily undermines his own argument by providing an inapt illustration that conflates acts that are prohibited for both moral reasons and their tangible harms to third parties’ persons or property (murder and animal cruelty are two of his examples) with acts that are prohibited solely for moral reasons (e.g., consensual same-sex sodomy). *Id.*

287. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (holding Indiana’s public indecency statute constitutional on the grounds that protecting morality is a “substantial government interest”).

288. *Id.* at 567–68.

289. *Id.* at 571–72.

290. *Cf. Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1254–55 (11th Cir. 2004) (Barkett, J., dissenting) (criticizing the majority’s decision to uphold the ban on the sale of sex toys because, like Texas’s ban on sodomy, this ban stigmatizes and demeans the intimate conduct of persons who use sex toys).

however, has never provided criteria for determining which groups merit this more rigorous form of rational basis scrutiny and which do not.

In short, the Court's rational basis scrutiny doctrine has granted some groups some discrete rights. But it has denied them the reasons for those rights that could protect them from future attempts to limit other rights or privileges.²⁹¹ It has also denied to other minorities the legal arguments necessary to persuade courts to shield them from restrictions on their rights.

IV. THE COURT OUGHT TO PROTECT GROUPS WITH RIGOROUS RATIONAL BASIS SCRUTINY.

For all the problems defining groups, one thing should be clear: It is possible to define "groups" for some purposes. Even though classification cannot be done with perfect objectivity, it does not follow that classification is either impossible—it is done all the time—or pointless. "[G]roups are *real*,"²⁹² even if it is hard to define them precisely.

A. *What Is a Group? The Concept of Structural Groups*

To begin with, the concept of "group" is not utterly vacuous. Some things about groups are clear. A group is more than the aggregation of several individuals. Groups (and their members) are created and act in relation to many different internal and external forces. These internal and external forces can include group members themselves, people outside the group, other groups, the law, and social norms (both the group's and outsiders'). Furthermore, the groups to which we belong (and are perceived to belong) often affect our lives and opportunities, in part because other people make implicit and explicit assumptions about groups and their members. Sometimes, as well, the groups to which an individual belongs (or is perceived to belong) shape and condition her social and legal interactions and relationships with other people.

Even at this general level it is possible to draw distinctions among

291. Cf. Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (explaining that Equal Protection Clause jurisprudence suffers from a lack of specifically enunciated rules, and therefore, does not provide much guidance in the way of what does and does not constitute violation).

292. Iris Marion Young, *Status Inequality and Social Groups*, 2 ISSUES LEGAL Scholarship, no. 1, art. 9, Aug. 2002, at 1, 5, available at <http://www.bepress.com/ils/iss2/art9>.

groups that help determine when treating a collection of people as a group is likely to advance certain constitutional goals. In some groups, patterns of interactions restrain the relative freedom and depress the material well-being of individual members. Iris Marion Young calls these “structural groups” (after the concept of “structural inequality”).²⁹³ More precisely, she defines such groups as “a collection of persons who are similarly positioned in interactive and institutional relations that condition their opportunities and life prospects” in mutually reinforcing ways.²⁹⁴ Interactions in one context “reinforce the rules and resources available for other actions and interactions involving” other members of the group.²⁹⁵ Consequently, groups that start with superior social status and resources have an easier time staying on top, and groups with inferior status have a harder time moving up the social hierarchy.²⁹⁶ That is not so with Cubs fans.²⁹⁷

Structural groups should not be confused with cultural groups, such as ethnic or racial groups. Sometimes these groups overlap, but often they do not. For example, Irish-Americans are a cultural group, as Saint Patrick’s Day parades, corned beef and cabbage, and maudlin renditions of *Danny Boy* attest. In the nineteenth and early twentieth centuries, discrimination against Irish-Americans may have also made the group a structural group, but no longer.²⁹⁸ Cultural groups emerge when both group members and outsiders perceive the group as meaningfully distinct from society in general. This shared feeling of distinctiveness arises from interactions between people who speak different languages and have different practices and beliefs. These encounters intensify the importance of shared attributes and solidify feelings of “mutual affinity and self-consciousness of themselves as groups.”²⁹⁹

293. *Id.* at 3 (explaining that “[s]tatus inequality” is inherent in a “structural situation where a group of individuals” occupies a disadvantaged position).

294. YOUNG, INCLUSION, *supra* note 238, at 97.

295. *Id.*

296. *Id.*

297. *See supra* Part III.B.1.

298. *See* YOUNG, INCLUSION, *supra* note 238, at 81–120 (explaining at length that structural groups tend to be those with an inherent “status inequality”).

299. *Id.* at 91. Young provides the example of how the indigenous people of New Zealand came to think of themselves as Maori. *Id.* at 90. Before the British arrived, these people “saw themselves as belonging to dozens or hundreds” of distinct groups. *Id.* Over time, their encounters with the English people, who were quite different from them and who viewed and treated them as similar to each other, “changed their perceptions of their differences.” *Id.* The Maori were all more different from the English than they were from

In contrast women, gay men and lesbians, and racial groups (as distinguished from some ethnic or cultural groups) are structural groups but not cultural groups.³⁰⁰ These groups are bound together by their shared “attempt[] to politicize and protest structural inequalities that they perceive unfairly . . . oppress” them.³⁰¹ Through this process, such groups may certainly develop shared practices and identity, but the shared experience of protest forged these feelings of affinity and created shared practices, not the other way around.³⁰²

People may belong to a structural group whether or not they self-identify with it and its members. The existence of these groups is one of many of the necessary “conditions under which we form our identities We act in situation, in relation to the meanings, practices, and structural conditions and their interaction into which we are thrown.”³⁰³ Kwame Anthony Appiah has said, “We make up selves from a tool kit of options made available by our culture and society. We do make choices, but we do not determine the options among which we choose.”³⁰⁴

Law frequently plays a central role in creating and sustaining structural groups. It can make some groups legally superior or legally inferior by, for example, making members of some groups ineligible for citizenship or to vote or by restricting the rights of members of some groups to make and enforce contracts. Law can also stigmatize a group by criminalizing conduct that is common to or associated with a group.

each other. *Id.*

300. *See id.* at 92 (explaining that groups built on “gender, race, class, sexuality, and ability” are best categorized as “structural”); *cf. also* Miranda Oshige McGowan, *Diversity of What?*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 237, 241–45 (Robert Post & Michael Rogin eds., 1998) (discussing how racial and ethnic categories “Asian” and “Hispanic” or “Latino” in particular apply to people who come from different cultural backgrounds and who may feel little or no cultural affiliation with one another).

301. YOUNG, INCLUSION, *supra* note 238, at 92.

302. *Cf.* Eskridge, *Channeling*, *supra* note 269, at 434 (arguing that “[l]aw’s entrenchment of sexual orientation as a totalizing social trait” forged a group among women and men who “had little in common with” each other “except by operation of law and social attitudes”). Much the same can be said about law’s treatment of persons with disabilities as persons with physical disabilities, mental disabilities, and mental illnesses that have little in common other than their experiences of segregation and stigmatization.

303. YOUNG, INCLUSION, *supra* note 238, at 101.

304. K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 149, 155 (Amy Gutmann ed., 1994).

The effect of such criminal laws can sweep far beyond individual lawbreakers and the prohibited action. They often stigmatize (and effectively criminalize) the traits associated with the *propensity* to commit the unlawful act.

The concept of structural groups avoids some of the problems discussed above that beset other attempts to define groups. It is consistent with the concept of structural groups for someone to deny that she identifies with a group though others identify her as such. Consequently, the concept skirts some of the boundary issues discussed above because it explains when such groups exist rather than defining the conditions under which an individual can be said to belong to such a group.

The concept of structural groups could also explain the most paradoxical aspect of the Court's application of heightened rational basis scrutiny—its refusal to protect the most discrete and insular groups.³⁰⁵ As explained above, this practice has long stood at odds with the leading normative justification for the Court's authority to negate duly enacted legislation—John Hart Ely's elaboration of Chief Justice Stone's footnote in *Carolene Products*.³⁰⁶ There, Ely argued that the Court should not negative legislation merely because a majority of justices believe it to be substantively unjust.³⁰⁷ Rather, the court should “intervene[] only when the ‘market,’ in our case the political market, is systemically malfunctioning.”³⁰⁸

The substantive injustice of a law does not by itself signal a malfunction. Ely argued that the political process itself must be unworthy of trust as well.³⁰⁹ Courts may negative duly enacted legislation when “the ins are choking off the channels of political change

305. Eskridge & Frickey, *supra* note 46, at 55. A similar argument could possibly provide a general explanation for the court's substantive due process and equal protection jurisprudence, too. Professor Bill Eskridge's articles on identity-based social movements (IBSMs) make a very similar argument, though Iris Marion Young's work generally and her concept of structural groups in particular does not figure into his analysis. See generally Eskridge, *Channeling*, *supra* note 269; Eskridge, *Effects*, *supra* note 227. Such a general explanation of the Court's Fourteenth Amendment jurisprudence, however, lies beyond the scope of this article.

306. See *supra* note 235 and accompanying text.

307. See ELY, *supra* note 216, at 101–02 (explaining that elected representatives are better situated to support the “American system of representative democracy” than are life-tenured judges).

308. *Id.* at 102–03.

309. *Id.*

to ensure that they will stay in and the outs will stay out;” or “though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest” effectively denying the group protections that other groups enjoy.³¹⁰

One could argue that neither of these conditions exists with respect to gay men and lesbians because dozens of state legislatures and state courts have overturned laws that criminalize sodomy and have persuaded dozens of localities and several states to enact bans on sexual orientation discrimination in employment and housing. Furthermore, as Part III.B explained, the Court has also refused to protect groups that meet one or both of Ely’s conditions.³¹¹ Under current doctrine, states may significantly restrict the civil rights of felons and ban polygamous marriages. The *Romer* Court declared that its reasoning did not change these cases, though in 1996, neither of these groups had much if any political power.³¹² Members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) have chosen to live in physically remote and isolated places to try to fly under the radar of legal authorities.³¹³ Former felons are among the most despised classes of people and are politically powerless; though this may be changing as felons have pressed for the restoration of their civil rights and have also begun to organize around the issue of prison rape.

The Court’s reluctance to protect groups until they have achieved some political success is not as paradoxical as it may first appear. Bill Eskridge has argued persuasively that extending constitutional protection to a discrete and insular group before it has amassed some outside support could be counterproductive.³¹⁴ Echoing Alexander Bickel’s passive virtues, Professor Eskridge argues that “a judiciary that defies a national *Kulturkampf* risks institutional suicide”³¹⁵ for the simple reason that the judiciary has to count on the other branches and on the

310. *Id.* at 103.

311. *See supra* Part III.B.

312. *See Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

313. Scott Anderson, *The Polygamists*, NAT’L GEOGRAPHIC MAG. (Feb. 2010), <http://www.ngm.nationalgeographic.com/print/2010/02/polygamists/anderson-text>.

314. *See Eskridge, Effects, supra* note, 227 at 2372 (“Any Supreme Court decision or series of decisions viewed as challenging a national equilibrium in favor of a norm or against a despised group will be subject to likely political discipline.”).

315. Eskridge, *Channeling, supra* note 269, at 511.

states to follow its decisions.³¹⁶ Constitutional protection for groups that are truly discrete and insular (that is, before a group has achieved some legislative victories or persuaded a sizeable plurality that its trait is at least, as Professor Eskridge puts it, “tolerable”) can backfire by cementing the existing and negative norms about the group.³¹⁷ The following sections argue why courts’ use of strict scrutiny is particularly likely to trigger such backlash that can undo the rights that they have declared, while courts’ careful use of rigorous rational basis scrutiny is far less likely to do so.

B. Rigorous Rational Basis Scrutiny Is Not Too Little Protection Too Late

The objection that rigorous rational basis scrutiny for structural groups is too little protection that comes too late should be rejected. True—the Court will only protect such groups when they have already gained some political traction.³¹⁸ A structural group, however, needs

316. *But see* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 724, 732 (2009) (arguing that the Court banks rather than spends its institutional capital when it invalidates the action of other branches or states and those institutions acquiesce to the decision). David Law is surely right that when the Court wins, it increases its power. *See id.* His argument should not be construed as one that the Court should issue decisions that cut deep against prevailing norms. *Id.* at 779–80. (One of Professor Law’s examples is *Bush v. Gore*, 531 U.S. 98, 111 (2000)). It is not a case, however, in which the Court’s ruling cut strongly against prevailing public opinion. Half the country was happy about the result and everyone was relieved to have the issue settled.) It suggests, rather, that the Court has to pick its battles carefully, as open defiance would certainly erode its power. *See id.* Furthermore, public opinion polls show that public respect for the Court has been waning in the wake of *Bush v. Gore*, *Citizens United v. FEC*, 558 U.S. 310 (2010), and the health-care decision in June 2012. *See* Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1 (opining that the “decline in the [C]ourt’s standing . . . could reflect a sense that the [C]ourt is more political, after the ideologically divided 5-to-4 decisions in *Bush v. Gore*, which determined the 2000 presidential election, and *Citizens United*” in 2010); Adam Liptak & Allison Kopicki, *Public’s Opinion of Supreme Court Drops After Health Care Law Decision*, N.Y. TIMES, July 19, 2012, at A21 (reporting that a majority of the public thought the personal or political biases of justices controlled the health-care law decision, not legal analysis). These trends call Professor Law’s thesis into question.

317. *See* Eskridge, *Effects*, *supra* note 227, at 2372 (“Any Supreme Court decision or series of decisions viewed as challenging a national equilibrium in favor of a norm or against a despised group will be subject to likely political discipline.”).

318. *See* Eskridge, *Effects*, *supra* note 227, at 2371–72 (describing how “constitutional protection” is “primarily a function of the political progress a minority group has made” and if “socially despised and not politically organized, it will be subject to pervasive state segregation into inferior spheres of the culture”).

protection just at this point because it risks serious retribution—both official and unofficial—when it is *publicly* protesting its legal treatment and achieving some measure of success. To take the most extreme examples, assassinations of highly visible group leaders like Martin Luther King Jr. and Harvey Milk unmistakably communicate to group members that effective, public protest of their subordinate status or stigmatization will meet violent backlash.³¹⁹ But lesser forms of abuse—both physical and verbal—can discourage many individuals from publicizing their group membership, which can make it harder for groups to organize to protest their inequality and amass the political resources necessary to mount successful legal campaigns. Still, rigorous rational basis scrutiny could be too little protection—an embarrassingly pallid response to the mayhem of assassination and physical violence.

But such scrutiny provides more effective protection than one might conclude from a simple comparison to strict scrutiny. Rigorous rational basis scrutiny requires a state to clear two hurdles before it can restrict the rights of structural groups.³²⁰ First, the state must prove that the restricted activity causes some palpable harm to the property or persons of third parties.³²¹ Second, the state must prove that the regulation is narrowly tailored to prevent that harm.³²² Serious over- or under-inclusivity dooms a regulation by creating a presumption that impermissible animus motivated the legislation. Such scrutiny forbids majorities from legally enacting their (sometimes violent) rage and outrage through further, legal restrictions on a group's rights and liberties.

The Court's focus on close fit and its insistence on evidence that regulations target problems of public policy prevent majorities from overreacting to a group's political successes, as Coloradoans apparently did when gay men and lesbians secured antidiscrimination protections from some localities. Furthermore, heightened scrutiny of purposeful

319. Cf. KARST, *BELONGING*, *supra* note 256, at 203 (asserting that laws that criminalize sex with same-sex partners “reinforce” the “stigma” of being gay or lesbian, “giving heterosexuals official ‘permissions-to-hate’ that encourage not only police harassment but all manner of privately inflicted harm from insults to trashing to violence”).

320. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 572 (1991).

321. See *id.* at 569 (holding that the statute was constitutional on the sole grounds that promoting “order and morality” to limit the social harm of public nudity furthers a “substantial government interest”).

322. See *id.* at 572 (upholding Indiana law on basis that it was narrowly tailored and was “modest, and the bare minimum necessary to achieve the State’s purpose”).

state attempts to disadvantage groups also sends a normative message to those who are outraged by a group's visibility and political success: Regulations based on outrage are "irrational" animus. Simply put, moral disapproval of certain groups is irrational.

Moral judgments need not be, and often are not, rational in the sense of employing logic in the service of consequentialist reasoning, so it might seem odd to condemn straightforward moral assertions as irrational. But rigorous rational basis scrutiny does not apply to private opinions or moral judgments, or even to moral judgments of groups such as a religious denomination. It applies to public acts taken by the state. In effect, rigorous rational basis scrutiny requires that state action be minimally rational in the following sense. The state must consider the effect the action will have on all members of a community. The state may not justify its action solely by reference to the moral judgments of any given subset of the public. The state must justify its action in terms of public ends, defined as ends that take into account the social consequences of the state action.³²³ By putting consequences on the table, rigorous rational basis scrutiny makes it coherent to talk about the rationality of public acts.

Putting consequences on the table has important effects. Heightened rational basis scrutiny forces majorities who would restrict the rights of certain groups to consider and deliberate about the actual harms that extending those rights pose, as well as the harms the

323. The Supreme Court put the point this way in *Lawrence v. Texas*:

[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.

"Our obligation is to define the liberty of all, not to mandate our own moral code."

539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)); *cf. id.* at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14–15 (1st Cir. 2012) (striking down DOMA as unconstitutional because Congress justified DOMA by "encomia to heterosexual marriage" but offered no "increase[d] benefits to opposite-sex couples" and no explanation of "how denying benefits to same-sex couples will reinforce heterosexual marriage").

restrictions inflict on the affected group. In essence, then, heightened rational basis requires states to recognize that membership in a protected group does not affect an individual's status as a citizen. Kenneth Karst has written that the principle of equal citizenship requires that "[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."³²⁴ The seemingly thin measure of constitutional protection—the requirement that the community and state demonstrate that a group's conduct harms another's person or property—forces others to tolerate the groups' existence and engage them in rational political debate about the costs and benefits of laws that disadvantage the group.³²⁵ In short, rigorous rational basis scrutiny means that in public dealings, group members must be treated with respect.³²⁶

C. *Inverting Carolene Does Not Pervert the Constitution*

That rigorous rational basis is effective medicine is, however, only half of the argument. What justifies extending rigorous rational basis protection to structural groups but not to minorities, like polygamists and ex-cons—who are even *more* discrete and insular? Moreover, group affiliations do not uniquely constitute identity or shape relationships. Disapproval or prohibition of any activity or association that constitutes personal identity can also inhibit the expression of individual identity and connections with others. While valid objections, several reasons still cut in favor of protecting the practices or traits of structural groups rather than participation in other disfavored activities that also constitute identity.

The first is evidentiary. Structural groups are forged through group protest of their subordination. Individuals who publicly protest their legal subordination risk ridicule, their personal safety, prosecution, and retribution. Taking such risks demonstrates that members of structural groups value certain rights and liberties highly and cannot tolerate the restrictions imposed on them.

324. KARST, *BELONGING*, *supra* note 256, at 3.

325. *Cf.* Eskridge, *Effects*, *supra* note 227, at 2375–76 (arguing that the Supreme Court's scrutiny of legislation that disadvantages identity groups has facilitated healthy political pluralism and can be normatively justified on that basis).

326. KARST, *BELONGING*, *supra* note 256, at 207 (noting that tolerance of a group's difference "implies respect, especially in our public dealings, for the beliefs and behavior of individual citizens who are different from ourselves").

Second, public protest also demonstrates that group members believe that keeping their traits, activities, or relationships with others private or secret is harmful or impossible. Participating in public protest reveals a person's group identity or affiliation. Sex toy users, nudists, people who pay for sex and people who watch nude dancers, usually keep their preferences and desires private (or visible only to others engaged in the same behavior, such as fellow strip club patrons) rather than avowing them publicly. The Fifth Circuit's decision that the Constitution prohibits bans on the sale of sex toys did not spark jubilation.³²⁷ The California Supreme Court's decision that marriage must be extended to partners of the same sex did.³²⁸ The Eleventh Circuit's decision upholding Alabama's ban on the sale of sex toys did not provoke protest marches or speeches by sex-toy users.³²⁹ The California Supreme Court decision upholding Proposition 8 did.³³⁰ Sex-toy users or fetishists may be perfectly happy to disclose their desires only to their partners. The illicit nature of these sexual activities may even be part of their allure. While an activity may constitute a significant part of individual identity, it may not constitute an individual's public identity. When the state does not, as a practical matter, enforce restrictions on such activities when they are performed in private, a law's formal illegality may not harm an individual's identity, self-concept, or relationships with other people generally.

Third, when groups organize to protest their unequal legal treatment and status, often their demands boil down to a claim for full and equal status as American citizens. In other words, group claims to equal status and treatment are not claims to have separate institutions recognized; they are instead claims to be included in the broader legal and social community. Kenneth Karst has argued that Americans' shared identity

327. *Texas Ban on Sex Toy Sales Overturned*, CBS NEWS (Sept. 15, 2010, 12:22 PM), http://www.cbsnews.com/2100-201_162-3829467 (describing relatively muted reaction from opponents of the law after the Fifth Circuit rendered its decision).

328. Jesse McKinley & John Schwartz, *California's Ban on Gay Marriage is Struck Down*, N.Y. TIMES, Aug. 5, 2010, at A1, available at <http://www.nytimes.com/2010/08/05/us/05prop.html>.

329. See Kim Chandler & Eric Velasco, *Alabama Supreme Court Upholds Sex Toy Ban*, BIRMINGHAM NEWS (Sept. 12, 2009), <http://www.al.com/birminghamnews/metro.ssf?/base/news/1252743369276790.xmlcoll=2> (failing to mention any protests to the Alabama Supreme Court ruling).

330. See McKinley & Schwartz, *supra* note 328.

as citizens³³¹ provides “at least one common ground on which all our subcultures can meet,” and “a community of meaning, . . . an identity, that overarches” our different group associations and personas.³³²

Rigorous rational basis scrutiny, in sum, reflects the reality that groups and their particular interests drive political debate and decision making. This level of scrutiny recognizes that members of these groups have distinctive interests in relation to the practice of certain politics (rather than distinct in the abstract). The practical effect of rigorous rational basis scrutiny is to insist that the state treat members of a group as equal members of the polity.³³³ Heightened rational basis’s strong rationality requirement forces those state actors who would choose to limit such a group’s rights and liberties to proceed cautiously and carefully.

Indeed, rigorous rational basis scrutiny may be just the right level of protection for a structural group to proceed in its political campaign for acceptance. This next section will discuss Professor Daniel Kahan’s work on the effectiveness of two types of policy reforms: shoves, which initiate large policy shifts, but which are often undone by backlash; and nudges, which initiate smaller policy shifts, but which can snowball into much larger shifts in public opinion and public policy.³³⁴ It is my contention that rigorous rational basis scrutiny is analogous to a nudge, while strict scrutiny is more like a shove.

D. Nudges May Move Public Opinion and Public Policy Further than Shoves

Daniel Kahan has argued that legal reformers should proceed cautiously and incrementally when public norms are not fully behind a particular legal change.³³⁵ Reformers should avoid abrupt, radical reforms of the status quo (which Professor Kahan calls “shoves”) because they can backfire.³³⁶ Instead, reformers who want to make big changes should proceed incrementally (he calls these “nudges”).³³⁷ Nudges often encourage further legal reforms that add up over time to

331. KARST, *BELONGING*, *supra* note 256, at 173.

332. *Id.*

333. *See, e.g.*, *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533–36, 538 (1973).

334. Kahan, *supra* note 44, at 608.

335. *See id.*

336. *Id.*

337. *Id.*

large and lasting shifts in law and public opinion.³³⁸

Professor Kahan's main example of shoves that have backfired are attempts by some states to broaden rape to include date rape by eliminating the element of force or the "mistake of fact" defense to lack of consent.³³⁹ These "reforms have little effect on juries, which continue to treat verbal resistance [saying "no"] as equivocal evidence of nonconsent, or on prosecutors, who remain reluctant to press charges unless the victim physically resisted the man's advances."³⁴⁰ The reason—"genuine societal ambivalence about the 'no sometimes means yes' norm."³⁴¹ Consequently, jurors "balk[ed]" at convicting men who failed "to take 'no' at face value."³⁴² Prosecutors, as a result, were less likely to charge men of rape when they were accused of raping women who did not physically resist.³⁴³

The refusal of juries to convict, and prosecutors to prosecute date rapists, persuades others that date rape is not morally condemnatory because people are influenced by others' opinions about morality. Morality is dynamic—when a person sees "that a relatively large group of like-situated persons are engaging in a certain form of behavior, she is more likely to engage in that behavior, too; this increases the size of the group, inducing even more individuals to engage in the behavior, and so forth and so on."³⁴⁴ Resistance to and defiance of law by legal officials, in other words, create feedback loops in which the refusal to prosecute and convict encourages others to refuse to prosecute and convict. The lack of legal enforcement, in turn, fails to encourage compliance with the new law. In the end, "the norm that the law is designed to change"—here, that no means no—"will grow in strength," making future enforcement even less likely, and so on.³⁴⁵ Radical legal changes that are opposed by officials and the public entrench existing norms more deeply, making subsequent reform efforts even harder.³⁴⁶

338. *See id.*

339. *Id.* at 607.

340. *Id.*

341. *Id.* at 623.

342. *Id.*

343. *Id.*

344. *Id.* at 615.

345. *Id.* at 610.

346. *Roe v. Wade*, 410 U.S. 113, 164–67 (1973), may be another example of a shove gone awry. Justice Ruth Bader Ginsburg, for example, has argued that the Court essentially wrested the issue of abortion out of the hands of legislatures, many of which were liberalizing

More incremental reforms—which Professor Kahan calls gentle nudges—may seem like weak medicine, but they can trigger an opposite kind of cascade effect that fundamentally changes the norms about some activity or the group associated with it.³⁴⁷ When all else is “equal, individuals prefer to carry out their legal obligations,” such that the legality or illegality of an activity modestly affects a person’s views of its morality.³⁴⁸ Consequently, legal officials will enforce laws with which they disagree, so long as they do not disagree too strongly.³⁴⁹ These enforcement efforts make it more likely that other officials who otherwise dislike the new law will also enforce and support it.³⁵⁰ Furthermore, people are more likely to condemn some act that their peers also condemn,³⁵¹ and peer opinion exerts an even greater influence on a person’s moral view of some act than its legal status.³⁵² Consequently, a modest nudge can snowball into even harsher moral condemnation of an act, which in turn will encourage further legal reforms to punish that act more harshly.³⁵³ Antismoking efforts of the

or considering liberalizing existing abortion laws. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992). She writes, “Around that extraordinary decision, a well-organized and vocal right-to-life movement rallied and succeeded, for a considerable time, in turning the legislative tide” toward greater abortion restrictions. *Id.* Interestingly, the pro-life movement has been most successful when it has worked for nudges rather than shoves. As William Saletan describes it, the pro-life movement has shaped public attitudes about whether fetuses are lives that merit legal protection. They started small, pushing for legislation that permitted women to recover for injuries that caused the miscarriage of a child, increased penalties for violent crimes that caused a miscarriage, restrictions on public funding of abortion, restrictions on doctors and clinics receiving federal funding from discussing abortion even when asked by their patients, parental notification laws, and short waiting periods that purported to help women understand the risks and implications of abortion more fully. See generally WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR (2004). Individually, none of these directly assaulted the right to get an abortion. Each, however, contributed either to the perception that fetuses were *alive*—human lives—or to the acceptability of restrictions on abortion more generally. By 2004, Congress passed a ban on some late-term abortions even though other types of abortion posed greater health hazards to women. See *id.*

347. Kahan, *supra* note 44, at 608.

348. *Id.* at 612–13.

349. *Id.* at 613.

350. *Id.* at 612–13 (arguing that an official is more likely to enforce a law that she personally finds disagreeable when *other* legal officials are enforcing that law).

351. *Id.* at 614.

352. *Id.*

353. See *id.* (explaining that a modest lean in favor of one position is “likely to end up decidedly skewed toward that position as individuals learn how others feel and why”).

last several decades show how successfully nudges can change norms. In the 1960s, over 40% of Americans smoked.³⁵⁴ Smoking was considered sexy and sophisticated, and people smoked everywhere—at work, in restaurants, bars, movie theaters, in other people’s homes, and on airplanes. People even smoked around children and while pregnant. Nonsmokers owned ashtrays because their friends smoked. Today, smoking is considered a dirty habit of poor and working-class people,³⁵⁵ and only 20% of Americans smoke.³⁵⁶ Ashtrays are rarer than California condors, and no smoker would dream of lighting up *in* a friend’s house, anyway. Smokers are pariahs in workplaces, in government buildings, in restaurants, and increasingly in nearly all other public accommodations including bars, hotel rooms, and outdoor public spaces.³⁵⁷ Pediatricians forbid smoking around children. Woe to any pregnant woman who smokes in public.

Nudges—small, incremental changes—produced this reversal in attitudes about and restrictions on smoking. Federal law first required printed health warnings on cigarette packages in 1965 and banned television and radio advertisements for cigarettes in 1971.³⁵⁸ In 1984, Congress strengthened these warnings and made them more specific—warning of the danger that smoking during pregnancy posed to developing fetuses, the increased risk of cancer, and the perils of secondhand smoke.³⁵⁹ During the 1980s, knowledge about the danger of secondhand smoke spurred restaurants to offer smoking and

354. Jason Koebler, *Study: Smoking Laws Prevented 800,000 Lung Cancer Deaths*, U.S. NEWS & WORLD REP. (Mar. 14, 2012), <http://www.usnews.com/news/articles/2012/03/03/14/study-smoking-laws-prevented-800000-lung-cancer-deaths?vwo=501cd>.

355. *Vital Signs: Current Cigarette Smoking Among Adults Aged 18 Years—United States, 2005–2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sep. 9, 2011), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6035a5.htm?s_cid=%20mm6035a5.htm_w (explaining that smoking prevalence “generally decreased with increasing education and was higher among adults living below the poverty level (28.9%) than among those at or above the poverty level (18.3%)”).

356. *See id.* (pointing to survey data to support conclusion that 19.3% of Americans smoke every day or some days).

357. *See, e.g.*, WIS. STAT. § 101.123 (2009–2010) (restricting smoking in public places in Wisconsin).

358. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89–92, § 4, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1333 (2006)); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, § 6, 84 Stat. 87, 89 (codified as amended at 15 U.S.C. § 1335 (2006)).

359. Comprehensive Smoking Education Act, Pub. L. No. 98–474, § 4, 98 Stat. 2200, 2201–03 (1984) (codified as amended at 15 U.S.C. § 1333 (2006)).

nonsmoking sections. A cascade of restrictions soon followed. The federal government banned smoking on domestic flights in 1989,³⁶⁰ and extended that ban to overseas flights in 2000.³⁶¹ States passed laws banning smoking in restaurants and banning smoking in buildings—pushing smokers out of doors to huddle around ashtrays. Hotels offered non-smoking rooms, and many soon realized that non-smoking rooms were cheaper to maintain. Now several states ban smoking in bars and clubs, and some localities ban smoking within twenty-five to fifty feet of entrances to public accommodations and buildings.³⁶²

E. Rigorous Rational Basis Scrutiny Is a Nudge Not a Shove

Rigorous rational basis scrutiny is also a nudge not a shove, though it operates somewhat differently than the smoking example. Over time, gradually increasing restrictions on smoking reversed public attitudes toward smoking by making smoking more costly to engage in. Rigorous rational basis scrutiny, however, does not make some behavior more costly. Instead it makes legal *restrictions* more costly by forcing majorities to articulate public-regarding reasons for restricting the rights or privileges of groups. Under rational basis scrutiny, “because” suffices as a reason.³⁶³ Rigorous rational basis requires majorities to follow the “because” with some reason other than the majority’s subjective preferences.³⁶⁴ Over time, forcing majorities to articulate reasons can dramatically change public attitudes.

Calling rigorous rational basis scrutiny a nudge is in tension with my earlier analysis about rigorous rational basis scrutiny’s strength—it has

360. Act of Nov. 21, 1989, Pub. L. No. 101-164, § 335, 103 Stat. 1069, 1098–99 (codified as amended at 49 U.S.C. § 41706 (2006)); *see also* Smoking Onboard Aircraft, 65 Fed. Reg. 36,772, 36,772 (June 9, 2000) (noting that the then-current rules against smoking onboard aircraft were “based [on] Public Law 101-164, which was enacted in 1989”).

361. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 708(a), 114 Stat. 61, 159 (2000) (codified as amended at 49 U.S.C. § 41706 (2006)).

362. *See, e.g.*, WIS. STAT. § 101.123 (2009–2010) (restricting smoking in public places in Wisconsin).

363. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (explaining that as long as the legislation could possibly be categorized as a “rational” remedy to a particular problem, then it survives constitutional muster under regular rational basis scrutiny).

364. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that the Colorado constitutional amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects”).

proven fatal whenever the Court has used it.³⁶⁵ Certainly, when it comes to results, rigorous rational basis scrutiny is strong medicine. It is still accurate to call it a nudge for two reasons. First, compared to intermediate and strict scrutiny, rigorous rational basis scrutiny is a nudge, and I will unpack how this is true in a moment. Furthermore, it is accurate to describe it as a nudge because it forces subtle shifts in the kinds of reasons that majorities can give for restrictions on groups.

Rigorous rational basis nudges proponents to justify restrictions in terms of the tangible third-party consequences of the restricted acts and thus in terms of the gains to the public more generally.³⁶⁶ It does not effectively declare restrictions completely off the table. Instead it requires a restriction's proponents to show that the restricted action produces tangible negative consequences to third parties; if that is true, then a restriction benefits the general public, and it would survive scrutiny.³⁶⁷ Rigorous rational basis scrutiny could also be described as a kind of gentle resistance that a legal restriction must overcome. The resistance can be pushed aside, but it takes some weight to move it. To satisfy the standard, majorities must articulate some reason for limiting the liberties of some group besides the majority's dislike of the group or fears about the group.³⁶⁸ In the absence of such reasons, rigorous rational basis scrutiny strikes down a particular restriction, requiring majorities to rethink their reasons for that restriction.

Rigorous rational basis scrutiny avoids broad principles that would call into question other types of restrictions. Strict scrutiny implies, and intermediate scrutiny usually implies, that distinctions on the basis of some classification are invalid or irrelevant. Rigorous rational basis does not. It requires only that the reasons involve consequences to third parties rather than be based on a belief that a group exists, and a distaste for that fact. One reason the Court said it would not be

365. See Kahan, *supra* note 44, at 608.

366. See *id.* In this respect, rigorous rational basis scrutiny and smoking restrictions are similar. Smoking used to be considered to be a personal choice or preference—you like to smoke, but I don't, and that's ok, much as you might like a Chevy Camaro, but I prefer the Volkswagen Karmann Ghia. Mounting evidence that smoking was not merely a personal choice, but a behavior that endangered other, nonsmoking and non-consenting people probably drove many of the smoking restrictions.

367. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (holding that the statute was constitutional on the sole grounds that promoting "order and morality" to limit the social harm of public nudity furthers a "substantial government interest").

368. See *id.*

applying intermediate or strict scrutiny to disability classifications in *Cleburne* was that persons with disabilities were, in their view, sometimes relevantly different from the able-bodied population.³⁶⁹ Statutes that require states to give children with disabilities special educational services, for example, ought to remain constitutional and within the power of legislatures to grant.³⁷⁰

In contrast, strict scrutiny's presumption that race is *irrelevant* to government decision making³⁷¹ imperils all classifications on the basis of

369. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (asserting that persons with mental disabilities are “different . . . in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one”).

370. Similarly, in *Plyler v. Doe*, the Court forbade Texas from ejecting undocumented alien children from public schools because Texas could demonstrate no reason for doing so. 457 U.S. 202, 230 (1982). But *Plyler* does not force states to treat undocumented aliens the same in all respects as citizens and legal aliens. *Id.* at 225. Employers are generally prohibited from hiring undocumented aliens in the United States, 8 U.S.C. § 1324a(a) (2006), and many states deny them driver licenses, *see, e.g., Heineman: State Will Defend Driver's License Policy*, LINCOLN J. STAR (Dec. 3, 2012, 5:00 PM), http://journalstar.com/news/state-and-regional/govt-and-politics/heineman-state-will-defend-driver-s-license-policy/article_7e5d843-98e6-54d1-a875-75f441cff2d7.html (reporting on Nebraska's policy of denying driver licenses to “illegal immigrants”—a policy Governor Dave Heineman said he would defend even after being threatened with a lawsuit by the ACLU).

371. For example, in *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), Justice Stevens chastised Chief Justice Roberts for insisting that all racial classifications are subject to strict scrutiny when only “a few recent opinions—none of which even approached unanimity” support that rigid application of “strict scrutiny.” *Id.* at 799–800 (Stevens, J., dissenting). Justice Stevens emphasized that he has “long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason.” *Id.* at 799 n.3. Justice Breyer agreed that race-conscious efforts to integrate schools are not subject to strict scrutiny under Court precedent. *Id.* at 823 (Breyer, J., dissenting). As he explained in *Parents*, “A longstanding and unbroken line of legal authority,” which is “accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself,” instructs that “the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it.” *Id.* at 823, 828 (Breyer, J., dissenting). In *Gratz v. Bollinger*, 539 U.S. 244 (2003), Justice Ginsburg (joined by Justices Souter and Breyer) rejected the application of strict scrutiny to the University of Michigan's affirmative action plan. *Id.* at 301 (Ginsburg, J., dissenting). Justice Ginsburg approvingly quoted Fifth Circuit Judge John Minor Wisdom. *Id.* at 302. Judge Wisdom wrote:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.

race, including government programs designed and intended to benefit historically disadvantaged groups.³⁷² (Indeed, justices who would uphold affirmative action have reasoned that benign discrimination such as affirmative action and school integration plans should be subjected to a lower level of scrutiny).³⁷³

Romer and *Lawrence* also demonstrate the subtlety of rigorous rational basis's nudge.³⁷⁴ *Romer* prohibited Colorado only from excluding gay men and lesbians from the regular democratic process; that was because Colorado offered no plausible reason for this restriction.³⁷⁵ For better or for worse, *Romer* did not require Colorado to protect gay men and lesbians from any kind of private discrimination or many kinds of public discrimination.³⁷⁶ After *Romer*, Colorado did not have to ban employment discrimination or housing discrimination or provide insurance to the partners of gay or lesbian employees.³⁷⁷ The only thing *Romer* said Colorado could not do was keep gay men and lesbians from using the regular political process to fight for these political changes.³⁷⁸

Lawrence nudged a little harder by declaring that gay men and lesbians had a protected liberty interest of intimate, consensual sexual

Id. (Ginsburg, J., dissenting) (quoting *United States v. Jefferson Cnty. Bd. of Ed.*, 372 F.2d 836, 876 (5th Cir. 1966)). And of course, Justices Marshall and Brennan always contended that intermediate scrutiny was the proper standard for racial classifications designed to remedy racial inequality. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564 (1990) (holding that the proper constitutional inquiry for policies designed to increase racial diversity was whether such policies substantially furthered important government interests).

372. *Id.*

373. *Id.*

374. See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (incorporating Justice Stevens' dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578); *Romer v. Evans*, 517 U.S. 620, 634–36 (1996) (reasoning that a “desire to harm a politically unpopular group” or a desire to “make them unequal to everyone else” because of “personal or religious objections to homosexuality” does not constitute a legitimate governmental interest (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))); see also Kahan, *supra* note 44, at 608.

375. *Romer*, 517 U.S. at 635.

376. See *id.* at 635–36 (not incorporating in its ruling that Colorado must adopt any additional legislation or constitutional amendments to afford homosexuals greater protections).

377. See *id.* at 629, 635–36.

378. See *id.* at 635 (reasoning that Amendment 2's announcement that homosexuals shall not be protected by law fails to meet the constitutional requirement that “a law must bear a rational relationship to a legitimate governmental purpose”).

conduct immune from state prosecution.³⁷⁹ But this declaration was not revolutionary or particularly counter-majoritarian. The attorney general for the State of Texas did not even defend its anti-sodomy law in argument before the Court—that task fell to the district attorney of Harris County.³⁸⁰ Furthermore, the *Lawrence* opinion declared no new *fundamental* liberty and carefully limited the protected liberty scope.³⁸¹ This liberty protected individuals from criminal prosecution for private, consensual conduct between adults that causes no harm to the persons or property of third parties.³⁸² (This last proviso is a definitional aspect of rigorous rational basis scrutiny: conduct that causes third-party harms to property or persons is a reason for a prohibition apart from simple dislike or fear of gay men and lesbians).

F. Recent Cases Illustrating the Subtlety of Rigorous Rational Basis's Nudge

The two recent circuit court decisions regarding same-sex marriage—*Perry v. Brown*³⁸³ and *Massachusetts v. United States Department of Health & Human Services*³⁸⁴—also exemplify rigorous rational basis scrutiny's nudge-like qualities.³⁸⁵ Let me begin with *Perry*

379. See *Lawrence*, 539 U.S. at 578 (finding a right to engage in sexual conduct without government intervention); see also Kahan, *supra* note 44, at 608 (explaining how “gentle nudge[s]” can snowball into consensus thought).

380. See David Oshinsky, *Strange Justice: The Story of Lawrence v. Texas*, by Dale Carpenter, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html> (revealing through a book review that the man “[a]rguing for Texas was Chuck Rosenthal, the flamboyant, if woefully unprepared, Harris County district attorney”).

381. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (“Though there is discussion of ‘fundamental proposition[s],’ . . . nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’” (alteration in original) (quoting *id.* at 565 (majority opinion))).

382. See *id.* at 578.

383. *Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012) (describing the rational-basis standard to be used as “not a toothless one” with footing in the realities of the legislation), *cert. granted sub nom.* Hollingsworth v. Perry, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

384. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012) (opining that the scrutiny applied in analyzing DOMA’s constitutionality should be something more than the ordinary deference afforded in rational basis scrutiny).

385. William Eskridge agrees:

As the proverbial “least dangerous branch,” the federal judiciary (headed by the Supreme Court) is unable, and usually unwilling, to strongly challenge entrenched

v. Brown, the Ninth Circuit decision that declared unconstitutional California Proposition 8, which banned same-sex marriage in California after the California Supreme Court had extended the right of marriage to same-sex couples.³⁸⁶

The Ninth Circuit opinion is notable for what it does not do. It does not say that the Constitution protects the right to same-sex marriage.³⁸⁷ It does not say that laws that restrict marriage to opposite-sex couples violate the federal constitution.³⁸⁸ It does not say that gay men and lesbians are a protected class.³⁸⁹ It does not say that same-sex couples are the same as straight couples for purposes relevant to marriage.³⁹⁰

The Ninth Circuit instead emphasized how unique Proposition 8 was among bans on same-sex marriage and, as a result, the narrowness of its ruling.³⁹¹ Proposition 8 was unique among same-sex marriage restrictions, the court explained, for two reasons.³⁹² First, it “stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of ‘marriage,’ which the state constitution had previously guaranteed them.”³⁹³ Second, it did so while leaving in place the other rights and responsibilities of domestic partners in California, which “are identical to those of married spouses.”³⁹⁴ By doing so, Proposition 8, like Colorado’s Amendment 2, “‘carves out’ an ‘exception’ to California’s equal protection clause, by

inequalities in this country. Judges may be willing to nudge the country in the right direction, but rarely do they give a hard shove until the balance of antiminority prejudice and prominority sympathy has shifted toward the latter.

William N. Eskridge, Jr., *The Ninth Circuit’s Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93, 96 (2012), available at <http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-93.pdf>.

386. *Perry*, 671 F.3d at 1096.

387. *See id.* at 1082 (declining to rule on whether same-sex couples possessed a fundamental right to marriage under the federal constitution).

388. *Id.* (refusing to decide whether permitting opposite-sex couples to marry while denying same-sex couples from marrying violates the Equal Protection Clause).

389. *Id.* at 1101 (“A classification ‘neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.’”).

390. *Cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010) (“Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions.”).

391. *See Perry*, 671 F.3d at 1064.

392. *See id.* at 1076.

393. *Id.*

394. *Id.*

removing equal access to marriage, which gay men and lesbians had previously enjoyed, from the scope of that constitutional guarantee.”³⁹⁵

The Ninth Circuit thus framed the question narrowly: could a majority withdraw “a privilege or protection . . . from a class of disfavored individuals, even if that right may not have been required by the Constitution in the first place”?³⁹⁶ The answer to that question was no, as Proposition 8’s defenders had produced no evidence that same-sex marriage undermined the institution of marriage.³⁹⁷ The Ninth Circuit observed that rational basis is “deferential” but not “toothless.”³⁹⁸ “[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.”³⁹⁹

The Ninth Circuit’s grounds for why Proposition 8 failed rigorous rational basis scrutiny were also narrow. Proposition 8’s proponents argued that Proposition 8 “advances California’s interest in responsible procreation and childrearing.”⁴⁰⁰ The Ninth Circuit steered clear of branding the position that opposite-sex couples make better parents than same-sex parents as irrational, meritless, or unsupported.⁴⁰¹ “We need not decide whether there is any merit to the sociological premise of Proponents’ first argument—that families headed by two biological parents are the best environments in which to raise children . . .”⁴⁰² Instead, the court observed,

Proposition 8 in no way modified the state’s laws governing

395. *Id.* at 1081.

396. *Id.* at 1085.

397. Proposition 8’s proponents produced no evidence at trial that same-sex marriage undermined the institution of marriage. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 949 (N.D. Cal. 2010) (stating that an expert for Proposition 8’s proponents testified that “recognizing same-sex marriage will lead to the deinstitutionalization of marriage” but cited no evidence and gave no reasons for this conclusion). The only evidence at trial suggested that same-sex marriage did not affect marriage or divorce rates. *Id.* at 972 (citing testimony from plaintiffs’ expert witness that “[d]ata from Massachusetts on the ‘annual rates for marriage and for divorce’ for ‘the four years prior to same-sex marriage being legal and the four years after’ show ‘that the rates of marriage and divorce are no different after [same-sex] marriage was permitted than they were before’” (second alteration in original)).

398. *Perry*, 704 F.3d at 1089 (quoting *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)).

399. *Id.* (alteration in original) (quoting *Heller v. Doe*, 509 U.S. 312, 321 (1993)).

400. *Id.* at 1086.

401. It appears that the Proposition’s defenders presented little evidence on this point. *See Schwarzenegger*, 704 F. Supp. at 944, 948–49 (explaining that the expert witness’s conclusions were “unsupported by evidence” and therefore were rejected).

402. *Perry*, 704 F.3d at 1086.

parentage, which are distinct from its laws governing marriage. . . . In order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify these laws in some way. It did not do so.⁴⁰³

On this point, the court could rely on what Proposition 8's proponents had written for the official voter guide's explanation of Proposition 8: "Proposition 8 doesn't take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, 'domestic partners shall have the same rights, protections, and benefits' as married spouses. (Family Code § 297.5.) There are NO exceptions. Proposition 8 WILL NOT change this."⁴⁰⁴

The court's decision rested on the uniqueness of California law and Proposition 8. It is not that gay men and lesbians have a right to same-sex marriage. Rather, California law had given them the right to marry, and Proposition 8 took it away. Under *Romer*, the Court emphasized:

[I]t is no justification for taking something away to say that there was no need to provide it in the first place; instead, there must be some legitimate reason for the act of taking it away, a reason that overcomes the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."⁴⁰⁵

Here the court relies on common sense: people feel losses more keenly than foregone gains.⁴⁰⁶ Not landing a job may feel bad, but

403. *Id.* at 1086–87.

404. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE 56 (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/argu-rebut/pdf/prop8-a-and-r.pdf>. According to the California Department of State website, arguments for and against ballot measures are written by the measure's proponents and opponents. See *Official Voter Information Guide: About Ballot Arguments*, CAL. SEC'Y OF STATE (last visited Dec. 9, 2012), <http://voterguide.sos.ca.gov/voter-info/about-ballot-arguments.htm>.

405. *Perry*, 671 F.3d at 1088 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

406. See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 306 (2011) (describing studies that demonstrate that people judge losses based on reference points, such that the "existing wage, price, or rent sets a reference point, which has the nature of an entitlement that must not be infringed"); *id.* at 304 ("If you are set to look for it, the asymmetric intensity of the motives to avoid losses and to achieve gains shows up almost everywhere."); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975) ("And whatever the mathematics, there is a human difference between losing what one has and not getting what one wants.").

getting laid off or fired feels worse.

Furthermore, even after Proposition 8, California law guaranteed gay men and lesbians who were registered domestic partners all of the same rights and obligations as married couples.⁴⁰⁷ The only work Proposition 8 did was to deny the name of marriage to these same-sex relationships that were in all substantive respects “marriage.”⁴⁰⁸ As the Ninth Circuit put it, “[o]nly the designation of ‘marriage’ is withdrawn and only from one group of individuals.”⁴⁰⁹

The logic of rigorous rational basis and these unique facts make *Perry* a clear but quite limited holding, and thus a nudge.⁴¹⁰ *Perry* announces no broad principles that could extend its reach to other cases.⁴¹¹ The Court’s reasoning, based on rigorous rational basis scrutiny, does not imply, as arguments based on strict scrutiny would, that same-sex couples are the same as straight couples.⁴¹² Nor does *Perry* imply that no reasons exist for distinguishing same-sex couples from their opposite-sex counterparts.⁴¹³ Rather, *Perry*’s point is that these defendants failed to prove such a case.⁴¹⁴ At trial, Proposition 8’s proponents called only a couple of witnesses.⁴¹⁵ The expert produced by the proponents testified that it was his opinion that same-sex marriage would undermine the institution of marriage more generally, but he produced no evidence to support this opinion and did not engage plaintiff’s evidence to the contrary.⁴¹⁶

Perry’s reach is limited in one other respect. It will only affect California, and in the four years since voters passed Proposition 8, Californians’ views have swung in favor of same-sex marriage. A 2012

407. The Ninth Circuit wrote, “Proposition 8 in no way alters the state laws that govern childrearing and procreation.” *Perry*, 671 F.3d at 1088. It reasoned, “As before Proposition 8, those laws apply in the same way to same-sex couples in domestic partnerships and to married couples. Only the designation of ‘marriage’ is withdrawn and only from one group of individuals.” *Id.*

408. *See id.*

409. *Id.*

410. *See id.* at 1096.

411. *Id.*

412. *See id.* at 1082 (declining to consider whether same-sex couples have a fundamental right to marry).

413. *Id.*

414. *See id.* at 1096 (holding that California failed to offer a legitimate reason for Proposition 8).

415. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010).

416. *Id.* at 949.

Field Poll estimates that 59% of California voters now favor permitting same-sex partners to marry on the same terms as straight couples, with only 34% against.⁴¹⁷ However, once *Perry* is finally resolved, gay men and lesbians in California will soon have the same right to marry as opposite-sex couples.⁴¹⁸

The First Circuit's declaration that the federal Defense of Marriage Act violated the Equal Protection Clause can also be described as a nudge.⁴¹⁹ *Massachusetts v. United States Department of Health & Human Services*, like *Perry*, takes a conservative, minimalist approach in ruling unconstitutional federal DOMA's exclusion of valid same-sex marriages from the federal definition of marriage.⁴²⁰ That provision prohibits same-sex married couples from filing joint tax returns, denies same-sex surviving spouses social security benefits, and denies federal workers dependent medical care benefits for their same-sex spouses.⁴²¹ (DOMA's other provision,⁴²² which "absolves states from recognizing same-sex marriages solemnized in other states" was not at issue in the case.⁴²³)

The First Circuit, like the Ninth Circuit, applied rigorous rational basis scrutiny and required "that the federal government interest in" enacting DOMA "be shown with special clarity."⁴²⁴ The First Circuit, like the Ninth Circuit, also steered clear of broad principles that would commit it to results in future cases. It explicitly sidestepped declaring that gay men and lesbians are a suspect class, reasoning that there is no precedent for it to do so.⁴²⁵ *Romer*, it says, would have been the natural place for the Court to declare gay men and lesbians a suspect class, and

417. Press Release, Mark DiCamillo & Mervin Field, The Field Poll, Big Increase in California Voters Who Favor Allowing Same-Sex Marriage: Six in Ten (59%) Now Approve (Feb. 29, 2012) [hereinafter Field Poll], available at <http://field.com/fieldpollonline/subscribers/RIs2406.pdf>.

418. See *Perry*, 671 F.3d at 1096 (holding Proposition 8 to be unconstitutional).

419. See Kahan, *supra* note 44, at 608 (explaining how "gentle nudge[s]" can snowball into consensus thought).

420. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9–10 (1st Cir. 2012) (explaining that it is not necessary to develop a new "suspect classification" for homosexuals).

421. Defense of Marriage Act § 3, 1 U.S.C. § 7 (2006); *Massachusetts*, 682 F.3d at 6;

422. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (2006).

423. *Massachusetts*, 682 F.3d at 6.

424. *Id.* at 10.

425. *Id.* at 9.

Romer “conspicuously” did not.⁴²⁶ Earlier First Circuit precedent has also held that gay men and lesbians are not a suspect class.⁴²⁷ (In a slip that reveals the First Circuit’s conservatism, the First Circuit refers to sexual orientation as “sexual preference.”⁴²⁸)

The court’s concern about a 1972 Supreme Court precedent, *Baker v. Nelson*, also demonstrates how conservative a nudge this decision is.⁴²⁹ In *Baker*, the Supreme Court summarily dismissed an equal protection challenge to Minnesota’s refusal to marry same-sex partners.⁴³⁰ In the First Circuit’s view, *Baker*’s summary dismissal foreclosed certain bases for the First Circuit decision.⁴³¹ *Baker* prevented it from declaring gay men and lesbians to be a “suspect” class, because suspect status would call into question all state bans on same-sex marriage.⁴³² *Baker* also kept the First Circuit from declaring that same-sex partners have any federal constitutional right to marry.

The First Circuit’s avoidance of heightened scrutiny is particularly noteworthy because the Justice Department had refused to defend DOMA and had urged the court to apply heightened scrutiny to find DOMA unconstitutional.⁴³³ The Justice Department’s position certainly gave the First Circuit political cover to write a broader opinion than it ultimately did. (That there was any controversy at all was due to the fact that the First Circuit permitted some members of Congress to intervene to defend DOMA.⁴³⁴) The court’s refusal to step into a

426. *Id.*

427. *Id.* (citing to *Cook v. Gates* 528 F.3d 42, 61 (1st Cir. 2008)) (reasoning that *Cook* “has already declined to create a major new category of ‘suspect classification’ for statutes distinguishing based on sexual preference”).

428. *Id.*

429. *See Baker v. Nelson*, 409 U.S. 810, 810 (1972) (summarily dismissing equal protection appeal for “want of substantial federal question”); Kahan, *supra* note 44, at 608 (explaining how “gentle nudge[s]” can snowball into consensus thought).

430. *See Baker*, 409 U.S. at 810; *see also* Kahan, *supra* note 44, at 608 (explaining how “gentle nudge[s]” may sometimes snowball into consensus thought if institutional actors don’t perceive it as a threat).

431. *Massachusetts*, 682 F.3d at 8 (“*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage.”); *see also id.* at 9 (reasoning that “to create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of *Baker*, which we are neither empowered to do nor willing to predict”).

432. *Id.* at 9–10.

433. *Id.* at 7.

434. *Id.*

political dispute between some members of Congress and the Executive Branch shows the court's desire not to get out ahead of public opinion.

In the end, DOMA still failed the weaker standard of rigorous rational basis scrutiny. According to the First Circuit, the rigorous rational basis line of cases discussed in Part II required it to “undertake[] a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.”⁴³⁵ Members of Congress justified DOMA on three grounds:⁴³⁶ first, “preserving scarce government resources”; second, “defending and nurturing the institution of traditional, heterosexual marriage”; and third, “defending traditional notions of morality.”⁴³⁷ None of these reasons satisfied rigorous rational basis scrutiny.

Cost savings could not justify DOMA. While Congress may have believed that DOMA would save the government money, the First Circuit held that “detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.”⁴³⁸ Under regular rational basis, the actual facts would not matter—Congress's assertion that DOMA would save it money supported by logical reasoning would be just fine. Rigorous rational basis scrutiny required Congress to get its math right. The actual facts on the ground contradicted Congress's reasoning and undermined DOMA.⁴³⁹

Nor could “defending and nurturing the institution of traditional, heterosexual marriage” justify DOMA.⁴⁴⁰ The First Circuit handled its rejection of this reason gently. Congress, according to the court, failed to produce evidence to support the “connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.”⁴⁴¹ The First Circuit might have said that the connection between the two was irrational or implausible. But like the Ninth, it avoided hyperbole and stuck to stating mildly that DOMA's defenders had not shown a link.⁴⁴²

435. *Id.* at 11.

436. There was a possible fourth—protecting state sovereignty—but the First Circuit held that it only served as a justification for DOMA's other section. State sovereignty would in fact cut in favor of federal recognition of valid state marriages. *See id.* at 14.

437. *Id.* at 14.

438. *Id.*

439. *Id.*

440. *Id.* at 14–15.

441. *Id.* at 15.

442. *Id.*

In rejecting the third reason, the court simply said that rigorous rational basis scrutiny rules out moral objections toward gay men and lesbians as a justification for DOMA and cited *Lawrence* and *Romer*.⁴⁴³ Once more revealing the mild nudge of rigorous rational basis scrutiny, the First Circuit took pains to avoid besmirching DOMA's proponents. "In reaching our judgment, we do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality."⁴⁴⁴ Wanting to preserve the institution of marriage in its traditional form "is not the same as 'mere moral disapproval of an excluded group,'"⁴⁴⁵ so DOMA's proponents are not necessarily bigots or hostile to gay men and lesbians. "Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity—not on benefits firmly provable in court."⁴⁴⁶ Nevertheless, however sincerely and benignly held, moral preferences do not satisfy rigorous rational basis scrutiny.

Rigorous rational basis scrutiny's gentleness is its strength because it can change policies while running a lower risk of backlash than strict scrutiny. Two other decisions that used strict scrutiny to declare unconstitutional bans on same-sex marriage show how backlash can undo strong constitutional protections.

G. Strict Scrutiny Is a Shove That Can Provoke Backlash That Negates Constitutional Protection

The virtues of nudges also can be perceived by contrasting decisions that nudge with those that shove. Strict scrutiny often leads courts to issue opinions that signal, in substance and possibly in form, that certain types of decisions are simply beyond the power of even overwhelming majorities. Such decisions can lead members of such majorities to feel that they have been excluded from the democratic process even though, being in the majority, they hold what usually is the trump card for that process. That sense of exclusion is different from the exclusion felt by members of groups who receive no protection from majorities whatsoever, but it can prompt the same desire to find a way to reclaim a seat at the policy table.

Let us first consider the Hawaii Supreme Court's 1993 decision in

443. *Id.*

444. *Id.* at 16.

445. *Id.* at 16 (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003)).

446. *Id.*

Baehr v. Lewin, which held that Hawaii's ban on same-sex marriage likely violated the state's equal protection clause.⁴⁴⁷ The Hawaii Supreme Court held that the restriction on same-sex marriage was sex discrimination.⁴⁴⁸ Under the Hawaii constitution sex discrimination was subject to strict scrutiny, so the state had to justify its ban on same-sex marriage under that stringent standard.⁴⁴⁹ The Hawaii Supreme Court indicated that the State's arguments would likely fail that standard.⁴⁵⁰ Without ruling on the merits, the Court deemed the State's argument—that it was preserving the traditional nature of marriage—“circular and unpersuasive.”⁴⁵¹ In the Court's view, the State's reasoning resembled that which the Supreme Court had rejected in *Loving v. Virginia*.⁴⁵² As the Hawaii Supreme Court presaged, the trial court that heard *Baehr* on remand ruled in 1996 that the State had failed to satisfy strict scrutiny.⁴⁵³ The Hawaii Supreme Court summarily affirmed.⁴⁵⁴ Thus, Hawaii's ban on same-sex marriage was unconstitutional.

But the Hawaii courts were not the last word on the matter by a long shot. The *Baehr* decision sent shockwaves throughout the country.⁴⁵⁵ In 1996, conservatives began a “campaign[] across the nation to insure that the recognition of same-sex marriages would not spread to other states.”⁴⁵⁶ “So great was aversion to the . . . Hawaii ruling that Congress passed—and President Clinton signed—the Defense of Marriage Act” in 1996 “granting states the right to refuse to recognize same-sex

447. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (holding that its decision is in complete harmony with *Loving v. Virginia*, 388 U.S. 1 (1967), and that, on remand, the statute must survive the strict scrutiny standard of proving both a “compelling state interest[]” and that the statute is “narrowly drawn to avoid unnecessary abridgements of constitutional rights”).

448. *Id.* at 64 (finding that the statute, “on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex”).

449. *Id.* at 68.

450. *See id.* at 67 (explaining that the statute is presumed to be unconstitutional unless Hawaii can overcome the high hurdle of showing that the statute is justified by “compelling state interests” and is “narrowly drawn” to avoid infringing on constitutional rights).

451. *Id.* at 61.

452. *Id.* at 63.

453. *Baehr v. Miiike*, 1996 WL 694235, *21 (Haw. Cir. Ct. 1996).

454. *Baehr v. Miiike*, 950 P.2d 1234 (Haw. 1997).

455. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1165 (2009).

456. *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last updated Nov. 13, 2012).

marriages from other states.”⁴⁵⁷ In Hawaii, voters overwhelmingly approved of a constitutional amendment⁴⁵⁸ permitting the legislature to ban same-sex marriage.⁴⁵⁹ Other states followed suit.⁴⁶⁰ In 1996 and 1997 alone, *twenty-five* states passed legislation defining marriage as a relationship between a man and a woman.⁴⁶¹ “By the time the *Baehr v. Lewin* litigation came to an end in 1998, thirty-one states had enacted laws to prevent the recognition of same-sex marriages.”⁴⁶² To be sure, few supposed that same-sex marriage had been permissible in these states or recognized by the federal government before the flurry of state-level DOMAs. Yet, the stamp of disapproval sent by strong majorities at the state and federal levels created a firm baseline against same-sex marriage.

The 2008 California Supreme Court decision that gay men and lesbians had a constitutional right to same-sex marriage appears to have provoked backlash that undid its work almost immediately.⁴⁶³ Like the Hawaii courts, the California Supreme Court also applied strict scrutiny, but for different reasons. It ruled that gay men and lesbians were a suspect classification.⁴⁶⁴ Sexual orientation was a suspect category because it is “associated with a stigma of inferiority and second class citizenship, manifested by the group’s history of legal and social disabilities”;⁴⁶⁵ “sexual orientation is a characteristic . . . that bears no

457. Miranda Ewell, *Gay-Marriage Ruling Ups the Ante*, SAN JOSE MERCURY NEWS, Dec. 5, 1996, at 27A.

458. See *1998 General Elections Precinct Report*, STATE OF HAWAII, 4 (Nov. 3, 1998), <http://hawaii.gov/elections/results/1998/general/98swgen.htm> (reporting results of 69.2% in favor, 28.6% against).

459. HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

460. See *State Policies on Same-Sex Marriage*, THE PEW FORUM ON RELIGION & PUB. LIFE (Jul. 9, 2009), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/State-Policies-on-Same-Sex-Marriage.aspx> (showing increase in states with constitutional amendments banning gay marriage from 1998–2008).

461. Michael D. Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 704, 725 n.163 (2011).

462. *Id.* at 725 n.163, 726 (listing states that had adopted state bans on same-sex marriage).

463. See CAL. CONST. art. I, § 7.5; see also *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that limiting marriage to “between a man and a woman” is unconstitutional), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

464. *In re Marriage Cases*, 183 P.3d at 401.

465. *Id.* at 442.

relation to a person's ability to perform or contribute to society";⁴⁶⁶ and, though the court hesitated to deem it immutable, it was sufficiently fundamental to a person's identity that one should not be required to disavow it.⁴⁶⁷

Additionally, the California Supreme Court also held that California's domestic partnership statute violated same-sex couples' fundamental right to marry.⁴⁶⁸ Though same-sex domestic partners had all of the same substantive rights of married couples, the court held,

[A]ffording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, . . . imping[es] upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.⁴⁶⁹

Notice how powerfully the California Supreme Court declares the rights of gay men and lesbians to marry. First, discrimination against gay men and lesbians is tantamount to discrimination on the basis of race, sex (which under California law also received strict scrutiny), religion, or national origin. Sexual orientation is an irrelevant basis for legislation save extraordinary circumstances.⁴⁷⁰ Second, gay men and lesbians had a fundamental right to marry in California.⁴⁷¹ Consequently, restrictions on the basis of sexual orientation or on the right to marry would have to satisfy strict scrutiny.⁴⁷²

This right to marry was very broad indeed. The California law that the Court declared unconstitutional had actually given same-sex relationships *all* of the same substantive rights and obligations as marriage.⁴⁷³ The domestic partnership statutes declared that every provision of the California Code that referred to marriage was to be

466. *Id.*

467. *Id.*

468. *Id.* at 446 (holding that "the relevant statutes significantly impinge upon the fundamental interests of same-sex couples").

469. *Id.* at 445.

470. *Id.* at 442-43.

471. *Id.* at 446; *see supra* text accompanying notes 468.

472. *See id.* at 401.

473. California made domestic partner rights equivalent to marriage beginning January 1, 2005, with the enactment of CAL. FAM. CODE § 297.5(a) (West 2004).

read as referring to domestic partners.⁴⁷⁴ That was not good enough to satisfy strict scrutiny.

If this domestic partnership law could not survive strict scrutiny, no differentiation between same-sex and opposite-sex partnerships could. Calling same-sex relationships “domestic partnership[s]” rather than marriage denied same-sex couples’ fundamental rights because some name other than “marriage” “cast[s] doubt on” the equal dignity of same-sex couples and their families.⁴⁷⁵ Denying same-sex couples “access to the familiar and highly favored designation of marriage” implied “an official view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples,”⁴⁷⁶ when the law demands that they be treated with equal dignity. Calling same-sex partnerships by a different, unfamiliar name denied same-sex couples the “assurance” that *married* couples enjoyed “that the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship rests.”⁴⁷⁷

The breadth of the California Supreme Court’s holding apparently frightened some California voters. Immediately in the wake of the decision, polls suggested that a bare majority of the public supported same-sex marriage—51% of Californians approved same-sex marriage, 42% opposed it, and 7% were undecided.⁴⁷⁸ But by November 2008, the California Supreme Court decision seemed to have turned undecided Californians against same-sex marriage, along with some voters who had previously said they favored same-sex marriage.⁴⁷⁹ The breadth and strength of the California Supreme Court’s decision let Proposition 8’s supporters argue that the court had made a personal moral issue—beliefs about the acceptability of same-sex marriage—into a legal issue.⁴⁸⁰ The amendment’s supporters argued that the California Supreme Court’s decision would require schools to teach children that same-sex marriage and gay or lesbian families were no different than

474. *Id.* § 297.5(e).

475. *In re Marriage Cases*, 183 P.3d at 400–01.

476. *Id.* at 401–02.

477. *Id.* at 427.

478. Field Poll, *supra* note 417, at tbl.1.

479. *See id.* at tbl.3.

480. *See Eskridge, supra* note 385, at 93.

traditional marriage and families.⁴⁸¹ Behind the hyperbole lay a grain of truth. The California Supreme Court had left no doubt that the state must treat these relationships exactly the same. Others worried that churches, as public accommodations, would have to accept gay men and lesbians as members and perhaps even perform same-sex marriage ceremonies.⁴⁸² Ultimately, 52% of voters voted to ban same-sex marriage.⁴⁸³

Contrast *In re Marriage Cases* and *Baehr* with the much narrower holdings of *Perry* and *Massachusetts*. Neither *Perry* nor *Massachusetts* said that sexual orientation was a suspect classification, or that gay men and lesbians had a fundamental right to marry.⁴⁸⁴ Instead, both courts said that the government had not shown that the legal restrictions on gay men and lesbians had a rational relationship to some legitimate interest apart from morality.⁴⁸⁵ Consequently, the government had to revisit the issue to try to articulate some reason besides moral disapproval of same-sex marriages.

Rigorous rational basis scrutiny leaves majorities some breathing room to reconsider their desire to discriminate against a group. Consequently it is less likely to produce backlash than strict scrutiny.⁴⁸⁶ *In re Marriage Cases* and *Baehr* left no doubt that in California and Hawaii any majoritarian attempts to treat gay men and lesbians differently than heterosexuals were completely off the table. Drastic measures—constitutional bans against same-sex marriage—were the only option. *Perry* and *Massachusetts* appear to have sparked no backlash.

That breathing room may make it possible for majorities to change

481. *Id.*

482. See Neil J. Young, *Equal Rights, Gay Rights and the Mormon Church*, N.Y. TIMES CAMPAIGN STOPS BLOG (Jun. 13, 2012, 11:05 PM), <http://campaignstops.blogs.nytimes.com/2012/06/13/equal-rights-gay-rights-and-the-mormon-church/>.

483. Tamara Audi et al., *California Set to Join Trend of Banning Gay Marriage*, WALL ST. J., Nov. 6, 2008, at A10.

484. See *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, No. 12-144, 2012 U.S. LEXIS 9416 (Dec. 7, 2012); see also *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012).

485. *Massachusetts*, 682 F.3d at 15; *Perry*, 671 F.3d at 1092–93.

486. It would be ludicrous to claim that the average, lay voter differentiates between “strict scrutiny” and “rigorous rational basis” scrutiny. Do not mistake me as making that claim. Instead, I am making a more modest one—that voters can tell the difference between a very broad declaration of rights and more modest push back from courts to reconsider the reasons for legislation.

their minds about the equality of previously subordinated groups. Interestingly, once a majority of Californians had voted to ban same-sex marriage, they appeared to be able to reconsider the issue. Not quite four years after Proposition 8 passed, 59% of Californians now support same-sex marriage, more than in 2008.⁴⁸⁷ Importantly, only 34% are against it, with 7% undecided.⁴⁸⁸ This polling data was gathered after *Perry*, which supports the idea that rigorous rational basis ruffles fewer feathers.

Perry and *Massachusetts* show how rigorous rational basis scrutiny operates as a nudge, particularly as compared to more heavy-handed intermediate or strict scrutiny analysis.⁴⁸⁹ As these cases show, rigorous rational basis scrutiny requires majorities to articulate public-regarding reasons for restrictions on groups. Under rational basis scrutiny, “because” suffices as a reason.⁴⁹⁰ Rigorous rational basis requires majorities to follow the “because” with some reason other than the majority’s subjective preferences. Over time, forcing majorities to articulate reasons can dramatically change public attitudes.

H. Conclusion: Nudges from Courts Can Be More Powerful than Shoves

At first glance, rigorous rational basis scrutiny might look like too little protection for groups from the courts too late, but that first impression is wrong. This section has argued that rigorous rational basis is indeed just the right tool for helping groups to integrate into and gain acceptance from the larger democratic community. It requires majorities to treat minority groups as members of the democratic community and to articulate reasons to justify treating those group members differently. As *Perry* and *Massachusetts* show, rigorous rational basis scrutiny permits courts to decide particular cases without declaring broad principles that would commit them to declaring broader

487. Field Poll, *supra* note 417, at tbl.1.

488. *Id.*

489. See *Perry*, 671 F.3d at 1089 (describing the rational-basis standard to be used as not toothless with some footing in the realities of the legislation); see also *Massachusetts*, 682 F.3d at 15 (opining that the scrutiny applied in analyzing DOMA’s constitutionality should be something more than the ordinary deference afforded in rational basis scrutiny).

490. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990) (“The first principle” of the American constitutional system “is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.”).

rights in later cases.⁴⁹¹ Two other cases, *Baehr* and *In re Marriage Cases* show how strict scrutiny is a bigger, blunter tool that appears to be more protective of groups' rights.⁴⁹² Strict scrutiny's strength can undermine its effectiveness because it can provoke backlash from majorities who reject the implication that the protected group is for all intents and purposes identical to the members of the majority. In contrast, rigorous rational basis's modesty is less likely than strict scrutiny to provoke backlash from those opposed to a group's agenda. Ultimately, it can therefore promote greater progress in a group's bid for tolerance and acceptance as full-fledged members of the political community.

V. CONCLUSION.

In a wide range of cases the Supreme Court and lower courts have applied a middle tier level of scrutiny—rigorous rational basis—to protect some groups from attempts by majorities to restrict the liberties of such groups based on dislike for or moral disapproval of such groups. Despite its ubiquity, the Court has often denied that this mid-level scrutiny exists and has never developed criteria for determining when rigorous rational basis scrutiny will apply.

Rigorous rational basis scrutiny should be applied to protect “structural” groups from discrimination and describes criteria for identifying when a structural group exists and should be entitled to constitutional protection.

One frequent criticism of extending constitutional protection to groups as opposed to prohibiting certain general classifications is that group protection will promote group separatism as opposed to assimilation into the larger American culture. Separatism in turn, goes the argument, kindles identity politics with different groups competing for their share of political goodies rather than being interested in policies that promote the broader good. On this view, some groups' entitlement to affirmative action encouraged people to identify more strongly as members of those groups and to fight for stronger affirmative action programs, despite the costs to other minority groups

491. See *Massachusetts*, 682 F.3d at 8 (explaining that precedent does not “mandate[] that the Constitution requires states to permit same-sex marriages”); *Perry*, 671 F.3d at 1082.

492. See *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (concluding that “statutes imposing differential treatment on the basis of sexual orientation” are constitutional suspect), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

(such as Asian Americans) who did not benefit under affirmative-action programs. Denying Asian Americans status as affirmative-action beneficiaries, in turn, galvanized Asian Americans either to fight against affirmative-action policies or for beneficiary status. Lost in the jostle over the spoils for preferences was measured consideration of the wisdom or utility of affirmative-action policies more generally in promoting the broader societal good.

As the analysis in Part IV suggests, the Court's use of rigorous rational basis scrutiny to shield some groups from legislation based on dislike or moral disapproval of a group is unlikely to spur divisive identity politics, promote separatism, or weaken American national identity.⁴⁹³ When groups insist on equal treatment under the law, they are not petitioning for separation from American legal and community institutions. They petition, instead, for inclusion in and equal treatment by those institutions,⁴⁹⁴ and that is what rigorous rational basis guarantees to them. Indeed, rigorous rational basis scrutiny is likely to produce quite the opposite effect. Rigorous rational basis scrutiny protects and strengthens democracy and common national identity by reducing individual group members' need for a distinct and separate group identity.⁴⁹⁵ The converse, in fact, is far more likely. Just as one

493. Iris Marion Young argued that

Paying specific attention to differentiated social groups in democratic discussion and encouraging public expression of their situated knowledge thus often makes it more possible than it would otherwise be for people to transform conflict and disagreement into agreement. Speaking across differences in a context of public accountability often reduces mutual ignorance about one another's situations, or misunderstanding of one another's values, intentions, and perceptions, and gives everyone the enlarged thought necessary to come to more reasonable and fairer solutions to problems.

YOUNG, INCLUSION, *supra* note 238, at 118; *see also id.* at 82 ("I argue that political claims asserted from the specificity of social group position, and which argue that the polity should attend to these social differences, often serve as a resource for . . . democratic communication that aims at justice."); *id.* at 82, 225 (arguing that attending to group inequalities and recognizing group identity facilitates the democratic engagement by transcending grudging willingness to let others alone and creating an opportunity for others to listen to and engage with each other).

494. *See* Eskridge, *Channeling*, *supra* note 269, at 486 (arguing that "[l]ike the due process and speech cases, the equal protection cases were a tacit concession by potential rebels that they wanted to remain part of the pluralist constitutional polity").

495. KARST, BELONGING, *supra* note 256, at 97 ("Most often, when individual men and women insist on 'being themselves,' they are in fact defending a self they share with others." (quoting Michael Walzer, *Pluralism: A Political Perspective*, in THE RIGHTS OF MINORITY

has less need to march to protest mistreatment the law already forbids, the less society insists that a particular fact about you defines you, the less defining that fact will seem to be in your daily routine. Legal recognition and protection of groups reduces the necessity of group identity to its members and facilitates their integration in to the broader community.⁴⁹⁶

Rigorous rational basis scrutiny is an appropriate level of scrutiny to promote a group's inclusion as it is less likely to spark political backlash against a group's court victories than stricter constitutional scrutiny. In short, it is a nudge, not a shove. Unlike strict scrutiny, it does not declare as a matter of constitutional law that group membership is irrelevant to government decision making. It does, however, require a reason for limiting the liberties of some group besides the majority's dislike of the group or fears about the group. In the absence of such reasons, rigorous rational basis scrutiny strikes down a particular restriction. The ball is then back in the majority's court to rethink their reasons for that restriction to determine if there are any reasons besides fear or dislike and reconsider their desire to discriminate against a group. Ultimately, the nudge of rigorous rational basis scrutiny can be just as if not more effective a tool for securing the equality of a group because it forces a majority to grapple with the reasons why it wants to treat some groups differently.

CULTURES 139, 146 (Will Kymlicka ed., 1995)).

496. KARST, BELONGING, *supra* note 256, at 96 ("When the enforced separation of a . . . minority ends, and its members come to participate in the activities and institutions of the wider society, their participation itself promotes assimilation.").