INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment, one of the most significant clauses of modern constitutional jurisprudence reads: no state shall "deny to any person within its jurisdiction the equal protection of the laws."[1] Under the conventional interpretation of this clause, the United States Supreme Court (hereafter "the Court") scrutinizes more carefully those laws that invoke or discriminate against a particular group, or what the Court calls a "suspect class." Those groups that constitute suspect classes inform the list of prohibited classifications. Under current constitutional doctrine, laws discriminating on the basis of race,[2] alienage,[3] and national origin[4] get strict scrutiny: where the Court asks whether the law is narrowly tailored to serve a compelling state purpose. Laws discriminating against sex get intermediate scrutiny:[5] where the Court asks whether the law is substantially related to serving an important governmental purpose. Those laws that do not invoke a suspect classification merely receive rational review, the most deferential standard of review. Under rational review, the legislation must only have a legitimate purpose, and the means must be rationally related to that purpose. The more the Court strictly scrutinizes a law, the more likely it will be struck down. According to Adam Winkler, between 1990 and 2003, 73 percent of all race-conscious laws subjected to strict scrutiny in federal courts were struck down.[6] Ultimately, the scrutiny framework turns out to be

[1] Sec. 1, Amendment XIV, Constitution of the United States
[2] *See, e.g.*, *Bolling v. Sharpe* (1954); *Loving v. Virginia* (1967); *Grutter v. Bollinger* (2003)
[3] *See Graham v. Richardson* (1971)
[4] *See, e.g.*, *Oyama v. California* (1948); *Korematsu v. United States* (1944)
[5] *See, e.g.*, *Craig v. Boren* (1976)
[6] Winkler 2006: 839

doctrinal shorthand for whether a law will be upheld or struck down. This means that whether a group counts as a suspect class makes all the constitutional difference.

The suspect class framework and the tiers-of-scrutiny approach (strict, intermediate, and rational) that accompanies it are a familiar feature of modern equal protection jurisprudence. Central to this framework is determining which groups count as suspect classes. After all, there are many groups in society: racial groups, the local Parent Teacher Association (PTA), gays and lesbians, women, a simple book club, blondes, or those with a particular eye color. Most are not suspect classes. Cass Sunstein argues that the core purpose of the Equal Protection Clause is "an attempt to protect *disadvantaged* groups from discriminatory practices, however deeply engrained and longstanding."[7] Currently, racial minorities and women are "in" – they count as protected disadvantaged groups, making race and sex a suspect classification; gays and lesbians are "out" – they do not count as a suspect class. Scholarly work has argued that they ought to count as one, thereby rendering sexual orientation a suspect classification under the Equal Protection Clause.[8] If the Court affirms gays and lesbians as a suspect class, prohibitions on same-sex marriage would receive higher scrutiny. This, in turn, would no doubt doom such prohibitions.

This book challenges this identity or class approach. It draws from political theory both to criticize current constitutional doctrine and to elaborate on a more salutary one. Although the problems of identity are well established, scholars have largely ignored their relationship to the suspect class framework. Constitutional legal scholars focus on the doctrine with little to no attention to its political weaknesses, and political theorists focus on the difficulties with the language of identity with no attention to constitutional doctrine or, in particular, the suspect class analysis. I argue that there is a deep dilemma with the suspect class framework, with *how* the Court strikes down equality-infringing laws and policies. On one hand, it is clear that racial minorities, women, and gays and lesbians require constitutional protection given the kind of discrimination each has faced. On the other hand, by elevating these

[7] Sunstein 1988: 1163 (emphasis added)
[8] *See, e.g.*, Ackerman 1985, Ely 1980, Feldblum 1996, Steiker 1985, Sunstein 1988, Yoshino 1996

groups but not others to suspect status – treating them as constitutionally "special" – the Court turns out to stigmatize them. It forces individuals who belong to these groups to highlight the way they are different from everyone else.

This book argues that in doing so, the suspect class framework suffers from at least four problems. First, the Court's need to demarcate certain groups but not others as suspect classes undermines a robust notion of individuality. It perversely requires that the Court define what it means to be a member of a particular identity group, a group that must be conceptually prior to the individual. The suspect class must be "out there" to be defined. After all, there has to be some permanent, biological, or fixed nature to the trait, a trait that defines the class. This is why the Court generally requires that this trait be immutable. But this requirement of immutability points to the way in which identity reifies the relevant group, denying the experiences of individuals.

Second, by invoking identity to invalidate laws and policies under the Equal Protection Clause, the Court exacerbates the sting of the counter-majoritarian difficulty. Alexander Bickel defines this difficulty as one in which the Court "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[9] It is a difficulty precisely because the Court *thwarts* rather than affirms majority sentiment. But the suspect class framework makes this difficulty worse, because the Court is not taking into account the interests of all, only those of the relevant identity group or class, in striking down legislation. In *Brown v. Board of Education* (1954), the Court reasoned that "separate but equal" is unconstitutional because it harms black children. Segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[10] The unconstitutionality of segregation arises from its effect on a particular group – here, a racial minority. Similarly, to contend that a prohibition on same-sex marriage is invalid because it harms gays and lesbians makes the discourse about a particular group. This straightforwardly characterizes the constitutional objection as entailing

[9] Bickel 1962: 17
[10] *Brown* at 494

the interests of some individuals – those who are members of the suspect class – rather than the interests of everyone.

Third, the Court's use of strict scrutiny perversely affirms the very racist beliefs it seeks to counter. If I choose a sledgehammer to crack a nut, I assume that the nut may be difficult to crack. I err on the side that it may be quite strong. Similarly, by scrutinizing such laws more carefully, the Court perversely gives credence to the bogus claims of racism. It suggests that racist laws and policies are based on something other than mere hostility. Otherwise, why does the Court need to impose strict scrutiny to realize that a law is based on racial animus? Simultaneously, strict scrutiny dooms remedial legislation – legislation that seeks to ameliorate the status of racial minorities. It needlessly makes it more difficult for a legislature to gain constitutional approval of affirmative action policies.

Fourth, the tiers-of-scrutiny framework turns out to be too subjective, allowing individual justices to decide cases on ideological rather than constitutional grounds. Although it may have comparative value in deciding cases (a law struck down under intermediate scrutiny ought to be struck down under its strict scrutiny counterpart), this framework has little actual content. For instance, the Court has defined the meaning of "compelling" in radically different ways. In *Korematsu v. United States* (1944), the Court upheld Japanese interment, reasoning that national security constitutes a compelling purpose under strict scrutiny. In *Grutter v. Bollinger* (2003), it upheld Michigan's race-based affirmative action policy, reasoning that racial diversity in higher education constitutes a compelling purpose under a similar level of scrutiny. Is achieving racial diversity in higher education as compelling as national security? There is no principled answer to this question because what counts as compelling and what is merely, under a lower standard of review, legitimate are empty placeholders that permit individual justices to fill in as they see fit. Defining what is an important versus a compelling purpose is a policy question that ought to be left to the relevant democratic legislature. It will not suffice merely to say that higher scrutiny is a tool of judicial review that seeks to smoke out illicit or invidious rationales. The suspect class framework does not clearly explain what, as a constitutional matter, "illicit" or "invidious" means. For if it did, there might not be need for higher scrutiny.

This book elucidates an alternative, extant interpretation of equal protection jurisprudence, an interpretation that avoids these problems. This interpretation is not concerned with suspect classes and tiers of scrutiny but rather with the kinds of reasons that are inadmissible as a matter of constitutional law. I argue that the Court already deems constitutionally inadmissible justifications for laws and policies that are based on animus or on the idea that a particular way of life is intrinsically better than another. In fact, whereas the tiers-of-scrutiny approach traces its roots to the mid-twentieth century,[11] this alternative approach has constitutional roots that may go farther back.

This book looks to cases such as *Yick Wo v. Hopkins* (1886) and *Romer v. Evans* (1996) to flesh out the principle that laws and policies based on animus are unconstitutional under the Equal Protection Clause. In both cases, the Court struck down racist and homophobic policies, respectively, without imposing any kind of higher scrutiny or deeming racial minorities or gays and lesbians a suspect class. *Romer* struck down a Colorado state amendment that discriminated against gays and lesbians on grounds that the Equal Protection Clause invalidates laws and policies based on a "bare . . . desire to harm" a group.[12] In *Yick Wo*, decided more than a hundred years before, a unanimous Court held that San Francisco authorities did not have the power under the Equal Protection Clause to grant laundromat licenses to whites but deny such licenses to those of Chinese descent. The Court reasoned that executing a law in this manner was an instance of "arbitrary power."[13] The Court made clear that "no reason for [such discrimination] exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified."[14] The Court did not impose any kind of higher scrutiny in arriving at this conclusion.

Constitutional law also deems inadmissible laws and policies that rest on the idea that a particular orthodoxy or way of life is simply better than another. In *Cleburne v. Cleburne Living Center* (1985), the

[11] *See, e.g.*, Robinson 2005, Siegel 2006, Simon 1978
[12] *Romer* at 634
[13] *Yick Wo* at 370
[14] *Yick Wo* at 374

Court invalidated a city ordinance that required a permit to establish a home for the mentally challenged. The city did not require a permit for homes used for other purposes including "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged."[15] The Court refused to deem the mentally challenged a suspect class. Without imposing any kind of higher scrutiny, the Court held that under the Equal Protection Clause, there were no "legitimate interests" that justified treating a certain living arrangement – in this case, a home for the mentally challenged – differently from others.[16] That is, the Court reasoned that city violated equality under the law or legal equality by favoring or privileging homes that were used for certain purposes rather than others. The Court concluded "that requiring the permit in this case appears . . . to rest on an irrational prejudice against the mentally retarded."[17]

This kind of unconstitutional favoring is also evident in *West Virginia v. Barnette* (1943), where the Court held that a law forcing students to recite the Pledge of Allegiance was unconstitutional. Although the case arose under the First Amendment, the Court articulates a more general proposition about our Constitution:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[18]

This language suggests that the state may not compel its citizens to follow certain kinds of orthodoxies or ways of living. *Lawrence v. Texas* (2003), invalidating a law criminalizing gay sex, informs this kind of argument. Although *Lawrence* invoked the constitutional right to privacy to strike down a sodomy law, it also reasoned that mere moral considerations are constitutionally insufficient for lawmaking under a

[15] *Cleburne* at 447
[16] *Cleburne* at 442–8
[17] *Cleburne* at 448
[18] *Barnette* at 642

standard of rational review. The Court held that "the 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."[19] The state may not impose a way of life on its citizens simply because it finds such a life intrinsically worthwhile. In the same way, the Establishment Clause ("Congress shall make no law respecting an establishment of religion"[20]) prohibits government from favoring a certain religion over another or favoring religion over nonreligion. The clause deems unconstitutional laws and policies based on the idea that a Christian way of life is better or superior to a Buddhist one or that a religious way of life is better or superior to a nonreligious one. I argue that constitutional law already dictates that the state may not "prescribe what shall be" good or acceptable for its own sake.

So, rather than making the constitutional objection to laws such as Jim Crow or prohibitions on same-sex marriage about the language of identity or suspect class and the scrutiny that accompanies it, the Court can make the objection about the reasons that underlie such laws and policies. Jim Crow was based on racial animus just as the Colorado state amendment was based on animus against gays and lesbians. Prohibitions on same-sex marriage are similarly problematic, because they rest on what a majority views as a religiously improper meaning of marriage. This makes the constitutional objection not about groups or identity but simply about the reason underlying the law.

In *Village of Willowbrook, et al. v. Olech* (2000), an often neglected case in scholarly work, the Court held that a town had violated the Equal Protection Clause even though there was no discrimination on the basis of race, sex, sexual orientation, or any other identity classification. Grace Olech asked the village of Willowbrook to connect her to the local municipal water supply. The village conditioned the connection on Olech granting the municipality a thirty-three-foot easement, instead of the standard fifteen-foot easement required of other residents. Olech contended that the village treated her differently, because she had filed an unrelated lawsuit against the city. She sued claiming that the village violated the Equal Protection Clause in asking for

[19] *Lawrence* at 577
[20] Amendment I, Constitution of the United States

an additional eighteen feet. The Court unanimously agreed reasoning that the village's decision to ask for fifteen more feet was "irrational and wholly arbitrary," thereby violating the Equal Protection Clause.[21] There was no language of higher scrutiny that informed the opinion. This points to an understanding of equality under the law that is not about suspect classes or classifications. After all, *Olech* had nothing to do with subordinated groups or identity. It had only to do with those *reasons* that are constitutionally inadmissible, reasons such as animus that can take aim at any group or anyone.

I draw from contemporary political theory's commitment to public justification to expound on and clarify this underlying logic of equal protection. The principle of public reason or justification is a familiar one.[22] John Rawls famously suggests that "the limits imposed by public reason" apply to "constitutional essentials and questions of basic justice."[23] The Supreme Court, according to Rawls, is an "exemplar" of public reason.[24] As Rawls puts it: "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideas acceptable to them as reasonable and rational."[25] This is not about some actual consensus but what reasonable individuals would accept. This commitment to public reason excludes those justifications that cannot in principle be accepted by all.

One variant of this principle of public justification is a commitment to antiperfectionism or liberal neutrality, a commitment that holds the state ought to remain neutral among competing conceptions of the good life. Howard Schweber provides a powerful defense of this kind of public reason or what he calls "public justification."[26] Such a theory of justification requires that democratic citizens proffer reasons that one's fellow listener could accept. This kind of justificatory constraint

[21] *Olech* at 565
[22] *See, e.g.*, Ackerman 1980, Forst 2002, Gaus 1996, Greenawalt 1995, Habermas 1990, 2001, Larmore 1987, Rawls 1996 [1993]
[23] Rawls 1996 [1993]: 214
[24] Rawls 1996 [1993]: 216
[25] Rawls 1993: 217
[26] Schweber 2012

rules out those reasons from the realm of law making that do not meet this principle.[27] For instance, this kind of public reason contends that conceptions of the good life are illegitimate justificatory grounds for state legislation. That is, the state may not pass laws and policies grounded in the belief that a particular way of life is intrinsically better than another. These beliefs are perfectionist ones, because they point to what counts as a decent or virtuous existence. They seek to articulate how we as individuals can live more perfect lives. Precisely because individuals may disagree over the inherent worthiness of certain ways of living over others, such beliefs are not in principle shareable by all. Liberal neutrality eschews them. It is about what is right, not what is good.

This book does not seek to articulate a new theory of jurisprudence. It does *not* aim to argue that constitutional law fully accepts liberal neutrality. My argument is not that radical. I realize that the Court does not even the use the words "antiperfectionism" or "liberal neutrality." My argument treats this theory as a lens through which we can tease out an interpretation of the Equal Protection Clause that does not look to identity or suspect class. This book fleshes out the underlying logic of this interpretation by drawing on some of its similarities to liberal neutrality. In doing so, I apply this framework to various cases that are often framed under a suspect class analysis. This methodological approach is similar to the "law and economics" model of adjudication. This model suggests that, properly understood, the law operates on economic principles such as self-interest and the reduction of transaction costs, even though courts do not explicitly invoke such principles.[28] This book suggests that at its best, equality under the law is about ruling out laws and policies that are based on constitutionally inadmissible reasons or rationales, rationales that liberal neutrality may also consider illegitimate.

Now, I realize that this conception of public reason is controversial, challenged by liberals and nonliberals alike.[29] For instance, Christopher

[27] *See generally* Solum 1993; *see also* Den Otter 2009
[28] *See generally* Epstein 2009, Posner 2010
[29] *See, e.g.*, Galston 1991, George 1993, 1999, MacIntyre 1988, Raz 1986, Sher 1997, Sandel 1982

Eberle makes the strongest case for concluding that a religious rationale ought indeed to suffice as a morally legitimate basis for lawmaking.[30] Others seek to defend liberal neutrality from these and other criticisms.[31] Lucas Swaine makes a powerful argument that even theocrats – those who favor a strong role for religion in politics – should opt for a conception of public justification that largely avoids appealing to religious rationales.[32] So, if the most hard-core of religious observers should prefer a kind of commitment to liberal neutrality from their own moral position, it ought to be the choice of those who hold a more watered down version of the role of religion in politics.

A more fundamental criticism of liberal neutrality is that it is self-defeating. The idea that the state ought to remain neutral among competing moral values in justifying laws and policies is itself a moral value. So how can liberal neutrality ever be truly impartial?[33] One way to mitigate and maybe even avoid this objection is to realize that this kind of antiperfectionism does not require that the state be neutral to all moral values in justifying laws and policies. Rather, it requires that the state only be neutral to conceptions of the good. This means that the state may not deem a particular way of life worthwhile or valuable *for its own sake*. Liberal neutrality may base laws and policies on the idea that a particular way of life has benefits for others. For instance, passing a law that prohibits assault on the idea that doing so benefits others does not violate antiperfectionism. Liberal neutrality only rules out those laws and policies based on the idea that a particular orthodoxy is inherently good. Or consider that laws relating to drug abuse or environmental protection do not seem to rest on the idea that certain ways of living are intrinsically better for the individual who undertakes them. Rather, these laws are about benefitting or protecting *others*: Environmental protections ensure that future generations are not saddled with a less habitable world. Drug abuse laws may seek to protect others from anti-social behavior. The point is that these laws are qualitatively different from a law that prohibits a kind of consensual sexual activity on the

[30] Eberle 2002. *See also* Perry 2003
[31] *See* Clayton 2006, Lecce 2008, Quong 2011, Schweber 2012
[32] Swaine 2008
[33] *See, e.g.*, Galston 1991, George 1999