POLITICAL POWERLESSNESS

NICHOLAS O. STEPHANOPOULOS*

There is a hole at the heart of equal protection law. According to long-established doctrine, one of the factors that determine whether a group is a suspect class is the group's political powerlessness. But neither courts nor scholars have reached any kind of agreement as to the meaning of powerlessness. Instead, they have advanced an array of conflicting conceptions: numerical size, access to the franchise, financial resources, descriptive representation, and so on.

My primary goal in this Article, then, is to offer a definition of political powerlessness that makes theoretical sense. The definition I propose is this: A group is relatively powerless if its aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups. I arrive at this definition in three steps. First, the powerlessness doctrine stems from Carolene Products's account of "those political processes ordinarily to be relied upon to protect minorities." Second, "those political processes" refer to pluralism: the idea that society is divided into countless overlapping groups, from whose shifting coalitions public policy emerges. And third, pluralism implies a particular notion of group power— one that (1) is continuous rather than binary, (2) spans all issues, (3) focuses on policy enactment, and (4) controls for group size, and (5) type. These are precisely the elements of my suggested definition.

But I aim not just to theorize but also to operationalize in this Article. In the last few years, datasets have become available on groups' policy preferences at the federal and state levels. Merging these datasets with information on policy outcomes, I am able to quantify my conception of group power. I find that blacks, women, and the poor are relatively powerless at both governmental levels; while whites, men, and the non-poor wield more influence. These results both support and subvert the current taxonomy of suspect classes.

Introduction

A week into the 2010 trial over California's Proposition 8 (which banned same-sex marriage in the state), political scientist Gary Segura took the stand for the plaintiffs.[1] For the next two days, he testified about gays'[2] political power.[3] It was quite low, in his view.[4] Very few openly gay individuals held elected office.[5] Survey respondents felt less warmth toward gays than toward almost any other group.[6] Gays were the most frequent victims of hate crimes.[7] They also were the

---

[1] *See* Transcript of Proceedings at 1523, Perry v. Schwartzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *see also Perry*, 704 F. Supp. 2d at 937, 943, 945, 951–52 (discussing Segura and Kenneth Miller's testimony).

[2] For the sake of brevity, I use "gay" throughout the Article as shorthand for "gay, lesbian, bisexual, or transgender" and "homosexual."

[3] *See* Transcript of Proceedings, *supra* note 1, at 1523–881.

[4] *See id.* at 1646 ("I conclude that gays and lesbians lack the sufficient power necessary to protect themselves in the political system.").

[5] *See id.* at 1556–57 (noting that less than 1% of local, state, and federal officials have been openly gay).

[6] *See id.* at 1563 (observing that the average warmth score of 49.4 toward gays was sixteen to twenty points lower than the average scores toward blacks and Hispanics).

[7] *See id.* at 1880 (pointing out that gays are the victims of 70% or more of hate-inspired murders).

most frequent targets of hostile ballot initiatives, which succeeded more than 70% of the time.[8] And most states lacked any statutory provisions protecting gays from discrimination.[9]

On the trial's tenth day, another political scientist, Kenneth Miller, took the stand for the defense.[10] Miller also testified for two days about gays' political power.[11] But, unlike Segura, he concluded that it was substantial.[12] Gays raised and spent large sums of money in salient campaigns (like the one against Proposition 8).[13] They enjoyed access to powerful lawmakers.[14] Their allies included Democratic officeholders at all levels, organized labor, many corporations, and the media.[15] Candidates endorsed by gay rights groups prevailed at the polls more often than not.[16] And anti-discrimination laws, hate crime penalties, and domestic partnership benefits existed in several states.[17]

Why did Segura and Miller focus so keenly on gays' political clout?[18] The answer is that, under hornbook equal protection law, a group's *political powerlessness* is one of several factors that bear on whether the group is a suspect class entitled to heightened judicial protection.[19] If gays are a suspect class, then laws that discriminate against them, such as bans on same-sex marriage, are subject to more rigorous scrutiny. But if gays are not a suspect class, then laws targeting them must survive only rational basis review. Political powerlessness matters because it helps determine suspect class status.

More importantly for present purposes, why did Segura and Miller cite so many different *conceptions* of political influence—the

---

[8] *See id.* at 1552 (stating that the success rate of anti-gay initiatives was close to 100% in the marriage area and about 70% in other areas).

[9] *See id.* at 1545 (noting that twenty-nine of the fifty states lack any anti-discrimination provisions for gays).

[10] *See id.* at 2414.

[11] *See id.* at 2414–715.

[12] *See id.* at 2480 ("I see sort of a trajectory of increasing success and power by the LGBT-rights movement.").

[13] *See id.* at 2438 (observing that opponents of Proposition 8 raised and spent $43 million dollars).

[14] *See id.* at 2448–53 (naming gays' influential political allies).

[15] *See id.* at 2455–68.

[16] *See id.* at 2470–71 (reporting that fifty-nine of the sixty-two candidates endorsed by Equality California won in the last election discussed by the organization's website).

[17] *See id.* at 2478–79 (pointing out that thirty states had adopted hate crime laws and twenty-one had adopted laws protecting against employment discrimination on the basis of sexual orientation).

[18] Impressively, more than 600 of the trial's 3000 or so transcript pages were devoted to the issue of gays' political power. *See* Transcript of Proceedings, *supra* note 1.

[19] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (explaining that one of the "traditional indicia of suspectness" is whether a group is "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

number of gays in office, feeling thermometer scores, hate crime sta-
tistics, money deployed in elections, alliances with other groups, the
fate of endorsed candidates, and so forth?[20] The explanation is not
verbosity. Rather, it is the Supreme Court's conflicting and atheoret-
ical pronouncements about what it means by powerlessness. At dif-
ferent times, the Court has referred to a group's numerical size, its
access to the franchise, its level of descriptive representation, its finan-
cial resources, and the enactment of policies protecting it, as the
essence of political strength.[21] On none of these occasions has the
Court sketched any kind of theory that might explain why power
should be understood one way rather than another.[22]

Nor have scholars stepped into the breach. They have added can-
didates to the definitional mix—whether a group's agenda is sup-
ported by public opinion, whether a group succeeds in repealing
adverse legislation, and whether a group is socioeconomically
advantaged, to name a few—but have failed to arrive at anything
resembling a consensus.[23] They also have failed to provide much theo-
retical ballast for the powerlessness doctrine. The point that a group
can be deemed powerless only if we have an account of what power *is*
for equal protection purposes seems largely to have been missed.[24]

This conceptual confusion is both surprising and troubling. It is
surprising because, forty years after the factor was introduced,[25] one
might expect courts and scholars to have worked out what powerless-
ness means and how it relates to democratic theory. And the trouble
with the current state of affairs is that it produces scenes like the one
in the Proposition 8 trial: rival experts testifying for days about what
power might or might not entail, neither having any reason to privi-
lege any one definition over any other.[26] This is no way for law to
operate. Litigants, judges, and academics alike need guidance in
determining how much influence a group enjoys—and so whether the

---

[20] *See supra* notes 5–9, 13–17.

[21] *See infra* Part I.A (showing that the lower courts have been even less consistent in
their analyses of powerlessness).

[22] *See infra* Part I.A.

[23] *See infra* Part I.B.

[24] *See infra* Part I.B.

[25] The Court's first reference to political powerlessness came in *San Antonio
Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

[26] Similar scenes unfolded in the proceedings in, among others, *Equality Foundation of
Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 425–26 (S.D. Ohio 1994),
rev'd, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *Evans v. Romer*, 1993 WL
518586, at *11 (Colo. Dist. Ct. Dec. 14, 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994) (en banc),
aff'd, 517 U.S. 620 (1996), and *Pedersen v. Office of Personnel Management*, 881 F. Supp.
2d 294, 327–32 (D. Conn. 2012).

case for extra judicial attention is bolstered or undercut. Without such guidance, the hole at the heart of equal protection law will remain.

My first goal in this Article, then, is to offer a definition of political powerlessness that makes theoretical sense. The definition I recommend is as follows: *A group is relatively powerless if its aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups.* Where does this definition come from? A multistage argument explains its provenance (and content).

First, the powerlessness factor stems from the third paragraph of *Carolene Products*'s famous fourth footnote.[27] In relevant part, this paragraph states that "more searching judicial inquiry" may be needed when the "operation of those political processes ordinarily to be relied upon to protect minorities" is "curtail[ed]."[28] It states, that is, that heightened scrutiny may apply when a minority wields less power than it would if the political system were functioning properly.

Second, the mechanism that typically is thought to protect minorities is, in a word, *pluralism*. If innumerable groups endlessly are forming and breaking alliances as they jockey for advantage, then each group sometimes will find itself in the majority. No group will be a perennial loser if the winning coalition is reshuffled on each issue.

And third, pluralism does not always work as intended. Sometimes a group is unable to cut deals with its counterparts, and so ends up being outvoted on item after item. It is precisely in this situation, when a group loses unexpectedly often, that the group is relatively powerless.

The pluralist roots of powerlessness account for each element of my proposed definition. Why deem the enactment of preferred policies the crux of a group's power? Because pluralism promises each group a chance to *win*, not merely to play the game. Why consider policies in the aggregate rather than individual issues? Because no group in the pluralist competition is entitled to prevail on any particular matter. Why control for a group's size when assessing its power? Because size matters; all else being equal, a larger group is more likely to end up in the majority. Why also control for classification type? To avoid comparing apples (e.g., the political power of gays) to oranges (e.g., that of blacks). And why conceive of powerlessness as a matter of degree? For the sake of accuracy. Power waxes and wanes; it does not turn on and off.

As soon as powerlessness is linked to pluralist theory, it becomes clear why other definitions of the term are flawed. If policy enactment

---

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

is the essence of power, then a verdict of powerlessness cannot be avoided simply because a group's members are free to vote, are affluent, or are descriptively represented (to name some prominent alternatives). Participation, affluence, and representation undoubtedly are correlated with policy enactment. But they are no guarantee of it, and it is winning that matters under pluralism, not exhibiting some common traits of winners. Similarly, the passage of measures protecting a group (such as anti-discrimination laws) is not proof that the group is strong enough that judicial involvement is unnecessary. It remains possible that the group loses on most *other* matters. Individual victories might conceal aggregate defeats.

In addition to defining powerlessness, I aim in this Article to begin grappling with the fascinating conceptual, doctrinal, and institutional issues that it implicates. Several of these issues are meaty enough to warrant papers of their own, so my discussion necessarily is suggestive rather than dispositive. In the interest of space, I also flag only three of the issues now, and leave the rest for later.

First, does it matter what the *reason* is for a group's powerlessness? *Carolene* asserted that "prejudice against discrete and insular minorities" is the principal cause of pluralist malfunction.[29] But scholars have subjected this claim to withering critique,[30] while also identifying many other factors that may account for a group's lack of influence: its diffuseness and anonymity, its low level of civic engagement, its dearth of resources, its support for a losing political party, and so on.[31] So what happens if a group is powerless but not for the reason that *Carolene* envisioned? My tentative answer is that the case for heightened scrutiny should remain intact. There still has been a pluralist breakdown even if the breakdown is attributable to other causes. Indeed, the powerlessness doctrine should be commended for transcending *Carolene*'s "bad political science"[32]—for focusing on the reality of malfunction rather than its explanation.

Second, is it possible to reconcile the inquiry into powerlessness with the rest of equal protection law? The Court has made clear that it subscribes to an anti-differentiation theory that subjects to more stringent review laws that distinguish among people on certain grounds.[33]

---

[29] *Id.*

[30] *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985) (arguing that discrete and insular minorities often have *more* clout than anonymous and diffuse ones).

[31] *See infra* Part II.C.1.

[32] Ackerman, *supra* note 30, at 743.

[33] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."). I

But powerlessness sounds not in anti-differentiation but rather in its great rival, anti-subordination.[34] To ask if a group lacks political influence is close to asking if the group is politically subordinated. In fact, to talk of classes at all (instead of classifications) is to venture onto thin legal ice. This tension is very real, and it may mean that the Court someday will eliminate the powerlessness factor. For the time being, though, the factor's continued existence suggests that the Court's embrace of the anti-differentiation theory is incomplete. Apparently, the Court cannot bring itself (as the theory would require) to excise politics entirely from its equal protection analysis.

And third, are courts even capable of *telling* whether a group is powerless? Under my definition, courts would need to assess the likelihood that a group's aggregate policy preferences will be enacted, controlling for the group's size and type. Is this a feasible judicial inquiry? Or, as Justice Powell once wrote about another of the factors relevant to suspect status, a history of discrimination, is there "no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not"?[35] I think there *is* a principled basis for measuring groups' political power, and my final goal in this Article is to substantiate this claim empirically.

I try to do so, first, by surveying the existing political science literature. Scholars have found, for example, that blacks and Hispanics are less likely than whites to have their preferences heeded with respect to levels of federal spending.[36] The voting records of members of Congress also are less responsive to blacks' and Hispanics' views, even taking group size into account.[37] Both members of Congress and state representatives are less responsive to the opinions of the poor as well, again controlling for group size.[38] The poor have less sway too over federal and state policy outcomes.[39] On the other hand, women are almost as ideologically close to their House members as are men (though gender proximity does vary by the member's party).[40] And while there is little survey data on gays' own preferences, it takes

---

call this theory "anti-differentiation" rather than "anti-discrimination" or "anti-classification" to avoid confusing it with anti-discrimination laws or suspect classifications.

[34] The canonical work on the anti-subordination theory remains Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). *See id.* at 155 (arguing that the Equal Protection Clause should be understood to protect "specially disadvantaged groups" characterized by "perpetual subordination and circumscribed political power").

[35] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 296 (1978) (plurality opinion).

[36] *See infra* Part III.A.

[37] *See infra* Part III.A.

[38] *See infra* Part III.D.

[39] *See infra* Part III.D.

[40] *See infra* Part III.B.

more than majority support in the *whole* population before pro-gay policies are likely to become law.[41]

Alas, while very interesting, most of the existing literature is deficient for my purposes. The problem is that little of it both examines policy enactment and controls for group size. For instance, the work on minority preferences and federal spending ignores the magnitude of each minority group. So does the work on the adoption of pro-gay policies, while also considering just a handful of items instead of the entire issue universe. And all of the studies of legislators' responsiveness and proximity to their constituents pertain to *representation*, which has only a tenuous link to actual policy.[42]

I thought it necessary, then, to carry out my own empirical analysis to show that powerlessness is amenable to measurement. At the federal level, I obtained access to a database recently compiled by Martin Gilens that includes responses to more than 2000 survey questions over the 1981–2006 period, as well as information on whether the policy asked about by each question was enacted during the ensuing four years.[43] Using this data, I replicated the models that Gilens ran for different income groups, but for different races, genders, and religions. Controlling for group size, I found that whites' preferences are more likely to be adopted by the national government than racial minorities'; that men's views are more impactful than women's; and that all religious denominations' opinions are about equally influential.[44]

At the state level, I used exit polls from 2000 to 2010, including more than 300,000 respondents, to determine the average ideology of different groups in each state.[45] I also relied on an index of state policy liberalism, spanning over 200 distinct issues, recently assembled by Jason Sorens.[46] These datasets enabled me to run essentially the same models as at the federal level, only this time for a wider range of

---

[41] *See infra* Part III.C.

[42] *See infra* Part III.

[43] *See Economic Inequality and Political Representation*, RUSSELL SAGE FOUNDATION, http://www.russellsage.org/research/data/economic-inequality-and-political-representation (last visited June 6, 2015). The book that Gilens wrote based on this data is one of a handful of studies directly measuring powerlessness (as I define it). MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012).

[44] *See infra* Part IV.A.

[45] The Roper Center generously gave me access to its state exit poll archive. *State Election Day Exit Polls*, ROPER CENTER, http://www.ropercenter.uconn.edu/polls/us-elections/state-exit-polls (last visited June 6, 2015) [hereinafter Exit Poll Database].

[46] *See Data*, STATE AND LOCAL PUBLIC POLICIES IN THE UNITED STATES, http://www.statepolicyindex.com/the-research/ (last visited May 23, 2015) [hereinafter Sorens Database].

groups thanks to the exit polls' greater coverage. Controlling for group size, I again found that state policy outcomes are more responsive to the preferences of whites and men than to those of racial minorities and women.[47] I also found that policy outcomes are more responsive to the wealthy and the middle-class than to the poor, more responsive to urban and suburban residents than to rural dwellers, and about equally responsive to groups of different ages, educations, and religions.[48]

These results are good evidence that powerlessness can be measured reliably. The consistency of the federal and state analyses, despite the use of completely different data, is especially encouraging. But the results are not just methodologically significant. They also assist in answering the crucial substantive question of which groups should be deemed suspect classes. The case for racial minorities and women—groups already recognized by the Court[49]—becomes stronger given their meager influence on policy enactment. The case *against* heightened protection for any age groups (also a result consistent with Court precedent)[50] becomes more persuasive as well. But, at least on grounds of clout, the poor have a compelling claim to suspect status. Their policy preferences are less likely to be realized than those of other income groups, at both the federal and state levels. The Court's holdings to the contrary[51] are in tension with political reality.

The Article proceeds as follows. In Part I, I describe the conceptual confusion that mars the powerlessness doctrine. This confusion is evident among both judges and academics, and stems from their failure to connect the doctrine to its pluralist roots. In Part II, the Article's theoretical core, I offer a definition of powerlessness that is derived explicitly from pluralist theory. I also criticize other definitions and begin coming to terms with the doctrine's many intriguing implications. In Part III, I examine the existing empirics on powerlessness. While there are several helpful studies, most of the literature does not directly capture the concept. Finally, in Part IV, I conduct my own empirical analysis of powerlessness. Using a series of recently compiled datasets, I show that powerlessness indeed can be measured and then usefully applied.

---

[47] *See infra* Part IV.B.

[48] *See infra* Part IV.B.

[49] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210 (1976) (gender); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race). However, as explained later, the case for blacks is substantially stronger than that for Hispanics. *See infra* Part IV.C.

[50] *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

[51] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Two last introductory points: First, as important as what this Article does is what it does *not* do. I do not provide an account of how powerlessness relates to the ultimate determination of suspect class status (though I note some possibilities). I also do not advance a general model of equal protection (though I do not hide my theoretical preferences). My more modest aims are simply to define powerlessness sensibly and then to apply my definition empirically. These strike me as quite enough for a single project.

And second, the powerlessness factor is not some dusty relic of the New Deal or Warren Courts. Rather, its legal significance has never been greater than it is today. Of all the cases ever to analyze it, close to half have been decided since 2000.[52] The majority of scholarship on the subject has been published in the same period.[53] And perhaps the most common argument made by defendants in perhaps our era's highest-profile equal protection cases—those involving gay rights—is that gays wield enough influence that courts need not intervene to protect them.[54] There is some urgency, then, to the task of figuring out what exactly powerlessness is, and who exactly counts as powerless.[55]

I

Conceptual Confusion

The powerlessness doctrine has been around for a long time. Its underlying theory was articulated in *Carolene*, decided in 1938,[56] and its explicit announcement came in the 1973 case of *San Antonio Independent School District v. Rodriguez*. "[T]he traditional indicia of suspectness," declared the Court, include whether a group is "rele-

---

[52] According to a Westlaw search conducted on January 15, 2015, 184 of the 501 federal and state cases explicitly examining political powerlessness date from after 2000.

[53] *See infra* Part I.B (discussing this scholarship).

[54] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 671 (7th Cir. 2014) (discussing defendants' contention that gays are politically powerful and therefore same-sex marriage should be left to the political process), *cert. denied*, 135 S. Ct. 316 (2014); Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 329 (D. Conn. 2012) (same); Griego v. Oliver, 316 P.3d 865, 882 (N.M. 2013) ("Focusing on the political powerlessness prong is a reasonable strategy for the opponents of same-gender marriage . . . ."); *see also* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 Washburn L.J. 1, 9 (2010) ("The most popular strategy by defenders of 'traditional marriage' . . . has been that gay people are not politically powerless . . . .").

[55] *See* Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 Calif. L. Rev. (forthcoming 2016) (manuscript at 16), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571756 ("[T]he controversy over the proper measure of political power is not likely to go away anytime soon.").

[56] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

gated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[57]

One might think that courts and scholars would have settled on the meaning of powerlessness in the decades since *Carolene* and *Rodriguez*. But one would be wrong. In fact, as I explain in this Part, judges and academics have offered widely diverging definitions of group influence, ranging from access to the franchise to descriptive representation to the passage of protective legislation. What accounts for this conceptual muddle? As to courts, I think the answer is their tendency to analyze powerlessness in the abstract, without considering the pluralist theory from which it arises. As to scholars, the most likely explanation is their distraction by bigger game, such as whether there should be a powerlessness factor in the first place.

A.   Courts

Over the years, the Court or individual justices have advanced at least five separate conceptions of powerlessness, all of which have found adherents among the lower courts. I arrange these conceptions here according to their stringency, beginning with the ones furthest removed from actual policy enactment. I also focus on the Court's reasoning and consign most of the lower courts' analyses to the margins.

First, certain Justices have equated a group's political strength with its numerical size. In a 1989 case, Justice Marshall argued that the "numerical . . . supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied,"[58] while in a 1996 case, Justice Scalia contended that women cannot be powerless "when they consti-tute a majority of the electorate."[59] Several lower courts have echoed

---

[57] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). The other traditional indicia of suspectness are (1) whether a group has experienced a history of discrimination; (2) whether a group is defined by an immutable characteristic; and (3) whether a group is defined by a trait that typically bears no relation to the group's ability to contribute to society. *See infra* note 208 and accompanying text. Of course, it is quite ironic that the powerlessness doctrine was announced in a decision that was so hostile to its use to provide heightened protection to the poor. The doctrine's roots also stretch all the way back to *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (noting that African Americans "need[ ] the protection which a wise government extends to those who are unable to protect themselves"). But even if concerns about powerlessness animated some of the pre-*Rodriguez* cases granting suspect status to different groups, these concerns were not voiced openly and so are difficult to analyze.

[58] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 553 (1989) (Marshall, J., dissenting) (referring to blacks in Richmond, Virginia).

[59] United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting).

these views in gay rights cases, claiming that gays lack influence because they "make up only a small percentage of the population."[60]

Second, in its cases conferring suspect status to aliens, the Court has treated the right to vote as the linchpin of political power. Aliens allegedly are powerless because they "are not entitled to vote,"[61] "have no direct voice in the political processes,"[62] and are "formally and completely barred from participating in the process of self-government."[63] Following the Court's lead, a few lower courts have emphasized access to the franchise in cases involving juveniles[64] and the poor.[65]

Third, in a 1973 decision suggesting that gender classifications might be subject to strict scrutiny, a plurality of the Justices defined power in terms of descriptive representation.[66] Women lacked clout because they were "vastly underrepresented in this Nation's decision-making councils . . . throughout all levels of our State and Federal Government."[67] Several lower courts' discussions of gays' influence have proceeded along similar lines. Typically, these courts have concluded that gays are powerless due to the "underrepresentation of gays and lesbians in political office."[68] On one occasion, though, a fed-

---

[60] Wolf v. Walker, 986 F. Supp. 2d 982, 1014 (W.D. Wisc. 2014), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *see also, e.g.*, Love v. Beshear, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014) (noting that the inquiry into powerlessness might look to the size of the class), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Bassett v. Snyder, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013) ("[G]ays and lesbians constitute a minority that lacks significant political power.").

[61] Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976).

[62] Foley v. Connelie, 435 U.S. 291, 294 (1978).

[63] Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("Minors cannot vote and thus might be considered politically powerless to an extreme degree.").

[64] *See* Ramos v. Town of Vernon, 353 F.3d 171, 181 (2d Cir. 2003) (noting that juveniles "lack the right to vote" and have no "independent voice in legislative decisionmaking").

[65] *See* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1022 & n.19 (Colo. 1982) (contrasting the poor, who are free to vote, with situations in which "a racial minority group was effectively excluded from equal participation in the political process").

[66] *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion).

[67] *Id.*; *see also* Castaneda v. Partida, 430 U.S. 482, 514 (1977) (Powell, J., dissenting) (arguing against Mexican-American powerlessness in a county where "a majority of the elected officials . . . were Mexican-American, as were a majority of the judges").

[68] Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 989 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also, e.g.*, Watkins v. U.S. Army, 875 F.2d 699, 727 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 446 (Conn. 2008) ("[O]f the more than one-half million people who hold a political office at the local, state and national level, only about 300 are openly gay persons."); Griego v. Oliver, 316 P.3d 865, 882 (N.M. 2013).

eral court of appeals determined that "[h]omosexuals are *not* without political power" based on a story that "one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual."[69]

Fourth, in a 1996 case, Justice Scalia asserted that affluence is the essence of influence.[70] Because gays "have high disposable income," "they possess political power much greater than their numbers, both locally and statewide."[71] At least one lower court has taken a similar approach, though it deemed gays a suspect class after finding that "homosexuals earn an income roughly equal to that of the national average."[72]

And fifth, in the 1985 case that prompted the Court's most extended commentary on powerlessness, it stressed the enactment of protective legislation.[73] "[T]he legislative response" to the condition of the mentally handicapped, which includes a range of beneficial federal laws, "negates any claim that [they] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."[74] Some lower courts have seized on this language to deny gays' claims to suspect status. They have reasoned that gays indeed are able to attract lawmakers' attention, as evidenced by the pro-gay measures that certain jurisdictions have adopted.[75] Other courts have paid heed not just to gays' victories but also to their defeats. They usually have determined that the losses outnumber the wins, meaning that a judgment of powerlessness is warranted.[76] And still other courts

---

[69] Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (emphasis added) (citing Margaret Carlson, *Getting Nasty: How to Spread a Smear*, Time, June 19, 1989, at 33); *see also* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1008 (D. Nev. 2012) (concluding that gays are not powerless after observing that "[h]omosexuals serve openly in federal and state political offices"), *rev'd sub nom.* Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).

[70] *See* Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) (noting gays' geographic concentration and greater preference intensity on gay rights issues).

[71] *Id.*

[72] Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 438 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

[73] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444–45 (1985).

[74] *Id.*; *see also* United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) ("[A] long list of legislation proves the proposition [that women are powerless] false."); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (citing the "solicitous regard that Congress has manifested for conscientious objectors" as a reason not to deem them powerless (internal quotation marks omitted)).

[75] *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990); Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007) (noting gays' "growing successes in the legislative and executive branches of government"); Andersen v. King Cnty., 138 P.3d 963, 974–75 (Wash. 2006) (citing the "enactment of provisions providing increased protections to gay and lesbian individuals").

[76] *See, e.g.*, Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (noting that a majority of states passed constitutional amendments banning same-sex

have broadened the inquiry and asked whether gays are able to end discrimination against them through the political process. Their answer most often has been negative, leading to their conclusion that gays lack influence.[77]

The crucial point about these definitions is that they are entirely inconsistent with one another. Gays may be a small and under-represented minority frequently targeted by hostile legislation (implying powerlessness), but they also vote freely, enjoy reasonable affluence, and win some policy battles (implying power). Similarly, blacks seem weak if their population share and income are empha-sized, but quite potent if the spotlight shifts to their access to the franchise, descriptive representation, and success in passing anti-dis-crimination and affirmative action laws. Grappling with these difficul-ties, lower courts often have complained that "the Supreme Court has no more than made passing reference to the 'political power' factor without ever actually analyzing it,"[78] and that "the Court has never defined what it means to be politically powerless."[79] Scholars have bemoaned the absence of doctrinal clarity in similar terms.[80]

What explains this confusion? Why have courts not settled on a single conception of group influence? The most likely answer, in my view, is the tendency of judges steeped in the common law system to

---

marriage); *Equal. Found.*, 860 F. Supp. at 439 (observing that gay "victories are being 'rolled back' at an unprecedented rate and in an unprecedented manner"); Jantz v. Muci, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (criticizing the position that "scattered, piecemeal successes in local legislation are proof of political power"), *rev'd*, 976 F.2d 623 (10th Cir. 1992).

[77] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 184 (2d Cir. 2012) ("The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination."), *aff'd*, 133 S. Ct. 2675 (2013); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 444 (Conn. 2008) (finding that gays lack political power because of their inability to rectify discrimination through the political process); Varnum v. Brien, 763 N.W.2d 862, 894 (Iowa 2009) (same). For a longer discussion of how lower courts have dealt with the passage of some pro-gay policies, see Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1381–90 (2011).

[78] *Equal. Found.*, 860 F. Supp. at 437 n.17.

[79] *Varnum*, 763 N.W.2d at 893; *see also, e.g.*, Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 328 (D. Conn. 2012) (commenting on the "ill-defined nature of this factor"); *Kerrigan*, 957 A.2d at 441.

[80] *See, e.g.*, Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 979 (2014) (describing powerlessness as "perhaps the most undertheorized element of the suspect class doctrine"); Schacter, *supra* note 77, at 1392 n.192 (referring to the "Supreme Court's pronouncements" on powerlessness as "scattered, scant and inconsistent"); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1793 (1996) ("[C]ourts have struggled to determine the appropriate indicia of political powerlessness.").

apply doctrinal tests without reflecting much on their origins. Take the Connecticut Supreme Court, whose 2008 disquisition on powerlessness remains the most detailed and thoughtful of any judicial body.[81] The court began by noting that powerlessness need not be absolute since blacks and women, both suspect classes, have at least some political clout.[82] The court then announced its definition of powerlessness: "whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means."[83] Next, the court recited several factors that convinced it that gays lack such strength: the intensity of the hostility against them, the scarcity of openly gay legislators, the limits of the protective measures already on the books, and so on.[84] Finally, the court argued that whatever influence gays wield, it is less than that of blacks and women, meaning that they too must be deemed powerless.[85]

Entirely missing from this analysis was any consideration of why the powerlessness doctrine exists in the first place. The court did not connect the doctrine to *Carolene*.[86] Nor did it mention the pluralist theory that offers at least one solution to the puzzle of how much influence minorities should wield in a democracy. Nor did it cite the political process approach associated most closely with John Hart Ely.[87] Instead, the court treated the words *political powerlessness* as if they were written in a vacuum, devoid of any theoretical foundation, open to whatever interpretation judges might give to them. It is no surprise that this mode of reasoning, repeated by many courts over many cases,[88] gives rise to irreconcilable notions of power. Power is a coherent concept only if it is perceived through a theoretical prism.

---

[81] *See Kerrigan*, 957 A.2d at 440–61; *see also* Schacter, *supra* note 77, at 1383 (describing *Kerrigan*'s analysis as "the most developed and extended"). As I discuss below, Schacter's explanation for the doctrinal confusion is different from mine. *See infra* Conclusion. She thinks political process theory itself is to blame. *See* Schacter, *supra* note 77, at 1390–402.

[82] *Kerrigan*, 957 A.2d at 440–44.

[83] *Id.* at 444.

[84] *Id.* at 444–52.

[85] *Id.* at 452–54.

[86] The court cited *Carolene* only for the proposition that "discrete and insular" minorities might require heightened judicial protection. *Id.* at 439.

[87] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (setting forth the approach in detail).

[88] Very few court decisions have approached powerlessness from a more theoretical perspective. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437–39 (S.D. Ohio 1994) (discussing pluralist theory), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996); Dean v. District of Columbia, 653 A.2d 307, 349 (D.C. App. 1995) (Ferren, J., concurring in part and dissenting in part) ("Finally, there is

This critique of the Connecticut Supreme Court applies even more strongly to the U.S. Supreme Court. In the half dozen or so cases in which the Court has examined the powerlessness factor explicitly, it *never* has linked it to any kind of democratic theory. Instead, the Court has tended to quote the factor's language, to invoke one or another conception of influence—and then to move quickly to other matters.[89] It is true that the Court, as the ultimate expositor of equal protection law, might have reasons beyond common law instinct for declining to define powerlessness more clearly. It might worry that a crisper definition (indeed, any definition at all) would push the law in unwanted directions. I address the potentially unsettling implications of the powerlessness doctrine later in the Article.[90] But next, I turn to the academic literature to see if scholars have done a better job than courts in ascertaining what the doctrine means.

B. Scholars

The short answer is no. In their works on powerlessness, scholars mostly have reiterated the standards already set forth by courts. While they have tweaked the judicial tests in various ways, they have not come to any consensus on the meaning of group influence. In fact, almost exactly the same cleavages that appear in the doctrine are evident in the relevant scholarship as well.

Take a group's numerical size (the first of the judicial definitions). Owen Fiss has argued that blacks are powerless because "they are a numerical minority,"[91] while Michael Klarman has advocated the opposite conclusion for women because they are a "slight majority of the eligible voting population."[92] Or consider a group's access to the franchise (the second judicial definition). William Eskridge has contended that after "people of color started voting" and "women gained

---

the question drawn directly from *Carolene Products*: whether gays and lesbians are a politically powerless minority.").

[89] *See* Lyng v. Castillo, 477 U.S. 635, 637–38 (1986); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974); Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[90] *See infra* Part II.C.

[91] Fiss, *supra* note 34, at 152 (citing blacks' economic condition and prejudice against them).

[92] Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 751 (1991) (noting that women are "fully enfranchised").

formal access to the political process," "it was not clear what more a referee Court should do."[93]

Likewise, a group's descriptive representation (the third definition) takes pride of place in the work of Daniel Farber and Philip Frickey[94] and Suzanna Sherry.[95] Sherry has written that "heightened scrutiny would be appropriate" if "a discriminatory decision is made by a political body in which [a group is] underrepresented."[96] A group's socioeconomic status (the fourth definition) is the core of Kenji Yoshino's conception of influence.[97] Three of his "factors [that] can influence a group's political power" are "the group's income and wealth," "its education level," and "its social position."[98] And the passage of protective legislation (the fifth definition) is endorsed by Eskridge in another piece[99] as well as by Marcy Strauss.[100] Strauss has put the point nicely: "Political powerlessness refers to a group's inability to rely on the legislative process to protect its interests."[101]

Scholars, then, are just as conflicted as courts on the meaning of powerlessness. How come? As before, I think one explanation is the temptation (not limited to judges) to focus on doctrine at the expense of theory. Several of the relevant articles dive into definitional issues without pausing to consider what broader values the powerlessness

---

[93] William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2379, 2381 (2002).

[94] *See* Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Calif. L. Rev. 685, 705 (1991) (commenting that "[a]lthough political influence is virtually impossible to measure, political representation is not").

[95] *See* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L.J. 89, 123 (1984).

[96] *Id.*

[97] *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 Yale L.J. 485, 565 (1998).

[98] *Id.* (recommending a group's "health and longevity," "its freedom from public and private violence," "its ability to exercise its political rights," and "the acceptability of prejudice against the group").

[99] *See* Eskridge, *supra* note 54, at 5 (describing political power as a group's ability to "resist or repeal these unjust discriminatory laws").

[100] *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev. 135, 153 (2011).

[101] *Id.* Still more conceptions of powerlessness abound. *See, e.g.*, Ely, *supra* note 87, at 152 (arguing that blacks are not powerless because they supported the winning presidential candidate in 1976); Hutchinson, *supra* note 80, at 1003–04, 1028 (offering a definition centered on whether public opinion favors a group's agenda); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 Va. L. Rev. 721, 734 (1991) (claiming that a group has sufficient power when the legislature "address[es] a group's concerns appropriately"). And in a valuable recent addition to the powerlessness literature, Ross and Li have advocated a "more holistic approach to determining whether a group has political power" that encompasses *all* of the factors previously identified by courts. Ross & Li, *supra* note 55 (manuscript at 5).

factor might aim to realize.[102] Another reason probably is academic self-interest. A scholar makes few waves by agreeing with existing positions. Professional incentives encourage differentiation.[103]

But the most likely answer, in my view, is simply that the literature has focused on tasks other than defining group influence. In particular, most scholars have sought either to assess the normative desirability of the powerlessness factor, to explain why certain groups but not others are deemed powerless, or to examine how the factor relates to the other suspect class criteria. Eskridge[104] and Jane Schacter,[105] for instance, have argued that powerlessness should be eliminated as an independent criterion for suspect status. Similarly, Eskridge,[106] Schacter,[107] and Yoshino[108] have observed a paradox in which courts dub powerful groups as powerless and powerless groups as powerful. And Richard Levy,[109] Daniel Ortiz,[110] and Yoshino[111] have stressed the oddity of employing some factors that reflect anti-differentiation theory and others that sound in anti-subordination. It is unfortunate, but not entirely unexpected, that a consistent conception of powerlessness has failed to emerge from such diverse academic projects.

Ultimately, the reasons for courts' and scholars' confusion are not terribly important. The key points are that there *is* sharp disagreement over the meaning of powerlessness—and that the disagreement *mat-*

---

[102] *See, e.g.*, Hutchinson, *supra* note 80, at 1028 (proposing a definition based only on various factors that political scientists have measured); Strauss, *supra* note 100, at 153 (proposing a definition without any prelude at all). For a notable exception, see Schacter, *supra* note 77 (discussing the operation of a system that properly represents minority interests).

[103] I am aware that this point applies to this Article, too.

[104] *See* Eskridge, *supra* note 54, at 20 ("[P]olitical powerlessness should not be a requirement for strict scrutiny.").

[105] *See* Schacter, *supra* note 77, at 1403 ("[T]he powerlessness criterion might be better conceptualized as something to be assessed . . . as an aspect of past discrimination . . . .").

[106] *See* Eskridge, *supra* note 54, at 19 (arguing that minority groups must pass a threshold of political power before the Court will apply heightened scrutiny).

[107] *See* Schacter, *supra* note 77, at 1397–402 (arguing that courts will apply protections to minority groups only after public opinion has deemed them worthy of protection).

[108] *See* Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 541 (2012) ("A group must have an immense amount of political power before it will be deemed politically powerless by the Court.").

[109] *See* Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 45 (2010) (discussing the Court's "political process" and "individual fairness" rationales in its jurisprudence on suspectness).

[110] *See* Ortiz, *supra* note 101, at 732 ("[T]he Court's overall approach to identifying suspect and quasi-suspect classifications appears highly schizophrenic.").

[111] *See* Yoshino, *supra* note 97, at 563–64 (observing that some factors are class-based while others are classification-based).

ters because it makes it almost impossible to tell whether a group does or does not qualify as powerless. In the next Part, I try my hand at clearing the fog that shrouds this area of law. I try, that is, to offer a definition of powerlessness that makes theoretical sense, and to show that other definitions are theoretically lacking.

II
Pluralism and Power

The definition I propose is this: *A group is relatively powerless if its aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups*. I explain, first, how this definition stems from the pluralist theory that underpins *Carolene*. The theory claims that, in a properly functioning political system, groups of about the same size and type should have about the same odds of getting their preferred policies enacted. So if a group's odds actually are much lower than its peers', then the system is *not* working properly, and the group is relatively powerless.

I then contend that other definitions of powerlessness are deficient from a pluralist perspective. The trouble with numerical size, access to the franchise, descriptive representation, and socioeconomic status is the same: None of these options zeroes in on policy enactment itself (as opposed to one of its potential causes). The passage of protective legislation comes closer to the mark. But the approach still is flawed because it considers only a small subset of all the issues that make up the pluralist marketplace.

Lastly, I begin exploring the many fascinating implications of the powerlessness doctrine. As to powerlessness itself, I discuss whether the reasons for it matter (I think not), and whether influence can vary over time and space (absolutely). As to the doctrine's legal fit, I address its relationship to the other suspect class criteria (awkward), its relationship to equal protection law as a whole (also uneasy), and the status of the pluralist theory on which it rests (questionable). And as to the courts that are responsible for implementing the doctrine, I comment on their capacity to do so given their political and psychological constraints (comparatively high), and their ability to determine powerlessness in the first place (improving).

A. *From Theory to Meaning*

The case for my proposed definition of powerlessness has several steps. Below, I go through these steps and then show how each element of the definition follows from pluralist theory.

1. *Pluralist Hopes and Fears*

The first key point about the powerlessness factor is that it is derived explicitly from the third paragraph of *Carolene*'s legendary fourth footnote. If "those political processes ordinarily to be relied upon to protect minorities" are "curtail[ed]," then minorities have less influence than they would if the "processes" were operating properly.[112] They are relatively powerless compared to the "ordinar[y]" situation in which their interests are "protect[ed]."[113] This linkage occasionally has caught the Supreme Court's eye.[114] It also has been recognized by several scholars. Yoshino, for example, has observed that "[t]he conventional wisdom that courts should not protect groups with sufficient political power dates back [to *Carolene*]."[115]

Second, the mechanism that typically is thought to protect minorities is, in short, *pluralism*. The Court, atheoretical as ever, has never said so outright.[116] But pluralism is one of the great theories of American democracy,[117] and it was especially ascendant when *Carolene* was decided in the 1930s. As political scientists Frank Baumgartner and Beth Leech have written, the approach was "the central framework of analysis during the first sixty years of [the twentieth] century."[118] Because of this intellectual dominance—and because it is hard to come up with other democratic theories in which

---

[112] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[113] *Id.*

[114] *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982) (discussing *Carolene* and the role of the judiciary in safeguarding the interests of the politically powerless); Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (connecting concern "for a discrete class's political powerlessness" to "the moment the Court began constructing modern equal protection doctrine in [*Carolene*]"); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (citing *Carolene* to support the assertion that powerless groups require judicial protection from the political process).

[115] Yoshino, *supra* note 108, at 537; *see also, e.g.*, Evan Gerstmann, The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection 80 (1999) (noting that the powerlessness factor "flows logically from the *Carolene Products* rationale for suspect classes"); Levy, *supra* note 109, at 38 (describing *Carolene* as the source of political process failure theory).

[116] Though lower courts occasionally have. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 438 (S.D. Ohio 1994) ("All groups are a minority on specific issues, and thus all groups must form coalitions in order to obtain beneficial legislation."), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

[117] *See* Bruce E. Cain, Democracy More or Less: America's Political Reform Quandary 12 (2014) (referring to pluralism as one of "three major reform traditions in the United States").

[118] Frank R. Baumgartner & Beth L. Leech, Basic Interests: The Importance of Groups in Politics and in Political Science 48 (1998); *see also, e.g.*, E.E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America 21 (1960) (describing the ascendance of "'group' theories of politics" during the "first third of the twentieth century"); Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Protection of Politics*, 101 Calif. L.

minorities play a central role—there is little academic disagreement that *Carolene*'s "political processes" refer to pluralism. In Edwin Baker's words, "[t]he image of the democratic process that is most consistent with [*Carolene*'s] footnote . . . is pluralistic democratic theory[ ]."[119]

Third, while there exist several variants of pluralism,[120] all of them share the following core logic: The population is divided into innumerable groups, none amounting to a majority, by myriad cross-cutting and overlapping cleavages.[121] Public policy emerges as these groups continuously compete and bargain with one another to advance their respective interests.[122] The makeup of the winning coalition shifts from issue to issue as the groups recurrently form and break alliances.[123] It thus is impossible to speak of "majority rule" since there is no single majority that remains constant across areas and over time.[124] Instead, public policy is the product of "minorities

---

Rev. 1565, 1610 (2013) (describing pluralism as the dominant theoretical conception of politics prior to 1960).

[119] C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 Tex. L. Rev. 1029, 1036 (1980); *see also, e.g.*, Ely, *supra* note 87, at 80 (claiming even more broadly that the entire "Constitution's more pervasive strategy . . . can be loosely styled a strategy of pluralism"); Ackerman, *supra* note 30, at 719 ("[G]enerations of [scholars] have filled in the picture of pluralist democracy presupposed by *Carolene*'s distinctive argument for minority rights.").

Of course, there are other plausible readings of *Carolene* (especially its second paragraph) as well. My claim is only that the pluralistic reading is a common and intuitive one.

[120] *See, e.g.*, John F. Manley, *Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II*, 77 Am. Pol. Sci. Rev. 368, 368–69 (1983) (contrasting conventional "pluralism I" with more pessimistic "pluralism II").

[121] *See, e.g.*, Arthur F. Bentley, The Process of Government 207 (1967) (noting that "we get a great confusion of the groups" when "hundreds, perhaps thousands, of planes [representing cleavages] are passed through the sphere [representing the public]"); Robert A. Dahl, Pluralist Democracy in the United States 369 (1967); David B. Truman, The Governmental Process: Political Interests and Public Opinion 508 (1951) (discussing the importance of overlapping group membership and changing interest groups in the political arena).

[122] *See, e.g.*, Bentley, *supra* note 121, at 260 (describing government as the process of aligning sets of interest groups); V.O. Key, Jr., Politics, Parties, and Pressure Groups 149 (5th ed. 1964) ("Much public policy emerges from . . . friction, attrition, and agreement among groups."); Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 Am. Pol. Sci. Rev. 376, 390 (1952).

[123] *See, e.g.*, Nelson W. Polsby, Community Power and Political Theory 115 (1963) (describing the pluralist assumption that winning political coalitions will differ across issues and in levels of intensity); Nicholas R. Miller, *Pluralism and Social Choice*, 77 Am. Pol. Sci. Rev. 734, 737 (1983) ("In the absence of a majority preference cluster, political outcomes are brought about by shifting coalitions of smaller clusters."); Ross, *supra* note 118, at 1580.

[124] Robert A. Dahl, A Preface to Democratic Theory 128 (1956).

rule"—the particular combination of groups that manages to prevail on a given matter.[125]

Fourth, minorities usually are protected in a pluralist system because they usually have decent odds of getting (at least some of) their preferred policies enacted. True, there is no guarantee that any group will end up on the winning side of any individual dispute.[126] But, as alliances endlessly come together and then come undone, any group that is willing to engage in "wheeling and dealing," in Ely's phrase, sometimes should find itself in the majority.[127] Why? In part because of sheer chance; in a world of ever-changing issues and cleavages, no group should be a perennial winner or loser.[128] But also because each group controls valuable resources that give it leverage as it negotiates with its counterparts—above all, the votes that are needed to assemble legislative majorities.[129] It is for these reasons that Robert Dahl, a leading pluralist theorist, has claimed that "few groups . . . who are determined to influence the government . . . lack the capacity and opportunity . . . to obtain at least some of their goals."[130]

And fifth, the pluralist safeguards for minorities do not always work. Sometimes a group finds itself losing on issue after issue, unable time and again to break into the majority.[131] Chance alone cannot produce such a dismal record; the flip of the coalitional coin cannot always come out wrong. Persistent defeats also are possible only if a group's preferences are distinctive along several dimensions; otherwise the group's views would overlap with the majority's more often.

---

[125] *Id.*

[126] *See* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1091 (1982) ("The fact that one group is disadvantaged by a particular piece of legislation . . . does not prove that the process has failed to function properly.").

[127] ELY, *supra* note 87, at 151.

[128] *See, e.g.*, Latham, *supra* note 122, at 391 ("Today's losers may be tomorrow's winners."); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1052 (1980).

[129] *See, e.g.*, Ackerman, *supra* note 30, at 720–22; Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1302 (1982) (arguing that groups' votes are "too desirable a plum to leave unplucked").

[130] DAHL, *supra* note 121, at 386; *see also, e.g.*, BENTLEY, *supra* note 121, at 271 (claiming that "[t]he lowest of despised castes . . . will still be found to be a factor in the government"). Dahl also has emphasized the highly complex structure of the American political system, which gives minorities many opportunities to *block* policies they oppose. DAHL, *supra* note 121, at 326. Still another pluralist protection is the crosscutting nature of many cleavages, which encourages majorities to take into account minorities' interests. *See* Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 213 (2012).

[131] *See, e.g.*, ELY, *supra* note 87, at 152 (referring to a minority that is "barred from the pluralist's bazaar"); Cover, *supra* note 129, at 1296 (describing groups that need protection as "perpetual losers of the political arena").

But if a group does hold unusual positions, it can end up a perpetual loser in numerous ways. It might be less skilled than its opponents at the cut and parry of politics.[132] It might be the victim of cleavages that are reinforcing rather than crosscutting.[133] Or it might be faced with other groups that steadfastly refuse to make deals with it.[134] If any of these conditions are present, then the pluralist promise of (at least some) policy success turns out to be hollow.

I doubt that this account of pluralism and group power would strike most equal protection scholars as especially original. It is, in essence, the argument that Ely first laid out a generation ago.[135] But while the story may be familiar, its doctrinal implications are not. Next, I show how pluralist theory, if taken seriously, urges a particular—and quite novel—understanding of the powerlessness factor.

2. Doctrinal Implications

Recall the definition of powerlessness that I outlined above. It is useful to divide it into a series of components. A group is (1) relatively powerless if (2) its aggregate policy preferences (3) are less likely to be enacted (4) than those of similarly sized (5) and classified groups.[136] Each of these elements proceeds logically from the pluralist vision that animates *Carolene*.

Start with the point that a group must be only *relatively* (rather than *absolutely*) powerless in order to have a claim to suspect status.[137] In a pluralist system, a group's likelihood of ending up in a

---

[132] *See, e.g.*, Ackerman, *supra* note 30, at 722–31 (explaining that diffuse and anonymous groups are less effective at promoting their interests); Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. Miami L. Rev. 107, 131 (1990).

[133] *See, e.g.*, Ross, *supra* note 130, at 217 (discussing the possibility of structural political impediments that repeatedly and adversely affect a minority group).

[134] *See, e.g.*, Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L.J. 1006, 1013 (1987) (referring to the "inability of some minorities to form coalitions with other groups"); David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1257.

[135] *See* Ely, *supra* note 87. Ely, however, followed *Carolene*'s lead in focusing on pluralist breakdowns caused by prejudice.

[136] And perhaps a sixth element should be added, for the meaning of *group* itself. By a group I mean a set of people who share a particular characteristic (either objective or subjective), and whose policy preferences have more in common than those of people chosen at random. By this definition, blacks clearly are a cognizable group, but short people probably are not, since despite their shared lack of height their views likely are no more consistent than those of randomly selected individuals. *See* Fiss, *supra* note 34, at 148–49 (advancing a similar definition of a social group).

[137] Most courts and scholars that have considered the matter have agreed that powerlessness should be analyzed in relative rather than absolute terms. *See, e.g.*, Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 329 (D. Conn. 2012); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 441 (Conn. 2008) (holding that plaintiffs in a gay rights case

winning coalition can range from near-zero to near-certain. A group can bargain (or stumble) its way into the majority anywhere from almost never to almost always. Since a group's odds of victory vary along a spectrum, so should any conception of a group's power (or powerlessness). It makes little sense to collapse a continuous variable into a binary one.[138]

A requirement of absolute powerlessness also would be nearly impossible to satisfy.[139] Take a group with distinctive preferences that can neither promote its views effectively nor ally with other groups (such as blacks in the Jim Crow South). Even this kind of group occasionally would see its favored policies enacted, on the uncommon occasions when its preferences overlapped with the majority's. The group might lose on the matters it cared about most, but it would not lose *all* of the time, on every single item. To insist on complete powerlessness thus would be to excise powerlessness from the law.

Second, consider the claim that policy preferences should be analyzed in the aggregate rather than individually. The claim follows from the basic pluralist premise that no group is entitled to prevail on any particular issue—that on any single vote a group may or may not manage to maneuver its way into the majority.[140] If this premise holds, then it is illogical to draw broad inferences about a group's power from any individual win or loss. To conclude that a group is powerless (or powerful), one must take into account the full range of matters over which groups compete—including both live items on the policy agenda *and* settled subjects already incorporated into the status quo.[141] As Eric Posner and Adrian Vermeule have observed, pluralist

---

"need not demonstrate that gay persons are politically powerless in any literal sense of that term"); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 Iowa L. Rev. 1059, 1080 (1974) ("[P]owerlessness or vulnerability is relative.").

[138] An implication of this point is that judicial protection does not need to be all or nothing. Courts could apply sliding-scale scrutiny based on a group's relative powerlessness, intensifying their review the weaker the group is and vice versa. *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–110 (1973) (Marshall, J., dissenting) (advocating a variant of this sliding-scale approach).

[139] *See, e.g.*, *Kerrigan*, 957 A.2d at 444 (explaining that if absolute powerlessness were necessary, then neither blacks nor women would qualify for suspect status); Hutchinson, *supra* note 80, at 998 ("Complete deprivation of political power . . . is a difficult, if not impossible, standard to meet . . . .").

[140] *See supra* note 126 and accompanying text; *see also, e.g.*, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1668 (2014) (Sotomayor, J., dissenting) ("The minority plainly does not have a right to prevail over majority groups in any given political contest."); Jesse H. Choper, Judicial Review and the National Political Process 76 (1980) (dismissing the idea that "each time any group loses any political battle . . . it may lay claim to the label of 'political weakness'").

[141] Settled subjects must be considered because, otherwise, conclusions about group power will be skewed heavily by the agenda's inclusion or exclusion of different issues. *See*

theory "aggregates across a large set of laws and finds a democratic failure only if a persistent minority . . . is repeatedly sacrificed for the benefit of a persistent majority."[142]

Another reason to focus on aggregate preferences is that if a group is granted suspect status due to its powerlessness, the label applies across the board. From then on, *all* laws that discriminate against the group are subject to heightened scrutiny, not just those arising in certain domains. As long as suspectness is a wholesale (rather than retail) designation, then powerlessness should be too.[143]

However, just because all issues should be considered does not mean they all should be considered *equally*. A group may hold preferences that vary widely in intensity.[144] It may care a great deal about one topic, and very little about another. In this situation, it is more beneficial to the group, more conducive to its overall utility, if it prevails on a matter about which it feels strongly than if it wins on a more trivial point. Notably, pluralist theory asserts that groups often trade their support on one item for other groups' backing on other items.[145] This kind of negotiation can arise only if not all issues are created equal, and it implies that preference intensity should be incorporated into powerlessness analysis.[146]

Third, the definition's most vital element is that actual policy enactment be treated as the crux of political power. This element has been implicit throughout the above discussion of pluralism. To speak of winning or losing coalitions is to speak of times when a group did or did not get its preferred policies enacted. Similarly, if the thesis of pluralism is that legislation emerges from the bargaining of different

---

Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 Am. Pol. Sci. Rev. 947, 948–52 (1962) (arguing that agenda control is a crucial second face of power).

[142] Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 Va. L. Rev. 1091, 1130 (2006); *see also, e.g.*, Tushnet, *supra* note 128, at 1052 (arguing that a group can be powerless "[o]nly if 'we-they' distinctions cumulate across issues").

[143] *See, e.g.*, Yoshino, *supra* note 97, at 542 ("[B]ecause heightened scrutiny follows the classification into all contexts, it makes sense to require that [powerlessness] also hold across these contexts.").

[144] I speak here of groups rather than group *members* for the sake of consistency with the rest of the part. Because groups are not monolithic, it also is common that their preferences on certain issues are heterogeneous. The empirical analysis explicitly takes into account this heterogeneity by using the proportion of a group supporting a policy change as the key independent variable. *See infra* Part IV.A.

[145] *See supra* notes 120–25 and accompanying text.

[146] *Cf.* Saul Levmore, *Voting with Intensity*, 53 Stan. L. Rev. 111, 142–61 (2000) (suggesting that voting could be improved if it took into account preference intensity); Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics*, 68 Vand. L. Rev. 441 (2015) (introducing another method, quadratic voting, of taking into account preference intensity in democratic governance).

groups,[147] then the thesis above all is one about policy outcomes. The judgment reached by Nelson Polsby, another prominent pluralist theorist, about the most apt "indices of the power of actors" thus is unsurprising.[148] After considering "(1) who participates in decision-making, (2) who gains and who loses from alternative possible outcomes, and (3) who *prevails* in decision-making," Polsby concluded that "the last of these seems the best way to determine which individuals and groups have 'more' power."[149]

But the odds of policy enactment, taken in their raw form, can be misleading. The fourth element stipulates that, for the odds to be meaningful, the *size* of a group must be controlled for. Why does size matter? One answer is that, as a matter of probability, a larger group is more likely than a smaller one to end up in the majority on any given issue. It simply accounts for more of the votes that are needed to pass a bill. Another answer is bargaining clout. A larger group typically has more leverage than a smaller one because its entry into (or exit from) a coalition is more apt to confer (or remove) policy control. Controlling for size thus is "essential to the responsible elaboration of *Carolene Products*," as Bruce Ackerman has put it.[150] Without doing so, there is no way to know if a group's influence stems from its group identity or its sheer numerosity.

Size, though, is not the only thing that must be kept constant. The fifth and final element states that group *type*—such as race, gender, sexual orientation, income, and so on—also must be held invariant.[151] One reason is that group power is related to group type in complicated ways, so it is only feasible to assess a group's clout relative to another group identified by the same classification. For instance, the

---

[147] *See, e.g.*, Darryl Baskin, *American Pluralism: Theory, Practice, and Ideology*, 32 J. POL. 71, 73 (1970); Latham, *supra* note 122, at 390 ("What may be called public policy is actually the equilibrium reached in the group struggle at any given moment . . . .").

[148] POLSBY, *supra* note 123, at 4.

[149] *Id.* (emphasis added); *see also, e.g.*, Bachrach & Baratz, *supra* note 141, at 948 ("[P]luralists concentrate their attention, not upon the sources of power, but its exercise."); Richard Davies Parker, *The Past of Constitutional Theory—and its Future*, 42 OHIO ST. L.J. 223, 249 (1981) (discussing the pluralist conception of power as the ability to affect outcomes).

[150] Ackerman, *supra* note 30, at 722; *see also, e.g.*, Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1332 (1993); Ross & Li, *supra* note 55 (manuscript at 30) ("[L]egislators should be more concerned about the potential preferences of larger groups than smaller groups."); Yoshino, *supra* note 80, at 1804.

[151] Of course, group type often is socially constructed, and one classification (such as income) may well blur into another (such as education). And to be clear, by "type" or "classification" I mean any characteristic, objective or subjective, that can be used to divide the population into a discrete number of non-overlapping groups. *See also supra* note 136 (defining "group" for present purposes).

power of the bottom income decile sensibly may be compared to that of the top decile, since the groups share the same size (10%) and type (income). But it would be far trickier to compare the bottom decile's power to that of blacks (a similarly sized group). Race and income are very different classifications, so it would be unclear what conclusions to draw from any gaps in influence.

Another reason to control for group type is that people simultaneously can be classified along multiple axes. Each of us has a race, a gender, a sexual orientation, an income, and so on. It thus is impractical to compare the power of groups identified by different classifications because these groups often include many of the same people. To return to the above example, the memberships of the bottom and top income deciles do not overlap (at any given moment). But some people *are* both in the bottom decile and black. This possibility of concurrent membership can be addressed only by keeping group type constant.[152]

Put these pieces together and you have my definition of powerlessness: A group is relatively powerless if, on the whole, its policy preferences are less likely to become law than those of other groups of the same size and type. As this definition is somewhat abstract, I next offer a stylized illustration of how it might be applied to particular groups and policies.

3.   Illustration

Take the category of hair color and make the following assumptions: First, that there are two equally sized groups, blondes and brunettes. Second, that there are two policy domains, guns and butter, which, contrary to every economics textbook, are unrelated to each other.[153] Third, that there are two options per domain, more or less guns and more or less butter.[154] Fourth, that blondes intensely prefer more guns and mildly prefer less butter, and that brunettes mildly prefer more guns and intensely prefer more butter. And fifth, that the actual policy outcomes are more guns and less butter.

Now we are in a position to assess relative group influence. Initially, we see that both of blondes' favored policies were enacted

---

[152] *See* Ackerman, *supra* note 30, at 721 (arguing that "the decisive thought-experiment should involve the comparison" of one group with another group that "contain[s] the same proportion of the population" but "is unencumbered by the bargaining disadvantages" that affect the first group).

[153] *Cf.* GUNS AND BUTTER: THE ECONOMIC CAUSES AND CONSEQUENCES OF CONFLICT (Gregory D. Hess ed., 2009) (linking these domains in the usual economics fashion).

[154] "More" and "less" here refer to one option versus the other, not to how the options relate to the status quo.

(more guns and less butter), compared to only one of brunettes' (more guns). Taking preference intensity into account, the disparity becomes even starker. Blondes prevailed whether or not they felt strongly about a policy. Conversely, brunettes only won on a policy of little value to them (more guns), while losing on the policy they truly cared about (more butter). Accordingly, we would conclude that brunettes are powerless relative to blondes. Despite being equally numerous, their views are less likely to become law, even on the issue that matters to them most.

Of course, groups of the same type seldom have the same population, meaning that controls for size usually must be added to the analysis. There also are many more than two policy domains and many more than two options per domain, making it difficult to ascertain group preferences and policy outcomes.[155] And group members often disagree with one another and differ in the intensity of their views. These internal variations, too, must be incorporated into any estimation of overall group opinion.

Nevertheless, the basic definitional point should be clear now. Pluralism requires a comparison of groups' records of getting their preferred policies enacted. A group is powerless, in pluralist terms, if its record is worse than those of its similarly sized and classified peers. What does this logic mean for the *other* notions of powerlessness that have been suggested by courts and scholars? Below, I comment on their deficiencies from a pluralist perspective.

B. Power Through Other Prisms

To begin with, four common definitions of group influence—numerical size, access to the franchise, descriptive representation, and socioeconomic status[156]—share the same flaw.[157] All of them conceive of power in terms other than actual policy enactment. True, a group's preferences are more *likely* to be converted into law, all else being equal, if the group is large, free to vote, represented by its own members, or affluent. In fact, I previously explained why numerical size is such an important determinant of policy success that the latter can be analyzed properly only by controlling for the former.[158] But neither

---

[155] Furthermore, different policy domains often are linked, and it is hard not to pay more attention to the status quo than to other policy options.

[156] *See supra* Part I (presenting these conceptions of group power).

[157] I do not mean to be too critical of these definitions. They all are *correlated* with actual policy enactment, which is no small thing. They also are consistent with important democratic values such as civic participation, proportional representation, and social egalitarianism. They just are *not* consistent with the particular democratic theory, pluralism, on which *Carolene* is based.

[158] *See supra* note 150 and accompanying text.

numerical size, nor any of the three candidates grouped with it, are *equivalent* to policy success. At best, they are some of its drivers: factors that make it more likely, but not certain, that a group's preferences will be heeded.

Ely has made this point nicely with respect to access to the franchise and descriptive representation. "If voices and votes are all we're talking about . . . other groups may just continue to refuse to deal, and the minority in question may just continue to be outvoted."[159] In other words, a group's odds of passing its preferred policies may be too low even if the group is enfranchised and represented by its own members. A district court in Connecticut has offered a similar rebuttal to the argument that gays are politically powerful because they wield "corporate power" and control "significant sums of money."[160] There is "no authority or evidence demonstrating that this 'corporate power' has effected appreciable socio-economic or political change," and "despite these sums raised, gay men and lesbians are still unable to impact the outcome of legislative processes."[161] Affluence, that is, does not necessarily translate into legislative victory.[162]

The last proposed definition of group influence—the passage of protective legislation[163]—improves substantially on the previous four. It indeed examines what pluralist theory deems the essence of political power, namely actual policy enactment,[164] rather than factors that may or may not lead to it. The drawback of this approach, though, is that it does not cast its net widely enough. It looks only to the passage of *protective* legislation, not to the passage of *all* legislation, protective or otherwise.[165] It thus violates the pluralist tenet that groups' preferences should be considered in the aggregate, not individually, because

---

[159] ELY, *supra* note 87, at 161; *see also, e.g.*, Bradley R. Hogin, *Equal Protection, Democratic Theory, and the Case of the Poor*, 21 RUTGERS L.J. 1, 25 (1989) ("In pluralist democracy, certain groups are politically powerless, even though they have the right to vote . . . ."); Strauss, *supra* note 100, at 154, 159.

[160] Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 331–32 (D. Conn. 2012).

[161] *Id.*

[162] And, to finish off the list, it is obvious that a group can be both numerically large and a perennial loser in the political process (or vice versa). *See, e.g.*, Ball, *supra* note 137, at 1080 ("A group may be small in number but . . . possessed of the power to protect itself."); Strauss, *supra* note 100, at 155 (rejecting the "notion that being a minority renders a group powerless in the political arena simply by virtue of its numbers").

[163] *See supra* notes 73–77 and accompanying text.

[164] *See supra* notes 147–49 and accompanying text.

[165] *See, e.g.*, *Pedersen*, 881 F. Supp. 2d at 331 ("The passage of such legislation suggests only an isolated achievement . . . and is not indicative of . . . political clout . . . ."); Strauss, *supra* note 100, at 156 ("A group can be both politically powerless and have some legislation passed on its behalf.").

no minority is entitled to prevail on any particular matter.[166] It improperly highlights one small corner of the vast issue universe.

To see why this narrow focus is problematic, suppose that a group is unable to secure the enactment of a law banning discrimination against its members. Suppose also that most of the group's *other* policy priorities (on taxes, spending, crime, the environment, and so on) are followed by the legislature. Is it really fair to say that the group is politically powerless? Is it not more accurate to conclude that the group actually is quite influential—just not omnipotent? Conversely, imagine that a group wins the passage of an anti-discrimination law, but loses on almost every other policy item. The group's lone triumph, even on an issue it may care about dearly, cannot possibly transform it into a political powerhouse.

This critique also applies to the more expansive variants of the protective-legislation definition used by some courts: namely, whether a group is able to *prevent* the enactment of laws victimizing it; and whether a group is able, though the political process, to end *societal* discrimination against it.[167] Both of these variants should be commended for broadening the inquiry beyond protective legislation alone. But both remain vulnerable to pluralist attack for not broadening it enough. The policy set of protective *and* antagonistic legislation, relating to de jure *and* societal discrimination, still amounts to only a fraction of all the issues that should be analyzed in assessing group power. It continues to be possible that a group thwarts bills persecuting it and extinguishes societal prejudice against it while losing on all other matters (or vice versa).

A further objection to the existing notions of powerlessness—albeit a doctrinal rather than a theoretical one—is that they are difficult to reconcile with the Court's suspect class designations.[168] Numerical size is a problematic definition because women are a suspect class despite comprising a majority of the population.[169] The right to vote is inadequate because women, racial minorities, and religious groups are all enfranchised, while minors (who are not a suspect class) are not.[170]

---

[166] *See supra* notes 140–43 and accompanying text.

[167] *See supra* notes 76–77 and accompanying text.

[168] They are difficult, rather than impossible, to reconcile because powerlessness is only one of the indicia of suspect status. A group could be powerless but still not a suspect class (or vice versa) depending on which way the other indicia point.

[169] *See* ELY, *supra* note 87, at 164 ("Finally, lest you think I missed it, women have about half the votes, apparently more.").

[170] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (observing that "[m]inors cannot vote and thus might be considered politically powerless to an extreme degree" under a franchise theory).

Descriptive representation fails because blacks are represented roughly proportionately,[171] while the poor (not a suspect class) are sharply underrepresented.[172] Socioeconomic status misfires because Asian Americans[173] and Jews[174] are protected despite their relative affluence, while the poor are unprotected despite being, well, poor. And the passage of protective legislation implies that women, racial minorities, and religious groups (all the beneficiaries of numerous laws) should not be suspect classes.[175]

Of course, it is not a fatal weakness that a proposed definition fails to account fully for current doctrine. Some of the proponents of the above approaches may well *want* to modify the Court's suspect class designations. But if that is their intent, they have not said so explicitly.[176] They also have not acknowledged the sweeping transformations of equal protection law that several of their preferred options would entail—in particular, the potential end of suspect status for blacks and women. In contrast, as I explain later in the Article, my conception of powerlessness would *not* result in such radical change.[177] It would preserve the current position of blacks and women (though it also would support the inclusion of the poor in the ranks of the suspect classes). This greater consistency with existing law is perhaps a minor point in favor of my approach.

This concludes my definitional argument, meaning that I could proceed directly to my empirical analysis of powerlessness. (And readers who are impatient to get to the empirics are encouraged to skip ahead.) But before attempting to quantify powerlessness, I think it is important to try to come to grips with the various issues it impli-

---

[171] *See* Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 834 (2013) (noting that blacks account for 13% of population and 10% of members of Congress).

[172] *See* Ross & Li, *supra* note 55 (manuscript at 4) (noting that only 6% of members of Congress serving from 1999 to 2008 worked in blue-collar jobs).

[173] *See Median Income of People in Constant (2009) Dollars by Sex, Race, and Hispanic Origin: 1990 to 2009*, U.S. CENSUS BUREAU (2012), http://www.census.gov/compendia/statab/2012/tables/12s0701.pdf (showing that median income is higher for Asian Americans than for whites, blacks, or Hispanics).

[174] *See* THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 60 (2008) (showing that 46% of Jewish respondents have an annual income of above $100,000, compared to 18% of the general population).

[175] *See* Hutchinson, *supra* note 80, at 995 ("If the Court used this same standard consistently, it would disqualify all of the existing suspect and quasi-suspect classes as candidates for judicial solicitude."); Strauss, *supra* note 100, at 157 (noting this implication of the Fourteenth Amendment and the Civil Rights Acts of 1868 and 1964).

[176] *But see* United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (arguing that women should not be considered a suspect class because they are not politically powerless).

[177] *See infra* Parts III–IV.

cates.[178] Next, I sort these issues into three categories, involving (1) the causes and levels of group power; (2) the legal place of the powerlessness doctrine; and (3) courts' capacity to implement the doctrine. I do not purport to wrestle these difficult matters to the ground, but I do begin what I hope is a useful exploration of some intriguing and understudied subjects.

C. *Powerlessness in Perspective*

1. *Causes and Levels*

Perhaps the most obvious question raised by the powerlessness factor is whether it matters what the *reason* is for a group's lack of influence. In *Carolene* itself, the Court offered one potential cause of powerlessness: "prejudice against discrete and insular minorities" that prevents them from enjoying sufficient policy success.[179] Scholars subsequently have criticized *Carolene*'s hypothesis, on the ground that discreteness and insularity often contribute to, rather than detract from, a group's clout.[180] They also have proposed several causes of their own. For instance, Ackerman has argued that a group's anonymity and diffuseness typically sap its political strength.[181] Jack Balkin has emphasized the link between resources and power, claiming that it is asset-deprived groups that are most prone to weakness.[182] Bradley Hogin has made a similar point with respect to participation: Groups whose members are less politically engaged may suffer at the bargaining table.[183] And political scientists have

---

[178] These issues also could be framed as objections to my definitional argument, to which I now respond.

[179] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[180] *See, e.g.*, Ackerman, *supra* note 30, at 723; Strauss, *supra* note 134, at 1264 ("[M]embers of discrete and insular groups will in fact exercise greater power than their numbers warrant."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 34 (1985).

[181] *See* Ackerman, *supra* note 30, at 724 ("[G]roups that are 'anonymous and diffuse' . . . are systematically disadvantaged in a pluralist democracy.").

[182] *See* J.M. Balkin, *The Footnote*, 83 Nw. U. L. REV. 275, 309 (1989) (referring to "the most obvious cause of all—disparities in political power caused by differences in economic power").

[183] *See* Hogin, *supra* note 159, at 29 (focusing on groups' "chronic quiescence"). At the edge of the participational spectrum are groups that deliberately choose not to engage at all in the political process (perhaps the Amish in Pennsylvania or certain ultra-Orthodox Jews in Israel). Classic pluralist theory does not contemplate the existence of such groups, and it may be a bit rich for minorities that intentionally exclude themselves from the pluralist fray then to complain that their policy preferences have not been heeded.

explained how party coalitions,[184] leadership positions,[185] and institutional structures[186] may shape power as well.

Carolene can be read to claim that the reason for a group's powerlessness *does* matter—and, indeed, must be "prejudice against discrete and insular minorities."[187] Justice Scalia apparently endorsed this view in a recent concurrence, suggesting that blacks in Michigan are not a suspect class because they neither are insular nor face prejudice from other groups.[188] On the other hand, the powerlessness doctrine itself, in its classic formulation, makes no reference to any causes.[189] And in a 1982 concurrence, Justice Blackmun asserted bluntly, "it never has been suggested that the *reason* for a discrete class's political powerlessness is significant; instead, the *fact* of powerlessness is crucial."[190] So which is it? Does powerlessness always support a designation of suspect status, or only if *Carolene*'s hypothesis is confirmed?

Based on pluralist theory, I think the answer has to be the former. As discussed above, pluralism fails to protect minorities if their aggregate preferences are heeded less often than those of groups of a similar size and type.[191] Under this conception of pluralist failure, the explanation for a group's relative lack of political success is irrelevant. All that matters is that the group in fact loses more often than it should, because the group then is not benefiting from the mechanisms that are supposed to assure it its fair share of legislative wins. To put the point another way, the promise of pluralism is that each group will

---

[184] *See, e.g.*, CHRISTIAN R. GROSE, CONGRESS IN BLACK AND WHITE: RACE AND REPRESENTATION IN WASHINGTON AND AT HOME 55 (2011).

[185] *See, e.g.*, KERRY L. HAYNIE, AFRICAN AMERICAN LEGISLATORS IN THE AMERICAN STATES 75–81 (2001).

[186] *See, e.g.*, Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 155–56 (2002).

Still another possibility is that a group loses more often than its peers because its policy preferences are, on net, ideologically extreme and so far from the midpoint of public opinion. This explanation also is in tension with classic pluralist theory, whose perspective on groups' interests is distinctly transactional and non-ideological. And in its emphasis on the median voter, the explanation seems more consistent with majoritarianism, which is not a theory that can be reconciled with pluralism. *See infra* Part II.C.2.

[187] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[188] *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1645 (2014) (Scalia, J., concurring in the judgment) ("Nor does [the dissent] explain why certain racial minorities in Michigan qualify as insular, meaning that other groups will not form coalitions with them—and, critically, not because of lack of common interests but because of prejudice." (internal quotation marks omitted)).

[189] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (asking whether a group is "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

[190] Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring).

[191] *See supra* Part II.A.

end up in the prevailing coalition as frequently as its similarly sized and classified peers. If a group does *not* end up in the majority as often, no matter what the reason, the promise has not been kept.[192]

True, there is a certain oddity to pledging allegiance to *Carolene*'s theory but not to its text. But the text is tentative rather than sure. "*Nor need we enquire*," wrote the Court, whether its posited cause "*may* be a special condition" that "*tends* seriously to curtail" the usual pluralist safeguards.[193] The text also turns out to be wrong. Ackerman's famous argument that discreteness and insularity usually enhance group power devastated *Carolene*'s hypothesis, and it has not been rehabilitated since.[194] The oddity of ignoring *Carolene*'s text thus pales in comparison to the strangeness of taking it seriously. If powerlessness had to be produced by prejudice against discrete and insular minorities, it very rarely would be found. At the same time, the political weakness that *does* handicap many groups, caused by anonymity, diffuseness, poverty, alienation, and the like, would fail to register on the judicial consciousness.

But for my position on causality to be convincing, it is not just *Carolene*'s hypothesis that must be rejected, but the need for *any* reason for powerlessness. How, then, to respond to Laurence Tribe's well-known hypothetical about burglars—a group that presumably lacks political influence due to its misconduct, but for whom "[s]uspect status is unthinkable"?[195] One tack is to deny the premise. Burglars' preferences as to the crime of burglary routinely may be rebuffed (since the crime exists), but it is entirely unclear how often they find themselves in the winning coalition on *other* matters. We no more can conclude from burglars' loss on the burglary issue that they are powerless, than we can from other groups' inability to pass protec-

---

[192] For scholars making similar arguments, see Ball, *supra* note 137, at 1080 ("What engages judicial protection is a minority's impotence in protecting itself, whether insular or not."); Loffredo, *supra* note 150, at 1335 ("Why should the absence of prejudice end the inquiry into democratic malfunction?"). *Cf.* Thornburg v. Gingles, 478 U.S. 30, 63 (1986) (plurality opinion) (concluding that, in polarization analysis under the Voting Rights Act, "only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters").

[193] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (emphasis added); *see also* Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1098 (1982) (noting that footnote four was "offered not as a settled theorem of government or Court-approved standard of judicial review, but as a starting point for debate").

[194] *See* Ackerman, *supra* note 30; *see also* Farber & Frickey, *supra* note 94, at 699 (describing Ackerman's argument as "an intellectual tour de force").

[195] Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980).

tive legislation.[196] A single defeat does not make a minority a per-
petual victim.

The other answer to the hypothetical is that the sky would not fall
if burglars in fact were deemed powerless. For one thing, powerless-
ness is just one of the indicia of suspect status.[197] None of the other
indicia apply to burglars, meaning that their lack of clout would not
give them a very strong claim to judicial protection. For another, even
if burglars did qualify as a suspect class, the only consequence would
be that policies discriminating against them, such as the one criminal-
izing burglary, would be subject to heightened scrutiny. But there is
little doubt that these policies would survive the more rigorous exami-
nation. In Ely's words, "There is so patently a substantial goal here . . .
and the fit between that goal and the classification is so close, that
whatever suspicion such a classification might . . . engender is allayed
so immediately it doesn't even have time to register."[198]

Now shift gears from the *causes* of group power to its *levels*. It
should be obvious that a group's political influence can vary from one
period or jurisdiction to the next. A group might find itself on the
losing side of too many policy disputes in a given time or place. But, in
another, the group might prevail just as often as we would expect
given its size and type. The question then becomes whether legal find-
ings of powerlessness (with the suspect class designations that, in part,
follow from them) should reflect these fluctuations in clout.

In a 1989 case, the Court hinted that they should.[199] Faced with a
minority set-aside program passed by the majority-black Richmond
City Council, the Court assumed without deciding that "the level of
scrutiny varies according to the ability of different groups to defend
their interests in the representative process."[200] Since blacks con-
trolled this particular city's government, they were not a powerless
group in this location.[201] Conversely, in a 1978 case, the Court sharply
criticized the idea that suspect status should differ temporally or spa-

---

[196] *See supra* notes 163–67 and accompanying text (explaining that the passage of
protective legislation is a faulty notion of group power because it does not consider
aggregate policy preferences).

[197] For a more extended discussion of the other indicia, see *infra* Part II.C.2.

[198] ELY, *supra* note 87, at 154. To put this point in doctrinal terms, the state has a
compelling interest in condemning harmful practices like burglary, as well as in reducing
the actual volume of burglary. A law criminalizing burglary clearly serves the state's
expressive interest in condemnation, and presumably (though it is an empirical question)
serves the state's interest in making burglary rarer too.

[199] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality
opinion).

[200] *Id.*

[201] *See id.* ("Five of the nine seats on the city council are held by blacks."). Similarly,
under the Court's Section 2 doctrine, a group's ability to "elect representatives of [its]

tially. If "judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces," then there is no "consistent application of the Constitution from one generation to the next."[202]

Under pluralist theory, it seems clear that powerlessness analysis should be dynamic. If a group was a perennial loser in another time or place, but is not in *this* one, then there is no clout-based reason for the group to enjoy extra judicial protection. It is navigating the political shoals adeptly on its own, just as pluralism expects it to. Likewise, if a group won its fair share of policy battles under other circumstances, but does not do so *here*, then its claim to suspect status should not be undercut by its erstwhile successes. The pluralist breakdown in this setting should not be overlooked because the pluralist machinery operated smoothly sometime or somewhere else.[203]

The temporal instability implied by this approach does not strike me as problematic. As the Article's empirical sections show, the influence of most groups does *not* change very much over time. In fact, groups recognized as suspect classes decades ago, such as racial minorities and women, remain relatively powerless today.[204] And if they eventually were to develop sufficient sway, then I think it would be appropriate for their privileged legal position to be rethought. They no longer would have the same need for it, despite their past defeats.

I am more concerned, however, about the approach's *spatial* instability. For one thing, it probably is not feasible for courts to make localized determinations of powerlessness—to conclude, say, that blacks have enough influence in North Carolina but not South Carolina, or in Newark but not New York City. For another, in our complex and multilayered system, it is doubtful that power can be assessed coherently at a subnational level. If women are politically ineffective

---

choice," 42 U.S.C. § 1973(b), may vary temporally and spatially as levels of political cohesion and racial polarization fluctuate.

[202] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 2986–99 (1978) (plurality opinion). Other courts also have expressed skepticism about recognizing variations in group power. *See, e.g.*, Wolf v. Walker, 986 F. Supp. 2d 982, 1014 (W.D. Wisc. 2014), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 502 (Conn. 2008) (Borden, J., dissenting) ("No one has ever suggested—nor do I—that, once established, a class entitled to heightened scrutiny protection may subsequently lose that status if its political power grows substantially.").

[203] Other scholars have made similar arguments. *See, e.g.*, Ackerman, *supra* note 30, at 733–34; Eskridge, *supra* note 93, at 2379; Fiss, *supra* note 34, at 155; Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. Tex. L. Rev. 163, 177 (2004) (explaining that pluralist theory "avoid[s] the danger of tagging any group with the status of a permanent victim—or, equally disturbingly, with the status of a permanent preferred group").

[204] *See infra* Parts III–IV.

in Chicago, effective in Illinois, and ineffective again in Washington, D.C., for instance, what is a court to do?[205] For these reasons, my provisional view is that powerlessness should be analyzed with respect to the country as a whole. A group's clout at different governmental levels can and should be taken into account, but a single national answer should be reached at any given time.[206]

So much, then, for the causes and levels of group power. Next, I discuss the second set of issues implicated by the powerlessness factor: namely, how it relates to the other suspect class criteria, to equal protection doctrine in its entirety, and to the democratic theories that underlie constitutional law. All of these issues probe the place of powerlessness in our legal system.[207]

2. Legal Position

Start with the other indicia of suspect status: (1) whether a group has experienced a history of discrimination; (2) whether a group is defined by an immutable characteristic; and (3) whether a group is defined by a trait that typically bears no relation to the group's ability to contribute to society.[208] How is powerlessness linked to these factors? Unfortunately, the Court has never said. Instead, it has applied the criteria in what a lower court politely has described as a "flexible manner,"[209] sometimes addressing and sometimes inexplicably ignoring each element. In Michael Dorf's stronger language, when

---

[205] *See Croson*, 488 U.S. at 553–54 (1989) (Marshall, J., dissenting) (arguing that even if blacks were powerful in Richmond itself, "the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provides an enormous political check" on their influence).

[206] *See* Dean v. District of Columbia, 653 A.2d 307, 351 (D.C. App. 1995) (Ferren, J., concurring in part and dissenting in part) ("[T]he focus on political power . . . has to be national, not local, lest constitutional rights vary from city to city.").

[207] A related question is how the powerlessness doctrine compares to the chief *statutory* protection for minority groups, Section 2 of the Voting Rights Act. A group's political influence plainly is relevant to "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," which is one of the factors that courts consider in Section 2's totality-of-circumstances inquiry. Thornburg v. Gingles, 478 U.S. 30, 37, 45 (1986) (plurality opinion) (quoting S. REP. NO. 97-417, at 28–29 (1982)) (internal quotation marks omitted). But Section 2's key goal is that minorities be able to elect their preferred candidates in sufficient numbers. This variant of descriptive representation is quite different from the pluralistic theory that underpins the powerlessness doctrine.

[208] For examples of courts identifying and then analyzing these criteria, see *Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013), *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425–61 (Conn. 2008), and *Varnum v. Brien*, 763 N.W.2d 862, 886–96 (Iowa 2009).

[209] *Varnum*, 763 N.W.2d at 888.

courts consider whether to dub a group a suspect class, "[t]he embarrassing fact of the matter is that they simply make it up."[210]

If courts were *not* to make it up, one option would be to prioritize powerlessness over the other three factors. As explained earlier, there is a strong pluralist case for conferring heightened protection to a group that loses too often in the political process.[211] This case is not weakened if the group is lucky enough not to have been discriminated against historically, or if its defining trait is mutable or sometimes germane to its societal contributions. Even if the other criteria go unmet, there still has been a pluralist malfunction that requires a judicial response. Following precisely this logic, as Marcy Strauss has noted, "some courts consider political powerlessness to be the ultimate question and view the other factors as subissues."[212]

This is not to say that the other factors would be irrelevant if powerlessness became the one criterion to rule them all. In certain cases, they could help illuminate *why* a group does or does not lack influence. For example, a history of discrimination, like the "prejudice" cited by *Carolene*, is one reason why a group may be less able to bargain effectively with other parties.[213] Similarly, as Jeffrey Roy has argued, immutable traits are more likely to divide society into a set of stable coalitions, one of which then may extract rents at the expense of the others.[214] These kinds of explanations would not be required under a powerlessness-centered approach (since it would be the existence of powerlessness, not its causes, that would be dispositive). But they could add context and texture to the key judicial inquiry.[215]

---

[210] Michael C. Dorf, *Equal Protection Incorporation*, 88 Va. L. Rev. 951, 964 (2002); *see also, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Calif. L. Rev. 481, 503 (2004) (arguing that the suspect class criteria "suffer from both misapplication and theoretical inconsistencies").

[211] *See supra* Part II.A.

[212] Strauss, *supra* note 100, at 153; *see also* Yoshino, *supra* note 97, at 565 ("I propose that the limiting principle [for suspect class designations] should be a refined analysis of political powerlessness.").

[213] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); *see also* Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law 117 (2010) ("[W]hen there is a lot of prejudice, a group probably doesn't have much opportunity to influence legislators . . . .").

[214] *See* Jeffrey A. Roy, Carolene Products: *A Game-Theoretic Approach*, 2002 BYU L. Rev. 53, 87 (explaining that "a trait used for rent seeking" is likely to be "*immutable* in the sense that the memberships of the majority and minority should be subject to little change over time").

[215] This is a good place to note that even if suspect status were based exclusively on powerlessness, the grant of the former would be unlikely to end the latter. Suspect status would mean that laws discriminating against the powerless group are subject to heightened scrutiny. But more radical action, involving legislation rather than litigation, probably

However, there are at least two arguments against ranking powerlessness above the other indicia. First, while there is a strong *pluralist* case for judicial intervention if a group is too politically weak, there is no reason why pluralism has to be the dispositive theory for suspect status designations. The powerlessness factor may be derived from *Carolene*, which in turn may be derived from pluralism—but the other factors flow from theories of their own, which cannot be dismissed simply because they are different. The idea of suspect status also is not tied as closely to *Carolene* as is powerlessness,[216] meaning that the former does not necessarily share the latter's pluralist orientation.

Second, prioritizing powerlessness would entail prioritizing its particular conception of suspect status. But this conception is controversial, and it conflicts with the understanding embodied in some of the other indicia. More specifically, powerlessness and a history of discrimination both apply to particular *groups* and so imply that *classes* should be suspect. But immutability and societal relevance both apply to particular *traits* and so imply that *classifications* should be suspect. The first two indicia suggest that extra judicial attention should be reserved for blacks but not whites, women but not men, gays but not straights, and so on. But the latter two mean that *all* groups defined by race, gender, sexuality, and the like should be protected—the privileged no less than the disadvantaged.[217]

I do not believe this conflict can be papered over. Thinking about suspect status in terms of classes is fundamentally at odds with thinking about it in terms of classifications. Beyond noting the doctrinal discord, though, I would make one further point: The fact that courts continue to employ all four criteria indicates that they have not, as is sometimes supposed,[218] concluded that only classifications can be

---

would be needed to realize the pluralist vision. However, this point also applies to all of the other indicia of suspect status. Suspect status would not end discrimination against a group or make its defining trait less immutable or more societally relevant either. There is a *general* lack of fit between the indicia and the consequences of suspect status.

[216] The Court began using the terminology of suspect status in the 1970s, in cases such as *Rodriguez*, without explicitly linking the concept to *Carolene*. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[217] I am not the first to notice the tension at the heart of the indicia. *See, e.g.*, Goldberg, *supra* note 210, at 504; Ortiz, *supra* note 101, at 732 ("The Court applies both process review and its naughty opposite, substantive review, at the same time."); Yoshino, *supra* note 97, at 563 ("The tension between the class-based view and the classification-based view manifests itself in the standard heightened scrutiny test.").

[218] *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (noting and challenging "the common assumption that, during the Second Reconstruction, the anticlassification principle triumphed").

deemed suspect. There must be something left to the notion of suspect classes if two of the four criteria see the world in terms of groups rather than traits. Plainly, the suspect class approach has lost ground since *Carolene*'s original group-focused formulation.[219] But it is fairer to label the status quo a stalemate than a rout for the suspect classification side.[220]

Essentially the same point holds if the level of generality is raised from the indicia of suspect status to the overarching theories of equal protection. The powerlessness factor is remarkably consistent with the anti-subordination theory, which maintains that courts should scrutinize most closely laws that disproportionately harm subordinated groups.[221] Almost by definition, groups that are politically powerless are politically subordinated too.[222] But the anti-subordination theory is not the dominant account of equal protection law. Instead, it is the anti-differentiation theory, which requires stricter review for laws that distinguish among people on certain grounds, that is ascendant.[223] The anti-differentiation theory, like the suspect classification approach, treats all groups defined by the same trait identically.[224] It thus is irreconcilable with the claim that the powerless, but not the powerful, are entitled to enhanced judicial protection.

Again, then, the continued existence of the powerlessness factor shows that the triumph of anti-differentiation over anti-subordination

---

[219] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (referring to "discrete and insular minorities").

[220] The enormous volume of case law on whether gays are a suspect *class*, *see supra* Part I.A., confirms the continued relevance of the group-focused criteria. So do the Court's repeated analyses of powerlessness even after supposedly endorsing the anti-differentiation theory in the 1970s. *See* cases cited *supra* note 89.

[221] *See* Fiss, *supra* note 34, at 155 (referring jointly to blacks' "perpetual subordination and circumscribed political power" as the reason why they should qualify as a suspect class). *See generally* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

[222] *See* Roy, *supra* note 214, at 78 ("The *Carolene Products* approach ties naturally to an antisubordination theory because it focuses on a group's lack of power in the political process.").

[223] *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1537 (2004) (describing the "conventional understanding" that "the Court embraced anticlassification and repudiated antisubordination"); *see also supra* note 33 (explaining my reasons for labeling this theory "anti-differentiation").

[224] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (advancing "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups").

is incomplete. If it *were* complete, the Court would not tolerate a criterion that sounds so clearly in anti-subordination. Nor is the powerlessness factor the only doctrinal outpost of anti-subordination values. As Reva Siegel has documented, they also persist in the state interest in diversity, which prizes the participation of marginalized groups;[225] in disparate impact law, which upholds facially neutral policies aimed at helping minorities;[226] and in the definition of racial classification, which omits certain benign uses of racial categories.[227] These further manifestations of anti-subordination principles confirm that the powerlessness factor is no outlier, no artifact of a bygone legal era. The factor bears witness, rather, that the struggle over the soul of equal protection still rages.

Now raise the level of generality by one more notch, from the theories of equal protection to the theories of democracy on which much of constitutional law is built. As I have reiterated, the powerlessness factor is rooted in one particular democratic theory: pluralism, the idea that when many groups compete and bargain with one another, no group is excluded permanently from the majority and policy approximating the public interest emerges from the contestation.[228] But pluralism is not the only available democratic theory,[229] and it has endured attacks from many different quarters. So what happens to the powerlessness doctrine if pluralism itself is discredited?

It depends on the critique. Several of the best-known challenges to pluralism accept its normative premise that it would be desirable if similarly sized and classified groups were equally likely to end up in the prevailing coalition. They just allege that this equal likelihood is illusory. For instance, public choice theory contends that concentrated groups enjoy more policy success than diffuse ones, because they are better able to organize effectively and avoid free-rider problems.[230]

---

[225] *See* Siegel, *supra* note 223, at 1539 (explaining that the diversity interest includes "ensuring that no group is excluded from participating in public life and thus relegated to . . . second-class status").

[226] *See id.* at 1541 (observing that "facially neutral, racially allocative state action that benefits subordinate groups is constitutionally permissible").

[227] *See id.* at 1543 (noting that courts uphold "racial data collection . . . without characterizing it as a racial classification subject to the presumption of unconstitutionality").

[228] *See supra* Part II.A.

[229] On the essentially contested nature of democracy, see generally Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004).

[230] *See also* BAUMGARTNER & LEECH, *supra* note 118, at 67 (claiming that with the emergence of public choice theory, "the pluralist perspective was essentially dead"); Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259, 259 (1999) (arguing that public choice theory is most applicable "where there are excellent opportunities to influence agenda setters or to bargain for the formation of winning

Similarly, E.E. Schattschneider has quipped memorably that "[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."[231] Affluent groups, that is, systematically outperform poorer ones. Crucially, if either public choice theory or Schattschneider is correct, the implication is *not* that the powerlessness factor should be discarded. The upshot, instead, is that pluralism breaks down relatively often, and thus that a relatively large number of groups lack sufficient influence. This is a rationale for greater judicial intervention, not for renunciation of the underlying pluralist hope.

On the other hand, other democratic theories amount to rejections of pluralism all the way down. Take the raw majoritarianism that is implicit in the *second* paragraph of *Carolene*'s fourth footnote.[232] If there is such a thing as a consistent majority—and if its preferences deserve to be followed as a normative matter—then the conceptual foundation of the powerlessness doctrine collapses. In a purely majoritarian democracy, minorities are entitled only to lose. Their repeated setbacks are par for the course, not cause for judicial concern.[233] Likewise, consider democratic theories that focus on participation[234] or deliberation.[235] It is irrelevant to them as well if certain groups fail to join the winning coalition with sufficient regularity. Perpetual defeat is perfectly consistent with extensive civic engagement or enlightened public discourse.

---

coalitions"). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (rev. ed. 1971).

[231] SCHATTSCHNEIDER, *supra* note 118, at 35; *see also, e.g.*, William E. Connolly, *The Challenge to Pluralist Theory*, *in* THE BIAS OF PLURALISM 3, 15 (William E. Connolly ed., 1969) ("[T]he pluralist system is significantly biased toward the concerns and priorities of corporate elites.").

[232] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (referring to majoritarianism when describing "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"); Klarman, *supra* note 92, at 781 (explaining that *Carolene*'s second paragraph treats majoritarianism as "the linchpin of our political system").

[233] *See* Ackerman, *supra* note 30, at 719 ("[M]inorities are supposed to lose in a [majoritarian] system—even when they want very much to win . . . ."). Essentially the same point applies to theories focusing on political parties. *See, e.g.*, E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT (1942) (setting forth an approach based on party accountability). If stable and coherent parties exist, then fluid pluralist competition does not.

[234] *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); *see also* Hogin, *supra* note 159, at 29 (noting that participatory democracy "dramatically expands the scope of equal protection review beyond the *Carolene Products* model").

[235] *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984) (arguing that deliberative democracy "is especially at odds with pluralism").

To be sure, these theories contemplate democratic malfunctions of their own. For a majoritarian, the great fear is that the majority's views will not be heeded, perhaps because of problems in the electoral system.[236] For a participatory democrat, public alienation from politics is the *bête noire*.[237] And for a deliberative democrat, policy enacted due to "naked preferences," not public-regarding reasons, is the deepest concern.[238] But the key point here is that even if these malfunctions support judicial involvement, the *kind* of activity they justify bears no resemblance to that entailed by the powerlessness doctrine. A court that intervened to ease the passage of items favored by the majority, to rouse the citizenry from its dormancy, or to strike down poorly reasoned legislation, would be operating in a manner entirely alien to the doctrine. Accordingly, if pluralism is cast aside in favor of another full-blown theory of democracy, the powerlessness factor must be tossed out with it. The factor cannot survive the replacement of the pluralist hope with a different democratic aspiration.[239]

Shifting from the theoretical to the practical, can the factor even survive its judicial implementation? In other words, are courts actually capable of identifying powerless groups and then riding to their rescue? These issues of institutional capacity are the last ones I address in this Part.

3. *Judicial Capacity*

In a series of recent articles, Eskridge,[240] Schacter,[241] and Yoshino[242] all have identified an irony at the core of the powerlessness doctrine. In their view, courts applying the doctrine typically confer suspect status to power*ful* groups and deny it to the truly power*less*.[243]

---

[236] For an argument along these lines, emphasizing the many ways that electoral rules can produce misalignment with the majority's views, see generally Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014).

[237] *See, e.g.*, Hogin, *supra* note 159, at 29 (describing "chronic quiescence" with respect to the political process as an "afflict[ion]").

[238] *See, e.g.*, Sunstein, *supra* note 235, at 1692 (distinguishing "naked preferences" from "public value[s]" as drivers of government action).

[239] In this vein, it is important to note that the popularity of pluralism has declined since its mid-twentieth-century heyday. *See, e.g.*, BAUMGARTNER & LEECH, *supra* note 118, at 87; Ross, *supra* note 118, at 1610. The continuing existence of the powerlessness factor thus puts us in the unusual position of having to develop a doctrine based on a theory that is no longer widely accepted.

[240] *See* Eskridge, *supra* note 54, at 18 ("[I]f a minority group is totally powerless . . . the Equal Protection Clause will not protect that group.").

[241] *See* Schacter, *supra* note 77, at 1399 ("[I]t is strikingly implausible to think that judges . . . can or will stand apart from prevailing public opinion . . . .").

[242] *See* Yoshino, *supra* note 108.

[243] Michael Klarman also has made this point with respect to Supreme Court intervention generally (rather than the powerlessness factor specifically). *See generally*

As Yoshino has put it, "A group must have an immense amount of political power before it will be deemed politically powerless."[244] One explanation for this curious pattern is that judges may be as vulnerable to biases and blind spots as the rest of society. They may be conditioned to respond favorably to the claims of influential groups and to spurn those of pariahs.[245] Another explanation is that courts may be wary of the repercussions of ruling in favor of marginalized minorities. In Eskridge's words, courts that "rile prejudiced majorities . . . risk[ ] a tremendous popular backlash."[246]

One response to this alleged irony is that it is largely beside the point. My main goals in this Article are to define powerlessness in a theoretically sensible way and to measure its levels for different groups. The legal realist claim that courts do not enforce the powerlessness doctrine properly is not particularly relevant to these normative and empirical aims. It demonstrates that courts *are* not following the law, but it says nothing about what courts *should* do, especially if they were given the requisite data.[247]

This response, though, is not very satisfying. *Is* implies *ought*: If courts inevitably ignore the powerless, there is little point to defining powerlessness more precisely and imploring courts to stick to the improved definition.[248] But I do not think there is anything inevitable about it. First, as an institutional matter, courts seem relatively well-suited to implementing the powerlessness doctrine. Their steady stream of cases exposes them to many unpopular litigants, making it plausible that they will be more receptive to these parties' pleas than other governmental actors. At the federal level, judges also have life tenure, and so are more insulated than other actors from the political consequences of their decisions. These characteristics may not make

---

MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

244 Yoshino*, supra* note 108, at 541.

245 *See* ELY, *supra* note 87, at 168 ("Judges tend to belong to the same broad categories as legislators . . . and there isn't any reason to suppose that they are immune to the usual temptations of self-aggrandizing generalization."); Eskridge, *supra* note 54, at 18; Schacter, *supra* note 77, at 1399.

246 Eskridge, *supra* note 54, at 25–26.

247 This also is my response to the claim that the powerlessness factor—and, indeed, all of the suspect class criteria—does not matter very much because courts can reach their preferred outcomes regardless of the level of scrutiny they apply. Even if this claim is correct, it is largely irrelevant to my effort here to get to the bottom of how the powerlessness factor *should* be implemented.

248 This is why Eskridge and Schacter both urge the elimination of the powerlessness factor. *See* Eskridge, *supra* note 54, at 20; Schacter, *supra* note 77, at 1403.

courts attentive to the powerless in any absolute sense, but they at least should yield comparative advantages.[249]

And second, as a factual matter, courts do not always reject the claims of vulnerable groups. The quintessential suspect classes, by most accounts, are blacks and women. As the next two Parts illustrate, both of these groups remain relatively powerless because, controlling for size, their preferences are much less likely to be enacted than those of whites and men.[250] Blacks and women may not lack any influence at all, but this has never been the doctrinal test. Accordingly, the irony spotted by Eskridge, Schacter, and Yoshino evaporates once a theoretically suitable definition of powerlessness is adopted.[251] By providing greater protection to blacks and women, courts have proven that they are willing to grant suspect status to groups that merit it. The courthouse door is not just open to the powerful.

Willingness to protect the powerless, though, is not the only capacity-related issue that must be considered. Courts also must be able to *tell* whether groups lack sufficient influence. That is, they must be able to distinguish between groups that enjoy enough policy success, given their size and type, and groups that do not. And this is not always an easy task. As one lower court has complained, the powerlessness factor "involve[s] a myriad of complex and interrelated considerations of a kind not readily susceptible to judicial fact-finding."[252] Or as David Strauss has written, the factor "requires the Justices to be, in a sense, amateur political scientists. They have to decide just which groups in American politics are able to form coalitions, and how easily."[253]

---

[249] *See* ELY, *supra* note 87, at 103 (arguing that judges are "in a position objectively to assess claims" relating to "majority tyranny"); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 67 (1991) (noting the importance of the "comparative question" of whether courts or other actors are better suited to particular tasks).

[250] *See infra* Parts III–IV.

[251] Not surprisingly, these scholars employ definitions of powerlessness that are more difficult for groups to satisfy, leading to their so-called paradox. *See supra* Part I.B.

[252] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 429 (Conn. 2008); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 297 (1978) (plurality opinion) ("The kind of variable sociological and political analysis necessary to produce such rankings [under the history-of-discrimination factor] simply does not lie within the judicial competence . . . ."); Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) (warning that "unless the Court can precisely define and constitutionally justify both the terms and analysis it uses," the identification of suspect classes will become incoherent).

[253] Strauss, *supra* note 134, at 1265; *see also, e.g.*, Baker, *supra* note 119, at 1051; Powell, *supra* note 126, at 1091 ("One reasonably may doubt the capacity of courts to . . . determine which groups—at a given time and place—operate effectively within our politics."); Schacter, *supra* note 77, at 1392.

This concern cannot be resolved through logical reasoning. Only data can show that powerlessness, as I conceive of it, can be measured and then usefully applied. The balance of the Article, then, is devoted to this demonstration. First, in Part III, I survey the existing political science literature on group influence. Some of it is quite useful (especially the work on the sway of different income strata), but much of it either fails to control for group size or studies representation rather than policy enactment. Next, in Part IV, I carry out my own empirical analysis of powerlessness. Using newly available data at both the federal and state levels, I am able to operationalize the definition I have advanced above.[254] Together, these Parts establish that, while powerlessness is a complex concept, it is not impervious to quantification. It thus cannot be dismissed on grounds of unmanageability.

III
Existing Empirics

The perfect study, for present purposes, would assess the odds of a group's aggregate policy preferences being enacted, while controlling for the group's size and type. A small subset of the literature comes close to this ideal, though only with respect to income. This work finds that the poor are relatively powerless at both the federal and state levels. Unfortunately, most of the relevant studies are lacking in several respects. If they examine policy enactment at all, they tend to consider only a few issues and not to control for group size. More often, they evaluate representation rather than the passage of legislation (though, in this case, sometimes holding size constant).[255] While not fully applicable for these reasons, this work concludes that racial minorities, women, and gays all lack sufficient political influence.

Below, then, I summarize the existing scholarship on group power. I arrange the studies by group type, beginning with classifications already deemed suspicious by the Court (race and gender), proceeding to classifications often urged to be added to the suspect list (sexual orientation and income), and concluding with a pair of additional categories (age and education). For each study, I discuss its key findings while also highlighting its limitations.

---

[254] *See supra* Part II.A.

[255] Another study examines how often different groups of voters cast ballots for losing candidates at all levels of government. *See* Zoltan L. Hajnal, *Who Loses in American Democracy? A Count of Votes Demonstrates the Limited Representation of African Americans*, 103 Am. Pol. Sci. Rev. 37 (2009). It finds that blacks are the group most likely to support losing candidates. *Id.* I do not discuss this approach further because it too deals with an aspect of democracy other than policy enactment.

A.   Race

The most important work on different racial groups' clout has been carried out by John Griffin and Brian Newman. In their book, *Minority Report*,[256] and in a series of studies,[257] they have investigated both the likelihood that racial groups' policy preferences will be enacted and various aspects of racial representation in Congress. While their methods do not allow them to capture my notion of powerlessness, their results are still illuminating.

As to policy enactment, Griffin and Newman used long-running opinion surveys to determine racial groups' views on whether federal spending should increase or decrease in six areas: national defense, the environment, education, foreign aid, aid to major cities, and the space program.[258] They then compared the groups' views to the changes in spending that actually took place.[259] This approach is imperfect because it addresses only a fraction of all federal activity, fails to control for group size, and overlooks the extent to which the status quo already reflects groups' preferences. Nevertheless, it shows that, on the covered issues, blacks and Hispanics' opinions are substantially less likely to be heeded than those of whites.[260] Spending on a given item is more apt to decrease when blacks and Hispanics favor a rise, and more apt to increase when they favor a fall.[261] This is probative (though hardly dispositive) evidence that blacks and Hispanics are relatively powerless.[262]

As to representation, Griffin and Newman measured racial groups' ideologies using another major survey,[263] and the positions of

---

[256] JOHN D. GRIFFIN & BRIAN NEWMAN, MINORITY REPORT: EVALUATING POLITICAL EQUALITY IN AMERICA (2008).

[257] *See* John D. Griffin, *When and Why Minority Legislators Matter*, 17 ANN. REV. POL. SCI. 327 (2014); John D. Griffin & Patrick Flavin, *Racial Differences in Information, Expectations, and Accountability*, 69 J. POL. 220 (2007); John D. Griffin & Michael Keane, *Are African Americans Effectively Represented in Congress?*, 64 POL. RES. Q. 145 (2011); John D. Griffin & Brian Newman, *The Unequal Representation of Latinos and Whites*, 69 J. POL. 1032 (2007).

[258] *See* GRIFFIN & NEWMAN, *supra* note 256, at 63–64.

[259] *Id.* at 64–69.

[260] *See id.* at 64–67 (discussing blacks' policy preferences); *id.* at 67–69 (discussing Hispanics' policy preferences).

[261] *Id.* More specifically, blacks are less likely to be "winners" in four of six areas, and more likely to be "big losers" in three of six areas. Hispanics are less likely to be "winners" in three of six areas, and more likely to be "big losers" in two of six areas. *Id.* at 64–68.

[262] For a study confirming racial minorities' lack of policy success in the very different context of direct democracy, see Hajnal et al., *supra* note 186, at 162–63 (finding that blacks, Hispanics, and Asian Americans all are more likely than whites to end up on the losing side of voter initiatives).

[263] *See* GRIFFIN & NEWMAN, *supra* note 256, at 82–83 (discussing the National Annenberg Election Survey).

members of Congress using roll call votes.[264] They then estimated the members' proximity and responsiveness to their constituents by racial group, controlling for group size.[265] Representation, again, is tied only loosely to enacted policy, and Griffin and Newman's size controls were suboptimal too.[266] Their results, though, consistently indicated that black and Hispanic voters wield less influence over their legislators than do whites. House members and senators are farther ideologically from their minority constituents, irrespective of the racial makeup of their district or state.[267] Similarly, in models including the population shares of minorities, legislators are markedly less responsive to their views.[268] These findings also support (but do not compel) a conclusion of black and Hispanic powerlessness.

Griffin and Newman ran several more analyses of representation in which they made no effort to control for racial group size.[269] Christopher Ellis has done the same in another study.[270] Because these analyses deviate even further from the ideal approach, I note only that they too found that blacks and Hispanics are underrepresented relative to whites, and do not dwell further on their results. (Later in this Part, in the absence of more relevant studies, I pay closer attention to work lacking any size controls.[271])

B.   Gender

Griffin, Newman, and Christina Wolbrecht also have authored the only study on how representation varies by constituents'

---

[264] *See id.* at 81–82 (discussing W-Nominate scores computed using all non-unanimous roll call votes).

[265] *See id.* at 96, 104, 107, 109 (presenting charts and models controlling for group size).

[266] Rather than include group size as an actual control in their proximity analyses, Griffin and Newman calculated proximity separately for districts and states in different racial percentage bands. *See id.* at 96, 104. They also did not include white population share in their senator responsiveness model. *See id.* at 107, tbl.5.4. Their House member responsiveness model, though, did control properly for group size. *See id.* at 108–09.

[267] *See id.* at 96 (showing racial gaps in proximity of five to forty points for districts); *id.* at 104 (showing racial gaps in proximity of four to twelve points for states).

[268] *See id.* at 107 (finding that black and Hispanic opinions have an impact indistinguishable from zero on senators' voting records); *id.* at 109 (finding that white opinion has an impact more than twice as large as black or Hispanic opinion on House members' voting records).

[269] *See id.* at 85 (senator responsiveness model); *id.* at 93 (House member proximity chart); Griffin & Newman, *supra* note 257, at 1039, tbl.2 (House member proximity model); *see also* Griffin & Flavin, *supra* note 257, at 225–26, tbl.2 (House member proximity model).

[270] *See* Christopher Ellis, *Understanding Economic Biases in Representation: Income, Resources, and Policy Representation in the 110th House*, 65 POL. RES. Q. 938, 943–44 (2012) (examining representation gaps for various groups).

[271] *See infra* Part III.E.

gender.[272] As in their racial work, they estimated constituent-legislator proximity using survey responses and roll call votes.[273] In addition, they computed constituents' "win ratio[s]" by comparing their preferences on specific bills to their legislators' votes on the same items.[274] These techniques, once more, bear little relevance to actual policy enactment and do not control explicitly for group size.[275] But they show that women are substantially underrepresented relative to men, in terms of both proximity and win ratios, when their legislators are Republicans or there is a Republican House majority.[276] In contrast, women enjoy a representational *advantage* (albeit a smaller one) when their legislators are Democrats or there is a Democratic House majority.[277] These results suggest that women's political influence is mediated by partisan forces. It waxes when Democrats are ascendant and wanes when Republicans are the dominant party.

Three further studies by Griffin and Newman have presented data on gender representation while focusing on other matters. They found that, relative to men, women are more ideologically distant from their House members[278] and have lower legislative win ratios.[279] These disparities, which do not take party into account, are consistent with the above conclusion that women are sharply underrepresented by Republicans and mildly overrepresented by Democrats. Modest overall shortfalls seem to mask wider partisan variations.

---

[272] John D. Griffin et al., *A Gender Gap in Policy Representation in the U.S. Congress?*, 37 Legis. Stud. Q. 35 (2012).

[273] *See id.* at 44–45.

[274] *Id.* at 44 (emphasis omitted).

[275] Though they do control for it *implicitly* since men and women make up about equal shares of the population. *See id.* at 37 ("[W]e might also want to know whether two groups of relatively equal size are represented equally.").

[276] Specifically, women are 0.083 points farther than men from their House member when represented by a Republican, *id.* at 51, and 0.012 points farther when there is a Republican House majority, *id.* at 50. And women's win ratio is 3.7 points lower than men's when represented by a Republican, *id.* at 50, and 1.45 points lower when there is a Republican House majority, *id.* at 47.

[277] Specifically, women are 0.091 points closer than men to their House member when represented by a Democrat, *id.* at 51, and 0.009 points closer when there is a Democratic House majority, *id.* at 50. And women's win ratio is 1.7 points higher than men's when represented by a Democrat, *id.* at 51, and 0.8 points higher when there is a Democratic House majority, *id.* at 47.

[278] *See* Griffin & Newman, *supra* note 256, at 94 (showing a two-point gap in ideological proximity by gender); Griffin & Newman, *supra* note 257, at 1038 (same).

[279] *See* John D. Griffin & Brian Newman, *Voting Power, Policy Representation, and Disparities in Voting's Rewards*, 75 J. Pol. 52, 57, fig.1 (2013) (showing a win ratio gap by gender of less than one point).

C. Sexual Orientation

Next, gays' policy preferences cannot be ascertained in the same manner as racial minorities' or women's. Their share of the population is too small for their views to be gauged accurately by most surveys, especially at subnational levels. It thus is impossible to compare their opinions directly with actual policy outcomes or legislators' voting records.[280] But it *is* possible, as Jeffrey Lax, Justin Phillips, and Katherine Krimmel have demonstrated, to assess gays' influence in other ways.[281] These scholars used a cutting-edge technique to estimate the entire public's views on various gay rights issues: adoption, marriage, military service, anti-discrimination legislation, and so on.[282] They then paired these views with policy outcomes at the state level and Congress members' votes at the federal level.[283] As a result, they were able to determine how congruent the outcomes and the votes are with public opinion as a whole.

This approach, of course, suffers from both its lack of data on gays' own preferences and its coverage of gay rights issues alone. Nevertheless, it reveals a persistent bias, at both the state and federal levels, in an anti-gay direction. At the state level, most pro-gay policies do not become likely to be adopted until they are backed by more than a majority of the population.[284] In fact, it typically takes close to two-thirds support before half of a suite of pro-gay policies are passed.[285] Similarly, at the federal level, most members of Congress need more than majority support among their constituents before they become willing to cast a pro-gay vote.[286] Of the many instances in which legislators contravened their constituents' preferences, fully

---

[280] This is why sexual orientation is not one of the categories I consider in Part IV.

[281] *See* Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367 (2009); Katherine L. Krimmel et al., Public Opinion and Gay Rights: Do Members of Congress Follow Their Constituents' Preferences? (Mar. 30, 2011) (unpublished manuscript), *available at* http://www.columbia.edu/~jhp2121/workingpapers/kklp_3_30_11.pdf.

[282] This technique is multilevel regression and poststratification (MRP), which allows opinion estimates for geographic subunits to be computed from a single, moderately sized national survey. *See* Lax & Phillips, *supra* note 281, at 371–72; Krimmel et al., *supra* note 281, at 6–7.

[283] *See* Lax & Phillips, *supra* note 281, at 372 (pairing views with state policy outcomes); Krimmel et al., *supra* note 281, at 7–9 (pairing views with Congress members' votes).

[284] *See* Lax & Phillips, *supra* note 281, at 374 (showing logistic regression plots for various policies); Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 156 (2012) (same); *id.* at 154 (showing that gay rights issues have the largest and most conservative incongruence bias of any policy area).

[285] *See* Lax & Phillips, *supra* note 281, at 374 (showing a logistic regression plot for an index of all eight policies).

[286] *See* Krimmel et al., *supra* note 281, at 30 (showing logistic regression plots for various congressional votes).

three-fourths arose due to anti-gay votes when the public favored a pro-gay stance.[287] Consequently, as Lax and Phillips put it, "representative institutions do a poor job protecting [gay] rights even when the public *supports* the pro[-gay] position."[288] This is not quite what I mean by powerlessness, but it is not too far either.

D.   Income

Almost exactly what I mean by powerlessness, though, *has* been captured by several income group studies. The most significant of these is Gilens's 2012 book, *Affluence and Influence*.[289] In it, he compiled answers to more than 2000 survey questions from 1981 to 2006, all asking whether respondents favored certain policy changes at the federal level.[290] The questions spanned a wide range of topics and addressed many sorts of shifts to the status quo, in many sorts of ideological directions.[291] Gilens then used the answers to estimate the preferences of respondents at the tenth, fiftieth, and ninetieth income percentiles on all covered issues.[292] Lastly, he painstakingly tracked whether each policy asked about by a survey actually was adopted by the federal government during the next four years.[293]

This approach is well suited to assessing powerlessness because it examines policy enactment in the aggregate and controls for group size and type.[294] (It is not flawless, though, because the survey questions did not ask respondents about the intensity of their prefer-

---

[287] *See id.* at 13 (finding that only 17% of noncongruent roll-call votes were in the liberal direction).

[288] Lax & Phillips, *supra* note 281, at 383.

[289] GILENS, *supra* note 43. Gilens also addressed these issues, albeit less extensively, in earlier work. *See* Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778 (2005). And he has continued to probe them since publishing *Affluence and Influence*. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014).

[290] *See* GILENS, *supra* note 43, at 57–60.

[291] In Gilens's database, the questions are sorted into the following categories: budget, campaign finance, civil rights, defense, economy and labor, education, environment, foreign policy, government reform, guns, health, immigration, race, religion, social welfare, taxation, terrorism, and welfare. Because the questions all ask about policy *changes*, a group may appear weak if it is largely content with the status quo but prefers a policy that fails to be enacted. On the other hand, such a group may appear strong if it *opposes* a policy that ultimately does not become law. A more sophisticated survey might ignore the status quo and simply ask whether various potential policies are favored. The answers then could be compared with the policies actually in effect.

[292] *See id.* at 61–62.

[293] *See id.* at 62–66.

[294] The group type is income, of course, and each income percentile captures a particular spot in the income distribution, with equal numbers of people located below the tenth percentile and above the ninetieth percentile.

ences.[295]) The method also produces some fairly startling results. With respect to issues on which income groups disagree, federal policy outcomes are highly responsive to the views of respondents at the ninetieth percentile. As their support for a given measure increases, the likelihood of the measure's adoption increases steadily as well.[296] But federal policy outcomes are entirely *non*-responsive to the views of respondents at the tenth or fiftieth percentiles.[297] In Gilens's words, "when preferences between the well-off and the poor [or middle-class] diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor [or middle-class]."[298]

Gilens's findings at the federal level have been extended to the states by Patrick Flavin[299] and Elizabeth Rigby and Gerald Wright.[300] These scholars used survey data to determine income groups' policy preferences in the aggregate, in Flavin's case,[301] and split into economic and social subsets in Rigby and Wright's.[302] They also obtained policy outcome information from databases assembled by Sorens and others (again, in the aggregate, in Flavin's case,[303] and subdivided economically and socially in Rigby and Wright's[304]). Lastly, they ran models with policy outcomes as the dependent variables and income groups' preferences as the key independent variables, controlling explicitly for group size.[305]

This methodology is near optimal from this Article's perspective (though it too does not take preference intensity into account directly). And it shows that the poor have next to no influence over state policy either. In all of Flavin's models, spanning three databases and two eras, the preferences of the low-income group have an impact

---

[295] The questions also often did not provide as much information as one might like about links or tradeoffs with other policies. However, they did take preference intensity into account *indirectly* in that they asked about salient issues more frequently. *See id.* at 58–59.

[296] Specifically, as the share of respondents at the ninetieth percentile favoring a policy rises from 10% to 90%, the odds of the policy's enactment rise from 10% to 50%. *Id.* at 80, fig.3.5.

[297] For respondents at both of these percentiles, the odds of a policy's enactment stay constant at about 30% no matter what share of the respondents support the policy. *Id.*

[298] *Id.* at 81.

[299] *See* Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 Am. Pol. Res. 29 (2012).

[300] *See* Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy? Policy Responsiveness to Poor Versus Rich Constituents in Poor Versus Rich States*, *in* Who Gets Represented 189 (Peter K. Enns & Christopher Wlezien eds., 2011).

[301] *See* Flavin, *supra* note 299, at 35–37.

[302] *See* Rigby & Wright, *supra* note 300, at 194–95.

[303] *See* Flavin, *supra* note 299, at 40, 43.

[304] *See* Rigby & Wright, *supra* note 300, at 195, 199.

[305] *See* Rigby & Wright, *supra* note 300, at 207; Flavin, *supra* note 299, at 41.

indistinguishable from zero on aggregate policy outcomes (compared to significant impacts for middle- and high-income preferences).[306] Similarly, in three out of Rigby and Wright's four models, the views of the low-income group have no effect on state economic or social policy (while middle- and high-income opinions have a substantial effect).[307] These results, in conjunction with Gilens's, are a clear sign that powerlessness can be quantified—and that, if any group is powerless, it is the poor.

Several additional studies have tackled differential *representation* by income group (most notably Larry Bartels's 2008 book, *Unequal Democracy*, which launched this field of inquiry).[308] Their findings are that both House members and senators are more ideologically distant from, and less ideologically responsive to, their low-income constituents.[309] Since this work does not relate directly to policy enactment, I do not discuss it further, except to point out its consistency with the more relevant literature.

E.   Other

Two final classifications, age and education, have not yet been the subjects of full-length treatments, but have been addressed in passing by a number of studies. As to age, Griffin and Newman found that respondents under thirty-five are farther ideologically from their House members than respondents over fifty-five.[310] Similarly, as to education, Ellis, Griffin, and Newman found that respondents with a high school diploma are farther ideologically from their House members, and have lower legislative win ratios, than respondents with a

---

[306] Flavin, *supra* note 299, at 42 tbl.1.

[307] Rigby & Wright, *supra* note 300, at 208–09 tbl.7.5, 213–14 tbl.7.6. The one exception is the model for social policy in 2004, in which the views of the middle-income group have the least influence. *Id.* at 214.

[308] Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age (2008).

[309] *See, e.g.*, *id.* at 259–62; Christopher Ellis, *Social Context and Economic Biases in Representation*, 75 J. Pol. 773, 779 (2013); Ellis, *supra* note 270, at 943; Ross & Li, *supra* note 55 (manuscript at 40–41) (finding no link between the share of poor in a House district and a House member's likelihood of supporting pro-poor legislation); Jesse H. Rhodes & Brian F. Schaffner, Economic Inequality and Representation in the U.S. House: A New Approach Using Population-Level Data 29 fig.7 (Apr. 7, 2013) (unpublished manuscript), *available at* http://people.umass.edu/schaffne/Schaffner.Rhodes.MPSA.2013.pdf; Chris Tausanovitch, Income and Representation in the United States Congress 22 tbl.1 (2011) (unpublished manuscript), *available at* http://www.christausanovitch.com/IncomeRepresentation2013.pdf.

I discuss this work in more detail in Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 Va. L. Rev. 1425, 1468–74 (2015).

[310] *See* Griffin & Newman, *supra* note 256, at 94 (showing an eight-point proximity gap between these groups); Griffin & Newman, *supra* note 257, at 1038 (same).

college degree.[311] Once again, these are analyses of representation rather than enacted policy, which fail to control for group size to boot. But they still imply that the young and the uneducated have less political sway than the old and the educated.

To conclude, then, the existing scholarship on group influence is suggestive but only partially applicable. Substantively, it hints that racial minorities, women, gays, the poor, the young, and the uneducated may be relatively powerless in my sense of the term. But methodologically, none of these intimations can be taken too seriously—except as to the poor—because they arise from studies that are flawed in one respect or another. In the next Part, I try to rectify these shortcomings. I borrow the best available techniques from the income group literature, and then apply them to a host of additional classifications and datasets. The result, in my view, is the strongest proof to date that powerlessness is amenable to measurement and application.

IV

New Empirics

I carry out my empirical analysis at both the federal and state levels.[312] At the federal level, I use Gilens's database of survey responses and policy outcomes, and I largely replicate his work—only for groups defined not just by income, but also by race, gender, and religion. I find that whites' preferences are more likely to be adopted by the national government than blacks' and Hispanics'; that men's views are more impactful than women's; and that all denominations' opinions are about equally influential.

At the state level, I gauge voters' preferences using exit polls from 2000 to 2010, and enacted policy using an index constructed by Sorens. I then run the same models that have gained wide acceptance in the income group literature, including interactions between group opinion and group size as well as additional group size controls. I again find that state policy is more responsive to the views of whites and men, respectively, than to those of racial minorities and women. I also find that state policy is more responsive to the wealthy and the middle-class than to the poor, and to urban and suburban residents than to rural dwellers. But there do not seem to be significant differences in responsiveness by age, education, or religion group.

---

[311] *See* Griffin & Newman, *supra* note 256, at 94 (showing a four-point proximity gap between these groups); Griffin & Newman, *supra* note 257, at 1038 (same); *see also* Ellis, *supra* note 270, at 944 (showing a two-point ideological distance gap and a one-point win ratio gap between these groups).

[312] All regression results are in the Appendix.

That there exist models tailored to measuring powerlessness is evidence of the concept's workability. Still more encouraging, in this regard, is the consistency of the federal and state findings despite their use of completely different data. As a doctrinal matter, the results suggest that racial minorities and women should keep their suspect status because they remain relatively powerless.[313] Analogously, no age or education group appears so weak that heightened judicial protection should be extended to it. But there *is* a strong clout-based case for suspect status for the poor and for rural dwellers, both of whom lack sufficient sway relative to other income and residence groups. And there also is reason to reconsider the extra judicial attention afforded to religious minorities, none of which is particularly impotent.

A.   Federal Level

As noted earlier, Gilens's remarkable database includes information on different income groups' preferences on more than two thousand issues from 1981 to 2006.[314] Gilens used this information, along with records of whether the policies referred to by the surveys in fact were enacted, to conduct his income group analysis.[315] But his database sheds light on more than income groups' views. Each entry also specifies how many respondents of each race, gender, and religion favored the policy, and how many opposed it.[316] These tallies allowed me to compute, for each policy, the level of support of each race, gender, and religion group.[317]

With these estimates in hand, I proceeded to run slightly adapted versions of Gilens's models. Like Gilens, I used as my dependent variable whether a policy was adopted by the federal government during the four years following a survey.[318] Also like Gilens, I examined two groups at a time, considered only issues on which their preferences diverged by at least ten percentage points, and was unable to adjust

---

[313] Though, as explained later, the case for blacks remaining a suspect class is stronger than the case for Hispanics. *See infra* Part IV.C.

[314] *See supra* notes 289–98 and accompanying text.

[315] *See* GILENS, *supra* note 43, at 60–61.

[316] Gilens's database is on file with the author. Each entry also states how many respondents answered "don't know." I omit these responses from my analysis. The database further breaks down respondents by region of the country and by union membership. Because these are not classifications that have been urged to be made suspect, I do not consider them further.

[317] I simply divided the number of each group's respondents favoring a given policy by the total number of the group's respondents favoring or opposing the policy. For example, if 300 blacks favored a particular policy and 200 opposed it, black support for the policy was 60%.

[318] *See* GILENS, *supra* note 43, at 73–77. In sum, about one-third of the policies in the database were enacted in this timeframe. *See id.* at 62–63.

for preference intensity.[319] But, unlike Gilens, I controlled explicitly for group size in all of my models.[320] For each group, I included an interaction term multiplying its support level by its share of the population, as well as its population share separately.[321] This is the approach recommended by Flavin,[322] Rigby and Wright,[323] and several other political scientists.[324] It weights each group's preferences by its size, while leaving open the possibility that group size may have an independent effect on policy enactment. It thus permits very nearly my conception of powerlessness to be quantified.

---

[319] *See id.* at 77–85. Only two groups at a time can be examined since it is the groups' opinion differences that determine which issues will be included in the analysis in the first place. And Gilens's rationale for focusing on issues on which groups disagree is that, otherwise, a group may appear influential simply because it agrees with the group that actually shapes policy. *See id.* at 78. Under my conception of group power, it arguably is irrelevant that a group's preferences may have been heeded only because they overlapped with those of another group. *See supra* Part II.A. Nevertheless, I adopt Gilens's approach here for the sake of comparability with his landmark work. It also makes little substantive difference whether only issues on which groups disagree, or *all* issues, are included in the analysis. Either way the results for different groups' clout are extremely similar.

[320] As noted earlier, Gilens controlled implicitly for group size. *See supra* note 294. Gilens's database also did not include population share information for any groups.

I obtained data on race from *Population Estimates*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/intercensal/national/nat2010.html (last visited June 7, 2015), and Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* (U.S. Census Bureau Population Division, Working Paper No. 56, 2002), *available at* http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf; data on gender from *Population Estimates*, *supra*, and FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 49–67 (2002), https://www.census.gov/prod/2002pubs/censr-4.pdf; and data on religion from *Subject Index*, GEN. SOC. SURVEY, http://www3.norc.org/GSS+Website/Browse+GSS+Variables/Subject+Index/ (last visited June 7, 2015) (follow hyperlinks to "R," "Religion," "R's Religious Preference. . .", "Respondent (current)," "RS RELIGIOUS PREFERENCE," and "Click here to see Trends for RELIG"). Of course, these controls only capture *temporal* variation in group size, which is substantial but not overwhelming over the twenty-five year period in question.

[321] More formally, each model I ran was a logit regression of the form: $P = \beta_0 + \beta_1 (\pi_{g1}\sigma_{g1}) + \beta_2 (\pi_{g2}\sigma_{g2}) + \beta_3\sigma_{g1} + \beta_4\sigma_{g2} + \varepsilon$. P indicates whether each policy was enacted within four years of the survey that asked about it, π is a group's level of support for a policy, and σ is a group's share of the population. It also would be reasonable to include group preference (that is, π) separately in the model. However, the existing literature has not done so, *see* sources cited *infra* note 324, and I do not either for the sake of comparability. But in results not reported here, I find that it makes little substantive difference whether group preference is included separately in the specification.

[322] *See* Flavin, *supra* note 299, at 41 (specifying the same models as those used here).

[323] *See* Rigby & Wright, *supra* note 300, at 207 (specifying the same models as those used here).

[324] *See, e.g.*, Yosef Bhatti & Robert S. Erikson, *How Poorly Are the Poor Represented in the U.S. Senate?* (specifying the same models as those used here and explaining that groups' population shares must be included separately in models to avoid odd results), *in* WHO GETS REPRESENTED, *supra* note 300, at 223, 230; Tausanovitch, *supra* note 309, at 11 (specifying the same models as those used here).

Beginning with race, I ran separate models for whites and blacks, and whites and Hispanics. (There were too few Asian American respondents in most surveys for their views to be determined accurately.[325]) In the white and black model, first, the coefficient for white policy support (weighted by white population share) is positive and statistically significant.[326] This indicates that, as white support for a policy increases, the odds of the policy's enactment increase as well. On the other hand, the coefficient for black policy support (weighted by black population share) is negative and statistically indistinguishable from zero.[327] This means that, as black support for a policy rises, the likelihood of the policy's adoption stays constant at best, and in fact may decline somewhat.

These results are illustrated graphically in Figure 1's first panel. The chart shows how the odds of policy enactment change as white support and black support for a policy vary from 0% to 100%, holding all other variables at their means.[328] As white support increases from 0% to 100%, the likelihood of adoption increases from about 10% to about 60%. As black support rises from 0% to 100%, though, the odds of enactment *fall* from roughly 40% to roughly 30%. Federal policy outcomes thus are highly responsive to the preferences of whites, but wholly non-responsive (or even negatively responsive) to those of blacks.

The white and Hispanic model yields similar outputs. Again, the coefficient for size-weighted white policy support is positive and statistically significant.[329] And again, the coefficient for size-weighted Hispanic policy support is statistically indistinguishable from zero.[330] As shown in Figure 1's second panel, the odds of policy enactment increase from about 10% to about 55% as white support rises from

---

[325] The median survey included only 10 Asian American respondents, compared to 862 whites, 105 blacks, and 55 Hispanics.

[326] *See infra* Table 1. I only discuss the coefficients for size-weighted policy support because the coefficients for group size, which represent its impact on the likelihood of policy adoption *when group policy support is zero*, are not substantively interesting. *Cf.* Bear F. Braumoeller, *Hypothesis Testing and Multiplicative Interaction Terms*, 58 Int'l Org. 807, 807–11 (2004) (noting the difficulty of interpreting lower-order coefficients in a model with an interaction term).

[327] *See infra* Table 1. The coefficient actually is significant at the 10% level, but I use the customary 5% threshold here. A Wald test confirms that the coefficients for white and black policy support are different (p=0.01).

[328] It is not possible to produce this chart with *size-weighted* policy support (i.e., the interaction term in the models) on the x-axis. This is because group size cannot be held constant at its mean as size-weighted policy support varies. Group size obviously is *part* of the interaction term.

[329] *See infra* Table 1.

[330] *See infra* Table 1. However, a Wald test fails to reject the hypothesis that the coefficients for white and Hispanic policy support are different (p=0.45).

0% to 100%. But the likelihood of adoption holds steady at roughly 30% as Hispanic support varies over the same range. Hispanics therefore have little sway over federal policy either, in contrast to the considerable influence enjoyed by whites.

Second, for gender, I ran a single model for men and women. The coefficient for size-weighted male policy support is positive and statistically significant.[331] Conversely, the coefficient for size-weighted female policy support is *negative* and significant.[332] The inference that federal policy is positively responsive to men's preferences, but negatively responsive to women's, is confirmed by Figure 1's third panel. As male support increases from 0% to 100%, the odds of policy enactment rise from about 0% to about 90%. But as female support varies over the same range, the likelihood of adoption falls from roughly 80% to roughly 10%. When men and women disagree, then, stronger female backing for a policy seems entirely futile.

Third, for religion, I ran separate models for Protestants and Catholics, and Protestants and non-religious people. (Many surveys also identified Jewish respondents, but their numbers usually were too small for their opinion estimates to be reliable.[333]) In the Protestant and Catholic model, there are few cases in which the groups' preferences diverge by more than ten points,[334] and neither coefficient for size-weighted policy support is statistically significant.[335] Not surprisingly, Figure 1's fourth panel paints a blurry picture too. The odds of policy enactment barely budge as Protestant support increases from 0% to 100%, and they decline as Catholic support varies over the same range. At least over this small set of cases, neither denomination appears especially influential.

Nor, over a somewhat larger sample size,[336] do Protestants or non-religious people. In the model for these groups, neither coefficient for size-weighted policy support rises to the level of statistical

---

[331] *See infra* Table 1. Female population share is omitted from the model because it is perfectly collinear with male population share.

[332] *See infra* Table 1. A Wald test confirms that the coefficients for male and female policy support are different (p=0.00).

[333] The median survey included only 9 Jewish respondents, compared to 283 Protestants, 134 Catholics, and 30 non-religious people.

[334] Specifically, there are 46 such cases out of the 903 surveys that include information on both Protestants' and Catholics' preferences. *See infra* Table 1. The regression results in the Appendix provide the sample size for each model.

[335] *See infra* Table 1. Predictably, a Wald test fails to reject the hypothesis that the coefficients for Protestant and Catholic policy support are different (p=0.44).

[336] There are 297 cases in which Protestants' and non-religious people's views diverge by at least ten points. *See infra* Table 1.

FIGURE 1. PREDICTED LIKELIHOOD OF FEDERAL POLICY CHANGE
VERSUS GROUP SUPPORT FOR POLICY CHANGE
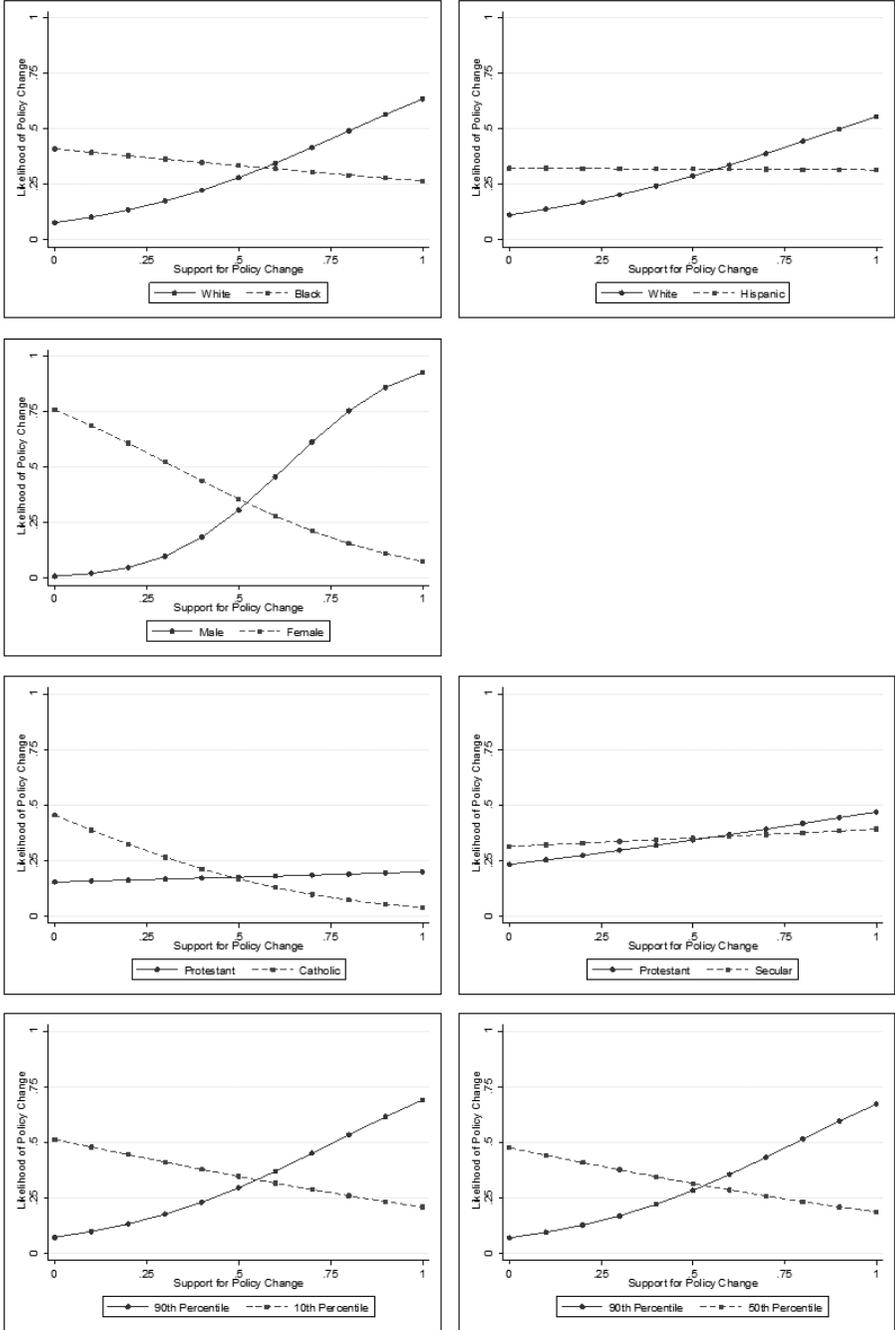
significance.[337] Similarly, in Figure 1's fifth panel, the likelihood of policy adoption increases only modestly, from about 25% to about 45%, as Protestant support rises from 0% to 100%. And the odds of enactment are even less responsive to non-religious people's views, increasing from roughly 30% to roughly 40% as their support varies over the same range.

Lastly, I updated Gilens's income group analysis by including surveys up to 2006 (rather than 2002).[338] Like Gilens, I did not control explicitly for group size, since each income percentile is always at the same spot in the distribution.[339] And like Gilens, I ran separate models for the tenth and ninetieth income percentiles, and the fiftieth and ninetieth income percentiles.[340] In the first of these models, the coefficient for policy support at the ninetieth percentile is positive and statistically significant, while the coefficient for policy support at the tenth percentile is negative and significant.[341] Consistent with this finding, Figure 1's sixth panel shows that, as support at the ninetieth percentile increases from 0% to 100%, the odds of policy enactment rise from about 10% to about 70%. But as support at the tenth percentile varies over the same range, the likelihood falls from roughly 50% to roughly 20%.

The results of the model for the fiftieth and ninetieth income percentiles are largely equivalent. The coefficient for policy support at the ninetieth percentile again is positive and statistically significant.[342] This time, though, the coefficient for policy support at the fiftieth percentile is negative, but just below the threshold for statistical significance.[343] In Figure 1's seventh panel, the odds of policy enactment increase from about 10% to about 70% as support at the ninetieth percentile rises from 0% to 100%. But the likelihood declines from roughly 50% to roughly 20% as support at the fiftieth percentile varies over the same range. This chart is virtually identical to the one for the tenth and ninetieth income percentiles.[344]

---

[337] *See infra* Table 1. Again, a Wald test fails to reject the hypothesis that the coefficients for Protestant and secular policy support are different (p=0.85).

[338] *See* GILENS, *supra* note 43, at 255 (including only surveys up to 2002 in income group analysis).

[339] *See supra* notes 294, 320, and accompanying text.

[340] *See* GILENS, *supra* note 43, at 254–55.

[341] *See infra* Table 1. A Wald test confirms that the coefficients for tenth and ninetieth percentile policy support are different (p=0.00).

[342] *See infra* Table 1.

[343] It is significant at the 10% level but not at the 5% level. *See infra* Table 1. Again, a Wald test confirms that the coefficients for fiftieth and ninetieth percentile policy support are different (p=0.00).

[344] In Gilens's analogous charts, federal policy appears *non*-responsive rather than *negatively* responsive to the preferences of the tenth and fiftieth income percentiles. *See*

Gilens's database, then, is extremely useful because it allows group power to be assessed at the federal level, considering policy in the aggregate and controlling for group size and type. But the federal level is not the only one in our complicated system. It remains possible that a group that is powerless as to national policy wields significant influence as to state policy, or vice versa. And how a group fares as to state policy matters legally. If an overarching determination of powerlessness is to be made for each group, taking into account clout at each governmental level, then the states cannot be ignored.[345] This is why I turn to them next.

B.   *State Level*

In the last few years, scholars have deployed a new technique to estimate public opinion in the states using national surveys.[346] Unfortunately, this procedure has been carried out for fewer than fifty individual issues, compared to the more than two thousand in Gilens's database.[347] Also regrettably, the procedure has been used primarily to determine the views of state populations in their entirety.[348] The opinions of state *subgroups* rarely have been calculated—and, indeed, usually cannot be calculated because of the relatively small sample sizes of most national surveys.[349] It thus is impossible, at present, to

---

GILENS, *supra* note 43, at 80. The likely explanation for the disparity is that Gilens did not hold all other variables at their means as he varied each group's policy support. Instead, he simply plotted predicted probability of policy change versus percent favoring change for each group. *See id.*

[345] *See supra* notes 205–06 and accompanying text.

[346] This technique, again, is MRP. *See supra* note 282 and accompanying text; *see also, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County, 102 CALIF. L. REV. 1123, 1156–59 (2014); Chris Tausanovitch & Christopher Warshaw, *Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities*, 75 J. POL. 330, 333–36 (2013).

[347] *See* Lax & Phillips, *supra* note 284, at 150, 154 tbl.2 (estimating state public opinion on thirty-nine policies in the largest study of its kind).

[348] The procedure also has been used to determine the views of district and city populations, again in their entirety. *See* Krimmel et al., *supra* note 281, at 6 (congressional districts); Tausanovitch & Warshaw, *supra* note 346, at 334 (cities and districts). *But see* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After* Shelby County, 115 COLUM. L. REV. (forthcoming 2015) (manuscript at 51, 55–56), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414652 (calculating ideal points for *white, black, Hispanic, and Asian* respondents by county); Elmendorf & Spencer, *supra* note 346, at 1160–63 (calculating levels of anti-black stereotyping for *non-black* respondents by state and county).

[349] Even scholars who have had access to very large national surveys typically have collapsed respondents' individual answers into a single left-right ideological dimension. *See, e.g.*, Tausanovitch & Warshaw, *supra* note 346, at 332.

repeat Gilens's analysis at the state level. The necessary data on sub-groups' preferences by issue simply does not exist.

In the absence of issue-specific data, I obtained access to the general election exit polls collected by the Roper Center for Public Opinion Research.[350] These polls are conducted in most states every two years, and they have a number of properties that make them well-suited to the estimation of subgroups' views. First, their collective sample size is enormous. The 208 polls that I used for this study, spanning the 2000–2010 period, had a total of more than 300,000 respondents.[351] Second, unlike most national surveys, exit polls are designed to have representative samples at the state level.[352] Their whole point, after all, is to appraise accurately the states' respective political environments. Third, all of the exit polls in this period asked respondents about their ideologies. Specifically, they posed the question, "On most political matters, do you consider yourself: Liberal, Moderate, or Conservative?" This question is not as fine-grained as one might like,[353] but its ubiquity compensates for its bluntness. And fourth, by probing general beliefs rather than individual policies, the polls largely avoided the problem of preference intensity. While it is reasonable (though not yet feasible) to weight *issues* by how much respondents

---

[350] Exit Poll Database, *supra* note 45. My thanks to the Roper Center for granting me access to these polls. I did not use primary exit polls because their respondents are representative of the *primary* rather than the *general* electorate. And I did not use national election day exit polls because their respondents are representative of the country as a whole, not of individual states. Moreover, the national exit poll is compiled from respondents to the state exit polls, so using it would have meant double-counting these people.

[351] *Cf.* Barbara Norrander & Sylvia Manzano, *Minority Group Opinion in the U.S. States*, 10 STATE POL. & POL'Y Q. 446, 452 (2010) (assembling a database of more than 300,000 respondents using 1996–2006 exit polls); Julianna Pacheco, *Using National Surveys to Measure Dynamic U.S. State Public Opinion: A Guideline for Scholars and an Application*, 11 STATE POL. & POL'Y Q. 415, 430 (2011) ("State exit polls overcome the measurement challenges of national surveys by . . . typically interviewing hundreds of state residents, regardless of state size . . . .").

Norrander graciously provided me with equivalent data from the 1996–2008 period. Using it in all of my models instead of the 2000–2010 data made essentially no substantive difference. The robustness of the results to data from different (albeit overlapping) periods is highly encouraging.

[352] *See* Norrander & Manzano, *supra* note 351, at 453–54 (discussing the elaborate procedures used to ensure the representativeness of state exit polls' respondents). Norrander and Manzano criticize Griffin and Newman for estimating state subgroups' views using national surveys whose state samples likely were unrepresentative. *See id.* at 452. They also argue that the disaggregation of exit poll data is superior to the application of MRP to national surveys, due in part to the greater sensitivity of the former approach to differences among states. *See id.* at 452–53.

[353] In contrast, the National Annenberg Election Survey used a five-point ideology scale, *see* GRIFFIN & NEWMAN, *supra* note 256, at 41, and the American National Election Study used a seven-point scale, *see* Bhatti & Erikson, *supra* note 324, at 226.

care about them,[354] it would seem to violate basic egalitarian norms to weight *people* differently based on the strength of their ideologies.

After amassing this vast pool of exit poll respondents, I computed their average ideologies by state and then by subgroup.[355] Following the lead of other scholars, I assigned values of 1 to "Liberal" answers, 0 to "Moderate" answers, and -1 to "Conservative" answers.[356] For classifications, I used both the four that I covered in my federal analysis (race, gender, religion, and income) and three additional ones (age, education, and residence).[357] While other works have estimated racial and income group ideology by state,[358] this is the first study to tackle the remaining categories.

With respect to enacted policy, information *does* exist on each state's laws on a host of topics. The database compiled by Sorens, in particular, lists each state's policy in more than 200 areas (updated biannually to boot).[359] This material is overkill for present purposes, since equally detailed public opinion data is unavailable. Fortunately, though, Sorens used principal components analysis to collapse all of the individual policies into a single index of state policy liberalism.[360] Positive scores on this measure indicate state policy that is more liberal overall, while negative scores denote the opposite.[361] The measure also correlates highly with indices of aggregate state policy

---

[354] *See supra* notes 144–46 and accompanying text.

[355] As recommended both by scholars and by the organization conducting the polls, I incorporated the respondents' weights into all of my calculations. *See* Norrander & Manzano, *supra* note 351, at 478 n.3. I also derived subgroups' population shares directly from the exit poll data. This means the shares represent subgroups' proportions of the *electorate* rather than the *general population*. *See id.* at 455.

[356] *See* Bhatti & Erikson, *supra* note 324, at 236; Norrander & Manzano, *supra* note 351, at 454. These scholars actually assigned values of -1 to "Liberal" answers and 1 to "Conservative" answers, but I reversed the signs in order to obtain the same ideological orientation as the Sorens index of state policy liberalism.

[357] Gilens's database does not include residence data, and its age and education data is not interpretable without access to the original surveys.

[358] *See supra* Parts III.A, III.D (discussing the relevant literature).

[359] Sorens Database, *supra* note 46 (covering 222 policy areas); *see also* Jason Sorens et al., *U.S. State and Local Public Policies in 2006: A New Database*, 8 STATE POL. & POL'Y Q. 309, 311–17 (2008) (describing the compilation of the database).

[360] *See* Sorens et al., *supra* note 359, at 319–21. They also created a measure of state policy *urbanism*, which I do not consider further because its substantive meaning is unclear, *see id.* at 322, 324, and because it correlates poorly with other scholars' indices. In addition, I use each state's *average* policy liberalism over the entire 2000–2010 period covered by the database. *See* Sorens Database, *supra* note 46.

[361] *See id.* Average scores over the 2000–2010 period range from -6.4 (Wyoming) to 12.8 (California), with a mean of 0.0 (roughly Oregon).

created by other scholars.[362] I thus felt comfortable making it the dependent variable in all of my state-level models.

In these models, I used exactly the same specification as Flavin, Rigby and Wright, and several other political scientists.[363] That is, I interacted each subgroup's average ideology with its share of the population, while also including population share separately so as to allow it to influence policy liberalism independently.[364] Unlike in my federal analysis, though, I ran a single model for each *classification* rather than for each *subgroup pair*, and I considered *all* cases rather than just those where subgroups' ideologies diverged.[365] I did so in part for the sake of consistency with the existing literature,[366] and in part to avoid discarding valuable data. With a universe of just fifty states, validity concerns would mount if numerous jurisdictions were excluded. The consequence of these choices is a bias against findings of statistical significance. As Ellis and Joseph Ura have noted, standard errors tend to be inflated when policy models include subgroups with similar ideologies.[367] Accordingly, any significant findings that *do* emerge should be seen as relatively robust.

Beginning with the model for race, the coefficient for white ideology (weighted by white population share) is positive and statistically

---

[362] *See* Sorens et al., *supra* note 359, at 320 (noting correlations of 0.81 and -0.76 with other scholars' indices); *see also* Devin Caughey & Christopher Warshaw, *Dynamic Representation in the American States, 1960–2012*, at 18 fig.2 (MIT Political Science Department, Research Paper No. 2014-22, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455441 (noting a correlation of 0.84 between their index and that of Sorens et al.).

[363] *See supra* notes 322–24 and accompanying text (describing this specification).

[364] More formally, each model I ran was an OLS regression of the form: $L = \beta_0 + \beta_1 (\pi_{g1}\sigma_{g1}) + \beta_2 (\pi_{g2}\sigma_{g2}) + \ldots + \beta_n (\pi_{gn}\sigma_{gn}) + \beta_{n+1}\sigma_{g1} + \beta_{n+2}\sigma_{g2} + \ldots + \beta_{2n}\sigma_{gn} + \varepsilon$. L is a state's overall policy liberalism, π is a subgroup's average ideology, and σ is a subgroup's share of the electorate. As in the federal analysis, it also would be reasonable to include subgroup ideology (that is, π) separately in the model. But, as before, the existing literature has not done so, and doing so makes little substantive difference.

[365] *See supra* note 319 and accompanying text (describing the methods used in the federal analysis).

[366] Notably, neither Flavin nor Rigby and Wright omitted states where different income groups' views were too similar. These scholars also considered all income groups together, not in pairs. *See* Flavin, *supra* note 299, at 42 tbl.1; Rigby & Wright, *supra* note 300, at 208–09 tbl.7.5, 213–14 tbl.7.6.

[367] Joseph Daniel Ura & Christopher R. Ellis, *Income, Preferences, and the Dynamics of Policy Responsiveness*, 4 PS: POL. SCI. & POL. 785, 790 (2008) ("[S]tandard errors become inflated when . . . correlated series are included as predictors simultaneously . . . ."); *see also* GILENS, *supra* note 43, at 253; Bhatti & Erikson, *supra* note 324, at 235 (explaining that when groups' ideologies are "more internally correlated," "[t]his results in higher multicollinearity and thus higher standard errors"). Because of the similar ideologies of many of the subgroups (and because of their sheer number), I do not report Wald tests in this Part.

significant.[368] This indicates that, as whites become more liberal from one state to another, overall state policy also becomes more liberal. On the other hand, the coefficient for black ideology (weighted by black population share) is statistically indistinguishable from zero.[369] This means that, as blacks become more liberal from one state to another, overall state policy does not change appreciably. The coefficient for size-weighted Hispanic ideology is positive and statistically significant as well.[370] As Hispanics become more liberal from state to state, overall state policy does so too.

Figure 2's first panel provides more information on responsiveness by racial group. The chart shows how state policy liberalism changes as white ideology, black ideology, and Hispanic ideology vary from the tenth to the ninetieth percentiles of their respective distributions, holding all other variables at their means.[371] As white ideology shifts over this range, state policy liberalism is highly responsive, going from about -4 (or roughly Alabama's policy set) to about 4 (or roughly Michigan's). But as black ideology varies over this span, state policy liberalism moves only from about -1 (or roughly Alaska's policy set) to about 1 (or roughly Ohio's). And as Hispanic ideology goes from its tenth to its ninetieth percentile, state policy liberalism changes only from about -2 (or roughly Louisiana's policy set) to about 2 (or roughly Maine's).

Second, in the model for gender, the coefficient for size-weighted male ideology is positive and statistically significant.[372] Conversely, the coefficient for size-weighted female ideology is negative and statistically indistinguishable from zero.[373] The inference that state policy is

---

[368] *See infra* Table 2. As in the federal analysis, I omitted Asian Americans because their numbers were too small for reliable ideology estimates to be produced. The median number of Asian American respondents per state was just 48, compared to 4673 for whites, 392 for blacks, and 136 for Hispanics. Also as in the federal analysis, I only discuss the coefficients for size-weighted ideology because the coefficients for group size, which represent its impact on state policy liberalism *when group ideology is perfectly moderate*, are not substantively interesting. *See supra* note 326.

[369] *See infra* Table 2.

[370] *See infra* Table 2.

[371] I use ideology *percentile* as the x-axis here, rather than ideology *itself*, to avoid having to make large numbers of out-of-sample predictions. In the federal analysis, most subgroups' levels of support for individual policies ranged from near 0% to near 100%. As a result, no heroic assumptions were necessary to estimate the likelihood of policy change for all levels of policy support. Here, on the other hand, most subgroups' ideologies vary from state to state by at most 0.5 points on a 2-point scale. Predictions of state policy liberalism for ideologies that subgroups never actually hold thus would be highly unreliable. *Cf.* GRIFFIN & NEWMAN, *supra* note 256, at 87 fig.5.2 (displaying the predicted W-Nominate scores for racial groups' twenty-fifth and seventy-fifth ideology percentiles).

[372] *See infra* Table 2.

[373] *See infra* Table 2.

responsive only to men's preferences is verified by Figure 2's second panel. As male ideology varies from its tenth to its ninetieth percentile, state policy liberalism goes from about -5 (or roughly South Dakota's policy set) to about 6 (or roughly Illinois's). But as female ideology shifts over the same range, state policy liberalism stays almost perfectly constant at about 0 (or roughly Oregon's policy set).

Third, in the model for religion, none of the coefficients for size-weighted ideology rises to the level of statistical significance (though that for Protestants comes close).[374] Figure 2's third panel confirms that state policy responsiveness does not differ very much by denomination. The slope for Protestant ideology is somewhat steeper than the slopes for Catholic ideology and Other Religion ideology, which in turn are somewhat steeper than the slope for No Religion ideology.[375] But these variations in responsiveness are relatively minor—and markedly smaller than the gaps by race and gender.

Fourth, in the model for income, none of the coefficients for size-weighted ideology rises to the level of statistical significance either.[376] (Though that for respondents earning more than $75,000 per year barely misses, and that for respondents earning less than $30,000 is negative.[377]) In Figure 2's fourth panel, state policy liberalism goes from about -2 (or roughly Louisiana's policy set) to about 3 (or roughly Delaware's) as the ideologies of those making more than $75,000, or between $30,000 and $75,000, shift from their tenth to their ninetieth percentiles. But state policy liberalism actually *decreases* from about 1 (or roughly Ohio's policy set) to about -1 (or roughly New Hampshire's) as the ideology of those making less than $30,000 varies over the same range.

Fifth, in what is becoming a trend, none of the coefficients in the models for age and education rises to statistical significance.[378] (Though, again, one comes close: that for respondents with up to a high school education.[379]) Figure 2's fifth and sixth panels show that state policy is about equally responsive to the ideologies of most age and education groups: respondents aged eighteen to twenty-nine,

---

[374] *See infra* Table 2. Protestant ideology is significant at the 10% level but not at the 5% level.

[375] In order to obtain sufficient sample sizes for all denominations, I recoded as Protestant respondents who identified as Mormon or Other Christian, and as Other respondents who identified as Jewish or Muslim.
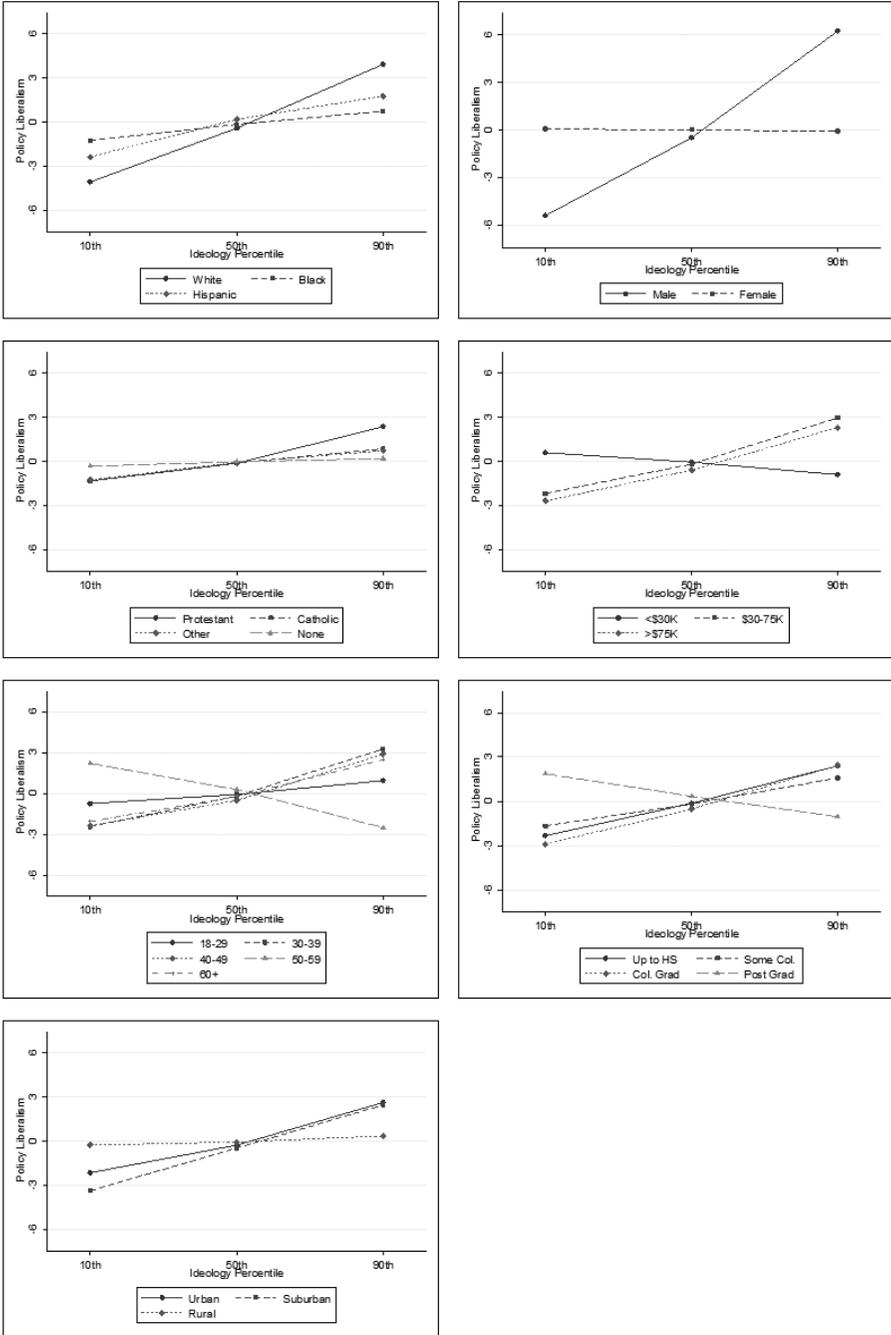
[376] *See infra* Table 2.

[377] *See infra* Table 2. The ideology of respondents earning more than $75,000 per year has a p-value of 0.059.

[378] *See infra* Table 2.

[379] *See infra* Table 2. The ideology of respondents with up to a high school education is significant at the 10% level but not at the 5% level.

FIGURE 2. PREDICTED STATE POLICY LIBERALISM VERSUS GROUP
IDEOLOGY PERCENTILE

thirty to thirty-nine, forty to forty-nine, and sixty and up, as well as respondents with up to a high school education, with some college education, and with a college degree. However, state policy seems to be negatively (though not significantly) responsive to the ideologies of respondents aged fifty to fifty-nine, and with a postgraduate degree. These somewhat unexpected results warrant further investigation.

Lastly, in the model for residence, the coefficients for size-weighted urban and suburban ideology both are positive and statistically significant. In contrast, the coefficient for size-weighted rural ideology is statistically indistinguishable from zero.[380] Figure 2's seventh panel supports this account of urban and suburban influence paired with rural weakness. As urban and suburban ideologies vary from their tenth to their ninetieth percentiles, state policy liberalism goes from about -3 (or roughly South Carolina's policy set) to about 3 (or roughly Delaware's). But as rural ideology shifts over the same range, state policy liberalism holds steady at about 0 (or roughly Oregon's policy set).

This concludes what may have seemed, to some readers, like an unending hail of statistics. Next, I consider what these regression results and predicted value charts actually tell us about political powerlessness. I address their implications for both the methodology of determining powerlessness and the broader substantive question of which groups should be deemed powerless.

C.   *Discussion*

The most important point about the above analyses is that they demonstrate that powerlessness, as I define it, is measurable. There exist models (and data to insert into them) that reveal how responsive policy outcomes are to different groups' preferences, controlling for the groups' size and type. And these models (and data) do not just *exist*. Rather, they have been discussed extensively in the political science literature, which has concluded that they are the proper way to quantify policy responsiveness by group.[381] As I noted earlier, the exact model specification I used has been employed previously by Flavin, Rigby and Wright, and several other scholars.[382] All of the

---

[380] *See infra* Table 2.

[381] *See supra* note 324 and accompanying text. In the first important work on responsiveness by income group, Bartels did not include groups' population shares separately in his models. *See* BARTELS, *supra* note 308, at 257–62. Bhatti and Erikson subsequently pointed out this omission, *see* Bhatti & Erikson, *supra* note 324, at 228–30, and all later studies have used the same specification that I employ.

[382] *See supra* note 322–24 and accompanying text.

data I worked with also has been relied on by prior studies of responsiveness.[383]

The second key point is the impressive consistency of the federal and state analyses, both with each other and with existing work. I found that blacks are relatively powerless at both the federal and state levels; so too have Griffin and Newman (at the federal level).[384] I also found that the poor are relatively powerless at both the federal and state levels; so too have Gilens (at the federal level), as well as Flavin and Rigby and Wright (at the state level).[385] And as for classifications not yet studied by other scholars,[386] my results for gender and religion were highly compatible as well. Women are relatively powerless at both the federal and state levels, while no religious group appears overly weak at either level. This consistency is quite heartening. It means that powerlessness determinations are robust to the use of completely different data from completely different jurisdictions.

It is true that the federal and state analyses are not entirely in sync. Hispanics, for instance, are relatively powerless at the federal level[387] but not at the state level. Similarly, the gap between the influence of the poor and that of other income groups is more glaring at the federal level.

In my view, these inconsistencies are fairly minor, involving just a few of the models' many groups. It also is unclear that they are discrepancies at all. It may well be that in the federal system, with its malapportioned Senate, filibuster, and very expensive campaigns and lobbying, Hispanics and the poor have little clout. But they may be more politically potent in the states, whose institutions typically are more majoritarian and less costly. Notably, my results for the poor are almost identical substantively to those of Gilens, Flavin, and Rigby and Wright.[388] This convergence suggests that the poor's sway does vary somewhat by governmental level.

---

[383] *See* Gilens, *supra* note 43, at 57–69 (discussing his database of group preferences and federal policy outcomes); Bhatti & Erikson, *supra* note 324, at 238–40 (using exit poll data to study senators' responsiveness); Flavin, *supra* note 299, at 40–43 (using Sorens's data to measure state policy outcomes); Rigby & Wright, *supra* note 300, at 195, 199, 208–09, 213–14 (same).

[384] *See supra* Part III.A.

[385] *See supra* Part III.D.

[386] These classifications, that is, have not yet been studied using an appropriate methodology. *See supra* Part III.B (explaining that existing gender studies focus on representation rather than policy enactment).

[387] Though, even at this level, a Wald test fails to distinguish their influence from that of whites. *See supra* note 330. Hispanics thus may not be powerless at *either* level.

[388] Like Gilens, I find a large gap in favor of the wealthy at the federal level. *See* Gilens, *supra* note 43, at 79–83. And like Flavin and Rigby and Wright, I find that the influence of the poor is indistinguishable from zero at the state level, while the middle-class

It also is true that the state analysis captures my notion of powerlessness less precisely than its federal counterpart. By aggregating group preferences and policy outcomes from the beginning, the former abstracts away the details of individual issues. It is cruder than Gilens's approach of using particular policies, not whole states, as the basic unit of study.[389] But, while correct, this critique should not be overstated. Even though it is suboptimal, the state analysis satisfies all of the criteria of a suitable methodology. It examines enacted policy, in many areas at once, while controlling for group size and type. It also avoids the need to adjust for preference intensity by considering ideologies in their entirety rather than specific agenda items.[390] Moreover, it is possible that Gilens's method soon will be feasible at the state level. Data on state publics' issue-specific views is proliferating, thanks to the emergence of a new estimation technique, and it would take just a few tweaks to this technique to produce opinion figures for state subgroups too.[391] In the near future, then, state analysis may require no sacrifice in sophistication.

A final objection relates to judicial capacity. Even if *political scientists* can assess group influence accurately, how can *courts* possibly do so? The very idea of judges running regression models and creating predicted value charts, in the style of the last two Sections, is preposterous. Much less far-fetched, though, is the notion of courts endorsing a definition of powerlessness that hinges on empirical evidence, and then admitting expert testimony that supplies this evidence. In fact, this is exactly how courts have tackled an array of election law issues: how many people are harmed by a voting restriction,[392] what the level of racial polarization is in an area,[393] what share of minority voters is needed so they can elect their preferred candi-

---

and the wealthy wield comparable power, which is sometimes but not always statistically significant. *See* Flavin, *supra* note 299, at 42 tbl.1; Rigby & Wright, *supra* note 300, at 208–09, 213–14.

[389] *See* GILENS, *supra* note 43, at 50–69.

[390] *See supra* note 354 and accompanying text (noting that it is not yet feasible to weigh issues by the degree to which respondents care about them).

[391] As noted earlier, Lax and Phillips already have produced estimates of state publics' views on thirty-nine separate issues, *see supra* note 347, and MRP needs only a few adjustments at the poststratification stage to generate figures for subgroups rather than populations in their entirety. *See* Lax & Phillips, *supra* note 284, at 150; Krimmel, *supra* note 281, at 7. If the large national surveys used by Tausanovitch and Warshaw, *see supra* note 349, were paired with the revised MRP procedure, Gilens's method likely would become feasible at the state level.

[392] This is a crucial issue whenever plaintiffs claim that a franchise restriction amounts to an unconstitutional burden on the right to vote. *See, e.g.*, Veasey v. Perry, 2014 WL 5090258, at *21 (S.D. Tex. Oct. 9, 2014) ("Several experts were tasked with determining the number of registered voters who might [be affected by Texas's photo identification requirement] . . . .").

date,[394] and so on. Courts have never tried to answer these questions on their own. Instead, they have called upon experts to assist them, and then relied heavily on their contributions. Political powerlessness doctrine could operate in the same fashion.

Indeed, its operation would be comparatively *less* taxing for the judiciary. In other fields, courts must admit, and then grapple with, expert testimony every time that a certain claim is made. But powerlessness is not itself a cause of action, but rather a factor that bears on a group's suspect status. And a group's suspect status is fixed nationally by the Supreme Court, and then revisited only rarely.[395] It is not up for grabs in every lawsuit. Accordingly, courts would need to evaluate a group's influence in only a handful of extraordinary cases. In the vast majority of equal protection litigation, courts would simply apply the type of scrutiny entailed by a group's preset status. The vexing empirics would be irrelevant.

Assume, then, that my definition of powerlessness is manageable, and that the results I presented earlier are reliable. What would be the legal implications? Below, I go through the classifications that I covered in the federal and state analyses: race, gender, religion, income, age, education, and residence. For each, I comment on whether (and how) current doctrine would have to change if the results were taken seriously. For the sake of analytical simplicity, I also equate suspect status and powerlessness here, even though the former obviously is not solely a function of the latter.[396] I further streamline the analysis by concluding that a group is powerless only if (1) its preferences do not have a statistically significant impact on policy outcomes at either the federal or state levels; and (2) the preferences of another group of the same type *do* have such an impact.[397]

---

[393] Racial polarization in voting is one of the three preconditions for liability under Section 2 of the Voting Rights Act. *See* Thornburg v. Gingles, 478 U.S. 30, 51, 52 n.18 (1986) (plurality opinion).

[394] Whether there is a sufficiently large minority population to elect its preferred candidate is also a precondition for liability under Section 2. *See id.* at 50.

[395] *See supra* note 206 and accompanying text (recommending that powerlessness be assessed nationally).

[396] *See supra* notes 208–20 and accompanying text (explaining that it is unclear how the four suspect class criteria are meant to be analyzed).

[397] Unfortunately, I am unable to comment on the classification that has attracted the most recent attention, homosexuality, because data on gay public opinion is unavailable at either the federal or state level. I also do not address the *intersections* of different groups—for example, black women or wealthy Protestants—due to data and space constraints. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing structural, political, and representational intersectionality in the context of violence against women of color).

Beginning with race, the legal status of blacks would not have to change at all. Blacks are a suspect class, at present,[398] and they also are relatively powerless at both the federal and state levels. At both levels, their views have a much smaller effect on enacted policy than those of whites.[399] Sadly, decades after the struggles of the civil rights era, blacks continue to require heightened judicial protection. On the other hand, Hispanics' need for such protection may be lessening. At the federal level, the coefficient for Hispanic policy support is indistinguishable from zero, but it also is indistinguishable from the coefficient for white policy support.[400] And at the state level, the coefficient for Hispanic ideology is positive and statistically significant.[401] From these figures, it is difficult to conclude that Hispanics are relatively powerless in the nation as a whole. At worst, they are weak in Washington but more potent in the states.

Second, as to gender, the case for women's suspect status remains compelling.[402] At both the federal and state levels, women's opinions exert much less influence than men's on policy outcomes. At both levels, in fact, the gaps between male and female clout are the largest of any groups I analyzed in tandem. This is perhaps the study's most surprising and robust finding. Despite their large population share and the range of laws protecting them from discrimination, women continue to be alarmingly powerless relative to men.

Third, as to religion, current law seems to treat all denominations as suspect classes,[403] but this treatment may no longer be necessary, at least for the groups for which data is available. In both the federal and state models, no coefficient for group preference rises to the level of statistical significance, indicating that no denomination is particularly strong or weak. This conclusion is bolstered by the predicted value

---

[398] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (declaring race a suspect classification).

[399] For confirmation of my findings by other scholars (at the federal level), see *supra* Part III.A.

[400] *See supra* note 330 (noting the results of a Wald test for Hispanic and white coefficients). Griffin and Newman also find that the Hispanic-white gap with respect to congressional representation is substantially smaller than the black-white gap. *See* GRIFFIN & NEWMAN, *supra* note 256, at 87 & fig.5.2, 88 (showing equally steep responsiveness slopes for whites and Hispanics, in contrast to the much flatter slope for blacks).

[401] *See supra* note 370 and accompanying text.

[402] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) (recognizing that the Court subjects gender-based classifications to heightened scrutiny).

[403] *See, e.g.*, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 596 (1895) (Field, J., concurring) (declaring, apparently, that religion is a suspect classification), *aff'd on reh'g*, 157 U.S. 429 (1895), *superseded on other grounds by constitutional amendment*, U.S. CONST. amend. XVI. Almost no modern equal protection cases involve religious groups, likely because their claims tend to be adjudicated under the First Amendment—a provision about which I express no opinion here.

charts, which show roughly equal slopes for all groups. However, it is important to note that only Protestants, Catholics, non-religious people, and a catch-all category were included in the analyses. It still is possible that smaller sects (such as Jews, Muslims, and Buddhists) or subgroups of larger traditions (such as evangelical and mainline Protestants) are relatively powerless.

Fourth, as to income, there is a strong (though not ironclad) argument that courts are wrong not to deem the poor a suspect class.[404] At the federal level, rising policy support at the tenth income percentile has a *negative* effect on the odds of policy enactment, suggesting a startling degree of impotence.[405] At the state level too, the coefficient for low-income ideology is negative and indistinguishable from zero. At this level, though, the coefficient for high-income ideology just misses statistical significance, meaning that the gulf between rich and poor may not be quite as large. In sum, it is fair to say that the poor are relatively powerless overall, but that their weakness may not be quite as pronounced in the states.[406]

Fifth, as to age and education, courts seem to have gotten it about right. They do not recognize any age or education group as a suspect class,[407] nor should they based on the state analysis. In the age and education models, no coefficient rises to the level of statistical significance. Similarly, in the predicted value charts, the slopes for most age and education groups are about the same. The exceptions, as observed earlier, are respondents aged fifty to fifty-nine and respondents with a postgraduate degree, whose slopes both are negative (though not significantly so). These results require further study, but, at present, they do not justify a verdict of powerlessness for either group.

Finally, as to residence, courts have never confronted a claim to suspect status by any residential group. But if they were faced with

---

[404] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (declining to recognize the poor as a suspect class). *But see* Ross & Li, *supra* note 55 (manuscript at 18–19) (noting that the Court did not squarely confront the suspect status of the poor in *Rodriguez*).

[405] Like Gilens, I ran models only for the tenth and ninetieth percentiles and the fiftieth and ninetieth percentiles in Part IV.A. Running the same model for the tenth and *fiftieth* percentiles produces the following results: a positive and statistically significant coefficient for policy support at the fiftieth percentile, and a negative coefficient significant at the 10% level for policy support at the tenth percentile. These results are almost identical to the ones from the model for the tenth and ninetieth percentiles, and they indicate that the poor also are powerless relative to the middle-class.

[406] For confirmation of my findings by other scholars (at both the federal and state levels), see *supra* Part III.D.

[407] *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) (declining to recognize the elderly as a suspect class). The Supreme Court has never faced any education group's claim to suspect status.

such a claim by rural inhabitants, they should be receptive to it. In the relevant state model, the coefficient for rural ideology is indistinguishable from zero, while those for urban and suburban ideology both are positive and statistically significant. Likewise, in the corresponding chart, the slope for rural ideology is nearly flat, while those for urban and suburban ideology are tilted upward. These findings would benefit from confirmation at the federal level, but their upshot is that rural dwellers are powerless relative to their urban and suburban neighbors.

All in all, then, current doctrine is consistent with the empirical evidence in some areas and at odds with it in others. Figure 3 summarizes the points of agreement and dispute. Its vertical axis shows whether or not courts deem each group powerless (again equating suspect status and powerlessness for present purposes), and its horizontal axis does the same for this Part's analyses. The upper-left and lower-right quadrants contain the groups as to which the approaches converge. The doctrine and the empirics concur that blacks and women are relatively powerless, and that whites, men, the non-poor, all age groups, all education groups, and the non-rural are not. Conversely, the lower-left and upper-right quadrants contain the groups as to which the approaches diverge. Hispanics and religious groups are relatively powerless according to the doctrine but not the empirics. And the poor and rural dwellers are relatively powerless according to the empirics but not the doctrine.

Equal protection law thus would look quite—but not completely—different if suspect status were based only on my definition of powerlessness.[408] Nothing would change for most groups, including blacks and women. But laws discriminating against Hispanics and religious groups no longer would be subject to more rigorous review, while laws discriminating against the poor and rural dwellers now would be. Into which bucket each group falls, though, ultimately is of secondary importance. The crucial point is that, under my approach, powerlessness would be analyzed in a theoretically and empirically defensible manner. A group would be deemed to lack sufficient influence if, and only if, its aggregate policy preferences were less likely to be enacted than those of similarly sized and classified groups. In the end, my proposal should rise or fall based on the appeal of this idea—not the identities of the groups that it benefits or harms.

---

[408] Again, this is a big if, which I am stipulating here only for the sake of analytical tractability. *See supra* notes 208–20 and accompanying text (discussing how the various indicia might be related to the ultimate determination of suspect status).

FIGURE 3. POWERLESSNESS DETERMINATIONS UNDER CURRENT
LAW AND ACCORDING TO EMPIRICAL ANALYSIS

Status According to Empirical Analysis

	Powerless	Not Powerless
Powerless	Blacks Women	Hispanics Religious groups
Not Powerless	Poor Rural	Whites Men Non-poor All age groups All education groups Non-rural

(left axis label: Status Under Current Law)

CONCLUSION

I am not the first to notice the incoherence at the core of the powerlessness doctrine. Eskridge and Schacter, among others, also have documented the many conflicting conceptions of influence that courts have embraced at different times.[409] These scholars, though, have responded to the disorder by calling for the doctrine's elimination. Eskridge, for instance, has argued that, while powerlessness "may cast light on the perseverance of prejudice and stereotyping," it

---

[409] *See, e.g.*, Eskridge, *supra* note 54, at 10–19 (tracing the courts' conflicting applications of the powerlessness doctrine); Schacter, *supra* note 77, at 1372–90 (same); *supra* note 80 (listing scholars who have criticized powerlessness doctrine for its lack of clarity).

should not be a separate criterion for suspect status.[410] More dramatically, Schacter has advocated the interment of the theory from which the doctrine is derived in the first place. In her words, pluralism "lacks the internal normative apparatus to answer the very question it makes central—whether a group is sufficiently disadvantaged in the political process to warrant special judicial solicitude."[411]

What distinguishes this project from prior works, then, is that I have sought to rebuild the powerlessness doctrine, not to reject it. I have offered a definition of powerlessness that follows directly from pluralist theory, in that it focuses on the likelihood that a group's aggregate policy preferences will be enacted. I also have shown that this definition can be operationalized using data and models that are widely accepted by political scientists. My perspective on powerlessness thus is markedly more optimistic than Eskridge and Schacter's. They see the doctrine's failures to date and conclude that it is inherently flawed. To me, in contrast, these shortfalls merely reveal a body of law that has not yet worked itself pure. Pluralism does not lack the normative apparatus to determine whether a group is powerless. The problem is just that its apparatus has not yet been put to good use.

---

[410] Eskridge, *supra* note 54, at 20.

[411] Schacter, *supra* note 77, at 1369 (referring to Ely's political process theory, which itself is derived, in relevant part, from pluralism).

APPENDIX

TABLE 1. FEDERAL REGRESSION RESULTS

VARIABLES	(1) White vs. Black	(2) White vs. Hispanic	(3) Male vs. Female	(4) Protestant vs. Catholic	(5) Protestant vs. Secular	(6) 50th Pct. vs. 90th Pct.	(7) 10th Pct. vs. 90th Pct.
White Weighted Support	4.224***	3.226***					
	(0.747)	(0.731)					
White Share	-0.953	57.87					
	(7.480)	(49.29)					
Black Weighted Support	-5.808*						
	(3.483)						
Black Share	-72.40						
	(133.8)						
Hispanic Weighted Support		-0.452					
		(4.435)					
Hispanic Share		89.03					
		(82.92)					
Male Weighted Support			17.63***				
			(2.782)				
Male Share			-324.1***				
			(57.66)				
Female Weighted Support			-9.152***				
			(1.640)				
Protestant Weighted Support				0.573	1.946		
				(6.767)	(1.476)		
Protestant Share				17.92*	-13.20		
				(9.236)	(10.28)		
Catholic Weighted Support				-13.39			
				(12.63)			
Catholic Share				0.830			
				(33.01)			

VARIABLES	(1) White vs. Black	(2) White vs. Hispanic	(3) Male vs. Female	(4) Protestant vs. Catholic	(5) Protestant vs. Secular	(6) 50th Pct. vs. 90th Pct.	(7) 10th Pct. vs. 90th Pct.
Secular Weighted Support					3.613		
					(7.769)		
Secular Share					-36.07**		
					(16.36)		
90th Percentile Support						3.315***	3.404***
						(0.996)	(0.543)
50th Percentile Support						-1.468*	
						(0.817)	
10th Percentile Support							-1.509***
							(0.496)
Constant	7.365	-53.53	155.5***	-10.62	9.797	-1.845***	-1.808***
	(21.58)	(44.60)	(28.05)	(10.93)	(7.524)	(0.420)	(0.267)
Observations	891	718	427	46	297	388	852

Note: Standard errors in parentheses. *** $p<0.01$, ** $p<0.05$, * $p<0.1$.

TABLE 2. STATE REGRESSION RESULTS

VARIABLES	(1) Race	(2) Gender	(3) Religion	(4) Income	(5) Age	(6) Education	(7) Residence
White Weighted Ideology	27.62***						
	(4.361)						
White Share	4.084						
	(4.608)						
Black Weighted Ideology	86.28						
	(57.32)						
Black Share	-7.473						
	(6.852)						
Hispanic Weighted Ideology	266.0***						
	(65.00)						
Hispanic Share	-25.16**						
	(9.357)						
Male Weighted Ideology		87.46***					
		(28.98)					
Male Share		-15.83					
		(136.7)					
Female Weighted Ideology		-0.214					
		(21.33)					
Female Share		-61.99					
		(148.3)					
Protestant Weighted Ideology			37.95*				
			(21.03)				
Protestant Share			1.184				
			(7.372)				
Catholic Weighted Ideology			60.72				
			(36.21)				
Catholic Share			-0.271				
			(7.851)				
Other Rel. Weighted Ideology			105.1				

VARIABLES	(1) Race	(2) Gender	(3) Religion	(4) Income	(5) Age	(6) Education	(7) Residence
			(97.28)				
Other Rel. Share			-93.25***				
			(33.87)				
No Rel. Weighted Ideology			26.69				
			(86.52)				
No Rel. Share			33.69				
			(25.31)				
<$30K Weighted Ideology				-31.87			
				(45.94)			
<$30K Share				-17.30			
				(13.80)			
$30–75K Weighted Ideology				40.63			
				(28.57)			
$30–75K Share				17.79			
				(11.34)			
>$75K Weighted Ideology				44.83*			
				(23.12)			
>$75K Share				-26.49***			
				(8.861)			
18–29 Weighted Ideology					26.38		
					(45.24)		
18–29 Share					147.0		
					(233.5)		
30–39 Weighted Ideology					99.29		
					(66.98)		
30–39 Share					98.52		
					(253.7)		
40–49 Weighted Ideology					78.48		
					(59.22)		
40–49 Share					99.59		
					(239.1)		

VARIABLES	(1) Race	(2) Gender	(3) Religion	(4) Income	(5) Age	(6) Education	(7) Residence
50–59 Weighted Ideology					-61.57		
					(55.89)		
50–59 Share					206.8		
					(246.0)		
60+ Weighted Ideology					55.30		
					(39.79)		
60+ Share					117.7		
					(245.2)		
Up to HS Weighted Ideology						108.8*	
						(54.08)	
Up to HS Share						-21.39	
						(16.82)	
Some Col. Weighted Ideology						50.54	
						(47.72)	
Some Col. Share						7.191	
						(17.83)	
Col. Grad Weighted Ideology						63.13	
						(65.11)	
Col. Grad Share						-19.52	
						(20.70)	
Post Grad Weighted Ideology						-46.86	
						(72.16)	
Post Grad Share						-22.60	
						(19.95)	
Urban Weighted Ideology							46.30***
							(12.79)
Urban Share							-4.229
							(4.453)
Suburban Weighted Ideology							47.61***
							(11.60)

VARIABLES	(1) Race	(2) Gender	(3) Religion	(4) Income	(5) Age	(6) Education	(7) Residence
Suburban Share							-9.001**
							(3.919)
Rural Weighted Ideology							7.247
							(14.64)
Rural Share							7.014
							(4.948)
Constant	-5.473	31.48	-0.217	-0.00508	-138.8	1.900	-1.330
	(4.239)	(140.8)	(1.617)	(5.649)	(241.0)	(1.511)	(3.119)
Observations	50	50	50	50	50	50	46
R-squared	0.844	0.738	0.790	0.786	0.759	0.693	0.811

Note: Standard errors in parentheses. *** $p<0.01$, ** $p<0.05$, * $p<0.1$.