

## Constitutional Crossroads and the Canon of Rational Basis Review

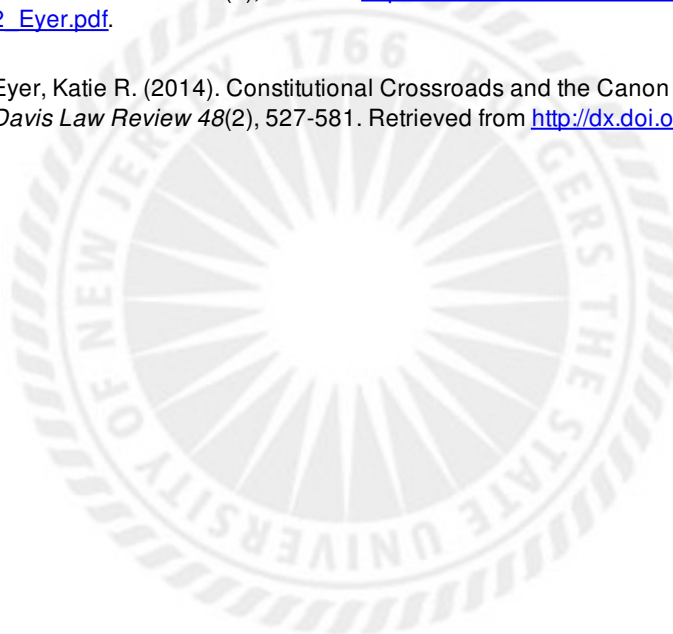
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# Constitutional Crossroads and the Canon of Rational Basis Review

Katie R. Eyer\*

*We stand at a crossroads in equal protection doctrine. Over the last 20 years, the Supreme Court has decided a series of cases in which it has constitutionally invalidated anti-gay discrimination. In each of these cases, the Court has declined to specify its standard of review, and has deployed an approach that is not easily classifiable within its traditional tiered standards of review. Nevertheless, as such decisions have accumulated, it has become clear that they are not simply aberrational deviations from deferential rational basis review; but rather, that they mark some form of more systematic development in the Court's equal protection doctrine.*

*The precise nature of the development marked by the gay rights cases, however, remains far from clear. On the one hand, such cases could be understood simply as precursors to a turn to formal heightened scrutiny for sexual orientation-based classifications: as a mark of the Court's special*

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\* Copyright © 2014 Katie R. Eyer. Assistant Professor, Rutgers School of Law – Camden. Many thanks are due to Earl Maltz, whose discovery of the fascinating debates behind *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), spurred my initial inquiry into this area and whose feedback helped shaped its early conceptual framing. This essay also benefitted greatly from conversations and commentary received from Josh Blackman, Lee Carpenter, Chai Feldblum, Ann Freedman, Jean Galbraith, Sally Goldfarb, Stacy Hawkins, Courtney Joslin, Kati Kovacs, Gwen Leachman, Serena Mayeri, Kim Mutcherson, Douglas NeJaime, Susannah Pollvogt, Reva Siegel, Daniel Sharfstein, Brian Soucek, Allan Stein, Rick Swedloff and Ingrid Waldron. This essay was prepared for the UC Davis Law Review's *Not Equal Yet* Symposium and benefitted greatly from feedback and conversations with other participants, and from the editorial feedback of the editors of the UC Davis Law Review, including especially Wei Li and Amar Naik. It was also presented at the 2014 AALS Annual Meeting, the Rutgers Junior Faculty Workshop, the Seton Hall Faculty Colloquium Series, the Fifth Annual Loyola University Chicago Constitutional Law Colloquium, and the AALS Workshop on Sexual Orientation and Gender Identity Issues and received helpful commentary and critiques in all of those venues. John Jacob at Washington and Lee deserves special thanks for his assistance in accessing archival materials, as do the research librarians at the Library of Congress. Finally, Evan Barker receives my wholehearted gratitude for providing excellent research assistance in connection with this project.

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*solicitude for challenges to discrimination targeting lesbians and gay men. But such cases can also be understood very differently: as marking broader shifts in the Court's equal protection doctrine, away from the Court's traditional "tiered" approach and towards a more flexible and robust vision of equal protection review.*

*This bifurcation of possibilities bears remarkable similarities to another historical moment in the Court's equal protection doctrine: the dilemma that the Court faced in the mid-1970s regarding how to characterize its early precedents striking down sex and illegitimacy classifications. And yet relatively little scholarship has explored these interconnections, and their potential salience for this contemporary moment in equal protection review. This essay seeks to recover this mid-1970s history, and to draw on it in considering the possibilities and risks that may attach to the particular juncture at which we find ourselves vis-à-vis the Court's equal protection doctrine.*

*What such an inquiry suggests is that the dominant modern understanding of the Court's minimum tier (rational basis) review — as a shallow and empty form of review, devoid of meaningful scrutiny — is, to some extent, a byproduct of our loss of historical memory. Just like the contemporary gay rights cases, the early sex and illegitimacy cases were not, at the time they were decided, applications of formally heightened review. It was only later — as mid-tier scrutiny became formally institutionalized — that such cases were reimagined as "[h]eightedened scrutiny under a deferential, old equal protection guise."*

*When viewed together with the Court's contemporary gay rights cases (as well as other, often overlooked applications of minimum tier review), what this history suggests is that our canonical understanding of minimum tier review is by no means the only vision of equal protection review possible. Rather, taking account of the full sweep of the Court's minimum tier jurisprudence, it is clear that the Court often applies greater than minimal scrutiny where group or rights-based concerns exist. Retaining this historical memory — regardless of the ultimate outcome of the Court's gay rights jurisprudence — may help ensure that all groups have access to a more robust and meaningful form of equal protection review.*

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INTRODUCTION

We stand at a crossroads in equal protection doctrine.<sup>1</sup> Over the last twenty years, the Supreme Court has decided a series of cases — *Romer v. Evans*,<sup>2</sup> *Lawrence v. Texas*,<sup>3</sup> *United States v. Windsor*<sup>4</sup> — in which it has constitutionally invalidated anti-gay discrimination. In each of these cases, the Court has declined to directly specify its standard of review and has deployed an approach that is not easily classifiable within its traditional tiered standards of review. As such decisions have accumulated, lower courts and commentators have struggled to

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<sup>1</sup> Cf. Brief of Professor Nan D. Hunter et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (“This Court is at a crossroads in its equal protection jurisprudence.”).

<sup>2</sup> 517 U.S. 620, 631-36 (1996) (invalidating a state constitutional amendment prohibiting lesbian/gay/bisexual (“L/G/B”) anti-discrimination protections under the Equal Protection Clause; apparently applying rational basis review, but not deferential rational basis review).

<sup>3</sup> 539 U.S. 558, 564-79 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) and invalidating state sodomy laws on due process grounds, but deploying rhetoric with strong equality overtones; level of scrutiny unclear). *Lawrence* is included in my discussion herein of gay equality cases, despite the fact that the majority’s ruling was founded on principally on due process reasoning for two reasons. First, the Court’s reasoning in *Lawrence* has been understood by many scholars as part of a more general move on the Court’s part towards fusing equal protection and due process-based reasoning, an understanding arguably furthered by the Court’s most recent decision in *Windsor*. Second, *Lawrence* (and its predecessor *Bowers v. Hardwick*) has played a significant role in the development of constitutional gay equality doctrine.

<sup>4</sup> 133 S. Ct. 2675, 2689-96 (2013) (drawing on equal protection, due process, and federalism themes in invalidating section 3 of the Defense of Marriage Act on Fifth Amendment grounds, without specifying what level of scrutiny the Court was applying).

understand their significance both for gay rights plaintiffs and for broader constitutional jurisprudence.<sup>5</sup>

Two significant possibilities present themselves as to how the gay rights cases might be understood. On the one hand, such cases might be understood as precursors to the formal recognition of heightened scrutiny for gays and lesbians; in Suzanne Goldberg's terms, as "the first step in a two-step decisionmaking dynamic through which courts tip from one view of a group's constitutional rights to another."<sup>6</sup> Or — as other scholars have argued — such cases might be taken to signal broader shifts in the Court's equal protection doctrine generally: from a rigidly tiered and compartmentalized approach to a more flexible and (for those groups not currently deemed "suspect" or "quasi-suspect") robust review.<sup>7</sup> Ultimately, and potentially quite soon, it seems likely that the Supreme Court will face pressures to choose between these competing formulations, as the lower courts increasingly show themselves willing to deploy *Romer*, *Lawrence*, and *Windsor* in support of diverse constitutional claims.<sup>8</sup>

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<sup>5</sup> See *infra* notes 146–51 and accompanying text.

<sup>6</sup> Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1980 (2006) [hereinafter *Tipping Points*]. Goldberg's article is concerned with a somewhat different phenomenon, tipping points in constitutional norms, rather than in heightened scrutiny per se. Nevertheless her formulation is helpful in conceptualizing the possibility that cases like *Romer*, *Lawrence*, and *Windsor* are a way station to something, rather than an ultimate resting point. See also Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 137-38 (1997) (discussing the possibility that *Romer* can be read as a precursor to formal heightened scrutiny); Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2814 (2005) (arguing that the recognition of formal heightened scrutiny would be simply an "acknowledgement of what the Supreme Court, in practice, has already established . . .").

<sup>7</sup> E.g., Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-C.L. L. REV. 225, 242-43 (1997); Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 381-87 (2012); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776-80, 787 (2011); Josh Blackman, *The Rational Basis Test: Gone with the Windsor?*, JOSH BLACKMAN'S BLOG (June 26, 2013) [hereinafter *Gone with the Windsor*] <http://joshblackman.com/blog/2013/06/26/the-rational-basis-test-gone-with-the-windsor>. See generally *infra* note 151 and accompanying text (listing additional examples of scholars' reading of the Court's gay rights cases as "indicative of broader shifts in its Fourteenth Amendment jurisprudence").

<sup>8</sup> Another possible understanding would be to view *Romer*, *Lawrence*, and *Windsor* simply as aberrational and isolated deviations from the Court's traditional rational basis review with little salience outside of their specific respective holdings. Although this understanding initially dominated the lower court response to *Romer* and *Lawrence*, it

There are striking parallels between the constitutional “crossroads” at which the Court finds itself today and the dilemma facing the Supreme Court in the mid-1970s regarding how to situate its then-current sex and illegitimacy jurisprudence.<sup>9</sup> Just as in the contemporary gay rights cases, the Court in the late 1960s and early 1970s had decided a series of cases in which it had struck down sex or illegitimacy-based classifications without formally declaring a heightened standard of review.<sup>10</sup> And, like today, lower courts and commentators struggled to understand the significance of these cases, construing them to signal everything from the recognition of heightened scrutiny for sex and illegitimacy to a new, more robust approach to equal protection review generally.<sup>11</sup>

Ultimately, during the 1976–1977 Term, the Supreme Court decided two cases — *Craig v. Boren*<sup>12</sup> and *Trimble v. Gordon*<sup>13</sup> — that would come to be widely understood as formally instantiating heightened scrutiny review for sex and illegitimacy classifications.<sup>14</sup> While *Craig*

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has become increasingly difficult to so characterize the Court’s decisions in this area — a difficulty reflected in the trend towards far more robust deployment of the gay rights cases by the lower courts that has emerged in the aftermath of *Windsor*.

<sup>9</sup> Cf. Peter Nicolas, *[G]a[y]ffirmative Action: The Constitutionality of Sexual Orientation–Based Affirmative Action Policies*, 92 WASH. U. L. REV. (forthcoming 2015) (noting the similarities between the stature of the contemporary gay rights cases and the early sex and illegitimacy cases).

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part I. As discussed below, a number of other major disputes in equal protection doctrine — the stature of “benign” classifications (i.e., affirmative action), the permissibility of effects-based (as opposed to intent-based) invalidation, what “counts” as action based on a protected status (e.g., whether pregnancy classifications are sex-based) — were all simultaneously pending during this 1970s time frame. See *infra* notes 16–17, 50 and 110. Although the focus of this essay is specifically on the question of whether to frame the sex and illegitimacy cases as rational basis cases or as a form of heightened review, I have attempted to periodically identify intersections between the debates described herein and these other pending questions.

<sup>12</sup> 429 U.S. 190 (1976).

<sup>13</sup> 430 U.S. 762 (1977).

<sup>14</sup> See, e.g., SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW AND THE CIVIL RIGHTS REVOLUTION 124 (2011) (describing *Craig* as “establish[ing] ‘intermediate scrutiny’”); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 n.54 (2011) (identifying *Craig* and *Trimble* as holding that sex and illegitimacy receive “intermediate scrutiny” and should be treated as a “quasi-suspect class”); Yoshino, *supra* note 7, at 756 & nn.66-67 (identifying *Trimble* and *Craig* as cases that “formally accorded heightened scrutiny” to “non-marital parentage” and “sex,” respectively). Some scholars place the recognition of heightened scrutiny or quasi-suspect status later for illegitimacy, at the Court’s 1988 decision in *Clark v. Jeter*, 486 U.S. 456 (1988). E.g., Goldberg, *Tipping Points*, *supra* note 6, at 1982 n.107; Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1614 & n.154 (2013). This ambiguity is unsurprising in view of the fact that, as

and *Trimble* did not immediately bring to an end all debates on the Court regarding the appropriate standard of review for sex and illegitimacy, many have marked them as a key turning point insofar as they seemed to embrace, for the first time, a mid-tier standard of equal protection review.<sup>15</sup> *Craig* and *Trimble* are thus often cast as part of a progressive narrative of the Court's developing equal protection doctrine during the 1950s–1970s, in which the Court responded to contemporary social movements' demands for more significant protections by expanding those categories afforded meaningful equal protection review.<sup>16</sup>

But the historical record suggests that marking *Craig* and *Trimble* as an unambiguous victory for progressive forces masks the much more complicated dynamics that were in fact at work on the Court during that time frame.<sup>17</sup> Specifically, while *Craig* and *Trimble* no doubt constituted

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described *infra*, *Trimble* and even *Craig* were far from unambiguous recognitions of quasi-suspect status for illegitimacy and sex respectively. See *infra* Part III. Nevertheless, many contemporary scholars identify *Trimble* and *Craig* as the key decisions institutionalizing mid-tier scrutiny for sex and illegitimacy.

<sup>15</sup> See *supra* note 14.

<sup>16</sup> See, e.g., Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebellius*, 73 MD. L. REV. 133, 136 (2013) (describing *Craig* as one of the cases during the *Burger* era to “expand[] individual rights in significant ways”); Stephanie K. Seymour, Remark, *Women as Constitutional Equals: The Burger Court's Overdue Revolution*, 33 TULSA L.J. 23 (1997) (characterizing *Craig* as “stabiliz[ing]” the constitutional “progress” that had been made vis-à-vis women's rights). But cf. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 390 (2012) (arguing that “the progress narrative associated with illegitimacy is a fiction”). Of course, as scholars such as Serena Mayeri have shown, even in the 1970s itself, this narrative was increasingly complicated by the advent of affirmative action cases on the Court, which raised the specter of the use of heightened scrutiny in opposition to programs and remedial measures intended to benefit women and minorities. See, e.g., MAYERI, *supra* note 14, at 126–30 (detailing the ways that feminists, as well as certain of the Justices, tried to “reason[] from sex” in cases like *Bakke* in response to litigant efforts to deploy heightened scrutiny in opposition to programs intended to benefit minorities). See generally Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008) [hereinafter *Reconstructing*] (addressing this subject extensively).

<sup>17</sup> See *infra* notes 18–20 and accompanying text; cf. MAYERI, *supra* note 14, at 126–130, 199 (describing the ways that affirmative action challenges had also complicated the benefits of heightened scrutiny, even in the 1970s); Mayeri, *Reconstructing*, *supra* note 16 (extensively discussing the complications that arose from the deployment of heightened scrutiny in the affirmative action context); *infra* notes 164–66 and accompanying text (discussing generally contemporary critiques of heightened scrutiny); *infra* notes 160, 170 and 179 (describing the ways that a turn to heightened scrutiny may have limited rational basis remedies even for those within nominally protected classifications, due to the limited scope of what the Court has understood as sufficient to trigger a finding of discrimination, and thus heightened scrutiny).

a partial victory for those (both on and off the Court) who wished to see sex and illegitimacy afforded heightened scrutiny, it appears that they also partially represented conservative<sup>18</sup> efforts to domesticate the sex and illegitimacy cases and strip them of potential salience for broader equal protection doctrine.<sup>19</sup> Thus, archival records suggest that *Craig* and *Trimble* (and the sex and illegitimacy cases that preceded them) came to be understood as heightened scrutiny cases in part because conservative Justices — and in particular Justice Rehnquist — described them as such, preferring such a characterization to the possibility that they might form the basis for a broader attack on deferential rational basis review.<sup>20</sup> As such, it appears that both conservative and progressive considerations (and actors) drove the reconfiguration of the Court's early sex and illegitimacy cases as a heightened "tier" of scrutiny, demarcated from traditional rational basis review.

Today, the legacy of both of these impetuses for framing the Court's sex and illegitimacy cases as deploying heightened scrutiny can be seen plainly in our received understanding of equal protection doctrine. Early sex and illegitimacy cases — widely cited in the 1970s in support of a more robust and flexible approach to rational basis review for all equal protection litigants — have today dropped almost entirely from the rational basis canon (reimagined as "[h]eightedened scrutiny under a deferential, old equal protection guise").<sup>21</sup> But so too, sex and

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<sup>18</sup> My use of the term "conservative" here is an over simplification, but meant to correspond to the rough divide that existed on the Court between those who endorsed a broader approach to rational basis review (largely those who would today be characterized as the Burger Court's liberals) and those who resisted such a move (largely those who would be characterized today as the Burger Court's conservatives). For an extended discussion of the various Justices' positions vis-à-vis this issue, see Earl Maltz, *The Burger Court and the Conflict over the Rational Basis Test: The Untold Story of Massachusetts Bd. of Retirement v. Murgia*, 39 J. SUP. CT. HIST. 264, 266-76 (2014). Cf. *infra* note 200 (noting that in the contemporary era it is not as clear that "conservative" judges and commentators would reject expanded rational basis review).

<sup>19</sup> See *infra* Parts II–III.

<sup>20</sup> See *infra* Parts II–III; cf. EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 52-53 (1999) (observing that the canonization of the sex and illegitimacy cases as intermediate scrutiny cases has constricted the scope of equal protection by limiting the availability of the early sex and illegitimacy cases as rational basis precedents).

<sup>21</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 683 (13th ed. 1997). This characterization is particularly striking, given that Gerald Gunther's 1972 *Harvard Law Review* Foreword was deeply influential in spreading the understanding of *Reed v. Reed*, 404 U.S. 71 (1971) and *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) — two of the early sex and illegitimacy cases — as cases marking a potentially significant turn in the Court's rational basis approach. See *infra* Part I; see also, e.g., PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 1182-83 (5th ed. 2006)



illegitimacy themselves have been successfully canonized as set apart, as consistently subject to a more stringent, non-deferential form of review.<sup>22</sup> Thus, the legacy of cases like *Craig* and *Trimble* remains bifurcated today, both expanding and contracting the scope of what equal protection protects.<sup>23</sup>

This history holds important lessons for the transitional moment in equal protection doctrine at which we find ourselves today. Just as in the mid-1970s, the Court faced a turning point in its sex and

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(characterizing *Reed* as a case in which “the Court purported to apply only the minimal rationality standard”); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 882 (3d ed. 2009) (in describing *Reed* stating that, “[a]lthough the Court purported to be using just the rational basis test . . . its reasoning was not characteristic of rational basis review”); GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW 729 (2d ed. 2011) (stating *Reed* “purported to apply rational-basis review”); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 682-83 (6th ed. 2009) (characterizing *Reed* as a case in which the Court “purport[ed]” to apply rational basis review, only later “acknowledg[ing] that it was applying heightened scrutiny”); Nicolas, *supra* note 9, at 28 (characterizing *Reed* and *Weber* as cases “in which the Court mouths the language of rational basis while in fact applying some form of heightened scrutiny”); Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. (forthcoming 2015) [hereinafter *Unequal Protection*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2476714](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476714) (characterizing *Reed* as a case in which the Court “purported to apply the minimum rationality test”); cf. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 678, 691-92, 866 (10th ed. 1980) (continuing to link *Reed* and *Weber* to rational basis review, while also characterizing *Reed* as “heightened scrutiny under a deferential, old equal protection guise” in an earlier edition of the same casebook); JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW 654-55 (14th ed. 2013) (including a discussion of *Reed* in the context of rational basis review, but classing it as among the cases in which the Court has “purport[ed] to apply the rational basis standard;” also including *Romer* and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 363 (1999) [hereinafter *Successful Rational Basis Claims*] (dismissing *Reed* and *Weber* as, in view of subsequent doctrinal developments “no longer appear[ing] to be case[s] of heightened rationality”); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 513 n.120 (2004) [hereinafter *Equality Without Tiers*] (omitting these cases from a rational basis discussion “on the theory that the Court might have been applying heightened scrutiny in practice but not in name”). *But cf.* GERSTMANN, *supra* note 20, at 42-45 (describing the history of the early sex and illegitimacy cases, and characterizing them as minimum tier / rational basis cases).

<sup>22</sup> *But cf.* Murray, *supra* note 16, at 389-90 (arguing that the protections that have been afforded to non-marital parents and their children have been very partial and continue to reflect strong preferences for the marital family). *See generally infra* notes 86, 138, 164-66 and accompanying text (describing contemporary critiques of heightened scrutiny even for those groups designated “protected classes”).

<sup>23</sup> *Cf.* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (describing how interstitial rules that grow up in the aftermath of an arguably transformative legal moment may serve to reinforce and reinstitute the old status regime).

illegitimacy cases — with important implications for its broader equal protection doctrine<sup>24</sup> — so too today, the Court is poised to make decisions that will have a profound influence on both gay equality and broader equal protection doctrine. Moreover, the sex and illegitimacy cases highlight that — although there are real benefits of a turn to formal heightened scrutiny for the groups thereby protected — there are also real potential costs for those outside the scope of heightened review.<sup>25</sup> Most notably, to the extent that a turn to heightened scrutiny is used as a basis for dismissing the salience of early group-protective cases to minimum tier (i.e., rational basis) review, the result may be a very limited and barren understanding of what equal protection (in the absence of formally heightened scrutiny) entails.<sup>26</sup>

But, the sex and illegitimacy cases also suggest that such a consequence of a turn to heightened scrutiny need not be inevitable. Rather, they suggest that the lost potential of the early sex and illegitimacy cases for broader equal protection review (as opposed to for sex and illegitimacy litigants, specifically) can be seen as a byproduct of our willingness to be complicit in a reimagining of the Court's early precedents as outside of the canon of the Court's minimum tier/rational basis review.<sup>27</sup> Thus, cases that were at the time understood by the Court itself as applying minimum tier standards have been reimagined today as outside the minimum tier canon — as cases in which the Court was acting at, but not actually, applying rational basis review.

Such a reinterpretation of the early sex and illegitimacy cases may, forty years on, seem the natural consequence of a turn to heightened scrutiny. But it was not. As scholars, we bear significant responsibility for how equal protection doctrine is canonized.<sup>28</sup> And, as the sex and

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<sup>24</sup> See *infra* Parts I–III.

<sup>25</sup> See *infra* Parts III–IV; cf. *infra* notes 47, 50, 86, 160, 163 and 170 (suggesting ways that a very deferential approach to rational basis review may have drawbacks for even those within the heightened tiers).

<sup>26</sup> See sources cited *supra* note 25.

<sup>27</sup> Because “rational basis” review has become so indelibly associated in the modern mind with its highly deferential formulation, I think it is helpful to have a term for the bottom tier of review that does not come with all of the connotations of that term. I use here the descriptive term relied upon by Justice Rehnquist in characterizing the bottom tier of review (“minimum” tier scrutiny) in the context of his discussions in *Murgia*. See, e.g., Memorandum from William H. Rehnquist to Lewis F. Powell, Jr. at 5 (May 25, 1976), *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), in POWELL PAPERS [hereinafter Rehnquist Memorandum to Powell], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976May25\\_30.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May25_30.pdf) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives [hereinafter POWELL PAPERS]).

<sup>28</sup> Cf. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 828–29

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illegitimacy cases demonstrate, the vision of minimum tier review that has come to dominate canonical accounts — a form of review so deferential as to be meaningless — has been made possible only by the exclusion from the canon of cases in which a more robust form of review was applied. In fact, when viewed over the broad sweep of history — including, but not limited to the Court's early sex, illegitimacy, and sexual orientation cases — there is a deep history on the Court of taking groups and rights seriously, even outside of the context of formally heightened review.<sup>29</sup>

Thus, regardless of how the Court ultimately situates the gay rights cases within its broader equal protection framework, the key to preserving their potential may lie in retaining (and indeed reviving) our historical memory of the Court's actual approach to minimum tier review. Simply remembering the Court's cases accurately — as they were decided, rather than as they can be reimagined — may allow us, to a significant extent, to retain both equality-protective possibilities of this transitional moment of equal protection review.

This essay takes up these ideas in four parts. Part I describes the early development of the Court's sex and illegitimacy equal protection doctrine in the late 1960s and early 1970s and the early divisions that emerged in understanding their salience. Part II, drawing on the recent work of Professor Earl Maltz,<sup>30</sup> turns to the Court's internal debates in *Massachusetts Board of Retirement v. Murgia*<sup>31</sup> and the role that the sex and illegitimacy cases played in the Court's debates regarding the appropriate standards for rational basis review. Part III turns to the Court's mid-1970s decisions in *Craig* and *Trimble* and the ways that their understanding as heightened scrutiny cases may have derived in part from concerns raised by the *Murgia* debates that the sex and illegitimacy cases might be used to make broader rational basis review more stringent generally. Finally, Part IV turns to the implications of this history for present moment, exploring the role that the canon may have in defining where the gay rights cases will ultimately lead us in the evolution of equal protection review.

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(2004) (describing the ways that scholars shape the canon, and that the canon shapes legal thinking).

<sup>29</sup> See *infra* Parts I, IV.

<sup>30</sup> See generally Maltz, *supra* note 18 (providing, for the first time, an extended account of the Court's internal deliberations in *Murgia*).

<sup>31</sup> 427 U.S. 307 (1976).

I. “A NEWER EQUAL PROTECTION”:<sup>32</sup> THE TRANSITIONAL CASES,  
MAY 1968–JUNE 1975

Prior to the late 1960s, the Equal Protection Clause afforded little protection to those challenging gender inequality or discrimination against those of non-marital birth.<sup>33</sup> The Supreme Court had long read the Equal Protection Clause as allowing a diverse array of sex-based restrictions on women’s civic and professional engagement.<sup>34</sup> And, the Court had showed little interest in taking up advocates’ efforts to address illegitimacy discrimination under the rubric of race and poverty claims.<sup>35</sup> Thus, in the mid-1960s, sex and illegitimacy stood — much as sexual orientation in the early 1990s — as a largely accepted basis of classification in law.

The late 1960s and early 1970s marked a major transition in this permissive approach to openly discriminatory classifications based on gender and non-marital parentage. From 1968 through 1975, the Court decided more than a dozen cases striking down sex or illegitimacy classifications on equal protection grounds.<sup>36</sup> Starting with its May 1968 decisions in *Levy v. Louisiana* and *Glon v. American Guarantee and Liability Insurance Co.* and extending through the 1974–1975 Term, the

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<sup>32</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 1 (1972).

<sup>33</sup> In the interest of brevity, I collapse here a discussion of the Court’s sex and illegitimacy cases. There are, of course, however, significant differences in the development of the doctrine in those arenas, as well as the social and legal context that influenced them. Nevertheless, they share important common features for the purposes of the discussion herein.

<sup>34</sup> See generally Serena Mayeri, “*When the Trouble Started*”: *The Story of Frontiero v. Richardson*, in *WOMEN & THE LAW STORIES* 57 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (“In 1970, the Supreme Court had yet to invalidate any sex discriminatory law under constitutional equality principles.”).

<sup>35</sup> See, e.g., Smith, *supra* note 14, at 1608-09 (describing the early history of the illegitimacy cases); see also Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 103 CALIF. L. REV. (forthcoming 2015) (manuscript at 10, 17, 28, 36) (on file with the author) [hereinafter *Marital Supremacy*] (describing race-based claims in the illegitimacy context).

<sup>36</sup> See generally *Stanton v. Stanton*, 421 U.S. 7 (1975) (sex); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (sex); *Weinberger v. Beaty*, 418 U.S. 901 (1974) (illegitimacy); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimacy); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (illegitimacy); *Gomez v. Perez*, 409 U.S. 535 (1973) (illegitimacy); *Richardson v. Griffin*, 409 U.S. 1069 (1972), *summarily aff’g* 346 F. Supp. 1226 (D. Md. 1972) (illegitimacy); *Richardson v. Davis*, 409 U.S. 1069 (1972) (illegitimacy); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (1971) (sex); *Glon v. Am. Guar. & Liab. Ins.*, 391 U.S. 73 (1968) (illegitimacy); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy).

Court regularly (albeit not entirely consistently) found sex and illegitimacy classifications to be constitutionally impermissible as a matter of federal equal protection doctrine.<sup>37</sup> Thus, by the mid-1970s, the constitutional stature of sex and illegitimacy classifications had clearly shifted away from the hands-off approach of earlier periods in equal protection doctrine towards a more meaningful approach.

The precise nature of the Court's new approach to sex and illegitimacy, however, remained far from clear, even close to a decade after the Court's initial pronouncements. Despite the urging of many advocates, the Court did not during the late 1960s and early 1970s formally designate sex or illegitimacy as "suspect" classifications subject to strict scrutiny review.<sup>38</sup> Instead, the Court continued to typically use the language of "reasonableness" or "rationality" — language that traditionally had been used to signal rational basis review.<sup>39</sup> And yet

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<sup>37</sup> See, e.g., *Stanton*, 421 U.S. at 17 (striking down sex classification under Equal Protection Clause); *Wiesenfeld*, 420 U.S. at 638 n.2, 653 (striking down sex classification under the equal protection component of the Due Process Clause); *Beatty*, 418 U.S. at 901 (affirming, summarily, lower court decision invalidating illegitimacy classification based on the equal protection component of the Due Process Clause); *Jimenez*, 417 U.S. at 637 (striking down illegitimacy classification under the equal protection component of the Due Process Clause); *Frontiero*, 411 U.S. at 680 n.5, 688-91 (invalidating sex classification under the equal protection component of the Due Process Clause); *Cahill*, 411 U.S. at 621 (invalidating illegitimacy classification under Equal Protection Clause); *Gomez*, 409 U.S. at 537-38 (invalidating illegitimacy classification under Equal Protection Clause); *Griffin*, 409 U.S. at 1069 (invalidating illegitimacy classification under equal protection component of Due Process Clause); *Davis*, 409 U.S. at 1069 (affirming, summarily, lower court decision invalidating illegitimacy classification under equal protection component of Due Process Clause); *Weber*, 406 U.S. at 175-76 (striking down illegitimacy classification under Equal Protection Clause); *Reed*, 404 U.S. at 75-76 (striking down sex classification under Equal Protection Clause); *Glonn*, 391 U.S. at 75-76 (striking down illegitimacy classification under Equal Protection Clause); *Levy*, 391 U.S. at 71-72 (striking down illegitimacy classification under Equal Protection Clause).

<sup>38</sup> In 1973, in *Frontiero*, a four-Justice plurality of the court concluded that sex classifications should be subject to strict scrutiny, but was unable to secure a fifth vote for that proposition. See *Frontiero*, 411 U.S. at 682-88. After *Frontiero*, the Court resorted back to its pre-*Frontiero* approach of not applying an officially heightened standard of review. See, e.g., *Stanton*, 421 U.S. at 13, 17 (stating that "[w]e find it unnecessary in this case to decide whether a classification based on sex is inherently suspect" and striking down the classification as invalid "under any test — compelling state interest, or rational basis, or something in between"). The Court held that illegitimacy was not a suspect class subject to strict scrutiny in *Mathews v. Lucas*, 427 U.S. 495, 503-06 (1976).

<sup>39</sup> See, e.g., *Stanton*, 421 U.S. at 14-17 (using language like "reasonable" and "rational" to express the requirements applied to the law and expressly stating that there was no need to reach the issue of heightened scrutiny as the law would not pass rational basis review); *Wiesenfeld*, 420 U.S. at 651-52 (expressing the defect of the law in terms

both the Court's results — frequently invalidating challenged laws as unconstitutional — as well as its approach — seeming to meaningfully scrutinize the government justifications offered — seemed inconsistent with traditional deferential rational basis review.<sup>40</sup>

By the mid-1970s, this ambiguity had led to substantial divisions in external perceptions of the significance of the Court's sex and illegitimacy cases to its broader equal protection doctrine. Some scholars, such as Gerald Gunther, read the Court's early sex and illegitimacy cases as part of a broader turn towards more robust rational basis review.<sup>41</sup> Writing in the 1972 *Harvard Law Review* Foreword, Gunther argued that the sex and illegitimacy cases — as well as other recent rational basis pronouncements — marked “a new trend”: a willingness of a majority of the Justices “to acknowledge substantial equal protection claims on minimum rationality ground.”<sup>42</sup> Moreover, he suggested, this turn was associated not just with a desire for more robust rational basis review, but with a “mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine.”<sup>43</sup>

Many lower courts agreed with Gunther's assessment of the salience of early sex and illegitimacy cases for broader equal protection review.<sup>44</sup> Increasingly in the early 1970s, lower courts struck down a diverse array of classifications on the authority of early sex and illegitimacy precedents such as *Reed v. Reed* and *Weber v. Aetna Casualty and Surety*

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of its “irrationality”); *Jimenez*, 417 U.S. at 631-32, 636 (using language like “reasonable” and “legitimate” to express the requirements applied to the law and declining to reach the question of whether heightened scrutiny might be warranted); *Weber*, 406 U.S. at 172-76 (using language like “rational” and “legitimate” to express the standard being applied, but also including ambiguous language arguably signaling a higher standard of review); *Reed*, 404 U.S. at 76 (stating that the question presented was whether the classification bore a “rational relationship” to the state's objective).

<sup>40</sup> See generally *supra* note 36 (collecting cases invalidating sex and illegitimacy classifications on equal protection review).

<sup>41</sup> See Gunther, *supra* note 32, at 12, 19. See generally *id.* (developing an argument that the Court's sex and illegitimacy cases were a part of a broader trend away from a rigid two-tier approach, and toward more robust rational basis review).

<sup>42</sup> *Id.* at 19.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> See *infra* notes 45-47 and accompanying text. The Solicitor General's Office also raised similar arguments to the Court in a number of cases. See Oral Argument at 3:14-13:34, *Mathews v. Lucas*, 427 U.S. 495 (1976) (No. 75-88), available at [http://www.oyez.org/cases/1970-1979/1975/1975\\_75\\_88](http://www.oyez.org/cases/1970-1979/1975/1975_75_88); Transcript of Oral Argument at 14:21-21:40, 44:16-53:36, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694), available at [http://www.oyez.org/cases/1970-1979/1972/1972\\_71\\_1694](http://www.oyez.org/cases/1970-1979/1972/1972_71_1694).

Co. (as well as other early 1970s precedents like *Eisenstadt v. Baird*).<sup>45</sup> While courts adopted different understandings of the specific methodology suggested by these early 1970s cases, many agreed that they suggested broadly that even cases involving classifications or rights not formally deemed “suspect” or “fundamental” could be subject to meaningful equal protection review.<sup>46</sup> Thus, in the early 1970s, *Reed*,

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<sup>45</sup> See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (striking down illegitimacy classification under Equal Protection Clause without applying formally heightened review); *Eisenstadt v. Baird*, 405 U.S. 438, 446-55 (1972) (concluding that Massachusetts’ ban on the sale of contraception to single people for the purposes of preventing conception violated the Equal Protection Clause under a minimum tier/rationality standard); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971) (striking down sex classification under Equal Protection Clause, while applying minimum tier/rationality review); see also, e.g., *Murgia v. Mass. Bd. of Ret.*, 376 F. Supp. 753, 754 (1973) (relying on *Reed* in striking down mandatory retirement law), *rev’d*, 427 U.S. 307 (1976); *Robinson v. Johnson*, 352 F. Supp. 848 (D. Mass. 1973) (relying on *Reed* and *Weber* in striking down exclusion from veterans’ educational assistance benefits for those who performed “alternate service,” such as conscientious objectors), *rev’d*, 415 U.S. 361 (1974); *Brown v. Merlo*, 8 Cal. 3d 855 (1973) (relying significantly on *Reed*, *Glonn*, and *Weber* in striking down portions of automobile guest statute that barred certain plaintiffs from recovery); *Ind. High Sch. Athletic Ass’n v. Raike*, 329 N.E.2d 66, 71-78 (Ind. Ct. App. 1975) (relying significantly on *Reed* in striking down ban on the athletic participation of married high school students). See generally *infra* note 140 (noting that in the 1974–1975 time frame, forty judicial opinions relied in part on *Reed* to strike down non-sex-based classifications on rational basis review).

<sup>46</sup> Some courts, like *Gunther*, read the sex and illegitimacy cases and other contemporary equal protection decisions as simply adopting a more meaningful standard for rational basis review. For authorities that read the sex and illegitimacy cases as establishing a general approach to minimum tier review, applicable to all minimum tier cases, see, for example *Robinson*, 352 F. Supp. at 856-57 and *Brown*, 8 Cal. 3d at 861-62. Others read them as suggesting that a sliding scale approach should apply, with contexts implicating classifications or rights that fit some of the criteria for suspect/fundamental status receiving more significant scrutiny. See, e.g., *Raike*, 329 N.E.2d at 71-78 (treating the Court’s approach as a sliding scale approach that looked to the degree of importance of the “individual’s interest” in setting the level of review); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (arguing in favor of a similar approach). It appears that these varying perspectives on the salience of the early 1970s cases was shared internally on the Court. Compare Draft Opinion by William J. Brennan, Jr. at 8-12 (Jan. 27, 1976), *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), in POWELL PAPERS [hereinafter Brennan Draft], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgiaOpinionChambers&1st.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgiaOpinionChambers&1st.pdf) (adopting the “sliding scale” approach to minimum tier scrutiny), and Memorandum from William J. Brennan, Jr. to William H. Rehnquist at 1 (Feb. 9, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS [hereinafter Brennan Memorandum to Rehnquist], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976FebMarch.pdf) (explaining the Brennan Draft’s reasoning in terms of the sliding scale approach), with Draft Opinion by Lewis F. Powell, Jr. at 5-8 (Apr. 7, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS [hereinafter First Powell Draft], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976FebMarch.pdf)

*Weber*, and other early sex and illegitimacy precedents were regularly deployed in service of judicial decisions applying a more robust, flexible, and contextual equal protection approach, even outside of the context of formally heightened review.<sup>47</sup>

But this assessment of the early sex and illegitimacy precedents' significance was not universally shared. Some courts and commentators viewed the sex and illegitimacy cases as reflecting a special concern with sex and illegitimacy, rather than creating a broadly applicable new equal protection approach.<sup>48</sup> And many judges during the early 1970s expressed uncertainty about the significance of the Court's sex and illegitimacy cases (both within the sex and illegitimacy contexts, and more broadly for equal protection doctrine), noting that the Court had not consistently or clearly expressed its views regarding the appropriate doctrinal approach.<sup>49</sup> Thus, while it was clear that the Court's early sex

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(adopting the globally applicable approach). These two approaches would have differing implications: the former would call for a more meaningful approach to all minimum tier cases, whereas the latter would only call for more meaningful scrutiny where group or rights based concerns were implicated. As discussed in Part IV, descriptively, the latter approach has tended to characterize the Supreme Court's minimum tier jurisprudence.

<sup>47</sup> See *supra* note 45; see also, e.g., *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973) (concluding that rational basis review was appropriate in the pregnancy discrimination context, but reading *Reed* and *Weber* broadly as modifying that standard to afford a robust form of scrutiny). As described more fully in *infra* note 50, disputes over how to characterize the standard of review applied by the sex and illegitimacy cases often dovetailed with disputes over what was sex or illegitimacy discrimination that would trigger heightened scrutiny. As cases like *Green* illustrate, the characterization of cases like *Reed* and *Weber* as minimum tier cases alleviated this tension by making robust review available, regardless of whether a sex or illegitimacy classification was found.

<sup>48</sup> See, e.g., *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973) (reading the Court's sex discrimination precedents as creating an "intermediate approach" specifically applicable to sex classifications); *Action Alliance for Senior Citizens of Greater Phila. v. Shapp*, 400 F. Supp. 1208 (E.D. Pa. 1975) (concluding that the sex and illegitimacy cases did not apply and stating that "we note that in each of these cases, the Supreme Court found present discrimination against a class of persons possessing many, and possibly all, of the traditional attributes of a suspect class"); *The Supreme Court, 1972 Term — Sex Discrimination by Federal Government in Payment of Fringe Benefits to Armed Services Personnel*, 87 HARV. L. REV. 116, 123 n.43 (1973) (noting that "*Reed* seems to indicate . . . that it is a special sensitivity to sex classifications . . . which explains the shift in the burden of persuasion when sex classifications are analyzed under the strict rationality test"); see also *Wiesenfeld v. Sec'y of Health, Educ. & Welfare*, 367 F. Supp. 981, 988 (D.N.J. 1973) (collecting authority taking this approach, but concluding that *Reed* and *Frontiero* did not clearly instantiate a formally heightened standard for sex classifications).

<sup>49</sup> See, e.g., *Women's Liberation Union of R.I. v. Israel*, 512 F.2d 106, 108-09 (1st Cir. 1975) (finding cases such as *Reed* and *Frontiero* to be ambiguous in their significance); *Wiesenfeld*, 367 F. Supp. at 988-89 (concluding that *Reed* and *Frontiero*



and illegitimacy cases marked some meaningful shift in the Court's approach to equal protection doctrine, courts and commentators were widely unresolved as to the precise nature of that shift.<sup>50</sup>

Internally on the Court, there were few reasons in the mid-1970s to believe that this uncertainty was approaching an imminent resolution.<sup>51</sup> While a plurality of Justices had held in 1973 in *Frontiero v. Richardson* that suspect class status was warranted for sex (and a subset of those Justices also felt that suspect class status was warranted for illegitimacy), the swing Justices on the Court — needed to form a majority — showed no signs of warming to this position.<sup>52</sup> Moreover,

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were ambiguous in their significance and characterizing the Court as “obvious[ly] reluctant[t]” to clarify the proper treatment of sex classifications”); see also John D. Johnson, *Sex Discrimination and the Supreme Court — 1971–1974*, 49 N.Y.U. L. REV. 617, 689 (1974) (arguing that the Court's contemporary sex discrimination cases lacked a principled consistent underpinning and reflected its uncertainty about “what constitutes sex discrimination, how virulent this form of discrimination is [and] how it should be analyzed in terms of due process and equal protection”).

<sup>50</sup> Further complicating matters, the courts were, during this time frame, also wrestling with how to address diverse claims brought by advocates advocating for more complex and varied ways of understanding “discrimination,” including intersectional, contextual, and effects-based approaches. See generally MAYERI, *supra* note 14 (describing the complex intersectional and effects-based arguments raised by advocates in the sex context during this time); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011) (describing arguments of feminists in the 1970s for more complicated ways of understanding constitutional sex equality); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (describing the role of anti-stereotyping principles in 1970s era sex discrimination litigation); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (describing “contextual intent” approaches to race Equal Protection cases during this time frame); Mayeri, *Marital Supremacy*, *supra* note 35 (describing intersectional and effects-based arguments raised by advocates in the illegitimacy context); Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) [hereinafter *Equality Divided*] (describing complex approaches to causation in the lower courts in race Equal Protection cases during this time frame); Reva Siegel, *Siegel, J., Concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 63 (Jack M. Balkin ed., 2005) (drawing on more complex forms of equality arguments extant in the early 1970s to imagine a sex equality-based argument for abortion rights). As discussed *supra* note 47, in the sex and illegitimacy contexts, the characterization of the governing precedents as minimum tier precedents to some extent softened these disputes, insofar as they made a robust form of review available regardless of the ultimate determination of whether sex or illegitimacy discrimination (in the pertinent constitutional sense) had transpired.

<sup>51</sup> Indeed, there is some evidence that at least some of the Justices quite deliberately avoided more specifically delineating the appropriate standard of review in the early sex and illegitimacy cases. See, e.g., Mayeri, *Marital Supremacy*, *supra* note 35, at 27–28 (describing exchange between Powell and his clerk in relation to *Weber* which suggests that Powell may have been deliberately vague as to the standard of review).

<sup>52</sup> See *supra* notes 38–40 (describing the status of disputes over suspect class status

one obvious alternative — the formal instantiation of a mid-tier standard of review — was of little interest to key centrist Justices such as Justice Powell, who resisted the idea of further partitioning equal protection review.<sup>53</sup>

But, neither was it apparent in the mid-1970s that there would be a majority for the Guntherian alternative: reading the Court's sex and illegitimacy cases as widely reimagining the Court's broader approach to rational basis review.<sup>54</sup> While the Court had also arguably deployed the sex and illegitimacy cases' more robust approach in a number of other non-strict scrutiny contexts, it had failed to do so in a number of high-profile cases.<sup>55</sup> Indeed, at least one of the prominent attempts by

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for sex and illegitimacy during this time frame); *see also* Memorandum from JHW to Lewis F. Powell, Jr. at 2-3 (Apr. 14, 1972), *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (No. 70-5112), *in* POWELL PAPERS, *available at* <http://law.wlu.edu/deptimages/powell%20archives/WeberAetna.pdf> (describing the divisions on the Court regarding whether illegitimacy should be treated as a suspect class, and recommending that Justice Powell remain “flexible and uncommitted”); *infra* note 95 (making clear that as of 1976, Justice Powell remained opposed to treating sex discrimination as a suspect class). The constitutional stature of sex, in particular, was also complicated by the pendency of the Equal Rights Amendment and the sentiment of a number of Justices on the Court that the Court should defer to the political process. *See* *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring, joined by Burger, C.J. and Blackmun, J.).

<sup>53</sup> *See, e.g.*, Memorandum from Lewis F. Powell, Jr. to Law Clerk at 3 (Sept. 6, 1976), *Trimble v. Gordon*, 430 U.S. 762 (1977) (No. 75-5952), *in* POWELL PAPERS, *available at* <http://law.wlu.edu/deptimages/powell%20archives/TrimbleGordon.pdf> (stating that he preferred “not to create a third tier and thereby add to the existing confusion”). It appears however that at least some of the Court's moderates — in particular Justice Blackmun — did support the institutionalization of an intermediate tier. *See, e.g.*, MAYERI, *supra* note 14, at 124 (describing Blackmun as having “long hoped” to establish mid-tier scrutiny); Maltz, *supra* note 18, at 17 (stating that, in *Murgia*, Blackmun advocated the institutionalization of a middle tier, although he also indicated his willingness to go along with Powell's approach); *cf.* Memorandum from Harry A. Blackmun to William J. Brennan, Jr. at 1 (Mar. 11, 1976), *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044) *in* WHITE PAPERS (on file with the Library of Congress in Byron White Papers, Box 344) [hereinafter WHITE PAPERS] (suggesting that Justice Blackmun was “not yet ready to commit [himself] to a position that rejects a possible intermediate ground”).

<sup>54</sup> As described earlier, both Gerald Gunther in his influential Harvard Law Review *Foreword*, as well as many lower courts, read the Court's early sex and illegitimacy precedents not as setting apart sex or illegitimacy as subject to heightened review, but rather as more broadly reconfiguring minimum tier review. *See supra* notes 41-47 and accompanying text.

<sup>55</sup> For circumstances where the Court had applied the same more robust approach outside of the sex and illegitimacy context, *see generally* Gunther, *supra* note 32. For prominent cases in which the Court apparently failed to adhere to this approach, *see, for example* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). *See also infra* note 56 and accompanying text.

the lower courts to extend the sex and illegitimacy cases outside of the sex or illegitimacy contexts (by reading them as broadly re-envisioning standards for rational basis review) was ultimately overturned by the Supreme Court (albeit using reasoning rejecting the District Court's outcome, but not necessarily its analytical approach, thus rendering the significance of the reversal debatable).<sup>56</sup>

Thus, as of the start of the Court's October 1975 Term, it was unclear how, if at all, the doctrinal ambiguity produced by the Court's early sex and illegitimacy cases would be resolved. There was no clear majority for any of the obvious doctrinal propositions for which the sex and illegitimacy cases could be said to stand. And the Court itself seemed to feel little sense of urgency to resolve globally the doctrinal uncertainty it had produced.<sup>57</sup>

## II. THE 1975 TERM: THE DEBATES IN *MASSACHUSETTS BOARD OF RETIREMENT V. MURGIA*<sup>58</sup>

It was not immediately apparent that the 1975 Term would be the one to push the Court to define more formally its sex and illegitimacy

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<sup>56</sup> See *Robinson v. Johnson*, 352 F. Supp. 848, 856-59 (D. Mass. 1973) (relying on *Reed* and *Weber* in striking down exclusion from veterans' educational assistance benefits for those who performed "alternate service," such as conscientious objectors), *rev'd*, 415 U.S. 361, 374-83 (1974) (reversing, but stating the standard in the same way it was articulated in *Reed* and other early 1970s sex cases, and applying a very meaningful assessment of the basis for the distinction drawn in the statute).

<sup>57</sup> Many of the early 1970s sex and illegitimacy cases were decided apparently without any significant internal discussion of the standard of review among the Justices. Rather, the Justices seem to have simply relied on earlier precedents that were themselves unclear as to the standard applied. See, e.g., Docket Sheet at 1-2 (Feb. 21, 1975), *Stanton v. Stanton*, 421 U.S. 7 (1975) (No. 73-1461), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/73-1461\\_StantonStanton.pdf](http://law.wlu.edu/deptimages/powell%20archives/73-1461_StantonStanton.pdf) (showing very little discussion in the Justice's *Stanton* conference of the applicable standard of review); Docket Sheet at 1-2, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/73-1892\\_WeinbergerWeisenfeld.pdf](http://law.wlu.edu/deptimages/powell%20archives/73-1892_WeinbergerWeisenfeld.pdf) (showing only cursory discussion of the applicable standard of review); Docket Sheet at 1-2 (Mar. 20, 1974), *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (No. 72-6609), in POWELL PAPERS, available at <http://law.wlu.edu/deptimages/powell%20archives/JimenezWeinberger.pdf> (showing that most of the discussion in conference for *Jimenez* focused on whether *Weber* was applicable); Docket Sheet at 1-2, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (No. 70-5112), in POWELL PAPERS, available at <http://law.wlu.edu/deptimages/powell%20archives/WeberAetna.pdf> (showing that most of the discussion in conference focused on the applicability of *Levy*).

<sup>58</sup> *Murgia*, 427 U.S. 307. In view of the subject of this essay, I have focused my discussion herein on the role of the sex and illegitimacy cases in the Court's internal debates in *Murgia*. For those interested in a fuller account, I recommend interested

doctrine. No major sex discrimination case appeared on the Court's docket during the 1975 Term. And the pair of illegitimacy cases that were before the Court — *Mathews v. Lucas*<sup>59</sup> and *Norton v. Mathews*<sup>60</sup> — generated, in conference, divergent perspectives on the extent to which illegitimacy should be subject to formally heightened review.<sup>61</sup> (Ultimately, a majority of Justices would hold in *Lucas* that illegitimacy did not qualify for the Court's most "exacting scrutiny" — reserved for suspect classes and fundamental rights — without further clarifying the applicable standard of review).<sup>62</sup>

But the internal debates in a seemingly unrelated October Term 1975 case — *Massachusetts Board of Retirement v. Murgia* — would more directly demonstrate to several of the Justices the need to clarify the nature of the Court's approach to sex and illegitimacy equal protection review. Thus, *Murgia* — although not itself resolving the ambiguity in the Court's sex and illegitimacy doctrine — made clear that the undefined nature of the sex and illegitimacy cases rendered them capable of unsettling long-standing presumptions about the generally deferential nature of equal protection review. Thus *Murgia* would — in a way previous cases had not — focus the Justices' attention on the potential consequences for broader equal protection doctrine of leaving unsettled the stature of the Court's sex and illegitimacy precedents.

*Murgia's* hearing on the Court began uneventfully. Raising the issue of whether age discrimination classifications should be deemed "suspect" — and more generally of the constitutionality of

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readers to Earl Maltz's excellent account of the *Murgia* deliberations, which describes in much greater detail those deliberations, and situates them within the Burger Court's broader rational basis jurisprudence. See generally Maltz, *supra* note 18 (describing the *Murgia* deliberations at much greater length).

<sup>59</sup> *Mathews v. Lucas*, 427 U.S. 495 (1976).

<sup>60</sup> *Norton v. Mathews*, 427 U.S. 524 (1976).

<sup>61</sup> See, e.g., Docket Sheet at 1-2, *Norton*, 427 U.S. 524 (No. 74-6212), in POWELL PAPERS [hereinafter Norton Docket Sheet], available at [http://law.wlu.edu/deptimages/powell%20archives/74-6212\\_Norton\\_Mathews.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-6212_Norton_Mathews.pdf) (showing that Justice Brennan argued for strict scrutiny in *Norton* and *Lucas*); Docket Sheet at 102 (Jan. 16, 1976), *Lucas*, 427 U.S. 495 (No. 75-88), in POWELL PAPERS [hereinafter Lucas Docket Sheet], available at <http://law.wlu.edu/deptimages/powell%20archives/MathewsLucas.pdf> (showing that at least some of the other Justices disagreed with Justice Brennan).

<sup>62</sup> See *Lucas*, 427 U.S. at 503-06; see also Memorandum from Lipsett to Harry A. Blackmun at 1 (Apr. 14, 1976), *Norton*, 427 U.S. 524 (No. 74-6212), in BLACKMUN PAPERS (Box 226) (on file with the Library of Congress Manuscript Division as "The Harry A. Blackmun Papers") (suggesting that although *Lucas* rejected suspect class status, it was deliberately drafted vaguely to leave unclear whether the standard it applied was "mere rationality" or "something slightly more in the way of a third or floating standard").

Massachusetts' mandatory retirement age for police officers — *Murgia* did not, in conference, generate significant divisions.<sup>63</sup> Thus, with the exception of Justice Marshall (who believed that review should be heightened and that the classification was unconstitutional), all of the Justices on the Court agreed that rational basis was the appropriate standard and that the classification under review was rational.<sup>64</sup>

But Justice Brennan, assigned to author the majority opinion, would elect not to take the consensus approach. Rather than drafting an opinion designed to generate the broadest agreement among the members of the majority, Justice Brennan crafted an initial draft that noticeably sought to move the Court away from a rigid, highly stratified approach to the standards of review.<sup>65</sup> Drawing substantially on the sex and, to a lesser extent, illegitimacy precedents, Justice Brennan's draft suggested a single sliding-scale standard applicable "in the absence of a need for strict scrutiny": that the classification be "reasonable, not arbitrary, and . . . rest[] upon some ground of difference having a fair and substantial relationship to the object of the legislation."<sup>66</sup>

The "fair and substantial" relation standard had considerable support in the Court's recent case law, having been articulated as the standard in many of the recent sex cases, as well as in a number of other early 1970s rational basis precedents.<sup>67</sup> But Justice Brennan's draft seemed to

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<sup>63</sup> See Docket Sheet at 1-2, *Murgia*, 427 U.S. 307 (1976) (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1975.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf); see also Maltz, *supra* note 18, at 266.

<sup>64</sup> See Docket Sheet, *supra* note 63, at 1-2; Maltz, *supra* note 18, at 266; see also *Murgia*, 427 U.S. at 317-27 (1976) (Marshall, J., dissenting).

<sup>65</sup> See Brennan Draft, *supra* note 46, at 8-11; see also Maltz, *supra* note 18, at 265.

<sup>66</sup> See Brennan Draft, *supra* note 46, at 8-11; see also Maltz, *supra* note 18, at 265. Interestingly, despite the fact that Justice Marshall had, in dissent, suggested a similar sliding scale approach in *San Antonio Independent School District v. Rodriguez*, Justice Brennan did not allude to the Marshall dissent in either his draft, or the memorandum that he circulated defending his reading of the Court's approach. See Brennan Draft, *supra* note 46 (making no mention of Marshall's *Rodriguez* dissent); Brennan Memorandum to Rehnquist, *supra* note 46 (making no reference to the *Rodriguez* dissent); cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (proposing a sliding scale approach). See generally *infra* note 185 (discussing Justice Marshall and Justice Stevens' association in contemporary scholarship with a sliding scale approach like that endorsed by Justice Brennan in *Murgia*).

<sup>67</sup> See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (articulating the standard as "fair and substantial relation" in a sex case); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (same); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (same); see also *Johnson v. Robinson*, 415 U.S. 361, 374 (1974) (articulating the standard as "fair and substantial relation" outside the sex discrimination context); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1971) (same). The "fair and substantial relation" language originated in a *Lochner*-era equal protection

add a new dimension to the analysis: an explicit assessment of whether the characteristics and political stature of the group (and perhaps the rights) at issue warranted more meaningful review.<sup>68</sup> The Brennan draft thus seemed to suggest an approach similar to that inferred by many of the lower courts who had construed the recent doctrinal developments expansively — one in which the Court would look, even outside of “suspect classes” or “fundamental rights,”<sup>69</sup> at contextual factors in determining the appropriate approach to review.<sup>70</sup>

Justice Brennan’s draft drew a less than enthusiastic response from a number of his brethren. Although Justice White immediately stated that he would join the opinion, Justices Rehnquist and Stewart quickly indicated that they would separately concur.<sup>71</sup> Justice Rehnquist, in particular, took issue with Justice Brennan’s approach, observing that while there “will always be differences among us as to what sort of

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precedent, *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920). See Maltz, *supra* note 18, at 265-68. It was certainly not the only formulation of the rational basis test in the early 1970s — as common was the much more deferential standard articulated, for example, in *Dandridge v. Williams*. See *id.* at 265-68; see also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (stating that, in defining the rational basis standard, “[i]f the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification is not made with mathematical nicety . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it” (internal quotation marks omitted)).

<sup>68</sup> See Brennan Draft, *supra* note 46, at 8-11.

<sup>69</sup> Under the classic formulation of the two-tier approach, strict scrutiny was applied to suspect classifications and to fundamental rights. See, e.g., *Rodriguez*, 411 U.S. at 17 (majority opinion). Some of the early 1970s minimum tier cases, such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972), seemed to suggest that the significance of the right or burden at issue could lead to more meaningful review, even absent a finding that the right at stake was fundamental. Thus, the sliding scale approach was generally understood to account for both group, and rights-based concerns that did not rise to the level of “suspectness” or “fundamentality.” See generally *Rodriguez*, 411 U.S. at 98-99 (Marshall, J., dissenting) (describing the Court’s sliding scale approach as including both the “societal importance of the interest adversely affected” and “the recognized invidiousness of the basis upon which the particular classification is drawn” as bases for assessing what “degree of care” the Court would apply in a particular equal protection case).

<sup>70</sup> See Brennan Draft, *supra* note 46, at 8-11; see also Brennan Memorandum to Rehnquist, *supra* note 46, at 1-4 (making even more explicitly clear that Justice Brennan’s intent was to adopt a sliding scale approach); cf. *supra* note 46 and accompanying text (discussing the divide among the lower courts as to what form of robust minimum tier review the Court had adopted, and describing the sliding scale approach).

<sup>71</sup> See Maltz, *supra* note 18, at 267; see also Memorandum from Potter Stewart to William J. Brennan, Jr. at 1 (Jan. 28, 1976), *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1975.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf).

classification demands ‘strict scrutiny’ and perhaps . . . as to whether there may be an intermediate level of scrutiny [applicable in cases like *Weber* and *Reed*] . . . once it is conceded that none of these factors are involved, the standard ought to be simply stated and ought to virtually foreclose judicial invalidation . . .”<sup>72</sup>

In response, Justice Brennan contended that the Court had, in fact, abandoned the traditional rational basis test in its recent decisions in favor of “a more flexible rule.”<sup>73</sup> Drawing heavily on the sex and illegitimacy cases, as well as a number of other early 1970s precedents, Justice Brennan contended that for the broad corpus of cases where strict scrutiny did not apply, the Court had in fact conducted an assessment in which “the requisite relationship between means and end” had turned on “the nature of each case presented.”<sup>74</sup> Arguing that cases such as *Weber*, *Reed*, and *Eisenstadt* were indefensible “[i]f only either mere rationality or strict scrutiny are the available tests,” he argued that the Court had adopted a more flexible approach which took account of contextual considerations.<sup>75</sup> He further defended the specific verbal formulation he had employed in the draft, noting that it pulled directly from a strong corpus of non-strict scrutiny precedents.<sup>76</sup>

Justice Rehnquist’s response to Justice Brennan’s memorandum, circulated two days later, was a sixteen-page typewritten draft opinion, declining to join Justice Brennan’s opinion and concurring in the judgment.<sup>77</sup> Taking aim at many aspects of the Brennan opinion, Justice Rehnquist’s draft concluded by specifically addressing the authority on

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<sup>72</sup> Memorandum from William H. Rehnquist to William J. Brennan, Jr. at 2-3 (Jan. 30, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1975.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1975.pdf).

<sup>73</sup> See Brennan Memorandum to Rehnquist, *supra* note 46, at 1; see also Maltz, *supra* note 18, at 268.

<sup>74</sup> See Brennan Memorandum to Rehnquist, *supra* note 46, at 1.

<sup>75</sup> See *id.* at 2; see also Maltz, *supra* note 18, at 268.

<sup>76</sup> See Brennan Memorandum to Rehnquist, *supra* note 46, at 1-4.

<sup>77</sup> See Draft Opinion by William H. Rehnquist at 1-16 (Feb. 11, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS [hereinafter Rehnquist Draft], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976FebMarch.pdf); see also Maltz, *supra* note 18, at 268. Although they were ultimately circulated to the Conference, Justice Brennan and Justice Rehnquist’s original correspondence regarding the Brennan Draft was directed only to each other. See Memorandum from William J. Brennan, Jr. to the Conference at 1 (Feb. 12, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976FebMarch.pdf) (circulating to the full conference Justice Brennan and Justice Rehnquist’s correspondence). Thus, Justice Rehnquist’s concurring opinion was the first public airing of their dispute. *Id.*

which it relied.<sup>78</sup> Noting that *Reed* and *Weber* “are repeatedly cited by the Court to support its discussion of the standard of constitutional review,” Justice Rehnquist argued in concurrence that those cases applied a “more rigorous judicial scrutiny” based on the fact that the classifications therein were “sex-based” and “discriminating against illegitimates.”<sup>79</sup> Noting that commentators had read *Reed* and *Weber* as heightening the level of scrutiny out of a special concern for “illegitimates” and women — a level of concern the Court acknowledged was inapplicable to age — Justice Rehnquist observed that, “[t]o my mind it follows from this distinction, *with which I fully agree*, that the level of judicial scrutiny afforded” in the sex and illegitimacy cases was inappropriate.<sup>80</sup>

Although Justice Rehnquist’s opposition to the Brennan draft’s approach was the most vocal, it soon became clear that a number of other Justices were also uncomfortable with aspects of the draft.<sup>81</sup> Justice Stewart and Chief Justice Burger quickly expressed their general agreement with Justice Rehnquist’s critiques.<sup>82</sup> And, on April 7th, Justice Powell circulated another long opinion concurring in judgment, taking issue with certain aspects of the Brennan draft, while also embracing significant aspects of Justice Brennan’s more robust approach to minimum tier review.<sup>83</sup> Specifically, Justice Powell noted that the “two-tier” approach was “firmly established” at the time he joined the Court, and thus — absent “a majority of the Court [that] wishes to attempt a new formulation” — binding.<sup>84</sup> But, he nevertheless argued strongly that the lower tier, rational basis review, “must have substance if the Equal Protection Clause is to have meaning.”<sup>85</sup> Contending that it was proper to scrutinize a classification to ensure a

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<sup>78</sup> See Maltz, *supra* note 18, at 268; see also Rehnquist Draft, *supra* note 77, at 12-15.

<sup>79</sup> Rehnquist Draft, *supra* note 77, at 12-15.

<sup>80</sup> *Id.* (emphasis added).

<sup>81</sup> See generally Maltz, *supra* note 18, at 268-76 (describing in detail the Justices’ perspectives on the Brennan, and later Powell, drafts).

<sup>82</sup> See Memorandum from Potter Stewart to William J. Brennan, Jr. at 1 (Feb. 12, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976FebMarch.pdf); Memorandum from Chief Justice Burger to William J. Brennan, Jr. at 1 (Mar. 30, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/741044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/741044_MassBoardRetirementMurgia1976FebMarch.pdf).

<sup>83</sup> See First Powell Draft, *supra* note 46, at 3-8; see also Maltz, *supra* note 18, at 269 (noting that the Powell opinion was circulated on April 7 and describing the prior memorandum that Justice Powell had circulated expressing his views).

<sup>84</sup> First Powell Draft, *supra* note 46, at 1-2 n.1.

<sup>85</sup> *Id.* at 5.



“fair and substantial” relation, he asserted that such scrutiny was necessary to ensure that the classification was “rational[]” and not used to mask “an improper (for example, racially discriminatory) purpose.”<sup>86</sup>

Justice Brennan, perhaps recognizing that his efforts could not succeed without Justice Powell’s assent, quickly modified his strategic approach.<sup>87</sup> Circulating a revised draft to Justice Powell (and Justice White) that “cribbed unashamedly” from the Powell draft, he directly requested that Justice Powell take responsibility for the majority opinion.<sup>88</sup> Noting that “our joint hope of a Court agreement on an equal protection standard in this area has a better chance of realization if you rather than I author the opinion” and that “much of the attached is in your words,” he stated that “I feel strongly that the opinion should be in your name not in mine.”<sup>89</sup> Justice Powell agreed and, after circulating his initial revised draft (combining Justice Brennan’s efforts with his own) to a number of Justices individually in early May, circulated to the full Court his revised majority opinion on May 19th.<sup>90</sup>

Justice Powell’s revised draft, while imposing more robust requirements for rational basis review, did not take the sliding scale approach endorsed by the initial Brennan draft.<sup>91</sup> Instead,

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<sup>86</sup> *Id.* at 7-8. This idea — that meaningful rational basis review might serve as a backstop to covert discrimination — is particularly intriguing in view of contemporary critiques of the narrow application of the Court’s intent doctrine in equal protection adjudication. *See generally* Haney-López, *supra* note 50 (arguing that contemporary intent doctrine marks an unnecessary narrowing of contextual understandings of intent previously applied by the Supreme Court); Siegel, *Equality Divided*, *supra* note 50 (critiquing contemporary intent doctrine, and arguing that historically broader understandings of intent were applied by the courts).

<sup>87</sup> Apparently Justice Brennan had already previously contacted Justice Burger about the possibility of reassigning the opinion, in view of the resistance that his initial draft had provoked. *See* Maltz, *supra* note 18, at 269.

<sup>88</sup> Memorandum from William J. Brennan, Jr. to Lewis F. Powell, Jr. at 1 (Apr. 14, 1976), *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), in POWELL PAPERS [hereinafter Brennan Memorandum to Powell], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976April.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976April.pdf); *see also* Maltz, *supra* note 18, at 269.

<sup>89</sup> *See* Brennan Memorandum to Powell, *supra* note 88, at 1; *see also* Maltz, *supra* note 18, at 269.

<sup>90</sup> *See* Maltz, *supra* note 18, at 272-74.

<sup>91</sup> *See* Second Draft Opinion by Lewis F. Powell, Jr. at 10-17 (May 19, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS [hereinafter Second Powell Draft], available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgiaOpinion3rd.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgiaOpinion3rd.pdf); *see also* Memorandum from WHB to Harry A. Blackmun at 1 (May 19, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in BLACKMUN PAPERS (Box 219) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (noting that Justice Powell’s draft did not embrace

“plagiariz[ing] Gunther,” he argued for a means-based assessment in which the justifications offered must be real and “genuinely related to the State’s purpose in enacting the legislation . . . .”<sup>92</sup> Noting that classifications should still be “presumed to be valid,” he nevertheless suggested that “even relaxed review of presumptively valid legislative classifications must have substance if the Equal Protection Clause is to have meaning.”<sup>93</sup> Perhaps hoping to avoid the controversy over the salience of the Court’s sex and illegitimacy precedents, Justice Powell also removed all references to the sex and illegitimacy cases in describing the draft’s doctrinal basis, relying instead on certain recent non-sex and illegitimacy cases (such as *U.S. Department of Agriculture v. Moreno*<sup>94</sup>) as well as Gunther’s “means model” approach.<sup>95</sup>

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the sliding scale approach). *But cf.* Memorandum from CRL to Harry A. Blackmun at 1-2 (May 24, 1976), *Mathews v. Lucas*, 427 U.S. 495 (1976) (No. 75-88), in BLACKMUN PAPERS (Box 228) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (suggesting that both Powell’s *Murgia* draft and Blackmun’s *Mathews v. Lucas* draft “designedly” left open the issue of whether “what is a ‘fair and substantial’ relation in the eyes of a ‘rational’ man may depend a bit on the classes discriminated and the subject of the legislative benefit.”). *See generally* Memorandum from Lewis F. Powell, Jr. to Harry A. Blackmun at 1 (June 7, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in BLACKMUN PAPERS (Box 219) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (suggesting to Justice Blackmun that Justice Powell’s *Murgia* draft — and Justice Blackmun’s draft in *Mathews* — “have the same objective: to frame E/P analysis (“rational basis”) fairly broadly or flexibly without creating a third tier of analysis”).

<sup>92</sup> Second Powell Draft, *supra* note 91, at 11-15; *see also* Memorandum from Lewis F. Powell, Jr. to Law Clerk at 1 (Apr. 26, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976April.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976April.pdf) (observing that he had incorporated the Gunther “means model” into the draft, and had “plagiarized Gunther somewhat more than our first draft”).

<sup>93</sup> Second Powell Draft, *supra* note 91, at 10.

<sup>94</sup> *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534-38 (1973) (striking down amendments to the Food Stamp Act which were based on dislike of “hippies”).

<sup>95</sup> *See generally* Second Powell Draft, *supra* note 91 (relying not on the sex and illegitimacy cases, but instead on non-sex and illegitimacy cases and Gunther’s “means model” approach). Indeed, Justice Powell’s draft went so far as to modify the description of the district court opinion — misleadingly implying that it had relied on *Dandridge v. Williams*, 397 U.S. 471 (1970) in finding that the age classification could not pass a test of rationality — when in fact the district court had relied on *Reed v. Reed*, 401 U.S. 934 (1971). *See* Second Powell Draft, *supra* note 91, at 5. This reluctance to cite the sex and illegitimacy cases may also have stemmed from Justice Powell’s concern that Justice Brennan hoped to use this case to emphasize the distinctiveness of sex within a sliding scale approach. Justice Brennan’s initial draft had emphasized sex’s special stature (distinguishing it from age), a move which Justice Powell perceived as a back-door effort to afford protected class status to sex — something that Justice Powell opposed. *See* Memorandum from Lewis F. Powell, Jr. to William J. Brennan, Jr. at 1 (Feb. 11, 1976),

Justice Powell's draft, while more restrained in approach than Justice Brennan's, continued to struggle to secure the majority support that Justice Brennan had hoped would follow from Justice Powell's assumption of authorship.<sup>96</sup> Justice Rehnquist, in particular (but certainly not exclusively), continued to express significant disagreement with even the Powell draft's approach, and on May 25th circulated an eighteen-page memorandum explaining his concerns.<sup>97</sup> Continuing to take issue with the draft's "expansion of the 'rational basis' test," Justice Rehnquist argued that "it mask[s] the actual operation of the Equal Protection Clause behind a surface doctrine which set[s] this Court up as a tutor for legislators in order that they may be taught how to enact statutes which carry out the purpose they have in mind."<sup>98</sup>

And, despite the fact that Justice Powell had removed all references to the Court's sex and illegitimacy cases, Justice Rehnquist again took aim at the presumed influence that those cases were having on his selected approach.<sup>99</sup> Noting that "[w]hat has most troubled the lower courts and the commentators are cases such as those involving sex [and illegitimacy] discrimination," Justice Rehnquist opined that Justice Powell's proposed approach would not offer a principled accommodation of those cases or relieve calls for suspect or mid-tier scrutiny there.<sup>100</sup> He thus opined:

While my own personal view of the matter is that the standard of review in both areas [heightened scrutiny and rational basis review] should be left pretty much the way it is, if I had to choose between some doctrine explaining cases such as the sex discrimination cases, on the one hand, and the across-the-board

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*Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976FebMarch.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976FebMarch.pdf) (suggesting that Brennan omit the portion of the opinion that suggested that sex classifications should get more rigorous scrutiny and noting his disagreement with the notion that sex is a "suspect class"); Brennan Draft, *supra* note 46, at 9-10 (displaying handwritten annotations by Justice Powell on portions of Brennan draft dealing with the sex cases, suggesting that Justice Powell perceived these aspects of the Brennan draft as an attempt to revisit *Frontiero's* failed attempt to institutionalize suspect class status for sex).

<sup>96</sup> See Maltz, *supra* note 18, at 269-76 (describing in detail the internal deliberations on the Court relating to Powell's various draft opinions).

<sup>97</sup> *Id.* at 274; see also Rehnquist Memorandum to Powell, *supra* note 27, at 1-18.

<sup>98</sup> Rehnquist Memorandum to Powell, *supra* note 27, at 18.

<sup>99</sup> See *id.* at 3-5.

<sup>100</sup> See *id.*

expansion of the minimum scrutiny test which you propose, on the other, I should unhesitatingly choose the former.<sup>101</sup>

In the weeks that followed, Justice Powell continued to struggle to try to form a majority for his proposed approach.<sup>102</sup> For, although a majority of the Justices apparently agreed with certain aspects of the Powell draft's more robust formulation of the rational basis approach, they were not agreed on which aspects of the test should be revised.<sup>103</sup> It thus seemed likely that there might not be a majority for any particular approach, and that Justice Powell's opinion might ultimately be only for a plurality.<sup>104</sup> On June 9th, any hope of securing a majority (or indeed even a plurality) disappeared when Justice White withdrew his support, frustrated by the majority's conclusion in the Term's illegitimacy cases — *Lucas* and *Norton* — that the “fair and substantial relationship” test was satisfied by mere administrative convenience (i.e., the use of categorical proxies for dependency, like legitimacy, in determining benefits eligibility).<sup>105</sup> Opining that such a result rendered the test of “even less help than the unadorned rationality standard,” he stated that “[r]ather than confuse the law further, I would prefer that *Murgia* be decided in the name of rationality only . . . .”<sup>106</sup>

Thus, on June 15, 1976, Justice Powell circulated a revised per curiam<sup>107</sup> that — with minor changes — would become the Court's final published opinion in *Murgia*. Written “as blandly . . . as one can write,” Justice Powell assured his brethren that “[i]t leaves, I think, each of us free to ‘fight again another day’ as to our respective perceptions of a proper formulation of the equal protection analysis.”<sup>108</sup> Justice Powell's

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<sup>101</sup> *Id.* at 5; see also Maltz, *supra* note 18, at 273-74.

<sup>102</sup> See Maltz, *supra* note 18, at 269-76.

<sup>103</sup> See *id.* Justices White, Brennan, Stewart, and Blackmun all at various junctures signaled their receptiveness to certain aspects of Powell's approach.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at 275-76; see also *Norton v. Mathews*, 427 U.S. 524, 525 (1976); *Mathews v. Lucas*, 427 U.S. 495, 497 (1976).

<sup>106</sup> See Maltz, *supra* note 18, at 275-76; see also Memorandum from Byron R. White to Lewis F. Powell, Jr. at 1 (June 7, 1976), *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976June.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976June.pdf).

<sup>107</sup> Draft Per Curiam (June 15, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgiaOpinion4th&5th.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgiaOpinion4th&5th.pdf).

<sup>108</sup> Memorandum from Lewis F. Powell, Jr. to the Conference at 1 (June 15, 1976), *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976June.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976June.pdf).

per curiam quickly secured the concurrence of the other Justices and was issued on June 25, 1976, bringing the long *Murgia* debates to an end.<sup>109</sup>

### III. CRAIG V. BOREN AND TRIMBLE V. GORDON AND THE LEGACY OF MID-TIER REVIEW

The 1975 Term thus came to a close with a major dispute regarding the proper approach to equal protection doctrine explicitly left open.<sup>110</sup> It was clear from the debates in *Murgia* that there were significant divides among the Justices as to how — and indeed whether — the Court should afford meaningful equal protection review to classifications outside of

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<sup>109</sup> See Powell Circulation Sheet at 1, *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976June.pdf](http://law.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976June.pdf) (showing the joint dates of the other Justices). For the final per curiam opinion published by the Court, see *Murgia*, 427 U.S. 307 (1976).

<sup>110</sup> Interestingly, although this coincided with a period of uncertainty over another major dispute on the Court — how to address race-based affirmative action — the Court seemed to devote little thought in the key cases discussed herein (*Murgia*, *Craig*, and *Trimble*) to how resolution of the two might be interconnected. See *Trimble v. Gordon* File, *Trimble v. Gordon*, 430 U.S. 762 (1977) (No. 75-5952), in POWELL PAPERS, available at <http://law.wlu.edu/deptimages/powell%20archives/TrimbleGordon.pdf>; *Craig v. Boren* File, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/75-628\\_CraigBoren.pdf](http://law.wlu.edu/deptimages/powell%20archives/75-628_CraigBoren.pdf); *Massachusetts Board of Retirement v. Murgia* File, *Murgia*, 427 U.S. 307 (No. 74-1044), in POWELL PAPERS, available at <http://law.wlu.edu/powellarchives/page.asp?pageid=1567>. But cf. First Powell Draft, *supra* note 46, at 8 (arguing, in *Murgia* draft opinion, that a meaningful form of rational basis review was needed as a backstop against covertly racially discriminatory government action). See generally MAYERI, *supra* note 14, at 126-43 (describing the ways that the Court at other times in the 1970s grappled with the implications of sex discrimination jurisprudence for race law, and in particular race-based affirmative action); Mayeri, *Reconstructing*, *supra* note 16, at 1800-08 (extensively discussing the Court's efforts to grapple with the implications of sex discrimination law for race-based affirmative action). In general, the Court — and even individual Justices — appear not to have felt any particular obligation to render their treatment of benign classifications in the race and sex context consistent, even on a broad theoretical level. See MAYERI, *supra* note 14, at 126-43; Mayeri, *Reconstructing*, *supra* note 16, at 1800-08; see also *Craig*, 429 U.S. at 218-20 (Rehnquist, J., dissenting) (arguing why the Court should not apply an elevated standard of scrutiny to classifications involving men, based on arguments directly contrary to the positions he would later take in the race context); *Kahn v. Shevin*, 416 U.S. 351, 355-56 & nn.8, 10 (1974) (showing that many of the Justices who would go on to hold that the claims of non-minorities must be treated identically to those of blacks in the context of race-based affirmative action did not take this approach in the sex context); cf. Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 554 n.67 (2014) (describing the positions taken by the Justices in internal debates over race-based affirmative action during the 1977 Term). See generally *supra* notes 11, 16-17, 47 and 50 (describing other ways that the disputes described herein intersected with other major contemporary equal protection disputes).

the context of suspect classifications and fundamental rights. And, for at least some Justices, it was evident that the Court's sex and illegitimacy precedents marked a key battleground in the dispute. But the internal debates in *Murgia* left it uncertain how the Justices' disagreements would be resolved, either as to the fundamental underlying question (of how to approach minimum tier review), or as to the specific meaning of the Court's sex and illegitimacy precedents.

The following Term would afford the Justices yet another opportunity to resolve at least some aspects of this dispute. Already, by the time that *Murgia* was decided in June 1976, the Court had noted probable jurisdiction in both a sex (*Craig v. Boren*) and illegitimacy (*Trimble v. Gordon*) case for the 1976 Term.<sup>111</sup> Thus, the Court, virtually immediately following *Murgia*, had yet another opportunity to — if it so chose — more clearly situate its sex and illegitimacy precedents within its existing approach to equal protection review. It was unclear, however, whether a majority existed on the Court for any definitive resolution of the stature of the sex and illegitimacy precedents, particularly in the specific contexts under review.<sup>112</sup>

Indeed, arguably the two cases pending during the 1976 Term (*Craig* and *Trimble*) were especially unlikely candidates to form the platform for a formal turn by the Court to explicitly heightened scrutiny for sex or illegitimacy classifications. *Craig*, a case challenging an Oklahoma law establishing a higher age for sale of “3.2%” or “near beer” to men than to women, was regarded even by some of the Justices as a “silly case,” one hardly implicating the serious concerns of gender equality that prior cases had raised.<sup>113</sup> Moreover, it was a case in which the alleged classification arguably disadvantaged men rather than women, an area in which the Court had struggled to develop a consistent and principled approach.<sup>114</sup> Finally, although the composition of the Court

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<sup>111</sup> Probable jurisdiction was noted in *Craig* and *Trimble* on January 12, 1976 and March 22, 1976 respectively. See *Craig v. Boren*, 423 U.S. 1047, 1047 (1976) (mem.); *Trimble v. Gordon*, 424 U.S. 964, 964 (1976) (mem.). Both *Craig* and *Trimble* were appeals within the Court's mandatory jurisdiction.

<sup>112</sup> See *infra* notes 113–17.

<sup>113</sup> See Memorandum from Lewis F. Powell, Jr. to File at 1, *Craig*, 429 U.S. 190 (No. 75-628), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/75-628\\_CraigBoren.pdf](http://law.wlu.edu/deptimages/powell%20archives/75-628_CraigBoren.pdf); see also Preliminary Memorandum at 4 (Dec. 12, 1975), *Craig*, 429 U.S. 190 (No. 75-628), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/75-628\\_CraigBoren.pdf](http://law.wlu.edu/deptimages/powell%20archives/75-628_CraigBoren.pdf) (noting that *Craig* was not a “particularly appealing case” in which to address the issue of the level of scrutiny); MAYERI, *supra* note 14, at 124 (making a similar observation).

<sup>114</sup> See MAYERI, *supra* note 14, at 122-27 (describing the evolution of the Court's jurisprudence in this context).

had changed since the unsuccessful effort to institutionalize strict scrutiny for sex in *Frontiero v. Richardson* (at which time only four Justices had endorsed suspect class status), there were few reasons to think that the new composition of the Court would be more amenable to formally heightened review.<sup>115</sup>

*Trimble* seemed perhaps an even less likely candidate for a turn to formal heightened scrutiny for illegitimacy classifications. Just the prior Term the Court had, in *Mathews v. Lucas*, unceremoniously rejected arguments to afford suspect class status to those of non-marital birth, finding that the Court's 1971 decision in *Labine v. Vincent* (an early 1970s decision that had applied highly deferential review to illegitimacy classifications) controlled.<sup>116</sup> And, *Trimble* was factually virtually identical to one of the Court's prior illegitimacy precedents and thus could arguably be disposed of easily simply by adhering to prior authority.<sup>117</sup> Accordingly, there were few reasons to think that the

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<sup>115</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973). One of the four Justices who joined the plurality opinion favoring strict scrutiny (Justice Douglas) had left the Court since *Frontiero* and had been replaced by Ford appointee John Paul Stevens. See *Members of the Supreme Court of the United States*, U.S. SUPREME COURT, <http://www.supremecourt.gov/about/members.aspx> (last visited Mar. 18, 2014); see also MAYERI, *supra* note 14, at 124 (noting the above, and that Stevens "attracted opposition from feminists during his confirmation hearings").

<sup>116</sup> See *Mathews v. Lucas*, 427 U.S. 495, 504-06 (1976). It is not clear whether *Labine* — which seemed to suggest that *no* constitutional scrutiny was required in the context of state control over property inheritance — could properly be considered dispositive of the heightened scrutiny question as the Court in *Mathews* argued. See *Labine v. Vincent*, 401 U.S. 532, 536-39 & n.6 (1971); see also *id.* at 548-52 (Brennan, J., dissenting). Regardless, however, it is clear that there was even less enthusiasm on the Court for classifying illegitimacy as a suspect class than there was for making such a move in the sex discrimination context. See Norton Docket Sheet, *supra* note 61, at 1-2; Lucas Docket Sheet, *supra* note 61, at 1-2; Docket Sheet at 1-2, *Lucas*, 427 U.S. 495 (No. 75-88), in BRENNAN PAPERS (Box I:369) (on file with the Library of Congress Manuscript Division as "William J. Brennan Papers"); Docket Sheet at 1-2 (Jan. 16, 1976), *Lucas*, 427 U.S. 495 (No. 75-88), in BLACKMUN PAPERS (Box 228) (on file with the Library of Congress Manuscript Division as "The Harry A. Blackmun Papers") (making clear that there was not wide support on the Court for treating illegitimacy as a suspect class). *But cf.* Memorandum from WHB to Harry A. Blackmun at 2 (June 22, 1976), *Lucas*, 427 U.S. 495 (No. 75-88), in BLACKMUN PAPERS (Box 228) (on file with the Library of Congress Manuscript Division as "The Harry A. Blackmun Papers") (suggesting that although *Mathews* rejected suspect class status, the language regarding the standard of review may have been left deliberately vague in part because *Trimble* was already pending and might present a "better vehicle to make the decision [regarding the standard of review].")

<sup>117</sup> *Labine*, the same case relied on by the Court in *Mathews* to conclude that suspect class status was inappropriate, had rejected a very similar challenge to that at issue in *Trimble*. See generally *Trimble v. Gordon*, 430 U.S. 762 (1977) (addressing an Illinois law similar to that at issue in *Labine*); *Labine v. Vincent*, 401 U.S. 532 (1971) (rejecting

Court in *Trimble* would elaborate its approach to illegitimacy/equal protection review, and many reasons to believe that it would not.

And indeed, the Court's decisions in *Craig* and *Trimble* — issued respectively in December 1976 and April 1977 — were by no means clear statements of the Court's commitment to a formally heightened standard of review for sex or illegitimacy classifications.<sup>118</sup> The majority opinion in *Craig*, while finding the law unconstitutional, purported once again to simply follow the dictates of *Reed*, a precedent widely understood at the time as defining strictures of equal protection scrutiny *outside* the context of formally heightened review (i.e., as setting the standard for cases evaluated under minimum tier or “rational basis” review).<sup>119</sup> Moreover, although the majority's statement of the applicable standard — “substantially” related to an “important” government objective — was no doubt linguistically more stringent than any traditional standard of rational basis review, two of the six members of the majority concurred separately to explicitly disclaim the institutionalization of a separate mid-tier standard of review.<sup>120</sup> As such,

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a constitutional challenge to Louisiana's intestate succession laws, which disadvantaged children of non-marital birth); Docket Sheet at 1-2 (Dec. 10, 1976), *Trimble v. Gordon*, 430 U.S. 762 (1976) (No. 75-5952), in POWELL PAPERS, available at <http://law.wlu.edu/deptimages/powell%20archives/TrimbleGordon.pdf> (documenting that a number of Justices believed that *Trimble* was controlled by *Labine*).

<sup>118</sup> See *infra* notes 119–24.

<sup>119</sup> See *Craig v. Boren*, 429 U.S. 190, 199 (1976) (“In this case, too, ‘*Reed*, we feel is controlling’ . . . .”); see also *supra* notes 41–47 and accompanying text (describing scholars and lower courts' understanding of *Reed*). See generally Memorandum of DW to Harry A. Blackmun at 7 (Nov. 6, 1976), *Craig*, 429 U.S. 190 (No. 75-628), in BLACKMUN PAPERS (Box 240) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (characterizing, in memorandum to Justice Blackmun regarding Brennan's draft, the opinion as simply following the same approach that had been followed in *Reed* and *Stanton*, two minimum tier cases).

<sup>120</sup> See *Craig*, 429 U.S. at 197; see also *id.* at 210-11 & n.\* (Powell, J., concurring) (noting that he “would not endorse” the characterization of *Craig* as a case involving “middle-tier” scrutiny, and applying the “fair and substantial relation” test to the legislation); *id.* at 211-12 (Stevens, J., concurring) (noting that “[t]here is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases” and applying an analysis focused on contextual factors to the legislation); Memorandum from Lewis F. Powell, Jr. to William J. Brennan, Jr. at 1 (Dec. 6, 1976), *Craig*, 429 U.S. 190 (No. 75-628), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/75-628\\_CraigBoren.pdf](http://law.wlu.edu/deptimages/powell%20archives/75-628_CraigBoren.pdf) (indicating that “[a]lthough I have some reservations as to the breadth of your discussion [of] the applicable standard for equal protection analysis (Murgia revisited!), I am in substantial agreement” and therefore joined, with a separate concurrence).

Even among those who did not separately concur, there were, at conference, several members of the majority who had expressed that the case could be properly resolved



it was far from clear that the majority in *Craig* was electing to institutionalize formally tiered heightened scrutiny for sex discrimination classifications, as opposed to the more flexible — and generally applicable — sliding-scale approach that some lower courts had derived from the Court’s early 1970s precedents.<sup>121</sup>

Similarly, the Court’s opinion in *Trimble*, issued four months later, did little to resolve the ambiguity in the Court’s illegitimacy precedents that had so troubled certain members of the Court in *Murgia*. Again disclaiming the notion that classifications based on illegitimacy could be deemed “suspect” and thus subject to the Court’s “most exacting scrutiny,” the Court noted that the standard applied was nevertheless “not a toothless one,” and proceeded to constitutionally invalidate the law.<sup>122</sup> But the Court did little to clarify whether this result —

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under existing precedents on minimum tier review. See, e.g., Docket Sheet at 1-2 (Oct. 6, 1976), *Craig*, 429 U.S. 190 (No. 75-628), in BLACKMUN PAPERS (Box 240) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (making clear that several of the Justices at Conference in *Craig*, including Justice Brennan, expressed that the classification was invalid on minimum tier review); Docket Sheet at 1-2, *Craig*, 429 U.S. 190 (No. 75-628), in BRENNAN PAPERS (Box I:401) (on file with the Library of Congress Manuscript Division as “William J. Brennan Papers”) (clarifying that several Justices expressed the view that the classification was invalid on minimum tier review); see also Handwritten Notes by Justice Blackmun at 1, *Craig*, 429 U.S. 190 (No. 75-628), in BLACKMUN PAPERS (Box 240) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (making clear that, for Justice Blackmun, the case was controlled by *Reed* and *Stanton*, minimum tier cases).

<sup>121</sup> See *supra* notes 119–20; see also *supra* notes 46, 66–70 and accompanying text (describing the sliding-scale approach). There is some language in *Craig* seeming to set sex classifications apart. See, e.g., *Craig*, 429 U.S. at 197-99 (describing the Court’s prior sex discrimination case law and discussing certain interests that would be insufficient to justify a sex-based classification). However, this approach was arguably consistent with Justice Brennan’s understanding of the sliding-scale approach, which would have allowed more heightened review generally vis-à-vis a particular class where particular contextual factors (roughly tracking those we today understand as comprising the considerations informing heightened scrutiny) existed. See Brennan Draft, *supra* note 46, at 9-10; Brennan Memorandum to Rehnquist, *supra* note 46, at 1 (describing the sliding-scale approach and the reasons why sex discrimination generally should be afforded more meaningful scrutiny under that approach). Given Justice Powell and Justice Stevens’ express disavowal of the notion that *Craig* marked a further elaboration of the tiered approach to scrutiny, this is arguably a more reasonable reading of the majority’s intent in *Craig* than the formal heightened scrutiny approach. See *supra* note 120. For an early draft concurrence by Justice Powell openly endorsing an understanding of the Court’s sex precedents as applying a sliding scale approach to equal protection analysis, see Draft Opinion by Lewis F. Powell, Jr. at 4-5 (Nov. 19, 1976), *Craig*, 429 U.S. 190 (No. 75-628), in POWELL PAPERS, available at [http://law.wlu.edu/deptimages/powell%20archives/75-628\\_CraigBoren.pdf](http://law.wlu.edu/deptimages/powell%20archives/75-628_CraigBoren.pdf).

<sup>122</sup> See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977); see also *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

constitutional invalidation — resulted from the application of a formally differentiated standard, or whether, instead, its decision simply marked a general application of minimum tier review.<sup>123</sup> Thus, the majority in *Trimble* — like in *Craig* — did not, on its face, clearly settle the issue of the illegitimacy precedents' salience to broader equal protection disputes.<sup>124</sup>

But while the Court's majority opinions in *Craig* and *Trimble* were underwhelming in their clarification of the proper characterization of the Court's sex and illegitimacy precedents (failing to formally endorse "intermediate," "mid-tier," "quasi-suspect," or even "heightened" review), the dissenters in *Craig* and *Trimble* (and especially Justice Rehnquist) were far more direct in their characterization of the majority's actions.<sup>125</sup> Thus, in *Craig*, Justice Rehnquist — long the Court's most consistent opponent of expanded protections for sex (and illegitimacy) — nonetheless was also the most explicit in describing the Court's standard of review for sex classifications, arguing that the standard that the Court applied to classifications disadvantaging women

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<sup>123</sup> See generally *Trimble*, 430 U.S. 762 (utilizing vague language regarding the standard of review, including a mix of language seeming to signal rational basis review, as well as language perhaps suggesting a more stringent review); see also Docket Sheet (Dec. 8, 1976), *Trimble*, 430 U.S. 762 (No. 75-5952), in BLACKMUN PAPERS (Box 249) (on file with the Library of Congress Manuscript Division as "The Harry A. Blackmun Papers") (showing that the discussion at conference did not focus on the standard of review, but rather on whether *Labine* was controlling and whether it should be overruled).

<sup>124</sup> *Trimble* did include a few snippets of language which seemed to suggest that the equal protection standard might be different in the context of illegitimacy cases, language much emphasized in Justice Rehnquist's dissent. See, e.g., *Trimble*, 430 U.S. at 767 (quoting the general rational basis standard and noting that, "[i]n this context, the standard just stated is a minimum; the Court sometimes requires more"); see also *infra* note 129 and accompanying text. But, as in the case of *Craig*, the majority did little to clarify the significance of this language, which was equally consistent with the generally applicable sliding-scale approach that a number of courts had inferred from the Court's early 1970s minimum tier/rational basis precedents. Cf. Memorandum from Lewis F. Powell, Jr. to the Conference at 3 (May 3, 1977), *Trimble*, 430 U.S. 762 (No. 75-5952), in BLACKMUN PAPERS (Box 249) (on file with the Library of Congress Manuscript Division as "The Harry A. Blackmun Papers") (invoking *Trimble* for the propriety of invalidating an irrational classification, but in an ambiguous context).

<sup>125</sup> Compare *Trimble*, 430 U.S. 762 (failing to clearly adopt formally heightened scrutiny), and *Craig*, 429 U.S. 190 (not clearly endorsing formal heightened scrutiny), with *Trimble*, 430 U.S. 762 (Rehnquist, J., dissenting) (suggesting that heightened scrutiny was what was applied), and *Craig*, 429 U.S. 190 (Rehnquist, J., dissenting) (suggesting heightened scrutiny applied). For a contemporary news article making this same observation (i.e., that it was the dissent, rather than the majority in *Craig* that claimed the Court was applying heightened scrutiny), see *Equal Rights: Still a Way to Go*, WASH. POST., Dec. 27, 1976, at A20.

was one of “elevated or ‘intermediate’ level scrutiny.”<sup>126</sup> Drawing extensively on the plurality opinion in *Frontiero* — an opinion conspicuously downplayed by the majority itself in *Craig* — Justice Rehnquist argued in dissent that the type of considerations that had warranted the instantiation of this heightened standard by the Court for classifications disadvantaging women (an instantiation he stated as fact, despite its continuing ambiguity) simply did not apply equally to men (the group arguably disadvantaged in *Craig*).<sup>127</sup>

Similarly, in *Trimble*, Justice Rehnquist (unlike the majority) described the Court’s approach to illegitimacy as a form of heightened scrutiny, arguing that “statements . . . in several opinions of the Court . . . suggest that although illegitimates are not members of a ‘suspect class,’ laws which treat them differently from those born in wedlock will receive a more far-reaching scrutiny . . . .”<sup>128</sup> Noting that “[t]he Court’s opinion today contains language to that effect,” Justice Rehnquist expressed the view that “this language is a source of consolation, since it suggests that parts of the Court’s analysis used in this case will not be carried over to traditional ‘rational basis’ or ‘minimum scrutiny’ cases.”<sup>129</sup> Thus, while facially taking issue with the Court’s heightened approach to illegitimacy classifications, Justice Rehnquist’s dissenting opinion in fact marked by far the most explicit statement that such an approach indeed existed.

This aspect of Justice Rehnquist’s dissents in *Craig* and *Trimble* represented a significant departure from his prior sex and illegitimacy dissents, which had generally presumed the majority opinions’ application of rational basis review and focused their critiques on the inaccurate application of the standard.<sup>130</sup> In contrast, in *Craig* and

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<sup>126</sup> See *Craig*, 429 U.S. at 218 (Rehnquist, J., dissenting); see also *infra* note 133 (describing Justice Rehnquist’s opposition to heightened scrutiny for sex and illegitimacy).

<sup>127</sup> See *Craig*, 429 U.S. at 217-20 (Rehnquist, J., dissenting); cf. *id.* at 199 (majority opinion) (treating *Reed* as the governing authority and referencing *Frontiero* only for minor subsidiary points). See generally *supra* note 110 (noting the inconsistency between Justice Rehnquist’s approach in *Craig* — in which he suggested that classifications disfavoring men should not qualify for an elevated standard of review — and his approach in race-based affirmative action cases, where he advocated in favor of strict scrutiny for all racial classifications, including those disadvantaging whites).

<sup>128</sup> *Trimble*, 430 U.S. at 781 (Rehnquist, J., dissenting).

<sup>129</sup> *Id.*; see also Draft Dissent by William H. Rehnquist at 5 (Apr. 8, 1977), *Trimble*, 430 U.S. 762 (No. 75-5952), in BLACKMUN PAPERS (Box 249) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (showing annotation by Justice Blackmun next to Justice Rehnquist’s reference to the lack of spillover as a “consolation,” in which Justice Blackmun noted, “to & for what?”).

<sup>130</sup> See *Jimenez v. Weinberger*, 417 U.S. 628, 638-41 (1974) (Rehnquist, J.,

*Trimble*, Justice Rehnquist presumed — despite its continuing ambiguity — that the Court’s standard for sex and illegitimacy classifications was formally heightened, and thus set apart from traditional rational basis review.<sup>131</sup> Thus, despite Justice Rehnquist’s long opposition to heightened review for sex and illegitimacy, his opinions in *Craig* and *Trimble* seemed to recognize as fact (and thus arguably promote) their stature as distinctively treated classifications, subject to a differentiated, formally heightened standard of review.<sup>132</sup>

Strategically, this approach might seem perplexing from a Justice long vocally committed to the notion that sex and illegitimacy should not be subject to heightened review.<sup>133</sup> Nevertheless, it seems quite unlikely

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dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621-23 (1973) (Rehnquist, J., dissenting); see also *Stanton v. Stanton*, 421 U.S. 7, 18-20 (1975) (Rehnquist, J., dissenting) (arguing that there was no need to reach the merits of the constitutional challenge); *Gomez v. Perez*, 409 U.S. 535, 538-39 (1973) (Stewart, J., dissenting) (arguing, in an opinion joined by Justice Rehnquist, that the case should be dismissed as improvidently granted for reasons unrelated to the standard of review). In these cases, Justice Rehnquist assumed the majority’s application of rational basis review and focused his critiques on the application of the standard. *But see supra* notes 126–29 (showing that in *Craig* and *Trimble*, Rehnquist argued that the majority was applying a formally heightened standard of review); cf. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 181 (1972) (Rehnquist, J., dissenting) (arguing, in the first illegitimacy case decided after Justice Rehnquist joined the Court, that the majority was applying a “hybrid standard,” between strict scrutiny and rational basis).

<sup>131</sup> See *supra* notes 126–29 and accompanying text. *But cf. Craig*, 429 U.S. at 220-21 (Rehnquist, J., dissenting) (unlike other passages in *Craig* and *Trimble* where Justice Rehnquist treats formal heightened scrutiny as an established fact, critiquing the specific standard applied by the majority in *Craig* as “apparently com[ing] out of thin air”).

<sup>132</sup> See sources cited *supra* notes 126–29 and 131; cf. Memorandum from WHB to Harry A. Blackmun at 1 (Apr. 8, 1977), *Trimble*, 430 U.S. 762 (No. 75-5952), in BLACKMUN PAPERS (Box 249) (on file with the Library of Congress Manuscript Division as “The Harry A. Blackmun Papers”) (making clear that Justice Blackmun’s clerk recommended that Justice Blackmun not join Justice Rehnquist’s dissent in *Trimble* — advice Justice Blackmun ultimately followed — so as to leave himself uncommitted for any reprise of the disputes from *Murgia* over the proper formulation of Equal Protection standards, something the clerk anticipated “may come soon”).

<sup>133</sup> In addition to Justice Rehnquist’s dissents under the Fourteenth Amendment, see discussion *supra* note 130, Justice Rehnquist had also opposed the ERA while he was a member of the Nixon Administration. See, e.g., Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1875 (2006) (describing a memorandum authored by Rehnquist as an Assistant Attorney General in which he strenuously opposed the ERA, arguing that it would have adverse effects on the traditional family unit and traditionally differing sex roles); see also *id.* at 1877 (“More than any other Justice appointed by President Nixon, Rehnquist resisted the development of sex discrimination doctrine under the Equal Protection Clause.”); cf. *id.* at 1880-86 (describing shifts in Justice Rehnquist’s approach to sex

that this reflected an unwitting lapse in judgment, or that it marked some significant change in Justice Rehnquist's views. Rather, when viewed in the light of the prior Term's debates in *Murgia*, it seems quite likely that Justice Rehnquist's dissents in *Craig* and *Trimble* were intended — in light of the apparently irreversible trajectory of the sex and illegitimacy cases — to confine their impact.<sup>134</sup> Thus, such cases could at least, by being characterized as “intermediate” or “heightened” scrutiny, be confined to their specific context, rather than standing for the “across-the-board expansion” of rational basis review to which Justice Rehnquist was so strenuously opposed.<sup>135</sup>

And indeed, although *Craig* and *Trimble* did not immediately end broader debates over whether sex and illegitimacy were properly subject to tiered heightened scrutiny — or over whether deferential rational basis (as opposed to a more flexible and robust form of review) should be considered the minimum tier norm — they can be seen as the starting point of a trajectory that has ultimately institutionalized both of these principles as fundamental precepts of equal protection doctrine.<sup>136</sup>

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discrimination cases in the 1990s and 2000s towards a more robust embrace of anti-gender stereotyping principles).

<sup>134</sup> See *supra* Part II.

<sup>135</sup> See *supra* note 101 and accompanying text (quoting memorandum circulated by Justice Rehnquist during the debates over *Murgia*).

<sup>136</sup> Disputes over the proper characterization of the illegitimacy cases continued longer than disputes over sex, but the stature of both remained to some extent uncertain following the 1976 Term. See, e.g., *Meloon v. Helgemoe*, 564 F.2d 602, 604 & n.3 (1st Cir. 1977) (noting that the “separate concurrences by Justice Powell and Justice Stevens” in *Craig* made it unclear whether the sex discrimination cases should be characterized as a distinctive middle tier of scrutiny); *Francis v. Cleland*, 433 F. Supp. 605, 615-20 (D.S.D. 1977) (continuing to read the sex and illegitimacy cases as reflective of a “pliable” standard “shaped by . . . the character of the class involved and the seriousness of the interest allegedly impinged on” and applying that standard to strike down certain restrictions on veterans’ educational benefits), *rev’d*, 435 U.S. 213 (1978); *Arp v. Workers’ Comp. Appeals Bd.*, 563 P.2d 849, 851 (Cal. 1977) (continuing to characterize the federal sex discrimination standard post-*Craig* as “not entirely clear” and “a curious hybrid, variously characterized as ‘strict rationality’ . . . or ‘rational scrutiny’”); *Bernacki v. Superior Construction Co.*, 270 Ind. 667, 672-73 (1979) (applying, apparently, the traditional rational basis test to a classification based on illegitimacy, despite dissent’s argument that intermediate scrutiny should be applied); see also GUNTHER, *supra* note 21, at 674-76 (continuing to characterize the Court as applying a “two-tier” model of Equal Protection, but suggesting that the Court had shown a “sporadic tendency toward ‘intermediate’ levels of review,” especially in the sex and illegitimacy contexts); JOHN NOWAK, RONALD ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 534 (3d ed. 1986) (describing, in 1986, the Supreme Court as having failed “to adopt openly a middle-level standard of review with applicability to a defined set of legal issues” and characterizing one danger emerging from this failure as the possibility of “indiscriminate exercise of independent judicial review of all

Thus, by the late 1980s and early 1990s, sex and illegitimacy became increasingly institutionalized as “quasi-suspect” classes subject to mid-tier review, rather than simply applications of general minimum tier (i.e., rational basis) review.<sup>137</sup> In that same time frame, rational basis review itself gradually returned — without the sex and illegitimacy precedents — to being understood as an acontextual bastion of deferential review: one that, outside of a few aberrational deviations, resulted in no meaningful scrutiny for equal protection claimants.<sup>138</sup>

This transformation — tentative and halting in the late 1970s and early 1980s — was essentially complete by the time that gay rights litigation efforts were beginning to gain credibility in the mid-1990s.<sup>139</sup>

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legislative classifications under the guise of a rational basis test”); Goldberg, *Equality Without Tiers*, *supra* note 21, at 513 n.120 (listing a number of cases invalidating government action on rational basis review post-*Craig* and *Trimble*); Maltz, *supra* note 18, at 27-42 (discussing continued internal debates on the Court over the proper formulation of minimum tier scrutiny after *Craig* and *Trimble*); *cf. infra* notes 137-42 (showing that by the late 1980s, these aspects of equal protection doctrine had largely reached consensus status).

<sup>137</sup> See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (providing a classic description of the three tiers of scrutiny and putting sex and illegitimacy in the middle tier); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (using the term “quasi-suspect class” in a majority opinion for the first time and characterizing both sex and illegitimacy as classifications subject to “heightened” review); see also RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 555-73 (3d ed. 1989) (including “gender” and “illegitimacy” in the section on “suspect classes,” and describing the Court as having coalesced around a standard). There is no clear case that marks the obvious pivot, even on the Court itself, of this shift. Rather, one sees very gradually increasing characterization of sex and illegitimacy as a demarcated middle tier — first in concurring and dissenting opinions — and ultimately by the late 1980s in majority opinions.

<sup>138</sup> See *infra* notes 139-42 and accompanying text; see also GERSTMANN, *supra* note 20, at 52-53 (identifying the removal of the sex and illegitimacy cases from the rational basis canon as key turning point in moving the Court’s rational basis doctrine back toward a restrained and limited form of review). This, of course, also coincided with other turns in the Court’s equal protection doctrine that also served to restrict access to equal protection remedies for those *inside* protected classes. For sources that describe some of these limitations, see generally Haney-López, *supra* note 50; Robinson, *Unequal Protection*, *supra* note 21; Siegel, *Equality Divided*, *supra* note 50.

<sup>139</sup> The L/G/B rights movement’s efforts to raise equality claims under the federal constitution long pre-dated the mid-1990s, but had fairly limited success prior to that time, especially in the decade immediately following *Bowers v. Hardwick*, 478 U.S. 186 (1986). See generally PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN & GAY RIGHTS CIVIL RIGHTS MOVEMENT* (2000) (detailing the evolution of litigation efforts for gay equality); JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001) (detailing the evolution of litigation efforts for gay equality in the specific context of the U.S. Supreme Court); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 *YALE L.J. ONLINE* 197, 204 & nn.27-32 (2013) [hereinafter *Popular Constitutionalism*] (describing the limited success

Early sex and illegitimacy precedents such as *Reed* and *Weber* — widely cited in the 1970s for rational basis/minimum tier standards — were no longer generally thought to be available precedents in arguing that the courts must (even outside of protected classes) take group rights seriously, and afford classifications meaningful review.<sup>140</sup> Instead a rigidly tiered vision of equal protection had come to largely prevail — one in which rational basis review was viewed as effectively meaningless, except for the Court's rare, aberrational deviations from the deferential standard of review.<sup>141</sup> Largely lost from memory was the robust tradition on the Court (most prominent in, but not restricted to, the Court's sex and illegitimacy cases) of taking seriously groups and rights even outside of the context of formally heightened review.<sup>142</sup>

It is impossible to know whether the early gay rights cases would have turned out differently had the historical memory of this more robust rational basis review remained. But certainly it seems clear that the reimagining of rational basis review as part of a strictly tiered framework — and as stripped of many of its most consistently rigorous precedents — facilitated a legal environment in which continued lower court

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that gay litigation efforts had in federal court during the immediate post-*Bowers* time frame).

<sup>140</sup> To take a specific example, *Reed v. Reed* was cited sixty-eight times in the two-year time period from 1974 through 1975 in contexts other than traditional sex discrimination matters in support of the proper formulation of the equal protection standard of review; in forty of those sixty-eight cases, the litigant prevailed. From 1994 through 1995, *Reed* was cited only nine times outside of the sex discrimination context in support of the equal protection standard of review, and litigants prevailed in only two of those cases. *Cf. Steffan v. Perry*, 41 F.3d 677, 708 (D.C. Cir. 1994) (Wald, J., dissenting) (relying on *Reed* in support of a robust form of rational basis review). *See generally* Robinson, *Unequal Protection*, *supra* note 21, at 10 & n.52 (noting the tendency of scholars to identify *Moreno*, *Cleburne*, and *Romer* as the three key cases underlying “rational basis with bite”).

<sup>141</sup> *See infra* note 143 (citing cases applying this tiered and highly deferential approach in the gay rights context).

<sup>142</sup> *See supra* note 140; *infra* note 143; *see also* Brief of Plaintiffs-Appellants at 18-27, *Cook v. Rumsfeld*, 528 F.3d 42 (1st Cir. 2008) (No. 06-2313) (raising, in a case where Don't Ask Don't Tell was affirmed on rational basis review, minimum tier arguments based on *Romer* and *Cleburne* but not relying on *Reed*, *Weber*, or the other early sex or illegitimacy cases); Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* at 9-14, *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723) (contending, in a case where Florida's ban on gay adoption was affirmed on rational basis review, that the court's very deferential approach to rational basis review conflicted with *Romer*, *Cleburne*, and *Moreno*, but not mentioning *Reed*, *Weber*, or the other early sex or illegitimacy cases); E-mail from Chai Feldblum to author (Apr. 4, 2014) (on file with the author) (commenting that “without a doubt” her lack of awareness of this history shaped her thinking in the context of her work on *Romer* and her early academic work on sexual orientation issues).

inaction vis-à-vis the rights of gays and lesbians was easy to sustain.<sup>143</sup> Faced with a due process precedent in *Bowers v. Hardwick*<sup>144</sup> that was far from embracing of gay equality and with a rational basis review that afforded “bite” only in its rare deviations from the norm, lower courts unsurprisingly often elected to do little to disturb discriminatory anti-gay laws, a trend that continued well into the 2000s.<sup>145</sup>

Ultimately, as the Supreme Court has increasingly struck down anti-gay discriminations — sending stronger de facto signals of its perspective on gay equality — the lower courts have begun to follow suit.<sup>146</sup> Thus, in the wake of *Lawrence*, lower courts began increasingly

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<sup>143</sup> There are ample examples of courts taking a very deferential approach to rational basis review in the sexual orientation context well into the 2000s. *See, e.g., Cook*, 528 F.3d 42 (declining to invalidate Don’t Ask Don’t Tell under a deferential version of rational basis review); *Lofton*, 358 F.3d 804 (declining to invalidate Florida ban on gay adoption under a deferential version of rational basis review); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002) (applying a deferential version of rational basis review to reject gay plaintiff’s arguments that a failure to take steps to address anti-gay harassment was a violation of Equal Protection); Equality Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (rejecting challenge to anti-gay referendum under a deferential version of rational basis review); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (rejecting an employment discrimination claim under a deferential version of rational basis review); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012) (rejecting challenge to Hawaii’s marriage laws under a deferential version of rational basis review); *see also* Eyer, *Popular Constitutionalism*, *supra* note 139, at 204 n.32 (describing continued rejection of heightened scrutiny and the effect on lower court litigation). *See generally* CAIN, *supra* note 139 (describing federal gay equality litigation after *Bowers*, including the resistance of the courts to applying heightened scrutiny, and the very low success rates of rational basis litigation). I focus herein exclusively on cases adjudicating federal equal protection claims — the focus of this Article. Many state courts were responsive far earlier to state law claims brought under state equal protection provisions.

<sup>144</sup> *See Bowers*, 478 U.S. at 194 (“[T]o claim that a right to engage in [same-sex intimacy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”)

<sup>145</sup> *See supra* notes 139 and 143. Although cases such as *USDA v. Moreno*, 413 U.S. 528 (1973) and *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) were never reimagined as heightened scrutiny cases and were regularly deployed by gay rights litigators, most lower courts (where the vast majority of gay rights cases were resolved) treated those cases as not establishing broader principles of minimum tier review and thus distinguishable. *See, e.g., Lofton*, 358 F.3d at 821-22; *cf.* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 556 (2d ed. 1991) (referring, in 1991, to the doctrinal approach taken in *Cleburne* and *Moreno* as only used “on occasion” and “controversial”).

<sup>146</sup> *See, e.g.,* Eyer, *Popular Constitutionalism*, *supra* note 139, at 208 n.49 (post-*Lawrence* developments); David S. Cohen & Dahlia Lithwick, *It’s Over: Gay Marriage Can’t Lose in the Courts*, SLATE (Feb. 19, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/Virginia\\_s\\_gay\\_marriage\\_ban\\_ruled\\_unconstitutional\\_a\\_perfect\\_record\\_For.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/Virginia_s_gay_marriage_ban_ruled_unconstitutional_a_perfect_record_For.html) (post-*Windsor* developments); *see also* Kitchen v. Herbert, 755 F.3d 1193, 1205-25 (10th Cir. 2014); *Smithkline Beecham v. Abbott*



to question and strike down anti-gay discriminations (even in the absence of a finding that heightened scrutiny was appropriate), a trend that has accelerated dramatically in the months since *United States v. Windsor* was decided.<sup>147</sup> It thus appears that — regardless of the conventional wisdom regarding rational basis’s applicability or constraints — lower courts have sensed a meaningful change in the Court’s trajectory on gay equality and are adhering to it.<sup>148</sup>

As in the case of the early sex and illegitimacy cases, this trend — towards affording greater meaning to the gay rights precedents — has not always been restricted to its specific context. While not as extensive as the broader movement towards robust minimum tier review that accompanied the early sex and illegitimacy cases, early signs suggest that lower courts, litigants, and scholars alike have increasingly been willing to find meaning in the gay rights cases far outside of their specific context.<sup>149</sup> For example, laws targeting immigrants, gun owners, and polygamists, have all been deemed constitutionally problematic by the lower courts, at least partially on the authority of the Court’s *Windsor*, *Lawrence*, and *Romer* decisions.<sup>150</sup> Scholars too have taken the Court’s gay rights cases to be indicative of broader shifts in its Fourteenth Amendment jurisprudence: away from a rigidly tiered approach to scrutiny, and towards a more flexible and robust overlapping liberty/equality jurisprudence.<sup>151</sup>

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Labs., 740 F.3d 471, 479-84 (9th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 372-84 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1079-82 (10th Cir. 2014); *Witt v. Dep’t of Air Force*, 527 F.3d 806, 813-21 (9th Cir. 2008).

<sup>147</sup> See *supra* note 146.

<sup>148</sup> See, e.g., *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1295-96 (D. Okla. 2014) (“There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one.”)

<sup>149</sup> See sources cited *infra* notes 150–51.

<sup>150</sup> See, e.g., *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (finding a likelihood of success on the merits of Plaintiffs’ equal protection claim, based in part on *Romer*, in a case challenging Arizona’s denial of drivers’ licenses to DREAMers); *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (invalidating part of local gun law on rational basis review, based in part on *Romer*); *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (relying in part on *Lawrence* to partially invalidate Utah’s anti-polygamy statutes).

<sup>151</sup> See, e.g., *Joslin*, *supra* note 7, at 242-43 (arguing, based in part on *Romer* that “the Court is moving away from group-oriented equal protection analysis” toward “a more fluid approach”); *Mcgowan*, *supra* note 7 (reading *Lawrence* and *Romer* as significant in defining the Court’s approach to rational basis review); *Yoshino*, *supra* note 7 (reading *Lawrence* as indicative of a broader shift in the Court’s jurisprudence away from protecting equality norms through Equal Protection and towards relying on liberty or due-process-based rationales); *Blackman*, *Gone with the Windsor*, *supra* note 7 (reading

Thus, we once again stand at a crossroads. The Court's gay rights precedents can be understood as an indicator of the Court's specific commitment to meaningfully scrutinizing anti-gay discriminations. Or, they can be understood as indicators of broader shifts in the Court's approach to Fourteenth Amendment review. But an unanswered question remains: can they be understood as both?

#### IV. LESSONS FROM SEX AND ILLEGITIMACY: IMPLICATIONS FOR CONTEMPORARY EQUAL PROTECTION REVIEW

Efforts to draw lessons from history carry with them certain obvious risks: of overdrawing comparisons, of suggesting that things are alike when they are not.<sup>152</sup> And indeed, the contemporary moment at which we find ourselves today is clearly not identical to the constitutional moment of the mid-1970s. Challenges to equal protection's rigid tiered system of scrutiny (then two-tier, today three-tier) are arguably less robust today than they were in the early 1970s.<sup>153</sup> And, the dynamics of

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*Windsor* as potentially indicative of broader shifts in the Court's approach to rational basis review and to the tiers generally); see also Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (arguing that *Lawrence* is indicative of "a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix"); Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 570 (2014) (describing the potential application of *Windsor* to the disability rights context as "inexact" but "promising"). See generally Goldberg, *Equality Without Tiers*, *supra* note 21 (drawing on *Romer* in sketching a model for a de-tiered approach equal protection review); Robinson, *Unequal Protection*, *supra* note 21 (making the case that the Court's gay rights cases have afforded greater protections than those afforded to those ostensibly within the Court's heightened tiers, and arguing for a "leveling-up" of the Court's Equal Protection doctrine); Siegel, *Equality Divided*, *supra* note 50 (describing the ways that the Court's 2012 Term gay rights jurisprudence seems to embrace a minority-protective model no longer seen in the Court's race discrimination jurisprudence); Susannah W. Pollvogt, *Marriage Equality, United States v. Windsor and the Crisis in Equal Protection Jurisprudence*, 42 HOFSTRA L. REV. 1045, 1045-49 (2014) (arguing that the Court's legal reasoning in *Windsor* and the legal reasoning in the lower courts' approaches to the same-sex marriage question reveals and is reflective of broader failures of traditional equal protection doctrine).

<sup>152</sup> Cf. Guido Calabresi, "We Imagine the Past to Remember the Future" — *Between Law, Economics, and Justice in Our Era and According to Maimonides*, 26 YALE J.L. & HUMAN. 135, 136 n.3 (2014) (quoting Lewis Naimier: "When discoursing or writing about history, [people] imagine it in terms of their own experience, and when trying to gauge the future they cite supposed analogies from the past: till, by double process of repetition, they imagine the past and remember the future." (internal quotation marks omitted)).

<sup>153</sup> One partial explanation for this may lie in the much larger volume of early sex and illegitimacy cases that the Court heard during the 1960s and 1970s (as compared

the Court — its members, their jurisprudential commitments, the social and legal backdrop against which it makes law — are no doubt less hospitable to broad equality-promoting shifts of any kind.<sup>154</sup> In short, it would be wrong to suggest that the Court will face a set of choices identical to those presented in the mid-1970s in addressing the future of its contemporary equal protection doctrine.<sup>155</sup>

to the sexual orientation cases, of which there have only been three meaningful precedents) — a factor that no doubt made it more difficult for 1970s lower courts to dismiss such precedents as simply aberrational deviations from the deferential rational basis norm. In addition, equal protection jurisprudence generally (and specifically the tiered system of review) was in an earlier stage of development in the 1970s and thus arguably more susceptible of recharacterization than it is today. Nevertheless, it appears that even in the less hospitable contemporary circumstances, the accumulation of gay rights cases has begun to put pressure on the lower courts' understanding of those cases as simply factually unusual or aberrational deviations from a "standard" of deferential rational basis review. See *supra* notes 146–51 and accompanying text.

<sup>154</sup> Cf. Yoshino, *supra* note 7, at 785-86 (noting that the Court has generally become more conservative since the 1970s and that some scholars have argued that its contemporary decisions restricting equality norms are indicative of this turn; but arguing that the Court's conservative turn has not stopped it from instantiating certain forms of equality-protecting innovations).

<sup>155</sup> It is particularly hard to know what to make of the Court's contemporary gay rights doctrine or other doctrinal innovations that scholars have commented on in its Fourteenth Amendment jurisprudence, given the apparent role of a single Justice's jurisprudential outlook (Justice Kennedy). See, e.g., Robinson, *Unequal Protection*, *supra* note 21, at 39-40 (discussing the importance of Justice Kennedy to the Court's current approach, and the possibility that his departure from the Court will shift the direction of the Court); Josh Blackman, *Preview of a New Article: Kennedy's Constitutional Chimera*, JOSH BLACKMAN'S BLOG (Aug. 22, 2013), <http://joshblackman.com/blog/2013/08/22/preview-of-new-article-kennedys-constitutional-chimera> (arguing that Justice Kennedy has led a profound shift in the Court's approach to rational basis review); see also Marc R. Poirier, "Whiffs of Federalism" in *United States v. Windsor: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935, 936-39 (2014) (describing the ways that Justice Kennedy's approach in *Windsor* can be seen as consistent with his general jurisprudential outlook regarding "how the state and federal levels of government relate to one another and how both levels relate to what [Justice Kennedy] views to be evolving understandings of human dignity or liberty"). Given the strong influence of Justice Kennedy on the gay rights cases, it is possible that some of the doctrinal innovations introduced in those cases may not, after his tenure on the Court comes to an end, endure. But, regardless of Kennedy's stature on the Court, it seems likely that the Court's trajectory towards generally endorsing gay equality is assured. Given the dramatic shifts in public opinion that have taken place, and continue to take place, vis-à-vis gay equality, it seems exceedingly unlikely that the Court will simply reverse course. See, e.g., *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Mar. 20, 2014); *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/marriage.aspx> (last visited Mar. 20, 2014). But cf. Robinson, *Unequal Protection*, *supra* note 21, at 40 (arguing that if Kennedy leaves the Court during a Republican administration, the gains of the L/G/B rights cases might be lost or at least diminished). Thus, regardless of Kennedy's presence or absence on the

Nevertheless, it would be equally mistaken to lose sight — in focusing on these differences — of what is, in fact, the same. Just as in the early sex and illegitimacy cases, the Court has, to date, approached its gay rights cases outside of the context of formally heightened review, opting instead in favor of ambiguous language not easily situated within the Court's existing tiered standards of review.<sup>156</sup> And, like the early sex and illegitimacy precedents, the Court's approach has widely been read by the lower courts as a form of rational basis review: an application of the Court's understanding of what, even outside of the realm of the heightened tiers of scrutiny, is required.<sup>157</sup>

Moreover, it is difficult to doubt that this approach (i.e., the Court's failure to cabin off its gay rights cases as a form of heightened scrutiny review) has — and will increasingly — put pressure on traditional understandings of rational basis review.<sup>158</sup> To the extent that we take seriously — as the lower courts are increasingly doing — the Court's apparent willingness to meaningfully scrutinize legal discriminations without deeming them “suspect,” “quasi-suspect,” or “fundamental,” this has wide implications for the potential of Fourteenth Amendment review. Many of these implications have been sketched out by legal scholars, and some are at least tentatively beginning to be adopted by the lower courts.<sup>159</sup> In short, a long-term failure to cabin the Court's gay rights cases leaves open the possibility that they can and will be understood as general expressions of the Court's willingness to take a more flexible and rigorous approach outside of the context of tiered review.

Conversely, to the extent that the Court turns — as it ultimately did with sex and illegitimacy doctrine — to a formal recognition of sexual orientation as subject to a differentiated and heightened form of equal

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Court, it seems highly likely that the Court will ultimately have to confront the set of dilemmas I sketch herein.

<sup>156</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2689-96 (2013); *Lawrence v. Texas*, 539 U.S. 558, 564-78 (2003); *Romer v. Evans*, 517 U.S. 620, 631-36 (1996).

<sup>157</sup> See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (concluding that the Court applied rational basis review in *Lawrence*); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (concluding that the Court applied rational basis review in *Romer*); *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (holding, in view of governing circuit precedent, that *Lawrence* must be understood as a rational basis decision). *But cf.* *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1295-96 (D. Okla. 2014) (recognizing that it is unclear at this point how to characterize the Court's gay rights trilogy). See generally Eyer, *Popular Constitutionalism*, *supra* note 139 (discussing the resistance of the lower courts to applying heightened scrutiny to sexual orientation classifications even after *Romer* and *Lawrence*).

<sup>158</sup> See *supra* notes 150–51.

<sup>159</sup> See *id.*

protection review, this runs a real risk of cutting short many of the potential progressive directions in which broader equal protection might otherwise turn.<sup>160</sup> Recognizing formally heightened scrutiny for sexual orientation would undoubtedly reaffirm the validity and centrality of the tiered approach to equal protection review. And, if used as an excuse to reimagine cases such as *Romer*, *Lawrence*, and *Windsor* — like the early sex and illegitimacy cases — simply as “[h]eightedened scrutiny under a deferential, old equal protection guise,”<sup>161</sup> such a turn could easily return us to an era in Fourteenth Amendment adjudication in which there are few arguments for affording groups outside of the formally heightened tiers<sup>162</sup> meaningful review.<sup>163</sup>

This risk could be taken as a reason to argue against heightened scrutiny for gays and lesbians, and to suggest that we should instead embrace and pursue a turn away from the Court’s traditional tiered approach. And indeed, over the last two decades, a number of scholars have argued for precisely a de-tiered equal protection doctrine, in which no group a fortiori receives favored review.<sup>164</sup> Such scholars have

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<sup>160</sup> Although I focus herein on the implications for groups outside the formally heightened tiers, see *infra* notes 163, 170–74, such a turn could also cut short the progressive potential of the gay rights cases for cases implicating racial or gender justice concerns that are, because of the Court’s narrow approach to even nominally “protected” classes, nevertheless designated as rational basis cases. Cf. Robinson, *Unequal Protection*, *supra* note 21 (contending that the gay rights cases currently afford a more robust version of equal protection review than is afforded to even those classifications subject to formal heightened scrutiny). See generally *supra* notes 47, 50 and 86 (discussing the ways that the characterization of the minimum tier may intersect with disputes over the scope of what counts as “discrimination”); *infra* note 170 (same).

<sup>161</sup> See SULLIVAN & GUNTHER, *supra* note 21, at 683.

<sup>162</sup> Although I focus herein on those groups outside the heightened tiers, such a turn might also have adverse consequences for those claims brought by protected groups that today fall outside of the fairly narrow scope of what the Court has been willing to deem sufficient to trigger heightened scrutiny. See *supra* note 160.

<sup>163</sup> Cf. *supra* notes 136–45 and accompanying text (describing the effects of stripping the sex and illegitimacy cases from the rational basis canon).

<sup>164</sup> See Goldberg, *Equality Without Tiers*, *supra* note 21, for perhaps the most prominent article advocating this approach. For other critiques of the current approach to tiered scrutiny, see, for example Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739 (2014); Russell K. Robinson, *Marriage Equality & Post-Racialism*, 61 UCLA L. REV. 1010, 1062-63 (2014) [hereinafter *Marriage Equality*]; Strauss, *supra* note 14. See also Robinson *supra* note 21, at 8-40 (delineating a variety of ways in which the Court’s trio of gay rights cases treats gay litigants more favorably than those nominally afforded protected class status); cf. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011) (critiquing the Supreme Court’s three-tier approach and suggesting that proportionality analysis, as deployed in other countries’ constitutional regimes, could form the basis for a more stable and effective foundation for rights protection).

offered thoughtful critiques of the many limitations of a tiered approach to equal protection scrutiny — its inadequacy for those outside the heightened tiers, the problems of symmetrical application of heightened scrutiny to suspect classifications (e.g., affirmative action), the apparent unwillingness of the Court to add new groups to the heightened tiers — many of which are difficult to dispute.<sup>165</sup> Thus, one could contend that we should take the opportunity that this constitutional moment affords to pursue a turn away from the tiers, eschewing litigation approaches that might encourage continuing group stratification within the equal protection domain.

But while the benefits of such an untiered approach for those currently outside the heightened tiers is indisputable, its merits for the gay rights movement itself are far more debatable. Thus, while some scholars have contended that the experience of other protected groups — including most notably racial minorities — should make us chary of the benefits of suspect class status, others have argued in contrast that the pursuit of heightened scrutiny remains a valuable gay rights goal.<sup>166</sup> Perhaps more importantly, advocates — those who will drive the trajectory of lesbian/gay/bisexual (“L/G/B”) litigation efforts on the ground — appear largely unpersuaded of the merits of an exclusively untiered (or minimum tier) approach.<sup>167</sup> Thus, although scholarly critiques of heightened scrutiny

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<sup>165</sup> See *supra* note 164.

<sup>166</sup> Compare Robinson, *Marriage Equality*, *supra* note 164, at 1058-59 (critiquing the LGBT rights movement’s pursuit of heightened scrutiny), and Robinson, *Unequal Protection*, *supra* note 21 (discussing the ways that the Court’s contemporary gay rights jurisprudence is actually more favorable to litigants than the approach applied to suspect and quasi-suspect classifications), with Luke Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 609-21 (2013) (developing arguments for why, despite the existence of critiques of formal heightened scrutiny, heightened scrutiny remains an important goal for the gay community). Although I share concerns regarding the limitations of suspect class status (and in general formal equality regimes), see, e.g., Katie Eyer, *Have We Arrived Yet? LGBT Rights and the Limits of Formal Equality*, 19 LAW & SEXUALITY 159 (2010), I also think that there are very real potential costs for the gay and lesbian community to eschewing formal heightened scrutiny. In addition to those costs identified by scholars such as Boso (e.g., the greater ability of anti-gay bias to infect individual judges’ decision-making where heightened scrutiny is not the norm), the loss of the normative signaling effect of a determination that heightened scrutiny is appropriate (and the concomitant loss of the deterrence effects that such normative signaling could have) constitutes a significant concern for those many members of the gay and lesbian community for whom litigation is not a realistic alternative.

<sup>167</sup> See, e.g., Robinson, *Marriage Equality*, *supra* note 164, at 1062 (noting that “[v]irtually every brief arguing for marriage equality urges the court to apply strict scrutiny”); see also e.g., Brief of Plaintiffs-Appellees Derek Kitchen et al. at 48, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178) (arguing for heightened

have long existed (even for its putative beneficiaries), many L/G/B advocates have nevertheless continued to push for protected class status for lesbians and gays.<sup>168</sup> And, there are few reasons to believe that this strategic approach to gay equality is likely to (or indeed, should) undergo an imminent change, precisely at the juncture that such arguments show increasing possibility of success.<sup>169</sup>

Is it inevitable then — if gays and lesbians succeed in securing heightened scrutiny — that we will face a resurgence once again of rigidly tiered equal protection, of an empty and meaningless form of rational basis review? Will groups<sup>170</sup> such as people with disabilities,<sup>171</sup>

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scrutiny in a very recent marriage equality case); Sevcik Plaintiffs-Appellants' Opening Brief at 49, *Latta v. Otter*, No. 12-17768, 2014 WL 4977682 (9th Cir. 2014), ECF No. 20-3 (arguing for heightened scrutiny on appeal from *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012)). *But cf.* Amicus Curiae Brief of Gay & Lesbian Advocates & Defenders and Lambda Legal Def. & Educ. Fund, Inc. in Support of Edith Windsor and the United States Addressing the Merits and Supporting Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Lambda Brief*] (arguing for the invalidation of DOMA on rational basis review, and suggesting a sliding-scale approach to rational basis review remarkably similar to that deployed in the 1970s).

<sup>168</sup> See *supra* note 167.

<sup>169</sup> See, e.g., Eyer, *Popular Constitutionalism*, *supra* note 139, at 209-13 (detailing the history of protected class status arguments for gay equality and showing that they have gained viability in the aftermath of the Obama administration's announcement that it viewed protected class status as legally appropriate); see also Katie Eyer, *Marriage This Term: On Liberty and the "New Equal Protection,"* 60 UCLA L. REV. DISCOURSE 2, 7-9 (2012) (noting that there are reasons to think that the L/G/B rights movement is approaching a constitutional tipping point to full constitutional equality).

<sup>170</sup> I have included only those groups here that are not formally protected by the Supreme Court's heightened scrutiny jurisprudence, but, as noted, there are significant arguments that a more robust minimum tier approach could benefit even those who are afforded heightened scrutiny. See, e.g., *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (rejecting arguments that a law should be subject to heightened scrutiny because of a disparate impact on African Americans, but citing *Reed* and finding it invalid on robust rational basis review); see also *supra* notes 47, 50, 86 and 160 (describing the ways that more robust rational basis review might alleviate some of the limitations on existing protected class review). See generally Robinson, *Unequal Protection*, *supra* note 21 (arguing that there are a number of ways in which the Court's contemporary gay rights jurisprudence treats L/G/B litigants more favorably than those afforded formal heightened scrutiny).

<sup>171</sup> Although *Cleburne* is often assumed, standing alone, to assure "rational basis with bite" for people with disabilities, it has not generally been so construed in practice. See, e.g., Robinson, *Unequal Protection*, *supra* note 21, at 12-13 (describing the Supreme Court's very crabbed reading of *Cleburne* in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)); Waterstone, *supra* note 151, at 550 (in most disability constitutional law cases "courts cite *Cleburne* for the proposition that people with disabilities are not a protected class, and exercise almost unlimited deference to the state's purported justifications as rational").

undocumented immigrants, the poor, the transgender<sup>172</sup> (much less those future social movements that we cannot yet imagine), of necessity face a regime in which “negative attitudes or fear” can animate government action,<sup>173</sup> where courts go so far as to “fail to ensure even a baseline of meaningful review”?<sup>174</sup> Perhaps, but to the extent we take seriously the Court’s own equal protection history, perhaps not.

The rational basis canon — indeed any canon — does not simply exist. It is created by multitudinous acts of summarizing and describing, of teaching and writing, of deciding what to (and what not to) include. Today, cases like the early sex and illegitimacy cases exist outside the rational basis canon because we have allowed them to be re-remembered as irrelevant to the Court’s minimum tier scrutiny: as simply precursors to sex and illegitimacy receiving formally heightened review.<sup>175</sup> But this was not the necessary consequence of the Court’s turn to formal heightened scrutiny for sex and illegitimacy. At the time they were decided, the early sex and illegitimacy cases were not applications of formally heightened scrutiny.<sup>176</sup> They were cases in

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<sup>172</sup> Transgender rights are arguably a distinctive case, since there are strong arguments, by now quite robustly embraced in the employment discrimination domain, for treating anti-transgender discrimination as a form of sex discrimination. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (embracing this argument in a constitutional employment discrimination case); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (embracing the sex discrimination argument in a constitutional employment case); *see also Macy v. Holder*, Appeal No. 0120120821 (EEOC Apr. 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> (concluding that anti-transgender discrimination is per se sex discrimination under Title VII). I include it here, however, given the lack of any Supreme Court level precedent addressing this issue, and the relative dearth of Circuit level precedent extending it outside of the employment discrimination context. *Cf. Robinson, Unequal Protection, supra* note 21 (suggesting that the Court has significantly weakened sex discrimination jurisprudence in ways that may ultimately be damaging for transgender Equal Protection litigants).

<sup>173</sup> *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

<sup>174</sup> Goldberg, *Equality Without Tiers, supra* note 21, at 490.

<sup>175</sup> *See, e.g., Stone et al., supra* note 21, at 682-83 (characterizing *Reed v. Reed* as a case in which the Court “purport[ed]” to apply rational basis review, only later “acknowledg[ing] that it was applying heightened scrutiny”); Sullivan & Gunther, *supra* note 21 (characterizing *Reed* as “[h]eighted scrutiny under a deferential, old equal protection guise”); Robinson, *Unequal Protection, supra* note 21, at 12 (characterizing *Reed* as a case in which the Court “purported to apply the minimum rationality test”). *See generally supra* note 21 (collecting additional sources).

<sup>176</sup> *See supra* note 36 (citing the Court’s early sex and illegitimacy cases, all of which failed to endorse formal heightened scrutiny and many of which explicitly stated that they were applying rational basis review); *see also* sources cited *supra* note 57 (indicating that the Justices certainly did not expressly understand themselves to be applying heightened scrutiny review in the early sex and illegitimacy cases).



which the Court took seriously its obligations to subject even minimum tier classifications to meaningful equal protection review.<sup>177</sup> So too in a host of other cases over the years — including the contemporary gay rights cases — the Court has belied a vision of minimum tier scrutiny which lacks rigor and which simply and uniformly defers to invidious government discriminations.<sup>178</sup>

Indeed, taking seriously the Court's contemporary equal protection jurisprudence on its own terms, one can easily craft a vision of the canon in which the Court generally does *not* default to a highly deferential form of review — even outside of the formally heightened tiers — where it perceives group or rights-based concerns<sup>179</sup> to exist.<sup>180</sup>

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<sup>177</sup> See sources cited *supra* note 176.

<sup>178</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (sexual orientation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual orientation); *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); see also, e.g., *Quinn v. Millsap*, 491 U.S. 95 (1989) (property ownership requirement for service on a government board); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (disability); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (long versus short term residents); *Plyler v. Doe*, 457 U.S. 202 (1982) (education for undocumented children); *O'Brien v. Skinner*, 414 U.S. 524 (1974) (residency based differences in voting rights of inmates); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (group-based animus); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptive use by unmarried individuals). For works collecting cases that invalidate classifications outside of formal heightened scrutiny review, see generally Farrell, *Successful Rational Basis Claims*, *supra* note 21 and Goldberg, *Equality Without Tiers*, *supra* note 21, at 513 n.120.

<sup>179</sup> I have used “group and rights-based” concerns here as a shorthand for cases addressing disparate treatment against groups that display some of the indicia of suspectness, as well as cases implicating rights that bear some of the indicia of fundamentality. This leaves aside the question of the Court's responsiveness (or more appropriately, lack thereof) to the burdens experienced by formally protected groups outside of the context of explicitly discriminatory laws. As I discussed above, it is possible that a reinvigorated minimum tier scrutiny could alleviate some of these limitations in existing equal protection doctrine as well, although that clearly has not been the primary target of the Court's minimum tier largess historically. See *supra* notes 47, 50, 86, 160 and 170. For a distinct, non-minimum tier focused argument regarding the potential of the gay rights cases for doctrine affecting those in the upper tiers, see generally Robinson, *Unequal Protection*, *supra* note 21.

<sup>180</sup> See *supra* notes 36 and 178; see also Lambda Brief, *supra* note 167, at 6-7 (developing the argument that the Court's equal protection doctrine “is not uniformly deferential” and that the Court applies a more meaningful form of minimum tier review to contexts that implicate group or rights-based concerns); cf. Brief of Professor Nan D. Hunter et al., *supra* note 1 (arguing for a “unifying, coherent two-part equal protection test, which distinguishes between classifications that have the indicia of invidiousness and those that do not” and drawing on precedents decided outside the context of “suspect” classes or “fundamental” rights in making the case that such an approach is jurisprudentially supportable); Waterstone, *supra* note 151 (making the case that the Court has shown itself willing to look to contextual factors like group-based concerns

That is, descriptively, it is clear that where the Court considers group and rights-based concerns to exist,<sup>181</sup> it often applies meaningful review — even in minimum tier cases.<sup>182</sup> Thus, rather than the prevalent account of minimum tier scrutiny — one in which “rational basis with bite” is a rare, aberrational deviation from the deferential norm — one could argue instead that a different account should prevail: one in which the Court’s failure to afford a meaningful assessment where group and rights-based concerns are implicated is viewed as aberrational.<sup>183</sup>

This is not to suggest that the Court has always applied a meaningful minimum tier approach to circumstances implicating group or rights-based concerns, or that this account is necessarily *more* accurate than the one that generally prevails today.<sup>184</sup> Rather, it is to suggest that

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in cases like *Cleburne* and *Windsor*, and arguing that this type of minimum tier analysis could be successful for people with disabilities).

<sup>181</sup> There are also some of the Justices who clearly perceived a more robust rational basis review to be appropriate, even outside of such group and rights-based concerns. See generally Maltz, *supra* note 18 (describing the various Justices’ perspectives on rational basis review, and demonstrating that at least some of the Justices during the time frame he discusses felt that rational basis review should be more stringent generally). But, none of these broader approaches ever appears to have gained consistent application. See generally Maltz, *supra* note 18 (showing that the Justices did not come to consensus on the application of such a “global” approach to more robust rational basis review). Thus, the only relatively consistent descriptive trend that one can derive from the Court’s minimum tier precedents is its tendency to apply a more meaningful level of scrutiny where it perceives group or rights-based concerns to be implicated.

<sup>182</sup> See *supra* notes 36 and 178; cf. Maltz, *supra* note 18 (describing in detail the internal deliberations in *Murgia*, which make clear that the Justices — rightly or wrongly — did not perceive age as bearing sufficient indicia of suspectness to warrant applying any more meaningful level of rational basis scrutiny).

<sup>183</sup> “Animus” analysis, which has been the focus of a number of recent scholarly treatments can be seen as consistent with this account and indeed as simply representing one sub-set of the type of cases in which the Court has perceived group-based concerns to exist (and thus applied something more than *de minimis* minimum tier review). Although there are clearly distinctive nuances to how the Court has applied “animus” analysis, its triggers (a specific kind of group-based concerns) and its result (a more meaningful form of review than deferential rational basis) are consistent with the general observation that the Court does not apply deferential rational basis where group-based concerns exist. For much more extended treatments of the nuances of the Court’s animus analysis, see, for example, Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2014) and Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

<sup>184</sup> Cf. Farrell, *Successful Rational Basis Claims*, *supra* note 21, at 411-13 (noting that the rights and groups account of where the Supreme Court applies meaningful minimum tier review has some support, but that the Court is not consistent); McGowan, *supra* note 7, at 397-98 (noting that a number of minimum tier cases have applied more meaningful review where group-based concerns were implicated). Note that while I agree with Professor Farrell that the Court has not been wholly consistent

taking the full sweep of the Court's minimum tier jurisprudence into account, the "meaningful review" account arguably has as much to support it as the more traditional ultra-deferential account. Thus, where group or rights-based concerns are implicated — including but not limited to the early sex, illegitimacy, and sexual orientation cases — there is a robust history of the Court applying more than de minimis rational basis review, even outside of the formally heightened tiers.<sup>185</sup> And, emphasizing those "meaningful review" cases — cases like *Weber*<sup>186</sup> and *Reed*,<sup>187</sup> *Romer*<sup>188</sup> and *Windsor*,<sup>189</sup> *Cleburne*,<sup>190</sup> *Moreno*,<sup>191</sup> *Eisenstadt*,<sup>192</sup> and *Plyler*<sup>193</sup> — rather than (or at least in addition to) cases

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in this approach, I do not agree as to his characterization of the extent of inconsistency, as some of the cases that he classes as not attending to group and rights concerns are cases in which the Court applied a meaningful form of review while ultimately concluding that the law was justified. For cases that apply a meaningful form of review, see, for example, *Sosna v. Iowa*, 419 U.S. 393 (1975) and *Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). See also *supra* note 56 (describing the ambiguity of how to characterize the Court's reversal of a mid-1970s minimum tier case invalidating a law in view of its apparent deployment of a robust standard of review). See generally *infra* note 202 (noting that a more meaningful form of review does not mean that all cases will result in plaintiff-favorable results).

<sup>185</sup> See *supra* notes 36, 178 and accompanying text; see also *infra* notes 186–93 and accompanying text. This history, with its focus on groups and rights, bears a significant resemblance to the sliding scale approach to equal protection (most commonly associated with Justices Marshall and Stevens and similar to one of the two predominant understandings of minimum tier review in the mid-1970s). See *supra* note 46; see, e.g., Leslie Friedman Goldstein, *Equal Protection After the Rational Basis Era: Is It Time to Reassess the Current Standards of Review?*, 4 U. PA. J. CONST. L. 372 (2002) (discussing Justices Marshall and Stevens's proposed sliding scale approach); Mathews & Sweet, *supra* note 164, at 865-66 (same); Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475 (1997) (describing both Justice Marshall and Justice Stevens's proposed approaches, but distinguishing between the two).

<sup>186</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (striking down illegitimacy classification on minimum tier review).

<sup>187</sup> *Reed v. Reed*, 404 U.S. 71, 75-77 (1971) (striking down sex classification on minimum tier review).

<sup>188</sup> *Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (striking down sexual orientation classification on minimum tier review).

<sup>189</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693-96 (2013) (striking down sexual orientation classification, without applying formally heightened scrutiny).

<sup>190</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-50 (1985) (striking down law targeting the mentally disabled on minimum tier review).

<sup>191</sup> *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-44 (1973) (striking down law motivated by dislike of "hippies" on minimum tier review).

<sup>192</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972) (striking down limitation on the sale of birth control to unmarried individuals on minimum tier review).

<sup>193</sup> *Plyler v. Doe*, 457 U.S. 202, 216-30 (1982) (striking down law excluding

like *Rodriguez*,<sup>194</sup> *Murgia*,<sup>195</sup> or *Beazer*<sup>196</sup> — creates a vision of equal protection doctrine that simply looks different. Thus, depending on how we constitute the canon — what we choose to include or not — we may build for ourselves an understanding of equal protection doctrine in which groups and rights are cognizable even outside of the higher tiers, or an understanding in which they are not.<sup>197</sup>

What difference might a reframed rational basis canon make? Without the benefit of prescience, it is impossible to know for sure. It may be that the courts would take little heed of scholars' reassessment of the Court's approach and would continue to adhere to a rigidly deferential understanding of the Court's minimum tier approach to scrutiny.

But there are also reasons to think that the framing of the canon does indeed matter. What treatises describe, what casebooks suggest, what students learn all frame our understanding of what the doctrine is.<sup>198</sup> Scholars and courts have already — through the Court's contemporary gay rights cases — been reminded that the Court does not always rigidly adhere to a highly deferential, de minimis scrutiny approach, even in the absence of formally heightened review (although memory of the historical precursors of this practice seem to have been largely lost).<sup>199</sup> This thus may be a uniquely plausible moment for reassessing our descriptive understanding of what the Court's "minimum tier" review

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undocumented children from public schools on minimum tier review).

<sup>194</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-55 (1973) (affirming on minimum tier review system of public school funding that generally resulted in poorer districts receiving lesser funding).

<sup>195</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314-17 (1976) (affirming on minimum tier review mandatory retirement age for Massachusetts police officers).

<sup>196</sup> *N.Y.C. Transp. Auth. v. Beazer*, 440 U.S. 568, 587-94 (1979) (affirming NYCTA policy of refusing to employ methadone users on minimum tier review).

<sup>197</sup> One potential critique of emphasizing these meaningful minimum tier cases may be that many of them are fairly old. But so too are many of the canonical cases cited for the notion that the Court applies deferential rational basis review, even in cases applying group or rights-based concerns. The Court has simply taken fewer cases of this kind in the modern era of equal protection jurisprudence.

<sup>198</sup> See, e.g., Hasday, *supra* note 28, at 829-30 (making a similar observation in relation to the influence of the family law canon); cf. Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571 (2013) (discussing the psychological phenomenon of "framing effects," i.e., the tendency to evaluate choices and options by "reference to surrounding context" including the tendency to "make decisions about value and risk with respect to a reference point, such as the status quo").

<sup>199</sup> See *supra* notes 146-51 and accompanying text; cf. Lambda Brief, *supra* note 167 (making a descriptive argument similar to that raised here, but without citing to the Court's early sex and illegitimacy cases).

looks like, and how the Court takes account of groups and rights, even outside of its higher tiers of review.<sup>200</sup>

And such a reassessment could — regardless of the outcome of the gay equality cases — have real meaning. At a minimum, such an approach could provide precedents and an alternative model for those litigators and sympathetic judges who will, in the future, bring and adjudicate claims.<sup>201</sup> Simply by being descriptively accurate — by including those cases that were, at the time they were decided, applications of minimum tier review — one can make persuasive arguments that group stigma, important (if not fundamental) rights, and a history of discrimination all matter, even outside of the context of formally heightened review.<sup>202</sup> In

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<sup>200</sup> See, e.g., Transcript of Oral Argument at 111, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-307\\_jnt1.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf) (“You seem to say . . . that there is three tiers, and if you get into rational basis then it’s anything goes. But . . . in the very first gender discrimination case, *Reed v. Reed* . . . [t]here was no intermediate tier . . . . It was rational basis. . . . And yet the Court said this is rank discrimination and it failed.” (statement of Justice Ginsburg)); see also Josh Blackman, *Which Rational Basis Test Are We Talking About?*, JOSH BLACKMAN’S BLOG (Mar. 27, 2013), <http://joshblackman.com/blog/2013/03/27/which-rational-basis-test-are-we-talking-about/> (discussing this and other aspects of the rational basis discussion during *Windsor* oral argument). As Justice Alito’s recent dissent in *Windsor* (joined by Justice Thomas) suggests, it is not clear that it is only “liberal” Justices, such as Justice Ginsburg, who might be receptive to such a turn in the Court’s jurisprudence. See *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting) (relying on *Reed* for the proposition that “[u]nderlying our equal protection jurisprudence is the central notion that “[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike” and describing the tiers of scrutiny as a “heuristic” for achieving this goal (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971))); cf. *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun Free School Zones Act of 1990, applying a meaningful form of rational basis review); Brief Amicus Curiae of Eagle Forum Educ. & Legal Def. Fund, Inc., in Support of Respondent Bipartisan Legal Advisory Grp. of the U.S. House of Representatives in Support of Reversal on the Merits, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (relying on *Royster Guano* and *Reed* in articulating the applicable standard of review, in an amicus brief by a conservative organization); Josh Blackman, *Equal Protection From Eminent Domain: Protecting the Home of Olech’s Class of One*, 55 LOY. L. REV. 697 (2009) (arguing for a robust Equal Protection doctrine in the arguably “conservative” area of eminent domain).

<sup>201</sup> Cf. Eyer, *Popular Constitutionalism*, *supra* note 139 (describing the reluctance of the lower courts to make significant equality-promoting doctrinal moves in response to popular constitutional developments absent authoritative doctrinal guidance from the Supreme Court or another entity).

<sup>202</sup> How exactly such factors matter (i.e., what exact form of review should follow from the presence of indicia of suspectness or fundamentality) is less clear from the Court’s existing precedents. However, some broadbrush observations can be made. Most notably, the Court typically does not in those instances where it regards group or rights-based concerns as significant apply the uber-deferential form of rational basis

short, rethinking the canon would at least create a counter-narrative to the long-standing dominant account of rational basis as an uber-deferential, analytically empty form of review.<sup>203</sup>

Thus, the contemporary moment at which we find ourselves in equal protection doctrine is one of real potential, but also one in which possibilities for progressive change may be lost. For gays and lesbians — *and* for those not likely to come within the heightened tiers — the next decade is likely to define in important ways how and what equal protection review protects. And, the accounting of this transitional

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review that most scholars define as archetypal minimum tier review. *See supra* notes 177–97 and accompanying text. Instead, the Court appears to demand some genuine connection between the classification at issue and the justification for the distinction and is attentive to (and likely to strike down) classifications based significantly on group stigma or stereotypes. *Id.* Of course, the application of a more meaningful form of review does not guarantee constitutional invalidation in all circumstances, but simply means that constitutional challenges outside of the heightened tiers receive some more significant scrutiny for irrationality and bias. *Cf. Vacco v. Quill*, 521 U.S. 793 (1997) (rejecting, on rational basis review, plaintiffs' equal protection claims as to the impermissibility of distinguishing between the right to refuse treatment and the right to physician assisted suicide, but only after extensively canvassing the reasons why the two are dissimilar). For this reason, the approach that some scholars have taken — of treating cases where the Court has not ruled in the plaintiff's favor as generally indicative of deferential rational basis review — is misleading in assessing the nature of the Court's approach to rational basis review. *See, e.g.,* Robert C. Farrell, *The Two Versions of Rational Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 290–91 & n.47 (2011) (supporting the assertion that “the deferential version [of rational basis review] is the established version used in a very high percentage of rationality decisions” by citing to the success rate of all rationality cases reviewed by the Supreme Court, without separating out those cases where the Court applied a meaningful form of scrutiny but nevertheless found this more meaningful form of scrutiny to be met); *see also supra* note 184 (noting that the extent of apparent inconsistency in the Court's approach is less significant if one accounts for the fact that the Court can apply meaningful review, and still reach a defendant-favorable result).

<sup>203</sup> There are, of course, critiques one can make of such a move, among them the potential for unguided and *Lochner*-esque deployment of rational basis review to invalidate government action in accordance with judges' personal preferences. *See, e.g.,* Rehnquist Draft, *supra* note 77, at 15–16 (articulating this concern). A full response to such critiques is beyond the scope of this essay, but I note that such a concern *already* exists in view of the existing Supreme Court rational basis precedents invalidating government action in the context of minimum tier review. *See, e.g.,* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (Marshall, J., concurring) (raising this concern, in light of the Court's failure to elaborate upon its criteria for or even acknowledge its application of something more than minimum rationality). A fuller and more accurate canonization of such precedents would at least have the benefit of providing a better descriptive account of the circumstances in which the Court in fact deploys rigorous minimum review (typically circumstances implicating some form of group-based discrimination or rights) and thus channeling exercises of robust minimum tier review to those contexts where they are precedentially justified.

moment that we make may help to shape — as the canonization of the sex and illegitimacy cases once did — the next forty years of equal protection review.

#### CONCLUSION

We stand at the cusp of a critical juncture for the Court's equal protection doctrine. There is increasing scholarly assessment that the current system of tiered review is broken. And, lower courts have increasingly deviated from once rigid understandings of the requirements of minimum tier scrutiny: its virtually unbending adherence to deference, its unwillingness to credit even the most extreme evidence of bias in undertaking equal protection review.

There can be no doubt that — to the extent the future brings more durable changes in equal protection doctrine — the gay rights cases will play a key role in this reassessment. Through the myriad of features that scholars have identified — their resistance to the traditional tiered formulations of review, their blending of due process and equal protection concepts, their aggressiveness in striking classifications even outside of formally heightened review — they have pushed courts and scholars towards a vision of equal protection that is considerably more flexible and robust. And yet, to the extent that such cases are ultimately situated within one of the formally heightened tiers of scrutiny, their potential as a catalyst for a broader reimagining of equal protection doctrine could — like the sex and illegitimacy cases before them — be thrown into doubt.

There are, then, important lessons for this new era in equal protection jurisprudence that can be drawn from the history of the Court's mid-1970s struggles over sex and illegitimacy. We cannot know if the Court will ultimately — as it did in the 1970s for sex and illegitimacy — turn to formal heightened scrutiny as the descriptive justification for its gay rights approach. But to the extent that it does, the trajectory of the sex and illegitimacy cases stands as a reminder that it is easy to lose historical memory once formal heightened scrutiny is achieved. Moreover, the sex and illegitimacy cases' postmortem — the equal protection era that followed — suggests that such a post-hoc stripping of early cases from the rational basis canon can have significant consequences: consequences that may make the path to equal protection victories for other groups (those not afforded heightened scrutiny) look bleak indeed.

But such a stripping of early precedents from the canon need not be inevitable. The equal protection canon is not delivered to us, whole and unalterable. Rather, it is made, through the multitudinous framing and

inclusion (or exclusion) decisions of scholars and teachers, of litigators and judges, of treatises, casebooks, and judicial opinions. There is no reason, in constructing the canon, that we should not take seriously the Court's own actual approach: that is, its willingness to apply meaningful scrutiny to equal protection classifications implicating group or rights-based concerns even outside of the context of formally heightened review. Indeed, to do otherwise seems simply descriptively inaccurate, a revisionist overlay on cases in which the Court itself did not understand itself to be adopting heightened scrutiny review.

In short, there are reasons why — regardless of the outcome of the Court's gay rights cases — we should reclaim for equal protection doctrine a more robust understanding of the Court's approach to minimum tier review. The Court has repeatedly shown itself willing to apply meaningful scrutiny to groups (and sometimes rights) that are not among those it has selected for formal heightened scrutiny review. This history should not be forgotten as we move forward to the next era of challenges and group rights claims confronting equal protection review.