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Identity Scripts & Democratic Deliberation

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Article

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INTRODUCTION

Consider a law firm partner who ascribes a feminine identity script to his female associate.[1] The partner assumes the associate conforms to traditionally understood notions of femininity, carrying herself softly and putting family commitments before career ambitions.[2] To advance her career, the associate will likely negotiate[3] that gender script by toeing a fine line—at times, rejecting the script to convey that she is assertive enough to compete in male-dominated environments and, at other times, performing the script to avoid stigma traditionally imposed on aggressive women.[4]

In a burgeoning body of legal scholarship, commentators have been explicating the harmful effects of such script negotiations and prescribing remedies accordingly.[5] While this scho-

1. This Article uses the term "identity script" to refer to actions and characteristics expected of an individual based on her perceived identity; these figurative scripts are developed by aggregating stereotypes regarding the script's subject. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 290 (1995) (defining identity scripts as "cluster[s] of expectations"). This definition of identity scripts is related to, but distinguishable from, the definition adopted by Kwame Anthony Appiah in his seminal works. *See* KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 21–23, 65–71 (2005) (discussing identity scripts); *see also infra* Part I.A (discussing identity scripts and Appiah's work).

2. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1132 (2008) ("Female attorneys are often presumed to be softer, less aggressive, and burdened in their ability to put work first because of family commitments.").

3. This Article uses the term "negotiation" to refer to how one manages the identity scripts that others ascribe to her. Depending on context, an individual may manage her scripts by adhering to them, or she may manage her scripts by rejecting them. For elaboration on negotiation processes, see *infra* Part I.A.

4. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 149, 154 –58 (2006) (describing pressures on women both to embrace and to reject femininity while employed at traditionally male workplaces). Walking this fine line was demanded of Ann Hopkins in the landmark case of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232–37 (1989) (quoting other workers' praise of her achievement and criticism of her aggressiveness).

5. *See, e.g.*, YOSHINO, *supra* note 4, at 74–166 (presenting his theory of

larship has generally focused on the harms suffered by individuals,[6] this Article takes a different tack, illuminating harms at a systemic level—harms to democracy. This Article posits that ascribed[7] identity scripts undermine democratic deliberation,

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"covering" identities); Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 113–22 (2000) [hereinafter Carbado & Gulati, *Conversations*] (discussing the effects of stereotyping on workplace conversation strategies); Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1672–77 (2004) [hereinafter Carbado & Gulati, *Race to the Top*] (considering racial types that are more likely to succeed in the corporate environment); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714 –28 (2001) [hereinafter Carbado & Gulati, *Fifth Black Woman*] (analyzing the "identity performance problem"); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1263–67 (2000) [hereinafter Carbado & Gulati, *Working Identity*] (showing how identity negotiation is "work"); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 874 –88 (2006) (criticizing the dichotomy of the "Good Black Man" and the "Bad Black Man"); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 643–53 (2005) (discussing the pressure for people to conform their identities to work culture); Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1284 (2007) (reviewing YOSHINO, *supra* note 4, and expanding upon Yoshino's concepts of "self " and "identity"); Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 322–35 (2007) (discussing the effects of "assimilation demands" on children's identities); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1290–1313 [hereinafter Onwuachi-Willig & Barnes, *By Any Other Name*] (analyzing the social construction of racial identity); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 883–98 (2006) [hereinafter Onwuachi-Willig, *Undercover Other*] (considering the role of "passing" in performing racial and sexual identities); Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1914 –27 (2007) (discussing three types of performative behavior by African Americans in response to the NBA appearance code); Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 305–13 (2005) (critically examining and elaborating on theories of "identity performance"); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination By Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145–71 (2004) (comparing morphology-based and performance-based identity ascription); Russell K. Robinson, *Uncovering* Covering, 101 NW. U. L. REV. 1809, 1839–48 (2007) (reviewing YOSHINO, *supra* note 4, and comparing his concepts to those in Carbado & Gulati, *Working Identity*, *supra*).

6. *See supra* note 5; *see also* Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 382 (2008) (noting that literature on script negotiations "tends to frame the issue largely in terms of individual interests"). *But see* Green, *supra*, at 383 (noting that pressures to negotiate identity scripts undermine not only individual interests, but also society's collective interest in social equality).

7. Note that this Article takes issue with *ascribed* identity scripts. Going forward, this Article uses the term "identity script" as shorthand for "ascribed

thereby contributing to a democratic deficit,[8] and that equal protection doctrine should ameliorate that deficit.

Just as the hypothetical law firm associate negotiates gender scripts, individuals often negotiate identity scripts in the political sphere. Consider the prominent example of Barack Obama. Commentators have argued that Americans typically perceive President Obama as a black man and ascribe him corresponding scripts for "acting black,"[9] which Obama has carefully negotiated to attain and maintain power.[10] This negotiation process has entailed alternating between performance and rejection of scripted black identity. Other politicians, journalists, and citizens engaged in political deliberation similarly negotiate ascribed identity scripts.

These ascribed identity scripts contribute to a democratic deficit in at least three regards. First, they create barriers to entry, limiting the scope of participants in democratic deliberation. For example, only African Americans who associate and disassociate with black identity scripts in very particular ways can achieve standing on the political stage.[11] By unduly limiting the scope of individuals who successfully mount the politi-

identity script" unless otherwise stated. Part I.A elaborates on the relationship between ascribed scripts and expectations that individuals voluntarily claim. *Cf.* Thuy N. Bui, *The Difference Between Race and Color: Implications for Changing the Racial Discourse*, 38 SANTA CLARA L. REV. 629, 632–34 (1998) (reviewing YOSHINO, *supra* note 4, and discussing identity scripts as "ascribed"); Carbado & Gulati, *Working Identity*, *supra* note 5, at 1261 n.2 (distinguishing "'sense of self' identity" from "'attributional' identity," which is roughly synonymous to this Article's notion of "ascribed" identity scripts).

8. The term "democratic deficit" refers to deficiencies concerning a government's realization of democratic political order. *See* Sanford Levinson, *The Democratic Deficit in America*, HARV. L. & POL'Y REV. (Online) (Dec. 4, 2006), http://www.hlpronline.com/2006/12/the-democratic-deficit-in-america/ (describing the concept of "democratic deficit").

9. *See* HENRY LOUIS GATES, JR., LOOSE CANNONS: NOTES ON THE CULTURE WARS 101 (1992) ("One must *learn* to be 'black' in this society, precisely because 'blackness' is a socially produced category.").

10. *See, e.g.*, Devon Carbado, *What Voters 'Don't Ask' but Can 'Tell' About Obama's Race*, DAILY J. (L.A.), Aug. 28, 2008, at 6 (discussing "Obama's racial double bind"); Marcus Mabry, *Color Test: Where Whites Draw the Line*, N.Y. TIMES, June 8, 2008, (Week in Review), at 1 (same); Patricia J. Williams, *L'Étranger*, NATION, Mar. 5, 2007, at 11, 14–15 (same).

11. *See* Carbado, *supra* note 10 ("[Obama] can be neither 'too black' nor 'not black enough.'"). Commentators have made similar arguments regarding racial minorities in employment settings. *See, e.g.*, Carbado & Gulati, *Working Identity*, *supra* note 5, at 1269–70 (giving the example of positive and negative stereotypes in the law firm setting); Cooper, *supra* note 5, at 884 (noting that corporations "reward race-distancing strategies and punish race-identifying strategies").

cal stage, identity scripts undermine the collective ideal of democratic governance. Second, script negotiations distort the deliberative conversations that ensue among political actors because script negotiations often entail self-censorship.[12] Third, identity scripts distort the way communications are received during deliberation.[13]

These impairments should inform an influential school of constitutional theory, which this Article will refer to as "democracy reinforcement theory." According to the theory, an overarching goal of constitutional jurisprudence should be to reinforce democracy.[14] Understanding identity scripts' effects on democratic deliberation illuminates new directions for democracy reinforcement theory, especially with regard to equal protection jurisprudence.

The remainder of this Article unfolds in three Parts. Part I describes in greater detail the ways in which identity scripts undermine deliberative democracy. Part II provides background on democracy reinforcement theory and develops a new branch within that school of thought, which this Article will refer to as "script-oriented" democracy reinforcement theory. This new approach focuses on how constitutional doctrine can ame-

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12. *See* Carol C. Gould, *Diversity and Democracy: Representing Differences*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 171, 180–81 (Seyla Benhabib ed., 1996) [hereinafter DEMOCRACY AND DIFFERENCE] (discussing the effect of difference on political participation); Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra*, at 120, 122–25 (arguing that deliberative democracy's tendency toward equality can prioritize certain communication strategies); *cf.* Carbado & Gulati, *Conversations*, *supra* note 5, at 113–22 (discussing how identity scripts regulate expression in corporate settings).

13. *Cf.* Carbado & Gulati, *Conversations*, *supra* note 5, at 113–22 (discussing how, in corporate settings, identity scripts distort the reception of communications).

14. This Article uses "democracy reinforcement theory" as an umbrella term for theories that share this goal, even though not all theorists under the umbrella have explicitly adopted the term. Commentators typically trace democracy reinforcement theory to John Hart Ely. *See, e.g.*, Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 13–14 (1996) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 4 –7 (1980)). While this Article concentrates on equal protection jurisprudence, commentators have applied democracy reinforcement theory to constitutional jurisprudence more generally. For examples of democracy reinforcement theorists, see CASS SUNSTEIN, THE PARTIAL CONSTITUTION 17–39 (1993) [hereinafter SUNSTEIN, PARTIAL CONSTITUTION] (tracing the historical development of the theory), and Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 742–53 (2004) (discussing Ely's conception of democracy).

liorate the democratic deficit caused by ascribed identity scripts. Part III applies script-oriented democracy reinforcement theory to four areas of equal protection jurisprudence: the question of how to determine suspect statuses, the sex discrimination argument for same-sex marriage, the topic of racial integration in public schools, and doctrine governing judicial review of racial and religious profiling. Script-oriented democracy reinforcement theory provides a normative compass for addressing these four areas of controversy.

I. DELIBERATION UNDERMINED

The literature on identity scripts and the literature on deliberative democracy have developed independently and, by and large, have remained separate. This Part provides background on these two bodies of writing and bridges them, describing how identity scripts weaken deliberative democracy.

A. BACKGROUND ON SCRIPTS

As noted at the outset, this Article uses the term "identity scripts" to refer to the expectations imposed on individuals based on their perceived identities.[15] While authors sometimes seem to use the terms "scripts" and "stereotypes" synonymously,[16] this Article considers scripts the product of aggregating stereotypes.[17] Consider a hypothetical Asian American man who is stereotyped as emasculated, disloyally foreign, and a

15. *See* Karst, *supra* note 1, at 290 (defining identity scripts as "cluster[s] of expectations").

16. *See, e.g.*, Emily Houh, *Critical Race Realism: Re-Claiming the Anti-discrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 464 (2005) (giving "scripting" as a synonym for stereotyping); Helen Norton, *Stepping Through* Grutter*'s Open Door: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking*, 78 TEMP. L. REV. 543, 568 (2005) (using the terms script and stereotype interchangeably).

17. A note on choice of terminology: because the terms "identity script" and "stereotype" are so closely related, I contemplated omitting the term "identity script" and using the term "stereotype" in its place throughout this Article. Considering that most readers are likely more familiar with the term "stereotype," I hesitated to complicate the discussion by adopting the terminological framework of scripts, which may strike some readers as jargonistic. Ultimately, however, I decided to focus on identity scripts because I think the term "script" captures the relationship among stereotypes better than the term "stereotype" alone does. This relational dynamic is discussed below in notes 18–30 and the accompanying text. It is worth noting that this Article's criticism of identity scripts subsumes criticism of the individual stereotypes that contribute to the content of scripts.

"model minority" who excels in particular fields of work and study.[18] These stereotypes coalesce, forming a script to which the man is expected to conform.

The notion of scripts suggests connectivity among stereotypes. In this regard, identity scripts are similar to theatrical scripts. If someone familiar with the script for *Romeo and Juliet*[19] turns on the television and sees a teenage girl dressed in Medieval attire asking "Romeo, wherefore art thou Romeo," he would likely presume that the television character will follow the script by tragically ending her life. Similarly, if an Asian American man adheres to part of an Asian American identity script, others will often presume that he adheres to other parts of the script. For example, if the Asian American man is relatively passive and speaks with an accent, people whose thinking is influenced by stereotypes will likely infer that he is an industrious model minority.[20] In this regard, an identity script's stereotypes are mutually reinforcing. Psychological literature supports this notion of connectivity. Using a different metaphor to describe this connectivity, psychologist David Schneider explained that "[w]hen stereotypes are active, a metaphorical stereotype gun may be cocked, waiting for a relevant stereotype behavior to fire inferences of other stereotype traits."[21]

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18. *See* ERIC LIU, THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER 115–27 (1998) (discussing stereotypes of Asian Americans as unpatriotic foreigners); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 39–130 (2002) (discussing the "model minority" and "perpetual foreigner" stereotypes of Asian Americans); John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 347–49 (1997) (discussing the popular portrayal of Asian American men as effeminate); Jean Shin, *The Asian American Closet*, 11 ASIAN L.J. 1, 3–7 (2004) (describing stereotypes of Asian Americans as "foreigners" and "model minorities").

19. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 1.

20. The film BETTER LUCK TOMORROW (Paramount Pictures 2003) depicts a similar dynamic. Because the film's main characters are Asian American high school students who comport with some expectations for model minorities—for example, they are successful academically—they seem literally to get away with murder because others have difficulty viewing these students as criminals; there is dissonance between criminality and the script depicting Asian Americans as model minorities. *See* Rene Rodriguez, *Funny, Weird, 'Better Luck' Traces Erosion of a Straight-A Good Kid*, MIAMI HERALD, Apr. 18, 2002, at 8G, *available at* http://www.betterlucktomorrow.com/review.php?id=18 (discussing *Better Luck Tomorrow*'s critique of the model minority script).

21. DAVID J. SCHNEIDER, THE PSYCHOLOGY OF STEREOTYPING 194 (2004). Schneider's assertion is informed by "implicit personality theory," which suggests that stereotypes are networked. *See also, e.g.*, Richard D. Ashmore & Frances K. Del Boca, *Sex Stereotypes and Implicit Personality Theory: Toward*

Rejecting identity scripts takes work.[22] Ascribed scripts are difficult to reject because of humans' cognitive biases.[23] Psychological research suggests that people are prone to mentally register instances in which individuals conform to stereotypes and, in contrast, people tend not to register instances where individuals break stereotypes.[24] As Linda Hamilton Krieger put it, cognitive biases "insulate . . . stereotypes from the corrective effects of disconfirming evidence."[25] Due to cognitive biases, identity scripts are strongly ascribed and burdensome to reject.

Because scripts are so strongly ascribed, our hypothetical Asian American man must take considerable steps to reject a script if he wants to convince others that it does not adequately

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a Cognitive-Social Psychological Conceptualization, 5 SEX ROLES 219, 220 (1979) (discussing specifically the relationship between sex stereotypes and implicit personality theory); Jacques-Phillipe Leyens et al., *The Social Judgeability Approach to Stereotypes*, 3 EUR. REV. SOC. PSYCH. 91 (1992) (noting the relationship between stereotypes and implicit personality theory). In his book, Schneider offers striking examples of how individuals experience networked stereotypes. For example, he describes a black professional who "worries . . . about ordering barbeque when he eats in the presence of whites; he has a slight fear that they might infer that he also is lazy and will break into a rap song." SCHNEIDER, *supra*, at 194 –95. Schneider also explains that "[p]rofessional women may fear discussing their home life and children, because others may too readily infer nurturing qualities and a lack of business-related agentic ones." *Id*. at 195. To be clear, although this Article uses the term "identity scripts" to describe a phenomenon supported by psychology literature, the term itself is not part of standard psychology vocabulary. In psychology literature, the term "scripts" is used to refer more broadly to a range of expected social interactions that may have little to do with identity. *See, e.g.*, GORDON B. MOSKOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS 162 (2005) (explaining that when "there is a row of cash registers at the front of a restaurant," the customer knows to follow the "script" of "order[ing] food there rather than sitting down and waiting for a waitress").

22. This concept that managing stereotypes amounts to "work" comes from Carbado & Gulati, *Working Identity*, *supra* note 5, at 1263–67 (describing the types of "work" that people perform on their identities).

23. *See* KENNETH S. BORDENS & IRWIN A. HORWITZ, SOCIAL PSYCHOLOGY 158–84 (2d ed. 2002) (providing background on cognitive biases related to perceptions of stereotyped traits); James L. Hilton & William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCH. 237, 251–52 (1996) (same); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1197–98 (1995) (same).

24. *See* Hilton & von Hippel, *supra* note 23, at 252 ("At the most basic level, perceivers sometimes simply refuse to make any inferences at all when confronted with stereotype incongruency . . . ." (citations omitted)).

25. Krieger, *supra* note 23, at 1198.

describe him.[26] For example, politicians may generally feel pressured to demonstrate their patriotism, but the Asian American politician faces a particularly heavy burden of proving patriotism because he has been stereotyped as foreign and disloyal.[27] This dynamic is especially true for Americans of South Asian descent whom, since 9/11, mainstream society has stereotyped as exceptionally foreign and disloyal.[28] To reject these stereotypes, a politician of South Asian descent might need to go beyond adorning a flag pin on his lapel and take particularly strong policy positions that are symbolically patriotic—for example, supporting war efforts—even though he would not be inclined to take those positions otherwise.

Indeed, individuals go to great lengths to negotiate their ascribed scripts. The work required to negotiate scripts is certainly not unique to the hypothetical Asian American politician. Devon Carbado and Mitu Gulati have provided other examples in their writings on employment. For instance, they have suggested that, to negate scripts associating African American men with laziness, some African American men will work longer hours than otherwise required.[29] Similarly, for our hypothetical female lawyer to break feminine stereotypes of

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26. *See* SCHNEIDER, *supra* note 21, at 194 –95 (describing steps taken to reject scripts); *see also* Shin, *supra* note 18, at 20 ("[R]acially-based assumptions are not easily overcome by simple denials or logic.").

27. *See* WU, *supra* note 18, at 79–130 (describing the perception of Asian Americans as unpatriotic "perpetual foreigners"); Shin, *supra* note 18, at 5–7 (discussing the "foreigner" stereotype).

28. *See* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586–91 (2002) (discussing the prevalence in the post-9/11 era of stereotyping Asians as disloyal foreigners and potential terrorists); Amy Gardner & Spencer S. Hsu, *Airline Apologizes for Booting Nine Passengers*, WASH. POST, Jan. 3, 2009, at A1 (discussing a pattern of cases in which airline security agents racially profiled South Asians, among others, as potential threats).

29. Carbado & Gulati, *Working Identity*, *supra* note 5, at 1292–93. Carbado & Gulati also explain:

> [W]hile all the employees in our hypothetical law firm have an incentive to demonstrate that they have the potential to become partners, the burden of proof, and thus the precise nature of the incentive, varies across identities.
>
> Recall the assumption that Korean-American Harvard Law School graduates are generally perceived as quiet, unassertive, good at math and science (detail-oriented work), and lacking in creativity and personality. . . . [These characteristics] conflict with the qualities that the firm requires in the employees it plans to groom for partnership. *The stronger this conflict, the harder the employee will have to work to overcome the negative assumptions by employing stereotype-negating strategies.*

Id. at 1267 (emphasis added).

passivity, she likely would take extra steps to convey her assertiveness, perhaps speaking up more often and more forcefully than her male peers.

The connectivity among stereotypes in an identity script further complicates the script negotiation process. To reject the stereotype of passivity, our female lawyer would likely need to reject other aspects of femininity as well. For example, she has incentives to self-censor discussions of her children because her colleagues may be prone to infer that women who adhere to nurturing stereotypes also adhere to passivity stereotypes.[30]

Note that this Article focuses on ascribed scripts, even though identity scripts are sometimes described as being *claimed* instead of *ascribed*.[31] To understand the difference between these two dynamics, consider ascribed scripts first. In interpersonal interactions, one party will perceive the other party as belonging to particular social groups. Upon labeling the perceived party with a group identity, the perceiver will ascribe a script that corresponds to that label.[32] For example, upon labeling someone as an Asian American woman, the perceiver likely associates the perceived individual with a script consisting of stereotypes on Asian American women.

These stereotypes come in two general forms: descriptive and normative.[33] For example, as a descriptive matter, mainstream society often views Asian American women as being particularly passive;[34] at the same time, from a normative standpoint, society may insist that Asian American women (and women generally) groom themselves in traditionally femi-

30. *See* SCHNEIDER, *supra* note 21, at 125 (noting that people pay attention to the behavior of others to confirm their expectations).

31. *See infra* notes 41–44 and accompanying text (discussing "scripts").

32. *See* APPIAH, *supra* note 1, at 66–69 (discussing the relationship between identification and identity).

33. *See* Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 8–9 (2001) (comparing descriptive and normative stereotypes); Mary Anne Case, "*The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1488 n.197 (2000) (same); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1032 (2006) (same). Kwame Anthony Appiah distinguishes between normative and descriptive stereotypes, while further distinguishing between two forms of descriptive stereotypes: "statistical" and "simply false" descriptive stereotypes. APPIAH, *supra* note 1, at 194 –95.

34. *See* Houh, *supra* note 16, at 512–13 (discussing stereotypes of Asian women).

nine manners.[35] Both of these types of stereotypes contribute to expectations regarding Asian American women.[36] Both regulate their conduct. Normative stereotypes regulate individuals by telling them what they ought to do. Descriptive stereotypes also regulate by altering individuals' ability to express themselves; if an Asian woman does not self-identify with a descriptive stereotype, she will likely need to go out of her way—that is to say, work—to reject the descriptive stereotype.[37]

It is important to acknowledge that individuals are ascribed numerous scripts at once. Individuals are subject to scripts based on various axes of identity—for example, race, sex, and sexual orientation—and the interactions among these axes.[38] For example, black women may be subject to the identity script of the Sapphire, which is both race-specific and gender-specific.[39] Any given individual may also be ascribed more

35. *See supra* notes 2–4 and accompanying text (laying out the traditional female script). Courts often uphold employers' sex-specific grooming codes, which entrench mainstream expectations that men present themselves masculinely and women femininely; such grooming codes set requirements for dress, hairstyles, make-up, etc. *See generally* Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90 (2006) (discussing case law on grooming codes).

36. To be clear, this Article uses the term "script" to refer to both normative expectations and descriptive expectations. Some descriptive expectations may be non-normative, for example, stereotypes of violence and criminality. Other writers have used the term "scripts" to refer to these non-normative expectations. *See, e.g.*, Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569, 1586 (2004) (describing stigmatized racial scripts); Carbado & Gulati, *Working Identity*, *supra* note 5, at 1298 n.106 (referring to an "unacceptable script" imposed on gay men). In contrast, Kwame Anthony Appiah uses the term "script" to refer specifically to normative stereotypes. *See* APPIAH, *supra* note 1 (stating that normative stereotypes "are close kin to what I've earlier called life-scripts").

37. On this sort of identity "work," see *supra* notes 22–29 and accompanying text.

38. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–52 (developing "intersectionality" theory, which examines dynamics at the intersection of identity axes); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (same); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 564 –67 (1997) (building on intersectionality theory to develop "multidimensionality" theory); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280–90 (1997) (building on intersectionality theory to develop "cosynthesis" theory).

39. *See* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539–40 (defining the Sapphire as a black woman who is "tough, domineering, emascu-

than one script for each axis of identity. For example, a biracial individual may be perceived differently by different people.[40] A person may also be subject to more than one script even among those who perceive her as being a particular race. For example, expectations associated with blackness may differ between predominantly black and predominantly white communities.[41] A common denominator among all these different identity scripts is that they induce the democracy-impairing decisions discussed in Part I.C.

In addition to being *ascribed*, "scripts" can be *claimed* by individuals. (I put "scripts" in quotation marks here because, as I explain below, "script" is a misnomer for expectations that are claimed.)[42] Achieving a sense of self is a fundamental part of human development.[43] To some extent, the availability of identity "scripts" facilitates that process of achieving a sense of self. As Kwame Anthony Appiah eloquently put it: "Autonomy, we know, is conventionally described as an ideal of self-authorship. But the metaphor should remind us that we write in a language we did not ourselves make."[44] Appiah elaborates that, "[c]ollective identities, in short, provide what we might call scripts: narratives that people can use in shaping their projects and in telling their life stories."[45]

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lating, strident, and shrill"). The term "Sapphire" derives from the name of a character on the *Amos 'n' Andy Show*. *See id.*

40. *See* Karst, *supra* note 1, 67–74. This dynamic may be even more pronounced with regard to other axes of identity such as sexual orientation. Playing on people's (in)ability to discern other individuals' sexual orientation, at least two reality television shows have been premised on challenges in which women attempt to discern the sexual orientation of male contestants. *See* Brian Lowry, *Gay, Straight or Taken?*, VARIETY, Jan. 18, 2007, at 17, *available at* http://www.variety.com/review/VE1117932400.html?categoryid=32&cs=1 (discussing the television shows *Gay, Straight or Taken?* and *Playing it Straight*). Another television show required men seeking a male partner to discern the sexual orientation of other men. *See* Tim Stack, *Gayme Show Déjà Vu*, ENT. WKLY., Jan. 12, 2007, at 70, *available at* http://www.ew.com/ew/article/0,,20007184,00.html (discussing the show *Boy Meets Boy*).

41. *See* Robinson, *supra* note 5, at 1817–26 (discussing the different expectations that mainstream society imposes on blacks, compared to the expectations imposed on blacks by self-identified blacks).

42. *See infra* notes 48–49 and accompanying text (discussing claimed "scripts").

43. *See id.*; *see also* Lau, *supra* note 5, at 318 n.6 (drawing from the works of psychologist Erik Erikson to argue that identity development is an integral part of human development).

44. APPIAH, *supra* note 1, at 156.

45. *Id.* at 22.

To understand this dynamic, consider the fact that achieving a sense of religious identity is an important psychological project for many individuals.[46] For example, to establish a religious sense of self, someone might self-identify as Catholic. By labeling herself a Catholic, she is claiming an identity "script." Consider that she may say that she is a Catholic, but makes it known to others that she does not agree with the Vatican's view on same-sex marriage.[47] Her rejection of the assumption that she condemns same-sex marriage is the exception proving the rule; she is implicitly welcoming others to impute certain expectations on her based on her claimed Catholic identity, but not the expectation regarding same-sex marriage. In this sense, "scripts" are indeed important because they help individuals to establish their sense of self. Note, however, that the difference in this case is that the individual played a large part in choosing the expectations that she claims.

Ideally, claiming a group identity should not be considered claiming a "script."[48] Instead, claiming group memberships should be akin to claiming identity templates that can be customized and rejected with relative ease.[49] It is worth emphasizing that this Article uses the term "script" to refer to expectations that—unlike identity templates—are difficult to customize and reject.[50] Part I.C explains that strongly ascribed scripts stifle democratic deliberation because individuals need to work with and around the scripts during deliberation. In

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46. *See* Lau, *supra* note 5, at 318 (discussing psychological literature on identity development).

47. *See* Ian Fisher, *Pope Reaffirms View Opposing Gay Marriage and Abortion*, N.Y. TIMES, Mar. 14, 2007, at A13 (describing the Vatican's opposition to same-sex marriage).

48. *See generally* Michele Moody-Adams, *Reflections on Appiah's* Ethics of Identity, 37 J. SOC. PHIL. 292 (2006) (rejecting the idea that group identities have rigid scripts that cannot be altered).

49. *See* Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1051 (2001) ("[R]ecognition [of identity groups] must allow for dialogue by being loose enough to allow the individual to reject any 'recognized' way of being."). As Michele Moody-Adams explained:

> [I]t is impossible to claim a collective narrative as part of one's own identity *without* inevitably altering the narrative in a potentially indefinite number of ways. I must interpret a narrative before I can adopt it, and my interpretations will alter details of the narrative (sometimes even significant details) in important ways.

Moody-Adams, *supra* note 48, at 297. For additional background on group identities, see Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1281–84 (2006).

50. *See supra* notes 20–29 and accompanying text.

contrast, claimed identity templates do not stifle deliberation, so long as they are malleable. So long as the hypothetical Catholic woman can freely disclaim parts of the Catholic identity template without working[51] hard to do so, deliberation will not be stunted.

B. ASPIRING TO DELIBERATIVE DEMOCRACY

Many commentators have analyzed how negotiation of identity scripts harms individuals' well-being.[52] In addition to creating these harms to individuals, negotiation of identity scripts generates systemic harms to democracy. Before proceeding to evaluate these systemic harms, this section elaborates on this Article's vision of democracy.

Democracy is governance based on the people's collective decisionmaking.[53] Views of collective governance usually take one of two forms: an aggregative model or a deliberative model.[54] Democratic theorists have increasingly accepted deliberative democracy as the superior goal.[55] Similarly, this Article eschews the aggregative model for deliberative democracy.

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51. On this sort of identity "work," see *supra* notes 22–29 and accompanying text. Contrast our hypothetical Catholic woman, who easily disclaims a position on same-sex marriage, with the Pakistani-American and the African American described *supra*, in notes 28–29 and accompanying text. For example, the African American man cannot simply disclaim laziness and work the same hours as other employees; he needs to work additional hours to reject scripted laziness.

52. *See supra* note 5.

53. *See, e.g.*, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 326 (1989); Seyla Benhabib, *Toward a Democratic Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 12, at 67, 68 (defining democracy with an emphasis on collective decisionmaking); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE, *supra* note 12, at 95, 95.

54. For examples of writings that distinguish between aggregative and deliberative democracy, see AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 13–20 (2004); Cohen, *supra* note 53, at 98–99; Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L. REV. 685, 685 (2004). *Compare infra* notes 57–58 and accompanying text (describing the aggregative model), *with infra* notes 59–64 and accompanying text (describing deliberative democracy).

55. *See* JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND 1 (2000) (noting that democratic theory has taken "a strong deliberative turn"); John S. Dryzek & Christian List, *Social Choice Theory and Deliberative Deliberation: A Reconciliation*, 33 BRIT. J. POL. SCI. 1, 1 (2003) ("[T]he strongest current [of democratic theory] is now deliberative."); Chad Flanders, *Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law*, 23 J.L. & POL. 147, 147 (2007) ("In recent years, political philosophy has been largely dominated by theories of deliberative democracy . . . ."); John F.

As its name suggests, the aggregative model treats democracy as a system for aggregating individuals' preferences. Aggregativists take these preferences as given and discount the possibility that they will change.[56] For an aggregativist, competition in political forums is what drives political outcomes.[57] In competing, political actors—including individuals, political parties, and interest groups—wheel and deal, forming strategic coalitions that shift over time.[58] Throughout this process, however, political players' preferences remain unchanged.

In contrast, deliberative democrats see reasoned debate among free and equal individuals as being central to democracy. During deliberation, political actors are expected to offer public-regarding[59] reasons for their political preferences. That is to say, people are expected to provide reasons why their policy positions are good not just for themselves, but for the public.[60] These reason-giving conversations[61] promote collective decisionmaking—not only in the sense that governance is "by the

Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1880 n.65 (2004) ("Certainly, most believe that deliberation is a good thing, and the design of the U.S. Constitution seems to favor deliberative democracy.").

56. *See* GUTMANN & THOMPSON, *supra* note 54, at 13 (describing aggregativist views); Pildes, *supra* note 54, at 690 (stating aggregativists' view interests as "fixed").

57. *See* Pildes, *supra* note 54, at 690 (explaining that aggregative theories of democracy derive from theories of competition).

58. Ely famously referred to this system of interest-group power politics as the "pluralist's bazaar." *See* ELY, *supra* note 14, at 152.

59. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 17 (explaining that "public-regarding" reasoning appeals to more than just private interests). For a discussion on how public-regarding reasoning in deliberative democracies are related to the Rawlsian concept of "public reasoning," see Benhabib, *supra* note 53, at 74–75.

60. Mere articulation of opportunistic self-interest does not suffice. Political actors are expected to provide public policy rationales that are compelling to others. *See* GUTMANN & THOMPSON, *supra* note 54, at 3; Benhabib, *supra* note 53, at 74–75; Cohen, *supra* note 53, at 99–100.

61. Democratic theorists often describe deliberation as a form of conversation. *See, e.g.*, Benhabib, *supra* note 53, at 70 (describing deliberation as "conversation"); Cohen, *supra* note 53, at 99–100 (describing deliberation as "discussion"); Flanders, *supra* note 55, at 147 ("The key concept for deliberative democrats is conversation . . . ."). Some theorists emphasize that deliberation includes more than literal conversations. For example, Akilah Folami emphasizes hip-hop music as a form of expression important to democratic deliberation. *See* Akilah N. Folami, *From Habermas to 'Get Rich or Die Tryin': Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 237 (2007).

people," but also "for the people."[62] Over the course of deliberation, one's preferences might evolve because deliberation is a transformative process.[63] Deliberating on public policy may lead to consensus, but it need not.[64] A decision that results from voting after deliberation is considered the best result for the time being, until further deliberation leads to a better-reasoned outcome.

To illustrate the differences between these two theories, take the case of ballot initiatives. Aggregative democrats typically view ballot initiatives—at least as they are currently conducted—more favorably than deliberativists do.[65] Deliberativists note that there is usually too little public debate regarding ballot initiatives.[66] Prior to voting, voters typically only hear sound-bite-driven media campaigns for and against such initiatives.[67] That dynamic lacks anything akin to the thoughtful de-

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62. *See* Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* RICHARD D. HEFNER, A DOCUMENTARY HISTORY OF THE UNITED STATES 147 (Indiana Univ. Press 1952) (promoting democracy that is "of the people, by the people, for the people").

63. Social science studies confirm the transformative nature of political deliberation. *See generally* JAMES S. FISHKIN, THE VOICE OF THE PEOPLE 40 (1995) (describing how deliberation changes, informs, and alters public opinion); Ethan Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 910–11 (2006) (discussing James Fishkin's research).

64. *See* GUTMANN & THOMPSON, *supra* note 54, at 20; Pildes, *supra* note 54, at 691. Some deliberativists—for example, early republican theorists and, more recently, Jurgen Habermas—view consensus as the end goal of deliberation. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS 379 (2d ed. 1998); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550 (1988) (discussing early republicanism).

65. *See* Leib, *supra* note 63, at 911–17 (explaining that, although most deliberativists oppose ballot initiatives, ballot initiatives can be conducted in a manner consistent with deliberative democracy); Lawrence Gene Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1414 (1978) ("Legislation by plebiscite is not and cannot be a deliberative process. We expect and presumably derive from an initiative or referendum an expression of the aggregate will of the majority, or the majority of those who vote. But there is no genuine debate or discussion . . . .").

66. *See* Leib, *supra* note 63, at 908–09; Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 70.

67. *See supra* note 66. One student author explains:

> Initiative campaigns generally reach the voters through advertising, seeking to reach a large number of people quickly and cheaply. This frequently results in oversimplified sound bites appealing to prejudice and emotions. The media-driven nature of these campaigns creates an environment that 'appeal[s] to passions and prejudices, spotlight[s] tensions, and may foster even greater conflict and disagreement.' [In contrast,] the legislative process includes many safeguards

liberation that exists in legislative houses or deliberation that occurs during year-long election campaigns, which usually include debates and substantial media commentary.[68]

It is worth highlighting[69] some reasons why deliberative democracy is an appropriate aspiration for American governance. Deliberative democracy is more desirable than aggregative democracy because it better realizes the ideal of collective governance, it is entrenched in our Constitutional history, and it offers functional advantages over the aggregative approach.

Compared to aggregative democracy, deliberative democracy adheres more tightly to the ideal of collective governing.[70] The aggregative model is collective in form. It tallies existing preferences among the collective and favors those with the most support. Meanwhile, the deliberative model is collective in both form and content. Deliberative democracy does not only tally preferences, but sometimes transforms them through debate that changes people's perspectives. Because deliberation can blend preferences, deliberative democracy's outcomes better represent the collective.[71] Furthermore, because political actors are expected to provide public-regarding reasons in deliberation, deliberative democracy furthers not just the "by the people" aspect, but also the "for the people" ideal of American democracy.[72]

In terms of historical support, Cass Sunstein, among others, has documented the American tradition of deliberative democracy.[73] In his writings, Sunstein draws from foundational documents such as the Federalist Papers to illustrate that the

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> 'designed to encourage careful deliberation and reasoned decision-making' . . . .

Lisa B. Ross, Note*, Learning the Language: An Examination of the Use of Voter Initiatives To Make Language Education Policy*, 82 N.Y.U. L. REV. 1510, 1523–24 (2007).

68. *See* Ross, *supra* note 67.

69. It is unfeasible to cite within these pages all the existing arguments for and against deliberative democracy. Among criticisms of deliberative democracy, the most prominent is that deliberative democracy is overly lofty in its aspirations. For examples of such criticism, see RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 112 (2003); IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 48–49 (2003); James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 437–46 (1996). For a rebuttal to these criticisms, see GUTMANN & THOMPSON, *supra* note 54, at 40–55.

70. *See* Cohen, *supra* note 53, at 101.

71. See id.

72. *See id.* at 108; *supra* notes 60–62 and accompanying text.

73. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 17–39.

Founders sought to establish deliberative democracy.[74] He also shows that the Founders established government structures such as the bicameral system to facilitate deliberation.[75]

Finally, deliberative democracy is functionally superior to the aggregative approach in at least two regards—instrumental and expressive.[76] In terms of instrumentality, Seyla Benhabib has explained that deliberative democracy generates government actions that are better informed[77] and better reasoned.[78] Deliberative democracy also has expressive value. In a truly deliberative environment, citizens express mutual respect for each other by engaging each other meaningfully, seeking to justify public policy positions rather than engaging in mere power politics.[79]

Of course, deliberative democracy is an aspirational model as opposed to a purely descriptive account of American governance.[80] As the example of ballot initiatives suggests, American

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74. *See id.* at 20.

75. *See id.* at 23; Staszewski, *supra* note 66, at 70 (discussing how the Founders intended the governing structure to facilitate deliberation).

76. For a general discussion of deliberative democracy's instrumental and expressive values, see GUTMANN & THOMPSON, *supra* note 54, at 21–23.

77. Benhabib notes:

> [D]eliberative processes are also processes that impart information. New information is imparted because 1) no single individual can anticipate and foresee all the variety of perspectives through which matters of ethics and politics would be perceived by different individuals; and 2) no single individual can possess all the information deemed relevant to a certain decision affecting all. Deliberation is a procedure for being informed.

Benhabib, *supra* note 53, at 71 (citations omitted).

78. *See id.* ("[T]he deliberative process . . . lead[s] the individual to further critical reflection on his already held views and opinions . . . . More significantly, the very procedure of articulating a view in public imposes a certain reflexivity on individual preferences and opinions.").

79. *See* GUTMANN & THOMPSON, *supra* note 54, at 22 ("[S]ignificant value resides in the act of justifying laws and public policies to the people who are bound by them. By deliberating with one another, decision-makers manifest mutual respect toward their fellow citizens."); Cohen, *supra* note 53, at 102 ("[P]roviding acceptable reasons for the exercise of political power to those who are governed by it—a requirement absent from the aggregative view—expresses the equal membership of all in the sovereign body responsible for authorizing the exercise of that power.").

80. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 144 ("To say that deliberation is required [in democracy] is only to ask how courts and other institutions might promote that aspiration."); Pildes, *supra* note 54, at 685 (noting the aspirational nature of deliberative democracy). Some critics argue that deliberative democracy is an unrealistic goal. *See* Kirk J. Stark, *The Right To Vote on Taxes*, 96 NW. U. L. REV. 191, 239 nn.241–49 (2001) (listing citations to criticisms).

lawmaking is not purely deliberative.[81] Laws and governing structures should be modified to realize deliberative democracy as much as possible. An ethos of deliberative democracy should also be instilled through, for example, public education.[82] Note that criticisms against Hillary Clinton, for overrelying on polling data to formulate her positions, were arguably allegations that she simply aggregated Americans' preferences instead of reasoning her way to policy positions.[83] Allegations that John Kerry flip-flopped, without principled reason, suggest similar criticism.[84] To some extent, when the public rejected those two candidates' alleged aggregativist tendencies, the public seemed to be rejecting aggregativist politics for an ethos of deliberation.

Some critics decry deliberative democracy as an unattainable utopia.[85] Even though the country may never function purely as a deliberative democracy, the country ought to be pushed closer to that ideal, reaping the benefits of improved deliberation.

C. EFFECTS OF SCRIPTS ON DEMOCRATIC DELIBERATION

The notion of scripts forms a powerful metaphor. If deliberation in democracy is to be free and equal, the idea that deliberation is scripted is troubling. This section explores those difficulties.

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81. *See supra* notes 65–68 and accompanying text.

82. *See generally* Benhabib, *supra* note 53, at 75 (noting that Rawlsian "public reason" is a principle, as opposed to a process, and that deliberative democracy requires both principle of public reason and adequate processes for deliberation).

83. *See* Toby Harnden, *Last Stand in the Lone Star State*, DAILY TELEGRAPH, Feb. 16, 2008, at 19 (criticizing Clinton because "every position she took was tested by polling and . . . calculated"); Robert Novak, *Some Clinton Backers Say Bill's Aggressive Campaigning Hurt Bid*, CHI. SUN-TIMES, Dec. 23, 2007, at B7 (noting arguments that Clinton relied too heavily on polling data); Robert Watson, *Inevitable . . . But Just Not Likeable*, S. FLA. SUN-SENTINEL, June 29, 2008, at 5F (criticizing Clinton's "calculated behavior" driven by "pollsters").

84. *See All Things Considered: How Do We Define a Political Flip-Flop?* (National Public Radio broadcast July 10, 2008), *available at* 2008 WLNR 12987165 (noting that some position changes are principled while others are not and noting criticism of Kerry's changes as unprincipled).

85. *See* Stark, *supra* note 80; *supra* note 69.

1. Barriers to Entry

Ascribed identity scripts unreasonably limit the range of speakers who can climb atop platforms for political discourse.[86] Access to political power is contingent upon individuals' negotiation of scripts corresponding to their perceived identities.

Devon Carbado and Mitu Gulati's example of the "fifth black woman" helps to illustrate this dynamic, even though their example occurs in the employment context. In their example, a law firm promotes four black women, two white women, and two white men to partnership.[87] A fifth black woman is denied partnership. Her qualifications equal the four other black women's qualifications, except she performed rather than rejected parts of the identity script ascribed to her.[88] For instance, the fifth black woman wore dreadlocks and West African-inspired clothes; she was also active in African American interest groups and belonged to the Nation of Islam.[89] By engaging in these behaviors, the fifth black woman activated negative stereotypes about black women.[90] Carbado and Gulati's example illustrates how identity scripting can limit an individual's entry into the corporate world's upper echelons, even if other members of her identity group break the glass ceiling.

Similarly, entry into political deliberation is regulated by identity scripting. Consider the significance of gender scripts. Some commentators questioned how Sarah Palin could concurrently raise young children and serve as Vice President, even though male candidates with young children are not similarly questioned.[91] These critics seemed to ascribe to Palin a feminin-

86. Commentators disagree on whether deliberative democracy should be a participatory democracy or representative democracy. *See* GUTMANN & THOMPSON, *supra* note 54, at 38–42. Either way, limiting the range of individuals who can climb atop political platforms stifles deliberation.

87. *See* Carbado & Gulati, *Fifth Black Woman*, *supra* note 5, at 714.

88. *See id.* at 728 (explaining that the fifth black woman "was denied partnership because she did engage in what her employer perceived to be stereotypically black female behavior").

89. *See id.* at 717–18.

90. *See id.* at 728 (explaining that the "employer penaliz[ed] [the fifth black woman] for behavior that activated negative stereotypes"). On how stereotype-confirming behavior triggers other stereotypes in an identity script, see *supra* notes 19–21 and accompanying text.

91. *See* Diana B. Carlin & Kelly L. Winfrey, *Have You Come a Long Way, Baby? Hillary Clinton, Sarah Palin, and Sexism in 2008 Campaign Coverage*, 60 COMM. STUD. 326, 332–34 (2009); Brian Knowlton & Sheryl Gay Stolberg, *2 Parties Struggle To Shape Running Mate's Image*, INT'L HERALD TRIB., Sept. 4, 2008, at 6 (discussing commentary questioning Palin's ability to juggle mo-

ity script that includes a portrayal of women as nurturing parents who put family commitments before professional responsibilities.[92] In many regards, Palin performed parts of the femininity script; for example, she competed in beauty pageants when she was younger, became a mother who served on the PTA, and typically opted for skirts over pantsuits.[93] Critics seemed to connect these performances of femininity to infer that Palin would conform to the rest of the script by putting child-rearing before professional responsibility.[94] In this case, gender scripting became a barrier to Palin's political rise. To acknowledge this barrier is not to suggest that Palin's candidacy failed for this reason alone;[95] nonetheless, the barrier should be recognized for its implications for democracy.[96]

Gender scripts do not always become obstacles for women the way they did for Sarah Palin. For example, in a much publicized episode, Governor Ed Rendell of Pennsylvania remarked that Janet Napolitano, former Governor of Nevada, was the perfect pick for Secretary of Homeland Security because she did not have a family.[97] Commentators construed that remark to

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therhood and vice presidential duties); Rick Martinez, *Scrutiny Smacks of Sexism*, NEWS & OBSERVER (Raleigh, NC), Sept. 3, 2008, at A11; Peggy O'Crowley, *To Be Mom and Veep at One Time*, STAR-LEDGER (Newark, NJ), Sept. 3, 2008, at 8; *GOP Convention Wrap-Up – Part 2* (CNN television broadcast Sept. 7, 2008), *available at* 2008 WLNR 16973609.

92. For a discussion of this femininity script in the context of law firm employment, see *supra* notes 2–4 and accompanying text. For an example of exceptional media coverage that questioned male candidates' ability to balance family life and political life, see Jodi Kantor, *In 2008 Race, Little Ones Go on the Trail with Daddy*, N.Y. TIMES, Aug. 26, 2007, at A1.

93. *See* Carlin & Winfrey, *supra* note 91, at 330–33; Martinez, *supra* note 91.

94. *See* Carlin & Winfrey, *supra* note 91, at 333. On the connectivity of stereotypes in identity scripts, see *supra* notes 17–21 and accompanying text. One might contend that Palin invited scrutiny of her work-family balance not because she performed feminine identity generally, but specifically because she prominently displayed her children on the campaign trail. *See* Carlin & Winfrey, *supra* note 91, at 333 (describing Palin as "a career woman who has children—and who displays them so prominently"). Arguably, anyone who so prominently displays children, regardless of gender, invites scrutiny. Carlin and Winfrey contend, however, that scrutiny directed at Palin nonetheless took a very gendered form, based on scripted expectations of mothers and fathers. *See id.* at 333–34.

95. *See* Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DEN. U. L. REV. 709, 719–21 (2009) (commenting on Palin's shortcomings as a candidate apart from her performance of gender script).

96. *See* discussion *infra* Part I.C.

97. *See* Mark Scolforo, *Rendell Apologizes for Comments on Napolitano*,

suggest that women can rise to high office, but only if they disconfirm the caretaker image that is part and parcel of femininity scripts.[98] With that said, women in politics need to be careful not to distance themselves overly from femininity. The ideal female candidate walks a fine line, rejecting femininity scripts to appear strong, but embracing femininity enough so as not to appear too radical.[99]

Gender scripts have also burdened male politicians. Mainstream media outlets admonished both John Edwards and John Kerry for failing to comport with masculinity scripts—Edwards because of his expensive haircuts, and Kerry because his demeanor was "too French" and therefore overly "girlie."[100] What if a hypothetical male candidate for president not only had concern for his hair and a penchant for French vacations, but also an earring in his right ear and a very noticeable lisp? Prejudice against this man for breaching masculinity scripts would likely hinder his political career.

Interestingly, Barack Obama was burdened by a different gender script: that of the hypermasculine black man who is aggressive and threatening.[101] Obama's presidential bid likely would not have succeeded had he not rejected that ascribed script by adopting a campaign tone that was unusually soft and reconciliatory for male politicians.[102] Unlike white male politicians, Obama faced incentives to mute masculine traits.[103]

PITT. POST-GAZETTE, Dec. 4, 2008, at B5.

98. *See* Jessica Reaves, *Families? They're Just Holding Our Leaders Back*, CHI. TRIB., Dec. 9, 2008, at 2; *see also* Scolforo, *supra* note 97. In disconfirming feminine caretaking stereotypes, Napolitano also warded off other parts of femininity scripts that depict women as passive—perhaps too passive to deal with matters of homeland security.

99. *See* McGinley, *supra* note 95, at 717 (using Hillary Clinton as an example to demonstrate that female politicians face a double bind, requiring them to both reject and embrace feminine stereotypes at once).

100. *See* Mark Dery, *Wimps, Wussies and W.*, L.A. TIMES, May 3, 2007, at A23 (discussing Edwards and Kerry); Ralph R. Reiland, *'The Great Backlash*,' PITT. TRIB. REV., June 19, 2006, *available at* 2006 WLNR 10570140 (discussing Kerry).

101. *See* Frank Rudy Cooper, *Our First Unisex President? Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633, 649–59 (2009) (discussing how Obama dealt with societal expectations of black hypermasculinity).

102. Obama, however, did have to toe a fine line. At times during his campaign, commentators criticized Obama's style as suggestive of weak leadership. *See id.* at 656.

103. *Cf. id.* at 647–48 ("[T]he idealized figure of the powerful white male is the model for hegemonic masculinity.").

These examples illuminate how identity scripts regulate individuals' participation in democratic deliberation. To be sure, all the politicians mentioned above contributed to political discourse as candidates. Nonetheless, identity scripts formed barriers to their mounting a higher political stage that would enhance their deliberative power. To overcome these barriers, each candidate needed to negotiate the gender scripts ascribed to him or her.

In this regard, identity scripts create power inequalities based on individuals' ability and willingness to negotiate scripts, such as those based on sex and race. These power imbalances do not necessarily fall along traditional group demarcations.[104] Members of traditionally powerful groups—men, for example—can have their power unduly restricted by identity scripts.[105] These power inequalities based on individuals' ability and willingness to negotiate ascribed identity scripts have disconcerting implications for democracy.

These inequalities are troubling because a well-accepted precondition for democracy is that people have relatively equal opportunity to influence politics.[106] Inequalities of deliberative power undermine the collective nature of democracy[107] and are only acceptable if they are supported by public-regarding reasons.[108] Historically, reasoned deliberation has suggested that inequalities resulting from race- and sex-based prejudice are

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104. *Cf.* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 15–17 (2008) (suggesting that privilege is not neatly tethered to specific identity groups and that privilege is "conferred in more complex and particular ways" that advantage subsets of women and subsets of men).

105. Men are often stigmatized for breaching scripts for masculinity. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 46–57 (1995); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 232 (2008); Darren Rosenblum, *Unsex CEDAW: What's Wrong with "Women's Rights,"* COLUM. J. GENDER & L. (forthcoming 2010) (manuscript at 56, on file with author); *see also* Onwuachi-Willig & Barnes, *By Any Other Name*, *supra* note 5, at 1300–01 (noting that whites suffer discrimination when they are regarded as black). *But see* Williams, *supra* note 10, at 11 (noting that stigma on blacks "[a]cting white" is more severe than that on whites who "act[] black").

106. For background on equality as a precondition of democracy, see generally ROBERT A. DAHL, ON POLITICAL EQUALITY ix (2006) ("The existence of political equality is a fundamental premise of democracy.").

107. *See* Benhabib, *supra* note 53, at 68; Cohen, *supra* note 53, at 106–07.

108. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 138–45.

rarely justified.[109] By extension, inequalities deriving from individuals' ability and willingness to negotiate prejudgments, in the form of race and gender scripts, are also presumptively unjustified.[110]

These barriers to deliberative power limit both the instrumental and expressive functions of deliberative democracy. The instrumental gains of collective decisionmaking are compromised because deliberation is not truly collective and the marketplace of ideas shrinks.[111] From an expressive perspective, hindering participation based on generally innocuous traits—such as motherhood[112]—denies respect to individuals who bear those traits.[113]

2. Distorting Output

Ascribed identity scripts also distort deliberation by regulating the output of communication.[114] Consider Hillary Clinton's 2008 presidential bid. Clinton needed to negotiate scripts that portray women as inherently weak and, therefore, unable to lead the country as commander-in-chief.[115] Many commentators suspect that Clinton adopted a hawkish position on the war in Iraq to disprove assumptions of weakness.[116]

Clinton's alleged manner of working around femininity scripts distorts deliberation on issues of national security. Certainly, there may be reasons to support a hawkish approach to

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109. See id.

110. In addition to Carbado and Gulati, other scholars focusing on employment law have made similar arguments that inequalities based on performance of race and gender scripts are essentially forms for race and sex inequality, respectively. *See*, *e.g.*, Rich, *supra* note 5, at 1158–66; Robinson, *supra* note 5, at 1840–48.

111. On the instrumental value of deliberation, see *supra* notes 76–78 and accompanying text.

112. *See supra* notes 91–97 and accompanying text (discussing how motherhood can hinder female politicians).

113. On the expressive value of deliberation, see *supra* notes 76, 79 and accompanying text.

114. *See* Carbado & Gulati, *Conversations*, *supra* note 5 (discussing a similar dynamic in workplace conversations).

115. *See* Alleen Barber, *Hail to the Future Chief: Whoever She Is*, NEWSDAY, June 11, 2008, at A35; Liz Halloran, *A Singular Achievement: Clinton Did Break a Glass Ceiling, Just Not the One She Hoped To*, U.S. NEWS & WORLD REP., June 16, 2008, at 25; Jodi Kantor, *Clinton Fades, but Not Her Impact*, INT'L HERALD TRIB., May 20, 2008, at 1; *Hillary Clinton To Speak at National Building Museum* (CNN television broadcast June 7, 2008), *available at* 2008 WLNR 10932823.

116. *See supra* note 115.

the Iraq war. However, recall that reason-giving conversations form the core of deliberative democracy.[117] If Clinton self-censors reasons to reject the war or exaggerates reasons to support the war for the purposes of script negotiation—as opposed to public-regarding purposes—then democratic deliberation is tainted. The instrumental value of deliberation is compromised because the marketplace of ideas is distorted. Individuals who are not ascribed a femininity script are freer to speak against the war because they do not have the weakness assumption to overcome.[118]

Consider also the case of Michelle Obama, who was central to her husband's campaign.[119] *Newsweek* magazine accused Michelle Obama of toning down her support for affirmative action.[120] Commentary in the popular press suggests that Michelle Obama's position change is a negotiation of identity scripts.[121] According to many observers, Michelle Obama was ascribed the script of the angry black woman,[122] a scripted role commonplace in American media.[123] Commentators speculate that Michelle Obama rejected the script by—as the *New York Times* put it—"softening" her image and "mut[ing]" most discussion of race.[124]

Again, this Article does not suggest that there are no reasons to oppose affirmative action, just as it did not suggest that there are no reasons to support the Iraq war. However, taking a policy position to negotiate an identity script does not itself

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117. *See supra* notes 59–64 and accompanying text.

118. *See* Cooper, *supra* note 101; *cf.* Carbado & Gulati, *Conversations*, *supra* note 5, at 141 (discussing "outsiders'" disproportionate burden to negotiate scripts); Robinson, *supra* note 5, at 1810–14 (same).

119. *See* Richard Wolffe, *Barack's Rock*, NEWSWEEK, Feb. 25, 2008, at 26, 26–29.

120. *See id.* at 26, 31 (arguing that although Michelle Obama previously claimed proudly that her Princeton education was a product of affirmative action, her office now denies any such claim, instead asserting that her application to Princeton benefitted from her legacy status).

121. *See infra* notes 122–24 and accompanying text.

122. *See* Andra Gillespie, *The Michelle Obama Drama*, ATLANTA J.-CONST., July 20, 2008, at B1; Sophia A. Nelson, *Black. Female. Accomplished. Attacked.*, WASH. POST., July 20, 2008, at B1; Michael Powell & Jodi Kantor, *After Attacks, Michelle Obama Looks for a New Introduction*, N.Y. TIMES, June 18, 2008, at A1.

123. *See, e.g.*, Austin, *supra* note 39, at 539–40.

124. *See* Powell & Kantor, *supra* note 122.

qualify as public-regarding reasoning,[125] which is essential to deliberative democracy.

Of course, it is merely speculation that the two women, Clinton and Obama, strategically altered their political opinions to negotiate identity scripts. Perhaps those policy positions seemed well-reasoned and naturally fitting to them, but we may never know for sure. The relevant inquiry should not be whether any particular individual has self-censored her point of view, but whether there are pressures to self-censor in the first place.[126] As long as identity scripts generate strong incentives for people to self-censor, a large question looms over the deliberative process. The public is left to wonder whether both individuals would have offered a better-reasoned policy position if the cloud of negotiating ascribed identity scripts did not loom over them.[127] In this sense, the instrumental value of deliberation was tainted.[128]

In a similar vein, President Obama seems to have muted his discussion of religion and race during his campaign. Although Obama self-identifies as Christian, some Americans perceived him as Muslim and ascribed him an identity script depicting Muslims as disloyal to Americans and sympathetic toward terrorists.[129] According to many commentators, Obama

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125. Recall that public-regarding reasons are explanations for a policy position that are animated by the public's best interests. Script negotiations do not, in and of themselves, serve the public interest. For example, a female politician who takes a hawkish position to reject femininity scripts may serve her individual career interests, but hawkish positions are not intrinsically good for the public. *See supra* notes 59–64 and accompanying text (discussing public-regarding reasons).

126. Kenji Yoshino has similarly argued that the important question is not whether an individual is actually "covering," but whether there is coercive pressure on an individual to cover. Borrowing from sociologist Erving Goffman, Yoshino uses the term "covering" to refer to the "ton[ing] down" of disfavored identity traits. *See* YOSHINO, *supra* note 4, at vii–ix, 189–91.

127. Note that this Article does not argue that one can ascertain whether a sufficient or optimal level of deliberation has been achieved. Instead, this Article argues that, because identity scripting so clearly compromises one's confidence in deliberation, the law should strive to remedy identity scripting's harms. *Cf.* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1422 (2008) ("[T]he participation model [of democracy] does not identify when an optimal or sufficient level of participation has been achieved.").

128. On the instrumental value of deliberation, see *supra* notes 76–79 and accompanying text.

129. *See, e.g.*, Fakhruddin Ahmed, Op-Ed., *Candidates Wrong To Snub Muslim Voters*, TIMES (Trenton, N.J.), Aug. 1, 2008, at A9 (discussing rumors that Obama is Muslim and how Obama has sought to distance himself from

worked to reject the script; his campaign disassociated him from the Muslim community by refusing to make campaign stops at mosques (despite making stops at churches and synagogues) and by asking women in Muslim headscarves to remove themselves from camera range during televised rallies.[130] The *New York Times* chronicled this phenomenon with an article headlined "Muslim Voters Detect a Snub from Obama."[131]

After Obama was elected, he changed his approach by publicly acknowledging his Muslim family members for the first time since the presidential campaign.[132] Obama now offers a strong voice arguing that Muslims need not be feared.[133] If Obama had not won the election, public discourse might have remained deprived of a high-profile advocate for improving the relationship between mainstream America and Muslim communities.[134] To the extent that identity scripting gave Obama incentive to self-censor during campaign season, identity scripting distorted democratic deliberation on Muslim citizenship and humanity.

Obama also seemed to mute discussion of race during his campaign. Besides giving a speech that was prompted by criticism against Obama's predominantly black church, Obama

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the Muslim community); Joseph A. Kechichian, Op-Ed., *Anti-Obama Rumour Mill Is Working Overtime*, GULF NEWS (Doha, Qatar), July 3, 2008 (same); Nafees A. Syed, Op-Ed., *GOP Should Accept Muslim-Americans: Quit Demonizing This Active Political Bloc*, ATLANTA J.-CONST., Sept. 14, 2008, at A13 (same). Obama has since apologized to the two Muslim-American women who were removed from camera range. *See* Ahmed, *supra*.

130. *See supra* note 129.

131. *See* Andrea Elliott, *Muslim Voters Detect a Snub from Obama*, N.Y. TIMES, June 24, 2008, at A1.

132. *See CNN Newsroom: Obama Speaks to Muslim World; Obama Meets With Republican Lawmakers* (CNN television broadcast Jan. 27, 2009), *available at* 2009 WLNR 1636464 (discussing how Obama, for the first time since campaigning for President, referenced his "Muslim roots" and Muslim family members to reach out to Muslim communities); *see also* Roger Cohen, Op-Ed., *After the War on Terror*, INT'L HERALD TRIB., Jan. 29, 2009, at 8 (documenting that Obama acknowledged his Muslim family members and experience living in a Muslim country).

133. *See supra* note 132.

134. During campaign season, Colin Powell was the most high-profile leader to speak out against fears of Muslims. Powell addressed the question of Obama's religion, stating: "The correct answer is, he is not a Muslim, he's a Christian. He's always been a Christian. But the really right answer is, what if he is? Is there something wrong with being a Muslim in this country? The answer's no, that's not America." Rachel Zoll, "*Treated as Untouchables:" American Muslims Say They'd Been Left Out of Presidential Campaign Until Powell Spoke Out*, TORONTO STAR, Oct. 24, 2008, at 2.

rarely spoke about race.[135] To be clear, this lack of explicit racial focus might not have been a result of script negotiation. Indeed, it is to Obama's credit that he was able to frame issues important to people of color as issues important to all Americans. For example, Obama framed reforms to health care, public education, and home foreclosure policies as a rising tide that would lift all boats.[136] A desire to develop the broader public's interests in these issues may have been the primary motivation for his choice of issue-framing. However, some commentators fear that there are issues disproportionately affecting communities of color that cannot be framed in manners avoiding explicit discussions of race, for example, the issue of race-based disparities in prison sentencing.[137] If President Obama chooses not to engage these issues due to fears of being stereotyped—as opposed to greater public policy rationales—deliberation is certainly stymied.

Note that it is not only pressures to conform to majoritarian norms that taint deliberation. Within minority groups, pressure to perform in-group identity scripts[138] also stifles deliberation. A growing number of legal scholars have been writing on in-group identity scripts. For example, Russell Robinson has written on normative stereotypes within the black community.[139] These normative stereotypes form an identity script that blacks must perform to maintain good standing within the

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135. *See* Justin Ewers, *An Enviable Position for Civil Rights Advocates*, U.S. NEWS & WORLD REP., Dec. 1, 2008, at 27 (noting that Obama rarely spoke about race); James Q. Lynch, *Vote Leaves Deep Impact on Blacks: Obama's Rise, Though, Just a Step to Equality*, GAZETTE (Cedar Rapids-Iowa City, Iowa), Nov. 9, 2008, at 1 (quoting Prof. Angela Onwuachi-Willig on how Obama rarely addressed race during his campaign).

136. I borrow this metaphor of the rising tide from Ewers, *supra* note 135.

137. *See* Allison Samuels, *Audacity of Hoping*, NEWSWEEK, Feb. 2, 2009, at 38, 38. There are signs that, although Obama limited speaking on race during his campaign, he is more willing to speak about race now that he is in office. *See* Earl Ofari Hutchinson, *As President, Obama Vows To Address Rights*, PHILLY.COM, Feb. 1, 2009, http://www.philly.com/philly/hp/news_update/20090201_As_president Obama_vows_to_address_rights.html (noting Obama's explicit commitment on his White House website to race-based civil rights).

138. This Article uses the term "in-group identity scripts" to refer to scripts that individuals who claim a particular identity impose on others who they perceive to share that identity. For a discussion on how in-group identity scripts might be created by lawyers who advocate on behalf of the group, see Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115, 115–18 (David Kairys ed., 1998).

139. *See* Robinson, *supra* note 5, at 1824–26.

black community.[140] For example, Robinson noted that, "[b]lacks who have questioned my [black] racial 'authenticity' (because I listen to 'white music,' for example, or perhaps because I refused to wear a doo rag in public) have a power to criticize me that whites lack."[141] Meanwhile, Angela Onwuachi-Willig has written on how intraracial marriage still constitutes part of people of color's in-group identity scripts.[142]

Most relevant to analyses of deliberative democracy, scholars such as Jacquelyn Bridgeman have written on the effects of in-group racial scripts on political discourse.[143] According to Bridgeman, minority racial groups often pressure their group members to perform in-group scripts by adopting certain policy positions—not by reasoning persuasively regarding those positions, but by threatening to label those who fail to comply as "traitor[s]" or "[s]ell-outs."[144] This ascription of an identity script and attendant pressure to comply stifles deliberation if the pressure to comply is not supported by public-regarding reasoning.

This Article has mainly focused on the deliberative power of politicians such as Barack Obama. Theorists, however, often conceptualize the deliberative sphere more broadly, acknowledging the role that the media and, indeed, ordinary citizens play in democratic deliberation.[145] Identity scripts also stymie the communicative output of journalists and ordinary citizens. For example, National Public Radio recently featured two seg-

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140. See id.

141. *See id.* at 1825.

142. *See* Onwuachi-Willig, *Undercover Other*, *supra* note 5.

143. *See generally* Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 35 SETON HALL L. REV. 1261 (2005); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008).

144. *See* Bridgeman, *supra* note 143, at 1263–65 (criticizing members of black communities who "summarily reject and ostracize those within [black] communities who do not appear to share our views" and "wonder[ing] if we do not duplicate some of the patterns of silencing and marginalization that we ourselves constantly struggle against, when we refuse to take seriously those within our communities who view the world differently"); *see also* Kang, *supra* note 143, at 778, 781 (discussing "discursive polarization" where "[p]olitics may freeze along the historically dominant axis of race, removing incentives for political leaders to challenge the public with new choices and understandings inconsistent with the entrenched racial alignment").

145. *See, e.g.*, Benhabib, *supra* note 53, at 75 (arguing that democratic deliberation exists not only among state actors in government institutions, but also among citizens in their various capacities as members of civil society).

ments on the experiences of journalists of color.[146] Numerous African American journalists expressed concern that they were being held to a higher standard, where any hint of their positive reaction to the Obama campaign—even clapping when Obama enters the room—would be derided as black bias inherent in black identity.[147] This higher standard likely generates incentives for black journalists to excessively self-censor.

Ordinary citizens also negotiate identity scripts in everyday political conversations. Recall that female law firm associates have incentives to reject femininity scripts.[148] Accordingly, a female associate who engages colleagues in political conversation over lunch has incentives to mute stereotypically feminine policy positions. Racial scripts similarly limit political deliberation among citizens in everyday interactions. As Jody Armour has suggested, scripts depicting black men as hostile and as criminals have created a "chilling effect," deterring black men from engaging other communities in civic interactions.[149] To the extent that black men do engage other communities in civic life, they may seek to negotiate stereotypes of hostility by avoiding controversial topics or positions on public policy. In this regard, racial scripting stifles democratic delibe-

146. *See Talk of the Nation: Covering Race on the Campaign Trail* (National Public Radio broadcast Aug. 6, 2008), *available at* 2008 WLNR 14707535 [hereinafter, NPR, *Covering Race*]; *Talk of the Nation: Journalistic Guidelines on the Campaign Trail* (National Public Radio broadcast July 30, 2008), *available at* 2008 WLNR 14207260 [hereinafter NPR, *Journalistic Guidelines*]; *see also* Mary Mitchell, *No Softballs from Minority Journalists*, CHI.-SUN TIMES, July 28, 2008, at 3 (discussing an NPR panel on the subject of minority journalists).

147. *See* Mitchell, *supra* note 146 ("[A]n NPR editor asked panelists whether it was appropriate for journalists [of color] to clap for Obama—and the question uncorked a mounting frustration among many black reporters."); Wendi C. Thomas, *Obama Challenges Journalists' Objectivity*, COM. APPEAL (Memphis, Tenn.), July 28, 2008, at B1 (expressing frustration that an NPR editor suggested that minority reporters refrain from clapping for Obama to convey their objectivity); NPR, *Covering Race*, *supra* note 146 (quoting Michel Martin, a black journalist, saying that she needs to "check[ ] herself " in ways that her colleagues need not); NPR, *Journalistic Guidelines*, *supra* note 146 (asking whether "black journalists are being held to a higher standard" and quoting individuals who answered in the affirmative).

148. *See* Robinson, *supra* note 2.

149. *See* Jody D. Armour, *Toward a Tort-Based Theory of Civil Rights, Civil Liberties, and Racial Justice*, 38 LOY. L.A. L. REV. 1469, 1476–77 (2005); *see also* Regina Waynes Joseph, *New Jersey's Issue with Race*, 5 J.L. & SOC. CHALLENGES 33, 38 (2003) ("Racial profiling has had a chilling effect on our lives [in African-American communities]."); Aaron Goldstein, Note, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1201 (2003) (discussing how stereotypes create chilling effects).

ration in everyday affairs. Because reason-giving conversations are central to deliberative democracy, race-based censorship during those conversations hampers democracy.

3. Distorting Input

Finally, identity scripts not only cause individuals to self-censor; they also warp conversations by distorting the way messages are received.[150] These two dynamics are, of course, closely related.

Consider, again, the example of Hillary Clinton and national security. What if Clinton had rejected the Iraq war? Others likely would have dismissed her position, not on its merits, but because it was stereotypically feminine and, therefore, considered weak.[151] The very same rejection of the war is received differently when the speaker has not been ascribed a femininity script. Interestingly, the script portraying black men as hypermasculine has typically been an unjustified burden on black men,[152] but the ascription of black hypermasculinity may have allowed Barack Obama to speak out against the Iraq war without being dismissed as being weak—at least in contrast to Hillary Clinton.[153]

Analyses of media content suggest that coverage of political races is often influenced by identity scripting. Reporters seem to focus disproportionately on the aspects of candidates that re-

150. *See* Carbado & Gulati, *Conversations*, *supra* note 5, at 120–21.

151. *See id.* (discussing a similar dynamic where feminine stereotypes distort the way male colleagues receive communications from women in the law firm context).

152. *See* Cooper, *supra* note 5, at 879 (recounting how scripts on black masculinity contributed to false convictions in the "Central Park Jogger" case); Kwan, *supra* note 38, at 1286–87 (outlining stereotypes of black men as hypermasculine); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2809 (2008) (discussing how the hypermasculine script affects black men's romantic relationships); *NPR News and Notes: Should Clinton or Obama Be First?* (National Public Radio broadcast Mar. 11, 2008), *available at* 2008 WLNR 4856463 (quoting Professor Kimberlé Crenshaw on the way conceptions of black masculinity hurt black men).

153. Because the public often ascribes black men with so-called masculine traits of strength and aggression, Obama's position on the war did not overly weaken the public's perception of his strength. *See* Cooper, *supra* note 101, at 637, 660 (noting how perceptions of black men as hypermasculine created some leeway for Obama to breach masculinity scripts); *cf.* Gloria Steinem, Op-Ed., *Women Are Never Front-Runners*, N.Y. TIMES, Jan. 8, 2008, at A23 (arguing that the "masculinity-affirming" nature of black men's identity scripts comforts some voters).

late to the candidates' identity scripts.[154] For example, even though female candidates announce policy positions on a variety of subjects, their positions on so-called masculine topics are often overshadowed.[155] Studies show that, when covering female candidates as opposed to male candidates, journalists tend to focus their reporting on the women's family lives, clothing, and positions on so-called feminine issues.[156]

This sort of biased reception of information stifles democratic deliberation. Deliberation becomes limited because ascribed identity scripts figuratively plug listeners' ears. To be clear, it may sometimes be reasonable to plug one's ears by taking a speaker with a grain of salt. For example, it would certainly be reasonable to take a habitual liar's words with caution. In such instances, however, filtering of messages is legitimized by credibility concerns and, therefore, distinguishable from instances where message filtering derives from ascribed identity scripts.

4. Putting Scripts in Perspective

The next two Parts examine how the law can help correct scripting's effect on public policy and reduce the salience of identity scripts going forward. Before proceeding to that discussion, it is worth emphasizing that addressing identity scripts is not a panacea. Identity scripts certainly are not the only roots to problematic barriers to deliberative power, distortions of communicative output, and distortions of communicative input. For example, an individual may self-censor during political deliberation for a host of reasons that are unrelated to identity scripts.[157] Addressing the social salience of identity scripts is nonetheless a worthwhile project. Even though it would not

154. Studies typically show that reporters disproportionately focus on female candidates' appearance and family life compared to male candidates' appearance and family life. Issue coverage for male candidates tends to be more well-balanced, while coverage for women tends to focus on feminine issues, although the issues associated with femininity seem to change over time. *See, e.g.*, Dianne G. Bystrom et al., *Framing the Fight*, 44 AM. BEHAV. SCIENTIST 1999, 2001, 2011 (2001); Carlin & Winfrey, *supra* note 91, at 329.

155. *See supra* note 154.

156. *See supra* note 154.

157. *See supra* note 83 and accompanying text (describing allegations that Hillary Clinton adopted policy positions based on group polling rather than on more principled reasons); *see also* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 137–38 (noting that economic inequalities can create barriers to participation in political deliberation).

produce pure reason-giving conversations, it would improve the quality of democratic deliberation.[158]

Note that reducing the power of identity scripts does not equate to marching toward an identityless world. It means heading toward a world in which identity-based expectations are less rigid.[159] In Carbado and Gulati's familiar employment hypothetical involving the African American man,[160] the man should not need to work more hours than his peers to reject stereotypes of laziness. He should be able to disconfirm such expectations much more easily, by working just as hard and as well as his colleagues. Similarly, in the ideal world, Hillary Clinton would not have needed to adopt a hawkish position just to disprove stereotypes of weakness.[161] She should be able to claim a feminine identity, but also prove her strength as easily as any man. Indeed, individuals should be able to claim group identities and tailor related identity "templates"[162] without having to go out of their way to reject stereotypes. Because identities would be more malleable in this ideal world, criticism would not be inflicted upon individuals for merely performing or rejecting identity-based expectations unless there were public-regarding reasons for such criticism.[163]

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158. Decreasing the social salience of identity scripts would reduce barriers to participation in democratic deliberation, thereby improving the collective aspect of deliberation. Reducing identity scripts' salience would also improve the quality of deliberation by mitigating incentives to self-censor and distortions in the reception of communication. For background on the dynamics of barriers to entry, self-censorship, and distortion in communication reception, see *supra* Parts I.C.1–3.

159. *Cf.* Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 6 (2001) (arguing for an agenda that "enable[s individuals] to adopt more fluid notions of gender identity that are less linked to biological sex").

160. *See supra* note 29 and accompanying text.

161. *See supra* notes 115–18.

162. Recall the difference between identity scripts, which are rigid expectations, and what I have termed identity "templates," which are relatively adjustable. *See supra* notes 48–51 and accompanying text.

163. In this ideal world, personal identities would continue to play an important role in political discourse. For example, a gay politician might explain how his experiences as a gay man—which are not representative of all other gay men—have shaped his values and his policy perspectives. It is important that the man freely articulate his own personalized gay narrative and that others respond to that personalized narrative as opposed to a preconceived script for gay identity. Other individuals should not impose scripted notions of gay identity that impede the hypothetical gay man's expression of self.

II. NEW DIRECTIONS FOR DEMOCRACY REINFORCEMENT THEORY

The effects of identity scripts should inform democracy reinforcement theory, which stipulates that constitutional rights ought to be interpreted in a manner that reinforces democracy. This Part begins by explaining how rights can reinforce democracy. It then focuses on equality rights. Traditionally, democracy reinforcement theorists have argued that equal protection rights should ameliorate group-based hierarchies that undermine democracy. This Part argues that equal protection rights should also ameliorate harmful identity scripts, even when they do not clearly perpetuate group-based hierarchy.

A. THE REINFORCEMENT CAPACITY OF RIGHTS

Consider this hypothetical: Congress passes a law banning all books; subsequently, the Supreme Court holds that the law violates the First Amendment's protection of free speech. In this situation, has the Court trampled democracy by trumping elected officials' prerogative? Arguably, the Court has not limited democracy and has, instead, supported democracy. If one views books as critical to democratic deliberation, then the Court secures a precondition to democracy by protecting people's right to produce and access books.

In this manner, protecting certain rights reinforces democratic functioning.[164] According to democracy reinforcement theory, this reinforcement capacity should inspire constitutional interpretation.[165] When the Constitution's text is ambiguous—especially if related precedents are also ambiguous—courts should construe constitutional rights in a fashion that reinforces democracy.[166] John Hart Ely first trumpeted this theory in his still-influential book *Democracy and Distrust*.[167]

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164. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 142 ("Many rights are indispensable to . . . democratic deliberation. If we protect such rights through the Constitution, we do not compromise self-government at all. On the contrary, self-government depends for its existence on firmly protected democratic rights.").

165. *See generally* Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 99 (2004) (providing background on "purposivist" theories to constitutional interpretation, including democracy reinforcement theory).

166. *See, e.g.*, ELY, *supra* note 14, at 101–02 (developing a "theory of judicial review" that reinforces representative democracy); SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 133 ("We should develop interpretive prin-

Returning to the First Amendment as an example, one can see how democracy reinforcement theory helps to clarify the contours of rights. Most people agree that freedom of speech is not absolute, but the First Amendment's text is unclear on the extent of its protections.[168] Democracy reinforcement theory helps to define those protections more specifically.

According to democracy reinforcement rationales, the Court correctly divides speech into two major categories.[169] On one hand, there is "high-value" speech, which is speech notably relevant to political deliberation. On the other hand, there is "low-value" speech, such as "fighting words," which add very little to political deliberation.[170] Courts properly exercise heightened scrutiny over legislation that restricts high-value speech.[171] Heightened scrutiny is justified because such restrictions threaten democracy; courts should intensely scrutinize restrictions of high-value speech to ensure that there are sufficient reasons for the policies to counterweigh their threat to democracy.[172] By limiting intense judicial review to cases concerning high-value speech, courts are careful not to override democracy, deferring to the political branches on matters that are not closely related to democratic impairment.[173]

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ciples from the goal of assuring the successful operation of a deliberative democracy.").

167. ELY, *supra* note 14; *see also* Schacter, *supra* note 14, at 737 ("Ely's classic book has helped to shape the intellectual agenda of constitutional scholars ever since it appeared.").

168. *See generally* DANIEL A. FARBER, THE FIRST AMENDMENT (2d ed. 2003) (exploring the contours of the First Amendment).

169. *See* JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 128 (2006); SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 232–38.

170. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words" as utterances that "tend to incite an immediate breach of the peace" and "are no essential part of any exposition of ideas"); ELY, *supra* note 14, at 114 (noting the appropriateness of the Court's fighting words doctrine under democracy reinforcement theory); *supra* note 169. *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding that the state's regulation of fighting words must not discriminate on the basis of viewpoint by prohibiting some fighting words but not others).

171. *See* FLEMMING, *supra* note 169; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 232–38.

172. *See* FLEMMING, *supra* note 169; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 232–38.

173. Commentators have also used democracy reinforcement theory to address First Amendment jurisprudence beyond that concerning the two-tier system. *See, e.g.*, Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73. 80–96 (1996) (drawing from democracy reinforcement theory to support protections of art as free speech); Gregory P. Magarian, *The Jurisprudence of Colliding First*

Of course, democracy reinforcement theory is not limited to First Amendment jurisprudence. In *Democracy and Distrust*, Ely argued that one way courts reinforce democracy is by ensuring that people have equal access to democratic processes generally.[174] The right to vote is perhaps the most obvious right to democratic process.[175] Ely viewed political speech as a democratic process because speech is a channel for political change.[176] Many commentators, however, believe that the most obvious flaw of Ely's work was his narrow focus on process.[177] Scholars have since expanded Ely's theory by arguing that certain substantive rights can reinforce democracy as well.[178]

The remainder of this Article focuses on how democracy reinforcement theory should inform equal protection jurisprudence. Although defending democracy reinforcement theory against its alternatives is beyond this Article's scope, it is worth highlighting that democracy reinforcement theory is not only appealing because it maintains fidelity to the Constitution's overarching commitment to collective governance;[179] for

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Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review, 83 NOTRE DAME L. REV. 185, 188–89 (2007) (using a variation of democracy reinforcement theory to evaluate competing First Amendment claims).

174. ELY, *supra* note 14, at 100.

175. *See id.* at 116–25.

176. *See id.* at 105–16.

177. *See, e.g.*, Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721–23 (1991); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980); *see also* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 396 (1997) ("Ely aggressively offered his theory in procedural terms and argued that it could be applied without requiring judges to make value-laden substantive distinctions that he regarded as institutionally unsuited to courts. But this is exactly the point on which Ely has proven most vulnerable.").

178. *See, e.g.*, Cohen, *supra* note 53, at 103 (asserting that substantive liberties, including religious liberty, are important to deliberative democracy); Jane S. Schacter, Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 753 (2004) (positing that certain "social conditions" can improve democracy); David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761, 769 (2004) (arguing that substantive due process rights can reinforce democracy); *see also* Magarian, *supra* note 173, at 185–86 (arguing that when two claims to free speech clash, courts should choose between them by evaluating their substantive value to democratic deliberation).

179. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 103 ("Any plausible theory of constitutional interpretation must pay a great deal of at-

pragmatic reasons, the theory is also particularly compelling in the context of equal protection.

From a pragmatic standpoint, democracy reinforcement theory is helpful because the other major interpretive tools are underdeterminate when it comes to the Equal Protection Clause. The Clause's text is unclear, necessitating an interpretive principle.[180] In previous writings, I have adopted a common law approach to constitutional interpretation,[181] relying on Supreme Court precedent to develop interpretive principles.[182] However, as discussed in Part III, equal protection precedent is sometimes unhelpfully vague in significant ways.

Originalism, an alternative to democracy reinforcement theory,[183] is also not very helpful in the context of equal protection. Originalism comes in various forms, the most popular of which dictates that judges should interpret constitutional provisions in a manner that would be consistent with the text's original meaning.[184] With regard to equal protection, however, one original meaning is elusive, rendering originalism underde-

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tention to the democratic aspirations of the American constitutional tradition.").

180. *See* U.S. CONST. amend. XIV, § 1 (mandating that people not be denied "the equal protection of the laws"); *see also* ELY, *supra* note 14, at 30 (noting that the Amendment's drafters consciously chose very general language); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 456 (2007) (arguing that the drafters of the Equal Protection Clause intentionally chose vague language); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) (noting the Clause's "inclusive" language).

181. For background on the "common law approach" to constitutional interpretation, see generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). *But see* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007) (critiquing the common law approach).

182. *See* Holning Lau, *Formalism: From Racial Integration to Same-Sex Marriage*, 59 HASTINGS L.J. 843, 852–57 (2008); Lau, *supra* note 5, at 346–62.

183. Although originalism and democracy reinforcement theory are considered separate theories, they both share an interest in democracy. Originalists can be considered fundamentalist democracy reinforcement theorists in that they believe fidelity to originalism is the best way to ensure that judges do not undermine democracy by invalidating legislation based on their personal opinions. *See, e.g.*, SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 95.

184. In the past, originalists generally focused on drafters' "original intentions;" however, as that strand of analysis fell out of favor, originalists turned to inquiries into the "original meaning" of a text, that is to say, how the public would have understood the text during the time of its drafting. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989).

terminate.[185] Indeed, some legal historians have argued that the framers and the public originally understood the Equal Protection Clause to be intentionally vague, deferring specific definition to future generations.[186]

As a result, democracy reinforcement theory is useful for filling the gap left behind by ambiguities in text, precedent, and original meaning. A final alternative approach to developing a gap-filler is moral philosophy,[187] which can be used to clarify general principles—such as equality—that are enshrined in the Constitution.[188] For current purposes, it is unnecessary to choose between democracy reinforcement theory and interpretive tacks grounded in moral philosophy.[189] One can hypothesize that these modes of interpretation complement each other. This Article argues for an equal protection jurisprudence that combats inequalities associated with ascribed identity scripts;[190] this proposal likely comports with both democracy reinforcement rationales and moral principles on equality, as

185. *See, e.g.*, Balkin, *supra* note 180, at 456–57 (arguing that the Equal Protection Clause was understood by its contemporaries to be intentionally vague); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 593 (2008) (same). *But see, e.g.*, Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48, 251 (1997) (contending that the Clause's framers intended to prohibit laws that "single out any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification" and that this intent should inform constitutional interpretation).

186. *See, e.g.*, Balkin, *supra* note 180, at 456–57; *see also* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253–54 (1997).

187. Ronald Dworkin, for example, argues that abstract constitutional text should be interpreted in the most morally principled manner. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). Rights derived from moral theory may not always reinforce democracy; indeed, they could be viewed as constraints on democracy. *See* Cohen, *supra* note 53, at 97 (noting that some liberties have been considered constraints on the democratic process); Schacter, *supra* note 177, at 389 (discussing a view of rights as constraints on democracy).

188. *See, e.g.*, Baker, *supra* note 165, at 89–93 (providing background on the use of moral philosophy for constitutional interpretation).

189. With that said, for an argument that democracy reinforcement produces better results than constitutional perfectionism based on moral reasoning, see Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2881–82 (2007) (arguing that judges are better equipped to give content to deliberative democracy than to more abstract ideals such as moral underpinnings of rights).

190. *See infra* Part III.

many commentators have expounded on how inequalities associated with script negotiations undermine human dignity.[191]

B. ADDRESSING GROUP HIERARCHY

While many rights do reinforce democracy,[192] this Article focuses on rights to equality. The collective nature of democracy hinges on people's equal opportunities to influence deliberation.[193] Collective governance is undermined if significant disparities in deliberative power exist within the political realm.[194]

Inequalities are affected by a variety of factors. Institutional design can influence deliberative inequalities. For example, campaign finance laws can ameliorate deliberative inequalities.[195] The laws' proponents argue that capping campaign expenditures levels the deliberative playing field.[196] Social dynamics also affect deliberative equality. Prejudice—in the form of outright hostility towards a social group or stereotyping—contributes to inequalities that stymie deliberation.[197]

Before elaborating on the effects of such prejudice, it is important to note that inequalities on some grounds may, indeed, be consistent with deliberative democracy. Some inequalities can be justified—at least provisionally—by "public-regarding" reasons that surface during democratic deliberation.[198] The jus-

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191. For literature on these dignitary costs of script negotiation, see *supra* note 5. *See also* Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669 (2005) (arguing that concern for dignity as a moral principle should drive constitutional jurisprudence, particularly race jurisprudence).

192. *See supra* notes 174–78 and accompanying text.

193. *See* Benhabib, *supra* note 53, at 68; Cohen, *supra* note 53, at 106.

194. Although scholars disagree on how to define this deliberative realm, it is arguably quite broad. Political deliberation occurs in electoral races and among elected officials. Some theorists argue, however, that political discourse also takes place in the "social sphere" of media, everyday conversations, and everyday encounters. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 54, at 29–39; Benhabib, *supra* note 53, at 75–77; Gould, *supra* note 12, at 172–76; Schacter, *supra* note 177, at 398–410.

195. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 84 –85, 223–24.

196. *See id.* (noting such arguments but questioning whether they are empirically valid).

197. *See id.* at 143. Note that this Article uses the term "prejudice" in both senses of the word: hostility towards a group, and preconceived ideas that may not be based on conscious hostility. *E.g.*, AMERICAN HERITAGE DICTIONARY 1384 (4th ed. 2006).

198. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 17, 352.

tification is provisional because further deliberation might lead to the conclusion that the inequalities are unjustified.

To clarify this point, consider whether imprisoning rapists is consistent with deliberative democracy. Surely, incarcerated rapists' deliberative power is limited because incarceration limits their ability to participate in numerous public forums. This inequality of power between convicted rapists and the general public can be consistent with deliberative democracy because the inequality can be supported, at least arguably, by public-regarding reasons. For example, one can conclude that incarcerating rapists serves the public well by deterring rape, a violent crime.[199]

In contrast to inequalities based on the status of rape offense, state-sanctioned inequalities based on grounds such as race and sex have often been unsupported by reasoned deliberation. Indeed, the Supreme Court has acknowledged that, historically, such inequalities have often been rooted in prejudice as opposed to public-regarding reason.[200] The Court has questioned the reasoning behind sex inequalities by noting that "sex characteristic[s] frequently bear[] no relation to ability to perform or contribute to society."[201] Likewise, the Court has questioned inequalities based on illegitimacy, race, and national origin because such traits "bear[] . . . no relation to the individual's ability to participate in and contribute to society."[202]

Among democracy reinforcement theorists, a common refrain is that certain social prejudices, such as those based on race and sex, lead to inequalities that ought not to be tolerated.[203] These theorists have tended to assess how these prejudice-derived inequalities stymie democracy by asking how prejudice contributes to group-based hierarchies. In *Democracy and Distrust*, for example, Ely discussed at length how animus

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199. Of course, determining *how much* countervailing public-regarding reason is necessary to justify power inequalities is a difficult question that I largely leave for another day. For the time being, we can acknowledge that there may sometimes be public-regarding reasons to justify inequalities on particular grounds. *See id.* at 238–45.

200. *See* Mathews v. Lucas, 427 U.S. 495, 505 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

201. *Frontiero*, 411 U.S. at 686.

202. *Mathews*, 427 U.S. at 505.

203. *See* ELY, *supra* note 14, at 153–54, 164 –70; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 143–44. Note that writers have been less consistent on how far the government should go to address other inequalities, such as economic disparities. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 137–38.

and stereotyping directed at minority groups and women disempowered such groups, thus undermining democracy.[204] Similarly, Cass Sunstein has focused on how prejudice affects intergroup dynamics.[205] He has argued that, "[i]f a group faces obstacles to organization or pervasive prejudice or hostility," democracy is stilted.[206] According to Sunstein, "[c]ourts should give close scrutiny to governmental decisions that became possible only because certain groups face excessive barriers to exercising political influence."[207] Consequently, an "anti-caste principle will play a critical role in this assessment" of political dynamics,[208] and caste manifests in the form of group-based subordination.[209]

Such group-oriented theory has legitimized courts' heightened review of laws discriminating against racial minorities and women,[210] reconciling the tension between judicial scrutiny and democratic rule.[211] Judicial review can be undemocratic because it allows unelected judges to override elected policymakers' prerogative.[212] However, because racial minorities and women have not wielded adequate influence in the political domain, laws discriminating against these groups may have resulted from deficient democracy.[213] Therefore, when courts in-

204. *See* ELY, *supra* note 14, at 153–54, 164 –70.

205. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 143.

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.* at 339 ("[In a caste system, a] social or biological difference has the effect of systematically subordinating the relevant group—not because of 'nature,' but because of social and legal practices.").

210. This Article uses "heightened review" as an umbrella term referring to standards of judicial scrutiny that are more stringent than rational basis review.

211. As discussed *infra*, in Part III.A, however, traditional democracy reinforcement theory does not legitimate cases in which courts have extended heightened review to laws that disadvantage groups, such as white men, who are typically considered politically powerful.

212. This dynamic, often referred to as the "countermajoritarian difficulty," has spawned a large body of commentary. *See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L.J. 153, 155 (2002) (defining the "countermajoritarian difficulty" as "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy").

213. *See* ELY, *supra* note 14, at 153–70 (discussing the power disadvantage of blacks and women); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 151–55 (1976) (discussing the power disadvantage of blacks).

tensely scrutinized such laws, they were not overriding democracy.[214] Instead, they were reviewing legislation that emerged from flawed democratic processes in the first place.[215] Indeed, in many regards, equal protection jurisprudence comports with democracy reinforcement theory. For example, courts often state that it is a group's "political powerlessness" that justifies heightened scrutiny of legislation concerning that group.[216]

C. ADDRESSING IDENTITY SCRIPTS

While democracy reinforcement scholars have made an invaluable contribution by highlighting prejudice's effects on democracy, their focus on group-based hierarchy elides the fact that identity scripts can sometimes undermine democracy without clearly reinforcing group hierarchies.[217] Identity scripts create harmful power inequalities that do not always map neatly along traditional group lines.[218] Identity scripts also distort the reason-giving conversations that are central to deliberative democracy.[219]

In the past, some scholars have suggested that identity scripting is problematic, even if it does not reinforce group-based subordination. For example, feminists such as Sylvia Law and Mary Anne Case have long argued that gender script-

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214. *See* Schacter, *supra* note 177, at 391.

215. *Id.* ("Seen in these terms, equality-enhancing judicial review *enables* democracy rather than applies a brake on it.").

216. *See generally* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1006–11 (3d ed. 2003) (discussing the "political powerlessness" criterion for "suspect status"). Note, however, that the Supreme Court has sometimes extended heightened review to laws disadvantaging social groups that are typically considered powerful—for example, white men. *See infra* Part III.A.

217. Democracy reinforcement theorists who focus on groups are not limited to Ely and Sunstein. *See, e.g.*, Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 30–45 (2006); Schacter, *supra* note 177, at 362. These theorists disagree on how deeply to look for inequality, but they all share the commonality of group-oriented analysis.

218. Consider the fifth black woman hypothetical, *supra* Part I.C.1, which illustrates that identity scripting can create troubling inequalities within an identity group, such as those between the fifth black woman and other black women who successfully negotiated their identity script. Carbado & Gulati, *Fifth Black Woman*, *supra* note 5, at 714 –19. Also consider how gender scripts do not simply empower men while subordinating women. Gender scripts disempower men, women, and transgender individuals whose gender performances do not conform to social expectations. *See supra* Part I.C.1.

219. *See supra* Parts I.C.2–3.

ing is harmful regardless of its group-based effects.[220] Reacting to laws that codify stereotypes, Law has argued that the government should protect "each person's authority to define herself or himself, free from sex-defined legal constraints."[221] Similarly, Case has argued that "'fixed notions concerning the roles and abilities of males and females' are problematic when embedded in law, even in law that does not in any articulable way subordinate women to men."[222]

This Article buttresses claims like those of Law and Case by demonstrating how identity scripts create harms to democratic deliberation, even if they do not reinforce group-based hierarchy. This insight provides new directions for democracy reinforcement theory. Script-oriented democracy reinforcement theory supports the idea that courts should interpret equality rights in a manner that addresses harmful identity scripts in addition to interpreting equality rights to address group-based hierarchy. Equal protection jurisprudence ought to correct for laws resulting from script-based deliberative impairments and to reduce the salience of harmful identity scripts. Part III applies this vision of democracy reinforcement to four areas of equal protection doctrine.

III. TAILORING DOCTRINE ACCORDING TO SCRIPT-ORIENTED THEORY

In equal protection doctrine, as in other areas of constitutional jurisprudence, courts subject some laws to rational basis review and other laws to heightened scrutiny. Script-oriented democracy reinforcement theory helps to determine which laws warrant heightened scrutiny. It also helps to define the parameters of heightened judicial review.

Recall that democracy reinforcement theory justifies heightened review of laws that either cause, or are effects of, democratic impairment. Heightened review of laws that *cause* democratic impairment reinforces democracy because heightened review of such laws can improve democratic function.[223] When judges exercise heightened review of laws that are the *effects* of democratic impairment, judges are not trumping democracy,

220. *See* Case, *supra* note 33, at 1473; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA.L. REV. 955, 969 (1984).

221. Law, *supra* note 220, at 969.

222. Case, *supra* note 33, at 1473 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

223. *See supra* notes 171–73 and accompanying text.

but are correcting for laws that flowed from flawed democratic processes in the first place.[224]

Accordingly, this Part examines how equal protection jurisprudence should apply heightened review to laws that risk perpetuating, or are the effects of, script-related democratic impairments. Specifically, this Part examines four areas of equal protection jurisprudence: the question of how to determine whether a status is suspect, the sex discrimination argument for same-sex marriage, the topic of racial integration in public schools, and the topic of racial and religious profiling.

To be clear, this Article uses the phrase "heightened scrutiny" as an umbrella term referring to judicial review that is more stringent than rational basis review.[225] When reviewing a

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224. *See supra* notes 210–16 and accompanying text; *see also* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 143 ("Courts should give close scrutiny to governmental decisions that became possible only because certain groups face excessive barriers to exercising political influence. Such scrutiny is justified in the interest of democracy itself.").

Of course, deliberation tainted by identity scripting possibly affects many laws. For example, recall that gender scripting's effects span so broadly that they taint even deliberation on national security. *See supra* notes 116–18 and accompanying text. Judicial power would stretch too far if courts were allowed to exercise heightened scrutiny over every policy that is tainted by identity scripting. The breadth of heightened review would swallow up rational basis review entirely, damaging the balance between legislative and judicial power. Insofar as the following sections are concerned with laws that are the effects of flawed deliberation, they will focus on laws that share a relatively tight nexus with identity scripting.

225. Rational basis review merely ensures that a law is rationally related to a legitimate government interest. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLITICS 651–63 (2d ed. 2002).

Currently, the two main forms of heightened scrutiny are strict scrutiny and intermediate scrutiny. *See id.* at 668–69, 721–28 (summarizing caselaw involving heightened scrutiny). Strict scrutiny requires that the discrimination be necessary or "narrowly tailored" to achieve "compelling" government interests. *See id*. at 668–69. Intermediate scrutiny requires that discrimination be "substantially related" to "important" government interests. *See id*. at 721–28. In both of these inquiries—in contrast to rational basis review—courts consider whether a law's discrimination is underinclusive or overinclusive with regard to achieving government interests. *See id.* at 668–69, 721–28; *see also* Lau, *supra* note 182, at 865–66. In this regard, heightened scrutiny interrogates the fitness of means and ends. *See* Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67, 86 n.110 (2008) (discussing rational basis review's lack of a fitness requirement).

Sometimes, under rational basis review, courts scrutinize laws to see if they are driven purely by animus. Commentators have differentiated this type of review from traditional rational basis review, calling it "rational basis with bite." *See id*. Even rational basis with bite, however, lacks a test for fitness. So

law that implicates identity scripting, courts should apply more than rational basis review. First, they should demand that government interests be more than just legitimate. The interests should be significant enough to counterweigh harms associated with identity scripting. Second, courts should require the state to do more than merely show the law is rationally related to government goals. The state should demonstrate fitness between the law and the government's stated ends. These two prongs are common features among the existing variants of heightened review. This Article stops short of prescribing a specific formula for heightened review because that project warrants a separate discussion.[226] With that said, this Part offers some preliminary thoughts on how a law's relationship to identity scripting should inform heightened review of that law.

A. DEFINING SUSPECT STATUS

Current equal protection doctrine dictates that only discrimination based on certain statuses trigger heightened scrutiny.[227] For economy of language, this Article refers to these particular grounds as "suspect statuses," even though courts sometimes divide these statuses into two subcategories: suspect and quasi-suspect.[228] Democracy reinforcement theory provides guidance on how to determine whether a status is suspect. This question has garnered much attention recently, as state courts wrestle with whether sexual orientation is a suspect status in same-sex marriage litigation.[229] Recent discourse on the Obama

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long as a law is not purely motivated by animus, the law is valid regardless of whether its means are proportionate to the legitimate ends sought. *See id*.

226. In previous writing, I have tentatively endorsed a singular proportionality test for heightened scrutiny. *See* Lau, *supra* note 182, at 852, 872–73 (rejecting heightened scrutiny that is "fatal in fact"); Lau, *supra* note 225 (discussing proportionality review); *see also* Vicki C. Jackson, *Being Proportional about Proportionality*, 21 CONST. COMMENT. 803, 806–07 (2003) (discussing the various proportionality tests used in foreign courts). A careful analysis of the strengths and weaknesses of alternatives to the present forms of heightened scrutiny warrants its own article.

227. *See* CHEMERINSKY, *supra* note 225, at 668–69, 721–28.

228. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004); *see also* Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-*Heller *Standard of Review*, 41 U. TOL. L. REV. 43, 47 (2009).

229. *See* Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 580 nn.69–72 (2009) (listing cases that have addressed whether sexual orientation is a suspect status).

presidency marking a post-racial era also prompts questions regarding whether race is still suspect.[230]

In discussing suspect statuses, the Supreme Court has referred to both "suspect classes" and "suspect classifications."[231] For example, at times, the Court has suggested that blacks are a suspect class; other times, it has suggested that race is a suspect classification.[232] It typically refers to suspect classes and suspect classifications interchangeably, blurring distinctions between the two concepts.[233] From the viewpoint of democracy reinforcement theory, the Court's entanglement of class and classification is misguided.

This entanglement of class and classification is apparent when considering how to determine whether a status is suspect. Although the Court has not explicitly delineated a test for suspectness,[234] lower courts have generally read Supreme Court jurisprudence to produce the following list of factors for consideration: (1) whether the status refers to a group that has suffered a history of purposeful discrimination; (2) whether the group is politically powerless; (3) whether the status is based on a trait that is irrelevant to individuals' ability to contribute to society; and (4) the immutability of the trait.[235] Some factors focus on status as a class (i.e., group status) while the other factors treat status as a classification basis. Lower courts have disagreed on how these various factors interact.[236]

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230. For a discussion of Barack Obama's "post-racial" politics, see, for example, Matt Bai, *Post-Race*, N.Y. TIMES, Aug. 10, 2008, at M34; Dawn Turner Trice, *Nomination No End to Civil Rights Dream*, CHI. TRIB., Aug. 29, 2008, at 4.

231. MURPHY ET AL., *supra* note 216, at 1005.

232. Id.

233. *See id.* ("There is an important conceptual difference between 'suspect classifications' and 'suspect classes.' Members of the Supreme Court tend to use the terms interchangeably and so confuse their own as well as others' analyses."); *see also* BLACK'S LAW DICTIONARY 1487 (8th ed. 2004) (defining suspect class as "[a] group identified or defined in a suspect classification").

234. *See* MURPHY ET AL., *supra* note 216, at 1010 (summarizing Supreme Court jurisprudence and concluding that, "[i]n sum, there is no short answer" to defining suspect classes or suspect classifications).

235. *See* CHEMERINSKY, *supra* note 225, at 645–47; *see also* Paul Ades, *The Unconstitutionality of "Antihomeless" Law*, 77 CAL. L. REV. 594, 624 n.209 (1989).

236. *See, e.g.*, Goldberg, *supra* note 228, at 503–04 (discussing the Supreme Court's inconsistent application of the factors); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Recognize Its Application of Heightened Scrutiny to Classes Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2785–804 (2005) (discussing courts' inconsistent application of the factors).

To further examine how the Supreme Court has entangled class and classification, consider the Court's sex discrimination jurisprudence. The Court has asserted that sex is a quasi-suspect classification.[237] To support that assertion, it has cited the fact that women have historically suffered discrimination and political disempowerment.[238] In doing so, the court has entangled class and classification. It is unclear why determining that women are a suspect *class* (i.e., a suspect group status) leads to the conclusion that sex is a suspect basis of *classification*. Women's experience with discrimination and political powerlessness says very little about why sex classifications that disadvantage men should trigger heightened scrutiny. Yet, the Court has indeed applied heightened review to laws that disadvantage men—even though men have neither been politically disempowered as a group nor suffered a history of discrimination.[239]

Democracy reinforcement theory suggests that class and classification should be disentangled. There should be two separate, coexisting tests for suspect status: one clearly focusing on classes and another clearly focusing on classifications. The former is based on traditional group-oriented theory while the latter is animated by a script-oriented approach.

A class of persons should be considered suspect if it suffers significant power impairment and has suffered a history of group-directed prejudice. In these cases, the group at stake has insufficient power to influence political deliberation and history suggests that the power deficit results from prejudice as opposed to public-regarding reason. Laws that single out such groups warrant heightened scrutiny both because they likely stem from flawed deliberation and because they may have the effect of entrenching the group's powerlessness.[240]

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237. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

238. *See id*.; *see also* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion) (arguing that sex should be a suspect status).

239. For example, in *Craig v. Boren*, the Supreme Court applied intermediate scrutiny to a law permitting women over the age of eighteen to buy beer, but requiring men to be twenty-one to make the same purchase. *See* 429 U.S. at 218 (Rehnquist, J., dissenting). In applying intermediate scrutiny, the Court questioned whether that law was animated by gender stereotypes. *See id*. at 197–99.

240. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 143.

Whether the group is defined by an immutable trait should be irrelevant.[241] Originally, jurists posited that groups defined by an immutable trait were particularly vulnerable to political disempowerment.[242] Recent scholarship has retired that theory by pointing to examples of how immutability is a poor proxy for political disempowerment.[243] For example, aliens and religious minorities are often politically impaired despite the fact that citizenship and religion are changeable.[244] In practice then, the group-oriented approach justifies treating groups such as aliens as a suspect class. Aliens satisfy the group-oriented approach's two criteria for suspectness because they are politically disempowered and historically have been the target of group-based prejudice. Religious groups that share those qualities would be similarly suspect.

Turning to script-oriented theory, a classification scheme should be suspect if it is grounded on a trait that is currently and has historically been the basis of identity scripting, and if the trait is not indicative of persons' ability to contribute to society. Laws based on such classifications warrant heightened scrutiny because there is a risk that they stemmed from script-tainted deliberation and will entrench script attribution based on the associated trait.[245]

It is worth emphasizing that this new, script-oriented test for suspect classifications preserves two important limiting me-

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241. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (refusing to make immutability a requirement for suspect status); Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 522–23 (Or. Ct. App. 1998) (same); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 728–31 (1985) (criticizing the immutability factor); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 694 –96 (2008) (same); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 489–90, 509–19 (1998) (same).

242. *See* Hutchinson, *supra* note 241, at 694 ("[T]he theory behind immutability posits that maltreatment on the basis of a 'biological' and immutable trait is particularly disabling [politically] . . . .").

243. *See id*. at 694–96 (summarizing scholarship).

244. *Cf. In re Marriage Cases*, 183 P.3d at 442 (noting that religion and alienage are regarded as suspect statuses even though they are not immutable).

245. If a trait is tethered to identity scripts, deliberation related to that trait will likely implicate related scripts because the trait and the scripts share a nexus. For discussion on how classifications based on a particular trait can entrench scripting related to that trait, see *infra* note 295 and accompanying text.

chanisms. First, the test requires that the trait at hand not be significantly indicative of an individual's ability to contribute to society. Legislatures likely have public-regarding reasons to classify people by traits that bear such significance. Therefore, such classifications do not presumptively implicate a democratic impairment justifying heightened scrutiny. For example, age affects a person's ability to contribute to society.[246] As a result, age-differentiating laws, such as those limiting the autonomy of minors, should not automatically trigger heightened scrutiny.[247]

The test's second screening criterion is history. There are indeed many bases for identity scripting, but those bases are not equally problematic.[248] Social scientists acknowledge that stereotypes based on some categories are applied more automatically and thus are more difficult to negate than other stereotypes. This is because certain categories are socially constructed as being particularly salient.[249] For example, mainstream society may impose strings of stereotypes on lawyers. However, a script for lawyers is distinguishable from racial scripts. History is a proxy for categories' salience. It is the repeated use of certain stereotypes—for example, stereotyping based on race, sex, and sexual orientation—throughout history that renders them deeply etched in the public's collective psyche.[250] During democratic deliberation, individuals must go

246. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 –15 (1976).

247. *See generally* MARTIN R. GARDNER & ANNE PROFFITT DUPRE, CHILDREN AND THE LAW 1–28 (2d ed. 2006) (providing background on the maturation process and legal personhood of minors).

248. *See* Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 419 (2007) ("Identity theorists have historically argued that these multiple components of the self are differentially weighted, such that some aspects are more important or salient than others." (citing Peter L. Callero, *Role-Identity Salience*, 48 SOC. PSYCHOL. Q. 203, 203 (1985))).

249. Jacquelyn L. Bridgeman, *Seeing the Old Lady: A New Perspective on the Age Old Problems of Discrimination, Inequality, and Subordination*, 27 B.C. THIRD WORLD L.J. 263, 317 (2006) ("[S]cientists have shown that some of the categories, such as race, with which we invest so much meaning are social constructs deriving their salience through repeated use and context." (citing Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, *in* CONFRONTING RACISM (Jennifer Eberhardt & Susan T. Fiske eds., 1998))); *see also* Krieger, *supra* note 23, at 1201–02 (citing social and cultural context as a determinant of social categories' salience); Eric J. Mitnick, *Law, Cognition, and Identity*, 67 LA. L. REV. 823, 852 (2007) (highlighting the significance of power relations, cultural norms, and history in the construction of social categories).

250. *See supra* note 249.

to great lengths to work around these deeply entrenched stereotypes. Therefore, stereotyping on historically salient categories is particularly problematic to deliberative democracy and it is those categories that should be suspect.[251]

One might argue that courts are not capable of determining whether stereotypes are historically entrenched. In practice, however, courts already engage in this inquiry. Courts already consider "history of discrimination" as a criterion of suspect status,[252] and discussions of stereotypes are common to that inquiry.[253] One way for courts to assess the historical sa-

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251. Although there is no bright line separating historically entrenched social categories from other categories, stark differences among categories are readily apparent. For example, significant literature documents how racial stereotypes have a history of informing public policies. There is also significant social science literature on the particular salience of race as a social category. *See* Krieger, *supra* note 23, at 1201–02 (reviewing relevant laws and literature). In contrast, one is hard-pressed to find comparable bodies of literature regarding stereotypes of lawyers.

252. *See* CHEMERINSKY, *supra* note 225, at 646.

253. Most recently, courts have examined the history of sexual orientation stereotyping to analyze whether sexual orientation is a suspect status. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 444 (Cal. 2008) (concluding that sexual orientation "has been the basis for biased and improperly stereotypical treatment"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 472–75 (Conn. 2008) (discussing stereotyping of same-sex couples); Conaway v. Deane, 932 A.2d 571, 609–16 (Md. 2007) (discussing the history of stereotyping homosexuals and heterosexuals); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (discussing "the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships," even though the court did not engage in this inquiry for the purposes of ascertaining suspectness). Note that stereotypes based on sexual orientation do not only concern homosexual or bisexual identities. Those stereotypes contrast with the normative stereotypes that form scripts for heterosexuality. *See* A. Jean Thomas, *The Hard Edge of* Kulturkampf*: Cultural Violence, Political Backlashes and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707, 727, 730 (2004) (arguing that children learn to "perform heterosexuality" scripts and suggesting that limiting marriage to opposite-sex couples preserves marriage as a "heterosexuality factory" (citation and internal quotation marks omitted)).

Indeed, courts have a history of adeptly identifying and condemning stereotypes. In *Frontiero v. Richardson*, 411 U.S. 677, 684 –85 (1973), Justice Brennan famously acknowledged that sex stereotypes—for example, expectations that women are timid and fragile—have wrongly animated legislation and court opinions in the past. In subsequent decisions, the Court has readily acknowledged that sex stereotyping has animated legislation. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130–31 (1994) (noting that the policy in question "serve[d] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"); *see also* Case, *supra* note 33, at 1449 (discussing the prevalence of antistereotyping reasoning in sex discrimination jurisprudence).

lience of identity scripts is to look at whether stereotypes based on a particular trait have historically animated lawmaking.[254]

Indeed, this Article bifurcates the *existing* criteria for suspectness into two tests: one focused on class and another focused on classification. Notably, it does not require courts to do more than they are already doing. To clarify the difference between the group-oriented and script-oriented approaches to suspect status, consider the example of sexual orientation. The Washington Supreme Court, for example, stated that the gay community is not a suspect class, reasoning that the community is politically powerful because Washington State has openly gay elected officials and the state legislature had yielded to the gay community's push for antidiscrimination legislation.[255]

Assuming *arguendo* that the gay community does have significant political power, the group-oriented approach would dictate that gays and lesbians do not constitute a suspect class. Under a script-oriented approach, however, sexual orientation would still be a suspect classification. The Supreme Court of California seems to have taken this approach, although it has not said so explicitly. In a same-sex marriage case, the Supreme Court of California stated that "courts must look closely at classifications based on [suspect] characteristic[s] lest out-

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Similarly, the Supreme Court has often identified and condemned racial stereotypes in dicta. *See* Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 304 –07 (2003) (discussing the Supreme Court's treatment of racial stereotyping and citing Miller v. Johnson, 515 U.S. 900, 913, 919–20 (1995); Shaw v. Reno, 509 U.S. 630, 646–48 (1993); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614, 628, 630–31 (1991); Metro Broad., Inc. v. FCC, 497 U.S. 547, 602–05 (1990) (O'Connor, J., dissenting); Holland v. Illinois, 493 U.S. 474, 484 n.2 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

254. Courts and commentators have examined how stereotypes based on sex, race, and sexual orientation have historically informed lawmaking. *See supra* note 253; *see also Frontiero*, 411 U.S. at 684 –86 (acknowledging a history during which "statute books gradually became laden with gross, stereotyped distinctions between the sexes"); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 13–97 (1999) (examining historical laws animated by sexual orientation stereotypes); Krieger, *supra* note 23, at 1201–02 (noting historical laws informed by racial stereotypes).

255. *See* Andersen v. King County, 138 P.3d 963, 974 –75 (Wash. 2006) ("[A]s a class gay and lesbian persons are not powerless but, instead, exercise increasing political power."). It should be noted that the Washington Supreme Court also based its reasoning, in part, on its not being persuaded that sexual orientation is immutable. *See id.* at 974 ("[P]laintiffs must make a showing [that homosexuality is immutable], and they have not done so in this case.").

dated social stereotypes result in invidious laws or practices."[256] The court suggested that sexual orientation is a suspect status because—both historically and in more recent times—people have been stereotyped based on sexual orientation, even though sexual orientation is a trait that generally has no relationship to individuals' capacity to contribute to society.[257] Importantly, the court refused to consider whether gays and lesbians are a politically powerless group, deeming that question irrelevant.[258]

The Supreme Court of California's approach indeed comports with democratic reinforcement ideals. Even if gays and lesbians are politically powerful according to some measures such as the election of openly gay legislators, deliberation on issues such as same-sex marriage can still be stymied by deeply rooted sexual orientation-based stereotyping.[259] If stereotyping does pose this threat, sexual orientation should be considered a suspect classification.

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256. *In re Marriage Cases*, 183 P.3d at 443 (quoting Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971)) (internal quotation marks omitted).

257. *See id.* at 443 (noting that one of the "most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification" is "whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society"). The court also did engage in a class-oriented analysis; in addition to concluding that "statutory classifications . . . on the basis of sexual orientation" are suspect, the court expressed concern that gays and lesbians constitute a "class of persons who exhibit a certain characteristic [which] historically has been subjected to invidious and prejudicial treatment." *Id.*

258. *See id.* ("[O]ur cases have not identified a group's current political powerlessness as a necessary prerequisite for treatment as a suspect class." (emphasis omitted)).

259. Recent scholarship suggests that, even though gays and lesbians are subject to decreasing levels of animus from mainstream society, they are still stereotyped in certain regards; for example, gays and lesbians are often stereotyped as unable to raise healthy children despite the overwhelming social science evidence that disproves that stereotype. *See* Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 134 –45, 159, 172, 191 (2008) (discussing stereotypes of gay and lesbian parents that lead to a "politics of disgust" against them, even though the stereotypes lack empirical support); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 279–311 (2009) (discussing stereotypes regarding gay and lesbian parents); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164 –67 (2001) (reviewing social science literature on gay and lesbian parents).

Note that this bifurcated approach to suspect status preserves race and sex as suspect statuses, despite recent political developments. The ascent of individuals such as Barack Obama, Hillary Clinton, and Sarah Palin has prompted some commentators to note that political glass ceilings have crumbled or, at least, are cracking.[260] The 2008 election year begs the question: with these glass ceilings falling, do women or blacks continue to have a power impairment justifying courts' intense scrutiny of laws based on sex or race?[261] Based on traditional democracy reinforcement theory, the answer is arguably unclear. Traditional democracy reinforcement theorists address power through a group-based paradigm,[262] but it is unclear to what extent electing a female or black president—or any number of government officials, for that matter—would signal that

260. *See, e.g.*, Peter Baker & Jim Rutenberg, *The Long Road to a Clinton Exit*, N.Y. TIMES, June 8, 2008, at A1 (quoting Hillary Clinton in thanking her supporters for "crack[ing]" the glass ceiling); DeNeen L. Brown, *Two Words with a Ring of Possibility*, WASH. POST, June 4, 2008, at C1 (calling an Obama victory "symboli[c of] the smashing of a glass ceiling"); Editorial, *Despite Push, Obama Needn't Rush VP Pick*, STAR TRIB. (Minneapolis), June 5, 2008, at A16 (arguing that by winning the Democratic primary, Obama "burst through a still-thick, race-based glass ceiling in American politics"); Scott Martelle, *Ohio Voters' Love Is Tough To Win*, L.A. TIMES, Mar. 2, 2008, at 13 (describing the Democratic primary as "destined to break one of two glass ceilings—gender or race"); Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 5, 2008, at A1 (describing Obama's victory as "sweeping away the last racial barrier in American politics").

261. *Cf.* Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES, July 30, 2008, at A1 (stating that "whether Americans will elect a black president" may be the "ultimate test of racial equality"). A related question is whether individuals who are *both* female *and* black continue to have a power impairment. For a discussion of "intersectional" groups such as black women, see *supra* Part I.A.

Recall that courts usually justify heightened scrutiny of laws affecting a particular group by highlighting the group's "political powerlessness." *See supra* note 216 and accompanying text.

262. Theorists typically analyze prejudice against groups and political underrepresentation of groups to determine the extent to which a democratic deficit exists. *See, e.g.*, ELY, *supra* note 14, at 103 (arguing that the democratic process "malfunction[s]" both when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out" and when "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest"); SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 14, at 339 (analyzing the problem of race and sex discrimination in democracy); Brown, *supra* note 217, at 36–38 (discussing the Constitution's requirements for minority group representation); Schacter, *supra* note 177, at 400 ("[S]ocial disenfranchisement corrodes the fairness of the political process by selectively hampering the ability of gay citizens and groups to achieve or influence preferred political outcomes.").

women or blacks are empowered as groups. It is difficult to assess whether any given individual represents a particular social group's interests.[263] Individuals who supposedly belong to a particular demographic group may fail to represent their group's collective interests.[264] Some courts suggest that political power can be assessed by counting heads in high elected office.[265] This method generates nebulous results.[266] As a threshold matter, it is unclear how to delineate group membership for counting purposes. (Should Barack Obama, a man with a white mother, be considered black?)[267] Moreover, it is unclear who legitimately represents a particular group.[268] (Does Sarah Palin represent all women?)[269]

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263. *See* Gould, *supra* note 12, at 184 (noting the possibility that some men may represent women's interests better than some women might).

264. Devon Carbado and Mitu Gulati have addressed this dynamic in workplaces, arguing that racial minorities who climb to the top of the corporate ladder tend not to represent the interests of their fellow minorities at the foot of the ladder. *See* Carbado & Gulati, *Race to the Top*, *supra* note 5, at 1646 ("[S]trong incentives exist for minorities to race to the top of the corporation and lift the ladder up behind them when they get there."); *see also infra* note 269.

265. *See, e.g.*, Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006) (reasoning that gays and lesbians are not politically powerless in part because "a number of openly gay candidates [have been] elected to national, state and local offices").

266. Some courts note "the lack of a mathematical equation to guide the analysis of [political powerlessness]." Varnum v. Brien, 763 N.W.2d 862, 894 (Iowa 2009) (addressing political powerlessness in same-sex marriage litigation). According to the high courts of Iowa and Connecticut, "the touchstone of the analysis should be 'whether the group lacks sufficient political strength to bring a prompt end to . . . prejudice and discrimination through traditional political means.'" *Id.* (quoting Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 444 (Conn. 2008)). This reasoning still begs the question, how should courts determine political strength?

267. *See* Yasmin Alibhai-Brown, *Calling Obama Black Insults His Mother*, SEATTLE POST-INTELLIGENCER, June 10, 2008, at B6 (questioning whether Barack Obama should be categorized as black); Karen J. Hunter, *Why Do We Call Obama Black?*, HARTFORD COURANT, May 25, 2008, at C3 (same); L.A. Johnson, *Obama Candidacy Raises Old Questions About What Is Black*, PITT. POST-GAZETTE, May 8, 2008, at A1 (same).

An individual's claimed group membership might be denied by other members of the group. Judy Scales-Trent has written eloquently, for instance, on how others have frequently rejected her claim to black identity because of her light skin. *See* JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN 14 (1995) (describing how some people perceive her as "a black person but 'really white'").

268. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1623 (1997) (discussing group-based civil rights campaigns and noting that "[g]roups are messy. They are, by definition, comprised of many indi-

Script-oriented theory clarifies that, even as women and communities of color increasingly cross power gaps, the United States is not yet in a post-gender or post-racial world because gender and racial scripts are still salient in the political realm.[270] They may not produce power imbalances that map along traditional group lines, yet they create more complicated power inequalities and distort deliberative conversations. Accordingly, race and sex still satisfy the second prong of the bifurcated test for suspect status because they are both traits that are currently—and have historically been—the basis of identity scripting and they are not indicative of a person's ability to contribute to society.

After courts establish that a status is suspect, the question of whether there is discrimination triggering heightened scrutiny does not end. This is because the definition of discrimination is not self-evident. The Court has stated that disparate treatment on suspect grounds always triggers heightened scrutiny; however, disparate impact on suspect grounds does not trigger heightened scrutiny unless the law was motivated by invidious intent.[271] The following sections critique these tests. In addition to addressing *when* to exercise scrutiny, the following sections also offer thoughts on *how* to apply heightened scrutiny.

B. THE SEX DISCRIMINATION ARGUMENT FOR SAME-SEX MARRIAGE

The question of what qualifies as disparate treatment that triggers heightened scrutiny is relatively straightforward; however, it has led to inconsistent case law in one particular con-

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viduals and thus encompass a range of desires and agendas."); *see also infra* note 269.

269. *See* Gloria Steinem, *Wrong Woman, Wrong Message*, L.A. TIMES, Sept. 4, 2008, at 29 ("Palin's value to . . . patriarchs is clear: She opposes just about every issue that women support by a majority or plurality."); *see also* Bridgeman, *supra* note 143, at 1265 (explaining that Justice Clarence Thomas has been "ostracized by and alienated from large portions of the black community"); Gould, *supra* note 12, at 184 ("It would be odd indeed to think that Clarence Thomas could represent all African-Americans or that Margaret Thatcher could represent all women."); John Blake, *Can an Obama Presidency Hurt Black Americans?*, CNN.COM, July 22, 2008, http://edition.cnn.com/2008/POLITICS/07/22/obama.hurt.blacks (suggesting that an Obama presidency might undermine the black community's best interests).

270. *See supra* Part I.

271. *See* CHEMERINSKY, *supra* note 225, at 644 –46 (discussing judicial scrutiny).

text: equally applied sex distinctions in marriage laws.[272] Same-sex marriage bans treat men and women differently inso- far as the laws embody a sex distinction.[273] For example, a woman who wishes to marry her female partner cannot do so because she is a woman; she would, however, be able to marry her female partner if she were a man. As such, the law treats her in a particular way due to her sex. In same-sex marriage litigation, one of the couples' typical arguments is that these sex distinctions amount to disparate treatment on the basis of sex, triggering heightened scrutiny.[274] In these cases, most state supreme court justices[275] have either ignored or rejected the sex discrimination argument for same-sex marriage.[276]

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272. *See* Lau, *supra* note 182, at 852–57 (2008) (summarizing case law on marriage laws' sex distinctions); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 472–79 (2007) (same).

273. In all but six states, laws limit marriage to opposite-sex couples. *See* Joanna L. Grossman & Edward Stein, *The State of the Same-Sex Union*, FINDLAW, July 7, 2009, http://writ.news.findlaw.com/grossman/20090707.html. New York does not issue marriage licenses to same-sex couples but recognizes same-sex couples' marriages licenses from other jurisdictions. *See* Tina Kelley, *New York Gay Couples Head to Massachusetts with Marriage in Mind*, N.Y. TIMES, Aug. 3, 2008, at B3.

274. This sex discrimination argument is usually paired with claims that marriage laws impermissibly discriminate on the basis of sexual orientation and that they violate the fundamental right to marry. *See generally* Andrew Koppelman, *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1638 (1997) (summarizing those arguments). In previous writing, I have argued that the sex discrimination argument for same-sex marriage is important but insufficient. Courts ought to recognize that same-sex marriage bans discriminate both based on sex and based on sexual orientation. *See* Lau, *supra* note 182, at 874–75.

275. *See* Michael Clarkson & Ronald S. Allen, *Same-Sex Marriage and Civil Unions: 'Til State Borders Do Us Part?*, BRIEF, Spring 2007, at 54, 54 ("The legal battles and challenges [concerning same-sex marriage] are still ongoing in most states but as of yet have not been waged in the federal courts."). There are, however, two pending high-profile federal same-sex marriage cases. For background on the federal case in California, *Perry v. Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal. filed May 22, 2009), see American Foundation for Equal Rights, http://www.equalrightsfoundation.org/press.html (last visited Jan. 27, 2010). For background on the federal case in Massachusetts, *Gill v. Office of Personnel Management*, No. 1:09-cv-10309 (D. Mass. filed Mar. 3, 2009), see GLAD, http://www.glad.org/work/cases/gill-vs-office-of-personnel-management (last visited Jan. 27, 2010).

276. Among same-sex marriage cases in which state high courts have recently issued judgments, the majority opinions have typically rejected the sex discrimination argument either implicitly or explicitly. A notable exception is *Baehr v. Lewin*, which held that Hawaii's same-sex marriage ban discriminated on the basis of sex and, therefore, warranted heightened scrutiny. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993). The decision was later rendered moot

The sex discrimination argument was explicitly rejected by high-court majorities in California, Maryland, New York, Washington, and Vermont.[277] In Massachusetts and Connecticut, the majorities ignored the sex discrimination argument, even though they held that excluding same-sex couples from marriage was unconstitutional.[278] One concurring justice in Massachusetts supported the sex discrimination argument.[279] However, three dissenting justices rejected the argument.[280] The justices in Iowa and New Jersey also ignored the sex discrimination argument, even though they all agreed that excluding same-sex couples from the rights and responsibilities of marriage violated their respective state constitutions.[281]

The justices who reject the sex discrimination argument typically note correctly that the sex distinctions apply equally to both men and women.[282] That is to say, even though same-

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by an amendment to Hawaii's constitution granting the legislature the power to reserve marriage to opposite-sex couples. HAW. CONST. art. I, § 23. Some lower-level state courts have endorsed the *Baehr* argument. *See, e.g.*, Marriage Cases, No. 4365, 2005 WL 583129, at *8–10 (Cal. Super. Ct. Mar. 14, 2005), *rev'd*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008); Varnum v. Brien, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007), *aff'd*, 763 N.W.2d 862 (Iowa 2009).

277. *See In re* Marriage Cases, 183 P.3d 384, 436–40, 452 (Cal. 2008) (rejecting the argument, but holding that withholding marriage rights from same-sex couples was unconstitutional); Conaway v. Deane, 932 A.2d 571, 591–602, 635 (Md. 2007) (rejecting the argument during the course of upholding a same-sex marriage ban); Hernandez v. Robles, 855 N.E.2d 1, 11, 22 (N.Y. 2006) (same); Andersen v. King County, 138 P.3d 963, 987–90 (Wash. 2006) (same); *see also* Baker v. State, 744 A.2d 864, 880–81 n.13, 889 (Vt. 1999) (rejecting the argument, but holding that denying same-sex couples the rights and responsibilities of marriage violated Vermont's constitution).

278. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) ("[W]e do not reach the plaintiffs' claims . . . that the state's bar against same sex marriage . . . discriminates on the basis of sex . . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 & n.21 (Mass. 2003) (applying rational basis review rather than strict scrutiny, which would have been required if the bar against same-sex marriage discriminated on the basis of sex).

279. *See Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

280. *See id.* at 992 (Cordy, J., dissenting).

281. *See* Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (holding that the Iowa Constitution requires allowing same-sex couples to marry, but because there is no important governmental objective furthered by the prohibition of same-sex marriage, not because the prohibition discriminates on the basis of sex); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (holding that the New Jersey Constitution requires same-sex couples to have the opportunity to enjoy the same rights and benefits as heterosexual married couples, but because failing to grant them that opportunity violates the guarantee of equal protection to same-sex couples, not because of sex discrimination).

282. See Jeffrey A. Williams, *The Equal Application Defense: The Equal*

sex marriage bans differentiate between two groups of people—men and women—both groups have their marriage options limited based on their sex. These justices then reason that equal application of the sex distinction neutralizes any disparate treatment and that equally applied sex distinctions ought not to trigger heightened scrutiny unless the distinctions were intended to entrench—or have the effect of entrenching—group-based hierarchy.[283] Because they do not believe that marriage laws subordinate women to men, or vice versa, they refuse to review same-sex marriage bans under heightened scrutiny.[284]

In essence, these justices have created a group-subordination test stipulating that equally applied sex distinctions must subordinate a particular sex to trigger heightened scrutiny.[285] These justices distinguish same-sex marriage bans from the antimiscegenation law at issue in *Loving v. Virginia*,[286] noting that the latter was enacted to reinforce white supremacy; therefore, antimiscegenation laws' equally applied race distinctions passed the judicially constructed group-subordination test.[287]

Application Defense, 9 U. PA. J. CONST. L. 1207, 1215–18, 1221 (2007) (summarizing same-sex marriage cases and arguing that the "enduring assertion of the equal application defense is that equal application erases the burden of a facial classification"); *supra* note 276.

283. *See, e.g.*, Conaway v. Deane, 932 A.2d 571, 601 (Md. 2007) (asserting that, "[a]bsent some showing that [the same-sex marriage ban] was designed to subordinate either men to women or women to men as a class," the ban did not amount to sex discrimination triggering heightened scrutiny (internal quotation marks omitted)); Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006) (refusing heightened scrutiny on the basis of sex discrimination because "[p]laintiffs [did] not argue . . . that [New York's same-sex marriage ban] is designed to subordinate either men to women or women to men as a class"); Baker v. State, 744 A.2d 864, 880–81 n.13 (Vt. 1999) (refusing heightened scrutiny because "[t]he evidence does not demonstrate such a purpose [behind Vermont's marriage laws] . . . [to] subordinate[ ] women to men"); Andersen v. King County, 138 P.3d 963, 988 (Wash. 2006) (refusing heightened scrutiny due to the belief that Washington's same-sex marriage ban did not subordinate women).

284. *See supra* note 283.

285. For an in-depth discussion of this test, see generally Lau, *supra* note 182, at 846–55, 858–61 (providing background on the test and arguing that it cannot be supported by a proper reading of case law).

286. 388 U.S. 1, 2 (1967) (holding that Virginia's antimiscegenation law was unconstitutional).

287. *See, e.g.*, *Deane*, 932 A.2d at 601 ("[W]e find the analogy to *Loving* inapposite."); *Hernandez*, 855 N.E.2d at 11 ("[Marriage exclusions are] not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation."); *Baker*, 744 A.2d at 880 n.13 ("[R]eliance

Commentators have argued that rejecting the sex discrimination argument for same-sex marriage is incorrect.[288] Some posit that sex distinctions in marriage laws do subordinate women and, therefore, satisfy a group-subordination test.[289] Others claim that justices who have rejected the sex discrimination argument have misread *Loving v. Virginia*, which did not embody a group-subordination test.[290] In addition, commentators argue that group subordination ought not to be a requirement for heightened scrutiny because, regardless of whether marriage laws subordinate a particular sex, marriage laws' sex distinctions reinforce gender stereotyping[291] that inhibits personal autonomy.[292]

Script-oriented democracy reinforcement theory extends this last argument. Gender scripting not only limits individu-

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[on *Loving*] is misplaced. There the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy."); *Andersen*, 138 P.3d at 989 ("*Loving* is not analogous. In *Loving* the Court determined that the purpose of the antimiscegenation statute was racial discrimination . . . .").

In *Loving*, the Court twice noted in dicta that Virginia's antimiscegenation law was enacted to reinforce white supremacy. *See Loving*, 388 U.S. at 7, 11.

288. *See infra* notes 295–300 and accompanying text.

289. *See, e.g.*, ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 64 –71 (2002) (arguing that the stigmas attached both to gay men and lesbians "have gender-specific forms that imply that men ought to have power over women"); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 105 (2005) ("[L]aws prohibiting same-sex coupling . . . preserve a gender hierarchy in which women must remain subordinate to men.").

290. *See, e.g.*, KOPPELMAN, *supra* note 289, at 62–64 (pointing out that "a party challenging a racially discriminatory statute does not need to show anything about the statute's relation to racism," and arguing that a party challenging a statute that discriminates on the basis of sex need not demonstrate a relationship between the statute and the subordination of women); Appleton, *supra* note 289, at 107 ("[T]he racial classification itself triggered heightened scrutiny."); Lau, *supra* note 182, at 855 (arguing that *Loving* does not impose a group subordination requirement).

291. *See infra* notes 295–302 and accompanying text (explaining how sex-based classifications reinforce gender scripting).

292. *See* Appleton, *supra* note 289, at 107 (discussing gender scripts' effects on autonomy); Case, *supra* note 33, at 1472–73 (arguing that gender scripts are problematic "even in law that does not in any articulable way subordinate women to men"); Lau, *supra* note 182, at 869 (arguing that sex distinctions essentialize the sexes, limiting individuals' capacity for self-definition); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 969 (1984) (advocating protections of "each person's authority to define herself or himself, free from sex-defined legal constraints").

als' authority to shape their own lives; at a systemic level, gender scripts compromise political deliberation.[293] In the interest of democracy reinforcement, courts should eschew the group-subordination test and adopt a formal rule that subjects sex distinctions to heightened scrutiny, regardless of whether the distinctions are applied equally.[294]

Courts should review sex-based distinctions with heightened scrutiny because they risk entrenching gender scripts. Social science literature suggests that the mere act of categorizing individuals by group statuses can reify socially constructed differences between the groups.[295] Courts should have latitude to give sex-based distinctions a hard second look to ensure that, if sex distinctions entrench gender scripting, such harm to democracy is sufficiently outweighed by government interests. Courts are also justified in exercising a hard second look because sex distinctions embodied in law may have been informed by scripted notions of gender roles in the first place.

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293. *See supra* Part I.C.

294. It is worth emphasizing that a strong doctrinal argument for this formal rule already exists. *See supra* note 290. This Article provides additional normative support, based on democracy reinforcement, for the doctrinal rule.

295. *See, e.g.*, Phyllis Anastasio et al., *Categorization, Recategorization and Common Ingroup Identity*, *in* THE SOCIAL PSYCHOLOGY OF STEREOTYPING AND GROUP LIFE 236, 237 (Russell Spears et al. eds., 1997) ("The mere act of classifying individuals into social categories not only guides people's cognitive impressions of others, but impacts upon their affective reactions as well. . . . [E]ven categorization along arbitrary dimensions leads to bias."); Krieger, *supra* note 23, at 1191–92 ("The experiments showed that, as soon a [sic] people are divided into groups—even on a trivial or even random basis—strong biases in their perception of differences, evaluation, and reward allocation result. As soon as the concept of 'groupness' is introduced, subjects perceive members of their group as more similar to them, and members of different groups as more different from them, than when those same persons are simply viewed as noncategorized individuals."); Mitnick, *supra* note 249, at 865 (arguing specifically that legal categories have a role in "further constructing social labels, and thereby entrenching and constituting social perceptions, statuses, and identities"); Penelope Oakes, *The Categorization Process: Cognition and the Group in the Social Psychology of Stereotyping*, *in* SOCIAL GROUPS AND IDENTITIES: DEVELOPING THE LEGACY OF HENRI TAJFEL 95, 97–98 (W. Peter Robinson ed., 1998) (summarizing literature on how "mere categorization" fuels stereotyping); Don Operario & Susan T. Fiske, *Integrating Social Identity and Social Cognition: A Framework for Bridging Diverse Perspectives*, *in* SOCIAL IDENTITY AND SOCIAL COGNITION 26, 26–49 (Dominic Abrams & Michael A. Hogg eds., 1999) (providing background on relevant social science literature).

To be sure, marriage laws do not explicitly require husbands and wives to perform different gender roles.[296] For example, husbands today are legally free to be homemakers and wives are free to be breadwinners. Nonetheless, the sex-based entry requirement for marriage runs the risk of reinforcing people's gendered social understanding of legal marriage. Laws that define marriage as uniting "one man" with "one woman" reify differences between men and women, implying that men share a common gender role that is somehow discrete from the gender role shared by women.[297]

Indeed, sociologist Steven Nock referred to marriage as a "gender factory."[298] To clarify how marriage reproduces gender roles, Nock offered the example of unemployed men for whom being a husband means performing a masculinity script:

> [I]n a two-earner marriage, the rational husband would do more housework if he were to become unemployed. Unemployed husbands, however, do exactly the opposite. Shortly after losing their jobs, such men actually reduce their housework labor. For a married man to be unemployed is to deviate from cultural scripts of masculine identity. For such a man to assume responsibility for the "feminine" tasks of housework would be even more deviant.[299]

Numerous commentators have suggested that removing marriage's sex-based entry requirement would abate the laws' implicit endorsement of the gender scripts described by Nock.[300]

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296. *See* Appleton, *supra* note 289, at 116 ("[L]awmakers have developed gender-neutral rules for alimony, childcare, work outside the home, family leaves, and the like.").

297. *See supra* note 295 and accompanying text.

298. Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1977 (2000).

299. *Id*. For another discussion on how marriage reproduces gender scripts, see Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. (forthcoming 2010), *available at* http://ssrn.com/abstract=1351133. Kim notes that most married women take their husbands' surnames and explains how that dynamic both reflects and reinforces gender roles. *See id*. Furthermore, she posits that opening marriage to same-sex couples would disrupt the gender roles within marriage. *See id.*

300. *See* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 156 (2006) ("Permitting same-sex marriage is . . . an entailment of affirming gender equality—rather than gender hierarchy and rigid gender roles—as a component of marriage."); Appleton, *supra* note 289, at 116 (claiming that legalizing same-sex marriage would be consistent with principles against sex stereotyping); Case, *supra* note 33, at 1488 (arguing that allowing same-sex couples to marry would have an "anti[-sex] stereotyping impact"); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 16 (1991) (arguing that legalizing same-sex marriage would destabilize the cultural meaning of marriage and

Due to the prevalence of gender scripting in American culture, courts should indeed have the opportunity to give marriage laws' sex distinctions heightened scrutiny to ensure that they were not motivated by gender scripts. Consider the New York Court of Appeals, which stated in *Hernandez v. Robles* that marriage law could be informed by the "common-sense premise that children will do best with a mother and father in the home,"[301] and that "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[302] This language suggests that "common sense" gender scripts may taint democratic deliberation on marriage laws. Fostering beliefs that there are a scripted "model man" and a scripted "model woman" should not be a government interest that satisfies heightened scrutiny.[303]

It is worth reemphasizing that, from a strictly doctrinal standpoint, commentators have already argued that marriage laws embodying sex distinctions should be reviewed under heightened scrutiny.[304] Alternatively, one can read doctrine to include a categorical rule against government policies that stereotype based on sex, including same-sex marriage bans.[305] This section thickens the normative support for those doctrinal

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socially constructed gender roles); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 237–38 (positing that legalizing same-sex marriage would "signal that [modern marriage] is a union not grounded in hierarchical gender roles"); *see also* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 207–12 (arguing that visibility of gays and lesbians has transformed social understandings of gender roles). *But see* Nock, *supra* note 298, at 1974 – 75 (questioning the ability of law to change social norms).

301. Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

302. *Id.* at 7.

303. Note that, in contrast to this Article's assertions, the New York Court of Appeals only exercised rational basis review in *Hernandez v. Robles*. *See id.* at 9.

304. *See, e.g.*, KOPPELMAN, *supra* note 289, at 63–64 (pointing out that to challenge a statute on equal protection grounds, a challenger need only show "that there is a classification of a kind that is subject to heightened scrutiny," such as sex); Appleton, *supra* note 289, at 107 (reasoning that the requirement of heightened scrutiny in *Loving* necessarily implies heightened scrutiny of marriage laws embodying sex distinctions); Lau, *supra* note 182, at 845–46 (arguing that laws that make sex-based distinctions must now be "subject to heightened scrutiny regardless of their substantive effects").

305. Mary Anne Case has argued that the Supreme Court's sex discrimination jurisprudence has actually moved away from "conventional application of heightened scrutiny" toward a strict categorical "rule against sex-stereotyping." *See* Case, *supra* note 33, at 1452.

arguments by hooking them to democracy reinforcement rationales. By following doctrine that supports the sex discrimination argument for same-sex marriage, courts would not be trumping democratic rule. To the contrary, courts would be ameliorating gender-based impairments to deliberative democracy.

Before proceeding, it is worth noting that heightened scrutiny of equally applied sex distinctions does not—and should not—mean that all sex distinctions are per se unconstitutional.[306] This Article simply argues that heightened scrutiny is appropriate for equally applied sex distinctions. The state has often satisfied heightened scrutiny of sex discrimination.[307] For present purposes, this Article merely argues that democracy reinforcement supports the idea that equally applied sex distinctions amount to disparate treatment triggering heightened scrutiny and that reinforcing gender scripts ought not be a government interest that satisfies such heightened review.

C. RACIAL INTEGRATION IN PUBLIC SCHOOLS

Racial integration in public schools provides a contrasting case of equally applied distinctions. In the recent case of *Parents Involved in Community Schools v. Seattle School District*[308] the Court reviewed Seattle's and Louisville's racial integration programs under strict scrutiny.[309] Script-oriented democracy

306. Indeed, there may sometimes be countervailing public-regarding reasons to justify laws' express differentiation between men and women. Under existing jurisprudence, sex-based classifications that address physical differences between men and women are usually deemed constitutional. *See, e.g.*, Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 473 (1981) (justifying a statutory rape law protecting underage girls, but not boys, because the sex-based distinction was based on a "real" asymmetry: girls can become pregnant, but no boy can). For discussions on how the Court has sometimes confused stereotyped differences for real differences, see, for example, David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1002–03 (2002); Law, *supra* note 292, at 987–1002. For arguments that both biological and cultural differences between men and women should sometimes be taken into consideration to further substantive equality, see, for example, Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1332–35 (1987). *See also* Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1953 (2006) (arguing that sex-segregated schools should sometimes survive heightened scrutiny).

307. *See supra* note 306.

308. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007).

309. Notably, the racial integration program at stake in *Parents Involved* was intended to combat segregation and no Justice argued that the program

reinforcement theory suggests that the Court was correct to subject the programs to heightened review, but applied a form of heightened review that was too stringent.

In Seattle and Louisville, students chose the schools that they wanted to attend, subject to some constraints including race-based constraints.[310] The race-based constraints applied equally to students regardless of their race; for example, in Seattle, "white" students were constrained when applying to schools already oversubscribed with white students and "nonwhite" students were constrained when applying to schools already oversubscribed with nonwhites.[311] *Parents Involved* shows that the Court applies heightened scrutiny to all racial classifications, even if they are equally applied and do not reinforce group-based racial hierarchy.[312]

In *Parents Involved*, the Court erred—not in reviewing the programs under heightened scrutiny, but by applying a virtually "fatal in fact" version of heightened review that amounted to a policy of color-blindness.[313] The Court was correct to employ heightened review because even race distinctions intended as means to beneficent ends risk entrenching race-based scripts that impair democracy.[314] As Goodwin Liu, a proponent of racial diversity in education, wrote: "[R]ace-conscious school assignment is not immune to the risk of racial stereotyping and other harms associated with government decision-making

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subordinated any particular race; the programs disadvantaged students—both whites and nonwhites—who sought to attend a school already oversubscribed with students of the same race. *See* Lau, *supra* note 182, at 855–56 (discussing the effects of the racial integration programs at stake in *Parents Involved*, 127 S. Ct. at 2747–48).

310. In both of the school districts, students applied to schools of their choice and the districts used race as a tiebreaker to determine school assignments to racially imbalanced schools. The race-based tiebreaker was applied equally across races. For example, Chief Justice Roberts acknowledged that, for the 2000–2001 academic year, Seattle's racial tiebreaker sometimes favored white students and sometimes favored nonwhite students. *See Parents Involved*, 127 S. Ct. at 2747–48; *see also* Lau, *supra* note 182, at 855–56 (providing background on the racial integration programs).

311. *See Parents Involved*, 127 S. Ct. at 2747–48. I use the racial labels "white" and "nonwhite" because they were the categories that Seattle used. *See id.*

312. *See* Lau, *supra* note 182, at 857–61.

313. In previous writing, I have criticized heightened review that is so stringent as to be "fatal in fact." *See id.* at 849, 872–73.

314. *See supra* note 295 and accompanying text.

based on race. [Heightened] scrutiny ensures that those harms are minimized or avoided."[315]

Commentators have criticized *Parents Involved*—rightly so—for its outcome.[316] However, it is imperative to bring nuance to these critiques. Some commentators, including prominent jurists like Judge Kozinski of the Ninth Circuit, have suggested that equally applied racial distinctions should not trigger heightened scrutiny if they were enacted with benevolent intentions.[317] This argument is, however, misguided. First off, benevolence can be difficult to assess. Moreover, even benevolent intentions can produce the inadvertent negative effect of unduly entrenching racial scripts. This was the case in *California v. Johnson*, where inmate segregation risked entrenching racial scripts even though the state's goal of preventing violence was benign.[318] The state could have, and should have, avoided the entrenchment of racial scripts by employing other means to prevent violence.

At first glance, the racial integration program in Seattle raised concerns about entrenching harmful stereotypes, especially since the program grouped all "nonwhite" students into one category even though "nonwhites" were quite diverse.[319] This categorization scheme risked stereotyping all nonwhites

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315. Goodwin Liu, Seattle *and* Louisville, 95 CAL. L. REV. 277, 280–81 (2007) ("When government acts on the premise that racial difference and division permeate our society, it runs the risk of magnifying the perception or reality of those differences."); *see also Parents Involved*, 127 S. Ct. at 2758 (expressing concern that racial balancing would effectively reinforce racial stereotypes); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1259–61 (1998) (arguing that social science suggests affirmative action programs run the risk of entrenching stereotypes, but that those risks can be overcome); Krieger, *supra* note 23 (summarizing social science literature on how "mere categorization" risks entrenching perceptions of group-based differences).

316. *See, e.g.*, Editorial, *Fracturing a Landmark*, L.A. TIMES, June 29, 2007, at A34; Donald Jones, Op-Ed., *Race: Integration Benefits All*, MIAMI HERALD, July 28, 2007, at A35; Kenneth W. Mack, *Which Side is* Brown vs. Board *on?*, L.A. TIMES, July 4, 2007, at A21 (same); Charles J. Ogletree, Jr., Op-Ed., Brown*'s Legacy Lives, but Barely*, BOSTON GLOBE, June 29, 2007, at A17 (same); Editorial, *Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28.

317. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1193–96 (9th Cir. 2005) (en banc) (Kozinski, J., concurring), *rev'd* 127 S. Ct. 2738, 2768 (2007).

318. Johnson v. California, 543 U.S. 499, 506–07 (2005) (holding that California's policy of segregating inmates by race could not withstand strict scrutiny, even though the policy was intended to prevent violence).

319. Seattle's population was approximately 24% Asian, 24% black, 11% Latino, and 41% white. Liu, *supra* note 315, at 286–88.

as interchangeable.[320] This construction of binary racial categories, white and nonwhite, raises concerns not only because it reinforces the salience of racial scripts generally,[321] but also because binary scripts are particularly harmful for at least three reasons.

First, the oppositional categories of whites and nonwhites reinforce the country's history of "racial othering," where whiteness is regarded as the ideal script against which other racial identities are defined and (de)valued.[322] Second, because the dominant racial paradigm in America is the black-white binary, the category of nonwhite is easily conflated with black, rendering other groups such as Asian Americans invisible.[323] Third, to the extent that groups such as Asian Americans are not invisible, clumping communities of color under one label can still be problematic. Frank Wu has explained how problems with the unrealistic model minority script for Asian Americans are exacerbated when society conflates Asian American identity with other minority identities.[324] Because different groups face different prejudices and structural barriers to achievement, the idea that any group can serve as a "model" for others is problematic.[325] Treating nonwhites as a monolithic entity facilitates this problematic thinking.[326]

Despite these concerns, the programs in Seattle and Louisville should have survived heightened review. Although this Article stops short of prescribing a specific test for heightened scrutiny,[327] it does contend that strict scrutiny, at least as it was exercised in *Parents Involved*'s plurality and concurring opinions, was an overly stringent version of heightened review. Both Seattle's and Louisville's integration programs ultimately contributed to the undoing of racial scripts, which would rein-

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320. See id.

321. On how "mere categorization" contributes to stereotyping, see *supra* note 295 and Lau, *supra* note 182, at 866–69.

322. *See* Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882, 885–92 (1997) (describing the phenomenon of "othering" whereby minority identities, and the value of minority cultures, are defined in opposition to a dominant, majoritarian identity).

323. *See* Robert S. Chang, *The Nativist's Dream of Return*, 9 LA RAZA L.J. 55, 55 (1996) (analyzing how Asian Americans have historically been omitted from American racial discourse, which focuses on black-white dynamics).

324. *See* WU, *supra* note 18, at 64 –66.

325. *See id.* at 64 –67.

326. *See id.*

327. *See supra* note 226 and accompanying text.

force democratic deliberation. Even though use of racial categories in school integration raises concerns about stereotypes in the short term, fostering interracial socialization in educational settings likely has the net effect of reducing stereotyping,[328] thereby enhancing democratic deliberation in the long term. Social science research suggests that interaction among a diverse student body helps to dispel myths behind racial stereotypes.[329]

Accordingly, the plurality in *Parents Involved* was incorrect to assert that racial diversity is not a compelling government interest in K–12 education contexts.[330] Racial diversity should be considered a sufficient government interest for purposes of heightened review, because diversity reinforces democracy by combating stereotypes. As for whether Seattle's and Louisville's racial integration programs were sufficiently related to the goal of diversity, commentators have argued that the programs were likely to be the most effective means for achieving racial diversity.[331]

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328. *See* Liu, *supra* note 315, at 282–90 (suggesting that race-based integration programs can combat stereotyping in the long run, rather than exacerbate notions of racial difference in society).

329. *See* Anastasio et al., *supra* note 295, at 239–40 (discussing how categorizing individuals for the purpose of uniting social groups can have the ultimate effect of destabilizing the salience of group stereotypes); Krieger, *supra* note 315, at 1275 (same); Liu, *supra* note 315, at 284 –85 (discussing social science literature on racial integration's effects on stereotyping). Researchers often use the term "contact hypothesis" to refer to this notion that socialization among diverse individuals reduces stereotypes. For a recent insightful discussion of the contact hypothesis in employment contexts, see Green, *supra* note 6, at 381–88.

330. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752–59 (2007) (plurality opinion) (arguing that racial diversity in K–12 education is not a compelling government interest). In his concurring opinion, Justice Kennedy acknowledged that diversity is a compelling interest in K–12 education settings. *Id.* at 2791 (Kennedy, J., concurring). Justice Kennedy argued, however, that the racial integration programs at hand were not narrowly tailored to achieve such diversity. *Id*. at 2791–97.

331. *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 154 –55 (2008) (arguing that the schools' programs were the most direct means for achieving racial diversity and combating racial isolation); *see also* Krieger, *supra* note 315, at 1276–1329 (arguing that color-blind policies are less effective than affirmative action programs in reducing bias).

Goodwin Liu has suggested that the white/nonwhite scheme was defensible in the specific context of Seattle because there was, in fact, little variance among nonwhites in terms of their residence or school preferences. Liu, *supra* note 315, at 286–90. Liu explains:

In sum, there ought to be a formal rule that explicit racial distinctions—like sex distinctions—trigger heightened scrutiny, regardless of whether they are equally applied and regardless of whether they reinforce group-based hierarchies. These classifications potentially entrench scripts that compromise democratic deliberation. Courts should have the authority to double check that the government's constructions of sex and racial categories do more good than harm. Importantly, however, these distinctions should pass heightened review if their benefits to democracy counterweigh their costs, for example, in the case of certain state-sanctioned racial integration programs.[332]

The law has a powerful expressive function.[333] Heightened review of sex and race classifications sends a significant social message. Heightened review signals that society should view race and sex distinctions with skepticism.[334] Just as the government should be judicious in categorizing individuals based on race or sex, private members of society should also think carefully before making generalized judgments based on race or sex, especially during the process of democratic deliberation.

D. RACIAL AND RELIGIOUS PROFILING

Script-oriented theory also provides some guidance for disparate impact doctrine. At present, state action that does not discriminate on its face but has a disproportionate impact based on a suspect status does not trigger heightened review unless the court finds that invidious intent motivated the

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> [I] nstead of stereotyping nonwhite groups as interchangeable, the white/nonwhite dichotomy in the Seattle plan simply responds to the reality of the city's stark racial geography. The plan illustrates that the expressive value of a racial classification can be quite different when examined in local context than when considered in the abstract.

Id. at 288. A similar use of white/nonwhite categories elsewhere may have been less defensible than it was in Seattle. *See id.* at 286–90. This sort of nuanced analysis is what heightened review should ensure.

332. *Cf.* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 203–05 (1991) (arguing that presumptions are correctly rebutted when rebuttal better serves the underlying purpose of the presumption).

Note that this section has argued that democracy reinforcement is one reason why Seattle's and Louisville's programs should have passed heightened scrutiny. This analysis does not preclude the possibility that the programs sufficiently advanced other government interests in a way that should also save the programs from constitutional challenge.

333. For background, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–25 (1996).

334. *See supra* Part II.B.

law.[335] This test has spawned a cottage industry of criticism, which typically argues that constitutional law on disparate impact is underprotective.[336]

Despite commentators' criticisms, courts have held steadfastly onto their test for discriminatory motive. A common reason offered for the discriminatory-motive test is that lowering the bar for disparate impact claims would open the floodgates to litigation.[337] In other words, the discriminatory-motive test is embraced as a limiting principle. Consider a hypothetical in which the government funds research on a medical condition that disproportionately affects Asian Americans. Should that funding decision trigger heightened review simply because it disproportionately benefits a particular racial group? Some commentators have expressed concern that lowering the bar for

335. *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (rejecting disparate impact arguments in a case regarding race discrimination). Several statutory antidiscrimination laws, however, do not include an intent requirement for disparate impact claims. *See* Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 112–15 (1998) (explaining that the Supreme Court has not required plaintiffs in Title VII cases to demonstrate that the employer acted with a discriminatory purpose).

336. *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 374 n.5 (2007) (listing articles that have criticized the limited scope of colorable disparate impact claims).

Relatedly, commentators have criticized the United States' exceptionalism compared to foreign peers on the topic of disparate impact. *See, e.g.*, Arthur Chaskalson, Brown v. Board of Education*: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503, 510–11 (2005) (explaining that South African courts do not require discrimination claims to prove intent and in this way South Africa follows the Canadian approach on this issue); Hunter & Shoben, *supra* note 335, at 115–23, 131 (examining disparate impact jurisprudence in the European Court of Justice, the United Kingdom, Australia, New Zealand, Canada, and UN treaty bodies, and asserting that "[t]he limitations imposed on the application of disparate impact analysis in the United States have not been reflected in international jurisdictions"); Lau, *supra* note 225, at 85–90 (explaining the lack of an intent requirement for disparate impact claims in Hong Kong).

337. *See, e.g.*, Dorf, *supra* note 180, at 1013–14 (noting the "floodgates" argument); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 561–62 (1998) (noting suggestions that intent requirements prevent frivolous discrimination claims); Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 69 (1994) (noting that, without intent as a limiting principle, disparate impact theory can be "overinclusive"); Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 189 (1999) ("[T]he biggest problem with an impact rule [without an intent requirement] is overinclusiveness.").

disparate impact claims would result in frivolous lawsuits, such as challenges to innocuous medical funding decisions.[338]

Script-oriented theory offers an alternative to the status quo. An antistereotyping principle should coexist with the test for discriminatory motive. At least in terms of deliberative democracy, among the most troubling of disparate impact claims are those that entrench identity scripts because scripting impairs deliberation. As such, courts should extend heightened review to cases of disparate impact that entrench scripts associated with suspect statuses, *regardless* of whether the disparate impact resulted from invidious intent.[339]

This proposed reform allows a new set of cases to fall within the domain of disparate impact cases triggering heightened scrutiny. Courts can define narrowly the set of disparate impact cases that reinforce stereotypes. Even with a narrow definition, however, criminal profiling that generates substantial disparate impact based on race and religion[340] should trigger heightened scrutiny because there is a rich literature on how the public perception of racial and religious profiling perpetuates corresponding stereotypes.[341]

Consider the practice of *Terry* stops,[342] which often involve racial or religious profiling.[343] Even when statistical evidence

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338. *See* Leipold, *supra* note 337.

339. *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 889–90 (2004) (arguing that equal protection analysis should shift focus from motives to harms).

340. *See, e.g.*, Volpp, *supra* note 28, at 1576–86 (discussing criminal profiling's effects on Muslims); Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics To Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 282–83 (2008) (describing how criminal profiling at traffic stops has a disparate impact based on race).

341. *See, e.g.*, I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 60–62 (2009) [hereinafter Capers, *Policing*] (explaining how profiling policies perpetuate stereotypes); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 861, 875–76 (2002) (same); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 803–17 (1999) (same); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1815–17 (2005) (same); Lisa Walter, Comment, *Eradicating Racial Stereotyping from* Terry *Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 276 (2000) (same); I. Bennett Capers, Race, Citizenship, and the Fourth Amendment (Jan. 30, 2010) (unpublished manuscript on file with author) [hereinafter Capers, Race, Citizenship] (same).

342. *Terry* stops got their name from *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* stops are limited warrantless detentions based on "reasonable suspicion" that a person may be armed and dangerous. *Id.* at 27. *Terry* stops are an exception

shows that these practices generate substantial disparate impact based on race or religion, they are difficult to challenge under existing equal protection doctrine because invidious intent behind the practices is extremely difficult to prove.[344] Under the proposed doctrinal reform, however, the practices should be reviewed under heightened scrutiny because the practices risk signaling an endorsement of criminality scripts based on race and religion.[345]

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to the "probable cause" requirement for search and seizures. *Id.* If law enforcement agents have reasonable suspicion that a person is armed and dangerous, they can pair the limited detention and questioning with a pat down for weapons. *Id.* at 30.

343. Among the most discussed forms of racial profiling are "pretextual traffic stops in the hope of discovering contraband . . . . This practice—known to some as driving while black or driving while brown—disproportionately impacts law-abiding minorities." Capers, *Policing*, *supra* note 341, at 64; *see also* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 298–303 (2001) (outlining empirical studies that describe the relationship between racial profiling and vehicle stops); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN ST. L. REV. 1181, 1203 (2005) (arguing that the Supreme Court has failed to account for the fact that time is not experienced uniformly by all people and that this failure has led to the deregulation of racial profiling); Capers, Race, Citizenship, *supra* note 341.

344. For example, in *United States* v. *Duque-Nava*, 315 F. Supp. 2d 1144, 1153–64 (D. Kan. 2004), the court held that statistical evidence sufficed to prove that traffic stops had a race-based disparate impact, but refused to infer discriminatory intent from statistics on traffic stops. Courts are generally loathe to infer discriminatory intent from statistical evidence. *See* Kevin R. Johnson, *Racial Profiling after September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 71–72 (2004) (summarizing equal protection case law on racial profiling and noting the difficulty of proving intent); Whitney*, supra* note 340, at 280–82 (summarizing case law and calling the intent requirement for disparate impact claims a "virtual roadblock" to equal protection challenges against racial profiling). For an exceptional case, see *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (holding that unrebutted statistical evidence of racial profiling established discriminatory intent).

345. *See* Lenhardt, *supra* note 339, at 895 (suggesting that a practice of *Terry* stops that disproportionately targets African American neighborhoods communicates a negative message about African Americans).

To be clear, even after reforming the limiting principle for disparate impact claims, challenges to profiling policies will still be difficult because current evidentiary rules make proving disproportionate impact difficult. *See* Sarah Oliver, Atwater v. City of Lago Vista*: The Disappearing Fourth Amendment and Its Impact on Racial Profiling*, 5 J. L. & SOC. CHALLENGES 1, 22–24 (2003) (describing the procedural hurdles related to evidence in racial profiling cases, especially after *United States v. Armstrong*, 517 U.S. 456, 465 (1996), which made "access to discovery nearly impossible"). Democracy reinforcement theory suggests that those evidentiary rules should also be reformed to facilitate challenges against racial and religious profiling. *See supra*

This Article's proposed reform joins other scholarship in arguing for courts in equal protection cases to inquire into the cultural implications of government policies.[346] A likely objection to the proposed antistereotyping principle is that courts do not have the capacity to assess whether policies reinforce stereotypes.[347] Other writers have made strong rebuttals to such objections.[348] While this Article cannot rehash all of those arguments, it is worth highlighting that courts already do identify instances where laws perpetuate stereotypes.[349] Moreover, the proposed inquiry into a law's effects would be no more diffi-

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Part II.A (explaining the scope of the democracy reinforcement theory and its application). However, a full analysis of how to reform evidentiary rules is beyond the scope of this Article.

346. *See, e.g.*, Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000) (suggesting that courts evaluate the "expressive content" of laws); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (contending that courts should assess the "cultural meaning" of policies); Lenhardt, *supra* note 339, at 878–82 (arguing that courts should examine how laws contribute to racial stigma).

It is not feasible to fully address within these pages the arguments how courts should assess the cultural implications of laws. It is worth noting, however, that Robin Lenhardt has offered a particularly helpful article on the matter, arguing that courts can examine social and historical context to determine whether government policies risk reinforcing race-based stigma. *See* Lenhardt, *supra* note 339, at 891–96. Similarly, courts should examine social and historical contexts to determine whether policies entrench identity scripts. This Article focuses on scripts because it has been concerned with scripts' relation to democratic reinforcement. Focus on group-directed stigma and focus on scripts are not mutually exclusive; instead, they are likely to overlap. *Cf. supra* Part II.B–C (discussing how focuses on scripts and group subordination can coexist).

347. *See* Lenhardt, *supra* note 339, at 925 (responding to the criticism that courts may lack the competence to address whether policies reinforce stereotypes).

348. For existing rebuttals to this objection, see, for example, Lawrence, *supra* note 346, at 381–82 (defending the competence of the courts in applying the "cultural meaning" test); Lenhardt, *supra* note 339, at 925–26 (explaining that requiring courts to address policies within a specific context is not a novel concept).

349. *See supra* note 253 and accompanying text (citing cases in which courts have examined the causes and effects of stereotyping); *see also* Susan T. Fiske et al., *Social Science on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1051–55 (1991) (describing how courts used social science literature to discuss sex stereotyping in the landmark case of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)). Perhaps the most well-known and celebrated case in which the Supreme Court explored cultural implications of state action is *Brown v. Board of Education*, 347 U.S. 483, 493–95 (1954) (explaining that racial segregation was culturally understood as denoting the inferiority of African Americans).

cult than the current inquiry into legislative motive, which usually involves an investigation of legislative history.[350] Commentators have likened examination of legislative history to the arbitrariness of looking into a crowd and picking out one's friends.[351]

Note that the proposed reform of disparate impact doctrine still offers courts a meaningful limiting principle to combat concerns that frivolous cases, such as the hypothetical case on scientific research, would flood courts.[352] Supplementing the discriminatory motive test with an antistereotyping exception should not stoke those fears. While there is plenty of commentary suggesting that racial profiling fosters racial stereotyping,[353] there is not a similar body of criticism that race-based funding of scientific research fosters stereotyping. The antistereotyping exception does not open the floodgates.

Note also that allowing heightened review of disparate impact cases that entrench stereotyping should not mean that the policies at hand must fail. Heightened review should simply give courts authority to give these policies a serious second look, ensuring that policies that entrench stereotyping, such as racial profiling, are used extremely judiciously.[354]

As discussed in Part II, criminality scripts profoundly impact democratic deliberation.[355] As Jody Armour has pointed out, racial profiling produces a "chilling effect" among black men, who are often the victims of criminal profiling.[356] Black men who fear being scripted have reasons to disengage from dialog with majoritarian communities, out of fear that they will

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350. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1226 (2007) (explaining that the basic premise of the traditional model of statutory interpretation assumes that the legislature's intent can be determined by the statute's legislative history).

351. *See id.* at 1229–30 (2007) (attributing the crowd metaphor to Judge Harold Levanthal).

352. *See supra* note 337 and accompanying text.

353. *See supra* note 341 and accompanying text.

354. *See supra* note 313 and accompanying text.

355. Although this Article focuses on how criminal profiling affects democracy by perpetuating identity scripts, it is worth noting that profiling policies also have a more direct effect on democracy: unequal rates of incarceration distort the collective nature of democratic rule. *See* Sklansky, *supra* note 341, at 1816–18 (explaining how disproportionate rates of incarceration have an "impoverishing" effect on democracy).

356. *See supra* note 149 and accompanying text.

be prejudged as violent criminals.[357] When black men do engage the majoritarian community, there are incentives for them to skew their expression to work around criminality scripts.[358] While Jody Armour focused on the chilling effect of blackness scripts,[359] another example of profiling's chilling effect can be found in the 2008 election cycle. As discussed above, the stereotype of Muslims as terrorists likely had a chilling effect on Obama when he was running for office.[360] Because criminal profiling policies entrench these race- and religion-based scripts, they risk entrenching impairments to democratic deliberation. Accordingly, they warrant heightened scrutiny.

CONCLUSION

The United States has come a long way in remedying inequalities. The 2008 election year highlights that fact. Individuals such as Barack Obama, Sarah Palin, and Hillary Clinton have put cracks—perhaps gaping holes—in the political glass ceilings that have hovered over African Americans and women. While this progress is certainly a cause for praise and celebration,[361] the celebration of these successes should not overshadow residual inequalities and other impairments to deliberation that still stifle American democracy.[362]

This Article has illuminated some ways[363] in which the social salience of race and sex continues to hamper democratic

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357. *See supra* note 149 and accompanying text.

358. *See supra* note 149 and accompanying text; *see also* Sklansky, *supra* note 341, at 1816 (arguing that racial profiling leads the profiled racial groups to "adopt roles of exaggerated deference and severely diminished self-agency . . . [in] social life").

359. *See* Armour, *supra* note 149.

360. *See supra* notes 129–34 and accompanying text.

361. Barack Obama's election elicited well-deserved praise from all over the world and renewed the United States' reputation as a land of opportunity. *See* Ethan Bronner, *The Promise: For Many Abroad, an Ideal Renewed*, N.Y. TIMES, Nov. 5, 2008, at A1.

362. It may be easy to overlook residual inequalities, especially with regard to race, since the media has characterized Barack Obama's ascendency as ushering in a "post-racial" era. *See supra* note 230. For additional criticism against claims that the Obama presidency ushered in a post-racial era, see Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743, 744–45 (2009).

363. For discussion of another way in which race- and sex-based inequalities continue to stymie democracy, see Gregory S. Parks & Jeffrey J. Rachlinski, *A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Race* 2 (Cornell Legal Studies Research Paper No. 08-007, 2008),

functioning. To ameliorate such impairments to democracy, this Article proposed four ways to tailor equal protection doctrine. First, bifurcate the test for suspect status. Second, regard all equally applied race and sex distinctions as disparate treatment that triggers heightened scrutiny. Third, ensure that a law's contribution to combating identity scripts weighs in favor of upholding the law. And fourth, in disparate impact cases, supplement the discriminatory-motive test for heightened scrutiny with a test for laws' stereotyping effects. These four proposals are examples of a script-oriented approach to democracy reinforcement. They seek to reinforce democracy by allowing courts to prevent the entrenchment of harmful identity scripting and to correct for laws that emerged from script-tainted deliberation in the first place.

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available at http://ssrn.com/abstract=1102704 (examining how unconscious biases affected the 2008 presidential race).