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A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class

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A CRITICAL LINGUISTIC ANALYSIS OF EQUAL PROTECTION DOCTRINE: ARE WHITES A SUSPECT CLASS?

by REGINALD C. OH

This Article contends that the linguistic structure of equal protection doctrine has played a major role in shaping and influencing its evolution and development. To show how linguistic structure shapes substantive legal discourse, this Article will examine a fundamental question that deals with equal protection law: when should the Court subject a law to heightened judicial scrutiny? Typically, when dealing with equal protection challenges to governmental action, the Court will generally defer to legislative judgment, presume the constitutionality of the legislation, and uphold the statute. However, under some circumstances, the Court will remove the presumption of constitutionality and subject certain legislation to rigorous, skeptical judicial scrutiny.

In some cases, the Court has justified heightened judicial scrutiny of legislation whenever the government has employed a suspect classification; i.e., when the government has classified on the basis of a suspect trait. In other cases, the Court has contended that heightened judicial scrutiny is justified whenever the government enacts legislation that discriminates to the disadvantage of a suspect class.

So, when does the Court apply heightened judicial scrutiny? Does it apply heightened scrutiny when a law employs a suspect classification, or does it apply heightened scrutiny when a law discriminates against a suspect class? However one answers that question, the curious thing is that, until recently, very few scholars or lawyers have asked critical questions about the differences between the terms suspect class and suspect classifications. Instead, courts, lawyers, and scholars have been prone to using the two terms interchangeably, implying that whether one describes equal protection doctrine either as the law of suspect classifications or as the law of suspect classes, it does not matter, since both terms presumably refer to the same theory.

The thesis of this Article is that, even though courts, lawyers and scholars have failed to recognize the differences between the two terms, the actuality is that a suspect classification is substantively different from a suspect class. The term suspect classification refers to traits or characteristics, while the term suspect class refers to vulnerable political groups.

Recent scholars are finally starting to recognize and to critically examine the differences between a theory of suspect classifications and a theory of suspect classes. Based upon their critical examination of equal protection doctrine, scholars contend that a dramatic shift in equal protection doctrine has occurred with little notice. Thus, Professor Jed Rubenfeld contends that, without any explicit ruling, the Court has transformed equal protection law from a doctrine of “suspect

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[583]
classes" to a doctrine of "suspect classifications."!

This Article accepts Professor Rubenfeld's conclusion that the law of equal protection today is a law of pure suspect classifications and not a law of suspect classes, and that the current formulation of equal protection law reflects the culmination of a dramatic doctrinal transformation. The equal protection doctrine was born out of the judicial impulse to protect politically vulnerable groups like African-Americans from invidious laws that treated them as inferior, second-class citizens. However, under current equal protection, the Court is no longer concerned with protecting politically vulnerable groups from legislative harm. Rather, the Court is concerned solely with prohibiting governmental action that classifies on the basis of a suspect trait or characteristic.

This Article will critically examine the emergence of the pure suspect classification theory of equal protection. Specifically, this Article will focus on the how question: how did an equal protection doctrine that developed out of concern for the protection of politically vulnerable groups become transformed into a doctrine that now considers that interest irrelevant to equal protection analysis?

This Article will be divided into four parts. Part I will explain the differences between the terms suspect classification and suspect class. It will then show that scholars and the Court have conflated the two theories and have treated them as if they have the same substantive meaning. Part I will then argue that the terms suspect classifications and suspect classes refer to two substantively different theories of equal protection: a theory of suspect classifications focuses on prohibiting the government from classifying on the basis of certain traits, while a theory of suspect classes focuses on prohibiting the government from discriminating to the disadvantage of politically vulnerable groups.

Part II will analyze the Court cases dealing with suspect class/classifications, and contend that the law of equal protection has always been concerned with the protection of suspect classes, but that in some cases, it has used and emphasized the language of suspect classes, while in other cases it has used and emphasized the language of suspect classifications. The case law can be divided into two categories. The first category includes those cases in which the Court justified heightened judicial scrutiny of laws only when the laws discriminated against a suspect class. Thus, under this theory, a law or classification would be considered presumptively invidious or suspect only when that classification was used to define and operate to the peculiar disadvantage of a suspect class. This Part will argue

1. See, e.g., Jed Rubenfeld, Affirmative Action, 107 YALE L. REV. 427, 465 (1997) ("The shift from a smoking-out to a justificatory use of strict scrutiny parallels a more obvious shift in the Court's equal protection jurisprudence: from classes to classifications."); 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, 699 (2003) ("The Court's equal protection doctrine contains numerous 'departures' from 'substantive' and 'procedural' standards like the class-to-classification and classification-to-class shifts."); Julie A. Nice, Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach, 85 CORNELL L. REV. 1392, 1400 (2000) ("The fifth antinomy represents a particularly strange turn in equal protection doctrine—the shift from protecting classes of people who suffer prejudice, such as African Americans or females, to prohibiting any use of classifications, such as race or sex, thus extending protection to dominant classes that historically have not suffered prejudice . . . .").
that the suspect class theory of equal protection is more consistent with the spirit and principle of equal protection doctrine that developed out of the concerns for racial justice and equality underlying the Brown v. Board of Education\(^2\) decision.

The second category includes those cases in which the Court began to justify heightened judicial scrutiny of laws primarily by focusing on the special nature of a particular classifying trait. However, even in these cases, while using the language of suspect classifications, an analysis of their reasoning shows that the Court still ultimately justified heightened judicial scrutiny only when a politically vulnerable group commanded extraordinary attention from the majoritarian political process. In other words, while using the language of suspect classifications, the Court in these cases was still primarily concerned about protecting suspect classes.

Part III will contend that, at least with regard to cases dealing with race and affirmative action, the Court has eliminated suspect class analysis and adopted an equal protection law of pure suspect classifications. A theory of pure suspect classifications justifies heightened judicial scrutiny based solely on the suspect nature of certain traits or characteristics, with no reference or concern at all for the protection of politically vulnerable groups. Under this theory, certain traits are suspect, because there is something inherent in the nature of traits such as race and gender that make them susceptible for invidious use by the government, and not because such traits are used to discriminate to the peculiar disadvantage of politically vulnerable groups. This Part will examine the Regents of University of California v. Davis,\(^3\) Richmond v. Croson,\(^4\) and Adarand v. Pena\(^5\) decisions to show how, through the affirmative action cases, the Court developed its current equal protection theory of pure suspect classifications. A pure suspect classification analysis made it much easier for the Court to justify strict scrutiny of race-conscious affirmative action programs, because the Court was able to avoid having to declare whites as a suspect class in order to justify heightened judicial protection of white political interests.

Part IV will discuss some of the linguistic implications in my analysis. First, this Part will explain the theory of critical or meta-linguistics, a field of language study that contends that the structure of language embodies particular views about the nature of reality. This Part will then contend that the linguistic structure of the terms suspect classification and suspect class help to explain the doctrinal shifting between suspect class and suspect classification analyses, and to explain how the Court ultimately adopted an equal protection law of pure suspect classifications. In short, the move to a pure suspect classification analysis reflects the Court’s commitment to an Aristotelian essentialist view of reality, and the linguistic structure of the term suspect classification actually embodies that essentialist view.

Second, this Part will argue that the linguistic conflation of the terms suspect class and suspect classification facilitated the Court’s silent transformation of equal protection doctrine. This Article, thus, is a call for the development of a critical linguistic analysis of law, an analysis that focuses on how courts rely on linguistic

\(^3\) 438 U.S. 265 (1978).
techniques to make invisible yet significant changes in legal doctrine.

I. SUSPECT CLASSIFICATIONS VERSUS SUSPECT CLASSES IN EQUAL PROTECTION DOCTRINE

Scholars contend that there has been a dramatic transformation of equal protection doctrine. In light of the Court's recent affirmative action cases, Professor Rubenfeld argues that "today's strict scrutiny doctrine can no longer be organized, and is no longer organized, around the concept of suspect classes. It is organized instead around the concept of suspect classifications—a momentous, if often unnoticed, shift." If, as Professor Rubenfeld argues, the shift from class to classification analysis represents a dramatic substantive transformation of equal protection doctrine, the question arises, why has this dramatic shift gone largely unnoticed? This Article contends that the linguistic confusion between the very similar terms suspect class and suspect classifications has played a role in facilitating the largely invisible transformation of equal protection doctrine. This Part will explain the differences between class and classification analysis, and show how the Court and scholars have typically conflated the two concepts together.

A. The Doctrine of Suspect Classes

Under the doctrine of suspect classes, a law will be subject to heightened scrutiny only if the law can be shown to "operate to the peculiar disadvantage of a suspect class." A social group will be considered "suspect" if it suffers from the traditional indicia of suspectness: whether a class is saddled with disabilities, whether it has been subject to a history of unequal treatment, whether the group has been relegated to "position[s] of political powerlessness as to command extraordinary protection from the majoritarian political process." If a group fails to meet the traditional indicia of suspectness, the group will be considered a non-suspect class, and laws discriminating against them will be subject to deferential rational basis review.

The term "suspect class," therefore, refers to a historically situated social group that has been disadvantaged and invidiously discriminated against in the political process. When the Court talks about suspect classes, it is not referring to traits or characteristics, but instead it is referring to social groups, like racial minorities, women, the poor, and the disabled. Specifically, the Court is referring to historically situated social groups who have been subject to a history of

7. See Plyler, 457 U.S. at 216-17 ("Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.").
9. Id.
10. Id.
prejudicial and hostile treatment.  

B. The Doctrine of Suspect Classifications

The problem with referring to the law of equal protection as the doctrine of suspect classes is that the Court has also sometimes referred to equal protection doctrine as the doctrine of suspect classifications, and not as the doctrine of suspect classes.  

Under the doctrine of suspect classifications, when a court is dealing with an equal protection challenge to a law, it must first determine whether a challenged law employs a suspect or a non-suspect classification. A legislation that relies on a suspect classification, like "race," will be subject to strict scrutiny. Under strict scrutiny review, a legislative classification will be upheld only if the classification is narrowly tailored to advance a compelling state interest. In contrast, when a non-suspect classification is challenged as a violation of equal protection, courts will use the lowest level of scrutiny, the rational basis test, to analyze the constitutionality of the law. With regard to non-suspect classifications, courts will generally give the legislature wide deference and uphold the law unless it can be shown to be irrational or enacted for an illegitimate purpose.

Under equal protection analysis, the critical inquiry for the Court is to determine if the state has enacted a suspect as opposed to a non-suspect classification. All laws classify on some basis, but the Court will treat only laws that classify on the basis of certain traits or characteristics as suspect. Under current equal protection law, the Court has held that traits such as race, national origin, alienage, gender, and illegitimacy are suspect classifications subject to heightened judicial scrutiny.


13. See, e.g., Croson, 488 U.S. at 493 (explaining the equal protection doctrine and explaining that when the doctrine is applied to race, the means must fit a compelling goal); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'").

14. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").


16. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (stating that legislation will be considered valid when it is rationally related to a legitimate state interest).

17. See id. ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.").


19. See Cleburne, 473 U.S. at 440-41. Race, national origin, and alienage classifications are subject to strict scrutiny. Gender and illegitimacy classifications are subject to intermediate scrutiny.
C. Confusing the Terms Suspect Classification and Suspect Class

The question arises, what is the law of equal protection? When should the Court apply heightened judicial scrutiny? Should it apply heightened scrutiny when a law employs a suspect classification, or should it apply heightened scrutiny when a law discriminates against a suspect class? And, perhaps more importantly, does it even matter whether we describe equal protection doctrine either as the law of suspect classifications or as the law of suspect classes?

The differences between a law of suspect classes and a law of suspect classifications matter, because the two theories reflect fundamentally different theories of equality: the law of suspect classes is more consistent with the anti-caste or anti-subordination theory of equal protection, while the law of suspect classifications is more consistent with the anti-classification or anti-differentiation theory of equal protection.

Thus, a law of suspect classes, in order to prevent the subordination of groups, focuses on protecting politically vulnerable groups such as African-Americans and women from invidious treatment by the government. A law of suspect classifications, on the other hand, focuses on prohibiting the government from classifying on the basis of certain traits like race or gender.

However, the importance of the differences between the suspect classes and suspect classifications doctrines is an issue that, up until recently, has not been critically examined by scholars, in part because lawyers, the courts, and scholars often conflate the two terms and treat them as if they referred to the same doctrine. Moreover, the substantive differences between the two theories are a reflection of the different linguistic structures underlying the two theories, as will be explained further in Part IV of this Article.

If, as this Article contends, the difference between a theory of suspect classifications and a theory of suspect classes reflects meaningful, substantive differences, then the fact that scholars and courts have tended to treat the two terms as if they meant the same thing becomes puzzling. One possible explanation for the conflation of the two terms is rather simple: the two terms are virtually the same words, and the terms are obviously interrelated. Thus, a suspect

20. See Hutchinson, supra note 1, at 622 (arguing that anti-subordination principle emphasizes "the impact of governmental actions upon historically subordinated groups").

21. See id. at 620-21 (arguing antidifferentiation principle treats classifications on the basis of race as presumptively unconstitutional).

22. See, e.g., Mark Strasser, Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise, 64 TEMPLE L. REV. 937, 939-40 (1991) (using "suspect class" and "suspect classification" interchangeably); Thomas W. Simon, Suspect Class Democracy: A Social Theory, 45 U. MIAMI L. REV. 107, 108-09 (1990) (describing courts' use of "suspect classifications" to determine equal protection violations and then describing "suspect classes" as disadvantaged groups in society); Jennifer E. Watson, When No Place is Home: Why the Homeless Deserve Suspect Classification, 88 IOWA L. REV. 501, 510 (2003) (describing Rodriguez as coming up with the standards of a suspect class and deciding that poverty was not a suspect classification). Moreover, during an informal discussion over lunch of the suspect class versus suspect classification issue, I asked several professors of constitutional law whether they typically used those terms interchangeably. They all answered yes, stating that, generally, many constitutional law professors do not make any significant analytic distinctions between those two terms.
classification like race is related to a suspect class like African-Americans, because race is the trait that defines the class or group African-Americans. However, even though clearly the trait race is different from the group African-Americans defined by that trait, an examination of scholarly analysis of suspect classes and suspect classifications shows the tendency for scholars to mix up traits and groups, treating traits as if they were the same thing as social groups/classes of people.

For example, Professor Thomas Simon in his article, Suspect Class Democracy: A Social Theory, asserts that he wants to analyze equal protection doctrine by examining the role of “suspect classes, i.e., disadvantaged groups, in a democratic system.” However, while talking about which groups in society ought to be treated as suspect classes, he then states that, “Race, alienage, ancestry, and to a lesser extent, gender and illegitimacy constitute the other accepted suspect classes,” and that “[o]f the many candidates for suspect class status, only four have qualified: race, gender, alienage, and illegitimacy.”

The problem with Professor Simon’s analysis is that it does not make much sense to talk about “race” as a “suspect class,” if by suspect class he is referring to “disadvantaged groups” in democratic society. “Race” does not refer to any particular, historically situated social group, but rather it refers to a “trait” that we ascribe to people. The term “gender” also does not refer to any particular historically disadvantaged group in society. Women, on the other hand, may be a disadvantaged group in society, but “gender” is merely an abstraction, a term we use to describe a trait or characteristic of human beings. Thus, when Simon talks about “race” as a suspect class, what he really means to say is that the trait “race” is generally treated in the law as a “suspect classification.” Likewise, when he writes about “gender” as a suspect class, what he really means is that the trait “gender” is generally treated in the law as a suspect classification.

Similarly, Professor Peter Rubin, in an important article re-examining the purposes of equal protection, conflates the terms suspect classification and suspect class. In his discussion of the Court’s suspect classification doctrine, he observes that “[t]he Supreme Court has never provided a clear explanation of the concept of suspectness, but it has taken the approach that certain abstract characteristics of particular classes render constitutionally suspect laws that disadvantage members of those classes.” He then goes on to identify the various criteria used by the Court to explain why certain abstract characteristics like race or gender should be considered suspect:

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24. Id. at 133.
25. Id. at 111.
26. See Cleburne, 473 U.S. at 440-41 (“Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. ‘What differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.’” (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973))).
28. Id. at 16.
Among the relevant criteria identified in Court decisions have been "discrete[ness] and insular[ity]," inability to compete on an equal footing in the political process, possession of "obvious, immutable or distinguishing characteristics" essentially irrelevant to the purpose for which a government decision is made, "status of birth" for which the individual bears no responsibility, a history of "prejudice" or "discrimination" against the group in question, and the risk of stigma or stereotype.29

In his list of relevant criteria for suspectness, however, he fails to separate out criteria used to determine whether a classification ought to be treated suspect from criteria used to determine whether a class or group ought to be treated as suspect. For example, the criteria status of birth over which the individual bears no responsibility refers to the nature of a characteristic like gender. One's gender is something which a person does not have control over because he or she is born with a gender. However, a history of prejudice or discrimination against the group in question does not describe the nature of a characteristic or trait. A trait like gender does not suffer from a history of prejudice or discrimination. Rather, it is the class or group of women who suffers from a history of prejudice and discrimination.

In treating the criteria to determine whether a class or group should be considered suspect as if they were the same as the criteria to determine whether a trait or characteristic should be considered suspect, Professor Rubin effectively implies that two analyses are the same—that the same criteria can be used to determine both the suspectness of a classification and of a class, because presumably a suspect classification is the same thing as a suspect class.

D. Suspect Class and Suspect Classification Analyses as Two Different Theories of Equal Protection

Scholars tend to conflate the two terms because the Court itself has never clearly differentiated between suspect classes and suspect classifications, and as a result, the Court has employed the use of both terms in ways that suggest that Justices do not fully understand how they are using the terms. An example of the Court's confusion is illustrated by its opinion in City of Cleburne v. Cleburne Living Center.30 The central issue in Cleburne was whether laws that classify on the basis of mental retardation should be subject to heightened judicial scrutiny. In Cleburne, the Court began its opinion by discussing the special nature of suspect classifications, and then, without any explanation, it then jumped into a discussion of suspect classes in ultimately holding that "mental retardation is not a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation."31

In Cleburne, the Court conducted a review of precedent and discussed at

29. Id.
31. Id. at 442.
length the rationales given for treating certain traits like race, national origin, alienage, gender and illegitimacy as suspect. In discussing the "suspect" nature of racial, alienage, and gender classifications, the Court derived three factors from prior case law as factors to use in determining whether laws classifying on the basis of a certain trait ought to be deemed constitutionally suspect. The first factor is whether the trait is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such consideration are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." The Court reasoned that a person's race is a factor that is rarely relevant to the achievement of any legitimate government interest.

The second factor to consider in determining whether a trait should be considered suspect is whether the trait is one that is beyond a person's control. Thus, because race, sex, and illegitimacy are traits that individuals possess by virtue of birth and not by virtue of one's choices or achievements, the Court suggests that laws that assign benefits and burdens on the basis of those traits are unfair and immoral.

The third factor is whether a trait frequently bears "no relation to ability to perform or contribute to society." The Court reasoned that a suspect trait like sex does not reflect a person's abilities, while a trait like intelligence does serve as a reasonable and legitimate proxy for a person's abilities. Similarly, the Court explained that "[b]ecause illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society,' official discrimination resting on that characteristic is also subject to somewhat heightened review."

The central principle underlying the Court's analysis of suspect traits or classifications is the concept of presumptive irrelevancy, which is the notion that there are certain traits that as a general matter are irrelevant to governmental decision-making. Thus, if a trait such as race bears no relation to one's ability to perform and is also beyond a person's control, then the assumption is that when government classifies on the basis of such a trait, it probably has no reasonable or legitimate reason for doing so.

After having explained at length why the Court treats certain traits as constitutionally suspect, the Court then turned to explain why mental retardation is not a suspect classification like race, gender, or illegitimacy. In its explanation, the Court did examine the nature of the trait mental retardation, and concluded that it is a trait that is presumptively relevant to governmental decision-making. However, most of the Court's analysis did not focus on the nature of mental retardation, but instead on the political and historical situation of the class or group of the mentally retarded to conclude that the mentally retarded are not a discrete

32. Id. at 442-47.
33. Id. at 441.
34. Id. (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).
35. Id. at 440-41.
36. Cleburne, 473 U.S. at 441.
37. Id. at 446.
and insular minority or a suspect class.\textsuperscript{38}

First, the Court contended that the mentally retarded are not “political[ly] powerless” because they have been able to successfully lobby legislatures to enact legislation protective of their rights.\textsuperscript{39} As a group able to protect its interests through the legislative process, the Court reasoned that the group’s political strength diminished the need for judicial intervention on their behalf. Second, the Court also reasoned that declaring the “large and amorphous class of the mentally retarded” as a quasi-suspect class would open the floodgates for other similarly large and amorphous classes or groups like “the aging, the disabled, the mentally ill, and the infirm”\textsuperscript{40} to be declared suspect classes as well. Third, the Court acknowledged a history of invidious discrimination against the mentally retarded, but reasoned that such a history alone does not justify labeling them as a suspect class.\textsuperscript{41}

In its opinion, the \textit{Cleburne} Court did not give any indication that it was shifting from a discussion of suspect classifications to suspect classes, and effectively treated those two terms as if they were the same concept.\textsuperscript{42} In fact, the Court’s opinion suggests that it was not even conscious of having made that shift. What is going on here? Is the equal protection doctrine a doctrine of suspect classifications or suspect classes? The answer is that it has been both. In short, the Court has required an analysis into whether a classification disadvantages a suspect class to determine whether it should treat a classification as “suspect,” thereby triggering strict scrutiny of the suspect legislative classification.\textsuperscript{43}

\textbf{II. THE DOCTRINAL DEVELOPMENT OF EQUAL PROTECTION ANALYSIS}

This Part will analyze the Court cases dealing with suspect class/classifications, and contend that the law of equal protection has always reflected a commitment to the protection of suspect classes, even if it has not always been consistent with its language. For example, in some cases, the Court has used and emphasized the language of \textit{suspect classes}, while in other cases it has used and emphasized the language of \textit{suspect classifications}. The case law can be divided into two categories. The first category includes those cases in which the Court justified heightened judicial scrutiny of laws only when the laws discriminated against a suspect class. Thus, under this theory, a law or classification would be considered presumptively invidious or suspect \textit{only} when that classification was used to define and operate to the peculiar disadvantage of a suspect class. This Part will argue that the suspect class theory of equal protection is more consistent with the spirit and principle of equal protection doctrine that developed out of the concerns for racial justice and equality underlying the \textit{Brown

\textsuperscript{38} \textit{Id.} at 445.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 445-46.
\textsuperscript{41} \textit{Cleburne}, 473 U.S. at 446.
\textsuperscript{42} \textit{Id.} at 442-47.
\textsuperscript{43} \textit{See Plyler}, 457 U.S. at 216-17 (explaining that a classification against a suspect class should be narrowly tailored and serve a compelling government interest).
v. Board of Education decision. 44

The second category includes those cases in which the Court began to justify heightened judicial scrutiny of laws primarily by focusing on the special nature of a particular classifying trait. In these cases, the Court began to articulate what this Article calls a pure suspect classification theory of equal protection. Under a pure suspect classifications theory, the equal protection clause is solely concerned with prohibiting the use of certain classifying traits, with no regard for the protection of suspect classes. However, even in these cases, while using the language of suspect classifications, the Court still ultimately justified heightened judicial scrutiny in terms of protecting politically vulnerable groups. In other words, while using the language of suspect classifications, the Court was still primarily concerned about protecting suspect classes.

A. The Original Understanding of Suspect Class Analysis

As Professor Jed Rubenfeld contends, "[t]he tiered framework of equal protection review originally developed not with the notion of "suspect classifications," but with the recognition of "suspect classes." 45 However, while Professor Rubenfeld may be correct in terms of the substantive change in equal protection law, his statement is inaccurate to the extent it implies that the Court has never used the language of suspect classifications until recently. Rather, in their opinions, the Court has for some time used both the language of suspect classes and suspect classifications. Thus, to be more accurate, under what this Article and Professor Rubenfeld calls "suspect class" analysis, the Court will subject a law to heightened scrutiny only when the legislature (1) enacts a suspect classification, and (2) that suspect classification disadvantages a suspect class. As the Court asserted in Plyler v. Doe: "[W]e have treated as presumptively invidious [i.e., suspect] those classifications that disadvantage a 'suspect class.'" 46

Constitutional scholars clearly understood that the suspect or presumptively invidious nature of a classification was triggered only when the classification was being used to disadvantage a suspect class. 47 As Professor John Hart Ely asserts, "[r]acial classifications that disadvantage minorities are 'suspect' because we suspect they are the product of racially prejudiced thinking of a sort we understand the Fourteenth Amendment to have been centrally concerned with eradicating." 48

The suspect class theory of equal protection is one that originated from the theory of judicial review explicated in United States v. Carolene Products Footnote Four. 49 Based on the Carolene Products theory, courts would strictly scrutinize legislatively enacted "suspect classifications" that burdened the rights of a

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44. 347 U.S. 483 (1954).
45. Rubenfeld, supra note 1, at 465.
46. Id. at 216.
47. See generally ELY, supra note 16, at 145-70 (stating that Supreme Court Justices examine specific groups before assigning them a particular level of scrutiny).
48. Id. at 243 n.11 (emphasis added).
vulnerable group or a "suspect class." Historically, of course, the reason why courts were required to be protective of suspect classes on an ongoing basis is because courts were seeking to dismantle a system of hierarchical social relations between whites and blacks in the Jim Crow South. Courts were engaging in an attempt to reconstruct the South and eliminate the system of race relations with its roots in slavery.

B. The Doctrinal Development of Suspect Class Analysis

While the Brown line of cases struck down Jim Crow segregation laws under equal protection during the 1950s and 1960s, the Court did not explicitly explain why it engaged in skeptical judicial scrutiny of laws that discriminated against racial minorities until it decided a series of cases in the late 1960s and in the 1970s. In a series of cases decided in the 1970s, the Court dealt with cases in which it had to decide whether laws disadvantaging other groups besides racial minorities ought to be deemed suspect. Through these decisions, the Court began to explicitly develop its theory of suspect class equal protection.

In Graham v. Richardson, the Court relied on suspect class analysis to hold that laws that discriminate against aliens should be subject to strict scrutiny. Although the Court did not explicitly use the term "suspect class," the Court summarily concluded that "[a]liens as a class are a prime example of a 'discrete and insular' minority" for whom heightened judicial scrutiny is appropriate.

In 1973, two years after Graham, the Court, in San Antonio v. Rodriguez, for the first time used the language and theory of suspect classes, ultimately concluding that the poor are not a suspect class. In reaching its holding, the Court provided an in-depth discussion of the role that "suspect class" analysis plays in determining whether a classification disadvantaging a group ought to be considered suspect and, therefore, subject to heightened judicial scrutiny. Although the Rodriguez Court relied on both the language of suspect class and suspect classification, its reasoning clearly emphasized the central role of suspect class analysis in determining the appropriate level of judicial scrutiny. Specifically, without being explicit about the connection, the Court reasoned that any attempt to determine whether a classification ought to be considered suspect must necessarily entail an examination into the nature and identity of the class or group that is being disadvantaged by a particular classification.

In Rodriguez, the Court dealt with an equal protection challenge to the State of Texas' public school funding scheme. The Court began its opinion by framing the issue in suspect class terms: "[w]e must decide, first, whether the Texas system of

50. See Plyler, 457 U.S. at 216-17 ("With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.").
51. Cover, supra note 47, at 1300-04 (analyzing the pervasive pattern of oppression against African Americans justifying the need for special judicial protection of their rights and interests).
53. Id. at 372.
54. 411 U.S. at 17-29.
financing public education operates to the disadvantage of some suspect class . . . thereby requiring strict judicial scrutiny." 55

The Court asserted that there were three ways to frame the issue in Rodriguez. To determine if the state of Texas's public school finance scheme ought to be subject to heightened equal protection scrutiny because wealth is a suspect classification, the Court stated that the Texas system "might be regarded as discriminating (1) against 'poor' persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent,' or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts." 56 The Court then asserted that, "[o]ur task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect." 57

The Court, however, refused to subject the Texas school financing scheme to heightened judicial scrutiny, because it held that "[t]he Texas system does not operate to the peculiar disadvantage of any suspect class." 58 The Court then articulated three factors to determine if a class is suspect and concluded that the poor did not meet the indicia of suspectness:

the system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 59

Only after first asserting that the poor are not a suspect class did the Court then conclude that therefore there was no reason for it to be suspicious of any resulting wealth classification. In other words, the Court reasoned that the only reason to be suspicious of a wealth classification is if it was operating to the peculiar disadvantage of a suspect class. The Court rejected the notion that classifying on the basis of wealth alone could make wealth classifications suspect, noting that it had "never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny. . . ." 60 The Court interpreted its earlier case law and concluded that earlier dealing with the rights of indigents did not create an absolute presumption that a wealth classification automatically triggered heightened scrutiny. 61 Rather, the Court emphasized that in determining if a wealth classification should be subject to heightened scrutiny, an analysis into

55. Id. at 17.
56. Id. at 19-20.
57. Id. at 20 (emphasis added).
58. Id. at 28.
59. Id.
60. Id. at 29.
61. Id. at 26.
whether a suspect class was being disadvantaged and the nature of that disadvantage or deprivation was required. 62

While a strong argument could be made that the poor should indeed be treated as a suspect class, the crucial point is that the Court clearly linked the suspectness of a classification with whether it has been used to disadvantage a suspect class.

Similarly, the Court in *Massachusetts Board of Retirement v. Murgia* 63 used suspect class analysis to hold that laws that discriminate against the aged are not suspect. In *Murgia*, a class of police officers forced to retire upon turning fifty years old challenged the constitutionality of a state mandatory retirement law. The threshold question for the Court was whether age discrimination should be treated as constitutionally suspect. In conducting its analysis, the Court returned to the language of suspect classes to determine the appropriate level of scrutiny, stating that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly . . . operates to the peculiar disadvantage of a suspect class." 64

The Court then rejected the contention that "a class of uniformed state police officers over 50" constitutes a suspect class. 65 It reasoned that the aged have not experienced a history of purposeful unequal treatment like "those who have been discriminated on the basis of race or national origin," 66 and the aged have not been "subjected to unique disabilities based on the basis of stereotyped characteristics not truly indicative of their abilities." 67 Finally, the Court reasoned that old age does not define or create a "'discrete and insular group' in need of 'extraordinary protection from the majoritarian political process.'" 68 Rather, old age simply "marks a stage that each of us will reach if we live out our normal life span." 69

C. The Doctrinal Development of Pure Suspect Classification Analysis

While the Court was developing its doctrine of suspect classes, simultaneously, it was also beginning to develop an alternative theory of heightened judicial review: the doctrine of pure suspect classifications. A theory of pure suspect classifications is one that justifies heightened judicial scrutiny based solely on the suspect nature of certain traits or characteristics, with no reference or concern at all for politically vulnerable groups. Under this theory, certain traits such as race and gender are suspect, because there is something inherent in their nature that makes them susceptible for invidious use by the government, and not because such traits are used to discriminate to the peculiar disadvantage of politically vulnerable groups.

While the doctrine of pure suspect classifications did not fully emerge until

62. *Id.* at 20 (noting that earlier cases in which wealth classifications were deemed suspect emphasized that indigents suffered an absolute deprivation of state benefit).
64. *Id.* at 312.
65. *Id.* at 313.
66. *Id.*
67. *Id.*
68. *Id.*
the Court's decisions in *Croson* and *Adarand*, several earlier equal protection cases include language and reasoning which laid the groundwork for the eventual emergence of a pure suspect classification equal protection analysis.\(^{70}\) However, even though these earlier equal protection cases relied on the language of pure suspect classification, there are aspects of those opinions which clearly show a firm commitment to the theory of protecting suspect classes.

In *Loving v. Virginia*,\(^{71}\) the Court used the language of suspect classifications in subjecting anti-miscegenation laws to strict scrutiny. The Court noted that Virginia's criminal prohibitions against interracial marriage "rest "solely upon distinctions drawn according to race."\(^{72}\) The Court, without any reference to politically vulnerable groups, then reasoned that that act of drawing racial distinctions or classifications, by itself, is "odious to a free people whose institutions are founded upon the doctrine of equality."\(^{73}\) Accordingly, the Court concluded that, under the Equal Protection Clause, "racial classifications, especially suspect in criminal statutes, [must] be subjected to the most 'rigid scrutiny.'"\(^{74}\)

In *Loving*, probably for strategic reasons, the Court relied heavily on the language of pure suspect classification analysis. In *Loving*, the State argued that the law did not violate equal protection because it prohibited both whites and blacks from marrying someone of another race. *Loving*, therefore, does not neatly fit into the suspect class approach to equal protection, since the law arguably violated the equal protection rights of a nonsuspect class as well as of a suspect class. Thus, to protect the rights of whites seeking to marry with persons of other races, the Court did so by resorting to suspect classification analysis, emphasizing that the act of classifying on the basis of race, regardless of whether that act burdens the rights of a suspect class or not, should still be subject to strict judicial scrutiny.

However, the case did not completely reflect a commitment to the pure suspect classification approach, because the Court emphasized that the law ultimately was unconstitutional because it reflected a desire to advance white supremacy, and by logic, to further the inferiority of racial minorities.\(^{75}\) Moreover, in *Loving*, arguably the law really did disadvantage a suspect class—if that class is defined as the class of *interracial couples* seeking to marry. Thus, despite its reliance on suspect classification analysis, the *Loving* decision still represented a

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70. From a chronological standpoint, the Court actually used the language of suspect classifications before it began to use the language of suspect classes. However, as this Article contends, the equal protection doctrine developing out of *Brown* were suspect class cases in principle if not in name. The likely reason that the Court in its earlier equal protection cases never had to explicitly deem African Americans and other racial minorities a suspect class is because that conclusion was an obvious one, particularly since the Court in *Carotene Products* asserted that racial minorities are a paradigmatic example of a discrete and insular minority. 304 U.S. at 152-53 n.4.

71. 388 U.S. 1, 11 (1967).

72. Id.

73. Id. (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

74. Id. (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

75. Id. ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").
firm commitment to protecting suspect classes from invidious laws.

The next equal protection case to rely heavily on the language of suspect classifications was *Frontiero v. Richardson*, a case in which the Court had to determine whether it should subject laws that discriminate against women to heightened judicial scrutiny. A plurality of the Court held that sex or gender is a suspect classification which must be subject to strict judicial scrutiny. Curiously, in holding that gender is a *suspect classification*, the Court never cited to *Rodriguez* nor did it examine the *Rodriguez* factors to determine if women constitute a suspect class. The Court did justify heightened judicial scrutiny by referring to the history of discrimination against women and by comparing the historical status of women to blacks during slavery, and it noted that gender classifications have "the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." Moreover, it did recognize that, because of the "high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."

However, the Court in *Frontiero* never explicitly declared women a suspect class, instead focusing primarily on the nature of the sex trait to justify declaring sex as a *suspect classification*. The Court reasoned that sex, as a highly visible characteristic like race and national origin, is "an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility." The reason the Court probably did not explicitly deem women a suspect class is that women present a problem to suspect class analysis because they are a numerical majority and therefore do not fit the classic definition of a "discrete and insular minority." Specifically, the Court probably believed it would have been difficult to contend that women are politically powerless in the majoritarian political process especially since Congress, in 1964, prohibited gender discrimination in the workplace, and because in 1972, Congress had just passed the Equal Rights Amendment and submitted it to the state legislatures for ratification. Thus, rather than fashion a new theory of suspect class that deviates from the discrete and insular minority definition of a suspect class, the Court instead couched its analysis in terms of the dangers and irrelevancy of sex classifications, and made only implicit the connection between the suspectness of the classification with its use in treating women as an inferior class.

If the *Frontiero* Court had relied on suspect class analysis to justify subjecting laws discriminating against women to heightened judicial scrutiny, the political

77. Id. at 685.
78. Id. at 687.
79. Id. at 686.
80. Id. (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).
81. Id. at 687-88.
the Court decided *Adarand* in 1995, the Court had effectively eliminated *suspect class* analysis and instead adopted a theory of *pure suspect classifications*, a theory that justifies heightened judicial scrutiny based solely on the suspect nature of certain traits or characteristics, with no reference or concern at all for politically vulnerable groups. Under this theory, certain traits are suspect, because there is something inherent in the nature of traits such as race and gender that make them susceptible for invidious use by the government, and not because such traits are used to discriminate to the peculiar disadvantage of politically vulnerable groups.

The move to a *pure suspect classification* analysis began actually with the Court’s first major affirmative action case, *Regents of University of California v. Bakke.* In *Bakke*, Justice Powell’s plurality decision laid the foundation for the eventual elimination of suspect class analysis from equal protection law dealing with race. The *Bakke* Court was confronted with an equal protection challenge to a university race-conscious affirmative action program. A white plaintiff challenged the constitutionality of a program that reserved seats in the medical school class for persons of disadvantaged racial groups. The threshold question the Court had to decide was whether it should subject the affirmative action program to strict scrutiny. The State argued that strict scrutiny should not apply, because the plaintiff challenging the law, a white man, is not a member of a "discrete and insular minority requiring extraordinary protection from the majoritarian political process." Justice Powell rejected the State’s analysis, and concluded that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination," even if the plaintiff challenging a racial classification is not a member of a discrete and insular group. Without using the language of *suspect classes*, Justice Powell reasoned that *suspect class* analysis is irrelevant to determining the level of scrutiny when racial or ethnic classifications are involved, because that rationale “has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny." Instead, he reasoned that *suspect class* analysis is relevant only in “deciding whether or not to add new types of classifications to the list of “suspect” categories or whether a particular classification survives close examination.”

Thus, in *Bakke*, since the Court had already declared race and ethnicity to be suspect classifications, Powell argued that there was no need to resort to suspect class analysis, since that analysis is only used to determine if non-suspect classification ought to be treated as suspect. However, if the Court had never made suspect class analysis a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny, then the question arises: what was the original rationale for

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85. *Id.* at 269.
86. *Id.* at 290.
87. *Id.* at 291.
88. *Id.* at 290-91.
90. *Id.*
responsiveness of Congress to women’s interests would have undermined the conclusion that women as a group need extraordinary protection from the majoritarian political process. The move to suspect classification analysis, however, made it possible for the Court to use the responsiveness of the political process to women’s rights and interests as an argument to support rather than undermine the argument for heightened judicial scrutiny of sex classifications. The Court reasoned that because “Congress itself has concluded that classifications based upon sex are inherently invidious,” that legislative conclusion ought to be weighed favorably by the Court in determining if sex classifications ought to be treated as presumptively suspect for constitutional purposes.

The linguistic move from talking about the class of women to talking about the sex trait helped the Court to avoid a particularly difficult doctrinal question. By talking about the inherently invidious nature of the sex trait, rather than talking about the nature of women’s political power, the Court was able to avoid having to engage in a complex discussion about why it should treat women as a suspect class even though women were seemingly furthering their interests adequately in the political process.

III. THE CONSTRUCTION OF A PURE SUSPECT CLASSIFICATION ANALYSIS IN EQUAL PROTECTION

In examining the doctrinal shifting between suspect classes to suspect classifications, three points need to be emphasized. First, while scholars tend to suggest a neat, linear doctrinal move from suspect classes to suspect classifications, it is more accurate to conclude that the Court has shifted back and forth between suspect class and suspect classification analyses, a shifting that reflects both linguistic confusion and doctrinal ambivalence over the central purposes of the Equal Protection Clause. Second, even when the Court used and emphasized the language of suspect classifications, they still remained committed to protecting suspect classes or politically vulnerable groups. Frontiero and Cleburne represent such cases. Third, the Court’s ad-hoc use of both suspect classification and suspect class analysis in its earlier case law facilitated the Court’s eventual move to eliminate the suspect class analysis from equal protection doctrine. This Part will explain the elimination of suspect class analysis and the emergence of the new equal protection of pure suspect classifications.

A. The New Equal Protection: The Emergence of Pure Suspect Classification Analysis

As argued above, under the original theory of equal protection, heightened scrutiny was triggered only when two requirements were met: (1) the government enacted a suspect classification; and (2) that classification disadvantaged a suspect class, a vulnerable class or group subject to widespread hostility. However, when

82. Frontiero, 411 U.S. at 687.
83. See, e.g., Plyler, 457 U.S. at 217-18 (“Thus we have treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental
subjecting racial or ethnic distinctions to strict scrutiny? Justice Powell answered
that question by asserting the inherent invidiousness of classifying on the basis of
race. "Distinctions between citizens solely because of their ancestry are by their
very nature odious to a free people whose institutions are founded upon a doctrine
of equality." 91

The critical point in Powell’s analysis is that he avoided having to declare
whites a suspect class in order to conclude that challenges to affirmative action
should be subject to strict scrutiny. Instead he emphasized that racial
classifications are somehow universally invidious and odious. In other words,
Justice Powell began to justify suspicion of racial classifications based on
something inherent in nature of classifying on the basis of race. Powell’s analysis
was the opening attempt by the Court to justify strict scrutiny of racial
classifications according to a pure suspect classification analysis instead of a
suspect class analysis.

Powell’s opinion, however, did not command a majority of the Court, and
therefore, his suspect classification/suspect class analysis remained dicta until the
Court decided Croson. In Croson, the Court finally commanded a majority of the
Court to adopt the pure suspect classification justification for subjecting racial
classifications to strict scrutiny. The Croson Court held that race conscious
affirmative action programs or benign racial classifications enacted by state and
local governments must be subject to strict scrutiny. 92

In reaching its holding, the Court rejected suspect class/discrete and insular
minority analysis and instead justified strict scrutiny of all racial classifications on
the basis of the special nature of the trait race. The Court concluded that "the
standard of review under the Equal Protection Clause is not dependent on the race
of those burdened or benefited by a particular classification." 93 Unlike in decisions
like Frontiero and Cleburne, the Court used the language of suspect classifications
without any direct and in-depth reference to the political strength or weakness of
the class challenging a discriminatory law. The Court reasoned that persons of all
races, even those who do not belong to a discrete and insular racial minority group,
deserve the fullest protection of their "equal dignity and respect." 94 In other words,
for the Court, there is something inherent in the act of making distinctions on the
basis of race that denies to persons of all races their equal dignity and respect.

The move to a theory of pure suspect classifications was completed in the
Court’s decision in Adarand. In that case, the Court extended the holding of
Croson and declared that when a white plaintiff challenges a federal law for
violating his or her right to equal protection, all federal law disadvantaging whites
on the basis of race must also be subject to strict scrutiny. 95 The Court asserted,
"[A]ny person, of whatever race, has the right to demand that any governmental

91. Id. at 290-91 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
93. Id. at 494. However, the Court also claimed that whites in Croson were a suspect class, because
a black- controlled Richmond City Council enacted a law disadvantaging the white minority in
Richmond. See id. at 495-96.
94. Id. at 493.
actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”96 In justifying its decision to subject all racial classifications to strict scrutiny, the Court emphasized that a person always “suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.”97

Thus, as in Croson, the Court in Adarand discussed the inherently harmful nature of racial classifications, contending that the act of classifying on the basis of race itself automatically creates a dignitary or stigmatic harm, since it is using a presumptively irrelevant trait in order to harm individual members of a racial group.98 Furthermore, in emphasizing that the Equal Protection Clause protects persons and not groups, the Court is also rejecting the notion that a person’s rights under equal protection depends on whether he or she belongs to a politically powerless group.99

B. Implications of the New Equal Protection Doctrine of Pure Suspect Classifications

There are several important points that arise from the emergence of the new equal protection. In Croson and Adarand, the Court accomplished one of two things: it (1) eliminated the suspect class prong of equal protection analysis, and declaring now that suspect classifications trigger strict scrutiny, it no longer mattered whether the classification was burdening a protected group or not; or (2) it declared that whites are a suspect class.

The first implication of the Court’s adoption of the pure suspect classification analysis in Croson and Adarand is that the Court has effectively eliminated suspect class analysis from equal protection law. In concluding that the suspectness of a classification like race derives from the special nature of a trait like race, the Court has basically rendered suspect class analysis irrelevant.

Moreover, the elimination of suspect class analysis suggests that the Court believes that racial minorities are no longer suspect classes deserving of special protection from the political process. Rather, the implication is that now, in the post-civil rights era, all racial groups stand on equal footing in the political process, and now the Court simply needs to use the equal protection clause to ensure that the state does not foster racial hostility and racial balkanization between equal racial groups. Therefore, the Court will strictly scrutinize all racial classifications without regard to whether the racial group being burdened is a suspect class or not, in order to prevent racial groups from engaging in racial politics.100

The second implication of the pure suspect classification analysis is that Court has effectively held that whites constitute a suspect class. By holding that laws that

96. Id. at 224.
97. Id. at 230.
98. See id. at 229 (use of racial classifications, even for benign purposes, can only “delay the time when race will become a truly irrelevant, or at least insignificant, factor”).
99. See id. at 227.
100. See Croson, 488 U.S. at 493 (reasoning that use of racial classifications may “lead to a politics of racial hostility”).
burden whites must be subject to strict scrutiny, the Court is giving whites extraordinary judicial protection from the majoritarian political process, the sort of judicial protection that had been ordinarily reserved for politically powerless groups. Arguably, therefore, in Croson and Adarand, the Court has effectively held that whites as a group now meet the "traditional indicia of suspectness,"101 because whites are a class saddled with disabilities, have been subject to a history of unequal treatment, and have been relegated to positions of political powerlessness as to command extraordinary attention from the majoritarian political process.

However, since it would have been extremely difficult from both a substantive and rhetorical standpoint to explicitly declare whites as a suspect class,102 the Court justified extraordinary judicial protection of white interests by resorting to an analysis which rendered suspect class analysis irrelevant. By emphasizing the inherent harm of classifying on the basis of race, the Court was able to avoid having to explicitly conclude what it did implicitly: declare whites as a suspect class. In other words, using suspect classification language instead of suspect class language was a way to change the subject away from a discussion of the political strengths and weaknesses of whites as a political group to a discussion of the inherent harms of racial classifications, benign or otherwise.

Either way, the Court has dramatically transformed equal protection doctrine with respect to issues dealing with racism and racial subordination, and it has never had to deal with the hard doctrinal questions in making this move. Instead, in part because of the looseness with which we use the terms "class" and "classification," the Court was able to contend that what they did in Croson and Adarand was fully consistent with prior equal protection case-law, emphasizing that the blackletter law of equal protection is that "race" is a suspect classification, period, regardless of whether the classification harms a suspect class or not. The Court, however, never had to explicitly hold that it was either eliminating the suspect class analysis of equal protection jurisprudence, or that it was explicitly holding that whites are now a suspect class.

IV. A CRITICAL LINGUISTIC EXAMINATION OF SUSPECT CLASSIFICATION DOCTRINE

This Part contends that the language structure of suspect classification doctrine played a large role in the emergence of the new equal protection doctrine, and a critical linguistic analysis of the doctrine can help to show linguistically how transformation occurred. This Part will explain critical linguistic methodology and then examine the linguistic implications of the Court's shift from class to classifications analysis.

A. Critical Linguistics

First, before this Part examines the linguistic implications of the Court's move

102. See ELY, supra note 16, at 170 (arguing that whites do not need special judicial protection because they are capable of protecting their own interests in the political process).
to a pure suspect classification analysis, it is necessary to briefly describe a field of linguistics called critical or meta-linguistics. The theory of "metalinguistics" was first developed by linguist Benjamin Lee Whorf to describe a loosely defined field of linguistics concerned with the relationship between language, thought, and the social construction of reality. The fundamental premise underlying a metalinguistic approach to the study of language is that "the structure of a human being's language influences the manner in which he understands reality and behaves with respect to it." Metalinguistics studies how language patterns structure and direct our attention to selective portions of our environment, and how we react to those selected portions of our environment.

Language structure reflects and embodies a metaphysical view of the world and the nature of reality. Therefore, changing or transforming the structure of language also means changing or transforming the underlying view of reality. The English language structure embodies and reproduces an Aristotelian essentialist understanding of reality. The English language structure is premised on the rules of Aristotelian logic, a logic based on Aristotelian essentialism, which is the view that there is an essential or ultimate nature of things, that things have "real" qualities in them.

Essentialism is a static view of reality and the world. If a thing has an essence or property by virtue of its essential nature, then under an essentialist view, that thing will always possess that particular property or essence. On the other hand, an anti-essentialist approach to language takes a process-oriented approach to understanding reality. It presumes that there is no "objective or essential" reality as is presumed under an Aristotelian metaphysics; instead, it presumes that "reality" is socially constructed through an interaction between subject and object. This approach to language presumes that words and categories are not "objective," but rather, are subjective, culturally contingent constructs that reflect, shape, and direct our focus and attention.

104. Id. at 23.
106. See, e.g., RICHARD BANDLER & JOHN GRINDER, THE STRUCTURE OF MAGIC: A BOOK ABOUT LANGUAGE AND THERAPY 21-22 (1975) (stating that humans use language to represent and model experience); WENDELL JOHNSON, PEOPLE IN QUANDARIES: THE SEMANTICS OF PERSONAL ADJUSTMENT 112-42 (1946) ("The relationship between language and reality is a structural relationship."). See generally S.I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 156 (1978) ("But as we know from everyday experience, learning language is not simply a matter of learning words; it is a matter of correctly relating our words to the things and happenings for which they stand.").
107. JOHNSON, supra note 74, at 28.
108. Id. at 7.
109. Id. at 6-10.
110. Id. at 83.
111. Id. at 121-22.
112. Id. at 83.
113. JOHNSON, supra note 74, at 144-45.
114. Id.
There are two key premises to a meta-linguistic analysis of language and law. One premise is the principle of non-identity, which boils down to the statement that "A is not A."\textsuperscript{115} In other words, the premise of non-identity states that there is a fundamental difference between a word and the object represented by a word, and that there is a fundamental difference between similar words or statements stated at different levels of abstraction.\textsuperscript{116} For example, with respect to the difference between a word and the object, we clearly understand that the word "hamburger" is something entirely different from the object "hamburger."\textsuperscript{117} Thus, we do not eat a menu with the word hamburger printed on it because we know that would not be the same thing as actually taking a bite of a type of food we call a hamburger.\textsuperscript{118}

The second key premise is that there is a fundamental difference between words and statements stated at different levels of abstraction.\textsuperscript{119} As Wendell Johnson notes:

Truth is not truth (A is not A), for example, in the sense that what truth refers to on one level of abstraction is not identical with that to which it refers on some other level. To put it in homely terms, a theoretical statement about hamburger is not the same as the label hamburger, which in turn is not the same as hamburger you stick a fork into and put in your mouth, which again is not the same as hamburger acted upon by your digestive juices and assimilated into your body\textsuperscript{120}

In other words, in a debate, when a person uses language in such a way to change the level of abstraction upon which debate occurs, that person is in effect changing the subject matter, even if we may not realize it. Another homely example may help to explain the implications of shifting a discussion from one level to another level of abstraction.

Assume two people are discussing a movie, and they are talking about a particular scene. They describe the scene to each other and both state that the scene was humorous. Then, one person asks why the other person found the scene funny, and that person goes on to explain that she enjoys physical, slapstick humor for the way such humor takes a surreal view of reality, which helps her to forget the routines of every day life. Once the discussion moved from a discussion describing a funny movie scene to a discussion about why that scene was humorous, the discussion moved to a higher level of abstraction. Even though they may still be referring to the same movie scene, now they are having a substantively different conversation, because the two discussants are no longer talking about the humorous movie scene, instead they are examining their own general personal tastes regarding humor.

\textsuperscript{115} ld. at 171-72. 
\textsuperscript{116} ld. at 177. 
\textsuperscript{117} ld. 
\textsuperscript{118} ld. 
\textsuperscript{119} JOHNSON, supra note 74, at 177. 
\textsuperscript{120} ld.
Just as everyday discussions and debates shift constantly between different levels of abstraction, legal discourse also shifts constantly between different levels of abstraction. A critical linguistic analysis of law is an analysis that focuses on being conscious of how courts and lawyers use linguistic techniques to subtly change the subject matter of a legal discussion, and of how such linguistic moves have both substantive and rhetorical effect on shaping legal discourse.\(^\text{121}\)

Meta-linguist Wendell Johnson provides two simple ways to determine the level of abstraction a discussion is operating on. First, [a] practical test of the relative level of abstraction on which we are speaking at any given moment lies simply in the amount of time (or number of words) required to make reasonably clear what we are talking about."\(^\text{122}\) Second, another test of the relative abstraction of a particular discourse is the extent to which the discourse leaves out descriptive details.\(^\text{123}\) As discourse moves toward higher levels of generality or abstraction, more and more details are left out.

Thus, a critical linguistic analysis of law is an analysis which focuses on how changes in language structure and word choice can affect the level of abstraction at which discourse occurs.\(^\text{124}\) Moreover, as stated above, the structure of our language actually reflects and reinforces epistemological and metaphysical premises and assumptions. A critical linguistic analysis of law, therefore, contends that scholars should focus on the language structure of such legal concepts as "suspect classifications" or "suspect classes" in order to better understand the nature of legal debates and discourse by (1) being conscious of the process of abstraction; by (2) uncovering the underlying epistemology or view of reality embedded within the language structure of a particular doctrine; and by (3) understanding how invisible linguistic techniques can and have been used for rhetorical purposes.

B. Examining the Essentialist Language Structure of Suspect Classification Doctrine

In part, the language structure of suspect classification analysis made it possible for the Court to develop a suspect classification analysis without any reference at all to suspect or vulnerable groups. By shifting the discussion from suspect classes to suspect classifications, the Court moved the doctrine to a higher level of abstraction, and subsequently changed the substance of equal protection doctrine.

From a linguistic standpoint, the doctrinal shift from classes to classifications constitutes a shift higher up the ladder of abstraction. A discussion of suspect traits (classifications) is at a higher level of abstraction then a discussion about groups of people (classes), because a discussion of traits leaves out greater detail than a discussion of classes of people. Specifically, instead of talking about all the various aspects of a group like African Americans (race, history of discrimination, political power), a discussion of traits focuses on only one particular aspect of that

\(^{121}\) See id. at 121-22 (analyzing the language structure of the statement “John is smart”).

\(^{122}\) Id. at 140.

\(^{123}\) Id. at 128 (describing the abstracting process as the process of leaving out details).

\(^{124}\) Id.
group (race).

Furthermore, the linguistic structure of the term suspect classifications then directs discussion even further up the ladder of abstraction, and the term tends to create essentialist discourse about the essence or true nature of a particular trait. The term is one in which the adjective "suspect" modifies the nominalized noun "classification." In other words, the term suspect classification is another way of saying "a classification is suspect," i.e., that this thing called a classification possesses this attribute or quality called "suspectness." The linguistic structure of the term "suspect classification" implies that there are these things called "classifications" which possess the attributes of "suspectness." If that is the case, to figure out why a classification like race is suspect, then what lawyers and scholars need to do is to figure out the nature of traits like height, weight, sexual orientation, and wealth to determine if they possess the same attributes of suspectness as race.

Thus, when determining why a classificatory trait like race is suspect and therefore any legislation relying on a racial classification should be subject to strict scrutiny, the legal discourse turns inexorably to the nature of the trait race. As Professor Rubin asserts, "Racial classifications of course form the paradigmatic case for strict scrutiny. And, since not all classifications trigger strict scrutiny, there must be something about the character of race that renders it different for equal protection purposes from other characteristics." Once we begin to talk about the nature of a thing like race, then we are engaging in Aristotelian essentialist discourse trying to figure out the true essence of things.

The underlying language structure and usage of the term "suspect classification," therefore, reflects an Aristotelian view of reality in which the world consists of things possessing certain qualities or properties. We ask questions about the nature of race assuming that there are some essential attributes about race that make it constitutionally suspect. That is exactly what the courts and scholars have done, they have asked questions like: what is race? Is race a genetic or biological trait? Is race a social construction?

Thus, when discussion focuses on "race," the topic inexorably moves to discussions about the true nature of "race." Accordingly, legal discourse focuses on whether race is a biological trait or whether race is a social construction. In specific doctrinal terms, shifting the discussion from suspect class to suspect classifications means a focus on issues like "immutability." Thus, for example, to determine whether a classification ought to be deemed "suspect," factors the Court has examined is whether the trait in question is "immutable," and whether it is a

125. Rubin, supra note 27, at 15 (emphasis added).
129. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (discussing the immutable nature of the gender characteristic).
trait that a person is born with and bears no responsibility for.\textsuperscript{130}

As the Court in \textit{Frontiero} concluded, sex/gender should be considered suspect because of its special nature. "[S]ex . . . is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex seem to violate the basic concept of our system that legal burdens should bear some responsibility to individual responsibility."\textsuperscript{131} However, the \textit{Frontiero} Court's rationale is one that need not and does not refer to the effects of classifying on the basis of a trait like gender on a particular vulnerable class (women). The Court's rationale is universalistic, in the sense that its reasoning justified a prohibition on all forms of gender discrimination, whether it is against men or women. Men, just like women, bear an immutable characteristic determined solely by accident of birth (maleness), and therefore, under a pure suspect classification analysis, they also should not be discriminated against on the basis of their gender.\textsuperscript{132}

The key in understanding the application of pure suspect classification analysis to realize that all those questions about the nature of suspect traits can be posed and answered without ever having to discuss the relationship between those questions about the nature and quality of "race" or "gender" and the relationship of those traits to the classes of people they define. Specifically, because the underlying language structure of the term orients discussion of that term towards a high level of abstraction, the Court was able to construct its pure suspect classification discourse in which the suspectness of the classification derived from the intrinsic nature of the classification itself. That focus on the essential nature of traits has led to an analysis that is completely divorced from the concerns about the actual, material realities of people who continue to suffer from long standing subordination and political isolation.

The suspect classification analysis, therefore, without any reference to suspect classes, produces a more static, highly abstract legal discourse, a discourse that ultimately tends to produce an ahistorical, decontextualized, universal justification for explaining why certain traits should be deemed suspect classifications. In other words, implicit in analysis focused exclusively on creating criteria about suspect classifications by looking solely at the nature of the classification tends to gravitate towards an analysis entirely divorced from historical and geographical circumstances, and the historical legacy and impetus behind the promulgation of the equal protection doctrine ends up as a legally irrelevant backdrop.

\textbf{C. The Role of Language in Legitimating Doctrinal Change}

As Professor Rubenfeld astutely points out, the transformation from a strict scrutiny doctrine incorporating both suspect classification and protected group analysis to a doctrine of merely suspect classification analysis has largely gone

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} at 686.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{See} Craig v. Boren, 429 U.S. 190 (1976) (holding laws that discriminate against men must be subject to heightened judicial scrutiny).
\end{itemize}
unnoticed by constitutional scholars, lawyers, and judges. The reason why this momentous move has gone unnoticed is because of the linguistic confusion in the interchangeable and ad hoc use of the two very similar terms, suspect classifications and suspect classes.

It is crucial to understand that the doctrinal move from suspect classification/suspect class to suspect classification is also a change in the linguistic structure of the equal protection doctrine. There is a reason why the Court's heightened scrutiny of affirmative action programs went hand in hand with the linguistic move from suspect classes to suspect classifications. For three reasons, it is much easier to justify heightened judicial scrutiny of race conscious affirmative action programs if you rely on "suspect classification" doctrine as opposed to doctrine incorporating both suspect classification and suspect class analyses.

First, a suspect classification analysis fits within a theory of equal protection that focuses on the protection of individual rights as opposed to group rights. Because a classification or trait is something that all individuals possess, such as race or gender, if the court concludes that "race" is a suspect classification, then logically, whether you are classified as white or black, it does not matter, the act of being classified on the basis of race is considered constitutionally suspicious.

Second, the linguistic confusion and conflation of the terms "suspect classification" and "suspect class" permitted the current Supreme Court to make dramatic changes in equal protection law while simultaneously being able to claim that what they were doing was fully consistent with prior case law. Because lawyers and constitutional scholars consistently referred to a strict scrutiny doctrine of suspect classifications disadvantaging suspect classes solely by the term "suspect classification" doctrine, it made the Court's move in dropping the "suspect class" aspect of the doctrine that much easier. It simply focused on precedent discussing the dangers and suspectness of certain "classifications," and then concluded that was all prior case law was concerned with. That simple linguistic move allowed the Court to make the dramatic move to impose heightened scrutiny on so called "benign racial classifications," concluding that it must treat race conscious affirmative action programs in the same way as it treated Jim Crow segregation laws, because dangers inhered in the simple use of racial classifications, regardless of the intended purpose. In making this move, the Court hardly mentioned that it had dropped the aspect of strict scrutiny doctrine that presupposed heightened scrutiny only when a suspect classification was putatively disadvantaging a "suspect class" subject to widespread hostility and prejudice.

133. Rubenfeld, supra note 5, at 301.
134. See id. at 516-17 (citing to Fullilove v. Klutznick, 448 U.S. 448 (1980)); Adarand, 515 U.S. at 200 (holding that even benign racial classifications are subject to strict scrutiny and effectively overruling Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) only to the extent that it was inconsistent with this holding).
135. See Adarand, 515 U.S. at 223 (arguing that racial classifications are inherently suspect).
136. Id. at 230 ("Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.") (emphasis in original).
137. See id. at 229-30 ("The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls
Third, under a suspect classification analysis, it is easier to presume the existence of equality rather than the existence of inequality. The focus on classifications presumes a formal equality between people and considers irrelevant any real socioeconomic inequality between people. This is because the focus is not on historically situated conditions affecting different racial groups in society, but rather, on the trait and universally felt effects of classifying on the basis of that trait.

On the other hand, it is much harder to justify heightened judicial scrutiny of race conscious affirmative action programs if the equal protection doctrine is based on a theory of the need to protect certain suspect classes or groups. Under a theory of suspect classes, to determine if heightened scrutiny should be imposed on affirmative action programs discriminating against whites, it would first be necessary to determine if whites are a suspect class (e.g., saddled with disabilities, historically discriminated against, a powerless political minority).

Clearing up the linguistic confusion would have forced the Court to be much more explicit about the dramatic changes it made in equal protection doctrine, and perhaps may have changed the votes of certain swing Justices. Linguistic clarity would also sharpen the debate regarding affirmative action and equal protection, and expose the dramatic intervention into legislative affairs under current equal protection doctrine that would have hardly been justifiable several decades ago.

**CONCLUSION**

The purpose of this Article was to engage in a critical linguistic analysis of equal protection doctrine to show how language structure played a crucial role in shaping the evolution of the law from *Brown* to *Adarand*. This Article is part of a larger project engaging in a critical linguistic analysis of the law, arguing that lawyers and legal scholars should be more conscious of the fact that words and concepts operate at multiple levels of abstraction, and understanding how those levels of abstraction influence and shape substantive legal discourse.