

# THE GAY TIPPING POINT

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## INTRODUCTION

In a 1999 assessment, *New York Times* journalists Dudley Clendinen and Adam Nagourney stated that “it seems likely that the movement for gay identity and gay rights has come further and faster, in terms of change, than any other that has gone before it in this nation.”<sup>1</sup> The evidence supports their claim. *The Encyclopedia of Associations*, for instance, shows that the number of organizations devoted to gay causes has skyrocketed in recent decades. In 1970, there were no gay or lesbian associations listed; in 1980, there were 14; in 1990, there were 234; and in 2000, there were 327.<sup>2</sup> A “gay tipping point” occurred in the United States in the latter decades of the twentieth century.

The gay tipping point raises the question of whether gay individuals are still a politically powerless minority deserving of judicial protection in this country. Under its equal protection jurisprudence, the United States Supreme Court has extended judicial solicitude to five classifications—race,<sup>3</sup> national origin,<sup>4</sup> alienage,<sup>5</sup> sex,<sup>6</sup> and nonmarital parentage.<sup>7</sup> In both granting and

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1. DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 13 (1999). I speak throughout this Article of “gay” rights to include lesbian, gay, and bisexual individuals. I self-consciously do not refer to LGBT rights because I think the issues surrounding transgender individuals are importantly different with respect to issues of political powerlessness.

2. 1 *ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE UNITED STATES* (Margaret Fisk ed., 6th ed. 1970); 1 *ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE UNITED STATES* (Nancy Yakes & Denise Akey eds., 14th ed. 1980); 1 *ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE UNITED STATES* (Deborah M. Burek ed., 25th ed. 1990); 1 *ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE UNITED STATES* (Tara E. Sheets ed., 36th ed. 2000).

3. See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (applying strict scrutiny to a statute that barred interracial marriage).

4. See *Oyama v. California*, 332 U.S. 633, 644–47 (1948) (applying strict scrutiny to a land-transfer statute that discriminated on the basis of national origin).

5. See *Graham v. Richardson*, 403 U.S. 365, 371–76 (1971) (applying strict scrutiny to legislation that conditioned welfare benefits on citizenship). The strict scrutiny granted to alienage is subject to two qualifications. First, this level of scrutiny does not apply to federal uses of the alienage classification. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 85–87 (1976) (holding that, because of the Constitution’s grant of authority to Congress over issues of alienage, congressional use of the alienage classification draws only rational basis review). Second, even with respect to state uses of the alienage classification, strict scrutiny

withholding such protection, the Court has often fixated on political powerlessness as a precondition for heightened scrutiny.<sup>8</sup> Although the Court has articulated more than one test for such political powerlessness, the canonical one lies in Footnote 4 of *United States v. Carolene Products Co.*<sup>9</sup>

### I. CAROLENE PRODUCTS

Like *Marbury v. Madison*,<sup>10</sup> the 1938 case of *Carolene Products* is a “masterwork of indirection.”<sup>11</sup> At the time *Carolene Products* was decided, the Court had just been chastened for overzealous judicial activism, and badly needed to engage in a show of obeisance to the political branches.<sup>12</sup> Justice Harlan Fiske Stone’s majority opinion seemingly does so, deferring in the text of the opinion to congressional legislation that regulated adulterated milk.<sup>13</sup> Yet the opinion buries a timebomb in Footnote 4, which has become the most famous footnote in Constitutional Law.

In that footnote, Justice Stone leaves open the possibility that “prejudice against discrete and insular minorities” might be a “special condition” that would justify more aggressive judicial review.<sup>14</sup> The influence of the footnote cannot be overstated. John Hart Ely’s celebrated theory of political process failure<sup>15</sup> was but one of many scholarly efforts that flowed out of this note.<sup>16</sup> More to the point, the footnote has influenced the Court. Constitutional scholar Gerald Gunther attributed the tiered structure of judicial review under the Equal Protection Clause to this note’s “pervasive influence.”<sup>17</sup> The idea of the “discrete

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does not apply when core governmental functions are at issue. See, e.g., *Foley v. Connelie*, 435 U.S. 291, 295–97 (1978).

6. See *Craig v. Boren*, 429 U.S. 190, 197–204 (1976) (applying intermediate scrutiny to a statute that barred women, but not men, from buying 3.2 percent beer).

7. See *Trimble v. Gordon*, 430 U.S. 762, 767–76 (1977) (applying heightened scrutiny to a statute that permitted children born in wedlock, but not children born out of wedlock, to inherit from their intestate fathers).

8. See *infra* notes 44–47 and accompanying text.

9. 304 U.S. 144, 152 n.4 (1938).

10. 5 U.S. (1 Cranch) 137 (1803).

11. ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (4th ed. 2005).

12. Cf. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 231–36 (1993) (discussing how President Franklin Delano Roosevelt prevailed in his confrontation with the Supreme Court).

13. See *Carolene Products*, 304 U.S. at 147, 151.

14. *Id.* at 152 n.4.

15. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

16. See, e.g., Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6–17 (1979).

17. GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 542 (10th ed. 1980).

and insular” minority has become a mantra to describe groups that deserve the Court’s concern.<sup>18</sup>

## II. BEYOND CAROLINE PRODUCTS

In 1985, Bruce Ackerman forcefully critiqued the *Caroline Products* formulation.<sup>19</sup> In his essay, Ackerman maintains that the “discrete and insular” minority formulation is a poor proxy for a politically powerless group.<sup>20</sup> To the contrary, Ackerman contends, “anonymous and diffuse”<sup>21</sup> minorities may be more worthy of the Court’s concern.<sup>22</sup>

Ackerman understands a minority to be “discrete” if “its members are marked out in ways that make it relatively easy for others to identify them.”<sup>23</sup> Drawing on Albert Hirschman’s *Exit, Voice, and Loyalty*,<sup>24</sup> Ackerman points out that when groups are burdened, they generally entertain two options: exercising voice against the discrimination or exiting the group. For members of “discrete” groups, however, exit is generally impossible—“If you are a black in America today, you know there is no way you can avoid the impact of the larger public’s views about the significance of blackness.”<sup>25</sup> In contrast, individuals with invisible characteristics can exit the group by passing—“As a member of an anonymous group, each homosexual can seek to minimize the personal harm due to prejudice by keeping his or her sexual preference a tightly held secret.”<sup>26</sup> The availability of exit lessens the necessity of voice, meaning gays will have less of an incentive to fight discrimination.

Relatedly, Ackerman describes several advantages of “insularity.” First, insularity “breed[s] sentiments of group solidarity” that safeguard a group from free riders, given that “news travels fast along the grapevine in an insular community.”<sup>27</sup> Second, insularity lowers organizational costs, because the group can

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18. See, e.g., Milner S. Ball, *Judicial Protection of Politically Powerless Minorities*, 59 IOWA L. REV. 1059, 1079 (1974).

19. Bruce A. Ackerman, *Beyond Caroline Products*, 98 HARV. L. REV. 713 (1985).

20. See *id.* at 717.

21. *Id.* at 724.

22. See *id.* at 722–31.

23. *Id.* at 729. Ackerman acknowledges that the *Caroline* Court may not have meant corporeal visibility when it referred to “discreteness.” See *id.* at 728–29. While this may be a stretch, it is not a long one. The Supreme Court has referred to the “high visibility of the sex characteristic,” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion), as a reason why women might be particularly vulnerable. It has also observed that the fact that nonmarital parentage does not carry an “obvious badge,” *Mathews v. Lucas*, 427 U.S. 495, 506 (1976), may mitigate the vulnerability of that status.

24. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

25. Ackerman, *supra* note 19, at 730.

26. *Id.*

27. *Id.* at 725.

“avail itself of the communications channels already established by the group’s churches, businesses, or labor unions.”<sup>28</sup> Finally, in an electoral system based on geographical jurisdictions, insularity gets individuals elected.<sup>29</sup>

Ackerman’s analysis seemed a precise and useful description of the political predicament faced by gays at the time of its 1985 publication and long thereafter. With respect to the exit/voice problem, my own work extended Ackerman’s analysis to argue that the problem of gay political organization was a classic collective action problem in which individual decisions to “pass” as straight sapped the political strength of the community.<sup>30</sup> It was a prisoner’s dilemma in which the prisoner’s cell was the gay person’s closet.<sup>31</sup>

Gays also suffered from some of the debilities that Ackerman associated with a lack of insularity. First, the closet undermined solidarity in an even more intense way than Ackerman suggested. Ackerman was concerned that diffuseness would lead to free-riding.<sup>32</sup> For gays, the concern was less that closeted gays would remain quiescent, but that they would actively harm their own. As Eve Sedgwick has observed, “it is entirely within the experience of gay people to find that a homophobic figure in power has, if anything, a disproportionate likelihood of being gay and closeted.”<sup>33</sup>

Second, with respect to political organization, gay groups did not have the reputable political building blocks available to African Americans: the “churches, businesses, or labor unions”<sup>34</sup> that Ackerman describes. The paradigmatic institution where gays gathered was the gay bar, which was hardly a dignified place to meet, as evidenced by its susceptibility to police raids.<sup>35</sup> Ultimately, it would be a gay bar—the Stonewall Inn in Greenwich Village—from which the gay rights movement would erupt in 1969.<sup>36</sup> But gays could certainly not count on respectable political institutions in the way that African Americans could.

Finally, with regard to electoral influence, gay dispersion over the country prevented us from getting elected. Only in the areas where gays had engaged in defensive separatism, like San Francisco, were openly gay officials elected.

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28. *Id.* at 726.

29. *Id.*

30. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 487, 535 (1998).

31. *Id.*

32. Ackerman, *supra* note 19, at 730.

33. EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 81 (1992).

34. Ackerman, *supra* note 19, at 726.

35. CLENDINEN & NAGOURNEY, *supra* note 1, at 17–18.

36. *Id.* at 21–23.

Even then, as the recent film *Milk*<sup>37</sup> documented, such officials were uniquely vulnerable.

### III. CAROLINE REDUX

So in 1985 and well beyond, Ackerman's analysis of "anonymous and diffuse" minorities appeared a spot-on diagnosis of the gay predicament. Yet the United States has since undergone an unimaginable transformation. National politics has become saturated with gay issues, such as same-sex marriage, the military's "don't ask, don't tell" policy, and a federal bill to protect gays against employment discrimination. And in the brave new world beyond the tipping point, the anonymity and diffuseness of gays seem a net political benefit.

The capacity of gays to pass—our anonymity—precluded gatekeeping mechanisms from being used against us. As a result, once it became safer for gay people to come out, we were already situated in the corridors of power in the United States. Pioneers in the political field, like Representative Barney Frank and Gerry Studds, would probably not have succeeded had they been openly gay when first elected.<sup>38</sup> But they could ultimately come out after having served anonymously in their offices for some time. Although gays have not had "gay churches," "gay businesses," or "gay labor unions," we have always been a quiet part of the equivalent institutions of the dominant group. When the time came, our people were there.

Similarly, the diffuseness of gays means every extended family in America includes a gay person. Dick Cheney, George W. Bush's influential and conservative vice president, has a lesbian daughter. A major turning point in U.S. gay politics was when Cheney stated in the 2000 Vice Presidential debate that same-sex marriage should be left to the states.<sup>39</sup> By 2004, he connected this stance to

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37. MILK (Focus Features 2008).

38. Frank was elected by a narrow margin (51.9 percent to 48.1 percent) in Massachusetts in 1981. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 1980, at 28 (1981). He came out in 1987, becoming the first member of Congress to do so voluntarily. Jeffrey Toobin, *Barney's Great Adventure*, NEW YORKER, Jan. 12, 2009, at 37. Studds, a Democrat, was elected to what was considered "a safe Republican seat" in 1972. Yvonne Shinhoster Lamb, *Gerry Studds; Gay Pioneer in Congress*, WASH. POST, Oct. 15, 2006, at A1. He came out in 1983 in the wake of a scandal involving a male page. *Id.*

39. As then-Secretary Cheney put it:

The fact of the matter is we live in a free society, and freedom means freedom for everybody. We shouldn't be able to choose and say you get to live free and you don't. That means people should be free to enter into any kind of relationship they want to enter into. It's no one's business in terms of regulating behavior in that regard. The next step then, of course, is the question you ask of whether or not there ought to be some kind of official sanction of the relationships or if they should be treated the same as a traditional marriage. That's a tougher problem. That's not a slam dunk. The fact of the matter is that matter is regulated by the states.

his daughter.<sup>40</sup> In an earlier generation, Mary Cheney would not have come out of the closet, and Dick Cheney would not have had to defend her. But once she was out, he did. Indeed, having an openly gay person in one's family seems to shield progay conservatives contending with their less progay brethren. Theodore Olson, the former solicitor general for George W. Bush, recently caused a stir when he brought a federal challenge to California's ban on same-sex marriage.<sup>41</sup> As he has observed: "For conservatives who don't like what I'm doing, it's, 'If he just had someone in his family we'd forgive him.'"<sup>42</sup>

At a minimum, then, it would be hard to say that gays will always be politically powerless because we are an "anonymous and diffuse" minority. We are increasingly powerful, and our anonymity and diffuseness seem, if anything, to be contributing to our advancement.

#### IV. THE FUTURE OF POLITICAL POWERLESSNESS

The gay tipping point might suggest that Justice Stone was correct in his original assessment that "discrete and insular minorities" were more likely to be politically powerless. Opponents of gay rights have long argued that gays are an extremely politically powerful minority, and therefore should not receive the protection of the courts.<sup>43</sup> The temptation here might be to argue that political powerlessness should not be necessary to a finding of heightened scrutiny. But we should not jettison the concept of political powerlessness as a precondition of heightened scrutiny. Instead, we should refine it.

By this, I do *not* mean we should turn to other existing formulas for political powerlessness. In the 1973 case of *Frontiero v. Richardson*,<sup>44</sup> a plurality of the Court observed that women could be deemed politically powerless despite their numerosity because they were "vastly underrepresented" in the "Nation's decisionmaking councils."<sup>45</sup> This is too lenient a standard, as almost any group

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I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area.

COMM'N ON PRESIDENTIAL DEBATES, TRANSCRIPT OF 2000 VICE PRESIDENTIAL DEBATE (2000), available at <http://www.debates.org/pages/trans2000d.html>.

40. Robin Toner, *Cheney Stakes Out His Own Position on Gay Marriage*, N.Y. TIMES, Aug. 25, 2004, at A20 ("In unusually personal remarks on the issue [of same-sex marriage], delivered at a campaign forum in Davenport, Iowa, the vice president referred to his daughter, Mary, who is a lesbian, saying that he and his wife 'have a gay daughter, so it's an issue our family is very familiar with.'").

41. Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy*, N.Y. TIMES, Aug. 19, 2009, at A1.

42. *Id.*

43. See, e.g., *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (describing gays as a "politically powerful minority" that should not be protected by the judiciary).

44. 411 U.S. 677 (1973).

45. *Id.* at 686 n.17 (plurality opinion).

disadvantaged by legislation could make this argument, including the purveyors of filled milk in *Carolene* itself. In the 1985 case of *City of Cleburne v. Cleburne Living Center*,<sup>46</sup> the Court found the mentally retarded not to be politically powerless because they had been able “to attract the attention of the lawmakers.”<sup>47</sup> To require lawmakers’ systematic inattention to a group is too stringent a standard—categorizations that have already received heightened scrutiny, like race or sex, could not have passed this standard at the time heightened scrutiny was granted to them.

I have long argued for a more flexible formulation of political powerlessness that would look to a variety of factors, on the ground that no social scientist would ever purport to measure the political power of a group based on a rote formula.<sup>48</sup> At a minimum, I argued that these factors should include: “(1) the group’s income and wealth; (2) its health and longevity; (3) its freedom from public and private violence; (4) its ability to exercise its political rights; (5) its education level; (6) its social position; and (7) the acceptability of prejudice against the group.”<sup>49</sup>

If we even begin to apply such a list to the situations of gays, we see that even beyond the tipping point, gays can still be deemed politically powerless. Despite the myth of gay affluence, gays face significant wage discrimination.<sup>50</sup> With respect to health and longevity, studies show that the suicide rate for gay

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46. 473 U.S. 432 (1985).

47. *Id.* at 445.

48. Yoshino, *supra* note 30, at 565.

49. *Id.* This list explicitly builds on constitutional scholar Cass Sunstein’s analysis. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994) (listing “poverty, education, political power, employment, susceptibility to violence and crime, [and] distribution of labor within the family” as potential markers of social welfare). Moral philosopher Martha C. Nussbaum has subsequently propounded a useful list of “human capabilities” in the context of thinking about women. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 78–80 (2000). Nussbaum contends that there are ten human capabilities, which include (1) longevity; (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species (the capacity to relate to animals, plants, and the world of nature); (9) play; (10) control over one’s environment (including political and material control). *Id.* Like me, she propounds these capabilities as exemplary rather than exhaustive, stating that “the list remains open-ended and humble.” *Id.* at 77.

50. In a recent article, Christopher Carpenter observes that “four recently published studies document a statistically significant earnings penalty associated with same-sex sexual behavior for males in the United States on the order of 15–30 percent of annual earnings.” Christopher S. Carpenter, *Revisiting the Income Penalty for Behaviorally Gay Men: Evidence From NHANES III*, 14 LABOUR ECON. 25 (2007). The four studies are: M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 729 (1995); Nathan Berg and Donald Lien, *Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?*, 20 CONTEMP. ECON. POL’Y 394 (2002); Dan Black, Hoda Makar, Seth Sanders & Lowell Taylor, *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449 (2003); John Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 INDUS. & LAB. REL. REV. 622 (2003).

youth is as high as seven times that of their straight peers.<sup>51</sup> According to the Federal Bureau of Investigation, recent years have generally seen a rise in reported hate crimes against individuals on the basis of sexual orientation.<sup>52</sup>

To return to discreteness and insularity, Justice Lewis Powell once commented that Justice Stone “would have had little patience with the suggestion that Footnote 4 provided some neat formula for constitutional adjudication.”<sup>53</sup> The gay tipping point supports the truth of this observation, because the anonymity and diffuseness of gays has been a net liability for us before the tipping point, and a net benefit after it. Yet Powell’s observation suggests that we should not cycle to some other neat formulation, like underrepresentation in the Nation’s decisionmaking councils or inability to get the attention of lawmakers. If the gay rights movement can help the Court retire all such “neat formulas” in favor of a more just and accurate conception of political powerlessness, it will enable a better civil rights jurisprudence not just for us, but for other groups—foreseen and unforeseen—that are to come.

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51. SUICIDE PREVENTION RES. CTR., SUICIDE RISK AND PREVENTION FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH 14–16 (2008) (“Research from several sources also revealed that LGB youth are nearly one and a half to seven times more likely than non-LGB youth to have reported attempting suicide.”).

52. In the most recent year for which the FBI published data, 2008, there were 1297 recorded hate crimes based on sexual orientation. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS 2008: INCIDENTS, OFFENSES, VICTIMS, AND KNOWN OFFENDERS BY BIAS MOTIVATION (2008), available at [http://www.fbi.gov/ucr/hc2008/data/table\\_01.html](http://www.fbi.gov/ucr/hc2008/data/table_01.html). In 2007, the number was 1265. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS 2007: INCIDENTS, OFFENSES, VICTIMS, AND KNOWN OFFENDERS BY BIAS MOTIVATION (2007), available at [http://www.fbi.gov/ucr/hc2007/table\\_01.htm](http://www.fbi.gov/ucr/hc2007/table_01.htm). In 2006, it was 1195. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS 2006: INCIDENTS, OFFENSES, VICTIMS, AND KNOWN OFFENDERS BY BIAS MOTIVATION (2006), <http://www.fbi.gov/ucr/hc2006/table1.html>. In 2005, it was 1017. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS 2005: INCIDENTS, OFFENSES, VICTIMS, AND KNOWN OFFENDERS BY BIAS MOTIVATION (2005), available at <http://www.fbi.gov/ucr/hc2005/table1.htm>. In 2004, it was 1197. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS 2004: INCIDENTS, OFFENSES, VICTIMS, AND KNOWN OFFENDERS BY BIAS MOTIVATION (2004), available at [http://www.fbi.gov/ucr/cius\\_04/offenses\\_reported/hate\\_crime/index.html#table2\\_32](http://www.fbi.gov/ucr/cius_04/offenses_reported/hate_crime/index.html#table2_32).

53. Lewis F. Powell Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1092 (1982).