# SUSPECT CLASSIFICATIONS, IMMUTABILITY, AND MORAL RESPONSIBILITY

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Immutability is an important thread in equal protection jurisprudence.[1] It helps explain when a government classification is constitutionally suspect, requiring courts to evaluate that classification under the exacting strict scrutiny standard.[2] Recently the Supreme Court, though not expressly relying on equal protection arguments to reach its holding, has suggested that sexual orientation is an immutable trait of the sort that traditionally triggers strict scrutiny when the government relies upon it.[3] But the suggestion that sexual orientation is immutable, and thus subject to strict scrutiny, has not found wide acceptance across the judiciary. Furthermore, the scientific evidence surrounding sexual orientation is far more subtle and nuanced than a simple dichotomy between "immutable" on one hand and "malleable" on the other might suggest.[4]

LGBTQ advocates may be tempted to seize on the Supreme Court's language to make equal protection arguments based upon strict scrutiny, especially in a political climate where courts appear likely to accept a wide range of rational bases for LGBTQ discrimination. But claims that focus

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1. *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 14-16 (2015).

2. *See* Michael Gentithes, *The Equal Protection Clause and Immutability: The Characteristics of Suspect Classifications*, 40 U. MEM. L. REV. 507 (2010).

3. "[P]sychiatrists and others [have] recognized that sexual orientation is both a normal expression of human sexuality and immutable." Obergefell v. Hodges, 576 U.S. 644, 661 (2015).

4. *See, e.g.*, Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RES. 363, 1-2 (2016) ("Scientific research does not indicate that sexual orientation is uniformly biologically determined at birth or that patterns of same-sex and other-sex attractions remain fixed over the life course.").

on immutability are too rigid. Those arguments assume that most characteristics, including sexual orientation, can be classified in one of two binary categories—either immutable or malleable. When that assumption is applied to sexual orientation, it often unintentionally demeans same-sex attraction as an inferior trait that must be explained away.[5] It also puts the LGBTQ community in the awkward position of suggesting binary classification of all traits is possible, including sexual identities that the community has long recognized as far more fluid than traditionally thought. Furthermore, the assumption that there is a binary immutable-malleable divide between human characteristics ignores one crucial insight hidden within immutability theory: that government should not classify individuals based upon characteristics for which they bear no moral responsibility, whether or not that characteristic can actually shift over the course of an individual's life. A renewed focus on that kind of responsibility may be a more useful foundation for arguments in favor of LGBTQ rights than immutability, as traditionally understood.

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The Equal Protection Clause of the Fourteenth Amendment reads that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws."[6] One strand of equal protection theory holds that classifications based upon a select set of specific criteria are "constitutionally suspect" and therefore subject to "the most rigid scrutiny."[7] In an early articulation of the suspect classification doctrine, Justice Hugo Black wrote that "[a]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] [c]ourts must subject them to the most rigid scrutiny."[8] Such classifications have very little chance of withstanding constitutional review under the Court's harsh strict scrutiny standard.[9]

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5. *See, e.g.*, Diamond & Rosky, *supra* note 4, at 31.

6. U.S. CONST. amend. XIV, § 1.

7. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

8. Korematsu v. United States, 323 U.S. 214, 216 (1944). In addition to the suspect classification strand of equal protection thought, there is a parallel "fundamental rights" theory, which holds that the clause is triggered if a law impacts a specific set of rights granted to all. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 113 (1976).

9. The standard has famously been called "strict in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Richard Fallon, *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 79

But what exactly constitutes a suspect classification? The text of the amendment itself suggests protection of "persons,"[10] which would call into question innumerable legal classifications between citizens necessary for the government to function. After all, any classification between persons seems dubious, or at least legally questionable, under the text of the Fourteenth Amendment. But surely the government must make some classifications that distinguish between people for society to function. Without any such distinctions, it would be impossible for the government to distribute goods and services in an orderly fashion.

Perhaps suspect classifications are those that generate particularly invidious subordination in society. Justice Black's formulation, and theoretical work by Professor Owen Fiss, suggested that classifications are suspect if they subordinate discrete "groups" that are distinct, interdependent, and have traditionally been saddled with lower status in society for some extended period of time.[11] This "anti-subordination" theory asks judges evaluating government classification to determine which groups have faced sufficient historical disadvantage such that future classifications based upon status in those groups are constitutionally suspect.[12] Anti-subordination theory acknowledges the need to consider whether historical discrimination will continue in the future,[13] even if historical discrimination helps identify which classifications are suspect and worthy of more searching judicial review. It also suggests that groups are only entitled to strict scrutiny protection if they are unable to rely upon ordinary political processes to influence government decision-making.[14]

I have previously argued for a vision of suspect classifications that focuses on the immutability of the traits the government uses to classify.[15] In other words, the government generally should not classify on the basis

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(1997) ("'strict in theory' will routinely prove 'fatal in fact'").

10. U.S. CONST. amend. XIV, § 1.

11. Fiss, *supra* note 8, at 147-50; *see also* Symposium, *The Origins and Fate of Antisubordination Theory*, ISSUES IN LEGAL SCHOLARSHIP, vol. 2, issue 1 (Aug. 2002), https://www.degruyter.com/journal/key/ils/2/1/html?lang=en.

12. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 52 (1976).

13. *See* Fiss, *supra* note 8, at 151 n.67.

14. On this basis, Justice Scalia argued in dissent in *United States v. Virginia* that gender-based discrimination might only be subject to rational basis review, given that women are a majority of the electorate capable of advancing their interests through the ordinary political process. 518 U.S. 515, 575 (1996) (Scalia, J., dissenting). Though certainly the LGBTQ community has expanded is political voice in recent years, it seems far less clear that it can advance it interests through the ordinary political process such that no form of heightened scrutiny is appropriate.

15. Gentithes, *supra* note 2, at 519-31.

of attributes which are beyond any individual's control.[16] Such characteristics are not readily alterable by choice,[17] regardless of whether there is some recognized history of discrimination on that basis.[18] Some government distinctions based upon "immutable" traits—say, clear eyesight for licensed drivers—may still seem appropriate. Classifications based upon eyesight may not be suspect (or may withstand strict scrutiny, even if suspect) because they rely upon something inherent in eyesight itself—the ability to see clearly while operating a potentially dangerous machine. But classifications based upon eyesight may be suspect (or may withstand strict scrutiny) if not related to something inherent about vision—say, a classification that denies certain forms of government largesse to those with worse eyesight, simply because of the assumption that nearsighted citizens are worthy of less respect or dignity.[19] Classifications based upon immutable characteristics in that way are particularly invidious.[20]

This seems to suggest, in unnecessarily rigid terms, that immutability should be the singular qualification for suspect status in equal protection jurisprudence. But reevaluating that immutability theory reveals a key insight that can expand the legal understanding of suspect classifications. The discussion of immutable characteristics above reveals, in part, that a lack of moral responsibility—one facet of immutable characteristics—is what makes classifications so suspicious. Early Supreme Court discussions of immutability, such as 1973's *Frontiero v. Richardson*, highlighted "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[21] Perhaps what arouses suspicion in classifications based upon immutable characteristics is the lack of responsibility for such characteristics. The immutability discussion merely shows that classifications based upon traits for which we are not responsible are far more likely to violate fundamental notions

16. *Id.* at 519-20.

17. *Id.* at 522.

18. *Id.* at 522-23.

19. Such classifications "fail to categorize persons on the basis of something inherent in the very characteristic used to implement the governmental scheme." *Id.* at 528. In a similar vein, John Rawls's "difference principle" posits that distinctions based upon natural characteristics should only be permissible when they benefit all members of society, including those who occupy the least advantageous positions on the social ladder. *See* JOHN RAWLS, A THEORY OF JUSTICE 65-68 (rev. ed. 1999).

20. Strict scrutiny might still have a role to play in smoking out illicit purposes for classifications that otherwise seem to accrue to society's general benefit. *See* Gentithes, *supra* note 2, at 534-38.

21. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)); *see also* Diamond & Rosky, *supra* note 4, at 16-17.

of fairness when the government distributes burdens and benefits. They are thus far more likely to violate equal protection.

To show the relationship between responsibility and immutability, it is helpful to reconceive arguments that classifications are suspect when based upon immutable characteristics into a straightforward categorical syllogism:

> Major Premise: It is unfair (and likely unconstitutional) to disadvantage someone because of characteristics for which they are not morally responsible.
>
> Minor Premise: Immutable characteristics are ones for which nobody is morally responsible.
>
> Conclusion: It is unfair (and likely unconstitutional) to disadvantage someone because of immutable characteristics.

As this syllogism demonstrates, it is not the unchangeable nature of an immutable characteristic itself that makes classification, and possible discrimination, on that basis so troubling. Instead, immutable characteristics classifications are suspect because they bear no relationship to individual moral responsibility, as the major premise in the syllogism above provides. That may be in part because of their unchangeable nature, but it is not impossible that other characteristics might similarly be ones for which individuals are not morally responsible irrespective of their malleability. Immutable characteristics, as mere "accidents of birth,"[22] do not generate any moral responsibility that would be appropriate to rely upon to make government classifications. But other characteristics might similarly fail to generate moral responsibility and might similarly be inappropriate grounds for government classification.

Immutable characteristics are generally unchangeable, at least not without great pain or effort. That permanence is often the focus of discussion of immutability in legal arguments, where LGBTQ advocates suggest that sexual orientation is fixed and biologically-determined trait.[23] But perhaps more importantly, immutable characteristics are traits for which nobody can be held morally accountable.[24] That lack of

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

23. "For more than 50 years, opponents of the rights of sexual minorities have argued that same-sex relationships represent deviant lifestyle choices that should be socially discouraged, and advocates for sexual minorities have countered by arguing that sexual orientation is a fixed, biologically based trait that cannot be chosen or changed." Diamond & Rosky, *supra* note 4, at 3.

24. As Jessica Clarke has noted, immutability theory has both a forward-looking aspect, which focuses on the individual's inability to change the characteristic, and a backward-looking aspect, which focuses on the individual's lack of responsibility for the characteristic. Clarke, *supra* note 1, at

responsibility is what makes discrimination on the basis of such characteristics so abhorrent.

Casting immutability arguments in these syllogistic terms reveals that immutable characteristics are just an example of factors for which nobody can be considered responsible. They may not be the only ones. Perhaps they are just the most clearly and easily demonstrated traits for which nobody is morally responsible because they are also unchangeable.[25] But perhaps some characteristics that are not entirely unchangeable are also not subject to claims of moral responsibility, despite having more fluidity in their expression than purely immutable characteristics. If so, it would remain abhorrent to classify individuals on the basis of those slightly more malleable traits. If individuals had no moral responsibility for the characteristic, even if it could be altered with slightly less effort or pain than traditional immutable characteristics, it might still be suspect for the government to create classifications on the basis of that characteristic.

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LGBTQ advocates raising equal protection claims have several options. First, advocates could focus their arguments on rationality, rather than attempting to change the level of scrutiny applied to classifications based upon sexual orientation or other gender identity characteristics. As I noted above, classifications appear particularly invidious unless the distinctions they draw are related to something inherent in the trait or group—clear eyesight for licensed drivers, in my example. That clear relationship seems exceedingly unlikely, and largely based upon unfounded assumptions, when classifications are based upon LGBTQ status or characteristics. Being LGBTQ does not affect an individual's abilities or needs in any meaningful way, especially in a manner that would be an appropriate grounds for distributing government benefits and burdens. Arguments that gay behavior is inherently immoral, undermines

20. The latter aspect is the focus of my discussion here.

The Supreme Court has noted this relationship between immutability and lack of responsibility in cases involving non-marital and non-citizen children. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."); Plyler v. Doe, 457 U.S. 202, 220 (1982) (noting children's lack of responsibility for undocumented immigration status).

25. So conceived, immutability would not be a necessary condition for a court to consider a classification suspect. *See* Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI. KENT L. REV. 597, 627 (2014).

community values, or improperly influences children or others could be directly challenged as irrational phobias that cannot survive even rational basis review.[26]

But the argument that LGBTQ classifications are irrational comes with risks, however. Rational basis review itself may be a flawed mechanism to meaningfully check abhorrent classifications, allowing them to survive on the thinnest reeds of justification. The current political climate, as well as the makeup of the judiciary and the Supreme Court, might counsel against simply accepting rational basis review as the appropriate standard of scrutiny. Strict scrutiny all but guarantees protection; rational basis review comes with significant risk that it will be applied in a watered-down manner that favors government classification even on dubious justifications. Proving that sexual orientation and gender identity are worthy of strict scrutiny would be a logically, and perhaps politically, clearer route to greater constitutional protection.

LGBTQ advocates drawn to a strict scrutiny argument might believe that immutability arguments hold the most promise. If there is a direct parallel between sexual orientation or gender identity on the one hand, and race on the other, then classifications based upon sexual orientation and gender identity should be viewed just as skeptically as racial classifications. But LGBTQ advocates should be wary of making that strong immutability claim for several reasons.

First, it is not scientifically accurate to suggest that sexual orientation is a uniformly unchangeable trait, over which individuals entirely lack any choice or control. As Lisa Diamond and Clifford Rosky have carefully documented, the scientific evidence suggests far more fluidity in sexual attraction over time.[27] The evidence also shows that, although same-sex attraction may have some biological influences, it is far from clear that genetics alone controls sexual orientation.[28]

Second, arguments based upon immutability—even if that term focuses less on malleability and more on the centrality of the trait to how an individual defines their personhood, as some courts' discussions of immutability have defined the term[29]—suggest that same-sex attraction is

26. For examples of how such arguments might be framed, *see* Obergefell v. Hodges, 576 U.S. 644, 665-76 (2015); Romer v. Evans, 517 U.S. 620, 632-36 (1996); United States v. Windsor, 570 U.S. 744, 769-75 (2013).

27. Diamond & Rosky, *supra* note 4, at 5-11 (2016). Diamond and Rosky note that "the simplistic notion of 'choice' wielded in public debates over sexual orientation does not do justice to the complex, variable, and multidimensional nature of sexual desire as it is manifested in the mind, brain, and body." *Id.* at 14.

28. *Id.*

29. *See* Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring)

an inferior or abnormal condition for which individuals must have some kind of excuse.[30] The subordination of sexual orientation as a trait individuals should cover up or apologize for may be just as abhorrent and damaging as a government classification that is made on the basis of sexual orientation or gender identity.

Instead, LGBTQ advocates might argue that immutable characteristics are both unchangeable and sit at one extreme end of a responsibility continuum. They are the exemplar of a trait for which most of us have no moral responsibility because we cannot select our immutable traits and we generally cannot alter them.[31] At the other end of the responsibility continuum would sit pure choices, defined as completely voluntary decisions that are fully within an individual's control. The individual bears clear and total responsibility for such pure choices. Viewed as a dichotomy, immutable characteristics classifications should always be suspect, while classifications based upon pure choices should not.

But there is a vast middle between those two extreme ends of the responsibility continuum. Perhaps some characteristics are more malleable, and yet we bear similarly little moral responsibility for them such that classification on their basis is suspect. Perhaps some characteristics that can sometimes change, or at least are subject to far more nuanced and subtle combinations of biological determination, environmental influence, and conscious control, may still land near the immutability end of the responsibility spectrum. Though such partially-malleable traits are not "immutable" in the traditional sense, the law should treat them similarly to other traits for which we bear no moral responsibility. They are not subject to conscious choice and are

("'[I]mmutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.").

30. "A final and fatal weakness of immutability arguments for the rights of sexual minorities is that these arguments boil down to large-scale apologies or excuses for same-sex sexuality." Diamond & Rosky, *supra* note 4, at 31. "The new immutability's protections for 'personhood' exclude the most stigmatized, and its underlying premises reinforce stereotypes." Clarke, *supra* note 1, at 12. "[T]hese theories are almost invariably couched in pejorative terms, such as abnormality, deficiency, [or] aberration." Stein, *supra* note 25, at 621.

31. One might also imagine that some traits exist on a continuum between wholly biologically determined and wholly determined by choice, as Edward Stein has noted. "[I]magine a continuum representing the contribution of biological factors to a trait: at one end is eye color and at the other end is taste in music. The debate about the extent to which sexual orientation is biologically based is, roughly, a debate about where sexual orientation falls on this continuum." Stein, *supra* note 25, at 604.

exceedingly difficult, if not impossible, to consciously change.[32] They do not trigger any moral responsibility on the part of the trait's holder simply for expressing that trait. Such traits, then, should still trigger strict scrutiny when classifications are based upon them.

In cases involving same-sex attraction, LGBTQ advocates should argue that the trait fits comfortably near the immutability extreme of the responsibility continuum. What places those traits on that end of the continuum is not just that these are difficult, if not impossible, traits to change, even if that is true in the vast majority of cases. Instead, these are not characteristics for which individuals are responsible, in any moral sense. They are not negative traits that individuals should apologize for through some appeal to irresistible biological compulsion—a scientifically dubious and morally superfluous argument. Instead, even if not wholly immutable at the time of one's birth, these traits do not generate moral desserts simply because an individual expresses them. Thus, government classifications that distribute societal benefits and burdens on the basis of those traits are suspect and should be reviewed under strict scrutiny standards.

Such an argument for strict scrutiny might also allow advocates to capitalize upon the intersectionality of LGBTQ characteristics with other traits that have traditionally led to marginalization and oppression. As those traits overlap—and as the experience of the LGBTQ community becomes centered around intersections with categories traditionally subject to strict scrutiny, like race or national origin—the argument for strict scrutiny even if sexual orientation is not wholly fixed or biologically determined becomes stronger still. Rather than ignore those overlaps, advocates can emphasize the differences within the LGBTQ community as a source of strength, providing greater protection against discrimination.[33] Such intersectionality arguments could tip the balance towards strict scrutiny.

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When LGBTQ advocates raise equal protection arguments, they should resist the temptation to make immutability claims. Instead, they

32. "The overwhelming evidence indicates that, for most people, sexual orientations are not consciously chosen and are very difficult or impossible to change." *Id.* at 611.

33. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (arguing that identity politics often ignores powerful differences within groups, generating tension rather that emphasizing these important intersections).

should acknowledge greater flexibility in sexual orientation and gender identity, thereby avoiding traditional and binary immutability theory, and emphasize the lack of moral responsibility as a ground for strict scrutiny. Such arguments may gain more traction in the years to come rather than repeated efforts to suggest that sexuality is biologically determined, unalterable, or both. Such arguments can also acknowledge the scientific evidence that suggests greater variation in sexual orientation, shifting the focus to the moral responsibility logic that lies behind traditional immutability theory. They can therefore be more persuasive both to courts and public opinion.