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Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court’s Suspect Classification Jurisprudence*, 50 WASHBURN L. J. 33 (2010).

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**Abstract:**

This essay responds to the Foulston, Siefkin Lecture, delivered by Professor William Eskridge at the Washburn University School of Law. Professor Eskridge challenged not only the argument that political powerlessness is a requirement for heightened scrutiny under the Equal Protection Clause, but also the wisdom of applying heightened equal protection scrutiny to laws discriminating against groups that are truly politically powerless. This essay uses Professor Eskridge’s argument to frame a more overarching issue in the Court’s suspect classification jurisprudence.

The political powerlessness issue highlights an important ambiguity in the Court’s decisions analyzing whether classes or classifications are inherently “suspect” so as to require heightened equal protection scrutiny of government action that adversely affects those classes or is based on those classifications. Put simply, the cases leave unclear whether heightened scrutiny applies because laws targeting a “suspect class” are likely to be the result of a political process failure, or because the use of a “suspect classification” is unfair to those affected. Under the political process rationale, scrutiny is elevated because a history of discrimination and political powerlessness leads us to suspect that the law is the product of animus toward the class and its members. Under the individual fairness rationale, scrutiny is elevated because the classification is unlikely to reflect real differences that justify treating people differently under the law. The political powerlessness issue is highly relevant if the focal point of the inquiry is the existence of a political process failure, while it is not so relevant to the question of whether it is fair to treat individuals differently on the basis of the classification.

I argue in the essay that the cases addressing whether a class or classification is suspect are ambiguous on this question, but other aspects of the Court’s equal protection jurisprudence suggest that it is individual fairness, rather than political process failure, that matters. The argument proceeds in several steps. I begin with a general overview of equal protection doctrine regarding suspect classes and classifications. I then describe the political process and individual fairness rationales for heightened scrutiny and consider the intermingling of the two rationales in the cases recognizing or declining to recognize a class or classification as suspect. Although these cases do not indicate which rationale is paramount or controlling, an examination of the Court’s “disparate impact” and “affirmative action” decisions suggest that the Court has firmly embraced the individual fairness rationale and rejected or minimized the political process rationale. Finally, I examine the lower court’s difficulties applying these principles to the question of whether to elevate scrutiny of classifications based on sexual orientation.