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# Sexual Orientation and Heightened Scrutiny: Mutually Inclusive Concepts for Our Times

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## INTRODUCTION

Dale Carpenter's book, *Flagrant Conduct*,<sup>1</sup> details the development of the landmark case, *Lawrence v. Texas*,<sup>2</sup> from the arrests of John Lawrence and Tyrone Garner for their violation of a Texas statute criminalizing homosexual conduct,<sup>3</sup> to the monumental United States Supreme Court decision that held the statute unconstitutional in violation of the Equal Protection Clause.<sup>4</sup> This decision by the Court overturned their five-to-four decision in *Bowers v. Hardwick*, less than two decades earlier, that a Georgia sodomy statute did not violate the fundamental rights of homosexuals.<sup>5</sup>

The Supreme Court's constitutional law jurisprudence demonstrates a policy of deciding civil rights issues only after the political climate of the nation has clearly indicated a fundamental shift in support of the relevant issue. This literary review argues that, in accordance with Carpenter's theory, a comprehensive shift in America's collective attitude toward sexuality is a strong indication that the Court will soon subject classifications based on sexual orientation to heightened scrutiny in order for relevant laws to pass constitutional muster. The Court granted certiorari in two cases on the same day in December 2012—*Hollingsworth v. Perry*<sup>6</sup> and *United States v. Windsor*<sup>7</sup>—both present the opportunity for the Court to finish what it started in *Lawrence*, and firmly secure the right of homosexuals to equal protection of the laws.

The *Windsor* case challenges the validity of the federal Defense of Marriage Act (DOMA),<sup>8</sup> and *Hollingsworth* opposes the legitimacy of a voter-enacted amendment of

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<sup>1</sup> DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS* (2012).

<sup>2</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>3</sup> TEX. PENAL CODE ANN. § 21.06(A) (2003).

<sup>4</sup> *Lawrence*, 539 U.S. at 585.

<sup>5</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>6</sup> 671 F.3d 1052 (9th Cir. 2011), *cert. granted*, No. 12-144 (Dec. 12, 2012).

<sup>7</sup> 699 F.3d 169 (2d Cir. 2012), *cert. granted*, No. 12-307 (Dec. 12, 2012).

<sup>8</sup> *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012),

California's constitution that restricts the state's recognition of marriage to only those "between a man and a woman."<sup>9</sup> The stakes are high, if the Court invalidates DOMA or Proposition 8 as unconstitutional under a heightened scrutiny standard. Either decision, depending on the depth of the Court's analysis, may result in the invalidation of all state and federal laws that prohibit marriage equality; the widespread effect would be parallel to the Court's decision in *Brown v. Board of Education*, where Kansas's segregation of schools was found unconstitutional therein resulting in desegregation of schools across the nation.

This analysis proceeds in three parts. The first part provides the little known factual background of *Lawrence* provided in *Flagrant Conduct*, as well as the book's discussion of the litigation strategy in that case as it bolsters this paper's position given the Court should clearly establish the applicability of a heightened scrutiny where legal classifications are based on sexual orientation. The second part discusses the Court's Equal Protection Clause jurisprudence concerning the development of heightened scrutiny analysis. Part Two also sets forth a history of the Court's landmark equal protection cases with respect to classifications based on sexual orientation. Finally, Part Three arrives at the conclusion that it is the Court's duty to employ heightened scrutiny to classifications made on the basis of sexual orientation based on the legal and social developments relevant to the issue.

## I. THE DEVIL IS IN THE DETAILS

The Supreme Court's decision in *Lawrence* provides only that police arrived at the apartment of John Lawrence in September 1998 in response to a reported weapons disturbance.<sup>10</sup>

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*cert. granted*, 133 S. Ct. 786 (2012); *see* CAL. CONST. art. I, § 7.5 (2008).

<sup>9</sup> *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted*, *Hollingsworth v. Perry*, 133 S. Ct. 786 (U.S. 2012); *see* 1 U.S.C. § 7 (2006) (defining "the word 'marriage' [to] mean[] only a legal union between one man and one woman as husband and wife, and the word 'spouse' [to] refer[] only to a person of the opposite sex who is a husband or a wife").

<sup>10</sup> *Lawrence*, 539 U.S. at 562.

Upon arriving, police found Lawrence and Garner engaged in a sexual act in violation of Texas's homosexual conduct law, resulting in their arrests.<sup>11</sup>

Carpenter begins *Flagrant Conduct* with a brief discussion of the history of the societal condemnation of sodomy commencing from the very beginning of American settlement. One account discovered in the diary of Reverend Francis Higgeson, dating back to an immigrant voyage of 1629, revealed that upon arriving in Massachusetts, five boys who confessed to having engaged in sexual "wickedness" during their voyage were sent back to England for their punishment—at the time, as the Massachusetts official was surely aware, sodomy was punishable in England by hanging.<sup>12</sup> This zero-tolerance policy of mother England seems to be the foundation of all state laws condemning homosexual conduct through the nineteenth century and well into the twentieth century through the prohibition of anal sex.<sup>13</sup>

Carpenter notes that pre-Civil War sodomy laws were especially vague because the crime was too abhorrent for the spoken word, considered "not fit to be named."<sup>14</sup> Simultaneous with the rapid industrialization of the time, homosexual subcultures existed in New York, San Francisco, St. Louis, Philadelphia, Chicago Boston, New Orleans, and Washington D.C.; resulting in more aggressive laws regulating sexuality.<sup>15</sup> It was not uncommon for such laws to call for the callous penalty of sterilization or castration of the convicted.<sup>16</sup> In a corresponding effort to eradicate homosexuality medical institutions performed extreme medical procedures

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<sup>11</sup> *Id.* at 563.

<sup>12</sup> CARPENTER, *supra* note 1, at 71 (citing FRANCIS HIGGESON'S JOURNAL, in THE FOUNDING OF MASSACHUSETTS (Boston, Massachusetts Historical Society, 1930) (entry of June 29, 1629).

<sup>13</sup> *Id.* at 4 (also prohibiting oral sex).

<sup>14</sup> *Id.* at 5

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 6.

including prefrontal lobotomies, the injection of mass doses of male hormones, and administration of electric shock therapy.<sup>17</sup>

At the same time, federal authorities took a comprehensive approach to suppressing homosexuality by seizing and destroying publications and films it deemed obscene, excluding immigrants convicted of sexual crimes, barring military service by those considered degenerates, and cracking down on the spread of communism in part because of the public belief that it was linked to deviant sexuality.<sup>18</sup>

The anti-homosexual fervor reached a head between 1941 and 1961, arrests for violations of state sodomy laws were at their peak, and at all levels of government, criminal penalties were imposed on as many as one million lesbian and gay men who engaged in consensual adult intercourse, and even acts of affection including dancing, kissing, and hand holding.<sup>19</sup>

Law enforcement officials were utilizing both direct and indirect methods to shut down community establishments known to be gay.<sup>20</sup> Regulatory systems, such as business and liquor-license schemes, represented one of the indirect mechanisms by which these unwanted businesses were barred from operation.<sup>21</sup> Specifically, a 1954 ordinance passed by Miami mandated discrimination by private proprietors by prohibiting bar owners from knowingly allowing two or more persons who were homosexuals, lesbians or perverts to congregate or remain in the place of business.<sup>22</sup> This ordinance had the effect of closing all of Miami's gay bars by 1960.<sup>23</sup> Similarly, the Liquor Authority of New York State, among other states, prohibited bars from

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

serving prostitutes and homosexuals.<sup>24</sup> Moreover, state efforts to target homosexuals through legislation were bolstered by their respective law enforcement officials by way of police stakeouts at suspected gay bars, decoy operations, and police raids to arrest large numbers of socializing homosexuals.<sup>25</sup>

Homosexual citizens responded to these attacks by political organization in the form of gay-rights groups such as the Mattachine Society and the Daughters of Bilitis, formed in the 1950s.<sup>26</sup> Naturally, the Federal Bureau of Investigations closely monitored these gay-rights groups, further increasing the social disapprobation.<sup>27</sup>

With respect to Texas, at first, its anti-sodomy law was unenforceable as the courts refused to affirm convictions under the statute due to a separate law requiring that criminal offenses be “expressly defined.”<sup>28</sup> Accordingly, outlawing the “crime against nature” did not satisfy the express standard under the law.<sup>29</sup> During this period of influx, Texas courts held that the anti-sodomy law applied equally to heterosexual activity.<sup>30</sup>

In 1943, the anti-sodomy law was revised by the state legislature explicitly making oral sex a crime for the first time in Texas.<sup>31</sup> Under the revision, the statute suggested that while oral sex for the purpose of “carnal copulation” was illegal, oral sex for some other purpose was acceptable.<sup>32</sup> Interestingly, while sexual intercourse with an animal was prohibited, oral sex with an animal was not illegal because the statute only forbade oral sex performed on “another human being.”

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<sup>24</sup> *Id.*

<sup>25</sup> CARPENTER, *supra* note 1, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.*

By the 1960s the nation's landscape with respect to privacy rights had undergone a significant change. These developments would set the foundation for the *Lawrence* brief. In the 1965 case of *Griswold v. Connecticut*, the Court held that the "right to privacy" protects the marital bedroom from police intrusion.<sup>33</sup> Less than a decade after this decision, the right to privacy was extended to unmarried persons in *Eisenstadt v. Baird*.<sup>34</sup> This shift was reflected in the Model Penal Code of 1955 (MPC), which in relevant part, urged the states to do away with or modify antiquated sex laws concerning subjects like adultery, fornication, bestiality, seduction, and sodomy.

The first of the states to accept the suggested changes of the MPC was Illinois in 1961. Following suit, in 1973, the Texas legislature revised its criminal laws liberalizing many of its sex laws. This comprehensive revision effected the decriminalization of adultery, fornication, seduction, and even bestiality.<sup>35</sup> Carpenter suggests that this change reflects the Texas legislature's understanding that the Supreme Court's decisions constrained the government's power to control human sexuality. Importantly, in 1970, a Dallas federal court held that the state sodomy law was unconstitutional in its application to married couples; however, the judgment was ultimately vacated.<sup>36</sup>

The national trend and court decisions on the issue did not persuade the Texas legislature to stay out of the bedrooms of homosexuals. In fact, the visible advancement of the gay-rights movement resulted in a backlash in Austin. As laws concerning the sexual conduct of heterosexuals, married or unmarried, procreative or non-procreative, were progressively becoming more liberal, the legislature maintained its codification of homosexual intolerance.

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<sup>33</sup> 381 U.S. 479 (1965).

<sup>34</sup> 405 U.S. 438 (1972).

<sup>35</sup> CARPENTER, *supra* note 1, at 11.

<sup>36</sup> *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated sub nom. Wade v. Buchanan*, 401 U.S. 989 (1971).

The new law defined “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person.”<sup>37</sup> Although seemingly equal in its application, a corresponding “Homosexual Conduct” provision clarified that these acts were a crime only if performed “with another individual of the same sex,” thus, heterosexual sodomy was legal in the state.<sup>38</sup> In fact, the scope of homosexual prohibition expanded, for the first time the law proscribed lesbian sex.<sup>39</sup>

Thus, while the 1973 liberalization of Texas Homosexual Conduct law marked the expansion of the types of sexual acts traditionally proscribed under sodomy laws, at the same time, the legislature expressly proscribed both oral and anal sex only if performed by homosexuals. The absurdity of this legislative development is best underscored by the fact that after the statute’s enactment in 1973, it was legal to have sex with an animal, but not with another person of the same sex.<sup>40</sup>

Gay-rights supporters had made countless attempts to challenge the Texas statute as unconstitutional under both the U.S. and Texas Constitutions, but were unsuccessful either because of technical reasons or courts’ rulings that the law was constitutional.<sup>41</sup> Notably, in 1985, the Court of Appeals for the Fifth Circuit held that the statute was constitutional under equal protection of the laws, which was a reversal of a decision by a lower court.<sup>42</sup> And although two state appeals court decisions in the early 1990s provided a victory for homosexuals who were discriminated against by their employer because of their sexual orientation, the Texas Supreme Court held that any challenge to the statute must be made through the state’s criminal

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<sup>37</sup> CARPENTER, *supra* note 1, at 11.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.*



courts. Thus, the statute could not be challenged until the arrest and prosecution of two consensual adults for having sex in private.

Interestingly, Carpenter's research revealed that in the 143-year life of the Texas sodomy law, there were no publicly reported court decisions involving the enforcement of the law against consensual sex between adult persons in a private space. The published Texas court decisions concerning the issue of sodomy contained some element that distinguished each of those cases from *Lawrence* – many concerned a non-private place, some involved force or coercion, others involved minors. Yet, as Carpenters points out, “the absence of published decisions does not mean that the Texas sodomy law was never enforced against private activity.”<sup>43</sup>

Carpenter points out that the development of the statute demonstrates that as was the case for similar laws around the country the law originally applied to certain acts regardless of the sex of the people involved.<sup>44</sup> Yet the statute evolved in such a way that it targeted a narrow type of people who engaged in certain acts. Thus, the statute stood for the codification of the cultural assumption that homosexuals were hyper-sexualized and dangerous.

All of the relevant players in the background facts of *Lawrence* – defendants, activists, and sheriff's deputies – were raised in Houston.<sup>45</sup> Carpenter discusses the history of Houston's gay men and lesbians in the years preceding *Lawrence* in order to illustrate the mutual “distrust and antagonism between the city's gay population and police.”<sup>46</sup>

Dating back to the 1920s, there existed bars in Houston that served a mostly homosexual clientele. Obviously, their existence and location was known by word of mouth. These bars were practically the only private place that homosexuals could gather. As these

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<sup>43</sup> CARPENTER, *supra* note 1, at 13–14.

<sup>44</sup> *Id.* at 16.

<sup>45</sup> *Id.* at 18.

<sup>46</sup> *Id.* at 19.

private bars were a place where members of the gay community could discuss gay life, they are considered the precursors to today's gay-rights political organizations.

However, attendance at any of these gay bars came with considerable risk. First, walking into one of these bars, if seen by the public, constituted a confession of one's sexuality. Second, there was the fear of being harmed by someone at the bar because during the 1940s and 1950s there were men known in the gay subculture as "dirt" who would rob and blackmail men at gay bars. In some instances, "dirt" would "drop a nickel on a sister," which would involve a person calling the employer of a gay acquaintance to inform the employer of their employee's homosexuality. The object was to get the person fired and then apply take his or her job.<sup>47</sup> Third, there was fear of a police raid. Houston police regularly raided gay bars from the 1950s through the mid-1980s, as did law enforcement officials in states around the country. Even private homes were subject to similar raids.

Gay bars and social life began to undergo comparative prosperity in 1960s.<sup>48</sup> There were dozens of gay bars in Houston, yet police still represented a legitimate fear of in their attempts to combat the community's success. This type of animus was even reflected in the private sector as demonstrated by the acts of a Houston businessman who controlled a prominent bank and founded a highly reputable law firm. The man hired a private detective to visit gay bars and record the license plates of nearby parked cars. Once recorded, the plates were checked against his employees' license plates, firing those that matched.<sup>49</sup>

During the late 1960s, Houston's gay community began forming gay political organizations in a response to police harassment. The roots of this movement began with the organizational efforts of Ray Hill, David Patterson, and Rita Wanstrom in 1967. From their

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<sup>47</sup> *Id.* at 20.

<sup>48</sup> *Id.* at 21.

<sup>49</sup> CARPENTER, *supra* note 1, at 21.

efforts came the lesbian group, Tumblebugs, and a gay group, the Promethean Society.<sup>50</sup> The organizational efforts were secretive requiring leafleting cars parked near gay bars.<sup>51</sup> Because of this constraint, continuity among the groups was compromised resulting in the hampering of group discussions.

Around the same time that Houston movement was taking off, New York City was the site of a landmark moment in gay rights. On June 27, 1969 police raided a gay bar known as the Stonewall Inn.<sup>52</sup> After the raid, a riot ensued by the bar patrons who were joined on the streets by members of the public. The people set fires defiant chants were coupled by their hurling of rocks and bottles at police. Even further unrest was displayed the following night, but all the while inspiring homosexuals across the country.<sup>53</sup>

In Houston, one year after the Stonewall Inn riots, a local chapter of Integrity, a gay religious group, was formed. Pursuant to a priest's permission, the chapter held its meetings at Holy Rosary Church. The chapter's founders were a group of gay men who described the group as a "fellowship of homophiles."<sup>54</sup> The group formed Houston's first gay speakers bureau and the first gay clinic to diagnose and treat venereal diseases.<sup>55</sup> Additionally, the group supported political candidates responsible for the election of Fred Hofheinz to mayor in 1973. Moreover, the groups' leaders were the first to appear before the city council supporting gay causes, and the core of the founders of the Gay Political Caucus.

The summer of 1971, like those prior, brought with it raids on local gay bars resulting in their destruction by Houston police. Fuel to the fire was added by the events surrounding the

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<sup>50</sup> *Id.* at 22.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> CARPENTER, *supra* note 1, at 23.

Houston Candy Man murders. For three years between 1970 and 1973, Dean Corll used his mother's candy business to abduct, rape, and murder twenty-seven young men in Houston. Police authorities discovered that Corll's method was first to incapacitate his victims with alcohol or deceived them into putting on handcuffs. Next, he would strip the victims naked, tie them to a board, torture, and sexually assault them. He then would either strangle or shoot his victims dead.<sup>56</sup> Corll would wrap the dead bodies in plastic sheets and discard them around Houston. This morbid story was circulated by the press and fanned the flames of those who believed that homosexuals were mentally ill, predatory, and a threat to children everywhere.

Yet, the struggle for gay rights continued in Houston. On June 19, 1984 the city council passed two ordinances prohibiting discrimination against gay people in city employment. This called for inserting a provision to include "sexual orientation" to sections of the civil service code.<sup>57</sup> On January 19, 1985, a referendum was held calling for the repeal of the ordinances.<sup>58</sup> The result of the referendum was the rejection of both ordinances by a 40% margin.<sup>59</sup>

John Geddes Lawrence was born to a devout family of Southern Baptists in Beaumont, Texas.<sup>60</sup> His parents divorced when he was six years old, and his father died when he was eleven. Lawrence was primarily raised by his grandmother. He served in the Navy for five years beginning in 1960. At one point, he had a marriage to a woman he met in the Navy, but it ended in divorce due to the absence of "physical attraction." Lawrence had various sexual relationships with several other men during his Naval service.

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<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.* at 28.

<sup>58</sup> *Id.* at 33.

<sup>59</sup> *Id.* at 35.

<sup>60</sup> *Id.* at 42.

Lawrence moved into the Colorado Club Apartments of East Houston in 1978.<sup>61</sup> Beginning in the late 1980s, Lawrence worked as a medical technologist at a nearby hospital.<sup>62</sup> And although Lawrence presented himself as an unassuming man, in 1967 he was found guilty of murder-by-automobile in Galveston County and sentenced to five years' probation.<sup>63</sup> And twice since that incident, he was arrested for driving while intoxicated.

Lawrence met Robert Eubanks in the mid-1970s.<sup>64</sup> Throughout the 1980s and 1990s, Eubanks worked odd jobs and slept wherever he could find shelter. He was described as a loud, volatile and a heavy drinker. At one point, Lawrence and Eubanks shared an apartment with each other, but Lawrence moved out because trouble followed Eubanks wherever he went. Despite this, they remained good friends.

In 1990, Eubanks met Tyrone Garner, the man arrested with Lawrence on the night underlying *Lawrence v. Texas*. Garner had nine siblings and was born into a traditional Baptist family. Garner and his family had an impoverished upbringing. Garner did not go to college. Not surprisingly, he never even rented an apartment, instead he moved about from place to place staying with family members and friends. Soon after meeting, Garner and Eubanks began dating and moved in together.<sup>65</sup> In what was described as a relationship that was “tempestuous, to say the least.”

After meeting each other, Garner and Lawrence had not become anything more than acquaintances. The three men occasionally went to diner, and about once a month, Garner and Eubanks traveled the twenty miles to Lawrence's neighborhood to clean his home and run his errands in exchange for money.

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<sup>61</sup> CARPENTER, *supra* note 1, at 43.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 44.

<sup>65</sup> *Id.* at 45.

At the outset, it should be noted that Lawrence's apartment was not legally in Houston, but in an unincorporated area outside the city limits.<sup>66</sup> As such, these locations fall under the jurisdiction of the Harris County Sheriff's Office ("HCSO"). Records show that HSCO deputies fired on unarmed people with far more frequency than similar urban law enforcement agencies during the period 1999-2004. One factor could be that other agencies had stricter use-of-force policies than did Harris County.<sup>67</sup> Equally disconcerting is HSCO's recorded treatment of minority groups. In this respect, HSCO had an unusually high rate of complaints about racial bias, with such complaints receiving retaliation. Moreover, within the years before *Lawrence*, almost all the leaders of the black officers' league had been fired, demoted, or forced to resign.<sup>68</sup>

With respect to sexual orientation, there were no openly gay employees working for the HSCO in 2007.<sup>69</sup> The department's equal employment policy did not grant protection to homosexuals.

Four deputies from the HSCO responded to the scene that formed the backdrop of *Lawrence*. They were on the scene responding to a call from their dispatcher informing them that there was potential gun violence at the home of John Lawrence.<sup>70</sup> The deputies on the scene were Joseph Quinn, William Lilly, Donald Tipps, and Ken Landry. Three of these men were interviewed by Carpenter in order to place *Lawrence* in context. Landry did not respond to his interview request.

Quinn, as the first on the scene, was the lead officer in charge of making arrests and filing reports. Quinn was recruited out of the army and began working at the county jail. Quinn had quickly developed a reputation as a tough cop. A county clerk who handled many of Quinn's

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<sup>66</sup> *Id.* at 46.

<sup>67</sup> CARPENTER, *supra* note 1, at 47.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 48.

<sup>70</sup> *Id.* at 49.

cases described him as “the worst nightmare I think anybody would ever come across.” Justice of the Peace, Judge Parrott, whose precinct covered Quinn’s cases had similar descriptions of Quinn. The justice described Quinn as an officer who would write kids tickets, “thrown them on the ground, handcuffed them, strip-searched them, and hailed them to jail in front of shocked parents and schoolchildren.”<sup>71</sup>

William Lilly was the only black man among the arresting deputies.<sup>72</sup> Lilly along with Quinn was one of the two deputies who claimed to have seen Lawrence and Garner having sex.<sup>73</sup> Lilly was raised to a conservative Baptist family. Following high school, he worked for the Texas Department of Corrections and for the Galveston County Sheriff’s Office.<sup>74</sup> Carpenter noted that Lilly’s views on homosexuality were the most nuanced of the three deputies. He admitted to having grown out of his homophobia, and believed that people were born gay.

In his interview, he stated that he opposed laws that criminalized private sex in the home and he opposed gay marriage, as did the other officers. Also, Lilly did not believe that homosexuals should serve in the military out of fear that they would be unsafe. Most interestingly, he was more tolerant of lesbians than homosexuals stating that it would be bad for society if male homosexuality were as accepted as being a lesbian. Carpenter believes that Lilly’s greater acceptance of lesbianism is because of Lilly’s perceived danger of AIDS.<sup>75</sup>

Donnie Tipps, the son of an American soldier, was born in Germany. Upon his mother’s decision that she could no longer care for Tipps and his three brothers, she gave them to Boys

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<sup>71</sup> *Id.* at 50.

<sup>72</sup> *Id.* at 54.

<sup>73</sup> CARPENTER, *supra* note 1, at 54.

<sup>74</sup> *Id.* at 55.

<sup>75</sup> *Id.* at 56.

Country, a Houston organization. He attended high school in Houston, after which he worked for a variety of auto supply and construction companies.<sup>76</sup>

During his employment in the department, Tipps was the subject of several internal affairs investigations.<sup>77</sup> Tipps believed that homosexual activity should be prohibited even in the privacy of the home. He supports this belief with references to the Bible. Additionally, because doing drugs and killing is prohibited no matter where it takes place, homosexual conduct should not be afforded an exception. He did not believe that homosexuals should have the right to marry. He did, however, believe that homosexuals should serve in the military.

Ken Landry was born in Louisiana and graduated from a high school in Houston.<sup>78</sup> He reached the rank of staff sergeant in the Army. Quinn described him as a jokester. Tipps described him as hardworking and smart.

Upon entering, the deputies conducted a search making their way to the back bedroom. Two of the officers reported seeing Lawrence and Garner having sex, in violation of the statute, in a bedroom located at the back of the apartment. The reporting officers found no gun. The deputies arrested the two men and gave them citations for violating the Texas sodomy statute.

One officer recalls that, with guns drawn, they had knocked on the apartment's door in search of a man going crazy with a gun. Quinn said he knocked on the door in such a way that it had the effect of pushing the door open. He also stated that nobody was present in the apartment upon entering, the lights were off, and the apartment was quiet. Upon entering, the deputies had split up into two groups of two. One set made a left toward a bedroom, and the other set kept going forward finding a man on a telephone. Quinn and his partner frisked the man and had him secured. Quinn and his partner noticed a separate dimly lit bedroom in the distance.

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 57.

<sup>78</sup> CARPENTER, *supra* note 1, at 58.



After Quinn's partner got a glimpse of the bedroom, he lurched back. In Quinn's opinion, he thought that his partner had discovered the armed man. Quinn then went around on the officer's side and in a crouched position aimed his gun inside the room. At that moment, seeing the men for the first time, Quinn claimed that he repeatedly told Lawrence and Garner to stop having sex, and that Lawrence, having made eye contact with Quinn, continued having sex. Quinn went on to say that as guns were drawn at Lawrence and Garner, the two deputies again ordered that the men cease having sex. And, according to Quinn, Lawrence and Garner refused to comply. Quinn recollects that the entire scene went on for well in excess of one minute and would have continued had the deputies not pried Lawrence from Garner.

Carpenter makes clear that Quinn's account of that night is unrealistic. Notably, the other set of officers did not see this sequence of events. It is also worth mentioning that Quinn and his partner did not agree on the type of sex that Lawrence and Garner had engaged in that night.

Lawrence and Garner had spent that night in the Harris County jail. The violation was a class c misdemeanor carrying with it a \$200 fine. As they were not connected with the gay rights movement, the two men could not have understood their case's potential.

Carpenter states that if not for Judge Parrott's closeted clerk, *Lawrence* may never have seen the light of day. Because upon seeing the report of the sodomy arrest and noticing that Quinn was the officer on the scene, the clerk had discussed the arrest with his partner – a local sheriff. Later that night, the two were discussing the arrest at a local gay bar bartender who was a gay activist. The activist-bartender quickly realized the magnitude of the case and eventually got in contact with Lambda legal.

Although Lawrence and Garner claim that they were not having sex or engaging in any form of intimate conduct that night, they pled guilty to allow a challenge for the underlying

injustice of the law, which was upheld by the Court in *Bowers*. Because there was no trial, the only facts attorneys were left with were confined to the seventy-word complaint filed by Quinn on the night of the arrests.

## II. HISTORY OF JURISPRUDENCE IN EQUAL PROTECTION

Carpenter highlighted that by the end of 2002, across the nation, the “tides had changed” and the constitutional arguments of both due process and equal protection by the petitioners had been fine-tuned for submission to the Court.<sup>79</sup>

Before Lambda had filed its cert petition, there existed some hesitancy among gay-rights lawyers and legal scholars as to whether the Court would overrule *Bowers*.<sup>80</sup> Notably, there was some doubt that Justice Sandra Day O’Connor, a member of the majority in *Bowers*, would reverse her own position in order to rule in favor of the petitioners in *Lawrence*.<sup>81</sup> And among the dissenting Justices in *Bowers*, only Justice Paul Stevens remained on the Court in 2002.<sup>82</sup>

The biggest risk that gay-rights advocates faced in a potential case before the Court was that *Bowers* would be reaffirmed.<sup>83</sup> In its determination as to whether a cert petition should be filed in their case, Lambda concluded that in light of the developments in society and the law since *Bowers* was decided in 1986, filing cert was worth the risk.<sup>84</sup>

The overarching theme of the case was that the United States had progressed far beyond the bigoted antigay affectation that the Texas sodomy law represented.<sup>85</sup> The central thrust of

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<sup>79</sup> *Id.* at 180.

<sup>80</sup> *Id.* at 181.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> CARPENTER, *supra* note 1, at 182.

<sup>85</sup> *Id.* at 184.

their argument was that the Court was now “behind the times” because the nation had progressed since *Bowers*, and the vestiges of traditional state sodomy laws reflected outdated bigotry.<sup>86</sup>

Carpenter’s account of the Lambda team’s tactical approach stresses the relevance of public perception in the Supreme Court’s decision of constitutional issues. Under this principle, the Court should clearly establish that laws that discriminate on the basis of sexual orientation, such as both DOMA and Proposition 8, should be found unconstitutional under heightened scrutiny.

### A. EQUAL PROTECTION JURISPRUDENCE

This section provides a general discussion of equal protection jurisprudence in order to provide insight concerning both the evolution of the Court’s analysis of equal protection claims, and the Court’s considerations when assigning levels of review to classifications.

Equal protection of the laws is guaranteed pursuant to both the Fifth and Fourteenth Amendments to the United States Constitution.<sup>87</sup> Because laws classify persons or groups in a manner that permits or denies certain benefits depending on the classification, the Court has established three primary levels of review in order to assess whether the classification withstands constitutional scrutiny.<sup>88</sup>

The most basic level of analysis is termed, rational basis review, which is highly deferential to almost all proffered government interests.<sup>89</sup> When rational basis review is employed, the Court holds that a classification “must be upheld against equal protection

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<sup>86</sup> *Id.*

<sup>87</sup> The Supreme Court has held that the equal protection requirement applies to the federal government pursuant to the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Further, the Court’s analysis under the Equal Protection Clause of the Fourteenth Amendment is no different than that of the equal protection requirement of the Fifth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

<sup>88</sup> *Plyer v. Doe*, 457 U.S. 202, 215-21 (1982) (concluding that challenges under equal protection theory are assessed according to three levels of scrutiny: strict scrutiny, intermediate scrutiny, heightened scrutiny, and rational basis review).

<sup>89</sup> *Cleburne*, 473 U.S. at 440.

challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>90</sup> In practice, the party alleging constitutional infringement bears the burden of disproving all conceivable rational bases for the classification, including any reasoning that had not originally been contemplated by the party defending the legislation.<sup>91</sup> Rational basis review has been applied to laws that classify on the basis of age, socioeconomic status, and cognitive impairment.<sup>92</sup>

With respect to other classifications, the Court employs a more searching review, falling under the umbrella of “heightened scrutiny.” Here, if the classification operates to discriminate against classes that have been held either “suspect” or “quasi-suspect,” the Court will employ either “strict” or “intermediate” levels of review, respectively.

“Strict scrutiny” has been employed to laws that classify on the basis of race, religion, and national origin,<sup>93</sup> whereas “intermediate scrutiny” has been employed to classifications on the basis of gender and illegitimacy.<sup>94</sup>

To survive “strict scrutiny,” the government must demonstrate that the classification is narrowly tailored to serve a compelling government interest.<sup>95</sup> Under “intermediate scrutiny,” the government must demonstrate that the classification is substantially related to an important government objective.<sup>96</sup>

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<sup>90</sup> *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

<sup>91</sup> *Id.* at 313–15.

<sup>92</sup> *Cleburne*, 473 U.S. at 440–42, 447 (applying rational basis review in the context of the cognitively impaired); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (applying rational basis review in the context of alienage); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20, 25 (1973) (applying rational basis review in the context of socioeconomic status).

<sup>93</sup> *Graham v. Richardson*, 403 U.S. 365 (1971) (national origin/alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race).

<sup>94</sup> *Clark v. Jeter*, 486 U.S. 456 (1988) (illegitimacy); *Craig v. Boren*, 429 U.S. 190 (1976) (gender).

<sup>95</sup> *Craig*, 429 U.S. at 216–17.

<sup>96</sup> *Clark*, 486 U.S. at 461.

Intermediate scrutiny review, albeit less demanding than “strict scrutiny,” requires that the government support its important objective by evidencing an “actual stated purposes, not rationalizations for actions in fact differently grounded.”<sup>97</sup>

One line of precedent suggests that the Court applies a dispositive approach in determining suspect class status, where meeting any factor is sufficient to gain suspect class status.<sup>98</sup> Yet, a separate line of precedent suggests that in the pursuit of obtaining suspect class status, the group must possess a common trait.<sup>99</sup>

### **B. EQUAL PROTECTION: THE BACKDROP**

The backdrop of modern day heightened scrutiny analysis was set in *United States v. Carolene Products Co.*, where, in relevant part, the issue before the Court was whether the review of a government law under the Equal Protection Clause required deference to the lawmaker.<sup>100</sup> The Court noted that when a “discrete and insular minority,” has brought a constitutional challenge, a “more searching judicial inquiry”<sup>101</sup> is required.

Although there was no discussion of the criteria necessary to constitute a “discrete and insular minority,” subsequent decisions such as *Graham v. Richardson*<sup>102</sup> and *Bernal v. Fainter*<sup>103</sup> have shed light on the term. Still, the *Carolene Products* Court did mention religious,

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<sup>97</sup> *United States v. Virginia*, 518 U.S. 515, 535-36 (1996).

<sup>98</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (suggesting that establishing any of the following may deem class suspect: the class is “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.”).

<sup>99</sup> *Cleburne*, 473 U.S. at 440.

<sup>100</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>101</sup> *Id.* at 152 n.4.

<sup>102</sup> 403 U.S. 365, 372 (1971) (holding that “aliens as a class are a prime example of a ‘discrete and insular’ minority for whom ... heightened judicial solicitude is appropriate.”).

<sup>103</sup> 467 U.S. 216 (1984).

racial, and ethnic minorities when it touched upon the proposition of discrete and insular minorities.<sup>104</sup>

Almost five decades later, in *San Antonio Independent School District v. Rodriguez*, the Court, for the first time, used the term “suspect class” in holding that impoverished school districts cannot satisfy suspect class status because they were 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.”<sup>105</sup>

That same year, in *Frontiero v. Richardson*, the Court augmented its equal protection review to include factors such as (i) whether the fact that members of the group share defining characteristics is relevant to its ability to contribute to society, and (i) the immutability of that defining characteristic.<sup>106</sup> In *Frontiero*, the Court concluded that because sex is an immutable characteristic “determined solely by the accident of birth,”<sup>107</sup> quasi-suspect class status was warranted.<sup>108</sup>

### C. EQUAL PROTECTION AND SEXUAL ORIENTATION

The Court’s landmark equal protection cases regarding sexual orientation are *Romer v. Evans*<sup>109</sup> and *Lawrence v. Texas*.<sup>110</sup> The impact that these cases have had on equal protection litigation will be discussed, but first, it is necessary to illustrate the relevance of *Bowers v. Hardwick*.

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<sup>104</sup> *Carolene Prods.*, 304 U.S. at 152 n.4.

<sup>105</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>106</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>110</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

The *Bowers* Court held that homosexual sodomy was not encompassed by the liberty component of the Due Process Clause.<sup>111</sup> In relevant part, the Court expressed that the “respondent would have us announce...a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.... Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.”<sup>112</sup>

The Court’s decision reversed the Eleventh Circuit holding and found that homosexual sodomy was not a fundamental right under the constitution, and that there was no historical recognition of a right to engage in sodomy in the United States.<sup>113</sup> A decade later, the Court decided *Romer v. Evans*.<sup>114</sup>

#### **D. ROMER: EQUAL PROTECTION OF PUBLIC REFERENDUMS**

In *Romer*, the Court held that Amendment 2 to the Colorado Constitution violated the Equal Protection Clause for its proscription of all legislative, executive, or judicial action at any level of government drafted to shield homosexuals from discrimination and prohibited the reinstatement of any such law or policy.<sup>115</sup>

While *Romer* was the first time that the Court encountered an equal protection challenge based on sexual orientation, the Court did not clearly identify the level of scrutiny to employ when reviewing sexual orientation based discrimination claims.<sup>116</sup> Rather, the Court side-stepped its assignment of any level of review and held that “[Colorado’s] Amendment 2 fails, indeed defies, even [rational basis] inquiry.”<sup>117</sup>

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<sup>111</sup> *Bowers*, 478 U.S. 186, 191-95 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>112</sup> *Id.* at 191, 194.

<sup>113</sup> *Id.* at 191-96.

<sup>114</sup> *Romer*, 517 U.S. 620.

<sup>115</sup> *Id.* at 627, 632.

<sup>116</sup> *Id.* at 632.

<sup>117</sup> *Id.*

As a result of the Court's unclear analysis, however, lower courts have interpreted *Romer* as establishing that when a law discriminates on the basis of sexual orientation, rational basis review applies.<sup>118</sup>

#### **E. ENTER LAWRENCE: THE STEPPINGSTONE TO HEIGHTENED SCRUTINY**

In *Lawrence v. Texas*, the Court expressly overruled *Bowers* as wrongly decided, and struck down the Texas statute that criminalized same-sex sodomy.<sup>119</sup> The Court was presented with constitutional challenges under the clauses of both Due Process and Equal Protection.<sup>120</sup> The holding, however, was based on the implied right to privacy afforded by the Due Process Clause as it extends to consensual intimate conduct between adults.<sup>121</sup>

*Lawrence* provides that deciding on equal protection grounds was “tenable” and that “[w]ere [the Court] to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”<sup>122</sup>

Episodically, the Court's exercise of restraint may be most clearly explained by the political climate at the time the case was decided. Other's argue that the Court's restraint may have been guided by other considerations.<sup>123</sup>

Regardless of the Court's motivation, *Lawrence* stands not only for the decriminalization of class-behavior, but also for its contribution to the changing landscape of the nation. *Lawrence* is a necessary step before the Court can decide in favor of marriage equality, much

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<sup>118</sup> *Lofton*, 358 F.3d at 818 & n.16; *Richenberg*, 97 F.3d at 260 n.5; *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002).

<sup>119</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>120</sup> *Id.* at 564.

<sup>121</sup> *Id.* at 554, 578.

<sup>122</sup> *Id.* at 574-75.

<sup>123</sup> Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25-26 (1994) (discussing that the advancement of gay rights will benefit from an incremental approach by the Court because to do otherwise may result in both increased oppositional violence against homosexuals, and the Court's loss of legitimacy in the eyes of the people).



like the Court's development from *Griswold v. Connecticut*<sup>124</sup> to *Eisenstadt v. Baird*.<sup>125</sup> In *Griswold*, the Court decriminalized contraceptive use by married couples under the Due Process Clause.<sup>126</sup> Seven years subsequent to *Griswold*, the Court in *Eisenstadt* held that the right to contraceptive use extends to unmarried couples.<sup>127</sup>

Although *Lawrence* was not a wholesale victory, the Court's narrow decision was proportionate to the nation's evolving perception of homosexuals. At the time *Lawrence* was decided, the walls surrounding the Court's holding appear to have been constructed by the political climate; one where the military's "Don't Ask, Don't Tell"<sup>128</sup> rule had effect, Congress had recently passed DOMA,<sup>129</sup> and the legislative backlashes that took place in Alaska and Hawaii represented political unease with expanding homosexual rights.<sup>130</sup> Moreover, speaking to the Court's consideration of the political climate, when it overruled *Bowers*, the *Lawrence* Court stated that at the time *Bowers* was decided, a majority of states had already decriminalized homosexuality.<sup>131</sup>

### III. THE NEED FOR A COMPELLING INTEREST & A NARROWLY TAILORED APPROACH

Since the *Lawrence*<sup>132</sup> decision, sexual orientation litigation has been compared to the civil rights movements concerning both racial<sup>133</sup> and gender<sup>134</sup> equality. And while

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<sup>124</sup> 381 U.S. 479 (1965).

<sup>125</sup> 405 U.S. 438, 454 (1972).

<sup>126</sup> *Griswold*, 381 U.S. at 484-85 (discussing that certain rights have implied corollaries under the interest of liberty that expand their meaning beyond what is written in the constitution, and that marital privacy rights emanate from already recognized extensions of the First, Third, Fourth, Fifth, and Ninth Amendments).

<sup>127</sup> *Eisenstadt*, 405 U.S. at 454 (concluding that "if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not married persons.").

<sup>128</sup> 10 U.S.C. §654(b) (2000).

<sup>129</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. 7, 28 U.S.C. 1738C (2000)).

<sup>130</sup> ALASKA CONST. art. I, §25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); HAW. CONST. art. I, §23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

<sup>131</sup> *Lawrence*, 539 U.S. at 572-73.

<sup>132</sup> 539 U.S. 558 (2003).

classifications based on race and gender were initially widely justified by the nation's majority, the Court's decisions stood for the legal stamp of approval that did not come before a change in the nation.<sup>135</sup>

### A. THE EVOLVING COURT

The Court's changing perception of homosexuals is of equal weight to that of the nation. The heightened scrutiny argument was first presented in the dissenting opinion of the denial of certiorari in *Rowland v. Mad River Local School Dist., Montgomery County, Ohio*.<sup>136</sup> The petitioner, a nontenured high school guidance counselor ("counselor"), brought constitutional claims against the school district in connection with her suspension and transfer coupled with the nonrenewal of her employment contract.<sup>137</sup>

The District Court for the Southern District of Ohio found in favor of the counselor, drawing support from unchallenged jury findings that the school district's actions were based solely on the counselor's bisexuality, and that her mentioning of her bisexuality did not "in any way interfere with the proper performance of [her or other school staff members'] duties or with the regular operation of the school generally."<sup>138</sup> Accordingly, the magistrate had ruled in favor

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<sup>133</sup> Sidney Buchanan, *A Constitutional Cross-Roads for Gay Rights*, 38 HOUS. L. REV. 1269, 1270 (2001) (discussing the progression of the sexual orientation movement parallels that of "the civil rights movement of the 1960s [as when it] confronted the nation on the question of racial segregation").

<sup>134</sup> Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 270 (2004) ("[S]ome scholars have proposed that *Romer* suggests that somewhat heightened scrutiny for sexual orientation is just around the corner."); Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 190 (1997) ("Some scholars have contended that although the *Romer* decision itself does not identify sexual orientation as a quasi-suspect class, it is the first step on the road towards that end.").

<sup>135</sup> *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating law that permitted women between the ages of eighteen and twenty-one to buy beer and prohibited men under the age twenty-one from buying beer); *Roe v. Wade*, 410 U.S. 113 (1973) (providing women with the right to have an abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating miscegenation); *Brown v. Board of Education*, 347 U.S. 483 (1954) (ending racial discrimination in public schools).

<sup>136</sup> 470 U.S. 1009 (1985) (Justice Brennan J., dissenting).

<sup>137</sup> *Id.* at 1010.

<sup>138</sup> *Id.* (quoting *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 456-58, 460 (6th Cir. 1984)).

of the counselor’s constitutional claims under both the First Amendment’s right to free speech, the Fourteenth Amendment’s right to equal protection of the laws.<sup>139</sup>

Justice Brennan, who was joined by Justice Marshall, dissented to the Court’s denial of certiorari, arguing that the Sixth Circuit’s reversal was based upon “a crabbed reading of our precedents and unexplained disregard of the jury and judge’s factual findings.”<sup>140</sup> In relevant part, the dissent suggested that the lower court’s decision was motivated by the avoidance of the issue of whether a State may dismiss an employee because of sexual orientation.<sup>141</sup>

Importantly, the dissent marks the first discussion of the application of heightened scrutiny when reviewing classifications based on sexual orientation. The dissent pointed out that “in applying the Equal Protection Clause, ‘[the Court has] treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’”<sup>142</sup> The facts of *Rowland* raised questions concerning suspect-class status and fundamental right impingement, which are the two prongs that trigger heightened scrutiny review under the Court’s “unsettled equal protection analysis.”<sup>143</sup>

In support of the first prong, the argument followed that homosexuals (i) “constitute a significant and insular minority of this country’s population;”<sup>144</sup> (ii) “are particularly politically powerless to pursue their rights openly in the political arena” in light “of the immediate and severe opprobrium often manifested against” them;<sup>145</sup> and (iii) “have historically been the object

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<sup>139</sup> *Id.*

<sup>140</sup> *Rowland*, 470 U.S. at 1009 (Justice Brennan dissenting).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1014 (quoting *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982)).

<sup>143</sup> *Id.* at 1014.

<sup>144</sup> *Id.* (citing footnote 7 of Justice Edwards’ dissent citing evidence indicating that homosexuals may constitute from 8-15% of the average population. *Mad River Local Sch. Dist.*, 730 F.2d at 455-56 (citing J. Marmor, *Homosexual Behavior: A Modern Reappraisal* (1980)). He concluded that nonheterosexual preference, like minority race status, “evoke[s] deeply felt prejudices and fears on the part of many people.” *Mad River Local Sch. Dist.*, 730 F.2d at 453.).

<sup>145</sup> *Id.*

of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely ... to reflect deep-seated prejudice rather than ... rationality.’”<sup>146</sup> Accordingly, “State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.”<sup>147</sup>

In support of the second prong, the dissent drew support from the findings of other courts that discrimination based on sexual preference infringed the rights to privacy and freedom of expression.<sup>148</sup> The argument also sought to extend *San Antonio Independent School District v. Rodriguez*,<sup>149</sup> where the Court concluded that the infringement of rights that are “explicitly or implicitly guaranteed by the Constitution,”<sup>150</sup> to the school district, requiring that demonstrate a compelling interest in order to survive strict scrutiny.<sup>151</sup>

Most importantly, *Rowland* acknowledged that “[w]hether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced

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<sup>146</sup> *Id.* (quoting *Plyler v. Doe*, 457 U.S. at 216).

<sup>147</sup> *Rowland*, 470 U.S. at 1014 (Justice Brennan dissenting) (footnoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (discrimination based on gender); *Plyler v. Doe*, 457 U.S. 202, 218-23 (1982) (suggesting heightened scrutiny for discrimination against alien children); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (discrimination based on illegitimacy); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (discrimination based on race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (discrimination based on national origin).

<sup>148</sup> *Id.* at 1015 (footnoting *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976) (refusal to allow homosexual student group equal access to state university facilities invalidated because infringement of First Amendment rights to expression and association not supported by any “substantial governmental interest”); *Ben-Shalom v. Secretary of the Army*, 489 F.Supp. 964, 969, 973-77 (E.D. Wis.1980) (regulation requiring discharge based on homosexual “tendencies, desire, or interest, but ... without overt homosexual acts” held unconstitutional as violative of First and Ninth Amendment rights and right to privacy), *aff’d on other grounds*, 826 F.2d 722 (7th Cir. 1987), *New York v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981) (criminal statute prohibiting private homosexual conduct found to infringe constitutional rights to privacy and equal protection under “compelling state interest” test). *See also Rich v. Secretary of the Army*, 735 F.2d 1220, 1227, n. 7, 1228-29 (10th Cir. 1984) (noting “significant split of authority as to whether some private consensual homosexual behavior may have constitutional protection” but finding military’s “compelling interest” in regulating homosexual conduct sufficient to uphold discharge based on false denial of homosexuality); *Beller v. Middendorf*, 632 F.2d 788, 809-10 (9th Cir. 1980), *cert. denied sub nom. Beller v. Lehman*, 452 U.S. 905 (1981). *But see Dronenburg v. Zech*, 741 F.2d 1388, 1395-98 (D.C. Cir. 1984) (naval discharge for homosexual conduct upheld as “rationally related” to permissible goals of the military; no constitutional right of privacy implicated). *See generally* KENNETH J. KARST, *THE FREEDOM OF INTIMATE ASSOCIATION*, 89 *Yale L.J.* 624, 682-86 (1980); SEXUAL PREFERENCE AND GENDER IDENTITY: A SYMPOSIUM, 30 *Hastings L.J.* 799-1181 (1979).

<sup>149</sup> 411 U.S. 1 (1973).

<sup>150</sup> *Id.* at 33-34.

<sup>151</sup> *Rowland*, 470 U.S. at 1015.

to permit their infringement, are important questions that this Court has never addressed, and which have left the lower courts in some disarray.”<sup>152</sup>

Almost two decades later, concurring in *Lawrence*, Justice O’Connor put forth similar arguments regarding the need for the Court to establish heightened scrutiny when reviewing equal protection challenges based on sexual orientation.<sup>153</sup> Justice O’Connor made clear that legislation motivated by “objectives, such as ‘a bare ... desire to harm a politically unpopular group,’ are not legitimate state interests”<sup>154</sup> and thus, do not survive rational basis scrutiny.<sup>155</sup> The Justice also noted the Texas legislature’s decision to criminalize only homosexual sodomy had the effect of discrimination in employment, family law, and housing.<sup>156</sup>

## B. INCONSISTENT COURT RULINGS

The Court has not provided any clear guidance concerning the level of equal protection analysis to employ when reviewing classifications based on sexual orientation. The Court has avoided the issue even in the face of a direct equal protection challenge.<sup>157</sup> The absence of clear direction has exacerbated the equal protection question by creating inconsistent review among the lower courts. Despite *Lawrence* expressly overruling *Bowers*, lower courts relied on pre-*Lawrence* precedent, drawing support from those cases that relied on *Bowers* rationale.<sup>158</sup> Most notably, in *In re Kandau*, a Ninth Circuit bankruptcy court relied on *High Tech Gays v. Defense Industrial Security Clearance Office*, which held that rational basis review applied to a

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<sup>152</sup> *Id.* at 1015.

<sup>153</sup> *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

<sup>154</sup> *Id.* at 580 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>155</sup> *Id.* at 579-580.

<sup>156</sup> *Id.* at 582 (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App.--Austin 1992, writ granted).

<sup>157</sup> *Romer*, 517 U.S. 620 (1996).

<sup>158</sup> *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008).

constitutional challenge to DOMA<sup>159</sup> because pursuant to *Bowers*, heightened scrutiny review is foreclosed as the U.S. Constitution affords no fundamental right to engage in homosexual sodomy.<sup>160</sup>

Even worse, courts have ruled that the holding in *Romer* provides that rational basis applies to laws discriminating on the basis of sexual orientation.<sup>161</sup> However, as already discussed, the *Romer* Court did not reach the question of what level of scrutiny to apply, instead, the Court ruled that the Colorado ballot measure at issue “fail[ed], indeed defie[d],” even the rational basis inquiry, and avoided the question of what level of scrutiny applied.<sup>162</sup> This is best evidenced by the Court’s remands in both *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,<sup>163</sup> which was remanded in light of *Romer*, and *Limon v. Kansas*,<sup>164</sup> which was remanded in light of *Lawrence*. The Sixth Circuit in *Equality Foundation of Greater Cincinnati, Inc.* concluded that “*Romer* supplied no rationale for subjecting a purely local measure of modest scope, which simply refused special privileges under local law for a non-suspect and non-quasi-suspect group of citizens, to any equal protection assessment other than the traditional ‘rational relationship’ test.”<sup>165</sup>

In *Limon*, the Kansas court was presented with an equal protection challenge based on the state punishing consensual homosexual sodomy with a minor more severely than it did

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<sup>159</sup> *In re Kandu*, 315 B.R. 123, 143-44 (Bankr. W.D. Wash. 2004) (citing *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990)).

<sup>160</sup> *Id.*

<sup>161</sup> *Lofton*, 358 F.3d at 818 & n.16; *Richenberg*, 97 F.3d at 260 n.5; *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996); *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. Feb. 1, 2002), *cert. granted*, *Limon v. Kansas*, 539 U.S. 955 (2003) (vacating judgment of Court of Appeals, and remanding for further consideration in light of *Lawrence*), *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004) (distinguishing case from *Lawrence*, and concluding that *Lawrence* Court confined its analysis to due process and limited its holding to adults).

<sup>162</sup> *Romer*, 517 U.S. at 632.

<sup>163</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

<sup>164</sup> *Limon v. Kansas*, 539 U.S. 955 (2003).

<sup>165</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 298-299 (6<sup>th</sup> Cir. 1997).

heterosexual sodomy with a minor.<sup>166</sup> On remand from the Supreme Court in light of *Lawrence*, the Kansas court distinguished *Lawrence* as ruling solely on due process analysis and therefore, inapplicable to the alleged equal protection challenge.<sup>167</sup>

### C. CHANGING CLIMATE

Marriage equality has gained significant support in recent years, which may be attributed to the nation's change in its perception of homosexuals.<sup>168</sup> The increasing support of expanding gay rights is also illustrated in recent court decisions and legislative action. Among the most notable is Congress' repeal of "Don't Ask, Don't Tell."<sup>169</sup>

The U.S. Executive branch showed its support of equal protection recognition on February 28, 2013 when the Obama administration filed an amicus brief in the *Hollingsworth v. Perry*.<sup>170</sup> The brief argues that equal protection challenges to laws that discriminate based on sexual orientation, as Proposition 8 does, should require the Court to review the challenge under the heightened scrutiny standard because homosexuals satisfy the Court's considerations under the standard.<sup>171</sup> The Obama Administration's argument, if employed by the Court, will have the effect of subjecting all subsequent state-level marriage equality cases to "heightened scrutiny."

The Obama Administration's brief in *Perry* is not the first time that the U.S. Government has weighed in on the equal protection issue. Almost exactly two years prior, Attorney General,

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<sup>166</sup> *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004), *cert. granted*, No. 00-85898-AS, 2004 Kan. LEXIS 284 (Kan. May 25, 2004).

<sup>167</sup> *Limon*, 83 P.3d at 235-36 (finding equal protection analysis "not a license for courts to judge the wisdom, fairness, or logic of legislative choices.").

<sup>168</sup> " CNN Political Unit, *CNN Poll: 'Rob Portman effect' Fuels Support for Same-Sex Marriage*, CNN Politics (March 25, 2013), available at <http://politicalticker.blogs.cnn.com/2013/03/25/cnn-poll-rob-portman-effect-fuels-support-for-same-sex-marriage/> ("The number of Americans who support same-sex marriage has risen by almost the same amount in that time - from 40% in 2007 to 53% today - strongly suggesting that the rise in support for gay marriage is due in part to the rising number of Americans who have become aware that someone close to them is gay[.]").

<sup>169</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

<sup>170</sup> Brief for the United States as Amicus Curiae Supporting Respondents, No. 12-144, 2013 WL 769326 (Feb. 28, 2013) [hereinafter *Obama Amicus*].

<sup>171</sup> *Obama Amicus*.

Eric H. Holder Jr., issued a memorandum to the John A. Speaker of the U.S. House of Representatives, John A. Boehner, regarding the U.S. Department of Justice's ("DOJ") position on litigation involving the Defense Against Marriage Act ("DOMA").<sup>172</sup> Holder's memorandum stands for the end of the DOJ's defense of Section 3 of DOMA in cases involving traditional rational basis review of the statute's constitutionality as it relates to legally married same-sex couples.

The litigation discussed in the memorandum concerned two lawsuits in the Second Circuit, *Windsor v. United States*<sup>173</sup> and *Pedersen v. Office of Personnel Management*.<sup>174</sup> The Second Circuit has no precedent concerning the constitutional review of laws that discriminate based on sexual orientation. Thus, upon direction from the Obama Administration, Holder, concluded that classifications based on sexual orientation should not be subject to traditional rational basis review but instead to "more heightened scrutiny."<sup>175</sup> Holder made clear (i) that the President's conclusion that Section 3 of DOMA as applied to legally married same-sex couples, fails to meet that standard and is thus unconstitutional; (ii) that he would instruct DOJ attorneys to advise courts in other pending DOMA litigation that both he and the President have concluded that heightened scrutiny should be applied to such cases; (iii) that Section 3 is unconstitutional under heightened scrutiny analysis; and (iv) that the DOJ will no longer defend Section 3.<sup>176</sup>

The underlying principle behind the DOJ's decision to cease defending Section 3 of DOMA is that "[m]uch of the legal landscape has changed in the 15 years since Congress passed DOMA." In support of this statement, Holder refers to (1) the Supreme Court's finding that laws

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<sup>172</sup> Letter of Att'y Gen. Holder to Speaker Boehner of the U.S. House of Rep. (Feb. 23, 2011) [hereinafter Holder Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>173</sup> 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012).

<sup>174</sup> 881 F.Supp.2d 294 (D. Conn. July 31, 2012).

<sup>175</sup> Holder Letter, *supra* note 174.

<sup>176</sup> *Id.*



criminalizing homosexual conduct are unconstitutional, (2) Congress' decision to repeal the military's Don't Ask, Don't Tell policy, and (3) federal court decisions striking down DOMA as unconstitutional.

The government's position has persuaded some lower courts to follow suit. In *In re Balas*,<sup>177</sup> the Ninth Circuit, having previously applied rational basis review to a DOMA challenge pursuant to *Bowers*, applied the Court's four considerations to determine whether homosexual classifications are subject to heightened scrutiny.<sup>178</sup>

#### **D. SEXUAL ORIENTATION: A CLEAR STANDARD**

Months after Attorney General Holder's memorandum was issued, the DOJ submitted a brief in *Golinski v. United States Office of Personnel Management*<sup>179</sup> that fleshes out the DOJ's arguments for heightened scrutiny review of DOMA challenges.<sup>180</sup> The DOJ brief, in the context of DOMA, is a concise compilation of the modern arguments in favor of heightened scrutiny for the Court's review of equal protection challenges based on sexual orientation classifications. The following are arguments supporting the application of heightened scrutiny to laws that classify on the basis of sexual orientation; primarily citing the brief submitted by the DOJ in *Golinski*.

The Supreme Court has expressed that certain classifications are much "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,"<sup>181</sup> that their use triggers a more searching inquiry. As discussed, the core of the Court's equal protection analysis is both the level of scrutiny to be applied, and the status

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<sup>177</sup> 449 B.R. 567 (Bankr. C.D. Cal. 2011).

<sup>178</sup> *Id.* at 575-76 (finding that heightened scrutiny applied to equal protection challenges based on sexual orientation classifications because of both a history of discrimination, and the *High Tech Gays* decision itself.).

<sup>179</sup> 824 F.Supp.2d 968 (N.D. Cal. February 22, 2012).

<sup>180</sup> Defendants' Brief in Opposition to Motions to Dismiss, *Golinski v. Office of Personnel Management*, No. C 3:10-00257-JSW (9th Cir. July 1, 2011) [hereinafter *Golinski* DOJ Brief].

<sup>181</sup> *Plyler*, 457 U.S. at 216 n.14.

of the classified group. Yet, there is no clear standard as to the appropriate type of review in cases involving classifications based on sexual orientation.<sup>182</sup>

Although the Court has yet to establish the level of review for classifications based on sexual orientation, it has consistently found and held a set of considerations that guide the Court in its determination whether to employ heightened scrutiny: (i) whether the group at issue has suffered a history of discrimination; (ii) whether members of the group exhibit obvious immutable or distinguishing characteristics that define them as members of a discrete group; (iii) whether the group is a minority or politically powerless; and (iv) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's ability to perform or contribute to society.<sup>183</sup>

As discussed, there has been confusion among and within the circuit courts as to the appropriate level of review for classifications based on sexual orientation. Because *Golinski* was a Ninth Circuit case, the DOJ submitted the argument that the rational basis standard used in *High Tech Gays* no longer withstood scrutiny.<sup>184</sup> It followed that although there existed substantial circuit court authority, such as *High Tech Gays*, that would bind the *Golinski* court to apply rational basis review to sexual orientation classifications, “most of these decisions fail to give adequate consideration to [the Court’s considerations]. Indeed, the reasoning of this line of

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<sup>182</sup> Golinski DOJ Brief, *supra* note 180, at 3 (footnoting that in neither *Romer* nor *Lawrence* did the Court opine on the applicability of heightened scrutiny to sexual orientation. Nor did the Court decide the heightened review issue in its one-line per curiam order in *Baker v. Nelson*, where it dismissed an appeal as of right from a state supreme court decision denying marriage status to a same-sex couple.).

<sup>183</sup> *Bowen v. Gilliard*, 484 U.S. 587, 602-03 (1987); *Cleburne*, 473 U.S. 432, 439 (1985).

<sup>184</sup> Golinski DOJ Brief, *supra* note 180, at vi

To the extent *High Tech Gays* rested on inferences drawn from the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that rationale does not survive the Supreme Court's subsequent overruling of *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003). To the extent *High Tech Gays* considered the factors the Supreme Court has identified as relevant to the inquiry, we respectfully submit that its consideration was incomplete and ultimately incorrect.

case law traces back to circuit court decisions from the late 1980s and early 1990s, a time when [*Bowers*], was still the law.”<sup>185</sup>

**i. Whether the Group at Issue has Suffered a History of Discrimination**

With respect to historic discrimination, homosexuals have been subject to a history of discrimination within the United States of America: There is substantial judicial record to this end. As the Ninth Circuit affirmed in *High Tech Gays*, “[W]e do agree that homosexuals have suffered a history of discrimination ...”<sup>186</sup> Similar thoughts were shared by the Court in *Lawrence*, where in overruling *Bowers*, the Court referenced “colonial laws ordering the death of ‘any man [that] shall lie with mankind, as he lieth with womankind’ to state laws that, until very recently, have ‘demean[ed] the existence’ of gay and lesbian people ‘by making their private sexual conduct a crime.’”<sup>187</sup>

Throughout history, homosexuals have been discriminated by all levels of government. Discrimination by the federal government dates back to the early 1950s.<sup>188</sup> During the time of World War II, homosexuals in the armed forces were “ferreted” out and removed from the military, and were denied benefits if they were found post-military service.<sup>189</sup> More recently, Congress enacted its “Don’t Ask, Don’t Tell” policy, which had the effect of repressing the

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<sup>185</sup> *Id.* at 4 (discussing that pursuant to the Court’s overruling *Bowers* in *Lawrence*, rational basis review does not withstand scrutiny).

<sup>186</sup> *Id.* at 6.

<sup>187</sup> *Lawrence*, 539 U.S. at 578.

<sup>188</sup> Golinski DOJ Brief, *supra* note 180, at 6-8 (providing a history of discrimination where federal government found homosexuals unfit for federal employment and precluding them from federal employment on the basis of sexual orientation, *Employment of Homosexuals and Other sex Perverts in Government*, Interim Report submitted to the Committee by Subcommittee on Investigations pursuant to S. Res. 280 (81<sup>st</sup> Congress), December 15, 1950, at 9; also citing federal government Executive Order 10450, issued by President Eisenhower, which added “sexual perversion” as ground for investigation and possible dismissal from federal service, Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953).

<sup>189</sup> *Clackum v. U.S.*, 296 F.2d 226 (Ct. Cl. 1960).

sexual identity of homosexuals in the armed forces.<sup>190</sup> Further, Congress prohibited the entry of homosexuals into the United States.<sup>191</sup> And, it was only until the late 1990s that federal agencies could no longer discriminate against homosexuals in employment.<sup>192</sup>

State and local governments have been equally responsible for historically discriminating against homosexuals.<sup>193</sup> States and localities have discriminated against homosexuals by denying them child custody rights based on stereotypes concerning homosexual deviance.<sup>194</sup> And, similar justifications have been used in order to preclude homosexuals from public employment.<sup>195</sup>

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<sup>190</sup> National Defense Authorization Act for Fiscal Year 1994, PL 103-160, 107 Stat. 1547 (current version 10 U.S.C.A. § 654 (2006)), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

<sup>191</sup> *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967) (interpreting the Immigration and Nationality Act, § 212(a)(4), 8 U.S.C.A. § 1182(a)(4), and holding that man who identified as homosexual was afflicted with a "psychopathic personality" within terms of the immigration statute excluding such individuals from entry into the United States).

<sup>192</sup> Exec. Order No. 13,087 (1998), 63 FR 30097 (1998).

<sup>193</sup> Golinski DOJ Brief, *supra* note 180, at 9 (discussing history of precluding both homosexuals and homosexual school employees from employment in professions requiring state licenses, citing Williams Report, ch. 5 at 18; as well as aggressive purging of homosexual employees from government services dating back to the 1940s, *Id.* at 18-34.).

<sup>194</sup> Golinski DOJ Brief, *supra* note 180, at 10 (citing *Ex parte HH*, 830 So. 2d 21,26 (Ala. 2002) (Moore, C.J., concurring) (concurring in denial of custody to lesbian mother on ground that "homosexual conduct is ... abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God [and] an inherent evil against which children must be protected"); *Pulliam v. Smith*, 501 S.E.2d 898, 903-04 (N.C. 1998) (upholding denial of custody to a gay man who had a same-sex partner; emphasizing that father engaged in sexual acts while unmarried and refused to "counsel the children against such conduct"); *Bowen v. Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997) (holding that a trial court did not err in granting a father custody of his son on the basis that people in town had rumored that the son's mother was involved in a lesbian relationship); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that, although the Court had previously held "that a lesbian mother is not per se an unfit parent," the "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth" and therefore "that conduct is another important consideration in determining custody"); *Roe v. Roe*, 324 S.E.2d 691, 692, 694 (Va. 1985) (holding that father, who was in a gay relationship, was "an unfit and improper custodian as a matter of law" because of his "continuous exposure of the child to his immoral and illicit relationship").

<sup>195</sup> Golinski DOJ Brief, *supra* note 180, at 9 (citing *Childers v. Dallas Police Dep't*, 513 F. Supp. 134,138 (N.D. Tex. 1981) (holding that police could refuse to hire gays), *aff'd* without opinion, 669 F.2d 732 (5th Cir. 1982); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1342 (Wash. 1977) (upholding the dismissal of an openly gay school teacher who was fired based on a local school board policy that allowed removal for "immorality"); *Burton v. Cascade Sch. Dist. Union High Sch., No.5*, 512 F.2d 850, 851 (9th Cir. 1975) (upholding the dismissal of a lesbian teacher in Oregon, after adopting a resolution stating that she was being terminated "because of her immorality of being a practicing homosexual"); *Bd. of Educ. v. Calderon*, 35 Cal. App. 3d 490 (1973) (holding that state sodomy statute was a valid ground for discrimination against gays as teachers); *see also Baker v. Wade*, 553 F. Supp. 1121, 1128 n.9 (N.D. Tex. 1982) ("A school board member testified that [the defendant] would have been fired [from his

The Court's decision in *Lawrence*, lends support a clear history of discrimination because the Court recognized that "for centuries there have been powerful voices to condemn homosexual conduct as immoral."<sup>196</sup>

Private parties have followed suit in discriminating against homosexuals.<sup>197</sup> National statistics demonstrate that homosexuals are continuously among the most repeated victims of hate crimes.<sup>198</sup>

## ii. Whether Members Share Immutable of Distinguishing Characteristics

With respect to the second consideration, homosexuals as a group exhibit distinguishing characteristics.<sup>199</sup> Judicial opinions evidence contradictions within the circuits as to whether homosexuals share characteristics that single them out. Specifically, the Ninth Circuit acknowledged that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality."<sup>200</sup> Subsequently, the same circuit in *High Tech Gays* contradicted this finding when it concluded that sexual orientation is not immutable, but instead is behavioral.<sup>201</sup>

Notwithstanding the inconsistencies in the Ninth Circuit's judicial interpretations of scientific data, the experts in this field are not at a loss for overwhelming consensus that

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teaching position] if there had even been a suspicion that he had violated [the Texas sodomy statute].") *rev 'd*, 769 F.2d 289 (5th Cir. 1985) (holding that challenged Texas homosexual sodomy law was constitutional)).

<sup>196</sup> *Lawrence*, 539 U.S. at 571.

<sup>197</sup> Golinski DOJ Brief, *supra* note 180, at 9 (footnoting private discrimination as relevant when considering whether a group has suffered a history of discrimination for purposes of heightened scrutiny application) (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

<sup>198</sup> FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 2008 HATE CRIME STATISTICS (Nov. 2009), *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2008> (last visited Mar. 30, 2011).

<sup>199</sup> Golinski DOJ Brief, *supra* note 180, at 14 (discussing that the Court does not require that the classification have a "visible badge" in order to satisfy heightened scrutiny requirements. Rather, the Court has established that a classification may be "constitutionally suspect" even if it rests on a characteristic that is not readily visible, such as illegitimacy.") (quoting *Mathews v. Lucas*, 427 U.S. 495, 504 (1976)).

<sup>200</sup> Golinski DOJ Brief, *supra* note 180, at 13 (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)).

<sup>201</sup> Golinski DOJ Brief, *supra* note 180, at 13 (quoting *High Tech Gays*, 895 F.2d at 573 as stating that sexual orientation is not immutable because "it is behavioral").

homosexuality is an immutable characteristic.<sup>202</sup> Although homosexuality does not carry any obvious or distinguishing characteristic, scientific opinion provides that “most gay people cannot change their orientation at will.”<sup>203</sup>

Similarly, the medical community has reached a consensus that efforts by homosexuals to change their sexual orientation are “futile and potentially dangerous to an individual’s well-being.”<sup>204</sup> More disconcerting is the argument that homosexuality is defined by a tendency to engage in certain conduct. Such an argument demeans homosexuals in light of the fact that many consider their sexual orientation as a fundamental aspect of their identity.<sup>205</sup> Moreover, the Court has rejected such oppositional arguments in *Lawrence*, and once more in *Christian Legal Society v. Martinez*, where the Court found that the false distinction between proscribing conduct and targeting homosexuals for disparate treatment is meritless.<sup>206</sup>

In sum, “[a]s the Court has recognized, sexual orientation is a core aspect of identity, and its expression is an “integral part of human freedom.”<sup>207</sup>

### **iii. Whether Group Constitutes a Minority with Limited Political Power**

With respect to the third consideration, homosexuals are minorities with limited political power. Notably, recognizing the difficulties in tracking the exact number of homosexuals in the

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<sup>202</sup> Golinski DOJ Brief, *supra* note 180, at 13 (citing G.M. Herek et al., DEMOGRAPHIC, PSYCHOLOGICAL, AND SOCIAL CHARACTERISTICS OF SELF-IDENTIFIED LESBIAN, GAY, AND BISEXUAL ADULTS, 7, 176-200 (2010)), available at <http://www.springerlink.com/content//fulltext.pdf> (noting that in a national survey conducted with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95 percent of the gay men and 83 percent of lesbian women reported that they experienced “no choice at all” or “very little choice” about their sexual orientation).

<sup>203</sup> Brief for the United States on the Merits Question, *United States v. Windsor*, No. 12-307, at 26 (February 22, 2013) [hereinafter *Windsor Merits Brief*], (citing Am. Psychological Ass’n, Report of the American Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation at v (2009), available at <http://tinyurl.com/APAReportTherapy>).

<sup>204</sup> Golinski DOJ Brief, *supra* note 180, at 14 (footnoting “[i]n fact, every major mental health organization has adopted a policy statement cautioning against the use of so-called “conversion” or “reparative” therapies to change the sexual orientation of gays and lesbians. These policy statements are reproduced in a 2009 publication of the American Psychological Association, available at <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>”).

<sup>205</sup> *Windsor Merits Brief*, *supra* note 203, at 28.

<sup>206</sup> *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (U.S. 2010).

<sup>207</sup> Golinski DOJ Brief, *supra* note 180, at 14 (quoting *Lawrence*, 539 U.S. at 562, 576-77).

United States, the Williams Institute has accounted for homosexuals comprising a minority of 3.5 percent of the adult population.<sup>208</sup>

The Court's equal protection jurisprudence suggests that this consideration is the guiding principle in protecting groups that are subject to legislative discrimination.<sup>209</sup> In *Rowland v. Mad River School District*, Justice Brennan's dissent underscores the history of homosexuals as a relatively politically powerless group and the coinciding overlap of historical discrimination.<sup>210</sup>

Although the Court has not established any clear guidance on measuring political powerlessness, the history of laws that target homosexuals, such as those in *Romer* and *Lawrence*, indicate that homosexuals have had "limited political power and 'ability to attract the [favorable] attention of the lawmakers'"<sup>211</sup>

Case law has no shortage of litigation concerning the vulnerability of homosexuals to discrimination via the democratic process,<sup>212</sup> and while there have been recent political advancements, albeit few, the central inquiry remains "whether they have the strength to politically protect themselves from wrongful discrimination."<sup>213</sup>

The homosexual community's lack of political power is undeniably demonstrated by the fact that "[f]rom 1974 to 1993, at least 21 referendums were held on the sole question of whether an existing law or executive order prohibiting sexual orientation discrimination should

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<sup>208</sup> *Id.* at 14 (footnoting April 2011 report by the Williams Institute analyzing various data sources, Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, available at <http://www3.law.ucla.edu/williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf> (last reviewed June 30, 2011)).

<sup>209</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (concluding that while the position of women has improved, there is still pervasive and visible discrimination in the political arena).

<sup>210</sup> *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from denial of certiorari).

<sup>211</sup> Holder letter (quoting *Cleburne*, 473 U.S. at 445).

<sup>212</sup> *Romer*, 517 U.S. at 623-34; *Perry v. Brown*, 671 F.3d 1052, 1063-64 (9<sup>th</sup> Cir. 2012)(discussing Proposition 8); *Holingsworth v. Perry*, Brief for Political Science Professors as Amici Curiae in Support of Respondents and Affirmance Addressing Political Powerlessness of Gay Men and Lesbians, No. 12-144 (February 2013).

<sup>213</sup> *Windsor*, 699 F.3d at 184 (citing *Frontiero*, 411 U.S. at 685).

be repealed or retained. In 15 of these 21 cases, a majority voted to repeal the law or executive order.”<sup>214</sup>

Additionally, recent demonstrations of the political powerlessness of homosexuals is best illustrated by the California Supreme Court holding that the state was constitutionally required to acknowledge same-sex marriage, and the subsequent passage of Proposition 8, which amended the constitution to remove from same-sex couples their once-had right to marry.<sup>215</sup> Not surprisingly, opponents have exercised their overwhelming political power by going so far as to target the State judiciary, such as in Iowa, where the voters recalled the three supreme court justices who constituted a unanimous decision legalizing same-sex marriage.<sup>216</sup>

**iv. Whether Classification Bears Rational Relation to Legitimate Policy Objectives or Ability to Perform or Contribute to Society**

Upon finding that a group satisfies heightened scrutiny considerations, the Court may nonetheless decline to treat a classification as suspect where the classification relates to the groups “ability to perform or contribute to society.”<sup>217</sup>

Sexual orientation bears no relation to “impairment in judgment, stability, reliability, or general social or vocational capabilities.”<sup>218</sup> Moreover, the groups’ history of discrimination is based not on the societal ineptitude of the homosexual community, but on “invidious and long-discredited views that gays and lesbians are, for example, sexual deviants or mentally ill.”<sup>219</sup>

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<sup>214</sup> Golinski DOJ Brief, *supra* note 180, at 15 (quoting Robert Wintemute, *Sexual Orientation and Human Rights* 56 (1995)).

<sup>215</sup> *Id.* at 16 (citing *In re Marriage Cases*, 183 P.3d 384,419 (Cal. 2008); *Strauss v. Horton*, 207 P.3d 48, 120 (Cal. 2009)).

<sup>216</sup> *Id.* (citing A. G. SULZBERGER, *OUSTER OF IOWA JUDGES SENDS SIGNAL TO BENCH*, N.Y. Times (Nov. 3, 2010)).

<sup>217</sup> *Id.* at 16 (quoting *Cleburne*, 473 U.S. at 441, finding that mental disability is not a suspect classification).

<sup>218</sup> Windsor Merits Brief, *supra* note 203, at 28 (quoting AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON HOMOSEXUALITY AND CIVIL RIGHTS, 131 Am. J. Psychiatry No. 4, 497 (1974)).

<sup>219</sup> Golinski DOJ Brief, *supra* note 180, at 17.



The repeal of “Don’t Ask, Don’t Tell,”<sup>220</sup> coupled with the judicial force of *Lawrence* and *Romer* lends significant support to the argument that “sexual orientation is not a characteristic that generally bears on legitimate policy objectives.”<sup>221</sup> Nor does “sexual orientation has no bearing on a person’s ability to ‘cope with and function in the everyday world.’”<sup>222</sup>

### CONCLUSION

The Court must establish a clear standard of heightened scrutiny to employ when reviewing classifications based on sexual orientation. As discussed above, the political climate has changed and reflects advocacy by the nation, judiciary, and government, for homosexual rights. Moreover, there is urgent need for the Court’s legal stamp of approval on the issue in light of inconsistent rulings among and within the lower courts, and most importantly because homosexuals as a group satisfy the traditional considerations used by the Court when determining whether a classification warrants heightened scrutiny review.

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<sup>220</sup> Administration of Barack H. Obama, 2010, *Statement on Senate Passage of Legislation Repealing the Department of Defense’s “Don’t Ask, Don’t Tell” Policy* (December 18, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201001083/html/DCPD-201001083.htm> (“It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.”).

<sup>221</sup> *Lawrence*, 539 U.S. at 577 (“[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”); *Romer*, 517 U.S. at 633 (noting that a law cannot broadly disfavor gays and lesbians because of “personal or religious objections to homosexuality.”).

<sup>222</sup> Windsor Merits Brief, *supra* note 203, at 23 (quoting *Cleburne*, 473 U.S. at 442).