

There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue

Daniel J. Galvin Jr.

Repository Citation

Daniel J. Galvin Jr., *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue*, 25 Wm. & Mary J. Women & L. 405 (2019), <https://scholarship.law.wm.edu/wmjowl/vol25/iss2/6>

THERE'S NOTHING RATIONAL ABOUT IT: HEIGHTENED SCRUTINY FOR SEXUAL ORIENTATION IS LONG OVERDUE

DANIEL J. GALVIN, JR. *

ABSTRACT

In this Article, I argue that sexual orientation meets the burden established by Supreme Court jurisprudence for suspect classification and, therefore, should receive heightened scrutiny under Fourteenth Amendment equal protection analysis. After decades of using the fundamental rights analysis to aid lesbian, gay, and bisexual individuals in their pursuit of equality, addressing the fundamental right to marry and the fundamental right to privacy, the Supreme Court must address the elephant in the courtroom: that sexual orientation meets all of the factors set by the Court in equal protection cases for suspect classification.

Gays, lesbians, and bisexual individuals (LGBs)¹ meet the burden for suspectness in that they are a discrete and insular minority, with a long history of discrimination, and are effectively politically powerless. Furthermore, sexual orientation is an immutable characteristic, irrelevant to an individual's ability to participate in and contribute to society. While the Supreme Court has not determined which factors are weighed more heavily than others in its award of suspect classification, sexual orientation meets all of the factors addressed by the Court in previous cases and therefore must be a suspect class and granted heightened scrutiny under the Fourteenth Amendment Equal Protection Clause.

* BA, Norwich University; JD, University of Massachusetts School of Law. I would like to thank Professor Jeremiah Ho for his steadfast support and guidance through the writing process as well as through law school, without whom, I would never have undertaken this project . . . or graduated for that matter. I would like to thank Professor Dwight Duncan for instilling in me a love and reverence for the Constitution. I would also like to thank the staff of the UMass Law Library for their assistance and endless supply of updated Bluebooks. Special thanks to my family and friends, particularly Paolo Corso, Zack Devlin, Mike Ryan, and Joe Kenyon for their support through the writing process as well as throughout law school and beyond. And lastly, much appreciation to editors Eydsa La Paz, Brooke Roman, and the staff of the *William & Mary Journal of Race, Gender, and Social Justice* for their hard work in moving this Article to its publication.

1. In this Article, the issue of sexual orientation will be analyzed under equal protection analysis. Gender identity, commonly identified as the "T" in LGBT, will not be addressed.

INTRODUCTION

I. FROM CIVIL WAR TO CIVIL RIGHTS: A HISTORY OF EQUAL PROTECTION

- A. *A Discrete and Insular Minority*
- B. *History of Discrimination*
- C. *Political Powerlessness*
- D. *Immutability*
- E. *Relevancy of the Trait in Participating and Contributing to Society*

II. WE'RE HERE, WE'RE QUEER, BUT WHERE IS HERE?: THE HISTORY OF GAY RIGHTS AND THE CURRENT STANDING OF SEXUAL ORIENTATION CLASSIFICATION

- A. *Where We Rise: The History of Gay Rights from One, Inc. to Obergefell*
- B. *Where We Fall Short: Current Issues Facing the LGB Community*

III. SEXUAL ORIENTATION MEETS THE BURDEN FOR SUSPECT CLASSIFICATION

- A. *A Discrete and Insular Minority*
- B. *History of Discrimination*
- C. *Political Powerlessness*
- D. *Immutability*
- E. *Relevance of a Group's Defining Characteristic*

CONCLUSION

INTRODUCTION

On June 26, 2015, same-sex marriage was universally recognized in the United States with the Supreme Court's decision in *Obergefell v. Hodges*.² The majority opinion, authored by Justice Kennedy, found that marriage is a fundamental right which cannot be denied to same-sex couples because of the nature of their same-sex relationship.³ This decision was a victory for proponents of gay rights and equality.⁴ However, at no point did the Supreme Court's decision make reference to sexual orientation as a suspect class or analyze the facts of the case under a suspect classification framework.⁵ At a time

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

3. *Id.*

4. Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.3f4118d01d05 [https://perma.cc/584Q-B8GY].

5. *See Obergefell*, 135 S. Ct. at 2597–600.

when sexual orientation rights seem to permeate the docket of the Supreme Court,⁶ the fact that the Court fails to recognize the applicability of suspect classification to the analysis of civil rights cases affecting the LGBT community requires immediate remedy.⁷ In this Article, I argue that given the current state of equal protection jurisprudence, sexual orientation should be granted suspect classification. Part I will outline the history of equal protection jurisprudence by evaluating the *stare decisis* that created and further molded the current five-factor balancing test the Court uses in determining suspectness. Part II will examine the history of LGB rights through the Supreme Court, from the first decision mentioning the LGB community to the landmark marriage cases recognizing the fundamental right of marriage for all, including the LGB community. Part II will also elaborate on the current discriminatory issues the LGB community faces without laws protecting them as a suspect class. Part III will argue that sexual orientation, as a suspect class, meets all of the burdens established by the Supreme Court for suspect classification. Therefore, Part III will argue that since sexual orientation meets the standard for suspectness under the current equal protection analysis, heightened scrutiny should be granted. Part III will also address the support the LGB community has received for granting suspect classification. The Conclusion reports that sexual orientation is a suspect class requiring heightened scrutiny.

I. FROM CIVIL WAR TO CIVIL RIGHTS: A HISTORY OF EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment states, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁸ Originally ratified to protect slaves emancipated after the Civil War via the Thirteenth Amendment,⁹ the Clause did not see traction in the Supreme Court until the Warren Court in the 1950s.¹⁰ The idea that certain classes required heightened review at the Supreme Court under Equal Protection analyses

6. See *id.* at 2593; *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013); *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm’n*, 584 U.S. ___ (2018).

7. See Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL’Y 385, 386 (2010).

8. U.S. CONST. amend. XIV, § 1.

9. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 142 (2011).

10. *Id.* at 142–43.

was first introduced in *United States v. Carolene Products Co.*¹¹ The case involved whether the Filled Milk Act, which prohibited interstate commerce of certain milk products, violated the Fifth Amendment.¹² However, it was the fourth footnote of the opinion which introduced the idea of heightened scrutiny.¹³ Justice Stone, author of the now famous footnote,¹⁴ wrote a “more searching judicial inquiry” was necessary when the “operation of those political processes ordinarily to be relied upon to protect minorities” was prejudiced against a “discrete and insular minorit[y].”¹⁵ Justice Stone suggested that in cases where a minority group is prevented from challenging a law which it believes discriminates against it through legislative means as a result of its minority status, a heightened level of judicial scrutiny may be required to analyze the issue.¹⁶ This footnote became the cornerstone of equal protection jurisprudence as the Court began to determine which classes required heightened scrutiny.¹⁷

The first mention by the Court of any suspect class requiring heightened scrutiny arose out of *Korematsu v. United States*.¹⁸ Because the Court had not established any type of conjunctive elemental test or factor balancing test at the time,¹⁹ the Court simply established “that [where] all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”²⁰ The Court, however, acknowledged that while race may fall into a class which requires heightened scrutiny, the applicability of the standard does not necessarily mean that the challenged law will be declared unconstitutional.²¹ While the Court implemented heightened scrutiny under a theory of suspect classification for race, *ab initio*, in *Korematsu*, it failed to outline the requirements for such a classification.²² It was not until the case of *San Antonio Independent School District v. Rodriguez* that the Court even used the term “suspect class” for the first time and provided examples of criteria used to determine suspectness.²³ *San Antonio Independent School District* raised the issue

11. *Id.* at 143.

12. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 145–46 (1938).

13. *Id.* at 152 n.4.

14. *See* Strauss, *supra* note 9, at 143.

15. *Carolene Prods. Co.*, 304 U.S. at 154 n.4.

16. *Id.*

17. *See* Strauss, *supra* note 9, at 144.

18. *Id.* (discussing race as a class worthy of “the most rigid scrutiny”).

19. *See id.*

20. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

21. *Id.*

22. *See* Strauss, *supra* note 9, at 144.

23. *Id.* at 145.

of suspect classification for poor school districts.²⁴ Rejecting suspect classification for the school districts, the Court introduced what it coined “traditional indicia of suspectness,” namely: “the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”²⁵ The addition of analyzing the history of discrimination as well as “political powerlessness”²⁶ created two new factors in a balancing test with the “discrete and insular” minority.²⁷

In the same year as *San Antonio Independent School District*, the Court also decided in *Frontiero v. Richardson* that two additional factors were prominent in its determination of suspectness: “whether a group’s defining characteristic was relevant to its ability to perform or contribute to society, and the immutability of that trait.”²⁸ The same factors were used three years later in *Craig v. Boren* in granting a new level of scrutiny to gender, intermediate scrutiny.²⁹ This quasi-suspect classification was created because a person’s gender has no relevance to his or her ability to contribute to society, and because gender, determined at birth, is an immutable characteristic of that person’s being.³⁰ While not going so far as to grant strict scrutiny review to gender as a classification, intermediate scrutiny review creates a heightened level of review.³¹

The questions that must now be answered are what these different scrutiny levels mean and how they are applied. In cases involving non-suspect classes, rational basis scrutiny is used.³² Established in *McCulloch v. Maryland*,³³ rational basis scrutiny requires that “[t]hose challenging . . . a law have the burden to establish that the law is not rationally related to any legitimate government purpose.”³⁴ Intermediate scrutiny, granted to “quasi-suspect” classes such as gender and illegitimacy,³⁵ assigns those challenging a law the burden

24. *Id.*

25. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

26. *Id.*

27. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

28. Strauss, *supra* note 9, at 145. The Court weighed these factors in determining whether gender should be a suspect class worthy of strict scrutiny, ultimately finding 5–4 that it was not. *Id.* at 145 n.50.

29. *Id.* at 145 n.50 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

30. Strauss, *supra* note 9, at 145.

31. *Id.* at 145 n.50.

32. *Id.* at 135–36.

33. *See McCulloch v. Maryland*, 17 U.S. 316, 437 (1819) (establishing judicial review of laws challenged under the Constitution).

34. Strauss, *supra* note 9, at 136 (footnote omitted).

35. *See Craig v. Boren*, 429 U.S. 190, 210 (1976) (granting gender quasi-suspect

of showing “[s]uch laws” are not “substantially related to an important government purpose.”³⁶ Finally, strict scrutiny, granted to suspect classes such as race and national origin,³⁷ requires the government show a “compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose.”³⁸ This Article argues that sexual orientation, currently analyzed under rational basis scrutiny,³⁹ should receive heightened scrutiny because sexual orientation meets the factors established by the Supreme Court through its equal protection jurisprudence. In order to do so effectively, a full understanding of each of the factors in the balancing test must be explained.

A. *A Discrete and Insular Minority*

The first factor a court may weigh in determining the suspectness of a proposed class is the class’s status as a discrete and insular minority.⁴⁰ Writing about the application of this standard, Professor Marcy Strauss states, “courts often conclusively asserted that a particular group was or was not a discrete and insular minority.”⁴¹ However, she further contends, “[p]erhaps the most widely accepted explanation for the terms ‘discrete and insular minority’ is that suggested by Professor Bruce Ackerman.”⁴² His article *Beyond Carolene Products* suggests “[a] group is discrete if they are visible in a way that makes them ‘relatively easy for others to identify’”⁴³ and “[a] group is insular if they tend to interact with each other with ‘great frequency in a variety of social contexts.’”⁴⁴ Strauss argues that “courts today measure suspectness” by “a group’s political power, history of discrimination, and immutability” in order “to implement the theory behind Footnote 4 [sic] of *Carolene Products* rather than by attempting to define the phrase ‘discrete and insular.’”⁴⁵

classification, and granting intermediate scrutiny); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (granting illegitimacy quasi-suspect classification, and granting intermediate scrutiny).

36. Strauss, *supra* note 9, at 137 (footnote omitted).

37. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (ruling that classifications of race and national origin are subject to strict scrutiny).

38. Strauss, *supra* note 9, at 137 (footnote omitted).

39. See Powers, *supra* note 7, at 387 (stating that the Supreme Court has yet to apply heightened scrutiny to statutes distinguishing on the basis of sexual orientation).

40. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

41. Strauss, *supra* note 9, at 149 (footnote omitted).

42. *Id.*

43. *Id.* (quoting Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729 (1985)).

44. *Id.* (quoting Ackerman, *supra* note 43, at 726).

45. Strauss, *supra* note 9, at 150.

This is supported in Supreme Court jurisprudence. In *Massachusetts Board of Retirement v. Murgia*, the Court, in a per curiam opinion, opined that a “discrete and insular group” is one which requires “extraordinary protection from the majoritarian political process.”⁴⁶ The Court, however, also stated “that a suspect class is one ‘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.’”⁴⁷ If one looks at the language between those two phrases, one will observe the Court equates a discrete and insular group with one “saddled with . . . disabilities,” a history of discrimination, and political powerlessness.⁴⁸ There is a strong argument that, as Professor Strauss opines, discrete and insular minority is merely an all-encompassing, umbrella term for the subsequent factors the Court looks at in determining suspectness.⁴⁹ If that is the current status of this factor in equal protection suspect classification balancing, then it is necessary to understand the subsequent factors established by the Court.

B. History of Discrimination

A class aiming for suspect classification must show a history of discrimination.⁵⁰ Professor Strauss argues that “[a] history of discrimination is relevant to a group’s suspect status because it is connected to the group’s political power and indicates whether the legislative process has failed to protect it, warranting judicial intervention.”⁵¹ Because the Court established race as a suspect class, *ab initio*, in *Korematsu*, the Court never addressed the history of discrimination as a factor in its ruling.⁵² It was not until *Frontiero v. Richardson* that the Court addressed the issue of a history of discrimination in its determination of suspectness.⁵³ The Court stated plainly, “[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.”⁵⁴ The Court then went on to explain the history of “romantic paternalism” which it explained “put women, not on a pedestal, but in a cage.”⁵⁵ The Court addressed

46. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

47. *Id.*

48. *Id.*

49. See Strauss, *supra* note 9, at 150.

50. *Id.*

51. *Id.*

52. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

53. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

54. *Id.* (footnote omitted).

55. *Id.*

the stereotypes and distinctions between the sexes, and even compared the status of women “to that of blacks under the pre–Civil War slave codes.”⁵⁶ It further opined that “women still face pervasive . . . discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.”⁵⁷ In doing so, the Court granted suspect status to gender as a class and utilized strict scrutiny.⁵⁸ Three years later, the Court changed its analysis of gender as a suspect class, utilizing the “important governmental objectives” test weighed against a “substantially related” goal,⁵⁹ creating what is known today as intermediate scrutiny.⁶⁰ The Court’s ability to examine the history of gender discrimination, citing cases and social mores which perpetuated systemic sexism, shows it is capable of undertaking a thoughtful process for other suspect or quasi-suspect classes.⁶¹

C. *Political Powerlessness*

The next prong the Court considers in determining whether a class is suspect is the class’s political powerlessness.⁶² “Political powerlessness refers to a group’s inability to rely on the legislative process to protect its interest.”⁶³ The goal of the Fourteenth Amendment Equal Protection Clause is to protect against discrimination based on class, and it is for that reason courts view this factor as one of the most important in protecting the class against a legislature with an inherent bias against the group.⁶⁴ Professor Strauss narrows this factor down to four possible approaches: “(1) the group’s ability to vote; (2) the pure numbers of the group; (3) the existence of favorable legislative enactments that might demonstrate political power; and (4) whether members of the group have achieved positions of power and authority.”⁶⁵

Certainly in *Frontiero* and *Boren*, the Court analyzed the history of voting rights in its determination of suspectness.⁶⁶ The Court

56. *Id.* at 685.

57. *Id.* (footnote omitted).

58. *See id.* at 690–91.

59. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

60. Strauss, *supra* note 9, at 137.

61. *See Frontiero*, 411 U.S. at 684–85.

62. Strauss, *supra* note 9, at 153.

63. *Id.* (footnote omitted).

64. *See id.*

65. *Id.* at 154.

66. *See Frontiero*, 411 U.S. at 685 (explaining that while blacks were granted the right to vote in 1870, women did not receive the right to vote until the ratification of the

has also analyzed a group's inability to vote in *Foley v. Connelie*, where it ruled aliens receive strict scrutiny because they "have no direct voice in the political process."⁶⁷ While a group's inability to vote has been analyzed, it may be indicative of political powerlessness.⁶⁸ "[B]lacks, women, indigents, and illegitimates may all vote, and yet all are politically powerless."⁶⁹

Footnote Four of *Carolene Products* first addressed the issue of the population of a group as a factor in Equal Protection rationale, noting that "exacting judicial scrutiny" may be necessary to determine the constitutionality of laws affecting "racial minorities" which Justice Stone determined "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁷⁰ The entire point behind Footnote Four is that a group that does not have the numbers to protect itself against the will of the majority should be able to rely on the courts to extend heightened scrutiny in determining whether the law is unconstitutional.⁷¹

The third prong of powerlessness the Court looks to is current laws favoring the group seeking suspect classification.⁷² Interestingly enough, the major application of this prong in Supreme Court jurisprudence did not arise out of a case awarding suspect classification, but rather denying it.⁷³ In *Cleburne v. Cleburne Living Center*, the Court ruled that the "mentally retarded have a reduced ability to cope with and function in the everyday world."⁷⁴ They further opined that mental retardation is an immutable characteristic.⁷⁵ However the Court, in addressing laws favorable to the mentally disabled, found that "the distinctive legislative response" to the mentally disabled "demonstrate[d] . . . that the lawmakers ha[d] been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."⁷⁶ The Court went on to list several instances where legislatures, "both national and state" had passed laws protecting the mentally disabled, including the Developmental Disabilities Assistance

Nineteenth Amendment); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (explaining the traditional role of women in the home rather than "the marketplace and world of ideas").

67. *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (involving a New York statute which prohibited non-citizens from becoming police officers).

68. Strauss, *supra* note 9, at 154.

69. *Id.* (footnote omitted).

70. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

71. *See id.*

72. *See* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985).

73. *Id.* at 442 (denying quasi-suspect classification to the mentally disabled).

74. *Id.*

75. *Id.* at 438.

76. *Id.* at 443.

and Bill of Rights Act, the Education of the Handicapped Act, and the Mentally Retarded Persons Act of 1977.”⁷⁷ By passing laws specifically tailored to assist the mentally disabled, “the legislative response . . . negate[d] any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”⁷⁸ Regardless of the unsuccessful application to award suspect classification to the mentally disabled, *Cleburne* demonstrates the Court’s ability to analyze the current state of laws favoring a prospective class.⁷⁹

The final prong of powerlessness is whether members of the proposed class have attained positions of power and authority.⁸⁰ In *Frontiero*, the Court noted the appellee’s argument that “women still are not engaged in politics, the professions, business, or industry to the extent that men are.”⁸¹ As of 2017, there are twenty-one female senators (21%) and 105 congresswomen (19.6%) serving in Congress.⁸² In statewide executive offices, women hold 23.7% of elected positions.⁸³ Over thirty years after the decision in *Frontiero*, there is still a clear gender gap in politics in a society where women make up 50% of the population.⁸⁴ The same issue faces racial minorities.⁸⁵ As of 2017, 19% of the 115th Congress is non-white, even though racial minorities compose 38% of the population of the United States.⁸⁶ While there has been a great increase in minority representation in government,⁸⁷ including the election of Barack Obama as the first black President of the United States in 2008,⁸⁸ white senators and congressmen still “account for 81% of the current Congress but represent just 62% of the population.”⁸⁹ Political powerlessness can be measured by any

77. *Id.* at 443–44.

78. *See Cleburne*, 473 U.S. at 445.

79. *See id.* at 465.

80. Strauss, *supra* note 9, at 154.

81. *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

82. *Women in Elective Office 2017*, CTR. AM. WOMEN & POL. (2017), <http://www.cawp.rutgers.edu/women-elective-office-2017> [<https://perma.cc/GX3P-3TLH>].

83. *Id.*

84. *See Frontiero*, 411 U.S. at 683; *Population, Female (% of Total)*, WORLD BANK (2017), <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=US> [<https://perma.cc/5YRS-AZLJ>]; *Women in Elective Office 2017*, *supra* note 82.

85. *See* Kristen Bialik & Jens Manuel Krogstad, *115th Congress Sets New High for Racial, Ethnic Diversity*, PEW RES. CTR. (Jan. 24, 2017), <http://www.pewresearch.org/fact-tank/2017/01/24/115th-congress-sets-new-high-for-racial-ethnic-diversity> [<https://perma.cc/5JSD-5TUE>].

86. *Id.*

87. *Id.*

88. Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES (Nov. 4, 2008), <http://www.nytimes.com/2008/11/05/us/politics/05elect.html> [<https://perma.cc/T2RZ-AK8D>].

89. Bialik & Krogstad, *supra* note 85.

of these prongs, and yet, the fact remains that even with Equal Protection advances, racial minorities and women are still vastly under-represented in elected office.

D. Immutability

Immutability, or a trait not easily changed,⁹⁰ is another factor the Court utilizes in determining suspectness.⁹¹ The Court in *Frontiero* explained its interpretation of immutability opining that sex, race, and national origin, all suspect classes under equal protection jurisprudence, are immutable simply because they are an “accident of birth”⁹² meaning that an immutable characteristic is one not easily changed.⁹³ In its opinion in *Plyler v. Doe*, the court found that undocumented status was not “an absolutely immutable characteristic since it is the product of conscious . . . action.”⁹⁴ The Court further elaborated on the status of immutability in *Mathews v. Lucas*, comparing the immutable status of illegitimacy to that of race and gender, “a characteristic determined by causes not within the control of the illegitimate individual.”⁹⁵ Understanding immutability and the application of this standard is crucial to understanding which prospective classes meet the burden of suspectness.

E. Relevancy of the Trait in Participating and Contributing to Society

In determining suspectness, “[c]ourts also consider the relevancy of a group’s defining characteristic or whether the trait bears a relation to the individual’s ability to participate and contribute to society.”⁹⁶ In *Frontiero*, the Court ruled that “sex . . . bears no relation to ability to perform or contribute to society.”⁹⁷ Consequently, the Court found that because one’s gender does not determine one’s ability to participate in society, any “statutory distinctions”⁹⁸ discriminate

90. See Strauss, *supra* note 9, at 162.

91. *Id.*

92. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

93. See Strauss, *supra* note 9, at 162.

94. *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (determining that withholding education rights from the child of an undocumented alien was unconstitutional because the same educational opportunities were offered to children of documented aliens and citizens).

95. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (deciding that illegitimacy is granted intermediate scrutiny, but not strict scrutiny as race and national origin).

96. Strauss, *supra* note 9, at 165 (footnote omitted).

97. *Frontiero*, 411 U.S. at 686 (footnote omitted).

98. *Id.* at 686–87.

against women “without regard to the actual capabilities of its individual members.”⁹⁹ Because gender bore no relevance to an individual’s ability to participate in society, in addition to the previously stated factors, suspect classification was granted to gender.¹⁰⁰ The Court in *Cleburne* found the opposite in rejecting suspect classification for the mentally disabled.¹⁰¹ In the majority opinion, Justice Byron White wrote,

[I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: . . . they range from those whose disability is not immediately evident to those who must be constantly cared for. . . . [I]n relevant respects . . . the States’ interest in dealing with and providing for them is plainly a legitimate one.¹⁰²

The Court explained that mental disability was, in fact, the very reason why a disabled individual’s disability was relevant to his or her ability to function in society.¹⁰³ In another case denying suspect classification, the Court ruled that age, unlike race or gender, “cannot be characterized as ‘so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.’”¹⁰⁴ The Court explained that there are times where laws which classify based on age serve a legitimate government interest because of age and thus failed to grant age suspect classification.¹⁰⁵

The Court, through its jurisprudence, has accepted these factors as instrumental in determining suspectness.¹⁰⁶ Beginning with Footnote Four in Justice Stone’s opinion in *United States v. Carolene Products* through cases involving rational basis scrutiny for age and mental disability, the Court has outlined the “test” for suspectness.¹⁰⁷ Moving forward, the Court has the opportunity to use this test in granting suspect classification to another class, sexual orientation.

99. *Id.* at 687.

100. *Id.* at 686, 688. *Craig v. Boren* reduced the level of scrutiny to intermediate and awarded gender quasi-suspect classification in 1976. Strauss, *supra* note 9, at 137 n.12.

101. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985).

102. *Id.* (footnotes omitted).

103. *Id.*

104. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (quoting *Cleburne*, 473 U.S. at 440).

105. *Id.* at 83.

106. Strauss, *supra* note 9, at 146.

107. *Id.* at 143, 146.

II. WE'RE HERE, WE'RE QUEER, BUT WHERE IS HERE?:
THE HISTORY OF GAY RIGHTS AND THE CURRENT STANDING OF
SEXUAL ORIENTATION CLASSIFICATION

A. Where We Rise: The History of Gay Rights from One, Inc. to Obergefell

Unlike race, which has faced and received legal protections from forms of discrimination over the past 160 years,¹⁰⁸ and gender, which has faced and received legal protections from discrimination dating back to the ratification of the Nineteenth Amendment,¹⁰⁹ sexual orientation has only become a major issue in the past sixty years.¹¹⁰ In order to understand how sexual orientation adheres to the current suspect classification standard, the history of LGB rights in Supreme Court lore must be understood.

The first case the Supreme Court ruled on which had any relation to the gay community was *One, Inc. v. Olesen*.¹¹¹ The per curiam opinion of the Court is one sentence long and yet, says so much.¹¹² One Incorporated published a magazine entitled “One, The Homosexual Magazine.”¹¹³ The United States Postal Service had determined that the magazine was “obscene, lewd, lascivious” and therefore refused to distribute the magazine.¹¹⁴ The trial court upheld the decision of the Postmaster,¹¹⁵ and the United States Court of Appeals for the Ninth Circuit upheld the decision.¹¹⁶ The magazine appealed to the Supreme Court, and in a one sentence opinion, the Supreme Court granted

108. See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (ruling preemptory challenges in jury voir dire cannot be used on the basis of race); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (ruling miscegenation laws unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (ruling segregation unconstitutional); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding Japanese internment); *Plessy v. Ferguson*, 163 U.S. 537, 548, 550–51 (1896) (upholding the doctrine of separate but equal); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (ruling facially neutral laws applied in a racially discriminatory manner violate equal protection); *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857) (ruling black men, whether born of free men or slaves, had no standing in court).

109. See U.S. CONST. amend XIX; *Craig v. Boren*, 429 U.S. 190, 192 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (upholding women’s right to choose abortion).

110. See *One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958); *One, Inc. v. Olesen*, 241 F.2d 772, 773 (1957).

111. Christianna Silva, *All the Times the Supreme Court Has Ruled on LGBT Rights*, NEWSWEEK (Nov. 23, 2017, 2:38 PM), <https://www.newsweek.com/all-times-supreme-court-has-ruled-lgbt-rights-720883> [<https://perma.cc/LT8A-NTQU>].

112. See *Olesen*, 355 U.S. at 371.

113. *Olesen*, 241 F.2d at 773.

114. *Id.*

115. *Id.*

116. *Id.* at 779.

certiorari and reversed the judgment of the Ninth Circuit,¹¹⁷ signifying the first victory of gay rights, finding that the homosexual material in the magazine was not obscene.¹¹⁸

While the LGB community may have found victory in *One, Inc.*, the plight of LGB people did not become a public issue until Saturday, June 28, 1969, when officers of the New York City Police Department raided the Stonewall Inn, a bar frequented by the LGBT community.¹¹⁹ In the past, when police raided locations where the LGBT community congregated, crowds would disperse, but not this night.¹²⁰ Instead, thousands began to fight back against the police, “chanting and throwing objects” as the police began arresting employees and patrons of the bar.¹²¹ Eventually, thousands joined the uprising.¹²² The Stonewall Riots are “regarded by many as the single most important” event that led to the development of the modern LGBT civil rights movement.¹²³ With increased visibility came increased discrimination.

Sodomy laws across the United States directly affected the gay community since sodomy, as defined by the Georgia statute in *Bowers v. Hardwick*, criminalized sex acts “involving the sex organs of one person and the mouth or anus of another.”¹²⁴ In ruling that the Georgia statute criminalizing sodomy was constitutional, the Court found, using rational basis scrutiny for the non-suspect class of sexual orientation, that,

[e]ven if the conduct at issue here is not a fundamental right, [Hardwick] asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.¹²⁵

The Court then ruled that even if that were the case, there was a rational basis for the law and refused to invalidate the law “of some 25 [sic] states” on this basis.¹²⁶ The gay community’s “loss” in *Bowers* showed that even when presented with issues of discrimination

117. *Olesen*, 355 U.S. at 371.

118. *Id.*; Silva, *supra* note 111.

119. *Stonewall National Monument*, NAT'L PARK SERV. (2017), <https://www.nps.gov/places/stonewall.htm> [<https://perma.cc/FW4H-TW7M>].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986) (citing GA. CODE ANN. § 16-6-2 (1984)).

125. *Bowers*, 478 U.S. at 196.

126. *Id.*

against sexual orientation, the Court was unwilling to grant protections to the LGB community.¹²⁷

The first major Supreme Court victory for gay rights occurred in *Romer v. Evans*, when the Court held that a Colorado constitutional amendment denying any type of “[p]rotected [s]tatus” for gays, lesbians, and bisexuals¹²⁸ was unconstitutional.¹²⁹ The Court ruled that “Amendment 2 bars homosexuals from securing . . . legal protections for this targeted class in . . . housing, sale of real estate, insurance, health and welfare services, private education, and employment.”¹³⁰ The Court then found that Amendment 2 not only failed to meet the burden of rational basis scrutiny, but “defie[d]” it.¹³¹ The Court’s analysis of Amendment 2 then goes on to say that the “disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”¹³² In its conclusion, the Court found “Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else,” finding that “[a] State cannot so deem a class of persons a stranger to its laws.”¹³³ The fact that the Court used rational basis scrutiny in striking down a law discriminating against LGB individuals demonstrates that the biases shown in *Bowers* were starting to dissipate.¹³⁴

Bowers was finally overturned in 2003 with the Court’s decision in *Lawrence v. Texas*, which ruled that a Texas statute criminalizing same-sex sodomy was unconstitutional.¹³⁵ Rather than analyzing the statute under an equal protection lens, the Court utilized a Fourteenth Amendment Due Process Clause analysis to find that the petitioners have a “right to liberty under the Due Process Clause” which entitles them “to engage in their conduct without intervention of the government.”¹³⁶ The Court, utilizing rational basis scrutiny, found that “[t]he Texas statute [prohibiting consensual, same-sex sodomy] furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹³⁷ The *Lawrence* decision, in overruling *Bowers*, allowed LGB individuals to enjoy the

127. *See id.*

128. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

129. *Id.* at 623.

130. *Id.* at 629.

131. *Id.* at 631–32.

132. *Id.* at 633.

133. *Id.* at 635.

134. *See Romer*, 517 U.S. at 635; *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986).

135. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

136. *Id.* at 578.

137. *Id.*

closeness of intimate relationships with their partners without fear of arrest; however, there was another major hurdle to overcome.¹³⁸

The next step in the fight for gay rights was the recognition of same-sex marriage. States began considering the idea of same-sex marriage in the 1990s after the Court's ruling in *Romer*.¹³⁹ In light of this increased drive for legalizing gay marriage, Congress passed the Defense of Marriage Act (DOMA), "which excludes a same-sex partner from the definition of 'spouse' as that term is used in federal statutes."¹⁴⁰ As a result, same-sex partners who wed in states or countries which permitted same-sex marriage or civil unions under state law were denied federal spousal benefits.¹⁴¹ Edith Windsor's wife, Thea Spyer, died in 2009.¹⁴² Married in Canada, the couple resided in New York City, but when Spyer died and willed her estate to Windsor, Windsor was denied the marital exemption of the federal estate tax because under DOMA, the tax exemption would only be applied to opposite-sex couples where "any interest in property which passes or has passed from the decedent to his surviving spouse."¹⁴³ Because DOMA defined marriage as "only a legal union between one man and one woman as husband and wife,"¹⁴⁴ Windsor was not able to claim the estate tax exemption.¹⁴⁵ Windsor challenged DOMA under a theory that the law violated her Fifth Amendment Due Process rights, applied to the states through the Fourteenth Amendment.¹⁴⁶ In finding DOMA unconstitutional, the Court found,

[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the state. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.¹⁴⁷

138. *Id.* at 578–79.

139. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2679 (2013).

140. *Id.* at 2682.

141. *Id.* at 2683.

142. *Id.*

143. 26 U.S.C.A. § 2056(a) (West 1997).

144. 1 U.S.C.A. § 7 (West 1996).

145. *Windsor*, 133 S. Ct. at 2679.

146. *Id.*

147. *Id.* at 2695–96.

The ruling meant that for the first time, gays and lesbians, joined in a union in one state, were not only guaranteed the rights and privileges granted to opposite-sex couples in various states, regardless of that state's own same-sex union recognition, but it also granted the federal rights of married couples to same-sex partners joined legally under the laws of their respective states.¹⁴⁸ That is not to say the majority opinion was met with universal praise.¹⁴⁹ In fact, three justices filed lengthy dissenting opinions, joined by a fourth.¹⁵⁰ However, two years later, the Court would finally rule on the biggest gay rights case in Court history.¹⁵¹

James Obergefell and John Arthur married on a tarmac in Maryland, on board a medical transport plane because Ohio did not recognize same-sex marriage.¹⁵² Three months after their wedding, John passed away after a short battle with amyotrophic lateral sclerosis (ALS).¹⁵³ Because Ohio did not recognize gay marriage, Obergefell was not "listed as the surviving spouse on Arthur's death certificate."¹⁵⁴ The Court was faced with the question of whether marriage was a fundamental right protected under the Fourteenth Amendment and whether denying same-sex couples the right to marry was constitutional.¹⁵⁵ The Court found that marriage was a fundamental right guaranteed to all Americans.¹⁵⁶ In the majority opinion, Justice Anthony Kennedy outlined the four factors the Court used to determine that marriage was a fundamental right.¹⁵⁷

First, the Court analyzed "the right to personal choice regarding marriage" as being "inherent in the concept of individual autonomy."¹⁵⁸ The Court opined that marriage is a choice which shapes an individual's destiny, which allows those who enter into a marital bond the ability to find "expression, intimacy, and spirituality."¹⁵⁹ Kennedy further wrote "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to

148. *See id.* at 2680–81, 2696.

149. *See id.* at 2696 (Roberts, J., dissenting); *id.* at 2697 (Scalia, J., dissenting); *Windsor*, 133 S. Ct. at 2711 (Alito, J., dissenting). Justice Thomas joined both Justices Scalia and Alito in their dissents.

150. *Windsor*, 133 S. Ct. at 2696 (Roberts, J., dissenting); *id.* at 2697 (Scalia, J., dissenting); *id.* at 2711 (Alito, J. dissenting). Justice Thomas joined both Justices Scalia and Alito in their dissents.

151. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

152. *Id.* at 2494.

153. *Id.*

154. *Id.*

155. *Id.* at 2606.

156. *Id.* at 2607.

157. *Obergefell*, 135 S. Ct. at 2599–601.

158. *Id.* at 2599.

159. *Id.*

make such profound choices.”¹⁶⁰ To paraphrase, the Court found that choosing to enter into marriage is a right ingrained in the individual as part of his exercise of individual autonomy.¹⁶¹

Second, the Court found that marriage is a fundamental right “because it supports a two-person union unlike any other in its importance to the committed individuals.”¹⁶² Citing to *Griswold v. Connecticut*, the Court found,

[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁶³

The Court then looked to its decision in *Lawrence* noting that while it struck down as unconstitutional a law criminalizing same-sex intimate conduct, “it does not achieve the full promise of liberty” because “it does not follow that freedom stops there.”¹⁶⁴ By determining that marriage is unique in the union it creates, the Court found that it is a fundamental right.¹⁶⁵

Third, the Court held that marriage is a fundamental right because “it safeguards children and families.”¹⁶⁶ The Court found that “same-sex couples provide loving and nurturing homes to their children, whether biological or adopted,”¹⁶⁷ while also finding “[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State,”¹⁶⁸ and rejecting the government’s argument that granting marriage rights to same-sex couples would not safeguard children and families.¹⁶⁹ Not only did the Court find marriage to be a fundamental right because of the implications on safeguarding children and families, but it further acknowledged the parental possibilities of same-sex couples.¹⁷⁰

160. *Id.*

161. *See id.*

162. *Id.*

163. *Obergefell*, 135 S. Ct. at 2599–600 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)) (*Griswold* found that a Connecticut law which banned the use of contraceptives by married persons was unconstitutional).

164. *Obergefell*, 135 S. Ct. at 2600; *see Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003).

165. *See Obergefell*, 135 S. Ct. at 2594, 2605–06.

166. *Id.* at 2600.

167. *Id.*

168. *Id.* at 2601.

169. *Id.* at 2607.

170. *Id.* at 2600–01.

Fourth, and finally, the Court analyzed marriage's position as "a keystone of our social order."¹⁷¹ Citing *Maynard v. Hill*, the Court "explain[ed] that marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.'"¹⁷² Marriage is a fundamental part of society and society in turn has supported married couples through "material benefits to protect and nourish the union" including "inheritance and property rights . . . spousal privilege in the law of evidence; hospital access; medical decision-making authority" among many other rights and benefits.¹⁷³ In reviewing the rights and privileges awarded married couples, the Court found "[t]here is no difference between same- and opposite-sex couples" and "[y]et by virtue of their exclusion from [marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage."¹⁷⁴ Because of the importance of marriage in society, and DOMA's obstruction to same-sex couples, the Court found marriage to be a fundamental right being unconstitutionally denied to same-sex couples.¹⁷⁵

Having found that marriage is a fundamental right, the Court ruled "[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."¹⁷⁶ In its final holding, the Court ruled "same-sex couples may exercise the fundamental right to marry in all States" and that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."¹⁷⁷ And with that, the Court recognized the right of same-sex couples to marry within any jurisdiction in the United States.¹⁷⁸

B. Where We Fall Short: Current Issues Facing the LGB Community

While the Court may have recognized same-sex marriage, the LGB community continues to face discriminatory issues. As of 2017, only twenty-two states and the District of Columbia have laws that protect the LGB community in employment practices in the public and private sector.¹⁷⁹ Additionally, seventeen states have no protections

171. *Obergefell*, 135 S. Ct. at 2601.

172. *Id.* (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

173. *Id.*

174. *Id.*

175. *Id.* at 2597, 2602.

176. *Id.* at 2607.

177. *Obergefell*, 135 S. Ct. at 2607–08.

178. *Id.*

179. *State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/employment> [<https://perma.cc/Q8Z3-FZ64>] (last updated June 11, 2018).

for the LGB community in employment at all.¹⁸⁰ Only sixteen states and the District of Columbia protect the LGB community in the field of education.¹⁸¹ Fifteen states do not have hate crime legislation that protects the LGB community.¹⁸² Only twenty-two states and the District of Columbia protect the LGB community in the area of housing.¹⁸³ Finally, only twenty-one states and the District of Columbia passed legislation which protects the LGB community against discrimination in public accommodations.¹⁸⁴ While gay couples have the right to marry, there are still great shortages in protections against discrimination based on sexual orientation.¹⁸⁵ The only way the LGB community has any real chance at securing these protections is through the Supreme Court granting suspect classification to sexual orientation.

III. SEXUAL ORIENTATION MEETS THE BURDEN FOR SUSPECT CLASSIFICATION

Having previously outlined the “test” for suspectness in the Introduction, Part III of this Article will analyze sexual orientation through the lens of the Supreme Court’s equal protection jurisprudence and show that it meets the standard for suspect classification.

A. A Discrete and Insular Minority

As previously outlined, a discrete and insular minority is one which is visible in a way that makes identification easy and interacts with others in various social contexts.¹⁸⁶ There has never been a time where the LGB community has been more visible than right now. When Ellen Degeneres came out as a lesbian on the cover of *Time* in 1997, it was the first time an openly gay actor would be playing

180. *Id.* (including West Virginia, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Wyoming, and Idaho).

181. *State Maps of Laws & Policies: Education*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/education> [<https://perma.cc/TFS8-8B7Z>] (last updated Dec. 1, 2017).

182. *State Maps of Laws & Policies: Hate Crimes*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/hate-crimes> [<https://perma.cc/LD7K-683C>] (last updated Dec. 1, 2017).

183. *State Maps of Laws & Policies: Housing*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/housing> [<https://perma.cc/A8PQ-BQV4>] (last updated June 11, 2018).

184. *State Maps of Laws & Policies: Public Accommodations*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/public-accommodations> [<https://perma.cc/PQ4E-DNJR>] (last updated June 11, 2018) (noting that public accommodations include any public or private entity that provides services to the general public).

185. See Susan Milligan, *Gay Rights Activists Face New Hurdles*, U.S. NEWS (Jan. 23, 2017, 3:46 PM), <https://www.usnews.com/news/national-news/articles/2017-01-23/gay-rights-activists-face-new-hurdles> (last visited Jan. 18, 2019).

186. See Strauss, *supra* note 9, at 149 (quoting Ackerman, *supra* note 43, at 729).

an openly gay lead character on a network television show.¹⁸⁷ Twenty years after the publication of the cover, Degeneres has been joined by numerous other celebrities who have come out, including United States Senator Tammy Baldwin,¹⁸⁸ Apple CEO Tim Cook,¹⁸⁹ and journalist and news anchor Anderson Cooper.¹⁹⁰ In addition to the numerous prominent individuals who have publically acknowledged their sexuality, there are countless advocacy groups that have become household names such as the Human Rights Campaign which advocates for LGB inclusion, the Gay & Lesbian Alliance Against Defamation (GLAAD) which promotes LGB causes, and The Trevor Project which advocates for and helps protect at-risk LGBTQ youth.¹⁹¹ Because of these celebrities, politicians, journalists, businessmen and women, the visibility of the LGB community has never been more apparent; the ability of the LGB community to participate in business, politics, entertainment, and other facets of society proves that the LGB community is a discrete and insular minority under the above definition. Furthermore, the fact that LGBT individuals only comprise between 5% and 10% of the population further supports the idea that this group is a minority for the purposes of equal protection analysis.¹⁹²

B. History of Discrimination

Until the 2003 *Lawrence* decision, sodomy was outlawed in several states in the nation, and those laws were often aimed at the gay community's ability to have intimacy within same-sex relationships.¹⁹³ However, the history of discrimination against the gay community does not rest solely in Supreme Court *stare decisis*. Until

187. Lily Rothman, *Read the 'Yep, I'm Gay' Ellen Degeneres Interview from 20 Years Ago*, TIME (Apr. 13, 2017), <http://time.com/4728994/ellen-degeneres-1997-coming-out-cover> [<https://perma.cc/65D3-U6BU>].

188. *About Tammy Baldwin*, U.S. SENATE, <https://www.baldwin.senate.gov/about> [<https://perma.cc/C6ZQ-T9KW>].

189. Brett Molina, *Apple CEO Tim Cook: 'I'm Proud to be Gay'*, USA TODAY (Oct. 30, 2014, 7:33 AM), <https://www.usatoday.com/story/tech/2014/10/30/tim-cook-comes-out/18165361> [<https://perma.cc/HY7R-BTG5>].

190. Gael Fashingbauer Cooper, *Anderson Cooper: 'I'm Gay, Always Have Been, Always Will Be'*, TODAY (Oct. 14, 2016, 11:51 AM), <https://www.today.com/news/anderson-cooper-im-gay-always-have-been-always-will-be-858165> [<https://perma.cc/GPN4-DHAA>].

191. *See About GLAAD*, GLAAD, <https://www.glaad.org/about> [<https://perma.cc/BL8M-UYX5>]; *About the Trevor Project*, TREVOR PROJECT, <https://www.thetrevorproject.org/about> [<https://perma.cc/L2EE-AGY9>]; *HRC Story*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/hrc-story> [<https://perma.cc/QRY9-RPTK>].

192. Powers, *supra* note 7, at 389; *see also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 440 n.30 (2008).

193. *See Lawrence v. Texas*, 539 U.S. 558, 570 (2003).

1990, United States immigration laws prevented homosexuals from entering the country, and it was not until 2009 that the ban on HIV-positive individuals ended.¹⁹⁴ Even though the Supreme Court invalidated sodomy laws in *Lawrence*, the lasting effect of those laws “accumulated a cultural force that extends far beyond their now technically defunct legal reach.”¹⁹⁵ Throughout history, the media has portrayed homosexuality in a negative light, perpetuating “[q]ueer criminal archetypes” that referred to LGB criminals as “perverts, predators, deviants, psychopaths, child molesters . . . bull dykes, pansies, girlie-men, monsters, he-shes, and freak shows.”¹⁹⁶ No example of equating homosexuality with criminality is more alarming than the response to the sexual abuse allegations against the Catholic Church.¹⁹⁷ “[W]hen the scandal broke publicly in 2002, Church authorities, already steeped in homophobia, scapegoated gay men in the priesthood and seminary” by instituting a witch hunt for “evidence of homosexuality” within the church, finding that such “deep-seated homosexual tendencies” was the cause of the abuse.¹⁹⁸ However, rampant discrimination against LGB individuals does not stop there. In 2015, 17.7% of those who reported hate crimes were victimized because of their sexual orientation.¹⁹⁹ Of those, 62.2% were gay men, 13.5% were lesbians, and 2.8% were bisexual.²⁰⁰ Until its repeal in 2011, Don’t Ask, Don’t Tell (DADT), prevented LGB service members from living an openly LGB lifestyle.²⁰¹ An estimated 100,000 service members were discharged for their sexual orientation under “less-than-honorable” conditions which prevented them from receiving veterans’ benefits, government jobs, employment opportunities, and other benefits.²⁰² Until 1973, homosexuality was listed as a mental disorder by the Diagnostic and Statistical Manual of Mental Disorders.²⁰³ Combined with the previously stated lack of protections in employment, education, public accommodations, and housing, the

194. JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 8 (2011).

195. *Id.* at 10.

196. *Id.* at 25–26 (emphasis in original).

197. *Id.*

198. *Id.* at 34.

199. *Hate Crime Statistics, 2015*, FED. BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS 1 (Fall 2016) https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final.pdf.

200. *Id.* at 2–3.

201. See Elisabeth Bumiller, *Obama Ends “Don’t Ask, Don’t Tell” Policy*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html> [<https://perma.cc/4GB7-G7VG>].

202. Dave Philipps, *Ousted as Gay, Aging Veterans are Battling Again for Honorable Discharges*, N.Y. TIMES (Sep. 6, 2015), <https://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html> [<https://perma.cc/CQM6-45KJ>].

203. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

LGB community has faced, and continues to face, rampant discrimination in various aspects of life.

In late 2016, Donald Trump was elected President of the United States.²⁰⁴ He selected, as his Vice Presidential running mate, Mike Pence, the then-Governor of Indiana.²⁰⁵ As the most powerful man in government behind the President, Pence's views on LGB issues raised alarm for the LGB community.²⁰⁶ He was supportive of a proposed "constitutional amendment that would have defined marriage as between a man and a woman," further indicating he believed living an LGB lifestyle was a choice and preventing same-sex marriage enforced "God's idea."²⁰⁷ He opposed legislation aimed at banning workplace discrimination against the LGB community.²⁰⁸ The Trump Administration's "war" on the LGB community does not stop there.²⁰⁹ Trump's choice for Attorney General was Alabama Senator Jeff Sessions.²¹⁰ Since his appointment to the Justice Department, Sessions has directed the Department to file "multiple amicus briefs arguing against LGBT protections" in upcoming Supreme Court cases involving protections of the LGB community.²¹¹ Even after the landmark cases which recognized same-sex marriage, the Trump Administration's hostility to the LGB community shows that even after so many successes in court, the LGB community still faces discrimination, even from its own government. After the successes realized under the Obama Administration,²¹² the United States is taking a leap backward in the fight to grant greater protections to the LGB community. Not only does the LGB community have a documented history of discrimination, but those same individuals continue to face widespread discrimination in various aspects of life.²¹³

204. Donald J. Trump *45th President of the United States*, WHITE HOUSE (2017), <https://www.whitehouse.gov/administration/president-trump> [<https://perma.cc/MK4G-DYHM>].

205. Will Drabold, *Here's What Mike Pence Said on LGBT Issues over the Years*, TIME (July 15, 2016), <http://time.com/4406337/mike-pence-gay-rights-lgbt-religious-freedom/> [<https://perma.cc/Z59Z-73SZ>].

206. Sarah Kate Ellis, *President Trump is Trying to Erase the LGBTQ Community*, TIME (Jan. 16, 2018), <http://time.com/5104657/donald-trump-lgbt-rights/> [<https://perma.cc/YN8P-2GXA>].

207. Drabold, *supra* note 205.

208. *Id.*

209. Ellis, *supra* note 206.

210. Chris Riotta, *Trump Administration Says Employers Can Fire People for Being Gay*, NEWSWEEK (Sept. 28, 2017, 3:56 PM), <http://www.newsweek.com/trump-doj-fired-being-gay-lgbt-issues-jeff-sessions-673398> [<https://perma.cc/RXD8-F9KM>].

211. *Id.*

212. This includes the repeal of DADT, as well as the Supreme Court's rulings in *Windsor* and *Obergefell*.

213. See *supra* notes 50–61 and accompanying text.

C. *Political Powerlessness*

LGB individuals are vastly underrepresented in legislatures and positions of power and authority.²¹⁴ No openly LGB individual has become a candidate for President or Vice President of the United States for either major party.²¹⁵ The United States has only elected one openly LGB member to the United States Senate.²¹⁶ There have been huge strides for LGB rights in many state legislatures, but the fact remains that even in 2015, at the time the Court recognized same-sex marriage, the Court was willing to analyze the history of same-sex marriage debates undertaken in state and federal courts. It found that in order to counteract legislatures unwilling to protect them, LGB individuals harmed by discriminatory laws sought redress in the only forum they found with a path to protections: the Court.²¹⁷ Even after legislatures and the courts “devoted substantial attention” to LGB individuals in analyzing “state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities,” the Court found that the government’s argument that “there has been insufficient democratic discourse before deciding” on the issue of same-sex marriage was insufficient.²¹⁸ The Court pointed out that while the issue of same-sex marriage had been debated, discussed, advocated for, and litigated, there was still a major split between the various states as to the rights of the LGB community.²¹⁹ If the LGB community was a powerful class, able to exact change through the legislative process, then all fifty states and the federal government would have protections for LGB individuals; yet, the evidence overwhelmingly shows that the LGB community is unable to do that and must seek protection through the courts under the Fourteenth Amendment Equal Protection Clause.²²⁰

214. Kit Ramgopal, *Only 0.1 Percent of Elected Officials are LGBTQ, New Report Finds*, NBC NEWS (June 22, 2018, 9:09 PM), <https://www.nbcnews.com/feature/nbc-out/only-0-1-percent-elected-officials-are-lgbtq-new-report-n885871> [<https://perma.cc/9U3Q-3F2C>].

215. Frank Bruni, *The First Gay President?*, N.Y. TIMES (June 11, 2016), <https://www.nytimes.com/2016/06/12/opinion/sunday/the-first-gay-president.html> [<https://perma.cc/H24S-8UY4>].

216. Nick Duffy, *Republicans Pick ‘Anti-LGBT Extremist’ to Challenge Out Senator Tammy Baldwin*, PINKNEWS (Aug. 15, 2018, 10:26 AM), <https://www.pinknews.co.uk/2018/08/15/republicans-pick-anti-lgbt-extremist-to-challenge-out-senator-tammy-baldwin> [<https://perma.cc/LH27-89A8>].

217. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

218. *Id.*

219. *See id.* at 2597.

220. *See supra* Section III.C.

D. Immutability

Sexual orientation is an immutable characteristic.²²¹ Historically, courts ruled that homosexuality is not immutable, determining it to be a behavior rather than a trait.²²² However, the facts do not support this and the Supreme Court has not accepted this either.²²³ Professor Strauss argues “[s]exual orientation is immutable even if not biologically determined, and even if a behavioral choice, because sexuality is a defining characteristic of personhood.”²²⁴ While the Supreme Court, historically, has yet to rule on the immutability of sexual orientation outright, the Court can easily find sexual orientation to be immutable because “the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class.”²²⁵ It was not until *Obergefell* that the Court recognized, in dicta, the widespread determination that “sexual orientation is both a normal expression of human sexuality and immutable.”²²⁶ Given that the Court has already addressed immutability in *Obergefell*,²²⁷ moving forward in a case raising the issue of suspect classification for sexual orientation, the Court should rely on its rationale in *Obergefell* finding that sexual orientation is, indeed, an immutable characteristic of a person’s very being.²²⁸

E. Relevance of a Group’s Defining Characteristic

The Court must find that sexual orientation does not reflect an “individual’s ability to participate and contribute to society.”²²⁹ Simply put, “[i]f a trait does not reflect a person’s abilities, it is presumptively irrelevant, and the law illegitimately discriminates on the basis of it.”²³⁰ There is overwhelming evidence that shows the LGB community is not only able to participate and contribute to society, but that it already does.²³¹ There are countless actors and actresses, business owners, police officers, soldiers, politicians, religious leaders,

221. *Obergefell*, 135 S. Ct. at 2596.

222. Strauss, *supra* note 9, at 162 (citing *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, 895 F.2d 563, 573 (9th Cir. 1990)).

223. *Obergefell*, 135 S. Ct. at 2596.

224. Strauss, *supra* note 9, at 163.

225. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

226. *Obergefell*, 135 S. Ct. at 2596.

227. *Id.*

228. *See id.* at 2594.

229. Strauss, *supra* note 9, at 165 (footnote omitted).

230. *Id.*

231. *See Powers, supra* note 7, at 389.

laborers, parents, children, brothers, sisters, educators, and activists who all identify as members of the LGB community, but whose sexual identity has no effect on their career or role in society.²³² The Court alluded to as much in *Obergefell* by finding that LGB individuals are not only capable of parenting, but already “create loving, supportive families,”²³³ proving that LGB individuals can participate meaningfully in society.

In addition to the legal evidence that shows sexual orientation meets the standard for heightened scrutiny, there is also widespread support for the elevation of sexual orientation to suspect classification.²³⁴ In a letter to Congress detailing the Justice Department’s position in the *Windsor* case, then–Attorney General Eric Holder concluded his remarks by stating,

[P]ursuant to the President’s instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President’s and my conclusions that a heightened standard should apply.²³⁵

This was most likely the first time a sitting President had advocated for the elevation of sexual orientation to a suspect class warranting heightened scrutiny.²³⁶ Support for suspect classification for sexual orientation does not end with the Executive Branch. Scholars also support the elevation.²³⁷ Writing on the issue, Professor Courtney Powers argues “the Court should find LGBTs a suspect class, and apply heightened scrutiny to statutes treating LGBTs differently, on the basis that LGBTs are a politically powerless minority group.”²³⁸ Professor Strauss also argues in favor of suspect classification for sexual orientation in her analysis of suspect classification in general, showing how the Court has historically failed to follow its own standards when considering laws that discriminate based on sexual orientation, opting to rule on issues of fundamental rights rather than addressing Equal Protection.²³⁹ The fact that sexual orientation meets

232. See *About Tammy Baldwin*, *supra* note 188; Cooper, *supra* note 190; Molina, *supra* note 189; Rothman, *supra* note 187.

233. *Obergefell*, 135 S. Ct. at 2600.

234. See Eric H. Holder, Jr., *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, DEP’T JUST. (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/BCU4-BVRP>]; see also Powers, *supra* note 7, at 385.

235. Holder, *supra* note 234.

236. See *id.*

237. See Powers, *supra* note 7, at 385.

238. *Id.* at 386.

239. See Strauss, *supra* note 9, at 138, 141.

the standard set by the Supreme Court for suspect classification, combined by support in both the governmental and private sectors, further shows that it is time to elevate sexual orientation as a suspect class and grant it heightened scrutiny.

CONCLUSION

As cases continue to reach the Court addressing discrimination of LGB members on the basis of their sexual orientation, it is time the Court recognized what has been established through the decades since *Bowers*.²⁴⁰ Members of the LGB community are a politically powerless group.²⁴¹ Even in light of advances to date, LGBs must rely on the courts, rather than the legislature, in order for their rights to be recognized.²⁴² LGBs are a discrete and insular minority making up only about 10% of the population.²⁴³ There is a lengthy documented history of discrimination based on sexual orientation and the current Administration shows no sign of protecting the rights of the LGB community.²⁴⁴ Sexual orientation is immutable, recognized not only by scholars, but by the Supreme Court in its opinion in *Obergefell*.²⁴⁵ Finally, there is no evidence to suggest that laws discriminating against sexual orientation serve a compelling, important, or legitimate government interest.²⁴⁶ In fact, sexual orientation is completely irrelevant to the LGB community's ability to function in and advance society.²⁴⁷ Combined with this burden, there is widespread support for granting sexual orientation suspect classification.²⁴⁸ For these reasons, sexual orientation meets the standard for suspectness under the "test" developed over the years by the Supreme Court. As a result, in cases raising a Fourteenth Amendment Equal Protection Clause claim based on sexual orientation, the Court should apply heightened scrutiny in its analysis.

240. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015).

241. See *supra* Section I.C.

242. *Id.*

243. Powers, *supra* note 7, at 389.

244. See *supra* notes 208–13 and accompanying text.

245. *Obergefell*, 135 S. Ct. at 2596.

246. See *id.* at 2608.

247. See Strauss, *supra* note 9, at 165 (footnote omitted).

248. See *Obergefell*, 135 S. Ct. at 2606–08.