# WHEN *WINDSOR* ISN'T ENOUGH: WHY THE COURT MUST CLARIFY EQUAL PROTECTION ANALYSIS FOR SEXUAL ORIENTATION CLASSIFICATIONS

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*This Article asserts that the "liberty interest" and "animus" analyses used by the United States Supreme Court in sexual orientation-related cases provide limited guidance to lower courts in conducting federal Equal Protection Clause analysis. As a result, lower courts face significant hurdles in analyzing these claims because the Court has not yet determined what standard of review should be applied. Until it does so, courts will continue to apply different levels of review and the results of discrimination claims will be pre-determined by the standard of review in the jurisdiction.*

*Recent cases recognizing marriage equality may resolve a host of legal issues faced by same-sex couples, but sexual minorities can also face other legal issues. Consequently, traditional equal protection analysis is still necessary for sexual minorities. This Article addresses the impact this lack of guidance has had on lower courts and how it may affect claims of governmental sexual orientation discrimination in the future.*

*Part I reviews traditional equal protection and due process jurisprudence. Part II examines the currently available analyses for sexual orientation discrimination by looking at the hybrid liberty interest, animus analysis, and traditional equal protection review. Part III evaluates what standards of review state supreme courts and federal courts have applied in sexual orientation-related cases to analyze how courts are utilizing standards of review and how United States Supreme Court precedents have impacted those courts' decisions. The last Part discusses why traditional equal protection review is still necessary and how the Court should approach equal protection analysis for sexual orientation-based classifications in the future.*

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*The Article concludes that a Court ruling that sexual orientation classifications merit heightened scrutiny analysis would not be breaking new ground but would be more of a restatement or a different application of what the Court and some lower courts are already doing in sexual orientation-related cases. The Court's clarification that heightened scrutiny should be applied to sexual orientation-related classifications in equal protection cases would provide fairness, predictability, and protection for lesbian, gay, and bisexual people.*



## INTRODUCTION

It seems that every day another court decision relating to the marital rights of same-sex[1] couples is in the news.[2] The number of pending cases has grown considerably since the United States Supreme Court

[1] This Article focuses on legal issues related to sexual orientation-related classifications. The common initialism for the lesbian, gay, bisexual and transgender (LGBT) community will be used to discuss legal issues that are relevant to the broader sexual minority community. Issues related to LGBT people may involve matters related to both sexual orientation and gender identity, and other issues may be more relevant to only one of these groups. The Court, however, has only examined issues related to sexual orientation in its decisions. These cases form the underlying analysis of this Article.

[2] *See generally* Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement and Will & Grace Led to Social Change for LGBT People*, 88 ST. JOHN'S L. REV. (forthcoming May 2015).

handed down the *United States v. Windsor* decision in 2013.[3] The Court's precedents, however, provide limited guidance to lower courts in conducting federal Equal Protection Clause[4] analysis in sexual orientation-related cases.[5] As a result, lower courts must read *Windsor*'s "tea leaves"[6] to determine which standard of review should be applied.

The Court's sexual orientation-related decisions have primarily relied upon "liberty interest" and "animus" analyses to determine the constitutionality of claims. This is illustrated by a trilogy of the Court's sexual orientation-related decisions in *Romer*, *Lawrence*, and *Windsor*.[7] Lower courts still face significant hurdles in analyzing federal Equal Protection Clause claims related to sexual orientation classifications because the Supreme Court has not yet determined what standard of review should be applied. This lack of guidance has created constitutional disparities because different jurisdictions are using a variety of standards of review, and sexual orientation-related rights have become in part dependent on how stringent of a test a particular jurisdiction applies to these claims.[8]

Marriage equality may resolve a host of legal issues faced by same-sex couples, but sexual minorities may face many other legal issues that have not been addressed by the Court.[9] While these marriage victories are important, they provide little clarity for courts addressing non-marital legal claims. It has also been argued that the marriage-related cases are more appropriately analyzed as sex-based discrimination, rather than sexual orientation discrimination, and therefore have limited value in other sexual orientation contexts.[10] Additionally, the focus on marriage litigation can minimize other legal issues, such as employment or housing[11] discrimination, that may be faced by less "mainstream" portions of the LGBT community such as the working poor and LGBT people of

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3 133 S. Ct. 2675 (2013); *see* discussion *infra* Part III.B.

4 U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

5 This Article will discuss "sexual orientation-related" issues. This phrase broadly describes legal matters where a person's sexual orientation is relevant to their claim even if it is not in fact the basis of the legal claim. For instance, this Article would describe a claim brought by a same-sex couple alleging an unconstitutional infringement of the their fundamental right to marry as a "sexual orientation-related" claim even though sexual orientation discrimination is not the basis of the claim or the ultimate court decision.

6 Whitewood v. Wolf, 992 F. Supp. 2d 410, 425 (M.D. Pa. 2014).

7 *See* 133 S. Ct. at 2693–96; Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620, 632–36 (1996).

8 *See* discussion *infra* Part III.

9 *See* discussion *infra* Part IV.

10 *See* Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and "Bare Desire to Harm,"* 64 CASE W. RES. L. REV. 1, 3–14 (2014).

11 During hearings on the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675; 28 U.S.C. § 1738C (2012), a United States senator stated that employers and landlords should have the right to discriminate on the basis of sexual

color.[12] As a result, traditional equal protection analysis is still necessary for sexual minorities.

The Court has instead created the liberty interest analysis, a melding of substantive due process and equal protection doctrines,[13] that is utilized to provide equal access to a person's "liberty."[14] The analytical shift towards the new hybrid liberty analysis can be interpreted as a movement away from the Court's privacy precedents and traditional due process analysis of fundamental rights and "'deeply rooted traditions.'"[15] In fact, the hybrid liberty analysis does not rely on traditional doctrinal analysis of either clause.

The Court's animus analysis asserts that it is constitutionally impermissible for the government to target a group because of moral disapproval[16] or a "'bare . . . desire to harm [the] . . . group'"[17] and consequently removes the need to conduct a traditional equal protection analysis. The *Windsor* Court further explained that laws motivated by improper animus require "careful consideration."[18] This indicates that the appropriate analysis in animus cases is a more stringent form of review than traditional rational basis. Some have suggested, however, that a finding of animus is akin to a "silver bullet" that, once detected, eliminates any purportedly legitimate justifications of the legislation.[19]

By relying on these nontraditional analyses, the Court sidestepped traditional analytical frameworks to reach its conclusions in the trilogy of cases. The use of these nontraditional analyses, however, does not eliminate the need for additional direction on the appropriate standard of re-

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orientation. *See The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 9, 12–13 (1996) (statement of Sen. Don Nickles).

12 *See* Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1038–39 (2014).

13 *See* Lawrence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004).

14 United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

15 Daniel J. Crooks III, *Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in* Lawrence *and* Windsor *Sets the Stage for the Inevitable* Loving *of Our Time*, 8 CHARLESTON L. REV. 223, 228–29 (2014) (citations omitted).

16 *See* Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After* U.S. v. Windsor, 62 CLEV. ST. L. REV. 1, 55–62 (2014); *see also* Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 188–90 (stating that the animus principle is uncontroversial and courts are competent to police unconstitutional animus).

17 *Windsor*, 133 S. Ct. at 2693 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

18 *See id.* (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

19 Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 213 (2013); *see also* Carpenter, *supra* note 16, at 204 (citing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 148 (2001) (referring to animus as a "trump card")).

view for sexual orientation-based claims under the Equal Protection Clause in other types of cases.[20]

This need was identified three decades ago, when Justice Brennan stated, "Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left lower courts in some disarray."[21] The Court's reliance on nontraditional analyses since that time has created a number of problems.

For example, the Court has applied the hybrid liberty analysis to limited substantive issues such as private, consensual sexual activity[22] and the federal Defense of Marriage Act (DOMA).[23] As a result, lower courts can easily compartmentalize the liberty analysis's relevance by applying it only to those legal issues and fact patterns the Court has addressed.[24] A court confronted with marriage litigation is more likely to engage in the hybrid analysis after *Windsor* because it was a marriage-related case than, for example, a court examining a claim of education discrimination on the basis of sexual orientation. It would be relatively easy for a court to distinguish its set of facts or claims from prior Court liberty interest decisions that related solely to sodomy statutes or DOMA.[25]

The Court's impermissible animus analysis is also limited. The animus analysis only is applied where there is actual or implied evidence of the animus, such as the enactment history and text of the law at issue in *Windsor*.[26] This type of evidence, however, may not be available in other challenges to governmental actions. Now that the Court has used

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[20] This is not the only instance where the Court's lack of guidance has led different courts to apply varying tests. *See, e.g.*, Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald, 21 Cornell J.L. & Pub. Pol'y 489 (2012) (analyzing the impact of the Court's lack of guidance on Second Amendment cases and recommending a standard of review).

[21] Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1015–16 (1985) (Brennan, J., dissenting).

[22] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[23] *See Windsor*, 133 S. Ct. at 2696 (2013).

[24] It can also be argued that the liberty analysis may be limited in its application to other substantive due process issues if the Court defaults to a more traditional analysis in future cases. The Court, for example, chose a more traditional analytical approach in *Gonzales v. Carhart*, 550 U.S. 124 (2007), where the Court upheld abortion regulations, than it did previously in *Lawrence*, which utilized a liberty analysis. *See* Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1519–20 (2008) (stating that the Court's *Gonzales* analysis indicates a return to the more traditional analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

[25] *See* Catherine Jean Archibald, *Is Full Marriage Equality for Same-Sex Couples Next? The Immediate and Future Impact of the Supreme Court's Decision in* United States v. Windsor, 48 VAL. U. L. REV. 695, 712–13 (2014).

[26] 133 S. Ct at 2693.

the animus analysis more regularly, legislatures may become more sophisticated at hiding unconstitutional biases in legislation by carefully drafting laws and avoiding legislative histories that demonstrate animus. Animus analysis is also not likely to be as useful in cases where the plaintiff is alleging a more individualized claim of discrimination against a government actor. It can, for example, be difficult to gather evidence demonstrating animus by a governmental employee who fails to hire or promote a person based on sexual orientation discrimination.

Some observers may believe that engaging in the examination and application of specific standards of review for sexual orientation classifications is not necessary because virtually all post-*Windsor* constitutional marriage equality challenges have resulted in invalidating governmental limitations.[27] This belief is shortsighted. The excitement and analyses generated by these court cases are only part of the constitutional legal picture for sexual minorities.

Despite significant increased support for sexual orientation-related issues,[28] discrimination against and opposition toward sexual minorities has not been eradicated. There are no federal laws prohibiting discrimination on the basis of sexual orientation or gender identity,[29] and a majority of states still do not offer any antidiscrimination protections for LGBT people.[30] The limited statutory coverage of sexual orientation discrimination creates a real need for constitutional equal protection for LGBT people. This concern is magnified when courts have interpreted

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[27] The only decisions upholding a state marriage equality ban post-*Windsor* occurred more than a year after the Supreme Court decision. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* Obergefell v. Hodges, 83 U.S.L.W. 3315 (Jan. 16, 2015) (No. 14-571) (preparing to review 6th Circuit decisions upholding Kentucky, Michigan, Ohio, and Tennessee marriage limitations); Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014); Borman v. Pyles-Borman, No. 2014-CV-36, 2014 WL 4251133 (Tenn. Cir. Ct. Aug. 5, 2014) (same-sex couple married in Iowa divorce request denied due to Tennessee's marriage ban for same-sex couples). More than two dozen marriage equality cases post-*Windsor* have resulted in the invalidation of a state marriage equality ban. *See* Lyle Denniston, *String of Same-Sex Marriage Rulings Broken*, SCOTUSBLOG (Aug. 11, 2014, 3:14 PM), http://www.scotusblog.com/2014/08/string-of-same-sex-marriage-rulings-broken/; *see also* discussion *infra* Part III.B (reviewing sexual orientation-related court cases post-*Windsor*).

[28] For example, polling in 2014 revealed that support for marriage equality laws increased to 55%. When Gallup first asked Americans about marriage equality in 1996, 68% were opposed to recognizing marriage between two men or two women and only 27% supported it. Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

[29] President Obama has signed executive orders prohibiting employment discrimination on the bases of sexual orientation and gender identity and prohibiting federal contractors from discriminating against their LGBT employees. *See* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

[30] *See State Nondiscrimination Laws in the U.S.*, NAT'L GAY AND LESBIAN TASKFORCE, http://thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf (last updated June 21, 2013).

sexual orientation-related precedents in dramatically different ways that result in inconsistent standards of review and results.[31]

Justice Kennedy authored the majority decisions in the Court's trilogy of cases relating to sexual orientation.[32] These cases provide the nontraditional liberty and animus approaches courts may use in determining whether the federal constitutional rights of sexual minorities have been violated, yet none of them provide a definitive test for lower courts to use in examining federal equal protection claims. This Article addresses the impact this lack of guidance has had on lower courts and how it may affect litigation resulting from governmental sexual orientation discrimination in the future.

This Article first reviews traditional equal protection and due process jurisprudence. Part II examines the currently available analyses for sexual orientation discrimination by looking at the hybrid liberty interest, animus analysis, and traditional equal protection review. The Article's third Part evaluates what standards of review state supreme courts and federal courts have applied in sexual orientation-related cases to analyze how courts are utilizing standards of review and how Supreme Court precedents have impacted those courts' decisions. The last Part discusses why traditional equal protection review is still necessary and how the Court should approach equal protection analysis for sexual orientation-based classifications.

The Article concludes that a Court ruling that sexual orientation classifications merit heightened scrutiny analysis would not be breaking new ground but would be more of a restatement or a different application of what the Court has already been doing in sexual orientation-related cases. The Court's clarification that heightened scrutiny should be applied to sexual orientation classifications in equal protection cases would provide fairness, predictability, and protection for lesbian, gay, and bisexual people.

## I. TRADITIONAL STANDARDS OF REVIEW

The Supreme Court has developed a number of traditional jurisprudential analyses to determine whether a governmental classification or infringement of a right meets the corresponding constitutional requirements. Most constitutional challenges to sexual orientation-related laws focus on equal protection and due process claims. Which standard of review a court uses to analyze the constitutionality of a law typically determines the outcome. As a result, the Court's failure to articulate

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31 *See, e.g.*, Lawrence C. Levine, *Justice Kennedy's "Gay Agenda":* Romer*,* Lawrence*, and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1, 2 (2013).

32 *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

which level of review to use for sexual orientation-related cases means that a person's constitutional rights will be dependent on the jurisdiction hearing the case.

### *A. Equal Protection*

In Equal Protection Clause[33] cases, the Supreme Court has developed different levels of review based on the classification of the affected group. Statutes that discriminate on the basis of race or national origin[34] are presumptively unconstitutional under strict scrutiny analysis, and in the equal protection context, the test is typically described as being "'strict' in theory and fatal in fact."[35] The government must prove that its action is "narrowly tailored" to "achieve a compelling governmental interest,"[36] and it is no more restrictive than necessary to achieve the purported governmental interest.[37] The test is extremely difficult to meet, and consequently, most laws analyzed under this standard of review are invalidated.

Gender[38] and illegitimacy[39] classifications are reviewed under intermediate scrutiny, and a valid restriction "must serve important governmental objectives and must be substantially related to achievement of those objectives."[40] The burden of proof is placed on the government in intermediate scrutiny cases, and while it is not as fatal as strict scrutiny, it is still "demanding."[41] In gender discrimination cases, the Court has indicated the relative strength of scrutiny by stating that there must be an "'exceedingly persuasive justification'" for the discrimination in order for the law to be upheld.[42] This can be seen as shifting intermediate scrutiny analysis more towards strict scrutiny rather than the easily attained rational basis test discussed below.

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33 *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting that the federal government is similarly limited by the Fifth Amendment Due Process Clause).

34 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (asserting that race-based affirmative action programs must meet strict scrutiny); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (asserting that racial classifications are suspect and "subject to the most exacting scrutiny").

35 Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

36 *E.g.*, Abrams v. Johnson, 521 U.S. 74, 82 (1997).

37 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 687 (Vicki Been et al. eds., 4th ed. 2011).

38 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

39 *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (citations omitted).

40 *Craig*, 429 U.S. at 197.

41 United States v. Virginia, 518 U.S. 515, 533 (1996) (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

42 *Id.*

In order to determine the appropriate standard of review for a classification, the Court stated in *Carolene Products* that a heightened level of scrutiny would be appropriate when there is "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[43] After *Carolene Products*, the Court has looked at the following factors in a variety of cases to determine if a classification should be analyzed under a heightened level of review: a history of invidious discrimination;[44] an immutable characteristic;[45] assumptions about a group's ability to contribute to society;[46] deep-seated prejudice;[47] and political powerlessness.[48]

All other classifications allegedly fall under rational basis review. A regulation will be held valid under rational basis review if it bears a "rational relationship" to a "legitimate governmental purpose."[49] Unlike the more rigorous levels of scrutiny discussed above, rational basis test challenges typically fail due to the relative ease of finding a legitimate governmental interest. Courts have held that any legitimate interest would suffice to meet the rational basis test, even if it were not an actual interest of the government when the law was passed.[50] Additionally, under the rational basis test, courts are generally highly deferential to the government.[51]

There are a limited number of cases where the Court appeared to apply the rational basis test or did not state what test it used and struck down the challenged provision under the Equal Protection Clause. These

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43 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

44 See Virginia, 518 U.S. at 531–32 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (Brennan, J., plurality opinion)) (history of sex discrimination).

45 *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (noting close relatives "do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group").

46 See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (finding that classifications may "reflect . . . a view that those in the burdened class are not as worthy or deserving").

47 *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

48 *See, e.g.*, *City of Cleburne*, 473 U.S. at 445 (analyzing whether the intellectually disabled are politically powerless); *Plyler*, 457 U.S. at 216 n.14 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

49 *E.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993).

50 "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961) (citations omitted).

51 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (stating that it never requires the legislature to articulate why it enacted legislation).

cases[52] suggest that the Court applied a more stringent version of the rational basis test, often referred to as "rational basis with bite."[53]

It is important to note that the last time the Court granted heightened scrutiny to a new classification was 1977,[54] long before any of our current Justices were sitting on the Supreme Court.[55] One reason the Court may be reluctant to expand the list of classifications that receive a heightened standard of review is pluralism anxiety, where "'insular and discrete' minorities" are found at "every turn in the road."[56] This concern was addressed in *Cleburne v. Cleburne Living Center, Inc.*, where the Court declined to extend heightened scrutiny to a group of people with intellectual disabilities due to the difficulty in distinguishing between the variety of groups with immutable characteristics.[57] Even if a classification is accorded heightened scrutiny, the analysis will be dropped to the more deferential rational basis standard if the law is facially neutral and lacks a discriminatory intent.[58]

Even though the Court has failed to extend heightened scrutiny to any new classifications in almost forty years, this reluctance may be tempered by the fact that it has applied rational basis with bite in a variety of cases[59] such as *Cleburne*, *Moreno*, and *Romer*.[60] The impact of these cases has been limited, however, as courts have generally applied traditional rational basis to the classes in the cases above in other contexts.[61] This has changed somewhat with the application of animus and rational basis with bite to cases related to sexual orientation classifications.[62]

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52 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632–36 (1996) (invalidating state constitutional amendment preventing state and local laws that prohibited discrimination on the basis of sexual orientation); *City of Cleburne*, 473 U.S. at 448 (affirming invalidation of city ordinance requiring special permit for group home for intellectually disabled); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (invalidating Food Stamp Act provision which deemed households containing unrelated individuals ineligible for the program).

53 *E.g.*, Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1129 (2004); *accord* Gunther, *supra* note 35, at 21; R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1283 (1994).

54 *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) (citing Trimble v. Gordon, 430 U.S. 762, 766–76 (1977) (applying heightened scrutiny to non-marital children)).

55 As a result, the Court's current generation has not seriously engaged in the political process theory that the Burger Court utilized in its equal protection analysis. William D. Araiza, *After the Tiers:* Windsor, *Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 369 (2014).

56 Yoshino, *supra* note 54, at 758 (quoting Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting)).

57 *See* 473 U.S. at 445–46.

58 *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

59 Yoshino, *supra* note 54 at 759.

60 *See* cases cited *supra* note 52.

61 *See* Yoshino, *supra* note 54, at 761 (citations omitted).

62 *See* discussion *infra* Part III.

While the Court has engaged in a traditional equal protection analysis for a variety of classifications, it still has not undergone this exercise for sexual orientation classifications. Until it does so, courts will be left on their own to determine how stringent of a test to apply in these cases.

### *B. Due Process*

"Equal Protection and Due Process analyses exist in somewhat parallel universes"[63] with legal challenges often involving claims under both constitutional provisions.[64] Substantive due process decisions typically break standards of review into the strict scrutiny[65] and rational basis categories.[66] If the infringement of a fundamental right is at issue, a court will typically apply strict scrutiny.[67] And if it is not a fundamental right, courts will analyze the claim under traditional rational basis review.

There is great debate among scholars and judges regarding what actually constitutes a fundamental right. Some suggest it is limited to the intent of the framers[68] or the Constitution's text,[69] including the Fourteenth Amendment's guarantee to protect life, liberty,[70] and property. Others look at it more expansively to include rights that are "deeply rooted in this Nation's history and tradition,"[71] and some expand the framework to include any rights within the "penumbras"[72] of the Constitution or included under the Ninth Amendment.[73] The Court has relied on the broader views of substantive due process in order to declare a fundamental right to privacy.[74]

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63 Sobel, *supra* note 20, at 496.

64 *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2660 (2013).

65 Due process strict scrutiny is not always applied in the same way in all due process cases or in comparison to equal protection strict scrutiny analysis. *See* Gunther, *supra* note 35, at 8.

66 *See* Sobel, *supra* note 20, at 496.

67 *See id.* at 496–98.

68 *E.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

69 *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

70 The constitutional protection of liberty has been interpreted to extend beyond physical restraint. *See* Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

71 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 68 (1991).

72 Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (citing Poe v. Ullman, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

73 *Id.*

74 *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 681–82, 685 (1977) (allowing only licensed pharmacists to provide contraceptives to individuals over sixteen violates privacy right); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (prohibiting unmarried individuals from using contraceptives violates privacy right).

Like equal protection rational basis analysis, the due process rational basis test "is typically easy to achieve but also has occasional bite."[75] A number of Supreme Court cases have used this more searching form of rational basis,[76] which is recognized by scholars as a different form of rational basis analysis.[77] Moreover, in every case where courts have applied rigorous rational basis, the added rigor has proven fatal to the challenged law.[78]

The test that is ultimately selected to analyze an equal protection or due process case will most likely be determinative of the outcome in that case.[79] As a result, the Court's failure to determine what test should be used for governmental sexual orientation classifications is of critical importance to the constitutional rights at stake for sexual minorities. The next Part reviews the trilogy of Supreme Court cases and the constitutional analyses available to sexual orientation-related constitutional claims.

## II. SUPREME COURT ANALYSES RELATED TO SEXUAL ORIENTATION CASES

Three of the Supreme Court's most recent decisions related to the rights of sexual minorities[80] may have represented victories for equality advocates, but they also left open a number of analytical issues. While it is clear that the Court was not applying traditional equal protection or due process analyses in these cases, it is unclear how these analyses may be applied in the future. Since the Court did not engage in equal protection analysis, it left open to the lower courts what standard of review should be applied to cases involving classifications based upon sexual orientation. This trilogy of cases provides clues to how the Court may approach sexual orientation matters in the future. These clues are critical at a time when the Court has essentially frozen which classifications may receive heightened scrutiny under equal protection[81] and limited the rights that are subject to strict scrutiny analysis under substantive due process.[82]

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75 Sobel, *supra* note 20, at 498 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

76 *See supra* notes 52–53 and accompanying text.

77 *See* Yoshino, *supra* note 54, at 760.

78 Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 385 (2012).

79 *See, e.g.*, Gunther, *supra* note 35, at 8.

80 *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996). This section does not discuss the Court's decision in *Hollingsworth v. Perry* because that decision was not decided on either substantive due process or equal protection grounds. *See* 133 S. Ct. 2652, 2659 (2013) (resolving on standing).

81 *See* Yoshino, *supra* note 54, at 757.

82 *See* Hunter, *supra* note 53, at 1108.

### *A. The Trilogy of Decisions*

In 1996, the Court's first case upholding the rights of sexual minorities was handed down in *Romer v. Evans*.[83] Part of *Romer*'s significance was the sheer fact that it was a favorable decision for LGBT advocates in a relatively short time after the Court decided that there was no right to "homosexual sodomy" in *Bowers v. Hardwick*.[84] Unlike the *Bowers* decision, *Romer* did not involve issues related to sexual activity. Instead, *Romer* involved an amendment to the Colorado constitution repealing local laws that prohibited discrimination on the basis of sexual orientation and prohibiting any future state or local legislative, judicial, or executive action protecting individuals on the basis of their sexual orientation.[85] Justice Kennedy, writing for the Court, stated: "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[86]

The decision further explained that the amendment placed a "broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."[87] Justice Kennedy concluded that the amendment seemed "inexplicable by anything but animus toward the class it affects" and that it lacked a rational relationship to legitimate state interests.[88] The decision, however, never addressed what standard of review should be applied to the group affected by the amendment. It merely stated that the amendment could not meet the most minimal of standards.

The decision is most notable for its animus-related analysis. *Romer* found that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[89] The *Romer* Court then reiterated the proposition that animus does not constitute a legitimate governmental interest.[90] As a result, the Court held that the amendment violated the Equal Protection Clause.[91] The *Romer* Court laid an important part of its new sexual ori-

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83 517 U.S. at 632.

84 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

85 *Romer*, 517 U.S. at 624 (citing COLO. CONST. of 1876, art. II, § 30b (1992)).

86 *Id.* at 627.

87 *Id.* at 632.

88 *Id.*

89 *Id.* at 634.

90 *See id.* at 634–35 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

91 *See id.* at 635.

entation analytical foundation with its application of impermissible animus to the equal protection claim.

The next sexual orientation case came before the Court in 2003.[92] This time it revisited sexual issues presented in *Bowers*.[93] Unlike *Bowers*, where the statute criminalized sodomy generally, *Lawrence* presented both equal protection and due process claims because the Texas sodomy statute solely criminalized same-sex sodomy.[94] Justice Kennedy, once again writing for the Court, stated that the decision should not be based on equal protection grounds. He reasoned that the right at issue was protected by the substantive guarantee of liberty, and a decision based on due process grounds advanced the equal protection interests present as well.[95] Even if same-sex sodomy prohibitions were treated the same legally as opposite-sex sodomy, the stigma related to the criminality would remain.[96]

The *Lawrence* Court quoted Justice Stevens's *Bowers* dissent, "'[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. *Moreover, this protection extends to intimate choices by unmarried as well as married persons.*'"[97]

Justice Kennedy also quoted *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s language related to personal liberty and added that the liberty right under the Due Process Clause gives sexual minorities the full right to engage in this conduct without intervention of the government.[98]

The Court concluded that the Texas law did not further a legitimate state interest[99] but did not explicitly state whether the right at issue was a privacy right or any other type of fundamental right.[100] *Lawrence*, like *Romer*, appears to put forth the idea that the statute could not survive even the lowest standard of review, and as a result, it was unnecessary

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

93 *See id.* at 564.

94 *See id.* at 566.

95 *See id.* at 575.

96 *See id.*

97 *Id.* at 578 (emphasis added) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting). The emphasized language clarified that liberty interests were not being tied to marital status. No state recognized marriage equality for same-sex couples when *Lawrence* was decided.

98 *See id.* at 578 ("'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992))).

99 *See id.*

100 *See* Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 247 (2005).

for the Court to articulate what standard of review should be applied in "liberty" cases. This case was still seen as an important victory. The Court's purposeful decision to avoid a traditional equal protection analysis, however, did not provide the tools necessary for courts to address other types of sexual orientation discrimination.

In *United States v. Windsor*,[101] the Court examined the constitutionality of section 3 of the Defense of Marriage Act (DOMA),[102] which limited federal recognition of marriages to one man and one woman.[103] The Court found that DOMA unconstitutionally injured the class of same-sex couples that New York law sought to protect by legally recognizing their marriages.[104] The Court then went on to quote *Moreno*, just as the *Romer* Court did.[105]

The Court stated that since DOMA's principal purpose and effect were to demean lawfully married same-sex couples, it was an unconstitutional deprivation of liberty under the Fifth Amendment.[106] The decision then linked the liberty interest protected by the Fifth Amendment's Due Process Clause with the prohibition against denying to any person the equal protection of the laws.[107] It further explained that the equal protection guarantee of the Fourteenth Amendment made the Fifth Amendment rights at issue more specific and better understood and preserved.[108]

The *Windsor* Court concluded that section 3 of DOMA was invalid because "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."[109] Once again, the Court took the minimalist route, declaring that DOMA had no legitimate purpose while

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101 133 S. Ct. 2675 (2013).

102 1 U.S.C. § 7 (2012) *invalidated by Windsor*, 133 S. Ct. 2675.

103 *See id.* Only section 3 of DOMA was invalidated by *Windsor*. *See* 133 S. Ct. at 2682–83. Section 2, DOMA's full faith and credit provision permitting states to legally ignore marriages of same-sex couples from other states, territories, possessions, or tribes, may face litigation in the future. *See* Mark Strasser, Windsor*, Federalism, and the Future of Marriage Litigation*, 37 HARV. J.L. & GENDER ONLINE 1, 1 (2013).

104 The Court stated that DOMA violated both equal protection and due process principles. *Windsor*, 133 S. Ct. at 2693 (citing U.S. CONST. amend. V; Bolling v. Sharpe, 347 U.S. 497 (1954)). The Court also discussed at length how federalism impacted the case, *see id.* at 2691–92, but ostensibly did not base its ultimate holding on federalism. *Cf.* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in* United States v. Windsor, 2012–2013 CATO SUP. CT. REV. 117, 128. *See generally* Marc R. Poirier, *"Whiffs of Federalism" in* United States v. Windsor*: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935 (2014).

105 *See Windsor*, 133 S. Ct at 2693 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)); *supra* note 90 and accompanying text.

106 *See Windsor*, 133 S. Ct. at 2695.

107 *See id.* (citing *Bolling*, 347 U.S. at 499–500 (1954); Adarand Constructors, Inc. v. Penã, 515 U.S. 200, 217–18 (1995)).

108 *See id.* at 2695.

109 *Id.* at 2696.

failing to state the standard of analysis it applied. This stands in contrast to *Windsor*'s Second Circuit decision, which determined that classifications based on sexual orientation should apply heightened scrutiny.[110] Despite its lack of traditional analysis, *Windsor* held that DOMA violated the Fifth Amendment.[111]

The *Windsor* decision mirrors Justice Kennedy's *Lawrence*[112] and *Romer*[113] opinions, which did not specifically state which standard of review was being applied. All three of the cases concluded that the government's proffered justifications did not satisfy even the lowest level of review, but did not indicate if that was the ultimate hurdle the government was required to meet.

Justice Scalia's *Windsor* dissent addresses this issue by pointing out that the majority opinion "does not apply strict scrutiny" or "anything that resembles" the deferential framework of rational basis review.[114] Commentators have suggested that the test the Court applied in *Windsor* was some form of heightened scrutiny,[115] with similarities to *Romer*.[116] At a minimum, these cases demonstrate that unlike traditional, deferential rational basis review, the Court will not automatically accept the government's asserted bases at face value.[117]

*Romer* and *Lawrence* are the foundational cases for the *Windsor* decision. This is evidenced by Justice Kennedy's references to those cases as well as the vocabulary and concepts *Windsor* employs.[118] *Windsor* ties its analysis to *Romer* as an equal protection decision[119] and *Law-*

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110 *See* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012). The Court merely restated the standard of review applied by the lower courts, but it did not discuss whether the standard was correct. *See* 133 S. Ct. at 2684. It can be argued that it implicitly accepted the standard of review with an unqualified affirmation of the Second Circuit's decision.

111 *See Windsor*, 133 S. Ct. at 2695.

112 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

113 *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

114 *See* 133 S. Ct. at 2706 (Scalia, J., dissenting) (citing Heller v. Doe, 509 U.S. 312, 320 (1993)). Justice Scalia offers possible legitimate reasons why Congress could have validly passed DOMA. *See id.* at 2708 (discussing choice-of-law issues relating to federal taxes).

115 *See* Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/ (referring to *Windsor*'s requirement of "careful consideration"). *But see* Helen J. Knowles, *Taking Justice Kennedy Seriously: Why* Windsor *Was Decided "Quite Apart from Principles of Federalism,"* 20 ROGER WILLIAMS U. L. REV. (forthcoming 2015) (manuscript at 26), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319487.

116 *See* Julie A. Nice, *And Marriage Makes Three: A Gay Rights Trilogy Secures a Legacy*, HUFFINGTON POST (July 3, 2013, 4:27 PM), http://www.huffingtonpost.com/julie-a-nice/and-marriage-makes-three-_b_3537739.html.

117 *See* Levine, *supra* note 31, at 6 (citing *Romer*, 517 U.S. at 631).

118 Linda C. McClain, *From* Romer v. Evans *to* United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 467 (2013).

119 *See Windsor*, 133 S. Ct. at 2693 (citing *Romer*, 517 U.S. at 633).

*rence* as a substantive due process decision.[120] Neither *Romer* nor *Lawrence*, however, applies traditional analysis such as identifying the right at issue as being fundamental or applying a standard of review analysis.[121] *Windsor* is even less clear in identifying which clause it utilized in its analysis. Nevertheless, *Windsor* relies on judicial analysis including liberty interests and the role of animus to determine that the legal provision at issue was unconstitutional.[122] Justice Scalia's dissent in *Windsor* points out that even though the majority decision failed to declare whether they were applying substantive due process or not, that is in fact what they were doing.[123]

The trilogy of cases demonstrates an evolution in the Court's analysis. The next subsection looks more closely at each of the available analyses' strengths and limitations for sexual orientation-related litigation.

### *B. The Available Sexual Orientation Analyses*

It appears that there are three constitutional analyses available to litigants bringing claims on the basis of sexual orientation discrimination. The first two are ones that the Court has utilized in the trilogy: the hybrid liberty interest and impermissible animus. The last, traditional equal protection analysis, has not been conducted by the Court for sexual orientation classifications. This subsection of the Article examines how the three analyses have been discussed by the Court and their relevance to future sexual orientation-related cases.

#### 1. Due Process/Equal Protection Hybrid Liberty Analysis

The Court has created a hybrid liberty interest analysis, which is a melding of substantive due process and equal protection doctrines.[124] This effort to bring the analysis together is not surprising given that scholars often discuss the difficulty in separating due process from equal protection analysis.[125] The distinction, however, becomes almost irrelevant with the Court's hybrid liberty interest analysis. Professor Law-

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120 *See id.* at 2692–93 (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

121 *See, e.g.*, Heather K. Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 846 (2007); Nice, *supra* note 116.

122 *See Windsor*, 133 S. Ct. at 2693, 2695.

123 *See id.* at 2706 (Scalia, J., dissenting). He further points out that the majority fails to argue that same-sex marriage is "'deeply rooted in this nation's history and tradition,'" *id.* at 2706–07 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)), or that DOMA prevents "ordered liberty." *Id.* at 2707 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). *See also id.* at 2715 (Alito, J., dissenting) (stating that it is beyond dispute that the right to same-sex marriage is not deeply rooted in history or tradition).

124 *See* Tribe, *supra* note 13, at 1897–98.

125 *See, e.g.*, Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17, 25–26 (2014) (discussing the concept of "equal liberty").

rence Tribe has discussed how the analyses of the two constitutional clauses are intertwined into a "legal double helix."[126] And this joining of analyses, according to Tribe, creates a so-called theory of "substantive liberty."[127] Professor Kenji Yoshino refers to these types of intertwined cases as "'dignity' claims" and argues that this move towards the hybrid analysis is due to the Court's reluctance to use true group-based equal protection analysis.[128]

In many ways, the trilogy of decisions reflects the judicial philosophy that Justice Kennedy foreshadowed in his confirmation hearing when he stated that he preferred to think of "privacy as being protected by the liberty clause" of the Due Process Clause.[129] During the hearing, Justice Kennedy discussed the reach of the Due Process Clause by stating that:

> [An] abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her potential.[130]

This response reflects the importance of the concept of liberty for Justice Kennedy. It can also be seen as an alternate route to privacy analysis for some due process claims. The Court's privacy jurisprudence has been much criticized by originalists and textualists[131] since it was first articulated in *Poe v. Ullman*.[132] The analytical shift in *Lawrence* towards the new hybrid liberty analysis can be interpreted as a movement away from the Court's privacy precedents and traditional due process analysis of fundamental rights and "deeply rooted traditions."[133] *Lawrence*'s reasoning is in large part based on privacy due process cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[134]

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126 Tribe, *supra* note 13, at 1898.

127 *Id.* (construing Lawrence v. Texas, 539 U.S. 558 (2003)).

128 Yoshino, *supra* note 54, at 748–49.

129 *See* Levine, *supra* note 31, at 12 n.83 (citing *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 121 (1989)).

130 *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 180 (1989).

131 *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 95–100 (1990).

132 367 U.S. 497, 521 (1961) (Douglas, J., dissenting). The opinion also contains language that serves as the foundation for substantive due process liberty jurisprudence. *See id.* at 542 (Harlan, J., dissenting).

133 Crooks, *supra* note 15, at 228–29 (citations omitted).

134 Lawrence v. Texas, 539 U.S. 558, 573–77 (2003).

*Lawrence*, however, recast the privacy right found in *Griswold*, *Roe*, and other cases as a liberty interest. The language *Lawrence* focuses on from the "privacy" line of precedents is the text regarding liberty.[135] In fact, the Court never describes the right at issue as a "privacy" right, and outside of a direct quote, the only reference to privacy occurred when it discussed that *Griswold* used the word to describe the relevant liberty interest in that case.[136]

The *Lawrence* decision also failed to engage in a substantive due process analysis, to determine whether the right at issue is fundamental, as it had with other rights before the Court.[137] The Court's most notable, recent application of traditional due process analysis occurred in *Washington v. Glucksberg*,[138] but the *Lawrence* Court ignored *Glucksberg*'s bifurcation of fundamental rights and other liberty interests.[139] *Lawrence* did not engage in a rigid application of strict scrutiny or rational basis review, but focused instead on the liberty interests at issue in the Texas statute.[140] *Lawrence* balanced Texas's regulatory interests against the liberty interests threatened by the Texas statute and concluded that the "'Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.'"[141]

Professor Cass Sunstein argues that the Court's effort to assimilate *Lawrence* with other fundamental right cases such as *Griswold*, *Roe*, *Carey*, and *Casey* suggests a fundamental right in the area of sex and reproduction.[142] Professor Randy Barnett proposes that Justice Kennedy employed a "presumption of liberty" analysis that requires the government to justify its liberty restriction instead of the claimant proving that the liberty at stake is "fundamental."[143] Regardless of the reason for the departure, *Lawrence* points to the hybrid liberty analysis as a potential replacement for traditional analysis.

The "liberty" that *Lawrence* spoke of was "as much about equal dignity and respect" as it was about the freedom to act.[144] The use of the word dignity[145] has received attention from scholars in relation to consti-

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135 *Id.* at 573–74.

136 Hunter, *supra* note 53, at 1105–06 (citing *Lawrence*, 539 U.S. at 565).

137 *See* Crooks, *supra* note 15, at 256.

138 521 U.S. 702, 720–36 (1997).

139 *E.g.*, Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003).

140 *See id.*

141 *Id.* (emphasis omitted) (quoting *Lawrence*, 539 U.S. at 578).

142 *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 47.

143 Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 36.

144 Tribe, *supra* note 13, at 1898.

145 Lawrence v. Texas, 539 U.S. 558, 567, 574–75 (2003).

tutional analysis on sexual orientation issues. Professor Tiffany Graham states that the *Lawrence* Court, in rejecting *Bowers*'s demeaning approach, "restored dignity to the class."[146] Professor Kenji Yoshino posits that the Court will continue to utilize due process to vindicate equality through "liberty-based dignity" claims.[147]

*Lawrence* justified expansive application of due process analysis by stating that the framers were intentionally vague, leaving the interpretation of due process to future generations.[148] Justice Kennedy also wrote in *Lawrence* that the Court's precedents "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[149] *Lawrence*, however, appears to promote the hybrid nature of the case[150] when Justice Kennedy stated, "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[151] As a result, *Lawrence* can be seen as a "universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their homes."[152]

*Windsor*'s analysis is consistent with the sexual orientation liberty language in prior cases.[153] In *Windsor*, Justice Kennedy stated that the federal Defense of Marriage Act "is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[154] Like *Lawrence*, *Windsor* does not mention privacy, but it does discuss private relationships.[155] Unlike *Lawrence*, however, *Windsor* appears to be deciding the case on equal protection grounds or some type of due process/equal protection hybrid analysis.

By relying on liberty instead of privacy, Justice Kennedy brought the analysis back to the text of the Due Process Clause and avoided the

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146 Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 202 (2011).

147 *See* Yoshino, *supra* note 54, at 748–50 (citing the fear of pluralism as the reason the Court has limited equal protection analysis to already protected groups).

148 *Lawrence*, 539 U.S. at 578–79; *see also* Yoshino, *supra* note 54, at 780 & n.228 (citing Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 830, 854 (1985) (arguing that the Constitution's rights provisions are "abstract")).

149 *Lawrence*, 539 U.S. at 572.

150 *Cf.* Ho, *supra* note 16, at 30–31 (citing Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 300–01 (2011)).

151 *Lawrence*, 539 U.S. at 575.

152 Yoshino, *supra* note 54, at 778.

153 *See generally* Charles D. Kelso & Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Liberty*, 9 DARTMOUTH L.J. 29 (2011) (discussing the development and application of Justice Kennedy's concept of constitutionally protected liberty).

154 United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

155 *See id.* at 2692 (quoting *Lawrence*, 539 U.S. at 567).

battles over the appropriateness of the privacy analysis. The recasting of the pertinent interest as a hybrid liberty interest created a new, more expansive legal analysis for substantive due process cases [156] that incorporated concepts of equality.

2. Equal Protection Animus Analysis

The Court's reliance on the doctrine of unconstitutional animus has become part of its equal protection analysis.[157] The Court has not explicitly stated what constitutes animus,[158] and its interpretations vary greatly. Some see animus as more than hostility, while others view it as a desire to harm or exclude.[159] There are also differences of opinion related to the impact of animus, which is demonstrated by evidence or inferred from the structure or function of the law. Some believe that animus invalidates the law and others believe that it may be upheld if there is another legitimate interest.[160] The language in *Windsor*'s opinions demonstrates how different Justices approach the animus concept. Justice Kennedy described animus as something similar to "unconscious bias as opposed to malicious intent."[161] Justice Scalia interpreted animus as an extreme or hateful mindset and then made the logical leap that the majority decision was, in effect, accusing Congress of acting with "hateful hearts" when it passed DOMA.[162]

*Windsor* followed the line of precedents where animus was the featured culprit behind the challenged law's irrationality.[163] The *Windsor* Court cited to animus precedents that were not related to sexual orientation classifications. *Windsor* utilized language from *Moreno* in its analysis when stating that the constitutional guarantee of equality "'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[164] The Court found that DOMA was "invalid, for no legitimate purpose

156 *See* Gerken, *supra* note 121, at 846 (stating that the opinion wove the "zonal, decisional and relational" concepts of substantive due process into a single liberty interest (citing Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443–48 (1992))).

157 *See, e.g.*, Pollvogt, *supra* note 19, at 205–06.

158 *See* Carpenter, *supra* note 16, at 184–85 (discussing varied criticisms of anti-animus principle).

159 *See* Pollvogt, *supra* note 19, at 209.

160 *See id.* at 209–10 (citations omitted).

161 *Id.* at 211 (citing United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).

162 *Id.* (quoting *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting)). He further characterized animus as the mindset of "unhinged members of a wild-eyed lynch mob." *Windsor*, 133 S. Ct. at 2707–08. Chief Justice Roberts's idea of animus required a "sinister motive" and "bigotry." *Id.* at 2696 (Roberts, C.J., dissenting).

163 *See* Ho, *supra* note 16, at 56 (citing Romer v. Evans, 517 U.S. 620, 635–36 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).

164 *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534–35).

overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect."[165]

The *Windsor* Court explained that laws motivated by an improper animus ("discriminations of an unusual character") require careful consideration.[166] Some have suggested, however, that a finding of animus is akin to a "silver bullet" that, once detected, eliminates any purported legitimate justifications of the legislation.[167] At a minimum, it can be argued that rational basis with bite, as opposed to traditional rational basis, should be applied once animus is detected.[168] Justice O'Connor also presented this principle in her concurring opinion in *Lawrence*: "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis to strike down such laws under the Equal Protection Clause."[169]

These cases demonstrate that when the Court has found legal animus against an unpopular group, it has applied a more searching form of rational basis review,[170] and in every case where courts have engaged in rigorous rational basis analysis, "the added rigor has proved fatal to the challenged law."[171] In the end, *Windsor*, like the animus cases before it, concluded that DOMA could not survive under the animus principle.[172]

3. Traditional Equal Protection Analysis

The Court has never engaged in a standard of review analysis of sexual orientation classifications, and *Windsor* is just the latest example of the Court's decades-long avoidance of classification analysis.[173] Unlike other classifications that the Court has said were not deserving of heightened scrutiny such as wealth,[174] intellectual disability,[175] or age,[176] the Court has never attempted a traditional equal protection analysis of sexual orientation as a class. In the sexual orientation trilogy cases, the

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165 *Id.* at 2696. *But cf.* Pollvogt, *supra* note 19, at 213–14 (citing *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting)) (discussing Justice Scalia's view that one legitimate interest overcomes impermissible animus).

166 *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633).

167 Pollvogt, *supra* note 19, at 213 (citing *Windsor*, 133 S. Ct. at 2696); *see also* Carpenter, *supra* note 16, at 204 (citing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 148 (2001) (referring to animus as a "trump card")).

168 *See* Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 336 (2013).

169 Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment).

170 *See* Pollvogt, *supra* note 19, at 208 (citing *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment)).

171 McGowan, *supra* note 78, at 385 (citations omitted).

172 *Windsor*, 133 S. Ct. at 2693.

173 *See* Araiza, *supra* note 55, at 369 (citations omitted).

174 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973).

175 *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985).

176 *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976) (per curiam).

Court concluded that the governmental interests were not legitimate, and consequently, the governmental restrictions did not satisfy rational basis review.

Some observers have argued that if the Court engaged in equal protection analysis, it would determine that sexual orientation should receive some form of heightened scrutiny due to the fact that LGBT people meet the traditional criteria.[177] Interestingly, the United States Attorney General informed Congress "the President had concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."[178]

It has been argued that *Windsor* is not a true equal protection decision because it does not engage in any type of classification analysis or discussion regarding what standard of review should be applied.[179] Additionally, its use of animus does not have as in-depth of a review of the equal protection implications as *Romer*.[180] Moreover, it demonstrates that equal protection can be applied more broadly than Justice O'Connor's concurring opinion in *Lawrence* by recognizing that the possibility of stigma is sufficient to invalidate a law.[181] *Windsor* can be seen as yet another incrementalist effort by the Court to further the rights of LGBT people while reflecting social trends in the country.[182]

The Court's animus precedents allowed the Court to focus on the invidious reasons behind the legislation instead of sociological debates about heightened scrutiny factors such as identity and immutability[183] in traditional equal protection analysis. By focusing on animus, the Court could ignore the immutability prong of equal protection analysis, which has been the source of much discussion by scholars.[184] The definition of

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177 *See, e.g.*, Nicholas Drew, *A Rational Basis Review that Warrants Strict Scrutiny: The First Circuit's Equal Protection Analysis in* Massachusetts v. U.S. Department of Health and Human Services, 54 B.C. L. REV. ELECTRONIC SUPPLEMENT 43, 52–53 (2013), *available at* http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/5.

178 United States v. Windsor, 133 S. Ct. 2675, 2683 (quoting Letter from Eric H. Holder, Attorney General, to Hon. John A. Boehner, Speaker, U.S. House of Representatives, Regarding the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act).

179 *See* Crooks, *supra* note 15, at 272.

180 *See id.* at 272–73 (citing *Windsor*, 133 S. Ct. at 2692).

181 *See* Gerken, *supra* note 121, at 849 (stating that equal protection analysis does not need to be as "formal" or "cramped" as Justice O'Connor's concurring opinion in *Lawrence* (citing Lawrence v. Texas, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring))).

182 *See* Ho, *supra* note 16, at 55; *see also* Sobel, *supra* note 2 (citing Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 171 (2009)) (tracing incremental developments in state law).

183 *See* Ho, *supra* note 16, at 60.

184 *See* Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 3 (2009).

immutability has been the focus of a number of lower court decisions and briefs,[185] including whether a person's sexual orientation is chosen; can be changed; or is something a person should not be forced to change.[186] An animus-based analysis also made a determination of political powerlessness unnecessary,[187] as well as dispensing with "whether [the] asserted right is 'deeply rooted in [the] Nation's history and tradition.'"[188]

There are many possible reasons these decisions do not formulaically apply a standard of review analysis. Perhaps Justice Kennedy felt that classifications based on sexual orientation merited a higher standard of review than rational basis but could not get the votes; believed it irrelevant what standard was applied because the legislation was based on prejudice; or in keeping with the tenants of judicial economy, chose to not extend the analysis because it was not necessary to the decision.[189] Regardless of its reasons, the Court's use of hybrid liberty interest and animus analyses negates the requirement to determine whether a sexual orientation classification should receive a heightened form of scrutiny[190] or rational basis review[191] because it is not necessary to the analysis. And the Court avoids the arduous task of articulating why sexual orientation deserves a form of heightened scrutiny.[192] *Windsor* is yet another example of Justice Kennedy's combining "judicial minimalism and

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185 *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 655–58 (7th Cir. 2014); Whitewood v. Wolf, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014).

186 *See* Helfand, *supra* note 184, at 6 (citations omitted).

187 *See* Robinson, *supra* note 12, at 1049–58 (discussing the role of political powerlessness as a factor in suspect classifications and use of the issue by marriage equality advocates). For those who believe in the concept of public choice, it could be argued that sexual minorities are no longer powerless, and therefore, they are undeserving of "special rights," such as nondiscrimination protections. *See* Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1624–25 (2013) (citing Romer v. Evans, 517 U.S. 620, 626, 636, 644 (1996) (Scalia, J., dissenting)).

188 Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 775 (2013) (second alteration in original) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

189 *See id.* at 771 (offering explanations for Justice Kennedy's "stealth determinations" in *Lawrence*); McClain, *supra* 118, at 476 (hypothesizing on reasons why no standard of review was stated in *Windsor*).

190 An equal protection analysis based upon sex discrimination has been offered as an alternate route to heightened scrutiny. *See, e.g.*, Catherine Jean Archibald, *Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case*, 34 N. ILL. U. L. REV. 1, 19–27 (2013); Koppelman, *supra* note 10, at 9–14.

191 *See* Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 93, 100 (Jack M. Balkin & Reva B. Siegel eds., 2009) (stating that liberty analysis is attractive for advocates because courts do not have to define a class); Post, *supra* note 139, at 100.

192 *See* Ho, *supra* note 16, at 56–57 & n.321 (citing Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 76 (1996)) ("[J]udges might claim it is too difficult to pin

avoidance, on the one hand, and, on the other, a robust (or more maximalist) vision of equality and the status of equal citizenship."[193]

The Court's failure to state what level of review was being used in the trilogy of cases, while summarily declaring laws invalid because the government could not meet the lowest standard of review, has resulted in criticism from advocates and scholars on both sides of the issue.[194] For example, Professor Eric Berger has stated that, with closer inspection, "*Lawrence* turned on a series of under-theorized, stealth determinations. It framed the question at a broad level of generality; relied on hybrid reasoning, using equal protection rationales to support a due process holding; declined to identify a level of scrutiny; and invoked changing public opinion." [195]

This trilogy of cases has created legally unsatisfying decisions, and with its most recent decision in *Windsor*, the Court may have signaled the fatal demise of traditional equal protection jurisprudence.[196] This lack of guidance has also led to confusion regarding the appropriate standard of review to apply by other courts.[197] Doctrinally, however, *Lawrence* and *Windsor* have provided credible bases for the courts and LGBT advocates to argue for continued use of a more stringent form of scrutiny than traditional rational basis review of sexual orientation-based classifications.[198]

Justice Scalia discussed how other courts would use *Windsor*'s analysis in the future and concluded, "How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."[199] Justice Scalia's predictions related to how the decision would be used have in fact transpired. This Article's next Part examines how courts have approached the various constitutional analyses prior to and after *Windsor* was handed down in 2013.

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anything so concrete as 'suspect class' status on this murky, contextual, and poorly charted human variation.").

193 *Cf.* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 143–54 (2013) (discussing avoidance of substantive issues to avoid backlash in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013)).

194 *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 459 (2005) (citations omitted); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578 (2004); McGowan, *supra* note 78, at 386.

195 Berger, *supra* note 188, at 767.

196 *See* Araiza, *supra* note 55, at 393.

197 This problem is seen in other areas of constitutional jurisprudence, such as the Second Amendment. *See, e.g.*, Sobel, *supra* note 20, at 499.

198 *Cf.* Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 684 (2012).

199 United States v. Windsor, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

## III. STATE AND FEDERAL COURT STANDARDS OF REVIEW

Courts have not consistently applied a single level of review in federal Equal Protection or Due Process Clause cases regarding sexual orientation classifications. Tests include traditional rational basis review, rational basis with bite, and heightened scrutiny. The Supreme Court has never addressed what level of review should be applied to cases alleging constitutional violations on the basis of sexual orientation. As a result, decisions are inconsistent at best. This Part reviews state and federal lower court decisions prior to and post-*Windsor* and concludes that the need for guidance from the Court has not been eliminated by the *Windsor* decision.

### A. *Pre*-Windsor *Cases*

Prior to 1996, most sexual orientation-related cases were decided in light of the Court's decision in *Bowers v. Hardwick*.[200] The *Bowers* Court did not address whether sexual orientation classifications comprised a suspect class under equal protection analysis but concluded that there was no right to homosexual sodomy.[201] Many courts throughout the country relied on *Bowers* and state sodomy laws to limit the rights of sexual minorities.[202]

A federal court of appeals addressed sexual orientation classification discrimination for the first time in 1988. [203] The Ninth Circuit, in *Watkins v. United States Army*, applied the heightened scrutiny factors to determine whether sexual orientation deserved strict scrutiny analysis under equal protection analysis.[204] The *Watkins* Court held that "homosexuals constitute such a suspect class."[205] The *Watkins* and *Bowers* decisions did not necessarily conflict because they were addressing two different constitutional claims.[206]

After *Watkins*, most federal and state courts still applied a deferential rational basis review to classifications involving sexual orientation,[207] including cases within the Ninth Circuit.[208] The most notable exceptions were state courts concluding that state constitutional provi-

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200 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

201 *See id.* at 190–91, 194.

202 *See, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (holding that lesbian conduct was a consideration in custody because it was punishable as a felony by state law).

203 *See* Watkins v. U.S. Army, 847 F.2d 1329, 1345 (9th Cir. 1988).

204 *Id.* at 1345–49.

205 *Id.* at 1349.

206 *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1165 (1988).

207 *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 & n.16 (11th Cir. 2004).

208 *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).

sions demanded heightened scrutiny.[209] The first post-*Watkins* case to apply strict scrutiny to a sexual orientation-related claim was *Baehr v. Lewin*.[210] The Hawaii Supreme Court had the task of deciding whether the state unlawfully prohibited same-sex couples from being married under the state constitution.[211] The *Baehr* court did not consider the case to be sexual orientation discrimination but held that the state's marriage laws discriminated against same-sex couples on the basis of sex and were subject to strict scrutiny under the Hawaii Constitution.[212] In 2008, the first post-*Watkins* state supreme court ruled that classifications based on sexual orientation should receive strict scrutiny analysis under the state equal protection clause.[213]

Similarly, in *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court concluded that "sexual orientation meets all the requirements of a quasi-suspect classification."[214] The *Kerrigan* court then utilized a traditional intermediate standard of review test and declared that Connecticut's law prohibiting same-sex couples from marrying was invalid under the state constitution.[215] The Iowa Supreme Court also determined that sexual orientation classifications were subject to heightened scrutiny under the state's constitution but declined to specify whether strict or intermediate scrutiny should be applied because the state's same-sex marriage prohibitions could not withstand intermediate scrutiny.[216] The Second Circuit examined four of the factors related to heightened scrutiny in *United States v. Windsor* and concluded that:

> [H]omosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect. While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment "is not sufficient to require 'our most exacting scrutiny.'"[217]

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209 *See In re* Marriage Cases, 183 P.3d 384, 441–44 (Cal. 2008).

210 852 P.2d 44, 67 (Haw. 1993).

211 *See id.* at 54.

212 *See id.* at 67.

213 *See* Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 580 & n.71 (2009) (citing *In re Marriage Cases*, 183 P.3d at 401).

214 957 A.2d 407, 431–32 (Conn. 2008).

215 *See id.* at 476–81.

216 *See* Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009).

217 United States v. Windsor, 699 F.3d 169, 185 (2d Cir. 2012) (citing Trimble v. Gordon, 430 U.S. 762, 767 (1977), *aff'd on other grounds*, 133 S. Ct. 2675 (2013)).

On the other hand, significantly more courts pre-*Windsor* applied rational basis review to sexual orientation classifications.[218]

Even though courts have applied the same heightened scrutiny factors to sexual orientation classifications, they have reached different results, particularly related to immutability and political powerlessness. For example, in *Andersen v. King County*, the Washington Supreme Court stated that the plaintiffs "must make a showing of immutability," and their failure to cite other authority or studies supporting the conclusion that sexual orientation is immutable is one of the reasons the court declined to apply strict scrutiny to the classification.[219] The *Andersen* court's analysis noted that *Lawrence* did not address the classification issue but invalidated the challenged law because it did not satisfy rational basis review, a standard that would not apply to an inherently suspect class.[220]

The Court of Appeals of Maryland also declared that sexual orientation should not be accorded strict scrutiny because it did not sufficiently satisfy political powerlessness.[221] The court found that:

> While there is a history of purposeful unequal treatment of gay and lesbian persons, and homosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society, we shall not hold that gay and lesbian persons are so politically powerless that they constitute a suspect class.[222]

The Supreme Judicial Court of Massachusetts did not engage in any type of analysis related to the appropriate standard of review, but defaulted to the concept that discrimination on the basis of sexual orientation cannot meet even the lowest rung of constitutional analysis under rational basis review.[223] A federal district court determined that strict

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218 *See, e.g.*, Davis v. Prison Health Servs., 679 F.3d 433, 438 (6th Cir. 2012); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); Veney v. Wyche, 293 F.3d 726, 731–32 (4th Cir. 2002); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950–51 (7th Cir. 2002) (stating that rational basis analysis is appropriate for equal protection claim related to harassment on the basis of sexual orientation); Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996); Zavatsky v. Anderson, 130 F. Supp. 2d 349, 356 (D. Conn. 2001); Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006); Seymour v. Holcomb, 790 N.Y.S.2d 858, 863 (N.Y. Sup. Ct. 2005).

219 Andersen v. King Cnty., 138 P.3d 963, 974, 976 (Wash. 2006).

220 *See id.* at 976. *Andersen* states an opinion concerning the standard of review applied in *Lawrence v. Texas* that is contrary to that of the Supreme Court. In *Lawrence*, the Court purposely utilized substantive due process in holding that the statute in question violated the Constitution and avoided an equal protection analysis. *See* discussion *supra* Part II.A. Justice O'Connor, in a separate concurrence in judgment, expressed a belief that the majority should have applied rational basis review under the Equal Protection Clause. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in judgment).

221 *See* Conaway v. Deane, 932 A.2d 571, 609 (Md. 2007).

222 *Id.*

223 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

scrutiny should apply to sexual orientation but decided that the analysis was unnecessary because the statute could not satisfy rational basis.[224]

Other cases relied on Supreme Court precedents, such as *Romer v. Evans*[225] and *Lawrence v. Texas*,[226] that did not apply or discuss what level of review should be used for sexual orientation classifications but noted that a legitimate interest does not exist when a regulation is based on animus or impermissibly intrudes into the personal and private life of the individual.[227] Courts also distinguished their cases from *Romer* or *Lawrence* in order to reach different conclusions.[228] The Court's *Windsor* decision has supplemented the analysis previously conducted by lower courts.

### *B. Post-*Windsor *Cases*

Most post-*Windsor* cases have struck down state laws and constitutional amendments related to sexual orientation. The courts, however, have gone about it in a variety of ways, utilizing different legal theories and applying them in different manners. Since *Windsor* lacked definitiveness in its analysis, some courts have even turned to Justice Scalia's account of what the majority did in *Windsor*.[229] This section examines what courts have done since *Windsor*.

As a threshold issue,[230] courts address the applicability of *Baker v. Nelson*, where the Court summarily dismissed an appeal from the Minnesota Supreme Court "for want of a substantial federal question."[231] Recent court decisions have stated that summary decisions lose their binding capacity if the Supreme Court no longer finds the issue unsub-

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224 *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd sub nom*. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

225 517 U.S. 620 (1996).

226 539 U.S. 558 (2003).

227 *See Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 634–35; Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 14–15 (1st Cir. 2012); Kansas v. Limon, 122 P.3d 22, 38 (Kan. 2005).

228 *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 868 (8th Cir. 2006) (differentiating state constitutional amendment limiting marital rights to opposite-sex couples from broadness of the Colorado amendment in *Romer*); Equal. Found. v. City of Cincinnati, 128 F.3d 289, 295, 301 (6th Cir. 1997) (upholding the city charter amendment prohibiting "special protection" for gays and lesbians by comparing its narrowness to the broadness of the Colorado amendment in *Romer*).

229 *See* Poirier, *supra* note 104, at 994 & n.251 (citations omitted).

230 This issue was not relevant in cases that were brought under state constitutional provisions.

231 Baker v. Nelson, 409 U.S. 810, 810 (1972). The Minnesota Supreme Court deemed the statutory prohibition on same-sex marriage constitutionally valid. *See* Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

stantial[232] and almost all courts addressing this issue since *Windsor* have determined that *Baker* is no longer binding precedent.

Once courts have gotten beyond the threshold question regarding *Baker*, they have engaged in a variety of analyses resulting in all three of the traditional tiers of scrutiny being applied to determine similar issues. Some post-*Windsor* courts have also relied on other constitutional justifications to invalidate laws, such as due process analysis of the fundamental right to marriage.

In *Whitewood v. Wolf*, the issue of the appropriate standard of review for a sexual orientation classification was one of first impression in the Third Circuit.[233] The *Whitewood* court acknowledged that *Windsor* provided little concrete guidance, but the court could apprehend in the "tea leaves of Windsor" that the application of scrutiny was "more exacting than deferential."[234] The court then engaged in an analysis of the four heightened scrutiny factors: recent political and legal gains did not negate the history of discrimination faced by gays and lesbians;[235] sexual orientation is not relevant to a person's capabilities as a citizen; sexual orientation is a distinguishing characteristic that is broader than immutability; and even though the political powerlessness factor was more equivocal than the others, there are no statewide protections for gays and lesbians.[236] As a result, the court concluded that sexual orientation was a quasi-suspect class that merited heightened scrutiny analysis.[237]

The Seventh Circuit, in *Baskin v. Bogan*, declined to engage in thorough equal protection analysis and stated instead that "[t]he discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny."[238]

Other courts have utilized a rational basis standard of review, often due to the fact that there was not sufficient, binding precedent to apply any other standard. This was the case in *Geiger v. Kitzhaber*, where the district court stated that, while evolving, key Ninth Circuit precedent was not binding.[239] Regardless, the court held that there were no legitimate interests to uphold Oregon's same-sex marriage proscription under ra-

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232 *Compare* Bostic v. Schaefer, 760 F.3d 352, 373 (4th Cir. 2014) (citations omitted) ("Summary dismissals lose their binding force when 'doctrinal developments' illustrate that the Supreme Court no longer views a question as unsubstantial."), *with* DeBoer v. Snyder, 772 F.3d 388, 399–402 (6th Cir. 2014) (citations omitted) ("But this reading of 'doctrinal developments' would be a groundbreaking development of its own."), *cert. granted sub nom.* Obergefell v. Hodges, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571).

233 *See* Whitewood v. Wolf, 992 F. Supp. 2d 410, 425 (M.D. Pa. 2014).

234 *Id.*

235 *See id.* at 428 (citing Frontiero v. Richardson, 411 U.S. 677, 685–86 (1973)).

236 *See id.* at 428–30.

237 *See id.* at 430.

238 766 F.3d 648, 656 (7th Cir. 2014).

239 994 F. Supp. 2d 1128, 1140–41 (D. Or. 2014).

tional basis analysis.[240] An Idaho district court[241] found to the contrary, concluding that Ninth Circuit precedents required the court to apply heightened scrutiny.[242] Furthermore, *Windsor* supported a heightened scrutiny analysis for sexual orientation classifications because the Supreme Court affirmed the Second Circuit's use of heightened scrutiny in the case.[243] The court then held that the Idaho marriage law was unconstitutional under the Due Process and Equal Protection Clauses.[244]

Courts have also defaulted to rational basis after concluding that there were no legitimate reasons for the sexual orientation discrimination. In *DeBoer v. Snyder*, the Eastern District of Michigan stated that it did not even have to address what level of scrutiny should be applied to the classification because the Michigan constitutional amendment did not survive rational basis.[245] The court also concluded that it did not have to bother with a fundamental rights analysis because the failure to meet equal protection review made the due process analysis moot.[246]

Even though the Western District of Texas in *De Leon v. Perry* conducted a traditional heightened scrutiny analysis and concluded that the plaintiff's arguments for heightened scrutiny were compelling, the court held that it was unnecessary to apply heightened scrutiny because the Texas prohibition at issue failed under the most deferential review.[247] The court further held that the laws were unconstitutional infringements of the fundamental right to marry, and after applying strict scrutiny, the court stated that the government's justifications were not rational, much less compelling.[248] In its conclusion, the *De Leon* court stated that "[w]ithout a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution."[249]

Since *Windsor*, a few courts have upheld marriage-related provisions that discriminate on the basis of sexual orientation.[250] In *DeBoer v. Snyder*, the Sixth Circuit became the only circuit to uphold a state's marital limitation to opposite-sex couples.[251] The Sixth Circuit stated that

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240 *See id.* at 1148.
241 *See* Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014).
242 *See id.* at 1075–76.
243 *See id.* at 1076.
244 *See id.* at 1076–77.
245 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014), *rev'd*, 772 F. 3d 388 (6th Cir. 2014).
246 *See id.* at 768.
247 *See* De Leon v. Perry, 975 F. Supp. 2d 632, 650–52 (W.D. Tex. 2014).
248 *See id.* at 656–60.
249 *Id.* at 666.
250 *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* Obergefell v. Hodges, 83 U.S.L.W. 3315 (Jan. 16, 2015) (No. 14-571); Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014); Borman v. Pyles-Borman, No. 2014-CV-36, 2014 WL 4251133 (Tenn. Cir. Ct. Aug. 5, 2014).
251 772 F.3d at 399–402.

the definition of marriage was limited to one man and one woman in every state from the founding to 2003, and the Fourteenth Amendment permitted this definition, but it did not require it.[252] The court then held that there were two rational governmental interests: regulating relationships that result in procreation; and allowing states to wait and see before changing the societal norm of marriage.[253] The court further explained that animus was not at issue in the Sixth Circuit states because the voter initiatives merely codified a long-standing social norm that was already reflected in state law.[254] *DeBoer* also found no fundamental right to marriage for same-sex couples[255] and that it was not required to apply heightened scrutiny analysis to the equal protection claims.[256] In the end, the court stated that the best way to address the issue was through the political process.[257]

In *Robicheaux v. Caldwell*, the court relied on the fact that *Windsor* did not mention heightened scrutiny.[258] The court further stated that if the *Windsor* "Court meant to apply heightened scrutiny, it would have said so" and then *Robicheaux* distinguished its facts from *Windsor*.[259] After analyzing the state's justifications, the court reasoned that they satisfied rational basis review because they were rationally related to the government's legitimate interests.[260] The court further found that there was no history or tradition of same-sex marriage, and consequently no fundamental right was implicated by the state's laws or constitution.[261] Ultimately, the court found that the state's provisions did not violate the Constitution.[262]

Some courts have focused their decisions on the fundamental right to marry instead of or in addition to equal protection classification analyses. The Fourth Circuit, in *Bostic v. Schaefer*,[263] found that same-sex couples were being deprived of the fundamental right to marry under the Due Process and Equal Protection Clauses, and the state did not meet the

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252 *Id.* at 404.

253 *See id.* at 404–06.

254 *Id.* at 408.

255 *Id.* at 411–12.

256 *Id.* at 413–16.

257 *Id.* at 421.

258 2 F. Supp. 3d 910, 917 (E.D. La. 2014).

259 *Id.* at 920 (suggesting that Louisiana engaged in a statewide deliberative process, unlike Congress in *Windsor*).

260 *See id.* at 919–20. The purported governmental interests in the case were that the laws serve a central state interest of linking children to an intact family formed by their biological parents and safeguarding that fundamental social change, in this instance, is better cultivated through democratic consensus.

261 *See id.* at 922–23.

262 *See id.* at 928.

263 760 F.3d 352 (4th Cir. 2014).

strict scrutiny standard necessary for the fundamental rights analysis.[264] Similar reasoning was used by the Tenth Circuit, in *Kitchen v. Herbert*,[265] where the court quoted *Lawrence*'s language regarding every generation invoking its principles in the search for greater freedom.[266] The court then stated that "'it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian.'"[267]

Similarly, in addition to the equal protection issues addressed in *Whitewood*,[268] the court addressed whether same-sex couples were being deprived of their fundamental right to marry under the Due Process Clause.[269] The *Whitewood* court stated that the right the plaintiffs sought was not a new right, but a right that had always existed—the right to marry.[270] The court held that the Pennsylvania statute was unconstitutional under the Equal Protection and Due Process Clauses.[271] The decision closed by stating, "[I]n future generations the label *same-sex marriage* will be abandoned, to be replaced simply by *marriage.* We are a better people than what these laws represent, and it is time to discard them into the ash heap of history."[272]

Other courts,[273] such as the Ohio district court, have also focused their decisions related to marriage equality on the fundamental right to marry under due process and equal protection and declared a state law invalid.[274] The *Obergefell* court engaged in fundamental rights heightened scrutiny factor analyses and concluded that heightened scrutiny should be applied, but concluded the death certificate law at issue would not succeed even under rational basis analysis.[275] In *Brenner v. Scott*, another district court found that Florida violated the fundamental right to marry under due process and equal protection analyses.[276]

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264 *See id.* at 375–76, 384.

265 755 F.3d 1193 (10th Cir. 2014).

266 *Id.* at 1218 (quoting Lawrence v. Texas, 539 U.S. 558, 579 (2003)); *see also* Bishop v. Smith, 760 F.3d 1070, 1075, 1079–82 (10th Cir. 2014) (relying on the *Kitchen* analysis to invalidate the Oklahoma constitutional amendment limiting marriage to opposite-sex couples).

267 *Kitchen*, 755 F.3d at 1218 (quoting Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013)).

268 *See supra* notes 233–37 and accompanying text.

269 *See* Whitewood v. Wolf, 992 F. Supp. 2d 410, 421–24 (M.D. Pa. 2014).

270 *See id.* at 423.

271 *See id.* at 431.

272 *Id.*

273 *See, e.g.*, Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* Obergefell v. Hodges, 83 U.S.L.W. 3315 (Jan. 16, 2015) (No. 14-571).

274 *See Obergefell*, 962 F. Supp. 2d at 982, 991 (using intermediate scrutiny to analyze the fundamental right to marry and using heightened scrutiny for equal protection analysis).

275 *See id.* at 991.

276 999 F. Supp. 2d at 1281–82.

One post-*Windsor* case that has received significant attention and does not relate to marital rights is *SmithKline Beecham Corp. v. Abbott Laboratories*.[277] This case was originally filed due to a *Batson* challenge to a peremptory strike of a self-identified gay prospective juror.[278] The court examined the case in light of their earlier *Witt* decision and *Windsor*, and concluded it was required to apply heightened scrutiny to sexual orientation classifications for equal protection purposes.[279] Moreover, *Lawrence* demanded the same conclusion for due process analysis.[280] The court then held "that heightened scrutiny applies to classifications based on sexual orientation and that Batson applies to strikes on that basis."[281] The *SmithKline* case has been criticized as "an aggressive and incomplete reading of *Windsor*" because the case did not discuss any traditional standard of review or require "that the means be 'closely' or 'necessarily' tailored to the objective."[282]

Since *Windsor*, lower courts have been grappling with issues related to sexual orientation and they have demonstrated a striking lack of consistency. While most of the cases involved marital rights, it is not a big, logical leap to conclude that courts faced with other sexual orientation discrimination issues are also likely to apply vastly different tests that could result in different case outcomes. The next Part discusses why traditional equal protection review is still necessary and how the Court should approach equal protection analysis for sexual orientation-based classifications.

## IV. THE ROLE OF EQUAL PROTECTION ANALYSIS IN FUTURE LITIGATION

Part III of this Article demonstrated how inconsistently courts are applying constitutional jurisprudence to sexual orientation-related cases. This Part will identify the gap in the Court's analysis, outline traditional equal protection review for future litigation, and explain why it is necessary despite the many recent marriage equality victories. Even though discrimination may occur in countless contexts, section A primarily focuses on employment discrimination to illustrate the impact of equal protection analysis. The Article will then address how equal protection analysis should evolve—with the Court clarifying that heightened scrutiny is the appropriate standard of review for sexual orientation classifications.

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277 740 F.3d 471 (9th Cir. 2014).
278 *See id.* at 474 (citing Batson v. Kentucky, 476 U.S. 79 (1986)).
279 *See id.* at 479–81 (citing Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008)).
280 *See id.* at 484 (citing *Witt*, 527 F.3d at 816, 821).
281 *Id.* at 489.
282 Carpenter, *supra* note 16, at 202.

### *A. Discrimination Beyond Marriage*

As seen in Part III of this Article, most of the recent litigation related to sexual orientation issues has been focused on marital rights. These rights are of critical importance to same-sex families, but court decisions in this legal area have limited impact on other substantive discrimination claims for sexual minorities. For example, Equality Advocates Pennsylvania's legal department was contacted by hundreds of LGBT individuals each year for legal assistance. The caller's sexual orientation or gender identity played a role in more than thirty legal issues such as advanced planning, discrimination in shelters, name changes, and custody matters.[283] While family-related issues comprised a significant number of requests for assistance, the single largest request for help was employment-related discrimination.[284]

Those nonmarital calls for legal aid are just one example of the need for the Court to clarify the equal protection analysis for sexual orientation classifications.[285] Unlike race and gender, there are no federal laws prohibiting discrimination on the basis of sexual orientation, and a majority of states still lack anti-discrimination protections for sexual minorities. As a result, clarification of the proper equal protection standard of review, if it is higher than traditional rational basis, would provide greater protection for sexual minorities who bring government-related discrimination claims.[286] At a time when many criticize the Court's seemingly weakened application of equal protection analysis in cases involving race and gender,[287] it is important to remember that the Equal Protection Clause is not quite dead yet and could still assist those facing discrimination on the basis of sexual orientation.

There will be sexual orientation discrimination claims brought by government employees or job applicants in the future. In *Dawkins v. Richmond County Schools*, the district court determined that the proper

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283 The author was the executive director of Equality Advocates Pennsylvania, formerly the Center for Lesbian and Gay Civil Rights, from 2001–2008. The organization was the only one in the country dedicated to advocating equality for LGBT people through direct legal services, legislation, and education.

284 Interview with Katie R. Eyer, Assistant Professor, Rutgers Sch. of Law—Camden and former Skadden Fellow and Emp't Project Attorney with Equal. Advocates Pa. (Sept. 10, 2014).

285 Some scholars criticize the limited way in which the Court applies the liberty interest to "domesticated" relationships and does not recognize a wider sexual privacy right related to sexual orientation or other non-marital relationships. *See generally* Katherine M. Franke, Commentary, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004).

286 *See, e.g.*, Ho, *supra* note 16, at 65.

287 *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Robinson, *supra* note 12, at 1062–63; *see also* Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. (forthcoming 2015) (raising the issue of how the Court may address "second generation" discrimination claims related to efforts to remedy past discrimination).

§ 1983 equal protection analysis was rational basis[288] and a Title VII claim could not be brought because it did not cover sexual orientation discrimination.[289] Similar issues were addressed in *Hutchinson v. Cuyahoga County Board of County Commissioners*, where the court held that the plaintiff's claims of failure to hire or promote her to a number of positions were actionable, subject to rational basis, as an equal protection claim under § 1983.[290] These cases demonstrate that courts will continue to hear a variety of sexual orientation-related equal protection claims that are legally unrelated to the marriage equality issues currently before the courts.

### *B. Equal Protection in the Future*

The employment cases discussed above are relatively recent. Those courts did not engage in any traditional equal protection analysis to determine whether sexual orientation-based discrimination claims should be analyzed under heightened scrutiny. This stands in contrast to much of the recent marriage-related litigation covered in Part III of this Article.

The increased use of the four factors in support of heightened scrutiny analysis may reflect a trend in greater acceptance of LGBT people and issues. Some scholars have posited that the first two prongs, a history of discrimination and ability to contribute, are easily met, while the immutability (to a lesser extent) and political powerlessness prongs are still at issue.[291] Several court decisions have reframed the immutability discussion from a trait that a person cannot change to one that is such a core part of a person's identity that they should not be required to change in order to comply with the law.[292] This reframing effectively renders the immutability question irrelevant as it relates to sexual orientation. Similarly, it has been argued that political powerlessness analysis is not relevant once a court has concluded that a classification is likely based on prejudice, and the fact that more political power is attained over time does not mean that prejudice and stereotypes have disappeared.[293]

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288 No. 1:12CV414, 2012 WL 1580455, at *4–5 (M.D.N.C. May 4, 2012) (citing Goulart v. Meadows, 345 F.3d 239, 260 (4th Cir. 2003)).

289 *Id.* at *4.

290 No. 1:08–CV–2966, 2011 WL 1563874, at *4 (N.D. Ohio Apr. 25, 2011).

291 *See, e.g.*, Berger, *supra* note 188, at 796.

292 *See* Graham, *supra* note 146, at 173 (citing Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009)). Other scholars have also called into question the use of immutability for sexual orientation classifications. *See generally* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998).

293 *See* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 268–69 (1996).

A number of the cases in Part III that applied the four-factor analysis found that some sort of heightened scrutiny was warranted for sexual orientation classifications.[294] This trend is likely to continue, but there will still be courts that will use traditional rational basis until the Supreme Court directs them to do otherwise.[295] And the Court's apparent shift away from traditional equal protection to some sort of hybrid liberty interest or animus analysis will not provide full legal coverage for the LGBT community.[296]

If the Court continues to pursue the liberty interest analysis instead of utilizing equal protection review, it will force LGBT people to gain their rights in a piecemeal fashion by "litigat[ing] pieces of their humanity, one by one."[297] Equal protection offers "a potential constitutional jackpot at the wholesale level" for the sexual orientation classification.[298] It could be used to litigate sexual orientation discrimination claims related to any government activity without waiting for the Court to recognize a liberty interest in the right first. This type of formal equality not only brings protections, but it also brings the possibility of deterrence and shifts the debate in a way that the liberty analysis cannot.[299]

Since *Lawrence* and *Windsor* are liberty-related cases, they highlight the right at issue belongs to all people, not just the group contesting the discrimination.[300] The Court is not likely to engage in these types of broad hybrid liberty interest analyses in the future. Additionally, many instances of discrimination will not contain the type of evidence needed to evoke an impermissible animus analysis. The best approach entails the Court deciding an Equal Protection Clause case that provides a specific standard of review for sexual orientation discrimination and explains how it reached its decision.

A future Supreme Court ruling that sexual orientation classifications merit heightened scrutiny under traditional equal protection analysis would not be breaking new ground, but would be more of a restatement or a different application of what the Court has already been doing in

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294 *See, e.g.*, Whitewood v. Wolf, 992 F. Supp. 2d 410, 428–30 (M.D. Pa. 2014).

295 *See, e.g.*, Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 917 (E.D. La. 2014).

296 *See* Yoshino, *supra* note 54, at 749–50, 797–802.

297 Gerken, *supra* note 121, at 851. Under this approach, just like the Court recognized a much broader right than the right to same-sex sodomy in *Lawrence*, the Court would need to make multiple broad decisions to effectively cover most legal issues where sexual orientation discrimination claims could be brought in the future. For example, the Court could recognize a broad right to education that would cover sexual orientation-related discrimination cases as well as claims by other classifications.

298 Yoshino, *supra* note 54, at 799 (quoting William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000)).

299 *See* Katie R. Eyer, *Marriage This Term: On Liberty and the "New Equal Protection,"* 60 UCLA L. REV. DISCOURSE 2, 14 (2012).

300 *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Yoshino, *supra* note 54, at 778.

sexual orientation-related cases. A declaration of heightened scrutiny would also be in keeping with the growing number of federal and state courts that have undergone the four-factor analysis and concluded that sexual orientation is a classification warranting heightened scrutiny.

While the *Windsor* Court may have not specifically stated that it was applying heightened scrutiny, its language and results confirm that this is what the Court was in fact doing. Whether it is the Court's hybrid liberty interest or impermissible animus analysis that is being applied, the Court has not applied rational basis to any sexual orientation case since *Bowers*. The Court now needs to merely connect the equal protection analysis to its trilogy of decisions, which have already recognized the social wrongs related to sexual orientation discrimination and applied heightened scrutiny. By clarifying that heightened scrutiny should be applied as part of traditional equal protection analysis of sexual orientation-based discrimination claims, the Court will provide other courts with a tool that they can use to remediate either broad or more individualized governmental discrimination.

It is no longer good enough for courts, including the Supreme Court, to state that no legitimate interest exists to avoid the exercise of discussing what standard to use. As demonstrated in Part III, until the Court decides this issue, courts will inconsistently apply equal protection standards of review. Since traditional rational basis is so fatal to a claim, it is imperative that the Court clarify that this is not the standard to be applied to sexual orientation classifications. Until it does so, the rights of individual claimants will be determined almost automatically by the standard of review in their jurisdiction. Finally, naming a heightened standard of review will provide fairness, predictability, and protection for lesbian, gay, and bisexual people.

## CONCLUSION

Many people, including scholars, in this country have been focused on sexual orientation issues related to marriage equality for the last few years. This fascination is understandable because of the media attention, legislation, ballot initiatives, and court cases on the topic.[301] It is much more difficult, however, to find coverage on other types of legal issues facing LGBT people such as employment, housing, or education discrimination.

Some people wrongly believe that most of the sexual orientation problems will be resolved if same-sex couples are granted marriage

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301 *See generally* Sobel, *supra* note 2.

equality.[302] Victories in cases such as *Windsor* give hope to LGBT people and their allies. These victories are meaningful, but there is still an incomplete legal roadmap for courts to follow for sexual orientation discrimination.

The rights gained with marriage lose some of their importance if a supervisor can legally fire an employee who applies for health benefits for his or her new same-sex spouse. The Court has already indicated what it is doing through its hybrid liberty and impermissible animus analyses. Now it is time to clarify that heightened scrutiny should be applied to sexual orientation discrimination under the Equal Protection Clause.

302 *See* Robinson, *supra* note 12, at 1071 (quoting ANDREW SULLIVAN, VIRTUALLY NORMAL 185 (1995) (stating that ninety percent of the political work necessary to achieve gay equality would be achieved by legalizing gay marriage)).