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Alexander Bondarenko

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# Between a Rock and a Hard Place

## WHY RATIONAL BASIS SCRUTINY FOR LGBT CLASSIFICATIONS IS INCOMPATIBLE WITH OPPOSITION TO LGBT AFFIRMATIVE ACTION

### INTRODUCTION

On February 23, 2011, Attorney General Eric Holder announced in a letter to members of Congress that President Obama had directed the Justice Department to stop defending Section 3 of the Defense of Marriage Act (DOMA) in a number of legal challenges addressing its adverse impact on gays and lesbians.<sup>1</sup> The Attorney General went a step further in announcing another change in the administration's position: "[G]iven a number of factors, including documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."<sup>2</sup> In response, Speaker John Boehner announced that the Bipartisan Legal Advisory Group (BLAG) would defend the law in the administration's stead.<sup>3</sup> BLAG supported a rational basis standard of review for classifications based on sexual orientation.<sup>4</sup>

Supporters of gay rights celebrated President Obama's sudden policy shift. Anthony D. Romero, executive director of the American Civil Liberties Union, stated that "[t]his is a great step by the Obama administration and a tipping point for the gay rights movement that will have ripple effects . . . . It

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<sup>1</sup> Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011 at A1.

<sup>2</sup> Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Letter from the Attorney General], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

<sup>3</sup> Frank James & Liz Halloran, *Boehner: House Will Defend DOMA; Courts, Not Obama, Should Decide*, NAT'L PUBLIC RADIO (Mar. 4, 2011, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2011/03/04/134268656/boehner-house-will-defend-doma-courts-not-obama-should-decide>.

<sup>4</sup> Ruthann Robson, *What's Rational About Rational Basis Review?*, SCOTUSBLOG (Aug. 17, 2011, 8:41 AM), <http://www.scotusblog.com/2011/08/what%E2%80%99s-rational-about-rational-basis-review/> ("The Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), defending DOMA in *Windsor*, filed its Memorandum on August 1, vigorously asserting that rational basis is the correct standard and that DOMA easily satisfies it.").

will reach into issues of employment discrimination, family recognition and full equality rights for lesbian and gay people.”<sup>5</sup> Former Congressman Barney Frank saw the administration’s change of position as “a sign of and a result of the fact that gay prejudice is being defeated by gay reality.”<sup>6</sup> While heightened scrutiny would certainly increase the chance of future victories against discriminatory laws assessed under that standard, for the past two decades the Supreme Court has wielded scrutiny analysis as a double-edged sword.

At a time when the viability of race-based affirmative action programs was at risk in the Supreme Court’s review last term of *Fisher v. University of Texas at Austin*,<sup>7</sup> opponents of LGBT nondiscrimination laws continued to raise the specter of the inevitability of affirmative action programs for gays and lesbians.<sup>8</sup> On October 12, 2012, Peter LaBarbera, president of Americans for Truth About Homosexuality, joined Religious Right talk show host Janet Mefferd on her daily radio show.<sup>9</sup> When the conversation turned to a job posting for bodyguards at the U.S. embassy in Libya that allegedly gave preference to United States government employees with same-sex domestic partners,<sup>10</sup> LaBarbera said, “I didn’t know that when Barack Obama was campaigning in 2008 that he was going to give us gay affirmative action, don’t you think that would have been an interesting point?”

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<sup>5</sup> Savage & Stolberg, *supra* note 1.

<sup>6</sup> Donovan Slack & Michael Levenson, *Obama Rejects Defense of Marriage Act*, BOSTON GLOBE (Feb. 24, 2011), [http://www.boston.com/news/nation/washington/articles/2011/02/24/obama\\_rejects\\_defense\\_of\\_marriage\\_act](http://www.boston.com/news/nation/washington/articles/2011/02/24/obama_rejects_defense_of_marriage_act).

<sup>7</sup> See Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES, Oct. 16, 2011, at SR4, available at <http://www.nytimes.com/2011/10/16/sunday-review/college-diversity-nears-its-last-stand.html?pagewanted=all&r=0>.

<sup>8</sup> Hans Bader, *Obama Administration Seeks Quotas Based on Disability, Race, and Perhaps Sexual Orientation*, OPENMARKET.ORG (Mar. 2, 2012), <http://www.openmarket.org/2012/03/02/obama-administration-seeks-quotas-based-on-disability-race-and-perhaps-sexual-orientation/>.

<sup>9</sup> *Janet Mefferd Show-10/12/2012*, THE JANET MEFFERD SHOW, (Oct. 12, 2012), <http://www.janetmefferdpremium.com/2012/10/12/janet-mefferd-radio-show-20121012-hr-3/>.

<sup>10</sup> Mefferd first said that the job posting “explicitly stated that they would give preference to filling these positions with qualified US citizens who were family members of US government employees and this included those with same-sex domestic partners,” but later asked, “[a]nd the silly part about it is why would you give preference to somebody who is a homosexual to be a security guard, what is the connection there?” Brian Tashman, *LaBarbera: ‘Dictator Obama’ Championing ‘Gay Affirmative Action’*, RIGHT WING WATCH (Oct. 15, 2012, 12:05 PM), <http://www.rightwingwatch.org/content/labarbera-dictator-obama-gay-affirmative-action>. Media Matters for America reported that the job application stated that “preference [would be] given to veterans and family members of government employees, a category which includes same-sex spouses.” Andy Newbold, *Limbaugh Peddles Hysteria over Possibility That Libya Embassy Was Recruiting Gay People*, MEDIA MATTERS FOR AMERICA (Oct. 11, 2012, 3:47 PM), <http://mediamatters.org/blog/2012/10/11/limbaugh-peddles-hysteria-over-possibility-that/190561>. “[T]he job posting . . . does not list same-sex domestic partners of government employees as a prerequisite.” *Id.*

Hey, who is in favor of affirmative action based on aberrant, deviant sexual conduct?"<sup>11</sup> A day earlier, Rush Limbaugh had reported on his radio show that the job posting "solicited for same-sex couples . . . [T]hey gave preference to citizens, same-sex domestic partners of U.S. government employees."<sup>12</sup>

The irony, of course, is that the language in the job posting that became a right-wing talking point was not related to a lesbian, gay, bisexual, and transgender (LGBT)<sup>13</sup> affirmative action program, but was rather the result of federal nondiscrimination law.<sup>14</sup> In a 1993 article, Jeffrey S. Byrne noted that "[w]hen the issue of affirmative action for gay and lesbian people is raised at all, it is almost always mentioned as a feared result of enacting antidiscrimination laws . . ."<sup>15</sup> Although mention of LGBT affirmative action has been sparse over the past decade, the possibility of it becoming law acted as a black cloud over the gay rights dialogue of the early 1990s, giving opponents of gay rights ammunition in the form of a buzzword: "special rights."<sup>16</sup> "[M]any people oppose gay demands for 'equal rights' because they saw similar demands from blacks and women, [which] they supported, morph into demands for preferential treatment, which they oppose."<sup>17</sup> Some states and

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<sup>11</sup> *Janet Mefferd Show-10/12/2012*, *supra* note 9.

<sup>12</sup> Newbold, *supra* note 10.

<sup>13</sup> Although this note uses the term LGBT broadly to refer to sexual orientation, the legal status of transgender status and gender identity in the context of antidiscrimination and equal protection is often treated separately from that of sexual orientation. See, e.g., Chris Geidner, *Transgender Breakthrough*, METROWEEKLY (Apr. 23, 2012, 10:38 PM), <http://www.metroweekly.com/news/?ak=7288> (discussing a decision of the Equal Employment Opportunity Commission interpreting solely gender-identity discrimination into the language of Title VII.) For a more detailed analysis of the legal status of gender identity under the equal protection clause and Title VII, see Gwen Havlik, Note, *Equal Protection for Transgendered Employees? Analyzing the Court's Call for More than Rational Basis in the Glenn v. Brumby Decision*, 28 GA. ST. U. L. REV. 1315 (2012).

<sup>14</sup> Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998), available at <http://www.gpo.gov/fdsys/pkg/FR-1998-06-02/pdf/98-14689.pdf>; see also U.S. EQUAL EMP'T OPPORTUNITY COMM'N, DISCRIMINATION BASED ON SEXUAL ORIENTATION, STATUS AS A PARENT, MARITAL STATUS AND POLITICAL AFFILIATION (2009), available at <http://www.eeoc.gov/federal/upload/otherprotections.pdf>.

<sup>15</sup> Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 47 (1993).

<sup>16</sup> See generally Jeffrey S. Byrne & Bruce R. Deming, *On the Prudence of Discussing Affirmative Action for Lesbians and Gay Men: Community, Strategy and Equality*, 5 STAN. L. & POL'Y REV. 177, 177 (1993) ("Would proposing affirmative action for lesbians and gay men fuel the already successful 'special rights' rhetoric of those who oppose gay and lesbian civil rights?"); Samuel A. Marcossou, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 137 (1995) (Analyzing and proposing counterarguments to the specter of "special rights" when used as a weapon by opponents of gay rights).

<sup>17</sup> "Attributes" For Gays?, DISCRIMINATIONS (Oct. 10, 2006), <http://www.discriminations.us/2006/10/affirmative-action-attributes-for-gays/>.

municipalities that have passed nondiscrimination laws that include affirmative action requirements included carve-outs for sexual orientation from affirmative action programs, ostensibly to allay such concerns.<sup>18</sup> On the federal stage, the Employment Non-Discrimination Act (ENDA), a proposed bill that has been introduced in varying forms in almost every Congress since 1994,<sup>19</sup> has failed in part due to fears that it would require employers to take affirmative action in employing gays and lesbians.<sup>20</sup>

What opponents of affirmative action based on sexual orientation fail to consider, and what this note seeks to illustrate, is that the Obama administration's newfound position in support of heightened scrutiny,<sup>21</sup> if successful, will prove to be a limiting factor for the viability of such affirmative action programs. And opponents of gay rights (and, certainly, LGBT affirmative action) that argue for a rational basis standard for classifications based on sexual orientation would

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<sup>18</sup> See, e.g., N.J. STAT. ANN. § 10:5-33 (2007) (“Except with respect to affectional or sexual orientation and gender identity or expression, the contractor will take affirmative action to ensure that such applicants are recruited and employed, and that employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex.” (emphasis added)); 1991 N.J. Sess. Law Serv. Ch. 519 (West) (“Although the bill would prohibit discrimination in employment on the basis of affectional or sexual orientation, the bill would not require affirmative action programs to recruit or employ persons solely based on their affectional or sexual orientation.”); see also Christy Mallory & Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt Non-Discrimination and Affirmative Action Policies to LGBT Employees* at 4-5, WILLIAMS INSTITUTE (Feb. 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Govt-Contractors-Non-Discrim-Feb-2012.pdf> (“Of the 61 localities with sexual orientation or gender identity contractor nondiscrimination ordinances, 35 do not require contractors to take ‘affirmative action’ or recruitment outreach steps with respect to any characteristic, including race and sex . . . Four of the 61 localities exclude sexual orientation and gender identity from their ‘affirmative action’ or recruitment outreach ordinances, although they do have these requirements for other protected groups such as racial minorities and women.”).

<sup>19</sup> See *History of Nondiscrimination Bills in Congress*, NATIONAL GAY & LESBIAN TASK FORCE, <http://www.thetaskforce.org/issues/nondiscrimination/timeline> (last visited Dec. 23, 2013); *FAQ: The Employee Non-Discrimination Act: What You Need to Know*, CENTER FOR AM. PROGRESS, <http://www.americanprogress.org/issues/lgbt/news/2011/07/19/9988/faq-the-employment-non-discrimination-act/#r1> (last visited Dec. 23, 2013).

<sup>20</sup> John S. Rosenberg, *Is Another Furor over Religious Liberty Coming?*, MINDING THE CAMPUS (Mar. 2, 2012), [http://www.mindingthecampus.com/originals/2012/03/is\\_another\\_furor\\_over\\_religiou.html](http://www.mindingthecampus.com/originals/2012/03/is_another_furor_over_religiou.html) (“Supporters at one point tried to assuage this concern by adding language (quoted from Section 4(f) of S. 811, Apr. 2011) barring preferential treatment to correct ‘an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation or gender identity employed by any employer,’ but the attempt failed because opponents pointed out that preferential treatment for other reasons—such as to provide ‘diversity’—would still be allowed.”).

<sup>21</sup> Letter from the Attorney General, *supra* note 2.

instead do well to agree to a higher scrutiny standard for sexual orientation. Though such a shift would concede the fight for nondiscrimination protections for LGBT individuals, shifting demographics and public opinion suggest that discriminatory laws are a lost cause.<sup>22</sup>

Instead, support for rational basis poses greater risks for conservatives: discriminatory laws continue to be struck down under that standard, whereas affirmative action based on sexual orientation would more likely be upheld.<sup>23</sup> Recognizing that the Supreme Court employs scrutiny analysis as a double-edged sword, a move toward support of heightened scrutiny would at least reserve fewer options for crafting a viable affirmative action program based on sexual orientation.<sup>24</sup> Under current law, embracing a strict scrutiny standard for both gender and sexual orientation would actually benefit opponents of affirmative action. This position would eliminate the existing legal paradox that makes it easier to legally defend affirmative action programs based on gender, and likely sexual orientation, as opposed to those based on race.<sup>25</sup>

Part I of this note discusses current events involving sexual orientation-based affirmative action. Part II surveys the current jurisprudence to determine the level of scrutiny currently applied to classifications based on sexual orientation by the Supreme Court and other lower federal courts. Part III examines how the Supreme Court has dealt with race-based affirmative action programs in employment and education. Part IV examines how lower federal courts have examined gender-based affirmative action programs under heightened scrutiny and strict scrutiny. Part V looks to how the constitutionality of a sexual orientation-based affirmative action program examined under a strict or heightened scrutiny analysis might differ from a program assessed under rational basis analysis and concludes that opponents of both LGBT rights and affirmative action are in an untenable position based on Supreme Court scrutiny jurisprudence. They are losing the nondiscrimination battle to changing demographics and public

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<sup>22</sup> Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What it Means*, FIVETHIRTYEIGHT (N.Y. TIMES Mar. 26, 2013 10:10 AM), [http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?\\_php=true&\\_type=blogs&\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_php=true&_type=blogs&_r=0).

<sup>23</sup> See *infra* Part V.

<sup>24</sup> See *infra* Part V.

<sup>25</sup> See *infra* Part V.

opinion, and their stated preference for rational basis scrutiny does not bode well for a potential affirmative action battle.

## I. IS THERE SUCH A THING AS LGBT AFFIRMATIVE ACTION?

Things I'm not worried about: LGBT affirmative action. A bizarre article appeared this morning on *The Advocate's* website, by gay conservative James Kirchick, denouncing LGBT affirmative action. The first thing that's bizarre about the article is that it's denouncing LGBT affirmative action. I don't know anyone who's proposing that, any municipality that's discussing an LGBT affirmative action program, or any school or business thinking about doing that. We can't even get [the Employment Non-Discrimination Act] passed, so no one's thinking about affirmative action. So weird.<sup>26</sup>

Affirmative action programs based on sexual orientation are very limited in range and scope and frequently arise within broader government contracting requirements.<sup>27</sup> Yet as demographics shift and public opinion changes—resulting in gay and lesbian civil rights victories<sup>28</sup>—the enactment of sexual orientation-based affirmative action programs in the employment and educational domains becomes more plausible.<sup>29</sup>

On January 13, 2012, the Center for American Progress (CAP) and the Williams Institute presented Diego Sanchez, then Congressman Barney Frank's Senior Legislative Adviser, with a memo presenting their research on a potential executive branch remedy to stall legislation on LGBT workplace discrimination.<sup>30</sup> The memo detailed how amending Executive Order (EO) 11246<sup>31</sup> to include protections for LGBT Americans

<sup>26</sup> Alex Blaze, *Things I'm Not Worried About: LGBT Affirmative Action*, BILERICO PROJECT (Feb. 9, 2010, 2:00 PM), [http://www.bilerico.com/2010/02/a\\_bizarre\\_article\\_appeared\\_this.php](http://www.bilerico.com/2010/02/a_bizarre_article_appeared_this.php).

<sup>27</sup> See Mallory & Sears, *supra* note 18.

<sup>28</sup> See, e.g., Chris Geidner, *With Unprecedented Gay Victories, U.S. Looks Wedded to Change*, BUZZFEED (Nov. 8, 2012, 4:02 AM), <http://www.buzzfeed.com/chrisgeidner/with-unprecedented-gay-victories-us-looks-wedde>; see also Chris Geidner, *The Seven States (Or More) That Could See Marriage Equality in 2013*, BUZZFEED (Dec. 24, 2012, 1:50 PM), <http://www.buzzfeed.com/chrisgeidner/the-seven-states-or-more-that-could-see-marriage>.

<sup>29</sup> For a more detailed discussion of LGBT protections in employment and policy proposal for affirmative action, see Ryan H. Nelson, *Affirmative Action for LGBT Applicants & Employees: A Proposed Regulatory Scheme*, 30 HOFSTRA LAB. & EMP. L.J. 179 (2012).

<sup>30</sup> See Chris Geidner, *Advocates Lay Out Case for Obama Contractor Executive Order in Memo to Rep. Barney Frank*, METROWEEKLY (Feb. 4, 2012, 9:00 PM), <http://www.metroweekly.com/poliglot/2012/02/advocates-lay-out-case-for-oba.html>; Memo, *LGBT Equality in Government Contracting*, CENTER FOR AM. PROGRESS & THE WILLIAMS INSTITUTE (Jan. 13, 2012) [hereinafter *LGBT Equality in Government Contracting*], available at <http://metroweekly.com/poliglot/CAP-Williams%20Inst%20Jan%2013%20memo.pdf>.

<sup>31</sup> EO 11246 was signed into law by President Lyndon B. Johnson in 1965. Exec. Order No. 11246 § 202(1), 30 F.R. 12319 (1965) ("The contractor will not

would accomplish some of the groundwork of ENDA.<sup>32</sup> The executive order requires the Department of Labor's Office of Federal Contract Compliance Programs to "ensure[] that all federal contractors doing more than \$10,000 in government contract work in a year comply with the executive order's equal employment opportunity policy."<sup>33</sup> According to Tico Almeida, president of Freedom to Work, employers contracting with the federal government account for 22% of jobs in the United States.<sup>34</sup> An amendment to EO 11246 would provide the Department of Labor with greater power to prohibit employers from discriminating on the basis of sexual orientation.<sup>35</sup> Amending the executive order would also result in the extension of certain benefits to LGBT employees because "[EO 11246] . . . requires covered contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment."<sup>36</sup>

The CAP memo notes that an amendment to EO 11246 or a new executive order could require those contracting with the federal government to install recruitment and retention programs for LGBT employees and to create workplace education initiatives to reduce workplace discrimination and harassment.<sup>37</sup> "These are the kinds of 'soft' affirmative action steps currently required with respect to national origin and religion."<sup>38</sup> On the other hand, numerical placement goals currently only apply to race, ethnicity, and gender.<sup>39</sup> The memo suggests that introducing such goals for sexual orientation and gender identity "may be logistically, legally and politically problematic."<sup>40</sup> President Obama has since decided not to

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discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.")

<sup>32</sup> *LGBT Equality in Government Contracting*, *supra* note 30.

<sup>33</sup> Chris Geidner, *Recognition, and Limitations*, METROWEEKLY (Jan. 24, 2012, 1:41 AM), <http://www.metroweekly.com/news/?ak=6989>.

<sup>34</sup> *Id.*

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

<sup>36</sup> The Executive Order 11246, *Overview*, U.S. DEPT OF LAB., <http://www.dol.gov/compliance/laws/comp-eeo.htm>.

<sup>37</sup> *LGBT Equality in Government Contracting*, *supra* note 30.

<sup>38</sup> *Id.* at 9.

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

<sup>40</sup> *Id.* at 9-10. Due to a complete lack of legal precedent on the point of treatment of LGBT affirmative action programs under the Equal Protection Clause,



amend EO 11246,<sup>41</sup> stating a preference for Congress to pass a version of ENDA.<sup>42</sup> Although the Senate passed a version of ENDA on November 7, 2013,<sup>43</sup> the Republican majority in the House of Representatives makes any passage of the proposed legislation unlikely.<sup>44</sup>

Although development in legislation with regard to LGBT employment protections remains stagnant, there has been discussion of the role that sexual orientation may play in the admissions practices among institutions of higher learning. A few colleges, for example, have begun to consider applicants' sexual orientation in their admissions processes. Middlebury College, which generally prohibits discrimination on the basis of sexual orientation and gender identity, maintains an affirmative action plan that is "commit[ed] to good faith and lawful efforts to correct any under-representation or under-utilization that has been identified by the College as warranting such action."<sup>45</sup> In October 2006, Inside Higher Ed reported that the assistant director of admissions at Middlebury announced that the school would begin to allot an "attribute" to those applicants that identified themselves as gay in their admissions application.<sup>46</sup> This admissions characteristic was the same afforded to members of ethnic minority groups, athletes, and children of alumni.<sup>47</sup> But following the release of the story, that same assistant director of admissions denied that Middlebury had any such admissions policy.<sup>48</sup> Nevertheless, the idea left

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extending the language of EO 11246 to sexual orientation would enter previously unexplored legal territory. See *infra* Part V.

<sup>41</sup> Chris Geidner, *White House Says No Federal Contractor Nondiscrimination Executive Order "At This Time"*, METROWEEKLY (Apr. 11, 2012, 6:05 PM), <http://www.metroweekly.com/poliglot/2012/04/white-house-no-federal-contractor-nondiscriminatio.html>.

<sup>42</sup> Chris Geidner, *News Analysis: Obama Executive Order Decision Raises Question Whether He's Broken 2008 Pledge*, METROWEEKLY (Apr. 13, 2012, 4:20 PM), <http://www.metroweekly.com/poliglot/2012/04/news-analysis-obama-executive-order-decision-raise.html>.

<sup>43</sup> HRC Staff, "ENDA Passes Senate 64-32," HUMAN RIGHTS CAMPAIGN (Nov. 7, 2013), <http://www.hrc.org/blog/entry/enda-passes-senate-64-32>.

<sup>44</sup> Chris Geidner, *Workplace Protections for LGBT Workers Remains Stalled*, BUZZFEED (Dec. 18, 2012, 5:18 PM), <http://www.buzzfeed.com/chrisgeidner/workplace-protections-for-lgbt-workers-remain-stal>.

<sup>45</sup> *About Middlebury, College Handbook, Affirmative Action Policy*, MIDDLEBURY COLLEGE, [http://www.middlebury.edu/about/handbook/general/aff\\_action](http://www.middlebury.edu/about/handbook/general/aff_action) (last visited Nov. 9, 2012).

<sup>46</sup> Scott Jaschik, *Affirmative Action for Gay Students*, INSIDE HIGHER ED (Oct. 9, 2006, 4:00 AM), <http://www.insidehighered.com/news/2006/10/09/gay>.

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

<sup>48</sup> See Shawn R. Passalacqua, *Middlebury Admissions Not Affected by Sexual Preference*, HARVARD CRIMSON (Oct. 20, 2006), <http://www.thecrimson.com/>

some administrators, counselors, and students thinking that there was “a case to be made” for such a program.<sup>49</sup> Others criticized the purposes of such a program and the potential issues with its implementation.<sup>50</sup>

In January 2011, the board of The Common Application, a nonprofit organization that provides a common application for nearly 500 colleges and universities,<sup>51</sup> announced that it rejected a proposal to add questions about applicants’ sexual orientation and gender identity.<sup>52</sup> Although reserving the possibility of reviewing the decision “later this decade” in light of “evolving cultural norms,” the Common Application board noted that, at present, admissions officers and guidance counselors were concerned that the “anxiety and uncertainty” of students unsure how to respond might outweigh any benefits of asking the questions.<sup>53</sup> Shane L. Windmeyer, executive director and founder of Campus Pride, a nonprofit organization that develops “support programs and services to create safer, more inclusive LGBT-friendly colleges and universities,”<sup>54</sup> responded negatively to the Common Application’s decision.<sup>55</sup> Windmeyer stated that the board was “acting like a parent of the 1950s” and that asking students about their sexual orientation sends a message that they can “be who they are as they apply to college, and for them to see that they can find a safe place.”<sup>56</sup>

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article/2006/10/20/middlebury-admissions-not-affected-by-sexual/; Kimberly Chow, *Colleges Discuss Admit Preference for Gays*, YALE DAILY NEWS (Oct. 30, 2006), <http://www.yaledailynews.com/news/2006/oct/30/colleges-discuss-admit-preferences-for-gays/>.

<sup>49</sup> See Jaschik, *supra* note 46 (quoting Greg McCandless, associate director of admission at Harvey Mudd College); Chow, *supra* note 48.

<sup>50</sup> One such criticism is that the potential for fraud is great, as it would be difficult for the administration to differentiate between a student who is genuinely gay and one who says so for a “leg up” on the admissions process. Nathan Everly, *Affirmative Action for Homosexual Students Misguided*, STUDENT LIFE, (Nov. 1, 2006, 12:00 PM), <http://www.studlife.com/archives/Forum/2006/11/01/Affirmativeactionforhomosexualstudentsmisguided/>.

<sup>51</sup> *Mission*, COMMON APPLICATION, <https://www.commonapp.org/CommonApp/Mission.aspx> (last visited Dec. 23, 2012).

<sup>52</sup> Jacques Steinberg, *Common Application Won’t Add Questions on Sexual Orientation*, N.Y. TIMES: THE CHOICE BLOG (Jan. 26, 2011, 2:32 PM), <http://thechoice.blogs.nytimes.com/2011/01/26/common-ap-2/>.

<sup>53</sup> Scott Jaschik, *The Same Boxes to Check*, INSIDE HIGHER ED (Jan. 26, 2011), [http://www.insidehighered.com/news/2011/01/26/common\\_application\\_rejects\\_new\\_questions\\_on\\_sexual\\_orientation\\_and\\_gender\\_identity](http://www.insidehighered.com/news/2011/01/26/common_application_rejects_new_questions_on_sexual_orientation_and_gender_identity).

<sup>54</sup> *Mission, Vision & Values*, CAMPUS PRIDE, <http://www.campuspride.org/about/mission/> (last visited Dec. 23, 2013).

<sup>55</sup> Jaschik, *supra* note 53.

<sup>56</sup> *Id.* (quoting Shane L. Windmeyer).

Later that year, Elmhurst College<sup>57</sup> announced that it would include a question on its admissions application asking applicants about their sexual orientation and gender identity.<sup>58</sup> The school's administration said that it wanted to use the application questions to connect students to campus resources and to identify students eligible for "Enrichment Scholarships," which are awarded to "talented students whose presence would add to the diversity and richness of campus life."<sup>59</sup> Elmhurst College emphasized its interest in diversity for educational purposes, and to build "a campus community that resembles our diverse society and multicultural world" engages students with a "wide spectrum of individuals."<sup>60</sup> It added that "[e]ncouraging talented, self-identified gay and transgender students" to attend Elmhurst would improve the quality of every student's education.<sup>61</sup> It is unclear how or even if the application question factors into the admissions process, but at a minimum the question and the scholarship resemble a "soft" recruitment and retention program described in the CAP memo, albeit one in an educational context.

Affirmative action programs based on sexual orientation are limited in scope and appear to be available only in certain jurisdictions that have enacted the programs as part of a broader regulatory scheme.<sup>62</sup> The potential for expansion of these programs, however, is made more plausible by the recent victories achieved for gay rights.<sup>63</sup> Opponents of affirmative action therefore should consider the means available to combat expansion of these programs. Race-based affirmative action programs remain politically unpopular<sup>64</sup> and have even been

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<sup>57</sup> *About Elmhurst College*, ELMHURST COLLEGE, <http://public.elmhurst.edu/about/101310474.html> (last visited Nov. 11, 2012).

<sup>58</sup> Eric Hoover, *Elmhurst College Will Ask Applicants About Sexual Orientation*, CHRONICLE OF HIGHER ED., HEAD COUNT BLOG (Aug. 23, 2011, 10:40 PM), <http://chronicle.com/blogs/headcount/elmhurst-college-will-ask-applicants-about-sexual-orientation/28553>.

<sup>59</sup> S. Alan Ray, *Despite Controversy, We're Glad We Asked*, CHRONICLE OF HIGHER ED. (Oct. 9, 2011), <http://chronicle.com/article/Despite-the-Controversy-Were/129316/>.

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

<sup>61</sup> *Id.*

<sup>62</sup> See Mallory & Sears, *supra* note 18 (discussing affirmative action programs for government contractors).

<sup>63</sup> See Geidner, *The Seven States (Or More) That Could See Marriage Equality* in 2013, *supra* note 28; Geidner, *With Unprecedented Gay Victories, U.S. Looks Wedded to Change*, *supra* note 28 (detailing those recent victories).

<sup>64</sup> Racially-based affirmative action to redress past discrimination remains unpopular and there is no demographic shift in favor of it, with a 2012 survey finding that 47% of eighteen to twenty-five year olds oppose, and 38% are in favor. See ROBERT P. JONES, DANIEL COX, & JUHEM NAVARRO-RIVERA, *DIVERSE, DISILLUSIONED, AND DIVIDED: MILLENNIAL VALUES AND VOTER ENGAGEMENT IN THE 2012 ELECTION* 25 (2012), *available at*

banned in several jurisdictions.<sup>65</sup> However, constitutional scrutiny analysis under the equal protection clause has provided opponents of affirmative action with an additional method of limiting these programs.<sup>66</sup> A heightened or strict scrutiny standard for classifications based on sexual orientation would produce similar results and might prevent these affirmative action programs from ever taking root.<sup>67</sup> To demonstrate how higher scrutiny of LGBT-based classifications provides a benefit to opponents of affirmative action, it is helpful to begin with a discussion of scrutiny analysis and its use in relation to classifications based on sexual orientation.

## II. EQUAL PROTECTION AND SEXUAL ORIENTATION

### A. *Three (and a Half?) Tiers: Strict Scrutiny, Heightened Scrutiny, and Rational Basis*

In footnote four of *United States v. Carolene Products*,<sup>68</sup> the Court explained when more searching judicial scrutiny of legislation appearing to infringe on constitutional rights becomes appropriate: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>69</sup> The Court has followed this principle in its analysis of cases under the equal protection clause of the Fourteenth Amendment, requiring that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>70</sup>

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<http://repository.berkeleycenter.georgetown.edu/121004DiverseDisillusionedDividedMillenni alValuesVoterEngagement2012Election.pdf>.

<sup>65</sup> Eight states currently ban affirmative action programs: Michigan, California, Florida, Washington, Arizona, Oklahoma, Nebraska, and New Hampshire. See Richard Wolf, *Justices Voice Support for State Affirmative Action Ban*, USA TODAY (Oct. 15, 2013 3:59 PM), available at <http://www.usatoday.com/story/news/nation/2013/10/15/supreme-court-affirmative-action-race-michigan/2969443/>.

<sup>66</sup> See *infra* Part III.

<sup>67</sup> See *infra* Part IV.

<sup>68</sup> 304 U.S. 144 (1938).

<sup>69</sup> *Id.* at 152-53 n.4.

<sup>70</sup> U.S. CONST. amend. XIV, § 1. The language of the equal protection clause applies to the federal government by way of the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

Laws relying upon classifications based on race and national origin, known as “suspect” classifications, are subject to strict scrutiny. Such laws “will be sustained only if they are suitably tailored to serve a compelling state interest.”<sup>71</sup> The Court burdens such a law with a strict scrutiny analysis because race and national origin “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . .”<sup>72</sup>

Laws employing classifications based on gender, known as “quasi-suspect” classifications, are subject to heightened scrutiny and will fail “unless [the need to employ a gender classification is] substantially related to a sufficiently important governmental interest.”<sup>73</sup> The Court is suspicious of laws that disparately burden members of a particular gender because such laws “very likely reflect outmoded notions of the relative capabilities of men and women.”<sup>74</sup> Additionally, the Court’s most recent gender-based equal protection challenge, *United States v. Virginia*,<sup>75</sup> spotlighted language from *Mississippi University for Women v. Hogan*,<sup>76</sup> which required the State to demonstrate an “exceedingly persuasive justification” for its use of a classification based on gender.<sup>77</sup>

The lowest tier of scrutiny analysis, the rational basis test, is used when social or economic legislation is at issue and extends “the States wide latitude” in matters traditionally within the realm of state regulation.<sup>78</sup> The “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>79</sup> In such cases, the Court defers to the findings of the legislature, even if the law “exact[s] a needless, wasteful requirement.”<sup>80</sup>

On a number of occasions, however, the Court has struck down laws challenged under the equal protection clause

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<sup>71</sup> *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

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

<sup>73</sup> *Id.* at 440-41.

<sup>74</sup> *Id.* at 440.

<sup>75</sup> 518 U.S. 515 (1996).

<sup>76</sup> 458 U.S. 718 (1982).

<sup>77</sup> *Virginia*, 518 U.S. at 531; *Hogan*, 458 U.S. at 724. In his dissent from *United States v. Virginia*, Justice Scalia noted that the Court did not explain whether a “justification” is “exceedingly persuasive” if it is substantially related to important government interests, and that the Court instead seems to be employing the former language in place of the latter, thus increasing the level of scrutiny applied to gender. *Id.* at 571-73 (Scalia, J., dissenting).

<sup>78</sup> *Cleburne*, 473 U.S. at 440.

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

<sup>80</sup> *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955).

despite the lack of a suspect or quasi-suspect classification. In these instances, the Court employs what scholars have called a “rational basis with bite” approach.<sup>81</sup> “As a matter of historical fact, proving that a law is based on unconstitutional animus is virtually the only way for a plaintiff to defeat deferential rational basis review.”<sup>82</sup> In *U.S. Department of Agriculture v. Moreno*, the Court examined Section 3(e) of the Food Stamp Act, which denied food stamps to individuals living in households containing one or more unrelated members.<sup>83</sup> The Court examined the legislative record and found that the little supporting legislative history indicated that Section 3(e) was intended to prevent “hippies” and “hippie communes” from benefitting from the food stamp program.<sup>84</sup> In invalidating the provision, the Court stated that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>85</sup>

Moreover, in *Cleburne v. Cleburne Living Center*, the Court struck down a zoning ordinance that required a special permit for group homes for the mentally retarded in a particular zoning district.<sup>86</sup> Though the Court determined that mental retardation did not constitute a “quasi-suspect” classification and that laws impacting such a group should be examined under the rational basis test, it nonetheless struck down the ordinance by rejecting each of the city’s justifications for its zoning regime.<sup>87</sup> The city made two arguments in support of its ordinance,<sup>88</sup> both of which the Court found to “rest on an irrational prejudice against the mentally retarded.”<sup>89</sup> Because “[t]he State may not rely on a classification whose relationship to an asserted goal is so

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<sup>81</sup> See Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

<sup>82</sup> Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 898 (2012).

<sup>83</sup> *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 529 (1973).

<sup>84</sup> *Id.* at 534.

<sup>85</sup> *Id.* (emphasis omitted).

<sup>86</sup> See *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

<sup>87</sup> See *id.* at 446-49.

<sup>88</sup> First, it argued that the proposed location of the group home was across the street from a junior high school, and the city feared that students might harass the residents. The city’s second justification was that the location was on “a five hundred year flood plain,” and thus placed residents in danger. *Id.* at 449 (internal quotation marks omitted).

<sup>89</sup> *Id.* at 450.

attenuated as to render the distinction arbitrary or irrational,” the ordinance was held to be invalid.<sup>90</sup>

### *B. The Supreme Court on Sexual Orientation*

The Supreme Court has addressed laws relating to sexual orientation only a handful of times in the past 20 years.<sup>91</sup> In *Romer v. Evans*, the Court was faced with a challenge to Amendment 2 to the Colorado State Constitution, which repealed recently enacted local ordinances prohibiting discrimination on the basis of sexual orientation and prevented any future “legislative, executive or judicial action at any level of state or local government designed to protect the named class.”<sup>92</sup> The Amendment was the product of a popular referendum, one fueled in part by a rise in nondiscrimination ordinances enacted in the cities of Aspen, Boulder, and Denver.<sup>93</sup> Among other things, these local ordinances banned public and private discrimination on the basis of sexuality in “housing, employment, education, public accommodations, and health and welfare services.”<sup>94</sup>

Colorado defended the Amendment by arguing that it did not take rights away, but simply put homosexuals back on equal footing with heterosexuals. The State asserted that all the Amendment did was take away homosexuals’ “special rights.”<sup>95</sup> Justice Kennedy, writing for the Court, refused to accept this argument, noting that the evident purpose of Amendment 2 was to withdraw a set of rights, which were in no way “special,”<sup>96</sup> from a single, specific classification of people:<sup>97</sup> “These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>98</sup>

Rather than establishing sexual orientation as a suspect or quasi-suspect classification, however, the Court struck down

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<sup>90</sup> *Id.* at 446-47 (citation omitted).

<sup>91</sup> *See, e.g.*, *Windsor v. United States*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>92</sup> *Romer*, 517 U.S. at 623-24.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 626.

<sup>96</sup> *Id.* at 631.

<sup>97</sup> *Id.* at 627.

<sup>98</sup> *Id.* at 631.

Amendment 2 under the rational basis test.<sup>99</sup> The Court found that the law did not satisfy even the lowest level of judicial inquiry under the equal protection clause, which requires that a law's classification scheme "bear[] a rational relation to some legitimate end."<sup>100</sup> The Court was startled by the "sheer breadth" of Amendment 2, finding it "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."<sup>101</sup> The "default mechanism of rational basis review"<sup>102</sup> permitted the Court to dispose of a constitutionally unacceptable law, as in *Cleburne* and *Moreno*, without deciding whether to enshrine a new class of individuals as suspect or quasi-suspect for equal protection purposes.

In 2003, the Court revisited the constitutionality of anti-sodomy laws in *Lawrence v. Texas*.<sup>103</sup> Seventeen years earlier, the Court had upheld anti-sodomy laws in *Bowers v. Hardwick*.<sup>104</sup> Writing for the Court once again, Justice Kennedy invalidated a Texas statute criminalizing consensual sex between adult males, thus overruling the *Bowers* holding.<sup>105</sup> The Court held that the right to liberty under the due process clause of the Fourteenth Amendment entitles two adults consenting to sex to a right to privacy beyond government intervention.<sup>106</sup> The Court also addressed Texas's alternative argument that the statute was distinguishable from the law in *Bowers* and therefore could not be shielded by precedent. Unlike the law at issue in *Bowers*, the anti-sodomy statute in *Lawrence* criminalized conduct only between same-sex individuals, which made an equal protection challenge an appropriate avenue for relief.<sup>107</sup> Though a "tenable" assertion, the Court dismissed Texas's equal protection argument because accepting it would allow states to prohibit the sodomy so long as it proscribed the behavior among same-sex and different-sex partners.<sup>108</sup> "If protected conduct is made criminal and the law which does so

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (citation omitted).

<sup>101</sup> *Id.* at 632.

<sup>102</sup> Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1552 (2003).

<sup>103</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>104</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>105</sup> *Lawrence*, 539 U.S. 558 at 578-79.

<sup>106</sup> *Id.* at 578.

<sup>107</sup> *Id.* at 574.

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



remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.”<sup>109</sup> In its two decisions on the constitutionality of anti-sodomy laws, the Court resolved the challenges under a due process, rather than equal protection analysis.<sup>110</sup>

Just as the Court in *Romer* made no determination of whether heightened scrutiny should apply to classifications based on sexual orientation, the *Lawrence* due process-based decision simply stated that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>111</sup> Justice O’Connor concurred in the Court’s judgment but disagreed that the statute was invalid under the due process clause. Instead, Justice O’Connor addressed the challenge as one arising under the equal protection clause.<sup>112</sup> In an attempt to explain the Court’s prior invalidation of laws under a rational basis standard, Justice O’Connor wrote that

[S]ome objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.<sup>113</sup>

Because the Texas statute treated similarly situated parties differently (same-sex versus opposite-sex couples), and the State’s purported interest in promoting morality was not legitimate, Justice O’Connor found the statute to be unconstitutional on equal protection grounds.<sup>114</sup>

Some scholars and commenters see the Court’s reasoning in *Romer* and *Lawrence* as a step in the direction of heightened scrutiny.<sup>115</sup> “Traditionally, the requirement that a statute or state action be rational is very weak and highly deferential; almost any justification is enough to establish

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<sup>109</sup> *Id.* at 575.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 578.

<sup>112</sup> *Id.* at 579 (O’Connor, J., concurring).

<sup>113</sup> *Id.* at 580 (internal quotation marks omitted) (citations omitted).

<sup>114</sup> *Id.* at 579-81.

<sup>115</sup> See, e.g., Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications For the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 190 (“Some scholars have contended that although the *Romer* decision itself does not identify sexual orientation as a quasi-suspect class, it is the first step on the road towards that end.”).

rationality.”<sup>116</sup> The Court’s more searching examination of Amendment 2 in *Romer*, reminded some commenters of *Reed v. Reed*,<sup>117</sup> where the Court invalidated an Idaho law establishing that when estates were left intestate, a man was chosen above a woman as the estate’s executor.<sup>118</sup> In *Reed*, Idaho defended its law as one that merely created a standard set of rules, thus eliminating hearings on the merits and minimizing intra-family controversy. But the Court stated that drawing the line at gender “[made] the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”<sup>119</sup> “This case can . . . be viewed as a struggle to avoid having to refine the equal protection doctrine (by applying intermediate scrutiny) or having to define clearly the existing doctrine (by applying strict scrutiny outside the context of race).”<sup>120</sup> In both *Reed* and *Romer*, the Court applied rational basis, rejected the States’ purported interests and saw at bottom two laws motivated by arbitrary and unacceptable classifications.<sup>121</sup>

Shortly following *Reed*, a plurality of the Court led by Justice Brennan applied strict scrutiny to a gender-based classification in *Frontiero v. Richardson*.<sup>122</sup> Failing to achieve a majority in that case, however, the Court later settled on a heightened scrutiny standard for gender classifications in *Craig v. Boren*. In *Boren*, the Court struck down an Oklahoma law that set the legal age for the purchase of low-alcohol beer at 18 for women and 21 for men.<sup>123</sup> Though “*Reed* indicated that heightened scrutiny for sex was imminent,” leading scholars to speculate that

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<sup>116</sup> Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN’S L.J. 263, 269 (2004) (“[S]ome scholars view the *Romer* Court as in fact applying a somewhat heightened standard of review, one roughly equivalent to intermediate scrutiny or one in between mere rational review and intermediate scrutiny (‘rational review with bite’).”).

<sup>117</sup> 404 U.S. 71 (1971).

<sup>118</sup> *Id.*; Stein, *supra* note 116, at 269 (“Given how weak the requirement of mere rational is, many have thought that the Court in *Romer* must have been applying more than the weak rationality requirement. Supporters of this reading of *Romer* might point to an early sex discrimination case, *Reed v. Reed*.”); Tobias Barrington Wolff, *Principled Silence: Romer v. Evans*, 116 S. Ct. 1620 (1996), 106 YALE L.J. 247, 250 (1996) (“Such reticence calls to mind the Court’s opinion in *Reed v. Reed*.”).

<sup>119</sup> *Reed*, 404 U.S. at 76.

<sup>120</sup> John Galotto, Note, *Strict Scrutiny for Gender, Via Croson*, 93 COLUM. L. REV. 508, 519-20 (1993).

<sup>121</sup> Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2781-82 (2005).

<sup>122</sup> *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion).

<sup>123</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

heightened scrutiny for sexual orientation was “just around the corner,”<sup>124</sup> the Supreme Court has yet to make that leap.

### C. *Defense of Marriage Act and Proposition 8 Cases*

Still lacking a defined or fixed test from the Supreme Court for sexuality-based classifications, lower federal and state courts have struggled to apply the reasoning of *Romer* and *Lawrence*.<sup>125</sup> “Ignoring the implications of these decisions, federal courts have continued to apply traditional rational basis review without examining whether the classification at issue may be based on animus or notions of majoritarian morality without a true legitimate governmental interest.”<sup>126</sup> However, a recent string of cases striking down Section 3 of DOMA<sup>127</sup> as unconstitutional have lent new hope to the application of a “more searching rational basis” analysis that is nearer in spirit to the test the Court used in *Romer* and *Lawrence*.<sup>128</sup> Although the Court struck down Section 3 of DOMA last year in *United States v. Windsor*,<sup>129</sup> it is helpful to examine the reasoning that the lower federal courts used to strike down the provision. *Windsor* continues the tradition of *Romer* and *Lawrence* of striking down a law based on a relatively narrow animus analysis under rational basis, so the scope of review has not shifted as dramatically as some expected.<sup>130</sup>

In *Massachusetts v. U.S. Department of Health and Human Services*,<sup>131</sup> the First Circuit invalidated Section 3 of DOMA using a form of rational basis review,<sup>132</sup> noting that “Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the

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<sup>124</sup> Stein, *supra* note 116, at 270.

<sup>125</sup> See Hunter, *supra* note 102; Smith, Note, *supra* note 121.

<sup>126</sup> Smith, *supra* note 121, at 2785.

<sup>127</sup> 1 U.S.C. § 7 (2006) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

<sup>128</sup> Smith, *supra* note 121, at 2808.

<sup>129</sup> 133 S. Ct. 2675 (2013).

<sup>130</sup> See *infra* Part II.D.

<sup>131</sup> 682 F.3d 1 (1st Cir. 2012).

<sup>132</sup> The court also intensified its analysis due to the federalism issues inherent in DOMA, that is, Congress legislating on marriage, which has long been an issue within the sphere of state law. See *Massachusetts v. U.S. Dep’t of Health and Human Serv.*, 682 F.3d at 11-16.

permissible justifications.”<sup>133</sup> While the Supreme Court did not adopt a new category of suspect classification in *Romer*, they “rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered.”<sup>134</sup> Finding that the disparate treatment and burden imposed by the law were great,<sup>135</sup> the court turned to the justifications offered by the Bipartisan Legal Assistance Group (BLAG), which stepped in to defend DOMA when the Obama administration ceased doing so in February 2011.<sup>136</sup>

The court rejected BLAG’s first argument that DOMA preserves scarce government resources “by limiting tax savings and avoiding social security and other payments to spouses,”<sup>137</sup> noting that keeping resources away from historically disadvantaged groups undermines the constitutional legitimacy of a law rather than providing support for it.<sup>138</sup>

BLAG’s second justification in defending DOMA was to promote stable, heterosexual marriages for child-rearing purposes.<sup>139</sup> The First Circuit noted that it did not even need to address the debate over the quality of child-rearing by same-sex couples, because DOMA was not connected to such a goal. No part of DOMA prohibits a same-sex couple from adopting a child, nor does the law increase benefits to child-rearing by opposite-sex couples.<sup>140</sup> “This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA’s treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.”<sup>141</sup>

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<sup>133</sup> *Id.* at 10.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 11.

<sup>136</sup> See *supra* Introduction; see also *Obama: DOMA Unconstitutional, DOJ Should Stop Defending In Court*, HUFFINGTON POST (Feb. 23, 2011, 12:21 PM), [http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional\\_n\\_827134.html](http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html); Chris Geidner, *House Republicans Vote to Defend DOMA in Court on Party Line 3-2 Vote*, METROWEEKLY (Mar. 9, 2011, 6:14 PM), <http://metroweekly.com/poliglot/2011/03/house-republicans-vote-to-defe.html>.

<sup>137</sup> *Massachusetts*, 682 F.3d at 14. The court disagreed with the proposition that DOMA preserves government resources and cited a report of the Congressional Budget Office suggesting the opposite. *Id.* at 14 n.9.

<sup>138</sup> *Id.* at 14. The court alluded to the principles of discrete and insular minorities and “representation reinforcement”: [W]hen a minority group is deprived of the ability to represent itself in the political process, it is the court’s role to step in. *Id.* Paradoxically, despite the court’s reasoning, such risks would typically call for a strict scrutiny analysis under the principles of footnote four, rather than a “rational basis with bite” approach. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

<sup>139</sup> *Massachusetts*, 682 F.3d at 14.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 15 (citation omitted).

The third justification that the court imputed from the legislative record in support of DOMA was moral disapproval of homosexuality.<sup>142</sup> The court noted that although “moral disapproval had been an adequate basis for legislation . . . for generations,” the Supreme Court had spoken in *Romer* and in *Lawrence* and rejected moral disapproval of homosexuals as a legitimate governmental purpose.<sup>143</sup>

The fourth and final justification BLAG cited was that DOMA allowed Congress to put a temporary “freeze” on the situation of legalization of gay marriage in one state bleeding into others, giving itself time to reflect on the issue.<sup>144</sup> But given that Congress had neither framed the statute as such nor written an expiration date into the law, the First Circuit rejected this argument.<sup>145</sup> The court did not find a single legitimate justification in support of DOMA and believed that “disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress’ will.”<sup>146</sup> The court found Section 3 of DOMA to be constitutionally invalid despite gays and lesbians not being a suspect or quasi-suspect group.<sup>147</sup>

Similarly, in *Golinski v. U.S. Office of Personnel Management*, the Northern District of California found Section 3 of DOMA to be unconstitutional under a rational basis test.<sup>148</sup> Karen Golinski, a staff attorney for the Ninth Circuit Court of Appeals, sought to enroll her wife in her family coverage health insurance plan, but the administrative office of the United States Courts, citing Section 3 of DOMA, refused her demand.<sup>149</sup> The court recited the principle that “[a] statutory

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<sup>142</sup> *Id.* (“Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both *moral disapproval of homosexuality*, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”(citation omitted)).

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

<sup>144</sup> *Id.*

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

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 11-15.

<sup>148</sup> *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp.2d 968, 995 (N.D. Cal. 2012). The court also conducted its own analysis on whether heightened scrutiny should apply because the Supreme Court had left the door open as to whether sexual orientation was a suspect classification. *Id.* at 983-85. Additionally, *Romer* and *Lawrence* made the underpinnings of the Ninth Circuit case *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), which determined that classifications based on sexual orientation should receive only traditional rational basis review, no longer applicable. *Id.* The court determined that heightened scrutiny should apply to such classifications, but also found, alternatively, that Section 3 of DOMA did not pass rational basis review. *Id.* at 995.

<sup>149</sup> *Id.* at 974-75.

classification fails rational-basis review only when it ‘rests on grounds wholly irrelevant to the achievement of the State’s objective.’”<sup>150</sup> The court addressed four justifications given for DOMA: the “promot[ion] [of] traditional notions of morality,” the “preserv[ation] [of] the government fisc,” the promotion of “responsible procreation and child-rearing,” and a need to “nurtur[e] the institution of traditional, opposite-sex marriage.”<sup>151</sup> The court found the first two stated interests in support of DOMA to not be legitimate justifications for denying same-sex marriage, and it found the latter two interests not rationally related to that denial.<sup>152</sup>

Yet again, in *Pederson v. Office of Personnel Management*, the United States District Court for the District of Connecticut found that Section 3 of DOMA violated the equal protection clause under the rational basis test.<sup>153</sup> The court rejected each of six justifications in support of DOMA.<sup>154</sup> The interests cited were: “defending and nurturing the institution of traditional heterosexual marriage,” “recognizing an institution to ensure that children have parents of both sexes,” “defending traditional notions of morality,” “preserving scarce governmental resources and protecting the public fisc,” “protecting state sovereignty and democratic self-governance,” and finally, “maintaining consistency and uniformity with regard to eligibility for federal benefits and employing caution in the face of a proposed redefinition of the centuries-old definition of marriage.”<sup>155</sup> It found that each of these reasons was either a non-justifiable interest for denying same-sex marriage or the means employed were not rationally related to the furtherance of that interest.<sup>156</sup>

In *Perry v. Brown*<sup>157</sup> (now known as *Hollingsworth v. Perry*<sup>158</sup>), the Ninth Circuit questioned the constitutionality of

<sup>150</sup> *Id.* at 996 (quoting *Heller v. Doe*, 509 U.S. 312, 324 (1993)).

<sup>151</sup> *Id.* at 996-99.

<sup>152</sup> *Id.* The court also conducted a heightened scrutiny analysis and determined that the law was invalid under all of its stated justifications. *Id.* at 990-95.

<sup>153</sup> Just as in the *Golinski* decision, the district court held that classifications based on sexual orientation should be analyzed under heightened scrutiny. *Pederson v. Office of Pers. Mgmt.*, 881 F. Supp.2d 294, 333-34 (D. Conn. 2012). However, the court did not apply heightened scrutiny in that case because “it is clear that DOMA fails to pass constitutional muster under even the most deferential level of judicial scrutiny.” *Id.*

<sup>154</sup> *Id.* at 335-46.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> 671 F.3d 1052 (9th Cir. 2012).

<sup>158</sup> *Hollingsworth v. Perry* (formerly known as *Perry v. Brown and Perry v. Schwarzenegger*), LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/perry-v-schwarzenegger> (last visited Nov. 10, 2012).

Proposition 8, a public referendum amending the California State Constitution to define marriage as the union between one man and one woman.<sup>159</sup> Proposition 8 overturned a decision of the Supreme Court of California finding same-sex marriage to be a right under the State Constitution.<sup>160</sup> The Ninth Circuit examined Proposition 8 under *Romer*, interpreting that case as standing for the proposition that “the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason.”<sup>161</sup> The court found that the amendment did not further and was not rationally related to any of the interests offered in support of the law. These interests included “childrearing and responsible procreation,” “proceeding with caution when considering changes to the definition of marriage,” protecting religious liberty, and “preventing children from being taught about same-sex marriage in schools.”<sup>162</sup> The court also found that “restor[ing] the traditional definition of marriage as referring to a union between a man and a woman” was not a legitimate state interest because “tradition alone is not a justification for *taking away* a right that had already been granted, even though that grant was in derogation of tradition.”<sup>163</sup> Just as *Romer* held that Amendment 2 was not justified simply because the rights it took away were not traditionally enjoyed under the common law, Proposition 8’s only purpose was to repeal the right of marriage and could not be justified on any constitutional grounds.<sup>164</sup>

#### D. Windsor v. United States<sup>165</sup>

Two lawsuits filed in the Second Circuit, which at the time had no precedent establishing the standard of review for suspect classifications based on sexuality, spurred the Obama administration to change positions on the standard of review it thought should apply to such classifications.<sup>166</sup> In response to these lawsuits, the Department of Justice took an affirmative,

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<sup>159</sup> *Perry*, 671 F.3d 1052.

<sup>160</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>161</sup> *Perry*, 671 F.3d at 1076.

<sup>162</sup> *Id.* at 1086.

<sup>163</sup> *Id.* at 1092.

<sup>164</sup> *Id.* After the State of California declined to defend Proposition 8, the official proponents of the ballot initiative intervened and appealed the decision to the Supreme Court. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659-61 (2013). Prior to reaching the merits, the Court held that the private appellants did not have standing to appeal the decision. *Id.* at 2668.

<sup>165</sup> 699 F.3d 169 (2d Cir. 2012).

<sup>166</sup> Letter from the Attorney General, *supra* note 2.

novel stance on the level of scrutiny that should apply to DOMA.<sup>167</sup> The *New York Times* speculated that had the administration maintained the status quo and argued in support of the rational basis standard, it “would most likely have had to conclude that [gays and lesbians] have not been historically stigmatized and can change their orientation” in order to justify why heightened scrutiny was inappropriate.<sup>168</sup>

Edith Windsor sued the United States government after she was denied the spousal deduction for federal estate taxes because Section 3 of DOMA prohibited the IRS from recognizing Windsor’s partner as her wife.<sup>169</sup> The denial resulted in a payment of \$363,053 more than she would otherwise have paid in an opposite-sex marriage.<sup>170</sup> Expressing some hesitation that DOMA could fail under a rational basis test,<sup>171</sup> the court was relieved of that outcome in finding that “[f]ortunately, no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case.”<sup>172</sup> On October 18, 2012, the Second Circuit Court of Appeals became the second federal appeals court to strike down Section 3 of DOMA and the first federal appeals court to determine that gays and lesbians constitute a “quasi-suspect” class. As a result, laws employing such a classification should receive heightened scrutiny in that circuit.<sup>173</sup>

The court undertook the multi-factor test used by the Supreme Court in determining whether a new classification qualifies as a quasi-suspect class:

- A) whether the class has been historically subjected to discrimination;
- B) whether the class has a defining characteristic that frequently bears [a] relation to ability to perform or contribute to society;
- C) whether the class exhibits obvious immutable, or

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<sup>167</sup> *Id.*

<sup>168</sup> *Savage & Stolberg*, *supra* note 1.

<sup>169</sup> *Windsor*, 699 F.3d 169 at 175.

<sup>170</sup> *Id.* at 176.

<sup>171</sup> *Id.* at 180 (“So a party urging the absence of any rational basis takes up a heavy load. That would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress; it has varying impact on more than a thousand federal laws; and the definition of marriage it affirms has been long-supported and encouraged.”).

<sup>172</sup> *Id.* at 181.

<sup>173</sup> *Id.* at 185; Chris Geidner, *Federal Appeals Court: Marriage Recognition Ban Unconstitutional*, BUZZFEED (Oct. 18, 2012, 12:46 PM), <http://www.buzzfeed.com/chrisgeidner/federal-appeals-court-doma-is-unconstitutional>.



distinguishing characteristics that define them as a discrete group; and D) whether the class is a minority or politically powerless.<sup>174</sup>

The court determined that all four factors justified the application of heightened scrutiny to classifications based on sexual orientation.<sup>175</sup> Interestingly, finding a parallel between the present case and the status of women's political power at the time of *Frontiero v. Richardson*, the court stated that while the position of gays and lesbians "has improved markedly in recent decades,' . . . they still 'face pervasive, although at times more subtle, discrimination . . . in the political arena.'"<sup>176</sup>

It is difficult to say whether homosexuals are "under-represented" in positions of power and authority without knowing their number relative to the heterosexual population. But it is safe to say that the seemingly small number of acknowledged homosexuals so situated is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private—which, for our purposes, amounts to much the same thing.<sup>177</sup>

Because it found that gays and lesbians meet the four criteria of the Supreme Court's suspect classification analysis and that they "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public," the Second Circuit agreed with the position of the Obama administration and found that sexual orientation-based classifications should be subject to heightened scrutiny.<sup>178</sup> Despite meeting all four factors, the court settled on heightened scrutiny rather than strict scrutiny, explaining that while gays and lesbians have suffered from "significant and long-standing discrimination in public and private spheres, this mistreatment 'is not sufficient to require [ ] most exacting scrutiny.'"<sup>179</sup>

The Second Circuit proceeded to strike down Section 3 of DOMA under heightened scrutiny, requiring that "a classification must be 'substantially related to an important government interest.'"<sup>180</sup> The court understood "substantially related" to mean that "the explanation must be 'exceedingly persuasive,' . . . 'genuine, not hypothesized or invented *post hoc*

<sup>174</sup> *Windsor*, 699 F.3d 169 at 181 (internal quotation marks omitted) (citations omitted) (alteration in original).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 184 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973)).

<sup>177</sup> *Id.* at 184-85.

<sup>178</sup> *Id.* at 185.

<sup>179</sup> *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 767 (1977)) (internal quotation and citation omitted).

<sup>180</sup> *Id.* (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

in response to litigation.”<sup>181</sup> The court held that BLAG’s four justifications (“maintaining a ‘uniform definition’ of marriage,” “protecting the fisc,” “preserving a traditional understanding of marriage,” and “encouraging responsible procreation”) were not substantially related to the quasi-suspect class impacted by DOMA.<sup>182</sup> The Second Circuit employed heightened scrutiny to strike down a law that the First Circuit and a number of lower courts disposed of under the less demanding so-called “rational basis with bite” test of *Romer* and *Lawrence*.

On appeal, the Supreme Court affirmed the decision of the Second Circuit but once again did so under narrower grounds.<sup>183</sup> Eschewing the definitive language of the Second Circuit, the Court struck down Section 3 of DOMA under what appeared to be a rational basis review.<sup>184</sup> The Court cited *Moreno* and *Romer*’s “improper animus or purpose” language and concluded that “[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>185</sup> DOMA’s legislative history also showed that the law was passed to express “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>186</sup> The majority opinion, however, did not address the Second Circuit’s decision to employ heightened scrutiny in its analysis as a result of historical animus shown to lesbian and gay individuals.<sup>187</sup> The Court’s reasoning was much closer to that of the First Circuit in *Massachusetts v. U.S. Department of Health and Human Services*, which struck down Section 3 of DOMA under “heightened” rational basis review due in part to the unique Tenth Amendment concerns of DOMA.<sup>188</sup> In all, while the Court’s reasoning resulted in striking down Section 3 of DOMA, it has not added very much to the jurisprudence regarding LGBT classifications. *Windsor* is not the sea-change

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<sup>181</sup> *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)) (internal citation omitted).

<sup>182</sup> *Id.* at 185-88.

<sup>183</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>184</sup> In his majority opinion, Justice Kennedy does not use the phrase “rational basis review,” although its typical phrasing of “legitimate purpose” is used to describe DOMA’s failings. *Id.* at 2696.

<sup>185</sup> *Id.* at 2693.

<sup>186</sup> *Id.* (quoting H.R. Rep. No. 104-664, 16 (1996)).

<sup>187</sup> See generally *id.*

<sup>188</sup> See *Massachusetts v. U.S. Dep’t of Health and Human Serv.*, 682 F.3d 1, 11-14 (1st Cir. 2012).

*Reed*-like decision commentators have been awaiting since *Romer*. The majority neither dismissed nor endorsed the Second Circuit's use of heightened scrutiny and left the issue to further develop in lower federal courts.

### III. SUSPECT CLASSIFICATIONS: RACE AND AFFIRMATIVE ACTION

To better understand the likely treatment of sexual orientation-based affirmative action programs under the equal protection clause, it is important to understand cases discussing race-based affirmative action, which is, by far, the most developed area of affirmative action jurisprudence. The past 20 or 30 years of Supreme Court jurisprudence on affirmative action has been referred to as cases about "white rights,"<sup>189</sup> as these cases have been brought by white individuals claiming that affirmative action programs have discriminated against them on the basis of race.<sup>190</sup> These affirmative action cases have extended the application of strict scrutiny from laws discriminating on the basis of race to those employing racial classifications in affirmative action

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<sup>189</sup> See John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. 25, 48 (1997) ("[The Reagan] administration legitimized the organization of whites against blacks and made claims of discrimination fungible enough that white rights and claims of discrimination were allowed to actually displace black rights and claims of discrimination."); Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U.L. REV. 567, 579 (1996) (statement of Clarence Page) ("Yes, the current Court has been moving in a pendulum swing away from black rights and toward white rights."); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 661 (2000) ("perhaps the *Brown* 'revolution' may have been the blip (albeit a ten to thirty year blip), in a long judicial history of allowing white rights to constrain, if not trump, the justiciable aspirations of non-whites.").

<sup>190</sup> *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (white plaintiff rejected from University of Texas at Austin sued due to consideration of race in admissions process); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (white plaintiff rejected from University of Michigan sued due to consideration of race in admissions process); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (white plaintiff rejected from University of Michigan Law School sued due to consideration of race in admissions process); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995) (contractors sued after federal subcontract to build a highway was awarded to a "disadvantaged" minority-owned business); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (general contractor sued after municipal contract originally awarded to it was rebid after failure to meet minority contracting requirements).

programs.<sup>191</sup> “[R]ace-conscious affirmative action has come to be regarded as racism itself.”<sup>192</sup>

#### A. *Race-Based Affirmative Action Programs in the Employment Context*

The Court first held that strict scrutiny should apply to race-based affirmative action programs in *City of Richmond v. J.A. Croson Co.*,<sup>193</sup> where Justice O’Connor, writing for the Court, invalidated Richmond’s “Minority Business Utilization Plan.”<sup>194</sup> Richmond’s program required city construction contractors to subcontract at least 30% of a contract’s value to one or more “Minority Business Enterprises” (MBEs).<sup>195</sup> The plan denied white “citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race,” and the Court therefore determined that employing the “highly suspect tool” of racial classification demands that such programs satisfy strict scrutiny.<sup>196</sup> The Court stated that “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race,” and its application was therefore necessary to determine whether the legislature could justify the use of race in its program.<sup>197</sup>

The Court narrowed the permissible uses of race-based classifications in the employment context. First, the Court stated that increasing minority participation in a field of work was “discrimination for its own sake” and thus invalid.<sup>198</sup> Second, remedying past discrimination is only a compelling interest when “triggered [by] ‘judicial, legislative, or administrative findings of constitutional or statutory violations,’” and such a goal must be directed to “specific instances of racial discrimination.”<sup>199</sup> Remedying the effects of discrimination in society at large is unjustifiable as “an

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<sup>191</sup> *Fischer*, 133 S. Ct. at 2415; *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326; *Adarand Constr.*, 515 U.S. at 227; *Croson*, 488 U.S. at 493.

<sup>192</sup> John F. Adkins, Scott C. Moriearty, & Rheba Rutkowski, *Equal Opportunity and Affirmative Action Considerations*, HFM MA-CLE 53, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (2008).

<sup>193</sup> 488 U.S. at 493; see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 753 (4th ed. 2011).

<sup>194</sup> *Croson*, 488 U.S. 469 (1989).

<sup>195</sup> *Id.* at 477-78. “Minority Business Enterprises” were defined as a business from anywhere in the country “at least fifty-one (51) percent of which is owned and controlled . . . by . . . Black[ ], Spanish-speaking, Oriental[ ], Indian[ ], Eskimo[ ], or Aleut[ ] citizens.” *Id.* at 477. (internal quotations and citations omitted).

<sup>196</sup> *Id.* at 493. (plurality opinion).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 496 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

<sup>199</sup> *Id.* at 497 (quoting *Bakke*, 438 U.S. at 307).

amorphous concept of injury that may be ageless in its reach into the past.”<sup>200</sup> Essentially, under *Croson*, the only justification for a race-based affirmative action program is remedying specific instances of prior discrimination by state actors affecting the subject matter, whether educational or employment-related, and jurisdiction of the program under review.<sup>201</sup>

The Court found that Richmond neither proved how many minority business enterprises were active within its jurisdiction nor the “level of [ ] participation” by minorities within the construction market.<sup>202</sup> Richmond had not shown that “qualified minority contractors ha[d] been passed over for city contracts or subcontracts, either as a group or in any individual case.”<sup>203</sup> In invalidating the law, the Court held that Richmond had failed to justify the use of race by a sufficient “basis in evidence for its conclusion that remedial action was necessary.”<sup>204</sup>

Six years later, in *Adarand Constructors, Inc. v. Peña*, the Court reaffirmed the central holding of *Croson*, but stated that *Croson* also applied to the federal government by way of the due process clause of the Fifth Amendment.<sup>205</sup> Once again writing for the Court, Justice O’Connor stated that three general propositions had become clear with respect to the use of racial classifications: skepticism,<sup>206</sup> congruence,<sup>207</sup> and consistency.<sup>208</sup> Under the principle of consistency, the particular race of the individual burdened or benefited by the classification is irrelevant; classifications based on race will always receive strict scrutiny.<sup>209</sup> Dissenting in *Adarand*, Justice Stevens illuminated the constitutional paradox the Court had created:

[T]he Court may find that its new “consistency” approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply “intermediate scrutiny” to cases of invidious gender discrimination and “strict scrutiny” to cases of invidious race

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<sup>200</sup> *Id.* (quoting *Bakke*, 438 U.S. at 307).

<sup>201</sup> *Id.* at 496-500 (plurality opinion and majority opinion).

<sup>202</sup> *Id.* at 510 (plurality opinion).

<sup>203</sup> *Id.* at 510.

<sup>204</sup> *Id.* at 510 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)) (internal quotations omitted).

<sup>205</sup> *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>206</sup> The principle of skepticism entails the application of “a most searching examination” to any benefit based on race. *Id.* at 223 (quoting *Wygant*, 476 U.S. at 273).

<sup>207</sup> Congruence requires identical analysis under the Fifth Amendment and the Fourteenth Amendment. *Id.* at 223-24.

<sup>208</sup> *Id.* at 224.

<sup>209</sup> *Id.*

discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.<sup>210</sup>

*Croson* and *Adarand* guaranteed that strict scrutiny would apply to benign classifications on the basis of race, and the embrace of a consistency principle established uneven footing for advocates hoping to secure equal rights but also remedy past injustices.<sup>211</sup>

### B. *Race-Based Affirmative Action Programs in Higher Education*

In *Gratz v. Bollinger*<sup>212</sup> and *Grutter v. Bollinger*,<sup>213</sup> the Court dealt with the admissions processes at the University of Michigan and the University of Michigan Law School (Michigan Law) that considered the race of applicants in their determinations. Because the Court deemed the use of racial quotas unconstitutional in *Regents of University of California v. Bakke*,<sup>214</sup> institutions of higher learning began to consider the race of a minority applicant as a "plus" in admissions.<sup>215</sup> In *Gratz*, the Court struck down an undergraduate admissions process that automatically gave minority applicants 20 points toward the 100 points needed to gain admission.<sup>216</sup> Although the volume of undergraduate applications made it administratively impossible for the University of Michigan to conduct an

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<sup>210</sup> *Id.* at 247 (Stevens, J., dissenting).

<sup>211</sup> The consistency rationale meant that the level of scrutiny applied to discriminatory racial classifications would also be applied to benign racial classifications. This led some advocates to second-guess the benefits of strict scrutiny for classifications based on gender. Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1, 36 (2011) ("However, after the Supreme Court adopted a rigid strict scrutiny analysis for race-based affirmative action, which mandates evidence of intentional discrimination by identifiable wrongdoers, Ginsburg, like other feminists, understood that application of this stringent standard could be even more fatal to gender preferences because of the subtle, elusive nature of gender bias. Thus, arguing for the same treatment of race and gender became dangerous.").

<sup>212</sup> 539 U.S. 244 (2003).

<sup>213</sup> 539 U.S. 306 (2003).

<sup>214</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>215</sup> While striking down the University of California's quota system, Justice Powell endorsed the "Harvard Plan," an individualized admissions process in which each applicant was given a "plus" on factors such as race, personal talents, work experience, overcoming disadvantage, etc. *Id.* at 317.

<sup>216</sup> *Gratz*, 539 U.S. at 255.

individualized inquiry into each applicant's file, the Court ruled that a practice of automatically boosting a student's score solely on the basis of his or her race was not a narrowly tailored consideration of race.<sup>217</sup>

In *Grutter*, however, Michigan Law successfully repelled the constitutional challenge to its race-based program because it employed the individualized admissions process missing from *Gratz*.<sup>218</sup> Justices O'Connor and Breyer, who joined the Court in striking down the undergraduate admissions program in *Gratz*, joined the dissenters from that case to uphold the Michigan Law program.<sup>219</sup> Michigan Law conducted an "individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."<sup>220</sup> Because it was unlike the undergraduate program in that it only used race as a "soft variable" and did not mechanically award bonuses on the basis of race, the Court deemed Michigan Law's admissions program to be narrowly tailored.<sup>221</sup>

The *Grutter* decision was also significant for acknowledging that Michigan Law's purported goal of achieving diversity was a compelling state interest, one strong enough to justify its consideration of race in admissions.<sup>222</sup> Michigan Law sought to enroll a "critical mass" of minority students to accrue enhanced educational benefits to its student body.<sup>223</sup> Diversity, therefore, became a second compelling state interest justifying the use of race in addition to efforts to remedy a state actor's past discrimination.<sup>224</sup> The acceptance of diversity as a compelling interest by a conservative Supreme Court has been attacked as a Pyrrhic victory for liberals, as "proponents of affirmative action have been forced to trade arguments of equity for a rationale favoring diversity, and in so doing, they may have silenced the most salient argument for

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<sup>217</sup> *Id.* at 275.

<sup>218</sup> *Grutter*, 539 U.S. at 334.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 337.

<sup>221</sup> *Id.*

<sup>222</sup> "More important . . . today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325. In *Bakke*, Justice Powell had acknowledged diversity as a compelling interest, but that point failed to obtain a majority of the Court's support. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

<sup>223</sup> *Grutter*, 539 U.S. at 329 (internal quotation marks omitted) (citation omitted).

<sup>224</sup> *See id.* at 328 ("It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action.").

the policy: Racial inequity persists, and proactive measures of racial justice are needed to address it.”<sup>225</sup>

In the 2013-2014 term, the Court examined whether the University of Texas (UT) could justify the use of race in its admissions process to attain a “critical mass” of minority students for purposes of diversity.<sup>226</sup> *Fisher v. University of Texas* involves a white woman who claimed UT denied her admission due to her race.<sup>227</sup> UT employs a unique system in its admissions process called the “Top Ten program,” where the top 10% of every Texas high school’s graduating class automatically gains admission to the school.<sup>228</sup> As a product of Texas’s highly *de facto* segregated public education system, the Top Ten program has produced a nominally diverse class. Of the freshman enrolled under the program in the fall of 2011, 26% were Hispanic and 6% were black.<sup>229</sup> UT, however, did not feel that these numbers constituted a sufficiently diverse class, as “classes in many subjects have few or no minority students.”<sup>230</sup> It therefore instituted a program similar to what the Supreme Court approved in *Grutter*, in which the remaining quarter of the University’s freshman class is filled using a system that takes the applicant’s race into account.<sup>231</sup>

At oral argument on October 10, 2013, Chief Justice Roberts asked UT’s lawyers a question that they had difficulty answering: “What is the critical mass of African-Americans and Hispanics at the university that you are working toward?”<sup>232</sup> Justice Kennedy appeared skeptical, noting that in his judgment it seemed that race was the most important factor in UT’s admissions process.<sup>233</sup> In 2007, Chief Justice Roberts and Justice Kennedy were part of a majority of the Court that

<sup>225</sup> Julianne Hing, *How Diversity Trumped Equity—and May Kill Affirmative Action*, COLORLINES (Oct. 10, 2012, 10:04 AM), [http://colorlines.com/archives/2012/10/how\\_diversity\\_trumped\\_equity—and\\_may\\_kill\\_affirmative\\_action.html](http://colorlines.com/archives/2012/10/how_diversity_trumped_equity—and_may_kill_affirmative_action.html).

<sup>226</sup> Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES, Oct. 9, 2012, at A1, available at <http://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html?pagewanted=all&r=0>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (“Almost everyone calls this the Top Ten program, though the percentage cutoff can vary.”).

<sup>229</sup> To put it into perspective, Texas as a whole is thirty-eight percent Hispanic and twelve percent black. *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Liptak, *supra* note 226; Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 11, 2012 at A1, available at <http://www.nytimes.com/2012/10/11/us/a-changed-court-revisits-affirmative-action-in-college-admissions.html?pagewanted=all>.

<sup>232</sup> Liptak, *supra* note 226.

<sup>233</sup> *Id.*



struck down a public school district's use of race in its admissions decisions because the consideration of race was not narrowly tailored to its purported interest in diversity: "[R]ace, for some students, was determinative standing alone" rather than "part of a broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints . . ." <sup>234</sup>

Although observers of the case, and particularly the oral arguments, felt that the fate of diversity as a compelling state interest was at risk, <sup>235</sup> the Court's decision disposed of the case on much narrower grounds. <sup>236</sup> Finding that the Fifth Circuit did not fully perform the "searching examination" required of strict scrutiny, in that it focused its decision on whether UT introduced the program "in good faith" and not whether it was narrowly tailored to compelling state interests, the Court remanded the case to see whether the program could be justified under true strict scrutiny. <sup>237</sup> The Court reaffirmed its strict analysis of race-based affirmative action programs and left the question of diversity as a compelling interest to a later date.

#### IV. QUASI-SUSPECT CLASSIFICATIONS: GENDER AND AFFIRMATIVE ACTION

The Supreme Court has never ruled on the issue of whether a gender-based affirmative action program violates the equal protection clause. <sup>238</sup> All but two of the federal appeals courts that have addressed gender-based affirmative action have held that these programs should be examined under the heightened scrutiny standard. <sup>239</sup> Despite a circuit split for over 20 years, the

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<sup>234</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (internal quotation marks omitted) (citation omitted). The Court also doubted the relevance of diversity as a compelling interest in the context of an elementary or secondary school and limited *Grutter* to higher education. *Id.* ("In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education . . .").

<sup>235</sup> Liptak, *supra* note 7.

<sup>236</sup> David H. Gans, *The Long Wait Is Over: The Supreme Court Decides Fisher*, NAT'L CONST. CENTER (June 25, 2013), <http://blog.constitutioncenter.org/2013/06/the-long-wait-is-over-the-supreme-court-decides-fisher/>.

<sup>237</sup> *Fisher v. Univ. of Tex at Austin*, 133 S. Ct. 2411, 2420-21 (2013) (citation omitted) (internal quotation mark omitted).

<sup>238</sup> Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1169 (1998).

<sup>239</sup> See Berger Levinson, *supra* note 211, at 15-16. The exceptions are the Federal Circuit and the Sixth Circuit Court of Appeals. *Id.* at 15. Based on *Croson*, the Sixth Circuit held in *Conlin v. Blanchard* that in order for the state to employ a remedial measure based on gender, it must satisfy strict scrutiny by showing that it engaged in prior discrimination and that the remedy adopted is narrowly tailored to

Court has not resolved the discrepancy, leaving scholars and judges to guess what level of scrutiny a gender-based affirmative action program demands under equal protection analysis.<sup>240</sup>

After *Croson*, when it became clear that strict scrutiny for race meant that a race-based affirmative action program would more likely be struck down than not, advocates of strict scrutiny review for gender classifications were at a crossroads.<sup>241</sup> “Many of those who previously favored strict scrutiny for gender classifications [became] concerned that such review would make it much more difficult for the government to engage in affirmative action to benefit women.”<sup>242</sup> Settling on a heightened scrutiny standard for gender has resulted in the constitutional quandary that Justice Stevens cheerlessly identified in *Adarand*,<sup>243</sup> and which numerous commenters on the issue have echoed:

[T]he gender-based component of an affirmative action program may survive challenge while the race-based component is held invalid. In these courts, it is easier to invalidate measures intended to remediate the arguably more serious, egregious racial discrimination than the similar provisions intended to remediate gender discrimination. Explaining this odd result, one lower court, while “questioning [its] logic” pointed out that “the Supreme Court has accepted the result that it is now more difficult to remedy race discrimination than gender discrimination.”<sup>244</sup>

Some have suggested that Justice Ginsburg’s majority opinion in *United States v. Virginia* pressed the heightened scrutiny standard closer to strict scrutiny by using the phrase “exceedingly persuasive justification” in place of the language typically associated with heightened scrutiny: “substantially related to important state interests.”<sup>245</sup> Others argue just the opposite: that “[m]ost appellate courts have not read [*United*

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remediating that discrimination. *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989). In 2002, the Federal Circuit similarly held that an affirmative action program based on gender would be judged under strict scrutiny. *Berkley v. United States*, 287 F.3d 1076, 1085 (Fed. Cir. 2002).

<sup>240</sup> See generally Berger Levinson, *supra* note 211; Skaggs, *supra* note 238; Galotto, *supra* note 120.

<sup>241</sup> CHEMERINSKY, *supra* note 193, at 777.

<sup>242</sup> *Id.*

<sup>243</sup> See *supra* Part III.A.

<sup>244</sup> Donna Meredith Matthews, *Avoiding Gender Equality*, 19 WOMEN’S RTS. L. REP. 127, 145 (1998) (internal citation omitted).

<sup>245</sup> See, e.g., Skaggs, *supra* note 238, at 1209 (“The ‘exceedingly persuasive justification’ standard . . . represents the proper level of analysis for all gender-based classifications, including gender-based affirmative action. This standard is demanding, and many gender-based affirmative action plans that may have been permissible under intermediate scrutiny are no longer valid.”).

*States v. Virginia*] as altering the test, as the Court recited the intermediate scrutiny standard while it stated that courts must evaluate whether the proffered justification for a gender classification is ‘exceedingly persuasive.’<sup>246</sup> Whether or not *United States v. Virginia* changed the test for gender remains to be seen, but many courts that have addressed a race-based and gender-based affirmative action program in the same case have struck down the one based on race and upheld the other based on gender.<sup>247</sup>

In *Associated General Contractors of California, Inc. v. City and County of San Francisco*, the Ninth Circuit looked at a San Francisco ordinance that established a program requiring each city department to set aside fixed amounts of its “purchasing dollars” for minority-owned and women-owned business enterprises (MBEs and WBEs, respectively).<sup>248</sup> Much like Richmond’s ordinance in *Croson*, the San Francisco ordinance “require[d] each city department to establish [ ] yearly goal[s] for the percentage of contracting dollars” that went to MBEs and WBEs, and it set an overall goal of 30% of the city’s contracting dollars to go to MBEs and 10% to WBEs.<sup>249</sup> The court judged the plaintiffs’ equal protection arguments against the MBE and WBE classification schemes separately.<sup>250</sup> Applying strict scrutiny to the MBE preferences, the court recognized that remedying past discrimination by the city of San Francisco was a compelling interest.<sup>251</sup> But the court found that the city did not present any evidence of discrimination against MBEs by city officials.<sup>252</sup> The court ruled against the city; “on the basis

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<sup>246</sup> Berger Levinson, *supra* note 211, 11 n.81 (internal citations omitted).

<sup>247</sup> *Cf. Contractors Ass’n of Eastern Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1009-11 (3d Cir. 1993) (reversing summary judgment invalidating MBE preference in order to further investigate its narrow tailoring under strict scrutiny, while upholding summary judgment striking down WBE preferences because city of Philadelphia did not adequately put forward evidence of the existence of gender discrimination in the construction industry. “[Heightened scrutiny] require[d] the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.”).

<sup>248</sup> *Associated Gen. Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 924 (9th Cir. 1987).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 928, 939.

<sup>251</sup> *Id.* at 930.

<sup>252</sup> *Id.* at 931. The city defended the program with statistics demonstrating the “virtual exclusion of minority-owned and women-owned businesses from City contracts.” *Id.* at 932 (internal quotation and citation omitted). The statistics reported that although MBEs and WBEs accounted for thirty-three percent and twenty-five percent of business in San Francisco, the city only awarded three percent of all contracting to MBEs and WBEs. *Id.* at 932-33. The court found fault with the statistics

of the record it had compiled, the city was not justified in turning to such drastic remedies as bid preferences and set-asides, at least not in the first instance.”<sup>253</sup>

Conversely, the court applied heightened scrutiny to the ordinance’s WBE preference, just barely upholding it as an acceptable use of gender under the Constitution.<sup>254</sup> The court held that the city was justified in “compensating women for disadvantages they have suffered . . . [.]” suggesting that while the goal of remedying societal discrimination is unacceptable under strict scrutiny, it might be an acceptable government interest under intermediate scrutiny.<sup>255</sup> The court expressed concern with the scope of the government’s interest, especially considering that there might be industries in which women are not discriminated<sup>256</sup> and noted that “[t]he notion that women need help in every business and profession is as pernicious and offensive as its converse, that women ought to be excluded from all enterprises because their place is in the home.”<sup>257</sup> Nevertheless, “[u]nlike racial classifications, which must be ‘narrowly’ tailored to the government’s objective, there is no requirement that gender-based statutes be drawn as precisely as [they] might have been.”<sup>258</sup> However, the court reserved the right to step in when an affirmative action program benefited women in “an industry where women are not disadvantaged.”<sup>259</sup>

Similarly, in *Coral Construction Company v. King County*, the Ninth Circuit once again upheld an ordinance

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as, in its judgment, they overestimated discrimination and the number of minority- and woman-owned businesses. *Id.* at 933.

<sup>253</sup> *Id.* at 938.

<sup>254</sup> *Id.* at 941-42 (“Although we find the city’s WBE preference troubling, we uphold it against the challenge presented in this case . . . . The WBE program is therefore substantially related to the city’s important goal of compensating women for the disparate treatment they have suffered in the marketplace.” (emphasis omitted) (internal citations omitted)).

<sup>255</sup> *Id.* at 932, 941. Berger Levinson traces this back to *Califano v. Webster*, where the Supreme Court upheld a social security provision “under which female wage earners, for purposes of calculating retirement benefits, could exclude from the computation of their average monthly wage three more lower-earning years than a male wage earner.” Berger Levinson, *supra* note 211, at 8. The Court unanimously upheld the law because it was intended to benefit women in order to “compensate for particular economic disabilities suffered by women” in general. *Id.* (internal citation omitted).

<sup>256</sup> *Associated Gen. Contractors of Cal., Inc.*, 813 F.2d at 932.

<sup>257</sup> *Id.* at 941.

<sup>258</sup> *Id.* at 941-42 (citations omitted) (internal quotation marks omitted); see also *Coral Const. Co. v. King Cnty.*, 941 F.2d 910, 932 (9th Cir. 1991) (“Unlike the strict standard of review applied to race-conscious programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy.”)

<sup>259</sup> *Associated Gen. Contractors of Cal., Inc.*, 813 F.2d at 942.

benefiting WBEs under heightened scrutiny while holding the MBEs to strict scrutiny.<sup>260</sup> The court reiterated that while, under heightened scrutiny, the discrimination to be remedied need not be the result of government action, “[s]ome degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field.”<sup>261</sup> For instance, the court upheld the statute on the basis of an affidavit submitted by the female president of a consulting engineering firm, which included her personal anecdotal evidence of a discriminatory attitude toward women in the engineering and construction business.<sup>262</sup> She stated that only seven percent of her firm’s business was derived from private contracts, while the majority of her firm’s business was the result of affirmative action set-asides.<sup>263</sup>

Jurisdictions employing both MBE and WBE programs have seen, even in the same case, the former struck down under a strict scrutiny standard and the latter upheld under heightened scrutiny. This illustrates not only the disparity between the two legal standards, but also the real-life implications of classifying a group as suspect or quasi-suspect. The lower the level of scrutiny associated with the group, the more successful advocates have been in defending an affirmative action program drawn for their benefit.

While the Supreme Court has found that diversity can be a compelling state interest under limited circumstances for race-based affirmative action, it has not had the opportunity to weigh in on whether diversity constitutes a significant or exceedingly persuasive justification for a gender-based program.<sup>264</sup>

The notion that exposing minority and nonminority students to each other will promote better understanding rings hollow in the context of gender because males have mothers, sisters, female cousins, aunts, and thus have numerous opportunities to interact with women. As to education, Justice Ginsburg conceded . . . that gender-based affirmative action in education, unlike race-based affirmative action, requires “altering recruitment patterns and eliminating institutional practices that limit or discourage female participation,” rather than a [diversity-based] special admissions program.<sup>265</sup>

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<sup>260</sup> *Coral Const. Co.*, 941 F.2d 910 at 932-33.

<sup>261</sup> *Id.* at 932.

<sup>262</sup> *Id.* at 933.

<sup>263</sup> *Id.*

<sup>264</sup> Berger Levinson, *supra* note 211, at 24.

<sup>265</sup> *Id.* at 24-25.

Diversity-based justifications for gender classifications have not effectively been tested under a heightened scrutiny standard. In *Metro Broadcasting, Inc. v. Federal Communications Commission*, however, the Court upheld a federal program under heightened scrutiny that provided enhanced licenses to minority-owned businesses in radio and television.<sup>266</sup> The Court upheld the use of race in that it was justified by the FCC's mission of "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves."<sup>267</sup> In theory, a diversity of viewpoints justification could translate to the context of gender and justify a program benefiting women in recruitment and retention.<sup>268</sup>

The Court has not examined an affirmative action program under heightened scrutiny in recent years, leading to a lack of consensus among Circuits and scholars over how to tailor a gender-based affirmative action program that meets the Supreme Court's ever-vacillating conception of equal protection. The fate of an LGBT affirmative program analyzed under heightened protection would remain equally uncertain.

## V. SCRUTINIZING AFFIRMATIVE ACTION BASED ON SEXUAL ORIENTATION

The Obama administration's decision to argue for heightened scrutiny for classifications based on sexual orientation threatens the future viability of an affirmative action program based on sexual orientation. For instance, what would happen if Rutgers University, a public university in New Jersey that has poured funding into LGBT outreach programs,<sup>269</sup> decided to create a "critical mass" of LGBT students? Thus, as part of a "holistic" admissions process, it begins to give a "plus" to students self-identifying as LGBT on their admissions applications. It justifies its program on the same basis that Elmhurst College justifies asking applicants

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<sup>266</sup> *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990). *Metro Broadcasting* arrived after *Croson* but before *Adarand*, when the Court briefly entertained the idea that Congress had greater authority to legislate based on race than did the States. *Id.* at 565-66. It was overruled by *Adarand's* insistence on a congruence rationale requiring strict scrutiny for race-based classifications under federal law. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>267</sup> *Metro Broad.*, 496 U.S. 547 at 567.

<sup>268</sup> See Berger Levinson, *supra* note 211, at 26-27.

<sup>269</sup> Ariel Kaminer, *Since Suicide, More Resources for Transgender and Gay Students*, NY TIMES, Sept. 22, 2012 at A18, available at <http://www.nytimes.com/2012/09/22/nyregion/after-clementis-suicide-rutgers-embraces-its-gay-and-transgender-students.html>.

about sexual orientation: “A campus community that resembles our diverse society and multicultural world” contributes to the education of every student.<sup>270</sup>

This is essentially the “Harvard” plan at the center of *Grutter*, which was upheld under a strict scrutiny analysis.<sup>271</sup> But *Grutter’s* holding, especially the concepts of obtaining a “critical mass” and diversity as a compelling interest, appeared to be at risk during *Fisher’s* oral arguments.<sup>272</sup> If a court ultimately strikes down the University of Texas’s use of race as not narrowly tailored, or it finds that diversity is no longer a compelling interest for purposes of strict scrutiny, would diversity still nonetheless qualify as a significant interest for the purposes of heightened scrutiny? Would *Metro Broadcasting’s* holding of viewpoint diversity as an important interest justifying preferential treatment under heightened scrutiny still hold water with the Court?

Even further, how would diversity as an interest function under the rational basis test? Where the Court defers to legislative findings under a rational basis regime, it becomes difficult for it to dismiss a legislature’s decision to endorse the findings of social scientists on the benefits of diversity.<sup>273</sup> Remedying past discrimination would also likely be considered a legitimate state interest, but the question then becomes what sort of discrimination? Under strict scrutiny, a state actor must have committed the discrimination, and the remedy must be narrowly tailored to remedying that particular discriminatory event.<sup>274</sup> Under heightened scrutiny, however, remedying societal, even private, discrimination is acceptable provided that the state can show a history of discrimination in the particular field of work affected by the legislation.<sup>275</sup> Does it then follow that remedying any and all societal discrimination against LGBT individuals could constitute a *legitimate* state interest under a rational basis analysis?<sup>276</sup> Could an LGBT affirmative

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<sup>270</sup> Ray, *supra* note 59.

<sup>271</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>272</sup> See Philip T.K. Daniel & Scott Greytak, Commentary, *Requiem for Affirmative Action in Higher Education: Case Analysis Leading to a Fisher v. University of Texas*, 279 EDUC. L. REP. 539 (July 7, 2012).

<sup>273</sup> See Berger Levinson, *supra* note 211, 24-26.

<sup>274</sup> See *supra* Part III.

<sup>275</sup> See *supra* Part IV.

<sup>276</sup> A legislative body should have no trouble proving societal discrimination against LGBT individuals. See, e.g., Jennifer C. Pizer, Brad Sears, Christy Mallory, & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012).

action program therefore pass constitutional muster under most circumstances? There are seemingly few limiting factors.

In circuits that have not settled on heightened scrutiny for classifications based on sexual orientation,<sup>277</sup> the Supreme Court's relative silence on scrutiny for LGBT classifications and *Adarand's* demand for consistency among the applications of scrutiny might lead a lower court to examine an LGBT affirmative action program under a "rational basis with bite" standard. However, the "bite" used in analyzing a discriminatory law based on animus does not translate to the context of an affirmative action program. The "bite" takes hold when there is "a bare desire to . . . harm" a group of individuals.<sup>278</sup> The intent of an affirmative action program on behalf of gay, lesbian, and transgender individuals in education or employment would be to benefit those groups, and not to harm heterosexuals.<sup>279</sup>

The current law of "rational basis with bite," opens up an array of options in crafting a constitutionally sound affirmative action program, proving dangerous to conservative opposition to affirmative action. The Court's use of scrutiny as a double-edged sword falters under "rational basis with bite" because the so-called "bite" functions as a built-in judicial "one-way ratchet."<sup>280</sup> That is, because "rational basis with bite" applies only when a "bare desire to do harm" is present, the Court's analysis should differ when rights are given to LGBT individuals rather than when they are taken away. BLAG's position in favor of rational basis is untenable from a practical standpoint. While a "rational basis with bite" approach has the ability to strike down discriminatory laws, it is seemingly toothless against laws that lack such a bare desire to do harm.

If the Supreme Court were to clearly hold that LGBT classifications must be examined under "rational basis with

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<sup>277</sup> Currently, the Second and Ninth Circuits have elevated classifications based on sexual orientation to a heightened scrutiny analysis. *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012); *SmithKline Beecham Corp. v. Abbott Lab.*, No. 11-17357, 2014 WL 211807 at \*1 (9th Cir. 2014).

<sup>278</sup> See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (alteration in original) (internal citations omitted).

<sup>279</sup> See also Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1365-66 (2013).

<sup>280</sup> Ratchet theory suggests that some legal mechanisms can only work in a single direction, for example "that Congress may enact laws that strengthen guarantees under the Due Process and Equal Protections Clauses of the Fourteenth Amendment, . . . but may not dilute those guarantees." *Ratchet Theory Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/r/ratchet-theory/> (last visited Dec. 23, 2013).



bite” or a similar standard, conservatives would find themselves in the precarious position of being stuck with a level of scrutiny capable of striking down discriminatory laws but seemingly powerless against sexual orientation-based affirmative action programs. The Supreme Court has reaffirmed the animus reasoning of *Romer* in striking down Section 3 of DOMA under rational basis. Public opinion has also shifted at a pace where discrimination against LGBT individuals will not be tolerated by a majority of Americans for much longer.<sup>281</sup> “Rational basis with bite” has provided courts with the power to strike down discriminatory laws but would likely provide far fewer limits to legislatures crafting affirmative action programs for gay and lesbian individuals.

On the other hand, if the Court endorses the view that sexual orientation is a quasi-suspect classification, it would be the step that commentators have anticipated since *Romer*.<sup>282</sup> More significantly, however, it would make legislating by sexual orientation more difficult, both discriminatorily and remedially. Heightened scrutiny would strike down the same laws that “rational basis with bite” now does, but under *Adarand’s* pillar of consistency, heightened scrutiny would only leave room for affirmative action programs supported by an “exceedingly persuasive justification.” This added benefit of heightened scrutiny should tempt opponents of affirmative action to come out in support of this standard for LGBT classifications.

Indeed, opponents of affirmative action with the foresight to realize that discriminatory laws against LGBT individuals are due to expire would do well for themselves by advocating for an across-the-board strict scrutiny standard for race, gender, and sexual orientation. This position would preserve the fewest options for crafting affirmative action programs, with the added benefit of eliminating the paradox in affirmative action jurisprudence allowing greater options for legislating based on gender and sexual orientation. Otherwise, the Court will continue to strike down discriminatory laws under lesser standards with more limited power to strike down laws employing benign classifications based on sexual orientation.

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<sup>281</sup> Public opinion has shifted in favor of gay marriage, and eighteen to twenty-nine year olds overwhelmingly support it by a three to one margin. *Public Opinion on Gay Marriage*, SALT LAKE TRIB. (Dec. 12, 2012, 1:01 AM), <http://www.sltrib.com/sltrib/opinion/55446668-82/marriage-court-gay-percent.html.csp>.

<sup>282</sup> See *supra* Part IV .

## CONCLUSION

Opponents of LGBT rights should ask themselves which they fear more: nondiscrimination laws or affirmative action? Although the Court continues to tread water over how to treat LGBT classifications, some doubt the likelihood of an eventual conservative win on the issue: “[Chief Justice] Roberts must know that long before his tenure . . . is up in 25 years or so, any decision by the court upholding bans on gay marriage will seem retrograde and foolish.”<sup>283</sup> The public opinion shift in favor of LGBT nondiscrimination and equality is staggering, whether or not the Court ultimately applies more heightened scrutiny to LGBT classifications. Because under these circumstances rational basis provides those opposed to LGBT affirmative action the fewest comforts, the current position in favor of this lesser review is short-sighted. Continued advocacy for such a low standard of review for LGBT classifications will result in the worst of both worlds for LGBT opponents: discriminatory laws will continue to be struck down under the rational basis with bite standard, while sexual orientation-based affirmative action will be upheld under the same standard. Such advocates truly find themselves between a rock and a hard place.

*Alexander Bondarenko*<sup>†</sup>

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<sup>283</sup> Adam Winkler, *Will the Supreme Court Uphold Gay Marriage Ban?*, HUFFINGTON POST (Dec. 7, 2012, 3:23 PM), [http://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-up\\_b\\_2259342.html](http://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-up_b_2259342.html).

<sup>†</sup> J.D. Candidate, Brooklyn Law School, 2014; B.A., Tufts University, 2009. I would like to thank the members of the *Brooklyn Law Review* for their insights and guidance, as well as my friends and family for their endless support.