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The Analogous Constitutional Protection of Race and Sexual Preference: Recognizing the Shared Vulnerability

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**THE ANALOGOUS CONSTITUTIONAL
PROTECTION OF RACE AND SEXUAL
PREFERENCE: RECOGNIZING THE
SHARED VULNERABILITY**

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Abstract: The Analogous Constitutional Protection of Race and Sexual Preference: Recognizing the Shared Vulnerability

Because there is a growing interest in legal rights for gay persons, courts will soon be force to address this important issue head on. Courts will have to decide whether sexual orientation meets the requirements of a suspect classification. This article aspires to provide guidance for courts that can no longer side-step the question of whether sexual orientation is a suspect classification. The analysis compares race and sexual orientation, examining the thinking process whereby race and sexual orientation share the vulnerability associated with the human attributes that the requirements of a suspect classification are expected to meet.

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The U.S. Constitution upholds multiple values, including justice, efficiency, and liberty, as well as the interests that are integral to those values. For example, when courts conclude that race is an attribute that deserves the protection we offer to vulnerable members of our community, they do so because of the intrinsic unfairness implicit in permitting a citizen to experience disparate treatment as a result of characteristics over which they lack discretion. However, the apparent justice in such a judgment conflicts with individualism, arguably the central value of American life.

The American legal system's theory of responsibility is decidedly individualistic, rooted in the ideas of John Locke and an individualistic American culture. Individualism, as the term is used here, refers to the assumption that humans do and should make decisions that determine the course of their life. Emerging from this assumption is an emphasis on individual responsibility as an expectation and prescription. Individual responsibility produces rulings that hold individuals accountable for what are considered to be the reasonable effects of their decisions. Individualism, refers to the belief that the individual is responsible for his or her own condition, whether comfortable or miserable.¹ In America, there is a unique fascination with individualism and the emphasis on rational determination of the

¹ Peter Schuck, *Understanding America - A Commentary* by Peter Schuck, YALE LAW SCHOOL (MAY 8, 2008) <http://www.law.yale.edu/news/6883.htm>.

course of ones life that it encourages. The presumption of individuals' capability to order their world results in a generalized hesitancy to "harm" citizens by extending compassionate assistance to them.²

In *Democracy in America*, Alexis de Tocqueville labeled what he observed in America as "individualism." Tocqueville argues that American individualists are often blind to the organic needs of society. Because American's hold themselves responsible for their own destiny, they attribute their individual responsibility model onto others. This attribution ensures that everyone is held responsible for their own actions, be they laudable or morally reprehensible.³

Examining the moral reasoning and decision making of American children further highlights the extensive reach of American individualism. In a study of Filipino and American children, Alison Carson and Ali Banuazizi found that American children's resource allocation decisions were likely to be based on merit as opposed to need.⁴ Regardless of the type of need

² See M. Neil Browne & Michael D. Meuti, *Individualism and the Markey Determination of Women's Wages in the United States, Canada and Hong Kong*, 21 LOY. L.A. INT'L & COMP. L.REV. 355, 357 (1999).

³ See M. Neil Browne & Nancy K. Kubasek, *A Communitarian Green Space Between Market and Political Rhetoric About Environmental Law*, 37 AM. BUS. L. J.127, 168-169 (1999); *But see* BARRY ALAN SHAIN, *THE MYTHOF AMERICAN INDIVIDUALISM* (1994) (arguing that although American individualism does exist, the extent of its impact upon American culture has been greatly exaggerated. He references the Protestant's rampant distrust of the radical individual, as well as their strong focus on the community and social cohesion to point out that America was not founded on the value of individual responsibility. Moreover, Shain highlights the civic republican tradition our founding fathers built our nation upon to illustrate another case where the individual is deemphasized in favor of the collective good.).

⁴ See Alison S. Carson & Ali Banuazizi, *"That's Not Fair" - Similarities and differences in distributive justice reasoning between American and Filipino children*, J. OF CROSS-CULTURAL PSYCH. ., 39(4), 493-514 (2008). In an effort to examine the relationship between cultural norms and resource distribution among 151 Filipino (generally collectivist) and American (generally considered individualistic) fifth graders, Carson and Banuazizi

expressed, the child awarding the resources was more likely to choose the individual who had worked hardest (and/or met the goal). From a very early age, American children are taught that individuals should be responsible for themselves.

In *Romer v. Evans*,⁵ the Court addressed the constitutionality of Colorado's Amendment 2 with pervasive individualism serving as an undercurrent.⁶ This amendment, approved by a voter referendum, barred any state action that protected lesbians, gay men, and bisexuals from discrimination.⁷ It further repealed various city ordinances that prohibited sexual orientation discrimination.⁸ The court explicitly avoided the issue of whether sexual orientation deserves heightened scrutiny

developed two scenarios. The scenarios each contained a child who had done a great amount of work and a child who had great need. The children were asked to determine how a reward should be distributed. Although the Filipino and American children both favored equality based distributions first, the American children were more likely to make their decision based on equity (37.9% in first scenario and 23.0% in the second). The Filipino children were more likely to make their decision based on need (47.9% in the first scenario and 42.3% in the second). The Filipino children were more likely than their American counterparts to consider the outcomes associated with their allocation recommendation. Negative feelings and potential conflict (which this author attributes to cultural norms emphasizing the need to maintain smooth interpersonal relations) were mentioned by the majority of Filipino participants. The American participants did not concern themselves with the relational outcomes.

⁵ *Romer v. Evans*, 517 U.S. 620 (1996).

⁶ *Id.* at 624. The amendment provided:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

⁷ *Id.*

⁸ *Id.*

under the Equal Protection Clause of the Fourteenth Amendment.⁹ In avoiding this issue, the Court held that the proposed amendment failed to pass constitutional muster even under rational basis review.¹⁰ In a 6-to-3 decision, the Court held that Amendment 2 of the Colorado State Constitution violated the equal protection clause. The amendment had denied homosexual and bisexual persons the right to seek and receive specific legal protection from discrimination. Justice Kennedy indicated that a law can be upheld under the equal protection clause, even if it seems to disadvantage a specific group, so long as it can be shown to “advance a legitimate government interest.” Amendment 2, by depriving persons of equal protection under the law due to their sexual orientation failed to advance such a legitimate interest.

The *Romer* decision, however, was not the first instance in which the Court has avoided determining the level of review for homosexuals.¹¹ In *Lawrence v. Texas*, the Court had to determine the constitutionality of sodomy laws that the Court had upheld in *Bowers v. Hardwick*.¹² Instead of deciding whether or not sexual orientation is a suspect class or the level of review gay persons would be provided in equal protection lawsuits, the Court in *Lawrence* completely side-stepped the equal protection issue.¹³ In ignoring the equal protection issue,

⁹ *Id.* at 632.

¹⁰ *Id.* The Court stated,

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is 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.

¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹² *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³ *Id.* at 578-79. The Court held that the victims in the case were entitled to be respected for their private lives. *Id.* at 578. The State cannot demean the victims’ existence or control their destiny by making their private sexual

the Court in *Lawrence* decided the case on substantive due process grounds, holding that the sodomy laws unconstitutionally imposed on sexual privacy.¹⁴

While the *Romer* and *Lawrence* decisions failed to directly address the issue of whether sexual orientation is a suspect class requiring laws that discriminate against homosexuals to be subjected to heightened scrutiny,¹⁵ subsequent petitions before the United States Supreme Court asked the high court to determine the constitutionality of Section 3 of the Defense of Marriage Act, which defines marriage, for purposes of federal law, as a legal union between a man and a woman.¹⁶ If the court agrees to hear any of these cases, the level of scrutiny to be applied to laws discriminating against homosexuals should be a central issue in the case. Because there is a growing interest in legal rights for gay persons, courts will soon be forced to address this important issue head on.¹⁷ Courts will have to decide whether sexual orientation meets the requirements of a suspect classification.¹⁸

conduct criminal. *Id.* Their right to liberty under the Due Process Clause endows the victims with the full right to engage in their conduct without interference from the government. *Id.*

¹⁴ *Id.* at 578. The Court noted that the Constitution promises that there is a realm of personal liberty in which the government may not enter. *Id.*

¹⁵ Unlike *Lawrence*, the *Romer* Court decided the case on equal protection grounds. . In *Romer*, the Court, however, determined that the amendment that was at issue was so irrational because it stripped homosexuals of all protections. *Id.* The Court held that the state could not even pass the most lenient rational basis review. *Id.*

¹⁶ Robyn Hagan Cain, *And Then There Were Seven: Court Receives Another Gay Marriage Case*, FINDLAW LEGAL BLOGS (Aug. 27, 2012, 3:14 PM), http://blogs.findlaw.com/supreme_court/2012/08/and-then-there-were-7-court-receives-another-gay-marriage-case.html?DCMP=NWL-cons_legalgrounds.

¹⁷ Kari Balog, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 *Cleve. St. L. Rev.* 545, 553 (2005-2006).

¹⁸ *Id.* As of yet, the Court has refused to recognize homosexuals as a suspect classification. The time has come when the Court can no longer avoid deciding the issue.

This article aspires to provide guidance for courts that can no longer side-step the question of whether sexual orientation is a suspect classification. The analysis compares race and sexual orientation by examining their similar human attributes that require suspect classification protections.

Part I of this article provides an overview of the Equal Protection Clause. This part is followed by an explication of suspect classes, indicating the requirements of a suspect class and a brief review of the groups currently recognized as such. Part III of this article will demonstrate how sexual orientation meets the requirements of a suspect class. Part IV examines equal protection of homosexuality under Canada's Charter of Rights and Freedoms. Part V concludes that laws that discriminate against homosexuals should be held to the same strict scrutiny as laws that discriminate on the basis of race.

I. EQUAL PROTECTION PRIMER

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution holds that no state shall deprive any person of the equal protection of the laws.¹⁹ This amendment requires that similarly situated people should be treated alike.²⁰ By adhering to this mandate, the United States Supreme Court has found that the Equal Protection Clause was enacted to guarantee nothing less than abolition of all cast and invidious class-based legislation.²¹ To achieve this end, the court has developed a three-tiered hierarchy of equal protection review to determine whether a governmental purpose is adequate to justify use of the discriminatory classification in question.²²

¹⁹ U.S. Const. Amend. XIV, § 1.

²⁰ *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

²¹ *Id.* at 213.

²² *Watkins v. U. S. Army*, 885 F. 2d 699, 712 (9th Cir. 1989).

The first standard of review, and the most deferential, is rational basis.²³ Rational basis review requires the party challenging the statute to bear the burden of proof.²⁴ Under this standard, legislative enactments enjoy a presumption of constitutionality as long as the classification is rationally related to a legitimate state interest.²⁵ Rational basis review applies to legislative enactments relating to nearly all economic and commercial legislation.²⁶

Under rational basis scrutiny, a court determines whether the classifications drawn in a statute are reasonable in connection to the purpose of the statute.²⁷ By requiring a nexus between the classifications and the legislative purpose, courts ensure that the purpose of the classification is not to burden the disadvantaged groups.²⁸ This relationship does not have to be demonstrated with precise certainty but should not be so attenuated as to render the distinction arbitrary or irrational.²⁹

The second standard of review is intermediate scrutiny.³⁰ Legislation implicating a quasi-suspect classification is subject to this level of review, essentially requiring that the legislation be substantially related to an important governmental interest.³¹ Gender and legitimacy are two recognizable quasi-suspect classifications.³²

²³ Richard Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky. L. J. 591, 603 (1999-2000).

²⁴ *Heller v. Doe*, 509 U.S. 312, 320 (1992).

²⁵ *Mass. Bd. Of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

²⁶ *U.S. R. R. Ret. Bd. V. Fritz*, 449 U.S. 166, 175-77 (1980).

²⁷ *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

²⁸ *Fritz*, 449 U.S. at 181 (Stevens, J. concurring).

²⁹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

³⁰ Justin Skaggs, *Justifying Gender-Based Affirmative Action Under the United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 Cal. L. Rev. 1169, 1173 (1998).

³¹ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

³² See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Legitimacy refers to a child born within a marriage. Katherine Smith, *Equal Protection for Children of Gay and Lesbian Parents*:

The Supreme Court has never explained why certain factors are significant in determining what classes are deserving of quasi-suspect status.³³ Courts have considered the following factors in determining whether a class is deserving of quasi-suspect status: (1) discrete and insular minority,³⁴ (2) immutability,³⁵ (3) stereotypes and stigmas,³⁶ and (4) political powerlessness.³⁷ Courts are willing to extend additional protection than rational basis review when it is evident that a group would suffer discrimination and would be unlikely to overcome such discrimination.³⁸ This additional protection is classifying certain groups as quasi-suspect.

Intermediate scrutiny shifts the burden of proof from the party challenging the legislative enactment to the government.³⁹ The government bears the burden of proof because courts are better able to determine whether legislative enactments are based in animus directed at a particular group.⁴⁰

Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology, 28 *Law & Ineq.* 307, 316 (2010).

³³ Laurence H. Tribe, *American Constitutional Law* (2d Ed. 1988).

³⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144 n. 4 (1938).

³⁵ *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972).

³⁶ *See Frontiero v. Richardson*, 411 U.S. 677 (1973).

³⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

³⁸ *See supra* notes 35-38.

³⁹ *Frontiero*, 411 U.S. at 688.

⁴⁰ *Cleburne*, 473 U.S. at 440. The Court in *Cleburne* stated,

The general rule is that 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. The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors 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 - a view that those in the class are not as worthy or deserving as others. For these reasons . . . these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. This judicial oversight is necessary when discrimination is unlikely to be timely resolved by legislative means. *Id.*

The third standard of review is strict scrutiny.⁴¹ Government acts implicating a suspect classification or explicitly burdening a fundamental right are subject to strict judicial scrutiny and must be narrowly tailored to further a compelling governmental interest.⁴² For this standard, the government bears the burden of proof.⁴³ In justifying strict scrutiny, the Court in *Plyler* held,

Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.⁴⁴

Under the Equal Protection Clause, courts apply some heightened level of scrutiny where there are reasons to suspect prejudice against a discrete and insular minority, which tends to limit the operation of those political processes to be relied upon to protect minorities.⁴⁵ Courts apply a high level of scrutiny because there is a presumption that classifications that burden some politically powerless groups are likely to reflect antipathy

⁴¹ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 64 *UCLA L. Rev.* 1267, 1277 (2007).

⁴² *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Certain classifications are presumptively not permitted on the ground that they are illegitimate. Nelson Tibbe and Deborah Widiss, *Equal Access and the Right to Marry*, 158 *U. Pa. L. Rev.* 1375, 1407 (2010). Because these classifications are presumptively disallowed, they must be justified by the state with doubts and ambiguities resolved against the government. *Id.* Race, national origin, and alienage are among the classifications that must be justified by a compelling state interest under the strict scrutiny standard of review. *Id.*

⁴³ *Cleburne*, 411 U.S. at 440.

⁴⁴ *Plyler v. Doe*, 457 U.S. 202, 216 n. 14 (1982).

⁴⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

against such groups and that such classifications are inherently suspect. Thus they require being strict scrutiny.⁴⁶ John Hart Ely noted that the doctrine of suspect classifications is a way of revealing official attempts to impose inequality for its own sake.⁴⁷ The concept of suspect classification is also a way to uncover official attempts to treat a particular group worse not in the service of overriding social goals but for the sake of simply disadvantaging its members.⁴⁸

II. SUSPECT CLASSIFICATIONS AND THE INDICIA OF SUSPECT CLASSIFICATION STATUS

The Supreme Court has recognized race,⁴⁹ alienage,⁵⁰ and national origin⁵¹ as suspect classifications. In this paper, we will argue that sexual orientation deserves inclusion in this list. This section will demonstrate how sexual orientation meets the criteria for determining whether a group is suspect. First we discuss

⁴⁶ *Plyler v. Doe*, 457 U.S. 202, 216 n. 14 (1982). Courts will view certain classifications “with skepticism, if not a jaundiced eye” in part because certain classifications are likely to be the result of animus rather than a desire to promote legitimate state goals, and in part because the normal correction mechanism within the political process may not operate fairly when these groups are involved. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

⁴⁷ Suzanne Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 502-03 (2004) (quoting John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 153 (1980)).

⁴⁸ *Id.*

⁴⁹ *Korematsu v. United States*, 323 U.S. 214 (1944). The court ruled that racial classifications are inherently suspect and subject to the most rigid scrutiny. *Id.* at 216.

⁵⁰ *Graham v. Richardson*, 403 U.S. 365 (1971). The court held that classifications based on alienage are immediately suspect because noncitizens are a perfect example of a discrete and insular minority for whom heightened judicial care is warranted. *Id.* at 372.

⁵¹ *Hirabayashi v. United States*, 320 U.S. 81 (1943). The court found that classifications on the basis of ancestry or national origin, similar to race, are inherently suspect. *Id.* at 100. Although in dicta, religion has been included in the list of suspect classifications. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam).

the appropriateness of race as analogous due to the immutability of race and sexual orientation. Then we will independently discuss each factor that the courts use to determine whether a class is suspect and show how sexual orientation fulfills each element.

We argue that race provides an appropriate basis for comparison because both race and sexual orientation are immutable characteristics.⁵² Alienage, is less relevant as a comparator because alienage is not an immutable⁵³ trait, although arguably it meets all the other indicia of being a suspect classification.⁵⁴

⁵² *Frontiero v. Richardson*, 411 U.S. 677, 686 (1976) (holding that race is an immutable characteristic). *See also* *Equality Found. Of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994), cert. denied, 525 U.S. 943 (1998). In this case, the court relied on credible and un rebutted evidence concluding that sexual orientation is an immutable characteristic that is beyond the individual's control. *Id.* Various state courts have determined that sexual orientation is an immutable characteristic resulting in these courts using a heightened level of review. *See, e.g.,* *Varnum v. Brien*, 763 N.W. 2d 862, 892 (Iowa 2009). *See also* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 *Colum. L. Rev.* 1753, 1831 (1996). The pro-gay position that homosexuality is immutable is based on scientific studies concluding that there are important differences between the brains of homosexuals and heterosexuals. *Id.* Courtney Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 *Duke J. Gender L. & Pol'y* 385, 389 (2010). Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 *UCLA L. Rev.* 471, 480-81 (2001). Scholars argue that sexual orientation is not chosen. *Id.* This argument is made because people should not be punished for something that they have no control over. *Id.* Scholars who support this argument rely on scientific research showing that sexual orientation is innate or biologically determined. *Id.*

⁵³ An immutable trait is one that is unchangeable. Strictly speaking, alienage is not an immutable characteristic because one can always become a citizen. THOMAS, SIMON, *DEMOCRACY AND SOCIAL INJUSTICE: LAW, POLITICS AND PHILOSOPHY*, at 7 (1995)

⁵⁴ *See, e.g.,* *Able v. United States*, 968 F. Supp. 850, 863 (E.D.N.W. 1997) (holding that alienage is not an immutable characteristic); *Smothers v. Benitez*, 806 F. Supp. 299, 306 n. 10 (D.P.R. 1992). The court noted that alienage is not immutable because aliens can become citizens. *Id.* *Assuming, arguendo, that religion is a suspect classification, religion is not analogous to sexual*

However, some scholars do argue that race does not provide this basis for comparison because sexual orientation is a mutable characteristic.⁵⁵ These scholars adopt the view that sexual orientation is a choice.⁵⁶

orientation because the former is a mutable characteristic. Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of Don't Ask, Don't Tell, 108 Yale L. J. 485, 495 (1998). Courts are reluctant to grant religious classification heightened scrutiny because religious discrimination cases have traditionally been decided under the First Amendment. Benjamin Hoorn Barton, Note: Religious-Based Preemptory Challenges After Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis, 94 Mich. L. Rev. 191, 204 (1995).

⁵⁵ See, e.g., Devon Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. Rev. 1467, 1480 (2000). John Butler, perhaps the most distinguished black American military sociologist, espoused the view that race is a static identity and that sexual orientation is a changeable lifestyle. *Id.* at 1479. Butler argued that the comparison between sexual orientation and race is tantamount to comparing a characteristic that is achieved with one that is ascribed or comparing a choice in expressed lifestyle with one that is not a choice. *Id.* at 1481. Dean Byrd, *Homosexuality: Innate or Immutable?*, 14 Regent U. L. Rev. 383, 388 (2001-2012). Simon Levay, who found subtle but important differences between the brains of homosexual men and heterosexual men, stressed that he did not prove that homosexuality is genetic or find a genetic cause for being gay. *Id.* Levay also noted that he did not prove that gay men are born gay. *Id.* J. M. Bailey and R. C. Pillard conducted another study concluding that environmental factors significantly contribute to sexual orientation. *Id.* at 390. Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1001 (2007). Dean Hamer, the author of the "Gay Gene" study, noted that homosexuality is not purely genetic and environmental factors play a role. *Id.* Hammer further explained that there is not a single gene that makes people gay. *Id.*

⁵⁶ See, e.g., Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 517 (1994). Former Vice President Dan Quayle became the most notable proponent of this view during the 1992 presidential campaign. *Id.* Quayle announced, "My viewpoint is that it's more of a choice than a biological situation. I think it is a wrong choice." *Id.* Larry Mutz, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay-and-Lesbian Rhetoric*, 27 WOMEN'S RTS. L. RPT. 69, 79 (2006). Anti-gay activists assert that homosexuality is a chosen lifestyle. *Id.* This assertion assumes that homosexuality is not a sexual orientation. *Id.* This assertion further assumes that homosexuality is a lifestyle constituted of sexual acts. *Id.*

The debate surrounding immutability of sexual preferences is crucial for this discussion. Should someone relying on the traditional meme of individualism conclude that sexual preference is a choice, it follows that the consequences of that choice are themselves the responsibility of the chooser. But claiming that sexual preference is a choice is incorrect for multiple reasons. The first reason is extensive evidence that sexual orientation is genetic, biological, and inherent.⁵⁷ Secondly, even if sexual orientation is not genetic, for purposes of constitutional law, homosexuality is an immutable characteristic because it cannot be changed without involving substantial difficulty or cost.⁵⁸ For gays and lesbians to change or be forced to change their orienta-

⁵⁷ Jonathan Pickhardt, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N. Y. U. L. REV. 921, 930 (1998). Scientist Dean Hamer noted that he was 99.5 percent sure that there was some genetic influence in forming sexual orientation. *Id.* Kari Balog, *Equal Protection for Homosexuals: Why the Immutable Argument is Necessary and Why It Is Met*, 53 CLEVE. ST. L. REV. 545, 560 (2005-2006). Doctors and scientists recognize that sexual orientation is not subject to change and is most likely determined at birth. *Id.* Although these doctors and scientists have not prove that there is a definitive cause for homosexuality, they nevertheless conclude that homosexuality is beyond an individual's control and that it is unlikely to change. *Id.* While there is no definitive proof that homosexuality is completely genetic, there is, however, no definitive proof that homosexuality is the result of social factors. *Id.* at 557. Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 938 (1989). Alan Bell, Martin Weinburg, and Sue Kiefer Hammersmith concluded that when boys and girls reach adolescence, these boys' and girls' sexual orientation is likely to already be determined. *Id.* Bell, Weinburg, and Hammersmith argue that such a conclusion would reaffirm that discrimination against homosexuals is no more justified than discrimination against redheads or blue-eyed persons. *Id.*

⁵⁸ Fernando Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEXUALITY 195, 222 (1994). A trait is considered immutable if to change the trait would be a great psychological, economic, or social cost to the individual. *Id.* Even gender is not completely immutable. *Id.* The reason is women can pay a significant amount of money to receive a sex change. *Id.* Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 228 (1998). Immutable does not mean the literal definition of immutability. *Id.*

tion would be at an immense psychological cost.⁵⁹ Lastly, sexual orientation is immutable because it is so integral to a person's identity that it would be unreasonable for the government to penalize a person for refusing to change.⁶⁰

The immutability element, however, is but one factor courts look at in determining whether a class is suspect.⁶¹ Other factors courts consider in granting suspect status are: (1) whether the group is a discrete and insular minority,⁶² (2) whether the group has been subjected to historical discrimination,⁶³ (3) whether the group has faced social stigmatization,⁶⁴ (4) whether the group is politically powerless,⁶⁵ and (5) whether the trait has any connection to the individual's ability to contribute to society.⁶⁶

A. *Discrete and Insular Minority*

It is imperative to first note that there is no commonly accepted definition of the terms "discrete" and "insular."⁶⁷ Professor Bruce Ackerman, however, provided the most widely accepted explanation for the terms "discrete and insular" minor-

⁵⁹ *Id.*

⁶⁰ Zamansky, *supra* note 52, at 252. Michael Helfand, *The Usual Suspect Classifications: Criminals, Aliens, and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 6-7 (2009). See also *Kerrigan v. Comm'r of Pub. Health*, 957 A. 2d 407, 438 (Conn. 2008).

⁶¹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

⁶² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n. 4 (1938).

⁶³ *Frontiero*, 411 U.S. at 684-85.

⁶⁴ *Id.*

⁶⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁶⁶ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1976).

⁶⁷ Sarona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1235 (2003). See also Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 148-49 (2011). In early cases, courts conclusorily stated that a particular group was or was not discrete and insular. *Id.* Because courts failed to define these terms, it is unclear what must be established for a court to consider a group discrete and insular. *Id.* at 149.

ity.⁶⁸ Professor Ackerman defined discreteness as a visible characteristic.⁶⁹ That is, a group is discrete if it is visible in a way that makes the group relatively easy for others to identify.⁷⁰ A group is insular if it tends to interact with other members of the group with great frequency in a variety of social contexts.⁷¹

Race is a discrete minority because racial minorities exhibit visible and identifiable characteristics.⁷² Skin color is an immediately obvious and permanent characteristic present at birth.⁷³ African-American individuals, for example, are perceived as such based on their skin color.⁷⁴ Even if they wanted to, many blacks could not pass for white because their physiognomies proclaim them to be black in a society that has given that label to people containing certain characteristics.⁷⁵

Sexual orientation is also a discrete minority because gay people have distinguishing and obvious characteristics classifying them as a distinct group.⁷⁶ Although gay people are identifiable,

⁶⁸ Strauss, *Id.* at 149.

⁶⁹ Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729 (1985).

⁷⁰ *Id.*

⁷¹ *Id.* at 726. This definition includes two concepts. *Id.* at 726 n. 24. The first concept is breadth involving the number of different sociological settings in which a particular group interacts. *Id.* In this respect, a group is more insular because it interacts in more settings. *Id.* Some of these settings are (1) schools, (2) churches, and (3) unions. *Id.* The second concept is intensity involving the importance group members associate with these social settings. *Id.*

⁷² Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1211 (2004).

⁷³ Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 793 (2005).

⁷⁴ *Id.* at 794.

⁷⁵ *Id.*

⁷⁶ Janine Dascenzo and Neal May, *Cleaning Out the Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy*, 23 U. TOL. L. REV. 433, 460 (1992). See Marc Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL'Y REV. 37, 40 (2001). See Marc Fajer, *A Better Analogy: "Jews" and "Homosexuals," and the Inclusion of*

they are coerced to conceal their status to avoid discrimination.⁷⁷ Many gay people are afraid to disclose their sexual differences to a society that labels their behavior unacceptable.⁷⁸

Scholars argue that race does not provide a basis for comparison because race is a visible characteristic.⁷⁹ Specifically, schol-

Sexual Orientatuin as a Forbidden Characteristic in Antidiscrimination Laws, 12 STAN. L. & POL'Y REV. 37, 40 (2110)

⁷⁷ John Charles Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. REV. 375, 377 (1990). Homosexuals are subjected to a vast array of official and unofficial discrimination that affect every aspect of their lives. *Id.* The ramifications of a gay person identifying himself or herself as a gay person are so severe and pervasive that he or she is forced to conceal his or her identity as a homosexual. *Id.* Discrimination against homosexuals has a long history. *Id.* This discrimination is actively promoted by state and federal governments in such areas as public employment and family law. *Id.*

⁷⁸ Jack Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCER L. REV. 189, 202 (1999). A majority of Americans believe that homosexuality is morally repugnant. *Id.* A minority of this number believe that homosexuality should be criminalized. *Id.* Opinion seems to vary among racial and ethnic groups. *Id.* at 202 n. 34. In a poll of 1000 Californians, 64% of Latino respondents thought homosexuality was morally repugnant as compared to 58% of black respondents and 36% of white respondents. *Id.* See also Charles Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 853 n. 59 (1998). Today and particularly in the past, the most common view of homosexuality is that it is an aberration and homosexual behavior is morally wrong. *Id.*

⁷⁹ Kennedy, *supra* note 67, at 793. These scholars argue that race and sexual orientation are not similar because race is an unchangeable characteristic that is visible. *Id.* In contrast, sexual orientation is a matter of chosen behavior that can be hidden. *Id.* These scholars further argue that skin color is an immediately visible characteristic. *Id.* Sexual orientation, on the other hand, is not. *Id.* That is, people do not know if a person is gay unless that person discloses that information. *Id.* African Americans, for example, do not have this same option. *Id.* See also Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 294 (1994). Sexual orientation is different from race because sexual orientation is both chosen and behavior. *Id.* Because sexual orientation is chosen, it is beyond the pale of civil rights protection. *Id.* Homosexuals are not entitled to civil rights protection because civil rights laws protect people for who they are and not for what they do. *Id.*

ars argue that gay people have a choice not to reveal their sexual orientation.⁸⁰ Racial minorities, however, do not have this same choice because race is usually revealed by appearance.⁸¹ Because gay people have a choice not to disclose their sexuality, they can avoid discrimination in a way that most racial minorities cannot.⁸² This proposition ignores the fact that race can be visibly hidden, it is somewhat susceptible to change, and it is sometimes culturally determined.⁸³ That is, race is not always visibly clear. For example, miscegenation statutes claimed “one drop” made a person African American, but the one drop was not always ascertainable.⁸⁴ Although their blood would classify them as otherwise, African Americans have “passed” as white.⁸⁵

Race is an insular minority because there are many settings that are vital sources of affirming the identity of racial minori-

⁸⁰ Ackerman, *supra* note 63, at 729. Gay people have the choice to keep their sexual orientation a private affair avoiding the public opprobrium attached to their minority status. *Id.* It is for this reason Ackerman considers homosexuals, and groups like them, anonymous minorities. *Id.*

⁸¹ *Id.* For instance, a black woman cannot do anything to hide the fact that she is a black woman. *Id.* Because a black woman cannot conceal the obvious fact that she is a black woman, she will have to deal with the social expectations and stereotypes caused by her evident group characteristics. *Id.*

⁸² Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. Pa. L. Rev. 193, 204 (1979).

⁸³ Kari Balog, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 CLEVE. ST. L. REV. 545, 555 (2005-06).

⁸⁴ *Id.* at 555 n. 77.

⁸⁵ *Id.* See also Frank Wu, *From Black to White and Back Again*, 3 ASIAN L. J. 185, 186 (1996) (noting that race is a social construct rather than being a scientific reality). See Kennedy, *supra* note 67 at 794. Walter White, an executive secretary of the NAACP, described himself as a “voluntary negro” because his appearance allowed him to pass as a white man. *Id.* Gregory William Howard, the current president of the City College of New York, described how his father had the ability to live as a black man and as a white man because of the father’s outward appearance. *Id.* Howard also described how he lived on both sides of the race line. *Id.*

ties.⁸⁶ There is a litany of interest groups that cater to the needs of racial minorities.⁸⁷ Some of these groups are: National Conference of Black Mayors; national civil rights organizations; National Association for the Advancement of Colored People; Congressional Black Caucus; Mexican American Legal Defense and Education Fund; Puerto Rican Defense Fund; and Black Women Organized for Political Action.⁸⁸ Irrespective of these groups, racial minorities interact with other racial minorities with great frequency,⁸⁹ especially because white and black Americans often still live apart from each other.⁹⁰

Commentators argue that gay people do not arise to the same level of insularity as do racial minorities.⁹¹ The proffered reason is that gay people have a few social contexts that serve as the center of activity for reaffirmation of gay identities.⁹² These contexts that serve as loci for the reaffirmation of gay identity

⁸⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938). See also Abner S. Green, *Kiryas Joen and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 58 (1996) (noting that the court increased judicial review in order to protect racial minorities as they constitute a discrete and insular minority).

⁸⁷ Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2244 n. 29 (1992).

⁸⁸ *Id.*

⁸⁹ Michael Potter, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance"DDD*, 63 S. CAL. L. REV. 1151, 1165 (1990). Statistics demonstrate that a majority of blacks rarely interact with whites, live in predominantly black neighborhoods, and socialize with only black residents. *Id.* In this country, blacks are the most spacially isolated racial group. *Id.*

⁹⁰ Vivian Morris and Curtis Morris, *Before Brown, After Brown: What has Changed for African-American Children?*, 16 U. FLA. J. L. & PUB. POL'Y 215, 223 (2005).

⁹¹ Ackerman, *supra* note 63, at 729. Sexual orientation differs from race because the former is somewhat insular where the latter is insular. *Id.* Homosexuals are somewhat insular because they do not share a broad range of social settings in which they interact as homosexuals. *Id.* at 729 n. 28.

⁹² *Id.* at 729 n. 28.

are most notably bars and restaurants found in major American cities.⁹³

Gay people, however, are also insular because they have a broad range of sociological settings that are important sources of reaffirming gay identity.⁹⁴ In the 1980s, especially in major cities, the range of sources of gay networking clearly went beyond the gay bars and restaurants that were once the only public meeting places for gay persons.⁹⁵ National publications such as Gayellow Pages noted the massive growth of gay-affiliated political organizations.⁹⁶ Gayellow Pages also evidenced the huge growth of gay-affiliated counseling centers, businesses, lawyers, public accommodations, and health care, religious, educational, and entertainment services.⁹⁷ These affiliations support the concept of “gay minority.”⁹⁸

Alternatively, courts consider several factors in determining whether a group constitutes a discrete and insular minority deserving the benefit of heightened scrutiny.⁹⁹ These factors include: (1) whether the group’s defining characteristic is immutable, (2) whether the group has suffered a history of discrimination, (3) whether the group is in a position of political powerlessness, (4) whether the group’s defining characteristic relates in any way to the individual’s ability to participate in and contribute to society, and (5) whether the characteristic is be-

⁹³ *Id.*

⁹⁴ Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN’S RTS. L. REP. 263, 276 (1992).

⁹⁵ *Id.* at 276 n. 115.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See, e.g., Michael Scaperlanda, *Illusions of Liberty and Equality: An “Alien’s” View of Tiered Scrutiny, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 26 (2005) (noting that to determine whether a group is a discrete and insular minority, courts must consider whether the group suffered a history of discrimination, lacks political power, and has an immutable characteristic); Hoffman, *supra* note 61, at 1235.

yond the control of the individual group member.¹⁰⁰ As discussed below, gay people and racial minorities are discrete and insular minorities because both gays and racial minorities are able to satisfy the foregoing factors.

B. History of Discrimination

It is axiomatic that racial minorities have been subjected to a history of discrimination.¹⁰¹ This discrimination was evident in the institution of slavery, which stripped Black Americans of all their human, civil, political, and social rights.¹⁰² One can never forget the huge amount of lynching that occurred in the south.¹⁰³

The landmark case of *Dred Scott v. Sanford*¹⁰⁴ held that even if Blacks were “free,” they were not “citizens” of the United States.¹⁰⁵ This ruling was not overturned until the passage of the Thirteenth and the Fourteenth Amendments in 1865 and 1868 respectively.¹⁰⁶ These amendments emancipated Blacks, expressly granted them citizenship status, and sought to protect their civil rights.¹⁰⁷ It was not until 1870 when blacks were extended the political rights of citizenship through the passage of the Fifteenth Amendment, which gave them the right to vote.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ Ian F. Haney Lopez, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985, 1021 (2007).

¹⁰² Sandra Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment under the Fourteenth Amendment*, 1 *DUKE J. GENDER L. & POL’Y* 89, 89 (1994).

¹⁰³ R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803, 863 (2004).

¹⁰⁴ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

¹⁰⁵ *Id.* at 416.

¹⁰⁶ U.S. CONST. amend. XIII. See also U.S. CONST. amend. XIV

¹⁰⁷ The thirteenth Amendment abolished the institution of slavery. *Id.* It was the Fourteenth Amendment that granted former slaves citizenship. U.S. CONST. amend. XIV. This amendment also guaranteed these former slaves due process of the law and equal protection of the laws. *Id.*

¹⁰⁸ U.S. CONST. amend. XV. Beginning in the colonial times, and the first one hundred years of this nation’s independent, blacks were precluded from

Despite the fact that blacks were endowed with certain rights as citizens, they endured years of racism and segregation due to laws mandating segregation passed in the late 1880s and 1890s.¹⁰⁹ The Supreme Court affirmed one of these laws in the case of *Plessy v. Ferguson*.¹¹⁰ The law in *Plessy* was a Louisiana statute requiring separate railway cars for blacks and whites.¹¹¹ The court in *Plessy* established the “separate but equal” rule to justify segregation.¹¹²

Without much judicial resistance, state legislative bodies continued to enact a slew of race-based laws.¹¹³ The preclusion of individuals based on race remained uncontested until *Korematsu v. United States*.¹¹⁴ After the attack on Pearl Harbor, the Supreme Court affirmed the conviction of a Japanese American for violating a civilian exclusion order.¹¹⁵ This order mandated the exclusion of all persons of Japanese ancestry from a designated military area.¹¹⁶

voting. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 56-57 (2000). Even most free blacks were excluded from suffrage before the Civil War. *Id.* at 57. In the United States, voting discrimination was not limited to a particular region. *Id.* For the blacks who were able to vote, their votes were rendered ineffective. *Id.* That is, there was racial gerrymandering that diluted these votes. *Id.* Blacks were also excluded from voting with the adoption of poll taxes and literary tests. *Id.* at 58-59.

¹⁰⁹ Brandon Robinson, *Johnson v. California: A Grayer Shade of Brown*, 56 DUKE L. J. 343, 349 (2006).

¹¹⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹¹¹ *Id.* at 542.

¹¹² *Id.* at 544.

¹¹³ See, e.g., *Berea Coll. V. Kentucky*, 211 U.S. 45, 58 (1908). In this case, the court upheld a trial conviction of a college because this college violated a state statute by admitting both black and white students. *Id.* *McCabe v. Atchison*, 186 F. 966, 969 (8th Cir. 1911) (upholding an Oklahoma statute mandating racial segregation of railway cars); *Hayes v. Crutcher*, 108 F. Supp. 582, 584-85 (M.D. Tenn. 1952) (upholding the separate but equal standard with respect to public golf courses).

¹¹⁴ *Ko rematsu v. United States*, 323 U.S. 214 (1944).

¹¹⁵ *Id.* at 215-16.

¹¹⁶ *Id.*

The approval, however, of legal restrictions that violated the civil rights of a racial group was ephemeral.¹¹⁷ During the 1952 term, the Supreme Court began scrutinizing the premise of the “separate but equal” doctrine.¹¹⁸ The Court reviewed five cases that contested the *Plessy* “separate but equal” doctrine in public education.¹¹⁹ In *Brown v. Board of Education*,¹²⁰ the court held that “in the field of education the doctrine of ‘separate but equal’ has no place.”¹²¹

Even after *Brown*, blacks still faced discrimination through the prohibition of interracial marriage.¹²² If a black person attempted to marry a white person, both parties faced criminal charges.¹²³ It was not until 1967, in the case of *Loving v. Virginia*,¹²⁴ when the laws barring interracial marriage were

¹¹⁷ Robinson, *supra* note 105, at 350.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 351.

¹²⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In *Brown*, blacks were seeking aid from the court in obtaining admission to public schools of their community on a nonsegregated basis. *Id.* at 487. Under laws permitting or mandating segregation, blacks were denied access to public schools attended by whites. *Id.* at 488. The court ruled that segregation of public schools on the basis of race, even though the facilities were virtually equal, deprived blacks of equal educational opportunities. *Id.* at 493. The court noted that to separate blacks from whites on the basis of race creates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone. *Id.*

¹²¹ *Id.* at 495.

¹²² Elizabeth Cooper, *Who Needs Marriage?: Equality and the Role of the State*, 8 J. L. & FAM. STUD. 325, 326 (2006).

¹²³ Steven Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 304 (1995).

¹²⁴ *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, Mildred Jeter and Richard Loving married in the District of Columbia. *Id.* at 2. Shortly after the marriage, the Lovings returned to Virginia. *Id.* Subsequently, the Lovings were charged with violating a state statute banning interracial marriage. *Id.* at 3. The Lovings pleaded guilty to the charge and were sentenced to one year in prison. *Id.* The trial judge, however, suspended the sentence on the condition that the Lovings leave Virginia for 25 years. *Id.* This judge stated,

declared unconstitutional.¹²⁵

Opponents of the comparison between race and homosexuality posit that the economic and social consequences of discrimination are much more severe for racial minorities than for homosexuals.¹²⁶ Even if the discrimination against racial minorities is more severe than the discrimination against gay persons, one still cannot deny the fact that homosexuals and racial minorities have been, and continue to be, the target of purposeful and pernicious discrimination.¹²⁷ This discrimination against homosexuals is apparent in many aspects.¹²⁸

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id. After their convictions, the Lovings moved to the District of Columbia. *Id.* The Lovings filed a motion to vacate the judgment and set aside the sentence on the ground that the statutes, which they had violated, were violative of the Fourteenth Amendment. *Id.* The court held that there was no doubt that restricting the freedom to marry on the basis of racial classifications violated the essence of the Equal Protection Clause. *Id.* at 12. The court further held that the Virginia statute was in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* In so doing, the court noted that the freedom to marry is recognized as a vital personal right essential to the orderly pursuit of happiness by free men. *Id.*

¹²⁵ *Id.*

¹²⁶ Schacter, *supra* note 74, at 291-92. Whatever the degree of social alienation that has accompanied perceptions of homosexuality, discrimination against homosexuals has never been as explicitly and systematically incorporated in the American legal system as has racism. Fajer, *supra* note, 71. The long-term effects of anti-gay discrimination do not include a high degree of spatial segregation nor a nearly permanent underclass. *Id.* In the United States, the long-term effects of discrimination against racial minorities do encompass a high degree of spatial segregation and a nearly permanent underclass. *Id.* at 38-39.

¹²⁷ C. Brett Miller, *Same-Sex Marriage: An Examination of the Issues of Due Process and Equal Protection*, 59 ARK. L. REV. 471, 499 (2006) (noting that the discrimination faced by gay persons is no less pernicious or intense than the discrimination faced by other groups treated as suspect classes).

¹²⁸ Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly, or Otherwise*, 64 TEMP. L. REV. 937, 948 (1991). Histori-

First, The United States has criminalized homosexual conduct in the past.¹²⁹ North Carolina's "crime against nature" had long criminalized oral or anal sex regardless of the gender or age of the participants and the location of the act.¹³⁰ Before the landmark case of *Lawrence v. Texas*,¹³¹ eight states had changed the "crime against nature" to criminalize only same sex acts.¹³² One of the most significant cases that pertains to the criminalization of homosexual conduct is *Bowers v. Hardwick*.¹³³ In *Bowers*, Michael Hardwick was arrested in his own bedroom for making love with another consenting adult and charged with sodomy.¹³⁴ Though Hardwick was not prosecuted, he filed a federal civil rights challenge to the statute, arguing that it violated his fundamental right of privacy.¹³⁵

Writing for a majority of five, Justice White concluded that the constitutional right of privacy did not extend to homosexual sodomy.¹³⁶ Essential to the majority's treatment of the case was its claim that homosexual sodomy has always been viewed as criminal; it was a criminal offense at common law and was criminalized by the first thirteen colonies at the time they ratified the Bill of Rights.¹³⁷ Justice White's opinion relied on the asserted antiquity of proscriptions against homosexual sodomy

cally, gay persons have been the object of pernicious and sustained hostility. *Id.* Discrimination against gay persons is more likely than not to reflect deep-seated prejudice as opposed to rationality. *Id.*

¹²⁹ Christopher Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 158 (2000).

¹³⁰ N.C. GEN. STAT. § 144-177 (2000). "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." *Id.*

¹³¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³² Michael Curtis, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 158 (2008).

¹³³ 478 U.S. 186 (1986).

¹³⁴ *Id.* at 187-88.

¹³⁵ *Id.* at 188.

¹³⁶ *Id.* at 191.

¹³⁷ *Id.* at 192.

to understand Hardwick's conduct.¹³⁸ Justice White cited ancient proscriptions to demonstrate that the framers could not have intended the Bill of Rights or the Fourteenth Amendment to protect Hardwick's homosexual sodomy and to support White's view that homosexual sodomy is sinful and immoral.¹³⁹ Because homosexuality is sinful and immoral, Justice White asserted that homosexuality is now, as it always has been, properly punished by the criminal law.¹⁴⁰

Second, homosexuals were dismissed from military service because of their sexual orientation.¹⁴¹ Until recently, homosexuals were not allowed to openly serve in the military because of "Don't Ask, Don't Tell (DADT)."¹⁴² DADT, which was a federal statute and military policy, prohibited recruiters from asking individuals about their sexual orientation and prevented gay service members from disclosing their sexual orientation through word or deed.¹⁴³ DADT barred gay service members from (1) engaging in homosexual acts, (2) stating that they are homosexual, or (3) marrying a person of the same sex.¹⁴⁴ The policy behind DADT was the proposition that permitting the service of individuals who have an inclination to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.¹⁴⁵

¹³⁸ *Id.*

¹³⁹ *Id.* at 192-93.

¹⁴⁰ *Id.*

¹⁴¹ Paul Secunda, *The Solomon Amendment: Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1773 (2007).

¹⁴² *Id.* Law schools started denying military recruiters access to their campus. *Id.* These schools were loath to promote the military's policy of discriminating against homosexuals. *Id.* Congress reacted by enacting the Solomon Amendment. *Id.* This amendment withholds certain federal funding from colleges and universities if they deny the military recruiters access to the campus and the students on the campus. *Id.*

¹⁴³ 10 U.S.C. § 654(b) (2000).

¹⁴⁴ *Id.*

¹⁴⁵ 10 U.S.C. § 654(a)(15) (2000). In 2010, the senate repealed Don't Ask, Don't Tell. S. 4023, 111th Cong. (2010). The repeal, however, did not take

Third, gay persons have been victims, and continue to be victims, of a significant number of hate crimes in the United States.¹⁴⁶ As an example, Jamie Nabozny entered the seventh grade and at that time he realized he was gay.¹⁴⁷ Unfortunately, Jamie's classmates also realized that Jamie was gay.¹⁴⁸ Consequently, Jamie was frequently called "faggot" and he was spat upon on many occasions.¹⁴⁹ This harassment, however, escalated culminating in a physical attack during class.¹⁵⁰ After the teacher stepped out of the room, two male students grabbed Jamie, pushed him to the floor, held him down, and performed a mock rape on him.¹⁵¹ No disciplinary action was taken.¹⁵² Unfortunately, this attack was not the only attack. Another attack resulted in Jamie suffering internal bleeding.¹⁵³

And as horrible as the attack on Jamie was, at least he lived. Others, like Matthew Shepard, were not so fortunate. The college student was tied to a fence, beaten, and left to die on the outskirts of Laramie, Wyoming in 1988.¹⁵⁴

effect until the President, the Secretary of Defense, and Joint Chiefs of Staff certified to Congress their acceptance and the Department of Defense provided new regulations to enforce the nondiscrimination policy. Anthony Noto, *Lawrence and the Morality of "Don't Ask, Don't Tell" After Lofton, Witt, and Cook: The Law Before and After Repeal*, 7 SETON HALL CIRCUIT REV. 155, 160 (2010).

¹⁴⁶ John Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse "Reparative" Therapy*, 11 BUFF. WOMEN'S L. J. 67, 71 (2002/2003). The U.S. Department of Justice provides that gay persons are probably the most frequent victims of hate crimes. *Id.* Hate crimes are crimes that are committed against a particular group. *Id.*

¹⁴⁷ *Nabozny v. Podlesny*, 92 F. 3d 446, 451 (7th Cir. 1996).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 452.

¹⁵⁴ Gregory Kouki, *Matthew Shepard and Hate Crimes*, Stand to Reason, <http://www.str.org/site/News2?page=NewsArticle&id=5443> (accessed 01/10/2013). Matthew Shepard's story has been cited by many as an illustration of the inhumane treatment homosexuals have been subjected to in our country.

It would be comforting to think that the attack on Matthew Shephard and Jamie's experience were just rare, isolated events, but unfortunately they were not.¹⁵⁵ Gay youth are more likely than their straight peers to be victims of violence at school.¹⁵⁶ The U.S. Justice Department reports that homosexuals are probably the most frequent victims of hate crimes.¹⁵⁷ The Federal Bureau of Investigation maintains statistics indicating that in 2008 17.6% of the victims of hate crimes were targeted based on their sexual orientation.¹⁵⁸ According to the Centers for Disease Control, one in six gay and lesbian teenagers is beaten up so badly during high school that they require medical attention.¹⁵⁹

C. Social Stigmatization

Racial minorities have been subjected to incorrect stereotyping and social stigmatization.¹⁶⁰ African-American men, for example, are perceived by society as being more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society.¹⁶¹ A harsh reality is that crime has become a metaphor to describe young black men.¹⁶² Because blacks are seen as criminals, people generally perceive acts to be violent when a Black person engages in these acts and

¹⁵⁵ Theresa Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 584 (1999).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Federal Bureau of Investigation Uniform Crime Reports, *available at* <http://www.fbi.gov/ucr/hc2008/victims>.

¹⁵⁹ Bryant, *supra* note 151, at 854.

¹⁶⁰ Girardeau Spann, *Affirmative Inaction*, 50 HOW. L. J. 611, 613 (2007).

¹⁶¹ Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 403 (1996). Black women also suffer from stereotypical perceptions. *Id.* For example, black women are perceived as untrustworthy, criminals, and dangerous. *Id.*

¹⁶² *Id.*

benign when a non-Black person engages in the same acts.¹⁶³ Blacks are also treated as if they are all potential thieves.¹⁶⁴ Most blacks have been denied entry to a store, closely watched, snubbed, questioned about their ability to pay for an item, or stopped and detained for shoplifting.¹⁶⁵

A stereotype that Asian Americans face is that people associate Asian Americans with foreignness.¹⁶⁶ This stereotype is still evident today.¹⁶⁷ To illustrate, two Asian Americans, who were associated with the O.J. Simpson trial and who spoke without a noticeable accent, were portrayed as bumbling, heavily-accented Asians who were unable to speak English.¹⁶⁸ The Asian-as-foreigner stereotype takes on harsh ramifications.¹⁶⁹ In 1982, Ronald Ebens and Michael Nitz, two White Detroit autoworkers, struck Vincent Chin, a Chinese American, to death with a baseball bat.¹⁷⁰ While beating Vincent, the two perpetrators called

¹⁶³ *Id.* at 404-05. Birt Duncan tested this hypothesis on 104 White undergraduate students. *Id.* at 405. The participants observed two people engaged in a heated argument that resulted in one shoving the other. *Id.* After the shove, the participants were told to rate the behavior of the person who shoved the other person. *Id.* Duncan concluded that when the person shoving was a Black person and the person being shoved was White, 75% of the participants perceived the shove as violent behavior, while 6% thought the shove was playing around. *Id.* at 405-06. Conversely, when participants observed the same events with a White person as the shover and a Black person as the victim, 17% thought the White person's shove was violent, while 42% characterized the White person's shove as playing around. *Id.* at 406.

¹⁶⁴ Theresa Martinez, *Embracing the outlaws: Deviance at the Intersection of Race, Class, and Gender*, 1994 UTAH L. REV. 193, 198 (1994).

¹⁶⁵ Regina Austin, *A Nation of Thieves: Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 149 (1994).

¹⁶⁶ Lee, *supra* note 157, at 430.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 431.

¹⁷⁰ Darren Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 91 (1999).

him a “Nip” and accused him of contributing to the loss of jobs in the automobile industry.¹⁷¹

Similar to Asian Americans, Latino Americans are associated with foreignness.¹⁷² Some people also perceive Latino Americans, if they are brown-skinned persons who speak English with a Spanish accent, as illegal immigrants.¹⁷³ This perception is bolstered if those Latino Americans are unskilled or employed as domestic or menial laborers.¹⁷⁴ Young male Latinos also face another stereotype because they are assumed to be gang members.¹⁷⁵ There is an ironic connection between the Latino-as-criminal stereotype and the Latino-as-illegal immigrant stereotype because illegal aliens are considered lawbreakers.¹⁷⁶

Homosexuals are subjected to equally harsh stereotypes.¹⁷⁷ One of the most common stereotypes of homosexuals is that they actively recruit children to homosexuality.¹⁷⁸ Part of their alleged strategy in this regard is presenting role models that make homosexuality appear attractive to young children.¹⁷⁹ This proposition, however, has no basis in fact.¹⁸⁰ To elucidate, homosexuals do not attempt to convert children, nor will exposure to a gay person affect a child’s sexual orientation.¹⁸¹ Sexual

¹⁷¹ *Id.* Ebens and Nitz pleaded guilty to manslaughter and were given light sentences of three years probation and fines of \$3,780. Hutchinson, *supra* note 170, at 91-92. The United States Department of Justice, however, prosecuted the defendants for violating Chin’s civil rights. *Id.* at 92. Ebens was convicted and sentenced to twenty-five years, and Nitz was acquitted. *Id.* Ebens’ conviction was overturned and he was subsequently acquitted. *Id.*

¹⁷² Lee, *supra* note 161, at 441.

¹⁷³ *Id.* at 442.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 443.

¹⁷⁶ *Id.*

¹⁷⁷ Harris Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 821 (1984).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 822.

¹⁸¹ *Id.*

orientation is established early in life and cannot be consciously acquired.¹⁸²

The most offensive stereotype is that homosexuals are more likely to molest children than are heterosexuals.¹⁸³ Officials used this misperception to justify sodomy statutes and employment discrimination.¹⁸⁴ In fact, the average homosexual is neither likely to molest children nor more likely than a heterosexual to be a child molester.¹⁸⁵

Another stereotype is that homosexuals are mentally ill.¹⁸⁶ Because people think that homosexuality is a mental disease, there is an idea that homosexuals are inferior or unstable.¹⁸⁷ The reality is that homosexuals who have come to terms with their homosexuality are no more distressed psychologically than are heterosexuals.¹⁸⁸ Homosexuality is not indicative of psychopathology.¹⁸⁹

¹⁸² *Id.*

¹⁸³ Timothy Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 774 (1999).

¹⁸⁴ Pamela Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1131 (2000).

¹⁸⁵ Clifford Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J. L. & FEMINISM, 257, 320 (2009). Empirical data shows that homosexuals are the least likely persons to sexually abuse children and that children are more likely to be sexually abused by heterosexuals than by homosexuals. *Id.* Social science research demonstrates that the great majority of child sexual abuse is committed by heterosexual men as opposed to lesbians or gay men. *Id.* Another review of the social science literature provides that the vast majority of sex crimes committed by adults on children are heterosexual, not homosexual. *Id.*

¹⁸⁶ Miller, *supra* note 177, at 823.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 822-24.

¹⁸⁹ Jablow, *Supra* note 194, at 1131. Sex researcher Magnus Hirschfield described homosexuality as a normal variation of human sexuality. *Id.* Mental health professionals adopted this proposition. *Id.* Mental Health professionals were prompted to remove homosexuality from the American Psychiatric Association's Diagnostic and Statistical Manual of Psychiatric Disorders in 1973. *Id.*

D. Political Powerless

To determine whether a group is politically powerless, courts must ascertain whether a particular group is respected in our nation's legislatures.¹⁹⁰ Put another way, courts must determine whether a group's interests are fully taken into account in the majoritarian process.¹⁹¹ The political powerlessness of a group is indicative of "a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs."¹⁹²

For centuries, legislatures have not respected racial minorities and the majoritarian process has not taken into account the interests of these racial minorities.¹⁹³ The lack of respect of the legislature is evident by the fact that blacks have faced a history of invidious discrimination.¹⁹⁴ By example, de jure segregation has been on the books for centuries.¹⁹⁵ It was accepted that blacks and whites were not allowed to drink from the same water fountains,¹⁹⁶ blacks and whites were not allowed to sit on

¹⁹⁰ Courtney Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 390 (2010).

¹⁹¹ *Id.*

¹⁹² *Id.* See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n. 24 (1985) (Marshall, J., dissenting).

¹⁹³ Keith Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y 263, 280 (2000). See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938). The court stated "prejudice 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." *Id.*

¹⁹⁴ Louis Henkin, *De Funis: An Introduction*, 75 COLUM. L. REV. 483, 486 (1975). As a result of our society being filled with adverse racial DISCRIMINATION and not yet purged of INVIDIOUS racial practices and attitudes, it is necessary that all racial classifications are suspect requiring close judicial scrutiny. *Id.*

¹⁹⁵ Richard Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036, 2046 (2002).

¹⁹⁶ James Blumstein, *Shaw v. Reno and Miller v. Johnson: Where we are and Where we are Headed*, 26 CUMB. L. REV. 503, 506 (1995-1996).

the same bus,¹⁹⁷ and blacks and whites were not allowed to occupy the same classroom.¹⁹⁸ Courts have also affirmed the ban on interracial marriage,¹⁹⁹ restrictive covenants,²⁰⁰ and the preclusion of blacks from sitting on the jury.²⁰¹

Other racial minorities have been disrespected by the legislature.²⁰² Japanese Americans, for example, were excluded from occupying a particular part of the country and were subject to a curfew.²⁰³ More recently, racial minorities could have faced an unreasonable search at any time in Arizona.²⁰⁴ Anyone suspected of being an illegal immigrant could have been compelled to show a photo identification.²⁰⁵

Homosexuals, in comparison, are not respected by the legislature, and their interests are not taken into account by the majoritarian process.²⁰⁶ It is axiomatic that homosexuals have suffered social isolation.²⁰⁷ One cannot dispute the fact that in the past homosexuals have been deemed mentally ill, and many people continue to believe that homosexuality is morally reprehensible.²⁰⁸ These beliefs were adopted by states when intimate conduct between gay persons was considered a crime throughout our nation's history.²⁰⁹ Throughout our nation's history, homosexuals were not given the right to marry the person of

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Paris v. Lippold*, 32 Cal. 2d 711 (1948) (en banc).

²⁰⁰ *Kraemer v. Shelley*, 198 S.W. 2d 679 (Mo. 1946) (en banc).

²⁰¹ *Swain v. Alabama*, 380 U.S. 202 (1965).

²⁰² Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 *UCLA L. Rev.* 933, 939 (2004).

²⁰³ *Hirabayashi v. United States*, 320 U.S. 81, 83-84 (1943).

²⁰⁴ L. Darnell Weeden, *It is Discriminatory for Arizona or Society to Engage in the Anti-Immigration Practice of Profiling Hispanics for Speaking Spanish*, 12 *LOY. J. PUB. INT. L.* 109, 120-21 (2010).

²⁰⁵ *Id.*

²⁰⁶ Powers, *supra* note 190, at 391.

²⁰⁷ *Id.* at 390.

²⁰⁸ *Id.* at 390-91.

²⁰⁹ *Kerrigan v. Comm'r of Pub. Health*, 957 A. 2d 407, 444 (Conn. 2008).

their choice in a significant number of states,²¹⁰ permitted to adopt children,²¹¹ or allowed to enter the military.²¹²

It is even more apparent that homosexuals were not respected by the legislature when there was a law on the books that barred the adoption of anti-discrimination laws against individuals based on their sexual orientation.²¹³ The most recent example of the lack of respect in the legislature comes from Mike Reynolds, a representative in Oklahoma.²¹⁴ Mr. Reynolds is pushing a bill in Oklahoma that would bar homosexuals from openly serving in the state's national guard.²¹⁵

Courts have also considered the direct representation of minorities in our government in determining whether a group is politically powerless.²¹⁶ Racial minorities were substantially underrepresented in Congress and state legislatures.²¹⁷ Although there was a national voting age population of 11.1% black, they constituted 4.9% of members of Congress and 5.4% of all state legislators.²¹⁸ Despite the fact that there was a national voting age population of 7.3% Hispanic, they made up 2.5% of Congress and 1.7% of state legislators.²¹⁹ Since the 1990 Census, state legislatures and federal and state courts adopted new redistricting plans producing some of the largest increases in minority

²¹⁰ *Id.*

²¹¹ Linda Lacey, "O Wind, Remind Him that I Have no Children": Infertility and Feminist Jurisprudence, 5 MICH. J. GENDER & L. 163, 176 (1998).

²¹² Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 900-01 (2007).

²¹³ *Romer v. Evans*, 15 U.S. 620, 623-24 (1996).

²¹⁴ Neal Broverman, *Okla. Lawmaker Wants Gays Barred from National Guard*, *The Advocate*, (Jan. 10, 2012), ww.advocate.com. See also *DADT Would Return to Oklahoma National Guard under Mike Reynolds' Proposed Bill*, *The Huffington Post*, (Jan. 10, 2012), www.huffingtonpost.com/. . . /OKLAHOMA-dadt-national-guard-mike-rey.

²¹⁵ *Id.*

²¹⁶ Powers, *supra* note 190, at 391.

²¹⁷ Frank Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 2 (1995).

²¹⁸ *Id.*

²¹⁹ *Id.*

representation.²²⁰ Irrespective of these gains, minority representation in Congress and state legislatures did not surpass the minority population percentages and still failed to provide proportional representation.²²¹

Homosexuals are also underrepresented in our government.²²² It is estimated that there are about five to ten percent of homosexuals in this country.²²³ There were three openly gay members in the 111th Congress.²²⁴

One cannot dispute the immense benefits that flow from having gay representation in our legislative bodies.²²⁵ The presence of openly gay legislators creates respect for homosexuals within that legislative body.²²⁶ The greater the number of openly gay representatives serving in a legislative body, the more opportunities there are for non-gay legislators to interact with homosexuals and gain a better understanding of the gay community.²²⁷ Another benefit of having openly gay legislatures is they are motivated to champion legislation, specifically designed to benefit and protect the gay community.²²⁸ The reason is openly gay legislatures have a direct understanding of the experience and

²²⁰ *Id.*

²²¹ *Id.* at 3.

²²² Powers, *supra* note 186, at 395.

²²³ *Id.* at 389.

²²⁴ *Id.* at 392.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* Representative Barney Frank of Massachusetts sponsored the Employment Non-Discrimination Act. *Id.* This act proposes to extend federal employment discrimination protections to include discrimination based on sexual orientation and gender identity. *Id.* Representative Tammy Baldwin of Wisconsin has also sponsored the Domestic Partnership Benefits and Obligations Act. *Id.* This act would require the federal government to provide the same benefits to its LGBT civilian employees as those already provided to its employees with different-sex spouses. *Id.* Tammy Baldwin has also introduced the Ending Health Disparities for LGBT Americans Act. *Id.* This act is designed to make the nation's health care system more equitable for LGBTs. *Id.*

needs of the gay community.²²⁹ Openly gay legislators are also more likely to identify the impact of legislation, which on its face, does not specifically address the gay community.²³⁰ This is vital because non-gay legislators are less cognizant of and sensitive to the needs and concerns of the gay community.²³¹

E. Ability To Contribute To Society

Research provides support for the proposition that race bears no relation to a person's ability to participate and contribute to society.²³² This proposition is evident in the fact that blacks comprise ten percent of the workforce.²³³ Based on 1990 Census figures, there are approximately 425,000 Black-owned businesses.²³⁴ Other blacks who do not own their businesses hold positions of physicians,²³⁵ lawyers,²³⁶ accountants,²³⁷ college professors,²³⁸ structural metal workers,²³⁹ and firefighters.²⁴⁰

²²⁹ *Id.*

²³⁰ *Id.* The health care debate during the 111th Congress, for example, did not explicitly address the rights of homosexuals. *Id.* at 393. The reason was the objective was to reform the system and expand insurance coverage for all Americans. *Id.* Tammy Baldwin, however, led an effort in the House to amend its health care reform legislation to: (1) assist people with AIDS in accessing drugs under Medicare; and (2) include data collection on the health of homosexuals. *Id.*

²³¹ *Id.* at 393.

²³² Justin Schwartz, *A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's "Newest" Equal Protection Jurisprudence*, 58 OHIO ST. L. J. 1055, 1059 (1997).

²³³ Tung Yin, *A Carbohc Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 237 (1997).

²³⁴ Schwartz, *supra* note 229, at 1058 n. 14.

²³⁵ *Id.* at 1058 n. 13.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 1058 n. 12.

²⁴⁰ *Id.*

In 1998, African Americans and Hispanics made up 12.5% of all professionals.²⁴¹ This percentage includes 14.3% of accountants,²⁴² 9.7% of physicians,²⁴³ 9.4% of college and university teachers,²⁴⁴ and 7.9% of engineers.²⁴⁵ African Americans and Hispanics also made up 7% of lawyers,²⁴⁶ 4.8 % of dentists,²⁴⁷ and 6.9% of natural scientists.²⁴⁸

Racial minorities participate in society in a number of other ways. For example, African Americans and Hispanics hold public elective offices.²⁴⁹ Despite holding public offices, racial minorities live, go to school, play, and worship in the same way as European Americans.²⁵⁰ Racial minorities are also similar to European Americans because racial minorities pay taxes,²⁵¹ get married,²⁵² and raise their families.²⁵³

Similarly, significant case law provides support for the notion that sexual orientation bears no relation to an individual's ability to participate and contribute to society.²⁵⁴ This proposition is

²⁴¹ Jodey Roure, *Achieving Educational Equity and Access to Underrepresented Students in the Legal Profession*, 19 TEMP. POL. & CIV. RTS. L. REV. 31, 34 (2009).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1292 (1989).

²⁵⁰ Colin S. Diver, *From Equality to Diversity: The Detour From Brown to Grutter*, 2004 U. ILL. L. REV. 691, 712 (2004).

²⁵¹ Beverly Moran, *Setting An Agenda for the Study of Tax and Black Culture*, 21 U. ARK. LITTLE ROCK L. REV. 779, 793 (1999).

²⁵² Regina Austin, *Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth*, 65 U. CIN. L. REV. 761 (1997).

²⁵³ Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Discrimination: Lessons From Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 703 (2011).

²⁵⁴ See, e.g., *Varnum v. Brien*, 763 N.W. 2d 862, 890 (Iowa 2009). The court noted that none of the same-sex marriage decisions from other state courts

essential to courts' analysis.²⁵⁵ Legislation treating LGBTs differently is often motivated by prejudice or an inaccurate stereotype even when there is no real difference in the ability of homosexuals compared to heterosexuals.²⁵⁶

By example, there is no real difference between children raised by gay parents than children raised by straight parents.²⁵⁷ Overall, studies show that the differences between children raised by homosexuals and those raised by heterosexuals are few.²⁵⁸ Specifically, researchers find no detrimental effect to a child as a result of the child being raised by one or more homosexual parent.²⁵⁹ Further research provides that there is no dif-

have found a person's SEXUAL ORIENTATION to be indicative of the person's ability to participate in and CONTRIBUTE TO SOCIETY. *Id.* The court further noted that Iowa's legislature declared as the public policy of the state that homosexuality is not relevant to a person's ability to contribute to a number of societal institutions other than civil marriage. *Id.* at 390-91.

²⁵⁵ *Id.*

²⁵⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). Typically, a classification immaterial to a person's ability to contribute to society reflects prejudice and antipathy. *Id.* There is an assumption that those in the burdened group are not as worthy or deserving as others. *Id.* These classifications also reflect outmoded notions of the relative capabilities of persons in this burdened class. *Id.*

²⁵⁷ Clifford Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 945 (2011). See also Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 Colum. J. Gender & L. 21, 54 (2010).

²⁵⁸ Heather Latham, *Desperately Clinging to the Cleavers: What Family Law Courts are Doing about Homosexual Parents, and What Some are Refusing to See*, 29 LAW & PSYCHOL. REV. 223, 233 (2005).

²⁵⁹ Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L. J. 163, 219 (2007). Numerous professional groups and many research studies have concluded that having GAY PARENTS IS NOT DETRIMENTAL to a CHILD's mental health or social functioning. *Id.* The American Academy of Pediatrics, the American Academy of Family Physicians, the Child Welfare League of America, the National Association of Social Workers, and the American Psychological Association have all found that homosexual parents are "just as good" as heterosexual parents, and that "children thrive in gay- and lesbian-headed families." *Id.* at 219-20.

ference in the development,²⁶⁰ mental health,²⁶¹ and psychological stability of a child parented by gay parents and one parented by straight parents.²⁶² Furthermore, children raised by gay parents have been found to exhibit impressive psychological strength.²⁶³

There is also no difference between homosexuals' and heterosexuals' ability to serve in the military.²⁶⁴ More specifically, there is no visible data supporting the conclusion that gays and lesbians cannot acceptably serve in the military.²⁶⁵ In fact, a significant number of gays have served and continue to serve in the military with distinction.²⁶⁶ Studies show that homosexuals not only serve in the military, but most of them do so without incident and receive honorable discharges at the conclusion of their service.²⁶⁷

Although there is no difference between homosexuals and heterosexuals, people still find reasons to condemn gays irrespective of the fact that gays work,²⁶⁸ pay taxes,²⁶⁹ vote,²⁷⁰ hold

²⁶⁰ Latham, *supra* note 255, at 233.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays, and Bisexuals*, 64 UMKC L. REV. 199, 207 (1995). The United States military has never argued that lesbians, gays and bisexuals could not physically or mentally perform military duties as effectively as heterosexuals. *Id.* The Defense Personnel Security Research and Education Center prepared a study for the military affirming that having a same-gender or an opposite-gender orientation is immaterial to job performance in the same way as is being left- or right-handed. *Id.* The most comprehensive study ever conducted for the military concerning gay and lesbian servicemembers in 1993 refused to address homosexuals' ability to perform because it was not significant. *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Troy Holroyd, *Homosexuals and the Military: Integration or Discriminatory*, 8 J. CONTEMP. HEALTH L. & POL'Y 429, 449 (1992).

²⁶⁸ *Snetsinger v. Montana University System*, 325 Mont. 148, 164 (2004).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

public office,²⁷¹ own businesses,²⁷² provide professional services,²⁷³ worship,²⁷⁴ raise their families and serve their communities in the same manner as heterosexuals.²⁷⁵ With respect to the workplace, there is no evidence that homosexuals are any less qualified, reliable, or productive employees than heterosexuals.²⁷⁶ This is especially evident in the teaching context where researchers found that male undergraduates who evaluated homosexuals concluded that gay teachers were not less qualified than straight teachers and these gay teachers were likely to succeed in the classroom.²⁷⁷ There are reservations as to whether the decisions to remove gay teachers from teaching positions can be supported on grounds that their presence disrupts the school environment.²⁷⁸

To supplement the reasoning so far, we can learn from the experience of our closest neighbor as it has struggled with the same question, using a very similar framework of analysis. Canada has, in many regards, the same kind of individualistic cultural tradition that fuels so much of American jurisprudence. In addition, it has an analogous history of disparate treatment of those with a preference for same-sex partners.

III. THE CANADIAN TREATMENT OF SAME SEX COUPLES AND STRICT SCRUTINY

While the laws of other countries are not in any way binding on the interpretation of the United States Constitution, examin-

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Sharon Portwood, *Employment Discrimination in the Public Sector Based on Sexual Orientation: Conflicts Between Research Evidence and the Law*, 19 *LAW & PSYCHOL. REV.* 113, 126 (1995).

²⁷⁸ *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *HARV. L. REV.* 1285, 1307 (1985).

ing what thoughtful judges in other countries have done can offer perspectives to help our justices in their interpretations²⁷⁹. The more similar the questions being considered and the more similar the laws in question, the more useful the examination. Studying what has happened in other jurisdictions can also help judges foresee some of the consequences a particular interpretation might have in our country. Again, the more similar the laws at issue and the nation to whose jurisprudence we look, the more useful is the examination of legal evolution of a particular legal principle. Examining what other countries do also helps us to see where the values being protected in our nation are in conflict or are consistent with the global moral climate.

The expansion of equal protection for homosexuals reflects a changing moral climate worldwide. One striking example is the growing number of nations providing equal protection for homosexuals with respect to protecting their right to marry a partner of the sex of their choice.²⁸⁰

As justices in this nation consider the standard of scrutiny we apply to homosexuals under the Equal Protection Clause, it may be instructive for them to consider how the Canadians approach the equal protection of homosexuals under their Charter of Rights and Freedoms, which serves the same function as our Constitution in protecting individual rights. Examining how Canadians have extended equal protection to homosexuals may

²⁷⁹ As Justice Breyer explained, if something has been written “by a man or a woman who has a job like mine in another country, and who is interpreting a document somewhat like mine and who in fact has a problem in front of the Court somewhat like mine, why can’t I read it, see what they’ve done? I might learn something.” Justice Breyer on the Role of International Law, Justice Watch, < <http://afjjusticewatch.blogspot.com/2010/04/justice-breyer-on-role-of-international.html>> April 1, 2010.

²⁸⁰ The first nation to recognize same sex marriage was the Netherlands, in , followed by Belgium in 2003, Spain and Canada in 2005, South Africa in 2006, Norway and Sweden in 2009, Portugal in 2010, Iceland and Argentina in 2010. The Washington Post.com <available at http://www.washingtonpost.com/world/specialreports/countries-where-same-sex-marriage-is-legal/2012/05/10/gIQAwoZiFU_gallery.html#photo=2>

be extremely valuable because Canada and the United States share cultural, social, economic and political traditions.²⁸¹ Indeed, according to Card and Freeman, “few countries offer a more natural pairing for evaluating policies and institutions or for uncovering the reasons for differences in outcomes than the United States and Canada.”²⁸²

Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.” The purpose of this provision is:

“[T]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”²⁸³ One could see this purpose as being similar to the purpose of the Equal Protection Clause of the U.S. Constitution.

Only when the law in question conflicts with this purpose will it be found to be in violation of the *Charter*. When analyzing whether a law conflicts with the charter, a three step test is used to determine the existence of a violation.²⁸⁴ The steps are whether a discriminatory distinction is formed, whether the claimant is subject to differential treatment as a product of that

²⁸¹ For a detailed discussion of these similarities, see generally, Christy Glass & Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn From their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143 (2008).

²⁸² David Card & Richard B. Freeman, *Small Differences That Matter: Canada vs. The United States*, in *Working Under Different Rules* 189, 191 (Richard B. Freeman ed., 1993).

²⁸³ *Halpern v. Canada* (2003) (OR 2d)1, 60.

²⁸⁴ *Law v. Canada*, (1998), (1999) 1 S.C.R., 497 (S.C.C.)

distinction, and whether the differential treatment discriminates, by imposing a burden upon or withholding a benefit from the claimant in a way that makes the claimant be viewed as less capable or worthy of recognition as a human being or Canadian citizen.²⁸⁵

In the case of *Halpern v. Canada*, the claimants include seven same sex couples who sought to become married. Applications were filed with the Toronto Clerk's office, which while not denying the applications, applied to the courts for direction and held the applications in abeyance. While these applications were in abeyance, the Metropolitan Community Church of Toronto performed ceremonies solemnizing the marriages of a number of same sex couples. Applications for these marriages were filed with the Office of the Registrar General, who denied the applications, stating that federal law prohibited same sex marriages. After this denial, the Metropolitan Community Church filed an action in the Divisional court, which was consolidated with the applications of the parties with filings in abeyance. The court eventually ruled that a denial of marriage to same sex couples constituted a violation of the *Charter of Rights and Freedoms*, which resulted in an expansion of the definition of marriage to include same sex couples.

The first step in determining a law's compliance with the charter is to determine either that the law draws a formal distinction between the claimant and other persons based on one or more personal characteristics, or that the law fails to take into account the already disadvantaged position of the claimant within Canadian Society that has resulted in substantially differential treatment on the basis of one or more personal characteristics.²⁸⁶

When determining whether a law is in compliance with this first step is to determine whether or not a distinction is made by the law in question. It is not necessary that the law create the

²⁸⁵ *Id.*

²⁸⁶ *Halpern O.R.* at 17

discriminatory effect that is the source of the claimants harm but rather simply that the law has somehow made a potentially discriminatory distinction between the group in which the claimant belongs and the remainder of Canadian society.²⁸⁷

A formal distinction was found to have been in limiting the definition of marriage as being between a man and a woman.²⁸⁸ As a consequence of the Canadian government giving legal recognition to marriage and a series of rights and obligations surrounding that institution, denial of access to those rights and obligations constitutes a formal distinction between same-sex and opposite-sex couples.²⁸⁹ The court concludes that the common law definition of marriage has created a distinction that satisfies the first condition of a 15(1) *Charter* inquiry.

The second step in a 15(1) *Charter* inquiry is to determine whether or not the claimant experienced differential treatment based on an enumerated or analogous ground²⁹⁰ that would be protected under the *Charter*. Case law has clearly enumerated that sexual orientation does in fact qualify as an analogous ground.²⁹¹ The court in *Egan* referred to sexual orientation as a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”. Because the laws discriminating against same sex couples are treating a class

²⁸⁷ *Vriend v. Alberta*, [1998] 1 S.C.R. 493

²⁸⁸ Halpern O.R.2d at 18-19.

²⁸⁹ Halpern O.R.2d at 19. The court then argues by analogy that denial of marriage on a religious or racial ground would definitely consist of a discriminatory distinction, which suggests that the Canadian courts are putting discriminatory distinction based on sexual orientation on the same level as discriminatory distinction against groups that in the United States would have the protection strict judicial scrutiny.

²⁹⁰ An enumerated ground is any that is explicitly listed within the charter as a protected group, while analogous groups are any of those who are protected, but not specifically listed in the charted. Race, national or ethnic origin, color, religion, sex, and age or mental or physical disability are the current enumerated grounds in the *Charter*

²⁹¹ *Egan v. Canada*, (1995), (1995) 2 S.C.R. 513

of persons differently based on an analogous ground, the second step in the inquiry has been satisfied.

The third step in performing an inquiry into whether a particular piece of law violates the charter of rights and freedoms is to determine whether discrimination has indeed occurred. When making this determination, the court looks to the substantive equality, not simply formal equality.²⁹² “When we are looking to see if discrimination exists, we are seeking to preserve the human dignity of those who could be affected by the law.”²⁹³ When making the decision as to whether or not the discrimination would violate the human dignity of a class or persons, the Canadian court looks to whether or not a reasonable person with the particular group’s traits and history would find the differentiation in the law demeaning to their dignity.²⁹⁴

In *Law v. Canada*,²⁹⁵ the court outlined four different factors for a claimant to reference in coming to a determination as to whether or not the human dignity of the claimant has been violated. These factors are: (1) the preexistent disadvantages or vulnerabilities of the claimant class, (2) the connection between the grounds and the actual needs and circumstances of the claimant, (3) whether the law in question benefits an even worse off class of persons than the class of the claimant, and (4) the nature of the affected interest.”

In regards to the first factor, Canadian courts give this factor the most weight, but do not go so far as to claim that it is determinative of discrimination having occurred.²⁹⁵ Canadian courts give this factor significant weight, as a law that discriminates against an already disadvantaged group has serious potential to expand the disparate effect that the previous discrimination has

²⁹² *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84

²⁹³ *Law v. Canada (Minister of Employment and Immigration)*, 1999 1 SCR 497

²⁹⁴ *Id.* at 533-534.

²⁹⁵ *Id.*

inflicted.²⁹⁶ In regards specifically to the homosexual community, Canadian courts have determined that evidence of such historical discrimination and disadvantage is both widely recognized and documented.²⁹⁷ This evidence of discrimination is not only prevalent, but demonstrates that the discrimination is present throughout the professional, public, and in private affairs, having potentially negative effects on all aspects of a person's life who is a member of the homosexual community.²⁹⁸ Due to this widespread documentation of historical discrimination, the first factor laid out in *Law*, is weighed heavily towards homosexuals being a class of persons in need of legal protections.

The second factor, the connection between the discriminatory grounds and the needs of the claimant, addresses whether or not the law in question operates to benefit the class in question. A law that accommodates the needs and capacities of the class in question is less likely to have a demeaning effect on that particular class of persons.²⁹⁹ It is difficult to assert that the denial of the right to marry to the homosexual community is somehow to the benefit of the homosexual community. When arguing in favor of a law that denied marriage to homosexual couples in *Halpern*, the Associated Gospel Churches of Canada (AGC) argued that law existed to serve the needs of heterosexual couples. It was argued that heterosexual couples were benefited by the fact that limiting marriage to only heterosexual couples would "facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it"³⁰⁰ The court was quick to dismiss this claim however, stating that just because a law may benefit one social group, we look to whether or not the group discriminated against is the one whose needs are ad-

²⁹⁶ *Id.*

²⁹⁷ *Egan 2*. S.C.R. at 600-602.

²⁹⁸ *Id.*

²⁹⁹ *Eaton v. Brant County Board of Education*, 1997 1 SCR 241

³⁰⁰ *Halpern* O.R.2d at 24.

dressed when analyzing the second factor of the test laid out in *Law*.³⁰¹ Because the claimant class receives no benefit from marriage prohibiting legislation, Canadian courts have found that the second factor of the discrimination analysis indicates that discrimination against the homosexual community exists.

The third factor of the analysis is whether or not the legislation benefits a class or classes of persons who are in some way worse off than the claimant's class. In *Halpern*, the respondent asserted that there is a negative impact on heterosexual couples by expanding the definition of marriage to include homosexual couples.³⁰² This argument was quickly dismissed by the court however, based on the aforementioned discrimination that homosexual persons have historically been subject to, and that no discrimination to the same extent has been experienced by heterosexual couples.³⁰³ Furthermore, the respondent failed to produce evidence of a particular disadvantage that was unique to heterosexual married couples that would put them at a disadvantage in comparison to homosexual couples.³⁰⁴ Overall, this factor did not undermine the findings of discrimination that were present throughout the rest of the analysis.

Finally, when making an analysis as to whether discrimination exists, the courts look at the nature of the alleged discrimination. The more severe the effect is, and the more localized the effect that occurs, the more likely that the discrimination will be of the sort in violation of the *Charter*.³⁰⁵ An inability to benefit from certain legislation and economic detriment demonstrate that discrimination exists. In determining whether discrimination exists, however, we do not simply look at potential economic damage, but we also look to impact on the individual from a personal and societal perspective. Factors such as

³⁰¹ *Law* 1 S.C.R. at 538.

³⁰² *Halpern* O.R.2d at 26.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Egan 2.* S.C.R. at 556.

whether the discrimination denies access to a fundamental social institution or whether the discrimination completely fails to recognize a particular group can be considered by the court in this analysis.³⁰⁶ In *Halpern*, it was found that denial of access to marriage to homosexual couples rose to this level of discrimination under the argument that it was in fact denial of access to a fundamental social institution.³⁰⁷

Since *Halpern*, which was a provincial case, was decided, nine other provinces in Canada used the same mode of analysis to provide equal protection for homosexuals and struck down laws prohibiting same sex marriage across Canada. Ultimately, the Canadian government passed legislation recognizing that equal protection required equal treatment of same sex couple with respect to the right to marry.

IV. CONCLUSION

A careful examination of the treatment and characteristics laid out in this article demonstrates that legislations affecting the rights of homosexuals should be subject to strict scrutiny, the same level of scrutiny applicable to racial minorities. Parts II and III of the article demonstrated that laws that discriminate on the basis of sexual orientation should be subject to the standard of strict scrutiny, as homosexuals clearly meet the standards for being a suspect class. Like racial minorities, sexual orientation is an immutable characteristic³⁰⁸, and homosexuals are a discrete and insular minority³⁰⁹, have been subject to a history of discrimination³¹⁰, have been subjected to social stigmatization³¹¹, and have been politically powerless³¹². Just as race

³⁰⁶ *Id.*

³⁰⁷ *Halpern* O.R.2d at 28.

³⁰⁸ *Supra* notes 47- 54 and accompanying text.

³⁰⁹ *Supra* notes 54 - 89 and accompanying text.

³¹⁰ *Supra* notes 90 -158 and accompanying text.

³¹¹ *Supra* notes 137 -166 and accompanying text.

³¹² *Supra* notes 167 -209 and accompanying text.

bears no relationship to a person's ability to contribute to society, one's sexual orientation likewise bears no such relationship.³¹³

Examining how our closest neighbor, Canada, provides equal protection for homosexuals further strengthens support for the case that we should apply strict scrutiny to legislation that discriminates against individuals based on their sexual orientation. And, as we observe the consequences of providing a heightened level of scrutiny for this group in Canada, and we see that their society has not suffered any adverse consequences as a result, we can be more confident that this heightened level of scrutiny would not lead to harmful consequences in our country.

The foregoing analysis clearly illustrates the analogous situation of racial minorities and homosexuals in terms of the form of vulnerability that courts seek to protect when they designate a group as a suspect classification. In light of this strong analogy, just as the laws affecting the fundamental rights of racial minorities are entitled to strict scrutiny, so should laws adversely affecting the fundamental rights of homosexuals.

³¹³ *Supra* notes 210 -256 and accompanying text.

