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**CLASSIFICATION OF HOMOSEXUALS UNDER
THE EQUAL PROTECTION CLAUSE:
FORWARD-LOOKING DISPARATE
IMPACT TEST**

BY A. NICOLE KWAPISZ¹

I. INTRODUCTION

Americans came early to accept the inevitable presence of outsiders. . . . Although every citizen could claim a basic set of legal rights, some of these citizens would almost certainly remain outsiders. . . . Each generation passed to the next an open question of who really belongs to American society. Equality and belonging are inseparably linked: to define the scope of the ideal of equality in America is to define the boundaries of the national community.² . . . The most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, [thus,] denying them their very selves.³

The promise of equality was explicitly written into the Fourteenth Amendment to the United States Constitution.⁴ Yet,

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² KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 2 (1989) [hereinafter KARST, *BELONGING TO AMERICA*].

³ *Id.* at 4.

⁴ See U.S. CONST. amend. XIV, § 1; JOHN E. NOWAK & RONALD D. ROTUNDA, *CONCISE HORNBOOK: PRINCIPLES OF CONSTITUTIONAL LAW* § 14.1 (2007) [hereinafter NOWAK & ROTUNDA, *CONCISE HORNBOOK*] (stating that the equal protection clause requires that “individuals who are similar to each

homosexuals, a historically stigmatized minority,⁵ have been repeatedly denied the opportunity of full participation in American society.⁶ Furthermore, governmental entities at all levels continue to pass and enforce anti-gay laws,⁷ which remain mostly unchallenged because they are subject to minimal judicial scrutiny. Nonetheless, recent history has shown signs of a shift in political and social attitudes towards gays and lesbians.⁸

other must be treated similarly”); KARST, *BELONGING TO AMERICA*, *supra* note 2, at 2.

⁵ See MIRIAM-WEBSTER COLLEGIATE DICTIONARY 791–92, 1225 (11th ed. 2003). “Minority” means “the smaller in number of two groups constituting a whole” or “a part of population differing from others in some characteristic and often subject to different treatment.” *Id.* at 791–92. To “stigmatize” means “to describe or identify in opprobrious terms.” *Id.* at 1225.

⁶ See WILLIAM N. ESKRIDGE, JR., *SEXUALITY, GENDER, AND THE LAW* 217 (Foundation Press 2d ed. 2004) [hereinafter *ESKRIDGE, SEXUALITY*]. Author discusses history of sexual orientation-based discrimination in the United States, which remains in effect in many states. *Id.*

Local, state, and federal governments in the United States pervasively discriminated against people based on their sexual or gender orientation during the twentieth century. For most of the century, lesbians, gay men, bisexuals, and transgendered people were the objects of special criminal laws against cross-dressing and homosexual solicitation, as well as generic sodomy laws; . . . were excluded from services in the United States armed forces; . . . were barred from federal or state government employment; . . . suffered under the stigma of laws or policies barring schools from depicting sexual or gender minorities positively or requiring them to denigrate such minorities; . . . could not obtain state recognition of their intimate relationships; . . . and could not adopt children or even retain custody of their own biological children; . . . [and] were excluded from entering the United States or becoming American citizens.

Id.; see, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW, CHALLENGING THE APARTHEID OF THE CLOSET* 205–38 (1999) [hereinafter *ESKRIDGE, GAYLAW*] (analyzing antigay laws).

⁷ See ESKRIDGE, *SEXUALITY*, *supra* note 6; ESKRIDGE, *GAYLAW*, *supra* note 6.

⁸ See, e.g., Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010); President Barack Obama, Statement by the President on the Don’t Ask, Don’t Tell Repeal Act of 2010 (Dec. 18, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/18/statement-president->

Particularly, the latest exciting developments legalizing same-sex marriage in New York, although on state level, clearly tip the scale in favor of equal rights for homosexuals.⁹ However, the state laws favorable to homosexuals remain vulnerable to federal preemption.¹⁰ In search of a meaningful solution, some argue that elevating the level of judicial scrutiny would eventu-

dont-ask-dont-tell-repeal-act-2010 (“It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion, or creed; it is time to allow gay and lesbian Americans to serve their country openly.”); Eric E. Holder, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> [hereinafter Holder, Statement]. In a letter directed to members of Congress, Attorney General, Eric E. Holder, announced on February 23, 2011, that President Obama declared the Defense of Marriage Act of 1996 (DOMA), which prohibited recognition of same-sex marriages, unconstitutional. *Id.* Consequently, President Obama instructed the Department of Justice to stop defending suits challenging the statute. *Id.*

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including documented history of discrimination [immutability, lack of political power, and the trait’s lack of bearing on legitimate policy objections] classification based on sexual orientation should be subject to a heightened standard of scrutiny. The President also concluded that Section 3 of DOMA [defining marriage for federal purposes as only between a man and a woman], as applied to legally married same-sex couples, fails to meet the standard and is therefore unconstitutional.

Id.

⁹ See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html> (stating that in recent years several states enacted ban on same-sex marriage, prompted by a culture war and politicians “who deployed the issue as a tool for energizing their [ideological] base”); Dan Wiessner, *New York Governor Signs Law Approving Gay Marriage*, UNIONLEADER.COM, June 25, 2011, <http://www.unionleader.com/article/20110625/NEWS/110629906&source=RSS> (“New York will become the sixth and most populous U.S. state to allow gay marriage.”).

¹⁰ See Tara Siegel Bernard, *What Gay Marriage News Means for You*, N.Y. TIMES, Feb. 23, 2011, <http://bucks.blogs.nytimes.com/2011/02/23/what-the-gay-marriage-news-means-for-you/?pagemode=print> (stating that Section 3 of DOMA will remain in effect unless it is repealed by Congress or struck

ally prompt government entities to cease enacting policies motivated by anti-gay animus.¹¹ Paradoxically, many of the prejudicial statutes do not explicitly target homosexuals, but instead carry a disparate adverse impact against sexual minorities.¹² Thus, under the current disparate impact analysis,

down by a judicial decision; and as long as DOMA remains a valid law, the Executive Branch will continue its enforcement).

¹¹ See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 761 (2011). Author points out that “Congress has more power to legislate with respect to classifications drawing heightened scrutiny than with respect to classifications drawing only rational basis review. The inability of new groups to have discrimination against them receive formal heightened scrutiny has profoundly negative effects on their equal protection claims.” *Id.*

¹² See, e.g., Matthew D. Besser, *The Use of Sex-stereotyping claims by LGBT employees in Ohio*, 24 OHIO LAWYER MAGAZINE 20 (Jan. 2010). “The issue of sexual orientation discrimination in the workplace is not merely academic.” *Id.* at 21. Although, federal law does not address sexual orientation discrimination, sexual minorities do suffer negative consequences. *Id.* According to a 2007 UCLA Law School compendium of studies “16 to 68 percent of LGBT [lesbian gay bisexual transgender] employees have experienced workplace discrimination.” *Id.* at 22. In addition, “studies have also shown that gay men earn 10 to 32 percent less on average than their similarly qualified heterosexual counterparts.” *Id.*; Brendan Cushing-Daniels & Tsz-Ying Yeung, *Wage Penalties and Sexual Orientation: An Update Using the General Social Survey*, 27 CONTEMPORARY ECONOMIC POLICY 164, 175 (2009), available at <http://www.thefreelibrary.com/Wage+penalties+and+sexual+orientation%3a+an+update+using+the+general-a0201481803.html>. Discrimination against a particular group of workers may take many forms, including partiality in hiring and treatment of the preferred group member vis-à-vis the marginalized group. *Id.* In addition, “[e]vidence of discrimination in the form of lower wages is widespread if not universal,” and there appears to be a “large penalty against gay men.” *Id.* The disparity in wages may be, in part, due to homophobia, which reduces homosexuals’ productivity. *Id.* Moreover, “sexual orientation stigma can cause homosexual workers stress and anxiety, which are likely to have a negative effect on their working ability.” *Id.*; David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 514, 529. The author discusses “mandatory sex segregation,” in the context of prison and jail populations, required by law based on the principle of “assumed heterosexuality,” because “men must be kept from women because men are heterosexual and will seek out women either consensually, or non-consensually.” *Id.* at 514. However, because “homophobia and sexism go hand in hand,” it can lead to “violence against men who do not exhibit out-

applicable to facially neutral, prejudicial laws,¹³ most such acts will remain unchallenged.¹⁴ The inadequacy of the disparate impact analysis rests on a misconception that discrimination is, in general, a consciously controlled human behavior.¹⁵ Conversely, cognitive science provides ample evidence for the implicit nature of bias.¹⁶ Thus, the courts must reexamine the concept of discrimination itself in order to prevent facially neutral, stigmatizing legislative acts that violate the Equal Protection Clause.¹⁷ This article will demonstrate that because the disparate impact analysis is inherently flawed, it needs to be re-

ward heterosexuality, . . . [including] those who are openly gay.” *Id.* at 529; see also *Lesbian, Gay, Bisexual, and Transgender Youth, An Epidemic of Homelessness*, NATIONAL GAY & LESBIAN TASK FORCE 4 (2006), http://www.thetaskforce.org/downloads/reports/reports/HomelessYouth_ExecutiveSummary.pdf (discussing President Bush’s executive order permitting federal funding for faith based organizations and its negative impact on services provided to the homeless LGBT youth, because “a number of faith-based providers oppose legal and social equality for LGBT people”).

¹³ See *Washington v. Davis*, 426 U.S. 228, 240 (1976) (mandating disparate impact test for facially neutral laws, which requires proof of impact and intent to discriminate); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (discussing detrimental effect of disparate impact test to the “cause of equal opportunity”).

¹⁴ See Lawrence, *supra* note 13; see, e.g., Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact Origins of ‘The Id, the Ego, and Equal Protection,’* 40 CONN. L. REV. 931, 952 (2008) [hereinafter Lawrence, *Unconscious Racism Revisited*] (“Note that Davis’ uncertainty about the cause of racially subordinating impact leads to the default position of no suspicion of racism.”).

¹⁵ See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 945–46 (2006); see, e.g., Jerry Kang & Krisin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 478 (2010) (disputing the idea that we live in a color-blind society).

¹⁶ See Greenwald & Hamilton Krieger, *supra* note 15, at 952 (discussing quantitative methods of measuring implicit bias); Kang & Lane, *supra* note 15, at 520 (discussing “the modern authority of empirical evidence . . . from scientific experiments, with all their mathematical precisions, objective measurements”).

¹⁷ See *infra* Part IV.

designed to acknowledge and utilize the vast scientific data on implicit bias.

Part II discusses the present ambiguity of classification for homosexuals under *Romer v. Evans*, which upheld discrimination based on sexual orientation subject to rational review, but opened the door to future equal protection challenges.¹⁸ However, like other constitutionally protected minorities,¹⁹ homosexuals have a long history of being invidiously discriminated against and should be granted either suspect or quasi-suspect classification under the Equal Protection Clause.²⁰ Part III considers the examples of other protected classes,²¹ and argues that even if the Supreme Court classifies homosexuals as a constitutionally protected minority under the disparate impact analysis of *Washington v. Davis*,²² the class will remain vulnerable to challenges of facially neutral, yet prejudicial laws.²³ Incidentally, in Title VII,²⁴ Congress explicitly recognized showing of disparate impact as sufficient for a plaintiff to establish employ-

¹⁸ See *infra* Part II.A.

¹⁹ See DAVID A. J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* 4–7 (1998) (arguing that homosexuals, like women and African-Americans, deserve suspect classification, because the respective laws against these groups enforce unconstitutional and unjust dehumanizing stereotypes, depriving each group of its basic human rights); *infra* Part II.B.

²⁰ See *infra* Part II.B.

²¹ See RICHARDS, *supra* note 19; *infra* Part III.A.

²² 426 U.S. 229 (1976).

²³ See *infra* Part III.A.

²⁴ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (adding § 703(k)(1) to Title VII, 42 U.S.C.A. § 2000e-2(k)). “An unlawful employment practice based on disparate impact is established under this subchapter only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” *Id.* See also ESKRIDGE, *SEXUALITY*, *supra* note 6, at 804.

ment discrimination claims on the basis of race or sex.²⁵ Furthermore, the empirical studies of anti-gay implicit bias strengthen the argument that requiring proof of discriminatory legislative intent in facially neutral laws is futile and inadequate to eradicate prevalent tacit discrimination.²⁶ Thus, Part IV proposes a revised, forward-looking disparate impact test, which will abandon the intent requirement, and instead focus the court's inquiry on quantitative evidence documenting the disparate impact of the law in question on stigmatized sexual minorities.²⁷

II. EQUAL PROTECTION CLAUSE: CLASSIFICATION FOR HOMOSEXUALS

Under the Equal Protection Clause of the Fourteenth Amendment, no person shall be denied "equal protection of the laws" by any state.²⁸ The law guarantees equality of legal and social status to all citizens and rests on a principle of "mutual respect and self-esteem."²⁹ As such, the Equal Protection

²⁵ See Civil Rights Act of 1991, *supra* note 24 for the other impermissible basis.

²⁶ See *infra* Part III.B.

²⁷ See *infra* Part IV.

²⁸ U.S. CONST. amend. XIV, § 1; see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 668 (3d ed. 2006). The Equal Protection provision was rarely used since the ratification of the Fourteenth Amendment after the Civil War in 1868, until *Brown v. Board of Education* [347 U.S. 483] in 1954. *Id.* *Brown* "ushered the modern era of equal protection jurisprudence." *Id.* Furthermore, "there is no provision in the U.S. Constitution that says the federal government cannot deny equal protections of the laws. However, in *Bolling v. Sharpe* [347 U.S. 497 (1954)] . . . the Court held that equal protection applies to the federal government through the due process of the Fifth Amendment." *Id.*

²⁹ See KARST, BELONGING TO AMERICA, *supra* note 2, at 7 (continuing extended discussion on "equal citizenship," history of discrimination in American society, and the role of judicial review in promoting equality); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4–6 (1978) (citing J. RAWLS, A THEORY OF JUSTICE 256 (1971)) [hereinafter Karst, *Foreword*] (defining the concept of "equal citizen-

Clause prohibits the government from treating individuals as members of “inferior castes” or as “nonparticipants.”³⁰ Furthermore, it protects individuals as class members from the imposition of stigma,³¹ which degrades their status to less than equal.³²

The equal protection analysis starts with identifying whether the government classifies people based on certain impermissible criteria.³³ Based on a determination that the government discriminates against a particular group of individuals, the court will then apply a corresponding level of scrutiny.³⁴ The Supreme

ship” in the substantive context of the Equal Protection Clause of the Fourteenth Amendment, which in principle “presumptively guarantees to each individual [American citizen] the right to be treated by the organized society as a respected, responsible, and participating member”).

³⁰ See Karst, *Foreword*, *supra* note 29, at 6; Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1993) (defining concept of the “anticaste principle,” which forbids social and legal practices from imposing social disadvantages on a group based on a group characteristic).

³¹ See WEBSTER II NEW RIVERSIDE DICTIONARY 663 (REV. ED. HOUGHTON MIFFLIN CO. 1996) [hereinafter WEBSTER II DICTIONARY]. “Stigma” means “a mark of infamy or disgrace.” *Id.*; see also NOWAK & ROTUNDA, *supra* note 4, § 14.2 (“If the government applies the law in a certain manner to all persons except a single individual, the single individual may bring an equal protection claim against the government even though the individual is ‘a class of one.’”); Karst, *Foreword*, *supra* note 29, at 6 (discussing an inverse relationship between stigma and recognition of a person, because a stigmatized individual is perceived as “unequal in some respect.”).

³² See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1 (2d ed. 1988) (“[E]quality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles.”); Karst, *Foreword*, *supra* note 29, at 6.

³³ See NOWAK & ROTUNDA, *supra* note 4, § 14.2 (discussing permissible criteria as related to proper governmental purpose to advance legitimate interests of society, as opposed to arbitrary reasons to burden a group of individuals); see also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 4 (1994) [hereinafter Sunstein, *Homosexuality*] (stating that the Court struck down legislation on the grounds of prejudice and hostility).

³⁴ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (discussing levels of scrutiny under the Equal Protection Clause of the Fourteenth Amendment); NOWAK & ROTUNDA, *supra* note 4, § 14.2; see also TRIBE, *supra* note 32, § 16-1.

Court has defined three levels of scrutiny applicable under the Fourteenth Amendment, contingent on whether the group subject to classification falls under a protected status.³⁵ Ultimately, the court will determine if the government classification was justified by a sufficient governmental purpose.³⁶ Under strict scrutiny, the most stringent standard, applicable to classifications based on race, national origin, religion and ethnicity, the government will have to prove that it had a compelling reason to discriminate and that the means it used were necessary to implement the law.³⁷ Under intermediate scrutiny, applicable to discrimination based on gender or illegitimacy, the law will be upheld if it substantially relates to an important government purpose.³⁸ A classification based upon any other trait is subject to a rational basis review, the lowest of the three standards, which will only require the government to show that the law rationally relates to a legitimate government purpose.³⁹ Since

³⁵ See NOWAK & ROTUNDA, *supra* note 4, § 14.2; Jeffery M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163 (1984) (“There are . . . three levels of, or tiers, of judicial review that are invoked in their respective spheres.”).

³⁶ See NOWAK & ROTUNDA, *supra* note 4, § 14.2; Shaman, *supra* note 35, at 161–62 (discussing development of multi-level system of scrutiny, and how the courts apply it to determine the constitutionality of the governmental conduct).

³⁷ See *Cleburne*, 473 U.S. at 440 (discussing levels of scrutiny under the Equal Protection Clause of the Fourteenth Amendment); NOWAK & ROTUNDA, *supra* note 4, § 14.3; *see also* CHEMERINSKY, *supra* note 28, at 671.

³⁸ See *Craig v. Boren*, 429 U.S. 190 (1976) (setting the level of scrutiny for gender discrimination as intermediate); NOWAK & ROTUNDA, *supra* note 4, § 14.3 (2010); *see also* CHEMERINSKY, *supra* note 28, at 671.

³⁹ See NOWAK & ROTUNDA, *supra* note 4, § 14.3; *see also* CHEMERINSKY, *supra* note 28, at 671.

the rational review standard is a very low threshold,⁴⁰ the court will make every effort to uphold the law as constitutional.⁴¹

The tiers or review approach to equal protection analysis has its critics, who argue that the rigid levels of scrutiny unduly limit the scope of judicial inquiry.⁴² Instead, to review laws allegedly violative of the Equal Protection Clause, the Court should consider a “spectrum of standards,” or a sliding scale, including factors of constitutional and social importance.⁴³ Moreover, the critics point out that the Court has already applied this multi-factor test in rational basis cases with more “bite” than the customarily deferential rational basis review.⁴⁴ However, the Court’s unwillingness to redefine the standard of review applied in these cases makes future equal protection challenges by bur-

⁴⁰ See NOWAK & ROTUNDA, *supra* note 4, § 14.3 (discussing that under rational review “the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution”); *see also* CHEMERINSKY, *supra* note 28, at 541 (explaining that the courts generally presume the legislature passes laws that are constitutional).

⁴¹ *See* Pennell v. City of San Jose, 485 U.S. 1, 16 (1988). Author explains that under rational review the court will not overturn a statute unless “the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.” *Id.*; Shaman, *supra* note 35, at 161. Author points out that under rational review, the court grants “extreme deference” and a “presumption of constitutionality” to the actions of the government, that can only be “overcome by showing them to be clearly irrational or unreasonable.” *Id.*

⁴² *See* CHEMERINSKY, *supra* note 28, at 673 (citing Justice Thurgood Marshall and John Paul Stevens among those who advocated a more liberal approach to judicial scrutiny).

⁴³ San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, L. dissenting) (citing Dandridge v. Williams, 397 U.S. 471, 520–21 (1970)) (expressing dissatisfaction with the Court’s rigid approach to Equal Protection analysis, and arguing for applying a “spectrum of standards” to review discrimination claims); *see* CHEMERINSKY, *supra* note 28, at 673.

⁴⁴ *See* CHEMERINSKY, *supra* note 28, at 673; *infra* notes 56–57.

dened minorities susceptible to mere rational review, and thus not deserving of judicial protection.⁴⁵

A. *Rational Basis Review Standard for Homosexual Discrimination*

In *Romer v. Evans*,⁴⁶ the Supreme Court held that classification based on sexual orientation does not require special constitutional protection; therefore, it is subject to rational review.⁴⁷ This case involved a constitutional amendment passed by the State of Colorado pursuant to a statewide referendum, which repealed and prohibited all legislative, executive or judicial actions designed to prevent discrimination based on sexual orientation.⁴⁸ Homosexuals sued municipalities in state court to challenge the Amendment (“Amendment 2”) as unconstitu-

⁴⁵ See Kenji Yoshino, *The New Equal Protection*, 12 HARV. L. REV. 747, 761–62 (discussing the rational basis with bite cases, including *Romer v. Evans*, and confirming that the standard applied in them is *not* equivalent to formal heightened scrutiny).

⁴⁶ 517 U.S. 620 (1996).

⁴⁷ See *id.* at 631; see also Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and Politics of Equal Protection*, 45 UCLA L. REV. 453, 464 (1997).

⁴⁸ See *Romer*, 517 U.S. at 624. The Court refers to the Colorado law as Amendment 2. *Id.*

Amendment 2 repeals . . . ordinances to the extent they prohibit discrimination on the basis of homosexual, lesbian or bisexual orientation, conduct, practices or relationships. . . . The amendment reads: “No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through 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 amendment shall be self-executing.”

Id.; see also Jackson, *supra* note 47, at 462.

tional and to enjoin its enforcement.⁴⁹ The trial court issued a preliminary injunction, which was affirmed on appeal by the Colorado Supreme Court, holding that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed on homosexuals' fundamental right to participate in the political process.⁵⁰ The U.S. Supreme Court denied the state's petition for certiorari.⁵¹ On remand, the trial court found the Amendment failed the strict scrutiny test and the Colorado Supreme Court affirmed.⁵² This time, the Supreme Court granted certiorari and affirmed the judgment.⁵³

In his opinion for the majority of the Court, Justice Kennedy concluded that Amendment 2 violated the Equal Protection Clause because the State discriminated against an entire class of persons, making the class "strangers to its laws."⁵⁴ The Supreme Court confirmed that homosexuals did not deserve protective status as a class under the Equal Protection Clause,⁵⁵ making the

⁴⁹ See Jackson, *supra* note 47, at 461; see also Amy D. Ronner, *When Courts Let Insane Delusions Pass the Rational Basis Test: The Newest Challenge to Florida Exclusion of Homosexuals from Adoption*, 21 U. FLA. J.L. & PUB. POL'Y 1, 68 (2010).

⁵⁰ See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

⁵¹ See Ronner, *supra* note 49, at 68.

⁵² See *id.*

⁵³ See *Romer*, 517 U.S. at 626; see also Jackson, *supra* note 48, at 462.

⁵⁴ *Id.* at 635 ("Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."); see Ronner, *supra* note 49, at 31. Colorado cited several reasons to justify passage of Amendment 2, but the Court was not persuaded by any of them. *Id.*

In *Romer* the State strained to justify Amendment 2. The State, portraying the amendment as a champion of other citizens' freedom of association, said that it gave liberty to those landlords and employees who contended that the amendment helped conserve resources to fight for more worthy causes, like discrimination of minorities. The court discredited those rationalizations, implying that they were delusional.

Id.

⁵⁵ See *Romer*, 517 U.S. at 633; see also Jackson, *supra* note 48, at 464 (explaining that Justice Kennedy, writing for the majority (6-3) stated: "If a law neither burdens a fundamental right nor targets a suspect class, we will up-

law subject to rational review.⁵⁶ However, Amendment 2 failed the rational review test for two reasons: first, because it imposed a “broad and undifferentiated disability on a single group; and second, because it harbored “animus” towards an entire class of people.⁵⁷ Ultimately, the Court rejected Colorado’s arguments justifying Amendment 2 as an effort to protect other citizens’ liberties, including their freedom of association, and conserving resources to fight discrimination against other minorities.⁵⁸ Colorado’s law simply did not rationally relate to any “identifiable legitimate purpose or discrete objective.”⁵⁹ However, because the Supreme Court did not commit to a heightened level of scrutiny, *Romer’s* applicability, like the cases cited by the Court, remains “narrow in scope and grounded in a sufficient factual context . . . to ascertain some relation between the classification and the purpose it served.”⁶⁰ As such, *Romer* joins a small group of cases which constitute narrow, targeted exceptions

hold the legislative classification so long as it bears a rational relation to some legitimate end.”).

⁵⁶ *See id.*

⁵⁷ *Id.* at 632 (“[s]heer breadth [of Amendment 2] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects”); BLACK’S LAW DICTIONARY 86 (7th ed. 1999) (defining “animus” as animosity, and “class-based animus” as “a prejudicial disposition toward a discernible, usually constitutionally protected, group of persons”).

⁵⁸ *Romer*, 517 U.S. at 635; *see also* Ronner, *supra* note 49, at 31 (discussing State’s argument as “strained to justify Amendment 2,” therefore discredited by the Court).

⁵⁹ *Id.* at 635.

⁶⁰ *Id.* at 632-33; *see also* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 9 (1996) [hereinafter Sunstein, *Foreword*] (concluding that although “the Court’s puzzling and opaque opinion is not satisfying from the theoretical point of view,” it serves another, less obvious purpose, and is masterful in combining degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause).

where laws were struck down even under the application of the rational review standard.⁶¹

Nonetheless, *Romer* needs to be acknowledged as a landmark case which set a precedent for future equal protection challenges based on “animus” and comprehensive disabilities imposed on a group of people.⁶² One important aspect of the case is the Court’s emphasis on the fact that homosexuals are subject to a “deeper kind of social antagonism,” associated not only with homosexual conduct but also with the homosexual identity.⁶³ Furthermore, relating homosexuality with status, rather than acts, links discrimination based on sexual orientation with discrimination based on race or gender and opens the door to a possibility of future reclassification of sexual minorities as a constitutionally protected class.⁶⁴

⁶¹ In addition to *Romer*, the Court struck down state laws in other cases using a form of the rational review test referred to as rational review with “bite.” See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (invalidating zoning ordinance requiring special permit to operate group home for the mentally retarded based on irrational prejudice); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (finding the amendment to *Food Stamps Act* of 1964, which required household members to be related to prevent “hippies” from participating in the program not rationally related to the government’s goal of preventing fraud); see also Ronner, *supra* note 49, at 30 n.157 (discussing cases that failed rational review test, and pointing out that “some commentators argue that the Court in these cases use[d] a stricter version of the rational basis test by giving rational basis a ‘bite’”); Sunstein, *Foreword: supra* note 60, at 59 (coining the cases that survived rational review as the “*Moreno-Cleburne-Romer Trilogy*”).

⁶² See Ronner, *supra* note 49, at 31; see also Sunstein, *Foreword: supra* note 60, at 59 (explaining that the approach taken by the Court was “minimalist” in order to minimize burdens and dangers of making decisions in general, particularly erroneous decisions).

⁶³ Sunstein, *Foreword: supra* note 60, at 62 (The author analogized *Romer* and *Cleburne*). “Here, as with the mentally retarded, we can find a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive.” *Id.*

⁶⁴ See *id.*

B. Heightened Scrutiny For Homosexuals as Suspect or Quasi-Suspect class

The absence of protective status for homosexuals as a class under the current equal protection jurisprudence makes gays and lesbians vulnerable to rational review,⁶⁵ which gives a great degree of “judicial deference” to legislative and administrative laws.⁶⁶ Yet, the Equal Protection Clause stands for an “anti-subjugation principle” and guards against laws that treat some people as “second-class citizens.”⁶⁷ Because homosexuals, like the other constitutionally protected classes, have a long history of invidious discrimination based on societal prejudice and stereo-

⁶⁵ See *Romer*, 517 U.S. at 632–33; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (landmark case regarding status of homosexuals, where the U.S. Supreme Court overruled its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) and invalidated Texas statute criminalizing homosexual sodomy). See Ronner, *supra* note 49, at 31; *supra* Part II.A. See generally Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 133 (2007).

The equality discussed in the *Lawrence* opinion is the same as the equality discussed in *Romer*: equality of status for a social group defined by a sexual orientation. Yet, the Court rested the *Lawrence* decision not on an equal protection ground, but rather on Fourteenth Amendment liberty, that is substantive due process. Although the opinion in *Lawrence* neither identified a fundamental interest nor suggested a standard of review that would require the state to offer important or compelling justification for its restriction on liberty, it did insist on some significant justification beyond the moral disapproval of homosexuality that had sufficed in *Hardwick*.

Id.

⁶⁶ See TRIBE, *supra* note 32, § 16-5 (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) “When expressed as a standard for judicial review, strict scrutiny is . . . ‘strict’ in theory and usually ‘fatal’ in fact.”).

⁶⁷ See TRIBE, *supra* note 32, § 16-21 (“When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws.”).

types,⁶⁸ they should be granted heightened scrutiny.⁶⁹ Furthermore, “judicial designation of homosexuality as a suspect classification . . . could provide a comprehensive doctrinal framework to address the problem of gay inequality.”⁷⁰

Since heightened levels of scrutiny warrant more stringent judicial inquiry into legislative intent and the purpose of the law,⁷¹

⁶⁸ See CHEMERINSKY, *supra* note 28, at 787; William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1328 (2000) [hereinafter Eskridge, *No Promo Homo*] (“For most of the twentieth century, laws or social norms stigmatizing gay people were justified on the ground that gay people do disgusting things or are diseased or predatory.”); AMY D. RONNER, *HOMOPHOBIA AND THE LAW* 3 (2005) (defining homophobia as “an irrationally negative attitude towards homosexuals that can manifest itself in harassment, verbal abuse, and even outright violence,” and stating that “homophobic attitudes still pervade both legislative and judicial decisions, denying rights on the basis of sexual orientation and gender identity”).

⁶⁹ See Ronner, *supra* note 49, at 31; *supra* Part II.A. “Heightened scrutiny” refers to both suspect and intermediate scrutiny, because either of these elevated levels of judicial review would provide more adequate protection for sexual minorities than the current rational review standard. Part II.B of this article shows that sexual minorities do meet the criteria under the test applied by the Court to examine applicability of strict scrutiny. Consequently, if strict scrutiny applied to sexual minorities, sexual minorities would also meet the less stringent criteria of intermediate scrutiny, or rational review “with a bite,” under *Romer*. For a discussion of classification of homosexuals as a suspect class, see Note, *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285 (1984) [hereinafter Note, *Constitutional Status*].

⁷⁰ Note, *Constitutional Status*, *supra* note 69, at 1297; see also TRIBE, *supra* note 32, § 16-1 (“The lack of openly acknowledged criteria for heightened scrutiny permits arbitrary use of the type of inquiry undertaken in *Cleburne*, for which courts will remain essentially unaccountable.”).

⁷¹ See Sunstein, *Homosexuality*, *supra* note 33, at 7.

The Supreme Court has granted “heightened scrutiny” to laws that discriminate against certain identifiable groups likely to be at particular risk in the ordinary political process. When the Court grants heightened scrutiny, it is highly skeptical of legislation, and the burden of every doubt therefore operates on behalf of groups challenging the relevant laws.

Id.; see also Kenneth Karst, *Developments in the Law – Equal Protection*, 82 HARV. L. REV. 1065, 1067 (1969) [hereinafter Karst, *Developments in the*

the Supreme Court has defined specific criteria relevant in determining whether a particular classification qualifies as suspect.⁷² The Court considers whether: (1) the class is a “discrete and insular minority” that lacks political power;⁷³ (2) there is a history of discrimination against the group;⁷⁴ (3) there is a social

Law] (discussing in-depth the process of judicial review for suspect classification and judicial review).

⁷² See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Justice Brennan, in his plurality opinion, joined by Justice Douglas, White, and Marshall, stated that “classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny.” *Id.* Although the Court ultimately settled the gender classification at intermediate scrutiny (*Craig v. Boren*, 429 U.S. 190, 197 (1976)), *Frontiero* provided invaluable insight into the analysis of factors considered by the Court for the elevated scrutiny status. See TRIBE, *supra* note 32, § 16-6; see also Sunstein, *Homosexuality*, *supra* note 33, at 7; cf. Note, *Constitutional Status*, *supra* note 69, at 1299 (stating that suspectness cannot be absolutely determined in every case; however, articulable boundary of suspectness can be created, by focusing on criteria which are universally accepted as reliable means of determining a group’s need for judicial intervention).

⁷³ See *United States v. Carolene Prods.*, 304 U.S. 144, 152, n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends [to] seriously . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial review.”); *Frontiero*, 411 U.S. at 686 (“Women still face pervasive, although more subtle, discrimination in our educational institutions, in the job market, and perhaps most conspicuously, in the political arena.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 152 (1980) (discussing Justice Stone’s opinion in *Carolene Products*); TRIBE, *supra* note 32, at 16-32.

⁷⁴ See *Frontiero*, 411 U.S. at 684 (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”); see also HART ELY, *supra* note 73, at 152; Karst, *Developments in the Law*, *supra* note 74, at 1065 (discussing that continuing presence of discrimination, evidenced in history of subjugation of American Blacks, needs to be remedied by heightened scrutiny to compensate for both past suffering and to correct the imbalance of the persistent prejudice in the present).

stigma perpetuated by a stereotype;”⁷⁵ and (4) the trait by which the class members are defined is immutable.⁷⁶ Although “none of the factors standing alone indicates whether a particular classification should receive heightened scrutiny,” all of them considered together help the Court to determine whether a group needs elevated judicial protection.⁷⁷

⁷⁵ See *Frontiero*, 411 U.S. at 685. The Court pointed out that women in the past were viewed primarily based on their roles as wives and mothers, and in accordance with the “law of the Creator.” *Id.*

[O]ur books became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was in many ways, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

Id.; see also WEBSTER II DICTIONARY, *supra* note 31, at 663 (“[s]tigma” means “a mark of infamy or disgrace;” “[s]tereotype” means “a conventional, formulaic, usually highly simplified opinion, conception, or belief”); HART ELY, *supra* note 73, at 152 (concluding that legislation based on stereotype is a legislation by generalization, without room for statistical deviation, which is inevitable in legislation, but under an erroneous assumption, it denies members of minorities equal protection); Note, *Constitutional Status*, *supra* note 69, at 1297 (discussing problem of “political powerlessness,” because legislative decisions are not only affected by actual political influence, but also by “unarticulated claims” about the legitimacy affecting the group, which are not always obvious).

⁷⁶ See *Frontiero*, 411 U.S. at 686. The Court explored issues of immutable traits in the context of the Equal Protection Clause. *Id.*

[S]ex, like race, and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic conception of our system that legal burdens should bear some relationship to individual responsibility.

Id. But see HART ELY, *supra* note 73, at 150 (disputing validity of immutability as a factor for heightened scrutiny, because alienage, and [even] gender are alterable, but justify heightened scrutiny, while physical disability and intelligence are not considered as classifying suspect traits).

⁷⁷ See *Frontiero*, 411 U.S. at 686. The Court concluded that generally “sex characteristic frequently bears no relation to ability to perform or contribute

Although the Supreme Court has never applied this analysis to cases of discrimination based on sexual orientation,⁷⁸ there is ample evidence that such discrimination merits heightened scrutiny.⁷⁹ Homosexuals are politically powerless, because societal prejudice and hostility often force them to remain anonymous or “diffuse” their sexual orientation.⁸⁰ Conversely, even when gays and lesbians overcome the social, economic and political pressures to conceal their sexual orientation, the “general animus” towards homosexuality may prevent public officials from openly supporting legislation favorable to homosexuals.⁸¹

to society.” *Id.* “As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members” *Id.*

⁷⁸ See Sunstein, *Homosexuality*, *supra* note 33, at 7 (“The Court has not yet decided how discrimination against homosexuals should be treated.”); Note, *Constitutional Status*, *supra* note 69, at 1297.

⁷⁹ See Note, *Constitutional Status*, *supra* note 69, at 1285;

Even within a “nation of minorities,” American gay people constitute a minority group that at once elicits an extraordinarily high degree of fear and contempt from society at large and receives an inordinately low degree of state protection from the institutionalization of that antipathy. Gay lobbyists and litigants have found little refuge in legislatures and courts [Thus] the courts should recognize homosexuality as a suspect classification under the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment.

Id.; see also Holder, Statement, *supra* note 8 (concluding that “classification based on sexual orientation should be subject to a heightened standard of scrutiny”); Sunstein, *Homosexuality*, *supra* note 33, at 8.

⁸⁰ See Sunstein, *Homosexuality*, *supra* note 33, at 8 (defining “anonymous” as “not known to be homosexual” and “diffuse” as “not tightly organized”); see also HART ELY, *supra* note 73, at 153 (“[P]rejudice’ . . . is a lens that distorts reality. We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that exist.”).

⁸¹ See *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988) (vacated en banc for a different reason), 875 F.2d 699 (9th Cir. 1989); see also Sunstein, *Homosexuality*, *supra* note 33, at 8 (discussing the problem faced by the proponents of gay rights, who often become “accused” of being homosexuals

Moreover, gays and lesbians have a long history of discrimination documented in a vast body of legislations, both state and federal, prohibiting homosexuals from participating in the most fundamental functions of a democratic society.⁸² And there is an undisputed social stigma against sexual minorities, ranging from pervasive attitudes viewing homosexuals as mentally ill, deviant or predatory,⁸³ to more subtle “benign” but exclusory treatment.⁸⁴ At last, there is the immutability factor to consider in the analysis for heightened scrutiny, which continues to be a

themselves, which may be harmful to their reputations); Note, *Constitutional Status*, *supra* note 69, at 1286 (“[Homosexuals] are forced to deny or disguise their identity in order to enjoy rights and benefits routinely accorded heterosexuals.”).

⁸² See ESKRIDGE, *GAYLAW*, *supra* note 6, at 5 (providing in depth historical perspective on discrimination based on sexual orientation and an overview of American regulation of sexual and gender variations in general); Note, *Constitutional Status*, *supra* note 69, at 1305 (“Because homosexuality is a determinative feature of personhood and because gay people have historically been victims of stigmatization and discrimination, courts must subject legislation that classifies on the basis of sexual orientation to a heightened standard of review and must closely scrutinize the state interests embodied in the legislation.”).

⁸³ See KARST, *BELONGING TO AMERICA*, *supra* note 2, at 151 (“Harm from direct, intentional stigmatizing acts are complemented by the harms inflicted indirectly and unthinkably by officials and others who are systematically inattentive to inequities that fall on members of a stigmatized group.”); Eskridge, *No Promo Homo*, *supra* note 68, at 1328 (“For most of the twentieth century, laws or social norms stigmatizing gay people were justified on the ground that gay people do disgusting things or are diseased or predatory.”).

⁸⁴ See ESKRIDGE, *GAYLAW*, *supra* note 6, at 2. Author explains that “homosexuality” is not a natural category, but a concept defined in the Western culture. *Id.* Although people of the same sex engaged in intimacy for centuries, “Western modern culture is distinctive in analyzing that intimacy around the concept of sexual orientation and stigmatizing the desire for such intimacy as well as the acts themselves.” *Id.*

[G]ender and sexual orientation are not natural forms but are instead “socially construed” categories reflecting a system of power relations; the social creation of disproved forms of gender and sexuality generates social travesty, and the innovation of law to direct social travesty generates apartheid of the closet, where gay people are physically as well as socially isolated; and the categories and the closet have not been productive and

contested subject of vigorous debates on both sides of the issue.⁸⁵ However, over the years, science has provided more consistent research supporting a proposition that homosexuality is immutable, rather than based on preference and conduct.⁸⁶ Therefore, sexual orientation classification meets the criteria for heightened judicial scrutiny under the Equal Protection Clause.⁸⁷

should be ameliorated by laws' acceptance of the idea of benign sexual variation [opposed to malign].

Id.; HART ELY, *supra* note 73, at 162–63 (“Homosexuals for years have been the victims of both ‘first-degree prejudice’ and subtler forms of exaggerated we-they stereotyping.”).

⁸⁵ See ESKRIDGE, *SEXUALITY*, *supra* note 6, at 246–47. Immutability may be relevant to suspect classification analysis because it would be unfair to penalize individuals for traits they cannot change, and the oppressed group may embrace the trait viewing it through a prism of identity. *Id.*; *but see* Susan R. Schmeister, *Changing the Immutable*, 41 *CONN. L. REV.* 1495 (2008). The author argues there is rhetorical confusion surrounding homosexuality and choice, linking it to a “misguided jurisprudence of immutability.” *Id.* Furthermore, focus on immutability as a factor represents an unnecessary departure from the core purpose of equal protection jurisprudence, which is to combat systemic discrimination against sexual minorities. *Id.*

⁸⁶ See Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 *WASH. U. L. REV.* 573, 582–91 (2006). The author discusses current scientific research regarding biological causes of homosexuality. *Id.* He acknowledges that sexual orientation, in biological terms, is a complex characteristic, and that “finding a single cause is highly unlikely.” *Id.* at 583. However, studies of identical twins separated at birth suggest strong genetic influence on sexual orientation. *Id.* at 584. Other studies, examining brains of gay and straight men suggested that the neuronal mechanisms and brain structure that regulate sexual behavior differ between gay and straight, leading some scientists to believe there may be a “gay gene.” *Id.* However it is uncertain whether the brain influences the sexual orientation or vice versa. *See id.* The author also discusses congenial studies, showing the more sons a woman has, the more likely that a subsequent son will be gay. *See id.* Although not conclusive, these studies show great and promising insight into the link between sexuality and biology. *See id.*

⁸⁷ See Note, *Constitutional Status*, *supra* note 69, at 1308.

An equal protection approach to gay rights recognizes both that personhood is the value to be protected and that inequality is the evil to overcome. Despite the unwillingness of most courts to . . . extend the range of suspect classifications, height-

Considering examples of other protected classes, race and gender in particular, application of heightened scrutiny to discrimination based on sexual orientation would undoubtedly lead to more uniform judicial review and help eradicate facially prejudicial, stigmatizing legislation.⁸⁸ However, as in cases of other protected classes, facially neutral laws that have a discriminatory effect on sexual minorities would be subject to review under the elusive standard of disparate impact analysis.⁸⁹

III. DISPARATE IMPACT TEST AND SUBCONSCIOUS BIAS

Under the Equal Protection Clause, facially neutral laws that strongly suggest discrimination because of their impact are difficult to challenge because they require proof of intent to discriminate.⁹⁰ The problem with reviewing claims based on prejudice in political outcomes rather than on the structure of the political process first surfaced in the context of racial discrimination.⁹¹ In

ened scrutiny in cases involving discrimination against gays is justified by an analysis of the concerns that should and do lie behind our current concepts of suspectness.

Id.

⁸⁸ See CHEMERINSKY, *supra* note 28, at 756; see also TRIBE, *supra* note 32, § 16–20 (2d ed. 1988) (discussing the doctrine that facially race-neutral governmental action will be subject to strict scrutiny only if it is discriminatory in impact and purpose, and otherwise will require only judicial review under the rational basis standard).

⁸⁹ See TRIBE, *supra* note 32, § 16–20; KARST, *BELONGING TO AMERICA*, *supra* note 2, at 152; Note, *Discriminatory Purpose and Discriminatory Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1379, 1404 (1979) [hereinafter Note, *Discriminatory Purpose and Discriminatory Impact*] (“Despite the growing number of Supreme Court pronouncements on discriminatory purpose, the actual process of ascertaining ‘purpose’ in a given case remains one of the more elusive legal exercises.”).

⁹⁰ See TRIBE, *supra* note 32, § 16–20; Lawrence, *supra* note 13.

⁹¹ See CHEMERINSKY, *supra* note 28, at 726. The author discusses the difficulties of proving discriminatory purpose in school segregation laws that were facially neutral. See *id.* In *Keys v. Schl. Dist. No.1, Denver, Colo.*, 413 U.S. 189 (1973), the Court draws distinction between *de jure* [legal] segregation, which was a constitutional violation, and *de facto* [factual] discrimination, which required proof of discriminatory purpose. See *id.* Thus, proof of racial

Washington v. Davis (“*Davis*”),⁹² the Supreme Court announced that to be reviewed under strict scrutiny, the law must have a discriminatory impact and purpose.⁹³ This “motive-based” standard has proven fatal to many Equal Protection Clause challenges, because it places a “very heavy, and often impossible burden of persuasion” on a minority to show that the government passed the law with a specific purpose to discriminate.⁹⁴ But the laws may have discriminatory impact on a minority and lack a specific discriminatory intent on the part of the legislature.⁹⁵ For example, legislatures often create generally applicable “one size fits all” laws, without considering specific classes of

segregation in schools is not sufficient to establish an equal protection violation, and like in other areas of equal protection law, “there must be evidence of intentional acts to segregate schools . . . to justify system-wide remedy.” *Id.*

⁹² 426 U.S. 229 (1976).

⁹³ *Id.* at 240; *see e.g.*, *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979) (deciding that facially-neutral laws discriminating based on gender are subject to disparate impact analysis); *see* KARST, *BELONGING TO AMERICA*, *supra* note 2, at 152. In *Feeney*, the Supreme Court extended the burden of proof to claims of sex discrimination, stating that discriminatory motive “either is a factor that has influenced the legislature’s choice or it is not.” *See id.* However, such a simplistic view of human motivation is inadequate when considering individual action, and much more complex when considering a large body of legislation. *See id.*

⁹⁴ *See* Lawrence, *supra* note 13; KARST, *BELONGING TO AMERICA*, *supra* note 2, at 154 (“One serious objection to a motive-centered doctrine of discrimination is . . . that it places the burden of justification on the wrong side of the dispute, to the severe detriment of the constitutional protection of equality.”).

⁹⁵ *See* KARST, *BELONGING TO AMERICA*, *supra* note 2, at 152.

Because an individual’s behavior results from the interaction of a multitude of motives, and because the attitudes of both officials and judges about race and sex are mostly embedded below a level of consciousness, in any given cases the official will be able to argue that the action was prompted by considerations in which race and sex played no part.

Id.; *see also* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 551–52 (2008).

individuals that the law will affect.⁹⁶ Conversely, the legislators, based on their prior experience, may learn to write laws that “seem” facially neutral, but are a pretext for discrimination.⁹⁷ However, more often than not, the problem of proving a discriminatory intent behind a facially neutral law lies within the modern concept of discrimination itself.⁹⁸

Although most Americans pride themselves as being egalitarian-minded, “social research studies on race and implicit bias indicate that Americans today are not . . . color blind.”⁹⁹ The findings regarding the subconscious nature of racism can be applied to other forms of prejudice, since discrimination towards different minorities shares universal characteristics and patterns.¹⁰⁰ Moreover, the tacit nature of discrimination finds sup-

⁹⁶ See, e.g., Lee, *supra* note 95, at 551. “The problem with relying on the legislature to determine what types of activities should or should not constitute legally adequate provocation is that legislatures tend to enact broad-based legislation that will apply to many different cases based on an abstract hypothetical set of facts.” *Id.*

⁹⁷ See KARST, *BELONGING TO AMERICA*, *supra* note 2, at 152; Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 *LOY. U. CHI. L. J.* 1, 29 (2010) (defining “overt discrimination as ‘the most obvious,’ vs. pretextual discrimination, which is a subtle form of ‘intentional discrimination hidden behind a veneer of facially neutral practices.’”).

⁹⁸ See Lawrence, *Unconscious Racism Revisited*, *supra* note 14, at 952.

⁹⁹ See Lee, *supra* note 95, at 537; cf. KARST, *BELONGING TO AMERICA*, *supra* note 2, at 151 (explaining that the twentieth century social and constitutional attack on racial caste resulted in rhetoric of individualism, but the principles of exclusion from community are common to other minorities that experience stigma).

¹⁰⁰ See Lee, *supra* note 95, at 547. Author argues that implicit racial bias can be applied to sexual discrimination bias because “many egalitarian-minded heterosexual individuals sincerely believe that gays and lesbians should not be discriminated against and self report positive attitudes towards homosexuality, yet manifest implicit bias in favor of heterosexuality and against homosexuality. *Id.* Implicit bias is a concern whether one is talking about race, gender, sexual orientation, or age.” *Id.*; see also Note, *Discriminatory Purpose and Discriminatory Impact*, *supra* note 89, at 1386–88 (pointing out that *Davis* analysis for racial discrimination in facially neutral laws was extended to gender discrimination in *Feeney*).

port in the relevant equal protection jurisprudence and proves that the disparate impact test under *Davis* is futile and inadequate to eradicate racism as well as other forms of discrimination, including discrimination based on sexual orientation.¹⁰¹ Thus, the Court needs to apply a different test that would provide remedial measures for the purpose of the Equal Protection Clause.¹⁰²

A. *Inadequacy of Davis' Disparate Impact Test*

In *Davis*, the Supreme Court fashioned a disparate impact test to determine whether a facially neutral law, in fact, discriminates against a racial minority.¹⁰³ The case involved a challenge

¹⁰¹ See Lawrence, *Unconscious Racism Revisited*, *supra* note 14, at 954 (“Note that Davis’ uncertainty about the cause of racially subordinating impact leads to the default position of no suspicion of racism.”).

¹⁰² See, e.g., Lawrence, *supra* note 13. Author proposes an alternative standard to *Davis*, called “the cultural meaning test” that would trigger judicial recognition of race-based behavior. See *id.* “[T]he chief virtue of the cultural meaning test lies in the correct question: Have societal attitudes about race influenced the governmental actor’s decision?” *Id.* *Contra Note, Discriminatory Purpose and Discriminatory Impact*, *supra* note 89, at 1404.

[I]f discriminatory purpose is to serve its role in maintaining a proper balance between the court’s obligation to enforce the [E]qual [P]rotection [C]lause and their responsibility to defer to the reasonable acts of legislators and administrators, methods must be developed to determine those instances where an improper consideration of race or gender has infected the legislative process Discriminatory purpose can be proved by ‘direct’ evidence of purpose—such as legislative history, speeches, minutes, or testimony – by circumstantial evidence – such as ‘objective’ evidence of the way in which actions were taken, as the results of those actions, from which purpose can be inferred, or by some combination of the two.

Id.; see Eang L. Ngov, *supra* note 97, at 29 (discussing Title VII [of the Civil Rights Act of 1964] in context of disparate impact analysis, and concluding that disparate impact “is most likely to survive strict scrutiny by serving the compelling purpose of removing barriers to provide equal employment opportunities”).

¹⁰³ See *Washington v. Davis*, 426 U.S. 229, 240 (1976); KARST, BELONGING TO AMERICA, *supra* note 2, at 155; Lawrence, *supra* note 13; Gayle Binion,

to a skills examination, known as Test 21, used by the District of Columbia Metropolitan Police Department (“DC Police Department”) to screen applicants for employment.¹⁰⁴ Unsuccessful black applicants alleged that Test 21 was unconstitutional, based on the statistical data which revealed the failure rate of the test was four times higher for blacks than for whites.¹⁰⁵ In his opinion for the majority, Justice White articulated that the discriminatory impact of the law “standing alone” was insufficient to prove racial classification.¹⁰⁶ Consequently, a facially neutral legislative act would be subject to rational review,¹⁰⁷ unless “there was a proof of discriminatory purpose behind the law.”¹⁰⁸ In the instant case, the Court held that Test 21 was

“Intent” and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 404 (1983); Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. F. 961, 1002 (1977) (“[T]he significance of *Davis* for modern equal protection litigation lies [in] . . . what it says about laws with facially neutral provisions.”).

¹⁰⁴ See *Davis*, 426 U.S. at 237; TRIBE, *supra* note 32, § 16-20; Schwemm, *supra* note 103, at 970.

¹⁰⁵ See *Davis*, 426 U.S. at 237; TRIBE, *supra* note 32, § 16-20; Schwemm, *supra* note 103, at 970.

¹⁰⁶ *Davis*, 426 U.S. at 242 (explaining that under the Equal Protection Clause “disproportionate impact is not irrelevant, but it’s not the sole touchstone of an invidious racial discrimination forbidden by the Constitution”); CHEMERINSKY, *supra* note 20, at 710; Schwemm, *supra* note 103, at 1050–51.

¹⁰⁷ See *Davis*, 426 U.S. at 248.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id.; KARST, *BELONGING TO AMERICA*, *supra* note 2, at 155 (discussing the Supreme Court’s decision to adopt the disparate impact standard and explaining that “[t]he doctrine of discriminatory motive was a way to contain the reach of the equal protection clause – and the role of judges – by saying ‘thus far and no further’”).

¹⁰⁸ *Davis*, 426 U.S. at 240 (stating “the basic equal protection principle that an invidious quality of law must be traced to a racially discriminatory pur-

facially neutral because it applied equally to black and white applicants.¹⁰⁹ Furthermore, “absent direct or inferential proof that the test was employed with a design to produce racially disproportionate results,”¹¹⁰ the disparate failure of black applicants, by itself, was insufficient to support a prima facie case for racial discrimination.¹¹¹ Under the rational review standard, which is highly deferential to the government,¹¹² the Court deemed “Test 21 was directly [and rationally] related to the requirements of the police training program,” because its scores sufficiently correlated with the actual performance of the police officers’ tasks.¹¹³ Thus, Test 21 was upheld as constitutional.¹¹⁴

pose”); CHEMERINSKY, *supra* note 20, at 710 (citing *Mobile v. Bolden*, 446 U.S. 55 (1980)); TRIBE, *supra* note 32, § 16-20 (“Disparate impact on an acknowledged suspect class, without more, required only rational review under the rational basis standard.”).

¹⁰⁹ See *Davis*, 426 U.S. at 246 (“Respondents, all Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed.”); Schwemm, *supra* note 103, at 972.

¹¹⁰ *Davis*, 426 U.S. at 252; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1115 (1977); Schwemm, *supra* note 103, at 1002-03.

¹¹¹ See TRIBE, *supra* note 32, § 16-20; Freeman, *supra* note 110, at 1115.

¹¹² See *Davis*, 426 U.S. at 250-52; Schwemm, *supra* note 103, at 972 (“The test was racially neutral on its face, and the Court found its use a rational means of upgrading the verbal skills required of police officers.”).

¹¹³ *Davis*, 426 U.S. at 251; *But see* TRIBE, *supra* note 32, § 16-20 (“The precise weight that evidence of disproportionate impact on one race should receive was left uncertain, [n]or did the Court give many clues as to just what short of proof it expected of the precise role of prejudiced motives in a given governmental action.”).

¹¹⁴ See *Davis*, 426 U.S. at 246 (“[T]he test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.”); see also Schwemm, *supra* note 103, at 971-72 (explaining that the requirement for a discriminatory purpose was warranted to limit the potentially dangerous and far-reaching effects of the Equal Protection Clause, which could put into question and potentially invalidate many other laws relating to taxes, public welfare, and employment regulation).

In his groundbreaking article published in 1987,¹¹⁵ Charles R. Lawrence III, joined by other prominent legal scholars, openly criticized the test established under *Davis* because the disparate impact doctrine failed to accomplish its purpose of assessing racial animus in facially neutral laws.¹¹⁶ Lawrence, however, expanded the discussion of the previously-cited reasons for the failure of the disparate impact test by referring to the subconscious and irrational nature of racism which, in his view,¹¹⁷ was

¹¹⁵ Lawrence, *supra* note 13, at 317.

¹¹⁶ See, e.g., Binion, *supra* note 103, at 405-06.

[T]he eschewal of the intent rule – in favor of the assumed alternative of an impact rule – also reflects a fear of loss of privilege The intent rule may, therefore, protect socioeconomically privileged classes whose interests are represented in legislative and administrative policy from judicial interference, with their resulting, often unquestioned, advantages.

Id.; see also KARST, *BELONGING TO AMERICA*, *supra* note 2, at 155 (arguing that the discriminatory impact test fails because “[w]hen in the context of race . . . the problem of the stigma of caste cannot even be understood, let alone resolved, by limiting inquiry to singular cases of purposeful stigmatization action”); Schwemm, *supra* note 103, at 1050–51.

The primary difficulty . . . is that improper purpose is hard to prove, and *Davis* . . . demonstrate[s] that an equal protection claimant will be hard pressed to establish necessary discriminatory racial purpose. The effect, if not the actual purpose . . . will be to reduce the number of meritorious civil rights claims that can be successfully brought under the equal protection clause.

Id.

¹¹⁷ See Lawrence, *supra* note 13, at 322–23. The author offers two explanations for the unconscious and irrational nature of racism. *Id.* at 322. First, the Freudian theory, which “states that the human mind defends itself from the discomfort of guilt by denying or refusing to recognize those ideas, wishes and beliefs that conflict with what the individual has learnt is good or right.” *Id.* Since our history made racism an integral part of our culture, but our society has evolved and now considers racism immoral, there is a conflict between racist propensities and social ethics which leads the mind to exclude racism from the consciousness. *Id.* at 323. Second, the theory of cognitive psychology states that the culture, including “media and an individual’s parents, peers, and authority figures – transmit certain beliefs and preferences.” *Id.* Cognitivists refer to these beliefs as “categorizations,” which are a com-

largely influenced by our cultural belief system.¹¹⁸ He cautioned that “requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent,” ignored our understanding of how the human mind works and disregarded the irrational nature of racism.¹¹⁹

In 2008, twenty years after publishing the article on purposeful intent and the unconscious nature of racism, Charles R. Lawrence III revisited his pioneering work.¹²⁰ Lawrence reflected on his contribution to Critical Race Theory, which provided great insight into the universal nature of discrimination.¹²¹ Many legal scholars and cognitive scientists have since advanced

mon source of racial and other stereotypes. *Id.* at 337. However, because these beliefs become an integral part of an individual’s life, they are not explicit, but rather are experienced on the subconscious level. *Id.* at 323.

¹¹⁸ See Lawrence, *supra* note 13, at 317, 322 (1987).

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites . . . We do not understand the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Id.

¹¹⁹ See *id.* at 323 (arguing that in order to eliminate invidious racial discrimination, the legal system must find a way to “come to grips” with unconscious racism).

¹²⁰ See Lawrence, *Unconscious Racism Revisited*, *supra* note 14, at 931.

¹²¹ See *id.* at 948–51 (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection* 39 STAN. L. REV. 317, 324 (1987)).

I wanted to prove that my argument against the discriminatory intent requirement did not require agreement with my more radical position that the Fourteenth Amendment embodies a constitutional norm or value of anti-subordination, to demonstrate that, even if we judged the *Davis* doctrine by the measure of the mainstream liberal theories of equal protection, the doctrine did not serve the Fourteenth Amendment purpose. . . . In *The Id, the Ego, and Equal Protection*, I spoke of the ‘cultural meaning’ of an allegedly racially discriminatory act as the

the research on the implicit bias theory, proving its general utility and application to other types of discrimination,¹²² including discrimination based on sexual orientation.¹²³

‘best available analogue for and evidence of the collective unconscious that we cannot observe directly.’

Id.

¹²² See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 979 (2006). “A central problem in today’s world . . . is the possibility that many people act on the basis of implicit bias.” *Id.* at 979. The authors note “[i]n response, legal rules might seek to reduce the likelihood that implicit bias will produce differential outcomes; but it would be quite difficult to conclude that current antidiscrimination law adequately achieves the goal.” *Id.* However, by incorporating psychological research about the unconscious nature of discrimination, implicit bias might be effectively controlled through “a general strategy of ‘debiasing through law.’” *Id.* at 969. See generally Lawrence, *Unconscious Racism Revisited*, *supra* note 14, at 941.

[T]he considerable and important body of research and literature . . . emerged since the advent of my article. Cognitive psychologists have employed carefully constructed research and sound scientific methodology to substantiate my article’s assertion that we are all influenced by racial bias, much of which we are unaware. Legal scholars, including Linda Krieger, Jerry Kang, Devon Carbado, and others have drawn on this social science and made the work accessible to lawyers and civil rights activists who have, in turn, used it well to do important political work of educating the courts and the public about the nature role of the unconscious in discrimination.

Id.

¹²³ See, e.g., Lee, *supra* note 95, at 551–52. Author argues that implicit racial bias can be applied to sexual discrimination bias, because “many egalitarian-minded heterosexual individuals sincerely believe that gay and lesbians should not be discriminated against and self report positive attitudes towards homosexuality, yet manifest implicit bias in favor of heterosexuality and against homosexuality. Implicit bias is a concern whether one is talking about race, gender, sexual orientation, or age.” *Id.*; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1569 (2004) [hereinafter Jerry Kang, *Trojan Horses of Race*] (discussing implicit bias in the context of cognitive stereotypes and affective prejudice towards homosexuals, based on the wildly popular show *Queer Eye for the Straight Guy*, where the five characters “gay it up” for the entertainment value); Kang & Lane, *supra* note 15, at 478 (discussing compiled empirical evidence on perceptual, cognitive, and behavioral aspects of implicit bias, including the effects on homosexual populations).

B. Title VII: Employment Discrimination Loophole

Discussion of disparate impact in cases involving facially neutral laws would be incomplete without referencing Title VII,¹²⁴ where Congress departed from requiring proof of intent in employment discrimination claims.¹²⁵ Specifically, the Civil Rights Act of 1991 recognized a valid claim for relief as long as a plaintiff could show the employer's discriminatory practices caused disparate impact on the basis of race, color, religion, sex or national origin.¹²⁶ In addition, the statute required the employer to demonstrate that the "challenged job practice . . . [was] job related for the position in question and consistent with business necessity."¹²⁷ The modified standard strongly supports a conclusion that Congress codified disparate impact because proving that an employer acted with a discriminatory intent caused confusion and inconsistencies in judicial interpretation.

The difficulty in establishing liability based on an employer's intent lays in the presumption that the employers are cognizant of their discriminatory actions.¹²⁸ Prior to the 1991 Title VII amendment, the courts applied disparate treatment theory, which required showing that an employer acted with a conscious discriminatory intent.¹²⁹ For example, in *Price Waterhouse v.*

¹²⁴ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e et seq. The Act was codified as amended in 1972 and 1991. Title VII provides federal protection against job discrimination in the private sector, as well as in state and federal employment cases.

¹²⁵ In-depth analysis of statutory structure in antidiscrimination laws is beyond the scope of this article. However, the codification of disparate impact in Title VII claims is relevant to the article's premise because it shows that proving intent is inadequate to prove implicit bias which is often a prevalent and underlying factor in discrimination claims.

¹²⁶ See *supra* note 24.

¹²⁷ *Supra* note 24.

¹²⁸ See Eang L. Ngov, *supra* note 97, at 41.

¹²⁹ See Ann C. McGinely, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y. 415, 417 (1999) [hereinafter Ann C. McGinely, *Viva La Evolucion!*]. The author concludes that "although the scholars have struggled with the meaning of discriminatory intent,

*Hopkins*¹³⁰ Justice Brennan stated that to prove discrimination, the employer must have had a conscious discriminatory motive at the time of making the adverse employment decision.¹³¹ The case involved a female employee (Hopkins) who was denied partnership in an accounting firm because the male partners viewed her as too masculine, and thus non-conforming to the employer's expected standards of a female manager.¹³² The Court held that such gender stereotyping was illegal.¹³³

To find the employer culpable, the Court circumvented the conscious awareness requirement by reasoning that "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."¹³⁴ Thus, the Court "unwittingly" expanded the definition of intent by considering both consciously and unconsciously held stereotypes affecting employment decisions.¹³⁵ Congress codified the "mixed motives" provision into the Civil Rights Act of 1991, applicable in cases of sex discrimination. However, because the Act did not explicitly prohibit discrimination against homosexuals, the em-

the courts have settled on a simplistic definition." *Id.* According to the courts, the employer intentionally discriminated only if and when he or she was aware of the discriminatory purpose at the time of undertaking the adverse employment decision. *Id.* See also Eang L. Ngov, *supra* note 97, at 41–42.

¹³⁰ 490 U.S. 228 (1988).

¹³¹ *Id.* at 250.

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id. See also note 129.

¹³² See *Hopkins*, 490 U.S. at 234–35; *infra* note 133.

¹³³ See Zachary Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-NonConforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 467 (2004). Title VII of the Civil Rights Act of 1964 prohibits discrimination against individuals in an employment context, "because of their sex." *Id.*

¹³⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

¹³⁵ Ann C. McGinely, *!Viva La Evolucion!*, *supra* note 129, at 475.

ployment discrimination claims brought under gender stereotype theory remain vulnerable to judicial interpretation.¹³⁶ Thus, the disparate impact analysis under *Davis* remains the default position in cases where courts adhere to a narrow, literal interpretation of the statutory amendment.

¹³⁶ See Ann C. McGinely, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713, 715 (2009) [hereinafter Ann C. McGinely, *Erasing Boundaries*]. “The problem of adequately protecting sexual minorities under Title VII lies in the courts’ binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex. *Id.* See Recent Cases, *Employment Law – Title VII–Sex Discrimination–Ninth Circuit Extends Title VII Protection to Employee Alleging Discrimination Based on Sexual Orientation–Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*), petition for cert. filed, 71 U.S.L.W. 344 (U.S. Dec. 23, 2002) (No. 02-970), 116 HARV. L. REV. 1889, 1889–91 (2002) [hereinafter Recent Cases]. “In *Rene v. MGM Grand Hotel, Inc.* [305 F.3d 1061 (9th Cir. 2002)], the Ninth Circuit took up the case of a plaintiff whose Title VII claim alleging discrimination on the basis of sexual orientation challenged existing interpretations of the words ‘because of . . . sex.’” *Id.* at 1889. In that case, Medina Rene, an openly gay man, who worked as a butler at the MGM Grand Hotel in Las Vegas, over a two-year period of his employment, was repeatedly sexually harassed by his coworkers. See *id.* at 1889–90. Nevertheless, the District held that “Title VII prohibition of ‘sex’ discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference.” *Id.* at 1890. The Ninth Circuit affirmed, reasoning that although Rene was harassed because of sexual orientation, he could not prove that the discrimination was “because of sex.” *Id.* The dissent, on the other hand, cited *Onacle v. Sundowner Offshore Services, Inc.* [523 U.S. 75 (1998)], the case where the Supreme Court “first established that same-sex harassment could be actionable under Title VII.” *Id.* at 1891. Ultimately, sitting *en banc*, the Ninth Circuit reversed and remanded, the plurality concluding that the “physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were ‘because of . . . sex.’” *Id.*

C. Effect of Implicit Bias Studies on Nature of Discrimination Claims

Over the past two decades, extensive research has confirmed the effect of implicit bias,¹³⁷ which has a substantial bearing on discrimination law.¹³⁸ The theory of implicit bias contradicts the common legal assumption that “human actors . . . [are] guided solely by their explicit beliefs and their conscious intentions to act.”¹³⁹ On the contrary, the science of implicit cognition proves that often actors do not have “conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”¹⁴⁰ Most of the evidence for the validity of implicit bias comes from the recent development of the Implicit Association Test (“IAT”),¹⁴¹ which

¹³⁷ See Greenwald & Hamilton Krieger, *supra* note 15, at 949–51. Authors first define implicit attitudes and implicit stereotypes, because both of these terms are especially relevant to bias and discrimination. See *id.* at 948. “Implicit attitudes” are implied “tendenc[ies] to like or dislike, or to act favorably, or unfavorably toward someone or something. *Id.* “Implicit social stereotypes” are implied “association[s] between a social group or category and a trait.” *Id.* at 949. Authors also define the term “bias,” which sometimes is referred to as “response bias, [which] denotes a displacement of people’s responses along a continuum of possible judgments.” *Id.* at 950. Finally, “implicit biases” are discriminatory biases based on implicit attitudes or implicit stereotypes. *Id.* at 951.

¹³⁸ See *id.* at 956 (“The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity, or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, or intentions.”); see Jolls & Sunstein, *supra* note 122, at 969.

¹³⁹ Greenwald & Hamilton Krieger, *supra* note 15, at 946.

¹⁴⁰ *Id.* at 946; see also Kang & Lane, *supra* note 15, at 468.

¹⁴¹ See Kang & Lane, *supra* note 15, at 473. The authors explain that since the IAT was introduced [on the Internet] in 1998, “hundreds of peer-reviewed scientific publications have produced largely consistent results.” *Id.*

Clear evidence of the persuasiveness of implicit bias comes from Project Implicit, a research website operated by Harvard University, Washington University, and the University of Virginia. At Project Implicit, visitors can try IATs that examine implicit attitudes and stereotypes on topics ranging across race,

measures a wide variety of the group-valence and group-associations that cause attitudes and stereotypes among various disadvantaged minorities, including homosexuals.¹⁴² The test documents the existence of implicit bias reflected by the difference in time it takes the subject to process information corresponding to well-established associations, such as stereotypes, and their opposites.¹⁴³ The premise of the IAT rests on an observation that producing the same response “when confronted with opposite associations is understandably more difficult than at-

gender, age, politics, religion, and even consumer brands. With over seven million completed tests, Project Implicit comprises the largest available repository of implicit social cognition data.

Id.; see also Jolls & Sunstein, *supra* note 122, at 979 (2006); Project Implicit website, <http://implicit.harvard.edu/implicit/demo/background/posttestinfo.html> (last visited on March 12, 2011) (“The IAT was originally developed as a device for exploring the unconscious roots of thinking and feeling.”).

¹⁴² See Greenwald & Hamilton Krieger, *supra* note 15, at 956.

Implicit attitudes are of greatest interest when implicit and explicit attitudes toward the same object differ. These discrepancies are referred to as disassociations between implicit and explicit attitudes. Disassociations are commonly observed in attitudes toward stigmatized groups, including groups defined by race, age, ethnicity, disability, and sexual orientation. Researchers have used the . . . IAT . . . to reveal such attitudinal disassociations.

Id.; Jolls & Sunstein, *supra* note 122, at 979 (“[I]mplicit bias as measured by the IAT has proven to be extremely widespread. Most people tend to prefer white to African-American, young to old, and heterosexual to gay.”); Kang & Lane, *supra* note 15, at 473. The authors explain that IAT is a reaction-time psychological test, which assesses implicit bias by measuring the time it takes for the subject to respond to well-established mental associations, such as social prejudice, and mentally challenging tasks, which take longer to complete. *Id.* at 471. “The time difference, which is recalibrated into what is known as the IAT D score, is interpreted as reflecting an implicit attitude.” *Id.* at 473; see also Nilananjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006); Kang, *Trojan Horses of Race*, *supra* note 123, at 1513 (explaining that “disassociations are most vivid when ‘the group averages for conscious and unconscious measures [are] placed side-by-side using a common metric,’ which reveals ‘wide divergences’ between the means”).

¹⁴³ See Cynthia Lee, *The Gay Panic Defense*, *supra* note 95, at 537.

tempting to map the response with given correlating [familiar] associations.”¹⁴⁴

Development of IAT by the scientists practicing in an emerging field of implicit social cognition (“ISC”)¹⁴⁵ is significant to the legal analysis of disparate impact¹⁴⁶ because it provides replicable evidence from numerous laboratories supporting the theory of implicit bias.¹⁴⁷ Furthermore, the statistical metadata

¹⁴⁴ *Id.* at 539 (citing Anthony G. Greenwald et al, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998)).

¹⁴⁵ See Kang & Lane, *supra* note 15, at 473 (“At the nexus of social psychology, cognitive psychology, and cognitive neuroscience has emerged a new body of science called ‘implicit social cognition’ (ISC).”); Reshma M. Saujani, *The Implicit Association Test: A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 396 (2002) (citing Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision-makers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 757 (1995)) (“Implicit social cognition uncovers ‘inaccessible effects of current stimulus or prior experience variations of judgments and decisions.’”). See generally Kristin A. Lane, et al., *Implicit Social Cognition and Law*, 3 ANN. REV. LAW. SCI. 427–51 (2007) (discussing implicit bias and pointing out that it destabilizes conventional understanding of disparate impact, and it should be considered in the analysis as an aggravating factor).

¹⁴⁶ See Saujani, *supra* note 145, at 396. The author recognizes the inadequacy of the purposeful discrimination rule under *Washington v. Davis* and argues the Court “must adapt its vision of anti-discrimination.” *Id.*

Imagine that we could measure unconscious discrimination. If so, then we could broaden the concept of purposeful discrimination to include the measurement of a legislator’s reliance on unconscious racial stereotypes. Such device may already exist: The Implicit Association Test (IAT), a computer-based test developed by Yale and University of Washington psychologists. . . . Currently, facially race-neutral statutes are practically impervious to constitutional challenges by aggrieved plaintiffs, because discriminatory intent often cannot be “located” by the Court. This barrier has continued to shield legislators from judicial scrutiny. The IAT could “smoke out” illegitimate purposes by demonstrating that the classification does not in fact serve its stated purpose.

Id.; see also Lane, et al., *supra* note 145, at 439.

¹⁴⁷ See Greenwald & Hamilton Krieger, *supra* note 15, at 954; Kang & Lane, *supra* note 15, at 473; Lane et al., *supra* note 145, at 439.

analysis of IAT results, collected over the years, has proven IAT to be a reliable instrument that accurately assesses implicit prejudicial attitudes.¹⁴⁸ Since the inception of IAT,¹⁴⁹ ISC scientists used the test to produce statistical data confirming the pervasive nature of various types of discrimination, including the anti-gay animus.¹⁵⁰ Metadata of the test results assessing various types of implicit biases have shown that “most people tend to prefer white to African-American, young to old, and heterosexual to

¹⁴⁸ See Kang & Lane, *supra* note 15, at 477–81. Authors explain that the scientists carefully examined reliability, [which means the instrument generates sufficiently reproducible measures over time], and after a decade of research, the evidence demonstrated the IAT is reliable. See *id.*

As for reliability, across twenty studies, the average (and median) correlation between a person’s IAT score at two different times was 0.50, which is a respectable psychometric measure. . . . [T]his level of accuracy is perfectly adequate for the IAT’s efficacy as a research tool because . . . [it] can aggregate across people to discern general patterns between mental constructs and behavior.

Id. Authors further explain that no psychological measure is perfectly pure, because even a simple self-assessment, like a person’s self-esteem scale, can be affected by various variables, such as person’s literacy and current mood. See *id.* at 481. Thus, “IAT is no different than other psychological measures, and the evidence suggests that none of the potential confounds can account for IAT effects in the hundreds of studies that have used the measure.” *Id.*

¹⁴⁹ See Kang & Lane; *supra* note 15, at 473 (stating that IAT was first introduced in 1998 as a Web-based test); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Website*, 6 GROUP DYNAMICS, THEORY, RES., & PRAC. 101, 102 (2002) (discussing simplified version of the IAT test available on the Web since September of 2008, which provided great accessibility and constituted a prototype for future Web-based psychological experiments); see also Greenwald & Krieger, *supra* note 15, at 955.

¹⁵⁰ See Kang & Lane; *supra* note 15, at 473 (“With over seven million completed tests, Project Implicit comprises the largest available repository of implicit social cognition data.”); Nosek et al., *supra* note 148, at 106 (“personal standards and practicing non-prejudiced responses can influence the magnitude of implicit biases . . . [and] have shown a relationship between rigidity in thinking, right wing ideology, and conscious and unconscious attitudes toward a variety of social groups (i.e. . . . gay).”).

gay.”¹⁵¹ In addition to assessing automatic responses, which represent negative implicit attitudes towards the disfavored groups,¹⁵² IAT data also reflect prevalent implicit stereotypes.¹⁵³ For example, studies report consistent implicit negative attitudes of straight men towards gay men when they are presented with

¹⁵¹ Jolls & Sunstein, *supra* note 122, at 971 (pointing out that “[s]trikingly, members of traditionally disadvantaged groups tend to show the same set of preferences” as the rest of the tested population); *see also* Kang & Lane, *supra* note 15, at 473–74. The statistical information in the metadata was compiled based on the largest available repository of implicit social cognition data (with over seven million tests completed). *See id.* The author used results from seventeen IATs available at Project Implicit. *See id.* Findings showed that most participants “demonstrated implicit attitudes in favor of one social group over another, away from the neutral position of no bias,” including sexuality attitude preference for straight people over gay people. *Id.*

¹⁵² *See* Kang & Lane, *supra* note 15, at 476. The studies confirm that the implicit biases are “hierarchy driven,” because those belonging to the “good” groups, including young, European, American straight people, demonstrate strong ‘ingroup favoritism.’ *Id.* Conversely, group members culturally assigned to the “bad” category, representing lower social status, “marked by weight, age, sexual orientation, [and] socioeconomic class,” demonstrated weaker preference for their own group. *See id.*; *see also* William A. Jellison et al., *Implicit and Explicit Measures of Sexual Orientation Attitudes: In group Preferences and Related Behaviors and Beliefs Among Gay and Straight Men*, 30 *PERSONALITY & SOC. PSYCHOL. BULL.* 629, 629 (2004) (“Implicit measures of attitudes assess automatic evaluations associated with attitude objects that perceivers may not necessarily be aware of, may not realize their influence on overt behavior, or may not be able to control.”).

¹⁵³ *See* Jellison et al., *supra* note 152, at 640.

[T]he implicit measures provide another tool that is less susceptible [than explicit measures] to self-presentational concerns and introspective blindspots. Future research should continue to explore . . . group prejudices and examine the motivations that sustain them. By continuing to explore the relationship between sexual orientation attitudes and the functions they serve, we can better understand both processes and consequences involved in the acquisition and maintenance of one’s sexual orientation identity.

Id.; Kang & Lane, *supra* note 15, at 476; *see also* Dasgupta & Rivera, *supra* note 142, at 270.

photographic images of two men engaged in an embrace.¹⁵⁴ Scientists attribute strong negative implicit response towards homosexuality to traditional gender roles and sexual identity.¹⁵⁵ Specifically, because of the pervasive stereotype that gay men possess feminine characteristics, “gay men may be especially aversive to straight men who [strongly] adhere . . . to cultural standards of masculinity.”¹⁵⁶ Thus, the sexual prejudice of heterosexual men towards homosexuals, as reflected in the IAT data, represents straight men’s endorsement of their own “masculine gender role for men” stereotype.¹⁵⁷ Furthermore, the IAT test findings of implicit bias correlate with actual “real life” behaviors, reflected in altered perception and awkward body language expressed towards the negatively-perceived subjects.¹⁵⁸ Thus, the more negative the implicit attitude or stereotype, the more profound the behavioral response exhibited in uncomfort-

¹⁵⁴ See Jellison et al., *supra* note 152, at 632; Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. OF SOC. PSYCHOL. 1, 19 (2007) [hereinafter Nosek et al., *Pervasiveness and Correlates*].

¹⁵⁵ See Jellison et al., *supra* note 152, at 632. See generally Nosek et al., *Pervasiveness and Correlates*, *supra* note 154, at 19 (reporting that “[b]oth implicitly and explicitly, participants showed a preference for straight people relative to gay people, and 68% showed the effect implicitly while 15% showed an implicit pro-gay effect,” and there were stronger implicit effects among political conservatives).

¹⁵⁶ See Jellison et al., *supra* note 152, at 631. See generally Nosek et al., *Pervasiveness and Correlates*, *supra* note 154, at 19 (compiling IAT statistical metadata and discussing statistical patterns and correlations of explicit and implicit measures among several different demographic variables).

¹⁵⁷ See Jellison et al., *supra* note 152, at 631; Kang & Lane, *supra* note 15, at 474-77.

¹⁵⁸ Kang & Lane, *supra* note 15, at 482-83; see Saujani, *supra* note 145, at 408-09; see also Dasgupta & Rivera, *supra* note 142, at 277 (explaining that although spontaneous behavior towards stigmatized others may be driven by automatically activated prejudice, studies also suggest that the relationship between automatic attitudes and social behavior is malleable and that such behavior “can be shaped by downstream conscious processes such as egalitarian motivation and behavioral control”).

able body language.¹⁵⁹ Although these behavioral manifestations may initially seem insignificant, they often carry social, ethical and legal implications because the parties involved in such nonverbal behavior are not even aware that they engage in discrimination.¹⁶⁰

The examples of gender stereotyping stemming from behavior viewed as inconsistent with preconceived ideas of gender identity are often present in the context of employment discrimination.¹⁶¹ In *Price Waterhouse v. Hopkins*,¹⁶² one partner recommended that Ann Hopkins, a female employee seeking promotion, should take “a course in a charm school.”¹⁶³ Another male partner advised her that in order to improve her chances for partnership, Hopkins should walk, talk and dress more femininely, as well as “wear make-up, have her hair styled

¹⁵⁹ See, e.g., Jolls & Sunstein, *supra* note 122, at 972. Authors point out that those “who demonstrate implicit bias also manifest this bias in various forms of actual behavior.” *Id.* In particular, IAT test scores correlate with parties’ ratings of degree of general friendliness to members of another race. *Id.* For example, scores show “greater speaking time, more smiling, and more extemporaneous social comments” in interactions with whites as compared to African Americans.” *Id.*; Kang & Lane, *supra* note 15, at 483.

¹⁶⁰ See Kang & Lane, *supra* note 15, at 483–84.

[U]nfriendliness seeps out through nonverbal cues: the more negative the implicit attitude, the more awkward the body language. Body language matters because if one person acts awkwardly to another, the other person will reciprocate, thus generating a vicious circle. This interaction will then sour the interview without either party recognizing the implicit causal forces.

Id.; see also Jolls & Sunstein, *supra* note 122, at 972 (discussing the effect of nonverbal communications in the employment context, and concluding that “[i]f people are treated differently, . . . because of their race or another particular trait, then the principle of antidiscrimination has been violated, even if the source of the differential treatment is implicit rather than conscious bias”).

¹⁶¹ See Kramer, *supra* note 133, at 467. Title VII of the Civil Rights Act of 1964 prohibits discrimination against individuals in an employment context, “because of their sex.” *Id.*

¹⁶² 490 U.S. 228 (1988).

¹⁶³ *Id.* at 235.

 III FORWARD-LOOKING DISPARATE IMPACT TEST

and wear jewelry.”¹⁶⁴ Price Waterhouse argued that it did not endorse gender stereotyping and that some of the derogatory comments were made “by persons outside the decision-making chain,” but the Court concluded that negative stereotyping comments could influence the partners’ decision in denying Hopkins’ promotion.¹⁶⁵ Ultimately, Hopkins prevailed on her Title VII discrimination claim not because the Court found her to be “nice” (and there was evidence to the contrary),¹⁶⁶ but because the partners, consciously or not, reacted negatively to her personality based on the fact that she was a woman.¹⁶⁷

Soon after, homosexuals began citing *Hopkins* to seek relief for gender employment discrimination.¹⁶⁸ However, the lack of uniformity in cases involving homosexual harassment reflects the courts’ disagreement on the applicability of the “analytic framework for heterosexual harassment to other contexts.”¹⁶⁹ In fact, the courts adopted “a binary view of sex and gender,” which draws sharp, yet artificial, distinctions between discrimination based on sexual stereotyping and sexual orientation or

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 257.

¹⁶⁶ *See id.* at 234. Record indicates that although Hopkins was very competent and hard-working, on several occasions her “aggressiveness apparently spilled over into abrasiveness.” *Id.* And the staff members seemed “to have borne the brunt of Hopkins’ brusqueness.” *Id.*

¹⁶⁷ *Id.* at 257–58 (“It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins is irrelevant.”).

¹⁶⁸ *See Kramer, supra* note 133, at 467. Author explains that Title VII prohibition on discrimination “because of sex” does not explicitly protect from discrimination based on sexual orientation. *Id.* Thus, lack of federal protection for claims based on sexual orientation prompted homosexuals to “alternative avenues of relief under Title VII. *Id.*

¹⁶⁹ Charles R. Calleros, *The Meaning of “Sex:” Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 65 (1995) (explaining that same-sex harassment includes harassment of one’s own gender, which may constitute discrimination based on sex, “whether motivated by homosexual desire or non-sexual animus”).

gender identity.¹⁷⁰ Such an understanding of gender “may be socially construed and artificially rigid rather than a natural result of biology,” resulting in failure to provide adequate protection, even if the law explicitly protected employees from discrimination based on their sexual orientation and gender identity.¹⁷¹

However, the problem of a narrow, semantic judicial interpretation in Title VII cases involving homosexuals is exceedingly more complex because the discrimination often stems from the harasser’s unconscious or hidden perceptions that “homosexuality is . . . the ultimate violation of gender norms.”¹⁷² Thus, in cases involving discrimination based on obvious non-conformity to stereotypes, an effeminate gay man and a masculine lesbian will stand a chance to prevail on their respective “because of sex” discrimination claims.¹⁷³ However, under the current analytical framework, the courts will likely dismiss a claim brought

¹⁷⁰ McGinely, *Erasing Boundaries*, *supra* note 136, at 715; *see also* Kramer, *supra* note 133, at 491.

Gays and lesbians do not fit within the binary gender construct because they personify an opposite relationship structure: homosexuals are attracted to the “wrong” sex, and, therefore, the “wrong” gender. . . . [Thus] “homosexuality is censured because it violates the prescriptions of gender role expectations.” The heterosexist society both expects and requires men and women to engage in only opposite sex sexual relationships.

Id.

¹⁷¹ *Id.* Author explains that the lack of adequate protection of sexual minorities from employment discrimination prompted lobby to amend Title VII or to pass new act, referred to as Employment Non-Discrimination Act of 2009, to protect sexual minorities from discrimination based on sexual orientation or gender identity. *Id.*

¹⁷² Recent Cases, *supra* note 136, at 1895 (explaining that discrimination based on sexual orientation is in large part caused by the harasser’s “refusal to accept the behaviors of those who do not behave as members of their sex are expected to behave”); *see also* Kramer, *supra* note 133, at 491 (“The existence of a same-sex relationship is, therefore, repugnant to heterosexist societal expectations”).

¹⁷³ *See* McGinely, *Erasing Boundaries*, *supra* note 136, at 735.

by a homosexual comporting to societal gender expectations.¹⁷⁴ Consequently, in the absence of overt gender non-conformity, a masculine gay man and a feminine lesbian will lack legal recourse because the courts do not understand that such discrimination is often motivated by deeply-rooted, unconscious prejudice.¹⁷⁵

Since cognitive science provides the best available evidence for explaining human behavior, the courts and legislature should utilize its findings regarding implicit bias in formulating and interpreting legal principles.¹⁷⁶ Consequently, “as the new scientific consensus emerges, the law should respond”¹⁷⁷ and implement revisions to the legal concept of intent.¹⁷⁸ A great example of merging the law and cognitive science is “behavioral

¹⁷⁴ See *id.*

¹⁷⁵ *Id.* (“[I]n harassment cases, courts have found it difficult to distinguish between harassment that is motivated by sexual orientation (which is not forbidden by Title VII) and harassment motivated by an individual’s failure to conform to gender norms (which is forbidden).”).

¹⁷⁶ See Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139 (2009) [hereinafter Kang, *Pushback from the Left*]; Linda Hamilton Krieger & Susan Friske, *Behavioral Realism in Employment Discrimination Law*, 94 CALIF. L. REV. 997, 997–98 (2006).

¹⁷⁷ See Saujani, *supra* note 145, at 396.

Studies using the IAT show that a test-taker can automatically activate associations with ingrained stereotypes, which can affect subsequent social and legal judgments. This finding contradicts current equal protection jurisprudence, which assumes that decision-makers can accurately point to why they are about to make or have made a particular policy choice.

Id.

¹⁷⁸ See Kang & Lane, *supra* note 15, at 468. The authors argue that “the law accounts for the most accurate model of human thought, decision-making, and action provided by the sciences.” *Id.* “Theories and data from the mind sciences are sharpening . . . [this] model.” *Id.* Therefore, “the law should change to reflect that more accurate model, or it should provide reasons why it cannot or will not do so.” *Id.*; see also Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Non-State Action*, 54 DUKE L.J. 1591, 1600 (2004) [hereinafter Karst, *Equal Citizenship at Ground Level*].

realism,”¹⁷⁹ which acknowledges scientific findings regarding human decision-making and behavior and calls for amending the existing laws or creating new laws to adequately reflect the evolving understanding of the concepts.¹⁸⁰ Furthermore, behavioral realism proves to be particularly useful when incorporated into antidiscrimination laws because it offers a more comprehensive and accurate understanding regarding the nature of prejudice.¹⁸¹ In particular, under current jurisprudence, “discriminatory motivation is equated with conscious intentional-

¹⁷⁹ See Krieger & Friske, *supra* note 176, at 1000–01. The authors explained the concept of “behavioral realism,” which means that “as judges develop and elaborate substantive legal theories, they should guard against basing their analysis on inaccurate conceptions of relevant, real world phenomena.” *Id.*

In the context of antidiscrimination law, behavioral realism stands for the proposition that judicial models – of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases – should be periodically revisited and adjusted so as to remain continuous with progress in psychological science.

Id.; see also Jolls & Sunstein, *supra* note 122, at 972; Kang, *Pushback from the Left*, *supra* note 176, at 1139–40.

¹⁸⁰ See Jolls & Sunstein, *supra* note 122, at 972. The authors explain that “work in behavioral law and economics has argued in favor of incorporating psychological insight about people’s actual behavior across a range of domains.” *Id.* Furthermore, behavioral approaches to law promote “debiasing” of actors through various legal strategies in order to curtail discrimination. *Id.*; see also Kang, *Pushback from the Left*, *supra* note 176, at 1139–40.

¹⁸¹ See Krieger & Friske, *supra* note 176, at 1062.

We do not yet know whether social psychology will eventually provide a simple, elegant, predictive model of human behavior. . . . Empirical social psychology . . . produces vivid, replicable demonstrations of how human beings tend to behave in particular contexts. Such demonstrations are important to law because they often sharply contradict widely accepted psychological intuitions that judges mistakenly think provide a simple, elegant, productive model of human behavior.

Id.

ity.”¹⁸² Such legal interpretation of bias is outdated and contrary to a well-established body of scientific empirical studies.¹⁸³ Consequently, to adequately review whether facially-neutral laws are discriminatory, courts should apply the framework of the implicit social cognitive model, based on automatic and unconscious categorization of people into social groups.¹⁸⁴

IV. SOLUTION: FORWARD-LOOKING DISPARATE IMPACT TEST

The ultimate goal of the Equal Protection Clause is to overcome discrimination.¹⁸⁵ Therefore, an adequate test to recognize prejudice in facially neutral laws should strive to accomplish this goal.¹⁸⁶ As demonstrated in Part III, discrimination is often the product of an actor’s unconscious attitudes and

¹⁸² See Krieger & Friske, *supra* note 176, at 1062; Karst, *Equal Citizenship at Ground Level*, *supra* note 178, at 1599–1600.

¹⁸³ See Krieger & Friske, *supra* note 176, at 999. Author discusses negative effects of disconnect, jurisprudential models of intergroup bias and “real world phenomena,” which lead to “normative ambiguity, adjudicative inefficiency and inaccuracy, and perhaps even an exacerbation of the very intergroup tensions antidiscrimination laws were enacted to diffuse.” *Id.*

¹⁸⁴ See Krieger & Friske, *supra* note 176, at 1062; Kang, *Pushback from the Left*, *supra* note 176, at 1144 .

¹⁸⁵ See Karst, *Equal Citizenship at Ground Level*, *supra* note 178, at 1599–1600; Karst, *Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 66 (2004) [hereinafter Karst, *Affirmative Action*].

¹⁸⁶ See, e.g., Karst, *Equal Citizenship at Ground Level*, *supra* note 178, at 1599–1600. Author discusses Title VII of the Civil Rights Act of 1964, which “forbids employers, both governmental and nongovernmental, to discriminate on grounds of race or sex in hiring.” *Id.* at 1599. Although the violation of the law grants the party challenging the law review under strict scrutiny in cases involving exclusion of disparate numbers of minorities, such protection is not available to cases involving race- or sex-neutral laws. See *id.* at 1599. In those cases, “the courts continue to require a showing of purposeful discrimination based on the employee’s race (or sex . . .) before relief can be granted.” *Id.* at 1600; Karst, *Affirmative Action*, *supra* note 185, at 66–70 (arguing that the ultimate goal of affirmative action is to promote diversity, in an effort to bring “racial and ethnic equality in America”).

stereotypes.¹⁸⁷ Hence, placing an additional burden of proof on plaintiffs to show that the law not only had a disparate impact but also that the legislature had discriminatory intent (purpose), “ignores the central feature of the psychology of discrimination.”¹⁸⁸ Thus, based on the scientific (sociological and psychological) theoretical framework, validated through extensive empirical inquiry,¹⁸⁹ “plaintiffs will rarely be able to prove” a disparate discriminatory impact.¹⁹⁰

¹⁸⁷ See Katie R. Eyer, *Have We Arrived Yet? LGBT Rights and the Limits of Formal Equality*, 19 *LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER ISSUES* 160, 160–61 (2010). Author discusses emergence of a problem, previously identified by civil rights theorists, which will affect LGBT even if the “discrimination becomes formally unlawful,” because “much of what previously would have been expressed as overt bias simply becomes covert.” *Id.*

The standards for proving discrimination that have been crafted by conservative federal judges are poorly situated to detect and address covert, unconscious, and structural biases. And, even if the legal standards were more adequate, the legal decision makers themselves – from the predominantly conservative judges to the jurors – are . . . skeptical of the existence of discrimination. . . . [Thus] absent an actual admission of discriminatory animus, it is difficult to envision what more one could do to persuade such jurors.

Id.; *supra*, Part III.

¹⁸⁸ Karst, *Equal Citizenship at Ground Level*, *supra* note 178, at 1600 (stating that in absence of discriminatory purpose, the actor-employer would deny the suggestion that he or she “wanted to inflict harm because of an employee’s race [or sex].”); see Karst, *Affirmative Action*, *supra* note 185, at 66; Lawrence, *supra* note 13, at 322 (“[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

¹⁸⁹ See *supra* Part III.A–B.

¹⁹⁰ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1137–38 (1996). Author points out that “the equal protection cases discussing discriminatory purpose never advert to [the] large body of empirical literature on the sociology and psychology of bias,” because “the judicial concept does not reflect prevailing understating, in which racial or gender bias operates.” *Id.* at 1138. Furthermore, when [in Davis] the court adopted the disparate impact test, it “refused to adopt an alternate ‘disparate impact’ standard,” applied in employment discrimination cases, under Title VII [of the Civil

Furthermore, the intent prong of the test, borrowed from concepts in tort and criminal law,¹⁹¹ should be eliminated because it is concerned with culpability centered on the concept of fault, which does not fulfill the promise of equal citizenship under the Equal Protection Clause.¹⁹² The “motive-centered” test focuses the judicial inquiry on government’s past behavior to determine whether the government acted in “good faith,” or was “guilty” of discrimination.¹⁹³ Thus, the test implies moral condemnation of the culpable government entity.¹⁹⁴ However, looking for a

Rights Act of 1964], which requires application of a less stringent standard.
Id.

Title VII inquiry involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administration and executives than is appropriate under the Constitution where special racial impact without discriminatory purpose is claimed. Indeed, in *Davis*, the Court openly worried that relinquishing the purpose requirement would leave too many forms of regulation vulnerable to equal protection challenge.

Id.

¹⁹¹ See, e.g., Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions? Stuck on the State of Mind in Antidiscrimination Law*, 42 WAKE FORREST L. REV. 1141, 1143 (2007) (suggesting that we should look past “‘good intentions’ to revisit our notions of culpability and fault” and to focus the disparate impact analysis solely on effects).

¹⁹² See Karst, *Affirmative Action*, *supra* note 185, at 73-74. The author discusses the correlation between race and poverty. See *id.* “One key objective, in seeking to vindicate the constitutional principle of equal citizenship, will be a material world in which individuals have a significant degree of choices as to the paths . . . that they, and their children, will follow.” *Id.* Furthermore, “[t]he Supreme Court has turned its attention away from these conditions, and nothing in recent years indicates any early change in this conception of the judicial role.” *Id.*; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520 (2003) (referring to the disparate impact test as an “evidentiary dragnet for deliberate discrimination,” because the disparate impact is difficult to prove”).

¹⁹³ Seicshnaydre, *supra* note 191, at 1141-42, 1144.

¹⁹⁴ See Kenneth L. Karst, *The Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978). Author discusses inadequacy of the motive-centered doctrine in racial discrimination cases, which distracts from focusing “on the community’s real ills,” and adversely impacts the relationship between often interdependent litigants outside of the context of litigation. *Id.*

wrongdoer shifts the attention from the purpose of abrogating the discrimination in the future to punishing past blame-worthy behavior.¹⁹⁵ This retrospective moral judgment of the government action is a judicial concept that fails to promote the normative principles of equality for oppressed minorities.¹⁹⁶ In

¹⁹⁵ See, e.g., Seicshnaydre, *supra* note 191, at 1141–42, 1144. Author discusses intent-based and effects-based methods of proof in disparate impact in employment and housing discrimination claims. *Id.* at 1141. The two concepts are often confused by litigants, who blend or enmesh disparate impact (effect) and disparate intent. *Id.* at 1142. Furthermore, over the years, the focus on intent in disparate impact theory has “proven limited . . . effectiveness, perpetuated uncertainty, and flouted” a principle that is simply too difficult to follow. *Id.* at 1144. The author poses a question whether the cause of suffering and exclusion is necessary to disparate impact analysis, because “‘what goes on’ in the minds of those who were merely thoughtless, rather than malevolent, or biased, matters little when class based exclusion occurs.” *Id.*

Several post-Katrina exclusionary zoning disputes . . . illustrate a conception of disparate impact liability in which state of mind does not matter, [because] . . . our conceptual resources are “exhausted” with respect to attempts to create accountability for suffering that is not intended. . . . [Thus] a pure effects theory must be embraced – one that relies not on state of mind, but on whether the conduct has the “consequences of perpetuating segregation” and exclusion.

Id. at 1144–45. See, generally, SUSAN NEIMAN, *EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY* 280–81 (2002) (discussing philosophical concept of intentionality, based on human knowledge and awareness, which is not relevant to the actual determination of the magnitude of the resulting events and suffering).

¹⁹⁶ See, e.g., Primus, *supra* note 192, at 585, 587. Author points out that equal protection is not static. *Id.* at 585. Thus, the “rise of individualist and colorblind values in the generation since Davis” requires evaluation of the tension between equal protection and disparate impact in antidiscrimination employment statutes. *Id.* “The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection suggests that only a very uncompromising court would issue such a decision.” *Id.*

[A]ntidiscrimination law should not cohere only with itself. It should also fit the social problems that it is aimed to cure. As long as those problems are still in large part about self-perpetuating [racial] hierarchies, it would be a mistake to purge concern with [racial] hierarchy from the law of discrimination.

Id. at 587.

order to curtail the pervasive discrimination against a particular stigmatized minority, such as homosexuals, which often is not apparent on the face of the law in question, the courts must devise a test that looks forward and has a broader purpose.¹⁹⁷ The objective of the test should be to not only strike down the defective law but, more importantly to prevent such discrimination in the future.¹⁹⁸

The proposed forward-looking test would consist of two prongs. The impact prong of the test would remain mostly the same as under the current disparate impact analysis.¹⁹⁹ Thus,

¹⁹⁷ See, e.g., Karst, *Foreword, supra* note 29, at 40 (discussing the role of the judiciary in promoting equal citizenship under the Equal Protection Clause). “The principle of equal protection is not so much a limiting principle as an informing principle.” *Id.* Because the principle is open ended, equal protection does not stop with race, “but recognizes broader substantive values in the equal protection clause.” *Id.*

¹⁹⁸ See George Rutherglen, *Disparate Impact, Discrimination, and the Essentiality Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313, 2313-14 (2005). Author observes that disparate impact is more favorable for plaintiffs, and discriminatory purpose is more favorable for defendants. *Id.* Furthermore, “[t]he distinction between disparate impact and discriminatory intent raises so many issues because it marks the boundary between consensus and controversy over the concept of equality in civil rights law.” *Id.* Thus, on the practical level of administering the law, disparate impact analysis allocates the burden of proof between plaintiffs and defendants. *Id.* But on the “abstract level of defining the ultimate aims of the law, it structures debates over equality.” *Id.* at 2314. *But see, e.g.,* Primus, *supra* note 192, at 498. Author points out that progressive scholars concentrate on attacking the holding in *Davis*, because the test does not adequately “address continuing problems of inequality.” *Id.*

[E]qual protection has moved steadily away from the orientation that the progressive critics endorse. It has become more individualistic, more formal, and less concerned with history and social structure. In addition to further trenching the conservative holding of *Davis*, these developments have put equal protection in tension with *Davis*' acquiescence to statutory disparate impact standards in laws such as Title VII [employment discrimination laws].

Id.

¹⁹⁹ See *Washington v. Davis*, 426 U.S. 229 (1976); see also Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. REV.* 701, 728

the plaintiff would have to show that the legislative act did, in fact, result in impermissible classification of the minority.²⁰⁰ As in *Davis*,²⁰¹ the court would begin its inquiry with answering a question of whether the particular law, on impact, singled out a protected minority.²⁰² In its analysis, the court would consider the history of discrimination experienced by the minority and compare whether the law had such effects on any other groups in society.²⁰³ However, in addition to using supportive evidence available under the current version of the test,²⁰⁴ plaintiffs

(2005) (noting that many scholars often miss an important part of the disparate impact analysis in *Davis*, because “[c]entral to the Court’s holding was a normative judgment that the administration of the test challenged in *Davis* was not properly defined as discrimination – intentional or otherwise”).

²⁰⁰ See *Davis*, 426 U.S. at 229; CHEMERINSKY, *supra* note 28, at 710; see also Karst, *Foreword*, *supra* note 29, at 41 (stating that judicial analysis will require constitutional balancing and assigning of weight to the government interest on one side in order against the protected interest of the minority); Selmi, *supra* note 199, at 728.

²⁰¹ 426 U.S. at 229.

²⁰² See *id.*; see also Selmi, *supra* note 199, at 728.

²⁰³ See *Davis*, 426 U.S. at 235; Karst, *Foreword*, *supra* note 29, at 48 (discussing “stigma of the caste,” where harm of stigma has two forms: loss of self-respect, and legislator’s inattentiveness to inequalities that fall on members of a stigmatized group).

[T]he focus of [judicial] inquiry is not immediate harm to the self-respect of stigma’s victims, but those consequential harms, generally of material kind, that befall people who are under-represented in the political process. The cumulative impact of such harms, may of course, ultimately reinforce the stigma; the judiciary’s special solicitude for those who are already disadvantaged is justified in part by this concern. . . . [T]he denial of participation tends to produce long term losses of self-respect as well as immediate ones.

Id.; Selmi, *supra* note 199, at 728-29 (explaining that the court in *Davis* noted that Washington, D.C. was “without a deep history of civil rights resistance,” and considering the city’s recruitment efforts towards African American applicants, and in light of the city’s black mayor, “it would have been difficult to suggest that the city was using the test . . . to exclude African Americans from the force”).

²⁰⁴ See *Davis*, 426 U.S. at 242–43 (stating that showing discriminatory impact through “seriously disproportionate” exclusion of a group “may for all the practical purposes demonstrate unconstitutionality”),

would be allowed throughout the litigation to utilize statistical data from the existing metadata bank of IAT tests (provided through Project Implicit) to support their claims.²⁰⁵ Once the court determined that plaintiffs met their initial burden of proof by showing they suffered a discriminatory impact of the law, the burden would shift to the government to rebut the discrimination claim.²⁰⁶

The major difference between the existing disparate impact test and the new, forward-looking alternative will lie in the second prong.²⁰⁷ The existing framework is highly deferential to

²⁰⁵ See Kang & Lane, *supra* note 15, at 473. Author explains that since the IAT was introduced [on the Internet] in 1998, “hundreds of peer-reviewed scientific publications have produced largely consistent results.” *Id.*

Clear evidence of the persuasiveness of implicit bias, comes from Project Implicit, a research website operated by Harvard University, Washington University, and the University of Virginia. At Project Implicit, visitors can try IATs that examine implicit attitudes and stereotypes on topics ranging across race, gender, age, politics, religion, and even consumer brands. With over seven million completed tests, Project Implicit comprises the largest available repository of implicit social cognition data.

Id.; see also Jolls & Sunstein, *supra* note 122, at 979; Project Implicit website, <https://implicit.harvard.edu/implicit/demo/background/posttestinfo.html> (last visited on March 12, 2011) (“The IAT was originally developed as a device for exploring the unconscious roots of thinking and feeling.”).

²⁰⁶ See Schwemm, *supra* note 103, at 972. Author points out that in *Davis*, Justice White indicated that a law’s disproportionate impact “might suffice in some cases to establish a prima facie case that would shift the burden of proof to the government to show legitimate, nonracial considerations prompted by its actions.” *Id.* However, the Court concluded that showing that Black applicants had higher failure rates was insufficient to prove discriminatory purpose of Test 21. *Id.*; See, e.g., Rutherglen, *supra* note 198, at 2323 (arguing that lawyers’ preoccupation with burden of proof is just a misplaced frustration over lack of tangible standard to achieve equality in disparate impact discrimination claims).

²⁰⁷ See, e.g., Rutherglen, *supra* note 198, at 2323. Author explores the prevalent “obsession” of lawyers litigating disparate impact discrimination cases with the burden of proof. *Id.*

For lawyers, disputes of the theory of disparate impact are disputes over the burden of proof. As an initial matter, disputes over whether the theory is available at all reduce to the ques-

government interests and plaintiffs have the daunting and nearly impossible task of proving that the government acted with an intent to discriminate.²⁰⁸ However, the new test would eliminate the blame-worthy state-of-mind requirement, which, as illustrated in this article, does not belong in equal protection jurisprudence.²⁰⁹ Instead, the court would focus its further inquiry on quantitative evidence documenting the disparate impact of the law in question on the stigmatized minority.²¹⁰ The objective of this analysis would be to concentrate on the most adequate remedial action to prevent future implicit discrimination.²¹¹

tion of whether the plaintiff has to carry the entire burden of proving intentional discrimination or only the lesser burden of proving disparate impact. . . . Lawyers care about the burden of proof, because in close cases, it determines who wins or loses, with doubts resolved against the party who bears the burden. The party who does not have the burden of proof can blame all the gaps in the evidence and in the resulting inferences on the party who does. Placing the burden of proof on the opposing party often gives lawyers a decisive edge in litigation.

Id.

²⁰⁸ See Selmi, *supra* note 199, at 728; Siegel, *supra* note 190, at 1137–38 (discussing various ways in which the legal system enforces social stratification and concluding that “status-enforcing state action evolves in form as it is contested”).

²⁰⁹ See, e.g., Rutherglen, *supra* note 198, at 2323.

²¹⁰ See, e.g., Ian Ayers, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2420 (2003). Author proposes various quantitative tests to measure “unjustified disparate impacts.” *Id.*

Race-contingent behavior should not simply be asserted. It needs to be continually reestablished by ongoing testing and ongoing scrutiny of test results. In many contexts, it is difficult for individuals to know whether they are the victims or the beneficiaries of discrimination because they do not know how other types of people are treated. It is too easy for some to say that discrimination is a thing of the past or that discrimination is pervasive. . . . [Thus] [o]bjective evidence of race-contingent decision making is knowable if we as a society have the will to go out and look for it.

Id.

²¹¹ See Binion, *supra* note 103, at 446–47 (stating that many critics of the “intent rule” recommend the courts apply a “flexible [standard of] review” to

Specifically, if IAT data confirmed that there has been prevalent unconscious bias based on sexual orientation, the governmental entity would be compelled to make decisions in the future that factor in that minority's interests and guarantee its members an adequate representation.²¹²

For example, if a policy in question provides retirement or pension benefits to married and cohabitating couples registered with the state, and the state issues marriage and domestic partnership licenses to validate unions between men and women, same-sex partners will inevitably be the most affected by this practice.²¹³ Thus, upon showing the obvious impact of the law on same-sex couples, the court would then look at the IAT data to confirm that sexual minorities experience prevalent discrimination based on the traditional view of what is perceived by society as the "family."²¹⁴ Ultimately, compelling the government to expand the definition of "family" to explicitly include same-

disproportionately disadvantaged policies by using multivariable balancing tests effecting compromise between the legitimate interests of the state and those of the disadvantaged group); Shawn C. Marsh, Ph.D., *The Lens of Implicit Bias, Juvenile and Family Justice Today* (Summer 2009), available at http://www.ncsconline.org/D_Research/ref/IMPLICIT%20BIAS%20Marsh%20Summer%202009.pdf. The author provided several solutions to reduce implicit bias, including, among others: education, environmental mindfulness (for possible sources enforcing stereotypes), and debiasing, referred to as a system of external checks and balances. *Id.* The debiasing assumes that implicit bias will occur, and affirmative action offers a solution, which might include "regular audits of decisions at various points, and ongoing monitoring of data regarding relative ratios of race, gender, age, and any other groups that experience bias." *Id.*

²¹² See, e.g., Dasgupta & Rivera, *supra* note 142, at 268; Kang & Lane, *supra* note 15, at 474.

²¹³ See, e.g., Fact Sheet, Lambda Legal Defense and Educational Fund, Inc., Recognition of Same-Sex Couples in United States (Jan. 28, 2011), <http://www.lambdalegal.org/publications/articles/status-of-marriage-equality.html>.

²¹⁴ See, e.g., Dasgupta & Rivera, *supra* note 142, at 268 (pointing out that in spite of public opinion polls showing public support for civil rights, IAT data support the conclusion that "subtle forms of discrimination [against disadvantaged minorities] continue in many areas of everyday life"); Kang & Lane, *supra* note 15, at 474–75 (compiling IAT data regarding implicit anti-gay prejudice).

sex partners would alleviate this type of tacit discrimination in the future.²¹⁵

Another type of law adversely impacting homosexuals would be a statute prohibiting discrimination based on gender or sex in government-operated educational institutions.²¹⁶ Considering the mixed litigation outcomes involving homosexuals in Title VII cases, such a statute would mostly apply to claims of discrimination perpetuating heterosexual gender stereotypes,

²¹⁵ See Paul Ettenbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753, 757, 759 (2000). Author argues that definition of family should be expanded to include LGBT, because “the current system of government and private disbursement of seemingly endless family benefits and privileges to the formalized few discriminates cruelly against the non-formalized many.” *Id.* at 757.

Traditional marriage should be accessible on a sex-neutral basis. . . . Marriage serves as a potent and strongly symbolic reminder of the status that certain people have as full and equal citizens. If miscegenation laws can be struck down because they help sustain a system of White Supremacy, then gender-exclusive marriage laws should also be struck down because they contribute to a system of patriarchal privilege and heteronormativity.

Id. at 759; Jeffrey A. Redding, *Queer/Religious Friendship in the Obama Era*, 33 WASH. U.J.L. & POL’Y 211, 253–54 (argues that the American pluralism in state-mandated definitions of marriage, including “special” kind of covenant marriage available to homosexuals in some states, is nothing more than an example of “‘separate but equal’ family law regimes which mixed-sex and same-sex couples enjoy within some states).

²¹⁶ The hypothetical statute refers to “gender” and “sex” interchangeably to further illustrate legislative ambiguity in drafting the provision, which is based on a Title VII provision prohibiting gender discrimination, often referred to as the “because of sex” provision. *But see* Mary Anne C. Case, *Diaggregating Gender from Sex and Sexual Orientation: the Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2, 9–10 (1995). Although the word “gender” has come to be used synonymously with the word “sex” in the law of discrimination, in women’s studies these terms have different meanings. *Id.* at 2. “Sex” refers to the anatomical and physiological distinctions between men and women (nouns: male/female), while “gender” purports cultural meanings assigned to the physical distinctions (adjectives: masculine/feminine). *Id.* at 9-10. See also *supra* note 24, and accompanying text.

based on the preconceived notions of femininity and masculinity.²¹⁷ Furthermore, depending on the reviewing court's willingness to extend the application of the statute, the judiciary could find merit in claims brought by effeminate gay men or "macho" lesbians because these claims would still fall within the traditional notions of gender role bias.²¹⁸ However, the law would not provide any remedy in cases involving harassment by a member of the same sex, who is uncomfortable with a person whom he knows or suspects to be homosexual.

For example, in a case brought by a "manly" gay applicant claiming that he was denied entry into a vocational mechanics' program under the auspice of Department of Agriculture (DOA) because of gender discrimination, his claim would likely fail. Let's just add the fact that during the interview for admission into the program, the applicant inadvertently mentioned his boyfriend, who also happened to be a mechanic. And the interviewer, who is a DOA admissions counselor and a mechanic working in an ultra-masculine setting, harbors strong convictions that masculinity and homosexuality are mutually exclusive.²¹⁹ Based on his implicit anti-gay bias, the interviewer would deny claimant's application simply because he was gay, even if the candidate was not effeminate.

²¹⁷ See Case, *supra* note 216, at 2. In cases involving discrimination claims of individuals diverging from their gender expectations, for example, when a woman displays masculine characteristics or a man is effeminate, discrimination against her is treated as prohibited sex discrimination. See *id.* However, the man's behavior "is generally viewed as a marker for homosexual orientation and may not receive protection from [such] discrimination." *Id.*

²¹⁸ See *supra* notes 170–72 and accompanying text.

²¹⁹ See Ann C. McGinely, *Erasing Boundaries*, *supra* note 136 at 739–40. The author discusses cases involving sex stereotyping brought by homosexuals, under Title VII. *Id.* Typically, such claims arise in virtually all male environments, where co-workers or supervisors use "vulgar verbal taunts as well as physical attacks, often to sexual organs of the victim, to harass him." *Id.* Moreover, the taunts invariably include comments questioning the victim's masculinity and his sexual orientation." *Id.* at 740.

The court would start its analysis by assessing the relevant data to determine if DOA's practices caused disparate impact to homosexuals. Because the program is relatively new and it involves a predominantly male setting, the court could find it difficult to determine that DOA engaged in gender stereotyping. However, unlike in traditional disparate impact analysis where the claim would likely be dismissed, here the claimant could introduce pertinent IAT data as evidence of discrimination. Upon establishing disparate impact, the court would engage in the second part of analysis and prescribe adequate remedy, including amendment to the statute expressly prohibiting discrimination based on sexual orientation. Furthermore, to achieve its forward-looking objective and prevent the anti-gay discrimination in the future, the court would require a form of affirmative action. Consequently, DOA would be compelled to endorse gay applicants by affirming its commitment to diversity in public statements, school catalogs, application forms and employment manuals. The court would also require DOA to conduct educational sessions for the employees, as well as the students, to dispel anti-gay animus and promote equality. DOA could also undertake its own anti-discriminatory initiative, for example, by extending employee and full-time student medical benefits to their domestic partners. Finally, the court would require DOA to periodically report on the success of its remedial measures in order to ensure the government's compliance.

Although the new test requires incorporating cognitive science into the legal standards, it is obvious that we can no longer ignore the reliability of the available statistical, quantitative data documenting the implicit nature of bias.²²⁰ Integrating the wealth of information contained in the existing and ever-ex-

²²⁰ See Kang, *Pushback from the Left*, *supra* note 176, at 1140 (explaining that modern evidence of implicit social cognition should be incorporated into preventive policies and doctrinal interpretations of the laws); see also Greenwald & Krieger, *supra* note 15, at 966–67 (discussing utility of cognitive science's "evolving, accumulating body of reproducible research findings" in the context of disparate impact analysis).

panding data bank of IAT would provide for a meaningful analysis, adequately addressing Equal Protection Clause principles for sexual minorities.²²¹

V. CONCLUSION

Sexual minorities have suffered long and comprehensive discrimination²²² and should gain protective status under the Equal Protection Clause.²²³ However, neither suspect nor quasi-suspect classification will provide LGBTs with adequate protection from facially-neutral laws.²²⁴ In our modern, seemingly egalitarian society, where laws with a clear discriminatory impact remain abundant,²²⁵ cognitive science reconciles this discrepancy with its extensive body of work on implicit bias.²²⁶ Furthermore,

²²¹ Schwemm, *supra* note 103, at 1002 (“The deficiency in the analysis suggested by *Davis* is that it accords undue deference to the government’s justifications for actions that in fact discriminate against minorities.”).

²²² See ESKRIDGE, *GAYLAW*, *supra* note 6; ESKRIDGE, *SEXUALITY*, *supra* note 6.

²²³ See HART ELY, *supra* note 73, at 162. The author argues that homosexuals should be granted suspect classification, because “[h]omosexuals for years have been the victims of both ‘first-grade prejudice’ and subtler forms of exaggerated we-they stereotyping.” *Id.*; KARST, *supra* note 2, at 210.

²²⁴ See, e.g., KARST, *supra* note 2, at 210 (pointing out that “harms from direct, intentional stigmatizing acts” against a minority group are easier to prove, unlike “harms inflicted indirectly,” which require proof of intent); Lawrence, *supra* note 13, at 324-35 (“By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where the discrimination does not exist unless it was consciously intended.”); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1100 (2008) (pointing out that segregation extends to our minds, because “Black and white people tend to perceive allegations of racial discrimination through fundamentally different cognitive frameworks”).

²²⁵ See *supra* note 7.

²²⁶ See Krieger & Friske, *supra* note 176, at 1000. The authors argue that while “judges develop and elaborate substantive legal theories, they should guard against basing their analysis on inaccurate conceptions of relevant, real world phenomena.” *Id.* Instead, “epistemic theories, both descriptive and normative, should be periodically revisited and revised to incorporate the

Congress' omission of a discriminatory intent requirement in Title VII further supports the conclusion that the second prong of the *Davis* disparate impact test is inadequate to prove discrimination. Thus, to remedy the defective, unfair laws adversely affecting sexual minorities, the courts must recognize the implicit nature of prejudice and incorporate the new understanding and empirical data into its analysis.²²⁷ Proclaiming equality does not affect equality.²²⁸ Hence, it is time for the law to grant sexual minorities equal citizenship rights as clearly contemplated by the Equal Protection Clause, because "what happens to homosexuals, ultimately affects all of American society."²²⁹

evolving understanding, derived from the empirical sciences, of how human cognitive processes actually work." *Id.*; see also Greenwald & Krieger, *supra* note 15, at 952; Kang & Lane, *supra* note 15, at 520.

²²⁷ See Krieger & Friske, *supra* note 176, at 1000; Kang & Lane, *supra* note 15, at 520; Kang, *Trojan Horses of Race*, *supra* note 123, at 1493 (discussing the implicit bias studies, of which results are "stunning, reproducible, and valid by traditional scientific metrics").

²²⁸ Cf. Note, *Constitutional Status*, *supra* note 69, at 1309. The author argues that constitutional protection [barring discrimination based on sexual orientation] under "the right of privacy and the first amendment are neither broad enough in the conceptions of sexual orientations nor wide-ranging . . . in their remedies to offer an adequate legal response to the problem of gay inequality." *Id.* However, "[a]n equal protection approach to gay rights recognizes both that personhood is the value to be protected and that pervasive inequality is the evil to overcome." *Id.*

²²⁹ See KARST, *supra* note 2, at 210. The author argues that the Supreme Court needs to recognize constitutionally guaranteed equal rights of homosexuals and refuse to justify the government's policies of exclusion. *Id.*

One day . . . the laws that stigmatize gays and lesbians will follow Jim Crow into a deserved oblivion. . . . In the meanwhile, however, gay and lesbian Americans – a group of many millions who experience their hurt one at a time – will live every day with the pains that come from being officially branded as outsiders.

Id.