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Twenty-First Century Equal Protection: Making Law in an Interregnum

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TWENTY-FIRST CENTURY EQUAL PROTECTION: MAKING LAW IN AN INTERREGNUM

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INTRODUCTION

During her remarkable career on the Supreme Court, Justice Sandra Day O'Connor articulated principles, in both concurrence and dissent, which moved to the doctrinal core of multiple areas of jurisprudence.[1] Perhaps, just perhaps, Justice O'Connor has done it again. In *Lawrence v. Texas*,[2] although the Court's

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1. Justice O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983), argued for adoption of an "undue burden" standard, rather than strict scrutiny, as the basis for judicial review of restrictions on women's choice to have an abortion. The Court adopted that standard in *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 874 (1992). Her argument in concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984), that government should not display religious symbols in such a way as to communicate endorsement of the beliefs of one group of citizens, became the dominant theme of Establishment Clause jurisprudence after *Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). Her defense in dissent of the sovereign authorities of states in *FERC v. Mississippi*, 456 U.S. 742, 777 (1982), had commanded a majority by the time she wrote the opinion of the Court in *New York v. United States*, 505 U.S. 144 (1992). Reflecting on this extraordinary impact, Professor Kathleen Sullivan has described Justice O'Connor as "the most influential woman in American history." Kathleen M. Sullivan, *Justice in the Balance*, WASH. POST BOOK WORLD, Dec. 25, 2005, at BW03 (review of JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL (2005)).

2. 539 U.S. 558 (2003) (striking down a Texas sodomy law, ruling that the state had no legitimate interest in criminalizing private, consensual sexual relations between two adults).

majority decided the case on substantive due process grounds,[3] O'Connor concurred relying solely on the Equal Protection Clause.[4] Because future litigation on sexuality and gender issues is more likely to turn on issues of equality (or expression) than on issues of privacy,[5] her concurrence may ultimately achieve the influence of many of her past minority opinions. And because its reach exceeds the bounds of any specific classification, O'Connor's concurrence in *Lawrence* may set the terms for equal protection analysis in cases involving a broad range of social groups.

Sexual privacy and equality law have been on a roller-coaster ride through the Court's jurisprudence. In *Bowers v. Hardwick*, the Court upheld a Georgia sodomy law on the grounds that privacy doctrine did not include a right to sexual conduct and that moral disapprobation of homosexuality constituted a legitimate state interest.[6] The effect was to authorize a "presumptive criminal" status for lesbian and gay Americans.[7] In *Romer v. Evans*,[8] the Court invalidated a Colorado state constitutional amendment that singled out gay people for disfavor in the process for enacting civil rights protections; it did so without addressing the seeming conflict with *Hardwick*. By reversing *Hardwick* and eliminating the presumptive criminal status, *Lawrence* unlocked the door to full application of *Romer*, with its recognition of equal protection rights for gay people. However, just as the *Romer* opinion failed to engage with *Hardwick*, the *Lawrence* majority does not discuss the *Romer* decision.

Justice O'Connor's concurring opinion in *Lawrence*, though joined by no other Justice, sought to provide a coherent account of the Court's gay rights jurisprudence. Although O'Connor's unwillingness to join the *Lawrence* majority in recognizing a liberty right to private consensual sexual conduct pushed her into an Equal Protection concurrence,[9] her opinion is likely to exercise considerable pull. *Romer* is the only opinion in which the full Court has tackled equal protection issues regarding sexual orientation. The Court's opaqueness makes O'Connor's attempt at explication through her *Lawrence* concurrence especially helpful.

Most important is Justice O'Connor's explanation of a heightened rational basis test under equal protection doctrine. Justice Kennedy's opinion for the Court in *Romer*, like his opinion in *Lawrence*, did not directly identify the standard of review that the Court was using in its analysis. In both cases, the Court used language associated with rational

3. *Id.* at 574-75.

4. *Id.* at 579-85 (O'Connor, J., concurring).

5. See Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1542-52 (2004).

6. Bowers v. Hardwick, 478 U. S. 186, 191-92, 196 (1986).

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

8. 517 U.S. 620 (1996).

9. *Lawrence*, 539 U.S. at 579.

basis review,[10] but invalidated laws that likely would have withstood scrutiny under the traditionally deferential rational basis standard.[11] The result was both coy and frustrating, leaving lower courts to guess what guidance was intended.[12] While it seems obvious that the Court is trying to create space for contentious cultural battles to evolve into their own resolutions with minimal judicial intervention, this strategy also creates the risk of confirming precisely what the Court presumably wants most to avoid: the appearance of purely outcome-driven results, unconstrained by clear rules of the game.

Justice O'Connor's opinion in *Lawrence* attempts to explain the emerging law of heightened rational basis review and to articulate a standard that lower courts can apply. It is too soon to know whether her approach will gain traction and support within the judiciary; that outcome may be less likely to occur given her departure from the Court. However, Justice O'Connor's concurrence in *Lawrence* could supply at least the starting point for an equal protection framework which would be applicable to all "new" socially visible minorities whose emergence postdates the enactment of federal civil rights laws. Moreover, it would clear up a murky zone of constitutional law that pre-dates the LGBT line of cases.

This essay seeks to place the O'Connor concurrence in perspective. Her opinion in *Lawrence* elucidates a standard which already operates, but does so erratically. The Court has refused to acknowledge the heightened rational basis

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10. *Id.* at 578 (the Texas sodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"); *Romer,* 517 U.S. at 635 (the Court could not "discern a relationship to legitimate state interests"). References to "legitimate state interest" are often associated with rational basis review. *See, e.g.,* Heller v. Doe, 509 U.S. 312, 320 (whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose"). In my view, however, *Lawrence* is far more complex than a simple rational basis review case. In it, the Court protects the liberty interest in private consensual conduct with a stringency equivalent to what it uses in the field of reproductive choice issues, where infringements on personal liberty are closely examined. *See* Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1113-23 (2004) [hereinafter Hunter, *Living With Lawrence*].

11. Under the traditional rational basis standard, legislative classifications have "a strong presumption of validity." Heller v. Doe, 509 U.S. 312, 319 (1993). Unlike the stricter forms of scrutiny accorded to classifications that the Court has found to be intrinsically suspect, rational basis review is "the most relaxed and tolerant form of judicial scrutiny." Dallas v. Stanglin, 490 U.S. 19, 26 (1989). A court need only find that

> there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (internal citations omitted).

12. Judge Richard Posner noted that "'rationality' . . . is not in fact a single standard, though the courts have been coy about admitting this." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 768 (7th Cir. 2003) (Posner, J., dissenting). In *Urban Believers*, several churches challenged the validity of a Chicago zoning ordinance, asserting that it unlawfully burdened religious exercise. Judge Posner dissented on the ground that plaintiffs' equal protection rights were violated and cited *City of Cleburne* for the proposition that in "sensitive" cases "judges are . . . more alert for unjustifiable discrimination than in the usual case. . .." *Id.* Judge Posner went on to cite both *Romer v. Evans* and *Lawrence v. Texas* as support for "the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts" than normal zoning classifications. *Id.* at 769.

standard, instead using it as a kind of constitutional "gimme" when none of the other tiers of equal protection law quite hits the target. On this understanding, Justice O'Connor's concurrence represents not so much an epiphany as a somewhat sketchy map.

Part I argues that LGBT equality cases force courts into a political discomfort zone, shaped by the knowledge that federal legislative remedies for discrimination have become a standard response to successful social movements and by the simultaneous uncertainty about whether LGBT people will achieve that goal or not. The uncertainty creates a different political environment than the one surrounding civil rights lawsuits that were litigated in the decade after *Brown v. Board of Education*,[13] before legislative relief became a politically viable option. In law, this discomfort zone produces what I call a constitutional interregnum. Part II examines the substance of Justice O'Connor's heightened rational basis standard, placing it in the context of prior cases that have accorded significant bite to rational basis.[14] I draw on briefs and correspondence among the Justices to compare LGBT rights cases to earlier equal protection puzzles. Using previously unavailable papers of the Justices, I find a particularly strong resonance with the status of sex discrimination cases in the early 1970's. Part III examines the contemporary judicial response to Justice O'Connor's concurrence. Part IV critiques O'Connor's approach, and offers a restatement of her standard in fuller terms. I return to the concept of interregnum and analyze how it relates to judicial legitimacy.

I. MAKING DOCTRINE IN A CONSTITUTIONAL INTERREGNUM

At its core, Justice O'Connor's concurring opinion in *Lawrence* tackles the most enduring institutional dilemma of the American judiciary: the tension between its extraordinary power to invalidate laws adopted by democratic processes and its duty to protect minorities from abusive policies. The Supreme Court's history tells us that it is most likely to deploy the former in service of the latter when public opinion supports such action, when other centers of state power have signaled the political viability of intervention, and when contrary political forces occupy outlier, or at least minority, status.[15] Those criteria were present to support the Court's ruling in *Lawrence*, but they do not exist as a base for invalidating at least some other anti-gay discriminatory practices, beyond

13. 349 U.S. 294 (1954).

14. The bite metaphor originated more than 30 years ago, in the first law review article to identify heightened rational basis as an operating principle in equal protection law. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

15. Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 440-45 (2005). Even Justice "Frankfurter later conceded that he would have voted to uphold public school segregation in the 1940s because 'public opinion had not then crystallized against it.'" *Id.* at 443. My own suggestions about the tipping point impact of other centers of state power can be found in Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 GEO. L.J. 941, 979 (2004).

criminalization of consensual adult sexual relations.[16]

Moreover, after having found that the use of certain characteristics in legislation triggers a higher than rational basis review,[17] the Court has suspended its willingness to recognize additional classifications as suspect. In *City of Cleburne v. Cleburne Living Center, Inc.*,[18] the Court essentially froze the identification of any additional social groups for that status, even one as distant from the cultural wars as the mentally retarded:

> [T]he appropriate method of reaching . . . instances [of invidious discrimination] is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.[19]

Instead, the Court relied on an unarticulated, pragmatic compromise to balance the two competing horns of its institutional dilemma: it reversed a lower court decision that authorized heightened scrutiny of legislative actions affecting the group, but it simultaneously struck down a discriminatory policy.[20]

Five years after *Cleburne*, Congress rendered the Court's analysis essentially moot for retarded or otherwise disabled persons, by adopting the Americans with Disabilities Act (ADA).[21] The ADA enacted sweeping anti-discrimination commands, reaching many more organizational entities, with a much deeper regulatory bite, than the Court could have produced in *Cleburne* under any equal protection analysis.[22] As a result, challenges to disability-based discrimination are routinely brought under the statute, and there is virtually no equal protection case law precedent on classifications based on disability.

The trajectory for disability rights law followed what has become the popularized narrative of progress for civil rights: social minorities use the litigation of constitutional claims as one of the early strategies for legal reform. If the litigation produces some victories and, especially, greater visibility and political traction, that success fuels the movement's demands for more change,

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16. Klarman, *supra* note 15, at 443.

17. The Supreme Court has applied elevated scrutiny to legislative classifications on the basis of national origin, Korematsu v. United States, 323 U.S. 214, 216 (1944); race, McLaughlin v. Florida, 379 U. S. 184, 191-92 (1964); alienage, Graham v. Richardson, 403 U.S. 365, 371-72 (1971); sex, Craig v. Boren, 429 U.S. 190, 197 (1976); and illegitimacy, Clark v. Jeter, 486 U.S. 456, 461 (1988).

18. 473 U.S. 432 (1985).

19. *Id.* at 446.

20. *Id.* at 432.

21. 42 U.S.C. §§ 12101-12181 (West, WESTLAW through P.L. 109-169).

22. Unlike the Constitution, the ADA has a detailed text. It applies to private as well as public actors, §§ 12111, 12181 (definitions under employment and definition of private entity); and covers disparate impact as well as disparate treatment discrimination. §§ 12112, 12182 (employment and public accommodation provisions).

which can lead to first state, and then federal civil rights legislation.[23] Under this familiar model, a kind of legal-political interregnum exists between the early phase of judicial and local legislative victories, and the culmination in the enactment of broad federal statutes.

From the perspective of judges concerned about the institutional role of the courts, the interregnum creates a period of political trial and error, requiring as much statesmanship as craftsmanship.[24] In the dance between politics and law, the role of judges becomes predictive as well as evaluative. Courts become a testing ground, a venue for assessing whether a particular equality claim is worthy. One way in which that assessment is expressed is whether recognition of a group's demand is justified by analogy to the claims that have already been established as valid.

Judicial precedent furnishes the explicit benchmark for validity of a legal claim. But an implicit benchmark exists as well. Because of the American experience that politically successful equal protection claims eventually produce national anti-discrimination statutes, another unacknowledged, but perhaps more important, metric also operates. It is difficult to imagine that judges do not ask themselves, perhaps unconsciously, whether an analogy offered by a "new" minority fits those arguments which were eventually validated by legislative imprimatur. If so, constitutional equal protection arguments succeed or fail based in part on an assessment of whether they are likely to succeed politically.

Operating in this discursive environment, once a group achieves a cultural toehold through its construction as a legible social minority, it still faces a complex challenge in the legal arena. Advocates must satisfy doctrinally-imbedded criteria for justifying judicial intervention, which include showing that the legislature used the group's identity to fashion an invidious and even irrational discriminatory classification. The underlying principle which they deploy is the need to correct faulty legislative processes.

At the same time, however, the realm of litigation includes a discursive backbeat which asks a very different question: how similar is this new situation to past examples of equality claims that we now consider legitimate, in part because they gained majoritarian support? Or, to put it more bluntly, from a judge's perspective: how likely is it that an equal protection ruling in favor of this group today will be legitimated by majority acceptance of the group in the future? Should a court intervene to countermand democratically authorized classifications without a sense that such change is likely? Or, is

23. Historical accounts of the social process of litigation on behalf of minorities include PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000); DAVID J. GARROW, LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); William N. Eskridge, Jr., *Channeling: Identity-based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

24. I owe this felicitous phrase to Andy Koppelman.

intervention when no change is foreseen all the more justified?

During an interregnum, the most important doctrinal question is the standard of review for the classification in question. The standard of review establishes the framework under which a social group will, or will not, emerge from the wilderness as a culturally legitimate minority. Bumping the standard of review upward signals the growing legitimacy of the group. Perhaps one reason why the Court has not stood forthrightly behind its adjustments in the rational basis standard is a sense that recognizing such a shift requires too much of a political commitment by a Court which clearly aspires to minimalism, at least insofar as equal protection is concerned.[25] If so, then O'Connor's standard is all the more appealing, because its low entry point of political unpopularity communicates nothing about the intrinsic worthiness of the group or the appropriateness of the classification.[26]

The LGBT civil rights movement poses exactly these dilemmas for today's judiciary. How then should the Court treat this minority—and indeed other minorities occupying the same position in the future—during an interregnum, the period after meaningful social and political support has accrued for their claims, but before they have achieved the muscle necessary to enact reforms in national majoritarian fora? That is, I believe, the fundamental question that Justice O'Connor's concurring opinion in *Lawrence* addresses.

For LGBT Americans, the primary legal question until *Lawrence v. Texas* was whether they could be prosecuted as criminals for the sexual conduct that marked the borders of the group. The full Court's opinion in *Lawrence* effectively decriminalized homosexuality.[27] But although LGBT people are no longer presumptive criminals, they are also not yet presumed fully innocent in a cultural sense. Acceptance of homosexuality as a benign variation is increasing rapidly, but in many quarters, it is still marked as deviant. LGBT people have achieved legal, but not social, innocence. Even open discrimination against them is often not "recognized [as] invidious[]"[28] in the uncontested way that it is against persons of color or women or adherents of non-dominant religions.

Justice O'Connor has demonstrated an acute sensitivity to the political nuances of equality in American society. She has written critically important decisions regarding both race and sex discrimination.[29] Until *Lawrence*, however, she had

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25. *Cf.* Jed Rubenfeld, *The Anti-Anti-Discrimination Agenda*, 111 YALE L.J. 1141 (2002) (arguing that an opposition to extensions of anti-discrimination principles is the unifying thread in the Supreme Court's recent trends in constitutional interpretation).

26. *See infra* Part IV(A)(1).

27. In fact, as I and many others have argued, conflating a form of sexual conduct with a group identity was a grave error. Using historical analysis, the Supreme Court in *Lawrence* corrected the conflation error that was made in *Hardwick*. Lawrence v. Texas, 539 U.S. 558, 567-72 (2003). Nonetheless, sodomy laws continue to have a social meaning that is often synonymous with homosexuality.

28. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 460 (1985) (Marshall, J., concurring).

29. Important decisions in politically sensitive race discrimination cases include *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding university affirmative action plan designed to achieve diversity in the

never written an opinion in a sexual orientation case. Her concurrence reflects the same kind of pragmatic insight into the political zeitgeist on sexual orientation issues that she brought to other equality issues.

II. HEIGHTENED RATIONAL BASIS

Justice O'Connor's concurring opinion in *Lawrence* is a relatively brief exegesis on equal protection law. Of course, it is impossible to know her goals in writing it. On a more ambitious reading, however, it reshapes Footnote 4 in *United States v. Carolene Products*,[30] which set the terms for all forms of heightened scrutiny under the Equal Protection Clause. At a minimum, it is an attempt by a member of the Court to re-invigorate analysis of the particular circumstances that give the rational basis test meaningful punch.

A. STATING THE O'CONNOR STANDARD

Lawrence v. Texas involved a Texas statute which criminalized oral or anal sexual conduct when the participants were two persons of the same sex, but not when a male-female couple engaged in the same acts. Five Justices invalidated the Texas sodomy law on the ground that petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[31] Justice O'Connor concurred in the result, but relied only on the Equal Protection Clause.

The key to O'Connor's analysis is the distinction she drew between her approach and the typical inquiry of whether a statute is rationally related to a legitimate state interest. She acknowledged that "laws such as economic or tax legislation . . . normally pass muster"[32] under the traditional test, invoking the judiciary's reliance on "the democratic processes" to correct wrongheaded policy choices. "[H]owever," she declared, "some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests."[33]

O'Connor's innovation was to move away from examination of the characteristics of the group, which traditionally formed the basis for a finding of suspect status. Indeed, O'Connor never even mentioned, much less analogized to, the classifications which have led to two tiers of heightened scrutiny in equal protection law. The substitute trigger for O'Connor is legislative motivation:

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student body); and *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995) (ruling that government's use of race-based classifications to benefit minorities must meet a strict scrutiny standard). O'Connor's sex discrimination opinions include *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (striking down the exclusion of men from a nursing program). She has also exercised extraordinary influence on the issue of abortion. *See* sources cited *supra* note 1.

30. 304 U.S. 144, 152 n.4 (1938). In *Carolene Products*, the Court upheld federal regulation of a dairy product believed to be unhealthy. In Footnote 4, the Court recognized that more stringent scrutiny was appropriate for legislation infringing on personal liberty, rather than economic interests.

31. *Lawrence*, 539 U.S. at 578.

32. *Id.* at 579.

33. *Id.* at 580 (citing Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

"When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[34]

O'Connor found that, by singling out same-sex conduct for criminal prohibition, Texas "[made] homosexuals unequal in the eyes of the law."[35] As a consequence, discrimination against them in areas unrelated to criminal law, such as employment or family law, was more likely.[36] "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[37]

The only state interest that Texas offered as justification for the statute was the promotion of morality.[38] Distinguishing *Hardwick*, which upheld promotion of morality as a legitimate basis for prohibiting sodomy as conduct, O'Connor wrote that the same principle did not apply when the state prohibited conduct for only one group.[39] "Moral disapproval of this group, like a bare desire to harm the group, is . . . insufficient" as a rational state interest.[40] "We have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale . . . to justify a law that discriminates among groups of persons."[41] The Equal Protection Clause prohibits classifications "'drawn for the purpose of disadvantaging the [particular] group.'"[42]

O'Connor's concurrence identifies a boundary between moral disapprobation of conduct, which she would accept if applied evenhandedly, and the moral disapproval of groups of persons, which she found illegitimate. It is an admonition to "hate the sin, but don't be unfair in punishing the sinners." Punishing only some of the sinners reveals that a group of persons, not allegedly immoral conduct, is the real target of opprobrium. Legal instantiation of such scapegoating constitutes *de jure* stratification among Americans, in effect creating second-class citizens. As the Court wrote in *Romer*, quoting the first Justice Harlan, "the Constitution 'neither knows nor tolerates classes among citizens.'"[43]

O'Connor closed her opinion with a caveat: under heightened rational basis review, other laws distinguishing between homosexuals and heterosexuals could be upheld.[44] A state that could show a legitimate interest—not moral disapproval of homosexuality—behind its law could succeed in preserving a classification

34. *Id.*
35. *Id.* at 581.
36. *Id.*
37. *Id.*
38. *Id.* at 582.
39. *Id.* at 583.
40. *Id.* at 582.
41. *Id.*
42. *Id.* at 583 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).
43. *Romer,* 517 U.S. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).
44. *Lawrence,* 539 U.S. at 585.

based on sexual orientation. O'Connor strongly suggested that excluding same-sex couples from marriage and excluding openly gay persons from the military could be based on reasons other than "mere disapproval of an excluded group."[45]

Extrapolating from this opinion, one can derive the O'Connor standard for heightened rational basis. The blackletter test is straightforward: whether a particular classification demonstrates animus toward a politically unpopular group. To reach a conclusion on this inquiry, courts would ask three subsidiary questions:

- Is the disadvantaged group politically unpopular?
- Can the court reasonably infer that animus (either a desire to harm or moral disapproval) toward this group infected the adoption or application of the law?
- Can the defending state actor demonstrate that a rational reason or legitimate policy objective, other than animus, actually motivated the challenged classification?

A possible additional factor would be the substantive importance of the deprivation or penalty. Although an amicus brief filed by constitutional law professors suggested this as a central aspect of heightened rational basis,[46] O'Connor apparently did not agree. O'Connor stated that the Court was most likely to ratchet up the rational basis test in cases involving "personal relationships,"[47] but she did not incorporate an assessment of the nature of the substantive interest into her proposed new standard. Thus, in her conceptualization, the nature of the interest apparently serves a predictive function, but is not central to the reasoning.

As it stands, the O'Connor standard is too skimpy to be more than barely workable. The *Lawrence* concurrence, however, does create a platform that future courts could use to build out more fully a new wing of constitutional law. It is not difficult to imagine an elaborated version of heightened rational basis joining the other tiers of equal protection analysis in future case law and treatises.[48]

B. THE CONTEXT FOR O'CONNOR: FOOTNOTE 4.1?

Just as the Court balked at extending suspect status—applied to racial classifications—to classifications based on sex,[49] the Court is now clearly

45. *Id.*

46. Brief for Constitutional Law Professors et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 135139 at *8-10.

47. *Lawrence*, 539 U.S. at 580.

48. *See infra* Part IV(B).

49. Frontiero v. Richardson, 411 U.S. 677 (1973).

unwilling to equate sexual orientation classifications with either race or sex. The Court eventually produced a category of intermediate scrutiny to be applied to classifications based on sex,[50] and today, it seems to be using increasingly stringent rational basis review for sexual orientation. In doing so, the Court draws on a kind of conceptual fallback which it has used before on scattered occasions.[51] For various reasons, however, the classifications that have drawn heightened rational basis in the past did not produce repeated litigation in the Supreme Court.[52] LGBT equality issues may persist, without federal statutory redress, for a longer period of time. If so, the alignment of this shadowy standard with an active social movement may bring heightened rational basis out of the constitutional closet.

The O'Connor standard builds more directly on *Romer v. Evans* than on any other case. Like O'Connor in *Lawrence*, the majority in *Romer* invoked *Department of Agriculture v. Moreno*[53] for the principle that a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[54] Unlike the O'Connor concurrence, however, the *Romer* opinion did not acknowledge that it was applying anything other than the traditional rational basis test, finding that the Colorado provision at issue "fails, indeed defies" even that lenient standard.[55]

The *Romer* Court's unwillingness to own the gap between its result and the ease with which most legislative classifications meet a rational basis test was a routine target of criticism.[56] The Court has had a history of resorting to an unarticulated level of rationality in cases which have involved politically unpopular groups, despite the protests of dissenting Justices.[57] O'Connor's concurrence, however, is the first time a Justice has responded to the criticism with a positive proposal forged in the context of sexual orientation cases, a

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50. United States v. Virginia, 518 U.S. 515 (1996).

51. In the 25 years prior to *Romer v. Evans*, the Supreme Court struck down legislative classifications using what was purportedly a rational basis test in 10 cases, while upholding classifications under that standard in 100 cases. Richard C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 (1999).

52. In sex discrimination cases, only five years separated the heightened rational basis analysis of *Reed v. Reed*, 404 U.S. 71 (1971), and the Court's formal acknowledgment of intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190, 197 (1976). Litigation regarding disability-based discrimination has proceeded primarily under the Americans with Disabilities Act since its enactment. *See supra* text accompanying notes 21-22. The communal living arrangements (other than extended families) protected in *Moreno* have largely disappeared.

53. 413 U.S. 528 (1973) (finding a provision of the Food Stamp Act barring eligibility for households containing unrelated persons to be unconstitutional under the Equal Protection Clause).

54. Romer v. Evans, 517 U.S. 620, 634 (1996).

55. *Id.* at 632.

56. While themselves defending the Court's decision in *Romer*, Daniel Farber and Suzanna Sherry noted that "[a]mong legal scholars, . . . it has mostly engendered puzzlement." Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257 (1996).

57. Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); *see also infra* text accompanying notes 59-67.

cultural flashpoint for the current Court.

In the past, Justices from opposite ideological ends of the Court have chafed when the majority applied rational basis with real bite. Justice Scalia's dissent in *Romer* criticized the majority for ignoring case law establishing that minimal scrutiny should have been applied and that it permits imperfectly tailored classifications.[58] Then-Justice Rehnquist made the same point almost 25 years earlier in his dissent in *Moreno*, in which the Court invalidated a congressional prohibition on providing food stamps to unrelated members of a household, in an attempt to cut off assistance to groups of hippies.[59] From a starkly different philosophical standpoint, Justice Douglas implicitly joined the Rehnquist critique in *Moreno*. Douglas believed that the restriction was invalid as a violation of associational rights. Absent that defect, however, Douglas concluded that under rational basis review, the statute "might well be sustained as a means to prevent fraud."[60] In *Cleburne,* the Court struck down a zoning ordinance requirement of special permits for group homes occupied by mentally retarded persons, professing that it was applying only the traditional rational basis standard. Justice Marshall, dissenting in part, wrote that he could not accept the Court's disclaimer of a more exacting standard: "[H]owever labeled, the rational basis test invoked today is most assuredly not the [traditional] rational-basis test . . . ."[61]

The same dynamic of unacknowledged heightened scrutiny and protests of inconsistency occurred even more dramatically in *Plyler v. Doe*.[62] The *Plyer* Court invalidated a Texas law that barred undocumented alien children from its public schools, assertedly using a rational basis standard of review that merely "[took] into account" the social costs of the law.[63] Justice Brennan's opinion for the Court prompted concurring opinions from Justices Blackmun, who argued that the overbreadth in the classification was "fatally imprecise" because of the "extraordinary nature of the interest involved,"[64] and Justice Powell, who concluded that "denial of education to these children bears no substantial relation to any substantial state interest."[65] A four-Justice dissent accused the majority of "spin[ning] out a theory custom-tailored to the facts of this case."[66]

Underlying this entire debate is Footnote 4 from *United States v. Carolene Products, Co.*, in which the Court, referring to religious, national, and racial minorities, noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call

58. *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).
59. *Moreno*, 413 U.S. at 546-47 (Rehnquist, J., dissenting).
60. *Id.* at 542.
61. *Cleburne*, 473 U.S. at 458 (Marshall, J., dissenting in part).
62. 457 U.S. 202 (1982).
63. *Id.* at 223-24.
64. *Id.* at 236.
65. *Id.* at 239.
66. *Id.* at 244.

for a correspondingly more searching judicial inquiry."[67] Since *Carolene*, the Court's indicia for strict or heightened scrutiny have turned on two broad categories of factors: intrinsic characteristics of the group, such as its history of discrimination and the capacity of its members to engage in the activity from which they are being excluded;[68] and the political position constructed for the group by the reactions of others to it, i.e. its political powerlessness.[69]

The O'Connor standard would examine only the political status of a group—its political unpopularity—and none of its other characteristics. Because political unpopularity changes with time, one imagines that at least some groups could move in and out of eligibility for heightened rational basis review. O'Connor's vision is of a more dynamic equal protection review than that alluded to in Footnote 4. She would accord significant flexibility and discretion to legislators for utilizing a variety of classifications, while also permitting, on a case-by-case basis, a potentially lethal form of review to apply outside the categories of race, religion, national origin, and gender.

C. WRESTLING WITH INDETERMINACY

As we have seen, the Court has struggled in the past with whether and when to apply heightened scrutiny to classifications based on certain characteristics. A closer examination of two critical historical points—*Frontiero v. Richardson*[70] and the *Cleburne* case—reveals that using a stricter standard than traditional rational basis, but not declaring it to be different, creates instability and uncertainty. The story of *Frontiero* resonates especially strongly with the current positioning of LGBT equality claims, because both the attorneys and the Justices struggled to define whether some form of heightened scrutiny had already been accepted for sex-based classifications.[71] In *Cleburne*, decided a dozen years later, Justice O'Connor herself participated in debates over a possible extension of heightened scrutiny.

Two years before *Frontiero*, in *Reed v. Reed,* the Court had unanimously struck down an Idaho law that required preference for appointment of male rather than female administrators of estates, when more than one candidate was equally eligible for appointment under the statutory categories.[72] The Court did not state what level of review it was applying, but used language that, like the language in *Romer* and *Lawrence*,[73] suggested that a rational

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

68. Frontiero v. Richardson, 411 U.S. 677, 684, 686 (1973).

69. *Id.* at 686; *Cleburne*, 473 U.S. at 443-44. In addition, when a fundamental right is at stake, the Court will examine any differential access to it with strict scrutiny. Skinner v. Oklahoma, 316 U.S. 535 (1942). In some cases involving apparently rational basis review, the Court also appears to be swayed by the nature of the interest. *See supra* text accompanying notes 64-65.

70. 411 U.S. 677 (1973).

71. *See infra* text accompanying notes 79-86, 90-95.

72. 404 U.S. 71 (1971).

73. *See* cases cited *supra* note 10.

basis test was being used.[74] The following year, in *Eisenstadt v. Baird*, Justice Brennan again used similar language whenhe referred to the Court's decision in *Reed* as a conclusion that the Idaho statute "fail[ed] to satisfy even the more lenient equal protection standard."[75]

Frontiero followed as the next sex discrimination case decided by the Court. It involved a federal statute which allowed male, but not female, married service members to automatically receive additional benefits for the "dependency" of their spouse.[76] In the three briefs which she filed with the Court,[77] American Civil Liberties Union attorney Ruth Bader Ginsburg repeatedly stressed the need for clarification of the muddy language in *Reed*.

In *Frontiero*, a three-judge district court had upheld the statute, finding in part that it "would be remiss" to apply heightened scrutiny in light of the *Reed* language.[78] Citing Justice Brennan's description of *Reed* as meaning only that the Idaho law was too irrational to meet the lowest level of review, Ginsburg criticized the district court's analysis, asserting that the Supreme "Court's reservation of the standard question for another day was misread as a mandate to lower courts to apply a lenient test. . . ."[79] Similarly, her brief argued that "the question of the stringency of review was left open" in *Reed*.[80]

Ginsburg argued that the lower courts, interpreting the *Reed* language to signal the use of only traditional rational basis review, were misguided, and other courts were confused. Her brief cited eighteen lower court decisions in post-*Reed* sex discrimination cases,[81] some in which the courts "regard[ed] *Reed* as a major precedent marking a new direction in judicial review of sex-based classifications"[82] and others evincing "'lenient' review."[83] In all, the outcome of the challenges aligned perfectly with how the court had characterized the standard of review.[84] Slyly discounting the plausibility of the inference that traditional

74. "The question presented by this case, then, is whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective that is sought to be advanced by [the challenged statutes]." *Reed*, 404 U.S. at 76. The Court concluded that Idaho's law violated the Equal Protection Clause because it provided "dissimilar treatment for men and women who are . . . similarly situated." *Id.* at 77.

75. Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). This language is reminiscent of the Court's statement in *Romer v. Evans* that the Colorado provision at issue there "fails, indeed defies" even a rational basis standard. Romer v. Evans, 517 U.S. 620, 632 (1996).

76. Frontiero v. Laird, 411 U.S. 677, 678 (1973).

77. Frontiero v. Laird, Jurisdictional Statement [hereinafter Frontiero Jurisdictional Statement]; Brief for American Civil Liberties Union as Amici Curiae Supporting Appellant, Frontiero v. Laird, 411 U.S. 677 (1973) (No. 71-1694) [hereinafter Frontiero Brief]; Joint Reply Brief of Appellants and American Civil Liberties Union Amicus Curiae, Frontiero v. Laird, 411 U.S. 677 (1973) (No. 71-1694) [hereinafter Frontiero Reply Brief]. Ginsburg also presented oral argument. *Frontiero*, 411 U.S. at 678.

78. Frontiero v. Laird, 341 F. Supp. 201, 206 n.2 (M.D. Ala. 1972).

79. Frontiero Jurisdictional Statement, *supra* note 77, at 10.

80. Frontiero Brief, *supra* note 77, at 31.

81. *Id.* at 32-33.

82. *Id* at 32.

83. *Id.* at 33.

84. *Id.*

rational basis was the correct guideline, she wrote that "[s]ome courts have even seen in *Reed* implicit rejection of a strict standard of review. . . ."[85] "[D]esignation of the sex criterion as suspect," she wrote in her reply brief, was "overdue."[86]

What emerged from the Court in *Frontiero* was a plurality decision written by Justice Brennan finding that strict scrutiny should apply to sex-based classifications. There was no fifth vote for that holding, however. Justice Stewart concurred stating only that the military's policy violated the principle of *Reed*.[87] Justice Powell, joined by Chief Justice Burger and Justice Blackmun, also concurred, specifically rejecting strict scrutiny and citing *Reed* as "abundan[t] support[]" for the judgment.[88]

Justice Blackmun's papers, recently released to the public, contain copies of the correspondence among the Justices as they considered whether to recognize sex as a suspect classification. Chief Justice Burger and Justices Blackmun and Powell were concerned about interference with the ratification process for the Equal Rights Amendment, which at that time had been adopted by Congress and was under debate in state legislatures.[89] However, the case also prompted a lively debate among the Justices over what they had in fact done in *Reed* and how equal protection standards should be developed.

Justice White, who ultimately joined Brennan in finding sex to be a suspect classification, wrote to Brennan:

> I think Reed v. Reed applied more than a rational basis test . . . . If moving beyond the lesser test means that there is a suspect classification, then Reed has already determined that . . . . Whether it follows from the existence of a suspect classification that 'compelling interest' is the equal protection standard is another matter . . . . [W]e actually have a spectrum of standards. Rather than talking of a compelling interest, it would be more accurate to say that there will be times . . . that we will balance or weigh competing interests.[90]

Justice Stewart apparently considered joining Brennan at one point. In a letter to him, Stewart wanted to substitute for part of the proposed opinion a "statement that we find that the classification effected by the statute is invidiously discriminatory. (I should suppose that 'invidious discrimination' is an equal protection standard to which all could repair . . . .)."[91]

Justice Powell wrote to Brennan of his concern that the Court was reaching out to decide a question then being resolved in the context of the ERA debates. "If . . .

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85. *Id.*

86. Frontiero Reply Brief, *supra* note 77, at 14.

87. *Frontiero,* 411 U.S. at 691 (Stewart, J., concurring).

88. *Id.* at 691-92.

89. These Justices discussed the ERA issue in their concurrence. *Id. at* 692 (Powell, J., concurring).

90. Harry A. Blackmun Papers, Box 163, Folder 9, Letter from Justice White to Justice Brennan (Feb. 15, 1973) [hereinafter Blackmun Papers].

91. *Id.*, Letter from Justice Stewart to Justice Brennan (Feb. 16, 1973) (emphasis in original).

this Court puts 'sex' in the same category as 'race' we will have assumed a decisional responsibility (not within the democratic process) unnecessary to the decision of this case . . . ."[92] Justice Brennan wrote back that he had given Powell's letter "much thought," but

> I come out however still of the view that the "suspect" approach is the proper one and, further, that now is the time, and this is the case, to make it clear . . . . Thurgood's discussion of Reed[93] . . . convinces me that the only rational explication of Reed is that it rests upon the "suspect" approach.[94]

Chief Justice Burger, who wrote *Reed*, closed the conversation on what he no doubt thought was a humorous note: "Some may construe Reed as supporting the "suspect" view but I do not. The author of Reed never remotely contemplated such a broad concept but then a lot of people sire offspring unintended!"[95]

Ironically, the end result in *Frontiero* was to reverse the outcome of the lower court, which had upheld the statute, but implicitly to affirm the conclusion that rational basis was the proper standard. These two courts were engaging two different versions of rationality. The district court had declared that any rational justification "perceived" by the courts, whether or not proven, would suffice.[96] Four Supreme Court Justices concurred in the judgment on the ground that rational basis analysis required invalidating the statute, but provided no explanation for why the military's policy failed the lowest level test.

By the time of *Cleburne*, the Court had essentially divided into three groups on the question of extending heightened scrutiny beyond the categories already recognized. These categories appear in Justice Blackmun's notes taken during the conference sessions that the Justices held on this case.[97] Chief Justice Burger and Justices White and Rehnquist flatly opposed any other suspect classes. Justices Brennan and Marshall wanted to recognize the mentally retarded as a quasi-suspect class, as the lower court had done. (Justice Blackmun joined Justice Marshall's opinion.)[98] And Justices Powell, Stevens, and O'Connor agreed that

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92. *Id.*, Letter from Justice Powell to Justice Brennan (Mar. 2, 1973).

93. The reference is to Justice Marshall's dissent in *San Antonio Independent School Dist. v. Rodriguez*, in which Marshall wrote that *Reed* "can only be understood as [an] instance[] in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination." 411 U.S. 1, 107 (1973) (Marshall, J., dissenting) (internal citations omitted).

94. Blackmun Papers, *supra* note 90, Letter from Justice Brennan to Justice Powell (Mar. 6, 1973).

95. *Id.*, Letter from Chief Justice Burger to Justice Brennan (Mar. 7, 1973).

96. Frontiero v. Laird, 341 F. Supp. 201, 206 (M.D. Ala. 1972).

97. Blackmun Papers, Box 428, Folder 7, Miscellaneous Notes by Justice Blackmun, No. 84-468, City of Cleburne v. Cleburne Living Center (Mar. 20, 1985) [hereinafter Blackmun Papers, Miscellaneous Notes, Blackmun Papers, Box 428, Folder 7, Miscellaneous Notes by Justice Blackmun, No. 84-468, City of Cleburne v. Cleburne Living Center (Apr. 26, 1985).

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

rational basis review was both appropriate and sufficient, but, at least according to the Blackmun documents, did not press the need to draw a clear line ruling out any further extensions of suspectness.[99]

The Blackmun conference notes from March 20, 1985, indicate that Chief Justice Burger's comments on the case included "no heightened scrutiny" and "no more quasi-suspect classes."[100] Justice White stated that he "would not create another category for heightened scrutiny." Justice Rehnquist agreed with not "creat[ing] any more" quasi-suspect classes; "we are awash in it." Justice O'Connor also did "no[t] like [the] new suspect class" idea. She also noted that she found it to be a "very close case."[101]

Justice Powell triggered a strong reaction when he circulated a memo among the Justices that proposed that the Court could avoid deciding the question of whether the recognition below of a quasi-suspect class had been correct, reasoning that the opinion could simply refer to rational basis analysis. Justice Rehnquist pointedly responded to Justice White, then at work on a draft of the Court's opinion:

> I would hope you would not subscribe to this idea, because it would result in the case deciding absolutely nothing that was not already well known before we took it. The issue presented by the case was whether or not "heightened scrutiny" should be employed to review equal protection claims where made by the mentally retarded: the Court of Appeals held that it should be, and we granted certiorari, I thought, to decide that question. To simply "punt" and turn the case into one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance would, to my mind, rob the decision of any importance which it would otherwise have.[102]

Justice White agreed:

> I see no persuasive reason for not announcing that rationality is the governing standard. That is the issue we took this case to decide, there is a clear majority for that standard, and not saying so will leave in place an erroneous . . . precedent . . . . I doubt that we would have granted this case had it involved only

99. *See generally* Blackmun Papers, Miscellaneous Notes, *supra* note 97.

100. Blackmun Papers, Miscellaneous Notes, *supra* note 97, Notes by Justice Blackmun (emphasis in original).

101. *Id.*

102. *Id.*, Letter from Justice Rehnquist to Justice White (June 5, 1985).

> whether the rational basis standard had been properly applied. . . .[103]

Powell was persuaded: "I now agree that we should decide explicitly that rational basis is the proper standard. This will be the precedent that counts."[104]

The correspondence and notes do not tell us what impact the *Cleburne* debates had on Justice O'Connor. She joined Justice White's opinion early in the process, and in the midst of the flurry of letters among the Justices, she sent a note to him saying "I am still with you on this."[105] But it seems highly likely that the Court's unresolved struggle to clarify the criteria for equal protection standards influenced her concurrence in *Lawrence.*

The historical documents from the *Frontiero* and *Cleburne* cases provide us with a richer historical context for understanding the Court's current struggles with the levels of equal protection review. Today we can see that the Justices disagreed among themselves about what standards they should adopt and even what standards they had already adopted. They debated when and how to deploy both specificity and silence in fashioning doctrine. It is a fair reading of *Romer* and *Lawrence* that this uncertainty—both expressive and instrumental—continues.

III. JUDICIAL RESPONSE TO THE O'CONNOR OPINION

In the three years since *Lawrence* was decided, there has been a mixed reaction to Justice O'Connor's concurring opinion.[106] No court has openly adopted a heightened rational basis test. Rather, courts invalidating anti-gay laws on equal protection grounds have relied on what they called simply a rational basis test, even though they have followed O'Connor's guidelines. Conversely, courts rejecting equal protection challenges have invoked the genuinely traditional form of rational basis review. The pattern repeats, with uncanny similarity, the actions of federal courts hearing sex discrimination cases shortly after *Reed v. Reed.*[107]

In *Citizens for Equal Protection, Inc. v. Bruning*,[108] a federal district court

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103. *Id.*, Letter from Justice White to Justice Powell (June 6, 1985).

104. *Id.*, Letter from Justice Powell to Justice Brennan (June 10, 1985).

105. *Id.*, Letter from Justice O'Connor to Justice White (June 12, 1985). Her earlier letter was written June 4, 1985.

106. In addition to cases discussed in the text, several courts have referred briefly to the O'Connor opinion. Most have been marriage cases in which courts invoked her implied acceptance of a legitimate state interest for excluding same-sex couples from marriage. Morrison v. Sadler, 821 N.E.2d 15, 20 (Ind. App. 2005); Lewis v. Harris, 875 A.2d 259, 273 (N.J. Super. Ct. App. Div. 2005); Hernandez v. Robles, 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005). *Cf.* Langan v. St. Vincent's Hosp., 802 N.Y.S.2d 476, 478 (N.Y. App. Div. 2005) (denying recognition to a civil union partner for purposes of wrongful death recovery). In one marriage case, the court cited O'Connor's concurring opinion to support the rejection of morality as a permissible state interest. Anderson v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. 2004).

107. *See supra* text accompanying notes 81-84.

108. 382 F. Supp. 2d 980 (D.Neb. 2005).

struck down a Nebraska state constitutional amendment which prohibited legal recognition for the "uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship."[109] The court found the amendment to be "indistinguishable" from the provision invalidated in *Romer*, because of the breadth of the disability imposed on a single group and the disjuncture between the classification and the asserted purpose of protecting marriage.[110] The court reasoned that because the purpose of "mak[ing] this class of people unequal, thereby disadvantaging a group" was clear from the evidence, the Nebraska amendment was a facial violation of the Equal Protection Clause.[111] Thus, the court found that it was unnecessary to reach the O'Connor question of "whether, once a law is found to be directed at a 'politically unpopular group,' more searching scrutiny is required."[112]

The reasoning applied in *Bruning* implies that the O'Connor test would be necessary only when animus is not self-evident. However, the court found the amendment to be motivated by animus only after close analysis of the neutral reasons proffered by the state in its defense. As in *Romer*, the finding of animus amounted to an inference drawn because of the weakness of the link between those reasons and the text of the amendment; the court cites no direct evidence of animus per se. Thus, although the court disclaimed reliance on heightened rationality, it seems nonetheless to have been using it.

In *State v. Limon*, which invalidated a sentencing law that mandated much longer incarceration for sexual activity between two underage partners when the participants were the same sex than when they were of different sexes, the Supreme Court of Kansas deployed a similar assertion—that only rational basis review was necessary—paired with actual use of higher than normal scrutiny.[113] Despite declaring that it was "apply[ing] the rational basis test,"[114] the court relied almost entirely upon the equal protection cases highlighted in Justice O'Connor's concurrence in *Lawrence*.[115] The court concluded that the classification was both over- and under-inclusive as to some asserted state interests,[116] and that it also impermissibly relied on moral disapproval of a group.[117] As was true of the district court in *Bruning*, the Kansas Supreme Court simply ignored older, more traditional rational basis analysis.

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109. *Id.* at 985.

110. *Id.* at 1002.

111. *Id.*

112. *Id.* at 1002 n.20 (quoting Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring)).

113. 122 P.3d 22 (Kan. 2005).

114. *Id.* at 30.

115. *Id.* at 30-32.

116. The court found no factual support for the belief that homosexual sexual activity was more harmful to minors than to adults, that public health justified the law, or that the law protected persons in group homes. *Id.* at 35-38.

117. The court rejected state interests in expressing moral disapproval of homosexuality and in channeling children's sexual development in traditional directions. *Id.* at 34-35.

The most extensive examination of O'Connor's concurrence is found in the Eleventh Circuit's opinion in *Lofton v. Secretary of the Department of Children and Family Services.*[118] The lower court had upheld a Florida law that barred homosexuals from adopting children. Although the Eleventh Circuit denied en banc review of the decision, Judges Birch and Barkett issued opinions in which they debated the meaning of the equal protection analysis in *Lawrence.* The critical point of contention was whether anything other than the most lenient form of rational basis review applied.

Judge Birch rejected the plaintiffs' equal protection argument by refusing to adjust the traditionally most lenient type of scrutiny. In assessing the rationale behind Florida's ban on gay persons adopting children, Judge Birch argued that the only permissible question was "whether the Florida legislature *could* have reasonably believed" that the prohibition would further the state's interest in placing adoptive children into homes offering "optimal developmental conditions."[119] Birch found the answer to be self-evident:

> [T]he mainstream of contemporary American family life consists of heterosexual individuals. Can it be seriously contended that an arguably rational basis does not exist for placing adoptive children in the *mainstream* of American family life? . . . I think not.[120]

Judge Birch dismissed the O'Connor standard as unsupported by any other opinion,[121] correctly pointing out, in what he described as his "more conventional and measured reading" of precedent,[122] that none of the cases cited by O'Connor had acknowledged using any standard other than regular rational basis.[123] Judge Birch concluded that rational basis review did not require, and indeed the Supreme Court had explicitly rejected, judicial examination of the actual motivations behind a law.[124] *Romer*, he argued,

> stand[s] for the proposition that when all proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. And animus *alone* cannot constitute a legitimate government interest.[125]

Birch pinpointed a key difference between heightened and normal rational basis, which is the extent to which a court will look behind what might be

118. 377 F.3d 1275 (11th Cir. 2004), *cert. denied* 543 U.S. 1081 (2005).
119. *Id.* at 1276.
120. *Id.* (emphasis in original).
121. *Id.* at 1279.
122. *Id.*
123. *Id.* at 1279-81.
124. *Id.* at 1279.
125. *Id.* at 1280 (emphasis in original).

pretextual or post hoc rationales for a classification, in order to assess the extent to which animus played a part in the legislative process.

Judge Barkett's spirited dissent utilized the O'Connor approach but stopped short of labeling it as a separate standard. She argued that "Florida's law fail[ed] to survive any form of rational basis review."[126] Central to that conclusion, however, was a heightened rational basis assessment:

> [T]here is no question that a politically unpopular group is being targeted, that the challenged legislation inhibits personal relationships, and that there is no legitimate rational relationship between Florida's proffered justifications and its sweeping categorical adoption ban against homosexuals.[127]

Although Barkett did not acknowledge using a heightened standard, her equal protection analysis used methodologies not associated with lenient review. She closely examined the lack of a fit between the exclusion of gay adoptive parents and the state's two goals: to place children with married parents to maximize the possibility of stability in their family life, and to place them with good role models. As to the first, she noted that the state permits unmarried heterosexuals to adopt and criticized the assumption that gay parent homes are less stable.[128] As to the second, she argued that the state's willingness to allow cross-racial adoptions or adoption by immigrant parents who cannot help children adjust to a culture that is unfamiliar to them, indicated that the state's rationales for rejecting gay adoptive parents were pretextual and thus that animus could be inferred.[129] In addition to her unwillingness to accept the logic of the state's justifications at face value, Judge Barkett relied on the extensive history of openly expressed anti-gay prejudice during enactment of the adoption ban as proof that animus fueled the legislation.[130]

Thus in *Bruning, Limon* and *Lofton*, courts have varied in their definitions of rational basis review when analyzing classifications based on sexual orientation. A forthright explication of heightened rational basis would offer substantially greater clarity in future cases.

IV. THE O'CONNOR STANDARD AS PROCESS OVERSIGHT

In evaluating Justice O'Connor's formulation of heightened rational basis, it seems only fair to do so on its own terms. It is most certainly not a new theory of justice or equality. The most outstanding characteristic of this approach is its

126. *Id.* at 1296.
127. *Id.*
128. *Id.* at 1297-99.
129. *Id.* at 1299-1300.
130. *Id.* at 1301-03.

singular focus on process. What the O'Connor standard contains are those components of heightened scrutiny which focus on the permissibility of the governmental interest and on the degree of tailoring between a legitimate interest and the classification. What it does not contain is any reference to characteristics of the group beyond the requirement that it be "politically unpopular."

O'Connor's standard is an attempt, pragmatic like its author, to operationalize the limited oversight of political processes that John Hart Ely argued was the foundation of judicial review.[131] Moreover, it revives what Gerald Gunther had called "means-oriented scrutiny,"[132] an approach that has lain dormant since his article. Unless more specifics are added, however, this standard may turn out to be only another of the Court's apparently random variations on traditional rational basis review.

A. OBJECTS OF SCRUTINY

There are three possible components that could comprise a heightened rational basis standard: criteria for the classification itself; criteria for the quality of the legislative process; and criteria for the nature of the interest at stake. I will analyze the O'Connor standard's treatment of each in turn.

1. The Classification Itself

"Politically unpopular" could describe tobacco company executives, lesbian schoolteachers, or paroled child molesters. By using only this descriptor for the group, O'Connor apparently seeks to diminish the role that group characteristics would play in heightened rational basis analysis. Most courts would probably take judicial notice of the political unpopularity of these three, and countless other, groups. And while some social minorities, like LGBT people, might have acquired meaningful political power in certain localities, even these groups, however, could be classed as unpopular if they cannot yet compete without controversy or stigma in national political arenas. Thus, although "politically unpopular" is a broad and imprecise term, it is unlikely to pose significant problems for judges applying a heightened rational basis analysis.

The requirement of unpopularity is softer than the political powerlessness to which Footnote 4 alluded. "Unpopular" avoids the absolutism of "powerless," which now uncomfortably fails to describe virtually any of the groups to which the Court has extended strict or intermediate scrutiny. The shift in language also emphasizes the ephemeral nature of the group's social status: popularity is a realm where change is almost expected. Even if a group's unpopularity is extremely unlikely to change (as with child molesters, for example), the

131. *See* generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); *see also* Janet E. Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

132. Gunther, *supra* note 14, at 23.

reference to popularity is a more neutral description than what is implied by political powerlessness, which suggests a problem of greater importance than unpopularity and implies an unmerited penalty.

2. The Quality of the Legislative Process

Traditional rational basis analysis does not authorize close scrutiny of legislative history in order to ascertain what the purposes of a classification actually were at the time of enactment.[133] Nor does it entail much examination beyond the question of surface plausibility for how closely a classification relates to whatever legitimate purposes the legislature may have had.[134] It is on these two questions where heightened rational basis analysis most closely resembles strict or intermediate scrutiny.

In querying actual purpose, for example, the analysis undertaken by the Court in *Eisenstadt v. Baird*[135] is much closer to the detailed examination given to the state's justifications for an all-male public military academy in *United States v. Virginia*, where the Court insisted that there could be no post hoc rationale and stressed the need for a genuinely important state interest,[136] than it is to the traditional rational basis analysis in *Federal Communications Commission v. Beach Communications, Inc.*, where the Court ruled that any conceivable legislative purpose could satisfy the rational basis test.[137] Similarly, the Court refused to accept the degree of misfit between legislative goals and an anti-gay classification that existed in the provision at issue in *Romer*,[138] in stark contrast to the allowance of admittedly crude lines drawn to disadvantage persons based on age in *Vance v. Bradley*[139] and *Massachusetts Board of Retirement v. Murgia*.[140] The nature and quality of the Court's examination of the sexual orientation classification in *Romer* much more closely resembles the rejection of what Justice Stevens characterized as the "not totally irrational" classification drawn between men and women in the age requirement for purchasing beer, deployed by the Court in its first application of intermediate scrutiny.[141] It also bears more than passing resemblance to Justice O'Connor's analogous "undue burden" standard for restrictions on abortion,[142] which authorizes flexible but still meaningful review of intrusions on liberty.

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133. Heller v. Doe, 509 U.S. 312, 333 (1993); Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993); *see also* Gunther, *supra* note 14, at 21.

134. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992); Dandridge v. Williams, 397 U.S. 471, 486 (1970); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955); *see also* Gunther, *supra* note 14, at 20-21.

135. 405 U.S. 438, 448-53 (1972).

136. United States v. Virginia, 518 U.S. 515, 533 (1996).

137. 508 U.S. 307, 313 (1993).

138. Romer v. Evans, 517 U.S. 620, 632-33 (1996).

139. 440 U.S. 93 (1979).

140. 427 U.S. 307 (1976).

141. Craig v. Boren, 429 U.S. 190, 213 (1976) (Stevens, J., concurring).

142. *See* cases cite *supra* note 1.

One problem associated with an inquiry to determine whether animus or hostility motivated legislation, is the difficulty of identifying what any legislative body's motivation was in enacting a particular provision. Gunther proposed a rational basis with bite approach, which sought to avoid this difficulty by not attempting to determine motivation.[143] Completely eschewing an inquiry into motivation, however, would invite post hoc rationalization and pretext. Although not every case will make for fruitful inquiry, in those situations in which evidence of bias is present, courts should not blind themselves to a social context that helped produce, maintain or enforce an invidious law.

Another problem with such an inquiry is the definitional question pressed by Justice Scalia in his dissent in *Lawrence*, in which he argued that "preserving the traditional institution of marriage," an interest that O'Connor was apparently willing to accept, amounted to nothing more than a kinder phrasing of moral disapproval of homosexuality.[144] "Traditional values" are widely assumed to be synonymous with disapproval of enhanced rights for gay people or legal protections for gay couples.[145] For any form of equal protection review to provide meaningful shelter for unpopular groups, courts will have to reject the perpetuation of tradition as a legitimate purpose, unless it is accompanied by some other, more material state interest. Tradition may be a fine motivation in many contexts. But the Constitution should not allow a classification of persons to be based solely or primarily on tradition, when the classification disadvantages a group which is already handicapped in the legislative world of pluralist bargaining. In that situation, the risk of legislation designed to stratify for the sake of stratification is too great.

A third problem with the legislative purpose analysis, which Justice O'Connor did not address explicitly, is the mixed motive issue. When legislators have relied partially on animus in their drawing of the classification, the effect of that reliance must be balanced against any co-existent legitimate goals. The Supreme Court has not yet been presented with such a mixture in an LGBT equality case: Colorado relied on only non-moralistic state interests to justify the provision at issue in *Romer*,[146] and Texas asserted only the promotion of morality to justify its sodomy law.[147]

Under heightened rational basis, the primary guideline for mixed motive

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143. Gunther's proposed model asked "that the Court assess the rationality of the means in terms of the state's purposes, rather than hypothesizing conceivable justifications on its own initiative . . . . A state court's or attorney general office's description of purpose should be acceptable." Gunther, *supra* note 14, at 46-47.

144. Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

145. See discussion of "'traditional family values' movement" in William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2179-81 (2001). *See generally* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993).

146. Romer v. Evans, 517 U.S. 620, 635 (1996).

147. *Lawrence*, 539 U.S. at 571, 582.

situations appears to be the degree of meaningful review that the *Romer* Court applied to the question of whether the classification fit logically with the goals that were proffered. There, the Court decided that the size of the gap made it impossible to accept that those proffered justifications reflected the true purpose behind the amendment.[148] Extrapolating from that analysis, the existence of a legitimate state purpose at the time of enactment, which was actually served by a particular classification, would preserve the legislation against an attack made under a heightened rational basis standard.

It may be that the same ongoing social change which creates the underlying conditions for a constitutional interregnum also makes legislative purpose analysis more challenging. As a minority group gains political support, legislators may become more reluctant to candidly express bias. Under a heightened rational basis test, legislation infected with unacknowledged prejudice could be sustained, but only if the exclusion or classification could be shown to actually advance legitimate policy interests unrelated to animus.

3. The Nature of the Interest at Stake

Justice O'Connor asserted that the Court was most likely to use heightened rational basis in cases involving personal relationships.[149] But three of the four cases she cited do not support the point. *Eisenstadt v. Baird*[150] turned not on relationship status (whether unmarried persons had a right of access to contraceptives) so much as on the premise, later fully stated in *Roe v. Wade*,[151] that individuals have a fundamental right to decide whether to become a parent. Heightened scrutiny is required of any classification that deprives some persons, but not others, of a fundamental right.[152] The plaintiff in *Cleburne* was the group home, an institutional facility, and its officers, not any identified set of persons who would be its occupants.[153] In *Romer*, no personal relationships were at issue. Colorado's Amendment 2 would have barred a wide range of anti-discrimination laws not limited to family matters or to persons involved in relationships.[154] That leaves *Department of Agriculture v. Moreno*, in which the plaintiffs were members of the same household and did share an ongoing relationship.[155] But *Moreno* also implicates what are often viewed as among the least significant forms of personal bonds.[156]

It is unclear why Justice O'Connor highlighted the subject matter of personal

148. *Romer*, 517 U.S. at 634-35.
149. *Lawrence*, 539 U.S. at 580.
150. 405 U.S. 438 (1972).
151. 410 U.S. 113 (1973).
152. *Eisenstadt*, 405 U.S. at 453.
153. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 435 n.1 (1985).
154. *Romer*, 517 U.S. at 624.
155. 413 U.S. 528, 531-32 (1973).
156. The provision at issue in *Moreno* "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program. *Id.* at 534.

relationships as a relevant factor in equal protection analysis. Precedent did not impose that limit on possible subject matter categories. In past decisions, the Court has analyzed the nature of other substantive interests—not just personal relationships—as a factor in determining how closely to review legislation.[157] O'Connor referred to the substantive interest only in predictive terms, and then got the antecedents wrong, to boot.

Including consideration of the interest at stake would have some advantages, primarily by providing even greater judicial flexibility in the application of a heightened rational basis standard. Integrating the weight of the liberty interest placed in jeopardy with the appropriateness of the classification, would be consistent with the holistic approach to equal liberty embodied in the full Court's opinion in *Lawrence*.[158] It could serve as an additional factor for a court to consider in deciding a close case.

But there would also be disadvantages. Evaluating the importance of an individual's substantive right is fraught with value judgments, a direction that Justice O'Connor might have wanted to avoid. Like Justice Stevens, a strong proponent of a sliding scale approach to equal protection,[159] O'Connor may have been seeking to focus the Court more consistently on the nature of the classification. Under her version of heightened rational basis, legislation patently fueled by animus, even having relatively insignificant consequences, could be closely questioned.

4. Summary

The net effect of the O'Connor standard would be to produce situational strictness, i.e. a more stringent than normal testing of the challenged classification when there is evidence of legislative process defects. This protection could extend to any politically unpopular group, but would not attach to the particular classification. Instead, its applicability would depend on whether the legislation was infected by animus, stereotype, or prejudiced assumptions, rather than being based on genuine rationality. Conversely, courts in other cases could be expected to uphold laws utilizing the same classification but without the baggage of such process failures. The heightened rational basis standard would be focused on motivation and means, and would be relatively indifferent to the interest at stake.

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157. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102 (1996); Plyler v. Doe, 457 U.S. 202 (1982). Justice Marshall, who repeatedly attempted to persuade other members of the Court to conceptualize equal protection analysis as a sliding scale, also argued that the level of scrutiny should be based, in part, on the importance of the interest which was infringed. *See, e.g.*, *Cleburne*, 473 U.S. at 460-61 (Marshall, J., concurring and dissenting).

158. *See* Hunter, *Living with* Lawrence, *supra* note 10, at 1134-36.

159. *See, e.g.*, *Cleburne*, 473 U.S. at 451-54 (Stevens, J., concurring); Craig v. Boren, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring).

B. RESTATING THE O'CONNOR STANDARD

The O'Connor standard will need further elaboration in order for its potential contribution to equality jurisprudence to be realized. Lower courts could provide that. As federal and state judges apply Supreme Court decisions, they refine and elaborate doctrinal tests to meet new factual scenarios. The optimal product of such a process would be a somewhat amplified, but still simple, standard for heightened rational basis review, preserving O'Connor's goal of applying process oversight to the political branches. What follows is a statement of how lower courts could elaborate O'Connor's concept of heightened rational basis.

Under a heightened rational basis standard, a court would determine whether a classification instantiated animus toward a politically unpopular social group. To do so, courts would use a three-pronged test.

First, courts would determine whether the disadvantaged group was politically unpopular, either nationally or at a state or local level. A full analysis of whether judges should consider geographic variances in political culture is beyond the scope of this essay. Courts are accustomed, however, to accounting for both national attitudes and corrective efforts embodied in state or local anti-discrimination laws.[160]

Second, courts would examine the history of the legislation or regulation to determine whether animus toward the group infected the adoption or application of the law. This would involve consideration of legislative history and of enforcement patterns. A finding of animus could be based on evidence of a desire to harm the group, moral disapproval of the group, or the goal of perpetuating a "tradition" of unequal treatment under the law.

Third, if the court found threshold evidence of animus, the burden would shift to the defendant to demonstrate that a legitimate purpose other than animus formed a major part of the motivation for the law, and that the classification actually served the legitimate governmental purpose. The court should consider any significant gap existing between the classification and the legitimate governmental purpose to be evidence that the actual purpose behind the classification was legislative animus.

This standard would be intended to allow effective challenges to laws which scapegoat unpopular groups, i.e. which saddle such groups with penalties that have only a tenuous connection to the achievement of permissible policy goals. It would not, however, create precedent directing courts in subsequent cases to invalidate all classifications that disadvantage those groups, if the legislation challenged in later cases did in fact advance appropriate public policy.

C. ANTI-THEORY

The flexibility and pragmatism of Justice O'Connor's approach must surely warm the heart of Professor Cass Sunstein, who argues in favor of minimalist

160. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 663-64 (2000) (Stevens, J., dissenting).

equality theory for the most culturally divisive claims, of which LGBT cases (especially marriage claims) are the current prime example.[161] Sunstein is the leading exponent of a form of judicial decision making which seeks openly to postpone and to limit the impact of rulings in politically explosive cases. Seeking to rebut criticism that such judicial strategizing is unprincipled, Sunstein invokes the benefits of dialogic engagement in the political branches where, ironically, progress toward civil rights is less politically vulnerable than it is when delivered by life-tenured judges interpreting the Constitution.[162] The courts should allow space for that progress to occur, however slowly, he argues, by rendering decisions that are both narrow, i.e. essentially limited to the facts of the specific case, and shallow, i.e. reluctant to venture beyond whatever partial explication of the meaning of equality is necessary to resolve a given dispute.[163] Sunstein specifically lauds the *Romer* decision as written in a way that is both narrow and shallow.[164]

Sunstein seeks to justify what I am calling a constitutional interregnum by defending the separation of principles from issues of timing and means. He seems to assume, however, an interregnum of relatively short duration. For example, he discusses sex discrimination, noting that the Court's decision to decline strict scrutiny in *Frontiero* led to intermediate scrutiny in *Craig v. Boren*.[165] He fails to note, however, the extreme brevity of the sex discrimination interregnum: five years.[166]

The current interregnum is likely to last much longer (indeed, it already has). Both the society and the federal courts are more cautious about equality today than they were in the early 1970's. Doctrinal elasticity and incomplete theorizing are not so much needed antidotes to excessively rapid change as they are simple descriptions of the status quo. There seems little likelihood that federal courts, especially, will do anything *except* stick to the shallow and narrow.

In this context, Justice O'Connor's proffered explication of a heightened rational basis test actually provides some degree of structure and predictability. In Sunstein's focus on defending minimalism as policy, he overlooks what a contemporary, which is to say fairly enduring, interregnum would entail. If the courts duck and bob and weave through a relatively small number of cases for a reasonably short period of time, the content of what they decide on the way is understood to be intentionally ephemeral, due to expire when social consensus

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161. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

162. *Id.* at 161.

163. *Id.* at 10-19.

164. *Id.* at 141-42, 155-57, 159.

165. *Id.* at 168-69.

166. *See supra* note 52. Sunstein specifically compares *Romer* to *Reed*, arguing that both represented "a subminimalist beginning to a set of judicial developments that go hand in hand with processes of democratic deliberation." SUNSTEIN, *supra* note 161, at 151. But the duration of the minimalist approach to equal protection which is reflected in these two opinions is quite different.

gels sufficiently to provide the necessary political support for deep and wide equality mandates. But what if the interregnum stretches on? One can see in Justice O'Connor's concurrence a sense that it will and that, at a minimum, the Court has a duty to explain why the Constitution prohibits a complete free for all.

Ultimately, in its direction toward process oversight, the heightened rational basis standard promises only that the game will have rules of some sort. As Mark Tushnet has pointed out, judicial scrutiny which targets whether lawmakers acted with impermissible motivations aligns with a theory of equality as non-discrimination, or equality of opportunity, and not with a more far-reaching theory of equality as non-subordination, or a redistributive project.[167] Justice O'Connor seems to be saying that, insofar as LGBT rights cases are concerned, avoidance of consequence is the game that we in fact are playing, whatever its virtues or limitations. Given that, it is better to adapt the rules to fit the reality of the game, rather than to start each new inning not knowing which rules apply.

CONCLUSION

Justice O'Connor's concurring opinion in *Lawrence v. Texas* makes a potentially important contribution to clarifying the role of the judiciary in adjudicating equality claims by social minorities. Its impact would be less to alter the substance of the law than to acknowledge it. Justice O'Connor deserves great credit for having the intellectual honesty to attempt to articulate a coherent standard for heightened rational basis review. Her approach would allow lower courts to proceed with similar honesty.

What O'Connor has proposed is a measured and modest change, especially when considered as largely an acceptance of what the Supreme Court has already done. Its strength and weakness are the same. Because of its modesty, the mitigating impact of the heightened rational basis standard on invidious social hierarchy would be quite limited.

With rationality always ultimately in the eye of the beholder, courts using the O'Connor standard would retain enormous discretion to evaluate, on a case-by-case basis, classifications that disadvantage social minorities. The primary change from the traditional rational basis test would be a re-setting of the starting point of the analysis, from almost certain acceptance of the rationality of the state's asserted interest, to skeptical engagement in the spirit of *Romer* and *Lawrence*. Despite its shortcomings, however, the heightened rational basis standard provides a rough but workable, partial measure of equality for this moment of constitutional interregnum.

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167. Mark V. Tushnet, *The Supreme Court's Two Principles of Equality: From* Brown *to 2003, in* FROM THE GRASSROOTS TO THE SUPREME COURT: *BROWN V. BOARD OF EDUCATION* AND AMERICAN DEMOCRACY 342 (Peter F. Lau ed., 2004).