EQUAL PROTECTION

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I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment, which reads, "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[1] is an invaluable tool for groups that experience discrimination. In addition to binding the states, it also applies to the federal government through the Due Process Clause of the Fifth Amendment.[2] To establish an Equal Protection violation, a plaintiff must prove purposeful discrimination directed at an identifiable or suspect class. Classes are defined by an individual's characteristics—for example, sex, sexual orientation, or race—and those classes determine the level of scrutiny received under the Equal Protection Clause.[3]

Part II of this article provides an overview of the principles of constitutional equal protection, discusses the three levels of judicial scrutiny and their corresponding triggers, and briefly addresses potential alternatives. Part III considers sex-based classifications under the federal and state constitutions. It first

1. U.S. CONST. amend. XIV, § 1.

2. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); United States v. Windsor, 570 U.S. 744, 744 (2013) (holding that Fifth Amendment rights are made "all the more specific and all the better understood and preserved" through application of the Fourteenth Amendment); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–17, 224 (1995) (holding that the Fifth Amendment Due Process Clause must be analyzed under the same standards as the Fourteenth Amendment Equal Protection Clause to ensure congruence between the state and federal governments); *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that segregation in District of Columbia public schools without a reasonable relation to a proper governmental objective violates the Fifth Amendment Due Process Clause); Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (holding that a foreign national who had a "significant voluntary connection" with the United States had a right to assert a Fifth Amendment claim); Collier v. Barnhart, 473 F.3d 444, 448 (2d Cir. 2007) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)) (holding that the "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

3. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Schs. Dist. No. 1, 551 U.S. 701, 720 (2007) (holding that classifications based on race are reviewed under strict scrutiny); *Collier*, 473 F.3d at 449 ("Because petitioner has not demonstrated invidious sex discrimination, we analyze the 20/40 Rule under rational basis review."); Nathaniel Persily, *The Meaning of Equal Protection: Then, Now, and Tomorrow*, 31 GP SOLO 13, 14 (2014) (explaining how a class-based approach to Equal Protection involves identifying, protecting, and scrutinizing differing treatment of certain groups of people, such as women and African Americans, whereas a classification approach focuses on the "bases for discrimination" and urges scrutiny of the Equal Protection rationale being employed).

describes the federal intermediate scrutiny test and details common and contentious areas of the law. It also addresses the extent to which *United States v. Virginia,*[4] *Nguyen v. INS*,[5] and *Sessions v. Morales-Santana*[6] altered the framework for analyzing sex-based classifications. Part III next discusses the standards of review that states apply in sex-based discrimination claims.

Part IV addresses discrimination based on sexual orientation under both the Equal Protection Clause and the Due Process Clause. This section begins with an overview of *Romer v. Evans*,[7] which established the applicability of rational basis review for sexual orientation-based classifications.[8] The section then covers *Lawrence v. Texas*—a landmark case in which the Supreme Court determined that homosexual people's right to liberty under the Due Process Clause gives them the right to engage in sexual conduct without interference from the government.[9] Next, the section looks at how district and circuit courts have used the *Romer* standard[10] to limit the rights granted in that decision,[11] and summarizes the pre-*Obergefell* circuit split on same-sex marriage and the resulting Supreme Court decisions expanding the right to marry to all same-sex couples in the 2013 *Windsor* decision[12] and the 2015 *Obergefell* decision.[13] Finally, Part IV explores state constitutions' varying levels of scrutiny of sexual orientation classifications.

II. OVERVIEW

This part first explains the threshold similarly situated requirement. It then details the three standards of review: strict scrutiny, based on either suspect classifications or fundamental rights; intermediate scrutiny; and rational basis review. It ends with a brief discussion of alternative formulations.

4. 518 U.S. 515, 535 (1996).
5. 533 U.S. 53, 60–61 (2001).
6. 137 S. Ct. 1678, 1689 (2017).
7. 517 U.S. 620, 631 (1996).
8. *Id.* at 631–32 (applying rational basis review and holding that a more stringent standard is not required because sexual orientation is not a suspect class).
9. 539 U.S. 558, 578 (2003) (striking down a Texas statute criminalizing sodomy between individuals of the same sex and overruling Bowers v. Hardwick, 478 U.S. 186, 216 (1986), which upheld a Georgia statute criminalizing sodomy); *see also* Raich v. Gonzales, 500 F.3d 850, 862 (9th Cir. 2007) ("The Supreme Court has a long history of recognizing unenumerated fundamental rights as protected by substantive due process.").
10. *See Romer*, 517 U.S. at 631–32 (establishing rational basis review for sexual orientation).
11. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 296 (6th Cir. 1997) (distinguishing *Romer* on the grounds that *Romer* dealt with a denial of equal rights while the Cincinnati amendment, which vacated laws prohibiting discrimination on the basis of sexual orientation, dealt with special rights and preferential treatment).
12. United States v. Windsor, 570 U.S. 744, 744 (2013).
13. Obergefell v. Hodges, 576 U.S. 644 (2015).

A. "SIMILARLY SITUATED" REQUIREMENT

The Equal Protection Clause demands that government actors[14] treat all similarly situated persons alike.[15] Similarly situated parties may possess common characteristics, belong to the same class, or operate in the same industry. An equal protection claim does not exist where the government treats different classes of people in different ways; accordingly, many statutes have been upheld against equal protection challenges because the similarly situated requirement was not met.[16]

B. STANDARDS OF REVIEW

The level of review applied in an equal protection claim will affect the outcome of the case—the more rigorous the level of review, the more likely the state action will be found unconstitutional.[17] Courts have developed three basic levels of review for analyzing constitutional challenges, including equal protection claims: strict scrutiny, intermediate scrutiny, and rational basis review.[18] Additional formulations have been proposed.[19] These alternative formulations center analysis on specific factual circumstances and legislative objectives rather than standard frameworks.[20]

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14. The Fifth and Fourteenth Amendment's Equal Protection Clauses only apply to government actions. *See* United States v. Stanley, 109 U.S. 3, 15–16 (1883) (holding that the Fourteenth Amendment's Equal Protection Clause may only remedy discriminatory state laws or actions otherwise taken under state authority because only governmental entities can affect the deprivation of an individual's right to equal protection under the law); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–17, 224 (1995) (holding that the Fifth Amendment Due Process Clause applies the same principles of the Fourteenth Amendment Equal Protection Clause to actions of federal government).

15. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

16. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 76–78 (1981) (finding that women are not similarly situated to men for means of conscription because women are ineligible for military combat); Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 471 (1981) (finding that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse" for the purposes of upholding statutory rape law); Schwartz v. Brodsky, 265 F. Supp. 2d 130, 133–34 (D. Mass. 2003) (finding that women and men are not similarly situated for purposes of the Military Selective Service Act because women are restricted from certain combat positions); South Carolina v. Wright, 563 S.E.2d 311, 312–15 (S.C. 2002) (finding that women and men are not similarly situated for purposes of the "difference in gender aggravator" in the offense of criminal domestic violence because of the "realistic physiological size and strength differences of men and women."). *But see* Kyle-Labell v. Selective Serv. Sys., 364 F. Supp. 3d 394, 417 (D.N.J. 2019) (finding that women and men are more similarly situated and "the administrative concerns described by the *Rostker* Court are not as tangible as they once were, given that women today are already serving in combat roles.").

17. *See, e.g.*, *City of Cleburne*, 473 U.S. at 439–42.

18. Adam J. Rosen, *Slaughtering Sovereignty: How Congress Can Abrogate State Sovereign Immunity to Enforce the Privileges or Immunities Clause of the Fourteenth Amendment*, 11 TEMP. POL. & CIV. RTS. L. REV. 111, 117 (2001) (explaining that the "tripartite framework" offers "distinctive degrees of legal protection for different groups of people.").

19. *See infra* Part II.B.4.

20. *See id.*

1. Strict Scrutiny

Strict scrutiny is the most rigorous form of judicial review. Government action is subject to strict scrutiny if it is directed at a suspect class or impedes a fundamental right.[21] To survive strict scrutiny, the government must prove that the challenged action furthers a "compelling governmental interest" and is "narrowly tailored" to that interest.[22] This standard is often thought to be "strict in theory, but fatal in fact," because government actions subject to strict scrutiny are likely to be held unconstitutional.[23]

a. Suspect Classifications. The Supreme Court considers classifications based on race, alienage, and national origin to be suspect.[24] The Court has not articulated a clear standard for determining whether a particular group or characteristic constitutes a suspect class. However, the Court has considered a number of

21. *See* St. John's United Church of Christ v. City of Chi., 502 F.3d 616, 637 (7th Cir. 2007) (explaining that strict scrutiny will apply if the act "targets a suspect class or addresses a fundamental right").

22. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–17, 227 (1995) (holding that racial classifications are analyzed under strict scrutiny and thus "are constitutional only if they are narrowly tailored measures that further compelling governmental interests"); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (holding that in order to satisfy strict scrutiny, the school district must demonstrate that its assignment plans are "narrowly tailored" to achieve a "compelling" government interest); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 429 (2006) (holding that under strict scrutiny, "the Government failed on the first prong of the compelling interest test, and did not reach the least restrictive means prong"); Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977) (holding that regulations burdening a decision "as fundamental as that whether to bear or beget a child" are "justified only by compelling state interests, and must be narrowly drawn to express only those interests").

23. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1267–68 (2007) (arguing that strict scrutiny "is best understood as mandating a proportionality inquiry" that weighs benefits and costs and seeks "regulatory alternatives"). *But see Adarand*, 515 U.S. at 237 (stating the Court wished to dispel the notion that strict scrutiny was fatal in fact).

24. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2221 (2016) (Alito, J., dissenting) (quoting Fisher v. Univ. of Tex., 570 U.S. 297, 310 (2013)) (explaining that racial classifications are subject to "the most rigid scrutiny" because they "so seldom provide a relevant basis for disparate treatment"); *see, e.g.*, *Parents Involved in Cmty. Schs.*, 551 U.S. at 720 ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 486 (1989) (invalidating a minority set-aside program for minority contractors under strict scrutiny because the city failed to show a narrowly tailored fit between the program and a compelling government interest); Graham v. Richardson, 403 U.S. 365, 382 (1971) (invalidating state welfare and assistance programs that took residency duration and citizenship status into account when determining eligibility); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying "most rigid scrutiny" to a state miscegenation statute that criminalized marriage of a white person to a nonwhite person); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419–20 (1948) (invalidating state fishing license eligibility criterion that barred "alien" individuals from receiving licenses); Korematsu v. United States, 323 U.S. 214, 216 (1944) (subjecting the curtailment of the civil rights of a single racial group to the most rigid scrutiny). *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided [and] has been overruled in the court of history").

factors in determining the suspect status of a group.[25] First, a class may be suspect if it has historically been subject to discrimination.[26] Discriminatory action against such a group may nonetheless be constitutional if a court determines that the historical discrimination does not impose "unique disabilities on the basis of stereotyped characteristics not truly indicative of [the group's] abilities."[27]

Second, a classification may be suspect if it is defined by an "immutable characteristic"[28] "determined solely by the accident of birth,"[29] particularly when the characteristic has no bearing on an individual's contribution to society.[30] If these descriptions apply, the governmental classification will be subject to strict scrutiny because these characteristics rarely provide a legitimate basis for disadvantageous legislation or other state action.[31]

Third, because a primary goal of equal protection is to restrain the inequitable treatment of minorities by the political majority,[32] the courts consider whether

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25. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (holding that classifications based on sex must be subject to strict judicial scrutiny in consideration of the history of discrimination against women, the immutability of sex, and the absence of a relation between the sex characteristic and the ability to perform or contribute to society).

26. *E.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987) ("Close relatives are not a 'suspect' or 'quasi-suspect' class . . . [because] [a]s a historical matter, they have not been subjected to discrimination . . . ."); Lyng v. Castillo, 477 U.S. 635, 638 (1986) (considering historical discrimination against a group as a relevant factor in determining whether a group is a suspect class); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (explaining that "traditional indicia" of class discrimination include subjection to "a history of purposeful unequal treatment"). *But cf. In re* Birmingham Reverse Discrimination Emp. Litig., 20 F.3d 1525, 1544 (11th Cir. 1994) (internal citations omitted) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. This strict scrutiny is employed even though the racial classification challenged operates against a group not historically subject to discrimination by government.").

27. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 317 (1976) (per curiam) (upholding a state law requiring police officers to retire at age fifty).

28. *E.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301 (1986) (Marshall, J., dissenting) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978)) ("[B]ecause whites have none of the immutable characteristics of a suspect class, the so-called 'strict scrutiny' applied to cases involving . . . suspect classifications was not applicable.").

29. Craig v. Boren, 429 U.S. 190, 212 n.2 (1976) (Powell, J., concurring) (quoting *Frontiero*, 411 U.S. at 686) ("Since sex, 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 concept of our system that legal burdens should bear some relationship to individual responsibility . . . .'").

30. *See, e.g.*, *Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

31. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2238 (2016) (first quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989); and then quoting Fisher v. Univ. of Tex., 570 U.S. 297, 309 (2013)) ("[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, . . . [r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.").

32. *E.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[E]quality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

the group is "discrete and insular," such that the group has likely been disadvantaged in the political process.[33] "Discrete" refers to the ease of identification[34] or visibility[35] of the group's common characteristic. "Insular" describes the "frequency" and "intensity" of social interaction among the group members.[36]

b. Fundamental Rights. A state action that impinges on a fundamental right is subject to strict scrutiny even if the action does not affect a suspect or quasi-suspect class.[37] Fundamental rights must be found either explicitly in the text of the Constitution or implicitly in "the concept of ordered liberty" or the history and traditions of the American people in order to receive protection.[38] Fundamental rights found under the Equal Protection Clause have so far been primarily limited to voting[39] and access to the judicial process,[40] but equal protection may also be used to protect fundamental rights found under other legal doctrines.[41] Fundamental rights found deserving of protection under the Fourteenth Amendment's Due Process Clause include general reproductive freedom,[42] the

33. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). *But see generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (arguing that *Carolene Products*' "discrete and insular" minority test is outdated because it does not adequately capture the dynamics of pluralist politics in the modern era, which systematically disadvantage "anonymous and diffuse" groups).

34. *See* Ackerman, *supra* note 33, at 729 (defining "discrete" as groups whose "members are marked out in ways that make it relatively easy for others to identify them").

35. *See Frontiero*, 411 U.S. at 684–86 (finding that women are targets of discrimination "in part because of the high visibility of the sex characteristic"); *see also* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 317 (1976) (per curiam)) (factoring into a suspect classification inquiry whether a group has "obvious . . . or distinguishing characteristics"); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask Don't Tell,"* 108 YALE L.J. 485, 497–98 (1999) (arguing that courts refer to "visibility" not by defining it as "strict" or "personhood" visibility, but rather, as "effective social visibility," which is used to presume political powerlessness).

36. *See* Ackerman, *supra* note 33, at 726 ("insularity" referred to as "tendency of group members to interact with great frequency in a variety of social contexts").

37. *E.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.").

38. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986).

39. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

40. *See* Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) (holding on equal protection grounds that indigent defendants are entitled to adequate and effective appellate review); Douglas v. California, 372 U.S. 353, 356 (1963) (holding that indigent defendants are entitled to counsel for the first appeal from a criminal conviction when the appeal is granted as a matter of right).

41. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (holding that a statute that restricted the fundamental right of free speech violated the Equal Protection Clause).

42. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972) (recognizing the right of an individual to decide whether to bear or beget a child); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching [sic] and devastating effects.").

freedom to marry,[43] the right to file for divorce,[44] the right to obtain contraception,[45] the freedom to raise and educate children,[46] and the right to maintain privacy in familial relationships.[47] However, the proposition that consensual homosexual sodomy[48] constitutes a fundamental right has been rejected by many courts.[49]

2. Intermediate Scrutiny

Intermediate scrutiny, sometimes referred to as quasi-suspect or heightened scrutiny, is used to evaluate classifications affecting members of quasi-suspect

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43. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex [sic] may not be deprived of [the] right and [the] liberty [to marry]."); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting *Skinner*, 316 U.S. at 541) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.").

44. *See* Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (holding that the right to file for divorce "is the exclusive precondition to the adjustment of a fundamental human relationship" in invalidating a filing fee requirement that precluded indigents from filing for divorce on due process, not equal protection, grounds).

45. *Eisenstadt*, 405 U.S. at 453 (citations omitted) ("[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (characterizing a law restricting married couples' access to contraception as "having a maximum destructive impact" on "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); *see also* Carey v. Population Serv. Int'l, 431 U.S. 678, 685-86 (1977) (holding that the right to privacy extended "to an individual's liberty to make choices regarding contraception," although every state regulation regarding contraception is not necessarily invalid).

46. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *see also* Troxel v. Granville, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children . . . ."). *But see* Flowers v. City of Minneapolis, 478 F.3d 869, 874 (8th Cir. 2007) (citing *Pierce*, 268 U.S. at 534–35) (distinguishing the right of the plaintiff from the fundamental right "to direct the upbringing and education of one's children").

47. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citations omitted) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."); *see* Washington v. Glucksberg, 521 U.S. 702, 771 (1997) (Souter, J., concurring) (recognizing a broader "liberty to be free from all unreasonable intrusions into the privacy of the home and the family life within it" as exemplified in constitutional provisions and prior Court decisions). *But see Flowers*, 478 F.3d at 874 (distinguishing the right of the plaintiff from the individual right of "marital privacy").

48. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (applying rational basis review to a Texas law criminalizing homosexual activity rather than using a more stringent standard of review and asserting that homosexual activity is a fundamental right); *see also* Cook v. Rumsfeld, 429 F. Supp. 2d 385, 394–95 (D. Mass. 2006) (explaining that the majority in *Lawrence* reviewed the Texas statute under an appropriate standard).

49. *But see Lawrence*, 539 U.S. at 565–67 (explaining that even though the Court did not declare homosexual activity a fundamental right, the Court distinguished homosexual sodomy from other "fundamental decisions" in invalidating a Texas sodomy statute that applied to homosexual behavior); see also *infra* Part IV.A.2.

classes.[50] Classifications based on gender[51] and legitimacy,[52] as well as questions of public education for children of undocumented aliens,[53] have been reviewed under intermediate scrutiny. Courts apply intermediate scrutiny to assess whether legislation categorizes people based on irrelevant stereotypes instead of individual capability or culpability.[54] To withstand intermediate scrutiny, a quasi-suspect classification must "serve important governmental objectives" and "be substantially related to achievement of those objectives."[55]

3. Rational Basis Review

Rational basis review is the most deferential standard applied by courts in an equal protection analysis.[56] It applies to all legislative classifications not affecting

50. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding that "heightened scrutiny" applies to suspect and quasi-suspect classes; namely, those which have been historically subject to discrimination, "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and are "a minority or politically powerless"); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a state law permitting women to purchase 3.2% alcohol beer at age eighteen but prohibiting men from doing so until the age of twenty-one).

51. *Craig*, 429 U.S. at 204 (invalidating a state law permitting women to purchase 3.2% alcohol beer at age eighteen but prohibiting men from doing so until age twenty-one because it was not substantially related to an important government purpose); *see* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (citations omitted) ("[A] statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification.'"); *see also* United States v. Virginia, 518 U.S. 515, 524 (1996) (holding that when the state makes a gender-based classification, it must serve an important governmental objective that is substantially related to the achievement of that objective).

52. *See, e.g.*, Lanier v. Rains, 229 S.W.3d 656, 666 (Tenn. 2007) (applying the Fourteenth Amendment Equal Protection Clause to hold that classifications "based on illegitimacy are subjected to intermediate scrutiny").

53. *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (holding that while status as an undocumented individual is not a "constitutional irrelevancy," children of undocumented individuals must be afforded public education as they cannot be denied "the ability to live within the structure of our civic institutions").

54. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505 (1976) (citation omitted) (applying slightly heightened scrutiny to discrimination on the basis of illegitimacy, in part because illegitimacy "bears no relation to [an] individual's ability to participate in and contribute to society" and "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); s*ee also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (citations omitted) (applying heightened scrutiny to gender classifications because "[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women"); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (applying heightened scrutiny to disabilities imposed on an illegitimate child because the legal burden bears no relationship to individual responsibility or wrongdoing).

55. *Craig*, 429 U.S. at 197; *see also* Equity in Athletic, Inc. v. Dep't of Educ., 504 F. Supp. 2d 88, 107 (W.D. Va. 2007) (holding that gender-based classifications are subject to intermediate scrutiny).

56. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 422 (1998) ("Thus, petitioner's own constitutional challenge is subject only to rational basis scrutiny. Even though [the challenged legislation] could not withstand heightened scrutiny, it is sustainable under the lower standard."); *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988) (explaining that "[t]he heightened scrutiny" standard of review is less demanding than strict scrutiny "but more demanding than the standard rational relation test . . . .").

either a suspect or quasi-suspect class or impinging on a fundamental right.[57]

To pass rational basis review, a statute must be rationally related to a legitimate governmental purpose.[58] Courts may speculate as to what legitimate governmental interest could have motivated the state action when a legitimate government interest is not readily apparent.[59] However, an unclear connection between a classification and the proffered governmental objective may render the distinction "arbitrary or irrational" and therefore unconstitutional.[60] A governmental objective that is steeped in animus toward a group is not legitimate.[61]

The vast majority of regulations reviewed under the rational basis standard are upheld.[62] The Supreme Court has articulated the rational basis standard in various

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57. *E.g.*, Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (citing *City of Cleburne*, 473 U.S. at 439–41); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[U]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."); *see also* Castaways Backwater Café, Inc. v. Fla. Dep't of Bus., No. 06-15065, 2007 WL 152544, at *1 (11th Cir. Jan. 23, 2007) (holding that when there is "no fundamental constitutional right and no suspect classification," the Equal Protection Clause "requires only that the challenged classification be rationally related to a legitimate government interest"); Soden v. Murphy, No. 4:05-CV-1399 CAS, 2007 WL 1445383, at *4 (E.D. Mo. May 10, 2007) (quoting *Nordlinger*, 505 U.S. at 10) (holding that where a petitioner failed to establish that he belonged to a protected class, he was therefore subject to rational basis review, under which a law is only valid if it "rationally furthers a legitimate state interest").

58. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *City of Cleburne*, 473 U.S. at 446 ("Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally [disabled] and others must be rationally related to a legitimate governmental purpose."); *see also* Jackson v. Russo, 495 F. Supp. 2d 225, 231 (D. Mass. 2007) (explaining that although under the rational relationship test there is considerable deference to the legislature, the regulation must still rationally further some legitimate state purpose).

59. *See* Heller, 509 U.S. at 320 (upholding a statutory scheme which required a higher standard of proof for commitment of mentally ill, as opposed to mentally disabled persons, because it was supported by rational speculation about presumed motivations of legislature).

60. *City of Cleburne*, 473 U.S. at 446.

61. *Romer*, 517 U.S. at 634–35 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); *City of Cleburne*, 473 U.S. at 455 (Stevens, J., concurring) (finding that the government's action was impermissibly based on the "irrational fears of neighboring property owners").

62. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (upholding the state statute under rational basis review, with deference accorded to legislative judgment); *City of Cleburne*, 473 U.S. at 441–42 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."); *see also* Williams v. Morgan, 478 F.3d 1316, 1320 (11th Cir. 2007) (applying rational basis review and upholding a statute which prohibited the sale of some but not all sexual devices); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 466 n.132 (2000) ("[I]n the vast majority of cases, courts applying rational basis review to state action challenged as discriminating on the basis of sexual orientation have upheld the regulatory practice . . . ."); *cf. Romer*, 517 U.S. at 631–32 (applying rational basis review, the court

ways, and each articulation has been accompanied by its own degree of deference.[63] Although rational basis review is highly deferential to legislative policy choices,[64] the standard has been applied with more vigor in certain circumstances; as a result, what was once a seemingly clear standard has become blurred.[65]

4. Alternative Formulations

Some scholars and judges have offered other interpretations of the three-tiered system of scrutiny.[66] One alternative interpretation is a fluid, fact-intensive standard, which considers the actual legislative objectives buttressing the classification, as well as the means by which the objective is accomplished.[67]

Another interpretation claims the existence of a fourth tier of review located between rational basis review and heightened scrutiny. This fourth tier is the "with bite" rational basis standard or "active" rationality review.[68] Under this

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struck down Amendment 2 to the Colorado state constitution, which prohibited state and local governments from enacting legal protections for homosexuals).

63. *Compare* F.C.C. v. Beach Commc'ns., Inc., 508 U.S. 307, 315 (1993) (citations omitted) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . [A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."), *with* Ry. Exp. Agency v. New York, 336 U.S. 106, 109–10 (1949) (explaining that it "would take a degree of omniscience which we lack" to review a legislative finding that advertisements on trucks for products sold by the owners of the trucks infringe less upon public safety than advertisements on trucks for products not sold by the owners of the trucks), *and* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (internal citations omitted) ("[C]lassification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."), *and* Jiminez v. Weinberger, 417 U.S. 628, 636 (1974) (striking down a Social Security Act provision denying insurance to illegitimate children of disabled claimants by finding that the exclusion of illegitimate children is not reasonably related to the legitimate governmental purpose of prevention of false claims).

64. This is especially true in a military context. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 66 (1981) ("The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court."). *But see* United States v. Virginia, 518 U.S. 515, 557 (1996) (striking down a state military institution's male-only admissions policy under heightened scrutiny).

65. *See generally* Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick, 32 HARV. C.R.-C.L. L. REV. 225, 239–40 (1997) (arguing that the *Romer* court failed to clarify the approach to the rational basis test, which has been used inconsistently in the last decade, alternating from very deferential to "active" scrutiny).

66. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 646–47 (13th ed. 1997); *see also City of Cleburne*, 473 U.S. at 451 (Stevens, J., concurring) ("In fact, our cases have not delineated three—or even one or two—such well-defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process.").

67. Dandridge v. Williams, 397 U.S. 471, 519–21 (1970) (Marshall, J., dissenting).

68. For cases and discussions supporting the existence of "active" rationality review, *see City of Cleburne*, 473 U.S. at 452 (Stevens, J., concurring) ("The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."); Kim S. Buchanan, Lawrence v. Geduldig: *Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1278 (2007)

fourth tier, a court does not hypothesize governmental interests, but instead evaluates the reasonableness of a classification in consideration of the actual legislative purposes behind the discriminatory measure and the means by which the purposes were accomplished.[69]

III. SEX-BASED CLASSIFICATIONS

Section A of this Part addresses the Equal Protection Clause of the United States Constitution. Section B of this Part discusses state constitutions.

A. FEDERAL CONSTITUTIONAL ANALYSIS

In assessing how sex-based classifications are viewed under federal constitutional scrutiny, this Section begins with a discussion of the intermediate scrutiny test. This Section will discuss the intermediate scrutiny test's requirement that sex-based classifications must constitute "purposeful discrimination" to fall under the intermediate scrutiny test. If purposeful discrimination is found, then the government must show that it serves an important government interest and is substantially tailored to that interest.

Next, this Section will explore where the federal courts draw the line between permissible sex-based classifications based on real differences between the sexes as opposed to sex-based classifications based on gender stereotypes. This Section will then look at the growing body of federal case law pertaining to sex-based classifications based on gender identity, particularly as it pertains to the transgender community. Next, this Section will look at when it is permissible to use sex-based classifications to remedy past sex-based discrimination.

This Section will then explore the federal courts' consideration of a higher standard of review for sex-based classifications through cases like *United States v. Virginia*[70] and *Nguyen v. INS*.[71]

(noting that in cases where there is discrimination on the basis of sexual orientation, certain courts have added "teeth" to the "ordinary rational-basis review"); 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, 20 (1972) ("The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases."); *see also* Joslin, *supra* note 65, at 239 (arguing that the use of the rational basis test in the last decade has alternated between a deferential approach and "active" scrutiny). *But see* Cook v. Rumsfeld, 429 F. Supp. 2d 385, 403–05 (D. Mass. 2006) (examining the possibility of an "active" rational basis test for a limited number of equal protection cases).

69. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632–33 (1996) (striking down Colorado's Amendment 2 under rational basis review because the Court found that it was not efficiently drawn to meet proffered goals); *City of Cleburne*, 473 U.S. at 450 (invalidating a special permit requirement to designate a house for mentally disabled persons, the Court found that the proffered objectives were unconvincing and that the requirement appeared "to rest on an irrational prejudice against the mentally retarded"); Plyler v. Doe, 457 U.S. 202, 227–30 (1982) (rejecting as unconvincing each of the objectives offered by Texas for refusing education to alien children); *cf.* Schlesinger v. Ballard, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting) ("Never, to my knowledge, have we endeavored to sustain a statute upon a supposition about the legislature's purpose in enacting it when the asserted justification can be shown conclusively not to have underlain the classification in any way.").

70. 518 U.S. 515 (1996).

71. 533 U.S. 53 (2001).

This Section will wrap up the discussion of federal constitutional analysis as it pertains to sex-based classifications by looking at equal protection and reproductive rights, equal protection and domestic violence, and issues surrounding equal pay.

Sex-based classifications are subject to heightened review under the Equal Protection Clause.[72] The Supreme Court has found that government action is incompatible with the principle of equal protection "when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[73] The Court has acknowledged that sex "frequently bears no relation to ability to perform or contribute to society,"[74] and that such classifications can have the effect of subjecting women to an inferior legal status.[75] However, the level of scrutiny applied to sex-based classifications does not make sex a "proscribed classification"[76] because, unlike race and national origin,[77] the Court has determined that "inherent differences"[78] exist between the sexes that serve as legitimate bases for some sex-based classifications.[79]

The current standard applies an intermediate level of scrutiny to governmental sex-based discrimination with "a strong presumption that gender classifications are invalid,"[80] absent an "exceedingly persuasive"[81] showing that the classification is "substantially related" to an "important governmental objective[]."[82] The intermediate scrutiny standard has produced divergent outcomes,[83] underscoring

72. Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) (quoting Wienberger v. Weisenfeld, 420 U.S. 636, 648 (1975)) (clarifying that sex-based discrimination would be examined under intermediate security regardless of "benign" or "compensatory" legislative justifications).

73. *Virginia*, 518 U.S. at 515.

74. Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (plurality opinion).

75. *Id.* at 687.

76. *Virginia*, 518 U.S. at 533.

77. *Id.*; *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (allowing a law school's race-conscious admission program to consider racial status as a "plus" in an applicant's file but requiring applicants of different races be placed on the "same footing for consideration"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995) (holding that equal protection concerns provide "any person, of whatever race" the ability "to demand that any governmental actor subject to the Constitution justify any racial classification").

78. *Virginia*, 518 U.S. at 533.

79. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981) (quoting Michael M. v. Superior Court, 450 U.S. 464, 469 (1981)) (holding that, for purposes of registering for the draft, "the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated").

80. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (citations omitted).

81. *Virginia*, 518 U.S. at 524 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

82. Nguyen v. INS, 533 U.S. 53, 60 (2001) (citations omitted).

83. *Compare* Caban v. Mohammed, 441 U.S. 380, 388–89 (1979) (invalidating a state statute requiring the consent of the mother, but not the father, before a child born out of wedlock could be

the fact that although there appears to be a general consensus that the differences between the sexes justify a lesser standard of review than strict scrutiny, no consensus exists regarding "real" differences and those that are socially constructed.[84] Substantial ambiguity remains regarding equal protection jurisprudence concerning sex-based classifications.[85]

1. Intermediate Scrutiny Test

Prior to 1971, the Supreme Court consistently upheld sex-based classifications through application of the extremely deferential "rational basis" standard of review.[86] However, in 1971, the Court laid the groundwork for a heightened standard of review in *Reed v. Reed*, employing the Equal Protection Clause to invalidate a gender classification for the first time.[87] The Court noted that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[88] The decision

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adopted because the classification was based upon the incorrect presumption that maternal and paternal roles are fundamentally different), *with Nguyen*, 533 U.S. at 73 (upholding an immigration law which imposed different requirements for a child's acquisition of citizenship depending on whether the citizen parent was the mother or father, as it determined that the classification was grounded in a real difference between men and women).

84. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 469 (1980) (citations omitted) ("[The] Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. . . . As the Court has stated, a legislature may 'provide for the special problems of women.'"); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) ("There are both real and fictional differences between women and men. . . . It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."); *see also* Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 13 (1995) (emphasis added) ("The Supreme Court's brand of sexual realism, which builds equality up from a ground of difference and regards 'sex . . . [as] an immutable characteristic,' although not quite suspect, is curious both for its ubiquity and for its opacity in equality jurisprudence. *While suggesting that sex is highly visible, the Court never makes clear what it means when it speaks of the characteristic that is sex*.").

85. *Compare Virginia*, 518 U.S. at 534 (invalidating Virginia's policy of excluding women from the Virginia Military Institute under an intermediate scrutiny standard, finding that the state did not present an "exceedingly persuasive justification" for its use of a sex-based classification), *with Nguyen*, 533 U.S. at 60–61 (applying the traditional intermediate scrutiny test which requires that a sex-based classification be "substantially related" to an "important governmental objective" to pass constitutional muster and finding that the different requirements for unmarried mothers and unmarried fathers asserting citizenship for their children was justified by an "important" governmental objective).

86. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding the permissive exclusion of women from jury service because women are the "center of [the] home"), *overruled by* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding a ten-hour work day for women under the theory that women require protection, noting "that her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man"); *see also* Goesaert v. Cleary, 335 U.S. 464, 466–67 (1948) (upholding a Michigan law which prohibited a woman from obtaining a license to tend bar unless she was the wife or daughter of the male owner), *abrogated by* Craig v. Boren, 429 U.S. 190 (1976).

87. Reed v. Reed, 404 U.S. 71, 75–76 (1971).

88. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

gave "some special sensitivity to sex as a classifying factor," while purporting to avoid application of a new equal protection standard.[89]

The Court's tacit rejection of minimal scrutiny in *Reed* was made clear two years later in *Frontiero v. Richardson*, which held that the differential treatment accorded servicewomen's dependency benefits was a violation of the Due Process Clause of the Fifth Amendment.[90] Justice Brennan, writing for a plurality, drew a comparison between the nineteenth-century position of women and the position of Black people under the pre-Civil War codes and concluded strict scrutiny should apply to sex-based classifications because such classifications are, like those predicated on race, inherently suspect.[91] The majority of Justices were not ready to apply strict scrutiny to sex based classifications, finding the *Reed* standard more appropriate, and therefore Brennan's holding that sex based classifications are subject to strict scrutiny is not binding.

In the five years following *Reed*, the Court considered several sex-based classifications without agreeing on a particular standard of review.[92] In 1976, the Court compromised and formally adopted an intermediate scrutiny test for sex-based classifications in *Craig v. Boren*.[93] Justice Brennan, writing for the majority, held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" to pass constitutional muster.[94] Since *Craig*, the Court has continued to, at least nominally, apply the intermediate scrutiny standard,[95] regardless of whether a

89. Gunther, *supra* note 68, at 33–34.

90. Frontiero v. Richardson, 411 U.S. 677, 688–90 (1973) (plurality opinion) (striking down a federal statute governing the living quarters allowance and medical benefits for members of the uniformed services, which required that spouses of female members, but not male members, prove their spouses' dependency in order to receive benefits).

91. *Id.* at 682, 685.

92. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 508–09 (1975) (using rational basis review, the Court held a legislative classification legitimate where women naval officers were given more time than men to gain mandatory promotion); Kahn v. Shevin, 416 U.S. 351, 355 (1974) (using the "fair and substantial relation" standard of *Reed*, the Court upheld a statute granting widows a property tax exemption but denied the analogous benefit to widowers); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (applying rational basis review to determine "whether the means used to achieve these ends are constitutionally defensible," the Court found an unwed father was entitled to a hearing before children were adopted by another person).

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

94. *Id.* at 197, 204 (striking down a state statute which prohibited men from purchasing 3.2% alcohol beer until twenty-one years of age but allowed women to purchase such products at eighteen, holding that the statute was not substantially related to its stated objective of reducing drunk driving).

95. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 60 (2001) (applying intermediate scrutiny to uphold immigration law imposing different requirements for lawful permanent residents born abroad and out of wedlock to obtain citizenship based on the sex of the citizen-parent); United States v. Virginia, 518 U.S. 515, 571–72 (1996) (applying intermediate scrutiny to strike down Virginia's policy of excluding women from the Virginia Military Institute); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) (applying intermediate scrutiny to strike down gender classifications in use of peremptory strikes); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724, 731, 742 (1982) (citations omitted) (applying intermediate scrutiny to strike down a policy excluding males from the Mississippi University for Women's School of Nursing); Califano v. Westcott, 443 U.S. 76, 89 (1979) (applying intermediate scrutiny in striking down a statute which based the availability of noncontributory welfare on sex);

specific classification disadvantaged women[96] or was designed to benefit them.[97] However, some commentators have argued that, given the trends in specific topical areas of the Court's jurisprudence, the rigor with which the Court applies intermediate scrutiny in different contexts practically amounts to different standards of review.[98]

The specific contours of the intermediate scrutiny test in the sex-based context remain unclear. In *United States v. Virginia*, the Court appeared to apply a more stringent level of scrutiny to sex-based classifications, requiring that classifications predicated on sex must present an "exceedingly persuasive justification."[99] However, more recently, in *Nguyen v. INS*, the Court seems to have walked that requirement back. *Nguyen* applied the traditional intermediate scrutiny test and explained that the "exceedingly persuasive" language was another descriptor for the same test.[100]

a. Discriminatory Purpose Doctrine. The Court has held that for a sex-based classification to be found unconstitutional under intermediate scrutiny, it must constitute "purposeful discrimination."[101] While facially discriminatory governmental

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Caban v. Mohammed, 441 U.S. 380, 388–89 (1979) (applying intermediate scrutiny in striking down a state statute which required the consent of a mother, but not a father, before a child born out-of-wedlock could be placed for adoption); Orr v. Orr, 440 U.S. 268, 271, 279 (1979) (applying intermediate scrutiny in striking down a state law allowing women, but not men, to receive alimony as part of a divorce); Califano v. Webster, 430 U.S. 313, 316–17 (1977) (per curiam) (applying intermediate scrutiny in upholding a Social Security provision that calculated benefits for women in a more financially advantageous manner than it did for men); *see also* Carpenter v. City of Snohomish, No. C06-0755-JCC, 2007 WL 1742161, at *6 (W.D. Wash. June 13, 2007) (citing *Hogan*, 458 U.S. at 723–24) (holding that where plaintiffs "can demonstrate that the law discriminates based on certain . . . quasi-suspect classifications, such as gender, intermediate scrutiny applies.").

96. *See, e.g.*, *Virginia*, 518 U.S. at 534 (applying intermediate scrutiny in striking down Virginia's policy of excluding women from the Virginia Military Institute); Kirchberg v. Feenstra, 450 U.S. 455, 459–61 (1981) (applying intermediate scrutiny in striking down a Louisiana law giving husbands the unilateral right to dispose of jointly owned property).

97. *See, e.g.*, *Hogan*, 458 U.S. at 731 (applying intermediate scrutiny in striking down an all-female admissions policy); *Craig*, 429 U.S. at 199–200 (applying intermediate scrutiny in striking down a state statute which established different drinking ages for men and women). *But see* Johnson v. Transp. Agency, 480 U.S. 616, 641–642 (1987) (upholding a preferential hiring policy which took sex into account as one factor in choosing between qualified applicants to the preference of the female candidate).

98. *See, e.g.*, Norman T. Deutsch, Nguyen v. INS *and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 213–19 (2003) (arguing that the Court's application of intermediate scrutiny in sex-based classifications practically amounts to a rational basis review presented as intermediate scrutiny); *see also* Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases*, 178 A.L.R. Fed. 25 Art. 1 (2002) ("[Intermediate scrutiny] is such that it allows [J]ustices to base their votes on individual perceptions of the reasonableness of a gender classification and the governmental interest asserted in each case.").

99. 518 U.S. at 532–33.

100. 533 U.S. 53, 60, 70 (2001).

101. *See* Lawson v. Curry, 244 F. App'x 986, 989 (11th Cir. 2007) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272–74 (1979)) ("A plaintiff claiming an equal protection violation based on sex discrimination must show that the discrimination was purposeful."); King v. Cape May Cnty. Bd. of

actions are obviously unconstitutional,[102] it is much more difficult to determine the constitutionality of a facially neutral governmental act. When dealing with facially neutral governmental actions, the Court has held that a showing of "disparate impact" disadvantaging minorities or women is insufficient, by itself, to prove purposeful discrimination.[103] The Court's purposeful discrimination requirement makes challenges to facially neutral laws or policies exceedingly difficult, as intent is an inherently challenging burden for plaintiffs to meet.[104]

b. Important Governmental Objective. Once a court establishes that purposeful, sex-based discrimination does exist, the classification will be considered invalid unless it is in furtherance of an "important governmental objective."[105] Unlike under a rational basis standard of review, courts need not accept the

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Freeholders, No. 04-4243, 2007 WL 2300785, at *3 (D.N.J. Aug. 8, 2007) (citing Andrews v. City of Phila., 895 F.2d 1469, 1478 (3d Cir. 1990)) (holding that for the plaintiff to establish a gender discrimination case, there must be proof of purposeful discrimination).

102. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 722–23 (1982) (holding state-supported university's policy of denying qualified males admission to its nursing program was a violation of the Equal Protection Clause).

103. *See Feeney*, 442 U.S. at 273, 279–80 (upholding a state statute that gave veterans preferential treatment in hiring decisions for state civil service positions because it did not represent purposeful discrimination, even though the effect of the statute was disproportionately felt by women); *see also* Collier v. Barnhart, 473 F.3d 444, 447–49 (2d Cir. 2007) (quoting *Feeney*, 442 U.S. at 274) (noting that "Supreme Court precedents dictate that disparate impact is only a 'starting point'" and using rational basis review because there was no evidence Congress was motivated by a discriminatory purpose, despite an indication that the 20/40 Rule might disproportionately disqualify women from Social Security Disability Insurance); Post & Siegel, *supra* note 62, at 468–69. However, disparate impact is probative of a discriminatory purpose and may, in conjunction with other factors the Court has enumerated, provide sufficient evidence to support a finding of purposeful discrimination. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977) (holding that disparate impact alone is insufficient to prove discriminatory purpose but may be evidence of such, along with background of discrimination, specific sequence of events just prior to the challenged decision, evidence of departures from prior procedures or substantive criteria for decision making, and legislative or administrative history, and that a challenger need only prove discrimination was a motivating factor and not the sole factor for the governmental action); *see also* Anderson v. Jackson, No. 06-3298, 2007 WL 458232, at *9 (E.D. La. Feb. 6, 2007) (quoting Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)) (noting that a claim for disparate impact under the Federal Housing Administration can be sustained if the decision "perpetuates segregation and thereby prevents interracial association").

104. *See* Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 672 (W.D. Pa. 2015) (citations omitted) (dismissing an equal protection claim when transgender individual could not prove that denial of access to male-only facilities was motivated by gender); Hiester v. Fischer, 113 F. Supp. 2d 742, 747 (E.D. Pa. 2000) (dismissing an equal protection claim when the plaintiff, a police academy trainee, could not prove that the poor treatment to which she was subjected was motivated by gender); *see also* Reva Siegel, *Symposium, The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action,* 49 STAN. L. REV. 1111, 1135–36 (1997) (citing *Feeney*, 442 U.S. 256 (1979)).

105. Craig v. Boren, 429 U.S. 190, 197–98 (1976) (first quoting Reed v. Reed, 404 U.S. 71, 76–77 (1971); and then quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)) ("[R]educing the workload on probate courts, . . . avoiding intra-family controversy, . . . [and] administrative ease and convenience . . . were deemed insufficiently important objectives to justify gender-based classifications.").

governmental objectives offered, and may instead find that offered objectives are illegitimate post-hoc rationalizations.[106] Courts are therefore free to evaluate the actual purposes they identify for a given classification.[107] This ability to police the motives regarding governmental classifications places a greater burden on the government to justify sex-based classifications[108] and has led, in some instances, to significant disagreement among the Justices regarding whether a proffered objective is genuine.[109]

The requirement that a sex-based classification be in furtherance of an "important governmental objective" is considerably less rigorous than that required under strict scrutiny, where a "compelling state interest" must be shown.[110] Under the intermediate scrutiny test, it is also more difficult to define and predict whether the classification serves an important governmental objective. This is evidenced by the broad array of objectives that have been approved by the lower federal courts as satisfying this standard. Examples of accepted objectives include avoiding the commitment of federal resources to support discriminatory practices,[111] ensuring public safety and deterring crime,[112] maintaining equity in estate taxation,[113]

106. *See* United States v. Virginia, 518 U.S. 515, 535–36 (1996) ("[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) (citations omitted) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.")

107. *See id.*

108. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (citations omitted) ("[W]e conclude that, although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.").

109. *See, e.g.*, *Virginia*, 518 U.S. at 579–96 (Scalia, J., dissenting) (finding error in the majority's contention that the state's objective of facilitating diversity in educational approaches was a post-hoc rationalization); *see also* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1447–48 (2000).

110. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225–27 (1995); *see also* Goldfarb v. Town of W. Hartford, 474 F. Supp. 2d 356, 366 (D. Conn. 2007) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)) ("Between [the] extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny").

111. *See, e.g.*, Cohen v. Brown Univ., 101 F.3d 155, 184 (1st Cir. 1996) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)) ("[A]voiding the use of federal resources to support discriminatory practices . . . providing individual citizens effective protection against those practices . . . [and] judicial enforcement of federal anti-discrimination statutes [are] important governmental objective[s].").

112. *See, e.g.*, Buzzetti v. City of New York, 140 F.3d 134, 142 (2d Cir. 1998) (upholding a city ordinance's distinction between exposure of the male and female breast because crime prevention, maintenance of the quality of urban life, and property values were held to constitute important governmental objectives).

113. *See, e.g.*, Mfrs. Hanover Tr. Co. v. United States, 775 F.2d 459, 461 (2d Cir. 1985) (upholding IRS's use of sex-based mortality tables to value reversionary interests of decedents' estates because the promotion of equity and fairness in estate taxes were held to constitute an important governmental objective).

protecting moral sensibilities,[114] and supporting the security needs of jails.[115] Courts have not accepted every objective posited by states. The Supreme Court has held that some objectives, such as administrative convenience[116] or any objective predicated on stereotypical conceptions of gender roles,[117] fail to qualify as important governmental objectives. The Court has declined to provide bright line rules in this area due to the fact-specific nature of the inquiry, which is illustrated in the Court's frequent divisions regarding whether specific objectives reflect "real" differences between men and women or socially constructed stereotypes.[118]

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114. *See, e.g.*, United States v. Biocic, 928 F.2d 112, 115–16 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.").

115. *See, e.g.*, Laing v. Guisto, 92 F. App'x 422, 424 (9th Cir. 2004) (quoting Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985)) ("[R]outine pat-down searches, which include the groin area, and which are otherwise justified by security needs, do not violate the fourteenth amendment because a correctional officer of the opposite gender conducts such a search.").

116. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152 (1980) (invalidating a state statute which required widowers, but not widows, to prove dependency on spouse's earnings to obtain workers' compensation because the state's justification of administrative convenience was insufficient); *accord* Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (plurality opinion) (invalidating the policy of requiring spouses of female members of the military, but not spouses of male members of the military, to prove dependency before increasing quarterly allowances and benefits, because the justification of administrative convenience was insufficient). *But see* deLaurier v. San Diego Unified Sch. Dist., 588 F.2d 674, 679-80, 684 (9th Cir. 1978) (upholding mandatory pregnancy leave as substantially related to furthering important educational and administrative objectives).

117. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725–29 (1982) (striking down an all-female admissions policy because although compensation for past discrimination could be viewed as an important governmental objective, its application here was predicated on "archaic and stereotypic notions" tending to "perpetuate the stereotyped view of nursing as an exclusively woman's job"); Orr v. Orr, 440 U.S. 268, 279–80 (1979) (striking down state law that allowed women, but not men, to receive alimony as part of a divorce, as it was based upon stereotypical views of gender roles where a wife plays a dependent role and the male is the breadwinner); *see also* Latta v. Otter, 771 F.3d 456, 485–86 (9th Cir. 2014) (striking down Idaho's and Nevada's same sex marriage laws as unconstitutional, noting that such laws drew on "archaic and stereotypic notions" about the roles and abilities of both sexes); Sassman v. Brown, 99 F. Supp. 3d 1223, 1247 (E.D. Cal. 2015) (holding that excluding male prisoners from California's Alternative Custody Program violated Equal Protection due to use of gender stereotyping in evaluating offenders for release); Thomka v. Mass. Interscholastic Athletic Ass'n, No. 051028, 2007 WL 867084, at *7 (Mass. Super. Feb. 12, 2007) (citing Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 378 Mass. 342, 357–63 (1979)) (noting that discriminatory classifications cannot be justified on theories such as "safety concerns for female athletes, or the protection of girls' participation in sports").

118. *See, e.g.*, Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 490–92 (1981) (Brennan, J., dissenting) (arguing that the government had failed to meet its burden to show that the physical differences between men and women, i.e., only women can actually become pregnant, justified imposing criminal liability on men who commit statutory rape, but not women, because to do so the state would need to show that such a measure is more effective than a gender-neutral law at preventing teen pregnancy); Caban v. Mohammed, 441 U.S. 380, 404–07 (1979) (Stevens, J., dissenting) (asserting that the majority erred in invalidating a state statute requiring the consent of a mother, but not a father,

c. Substantial Relationship Requirement. In addition to the requirement that a sex-based classification be instituted in furtherance of an important governmental objective, intermediate scrutiny also requires that the means employed be substantially related to that objective.[119] In comparison to the strict scrutiny standard, where the Court has more precisely articulated the relationship that is necessary to satisfy that standard's "narrowly tailored" requirement,[120] it is less clear what represents an acceptable level of tailoring in intermediate scrutiny. In some contexts, the Court has utilized empirical data to determine whether a sufficient relationship exists to satisfy intermediate scrutiny, although even in cases where such statistics are available, the Court's decisions have failed to establish a rule regarding the type of corollary relationship that is of probative legal value.[121] In other contexts, such as those where the Court is determining whether men and women are similarly situated, the Court has been far less rigorous in analyzing this component of intermediate scrutiny. Instead, it has exhibited a greater willingness to defer to legislative judgments concerning the nexus between a stated objective and a particular classification.[122]

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before a child born out-of-wedlock could be adopted, as the actual physical differences between men and women provide a valid basis for making such a gender-based distinction).

119. Nguyen v. INS, 533 U.S. 53, 70 (2001); *Wengler*, 446 U.S. at 151.

120. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 269–70 (2003) (striking down a university's undergraduate admissions policies as not narrowly tailored); Grutter v. Bollinger, 539 U.S. 306, 325–26, 334, 343 (2003) (upholding the University of Michigan Law School's admissions policy because it was sufficiently narrowly tailored to furthering the compelling interest of diversity so as not to offend equal protection) (superseded on statutory grounds); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236–37 (1995) (announcing that all race-based classifications are subject to strict scrutiny and discussing the nature of strict scrutiny review).

121. *See, e.g.*, Wal-Mart Stores v. Dukes, 564 U.S. 338, 356 (2011) (denying class certification for women employees of Wal-Mart alleging widespread sex discrimination in promotion practices, on the grounds that regression analyses by well-regarded statisticians finding statistically significant gender difference in promotion practices were insufficient in the absence of a uniform company policy); Craig v. Boren, 429 U.S. 190, 200–01 (1976) (invalidating state statute despite empirical data that showed men between the ages of eighteen and twenty-one were significantly more likely to engage in drunk driving as compared to women); *see also* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 457 (2016) (holding that *Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability); Collier v. Barnhart, 473 F.3d 444, 448 (2d Cir. 2007) (quoting Jerry A. Jacobs & Janice Fanning Madden, *Mommies and Daddies on the Fast Track: Success of Parents in Demanding Professions*, 596 ANNALS AM. ACAD. POLITICAL & SOC. SCI. 246, 250 (2004)) ("[W]omen with professional degrees are out of the labor force at a rate about three times that of their male counterparts and they overwhelmingly cite family responsibilities as the reason"); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1274 (7th Cir. 1983) (striking down a policy of conducting body cavity searches of female but not male arrestees, as the city failed to demonstrate that the number of items found in searching women was sufficiently greater than in men to justify the grossly disparate treatment); Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cnty., 333 F. Supp. 2d 1305, 1332–33 (S.D. Fla. 2004) (striking down a sex-based affirmative action program because the statistical evidence in the record failed to show that the program was effective in remedying discrimination).

122. *See, e.g.*, *Nguyen*, 533 U.S. at 94 ("[W]ide deference [is] afforded to Congress in the exercise of its immigration and naturalization power."); Rostker v. Goldberg, 453 U.S. 57, 66 (1981) ("The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court"); *Michael M.*, 450 U.S. at 473 ("It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment.").

2. Areas of Contention in Sex-Based Equal Protection Jurisprudence

a. Sex Classifications Based on Gender Stereotypes. One of the most controversial issues in equal protection jurisprudence is where to draw the line between permissible sex-based classifications predicated on "real" differences between the sexes and impermissible classifications that rest on stereotypical notions of gender roles.[123] Although there is consensus within the Court that "real" differences exist, there is little agreement regarding what those differences are, or what types of policy decisions they may support.[124] However, it is possible to identify trends in specific areas of the Court's sex-based jurisprudence where there is a relative degree of consistency. For example, the Court has consistently invalidated laws that treat men primarily as "breadwinners" and women as economically dependent.[125] The Court has similarly rejected classifications based upon traditional ideas regarding the appropriate occupational roles of men and women[126] and notions that attempt to designate women as the primary child caretaker in the family.[127]

On the other hand, the Court has been fairly consistent in allowing disparate treatment of men and women where the distinction is explained by physical differences between the sexes. For example, regarding pregnancy, the Court has upheld statutes that require fathers, but not mothers, to take affirmative steps in order to establish a legally recognized relationship with their offspring.[128] Also,

123. *See, e.g.*, *Nguyen*, 533 U.S. at 82–83 (O'Connor, J., dissenting) (illustrating the clear disagreement between justices in a 5-4 decision regarding what constitutes a "real" difference).

124. *See, e.g.*, *id.*; United States v. Virginia, 518 U.S. 515, 585–86 (1996) (Scalia, J., dissenting) (underscoring the disagreement between the majority and dissenters regarding whether the defendant's objectives were predicated on "real" or stereotypical differences).

125. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 142, 147–49 (1980) (striking down a state law granting widows benefits automatically but requiring widowers to show economic dependence or physical incapacitation because it relied on stereotypes about financial capabilities of men and women); Orr v. Orr, 440 U.S. 268, 281 (1979) (striking down a law permitting the awarding of alimony to women but not men); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (striking down the Federal Old-Age, Survivors and Disability Insurance Benefits program that automatically qualified women, but not men, for benefits because it was predicated on stereotypes); Weinberger v. Wiesenfeld, 420 U.S. 636, 643–45 (1975) (striking down a Social Security Act provision permitting a widow, but not a widower, to receive benefits based on the earnings of the deceased spouse because it was predicated on an assumption that male workers' earnings are more "vital to the support of their families" than those of female workers).

126. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (striking down a state policy of excluding men from nursing school because it "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job.").

127. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198–99 (1976) (citations omitted) (holding that sex-based classifications cannot be grounded in "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'"); Caban v. Mohammed, 441 U.S. 380, 388–89 (1979) (invalidating a state statute requiring the consent of the mother, but not the father, before a child born out of wedlock could be adopted because the classification was based on an assumption that maternal and paternal relations are fundamentally different).

128. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 73 (2001) (finding that no equal protection violation occurred when an immigration law imposed different requirements for a child's acquisition of citizenship depending on whether the citizen-parent was the mother or father); Lehr v. Robertson, 463

in examining statutory rape laws, the Court has upheld legislation that only penalizes males for having sexual intercourse with minor females without providing the same punishment for women when these roles are reversed.[129] In upholding classifications based on "inherent differences" between the sexes, the Court has noted that such differences may not be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[130]

b. Sex Classifications Based on Gender Identity. Over the past several years, there has been an increasing focus on transgender legal rights and whether the Equal Protection Clause protects against discrimination based on gender identity. In 2011, the Eleventh Circuit ruled that an employer's decision to fire an employee due to her identity as a transgender woman violated the Equal Protection Clause.[131] Though federal courts have not reached a consensus on the issue, and the Supreme Court has not yet resolved the split, this decision marks a major victory for the constitutional rights of transgender people.

This section will proceed by first discussing cases that have impacted the constitutional understanding of gender identity and sex-based classifications. These constitutional cases also have statutory implications, which will lead into an additional description of several cases that deal more specifically with statutory concerns rather than constitutional ones. First, *Grimm v. Gloucester County School Board* will be reviewed in order to identify the constitutional argument for equal protections for transgender people. Next will be a review of *Adams v. School Board of St. Johns County, Florida,* which is an ongoing case examining

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U.S. 248, 266–67 (1983) (upholding a state law permitting a child to be adopted without notice to the father if the father had not lived with the mother and child or had not registered his intent to claim paternity, thereby implying that it does not violate equal protection to require fathers but not mothers to take affirmative steps to establish a parental relationship); Parham v. Hughes, 441 U.S. 347, 356 (1979) (upholding a state law permitting the mother, but not the father, to sue for the wrongful death of a child born out of wedlock because the classification was not based on overbroad stereotypes about fathers as a class but rather distinguished between men who had established paternity and those who had not); Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (holding that a state law which required the consent of mothers, but not fathers, of illegitimate children for the purposes of adoption did not violate equal protection).

129. Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 470–72 n.7 (1981) (citing United States v. O'Brien, 391 U.S. 367, 383 (1968)) (explaining that the stated purpose of the statutory rape law in question, the prevention of teenage pregnancy, was genuine, and finding that there were physical, sex-based differences regarding the burdens of pregnancy that justified the state's imposition of criminal liability only onto men. In reaching this conclusion, the Court rejected the argument that the statute's true purpose was to protect the virtue and chastity of young women: "[e]ven if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner's argument must fail because 'it is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'").

130. United States v. Virginia, 518 U.S. 515, 533 (1996); *see also* Thomka v. Mass. Interscholastic Athletic Ass'n, No. 051028, 2007 WL 867084, at *7, 2007 LEXIS 83, at *22 (Mass. Super. Feb. 12, 2007) (citing Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 293–96 (Mass. 1979)) (mentioning that neither safety concerns for female athletes nor protection of girls' participation in sports are justified classifications).

131. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

constitutional and statutory protections for transgender individuals. Finally, these discussions of constitutional challenges will be supplemented with a brief overview of cases that highlight issues of gender identity in statutory interpretation, including *Blatt v. Cabela's Retail, Inc.* and *Bostock v. Clayton County*.

Recently, several federal decisions have dealt with protections for transgender individuals through constitutional claims under the Fourteenth Amendment.[132] Additionally, courts have heard statutory challenges under Title VII of the Civil Rights Act of 1964,[133] the Americans with Disabilities Act,[134] and Title IX of the Education Amendments of 1972.[135] In time, these statutory cases may lay the framework for the advancement of more concrete constitutional protections for transgender people.

In 2016, the Fourth Circuit heard *Grimm v. Gloucester County School Board*, which dealt with the treatment of transgender individuals under Title IX protections against sex discrimination and the equal protections granted by the Fourteenth Amendment.[136] The Fourth Circuit found in favor of Grimm, a transgender teenager who was barred from using the restroom corresponding to his gender identity at his high school, determining that transgender students must be treated in accordance with their gender identity.[137] Though this decision was vacated and remanded by the Supreme Court in 2017,[138] the earlier decision was once again affirmed by the lower court, leaving in place both statutory and constitutional protections for transgender individuals.[139]

More recently, in 2021, rights for transgender people advanced through the Eleventh Circuit's decision in *Adams v. School Board of St. Johns County, Florida*. This case, like *Grimm*, considers the situation of a transgender student who was barred by his school from using the bathroom that corresponded to his gender identity.[140] Suing under Title IX and the Fourteenth Amendment, Drew Adams alleged that he was being unfairly discriminated against due to his gender identity when his school barred him from using the boys' bathroom.[141] While the

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132. *See e.g.,* Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1320 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

133. Title VII of the Civil Rights Act of 1964; Bostock v. Clayton Cnty.,140 S. Ct. 1731, 1754 (2020).

134. Defendant's Memorandum of Law in Response to the Second Statement of Interest of the United States, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822-JLS, 2015 WL 9907608, at *6 (E.D. Pa. 2015).

135. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017); Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1320 (11th Cir.), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

136. *Grimm*, 822 F.3d at 715 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

137. *Id.* at 716, 723.

138. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017).

139. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

140. Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1304 (11th Cir.), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

141. *Id.* at 1320.

court declined to reach a Title IX claim in this instance, it did find that Adams's Fourteenth Amendment rights had been unconstitutionally violated by the School Board.[142] Later that same year, however, the Eleventh Circuit vacated the court's decision and determined that the case would need to be reheard *en banc*.[143]

In 2015, a transgender woman filed the first equal protection challenge to the Americans with Disabilities Act (ADA) in *Blatt v. Cabela's Retail, Inc*.[144] While employed at Cabela's, Blatt alleged that she endured discrimination on the basis of her sex under Title VII of the Civil Rights Act and asserted that Cabela's failed to reasonably accommodate her requests to use a female or gender-neutral restroom in violation of the ADA.[145] The ADA does not explicitly include gender identity disorder (GID) in its coverage;[146] however, Cabela's motion to dismiss was denied due to a plausible interpretation of the law that coverage of common impairments, which are typically associated with GID, are already assured.[147] The court eschewed the equal protections claim, shying away from making a constitutional determination. Instead, the Eleventh Circuit considered the purpose of the ADA and utilized its efforts to protect vulnerable individuals as the impetus for separating GID from the impairments that often accompany GIDs.[148] Ultimately, this case did not result in broader constitutional implications but did foster statutory change.

Bostock v. Clayton County, decided in 2020 by the Supreme Court, once again affirmed that Title VII protections extend to transgender individuals; however, this case relied on a reading of the statute rather than a question of constitutionality.[149] The Supreme Court consolidated three cases in *Bostock*, one of which was *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc*.[150] While the other two cases focused on homosexual individuals, whose employment outcomes did not necessarily have legal implications for individuals with GIDs, *R.G. & G.R. Harris Funeral Homes Inc*. involved a transgender woman whose employment at a funeral home was terminated because she wished to fully live as a transgender woman.[151] The Court ultimately found that her employer had violated Title VII by terminating her on the basis of her sex and, in the process, confirmed that Title VII protects the rights of transgender

142. *Id*.

143. Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369, 1372 (11th Cir. 2021).

144. Defendant's Memorandum of Law in Response to the Second Statement of Interest of the United States, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822-JLS, 2015 WL 9907608 (E.D. Pa. 2015).

145. *Id*.

146. 42 U.S.C. § 12211 (2009).

147. Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

148. Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *and A New Path for Transgender Rights*, 127 YALE. L.J. FORUM 373, 383–84 (2017).

149. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

150. *Id*. at 1738.

151. *Id*.

people.[152] Justices Alito and Thomas, in dissent, allege that this decision could act as a gateway to protect LGBTQ individuals from discrimination under the Fourteenth Amendment's Equal Protection Clause.[153]

c. Sex Classifications as a Remedial Measure. Although the Supreme Court has not explicitly stated that intermediate scrutiny is the appropriate means of evaluating sex-based affirmative action programs,[154] it has found that remedying past sex-based discrimination constitutes a justifiable objective for sex-based classifications.[155] However, to pass constitutional muster, a provision must be focused on directly redressing specific discriminatory effects rather than general discrimination.[156] Applying intermediate scrutiny requires that the subject be substantially related to the claim at hand. Additionally, as is the case for all sex-based classifications, remedial measures cannot be grounded in gender stereotypes[157] or

152. *Id.* at 1754.

153. *Id.* at 1783.

154. *See* Eng'g Contractors Ass'n v. Metro. Dade Cnty., 122 F.3d 895, 909 (11th Cir. 1997) ("The Supreme Court has not addressed the question explicitly, and there is a similar dearth of guidance in the reported decisions of other federal appellate courts."). Intermediate scrutiny has ordinarily been applied to sex-based classifications. *See, e.g.,* Nguyen v. INS, 533 U.S. 53, 60 (2001) (applying intermediate scrutiny to uphold immigration law imposing different requirements for lawful permanent residents born abroad and out of wedlock to obtain citizenship based on the sex of the citizen-parent); United States v. Virginia, 518 U.S. 515, 571–72 (1996) (applying intermediate scrutiny to strike down Virginia's policy of excluding women from the Virginia Military Institute); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152 (1994) (applying intermediate scrutiny to strike down gender classifications in use of peremptory strikes); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (citations omitted) (applying intermediate scrutiny to strike down a policy excluding males from the Mississippi University for Women's School of Nursing); Califano v. Westcott, 443 U.S. 76, 89 (1979) (applying intermediate scrutiny in striking down a statute which based the availability of noncontributory welfare on sex); Caban v. Mohammed, 441 U.S. 380, 388–89 (1979) (applying intermediate scrutiny in striking down a state statute which required the consent of a mother, but not a father, before a child born out of wedlock could be placed for adoption); Orr v. Orr, 440 U.S. 268, 271, 279 (1979) (applying intermediate scrutiny in striking down a state law allowing women, but not men, to receive alimony as part of a divorce); Califano v. Webster, 430 U.S. 313, 316–17 (1977) (per curiam) (applying intermediate scrutiny in upholding a Social Security provision that calculated benefits for women in a more financially advantageous manner than it did for men); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (stating that the Court's avowed "consistency" principle would apply to sex-based affirmative action programs, which would thus be reviewed under intermediate scrutiny, creating the "anomalous result" that racial affirmative action programs would become more difficult to justify than sex-based affirmative action programs, making it more difficult for the government to redress racial discrimination than sex discrimination).

155. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987) (upholding the promotion of a female dispatcher over the male plaintiff, rationalizing that due to "manifest imbalance" in proportion of men to women within the job category, it was acceptable to take sex into account as one factor among many).

156. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (striking down an admissions policy barring men from a nursing school, as it did not redress unequal educational opportunities because women had not been historically subject to discrimination in that particular field).

157. *See, e.g.*, *id.* at 729 ("Rather than compensate for discriminatory barriers faced by women, [the University's] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."); Orr v. Orr, 440 U.S. 268, 283 (1979) (invalidating a state law permitting women, but not men, to receive alimony in divorce because the classification was based on stereotypes about the financial status of husbands and wives).

be used "to create or perpetuate the legal, social, and economic inferiority of women."[158] Nevertheless, they may be used "to compensate women for particular economic disabilities [they have] suffered"[159] so as to "promote equal employment opportunity"[160] and "to advance full development of the talent and capacities of our Nation's people."[161]

In the absence of an explicit directive, however, lower federal and state courts have taken different approaches in reviewing the validity of sex-based affirmative action programs.[162] Specifically, the Third,[163] Ninth,[164] Tenth,[165] and Eleventh Circuits[166] have adopted a consistent policy to evaluate all sex-based classifications, including those with remedial objectives, under intermediate scrutiny. In contrast, the Sixth Circuit has interpreted the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.* to require the application of strict scrutiny to all affirmative action programs, although it still applies intermediate scrutiny to non-remedial sex-based classifications.[167]

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158. United States v. Virginia, 518 U.S. 515, 534 (1996).

159. *Id.* at 533 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam)).

160. *Id.* (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987)).

161. *Id.*

162. *See* Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia's *"Exceedingly Persuasive Justification" Standard*, 86 CALIF. L. REV. 1169, 1174-76, 1196 (1998) (arguing that the Court's lack of guidance regarding the appropriate level of scrutiny for evaluating sex-based affirmative action led to circuit split, and that after *Virginia*, courts should apply the "exceedingly persuasive justification" level of scrutiny to all sex-based classifications including affirmative action programs).

163. *See, e.g.*, Contractors Ass'n v. Philadelphia, 6 F.3d 990, 1001 (3d Cir. 1993).

164. *See, e.g.*, Coral Constr. Co. v. King Cnty., 941 F.2d 910, 931 (9th Cir. 1991).

165. *See, e.g.*, Concrete Works of Colo., Inc. v. Denver, 321 F.3d 950, 959 (10th Cir. 2003) (citations omitted).

166. *See* Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1580 (11th Cir. 1994); *see also* Danskine v. Mia. Dade Fire Dep't, 253 F.3d 1288, 1293-94 (11th Cir. 2001) (citations omitted) (applying intermediate scrutiny); Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty., 122 F.3d 895, 907–09 (11th Cir. 1997) (citing *Ensley Branch*, 31 F.3d at 1565); Hershell Gill Consulting Eng'rs v. Miami-Dade Cnty., 333 F. Supp. 2d 1305, 1332–33 (S.D. Fla. 2004) (applying intermediate scrutiny).

167. *See, e.g.*, Brunet v. City of Columbus, 1 F.3d 390, 403–04 (6th Cir. 1993) (following Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989)) (applying strict scrutiny to a consent decree containing an affirmative action plan in favor of female applicants to the city fire department); Vogel v. City of Cincinnati, 959 F.2d 594, 599 (6th Cir. 1992) (applying strict scrutiny and upholding an affirmative action policy using race and sex preferences); *Conlin*, 890 F.2d at 816 (applying strict scrutiny to a state affirmative action plan using race and sex preferences). In holding that strict scrutiny applied to sex-based affirmative action programs, the Sixth Circuit in *Conlin* relied on *Wygant v. Jackson Board of Education*, in which the Supreme Court stated that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," and thus reviewed a race-based affirmative action program for minority teachers under strict scrutiny. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986); *Brunet*, 1 F.3d at 403–04. The Sixth Circuit applied *Wygant*'s strict scrutiny mandate to the state's affirmative action program as it encompassed both race- and sex-based affirmative action. *See Conlin*, 890 F.2d at 816. *Conlin*'s progeny have applied strict scrutiny to affirmative action programs with only sex-based components. *See, e.g.*, *Brunet*, 1 F.3d at 390; *Vogel*, 959 F.2d at 594.

The application of strict scrutiny to both racial and sex-based affirmative action programs created by some courts has made remediation efforts more difficult to defend, even with the Court's application of the discriminatory purpose doctrine to insulate facially neutral policies that have a disparate impact on minorities or women from challenge.[168] This practical result seems incongruous, given the Court's focus on the importance of "consistency" in the evaluation of potentially discriminatory classifications in *Adarand Constructors v. Pena*,[169] yet the differences have not been explicitly addressed by the Court.

3. Abbreviated Move Towards a Higher Standard of Review

a. United States v. Virginia. In *United States v. Virginia*, the Supreme Court created considerable controversy by asserting that a sex-based classification requires an "exceedingly persuasive justification" to pass constitutional muster,[170] leading some to believe that the Court had set forth a new and more demanding level of scrutiny for its gender-based equal protection jurisprudence.[171] After *Virginia*, lower courts were left without direction as to whether the strict scrutiny standard that applied to racial discrimination applied to gender classifications.

In *Virginia*, the Court held that the all-male admissions policy of the Virginia Military Institute (VMI), a state military college, violated the Equal Protection Clause by denying female students its unique educational opportunities.[172] In its decision, the Court asserted that for the state to defend its exclusion of women from VMI, it would have to prove that its sex-based classifications serve an important governmental objective and that the specific means employed are substantially related to its achievement.[173]

The Court rejected the state's contention that single-sex education furthered an important governmental objective by providing "important educational benefits" contributing to a "diversity in educational approaches."[174] Instead, the Court found that the objective was a post-hoc rationalization rather than a genuine

168. *See* Siegel, *supra* note 104, at 1135–36; Donna Meredith Matthews, *Avoiding Gender Equality*, 19 WOMEN'S RIGHTS L. REP. 127, 131 (1998).

169. *See* Adarand Constructors, Inc.,v. Pena, 515 U.S. 200, 227 (1995).

170. United States v. Virginia, 518 U.S. 515, 531 (1996).

171. *See, e.g*., Frances E. Burgin, Note, *"Fire Where There is No Flame": The Constitutionality of Single-Sex Classrooms in the Commonwealth*, 13 WM. & MARY J. WOMEN & L. 821, 830 (2007) (noting that the *Virginia* decision was applying a "new standard"); Steven A. Delchin, Comment, United States v. Virginia *and Our Evolving "Constitution": Playing Peek-A-Boo with the Standard of Scrutiny for Sex-Based Classifications,* 47 CASE W. RES. L. REV. 1121 (1997) (arguing *Virginia* elevated the level of review for sex-based classifications to strict scrutiny); N. Contracting, Inc. v. Illinois, 473 F.3d 715, 720 n.3 (7th Cir. 2007) (noting that "the Supreme Court has not made clear whether a more permissive standard applies to programs," which involve gender classifications, as opposed to race or ethnicity); Builders Ass'n of Greater Chi. v. Cnty. of Cook, 256 F.3d 642, 644 (7th Cir. 2001) (noting that, after *Virginia,* the difference between the strict scrutiny applied to racial discrimination and the intermediate scrutiny applied to sex discrimination had become "vanishingly small").

172. *Virginia*, 518 U.S. at 533–35.

173. *See id*. at 524.

174. *See id*. at 535–37.

objective, given that VMI's exclusion of women dated back to a time when women were excluded from all institutions of higher education in Virginia.[175] The Court also found that VMI's assertion that its distinctive "adversative method" could not be continued if women were admitted was predicated upon "overbroad generalizations" about the differences between males and females, and therefore an insufficient justification to meet the State's burden of proof."[176] It was undisputed that some women would not only want to attend VMI if they had the opportunity,[177] but would also be "capable of all of the individual activities required by VMI cadets."[178] As such, the state's exclusion of all women from VMI, without providing a parallel program with comparable benefits,[179] constituted a violation of the Equal Protection Clause.[180]

Some commentators have argued that the standard applied by the Court in *Virginia* more closely resembles strict scrutiny—both in asserting that a sex-based classification requires an "exceedingly persuasive justification" between the government's stated objective and in the means utilized to achieve that end—than the Court's traditional intermediate scrutiny standard of review.[181] Indeed, Justice Scalia argued in dissent that the majority had in fact applied strict scrutiny in striking down VMI's all-male composition purely because there exist some women "willing and able to undertake VMI's program," effectively requiring a least-effective-means analysis, whereas the established standard of intermediate scrutiny only required a "substantial relation" between the classification and the interests served.[182] At least three views among commentators and scholars have emerged over the impact of *Virginia*: "(1) intermediate scrutiny continues to apply to gender-based classifications; (2) gender classifications are subject to strict scrutiny; and (3) sex-based classifications are now subject to a level of analysis that falls between strict and intermediate scrutiny."[183]

In the years following *Virginia*, the federal courts have applied the standard differently, with each of the three primary interpretations of the decision

175. *See id.*

176. *Id.* at 533, 540.

177. *See id.* at 540.

178. *Id.*

179. *See id.* at 553 (establishing that the remedial program offered by the state, the Virginia Women's Institute for Leadership, did not offer comparable "curricular choices and faculty stature, funding, prestige, alumni support and influence").

180. *See id.* at 558.

181. *See* Deborah L. Brake, *Reflections on the VMI Decision,* 6 AM. U. J. GENDER & L. 35, 36–39 (1997) (reviewing similarities between a strict scrutiny standard of review and that applied in *Virginia*).

182. *Virginia*, 518 U.S. at 573, 596 (Scalia, J., dissenting) (citations omitted) ("And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny.").

183. *See* Skaggs, *supra* note 162, at 1171, 1182–83 (explaining that *Virginia* is viewed as part of a "doctrinal progression towards a higher level of scrutiny" and thus a more rigorous standard "rooted in Equal Protection doctrine [that] should be recognized as the proper basis of analysis for all types of gender classifications.").

expressed above finding some support.[184] For example, the First[185] and Eleventh[186] Circuits read the decision as a largely traditional application of intermediate scrutiny. The Second Circuit applied the "exceedingly persuasive" justification from *Virginia*, yet did not comment on whether the justification heightened the immediate scrutiny standard to strict scrutiny.[187] The Sixth[188] and Seventh[189] Circuits agreed with Justice Scalia and determined that the majority in *Virginia* effectively raised the level of review for sex classifications to strict scrutiny, without yet explicitly so holding.[190] A dissenting opinion from the First Circuit represents the third view, arguing that *Virginia* essentially created a new standard of scrutiny more stringent than traditional intermediate scrutiny, but less rigorous than that applied to proscribed classes.[191] However, the Court's most recent treatment of sex-based classifications in *Nguyen v. INS* appears to support the view that *Virginia* was not a move towards strict scrutiny.[192]

b. Nguyen v. INS. In *Nguyen*, the Court upheld a provision in the Immigration and Nationality Act that required American unwed fathers, but not American unwed mothers, to take affirmative steps to establish parenthood in order to confer United States citizenship upon children when the other parent was not a United States citizen.[193] The majority identified two governmental objectives that satisfied both prongs of the traditional intermediate scrutiny test: (1) the importance of ensuring that a biological parent-child relationship exists and (2) the importance of ensuring that the child and citizen–parent have the opportunity to develop a relationship with "real, everyday ties."[194]

The Court found that the statute was substantially related to both of these objectives, as it was designed to acknowledge real differences in how men and

184. *See, e.g.*, *infra* notes 185-89.

185. *See* Cohen v. Brown Univ., 101 F.3d 155, 183 (1st Cir. 1996) (asserting that *Virginia* applied the intermediate scrutiny standard).

186. *See* Eng'g Contractors Ass'n of S. Fla. Inc., v. Metro. Dade Cnty., 122 F.3d 895, 907–08 (11th Cir. 1997) (describing the Court's use of "exceedingly persuasive justification" in *Virginia* as "linguistic verve" that ultimately did not affect the applicable standard in gender discrimination, which remained intermediate scrutiny).

187. *See* Buzzetti v. City of New York, 140 F.3d 134, 141–42, 144 (2d Cir. 1998).

188. *See* Montgomery v. Carr, 101 F.3d 1117, 1123 (6th Cir. 1996) (holding that *Virginia* appears to have created a new standard of review for gender-based classifications). *But see* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 692–93 (6th Cir. 2006) (discussing the standard applied in *Virginia* without mention of a raise in the standard of review traditionally applied).

189. *See* Nabozny v. Podlesny, 92 F.3d 446, 456, 461 n.6 (7th Cir. 1996) (noting that *Virginia*'s "exceedingly persuasive justification" standard differed from a traditional intermediate scrutiny formulation, but not stating whether the standard was heightened).

190. *See Virginia*, 518 U.S. at 596 (Scalia, J., dissenting).

191. *See Cohen*, 101 F.3d at 183, 191 (Torruella, C.J., dissenting) (noting that *Virginia* appears to have raised the level of scrutiny in sex-based classifications).

192. *See* Nguyen v. INS, 533 U.S. 53, 70 (2001).

193. *Id.* at 60–61.

194. *Id.* at 62–65.

women are situated in relation to the birth process,[195] rather than to reflect a stereotypical view of either sex.[196] Real differences include the fact that a father, unlike a mother, "need not be present at the birth"[197] and may not even know that the child was conceived or born. Thus, the sex-specific affirmative requirement was an "unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred."[198]

In Justice O'Connor's dissent, she sharply criticized the majority's use of a hypothetical objective not presented by the government,[199] arguing that it condoned the stereotype that mothers must care for children while fathers may ignore them.[200] Justice O'Connor also argued that the majority failed to require a close enough fit between means and end under heightened scrutiny, and thus applied a less rigorous application of heightened scrutiny than precedents required.[201]

c. Sessions v. Morales-Santana. In *Sessions v. Morales-Santana*, the court held that section 1409(c) of the Immigration and Nationality Act was unconstitutional as a violation of equal protection.[202] Section 1409(c) transmits the citizenship of an unwed U.S. citizen mother to her child born outside of the United States provided that the mother lived continuously in the United States for just one year prior to the child's birth.[203] However, under section 1409(a), applicable to unwed U.S. citizen fathers, citizenship is only transmitted to his child born outside of the United States provided that the father have ten years physical presence in the United States prior to the child's birth, "at least five of which were attained after attaining" age fourteen.[204]

The Court emphasized the heightened scrutiny standard that applied to all gender-based classifications and thus, a successful defense required an "exceedingly persuasive justification."[205] The Court, citing *Virginia*[206] and *Obergefell v. Hodges*,[207] held that the government must show (1) "at least that the [challenged] classification serves important governmental objectives," (2) "that the discriminatory means employed are substantially related to the achievement of those objectives" and (3) that the classification substantially serves an important

195. *See id*. at 73.
196. *See id*. at 68.
197. *Id*. at 62.
198. *Id*. at 66–67.
199. *Id*. at 84–86 (O'Connor, J., dissenting) (asserting that the majority's hypothetical rationale was not only "insufficient under heightened scrutiny" but also was a "watered-down and beefed up version" of the interest actually asserted by the INS).
200. *Id*. at 89, 92.
201. *Id*. at 77, 79.
202. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).
203. *Id*. at 1682.
204. *Id*.
205. *Id*. at 1689–90.
206. United States v. Virginia, 518 U.S. 515 (1996).
207. Obergefell v. Hodges, 576 U.S. 644 (2015).

governmental interest at the time of the challenge.[208] The Court's third requirement, that the government must also show that the classification substantially serves an important governmental issue today, seems to continue the trend towards a higher standard of review by applying a standard higher than both traditional intermediate scrutiny and the standard required in *Virginia*.

The government argued that the classification served two objectives: "(1) ensuring a connection between the child to become a citizen and the United States and (2) preventing 'statelessness.'"[209] However, the Court held that even if Congress intended to serve these interests, they failed to meet the heightened scrutiny standard.[210] Justice Ginsburg, who delivered the opinion of the Court, held that the statute was "anachronist" and thus could not serve an important government interest of today.[211]

4. Equal Protection and Reproductive Rights

The Supreme Court has not expressly analyzed reproductive rights cases under the Equal Protection Clause as sex-based discrimination; instead, the Court analyzes these cases under substantive due process jurisprudence as issues of "reproductive autonomy."[212] For example, in 1974, the Court focused on due process rather than equal protection issues in two cases involving the constitutionality of forced pregnancy leave for grade-school teachers, even though both cases were argued in lower courts on the basis of equal protection.[213] Since *Roe v. Wade*,[214] the Court has consistently upheld a woman's constitutional right to an abortion on substantive due process rather than equal protection grounds,[215] although a number of scholars, including Justice Ginsburg, have criticized the Court's unitary reliance on substantive due process.[216] The Court has also rejected equal

208. *Sessions*, v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017).

209. *Id.* at 1694.

210. *Id.*

211. *Id.* at 1693.

212. *See* Roe v. Wade, 410 U.S. 113, 153, 164 (1973) (holding that women have a constitutional right to an abortion on substantive due process grounds); Planned Parenthood of Se. Pa. v. Casey, 505 U. S. 833, 879 (1992) (upholding the core of *Roe* on substantive due process grounds); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375–76 (1985) (noting that while the Court "has analyzed classification by gender under an equal protection/sex discrimination rubric, it has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women") (article published prior to Ginsburg's appointment to the Supreme Court in 1993).

213. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 636, 651 (1974); *see* Matthews, *supra* note 168, at 140.

214. *Roe,* 410 U.S. at 164.

215. *See Casey*, 505 U.S. at 879 (upholding the core of *Roe* on substantive due process grounds); Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (reaffirming *Casey* and applying substantive due process to abortion); Whole Women's Health v. Hellerstadt, 136 S. Ct. 2292, 2309–10 (2016); June Med. Serv. v. Russo, 140 S. Ct. 2103, 2113 (2020).

216. *See* Ginsburg, *supra* note 212, at 376 (asserting that the Court's compartmentalization of gender classification as an equal protection issue and reproductive autonomy as a substantive due process issue

protection challenges to regulations that prohibit state[217] and federal[218] funding for abortions.

5. Equal Protection and Domestic Violence

The Supreme Court has not addressed the use of the Equal Protection Clause in litigation against police departments and municipalities for failing to provide adequate protection to victims of domestic violence.[219] However, several circuit courts have addressed this issue and have concluded that these suits state a claim upon which relief can be granted.[220] Specifically, the courts of appeals have held that police actions are subject to equal protection challenges when the suit centers upon the execution of prohibited acts or the failure to perform the duties of a police officer.[221] There is no constitutional right to police protection; however, if

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presents an "incomplete justification" for the Court's decision in *Roe*); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 936, 947 (1973) (criticizing the Court's reliance on substantive due process, asserting that "[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311–24 (1991) (rejecting the adequacy of a substantive due process "privacy" right, which fails to recognize the "place of reproduction in the status of the sexes," and instead recommending that restrictions on abortion be treated as a form of sex discrimination); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 29 COLUM. L. REV. 1, 16 (1992); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 168–69 (2013) (discussion of equal protection arguments in analyzing the constitutionality of abortion restrictions); Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 24 HARV. J.L. & GENDER 377, 378–79 (2011).

217. Maher v. Roe, 432 U.S. 464, 474 (1977) (holding that financial need is not a suspect class under the Equal Protection Clause and that "[*Roe v. Wade*] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds").

218. Harris v. McRae, 448 U.S. 297, 316 (1980) (reaffirming that poverty is not a suspect classification for the Equal Protection Clause and upholding the "Hyde Amendment," which prohibits federal funding of abortions, asserting that "[a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation").

219. *See* 28 AM. JUR. PROOF OF FACTS 3D 1 (1994). *But see* Town of Castle Rock v. Gonzales, 545 U. S. 748, 761 (2005) (noting that enforcement of a domestic order is a discretionary function).

220. *See* Soto v. Flores, 103 F.3d 1056, 1066 (1st Cir. 1997), *cert. denied*, 522 U.S. 819 (1997); Ricketts v. City of Columbia, 36 F.3d 775, 779 (8th Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995); Eagleston v. Guido, 41 F.3d 865, 878 (2d Cir. 1994) (noting there is no equal protection claim "[a]bsent some evidence of such [discriminatory] intent or purpose), *cert. denied*, 516 U.S. 808 (1995); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990); Hynson v. City of Chester, Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988); Watson v. Kansas City, 857 F.2d 690, 694 (10th Cir. 1988).

221. *See, e.g.*, Smith v. Ross, 482 F.2d 33, 36–37 (6th Cir. 1973) ("[A] law enforcement officer can be liable under [42 U.S.C.A.] § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denies equal protection to persons legitimately exercising rights guaranteed them under state or federal law. Acts of omission are actionable in this context to the same extent as are acts of commission."); Azar v. Conley, 456 F.2d 1382, 1387 (6th Cir. 1972).

a state chooses to provide police protection, a "selective withdrawal of police protection . . . is the prototypical denial of equal protection."[222]

The first important domestic violence case to raise an equal protection claim, *Thurman v. City of Torrington*, appeared to present a heightened standard of review for these claims.[223] The plaintiff alleged that the city used a de facto gender-based classification that offered less protection to female victims of domestic violence.[224] The district court, finding that the police officers were under an affirmative duty to preserve law and order, held that, although there was no facially discriminatory law, the plaintiff stated a constitutional claim by asserting that there was an administrative classification that caused the law to be dispensed in a discriminatory way.[225]

Although several circuits have adopted *Thurman*'s heightened standard, others have been more limited in their Equal Protection Clause formulations.[226] Three years after *Thurman*, in *Watson v. Kansas City*,[227] the Tenth Circuit decided that although the plaintiff had proven through statistical surveys that the police provided less protection to domestic assault victims than to non-domestic assault victims,[228] she failed to show that there was a discriminatory purpose behind the policy upon which she based her sex discrimination claim.[229] As a result, the court reversed the dismissal of the plaintiff's claim as a member of the class of domestic violence victims, but upheld the dismissal of her sex discrimination claim.[230]

Thus, plaintiffs in these suits face a dilemma: although statistical evidence showing a disproportionate impact upon domestic violence victims may be enough to show a policy or custom of police officers responding differently to

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222. Hilton v. City of Wheeling, 209 F.3d 1005, 1007 (7th Cir. 2000); *see also* Hayden v. Grayson, 134 F.3d 449, 456 (1st Cir. 1998); *Ricketts*, 36 F.3d at 779; *Watson*, 857 F.2d at 694; DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."); Christopher J. Klein, *Will the § 1983 Equal Protection Claim Solve the Equal Protection Problem Faced by Victims of Domestic Violence?: A Review of* Balistreri, Watson, Hynson, *and* McKee, 29 J. FAM. L. 635, 642 (1991).

223. Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984).

224. *Id.* at 1526–27.

225. *Id.* at 1527.

226. *See* Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* DeShaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1392, 1403–04 (1990); Brown v. Grabowski, 922 F.2d 1097, 1118 (3d Cir. 1990) ("We believe that *Thurman* . . . a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim . . . to enable reasonable officials to 'anticipate [that] their conduct [might] give rise to liability for damages.'").

227. Watson v. Kansas City, 857 F.2d 690, 696 (10th Cir. 1988).

228. *Id.*

229. *Id.* at 697; *see also* Beltran v. City of El Paso, 367 F.3d 299, 305 (5th Cir. 2004) (noting that discriminatory intent is necessary for a policy to violate the Equal Protection Clause).

230. *Watson*, 857 F.2d at 696–98.

domestic assault cases,[231] equal protection claims of domestic violence victims are subject only to rational basis scrutiny.[232] Therefore, the government only needs to articulate a legitimate reason for the discriminatory treatment.[233] To achieve the heightened standard of review that is more likely to hold the government action invalid, the plaintiff must prove intention on the part of the police or the municipality to discriminate against domestic violence victims due to gender.[234] This intention requirement "mandated the conclusion in *Watson* that even a showing of adverse impact would not overcome the plaintiff's 'heavy burden' to escape summary judgment."[235]

However, some commentators have suggested that plaintiffs can escape this heavy burden by showing that the disparity in treatment was based on "archaic and overbroad generalizations about women that [the Supreme Court has] found insufficient to justify a gender-based classification."[236] For example, in *Balistreri v. Pacifica Police Department*, the Ninth Circuit held that the plaintiff alleged adequate facts to survive a summary judgment motion[237] when the complaint alleged that an officer responding to one of the victim's reports of assault stated that he "did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on.'"[238] According to the court, these types of comments indicated "an intention to treat domestic complaints less seriously than other assaults, as well as an animus against abused women."[239]

If the Supreme Court adheres to its current precedents, any future case alleging that a police policy is based upon a stereotype that women "choose" abusive situations by marrying or living with violent individuals would likely be invalidated by the Court as an archaic and overbroad generalization about women.[240] However, without a "smoking gun" showing either a facially discriminatory policy or evidence of an informal institutional rule that is based at least partly on preconceived notions about the role of women in domestic assault situations, the

231. *Id.* at 696 (noting that although "statistical evidence alone may not be enough to prove the existence of a policy or custom," the plaintiff had provided evidence showing that officers were trained to treat domestic violence cases differently than other assault cases, and that "the training encourages officers to attempt to 'defuse' the situation and to use arrest as a last resort").

232. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441–42 (1985) ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

233. Daniel P. Whitmore, *Enforcing the Equal Protection Clause on Behalf of Domestic Violence Victims: The Impact of* Doe v. Calumet City, 45 DEPAUL L. REV. 123, 139 (1996).

234. *See supra* Part III.A.1.a.

235. Whitmore, *supra* note 233, at 141.

236. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 n.16 (1982); *see also* Whitmore, *supra* note 233, at 141–45.

237. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990).

238. *Id.*

239. *Id.*

240. *See supra* Part III.A.2.b.

Court is unlikely to find any animus against women. Without such a finding, the Court will not apply heightened review, and the policy will likely be upheld.

6. Equal Pay

The Supreme Court has not addressed the use of the Equal Protection Clause in litigation concerning equal pay for women in the workplace. Pay discrimination has instead been addressed through a range of statutory remedies, including the Equal Pay Act, Title VII, and state laws.[241]

B. STANDARDS OF REVIEW UNDER STATE CONSTITUTIONS

Many state constitutions prohibit the determination of rights based on sex.[242] In addition, other states have implemented more limited equal rights

241. In the United States, there are a range of federal and state laws addressing pay discrimination. The Equal Pay Act of 1963 prohibits employers from paying unequal wages to men and women who perform substantially equal work which requires "equal skill, effort, and responsibility . . . performed under similar working conditions." 29 U.S.C.A § 206(d). An employer can avoid liability for pay discrimination under the Equal Pay Act if the difference is due to a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or a differential based on any factor other than sex. *Id*. Title VII of the Civil Rights Act of 1964 also prohibits employers from discriminating against any individual with respect to her compensation based on sex, or any other protected category under Title VII. 42 U.S.C. § 2000e2. Under the Lilly Ledbetter Fair Pay Act, each discriminatory paycheck resets the 180-day window for filing a Title VII equal pay charge with the EEOC. *See* 42 U.S. C.A. § 2000e-5(e)(3)(A). Over the past several years, individual states have also adopted stronger equal pay legislation to address the gender wage gap. *See Progress in the States for Equal Pay*, National Women's Law Center (Oct. 2021) (highlighting legislation that prohibits the use of salary history in hiring, requires salary range transparency, requires employers to collect and report pay data, protects employees who discuss their pay, expands equal pay protections to characteristics other than sex, modifies the "equal work" standard, and closes loopholes in employer defenses), https://nwlc.org/wp-content/uploads/2021/11/State-Equal-Pay-Laws-Final-2021-10.20.21-v2.pdf. Despite these legislative protections, women are still paid less than their male counterparts, with even larger gaps for women of color. *See The Wage Gap: The Who, How, Why, and What to Do*, NAT'L WOMEN'S L. CTR. (Sept. 2021), https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf (providing wage gap data and discussing the causes of the wage gap).

242. *See* ALA. CONST. art. I, § 1 ("That all men are equally free and independent."); O'Neal v. Robinson, 45 Ala. 526, 534 (1871) (holding that "men" in the state constitution includes both sexes), *overruled on other grounds*; ALASKA CONST. art I, § 3 ("No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin."); ARIZ. CONST. art II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); CAL. CONST. art. I, § 7(a) ("A person may not be . . . denied equal protection of the laws"); CAL. CONST. art. I, § 8 ("A person may not be disqualified from . . . business, profession, vocation, or employment because of sex[.]"); CAL. CONST. art. I, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of . . . sex . . . in the operation of public employment, public education, or public contracting."); COLO. CONST. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."); CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."); FLA. CONST. art I, § 2 ("All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and

provisions.[243] Unlike the Supreme Court and lower federal courts, some state courts apply strict scrutiny to sex-based discrimination claims brought under state

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defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property."); GA. CONST. art. I, § 1, para. II ("Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."); Franklin v. Hill, 264 Ga. 302, 304–05 (Ga. 1994) (holding that a state seduction statute, analyzed under intermediate scrutiny, violated the state equal protection clause); HAW. CONST. art. I, § 3 ("Equality of rights under the law shall not be denied or abridged by the State on account of sex."); ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); IOWA CONST. art I, § I ("All men and women are, by nature, free and equal, and have certain inalienable rights–among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); LA. CONST. art. I, § 3 ("No person shall be denied the equal protection of the laws . . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex . . . ."); MD. CONST. art. XLVI ("Equality of rights under the law shall not be abridged or denied because of sex."); MASS. CONST. pt. I, art. CVI ("Equality under the law shall not be denied or abridged because of sex . . . ."); MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex . . . ."); NEB. CONST. art. I, § 30 ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of . . . sex . . ."); N.H. CONST. pt. I, art. II ("Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex . . . ."); N.J. CONST. art. I, ¶ 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."); N.J. CONST. art. X, ¶ 4 (stating term "persons" includes both sexes); N.M. CONST. art. II, § 18 ("Equality of rights under law shall not be denied on account of the sex of any person."); PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); R.I. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state."); TEX. CONST. art. I, § 3(a) ("Equality under the law shall not be denied or abridged because of sex . . . ."); UTAH CONST. art. 1, § 1 ("All persons have the inherent right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peacefully, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and options, being responsible for the abuse of that right."); VA. CONST. art. I, § 11 ("[T]he right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."); WASH. CONST. art. XXXI, § 1 ("Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

243. *See* MO. CONST. art. VII, § 10 ("No person shall be disqualified from holding office in this state because of sex."); NEV. CONST. art. 1, § 21 ("The State of Nevada and its political subdivisions shall recognize marriages and issue marriage licenses to couples regardless of gender."); OKLA. CONST. art. 2, § 36A ("The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting."); UTAH CONST. art. IV, § 1 ("The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."); WYO. CONST. art. I, § 3 ("Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.").

constitution equal protection guarantees or equal rights amendments.[244] Some state courts have noted that when states go to the trouble of amending their constitutions to prohibit discrimination based upon sex, the protection offered by these amendments must be more sweeping than that of the federal Constitution.[245] Thus, the existence of state equal rights amendments are used to justify, in part, a higher degree of judicial scrutiny than is afforded under the federal Constitution.[246] State courts in California,[247] Connecticut,[248] Hawaii,[249] Illinois,[250] Maryland,[251] Massachusetts,[252] New

244. *E.g.*, Thomka v. Mass. Interscholastic Athletic Ass'n, No. 051028, 2007 WL 867084, at *7, 2007 LEXIS 83, at *21 (Mass. Super. Ct. Feb. 12, 2007), *vacated on other grounds*, 80 Mass. App. Ct. 1105, 2011 WL 3802192, at *1, 2007 LEXIS 83, at *21 (Mass. App. Ct. 2011) (applying strict scrutiny for sex-based discrimination under the Massachusetts Equal Rights Amendment) (citing Brackett v. Civil Serv. Comm'n, 850 N.E.2d 533, 547 (Mass. 2006)).

245. *See* Rand v. Rand, 374 A.2d 900, 903 (Md. 1977) ("[B]y ratifying 'the broad, sweeping, mandatory language' of the amendment, the citizens 'intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests.'") (citing Darrin v. Gould, 540 P.2d 882, 889 (Wash. 1975)); Pennsylvania v. Butler, 328 A.2d 851, 855 (Pa. 1974) (noting that because of the state equal rights amendment, "[i]n this Commonwealth, sex may no longer be accepted as an exclusive classifying tool").

246. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) (applying strict scrutiny to a ban on same-sex marriage under the state constitution based, in part, on the enactment of a state equal rights amendment), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

247. *See, e.g.*, Arp v. Workers' Comp. Appeals Bd., 563 P.2d 849, 855 (Cal. 1977) (en banc) (applying strict scrutiny to statute denying a widower presumptive dependence on his wife, who died during the course of employment, for workers' compensation where the presumption was granted to similarly situated widows); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539 (Cal. 1971).

248. *See, e.g.*, Page v. Welfare Comm'r, 365 A.2d 1118, 1122–24 (Conn. 1976) (applying strict scrutiny to the administrative classification distinguishing husband and wife in computations concerning a legally liable child's duty to contribute to the support of parents).

249. *See, e.g.*, HAW. CONST. art. I, § 3 ("Equality of rights under the law shall not be denied or abridged by the State on account of sex."); *Baehr*, 852 P.2d at 67 (plurality opinion) (citing Frontiero v. Richardson, 411 U.S. 677 (1973)) (applying strict scrutiny to the ban on same-sex marriage under the state constitution based on federal equal protection jurisprudence and the enactment of a state equal rights amendment); *see also* Doe v. Maher, 40 Conn. Supp. 394, 448 (Conn. Super. Ct. 1986) (stating that the standard for judicial review of sex classifications is "at the very least" strict scrutiny).

250. *See, e.g.*, Estate of Hicks, 675 N.E.2d 89, 93 (Ill. 1996) (finding an equal protection violation under strict scrutiny when a statute permitted only a mother and her descendants to inherit from an intestate child born out of wedlock who died without a surviving spouse or descendants); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974) (applying strict scrutiny to sex-based classifications because the equal rights amendment intended to expand rights conferred under the state equal protection provision).

251. *See, e.g.*, *In re* Roberto d.B., 923 A.2d 115, 122 n.13 (Md. 2007) (noting that the Maryland Supreme Court has applied a strict scrutiny standard when reviewing gender-based discrimination claims); Giffin v. Crane, 716 A.2d 1029, 1037 (Md. 1998) ("sex is not, and can not be, a factor in the enjoyment or the determination of legal rights."); Murphy v. Edmonds, 601 A.2d 102, 109 n.7 (Md. 1992) (holding that sex-based classifications are suspect and subject to strict scrutiny due to the passage of a state equal rights amendment).

252. *See, e.g.*, Dupont v. Comm'r of Corr., 861 N.E.2d 744, 757 (Mass. 2007) (explaining that in Massachusetts, sex-based classifications are, "like race-based classification[s] under Federal law, subject to strict scrutiny"); Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980) (applying strict scrutiny to a statute that allowed a child born out of wedlock to inherit from her mother just as though she were "legitimate," but placed conditions on the child's ability to inherit from her father); Attorney Gen. v.

Mexico,[253] and West Virginia[254] have all applied strict scrutiny by construing the provisions of their state constitutions to confer suspect status to sex classifications. Other courts have concluded that, because of the "immutability" of sex, historical discrimination against women, and legislative protection against sex discrimination, classifications based on sex require strict scrutiny.[255] For example, the Hawaii Supreme Court held that the denial of marriage licenses to same-sex couples amounts to a sex-based classification, or suspect class, thereby triggering strict scrutiny review under the state constitution.[256] In contrast, Texas has viewed the implementation of an equal rights amendment as an indication that strict scrutiny should be used only in challenges brought under the equal rights amendment itself.[257]

Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 291, 296 (Mass. 1979) (finding a state equal protection violation under strict scrutiny when a state athletic association rule prohibited male athletes from playing on females' team, even though females were permitted to play on males' team if that sport was not offered for females); *see also* Thomka v. Mass. Interscholastic Athletic Ass'n, No. 051028, 2007 WL 867084, at *8, 2007 LEXIS 83, at *22 (Mass. Super. Ct. Feb. 12, 2007) (applying strict scrutiny and concluding that MIAA Rule 43.2.1.1 violated the state equal rights amendment because it provided female golfers with only one individual and one team championship annually, while allowing male golfers to have two such championships annually).

253. *See, e.g.*, N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 853–56 (N.M. 1998) (applying strict scrutiny and finding an equal protection violation under the state equal rights amendment when a statute prohibited state funding of medically necessary abortions, except in limited circumstances, for Medicaid-eligible women).

254. *See, e.g.*, Peters v. Narick, 270 S.E.2d 760, 765–67 (W. Va. 1980) (finding sex-based classifications suspect under state equal protection because: (1) sex is an immutable characteristic; (2) women have suffered historical discrimination; and (3) the state legislature had taken actions to eliminate sex-based discrimination).

255. *Id.* at 765–66 (citations omitted) (holding that "[i]t is readily apparent that gender, like other classifications previously designated as suspect, possesses certain of these indicia of suspectness. Gender is biologically permanent. It is an obvious and easily recognizable characteristic which, like race, can carry with it a stigma of inferiority. . . . This long-standing and comprehensive system of discriminatory laws directed toward women should compel the strictest possible judicial scrutiny of its remaining vestiges.").

256. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (subjecting a statute banning same-sex marriage to strict scrutiny as a sex-based classification under the state constitution), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015). *But see* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (upholding a statute that prohibited same-sex marriage under a rational basis test).

257. *See In re* Unnamed Baby McLean, 725 S.W.2d 696, 697 (Tex. 1987) ("We decline to give the Texas Equal Rights Amendment an interpretation identical to that given state and federal due process and equal protection guarantees. . . . If the due process and equal protection provisions and the Equal Rights Amendment are given identical interpretations, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility."); *see also* Lens Express, Inc. v. Ewald, 907 S. W.2d 64, 69 (Tex. App. 1995) (noting that sex-based classifications warranted strict scrutiny review under the state equal rights amendment); Messina v. Texas, 904 S.W.2d 178, 180 (Tex. App. 1995) ("The Texas Equal Rights Amendment requires that courts subject sex-based classifications to strict judicial scrutiny.").

IV. SEXUAL ORIENTATION-BASED CLASSIFICATIONS

Section A of this Part addresses the Equal Protection Clause of the federal Constitution. Section B of this Part discusses state constitutions.

A. FEDERAL CONSTITUTIONAL ANALYSIS

First, this section examines the rational basis review for sexual orientation-based classifications as established in *Romer v. Evans*.[258] The section then explores the Supreme Court's analysis of a sexual orientation-based equal protection claim in *Lawrence v. Texas*.[259] Finally, the section examines how lower courts have applied the *Romer* standard to sexual orientation-based discrimination claims in the context of employment, adoption, and same-sex marriage.

In *Romer v. Evans*, the Supreme Court established that sexual orientation-based classifications are subject to rational basis review.[260] The Court's analysis assumed that a more stringent standard is not required, because sexual orientation is not a suspect class.[261] As such, lower courts that subjected sexual orientation classifications to a higher standard of review were reversed on appeal.[262]

Rational basis review requires that discrimination based on sexual orientation bear a rational relationship to a legitimate governmental purpose.[263] Many governmental purposes have been deemed legitimate by courts upholding government-sponsored sexual orientation-based classifications, such as national

258. 517 U.S. 620, 631–32 (1996).

259. 539 U.S. 558 (2003).

260. Romer v. Evans, 517 U.S. 620 (1996); *see also Obergefell*, 576 U.S. at 661 (citing *Romer* as a landmark case enhancing protections against discrimination based on sexual orientation); U.S. v. Windsor, 570 U.S. 744, 768 (2013) (referencing *Romer* in its discussion of why DOMA is subject to particularly careful consideration).

261. Romer, 517 U.S. at 631 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *cf.* Cook v. Rumsfeld, 429 F. Supp. 2d 385, 396–97 (D. Mass. 2006) ("[N]o controlling case has held that homosexuals . . . constitute a 'suspect class' for equal protection purposes. Indeed, in two cases where it might have agreed to such a holding, *Romer* and *Lawrence*, the Supreme Court . . . avoided doing so."); Able v. United States, 968 F. Supp. 850, 862 (E.D.N.Y. 1997) (noting that the *Romer* court failed to reach the question of whether "laws that are not overtly based on irrational prejudice but discriminate against gay men and lesbians warrant . . . heightened scrutiny" because "the law in that case discriminating against homosexuals could not withstand the most minimal scrutiny").

262. *See, e.g.*, *Able*, 968 F. Supp. at 862 (holding that homosexuals should have heightened protection under the Equal Protection Clause), *rev'd*, 155 F.3d 628, 634–35 (2d Cir. 1998) (noting that *Romer* analysis does not apply because of the military setting of the case); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 440 (S.D. Ohio 1994) (holding that homosexuals are a group warranting intermediate scrutiny), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *reinstated*, 128 F.3d 289, 292–93 (6th Cir. 1997) (holding that homosexuals are subject to rational basis review under Bowers v. Hardwick, 478 U.S. 186 (1986), and its progeny). Note that the Ninth Circuit applied heightened scrutiny prior to the Supreme Court's decision in *Obergefell*; *see* SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 484 (9th Cir. 2014).

263. *Heller*, 509 U.S. at 320. *See also supra*, Part II.B.3.

security,[264] preserving public order,[265] protecting heterosexual marriage and families,[266] favoring procreation,[267] combating disease,[268] and preserving public morality.[269] Despite its broad deference in finding that governmental objectives are legitimate, the Supreme Court has consistently held that the "bare . . . desire to

264. *See* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (holding that national security is a legitimate state interest); Thomasson v. Perry, 80 F.3d 915, 925–29 (4th Cir. 1996) (upholding "Don't Ask, Don't Tell" policy under rational basis analysis in which the government asserted national security as an interest); High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 574–76 (9th Cir. 1990) (applying rational basis review and upholding a policy on granting security clearance that discriminated against gays on the grounds that their social position might make them disloyal to their country), *implied overruling recognized by SmithKline*, 740 F.3d 471.

265. *See Thomasson*, 80 F.3d at 929 (holding that National Defense Authorization Act did not violate the Equal Protection Clause, because the Act was rationally related to Congress' legitimate state interest in good order and discipline); Beller v. Middendorf, 632 F.2d 788, 811–12 (9th Cir. 1980), *overruling recognized by* Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008) (holding that the need for order in the military, combined with the potential for sexual tension among crewmembers, is a legitimate government concern).

266. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (noting that "preserving the traditional institution of marriage" is a legitimate state interest); Lofton v. Kearney, 157 F. Supp. 2d 1372, 1384 (S.D. Fla. 2001) (holding that a Florida statute barring homosexuals from adopting children did not violate the Equal Protection Clause because it was rationally related to the state's legitimate interest of placing adopted children in homes with a married mother and father); Baker v. Nelson, 191 N. W.2d 185, 186 (Minn. 1971) (noting that the historical definition of marriage has more of a foundation than any contemporary same-sex construction, and the historical definition should not be restructured by the judiciary); *In re* Cooper, 592 N.Y.S.2d 797, 799–800 (N.Y. App. Div. 1993) (applying rational basis review and upholding the state's elective share law's requirement that the petitioner be married to the decedent to file suit). This purpose was rejected by the Court in its decision in *Obergefell*. 576 U.S. at 647–48.

267. *Baker*, 191 N.W.2d at 186 (upholding a denial of same-sex marriage licenses because of a legitimate state interest in marriage between a man and a woman as uniquely involving procreation); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[T]he refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'").

268. State v. Walsh, 713 S.W.2d 508, 512–13 (Mo. 1986), *rev'd*, *Lawrence*, 539 U.S. 558. This purpose was rejected by the Court in *Obergefell*. 576 U.S. at 660–61 ("We need not refer to medical literature to suggest . . . that there might rationally be health ramifications to anal intercourse and/or oral-genital sex . . . [and that] the General Assembly could have reasonably concluded that the general promiscuity characteristic of the homosexual lifestyle made such acts among homosexuals particularly deserving of regulation . . . ."); Lawrence v. State, 41 S.W.3d 349, 357–59 (Tex. Crim. App. 2001) (holding that a statute criminalizing "deviate sexual intercourse" did not violate the defendant's Fourteenth Amendment rights, despite the statute's disparate impact on homosexuals, because it was rationally related to state interests in public health and preserving public morals).

269. Williams v. Morgan, 478 F.3d 1316, 1323 (11th Cir. 2007) (citing Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 358 F.3d 804, 819 n.17 (11th Cir. 2004)) (distinguishing *Lawrence*, the Eleventh Circuit held that "public morality survives as a rational basis for legislation"); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1346–47 (Wash. 1977) (holding that a school district's dismissal of a homosexual teacher was not in violation of equal protection law, because the presence of a homosexual teacher could create approval and imitation of the homosexual lifestyle among students). *But see Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (citing Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Romer v. Evans, 517 U.S. 620, 634–35 (1996)) ("Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.").

harm a politically unpopular group" is not a legitimate governmental purpose,[270] and if some form of government action that classifies LGB people differently than others is deemed to have been fueled by animus, it will be struck down as a violation of the Equal Protection Clause.[271]

In *United States v. Windsor*, the Court held that the restriction of "marriage" and "spouse" to heterosexual unions by Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional under the Due Process Clause.[272] Although *Windsor* was not based on the Equal Protection Clause, federal courts began applying a heightened scrutiny standard following the decision.[273]

Leading up to the Court's landmark ruling in *Obergefell v. Hodges*, the circuits were split on same-sex marriage. For example, the Fourth and Seventh Circuits held that same-sex marriage bans were unconstitutional violations of the Equal Protection Clause,[274] while the Sixth Circuit held that the ban was constitutional.[275]

In *Obergefell*, the Court held that the Fourteenth Amendment guarantees the right to marriage for same-sex couples based on substantive due process concerns as well as equal protection.[276] Although Justice Kennedy hinted at the possibility of sexual orientation appropriately being labeled a suspect class in *Obergefell*, the Court did not use this label and did not clearly indicate what level of scrutiny was appropriate to apply to discrimination on the basis of sexual orientation.[277] This lack of clarity has sparked much debate since the ruling.[278]

1. The Rational Basis Review Standard Established in *Romer v. Evans*

In *Romer v. Evans*, the Supreme Court struck down a Colorado state constitutional amendment that revoked the protection of antidiscrimination laws for LGB

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270. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (citing *Moreno*, 413 U.S. at 534); *see also* Goldstein v. Pataki, 488 F. Supp. 2d 254, 284 (E.D.N.Y. 2007) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985)) ("[S]ome objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests.").

271. *Romer*, 517 U.S. at 632 (holding that animus is not a legitimate legislative purpose).

272. United States v. Windsor, 570 U.S. 744, 775 (2013).

273. Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014); SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (citing J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 (1994)) ("[G]ays and lesbians are no longer a 'group or class of individuals normally subject to 'rational basis' review.'").

274. *See* Bostic v. Shaefer, 760 F.3d 352, 384 (4th Cir. 2014) (holding same-sex marriage ban unconstitutional in violation of the Equal Protection Clause); Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014) (holding same-sex marriage ban unconstitutional).

275. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (holding the ban on same-sex marriage constitutional).

276. Obergefell v. Hodges, 576 U.S. 644, 674–75 (2015).

277. *Id.* at 657, 672–73 (using the term "immutable" when referring to sexual orientation and comparing the laws banning same-sex marriage to "invidious sex-based classifications in marriage [that] remained common through the mid-20th century").

278. *See generally* Ira Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L.L. REV. 1 (2015).

people in the state.[279] As enacted, Colorado's Amendment 2 read:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[280]

Colorado argued first that the statute furthered the state's interest in freedom of association, religious freedom, and conservation of resources to fight discrimination against suspect classes, and second, that the amendment did not implicate the Equal Protection Clause, because it only created a ban on providing special rights.[281] The Colorado court applied a strict scrutiny test and found that the amendment was unconstitutional.[282]

The Supreme Court affirmed the Colorado Supreme Court's ruling, but found that the statute was unconstitutional under rational basis review.[283] The Court held that the rational relationship requirement exists to ensure that invidious intent is not the foundation for legislative classifications,[284] that to narrowly single out one category of persons and subject that category to a blanket denial of governmental protections could not rationally serve any legitimate interest,[285] and that the lack of a rational relationship to any legitimate interest indicated that Amendment 2 was motivated by invidious intent.[286] Colorado's proffered state interests in freedom of association, religious freedom, and conservation of resources to fight discrimination against suspect classes were all rejected by the Court.[287] The Court also dismissed the notion that the amendment denied LGB people only "special" rights.[288] In the majority opinion, Justice Kennedy found that Amendment 2 withheld protections that "constitute ordinary civic life in a free society."[289]

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279. 517 U.S. 620 (1996).

280. COLO. CONST. art. II, § 30b (repealed 1996).

281. *Romer*, 517 U.S. at 626, 635.

282. Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994) ("The state has failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way.").

283. *Romer*, 517 U.S. at 635–36.

284. *Id*. at 634–35.

285. *Id*. at 635.

286. *Id*. at 632 ("[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus.").

287. *Id*. at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").

288. *Id*. at 631.

289. *Id*. at 631.

Justice Scalia dissented in *Romer*, arguing that Colorado's desire to preserve traditional sexual mores was a sufficiently legitimate justification for Amendment 2 to survive rational basis review.[290] Justice Scalia also expressed doubt as to whether the Equal Protection Clause was implicated at all by Amendment 2 because he, unlike the majority, believed that it withheld only special rights, not equal rights.[291] Justice Scalia also argued that *Bowers v. Hardwick*[292] countenanced the state's denial of protection to LGB people.[293]

There is disagreement over what *Romer's* implications are for sexual orientation classifications under the Equal Protection Clause. Some commentators have argued that *Romer* actually used a level of scrutiny higher than rational basis, which may portend at least quasi-suspect status for gay, lesbian and bisexual persons in future equal protection cases.[294] The history of interpretation of the Equal Protection Clause supports this position, given that gender and illegitimacy received quasi-suspect classification only after first being treated with a heightened form of rational basis review.[295] Additionally, some commentators argue that by emphasizing the over-inclusive and under-inclusive nature of Amendment 2, the Court abdicated the traditional rational basis scrutiny test and introduced an element of heightened scrutiny.[296]

Another explanation of *Romer* is that the Court applied a fourth level of scrutiny, "rational basis with [bite]."[297] Under this test, the Court scrutinizes the rationality of the nexus between the professed legislative purpose behind discriminatory legislation and the means chosen without conjecture as to additional purposes.[298] This standard of review has never been explicitly acknowledged by the Court, but it was applied in three cases prior to *Romer*: *Department of Agriculture v. Moreno*,[299] *Plyler v. Doe*,[300] and *City of Cleburne v. Cleburne*

290. *Id.* at 636 (Scalia, J., dissenting).

291. *Id.* at 637–39.

292. Bowers v. Hardwick, 478 U.S. 186 (1986) (holding state law criminalizing sodomy did not violate the Due Process Clause), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that the laws seeking to control personal relationships and private conduct in an individual's home encroach upon the liberty protected by due process).

293. *Romer*, 517 U.S. at 641.

294. *See* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J. 89, 137–38 (1997) (arguing that *Romer* is a step in the right direction, despite the fact that the Court did not hold that sexual orientation is a suspect classification).

295. *See* Trimble v. Gorden, 430 U.S. 762, 767 (1977) (rejecting strict scrutiny for classifications based on illegitimacy); *see also* Lanier v. Rains, 229 S.W.3d 656, 666 (Tenn. 2007) (discussing *Trimble* and the heightened form of rational basis review used for illegitimacy).

296. *See, e.g.*, Jerald W. Rogers, Note, Romer v. Evans*: Heightened Scrutiny Has Found a Rational Basis—Is the Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals?*, 45 U. KAN. L. REV. 953, 959 (1997) (noting that strict scrutiny review examined "whether the means of achieving the ends have been narrowly tailored in such a way as to avoid over- or under-inclusiveness").

297. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 260 (1996).

298. GUNTHER & SULLIVAN, *supra* note 66, at 647.

299. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–36 (1973) (holding that the "unrelated person" classification was invalid because it was not rationally related to a stated government interest).

300. Plyler v. Doe, 457 U.S. 202, 228–30 (1982) (rejecting as unconvincing every objective offered by Texas for refusing education to alien children).

Living Center.[301] It is interesting to note that *Plyler* and *Cleburne* are not cited in the *Romer* opinion,[302] while *Moreno* is cited[303] along with other cases applying the ordinary rational basis test.[304]

The question of whether "rational basis with bite" review exists was analyzed in *Cook v. Rumsfeld*,[305] where the District Court of Massachusetts conducted an extensive search for such an "active" rational basis review.[306] The plaintiffs in *Cook* were openly non-heterosexual service members who were separated from the military pursuant to "Don't Ask Don't Tell" and alleged that the state interest, "unit cohesion," was a pretext for animus.[307] Therefore, they wanted a "more searching review" that would inquire into the government's proffered justifications.[308] To support their claim, the plaintiffs relied principally on *Romer*, *Cleburne*, and *Moreno*, and on Justice O'Connor's concurring opinion in *Lawrence v. Texas*.[309] The district court noted that if such a test does exist, it was only employed by the Supreme Court "in a limited number of cases, all of which invalidated challenged legislative acts under equal protection theory."[310]

The district court stated that "it is far from clear" whether the cases the plaintiffs relied upon applied anything other than the traditional rational basis test.[311] In *Heller v. Doe*,[312] the Supreme Court discussed how it had applied the

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301. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 433 (1985) (holding that a council's proffered reasons for rejecting a housing permit for intellectually disabled individuals were unconvincing and seemingly pretext for irrational prejudice against the intellectually disabled).

302. Farber & Sherry, *supra* note 297, at 264.

303. Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting *Moreno*, 413 U.S. at 534) (emphasis in original) ("[T]he disadvantage imposed is born of animosity toward the class of persons affected. 'If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'")

304. *Id.* at 632 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486–88 (1955) (applying minimal scrutiny to hold that a state law requiring a prescription from an optometrist or ophthalmologist "to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer" was rationally related to the welfare of the people)); Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (applying minimal scrutiny to hold that a law that prohibited advertising on vehicles using the streets was rationally related to its purpose of keeping the streets safe and free from distraction)).

305. Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006).

306. *Id.* at 403–06.

307. *Id.* at 403.

308. *Id.*

309. *Id.*

310. *Id.*; *see* Romer v. Evans, 517 U.S. 620 (1996) (holding that the Colorado constitutional amendment violated equal protection under rational basis review); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (applying rational basis review and invalidating, on equal protection grounds, the need for a permit for a group home for people with intellectual disabilities); Dep't of Agric. v. Moreno, 413 U.S. 528, 544–45 (1973) (applying rational basis review on equal protection grounds and invalidating the provision of the Food Stamp Act which precluded "unrelated persons" from participation).

311. 429 F. Supp. 2d 385, 404 (D. Mass. 2006).

312. *Id.* (citing Heller v. Doe, 509 U.S. 312 (1993)).

deferential rational basis review in two cases involving the mentally ill.[313] In *Moreno*, a traditional standard was employed to invalidate a law "wholly without any rational basis."[314] However, in *Plyler*, the Supreme Court noted that undocumented immigrants are not a suspect class and education is not a fundamental right, yet patched together bits and pieces of what may be termed quasi-suspect class and quasi-fundamental rights analysis.[315] In *Lawrence*, Justice O'Conner explicitly stated that when laws exhibit a bare "desire to harm a politically unpopular group," the Supreme Court has "applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[316]

In *Cook*, the district court was unconvinced that there was "a bare . . . desire to harm a politically unpopular group," and found Congress' express purpose, national security, to be rational.[317] Similarly, *Trump v. Hawaii,* where Presidential Proclamation No. 9645 placed entry restrictions on the nationals of eight foreign states, passed rational basis review through the court's finding that there was a legitimate government interest in national security, rather than a mere implementation of a desire to harm a politically unpopular group.[318]

It is still unclear whether this fourth tier of rational basis review exists, and whether it was used in *Romer*[319] or *Obergefell*.[320] It is possible that lurking behind the traditional rational basis review is a more "active," "result-oriented" test that will be triggered when there is a bare desire to harm a politically unpopular group, especially when such a group is unable to rely upon the protection of intermediate or strict scrutiny because of the criteria for those standards of review.[321]

313. *Heller*, at 321 (citing *Cleburne*, 473 U.S. at 432; Schweiker v. Wilson, 450 U.S. 221, 234 (1981)) ("We have applied rational-basis review in previous cases involving the intellectually disabled and the mentally ill.").

314. *Moreno*, 413 U.S. at 538.

315. Plyler v. Doe, 457 U.S. 202, 244 (1982) (Burger, J., dissenting) ("[T]he Court spins out a theory custom-tailored to the facts of these cases . . . If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.").

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

317. Cook v. Rumsfeld, 429 F. Supp. 2d 385, 405 (D. Mass. 2006) (holding that Congress's purpose was "to assure the effectiveness of the armed forces").

318. Trump v. Hawaii, 138 S. Ct. 2392, 2402, 2420 (2018).

319. *But see* Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2389 (2007) ("The Court has never applied intermediate scrutiny to strike down a law discriminating against gays in general or against same-sex couples in particular. The closest it has come to doing so was in *Romer v. Evans*, where the Court applied a form of rational-basis scrutiny sometimes called 'rational basis with bite.'").

320. See *infra*, Part IV.A.3.

321. *Cook*, 429 F. Supp. 2d at 403–05 (examining the possibility that a more "active" rational basis test may exist in a limited number of circumstances); *Plyler*, 457 U.S. at 238 (Powell, J., concurring) ("The classification at issue deprives a group of children of the opportunity for education . . . simply . . . due to a violation of law by their parents."); *see* Buchanan, *supra* note 68, at 1278 ("Where state action is understood to deprive plaintiffs of sexual liberty in a way that discriminates on the basis of sexual orientation . . . [courts have applied] a 'more searching' standard of rational-basis review . . . ").

2. *Lawrence v. Texas*: The Supreme Court's Post-*Romer* Analysis of a Sexual Orientation-Based Equal Protection Claim

In *Lawrence v. Texas*, the Supreme Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause.[322] The Court's decision in *Lawrence* established that individuals have a right to make decisions concerning the intimacies of their personal relationships,[323] overruling its decision in *Bowers v. Hardwick*,[324] which had permitted Georgia to criminalize sodomy.

The Court held that the argument that the statute was voidable under *Romer* was tenable.[325] However, the court concluded that if the statute were found "invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[326]

Justice O'Connor agreed with the disposition of *Lawrence* but did not join the Court in invalidating the statute on due process grounds.[327] In a concurring opinion, she wrote that the statute instead violated equal protection by discriminating between heterosexuals and non-heterosexuals.[328] O'Connor found that, like Amendment 2 in *Romer*, the Texas sodomy law "singled out homosexuals 'for disfavored legal status.'"[329]

3. The Courts of Appeals' and District Courts' Application of *Romer* to Sexual Orientation-Based Discrimination Claims

The rational basis level of review established in *Romer* has been utilized by Courts of Appeals and District Courts to analyze sexual orientation-based discrimination in a variety of contexts. Beyond *Romer*, sexual orientation-based equal protection claims have been raised in the contexts of so-called "special" rights for LGB people in employment, adoption, and same-sex marriage.

a. Special Rights. The Sixth Circuit considered the impact of *Romer* and special rights for LGB individuals in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.[330] An amendment to Cincinnati's city charter, similar to Colorado's Amendment 2, voided previously enacted ordinances prohibiting

322. 539 U.S. 558, 558 (2003).
323. *See id.* at 578.
324. 478 U.S. 186 (1986).
325. *Lawrence*, 539 U.S. at 574.
326. *Id.* at 575.
327. *Id.* at 579 (O'Connor, J., concurring).
328. *Id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)) ("Under our rational basis standard of review, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'").
329. *Id.* at 584 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).
330. 128 F.3d 289 (6th Cir. 1997).

discrimination based on sexual orientation.[331] The Sixth Circuit applied rational basis review and upheld the city charter amendment, finding that the amendment "did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians."[332] The court distinguished *Equality Foundation* from *Romer* by citing *Romer*'s broader, state-wide impact and by claiming that the charter amendment dealt with special rights, while *Romer* dealt with a statute denying equal rights.[333] The Supreme Court denied certiorari and gave no opinion as to the merits, but in an unusual explanation for the denial of certiorari, Justices Stevens, Souter, and Ginsburg expressed that the denial rested on the fact that *Equality Foundation* was a poor vehicle for Supreme Court consideration and should not be interpreted as the Court's agreement with the Sixth Circuit's decision.[334] Because Supreme Court denials of certiorari are normally cursory, the explanation suggests that at least three of the dissenting Justices may have felt that *Equality Foundation* did not comport with *Romer*.[335]

b. Employment. The Equal Protection Clause has also been used to challenge discriminatory employment decisions against LGB people. In *Shahar v. Bowers*,[336] for example, the Georgia State Attorney General's office withdrew an offer of employment to a staff attorney after discovering her intent to marry another woman.[337] The court did not find an equal protection violation because the withdrawal of the job offer was not necessarily due to the plaintiff's sexual orientation or preference, as was condemned in *Romer*, but rather was due to her conduct as a lesbian, in choosing to marry another woman.[338]

Although the Constitution may not be particularly helpful for LGB employees, there are still statutory remedies available. The Equal Employment Opportunity Commission (the "EEOC"), through agency adjudication, has held that employment discrimination on the basis of an employee's sexual orientation is

331. *Compare id.* at 291 (citing CINCINNATI, OHIO, AMEND. art. XII (Nov. 2, 1993)) ("The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment."), *with* Romer v. Evans, 517 U.S. 620, 624 (1996) (citing COLO. CONST. art. II, § 30b) ("Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.").

332. *Equal. Found. of Greater Cincinnati*, 128 F.3d at 301.

333. *Id.* at 300–01.

334. Linda Greenhouse, *Justices Leave Intact Anti-Gay Measure,* N.Y. TIMES, Oct. 14, 1998, at A19.

335. *Id.* ("In an opinion by Justice Scalia, the three Justices said that citizens at the local level should be free to decide 'in democratic fashion, not to accord special protection to homosexuals'").

336. 114 F.3d 1097, 1110 (11th Cir. 1997).

337. *Id.* at 1101.

338. *Id.* at 1110.

discrimination on the basis of sex under Title VII and thus violates the Civil Rights Act.[339] During the appeal of the Federal Aviation Administration's decision to dismiss a complaint of unlawful employment discrimination, the EEOC held that discrimination on the basis of sexual orientation involves the inherent differential treatment of an employee on the basis of that individual's sex and gender stereotypes, which Title VII is meant to protect against.[340] In *Bostock v. Clayton County*, the Supreme Court affirmed the EEOC's decision.[341] The Court agreed with the EEOC's rationale that sex has played a "necessary and undisguisable role" in the termination of employment, exactly the type of discrimination that Title VII was designed to forbid.[342] Title VII prohibits employers from taking certain actions "because of" sex, and as the Court previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'[343] and that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex."[344] The Court reasoned that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[345] This 6-3 decision written by Justice Gorsuch represents a remarkable victory for the gay and transgender people and arguably has a broader implication that the Court may apply heightened scrutiny to review future equal protection claims based on sex orientation.

c. Adoption. In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit applied the *Romer* analysis and upheld a Florida statute prohibiting adoption by a gay person.[346] The court found that the statute triggered rational basis review and that the statute was rationally related to Florida's interest in furthering the best interests of adopted children.[347] The appellants in *Lofton* argued that Florida's law punished homosexual couples exercising the right established by the *Lawrence* court.[348] The Eleventh Circuit distinguished *Lofton* from *Lawrence* by stating that adoption is a privilege and not a right, and that Florida's statute was civil rather than criminal.[349] The court also asserted that the statute furthered the legitimate state interest in encouraging the optimal family structure.[350] The statute was later struck down by a state court applying

339. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 at 15 (July 16, 2015).
340. *Id.* at 14.
341. 140 S. Ct. 1731, 1754 (2020).
342. *Id.* at 1737.
343. *Id.* at 1739 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)).
344. *Id.* at 1741.
345. *Id.*
346. 358 F.3d 804, 826–27 (11th Cir. 2004). *But see* Fla. Dep't of Children and Families v. Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010) (finding the statute in violation of the equal protection provision of the Florida Constitution).
347. *Lofton*, 358 F.3d at 818, 820.
348. *Id.* at 809, 815.
349. *Id.* at 809, 811–12, 817.
350. *Id.* at 819–20.

rational basis review under the Florida Constitution's Equal Protection Clause.[351]

In *Fulton v. City of Philadelphia*, the Supreme Court exercised strict scrutiny review[352] and held that a city's refusal to contract with a religious foster care agency due to its provision not to certify same-sex couples in foster services violated the First Amendment.[353] The Court reasoned that the government burdened the foster agency's religious exercise by imposing the contractual non-discrimination policies that do not meet the requirements of being neutral and generally applicable.[354] The Court explained that "[a] law lacks general applicability if it prohibits religious conduct while permitting secular conduct."[355] The Court concluded that the city's interest in the equal treatment of foster parents and foster children was not a compelling interest that justified the city's burdening of agency's free exercise rights.[356]

d. Same-Sex Marriage. After multiple district and circuit courts held that the prohibition of same-sex marriage violated equal protection under the *Romer* rationale,[357] the Supreme Court issued two groundbreaking decisions confirming the unconstitutionality of same-sex marriage bans. In *United States v. Windsor*, the Court held that excluding homosexual couples from the definition of "marriage" and "spouse" in Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional under the Due Process Clause.[358] The Court did not clarify the level of scrutiny required for same-sex marriage prohibitions.[359] As such, federal district courts continued to apply rational basis scrutiny after *Windsor*.[360]

Obergefell v. Hodges conclusively expanded upon the scope of *Windsor* by holding that same-sex couples across the nation have a right to marry.[361] In his passionate majority opinion, Justice Kennedy held that "the right to marry is a fundamental right inherent in the liberty of the person," protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[362]

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351. Fla. Dep't of Child. & Fams. v. Adoption of X.X.G., 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).

352. 141 S. Ct. 1868, 1882 (2021) (reasoning that the non-discrimination requirement in Philadelphia's standard foster care contract was not generally applicable, and thus was subject to strict scrutiny).

353. *Id.*

354. *Id.* at 1877.

355. *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–33 (1993)).

356. *Id.* at 1881–82.

357. *See* Gill v. U.S. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 397 (D. Mass 2010), *aff'd sub nom.*, Massachusetts v. U.S. Dep't of Health & Human Services, 682 F.3d 1, 15–16 (1st Cir. 2012), *cert. denied*; Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 995 (N.D. Cal. 2012), *appeal dismissed* (holding that Section 3 of DOMA violated equal protection on heightened scrutiny, or alternatively on rational basis review).

358. 570 U.S. 744, 775 (2013).

359. *Id.* at 793–94.

360. *See* Monica Hof Wallace & Christopher Gerald Otten, *Marriage Equality: The "States" of the Law Post Windsor and Perry*, 16 LOY. J. PUB. INT. L 239, 264 (2004).

361. 576 U.S. 644, 674–75 (2015).

362. *Id.*

State prohibitions on same-sex marriage violated both provisions of the Fourteenth Amendment and its protection of "personal choices central to individual dignity and autonomy," in which the intimate choice of engaging in a marital relationship is included.[363] Although the decision affirmed that the Fourteenth Amendment guarantees the right to marriage for same-sex couples, the Court yet again did not specify whether sexual orientation is a suspect class or what level of review it was applying.[364] The Court's references to the "immutable nature" of sexual orientation and the outdated "invidious sex-based classifications in marriage" imply that sexual orientation is a suspect class, but it remains uncertain when and how the critical questions of suspect-class treatment and the level of scrutiny will be clarified, particularly given the influx of First Amendment challenges to *Obergefell* from states.[365]

B. STANDARDS OF REVIEW UNDER STATE CONSTITUTIONS

Most states have followed the federal standard and have found that sexual orientation is not a suspect or quasi-suspect classification.[366] Before *Obergefell*, many state courts upheld sexual orientation-based classifications under rational basis review. For example, courts in Arizona,[367] New York,[368] Minnesota,[369] Indiana,[370] Maryland,[371] and Washington[372] rejected challenges to the exclusion

363. *Id*. at 663.

364. *Id*. at 674–75.

365. *See* Chris Johnson, *One Year After Marriage Ruling, Pockets of Defiance Remain*, WASH. BLADE (June 22, 2016), http://www.washingtonblade.com/2016/06/22/one-year-after-supreme-court-ruling-pockets-of-marriage-inequality-remain/; *see also* Order Granting Permanent Injunction, Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906 (S.D. Miss. 2014) (enjoining Mississippi State executives from enforcing the unconstitutional ban on same sex marriage following *Obergefell*); Complaint for Declaratory Judgment at 1, Grant v. Anderson (2016) (No. 44859) (challenging Tennessee law relative to marriage licenses as no longer valid following *Obergefell*), aff'd, No. M201601867COAR3CV, 2018 WL 2324359 (Tenn. Ct. App. May 22, 2018).

366. *See* Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 387 (2010).

367. Standhardt v. Super. Ct. *ex rel*. Cnty. of Maricopa, 77 P.3d 451, 465 (Ariz. Ct. App. 2003).

368. Hernandez v. Robles, 855 N.E.2d 1, 10–11 (N.Y. 2006) ("By limiting marriage to opposite-sex couples, [the State] is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike — they are permitted to marry people of the opposite sex, but not people of their own sex.").

369. *See* Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971) (finding no equal protection violation in a state ban on same-sex marriage under rational basis review because the "institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" and classification was not based on "irrational or invidious discrimination").

370. Morrison v. Sadler, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005) ("There was a rational basis for the legislature to draw the line between opposite-sex couples . . . and same-sex couples . . . .").

371. Conaway v. Deane, 932 A.2d 571, 634 (Md. 2007).

372. *See* Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (upholding a same-sex marriage statutory ban under rational basis review); Singer v. Hara, 522 P.2d 1187, 1196–97 (Wash. Ct. App. 1974) (upholding a prohibition on same-sex marriage under rational basis review because marriage was defined as union between man and woman).

of same-sex couples from civil marriage. Other states, however, invalidated the state policies that discriminated on the basis of sexual-orientation classification, including Florida,[373] New Hampshire,[374] and Pennsylvania.[375] These also included states that held sexual orientation to be a suspect class, such as California,[376] Kentucky,[377] and Kansas.[378] Other states classified sexual orientation as a quasi-suspect class and subsequently invalidated the policies based on sexual orientation classifications, including Connecticut[379] and Iowa.[380]

In 2003, the Supreme Judicial Court of Massachusetts became the first court to recognize same-sex marriages.[381] In *Goodridge v. Department of Pub. Health*, the state's highest court found that the state had no rational reason to deny marriage licenses to same-sex couples.[382] In a divided decision, the court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates

373. 10A Fla. Jur. 2d Constitutional Law § 451 (2016). *See* Fla. Dept. of Child. and Fams. v. Adoption of X.X.G., 45 So. 3d 79, 91–92 (Fla. Dist. Ct. App. 2010) (holding under a rational basis standard that the exclusion of homosexuals from adopting children violated the equal protection clause of the Florida Constitution).

374. *See In re* Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (applying rational basis review and finding a state equal protection violation where a portion of a proposed bill would prohibit lesbians and gay men from running licensed day-care centers because "role model theory" was attenuated when employees would have little contact with children).

375. *See* Demarco v. Pa. Liquor Control Bd., 657 A.2d 1359, 1363 (Pa. 1995); *see also* Commonwealth v. Bonadio, 415 A.2d 47, 50–52 (Pa. 1980) (finding an equal protection violation when a deviate sexual intercourse or anti-sodomy statute, which exempted married persons, lacked rational basis to proscribe behavior only when the activity was between unmarried persons).

376. *See* Citizens for Responsible Behavior v. Super. Ct. of Riverside Cnty., 2 Cal. Rptr. 2d 648, 655–56 (Cal. Ct. App. 1991) (finding no rational basis for a ballot initiative repealing existing ordinances that prohibited discrimination against lesbians, gay men, and persons suffering from AIDS, and requiring that, in the future, proposed ordinances that would proscribe discrimination on the basis of sexual orientation or AIDS status must be submitted for voter approval); *see also In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (holding sexual orientation as a suspect class subject to strict scrutiny for the purposes of the California Constitution).

377. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 502 (Ky. 1992) (finding no rational basis for a criminal statute prohibiting consensual homosexual sodomy, even though a majority might find such conduct offensive, because it violated both equal protection and privacy rights).

378. *See* State v. Limon, 122 P.3d 22, 38 (Kan. 2005) (applying rational basis review and striking down the Kansas statute because there can be no legitimate state interest based on majoritarian sexual morality).

379. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); *see* Renee T. Hindo, *Connecticut's Class Divide: Sexual Orientation as a Quasi-Suspect Class*, 87 U. DET. MERCY L. REV. 227, 233 (2010).

380. Varnum v. Brien, 763 N.W.2d 862, 885–86, 893 (Iowa 2009).

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

382. *Id.* at 961 (holding that the limitation of protections, benefits, and obligations of civil marriage to individuals of opposite sexes lacked a rational basis and violated state constitutional equal protection principles).

the Massachusetts Constitution."[383] The court redefined the term "marriage" in the Massachusetts Constitution to mean "the voluntary union of two persons as spouses, to the exclusion of all others" and ordered that the State of Massachusetts recognize the marriage of same-sex couples within six months of the opinion's issuance.[384] The precedential value of *Goodridge* outside of Massachusetts may have been diminished slightly when the court characterized the Massachusetts Constitution as being more "protective of individual liberty and equality than the Federal Constitution . . . ."[385] Therefore, at the time of the *Goodridge* ruling, "no jurisdiction, not even Massachusetts, ha[d] declared that there is a fundamental right to same-sex marriage under the federal or its own constitution."[386]

Other state courts have taken an approach similar to the Sixth Circuit in *Equality Foundation* and interpreted *Romer* narrowly. For example, in *Bailey v. City of Austin*,[387] a Texas court upheld a referendum amendment to a city charter that eliminated employee benefits for domestic partners of government employees, regardless of their sexual orientation. The court distinguished *Bailey* from *Romer* because: (1) there was no evidence of intent to discriminate; (2) the proposition applied to all Texans regardless of their sexual orientation; (3) the proposition did not deal with access to political or judicial redress; and (4) the proposition was rationally related to a legitimate government purpose of recognizing and favoring legally cognizable family relationships.[388]

Some states have applied standards of review very similar to the rational basis test, ranging from Vermont's "uniform standard"[389] to New Jersey's "flexible"

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383. *Id*. at 969.

384. *Id*. at 969–70. Massachusetts has also repealed a 1913 law that had the effect of blocking same-sex marriages involving out-of-state couples. *See* Kevin McNicholas, Scott Malone, *Out-of-State Gay Marriage Closer in Massachusetts*, REUTERS (Jul. 29, 2008, 7:38 PM), https://www.reuters.com/article/us-usa-gaymarriage-massachusetts/out-of-state-gay-marriage-closer-in-massachusetts-idUSN2943059420080730.

385. *Goodridge*, 798 N.E.2d at 948; *see also In re* Kandu, 315 B.R. 123, 139 (Bankr. W.D. Wash. 2004) (refusing to extend *Goodridge* and find that there is a fundamental right to marry, as the Massachusetts Constitution is "more protective of individual liberty and equality than the Federal Constitution").

386. Lewis v. Harris, 908 A.2d 196, 211 (N.J. 2006). Although same-sex marriage is not a fundamental right in New Jersey, after *Lewis*, the Legislature enacted the Civil Union Act, N.J. STAT. ANN. §§ 37:1(28)–(36) (West, 2010), which establishes civil unions for same-sex couples and allows them to wed. *See also* Quarto v. Adams, 929 A.2d 1111 (N.J. Super. Ct. App. Div. 2007). However, in 2008, the California Supreme Court stated that the right to marry is a fundamental right guaranteed to *all* persons. *In re* Marriage Cases, 183 P.3d 384, 419 (Cal. 2008) ("Although our state Constitution does not contain any explicit reference to a 'right to marry,' past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution"), *superseded by constitutional amendment*, CAL CONST. art. I, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

387. Bailey v. City of Austin, 972 S.W.2d 180, 190 (Tex. Ct. App. 1998).

388. *Id*. at 190.

389. *See* Baker v. Vermont, 744 A.2d 864, 878–79 (Vt. 1999) (finding a violation of the state common benefits clause when the state denied marriage licenses to same-sex couples under a "relatively

balancing test.[390] In other states, courts have held that sexual orientation constitutes a suspect class and is therefore subject to strict scrutiny. For example, the Oregon Court of Appeals held that unmarried same-sex couples are a suspect class, and thus strict scrutiny applies to laws discriminating between married couples and unmarried same-sex couples.[391] The significance of strict scrutiny in such cases is based on the assumption that challengers to the same-sex marriage bans are likely to succeed under a heightened standard of review.[392] Beyond Oregon, judges from other jurisdictions have also concluded that sexual orientation should be considered a suspect classification.[393]

In 2008, California took Oregon's initiative to a new level and became the second state to recognize same-sex marriages.[394] In *In re Marriage Cases*,[395] a 4–3 majority of the California Supreme Court struck down the state's ban on same-sex marriage.[396] The court concluded that sexual orientation constitutes a constitutionally suspect class,[397] and that the right to marry is a fundamental right under the state constitution.[398] Therefore, the appropriate standard of review is strict scrutiny. Upon the application of the most stringent standard of review, the court could not find a compelling state interest, and ultimately held the Family Code provisions limiting marriage to opposite-sex couples to be violations of the state equal protection clause. In order to strike down the same-sex marriage ban in California, "the [c]ourt had to reject the state's reliance on traditional practices in

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uniform standard" because omission of part of the community from the benefit, protection, and security of the challenged law bore no "reasonable and just relation" to a governmental purpose).

390. *See, e.g.*, Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006) (explaining that New Jersey has a "flexible" equal protection test, "measuring the importance of the right against the need for the governmental restrictions"); Rutgers Council of AAUP Chapters v. Rutgers, 689 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1997) ("New Jersey courts have rejected the rigid, multi-tiered approach followed by the federal courts, instead relying on a flexible balancing test.").

391. Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998).

392. *See* Ledsham, *supra* note 319, at 2386–88.

393. *E.g.*, Hernandez v. Robles, 855 N.E.2d 1, 27 (N.Y. 2006) (Kaye, J., dissenting); Andersen v. King Cnty., 138 P.3d 963, 1029–32 (Wash. 2006) (Bridge, J., concurring in dissent) (discussing the history of discrimination against gays and lesbians).

394. Melissa Murray, Remark, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1395 (2008).

395. 183 P.3d 384 (Cal. 2008).

396. *Id.* at 409–10 (holding unconstitutional CAL. FAM. CODE §§ 300 (West 2008) (defining marriage as a "civil contract between a man and a woman"), 308.5 (stating that "only marriage between a man and a woman is valid or recognized in California")); Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2107 (2008); Maura Dolan, *Gay Marriage Ban Overturned*, L.A. TIMES, (May 17, 2008), http://www.latimes.com/news/la-me-gay-marriage17-2008may17-story.html; *see also* Maura Dolan, *Gay Marriage Ban Overturned*, L.A. TIMES, (May 16, 2008 12:00 A.M.), https://www.latimes.com/archives/la-xpm-2008-may-16-me-gaymarriage16-story.html.

397. *In re* Marriage Cases, 183 P.3d at 401; Jacob Larson, Note, *It's About Time, or Is It?: Iowa District Court's Invalidation of Iowa's Mini-DOMA*, 12 J. GENDER, RACE & JUST. 153, 158 (2008).

398. *In re* Marriage Cases, 183 P.3d at 401 ("[The] issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.").

the United States and the world."[399] In justifying its decision to reject the traditional practice that 98% of the countries in the world implement, the court turned to the evolution of "prevailing societal views and official policies toward members of minority races and toward women over the past half-century."[400] The court noted that even if the tradition of disfavoring a minority group is long-standing and widely shared, this does not necessarily provide a compelling state interest. This line of reasoning contrasted with the United States Supreme Court's reasoning in *Lawrence*[401] and *Roper v. Simmons*.[402]

The three dissenting justices argued that this issue should not be decided by the court, but rather should be left to the electorate or the legislature. In the first line of the dissent, Justice Corrigan stated:

> In my view, Californians should allow our gay and lesbian neighbors to call their unions marriage. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote.[403] This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not.[404]

Shortly after the *In re Marriage Cases* decision, California voters passed Proposition 8 by ballot initiative, which overruled the court's decision by amending the state constitution to define marriage as being between one man and one

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399. Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 654 (2008). At the time of this case, only six jurisdictions, Massachusetts and five foreign nations—Canada, South Africa, the Netherlands, Belgium, and Spain—authorized same-sex marriage. *Id. at 654; In re* Marriage Cases, 183 P.3d at 451 n.70. The court further noted that although only the highest court in Massachusetts had found a statute limiting marriage to opposite-sex couples violative of its state constitution, when other state high courts had addressed the issue in recent years, each decision rejecting the constitutional challenge a divided the court. *Id; see, e.g.*, Conaway v. Deane, 932 A.2d 571 (Md. 2007) (4-3 decision); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (4-2 decision); Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (5-4 decision).

400. *In re* Marriage Cases, 183 P.3d at 451.

401. Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("[T]he right the petitioners seek . . . has been accepted as an integral part of human freedom in many other countries.").

402. 543 U.S. 551, 578 (2005) ("[T]he opinion of the world community . . . does provide respected and significant confirmation for our own conclusions.").

403. Justice Corrigan is referring to when California voters adopted a ballot measure, Proposition 22, with a 61.4 percent approval rate and codified § 308.5 into the California Family Code in 2000. Evelyn Nieves, *The 2000 Campaign: California; Those Opposed to 2 Initiatives Had Little Chance From Start*, N.Y. TIMES (Mar. 9, 2000), http://www.nytimes.com/2000/03/09/us/2000-campaign-california-those-opposed-2-initiatives-had-little-chance-start.html. *See* Secretary of State Bill Jones, *Limit on Marriages: Initiative Statute, Text of Proposition 22, §308.5*, VOTE 2000, http://vig.cdn.sos.ca.gov/2000/primary/pdf/text-22-29.pdf (last visited Mar. 22, 2022) [hereinafter *Limit on Marriages*] (codifying § 308.5 in the Family Code). At the time of Proposition 22, § 300 defined marriage as a "civil contract between a man and a woman"; however, § 308 stated that a "marriage contracted outside this state [California] that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state." Advocates of Proposition 22 felt that section 308 was a loophole which forced California to recognize same-sex marriages that were valid in other states. *See Limit on Marriages*.

404. *In re* Marriage Cases, 183 P.3d at 468 (Corrigan, J., concurring in part and dissenting in part).

woman.[405] A group of same-sex couples chose to challenge the amendment and successfully appealed to the Supreme Court in *Hollingsworth v. Perry*.[406] However, the *Hollingsworth* holding did not reach any questions on Proposition 8's constitutionality because the Court held that the petitioners lacked Article III standing to bring the challenge in the Ninth Circuit.[407] The petitioners failed to demonstrate individualized injury from an actual controversy, and instead raised only a "generalized available grievance about government" insufficient for Article III standing.[408] Without standing, the district court's finding that Proposition 8 violated the Equal Protection Clause was upheld.[409] The dissent in *Hollingsworth* emphasized the political implications of the Court's intervention into the ballot initiative process, highlighting the need to respect the voters' authority instead of undermining the results of a democratic election.[410]

Five months after the *In re Marriage Cases* decision, the Connecticut Supreme Court, relying heavily on the California ruling,[411] made Connecticut the third state to recognize same-sex marriage.[412] In *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court was asked to decide a narrow issue—whether civil unions created benefits and rights equal to those of marriage.[413] However, when the court decided this issue, it did so in a sweeping fashion by also addressing the question of whether laws that make distinctions based on sexual orientation deserve intermediate or strict scrutiny rather than rational basis review. In a 4–3 majority, the court held that sexual orientation is a "quasi-suspect" classification[414] and the right to marry is a "basic civil right";[415] hence, the proper standard of review is intermediate scrutiny under the state equal protection clause.[416] The court further declined to follow the decisions of the highest courts

405. *See* Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009). In *Strauss v. Horton*, the California Supreme Court confirmed that Proposition 8 overruled *In Re Marriage Cases* by carving out a small exception to the state equal protection clause that "restrict[s] the family designation of 'marriage' to opposite-sex couples only, and withhold[s] that designation from same-sex couples." The court made it clear that all other protections for same-sex couples remained, including the holding that sexual orientation constitutes a suspect class.

406. 570 U.S. 693, 697 (2013).

407. *Id*. at 713.

408. *Id*. at 705–06.

409. *Id*. at 715.

410. *Id*. at 727.

411. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (citing *In re Marriage Cases* fifteen times).

412. *Id*.; Robert D. McFadden, *Gay Marriage is Ruled Legal in Connecticut*, N.Y. TIMES (Oct. 10, 2008), http://www.nytimes.com/2008/10/11/nyregion/11marriage.html.

413. Ashby Jones, *A 'Sweeping' Ruling in Connecticut: Sizing Up* Kerrigan v. Commissioner, WALL ST. J. (Oct. 10, 2008), https://www.wsj.com/articles/BL-LB-6633.

414. *Kerrigan*, 957 A.2d at 412.

415. *Id*. at 481.

416. *Id*. at 432 ("Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society.").

of Kansas,[417] New York,[418] Washington,[419] Maryland,[420] and the District of Columbia,[421] all of which failed to label sexual orientation as a suspect or quasi-suspect class.[422] Rather, the court was persuaded by the logic and analysis of California's highest court, finding, under a heightened standard of review, that the State of Connecticut failed to establish an adequate reason to justify its statutory ban on same-sex marriage.[423]

In *Varnum v. Brien*, the Supreme Court of Iowa unanimously ruled that a state law prohibiting same-sex marriage violated the equal protection clause of the state constitution.[424] In doing so, it joined Connecticut in holding that sexual orientation is a quasi-suspect class.[425] The court began its analysis by finding that the plaintiffs in the case were similarly situated to heterosexual couples, and that the challenged statute was a classification based on sexual orientation as opposed to gender.[426] It then addressed the issue of what level of scrutiny to apply, which turned on whether or not sexual orientation was a suspect or quasi-suspect class.[427] The court analyzed sexual orientation under four factors: (1) whether the class has experienced a history of invidious discrimination; (2) whether the characteristics of the class are indicative of a typical class member's ability to contribute to society; (3) whether the distinguishing class characteristic is immutable; and (4) whether the class is politically powerless.[428] The court found that these considerations justified the application of heightened scrutiny, but since it also found that the challenged statute would not survive intermediate scrutiny, it did not attempt to discern whether sexual orientation would qualify as a suspect class.[429] The statute was found not to substantially further any important governmental objective and was invalidated.[430] The Supreme Court's decision in *Obergefell* invalidated all such state laws prohibiting same-sex marriage.[431] Since *Obergefell*, Justices have alluded to a "heightened" standard of review for sexual orientation-based discrimination, though the specifics of that standard have yet to be determined.[432] However, state laws still vary with regard to the classification

417. State v. Limon, 122 P.3d 22, 29 (Kan. 2005).
418. Hernandez v. Robles, 855 N.E.2d 1, 27 (N.Y. 2006).
419. Andersen v. King Cnty., 138 P.3d 963, 990 (Wash. 2006).
420. Conaway v. Deane, 932 A.2d 571, 606 (Md. 2007).
421. Dean v. District of Columbia., 653 A.2d 307 (D.C. 1995).
422. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 470–72 (Conn. 2008).
423. *Id.* at 472–73.
424. 763 N.W.2d 862 (Iowa 2009).
425. *Id.* at 895–96.
426. *Id.* at 883, 885.
427. *Id.* at 885–86.
428. *Id.* at 886–89.
429. *Id.* at 898.
430. *Id.* at 906–07.
431. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).
432. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting) (citing Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)).

of sexual orientation, since *Obergefell* did not resolve the issue.[433]

The issue of same-sex marriage is interrelated with gender-based discrimination. The primary argument of sex discrimination has been presented to the courts as having distinct parts: (1) facial discrimination restricting an individual's right to marry based purely on the gender of the chosen spouse; and (2) impermissible sex stereotypes.[434] The courts have rejected the former argument on the grounds that it "applies equally to men and women," distinguishing *Loving*.[435] The latter argument has generally been dismissed because of a lack of proof of discriminatory purpose or intent underlying the marriage laws.[436]

Although there is no uniform standard among the states regarding the classification of sexual orientation, the trend seems to be toward a heightened standard of review for sexual orientation. The highest state courts in California, Iowa, and Connecticut clearly set a precedent in their respective states, and this precedent may influence the U.S. Supreme Court's decision to apply heightened standard of review should a case of that nature reach the docket.

V. CONCLUSION

The Equal Protection Clause is an important tool for groups facing discrimination based on sex or sexual orientation. The three-tiered model of scrutiny is supposed to provide predictability, but it has caused confusion in equal protection cases involving sex-based classifications and has become somewhat unpredictable in cases challenging sexual orientation classifications.

The Supreme Court acknowledges the three-tiered model, yet the Court does not consistently apply the strict scrutiny, intermediate scrutiny, and rational basis tests. Even though a large majority of circuits and scholars recognize that the Court continues to operate within this three-tiered system, confusion about sex-based classification cases arose in part from Justice Ginsburg's use of the words "exceedingly persuasive" in her application of intermediate scrutiny in *Virginia*.[437] In *Nguyen,* the Court explained "exceedingly persuasive" as nothing more than the traditional standard applied in prior sex-based discrimination cases, but confusion lingers.[438]

Confusion over the level of scrutiny to apply to discriminatory policies based on sexual orientation also lingers. In keeping with *Romer*, most courts apply a

433. RODNEY M. PERRY, CONG. RSCH. SERV., R44143, OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED 1, 6-7 (2015).

434. Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462, 469 (2007) (noting as examples of impermissible sex stereotypes that "men must 'act like husbands'" and "women must 'act like wives'").

435. *Id.* at 472; *e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006) ("[L]imiting marriage to opposite-sex couples . . . does not put men and women in different classes, and give one class a benefit not given to the other.").

436. Widiss et al., *supra* note 434, at 473.

437. *See supra*, Part III.A.3.a.

438. *See supra*, Part III.A.3.b.

rational basis test when ruling on sexual-orientation classifications.[439] However, sometimes the rational basis has "bite," and sometimes it does not. As the question of sexual-orientation classifications increasingly comes under scrutiny, the equal protection doctrine is in growing need of clarification. States and circuit courts are still divided as to the treatment of sexual orientation as a suspect class and the corresponding standard of review.[440] The *Obergefell* decision ensured that same-sex couples are granted the right to marry guaranteed by the Fourteenth Amendment,[441] and *Bostock* may represent a move towards heightened review of discrimination based on sexual orientation, but it remains to be seen whether the Supreme Court will explicitly clarify the level of scrutiny afforded to the classification of sexual orientation under the Equal Protection Clause.

439. *See supra*, Part IV.A.3.
440. *See supra*, Part IV.B.
441. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).