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**BABY, WE WERE BORN THIS WAY: THE CASE FOR
MAKING SEXUAL ORIENTATION A SUSPECT
CLASSIFICATION UNDER THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT**

*Jennifer R. Covais**

ABSTRACT

Currently, the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution provides minimal constitutional safeguards against discrimination based on sexual orientation. Laws that treat queer Americans differently than their straight counterparts are presumptively constitutional if those laws bear a rational relationship to any legitimate government interest. Consequently, states may limit same-sex couples' ability to adopt children, enjoy the goods and services of certain businesses, and qualify for government programs. The Supreme Court established enhanced equal protection guarantees for classifications based on race, ethnicity, and national origin which are deemed suspect classifications. These classifications will only survive judicial review if the government proves the law is necessary to achieve a compelling government interest. Classifications based on race, ethnicity, or national origin rarely meet this high legal burden, making it nearly impossible for states to discriminate based on these protected categories. However, the Supreme Court has never extended these protections to any other category of people, despite having ample opportunity to do so.

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To achieve suspect classification status, the Court will ask whether the particular group “(1) constitutes a discrete and insular minority; (2) has suffered a history of discrimination; (3) is politically powerless; (4) is defined by an immutable trait; and (5) is defined by a trait that is generally irrelevant to one’s ability to function in society.”¹ Sexual orientation meets all five categories based on the LGBTQ+ community’s longstanding history of oppressive government laws and regulations, inability to exert significant power through the democratic process, and the inability of a person’s sexual orientation to change. This Note argues that the Court must now extend enhanced constitutional protections to queer communities as the pillars of equal protection jurisprudence demand it.

¹ Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014).

I. INTRODUCTION

On June 15, 2015, LGBTQ+ Americans rejoiced upon learning that the Supreme Court finally held that the right to marry the person you love, regardless of their gender, is a fundamental right belonging to all.² Same-sex couples can now experience the union of marriage to the same extent as their heterosexual peers. However, marriage equality only solves one of a profusion of issues posed to queer Americans.³ The Supreme Court has been reluctant, if not all out defiant, to address these issues.⁴ Beyond extending the fundamental right to marry to queer people, the Supreme Court has heard only a handful of cases challenging the constitutionality of state laws and ordinances that either directly or indirectly target queer people.⁵ Of these cases, the Court has never extended heightened constitutional protections to queer people, creating legal ambiguities as to what protections, if any, are afforded to queer Americans.

The Court has attempted to apply the Equal Protection Clause of the Fourteenth Amendment to classifications based on sexual orientation but has only awarded sexual orientation minimal constitutional protections. The Equal Protection framework calls on courts to consider whether the class of people affected by the statute are members of a suspect, quasi-suspect, or non-suspect class.⁶ If the intended class is suspect, then a court will apply the highest standard of review: strict scrutiny.⁷ When a law treats groups differently based on a suspect classification, that law will only survive strict scrutiny review if the government shows the law is narrowly tailored to serve a compelling government interest.⁸ Quasi-suspect classifications are

² Obergefell v. Hodges, 576 U.S. 644 (2015).

³ See Abhilasha Mandal, *The Conversation Surrounding the Word 'Queer' is Evolving*, THE STATE PRESS (Sept. 9, 2020, 6:27 PM), <https://www.statepress.com/article/2020/09/specho-reclaiming-the-word-queer-from-negative-association> (for a discussion on the reclamation of the word “queer” by members of the LGBTQ+ community). For the purposes of this Note, the word “queer” will be used to refer to any person identifying with the LGBTQ+ community in an effort to be inclusive of all possible identities held by those belonging to the LGBTQ+ community.

⁴ *Infra* Part V.

⁵ Lawrence v. Texas, 539 U.S. 558, 578 (2003); United States v. Windsor, 570 U.S. 744 (2013).

⁶ *Infra* Section III.

⁷ Loving v. Virginia, 388 U.S. 1, 11 (1967).

⁸ *Id.*

subject to intermediate scrutiny, where the government must show that the law is substantially related to an important government purpose.⁹ Finally, all other classifications are deemed to be non-suspect classes and are presumed to be constitutional unless the challenger can show the statute fails rational basis review; the law must only be rationally related to a legitimate government purpose.¹⁰

The Court has named sexual orientation as a non-suspect classification, so it is only subject to rational basis review. Whenever the Court struck down a statute classifying people based on sexual orientation, the Court noted that the law was illegitimate because it was predicated on the bare desire to harm queer people, or it lacked a rational relationship to a legitimate state interest.¹¹ Only the most egregiously offensive statutes will fail to satisfy rational basis review because under this standard, a law need only bear a rational relationship to a legitimate purpose and almost all laws meet this standard. Systemic homophobia is a part of American life: it rears its ugly head in many areas of life including housing and employment discrimination, the continuing existence of conversion therapy, and more.¹² Additionally, a majority of states have not enacted anti-discrimination statutes that seek to provide equal protection for queer people.¹³ This reality creates an urgent need for heightened judicial scrutiny on sexual orientation-based classifications to ensure that governments are less likely to pass and enforce laws that are injurious to their queer constituents.

The Court has only extended suspect status to classifications made on race, ethnicity, and national origin.¹⁴ The Court has recognized something distinctly different about these groups that entitle them to the highest degree of constitutional scrutiny.¹⁵ To determine if a group should become a suspect class, the Court will ask

⁹ *Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Levy v. Louisiana*, 391 U.S. 68 (1968).

¹⁰ Raphael Holoszyz- Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?* 90 N.Y.U. L. REV. 2070, 2072 (2015).

¹¹ *Windsor*, 570 U.S. at 770.

¹² *Infra* Sections IV.B, IV.C.

¹³ *LGBTQ Americans Aren't Fully Protected From Discrimination in 29 States*, FREEDOM FOR ALL AMERICANS, <https://freedomforallamericans.org/states/> (last visited Oct. 13, 2021).

¹⁴ *Korematsu v. United States*, 323 U.S. 214 (1944); *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁵ *Id.*

whether the particular group “(1) constitutes a discrete and insular minority; (2) has suffered a history of discrimination; (3) is politically powerless; (4) is defined by an immutable trait; and (5) is defined by a trait that is generally irrelevant to one’s ability to function in society.”¹⁶ Sexual orientation meets each one of these factors similarly to that of race, national origin, and ethnicity and thus, should become a suspect classification under the Equal Protection Clause.

This Note will be divided into six sections. Section II will explore the inception of race and national origin as a suspect classification and the early stages of the suspect classification framework. Section III will discuss the modern equal protection jurisprudence and how today’s courts would analyze an equal protection claim. Section IV will explore the history of the queer community and how the United States has failed to protect queer people from harm, and at times, was the perpetrator of systemic oppression of queer Americans. Section V will apply the modern equal protection framework to the traits and realities of queer communities across the country. This section will then explain how elevating sexual orientation from a non-suspect classification to a suspect classification will provide queer communities with the constitutional protections they need to evade incessant and invidious discrimination. Finally, Section VI will argue that the Supreme Court should now recognize that sexual orientation meets all the criteria for strict scrutiny despite its prolonged reluctance to do so.¹⁷

¹⁶ Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014).

¹⁷ This Note will only argue for the application of strict scrutiny analysis under the Fourteenth Amendment to classifications based on sexual orientation and not on classifications based on gender identity. This is not to say that gender-based discrimination is not worthy of growing litigation and legal scholarship, but merely that classifications made on the basis of gender, specifically transgender identity, falls squarely into legal tests created for quasi-suspect classifications and do not meet the factors for qualifying as a suspect classifications. *See generally*, *Craig v. Boren*, 429 U.S. 190 (1976). Gender-based classifications are usually made on the basis of an individual’s biological sex and such a distinction is based on gender stereotypes and those classifications can only survive if they are substantially related to an important government purpose. *Craig*, 429 U.S. at 204. Thus, it follows that any classification made on the basis of gender identity or gender would most successfully be litigated under *Craig*.

II. THE BEGINNINGS OF SUSPECT CLASSIFICATION: RACE AND NATIONAL ORIGIN

In the 1950s, the Supreme Court expanded the application of the Fourteenth Amendment in the wake of the Civil Rights Movement and struck down blatantly racist post-war laws and practices.¹⁸ The Fourteenth Amendment was understood to overturn the *Dred Scott* decision¹⁹ by making all people born or naturalized within the United States citizens of the United States.²⁰ The Fourteenth Amendment also put an end to state authorized discrimination on the basis of race and required black and white Americans to be treated equally under the law.²¹ Beginning in the mid- twentieth century, the Court slowly began to apply *Carolene Products*²² “discrete and insular minorities” test to state mandated race-based classifications.²³

For the first time, in *Korematsu v. United States*,²⁴ the Court explicitly stated that all classifications based solely on race designed to effectively curtail the civil liberties of racial minorities are subject to “the most rigid scrutiny.”²⁵ In *Korematsu*, the Court considered the constitutionality of a government order that required Japanese-Americans to move into relocation camps.²⁶ Immediately following the attack on Pearl Harbor during World War II, President Franklin Roosevelt signed Executive Order 9066 that required all Japanese--Americans to relocate to detention camps away from military bases on the west coast in order to take necessary steps to “prevent espionage and sabotage in an area threatened by Japanese attack.”²⁷ The petitioner, an American citizen of Japanese descent, refused to relocate to the detention camps and was convicted in federal district court for violating the order.²⁸ The Court upheld the detention order on the

¹⁸ MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 88 (2001) (ebook).

¹⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

²⁰ *Id.* at 54.

²¹ *Id.*

²² *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

²³ Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L. J. 1807, 1818 (2017).

²⁴ 323 U.S. 214 (1945).

²⁵ *Id.* at 216.

²⁶ *Id.* at 221.

²⁷ *Id.* at 217.

²⁸ *Id.* at 215. There was no question raised at trial as to the petitioner’s loyalty to the United States. *Id.*

grounds that not all laws predicated on suspect classifications are automatically unconstitutional because it may be that “pressing public necessity” justifies the necessity for race-based classifications.²⁹

Here, the Court in *Korematsu* recognized that racial minorities fall within the general meaning of *Carolene Products*’ “discrete and insular minorities” due to the nation’s ugly history of racial oppression, but incorrectly applied what the Court called “rigid scrutiny.” To satisfy strict scrutiny, a law must be narrowly tailored so that it is not underinclusive or overbroad. A law is overbroad and underinclusive if it burdens unintended subjects of a law as well as the unintended subjects far more than necessary to achieve the government’s compelling purpose.³⁰ The Court failed to identify the obvious overinclusive and underinclusive nature of the exclusion order which exemplifies a lack of narrow tailoring.³¹

In *Plessy v. Ferguson*,³² the Court addressed race-based classifications but did not state that racial discrimination was entitled to any scrutiny, let alone “rigid scrutiny” like in *Korematsu*.³³ The Court upheld a Louisiana law that required “separate but equal” train cars in which white passengers were to ride in one car and black passengers were to ride in another.³⁴ The Court reasoned that society at the time did not want white and black people to commingle in social situations and the law only intended to effectuate this intent.³⁵ The Court in *Plessy* did not see how the separation implied that one race was inferior to the other, and held that there was no Fourteenth Amendment violation as both races were treated equally under the law.³⁶ Nine years after *Korematsu* in *Brown v. Board of Education of Topeka*,³⁷ the Court finally struck down a race-based classification,

²⁹ *Id.*

³⁰ *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 837 (1978).

³¹ The president justified the exclusion order on the grounds that the United States had an interest in preventing “espionage and sabotage” but failed to exclude German-Americans or Italian-Americans who may pose similar threats to national security, rendering the act underinclusive. *Id.* at 240. The act is also overbroad because it included children and elderly: groups who were unlikely to be a national security threat. *Id.* at 243.

³² 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³³ *Plessy*, 163 U.S. at 540.

³⁴ *Id.*

³⁵ *Id.* at 544.

³⁶ *Id.*

³⁷ 347 U.S. 483 (1954).

schools segregated by race, even though the schools were “separate but equal,” overruling *Plessy v. Ferguson*.³⁸ In 1954, the Court finally found segregation unconstitutional under the Fourteenth Amendment and held that “separate” was never actually “equal.”³⁹ The Court in *Brown* held that although white and black schools are physically and structurally equal, segregated schools are *inherently* unequal because separation in schools based solely on race impermissibly ostracizes racial minorities by creating feelings of inferiority.⁴⁰

In *Loving v. Virginia*,⁴¹ the Court struck down a law that prohibited interracial marriage on the ground that such a law is facially discriminatory because it draws distinctions based solely on race.⁴² Relying on *Korematsu*,⁴³ the Court recognized that the antimiscegenation statute in *Loving* created a suspect classification subject to the most rigid scrutiny.⁴⁴ The Court found “no legitimate overriding purpose independent of invidious racial discrimination” to justify the classification and restricting the right to marry solely based on racial classifications violated the Fourteenth Amendment.⁴⁵

Loving established that classifications based on race that were intended to burden racial minorities were subject to strict scrutiny.⁴⁶ Going forward, the Court was now tasked with applying strict scrutiny to laws that intend to benefit racial minorities in affirmative action cases throughout the rest of the twentieth century.⁴⁷ In the early cases, the Court struggled with determining how and when strict scrutiny should apply, but in *Adarand Constructors v. Peña*,⁴⁸ the Court finally decided that *all* race-based classifications must pass strict scrutiny in which they “serve a compelling governmental interest, and [are] narrowly tailored to further that interest” even when such legislation is intended to help racial minorities.⁴⁹

³⁸ *Id.* at 493-94 (1954).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 388 U.S. 1 (1967).

⁴² *Id.* at 11.

⁴³ *Supra* notes 24-29 and accompanying text.

⁴⁴ *Loving*, 388 U.S. at 11.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See generally*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United States v. Paradise*, 480 U.S. 149 (1987); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

⁴⁸ 515 U.S. 200 (1995).

⁴⁹ *Id.* at 235.

III. THE MODERN EQUAL PROTECTION CLAUSE AND LEVELS OF SCRUTINY

The Equal Protection Clause of the Fourteenth Amendment was ratified in 1868,⁵⁰ and requires that, “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵¹ Congress proposed the Equal Protection Clause with the intention of preventing state actors from discriminating on the basis of race either covertly or overtly by requiring states to make and enforce laws that applied to all people evenhandedly.⁵² Before the Fourteenth Amendment was ratified, states could enact laws that discriminated against nonwhites while simultaneously providing benefits for white Americans.⁵³

Between the late nineteenth century and 1938, the Court entered a period of jurisprudence known as the *Lochner* era.⁵⁴ During the *Lochner* era, the Court struck down numerous pieces of social legislation on the ground that the freedom to contract trumped laws that sought to protect individual rights.⁵⁵ The Court held that the freedom to contract was a fundamental right under the Constitution and states could only limit this right pursuant to their police powers in limited circumstances.⁵⁶ In *United States v. Carolene Products*,⁵⁷ the

⁵⁰ MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 54 (2001) (ebook).

⁵¹ U.S. CONST. amend. XIV. § 1.

⁵² PERRY, *supra* note 50, at 54.

⁵³ PERRY, *supra* note 50, at 56. States frequently passed laws that made it easier to obtain a criminal conviction against nonwhites than against whites. *Id.* States also made it a crime to steal from, or to kill a white person but there was no crime for stealing from or killing a nonwhite person. *Id.*

⁵⁴ Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 122-23 (1990). The *Lochner* Era earned its name from the landmark case, *Lochner v. New York*, 198 U.S. 45 (1905), which held that a state law that limited the number of hours bakery employees could work in one week to sixty hours in one week, and no more than ten hours in one day was unconstitutional. *Id.*; *see also*, Joshua Waimberg, *Lochner v. New York: Fundamental Rights and Economic Liberty*, NATIONAL CONSTITUTION CTR. (Oct. 26, 2015), <https://constitutioncenter.org/blog/lochner-v-new-york-fundamental-rights-and-economic-liberty/>. The Court reasoned that the state law did not “constitute a legitimate exercise of state police powers” and instead interfered with employers’ and employees’ right to enter into employment contracts. *Id.*

⁵⁵ Waimberg, *supra* note 54.

⁵⁶ *Id.*

⁵⁷ 304 U.S. 144 (1938).

Court marked the end of the *Lochner* era when it held that rather than subject legislation challenging economic and freedom of contract rights to heightened scrutiny, the Court would now apply rational basis review.⁵⁸ The Court explained that heightened scrutiny would still apply in the following situations: (1) where a law or statute conflicts with Bill of Rights protections, which was later recognized as fundamental rights protected under the Constitution, (2) where the political process has closed or is malfunctioning, and (3) where regulations adversely affect “discrete and insular minorities.”⁵⁹

Following *Carolene Products*, the Court expanded the heightened standard of review for Equal Protection Claims. Today, the Court applies a consistent framework to all equal protection claims.⁶⁰ A plaintiff seeking to bring a claim for an alleged violation of the Equal Protection Clause must first prove three procedural requirements: (1), the court must have jurisdiction, (2), the claim must be justiciable,⁶¹ and (3), the conduct giving rise to the claim must be governmental action.⁶²

Once the plaintiff successfully meets the necessary procedural requirements, the plaintiff must show that the action has substantive merit. To proceed on the merits, the claimant must show that a government action places a burden or a benefit to the exclusion of another class of citizens.⁶³ The Equal Protection Clause demands that “government actors treat all similarly situated persons alike.”⁶⁴ Under Equal Protection analysis, government classifications fall into one of two categories. Government classification can be facially discriminatory,⁶⁵ or facially neutral but have a discriminatory intent and effect.⁶⁶ If the government used a classification to discriminate

⁵⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

⁵⁹ *Id.* at 152 n.4.

⁶⁰ Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 123 (1989).

⁶¹ “The quality, state, or condition of being appropriate or suitable for adjudication by a court.” *Justiciability*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶² Galloway, *supra* note 60, at 123.

⁶³ *Id.*

⁶⁴ Cain Norris & Whitney Turk, *Fourteenth Annual Gender and Sexuality Law: Annual Review Article: Equal Protection*, 14 GEO. J. GENDER & L. 397, 399 (2013).

⁶⁵ *Id.*; see *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (holding that statutes that explicitly require segregation of public schools solely on the basis of race deprive children of the minority group of equal education opportunities).

⁶⁶ Galloway, *supra* note 60, at 123; see also *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a facially neutral statute may still violate the Fourteenth

against a group, then the classification must be supported by a sufficient justification.⁶⁷ Courts use varying tests known as “means-ends scrutiny” to determine if the justification supported the classification-based discrimination.⁶⁸ Government discrimination is categorized into three classifications: suspect classifications, quasi-suspect classifications, and non-suspect classifications.⁶⁹

When the government discriminates against a person or a group of people based on a suspect classification, that government action is subject to strict scrutiny review by the court.⁷⁰ A classification is suspect when the government discriminates on the basis of race,⁷¹ national origin,⁷² or ethnicity.⁷³ To determine which groups shall be classified as a suspect class, the Court will ask whether the particular group “(1) constitutes a discrete and insular minority; (2) has suffered a history of discrimination; (3) is politically powerless; (4) is defined by an immutable trait; and (5) is defined by a trait that is generally irrelevant to one’s ability to function in society.”⁷⁴ These questions are not quite elements, but are factors to be considered rather than a requirement to be fulfilled.⁷⁵ If the government discriminates on the

Amendment Equal Protection Clause only if the statute is shown to have both a discriminatory effect on a particular race and is motivated by racial discrimination).

⁶⁷ Galloway, *supra* note 60, at 123.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 743 (2014).

⁷¹ *Loving v. Virginia*, 388 U.S. 1 (1967). The Court here struck down a state statute that prohibited interracial marriage. *Id.* at 1. For the first time, the Court held that statutes that deny a person access to marriage, a fundamental right, solely on the basis of race are unconstitutional under the Equal Protection Clause. *Id.* at 11. The Court reasoned that because classifications based solely on race are suspect, they are entitled to the “most rigid scrutiny” and if these laws are upheld, they must be shown to be necessary to achieve some legitimate state interest beyond the intent to carry out a racist political agenda. *Id.*

⁷² *Korematsu v. United States*, 323 U.S. 214 (1944). The Court upheld an executive order that forced Japanese Americans into internment camps following World War II on the ground that the order passed muster under strict scrutiny. *Id.* at 219. The Court recognized that government actions that classify individuals solely based on their national origin are inherently suspect; however, the order was justified by a compelling government interest to prevent espionage and sabotage. *Id.* at 227.

⁷³ Pollvogt, *supra* note 70, at 742.

⁷⁴ *Id.*

⁷⁵ Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX. RSCH.

basis of a suspect classification, the Court will only uphold the statute or government practice if the statute is “narrowly tailored to serve a compelling government interest.”⁷⁶ When state action infringes on a fundamental right, it is subject to strict scrutiny even if the affected group is not a suspect or quasi-suspect class.⁷⁷ The Supreme Court is responsible for identifying what constitutes a fundamental right requiring strict scrutiny under the Equal Protection Clause.⁷⁸ The Supreme Court has used two methods to identify fundamental rights. First, the rights stated explicitly in the Constitution, including the Bill of Rights, are fundamental rights.⁷⁹ Second, implicit rights can be found using the “concept of ordered liberty” or in the “history and traditions of American people.”⁸⁰ Strict scrutiny review has famously been coined as “‘strict’ in theory, and fatal in fact” because it is rare that the government will be able to justify the suspect classification under strict scrutiny’s high burden.⁸¹

The next classifications recognized by the Court are semi-suspect or quasi-suspect classifications. Gender and illegitimacy-based classifications are semi-suspect or quasi-suspect classifications,⁸² and will be upheld only if the government action meets intermediate scrutiny.⁸³ Intermediate scrutiny requires that the government must show that the action that discriminates based on sex⁸⁴

1, 18 (2016),
<https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1023&context=scholarship>.

⁷⁶ Pollvogt, *supra* note 70, at 744.

⁷⁷ Norris & Turk, *supra* note 64, at 402.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* Fundamental rights are mostly limited to voting rights and access to the judicial process, but the Court has found fundamental rights in other legal doctrines and has named reproductive freedom, the right to marriage for homosexual and heterosexual couples, the right to file for divorce, the right to obtain contraception, the right to privacy, and the freedom to raise and educate children. *Id.*

⁸¹ 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, 8 (1972).

⁸² The Court held that government classifications that distinguish groups based on whether they were born to married parents or an unmarried, single parent were subject to intermediate scrutiny because illegitimate persons’ birth status has no relationship with their ability to perform in society. *See Trimble v. Gordon*, 430 U.S. 762 (1977).

⁸³ Galloway, *supra* note 60, at 125.

⁸⁴ *Craig v. Boren*, 429 U.S. 190 (1976).

or illegitimacy⁸⁵ is substantially related to the achievement of an important government purpose.⁸⁶ Courts historically applied intermediate scrutiny to determine whether government action categorizes people based on gender stereotypes instead of an individual's capability.⁸⁷

All other classifications that remain are deemed non-suspect classifications and the court will only strike down the statute if the challenger can show that the government action does not meet rational basis review.⁸⁸ Rational basis review is the most deferential standard applied by courts in the equal protection framework and only requires that a government action is rationally related to achieving a legitimate government interest.⁸⁹ Rational basis rarely invalidates legislation; the Court has only struck down laws as violative of the Fourteenth Amendment under rational basis seventeen times out of over one hundred challenges.⁹⁰

IV. THE HISTORY OF THE OPPRESSION OF THE LGBTQ+ COMMUNITY

A. Before World War II

Most scholars agree that the gay and lesbian rights movement began in the 1950s; however earlier developments beginning as early as British Colonial America influenced the beginning of a full-fledged gay rights movement.⁹¹ Same-sex sexual relationships were commonly practiced before and after the Europeans arrived in North America and political and religious leaders viewed them as a crime and a sin.⁹² At this point in history, people did not view themselves as either “heterosexual” or “homosexual” but rather viewed sex as an act and not an identity.⁹³ In the early nineteenth century, many scientists

⁸⁵ *Levy v. Louisiana*, 391 U.S. 68 (1968).

⁸⁶ *Craig*, 429 U.S. at 197.

⁸⁷ *Norris & Turk*, *supra* note 64, at 404-05.

⁸⁸ *Id.* at 405.

⁸⁹ *Id.* at 402.

⁹⁰ Raphael Holosyzc- Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015).

⁹¹ MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* 13 (2012).

⁹² *Id.*

⁹³ *Id.*

argued that queer people suffered from a defect or disease.⁹⁴ As a result of growing oppression and othering by the majority of society, a growing number of queer people began to view themselves as a distinct community with unique gender and sexual identities.⁹⁵ By the early twentieth century, sexual communities in many locations around the country were filled with people of diverse sexual preferences who began to see their sexual identities as core components of their identities.⁹⁶

In the early English colonies, non-reproductive sex was seen as a threat.⁹⁷ People engaging in homoerotic relationships outside of marriage faced harsh criminal penalties.⁹⁸ Those found guilty of these “crimes” could face punishments including fines, jailing, whippings, or a death sentence.⁹⁹ Some jurisdictions even adopted criminal penalties for those who engaged in “cross-dressing.”¹⁰⁰ In the 1840s, a New York newspaper launched a hateful attack on the city’s “sodomites,” who are the modern equivalent of gay French, English, Portuguese, and Jewish male immigrants.¹⁰¹ The articles portrayed these men as savage, violent, and sex-crazed predators looking to destroy “men of respectability” into “victims of extortion.”¹⁰²

After the Civil War, queer communities grew larger and queer people began to envision themselves as members of a minority group in society as sexual orientation became an increasingly central trait to one’s identity.¹⁰³ Writers and artists began to represent queer people and culture in their works, which brought the life and experiences of queer people to the forefront of the public eye.¹⁰⁴ In response, medical doctors increasingly classified and encouraged society to treat queer people as mentally ill.¹⁰⁵ Oppression against queer communities continued to grow as most states criminalized sodomy by the 1880s and 1890s with many states still using capital punishment for sodomy

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 17.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.* at 20.

¹⁰² *Id.* at 21.

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 23.

into the mid-1860s.¹⁰⁶ While sodomy charges were difficult to prosecute, states continued to target queer communities by enforcing laws against disorderly conduct, lewdness, loitering, solicitation, vagrancy, and cross-dressing that expressly targeted queer people.¹⁰⁷ The federal government deported immigrants identified as “sexual perverts” if convicted of any of the aforementioned crimes.¹⁰⁸ Penalties for same-sex sex related crimes included not only fines and prison sentences, but forced sterilization, castration, and institutionalization.¹⁰⁹ Attitudes towards the queer community stayed consistent with little to no major advocacy groups forming until after the Second World War.¹¹⁰

B. Post-World War II

After the end of World War II, queer communities became increasingly visible to non LGBT+ communities because queer life made its way into mainstream pop culture in blues music and theater.¹¹¹ The increasing awareness of a vulnerable population in the post-war era informed Senator Joseph McCarthy’s belief that gay people constituted security risks to the nation and queer people needed to be purged from government jobs.¹¹² President Dwight D. Eisenhower issued Executive Order 10450 which banned all gay individuals from working for the government in an effort to promote the national security concerns Senator McCarthy warned about.¹¹³

¹⁰⁶ *Id.* at 26. Laws prohibiting sodomy extended not only to men having sexual intercourse with other men but to women having sexual intercourse with women and anyone engaging in oral sex. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 27.

¹⁰⁹ *Id.*

¹¹⁰ Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCH. ASS’N, <https://www.apa.org/pi/lgbt/resources/history> (last visited Feb. 22, 2021).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953). Section 8(a)(iii) of the Executive Order states that “sexual perversion” is fair reason to terminate a government employee from his or her job. *Id.* At the time, homosexuality was not only a crime, but was considered a mental illness as classification in the American Psychiatric Association’s diagnostic manual until 1973. Morris, *supra* note 107.

In 1965, Congress passed the Civil Rights Act (“CRA”) which provided new legislation outlawing racial discrimination.¹¹⁴ Directly following the passage of the CRA, the first gay rights demonstrations took place in Philadelphia and Washington D.C.¹¹⁵ Meanwhile in New York, the State Liquor Authority refused to grant liquor licenses to bars that served queer people which forced those bars to act as “illegal saloons.”¹¹⁶ On June 27, 1969, the police arrived at the Stonewall Inn, a bar frequented by mostly poor, queer people of color, and arrested thirteen people inside.¹¹⁷ Over the next six days, violent riots ensued outside the Stonewall Inn.¹¹⁸ Police sprayed protestors with fire hoses and arrested individuals by the dozens and the tenacious gay crowd responded by throwing bricks at law enforcement, smashing windows, and chanting powerful cries for liberty from the hands of government sanctioned homophobia.¹¹⁹ Just one year later in 1970, the first gay pride parades took place in various cities throughout the country.¹²⁰ Every year on the last Sunday in June since 1970, almost every major city in the United States hosts a gay pride parade with New York City’s parade having the most parade attendees of any kind exceeded only by the St. Patrick’s Day parade.¹²¹

In the 1970s, the gay rights movement’s attempts to bring national attention to queer issues were met with staunch suppression by the revival of conservative movements.¹²² In 1977, “Save Our Children,” a conservative anti-gay political group, protested a Florida ordinance that attempted to prevent discrimination against the queer community.¹²³ “Save Our Children” was successful and the law was

¹¹⁴ Morris, *supra* note 110.

¹¹⁵ *Id.*

¹¹⁶ Garance Franke-Ruta, *An Amazing 1969 Account of the Stonewall Uprising*, THE ATLANTIC (Jan. 24, 2013), <https://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Erin Blakemore, *How the Stonewall Uprising Ignited the Modern LGBTQ Rights Movement*, NAT’L GEOGRAPHIC (June 26, 2020), <https://www.nationalgeographic.com/history/article/stonewall-uprising-ignited-modern-lgbtq-rights-movement>.

¹²¹ *Id.*

¹²² *LGBTQ Rights Timeline in American History*, LGBTQHISTORY <http://www.lgbtqhistory.org/lgbt-rights-timeline-in-american-history/>, (last visited Feb. 22, 2021).

¹²³ *Id.*

repealed, rolling back protections for queer people in Florida.¹²⁴ However, in 1977, Harvey Milk was elected county supervisor in San Francisco and became the third “out” elected public official in American history.¹²⁵ Just one year after his election, Milk was assassinated by a former city supervisor.¹²⁶ Shortly after Milk’s murder, a California state senator introduced a ballot initiative that allowed local school districts to ban gay teachers.¹²⁷

In 1981, conservatives in Congress proposed the Family Protection Act which prevented the allocation of federal funds to “any organization that suggests that homosexuality can be an acceptable alternative lifestyle.”¹²⁸ The Act was defeated, despite President Ronald Reagan’s endorsement.¹²⁹ In 1982, the Department of Defense issued a policy stating that homosexuality is “incompatible” with military service.¹³⁰ During the 1980s, the AIDS epidemic reached its height as infected individuals died at exponential numbers with little to no intervention from the government.¹³¹ AIDS disproportionately impacted gay men as compared to straight men and women, which effectively strengthened the backlash to gay rights movements.¹³² In 1986, the Supreme Court turned a blind eye to homophobic government practices when it upheld a Georgia state law that criminalized sodomy on the ground that gay couples had no constitutional right to engage in same-sex sex.¹³³

Government at the federal and local levels from the 1990s until the present continued to present obstacles to equal treatment under the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *History of the Anti-Gay Movement Since 1977*, S. POVERTY L. CTR. (Apr. 28, 2005), <https://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977>. The ballot initiative ultimately failed and was never enacted. *Id.* The senator who introduced the initiative said that, “One third of San Francisco teachers are homosexual ... I assume most of them are seducing young boys in toilets.” *Id.*

¹²⁸ Family Protection Act, H.R. 311, 97th Cong. (1981).

¹²⁹ *History of the Anti-Gay Movement Since 1977*, *supra* note 127.

¹³⁰ UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: DEFENSE FORCE MANAGEMENT: DOD’S POLICY ON HOMOSEXUALITY 16 (1992).

¹³¹ JAMIE K. TAYLOR ET AL., THE REMARKABLE RISE OF TRANSGENDER RIGHTS 29 (2006).

¹³² *Id.*

¹³³ See *Bowers v. Hardwick*, 478 U.S. 186 (1986) *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

law to the LGBTQ+ community. In 1993, the Clinton Administration promised to remove the military's long-term ban on homosexuals that was formally acknowledged in 1982.¹³⁴ Instead of improving the quality of life of queer Americans in the military, Congress passed the "Don't Ask, Don't Tell" law.¹³⁵ As of December 21, 1993, homosexuals were permitted to serve in the military but shall not "(1) engage in homosexual acts, (2) state homosexual or bisexual preferences or (3) attempt to marry or marry an individual of the same sex" and any violation of these provisions will result in discharge from the military.¹³⁶ In 1996, Congress passed the Defense of Marriage Act ("DOMA") which prohibited any state from respecting a marriage between members of the same sex.¹³⁷ In 2018, former President Trump issued a Presidential Memorandum that disqualified transgender individuals from military service on the grounds that they are psychologically and physically unfit to serve.¹³⁸ Since President Biden's Inauguration in January of 2021, the Biden Administration has taken care to roll back anti-LGBTQ+ policies from previous administrations and provide subsequent protections to LGBTQ+ individuals.¹³⁹ President Biden issued Executive Order 14004 that revokes Trump's 2018 Presidential Memorandum and declares that "gender identity should not be a bar to military service."¹⁴⁰

C. Conversion Therapy

In 1899, a German psychiatrist, Albert von-Schrenck-Notzing, announced that he believed he found the cure for homosexuality; he

¹³⁴ Debra A. Luker, Comment, *The Homosexual Law and Policy in the Military: "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"... Don't be Absurd!* 3 SCHOLAR 267, 286 (2002).

¹³⁵ *Id.*; see also 10 U.S.C. § 654 (repealed 2010).

¹³⁶ Luker, *supra* note 134, at 286.

¹³⁷ Defense of Marriage Act, Pub. L. No. 104-199, § 7, 110 Stat. 2419 (1996) (codified as 28 U.S.C. § 1738C(a) (1996)).

¹³⁸ Memorandum on Military Service by Transgender Individuals, 2018 DAILY COMP. PRESS. DOC (Mar. 23, 2018).

¹³⁹ *President Biden's Pro-LGBTQ Timeline*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/president-bidens-pro-lgbtq-timeline> (last visited Sept. 17, 2021).

¹⁴⁰ Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021).

could hypnotize a gay man into becoming straight.¹⁴¹ After forty-five hypnosis sessions and a trip to the local brothel, he claimed that he successfully redirected a man's sexual attraction from men to women.¹⁴² Von-Schreck-Notzing's theory was the beginning of a pseudoscientific psychological technique to "cure" homosexuality: conversion therapy.¹⁴³

Although modern science explicitly rejects the validity of conversion therapy today, conversion therapy was widely practiced throughout the twentieth century¹⁴⁴ and is still practiced by some providers today.¹⁴⁵ Some conversion techniques involved physically invasive procedures that had lasting irreversible consequences.¹⁴⁶ Nineteenth century endocrinologists believed that a person's sexuality was controlled by the hormones one's sex organs produce, so many gay men were castrated and given "heterosexual testicles."¹⁴⁷ Other psychiatrists performed lobotomies and electro-shock therapy to permanently alter gay men's brains in the hopes of making them straight.¹⁴⁸ More common forms of conversion therapy involved less physically invasive methods, but "therapeutic" measures that were nonetheless traumatizing¹⁴⁹ and morally reprehensible, including aversion therapy,¹⁵⁰ faith-based conversion therapy, and other "talk"

¹⁴¹ Erin Blakemore, *Gay Conversion Therapy's Disturbing 19th Century Origins*, HISTORY (June 22, 2018), <https://www.history.com/news/gay-conversion-therapy-origins-19th-century>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *About Conversion Therapy*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/about-conversion-therapy/> (last visited Apr. 27, 2021).

¹⁴⁶ Blakemore, *supra* note 138.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Studies have shown that conversion therapy resulted in higher risk for low self-esteem, treatment-related anxiety, suicidal ideation, relationship dysfunction, and impotence. AMERICAN PSYCH. ASSOC., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION. 41-42 (2009).

¹⁵⁰ Blakemore, *supra* note 141. The goal of aversion therapy was for queer people to associate homosexuality with pain or disgust. *Id.* Providers would force queer people to look at photos of their partners while ingesting chemicals that made them vomit or were forced to look at queer pornography while receiving electric shocks to their bare genitals. *Id.*

methods.¹⁵¹ Many providers tried to convince queer people that their attraction towards the same sex is a product of childhood abuse and trauma that may or may not have actually existed.¹⁵²

Modern science has fully rejected conversion therapy as either effective or ethically appropriate, so licensed mental health providers do not attempt to change a person's sexual orientation.¹⁵³ Fortunately, twenty state legislatures, the District of Columbia, and Puerto Rico passed laws that prohibit the practice of conversion therapy for queer youth.¹⁵⁴

D. Housing Discrimination against Queer Persons

Housing discrimination is a pervasive and persistent problem for queer people. In a 2015 survey, seventy-three percent of queer people reported fearing housing discrimination.¹⁵⁵ A 2017 study showed that gay men searching for housing were informed about fewer units and given higher quoted rental fees than their straight counterparts.¹⁵⁶ A Michigan study also showed that twenty-seven percent of the time, renters showed a preference for heterosexual couples by offering those couples lower rates, waived or lower application fees, and rigorously encouraging those couples to apply compared to queer couples.¹⁵⁷ Many queer people report being told by landlords that they do not, and will not, rent to a gay person because they do not support the "gay lifestyle" or "their kind" at this rental unit.¹⁵⁸ Landlords reason that queer people and couples in the neighborhood may disrupt the "low profile" community aesthetic because queer tenants' "unique relationships" are distracting and

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *The Lies and Dangers of Efforts to Change Sexual Orientation and Gender Identity*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (last visited Apr. 27, 2021).

¹⁵⁵ *2015 LGBT Home Buyer and Seller Survey*, NAT'L ASSOC. OF GAY & LESBIAN REAL ESTATE PROF., 1, 17 (2015), <https://naglrep.com/wp-content/uploads/2017/06/naglrep-lgbt-survey-2015.pdf>.

¹⁵⁶ Rigel C. Olivieri, Article, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After Bostock v. Clayton County*, 69 U. KAN. L. REV. 409, 412 (2021).

¹⁵⁷ *Id.* at 412.

¹⁵⁸ *Id.* at 428.

invasive.¹⁵⁹ Rates of housing discrimination are even higher for transgender individuals, queer people of color, and queer women.¹⁶⁰ Additionally, only twenty-two states and the District of Columbia provide statutory protections for queer people against housing discrimination.¹⁶¹ Twenty-one states and five territories have absolutely no protections for housing discrimination based on sexual orientation.¹⁶²

In 1968, Congress passed the Fair Housing Act (“FHA”) with the purpose to provide for “fair housing throughout the United States.”¹⁶³ The FHA makes it unlawful to refuse to sell or rent to a purchaser “because of race, color, religion, sex, familial status, or national origin.”¹⁶⁴ Until the Supreme Court’s ruling in *Bostock v. Clayton County*¹⁶⁵ that held that the provision, “because of sex” in the Civil Rights Act of 1964, included protections to sexual orientation and transgender status,¹⁶⁶ it was not clear whether sexual orientation was a protected category in Civil Rights statutes.¹⁶⁷ The Fair Housing Act includes similar language as the Civil Rights Act in regard to sex, namely the provision, “because of sex,” but the Court has yet to determine whether the holding in *Bostock* extends to similar statutes like the Fair Housing Act.¹⁶⁸ Members of Congress have tried to remedy the problems facing queer people’s ability to find housing by introducing The Equality Act multiple times, but the Act has never successfully passed.¹⁶⁹ The Equality Act attempted to provide federal protections for queer people in housing, but the bill was unsuccessful in Congress.¹⁷⁰ More recently in 2019, the House of Representatives introduced the Fair and Equal Housing Act which would explicitly

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 413.

¹⁶¹ *Non-Discrimination Laws*, LGBT MAP, https://www.lgbtmap.org/equality-maps/non_discrimination_laws, (current as of Apr. 29, 2021).

¹⁶² *Id.*

¹⁶³ Fair Housing Act, Pub. L. No. 90-204, §801, 82 Stat. 81 (1968) (codified as 42 U.S.C. §3601).

¹⁶⁴ Fair Housing Act, Pub. L. No. 90-204, §804, 82 Stat. 81 (1968) (codified as 42 U.S.C. §3604(a-e)).

¹⁶⁵ 140 S. Ct. 1731 (2020).

¹⁶⁶ *Id.* at 1741.

¹⁶⁷ *Id.* at 1738.

¹⁶⁸ Olivieri, *supra* note 156, at 409-10.

¹⁶⁹ *Id.* at 414; *see generally*, H.R. 1447, 115th Cong. (2017); S. 1328, 115th Cong. (2017).

¹⁷⁰ Olivieri, *supra* note 156, at 414.

protect queer people by adding “sexual orientation” to the Fair Housing Act, but the Act has never made it out of committee in both the House and the Senate.¹⁷¹ Congress’s unwillingness to affirmatively protect queer people in the fight for fair housing by blatantly ignoring these bills is yet another example of the queer communities’ long history of oppression.

V. THE SUPREME COURT’S APPROACH TO DEFINING SEXUAL ORIENTATION AS A CLASSIFICATION UNDER THE EQUAL PROTECTION CLAUSE

To date, the Supreme Court has yet to determine what standard of review should apply to sexual-orientation related cases.¹⁷² Recently, the Supreme Court recognized that under the Equal Protection Clause same-sex couples are entitled to the fundamental right to marry in *Obergefell v. Hodges*.¹⁷³ However, the Court in *Obergefell* did not use a traditional equal protection analysis to hold that same-sex couples have a fundamental right to marry.¹⁷⁴ Marriage equality resolves a plethora of legal issues facing same-sex couples, but sexual minorities face a whole host of legal issues that require the Court to definitively establish a consistent standard under the Equal Protection Clause.¹⁷⁵ Before discussing the advantages of adopting sexual orientation as a suspect classification, it is beneficial to first discuss Supreme Court jurisprudence on sexual orientation and the Equal Protection Clause.

The Supreme Court first considered a statute that discriminated on the basis of sexual orientation in *Bowers v. Hardwick*.¹⁷⁶ In *Bowers*, the Court upheld a statute that created criminal liability for those who engaged in same-sex sexual intercourse or encounters on the ground that homosexual couples had no fundamental right to engage in sodomy.¹⁷⁷ The District Court granted the State’s motion to dismiss for failure to state a claim on the ground that a statute prohibiting

¹⁷¹ H.R. 2402, 116th Cong. (2019); S. 1246 116th Cong. (2019).

¹⁷² Stacey L. Sobel, *When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL’Y 493, 495 (2015).

¹⁷³ *Obergefell v. Hodges*, 576 U.S. 644, 655 (2015).

¹⁷⁴ Sobel, *supra* note 172, at 495.

¹⁷⁵ *Id.*; see also 10 U.S.C. § 654 (1994) (repealed 2010).

¹⁷⁶ 478 U.S. 186 (1986).

¹⁷⁷ *Id.* at 190-91.

sodomy did not violate the Constitution.¹⁷⁸ The Court of Appeals reversed, holding that the state statute violated respondent's fundamental right to privacy because the practice of sodomy is a "private and intimate" activity that is "beyond the reach of state regulation."¹⁷⁹ The Court explained that that the Court of Appeals incorrectly applied the right to privacy in one's home and failed to consider whether homosexual people have a fundamental right to engage in sodomy.¹⁸⁰ The Court declined to extend the fundamental right to marry and raise children to queer Americans, because it did not see a connection between homosexual activity and marriage and procreation.¹⁸¹ Because the right to engage in sodomy is not a fundamental right, the law prohibiting sodomy must only be justified by a "rational basis for the law."¹⁸² The Court in *Bowers* explained that the moral opposition to sodomy by a majority of the electorate in Georgia constituted a legitimate government interest in enacting a statute to prohibit its practice.¹⁸³ The Court reasoned that because most laws are based on the notion of morality, if all laws representing moral conflicts are to be invalidated under the Fourteenth Amendment, most laws would not survive.¹⁸⁴ It then would be unreasonable to strike down laws on this ground.¹⁸⁵

In *Romer v. Evans*,¹⁸⁶ the Court held that an amendment to a state constitution that denied legal protections to homosexual and bisexual people violated the Equal Protection Clause because the Amendment is not related to any legitimate government purpose.¹⁸⁷ *Romer* was the first case to safeguard the rights of sexual minorities. However, *Romer* did not add anything to determine if sexual orientation as a classification under the equal protection clause requires a different degree of constitutional scrutiny.¹⁸⁸ *Romer* instead merely applied a pre-existing standard of scrutiny: the rational basis

¹⁷⁸ *Id.* at 188.

¹⁷⁹ *Id.* at 189.

¹⁸⁰ *Id.* at 190.

¹⁸¹ *Id.* at 191.

¹⁸² *Id.* at 196.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 517 U.S. 620 (1996).

¹⁸⁷ *Id.* at 635.

¹⁸⁸ Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL'Y 493, 505 (2015).

test for non-suspect classifications that invalidate a state's constitutional amendment if it lacks any legitimate government purpose.¹⁸⁹

The Court in *Romer* analyzed precedent regarding non-suspect classes and the Equal Protection Clause and concluded that if a law neither burdens a fundamental right nor targets a suspect class, the Court shall uphold the law “so long as it bears a rational relation to some legitimate end.”¹⁹⁰ In this case, the state of Colorado in 1992 adopted an amendment by referendum that prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect” LGBTQ+ identifying groups in response to growing city ordinances that banned discrimination on the basis of sexual orientation.¹⁹¹ On appeal, the Court found no rational relationship between the classification adopted and the amendment because it was both too narrow and too broad.¹⁹² Additionally, the Court found that the bare desire to harm a politically unpopular group cannot constitute a legitimate government interest.¹⁹³

In 2003, the Supreme Court overturned *Bowers* in *Lawrence v. Texas*.¹⁹⁴ The Court in *Lawrence* held that there was no rational basis for a criminal statute that prohibited consensual sodomy.¹⁹⁵ However, the Court analyzed this case *not* under an Equal Protection analysis, but under the Due Process Clause of the Fourteenth Amendment.¹⁹⁶ The doctrine of “substantive due process” prevents states from infringing on fundamental liberty interests unless the state can show the infringement is narrowly tailored to a compelling government

¹⁸⁹ *Id.*

¹⁹⁰ 517 U.S. at 631. The Court did not discuss whether sexual orientation is a suspect class and thus entitled to heightened scrutiny, and automatically denoted sexual orientation as a non-suspect class under the Equal Protection Clause. *Id.*

¹⁹¹ *Id.* at 623.

¹⁹² *Id.* at 633. The Court noted that a law may still be rationally related to a legitimate government end even if the law “seems unwise or works to the disadvantage of a particular group, or the rationale for it seems tenuous.” *Id.* However, the amendment in this case cannot even satisfy this minimal standard because of the underinclusive and broad nature of the amendment; the amendment identified persons by a single trait and then denied them any and all protections under the law pursuant to that one trait, which the Court found to be unprecedented. *Id.*

¹⁹³ *Id.* at 635 (citing *Dep’t of Agric., v. Moreno*, 413 U.S. 528, 534 (1973)).

¹⁹⁴ 539 U.S. 558 (2003).

¹⁹⁵ *Id.* at 586.

¹⁹⁶ *Id.* at 564.

interest.¹⁹⁷ The Court in *Lawrence* rejected the majority's reasoning in *Bowers* that upheld a criminal statute prohibiting sodomy based on moral opposition to homosexuality.¹⁹⁸ The Court held that the moral opposition to sodomy by some percentage of the community does not allow the state to force those views on the public at large by criminalizing sodomy and effectively limiting a group's freedom.¹⁹⁹ Instead, individual decisions by married couples concerning the private details of their sexual relationship even when not intended for reproduction are a form of liberty protected under the Due Process Clause.²⁰⁰ The Court recognized that all individuals are entitled to the fundamental right to privacy²⁰¹ in their private lives and the state cannot "control their destiny by making their private life a crime."²⁰²

In 2013, the Supreme Court again considered a law that discriminated on the basis of sexual orientation in *United States v. Windsor*.²⁰³ In *Windsor*, the Court struck down the Defense of Marriage Act ("DOMA") on the ground that it violated the Equal Protection Clause because it prevented an entire class of people, same-sex married couples, from having access to the benefits of a legally recognized marriage.²⁰⁴ Congress passed DOMA before state legislatures could legalize same-sex marriage.²⁰⁵ DOMA excluded a same-sex partner from the definition of "spouse" in all federal statutes.²⁰⁶ The Respondent, Edith Windsor, and her wife were lawfully married in Ontario, Canada but lived in New York which recognized their Ontario marriage as a valid one.²⁰⁷ Windsor wanted to claim her late wife's estate under the estate tax exemption for surviving spouses.²⁰⁸ Because of DOMA, Windsor could not claim the marital exemption from the federal estate tax which excludes from

¹⁹⁷ *Id.* at 593.

¹⁹⁸ *Id.* at 570.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 578 (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

²⁰¹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a fundamental right to privacy in marital relationships); see also *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a constitutional right to terminate her pregnancy pursuant to the right to privacy found implicitly in the constitution).

²⁰² *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁰³ *United States v. Windsor*, 570 U.S. 744 (2013).

²⁰⁴ *Id.* at 775.

²⁰⁵ *Id.* at 752.

²⁰⁶ *Id.* at 753.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 750.

taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.”²⁰⁹ The Court first recognized that the states have the power to create their own laws governing marriages in their own state and the federal government typically does not reach into this traditional state power.²¹⁰

At the time of the Respondent’s wife’s death in 2009, New York recognized same-sex marriages from other states and later legalized marriages made within the state in 2011.²¹¹ DOMA sought to invalidate and injure the very class New York intended to protect when it recognized and then allowed same-sex marriage in the state, violating Equal Protection principles.²¹² Relying on *U.S. Department of Agriculture v. Moreno*,²¹³ the Court held that at the very least, the Fourteenth Amendment prevents Congress from implementing statutes with the bare desire to harm a politically unpopular group to which that desire is motivated by animus or hatred.²¹⁴ Such a problematic intention cannot be deemed a legitimate government purpose and fails to satisfy rational basis review under the Equal Protection Clause.²¹⁵

The cases where the Court considered sexual orientation under the Equal Protection Clause resulted in the Court’s defending the LGBTQ+ community by striking down discriminatory statutes that denied individuals equal protection under the law solely because of whom they love. While the Court’s decisions have substantially helped the LGBTQ+ community, the Court has failed to identify classifications based on sexual orientation as suspect or quasi-suspect classifications subject to strict scrutiny or even intermediate scrutiny. In *Windsor*, the Court could have considered whether queer people constituted a suspect class, but instead the Court simply invalidated DOMA as a product of animus directed towards same-sex couples: a well-established framework used regularly on non-suspect classes.²¹⁶ The Court has never considered the merits of an argument for classifying sexual orientation as a suspect classification even though

²⁰⁹ *Id.* (quoting 26 U.S.C. § 2056(a) (2018)).

²¹⁰ *Id.* at 768.

²¹¹ *Id.* at 769.

²¹² *Id.*

²¹³ 413 U.S. 528 (1973).

²¹⁴ *Windsor*, 570 U.S. at 770.

²¹⁵ *Id.*

²¹⁶ Darren Lenard Hutchinson, “Not Without Political Power”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine* 65 ALA. L. REV. 975, 977 (2014).

the history of systemic oppression of queer people in the United States meets all the criteria required to constitute a suspect class discussed in Section II of this Note.²¹⁷

VI. RATIONALE FOR ADOPTING SEXUAL ORIENTATION AS A SUSPECT CLASSIFICATION

A. Discrete and Insular Minority

Suspect classifications under the Equal Protection Clause originate from the seminal case, *United States v. Carolene Products*,²¹⁸ previously discussed in Section III of this Note.²¹⁹ Paragraph three of *Carolene Products* requires heightened constitutional scrutiny for legislation that appears, on its face, to target particular religious, national, racial groups, or prejudice directed at “discrete and insular minorities” that have the effect of “curtail[ing] 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.”²²⁰

In *Massachusetts Board of Retirement v. Murgia*,²²¹ the Supreme Court held that a “discrete and insular” group is one that demands “extraordinary protection from the majoritarian political process.”²²² Additionally, a “discrete and insular” group is subjected to purposeful and systemic unequal treatment rendering it politically unpopular and politically powerless.²²³ Building on *Murgia*, Professor Bruce Ackerman champions a more descriptive definition for the phrase, “discrete and insular minority.”²²⁴ A group is “discrete” if its members are “relatively easy for others to identify” and a group is

²¹⁷ Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014).

²¹⁸ 304 U.S. 144, 152 (1938).

²¹⁹ See *supra* notes 57-59 and accompanying text.

²²⁰ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

²²¹ 427 U.S. 307 (1976).

²²² *Id.* at 313 (holding that a state law that required police officers to retire at age fifty did not violate the Equal Protection Clause because the right of government employment was not fundamental, and the law was rationally related to a legitimate public interest in maintaining a physically competent police force).

²²³ *Id.*

²²⁴ Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729 (1985).

“insular” if its members readily and frequently interacts with one another in a variety of social contexts.²²⁵

The queer community is certainly a discrete and insular minority as queer people are only 5.6% of the American population.²²⁶ Queer Americans are especially discrete and insular compared to racial minorities, where the number of Americans of color more than doubles that of queer Americans totaling up to: 13.4% Black, 18.5% Hispanic or Latino, 5.9% Asian, and 1.5% Native, Alaska Native, Hawaiian, or Pacific Islander.²²⁷

At first glance, a person’s “queerness” is not automatically discernable simply from looking at a person, the way a person’s race is more easily discernible. One’s sexual orientation is an internally held trait and not a physical trait making it difficult to always know if a person is queer or straight. However, the queer community still fits within Professor Ackerman’s definition for discrete and insular because queer culture is full of identifying characteristics such as dress, speech patterns, language, and overall appearance that make it easier for others to know or assume that another person is queer.²²⁸ Studies show that queer people commonly alter their appearance after coming out to conform with known queer stereotypes and trends to make themselves easily identifiable to other queer people.²²⁹ Lesbian or queer women often embrace a more masculine appearance by limiting their use of cosmetic products, cutting their hair short, and wearing androgynous or masculine clothing.²³⁰ Gay or queer men

²²⁵ *Id.* at 726.

²²⁶ Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in the Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

²²⁷ United States Census Bureau, *QuickFacts*, CENSUS.GOV, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Mar. 29, 2021).

²²⁸ Nicholas O. Rule, *Perceptions of Sexual Orientation from Minimal Cues*, 46 ARCHIVES OF SEXUAL BEHAVIOR 129 (2017).

²²⁹ *Id.* at 130.

²³⁰ *See id.* There is a plethora of other identifying non-verbal cues that queer people use or adapt that signal a queer identity. *See id.* at 130-32. The most common cue that conveys sexual orientation is through the way a person speaks. *Id.* Queer people commonly pronounce letters and consonants differently than their straight counterparts, most notably: the “gay lisp” where gay men frequently lisp more than straight men on the consonant, /s/. *Id.* at 131. Gay men also are statistically more likely to have a higher pitched voice than that of straight males. *Id.* While the debate over speech differences between queer and heterosexual individuals is elusive in that

similarly distinguish themselves by “donning particular styles of clothing and grooming to signal their affiliation within subgroups of gay culture [such as] ‘leather-men’ and ‘bears.’”²³¹ Gay and queer men may also dress more stereotypically feminine compared to their straight male counterparts.²³² While these identifying characteristics were originally adopted for queer people to signal to other queer people that they are interested in same-sex relationships,²³³ non-queer people are also familiar with these identifying non-verbal cues and use this information in a myriad of ways.²³⁴ Studies show that people often unconsciously process assumptions about a person’s sexual orientation based on these cues and unintentionally force stereotypes and heteronormative ideals on queer people to the queer community’s detriment.²³⁵ Although sexual orientation is not an overt physical trait like race or sometimes gender, a person’s style, personality, speech, and language signal their belonging to the queer community, allowing them to be easily identifiable to the community at large, which in turn makes them a discrete and insular minority.

Members of the Court have historically recognized queer people as part of an insular minority in the United States for decades, even though a majority of the Court has yet to hold that sexual orientation is a suspect class under the Fourteenth Amendment.²³⁶ Justices Brennan and Marshall argued that severe criticism targeted at publicly “out” queer people render those individuals politically powerless to “pursue their rights openly in the political arena.”²³⁷ Although a majority of the Court has never adopted Justice Brennan and Justice Marshall’s interpretation of suspect classifications as applied to sexual orientation, the Court has interpreted the “discrete and insular” analysis to limit the government from using certain personality traits as a means of classification, “when these traits are

it is unclear exactly what makes speech vary amongst queer and straight individuals, there is robust support that one’s speech conveys their sexual orientation. *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 135.

²³⁵ *Id.*

²³⁶ *Rowland v. Mad River Local Sch. Dis.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting).

²³⁷ *Id.*

irrelevant to a person's capabilities to contribute to society.”²³⁸ A person's sexual orientation has no bearing on the ability to function in society in any way, and thus, classifications based on sexual orientation are arbitrary and have no other purpose other than to make the lives of queer people more difficult.

Early Equal Protection cases centered their analysis on whether a particular group was or was not a “discrete and insular” minority.²³⁹ Today, courts have begun using other factors such as political powerlessness, history of discrimination, and immutability to determine whether a group was a “discrete and insular minority” deserving of heightened scrutiny.²⁴⁰ The modern approach allows for courts to determine a group's “suspectness” with greater precision to more successfully implement the spirit and theory of Footnote Four: to require heightened scrutiny for laws that burden discrete and insular minorities.²⁴¹

B. The Queer Community Has Suffered a History of Discrimination

Classifications that the Court has deemed to be suspect are classifications based on race, ethnicity, and national origin.²⁴² When governments make classifications based on race, ethnicity or national origin, the groups targeted by the classification, mainly people of

²³⁸ *Frontiero v. Richardson*, 411 U.S. 677 (1973). A plurality of the Court recognized sex as a suspect class and a concurrence of four Justices refused to extend strict scrutiny to sex, but the sex-based classification in this case should be overruled pursuant to precedent in *Reed v. Reed*, 404 U.S. 71 (1971). In *Frontiero*, the Court considered a case where a married female Air Force officer sought to obtain government benefits for her husband if she claimed him as a dependent. *Frontiero*, 411 U.S. at 678. Under federal law, a man could claim his wife as a dependent “without regard to whether she is in fact dependent” on him financially, but a woman could claim her husband only if she sufficiently proved that her husband relies on her for one-half of his support. *Id.* The question before the Court was whether the difference in treatment of the two groups based only on sex violates the Due Process Clause. *Id.*; See also Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 153 (1988).

²³⁹ Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 149 (2011).

²⁴⁰ *Id.* at 150.

²⁴¹ *Id.*

²⁴² See generally *Korematsu v. United States*, 323 U.S. 214 (1945).

color, have suffered a history of discrimination.²⁴³ Black and brown Americans have suffered a terrible history of discrimination since the nation's inception beginning with the slave trade and continuing to the modern day with ever-present police brutality targeted at black Americans.²⁴⁴ Courts have struggled with determining whether a group has the "requisite history of discrimination" because courts must compare the present group's history with the experience of Americans of color and immigrants.²⁴⁵ The Court has never announced another suspect class in part because in the eyes of the Court no other group's history has sufficiently compared to the experience of marginalized racial, ethnic, and immigrant groups.²⁴⁶ While not as visible, the queer community has also sustained a history of prolonged discrimination.²⁴⁷ State authorized discrimination targeted at queer people persists to this day as many state legislatures continue to advance bills that target queer people directly, and allow for religious exemptions that effectively target queer people and their right to fully participate in society.²⁴⁸

Congress passed The Religious Freedom Restoration Act ("RFRA") in 1993 in order to prevent states from substantially burdening religious practice without a compelling governmental interest.²⁴⁹ Governments can only burden religion if the law is the least

²⁴³ Strauss, *supra* note 239, at 150.

²⁴⁴ Meilan Solly, *158 Resources to Understand Racism in America*, SMITHSONIAN MAG, (June 4, 2020, 11:47 AM), <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/>.

²⁴⁵ Strauss, *supra*, note 239, at 151-52.

²⁴⁶ *Id.*

²⁴⁷ *See generally supra* Section IV.

²⁴⁸ American Civil Liberties Union, *Past Legislation Affecting LGBT Rights Across the Country 2020*, ACLU, <https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020> (Last updated Mar. 20, 2020).

²⁴⁹ Religious Freedom Restoration Act, 42 U.S.C. 2000bb(2)(a)(3) (2018). Congress passed RFRA with the intent of restricting the application and force of the Court's decision in *Emp. Div. Dep't. of Hum. Res. v. Smith*, 494 U.S. 872 (1990). *See* David Schultz, *Religious Freedom Restoration Act of 1993*, THE FIRST AMENDMENT ENCYCLOPEDIA (last updated, Sept. 2017), <https://www.mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of-1993#:~:text=Congress%20adopted%20the%20Religious%20Freedom,First%20A%20mendment%20free%20exercise%20clause>. In *Smith*, the Court effectively eliminated the need for strict scrutiny review on government actions that burden religion and instead, held that neutral and generally applicable laws do not violate the First Amendment. *Id.* In response to *Smith*, Congress enacted RFRA to restore the "strict scrutiny" test used in *Sherbert v. Verner*, 374 U.S. 398 (1963) and

restrictive means to achieving that interest.²⁵⁰ Just four years after Congress passed RFRA, the Court held that Congress only had authority to extend RFRA to federal laws and that applying RFRA to the states exceeded Congress's authority.²⁵¹ In response to the Court's holding, state legislatures passed their own versions of RFRA to effectively allow for any entity to refuse public services to anyone, based on religious objections.²⁵² The state versions of RFRA are substantially broader, and allow for any institution, even private restaurants, bakeries, or other business organization to refuse service to queer people on the ground that their religious beliefs prohibit them from supporting queer "lifestyles."²⁵³ These state bills have the potential to be deadly or life altering to queer people because they may even allow for doctors and medical providers to refuse abortion services, birth control, adoption services, and patient referrals just because a patient is queer.²⁵⁴ Anti-LGBTQ+ advocacy groups fund legislators campaigns throughout the country and lobby their offices to adopt anti-queer legislation under the guise of religious freedom.²⁵⁵

A history of discrimination is important to determine a group's suspect status because it is an indicator of a group's political power and helps courts determine whether the political branches of government have failed to protect the group.²⁵⁶ If a group suffers a history of discrimination, its relationship with the political process is tarnished in two ways. First, because the group is socially despised and politically unpopular, they may have not been able to form coalitions with other advocacy groups to garner support for legislation and initiatives to improve their quality of life.²⁵⁷ The queer community

Wisconsin v. Yoder, 406 U.S. 205 (1972). RFRA ensured that strict scrutiny, not rational basis, would be the applicable standard of review to determine whether burdens on religion are constitutional. *See* 42 U.S.C. 2000bb(2)(b)(1).

²⁵⁰ 42 U.S.C. 2000bb(2)(a)(3).

²⁵¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁵² Arielle P. Schwartz, *Discrimination Masquerading as Religious Freedom is a Slippery Slope that Hurts Everyone*, NAT'L. LGBTQ TASK FORCE, <https://www.thetaskforce.org/discrimination-masquerading-as-religious-freedom-is-a-slippery-slope-that-hurts-everyone/> (last visited Apr. 1, 2021).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 'RELIGIOUS LIBERTY' AND THE ANTI-LGBT RIGHT, S. POVERTY L. CTR. (Spring 2016), https://www.splcenter.org/sites/default/files/splc_religious_liberty_and_anti-lgbt_right.pdf.

²⁵⁶ Strauss, *supra* note 239, at 150.

²⁵⁷ *Id.* at 151.

was not recognized as a distinct minority with unique challenges and realities until the mid 1950s when LGBTQ+ advocacy groups started to form.²⁵⁸ Second, legislators themselves may be susceptible to bias towards historically oppressed groups due to pressure from their constituents and ongoing cultural norms.²⁵⁹

Twenty-five state legislatures have adopted minimal legislation to affirmatively protect queer people.²⁶⁰ The Human Rights Campaign, a civil rights group, creates an annual “State Equality Index” where it assesses state efforts to prevent queer discrimination and gives each state a grade for its performance.²⁶¹ The twenty-five states that have not adopted any or very minimal legislation to protect queer people have no laws to outlaw conversion therapy, address hate crimes against queer people, anti-bullying laws, anti-housing discrimination, and more.²⁶² States’ hesitation to remedy queer discrimination stems from a tumultuous history of anti-queer sentiments throughout American history.

C. Immutability

The Court has never offered a concise definition of immutability as a factor in Equal Protection analysis,²⁶³ but instead the immutability criterion has evolved over the years from various additions to immutability jurisprudence.²⁶⁴ The Court first established immutability as a suspect criterion in *Frontiero v. Richardson*.²⁶⁵ The Court held that since both sex and race are “immutable characteristic[s] determined solely by the accident of birth” placing burdens on those groups solely based on their identification with that immutable trait violates the premise that “legal burdens should bear some relationship to individual responsibility.”²⁶⁶ In *Bakke*, Justice Brennan described

²⁵⁸MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* 13 (2012).

²⁵⁹ Strauss, *supra* note 239, at 151.

²⁶⁰ Carl Smith, *2020 Brought Legislative Progress, Pushback on LGBTQ Issues*, GOVERNING (Jan. 21, 2021), <https://www.governing.com/now/2020-Brought-Legislative-Progress-Pushback-on-LGBTQ-Issues.html>.

²⁶¹ *Id.*

²⁶² *State Scorecards*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/state-scorecards> (Last visited Apr. 1, 2021).

²⁶³ Nicholas Serafin, *In Defense of Immutability*, 2020 B.Y.U.L. REV. 275, 280.

²⁶⁴ *Id.*

²⁶⁵ 411 U.S. 677 (1973); *see supra* note 232.

²⁶⁶ 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

an immutable trait as something “which its possessors are powerless to escape or set aside.”²⁶⁷

In *Obergefell*,²⁶⁸ Justice Kennedy recognized sexual orientation as both a “normal expression of human sexuality and immutable.”²⁶⁹ The Court reasoned that because sexuality is immutable, the petitioners had no real choice but to marry a same-sex partner.²⁷⁰ Justice Kennedy noted the longstanding recognition of the fundamental right to marry and held that same-sex couples shall be just as entitled to the right to marry as their heterosexual counterparts.²⁷¹ The Court’s holding relied on scientific evidence that sexuality is a static trait that a person can never change and is born with: just as individuals cannot change their race or ethnicity.²⁷² Scientific research suggests that sexual orientation is not determined by any one factor and instead results from a culmination of genetic, cultural, environmental, and biological influences.²⁷³ This means that people cannot simply “choose” their sexual orientation, but instead are born with it, and it is likely something predetermined much like someone’s eye color or skin color.²⁷⁴ As a result, people are unlikely to be successful in trying to change their sexual orientation because it is a predetermined and static characteristic.²⁷⁵ This is evidenced through the consistent failure of conversion therapy to change a person’s sexual orientation.²⁷⁶ Although some participants report that they learned strategies to ignore their attraction to members of the same-sex and engage in heterosexual encounters, they rarely report that conversion therapy “successfully” made them straight.²⁷⁷

Opponents of heightened scrutiny for queer communities may argue that sexual orientation is not immutable because studies show

²⁶⁷ *Regents of the Univ. Of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part).

²⁶⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁶⁹ *Id.* at 661.

²⁷⁰ *Id.* at 658.

²⁷¹ *Id.* at 665.

²⁷² Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX. RSCH. 1, 2-3 (2016), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1023&context=scholarship>.

²⁷³ *Id.* at 3-6.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 8.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

that sexual orientation is subject to flexibility and slight change throughout a person's life.²⁷⁸ In longitudinal studies, a significant number of people report identifying as one sexual orientation earlier in life, and then when asked again many years later, they report a different sexuality.²⁷⁹ These slight changes in self-identification can be attributed to changes in the changing social climate and attitudes towards queerness, varying life experiences and romantic relationships, and more.²⁸⁰ In other words, people's own perception of their sexuality is subject to change and flexibility over time as the communities they live in grow to accept or reject queer people, or as individuals enter and leave romantic relationships. However, the fact that some people change the labels they give themselves over time as they experience the world does not detract from the fact that sexual orientation is still generally static and unchanging for most.²⁸¹

Courts have also made clear that immutability of a characteristic is not a necessary component for a group to be a suspect classification under the Equal Protection Clause.²⁸² Instead, immutability is one factor of many that may help courts determine if a classification is suspect. In fact, the Court in *Graham v. Richardson*²⁸³ determined that classifications based on alienage were subject to strict scrutiny just like race and national origin classifications even though alienage is not an immutable trait.²⁸⁴ Noncitizens have the opportunity to no longer be considered "aliens" by applying to become naturalized citizens.²⁸⁵

D. Political Powerlessness

The political powerless doctrine is perhaps the most understudied and under-evaluated element of the suspect classification doctrine.²⁸⁶ No court has provided a succinct definition of "political

²⁷⁸ *Id.* at 12.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 18.

²⁸³ 403 U.S. 365 (1971).

²⁸⁴ *Graham*, 403 U.S. at 371-72.

²⁸⁵ *Diamond & Rosky*, *supra* note 272, at 19.

²⁸⁶ Darren Lenard Hutchinson, *Article: "Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 978 (2018).

powerlessness” in the equal protection context, which only obfuscates the understanding and application of the doctrine.²⁸⁷ The Supreme Court has noted, however, that groups who face “political isolation and historical mistreatment” such as the poor,²⁸⁸ mentally disabled,²⁸⁹ the elderly,²⁹⁰ and undocumented persons²⁹¹ do not qualify as a suspect or quasi-suspect class.²⁹² As previously stated, the Court has never considered whether sexual orientation ought to constitute a suspect class. However, Justice Scalia once indicated that he would not vote in favor of elevating sexual orientation to suspect status because he believed that queer people have “disproportionate wealth, education, and political power.”²⁹³

Justice Scalia’s belief is entirely misguided. Professor Ackerman posits that American politics are not defined simply by one, cohesive majority and one, cohesive minority that work against one another to gain political influence.²⁹⁴ Instead, normal politics are pluralistic: where smaller fractions of groups bargain with one another to gain mutual support.²⁹⁵ Some groups, Professor Ackerman calls them “C-Groups” named after “discrete and insular” groups discussed in *Carolene Products*’ Footnote Four, have difficulty striking bargains

²⁸⁷ *Id.*

²⁸⁸ *James v. Valtierra*, 402 U.S. 137 (1971) (holding that a law that required a majority voting in a community election to approve of the construction of low-rent housing did not violate the Equal Protection Clause).

²⁸⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that the denial of a special use permit to a permanent residential facility for the mentally disabled was premised on an irrational prejudice against the mentally ill and thus unconstitutional under the Equal Protection Clause).

²⁹⁰ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (upholding a police department’s mandatory retirement provision on the ground that such a classification based on age survived rational basis review).

²⁹¹ *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a state law that withheld funding to local school districts that educated undocumented students on the ground that non-citizens are entitled to the fundamental right to receive an education).

²⁹² Hutchinson, *supra* note 286, at 992. This premise is not to be confused with the distinct “history of discrimination” element of the equal protection analysis discussed in Section 6B of this Note. The “history of discrimination” element speaks to a systemic, outright, and invidious history of discrimination towards a particular group, while the “historical mistreatment” discussed in the preceding line of cases refers to pervasive prejudice among those groups.

²⁹³ *Id.* at 993. *See also Romer v. Evans*, 517 U.S. 645-46 (1996) (Scalia, J., dissenting).

²⁹⁴ Bruce Ackerman, *Article: Beyond Carolene Products*, 98 HARV. L. REV. 713, 719-20 (1985).

²⁹⁵ *Id.* at 995; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

with other groups seeking a coalition.²⁹⁶ Consequently, C-Groups will often lose politically, in that they are unable to influence legislation to be favorable to their needs and demands.²⁹⁷ Denoting C-Groups as a suspect class ensures that a court intervenes and defends the C-Group when the legislative system fails to defend that group initially.²⁹⁸

The Seventh Circuit and the District of Columbia Superior Court have heard cases that purported to raise sexual orientation to a quasi-suspect or suspect class entitled to heightened scrutiny.²⁹⁹ Both cases, in sum, held that sexual orientation cannot be a suspect class because queer people do not lack political power to warrant heightened constitutional protection.³⁰⁰ Both courts pointed to the growth of local legislation that sought to legalize domestic partnerships in a given area.³⁰¹ The courts suggested that because the queer community was able to successfully access the legislature in some areas, queer people cannot possibly be politically powerless.³⁰²

These courts greatly overestimate the helpfulness of these bills, while underestimating the overall lack of federal legislation to legalize same-sex marriage. The late legalization of same-sex marriage in 2015 in *Obergefell*,³⁰³ and the continuous passage of state RFRA statutes in a multitude of states signals the governments' obvious reluctance to use the political process to assist queer communities.³⁰⁴ There will never be a group that will have zero political power, as even the smallest minorities are likely able to influence politics in some way. Every group can create grassroots lobbying groups, vote in every single election available to them, and donate to their favorite politicians in the hopes of seeing at least the slightest favorable results. If the standard were "complete deprivation of political power" then

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Dean v. D.C.*, 653 A.2d 307 (D.C. 1995).

³⁰⁰ *Dean*, 653 A.2d at 350.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *See generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁰⁴ Arielle P. Schwartz, *Discrimination Masquerading as Religious Freedom is a Slippery Slope that Hurts Everyone*, NAT'L. LGBTQ TASK FORCE, <https://www.thetaskforce.org/discrimination-masquerading-as-religious-freedom-is-a-slippery-slope-that-hurts-everyone/> (last visited Apr. 1, 2021).

virtually no group would ever qualify as this is an impossible standard to meet.³⁰⁵

It would be unconscionable to posit that queer Americans have not made any progress in gaining political power over history in relative terms, as they were never expressly denied the right to vote, the right to organize, or expressly denied the right to run for office. However, queer Americans still are disproportionately excluded from American politics.³⁰⁶ In 2020, eleven openly gay lawmakers were elected to the 117th Congress.³⁰⁷ While this was the highest number of queer Congresspeople elected to date, these eleven make up merely two percent of Congress while the queer population in America is nearly double at 5.6%.³⁰⁸ In the 2020 state elections, 317 openly queer candidates ran for office.³⁰⁹ Of the 237 candidates who survived the primaries, 149 won their races³¹⁰ out of a total of 7,383 available state legislator seats in the nation³¹¹ resulting in two percent of state legislature seats being held by queer representatives. Additionally, the very reluctance of the Supreme Court to afford higher constitutional protections to queer communities also speaks to queer communities' systemic lack of political power. As previously stated, the Court has never considered sexual orientation as a quasi-suspect or suspect classification under the Equal Protection Clause and has only recently extended the fundamental right to marry to same-sex couples. Without heightened constitutional scrutiny, states have historically been successful in passing anti-LGBTQ laws so long as they meet rational basis review. Queer interest groups, super-PACs, and individual advocates alike have been unsuccessful in persuading the Court to

³⁰⁵ Hutchinson, *supra*, note 286, at 998.

³⁰⁶ Andrew Flores, et al, *11 Openly LGBTQ Lawmakers Will Take Their Seats in the Next Congress*, WASH. POST (Nov. 30, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/11/30/11-lgbtq-legislators-will-take-their-seats-next-congress-largest-most-diverse-group-ever/>.

³⁰⁷ *Id.*

³⁰⁸ Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in the Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

³⁰⁹ Flores et al. *supra* note 300.

³¹⁰ *Id.*

³¹¹ *Number of Legislators and Length of Terms in Years*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx> (last visited Oct. 12, 2021).

award more protections for queer Americans: a direct testament to the continuous political powerlessness of the queer community.

VII. CONCLUSION

Upon analyzing the Court's equal protection jurisprudence and its exclusion of sexual orientation from the suspect classification framework, it has become clear that heightened constitutional scrutiny is needed to protect queer Americans from invidious discrimination. The existing equal protection framework has made it impossible for new groups beyond race, ethnicity, and national origin to obtain suspect classification status even though those groups squarely fit into the existing equal protection framework. The factors to consider whether a classification is suspect: discrete and insular, immutability, history of discrimination, and political powerlessness, apply to sexual orientation in similar ways the framework has applied to preexisting suspect classifications.

The growing demand for social justice in the United States for marginalized groups should serve as an impetus for the Court to finally take action to protect the LGBTQ+ community when it has historically been unwilling to do so. States should not be able to pass laws that treat queer people differently than their straight counterparts without a compelling reason for doing so just as in the case of racist and xenophobic legislation. Sexual orientation has no bearing on the ability to participate in society and should not be a basis for excluding queer people from the public sphere. The United States may not be "the land of the free" until the nation's laws seek to serve the people evenhandedly. President Obama eloquently said: "When all Americans are treated as equal, no matter who they are or whom they love, we are all more free."³¹²

³¹² Barack Obama (@BarackObama), TWITTER (May 8, 2014, 2:28 PM), <https://twitter.com/barackobama/status/464471801473417217?lang=en>.