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EDITOR INTRODUCTION

The 2016 Law Journal for Social Justice Symposium, "Promising Practices in Criminal Justice" focused on current programs regarding re-entry and rehabilitation. Discussions ranged from specialty court programs like the Veteran's Court and Homeless Court, victim-oriented rehabilitation for trafficking victims, and re-entry programs. Panelists included judges, practicing attorneys, and community organizers.

Social justice is an evolving, broadening concept, finding new meaning throughout the academic community. This journal, and the articles found herein, is designed to present these emerging concepts in a manner that allows both the jurist and the layperson to engage them. The issue begins with *Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?*, written by Kim Weidenaar, an article commenting on local zoning ordinances as tools for preventing obesity in disproportionately affected populations. However, with the second article, *Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies*, Leah K. Jurss concentrates on food sovereignty in tribal communities and labeling of Native food products. Alex D. Ivan then shifts the focus by studying how electronic monitoring may be used to empower victims while reducing burdens of imprisonment spending in *Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety*. Next, in *Constitutional Protection of Domestic Violence Victims Reinforced by International Law* Marina Kovacevic argues ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in the United States. Sara Movahed, in *Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution*, then examines legal shortcomings resulting when asylum based solely on a history of gender-based persecution is not considered. Through *Kennedy's Law: The Hidden Constitutionally-Protected Classification*, Nicole Fries explores the necessity of Supreme Court action to provide lower courts the ability "to apply a suspect class framework to non-marriage sexual orientation laws." Next, Erin Iungerich, in *My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry?*, considers protections for at-will employees participating in adult industry activities after-hours. Finally, *Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass* by Peter L. Krehbiel concludes the issue by analyzes concerns that shifting costs related to trade secrets may undermine public policy and society at large. Collectively, the unique perspectives of these articles present important domestic and international issues that must be examined in today's changing landscape.

Special thanks to the Law Journal for Social Justice Editorial Board for their hard work and dedication.

Asha McManimon
2015-2016 Editor-in-Chief
Law Journal for Social Justice

KENNEDY'S LAW: THE HIDDEN DOUBLE-HELIX APPROACH TO SEXUAL ORIENTATION

Nicole Fries, JD*

INTRODUCTION

> It is clear that the fundamental right to marry shall not be deprived to some individuals based solely on the person they choose to love. In time, Americans will look at the marriage of couples such as [the] plaintiffs, and refer to it simply as a marriage–not a same-sex marriage. These couples, when gender and sexual orientation are taken away, are in all respects like the family down the street. The Constitution demands that we treat them as such.[1]

The case of *Obergefell v. Hodges* that was decided by the Supreme Court in July 2015 is the most recent piece in the puzzle of sexual orientation discrimination cases. Authored by Justice Kennedy, and written in a similar fashion to his previous opinions in this line of cases, including *Lawrence v. Texas* and *United States v. Windsor*, *Obergefell*'s impact has yet to be seen. *Obergefell*'s most immediate effect was to legalize same-sex marriage across the country. In this article, I predict that it will not have a great impact on civil rights litigation because it did little to clarify the level of scrutiny that courts should apply when reviewing the constitutionality of laws that treat people differently on the basis of sexual orientation. Most specifically it solidified Kennedy's law, a combination of due process and equal protection rhetoric that scholars currently refer to as the "double helix" of equal dignity.[2]

While Kennedy's rhetoric is lauded by some for truly establishing fundamental liberties in equality, this article aims to point out that in a practical way, the opinion has very little legal usefulness. As the court that creates law and leads the way for the rest of our federal judiciary, the Court should provide lower courts with the tools to parse out these constitutional protections. In Part I, this article provides an overview of

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* Nicole Fries, JD, Sandra Day O'Connor College of Law Class of 2016. Much appreciated edits and support from Professor Zachary Kramer and Kyle LaRose.

[1] *Baskin v. Bogan*, 766 F.3d 648, Entry Cross-Motion for Summary Judgment (7th Cir. 2014).

[2] Lawrence H. Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. F. 16 (2015).

the development of both equal protection and substantive due process frameworks and distinguishes between these legal concepts. Then in Part II, this article reviews the Court opinions Kennedy authored which created the present state of the law as it relates to sexual orientation. Finally, this article argues that the line of sexual orientation cases that conflate due process and equal protection make it difficult for lower courts to consistently analyze these different types of cases because the Court has repeatedly passed up the opportunity to announce the appropriate level of scrutiny. In addition, as new interpretations of sexual orientation come into courtrooms on discrimination-based claims, they cannot be afforded protections under the Equal Protection Clause. Instead, the Court should acknowledge that this rhetoric has theoretically, but not nominally, raised the level of protection for sexual orientation and given lower courts the ability to use the equal protection classification framework as it was intended.

I. CONSTITUTIONAL EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS

During Franklin D. Roosevelt's presidency the structure and function of the Federal government changed in many ways. It also had a profound effect upon how the Court began to see its own structure and function. Beginning in 1938 the Court took its first steps toward modern equal protection jurisprudence in *United States v. Carolene Products*. *Carolene Products* put an end to the practice of "stringently limiting the ability of states and Congress to enact progressive economic legislation."[3] At that time an equal protection framework was interpreted to only protect economic legislation; thereafter, such legislation was judged on a rational basis and placed the burden on the plaintiff to prove the law is impermissibly discriminatory in nature. [4] This deference was applied by the Court to other forms of government, believing that the judiciary "are ill-suited to play a vigorous oversight role and thus allow the coordinate branches of government wide latitude to determine the law."[5]

Most importantly, it was also in *Carolene Products* that the Court noted that in cases involving core rights and discrimination issues, the "ordinary political processes could not be trusted to reach constitutionally legitimate results."[6] The Court suggested the ordinary deference should

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[3] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798 (2006).

[4] *Id.* at 799.

[5] *Id.*

[6] Winkler, *supra* note 3 at 803.

be reversed and the government should bear the burden to rebut the discriminatory presumption.[7] Thus the jurisprudence of heightened review was created, as a policing mechanism for the political process and improperly discriminatory motivation.[8]

In 1942, the Court heard *Skinner v. Oklahoma*, a case involving a law that allowed the sterilization of prisoners based on the level of "moral turpitude" of their crime.[9] Justice Douglas delivered the opinion of the Court, in which he identified procreation as a "basic civil right of man" and strictly scrutinized the classification Oklahoma used, "lest . . . invidious discrimination are made against groups . . . ."[10] In addition Justice Stone said that legislation aimed at "discrete and insular minorities," which lacked the normal protections of the political process, would be one exception to the presumption of constitutionality, justifying a heightened standard of judicial review.[11] This phrasing became more popular in use following the opinion, and ultimately spawned the two-tier test used today when a court invokes the Equal Protection Clause. However, if procreation is a fundamental right, then strict scrutiny should apply under substantive due process principles. Yet, the Court goes on to talk about equal protection, a precursor to Justice Kennedy's conflation of these principles today.

A. Equal Protection Framework

The two-tier inquiry applies to all levels of scrutiny: (1) determine the reason for the discrimination (that is, the government interest being advanced); (2) determine whether the law is sufficiently related or tailored to achieving that interest. For rational basis review, a strong government interest is not required, nor does the law need to be narrowly tailored. For strict scrutiny, a more compelling government interest is required and the law must be closely tailored to meeting the goals of that interest.

In the first element of the equal protection framework the court determines if the government entity has compelling objectives or ends.[12] The government's reasons for enacting the law must have societal importance in order to justify "impinging upon someone's core constitutional rights."[13] If the reasons are determined to be compelling, then the second tier requires that the law must be narrowly tailored to the

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[7] *Id.*
[8] *Id*. at 802.
[9] *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).
[10] *Id.*
[11] *Id.*
[12] Winkler, *supra* note 3 at 800.
[13] *Id.*

government's reasons. This requires that the law does not implicate any more or less rights than is necessary to further the purpose of the law.[14] This is also known as the "least restrictive alternative" requirement, and the court may determine there is pretext or animus in the reasons provided by the government if a much greater number of individuals or their rights are implicated by a law than is necessary for their stated purpose.[15] As Justice Marshall wrote in his dissent in *City of Cleburne*, "[h]eightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group . . . but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day."[16]

To merit the presumption of impermissible legislation when directed at a specific class, at least three requirements must be met, with courts sometimes separating them differently or adding additional factors: (1) there is a recognized history of discrimination; (2) the class is politically powerless; and (3) the class is immutable and discrete. The political powerlessness and immutability of a group are relevant because they "point to a social or cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs."[17] Classifications are discussed further in Section III. Thus, the majority of government action, if it only merits a rational basis level of review, will not be struck down. However, there are certain specific cases where the Court has found the government action cannot even survive the baseline requirements of rational basis review.

i. *City of Cleburne v. Cleburne Living Center*

Some classes that have a similar history of discrimination have not been held to be a class deserving of strict scrutiny review. In *City of Cleburne v. Cleburne Living Center*, the mentally handicapped did not meet the requirements of a suspect classification. The Court identified that the mentally handicapped have real and evident differences from the population as a whole.[18] The Court noted that the mentally handicapped have a "reduced ability to cope with and function in the everyday world."[19] However, the Court found the class was not immutable.[20]

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[14] *Id.*
[15] *Id.* at 801.
[16] *City of Cleburne*, 473 U.S. at 472 (Marshall, J. dissent).
[17] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 472, n.24 (1985) (Marshall, J. dissent).
[18] *City of Cleburne*, 473 U.S. at 442.
[19] *Id.*
[20] *Id*.

Although the Court did not provide a full definition of an "immutable" or "discrete" class, they opined that the mentally handicapped "range[d] from those whose disability is not immediately evident to those who must be constantly cared for."[21] Since there was no suspect classification, the Court applied a rational basis standard of review. Legislation that "singled out the [mentally handicapped] for special treatment reflects the real and undeniable differences," between this class and the rest of the public meant the city had a rational reason for making the distinction.[22]

The Court ultimately held the zoning ordinance requiring a special use permit for a group home for the mentally handicapped was invalid.[23] The Court based its decision on the lack of a rational reason in the record for the city to require this special use permit.[24] However, previous rational basis cases had not only been upheld on weaker reasons than those provided in the record, but they also stated that the rational reason best suited to uphold the law does not need to be included in the record before the court.[25] Considering the Court previously stated that a government could have a legitimate interest in treating the mentally handicapped differently, it is unusual that it could not find one of those moments of differential treatment to uphold the zoning ordinance.[26]

This is one of the early Supreme Court cases where a fairly obvious case of animus caused the Court to rule against the government, although they chose to avoid the political question of deciding whether a class should receive anything above strict scrutiny. Justice Marshall's dissent clearly speaks to the majority and warns that the rational basis applied by the Court appears much more like heightened scrutiny than any other rational basis case.[27] In his concurrence, Justice Stevens warned;

"I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[28]

Stevens pointed out that results vary in "quasi-suspect" class cases, not only because they fluctuate between strict or rational applications, but because "the characteristics of these groups are sometimes relevant and

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[21] *Id.*
[22] *City of Cleburne*, 473 U.S. at 444.
[23] *Id.* at 447-48.
[24] *Id*. at 448.
[25] *Loving*, 388 U.S. 1.
[26] *City of Cleburne*, 473 U.S. at 442.
[27] *Id.* at 458.
[28] *Id.* at 452.

sometimes irrelevant to a valid public purpose, or . . . to the purpose that the challenged laws purportedly intended to serve."[29]

The Court also discussed how, if another "large and amorphous class" like the mentally handicapped were to gain quasi-suspect review, the Constitutional precedent would all but disappear. The Court opined that it would be difficult for it to draw a line between one class and another if both were politically disadvantaged and pointed out what class could not "claim some degree of prejudice from at least part of the public at large."[30] Therefore, the Court found that the mentally handicapped received rational basis review, however it said this standard "afford[ed] government the latitude necessary both to pursue policies designed to assist," or to "freely and efficiently engage in activities that burden . . . [in] an incidental manner."[31] Ultimately, *Cleburne* left the determination of suspect classes in equal protection jurisdiction in thoroughly murky waters.

ii. *United States v. Virginia*

In 1996, the Court was faced with another intermediate scrutiny case, one that was decided in a very different manner. Under government action that classifies based on gender, the burden lies with the government to "demonstrate an exceedingly persuasive justification for that action."[32] In *United States v. Virginia*, Virginia Military Academy (VMI) discriminated against women in its complete bar of admission of female students and had previously been rebuked by the Court.[33] To comply, VMI created a school that was specifically for women, and found themselves in front of the Court for discriminating against women in admission to VMI's traditional program.[34] The Court explained that although VMI stated the two separate programs were equally and ideally suited for each gender, this was flawed.[35] VMI claimed the "exclusion of women [was] not only substantially related, [but] essential to that objective."[36] VMI stated that their perceived goal was to provide quality education to men; the Court said this was incorrect and that VMI's historically-stated goal was to "produce citizen-soldiers."[37] The Court held that not only were women now equal to men in "citizens of American

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[29] *Id.* at 453-54.
[30] *City of Cleburne*, 473 U.S. at 445.
[31] *Id.* at 446.
[32] *United States v. Virginia*, 518 U.S. 515, 531 (1996) (internal quotations omitted).
[33] *See generally id.*
[34] *Id.*
[35] *Id*. at 545.
[36] *Virginia*, 518 U.S. at 545.
[37] *Id.*

democracy," but they had "individual merit," and VMI's goal could only be further advanced by admitting qualified female candidates.[38]

The Court's reasoning for placing gender under intermediate scrutiny included; (1) "our Nation has had a long and unfortunate history of sex discrimination,"[39] and (2) it wasn't until 1920 that women gained the right to vote, and for decades following, government "could withhold from women opportunities accorded men so long as any basis in reason could be conceived for the discrimination."[40] The Court did not address whether gender is an immutable and discrete class; since it recognized gender as such in an earlier case, the Court deemed it unnecessary to address.[41]

The Court clarified that in a heightened scrutiny review, "the burden of justification is demanding and it rests entirely on the State."[42] In addition, the justification must be genuine and in gender situations, "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[43] But unlike other heightened scrutiny cases, the Court found that inherent differences between men and women are enduring, and are an acceptable basis for legislation.[44]

iii. *The First Protected Class: Loving v. Virginia*

The Court has said many times, in many ways, that the Constitution "neither knows nor tolerates classes among citizens."[45] However, the process in which the Court finds those discriminatory laws, determines they are impermissible, and strikes them down is far more complicated. The general rule of rational basis review under the Equal Protection Clause is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[46] However, when a law classified by "race, alienage, or national origin . . . . [t]hese factors are so seldom relevant to the achievement of any legitimate state interest [they] are deemed to reflect prejudice and antipathy . . . ."[47] In situations such as this, a court must

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[38] *Id*. at 545-46.
[39] *Id.* at 531 (quoting *Frontiero v. Richardson,* 411 U.S. 677 (1973)).
[40] *Id.* (internal quotations omitted).
[41] *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).
[42] *Virginia*, 518 U.S. at 533.
[43] *Id*.
[44] *Id.*
[45] *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537 (1896)).
[46] *City of Cleburne*, 473 U.S. at 440.
[47] *Id.*

step in because these infringements are "unlikely to be soon rectified by legislative means . . . ."[48] These laws are subject to the two-tier strict scrutiny review, and "will be sustained only if they are suitably tailored to serve a compelling state interest."[49]

These levels of scrutiny are delineated by the levels of deference given to the governments that created these laws. It is important to give deference to the government in many equal protection cases because it respects the legislative process as more representative of the "people's will," than an often appointed judiciary. However, when the inequality in political power between a classification and the majority is so great, the court is required to step in to protect interests that won't be protected by antipathy or animus in the legislative process.

In *Loving v. Virginia*, the case that created the closest to a black letter law that exists in equal protection jurisprudence, the Court said that a ban on interracial marriage was an impermissible use of classification on the basis of race, and the state law was overturned. The Court invalidated the prohibition using both a due process and equal protection review framework, declared the unequal treatment of interracial couples was unconstitutional, and stated that "restricting the right to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[50] The Court has also noted that, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[51] This "double helix" of the combined power of the due process and equal protection clauses to find a law unconstitutional has been revived by Justice Kennedy and is discussed further in Section C.

Justice O'Connor has suggested that remedying past discrimination is the "only government objective that was compelling enough to satisfy strict scrutiny in the context of race discrimination."[52] Supreme Court decisions in this area of equal protection have limited what kinds of reasons can be found to be compelling reasons and have created the framework. Those decisions "left open an avenue for lower courts" to find and uphold affirmative action plans.[53] However, that exception has not been carved out in other equal protection cases.

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[48] *Id.*
[49] *Id.*
[50] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[51] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).
[52] Winkler, *supra* note 3 at 835.
[53] *Id.* at 837.

iv. *Strict in Theory, Fatal in Fact*

During the 1980's a legal theory began to form that held that the two-tier equal protection framework is "strict in theory and fatal in fact."[54] This premise was understood to mean that a rationale level of scrutiny was an impossible barrier for plaintiffs to overcome. Due to the high level of deference given to the government under a rational basis review, where any rational basis would be upheld, there was virtually no possibility that a plaintiff could prevail. However, many scholars, including Professor Adam Winkler, have disputed this fact, arguing that there are many other factors that impact the likelihood of success under the three possible levels of review for equal protection claims.[55]

In *Lawrence v. Texas*, Justice O'Connor stated that the "fundamental purpose of strict scrutiny is to take relevant differences into account."[56] Specifically, the Court takes the level of the government entity being challenged into account. Constitutional scholar Mark Rosen has argued that "constitutional principles [should be tailored] to apply differently to different levels of government."[57] Rosen argues that different levels of government are "sufficiently dissimilar that a particular limitation as applied to one may have very different repercussions when applied to another."[58]

This tailoring is seen most generally when strict scrutiny is applied to federal laws and intermediate or rational basis scrutiny is applied to state laws, however the reasons courts use any one of these levels of scrutiny is not always clear. Following the hierarchy from federal to state to local, the lower in jurisdiction a government act stems from the less likely a law is going to overcome judicial rational basis review.[59] As an exception, when the judiciary is the institution behind a law, such as a court order or consent decree, the law is the most likely, of any kind of law, to be upheld.[60]

B. Substantial Due Process

The Due Process Clause prohibits governments from infringing on the exercise of individuals' fundamental rights of "life, liberty, and property,"

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[54] Winkler, *supra* note 3 at 794.
[55] *Id.*
[56] *Id.* at 795.
[57] *Id.* at 821.
[58] Winkler, *supra* note 3 at 821.
[59] *Id.* at 830.
[60] *Id.*

without due process of law.[61] These rights as recognized explicitly in the Constitution and subsequent legislation, and under Kennedy's expansive view of the Court's role, are implicit and it is the responsibility of the Court to defend individuals from any entity encroaching on these rights. Due process review requires two intertwined tests. First, the court must ask what right the parties are asking to protect. Second, the court must determine what type or level of right this is, because only fundamental rights are entitled to strict scrutiny. Within that determination is the second test; (1) the right must be carefully delineated by the court; (2) the right must be rooted in the traditions and history of the United States; and (3) the right must be implicit to the concept of ordered liberty.[62] If the right does not meet the second test, then it is not a fundamental right and only receives rational basis review, and the deference that entails.

However, fundamental rights in their entirety have already been determined by the Court. Although not all rights are enumerated, it is almost impossible for a court to "discover" a new fundamental right, not previously acknowledged. Therefore, a party's best strategy is to ground the right within an already acknowledged fundamental right. As this article articulates, some of Kennedy's opinions have been grounded within the right to privacy. However, both the LGBTQ movement and Kennedy's *Obergefell* opinion ultimately sought different fundamental rights, "intimacy" or "love", to tie to.[63] Thus, identification of a new fundamental right is a poor place to launch a campaign for a new body of law, or approach to previously existing constitutional rights.

C. The Invisible Difference and Why It Matters

The two bodies of law that have grown out of seeds in the Constitution serve entirely different purposes when protecting citizens of the U.S. Both are meant to protect citizens from impermissible or overreaching government actions; and thus indirect government actions can trigger a claim under the 5th and 14th Amendments. Both have been historically upheld by the Court to protect individuals and minority groups against the mindset of the majority. Both protect on the basis of "closely held" characteristics that include: race, criminal status, gender, and parenting.

The way claims under each of these frameworks were argued previously were very different. The Due Process Clause was argued to protect intrinsic rights the people held, which only under great

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[61] U.S. CONST. amend. V.
[62] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[63] *See Obergefell*, 135 S. Ct. 2584.

justification, could the government wrest from their control, such as invading the privacy of the home. The Equal Protection Clause is always initially examined under the premise of permissible government action, which, only when it impermissibly discriminates against a specific class, will it be questioned and limited. In result, cases tried under these two bodies of law often look similar; if government action is impermissible under either standard, the action is enjoined or deemed invalid. However, when a "new" fundamental right is being delineated by the Court or a new level of scrutiny is adopted, the rule or test must be clear to allow for future, finer articulations and distinctions.

II. KENNEDY'S TREATMENT OF SEXUAL ORIENTATION DISCRIMINATION

Following the Warren Court, which created the theories and framework of modern equal protection jurisprudence, the more reserved and conservative Burger Court promised to rein in this newly expanded area of law. Justices Rehnquist, Powell, Blackmun, and Chief Justice Burger ushered in a period with "interventionist equal protection review," a review that did not invoke the two-tier equal protection framework put in place by the Warren Court.[64] Many scholars have argued a softening of traditional tiers has continued. Cases that invoke a conflation of rational basis and heightened scrutiny have come to be termed "rational basis with bite" because the Court will use rational basis language, but undertakes a genuine scrutiny of the government's purpose.[65] Proof of this style of strict scrutiny review can be found in a study of Supreme Court rational basis decisions between 1973 and 1996, which found that 10% of the time, the government interest was not found as a compelling interest.[66]

Another unique factor running through these cases is that every majority opinion was authored by Justice Kennedy. Justice Kennedy, the famed swing vote in the makeup of the current Court, writes his opinions as the most senior justice in the majority, one possible reason he has consistently authored these controversial opinions. However, it can also be argued that the more liberal justices have sometimes won Kennedy over in these contentious decisions allowing him to author an opinion in exchange for the coveted role of being the decisive vote. Regardless, Kennedy's unique jurisprudence and voice carry through all of these majority opinions, creating a unique body of law, as well as stand-alone opinions full of beautiful legal prose.

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[64] Winkler, *supra* note 3 at 806.
[65] *Id.* at 809.
[66] *Id*. at 809, n.97.

Due to Kennedy's authorship of the cases discussed below, the Court has come to increasingly rely on the due process review framework in sexual orientation cases. However, many lawyers, including one of the justices previously on the Court, see this as an avoidance tactic because the phrasing of the fundamental right in any specific Court case can create widely varied results.[67] Instead, the Court, always in opinions authored by Kennedy and differently in each of the landmark cases for sexual orientation rights, has "bootstrapped" sexual orientation to a recognized fundamental right, such as intimate association, spousal rights, and marriage.[68]

A. Romer v. Evans

In 1996, during the same term as *United States v. Virginia*, a referendum precluding all legislation protecting individuals on the basis of their sexual orientation was overturned by the Court.[69] The referendum was a response by the voters of Colorado to a local municipal law passed prohibiting discrimination on the basis of many traits, including sexual orientation.[70] The state – on behalf of Colorado voters – argued that these preclusions only removed special rights conferred based on sexual orientation, which had been given through the initial local legislation.[71]

The Court found that the referendum was discriminatory because it "impose[d] a special disability upon those persons alone."[72] Specifically, that homosexuals would not be afforded the same protections that all others were entitled to. This is because the referendum went further than to just reverse the anti-discrimination statute, by also mandating that homosexuals could not be protected by any legislative, executive, or judicial action.[73]

Most importantly this case never mentioned either test contained in the equal protection review framework in any detail. After acknowledging the general premise of the Fourteenth Amendment, the Court proceeded to

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[67] *See Obergefell*, 135 S. Ct. 2584 (Scalia, J. dissent) (stating that sexual orientation alone is not a historically recognized fundamental right); *and see Lawrence,* 539 U.S. 558 (stating that homosexual sodomy is not a fundamental right and *Bowers v. Hardwick* held there was no right to sodomy).

[68] *See Lawrence,* 539 U.S. 558; *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell*, 135 S. Ct. 2584.

[69] *Romer*, 517 U.S. at 624-25.

[70] *Id.*

[71] *See id.* at 631.

[72] *Id.*

[73] *See generally Romer*, 517 U.S. 620.

reference rational basis review.[74] However, its traditional approach to equal protection ends there, and the Court held the referendum invalid under what appeared to be rational basis review.[75] In his dissent, Justice Scalia held the majority responsible for their divergence from the known equal protection framework and began the conversation that continued in each of the following dissents; one that argues against homosexuals being subject to strict scrutiny because the Court pays lip service to rational basis, but actually applies something stronger.[76] Under examination, this is the only true equal protection opinion that Kennedy has written.

B. Lawrence v. Texas

The *Lawrence v. Texas* majority opinion, decided in 2003, is the first one authored by Kennedy in the unique framework he continued to use in sexual orientation rights decisions up to 2015 in the most recent case, *Obergefell v. Hodges*. In an opinion overruling *Bowers v. Hardwick*, the Court held criminal sodomy statutes directed toward homosexuals were invalid under the Due Process Clause.[77] Yet in *Lawrence*, the majority also goes as far as saying that *Bowers* misguided opinion, and the legislation in *Romer*, failed even under a rational basis review because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[78]

Although the majority opinion is grounded in the Due Process Clause and not the Equal Protection Clause, Kennedy made a point of addressing the factors relevant to a determination of a protected classification.[79] Under the first factor, Kennedy addressed the history of discrimination against homosexuals, specifically homosexual conduct.[80] Regarding the second factor, the number of states that had previously or still had criminal sodomy statutes in operation made it clear how politically powerless the group was.[81] Kennedy also pointed to cases in Europe to show that U.S. case law did not keep up with the moral and ethical positions of European nations. This also supported the argument that homosexuals are less

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[74] *Id.* at 631 ("If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

[75] *See id*.

[76] *Id.* at 641.

[77] *See Lawrence,* 539 U.S. 558.

[78] *Id.* at 526.

[79] *Id.* at 567.

[80] *Id.* at 567-72.

[81] *See Lawrence*, 539 U.S. at 572.

powerful politically in the United States, compared to in Europe.[82] The third element of a protected class determination, whether the class is discrete and immutable, was not referenced in the majority opinion. However, building on the Court's language in *Romer*, it can be understood that it determined homosexuals were a discrete and immutable class that the statute was directed against.[83]

Finally, Justice Scalia, in a prescient moment, found that the reasoning in *Lawrence*, "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[84] He pointed to Justice O'Connor's contention that "preserving the traditional institution of marriage" is a legitimate government interest, but found that just as traditional sexual norms have been deemed an irrational basis of legislation by the Court in this case, the line that would prevent the same thing from occurring in marriage laws could easily be blurred.[85]

The due process elements of *Lawrence* change the rhetoric of the case from recognizing the rights of a newly acknowledged class, to acknowledging these rights as those held by all citizens; "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[86] In earlier cases, including *Griswold v. Connecticut* and *Roe v. Wade*, the Court held that privacy interests could be tied to the right to liberty under the Due Process Clause.[87] In *Eisenstadt v. Baird*, where the Court held that contraception must be made available to both married and single individuals, the Court went so far to say, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[88]

When examining criminal sodomy laws in *Lawrence*, the Court acknowledged that although a law may "purport to do no more" than prohibit a particular sexual act, for example, it may have "more far-reaching consequences, touching upon the most private human conduct, [and] sexual behavior . . . ."[89] The criminal sodomy statutes sought to control a personal relationship, and regardless of the sexual orientation

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[82] *Id.* at 573.

[83] *See Romer*, 517 U.S. 620; *and see Lawrence,* 539 U.S. 558.

[84] *Id.* at 601 (Scalia, J. dissent).

[85] *See Lawrence,* 539 U.S. at 602-605 (Scalia, J. dissent).

[86] *Id.* at 562.

[87] *Id*. at 565.

[88] *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438 (1972)) (internal emphasis removed).

[89] *Lawrence,* 539 U.S. at 567.

attributed to that relationship, the Court said that was an impermissible encroachment on the "liberty of persons to choose . . . ."[90] Relying on the previously decided privacy cases, the Court couched its opinion in terms of the liberty to choose what kind, and with whom, and individual would have sexual relations.

Further, the Ninth Circuit in *Witt v. Department of the Air Force*, determined that *Lawrence* applied a heightened level of scrutiny under the Due Process Clause, rather than a rational basis analysis.[91] *Witt* held that three factors pointed to a higher level of review; first, that *Lawrence* did not consider possible post-hoc rationalizations for the law, which is required under rational basis review.[92] In addition, *Lawrence* found that there was no legitimate state interest to "justify the harm that the Texas law inflicted," a standard traditionally associated with heightened scrutiny.[93] Finally, the Ninth Circuit pointed to the cases *Lawrence* relied upon, all of which applied heightened scrutiny review.[94] Under these three factors, the Ninth Circuit concluded that *Lawrence* actually applied heightened scrutiny review to the substantive due process right implicated in *Lawrence*.

However, Justice Scalia's dissent's main frustration was a shortcut the majority took with the due process review framework. "Nowhere does the Court's opinion declare that homosexual sodomy is a fundamental right under the Due Process Clause, nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a fundamental right."[95] Scalia argued that the majority directly contradicts *stare decisis* by overruling *Bowers* without following the correct presentation of rationale.[96] Under *Washington v. Glucksberg*, the dissent argued, only fundamental rights which are deeply rooted in U.S. history and tradition qualify for anything other than rational basis scrutiny under the doctrine of substantive due process.[97] When applied to the facts at hand in both *Lawrence*, and the later cases of *Windsor* and *Obergefell*, the "deeply rooted belief" factor cannot be an appropriate bar to a finding of a protected class because homosexuality had not been publicly accepted until recently in U.S. history, and recent events show it is still the subject of hatred and violence.[98]

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[90] *Id.*
[91] *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014).
[92] *Id.*; *see Lawrence,* 539 U.S. 558.
[93] *SmithKline,* 740 F.3d at 480.
[94] *Id.*
[95] *Lawrence,* 539 U.S. at 586 (internal quotations omitted) (emphasis omitted).
[96] *Id.* at 587.
[97] *Id.* at 588 (quoting *Glucksberg*, 521 U.S. 702) (internal citations omitted).
[98] Lisette Alvarez and Richard Perez-Pena, *Orlando Gunman Attacks Gay Nightclub,*

C. United States v. Windsor

The issue in *Windsor* was critical in setting the stage for the majority opinion in *Obergefell*. Justice Kennedy authored the majority opinion and again emphasized the dignity that comes from equality.[99] Although precedent limited the Court to rational basis review under the Equal Protection Clause, the majority opinion analyzes under some unspecified higher level of scrutiny.

Windsor was a challenge to the federal Defense of Marriage Act (DOMA) which applied the definition of marriage as between a man and a women to a wide variety of federal laws.[100] "This lowest level of review does not look to the actual purposes of the law. Instead, it considers whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law."[101] However, the Court did not consider hypothetical reasons for DOMA's enactment, and instead looked behind any justifications to the "avowed purpose" of Congress[102], "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages . . . ."[103] Some courts have interpreted this part of *Windsor* to require them to examine Congress's actual purpose, not hypothetical ones, an approach that is "antithetical to the [previous] concept of rational basis review."[104]

In addition, *Windsor* required Congress to "justify disparate treatment of the group."[105] "*Windsor*'s concern with DOMA's message follows our constitutional tradition in forbidding state action from denoting the inferiority of a class of people."[106] The Court identified DOMA's principle effect as making a subset of state-sanctioned marriages unequal to all others.[107] "This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects."[108] The balancing the Supreme Court did in *Windsor*, the Ninth Circuit found,

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Leaving 50 Dead, NEW YORK TIMES, 12 June 2016, http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html?_r=0.

[99] *See generally Windsor*, 133 S. Ct. 2675.

[100] *Id.*

[101] *Id.*

[102] *SmithKline,* 740 F.3d at 481-82.

[103] *Windsor*, 133 S. Ct. at 2693.

[104] *SmithKline,* 740 F.3d at 482.

[105] *Id.* (quoting *Windsor*, 133 S. Ct. 2675).

[106] *Id.* (internal quotations omitted).

[107] *Windsor*, 133 S. Ct. at 2694.

[108] *Id.*

between the government's interest and harm to homosexuals, is not the balancing of a rational basis review.[109] As their final factor, the Ninth Circuit found it relevant to note the Supreme Court's reliance on cases that apply some heightened form of rational basis review in *Windsor*.[110] Because of these three factors, the Ninth Circuit concluded that *Windsor* at least requires "something more than traditional rational basis review."[111]

Regardless of the implications resulting from *Windsor*, Chief Justice Roberts's dissenting opinion lays out the issues with extrapolating on this unclear legal framework;

> [I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.[112]

Roberts's opinion, as well as each of the other dissents, took issue with the majority's conflating of traditional precedent regarding both the Equal Protection Clause and the Due Process clause.[113]

The majority opinion in *Windsor* is one of the more convoluted Justice Kennedy has created in this area, because of his due process review framework. Since this is the first case that interacts with the petitioners' claim of right to marriage for same-sex couples, a thorough due process framework should have been created and laid out in the opinion. Kennedy reached many of the necessary points but never referred to this fundamental rights framework.

The analysis under the due process clause began with the historical support for same-sex marriage, being extended first by the states.[114] Because the history the majority articulates in their opinion discussed DOMA as an intervention into the states' traditional regulation of marriage in order to overrule it, Kennedy reframed the third requirement to determine a fundamental right as, "in order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition."[115] Under that prong of analysis, that the law is against historical precepts and ordered liberty, Kennedy framed the intervention of DOMA as, "reject[ing] the

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[109] *SmithKline,* 740 F.3d at 481-82
[110] *Id.* at 483; *see Windsor*, 133 S. Ct. 2675.
[111] *SmithKline,* 740 F.3d at 483.
[112] *Windsor*, 133 S. Ct. at 2706 (Roberts, C.J. dissent).
[113] *See id.*
[114] *Id.* at 2689.
[115] *Id.* at 2691.

long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State . . . ."[116]

Kennedy articulated the first factor of the test for a fundamental right, and explained the full injury of DOMA and how it implicated the Due Process Clause.[117] The majority opinion ultimately reached the last element of the fundamental rights test again, explained as the already cognized impacts DOMA has on same-sex couples.[118] "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."[119] This statement makes the majority opinion appear to decide based upon equal protection, only under closer analysis does the "double helix" of Kennedy's unique jurisprudence make it clear that the equal protection clause is not applied correctly.

D. Obergefell v. Hodges

In his most recent case handed down by the Court impacting this body of law, Justice Kennedy again authored the majority opinion.[120] In addition, of the four majority opinions Kennedy has written in the line of sexual orientation cases, *Obergefell* is the one where due process and equal protection frameworks are most intertwined and confused.

The Court began its equal protection analysis by stating there is no difference "between same- and opposite-sex couples" with respect to their embodiment of the institution of marriage.[121] In addition the Court opined that it "demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."[122] The majority's opinion can be summed up in their phrase, "the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution," although that use of the Equal Protection Clause will diminish, if not destroy, the utility of decades of equal protection framework precedents.[123]

In writing the majority opinion to invalidate laws preventing same sex marriage, Kennedy relied heavily on the implicit right to marriage, a long-recognized fundamental right[124], which the majority believed was couched in the Due Process Clause. "The Constitution promises liberty to all

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[116] *Windsor*, 133 S. Ct. at 2692.
[117] *Id.*
[118] *Id.* at 2694-95.
[119] *Id.* at 2694.
[120] *Obergefell*, 135 S. Ct. 2584.
[121] *Id.* at 2601.
[122] *Id.* at 2602.
[123] *Id.* at 2604.
[124] *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)

within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[125] Without labeling the elements of the due process heightened scrutiny review process, Kennedy touched on each element of the test.

First, the majority opinion identified that petitioners want the right to marry an individual of the same sex and have their marriage respected by the State on equal grounds with all others.[126] Next, Kennedy detailed the history of the importance of marriage in the United States, but also how its definition changed in more recent decades.[127] "Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[128] This satisfied the second requirement of recognizing a fundamental right.

Kennedy then related how granting the existence of marriage as a fundamental right is implicit to the concept of ordered liberty.[129] In addition, the majority opinion detailed four ways marriage is a fundamental right and applies to same-sex couples equally. First, marriage is inherent in the right to personal choice and individual autonomy.[130] Second, the union between two committed individuals is unlike any other fundamental right.[131] Third, the right to marry protects the further rights to "establish a home and bring up children," which are recognized fundamental rights.[132] Fourth, the majority pointed to marriage as "a keystone of our social order."[133] "The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."[134]

Finally, Kennedy identified the first element of recognizing a fundamental right; the "liberty [requested] must be defined in the most circumscribed manner [by the court]."[135] Here, Kennedy addressed the concerns of past dissents, and those within this opinion. The majority stated this method is appropriate for some asserted rights, however "it is

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[125] *Obergefell*, 135 S. Ct. at 2593.
[126] *Id.*
[127] *Id.* at 2594-95.
[128] *Id.* at 2596.
[129] *Obergefell*, 135 S. Ct. at 2597-99.
[130] *Id.* at 2599.
[131] *See id.* at 2599-600.
[132] *See id*. at 2600-601.
[133] *Obergefell*, 135 S. Ct. at 2601.
[134] *Id.*
[135] *Id.* at 2602.

inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[136] Instead, Kennedy stated that each previous case, as well as this one, inquired about the right to marriage "in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."[137] This attempt to draw a coherent line through the cases in Kennedy's jurisprudence ignores the fact that he has combined two, well-established, coherent jurisdictions into one that is unusable.

Justice Thomas's dissent fixed on this and argued that the Court's definition of due process is incorrect. Historically, liberty has been "understood as individual freedom from governmental action, not as a right to a particular governmental entitlement."[138] Previously the cases in this body of law, or in the body of law relating to marriage, involved "absolute prohibitions on private actions associated with marriage."[139] Here, the petitioners asked the Court to outlaw an animus, and therefore force state governments to give them something, the right or license to marry and the benefits that conveys. This forcing of state government action, Justice Thomas argued, is unprecedented and not the purpose of Due Process law. Instead, Due Process law has been used to invalidate undue restrictions on the liberty of individuals. In his absolute avoidance of acknowledging sexual orientation as a suspect class under equal protection jurisprudence, Kennedy has now diminished the precedence of the Due Process Clause.

III. CREATING A STRUCTURE FOR FUTURE CLAIMS

"Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause."[140] The structure of a classification under the Equal Protection Clause provides a test to determine whether a class should receive strict scrutiny, or if it is non-discriminatory in nature and is permissible. This test has allowed the Court to extend protections to individuals who have been situated unequally based on their race, gender, color, national origin, and religion. At each point, the Court has applied the test to a class with a history of discrimination and decided that going forward, laws on this basis are unacceptable.

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[136] *Id.*
[137] *Obergefell*, 135 S. Ct. at 2602.
[138] *Id.* at 2634 (Thomas, J. dissent).
[139] *Id.* at 2636 (Thomas, J. dissent).
[140] *City of Cleburne*, 473 U.S. at 466 (Marshall, J. dissent).

In the sexual orientation line of cases, Kennedy has said this, too. Through all his talk of dignity and liberty, Kennedy has shown that same sex individuals and couples cannot be situated unequally from their counterparts in certain situations. The law is often behind society's changing values, however the goal of jurisprudence and frameworks are to allow the law to adapt to new facts while upholding the core tenants our Constitutional protects.

In addition, due process is a clunky, historically-tied framework. One that is not ideally situated to support what many in the LGBTQ community hope is a departure from the history of discrimination in the U.S. Yet, Justice Scalia insists that "[c]onstitutional entitlements do not spring into existence . . . ."[141] However, in the equal protection body of case law that may be the case. When the Fourteenth Amendment was passed to protect on the basis of race, the abolishment of slavery was not deeply rooted in our Nation's history, nor was desegregation until *Brown v. Board of Education*. The purpose of the Due Process Clause is to update our constitutional protections for the characteristics that the political process cannot protect, although they are fundamental, due to their newness. It is possible, under the already existing equal protection jurisprudence, to apply protections for sexual orientation in many more areas of society.

A. Justice O'Connor's *Lawrence* Concurrence

Justice O'Connor's concurrence in *Lawrence* is the strongest equal protection language in the opinion. O'Connor explained that the Court has held, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[142] However, in situations where an objective of the legislation is "a bare . . . desire to harm a politically unpopular group," the Court has found that is not a legitimate government interest.[143]

Texas argued that their case was preempted by *Bowers v. Hardwick* and that Texas had a legitimate governmental interest of morality in enforcing this statute.[144] O'Connor opined that *Bowers* was different because the Court needed to find there was a fundamental right to homosexual sodomy in order to overrule the legislation in that instance.[145] The difference in *Lawrence* she noted, was that homosexuals are

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[141] *Id.* at 598.
[142] *Lawrence,* 539 U.S. at 579-80 (O'Connor, J. concur).
[143] *Id.* at 580 (O'Connor, J. concur).
[144] *Id.* at 582 (O'Connor, J. concur).
[145] *Id.*

unequally targeted because homosexual sodomy is a crime, yet heterosexual sodomy is not.[146] "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[147] She continued, noting that although Texas argues the law only goes to the conduct, not the class, by labeling homosexual behavior as criminal behavior, it labels the entire class defined by that conduct as criminal and "legally sanctions discrimination against them in a variety of ways unrelated to the criminal law."[148] Under the analysis she laid out, the same outcome in *Obergefell* could rest squarely on an equal protection opinion in *Lawrence*.

B. Is Sexual Orientation an Impermissibly Discriminatory Classification?

"A prime part of the history of our Constitution", historian Richard Morris recounted, "is the story of the extension of constitutional rights and protections to people once ignored or excluded."[149] Analyzing whether sexual orientation is a suspect class under the equal protection clause is not the quandary the Court seems to think it is. Following the three-part test used in *City of Cleburne*, the elements of the test include (1) there is a recognized history of discrimination; (2) the class is politically powerless; and (3) the class is immutable and discrete. As Kennedy's opinions have laid out repeatedly, homosexuals in the United States have suffered alienation and marginalization, if not outright discrimination. In addition, many of the recent cases in this jurisprudence show that homosexuals have not been afforded the same rights as heterosexuals, until *Lawrence*, *Windsor*, and *Obergefell* acknowledged those rights.

As O'Connor pointed out in her concurrence in *Lawrence*, activity can define a class, as sodomy defined homosexuality in the public mindset for decades. When that activity is criminalized, therefore making expression of that class illegal, there can be no more politically powerless position.[150] Finally, determining whether sexual orientation is immutable and discrete might actually be the most difficult factor. The Court does not speak about this element in every case of equal protection. Instead, this is only discussed if it is a factor largely in favor of heightened scrutiny.[151]

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[146] *Lawrence,* 539 U.S. at 582 (O'Connor, J. concur).
[147] *Id*.
[148] *Id.* at 583-84.
[149] *Virginia*, 518 U.S. at 557.
[150] *See Lawrence*, 539 U.S. at 584 (O'Connor, J. concur).
[151] *See Loving*, 388 U.S. 1.

Therefore this element is not dispositive and will be discussed further in Section IV. Ultimately, the Court has answered all of the elements of the legal question relating to whether sexual orientation is a protected class, they just have yet to label the class as such.

C. SmithKline Beecham v. Abbot Laboratories

We need not guess at whether this formula can be applied successfully were it to be enacted. The Ninth Circuit, in *SmithKline Beecham Corp. v. Abbott Labs.*, determined that homosexuals were a protected class and successfully applied a heightened scrutiny review to the judicial action of allowing a *Batson* strike.[152] In *Batson v. Kentucky*, the Supreme Court held that peremptory strikes in jury selection were subject to the Equal Protection Clause and it was impermissible to strike a juror based on their membership within a protected class.[153] In *SmithKline* a potential juror was peremptorily struck and it was plausibly caused by his sexual orientation.[154] The Ninth Circuit reasoned they must determine whether sexual orientation is a protected class in order to determine whether the strike violated *Batson*.[155]

The Ninth Circuit began its analysis from a rational basis review position, but said it understood *Windsor* to apply an increased level of scrutiny to sexual orientation discrimination.[156] "*Windsor*, of course did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary."[157] Following their analysis in *Witt*, the Ninth Circuit held that "[w]hen the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent by considering what the Court actually did, rather than by dissecting isolated pieces of text."[158]

Windsor, the Ninth Circuit reasoned, followed the same pattern as *Lawrence*, however for the Equal Protection Clause instead of the Due Process Clause.[159] Similar to *Lawrence*, *Windsor* did not consider post-hoc rational bases for the law, as it should have under rational basis review.[160] However, the Ninth Circuit could not reconcile "our earlier

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[152] *SmithKline,* 740 F.3d at 474 (did not apply for certiorari).
[153] *Batson v. Kentucky*, 476 U.S. 79 (1986); *see id.* at 479.
[154] *SmithKline,* 740 F.3d at 474.
[155] *Id*. at 480.
[156] *Id.* at 480.
[157] *Id.*
[158] *SmithKline,* 740 F.3d at 480 (internal citations omitted).
[159] *Id*. at 481.
[160] *Id.*

cases applying rational basis review to classifications based on sexual orientation" with *Windsor*, therefore it reasoned *Windsor* applied heightened scrutiny.[161] The Ninth Circuit could not determine from precedent "whether heightened scrutiny is sufficient to warrant *Batson*'s protection or merely necessary," and thus proceeded to determine whether sexual orientation was a protected class.[162]

Using *J.E.B.*, in a case applying *Batson* to strikes on the basis of gender, the Ninth Circuit found that strikes based on an individual's sexual orientation are impermissible.[163] "For women, a history of exclusion from jury service and the prevalence of invidious group stereotypes led the Court to conclude that *Batson* should extend to strikes on the basis of gender."[164] Similarly, the Ninth Circuit found that homosexuals have been "systematically excluded from the most important institutions of self-governance," including employment in federal agencies and the military.[165] The Ninth Circuit also identified that homosexuals have been discriminated from service on juries, when applied to the "unique experiences of gays and lesbians."[166] Although for many years, public identification as homosexual did not occur, this was comparable to how strikes based on gender were not possible until women were allowed to serve on juries.[167] For these reasons, the Ninth Circuit found that homosexuals were a protected class under *Batson* and that a law classified on the basis of sexual orientation must be examined under a heightened scrutiny level of review.[168]

D. Kennedy's Law

In each of the foregoing opinions the Court attempted to reach a tenuous position. Not only is it nearly impossible to overrule a law because it violates a newly identified fundamental right, but also because it discriminates against a newly identified protected class. However, Justice Kennedy's method of trying to do both in one sweep is not the right answer. In this way he engendered the ire of both conservatives and liberals. As *SmithKline* has shown, resourceful lower courts have attempted to interpret these opinions to do more than merely overrule DOMA, or criminal sodomy laws. Yet, most lower courts are not

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[161] *Id*.
[162] *SmithKline,* 740 F.3d at 484.
[163] *Id.*
[164] *Id*. (internal quotations omitted).
[165] *Id.* at 484-85.
[166] *SmithKline,* 740 F.3d at 485.
[167] *See id.*
[168] *See generally* 110 Stat. 2105.

prepared to make that leap because they might be overruled on appeal, or for fear of misinterpreting the vague law created by these opinions. As the dissents in each of these cases have identified, this topic is a political question, albeit one brought to the Court's doorstep. If the Court has chosen to wade into the fight and answer the question with opinions that provide sweeping protections to homosexuals and same-sex married couples, then it should not be created in a rule that makes duplicating the analysis even more difficult.

Frameworks already exist to protect these fundamental rights, it is merely a matter of properly assigning them. Although Kennedy has identified he doesn't believe the frameworks fit upon this kind of legal question, that is the purpose of creating multi-part tests. The frameworks themselves are not fitted to denying or creating new fundamental rights or protected classes. They require the Court to state its reasons in a thorough and well-researched method. The frameworks require the Court to provide enough information that even opponents of the outcome of the opinion can understand its rationale. By abandoning this premise in his opinions, Kennedy has placed these landmark cases on shaky foundations, and prevented lower courts from feeling comfortable using these holdings in any way other than to strike down a law that is substantially similar to the ones each of these cases. The purpose of Supreme Court cases, by and large, is to create new interpretations that ultimately guide the majority of the judicial work in this country. However, Kennedy's law, or the way he has framed these new laws, has prevented lower courts from being able to use them effectively.

CONCLUSION

The law responds as best it can to a society that changes more quickly than the judicial process proceeds. However the sexual orientation discrimination body of law is unique in how quickly the state of the law has caught up to acceptance of gay marriage now voiced by a majority of U.S. citizens.[169] Proposed legislation and the statements of political candidates have identified a new frontier in sexual orientation; an entire spectrum of sexual identities has become part of our cultural consciousness, and they are most likely to fall within this body of constitutional law.

"Sexuality exists along a spectrum with degrees of heterosexuality and homosexuality, and yet we continue to categorize people as if the only options are gay, straight, or bi. But new research shows this is changing,

[169] *Marriage*, GALLUP POLL, 6-10 May 2015, http://www.gallup.com/poll/117328/marriage.aspx.

especially among young adults who tell us they self-identify outside of these three so-called 'traditional' categories."[170] This newly recognized spectrum of identities shares many of the same attributes as traditional conceptions of sexual orientation and are likely to need protections in many of the same areas that cases regarding homosexuality have already been decided. Transgendered and transitioning individuals have already brought numerous cases in the field of employment law, and courts have scrambled to find an application of the law that fits because existing sexual orientation workplace protections do not always solve their problems.[171]

Therefore a workable framework that plainly acknowledges sexual orientation as a class meriting heightened scrutiny is the most logical step forward. As new facets or identities in this spectrum become cognizable in a legal way, the court can apply this same equal protection framework and determine whether a law targeting a sexual orientation classification does so impermissibly. Continuing to believe that sexual orientation as it now interacts with the law is a stagnant field and Kennedy's conflated framework is enough, denies the changes that occur continuously as society begins to understand sexuality and gender in new ways.

Justice Kennedy has authored some beautiful language about the freedoms and liberties that homosexuals in the United States are entitled to under the Constitution. Unfortunately, as wonderful as these opinions are to read, they are certainly difficult to implement. As the number of discrimination cases brought by homosexuals and individuals of all sexes and genders increases, lower courts will bear the brunt of parsing out when and where these individuals are protected. If Kennedy's opinions hold true to what they say, then sexual orientation is a suspect class under the Equal Protection Clause. However, without acknowledging that directly, these opinions cannot afford the protections they purport to create.

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[170] Dr. Rich Savin-Williams, *Sexuality Spectrum*, THE ACADEMIC MINUTE, Mar. 2, 2015, *available at* http://academicminute.org/2015/03/ritch-savin-williams-cornell-university-sexuality-spectrum/.

[171] *See Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).