Note

Building Bridges: Queer Rights in and out of the Courts

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It is unclear whether the Equal Protection Clause of the Fourteenth Amendment prohibits states from differentiating between people based solely on their sexual orientation and/or gender identity. This Note analyzes the Supreme Court's tiers of scrutiny—rational basis review, intermediate scrutiny, and strict scrutiny—to argue that a new suspect class is warranted for sexual orientation and gender identity (SOGI), triggering strict scrutiny for SOGI classifications. This analysis shows that a united SOGI class meets all of the characteristics associated with suspect classes, including a history of anti-LGBTQIA+ discrimination and the irrelevance between SOGI and one's ability to contribute to society. This Note highlights the importance of uniting sexual orientation and gender identity into a single suspect class and presuming that any government actions on these bases are unconstitutional.

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INTRODUCTION

Frustrated by expanding protections for gay and lesbian individuals, one state proposed amending its constitution to repeal current and prevent future policies designed to protect people based on their sexual orientation.[1] Although originally spearheaded by a small group of religious fundamentalists, the amendment ultimately passed via ballot initiative with fifty-three percent of state voter support.[2] Within seven months, hate crimes against gay and lesbian people jumped more than 400%.[3] Activists called for a boycott of the so-called "Hate State."[4] The policy in question? Colorado's "Amendment 2" provision, passed in 1992.[5]

More than thirty years later, Colorado's Amendment 2 feels like both a relic of the past and a sign of what is to come for LGBTQIA+[6] people.[7] The U.S. Supreme Court overturned Amendment 2 in 1996 in *Romer v. Evans*, finding the provision

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1. Romer v. Evans, 517 U.S. 620, 629 (1996) ("[The amendment] operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination . . . .").

2. *Amendment 2*, COLO. SPRINGS PIONEERS MUSEUM, https://www.cspm.org/cos-150-story/amendment-2 [https://perma.cc/WQH2-ECYL]; *see also* Scott Franz, *Ending the Hate State: Coloradans Were Shocked and Outraged After Passage of Anti-Gay Amendment*, KUNC (Oct. 7, 2024), https://www.kunc.org/news/2024-10-07/ending-the-hate-state-coloradans-were-shocked-and-outraged-after-passage-of-anti-gay-amendment [https://perma.cc/56JV-ET8P] (describing the spread of anti-LGBTQIA+ propaganda by far-right religious organizations ahead of the amendment vote).

3. Terry Schleder, *Discrimination Costs: The Boycott Strategy*, QUEER RES. DIRECTORY, http://www.qrd.org/qrd/www/FTR/boycott.html [https://perma.cc/RQ3U-A8BN].

4. *Id.*; *see also Amendment 2*, *supra* note 2 ("Boycotts made this amendment the most expensive civil rights violation in U.S. history.").

5. COLO. CONST. art. II, § 30b (overturned May 20, 1996).

6. This Note uses the acronym "LGBTQIA+" to refer to people with a wide variety of sexual orientations, romantic orientations, gender identities, and gender modalities. For an analysis of the evolution of the LGBTQIA+ acronym, see Erin Blakemore, *From LGBT to LGBTQIA+: The Evolving Recognition of Identity*, NAT'L GEOGRAPHIC (Oct. 19, 2021), https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity [https://perma.cc/6Y4F-FGXL].

7. *See* Sarah Kuta, *20 Years After Colorado's Amendment 2 Struck Down, Parallels Seen in Transgender Fight*, BOULDER DAILY CAMERA (May 19, 2016), https://www.dailycamera.com/2016/05/19/20-years-after-colorados-amendment-2-struck-down-parallels-seen-in-transgender-fight [https://perma.cc/2B7L-EV3Z].

to be "inexplicable by anything but animus toward the class it affects."[8] The classification had no "rational relationship to an independent and legitimate legislative end," and therefore could not survive even the most basic level of judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[9]

After three decades of lower court confusion on where sexual orientation and gender identity truly sit in the three tiers of judicial scrutiny, the Supreme Court is poised to resolve the circuit split in its upcoming decision in *United States v. Skrmetti*.[10] Although this Note does not seek to predict the Supreme Court's ruling, it also cannot ignore the importance of this case. This Note refers to components of *Skrmetti* throughout: the case provides an example of an anti-LGBTQIA+ statute that made it all the way to the Supreme Court, creating an opportunity for the highest court to clarify and cement constitutional protections for the LGBTQIA+ community. Ultimately, this Note argues for (1) strict scrutiny for laws distinguishing based on sexual orientation and/or gender identity (SOGI) and (2) the unification of sexual orientation and gender identity into a single protected class—two outcomes which are highly unlikely in the *Skrmetti* case. Still, this Note argues that existing Equal Protection Clause jurisprudence requires judges to review SOGI-based laws with the highest level of judicial scrutiny available—strict scrutiny—rather than rational basis review, like the ballot initiative in *Romer*, or intermediate scrutiny, like sex/gender[11] discrimination.

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8. Romer v. Evans, 517 U.S. 620, 632 (1996).

9. *Id.* at 633. For an explanation of rational basis review, see *infra* Part I.A.

10. *See* United States v. Skrmetti, 144 S. Ct. 2679 (2024) (granting certiorari).

11. Courts often use the terms "sex" and "gender" interchangeably or indistinguishably. *See* Marta R. Vanegas, *On the Basis of Sex, Gender or Both*, CONTRA COSTA CNTY. BAR ASS'N (Nov. 2023), https://www.cccba.org/article/on-the-basis-of-sex-gender-or-both [https://perma.cc/DYJ8-MNTC] (describing the Supreme Court's interchangeable use of "sex" and "gender" since at least 1974). Unless referring to only one term for a particular reason, this Note uses the collective term "sex/gender" to emphasize the overlapping, inextricable nature of these terms both practically and judicially. *See also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) ("[I]n every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles.").

This Note accepts the precepts and precedents of the U.S. Supreme Court for argument's sake, reserving many criticisms of the Court,[12] as well as its treatment of disability,[13] sex/gender,[14] race,[15] and birthing people.[16] This Note does not provide many definitions or a "Trans 101" section,[17] but instead uses

12. *See, e.g.*, Louis Michael Seidman, *The Long, Troubled History of the Supreme Court—and How We Can Change It*, NATION (June 20, 2022), https://www.thenation.com/article/society/supreme-court-dangerous [https://perma.cc/M6ZM-P9W7] (describing the institutional failings of a Supreme Court that serves as "the defender of class privilege, racial hierarchy, and misogyny"). *See generally* Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021) (examining long- and short-term prospects of Supreme Court reform).

13. *See, e.g.*, Jayne Ponder, Note, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. C.R.-C.L. L. REV. 709, 728 (2018) (arguing that courts should "amend the standard of constitutional review for legislation affecting people with disabilities to intermediate scrutiny").

14. *See, e.g.*, Eric Boos, *The Unscientific Science of Gender Jurisprudence: Evaluating the Negative Impact of Normative Legal Language on Issues of Sex and Gender*, 27 WIS. J.L., GENDER & SOC'Y 229, 237 (2012) (describing Judith Butler's approach for "rethinking how and why we legislate sex and gender issues"); *see also infra* Part I.B (critiquing the practical implications of the intermediate scrutiny test).

15. *See, e.g.*, Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1598 (2012) (critiquing the Supreme Court's "narrow 'color-blind' interpretation of the purposes of the Reconstruction Congress . . . fueling a long retreat from race-conscious efforts to promote equality"); Peter Dreier, *Affirmative Action: Perfectly Fine for West Point and Annapolis—but Not Harvard*, NATION (July 4, 2023), https://www.thenation.com/article/society/supreme-court-affirmative-action-military-academies [https://perma.cc/2JA5-TAZM] (analyzing the Supreme Court's exemption for military academies in its otherwise broad ban of race-based affirmative action).

16. *See, e.g.*, Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (And Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 106–07 (2023) (analogizing the interpretative method of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), to that used by the Supreme Court to justify segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Marc Spindelman, Dobbs*' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 126–63 (2023) (describing the threat of *Dobbs* to sex equality and the Constitution); Samira Seraji, *Reproduction and Gender Self-Determination: Fertile Grounds for Trans Legal Advocacy*, 28 MICH. J. GENDER & L. 251, 275–78 (2022) (connecting the struggle of non-trans women of color for reproductive justice with the struggle of trans people for self-identification).

17. In largely avoiding definitional questions, this Note follows the lead of scholars like Professor Paisley Currah. *See* PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY, at xiii (2022) ("I certainly don't

footnotes to direct readers to further reading about the expansive and beautiful universe of the LGBTQIA+ community.[18]

Part I provides a brief background on the Equal Protection Clause, important case precedents, and the three levels of judicial scrutiny. Part II then describes the common factors of a "protected class" using Supreme Court precedent as a guide. Part III goes on to assess the real-world impact of this factor-based test on the LGBTQIA+ community. Section III.A tests these factors on this community, arguing that each of the recognized characteristics of a protected class applies to SOGI. As a result, this Section advocates for the adoption of a strict scrutiny approach to anti-LGBTQIA+ discrimination, which would find that classifications based on SOGI are presumptively unconstitutional. Section III.B explains why SOGI should be treated as a single class, rather than split into sexual orientation and gender identity, or other components. Section III.C. explains the impact that this path would have on state laws. Section III.D concludes with an analysis of alternative pathways to achieve LGBTQIA+ protections outside of equal protection jurisprudence.

I. BACKGROUND: THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment was ratified in 1868 as one of three Reconstruction Amendments enacted after the American Civil War.[19] The first section of this amendment, commonly referred to as the Equal Protection Clause, proclaims: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[20] The Supreme Court held that state action may violate this clause in two distinct settings: first, where state laws are discriminatory on their face, and second, where facially-

want to befuddle readers unfamiliar with the ins and outs of gender non-normativity and gender transition, but neither do I want to clear up the confusion by providing pat accounts of clearly limned categories like *transgender*, *cisgender*, and *non-binary*.").

18. In writing about transgender people, this Note relies loosely on the editorial guidance set out by Alex Kapitan. *See generally* Alex Kapitan, *The Radical Copyeditor's Style Guide for Writing About Transgender People*, RADICAL COPYEDITOR (2020), https://radicalcopyeditor.com/wp-content/uploads/2020/10/trans-style-guide_rev-oct-2020.pdf [https://perma.cc/9MQ7-RGYH].

19. U.S. CONST. amend. XIV; *see also id.* amend. XIII (abolishing slavery and involuntary servitude "except as a punishment for crime"); *id.* amend. XV (establishing "[t]he right of citizens of the United States to vote" without regard to "race, color, or previous condition of servitude").

20. *Id.* amend. XIV, § 1.

neutral state laws are administered in a way that leads to a discriminatory result.[21] These dual paths allow the Court to overrule both explicit and covert discrimination by states.[22] But not all state actions that differentiate between people of certain identities are presumed to be unconstitutional: states can and often do differentiate based on many identities including age[23] and even sex/gender.[24] By contrast, the Supreme Court presumes that differentiation based on a set few identities like race, religion, or national origin (deemed "suspect classes") are unconstitutional, and thus these classifications are rarely upheld.[25]

These different paths of review are possible due to the Supreme Court's three-tiered system of judicial scrutiny for equal protection claims. From least exacting to most, these tiers are (1) rational basis review, (2) intermediate scrutiny, and (3) strict scrutiny.[26] Each test involves an analysis of the state's purpose behind the action and the relationship between that purpose and the action taken. This Part describes the historical use and modern relevance of each level of judicial scrutiny. By providing a background of Equal Protection Clause jurisprudence, this Part sets the groundwork for the Note's overall argument that discrimination based on sexual orientation and/or gender identity should be subject to the most exacting level of judicial review—strict scrutiny.

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21. *See* Jay S. Bybee, *The Congruent Constitution (Part Two): Reverse Incorporation*, 48 BYU L. REV. 303, 343 (2022) (first citing Strauder v. West Virginia, 100 U.S. 303, 309 (1880) (regarding facially discriminatory rules); and then citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (regarding maladministration of rules leading to a discriminatory effect)).

22. While this Note focuses on state actions, the Supreme Court held that a similar principle of equal protection binds actions of the federal government. *See id.* at 349 ("[I]n the main, the Court believes that 'the equal protection obligations [of the state and federal governments] . . . are indistinguishable.'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995))).

23. *See infra* notes 34–36 and accompanying text (describing the constitutionality of age-based distinctions).

24. *See infra* notes 48–57 and accompanying text (describing the constitutionality of certain distinctions based on sex/gender).

25. *See infra* notes 72–73 and accompanying text (describing the unconstitutionality of suspect class distinctions); *see also infra* Part III.C.4 (describing the Supreme Court's historical allowance, and current prohibition, of affirmative action policies).

26. *See infra* Part I (describing the levels of scrutiny).

A. RATIONAL BASIS REVIEW

Rational basis review is the default constitutional analysis for Equal Protection Clause claims under the U.S. Constitution; unless there is a reason to apply strict or intermediate scrutiny, the Supreme Court will typically only apply rational basis review.[27] The Supreme Court has utilized this test to review state laws that discriminate on the basis of age, disability, and wealth.[28] When a state action differentiates between people based on one of these classes, the Supreme Court will uphold it as long as there is "a rational relationship between the disparity of treatment and *some* legitimate governmental purpose."[29] This level of review is fairly easy to overcome,[30] especially because a rational basis can be offered "post-hoc," or after enactment of the legislation or action.[31] In other words, the state body need not have a legitimate government purpose in mind when taking the discriminatory action as long as one is provided during litigation.[32]

Most of the time, rational basis review serves to uphold state action.[33] For example, in *Massachusetts Board of Retirement v. Murgia*, the Supreme Court applied rational basis review and determined that a state organization—the Massachusetts Board of Retirement—could automatically retire police officers on their fiftieth birthdays.[34] Although the policy technically

27. *See infra* Part II (describing the factors considered to justify heightened scrutiny).

28. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (applying rational basis review to age classifications); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444 (1985) (applying rational basis review to disability classifications); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (applying rational basis review to wealth classifications).

29. United States v. Brucker, 646 F.3d 1012, 1017 (7th Cir. 2011) (citing Smith v. City of Chicago, 457 F.3d 643, 652 (7th Cir. 2006)).

30. *See Murgia*, 427 U.S. at 314 (explaining that rational basis review is "a relatively relaxed standard" whereby the action of a legislature "is presumed to be valid").

31. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) (speculating on the possible rational basis for a law during the litigation).

32. *See id.*

33. *See* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071–72 (2015) ("Between the 1971 and 2014 Terms, the Supreme Court has held laws violative of equal protection under rational-basis scrutiny only seventeen times, out of over one hundred challenges analyzed under rational-basis scrutiny.").

34. *Murgia*, 427 U.S. at 313.

discriminated on the basis of age, the Court found that this choice was rationally related to the legitimate state purpose of "protect[ing] the public by assuring physical preparedness of its uniformed police."[35] Under rational basis review, the Court need not decide whether the policy is the wisest or best method for achieving the stated goal; a rational relationship to some legitimate government purpose is enough to justify disparate treatment.[36]

B. INTERMEDIATE SCRUTINY

Above rational basis review lies intermediate scrutiny, which applies in cases of discrimination based on what the Court varyingly refers to as "sex" or "gender,"[37] as well as for nonmarital births or "illegitimacy" (i.e., the status of being born to unmarried parents).[38] Under intermediate scrutiny, the Supreme Court requires that classifications based on these identities serve "important governmental objectives" and are "substantially related to achievement of those objectives."[39] The state bears the burden to prove it has met these standards.[40]

While rational basis review almost guarantees the reviewed action will be upheld,[41] intermediate scrutiny carries a strong, but rebuttable, presumption that the action should be overruled.[42] This standard developed primarily in the 1970s.[43] In

35. *Id.* at 314.

36. *Id.* at 316.

37. *See* Vanegas, *supra* note 11 (describing the variation in usage of these terms).

38. *See* Mathews v. Lucas, 427 U.S. 495, 509 (1976) (finding that a statute's classifications based on legitimacy of birth were "reasonably related" to the statute's purpose, and thus constitutional).

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

40. *See* Boos, *supra* note 14, at 230 n.7 ("Under the rational basis test the plaintiff has the burden of negating every reasonable basis upon which the classification is sustained. The next level of scrutiny, 'intermediate scrutiny,' shifts the burden to the party seeking to uphold the statutory classification as furthering an important governmental interest.").

41. *See supra* note 33 and accompanying text.

42. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) ("[O]ur case law does reveal a strong presumption that gender classifications are invalid.").

43. In 1973, the Supreme Court held in a plurality opinion that classifications based on "sex" would be subject to strict scrutiny. Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) ("[W]e can only conclude that

Craig v. Boren, the Supreme Court held that an Oklahoma statute governing the purchase of low-alcohol beer improperly differentiated between women and men when it allowed women to purchase the beer at age eighteen but men at age twenty-one.[44] Although the state alleged that the disparate treatment (different purchase age based on gender) was "substantially related" to the achievement of the state's alleged objectives (deterring drunk driving), the Court disagreed.[45] Reviewing the statistical surveys and support in the record, the Court found that any evidence was either inaccurate or "offer[ed] only a weak answer to the equal protection question."[46] This weak correlation was not enough to survive intermediate scrutiny.[47]

As previously stated, the presumption of unconstitutionality in cases of sex/gender discrimination is technically rebuttable.[48] A state may rebut this presumption by proving that the disparate treatment is indeed "substantially related" to the achievement of an "important" state objective, often because the treatment is related to what the Court calls "biological differences."[49] In *Nguyen v. Immigration & Naturalization Services*, the Supreme Court upheld a federal immigration statute[50] which

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classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."). Just a few years later, a majority of the Court settled on what is now referred to as intermediate scrutiny. *Craig*, 429 U.S. at 197 (describing a less stringent test for sex/gender classifications than that of strict scrutiny); *see also* Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 173 (2011) (describing the shift as necessary to "command[] a majority" of Justices' support).

44. *Craig*, 429 U.S. at 197.

45. *Id.* at 197–99.

46. *Id.* at 201.

47. *See id.* at 204 ("Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving.").

48. *See supra* note 42 and accompanying text.

49. Nguyen v. Immigr. & Naturalization Servs., 533 U.S. 53, 70–73 (2001); *see also* Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 473 (1981) (finding that the imposition of a criminal sanction against only men for statutory rape was "substantially related" to the achievement of the state's objective—to prevent illegitimate pregnancies—because it balanced out the deterrent effect that women were already subject to: the possibility of pregnancy).

50. *See generally Nguyen*, 533 U.S. 53. Although the Equal Protection Clause of the Fourteenth Amendment applies to states, the Supreme Court held

established different pathways to citizenship for certain children—specifically children born outside of the United States to parents who are unmarried, and where one parent is a U.S. citizen while the other is not—depending on whether their citizen parent is their mother or father.[51] The child's pathway to citizenship is more difficult if the citizen parent is their father.[52] The Court applied intermediate scrutiny but upheld this statute, finding that the gender-based distinction was necessary to recognize one of humanity's "most basic biological differences," namely "the fact that a mother must be present at birth but the father need not be."[53] Absent any lurking stereotypes about the roles of mothers and fathers in child-rearing,[54] this is arguably a practical concern: a birthing parent is physically present and physically tied to a birthed child. These physical ties "prove" the biological relationship between a birthing parent and the child.[55] A non-birthing parent must prove their biological relationship to the child in another way for the purposes of extending citizenship under this statute.[56]

There are several harmful consequences of this "biological differences" test, including that it reflects a larger misunderstanding of sex as biological and immutable, which is not a

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that the federal government is subject to substantially similar equal protection requirements. *See* discussion *supra* note 22.

51. *Nguyen*, 533 U.S. at 56–57.

52. A citizen mother need only meet a physical presence requirement, while a citizen father is required to take a series of steps including, among other things, proving a "blood relationship" to the child "by clear and convincing evidence" and guaranteeing in writing that he would provide the child with "financial support" until the age of eighteen. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1694 n.15 (2017) (quoting 8 U.S.C. §§ 1401(g), 1409(a)).

53. *Nguyen*, 533 U.S. at 73.

54. The Court rejected claims that this involved sex stereotyping. *Id.* at 55.

55. Except, of course, when this is not true—such as in instances of surrogacy. *See* Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. 1409 in* Nguyen v. INS, J.L. & INEQ. 275, 310 (2002) ("Fathers do not have to be at the birth of their child, but neither does the biological mother when a surrogate is carrying the biological mother's baby to term.").

56. *See* Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 415 (2013) ("Together, the 'perceived absence' of close family ties and the concern with 'serious problems of proof that usually lurk' in paternity decisions have enabled provisions of the [Immigration and Naturalization Act] differentiating between men and women in their parental roles to withstand various equal protection challenges." (citing Fiallo v. Bell, 430 U.S. 787, 799 (1977))).

tenable understanding.[57] Moreover, under this precedent, a state may explicitly discriminate on sex/gender lines as long as it relies on so-called "biological differences."[58] This currently helps justify practices like sex/gender-segregated bathrooms and sports teams, a discussion of which is outside the scope of this Note.[59] However, the "biological differences" test appears to have no outer limits or clear definition;[60] and, with a political arena increasingly shifting to the right, the prospects for women and gender-expansive people seem dim.[61]

Some argue that sex/gender distinctions should be reviewed under strict scrutiny,[62] the highest level of judicial scrutiny under the Equal Protection Clause. While intermediate scrutiny allows sex/gender distinctions based on "biological differences," no such loophole exists for strict scrutiny. For example, the Court has found no innate differences between people of two different

57. Agustín Fuentes, Opinion, *Here's Why Human Sex Is Not Binary*, SCI. AM. (May 1, 2023), https://www.scientificamerican.com/article/heres-why-human-sex-is-not-binary [https://perma.cc/W3NF-USW2].

58. *Nguyen*, 533 U.S. at 64 ("Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference between the parents . . . [and] is inherent in a sensible statutory scheme[.]").

59. For further reading on these topics, see Laura Portuondo, Note, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 497–525 (2018) (arguing that sex-segregated bathrooms are legally and normatively untenable). *See also* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 963–74 (2019) (analyzing the impact of nonbinary inclusion on sex-segregated policies in schools, sports, and workplaces); Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU (Apr. 30, 2020), https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked [https://perma.cc/B6Y8-CY2H] (disproving common myths about trans athletes).

60. *See* Ezie, *supra* note 43, at 184 ("Intermediate scrutiny premised on biological theories of sex has given a presumption of validity to sex discrimination, obscuring the ways that sex discrimination and sex classifications remain invidious.").

61. *See* Paula England et al., *Progress Toward Gender Equality in the United States Has Slowed or Stalled*, 117 PROC. NAT'L ACAD. SCIS. 6990, 6995–96 (2021) (analyzing the rise and plateau of several indicators of gender equality in the United States from 1970 to 2018).

62. *See, e.g.*, Ezie, *supra* note 43, at 144 ("This Article breaks new ground by . . . regard[ing] sex categories as a suspect classification . . . .").

religions to justify discrimination by the state.[63] "Biological differences" persist as the exception to the general ban on invidious discrimination against protected classes, but only in the sex/gender context.[64]

C. STRICT SCRUTINY

Strict scrutiny is the highest level of judicial scrutiny for equal protection cases, establishing the most difficult test for a state to overcome. Just like the other levels of scrutiny, strict scrutiny applies when certain identities are at issue[65]: here, those identities are race,[66] religion,[67] "alienage,"[68] and national

63. *Compare* Loving v. Virginia, 388 U.S. 1, 11 (1967) (describing the difficulty to "conceive of a valid legislative purpose . . . which makes the color of a person's skin the test" of permissible conduct (citing McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring))), *with Nguyen*, 533 U.S. at 64 (finding differential treatment based on biological differences between mothers and fathers to be "inherent in a sensible statutory scheme"). There is, however, a "political function" exemption for statutes that seek to "exclude aliens from positions intimately related to the process of democratic self-government." Bernal v. Fainter, 467 U.S. 216, 220 (1984).

64. This Note seeks to avoid this loophole by applying strict scrutiny, not intermediate scrutiny, to anti-LGBTQIA+ discrimination. *See infra* Part III.C.3.

65. Although not discussed in this Note, strict scrutiny also applies to cases involving interference with the exercise of a fundamental right, like the freedom of speech and the right to vote. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963) (considering First Amendment freedoms); Bush v. Gore, 531 U.S. 98, 105 (2000) (considering the right to vote). *But see* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976) (per curiam) (holding a mandatory retirement age does not constitute a violation of a fundamental right and therefore should not receive strict scrutiny); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973) (rejecting the idea that education is a fundamental right justifying strict scrutiny).

66. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

67. Hassan v. City of New York, 804 F.3d 277, 300–01 (3d Cir. 2015, revised Feb. 2, 2016) (analyzing the lengthy history of the Supreme Court treating religion as a suspect class). The free exercise of religion is also a fundamental right triggering strict scrutiny. *Id.* at 298 n.9.

68. *Bernal*, 467 U.S. at 219 ("As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny."). *But see* Allison Brownell Tirres, *The Unfinished Revolution for Immigrant Civil Rights*, 25 U. PA. J. CONST. L. 846, 848 (2023) (critiquing the "dual standard" for noncitizens where courts sometimes apply strict scrutiny, and other times apply rational basis review).

origin.[69] Each of these categories is referred to as a "suspect class," and state actions that discriminate based on these identities are "immediately suspect," or presumed unconstitutional.[70] Like intermediate scrutiny, this presumption is rebuttable; but doing so is much harder in these cases.[71]

To overcome strict scrutiny, a state must prove that its action is narrowly tailored to achieve a "compelling state interest."[72] If the state could have written the policy in any other way without involving the suspect class, it is not "narrowly tailored."[73] The state interest must also be more than merely "legitimate" (as required under rational basis review) or "important" (as required under intermediate scrutiny),[74] though there is no singular definition for a "compelling state interest."[75] The "compelling state interest" requirement involves a cost-benefit analysis between the state's interests and the potential harms

69. *See* Oyama v. California, 332 U.S. 633, 646 (1948) ("Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis [of national origin] in the face of the equal protection clause . . . .").

70. *See supra* notes 66–69 and accompanying text. In contrast, sex, gender, and legitimacy of birth are referred to as "quasi-suspect" classes. *See* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1424 (2023).

71. *See Korematsu*, 323 U.S. at 216 ("That is not to say that all such [racial] restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (finding that categorizations based on suspect classes "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

72. *Cleburne*, 473 U.S. at 440 (explaining that statutes which invoke suspect classes are "subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

73. *See* Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring does not require exhaustion of every conceivable [class]-neutral alternative . . . [but it] does, however, require serious, good faith consideration of workable [class]-neutral alternatives . . . .").

74. *Compare* United States v. Brucker, 646 F.3d 1012, 1017 (7th Cir. 2011) (reviewing the constitutionality of statutory minimum prison sentences utilizing rational basis review), *with* Craig v. Boren, 429 U.S. 190, 197 (1976) (reviewing the constitutionality of sex/gender-based minimum purchase ages for low-alcohol beer using intermediate scrutiny).

75. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007) ("[W]hat will count as a compelling interest depends on the version of the test that a court applies.").

caused by the classification.[76] The burden lies on the state to prove that the interest "is compelling as applied to the specific circumstances of the case and exemption sought."[77]

One example of the application of strict scrutiny is *Loving v. Virginia*, the Supreme Court case that held anti-miscegenation laws unconstitutional.[78] There, the Supreme Court reviewed a Virginia statute which prohibited interracial marriage.[79] In order to overcome strict scrutiny, the state was required to prove that the racial classification in the statute was "necessary to the accomplishment of some permissible state objective."[80] The Court conducted this test and found that the state failed on prong one: There was no permissible state objective "independent of invidious racial discrimination" to justify the racial classification.[81] The Court did not need to assess whether the classification was "narrowly tailored" because there was no "compelling state interest" to which it could be tailored.[82] Animus cannot be a legitimate or compelling government interest.[83]

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76. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 14 (2000) ("[T]he use of the 'compelling' label incorporates the idea that the costs of using a particular type of classification are great enough that the achievement even of most legitimate governmental purposes will not outweigh the harm wrought by use of the classification."); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 397, 406 (2006) (describing the cost-benefit analysis).

77. Netta Barak-Corren & Tamir Berkman, *Constitutional Consequences*, 99 N.Y.U. L. REV. 785, 839–40 (2024).

78. 388 U.S. 1, 12 (1967). Because the statute was thrown out on animus grounds, some scholars argue that it was an application of "heightened, but not strict, scrutiny." Siegel, *supra* note 76, at 403. But because the Court utilized at least the first part of the test, this Author refers to it as representative of strict scrutiny. *Loving*, 388 U.S. at 11.

79. Racial Integrity Act, VA. CODE ANN. § 20-50 (1950).

80. *Loving*, 388 U.S. at 11.

81. *Id.*; *see also id.* at 7 (describing the proffered justifications for the statute—which included the state's aim "to preserve the racial integrity of its citizens" and to prevent "the obliteration of racial pride"—as "obviously an endorsement of the doctrine of White Supremacy").

82. The compelling interest requirement thus operates as a condition precedent in the strict scrutiny test.

83. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("Pressing public necessity may sometimes justify the existence of such [racial] restrictions; racial antagonism never can."), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018). Although the *Korematsu* Court claimed to be operating outside of "racial antagonism" in its allowance of Japanese internment camps, a later

Adding a new suspect class to the list recognized by the Supreme Court is difficult but possible in certain cases.[84] In considering a new suspect class, the Supreme Court may look to a variety of characteristics of that class.[85] The next Part discusses each factor in depth.

II. FACTORS JUSTIFYING HIGHER LEVELS OF SCRUTINY

When the Supreme Court considers creating a new suspect or quasi-suspect class, it may look to certain characteristics of the class including: (A) its history of discrimination; (B) the irrelevance between the identity and the ability of individuals in the class to contribute to society; (C) its existence as a discrete and insular group with immutable characteristics; and (D) the group's "political powerlessness."[86] This test is not a hard-and-fast rule, and the Court has not "clearly and consistently applied [any] definitive test."[87] The first two factors—history of discrimination and societal irrelevance—appear to be the most important; the last two—discrete, insular, and immutable and political powerlessness—are often considered subordinate[88] or even optional.[89] There are some reasons to oppose the test

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iteration of the Court in *Trump v. Hawaii* (and countless scholars, activists, and individuals before and after *Korematsu*) suggested otherwise. 585 U.S. at 710 (describing *Korematsu* as "morally repugnant" and "overruled in the court of history").

84. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 510 (1976) (identifying legitimacy of birth as a quasi-suspect class subject to intermediate scrutiny); Graham v. Richardson, 403 U. S. 365, 372 (1971) (identifying "alienage" as a suspect class subject to strict scrutiny).

85. *See infra* note 86 and accompanying text (listing the factors). *But see infra* note 87 and accompanying text (describing the lack of a clear and consistent test); sources cited *infra* note 90 (disputing the usefulness of the test).

86. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (first citing Bowen v. Gillard, 485 U.S. 587, 602 (1987); and then citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985)), *aff'd on other grounds*, 570 U.S. 744 (2013).

87. Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1590 (2017).

88. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 427 (Conn. 2008) ("It is evident, moreover, that immutability and minority status or political powerlessness are subsidiary to the first two primary factors . . . .").

89. *See Windsor*, 699 F.3d at 181 ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class . . . . Nevertheless, immutability and political power are indicative, and we consider them here.").

entirely.[90] Still, for argument's sake, this Part considers the purpose and use of each factor in establishing new suspect classes.[91]

A. HISTORY OF DISCRIMINATION

All currently recognized suspect and quasi-suspect classes have a documented history of discrimination. For example, the "long and unfortunate history of sex discrimination" served to justify heightened scrutiny based on sex/gender.[92] Heightened scrutiny is required in these cases for "the nation to transcend a history of classification," or subordination based on these classes.[93]

It is unclear exactly how long of a history of discrimination, and in what respects, is necessary to meet this requirement. Despite decades of eugenics, incarceration, and mistreatment, the Supreme Court held that the disabled community is not a protected class.[94] A history of discrimination appears to be required

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90. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 558 (1998) [hereinafter Yoshino, *Assimilationist Bias*] (critiquing the factors' "gatekeeping function in limiting the number of groups deemed to deserve the courts' solicitude"); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 141 (2011) (exposing "the flaws, confusion, and unanswered questions that inure in the criteria for assessing suspect and nonsuspect classes"); *see also* Ponder, *supra* note 13, at 728 ("[I]t could also be argued that the Court first decides on the level of scrutiny before using these factors retroactively to justify its conclusion.").

91. These factors can also be used to establish a new quasi-suspect class, subject to intermediate scrutiny, but it is even less clear how many of the factors need to apply (and to what degree) to create a quasi-suspect class. *See* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIA. L. REV. 107, 141 (1990) ("[T]he boundary line between suspect classes and non-suspect classes is drawn in a haphazard way.").

92. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination."); s*ee also* Ezie, *supra* note 43, at 172 (finding the *Frontiero* plurality partially relied on "the links between sex discrimination and racial subordination, including their historical character" to establish heightened scrutiny for sex/gender). *But cf. supra* note 43 (noting that a plurality of Justices in *Frontiero* initially suggested strict scrutiny for gender classifications).

93. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (internal quotation marks omitted).

94. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (requiring only rational basis review for statutes that discriminate based on disability); *see* Ponder, *supra* note 13, at 729 (critiquing the *Cleburne* Court for

but not alone sufficient to the analysis: Without this history, a class will surely not be protected, but the presence of such a history does not guarantee protection.[95]

B. IRRELEVANCE

The second factor considered in establishing a new protected class is whether the identity in question frequently bears a "relation to ability to perform or contribute to society."[96] The Supreme Court held that sex/gender and race, as examples, do not frequently bear a relationship to an individual's ability to contribute to society. Instead of classifying people based on relevant differences, statutory distinctions on these bases "often have the effect of invidiously relegating the entire class of [people] to inferior legal status without regard to the actual capabilities of its individual members."[97] Classes of people are locked out of public spaces due to a *perceived* inferiority, even if the actual qualifications of individuals of that identity span a wide range.

The requirement of "irrelevance" is premised on the legal idea that "all persons similarly situated should be treated alike."[98] In other words, someone should not be penalized for something that does not provide a relevant distinction between them and the members of another class.[99]

"blatantly ignor[ing] a history of gross mistreatment of people with disabilities, ranging from discrimination and segregation to eugenics").

95. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (considering the "history of purposeful unequal treatment" against poor communities but concluding that only rational basis review applied). *But see* Jamal Greene, *Book Talk: How Rights Went Wrong*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (May 6, 2021), https://knightcolumbia.org/events/book-talk-how-rights-went-wrong [https://perma.cc/Q223-NUCR] (describing other reasons for *San Antonio*'s outcome, including that the opinion's author, Justice Powell, was a "radical anti-communist" interested in "preserving this form of resegregating schools").

96. *Cleburne*, 473 U.S. at 440–41 (citing *Frontiero*, 411 U.S. at 686).

97. *Frontiero*, 411 U.S. at 687.

98. *Cleburne*, 473 U.S. at 439.

99. Unlike sex/gender and race, the Supreme Court has found that disability and age *do* bear a relation to the individual's ability to perform in society, even if some individuals in the class may prove to be an exception to that general rule. *See, e.g.*, *id.* at 441–42 (connecting disability status with "distinguishing characteristics relevant to interests the State has the authority to implement"); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 315–16 (1976) (per curiam) (connecting age with "physical preparedness" of the police force, and finding no evidence

C. DISCRETE, INSULAR, AND IMMUTABLE

The third and potentially most muddy factor in this analysis centers on the idea that a protected class must (1) be "discrete and insular,"[100] and (2) share a common characteristic that is immutable.[101] The first half of this factor originates in a 1938 Supreme Court footnote, where the Court said that legislation involving "prejudice against discrete and insular minorities" may be subject to a higher level of judicial scrutiny than mere rational basis review.[102]

A "discrete" group is one that can be distinguished from another.[103] The Supreme Court held in 1985 that the disabled community was not a discrete group because it was too "large and amorphous."[104] An insular group, by contrast, is one whose existence is somewhat separate from the rest of society, whether by choice or by force.[105] Justice Marshall wrote separately in that 1985 case and argued that minors were not an insular group because of their "social integration," meaning that they "tend to be treated in legislative arenas with full concern and respect."[106]

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that the statute "has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute"). It is unclear whether these distinctions are truly constitutionally justifiable, but such arguments are outside the scope of this Note. For more, see generally Ponder, *supra* note 13 (arguing that discrimination based on disability should receive strict scrutiny); Hiroharu Saito, *Equal Protection for Children: Toward the Childist Legal Studies*, 50 N.M. L. REV. 235 (2020) (arguing that discrimination against children should receive heightened scrutiny).

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

101. Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding "close relatives are not a 'suspect' or 'quasi-suspect' class" partly because they lack individualizing characteristics).

102. *Carolene Prods.*, 304 U.S. at 152 n.4.

103. *See* Jessica Mitten et al., *Equal Protection*, 23 GEO. J. GENDER & L. 267, 273 (2022) (defining "discrete" as "refer[ring] to the ease of identification . . . of the group's common characteristic").

104. *Cleburne*, 473 U.S. at 445. *But see* Ponder, *supra* note 13, at 729 (critiquing this gloss for its failure to recognize "that other (quasi-) suspect classifications, like women and racial groups, are not monolithic").

105. *See* Mitten et al., *supra* note 103, at 273 (defining "insular" as referring to the "frequency and intensity of social interaction among the group members").

106. *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part). *But see* Saito, *supra* note 99, at 247 (arguing that the "[d]enial of the right to vote or to hold office" cuts in favor of children being a discrete and insular group).

Accordingly, then, a discrete group is one with clear boundaries and an insular group is sufficiently unintegrated in society such that its interests are not fully considered by legislatures.

The second half of this factor, immutability, suggests that a protected class must share some "obvious, immutable, or distinguishing characteristics."[107] The Supreme Court held that all recognized protected classes involve "an immutable characteristic determined solely by the accident of birth";[108] whether that be sex/gender, race, national origin, or another protected class, these are things outside of one's control. Immutability is premised on the idea that "legal burdens should bear some relationship to individual responsibility."[109] If one cannot change a particular characteristic, it is not fair for them to be penalized for having it; versus something that does change (like age) or something that is in their control (like, arguably, criminal activity). Characteristics that one can choose to change or that will inevitably change are more likely to be valid bases for state action.

Immutability remains a thorny subject in equal protection jurisprudence. There are application concerns,[110] definitional concerns,[111] and assimilationist bias concerns.[112] One of the most well-known protected classes, religion, is not an immutable identity in the traditional sense of the term.[113] It is instead, "a matter over which an individual has control."[114] As a result of these many challenges, the immutability prong is not strictly necessary to identify a protected class.[115] When it is used, many courts

107. *Castillo*, 477 U.S. at 638.

108. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

109. *Id.* (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

110. *See* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 172 (2011) (citing J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (arguing that immutability is irrelevant)).

111. *See id.* (citing Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (critiquing the false essentialism of identity)).

112. *See id.* (citing Yoshino, *Assimilationist Bias*, *supra* note 90 (critiquing the factor's tendency to subtly encourage people to change or conceal their defining trait)).

113. *See id.* at 197–98 (noting that immutability relates to an important aspect of individual identity which is "deeply held").

114. *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008).

115. *See* Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) ("Immutability [is] . . . not strictly necessary [] to identify a suspect class."), *aff'd on other grounds*, 570 U.S. 744 (2013).

have shifted to view an immutable trait as one that someone should not have to change, rather than solely one that someone cannot change.[116] One judge argues that "'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[117] This allows the immutability prong to be flexible enough to encompass technically changeable but protected traits (like religion) but exclude technically immutable but unprotected traits (like height).[118]

D. POLITICAL POWERLESSNESS

The final characteristic considered in this analysis is whether the class has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[119] What counts as political powerlessness is unclear. Courts disagree on the relevance of discriminatory laws, public hostility and prejudice, and representation in elected bodies.[120] In the face of this uncertainty, it is safest for scholars to analyze all potentially relevant factors including "interest group support, measures of political inequality, relative group voter turnout, and descriptive representation."[121]

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116. *See* Graham, *supra* note 110, at 200 (describing the shift from the fault-based model to an autonomy-based model).

117. Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

118. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("[I]mmutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances."). Citizenship status ("alienage") is another technically changeable but protected trait. *See* Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977) (finding that the "voluntariness" of citizenship status does not defeat its protected status).

119. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

120. *See* Leslie, *supra* note 87, at 1599–1603 (describing how various courts examine political powerlessness). The Supreme Court has not developed a comprehensive definition of political powerlessness and then has inconsistently applied "its already inadequate definition." Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 979 (2014).

121. Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 380 (2016).

This factor is also not "strictly necessary,"[122] in large part because of measurement issues.[123] Importantly, the fact that a group can get its case in front of the Supreme Court has not been enough to torpedo their claim of political powerlessness.[124] Groups thus must have enough political power to raise their case, but not enough to achieve meaningful redress through the legislative process.[125] Political powerlessness is a relevant but neither necessary nor sufficient factor for establishing a protected class.[126]

The next Part argues that, based on the presence and extent of all these factors, the Supreme Court should recognize SOGI as a distinct suspect class that triggers strict scrutiny.

III. PROTECTING SEXUAL ORIENTATION AND GENDER IDENTITY

By analyzing the factors required for heightened scrutiny under the Equal Protection Clause, it becomes clear that government actions that discriminate based on sexual orientation and/or gender identity could fail under any level of review. Indeed, the Supreme Court overturned both Colorado's Amendment 2 and the federal Defense of Marriage Act (DOMA) without specifying a particular level of review because both of these actions were motivated by animus.[127] A statute motivated by

122. *See supra* notes 88–89 and accompanying text.

123. *See* Leslie, *supra* note 87, at 1599–1608 (discussing the Supreme Court's inconsistency in measuring political powerlessness).

124. *See* Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 539 [hereinafter Yoshino, *Paradox*] ("[A] group usually must have significant political power before the Court grants it heightened scrutiny. If a group is sufficiently politically powerless, it will never even get on the Court's radar.").

125. *But see id.* (discussing how the Court may still be reluctant to find in a group's favor if many states have not already done so).

126. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates." (internal citation omitted)).

127. Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); United States v. Windsor, 570 U.S. 744, 772 (2013) ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.").

animus fails under any standard of review.[128] This sets a clear precedent when animus exists,[129] but leaves a gray area when lower courts consider less clear-cut anti-LGBTQIA+ actions.[130] A circuit split has developed on the issue for anti-transgender actions,[131] which the current Supreme Court is poised to resolve in its spring 2025 ruling on *United States v. Skrmetti*.[132]

Skrmetti involves a Tennessee ban on gender-affirming healthcare for transgender minors. The State of Tennessee argues that the ban on gender-affirming care is based solely on age (by targeting minors) and medical conditions (by focusing on people with gender dysphoria), two classifications which receive the lowest level of scrutiny (rational basis review) and thus require the most deference to legislators.[133] On the other side, Petitioners argue that the statute also discriminates based on sex, which is enough to raise the test to intermediate scrutiny.[134] In the

128. Hutchinson, *supra* note 120, at 1012 ("This purpose [of animus] fails rational basis review.").

129. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (describing a "discriminatory purpose" as one where a state "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (setting out the requirements to prove discriminatory intent).

130. *See* Hutchinson, *supra* note 120, at 1024 ("Laws, however, rarely contain such explicit statements of hostility. This fact makes the animus approach an incoherent and unpredictable alternative to strict and intermediate scrutiny." (internal citations omitted)).

131. *Compare* Adams *ex rel.* Kasper v. Sch. Bd., 57 F.4th 791, 801 (11th Cir. 2022) (en banc) (applying intermediate scrutiny due to "sex-based classification"), *and* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 670 (8th Cir. 2022) (applying intermediate scrutiny due to "biological sex" distinction), *and* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1051 (7th Cir. 2017) (applying intermediate scrutiny due to presence of "sex stereotyping"), *with* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020) (applying intermediate scrutiny partially on the grounds that "transgender people constitute at least a quasi-suspect class"), *and* Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (per curiam) ("We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.").

132. United States v. Skrmetti, No. 23-477 (U.S. argued Dec. 4, 2024).

133. Transcript of Oral Argument at 151, *Skrmetti*, No. 23-477 (arguing that the Constitution "does not provide heightened protection based on any suspect classification" in the case, "and, thus, rational basis review applies").

134. *Id.* at 7 ("[Y]ou can't avoid heightened scrutiny just because you have a non-protected characteristic that accompanies the protected one.").

alternative, they argue that transgender people comprise a protected class on their own and thus should receive intermediate scrutiny.[135]

There are reasons to believe that the current Supreme Court will not act favorably toward transgender people in this case.[136] There is also the possibility that it will. Ultimately, this Note does not attempt to predict the outcome of *Skrmetti* or analyze its particular facts in depth. Rather, this Note uses the possible outcomes of *Skrmetti* as a starting point to frame the remainder of its argument.

There are four major pathways the Supreme Court could take in its *Skrmetti* ruling. First, it could side with Tennessee and hold that the statute is subject only to rational basis review. Second, it could side with the Petitioners' first argument and hold that the statute is subject to intermediate scrutiny because anti-transgender discrimination is sex discrimination. Third, it could side with the Petitioners' alternative argument, finding that anti-transgender discrimination is subject to intermediate scrutiny on its own merit. Finally, and admittedly most unlikely, the Court could side with this Author's argument: discrimination based on sexual orientation and/or gender identity is subject to strict scrutiny on its own merit.

If the Supreme Court were to dutifully apply its precedent governing new protected classes, this Note argues it would find that SOGI meets every requirement to constitute a suspect class. While some scholars argue that either sexual orientation or gender identity on their own should qualify as a quasi-suspect or suspect class,[137] this Note takes the novel stance that these identities should be considered as one, unified suspect class.

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135. *See* Reply Brief for the Petitioner at 11, *Skrmetti*, No. 23-477, 2024 WL 4766977, at *11 (arguing that transgender people "qualify as a quasi-suspect class").

136. *See infra* Part III.D.

137. *See, e.g.*, Ezie, *supra* note 43, at 144 (defending "sex categories," including transgender and intersex, as a suspect classification); Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 771–77 (2015) (defending "sexual orientation" as a class requiring heightened scrutiny); Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 279 (1992) (defending "gay men and lesbians" as a suspect class). *See generally* Samantha J. Levy, Comment, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & C.R. L. REV. 141 (2002) (defending "gender identity" as a protected class).

The next Section returns to the factors governing new protected classes, explaining why SOGI should be a suspect class. Then, Section III.B describes the merits of merging sexual orientation and gender identity into a single suspect class rather than treating them as distinct groups. Section III.C then outlines the impact that this new suspect class would have on state legislation. Finally, Section III.D describes the possibility of alternative pathways (outside the federal judiciary) toward codifying LGBTQIA+ rights.

A. DUTIFULLY APPLYING THE FACTORS

As described in Part II, when considering a new suspect or quasi-suspect class, the following characteristics are important: (1) history of discrimination; (2) irrelevance between the identity and ability to contribute to society; (3) discrete, insular, and immutable group; and (4) political powerlessness.[138] This Part analyzes each of these factors for its persuasive value and argues that, based on the presence and extent of all of them, the Supreme Court should recognize SOGI as a suspect class that triggers strict scrutiny.

This Note acknowledges that the current Supreme Court might be unwilling to create a new protected class for SOGI due to the Court's political leaning.[139] For now, this Section sets that issue aside and focuses on mechanically applying the test—established through decades of Supreme Court precedent—to justify heightened scrutiny for SOGI.

1. The Lengthy History of Anti-LGBTQIA+ Discrimination

Courts have regularly held that there is a substantial history of discrimination based on sexual orientation and gender identity in the United States.[140] In *Windsor v. United States*, for

138. *See supra* Part II.

139. *See infra* notes 296–97 and accompanying text.

140. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 627 (4th Cir. 2020) (Wynn, J., concurring) ("Discrimination like that faced by Grimm has reared its ugly head throughout American history."); Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012) ("Ninety years of discrimination is entirely sufficient to document a history of discrimination." (citation omitted)), *aff'd on other grounds*, 570 U.S. 744 (2013); United States v. Windsor, 570 U.S. 744, 753 (2013) ("[T]he President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." (citation omitted)).

example, the Second Circuit found that it was "easy to conclude that homosexuals have suffered a history of discrimination."[141] Any present animosity is couched in at least a century of historical animosity, including the many state laws outright criminalizing same-sex sexual activity until 2003,[142] as well as the ban on federal recognition of same-sex marriages until 2013.[143] Animosity against transgender and gender-nonconforming people is at least as lengthy,[144] with transgender people and advocates successfully challenging many instances of discrimination, including "cross-dressing laws, unfair workplace practices, public and private health insurance exclusions, and antiquated surgical requirements for obtaining changes to birth certificates and other official documents."[145] But discriminatory efforts and impacts have not abated—state legislatures introduce new anti-trans legislation almost every day,[146] which only compound the effects of the already high rates of employment discrimination, economic instability, and homelessness this community experiences.[147]

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141. *Windsor*, 699 F.3d at 182.

142. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding anti-sodomy laws unconstitutional under the Fourteenth Amendment's Due Process Clause).

143. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7), *invalidated by Windsor*, 570 U.S. 744 (holding DOMA's restrictive definition of marriage unconstitutional under the Fifth Amendment's Due Process Clause).

144. *See* Eyer, *supra* note 70, at 1428 ("As such courts have observed, there is an extensive and irrefutable history of discrimination against the transgender community, extending into the modern era.").

145. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 508 (2016).

146. Between January 1st and August 19th of 2023, state legislators introduced at least 142 anti-trans bills. *See* Minami Funakoshi & Disha Raychaudhuri, *The Rise of Anti-Trans Bills in the US*, REUTERS (Aug. 19, 2023), https://www.reuters.com/graphics/usa-healthcare/trans-bills/zgvorreyapd [https://perma.cc/T777-HCPM]. One journalist estimates that between January 1st and April 18th of 2025, state legislatures introduced over 850 anti-trans bills. Erin Reed, *Over 850 Anti-LGBTQ+ Bills Filed in 2025; Most in History*, ERIN IN THE MORNING (Apr. 18, 2025), https://www.erininthemorning.com/p/over-850-anti-lgbtq-bills-filed-in [https://perma.cc/47SL-DXUS].

147. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 611 (4th Cir. 2020) (explaining how transgender people have been subject to discrimination in education, employment, and housing). One study has linked the increased passage of anti-trans laws with increased rates of suicide attempts amongst transgender teens. *See* Selena Simmons-Duffin, *More Trans Teens Attempted Suicide After States Passed Anti-Trans Laws, a Study Shows*, NPR (Sept. 26,

Historically, "sexual deviancy" laws lacked explicit mention of sexual orientation and/or gender identity.[148] Some argue that there is no longstanding history of discrimination against LGBTQIA+ people because of this absence.[149] It is fair to say that these laws applied to everyone, not just the LGBTQIA+ community.[150] For example, a cisgender heterosexual person was forbidden from "cross-dressing" just as much as a gay trans person was. But it is entirely different—and inaccurate—to say that these laws did not have the effect of primarily discriminating against the LGBTQIA+ community. As the Supreme Court elaborated in *Lawrence v. Texas*, the absence of explicit language in these older statutes did not "suggest approval of homosexual conduct,"[151] but was instead likely due to the emerging language of homosexuality as a concept.[152] Failing to specifically use terms

2024) (citing Wilson Y. Lee et al., *State-Level Anti-Transgender Laws Increase Past-Year Suicide Attempts Among Transgender and Non-binary Young People in the USA*, NATURE HUM. BEHAV. (Sept. 26, 2024), https://www.nature.com/articles/s41562-024-01979-5.epdf [https://perma.cc/M8RH-KCPS]), https://www.npr.org/sections/shots-health-news/2024/09/25/nx-s1-5127347/more-trans-teens-attempted-suicide-after-states-passed-anti-trans-laws-a-study-shows [https://perma.cc/6UXB-H29Y].

148. *Lawrence*, 539 U.S. at 568 (acknowledging "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter"). More recently, anti-LGBTQIA+ laws have specifically named LGBTQIA+ identities as their targets. *See, e.g.*, Donald J. Trump, *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals*, THE WHITE HOUSE (Mar. 23, 2018), https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals [https://perma.cc/TU8R-9HTM] (disqualifying "transgender persons with a history or diagnosis of gender dysphoria" from military service).

149. *Lawrence*, 539 U.S. at 568 (highlighting the historical absence of legal prohibitions targeting the LGBTQIA+ community).

150. *See* I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMANS. 1, 9 (2008) ("Cross dressing prohibitions did not just impact cross dressers, or even 'butch' women or 'effeminate' men. The prohibitions signaled to everyone what dress, and what behavior, was appropriate."); *A History of LGBT Criminalisation*, HUM. DIGNITY TR. (Apr. 1, 2025), https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation [https://perma.cc/3SJR-4R9L] ("While anyone could technically be convicted under [anti-sodomy laws], it was same-sex convictions that were most common.").

151. *Lawrence*, 539 U.S. at 568–69.

152. *Id.* at 568 ("[T]he concept of the homosexual as a distinct category of person did not emerge until the late 19th century."); *see also* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL

like "homosexual" or "gay" did not erase the animus against "sexual deviants," including those who may now refer to themselves as part of the LGBTQIA+ community.[153] These laws worked to "reify hierarchies of sex, class, race, and sexuality."[154] The absence of specific language to that effect did not prevent these impacts.[155]

Instead, the history of discrimination against LGBTQIA+ people involves the history of discrimination against "sexual deviancy" as a whole, which includes the long legacy of anti-sodomy and anti-crossdressing laws, as well as the ever-expanding present onslaught of bathroom bills, sports bans, and more. The explosion of anti-LGBTQIA+ bills in recent years—both in volume and extremity[156]—represents a continuation of, rather than an exception to, the legacies of homophobia and transphobia in this country.[157]

2. The Irrelevance Between LGBTQIA+ Identities and Societal Contribution

The irrelevance factor requires that the identity in question does not frequently bear a "relation to ability to perform or contribute to society."[158] Sex/gender, for example, does not "frequently" bear such a relationship, but the Court has carved out exceptions so that a state can classify on this basis when a

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MINORITY IN THE UNITED STATES 1940–1970, at 4 (1983) ("The absence of rigid categories called 'homosexual' and 'heterosexual' did not imply approval of same-sex eroticism.").

153. *See also* Transcript of Oral Argument, *supra* note 133, at 110 ("[H]omosexuality and transgender status are sort of lumped together in discriminatory frameworks as language has changed.").

154. Capers, *supra* note 150, at 6–7.

155. *A History of LGBT Criminalisation*, *supra* note 150 (describing how anti-sodomy laws often led to convictions of same-sex relationships even if "anyone could technically be convicted" under the policy).

156. *See* Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN (Jan. 22, 2024), https://www.cnn.com/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/W24A-XMJ6] ("It's not just the total number [of bills] that has gotten worse, but [also] the extremity of the bills." (quoting Gillian Branstetter)).

157. *See infra* Part II.D.

158. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985) (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).

relationship does exist.[159] For disability, the Court has found a particularly strong relevance between disability and societal contribution, one reason why discrimination against disabled people is only subject to rational basis review.[160]

Rather than asserting the highly controversial claim that LGBTQIA+ identity is directly related to one's ability to contribute to society (i.e., believing a transgender person cannot perform a job as well as a cisgender person merely because they are transgender[161]), opponents will typically opt to argue that LGBTQIA+ identity is sufficiently related to a tangential state interest like safety or health. In *Skrmetti*, for example, the ban on gender-affirming care for minors is disguised as a fear that the health benefits of gender-affirming care are not sufficiently proven,[162] despite years of research to the contrary.[163]

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159. *See id.* The Supreme Court has considered sex/gender in a different way than this Author believes it should consider LGBTQIA+ identity. The question of whether intermediate scrutiny and the biological differences exception are appropriate for sex/gender is outside the scope of this Note. For more on these topics, see generally Franke, *supra* note 11 (reconceptualizing fundamental elements of sex equality jurisprudence); Kim Forde-Mazrui, Dobbs *and the Future of Liberty and Equality*, 72 CLEV. ST. L. REV. 1 (2023) (predicting the detrimental impact of *Dobbs* on modern liberty rights); Henry F. Fradella, *The Imperative of Rejecting "Gender-Critical" Feminism in the Law*, 30 WM. & MARY J. RACE, GENDER, & SOC. JUST. 269 (2024) (critiquing "gender-critical" feminist arguments).

160. *See Cleburne*, 473 U.S. at 444 (discussing the appropriate constitutional inquiry in the disability context). *But see* Ponder, *supra* note 13, at 722 (critiquing the *Cleburne* Court for "looking not to the potential contribution of the individual with a disability, but to the degree of economic hardship required of the employer").

161. *See* Barry et al., *supra* note 145, at 558–59 (distinguishing between transgender identity and gender dysphoria, a recognized medical condition that some transgender people experience).

162. *See* Transcript of Oral Argument, *supra* note 133, at 147 (arguing that gender-affirming care has "significant effects on minors and often leave[s] them with bodies that are infertile and permanently damaged"); *see also* discussion *infra* note 166 (analogizing the "lack of evidence" arguments proffered by states to support gender-affirming care bans in modern day and anti-miscegenation laws historically). The second Trump administration similarly calls into question the science behind gender affirming care. *See* Exec. Order No. 14,187, 90 Fed. Reg. 8771 (Feb. 3, 2025) ("The blatant harm done to children by chemical and surgical mutilation cloaks itself in medical necessity, spurred by guidance from the World Professional Association for Transgender Health (WPATH), which lacks scientific integrity.").

163. *See, e.g.*, Diana M. Tordoff et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, NAT'L

To be clear, this is a straw man argument; it is an attempt, whether conscious or subconscious, to obfuscate this test's actual focus on whether an identity *frequently* bears a relationship to one's *ability to contribute* to society.[164] Looking beyond any one case or statute, the LGBTQIA+ community appears to be just as willing and able to work, learn, and contribute to society as non-LGBTQIA+ people.[165] Arguing that there is some state interest that justifies a classification on this basis jumps to a later part of the equal protection analysis; first, the Supreme Court must determine whether a heightened level of scrutiny applies, and only then may it consider the arguments to justify the classification anyway.[166]

The "biological differences" exception for sex/gender also seems ill-applied to sexual orientation and gender identity, two types of identities that some argue are also an "accident of birth,"[167] but very few argue are due to "biological

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LIBR. OF MED. (Feb. 25, 2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC8881768 [https://perma.cc/EB9S-4Y2J] (finding that gender-affirming care was "associated with lower odds of depression and suicidality over 12 months" for transgender youth).

164. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (recognizing that "sex characteristic frequently bears no relation to ability to perform or contribute to society").

165. *See, e.g.*, Mary Beth McAndrews, *12 Historic LGBTQ Figures Who Changed the World*, NAT'L GEOGRAPHIC (June 18, 2018), https://www.nationalgeographic.com/culture/article/historical-lgbt-figures-activists-culture [https://perma.cc/GWY6-BAYK] (honoring the contributions of LGBTQIA+ people to society); *Being Gay Is Just as Healthy as Being Straight*, AM. PSYCH. ASS'N (May 28, 2003), https://www.apa.org/topics/lgbtq/mental-health [https://perma.cc/UX7G-QQY6] (debunking outmoded concepts of mental health differences and finding no differences in psychology between members of the LGBTQIA+ community and non-LGBTQIA+ people).

166. In the December 2024 oral arguments for *United States v. Skrmetti*, Justice Jackson pointed out that this disordered reasoning and draws an eerie parallel to the state's arguments in *Loving v. Virginia*: Justice Jackson analogized Virginia's arguments in *Loving* (in favor of anti-miscegenation laws) with Tennessee's arguments in *Skrmetti* (in favor of gender affirming care bans for minors), finding that both states ask the Court to defer to the state legislature because the relevant "scientific evidence is substantially in doubt." *See* Transcript of Oral Argument, *supra* note 133, at 113–14 (quoting Loving v. Virginia, 388 U.S. 1, 8 (1967)).

167. *Frontiero*, 411 U.S. at 686. *See also What Causes Sexual Orientation?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/sexual-orientation/sexual-orientation/what-causes-sexual-orientation [https://perma.cc/HYG7-LCBB] ("It's not completely known why someone might be lesbian,

differences"[168]—at least not biological differences that have any consequence to society.[169] The important point is whether LGBTQIA+ people are less able to contribute to society; looking to the Supreme Court's precedent and the science on LGBTQIA+ identity, it seems that there is no relevant relationship.

3. The LGBTQIA+ Community as Discrete, Insular, and Immutable

Given the separate history and development of each half of this factor—discrete and insular on the one hand,[170] and immutable on the other[171]—this Section will discuss them separately. To start, a discrete and insular group is one that is socially unintegrated and treated with less concern and respect than other, more integrated groups.[172] The Supreme Court has held that that disabled people do not constitute a discrete and insular group because the disability community is too diffuse.[173] Justice Marshall also surmised that minors would not constitute a discrete and insular group because they are too socially integrated.[174]

The example of minors is particularly illustrative as a foil for the LGBTQIA+ community. Minors are treated with relative respect by legislatures, even though they cannot vote or hold political office.[175] Statutes discriminating against minors are rare, in part because "those who do vote and legislate were once themselves young, typically have children of their own, and certainly

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gay, straight, or bisexual. But research shows that sexual orientation is likely caused partly by biological factors that start before birth.").

168. *But see* Transcript of Oral Argument, *supra* note 133, at 96 ("I think that the record shows that the . . . discordance between a person's birth sex and gender identity has a strong biological basis . . . .").

169. *See generally* Saray Ayala, *Sexual Orientation and Choice*, 3 J. SOC. ONTOLOGY 249 (2017) (examining whether sexual orientation is a choice).

170. *See supra* Part II.C (describing the history and development of "discrete and insular").

171. *See supra* Part II.C (describing the history and development of "immutability").

172. *See supra* Part II.C (describing what it means to be discrete and insular).

173. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) (holding that people with disabilities do not constitute a protected class).

174. *Id.* at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part).

175. *Id.*

interact regularly with minors."[176] The same is not true for LGBTQIA+ people. Firstly, there are simply fewer LGBTQIA+ people in the country: minors make up about twenty-two percent of the U.S. population,[177] while LGBTQIA+ people make up around five to eight percent of adults in the United States or four to six percent of the overall U.S. population.[178] With less population and visibility, it is also not true that all voters and legislators know an LGBTQIA+ person,[179] let alone live in such close proximity with one as they might with their child.

Many LGBTQIA+ people are forced to form their own communities, outside of the public eye which has so often criminalized and discriminated against them.[180] While it is not true that all or even most LGBTQIA+ people are cast out of their families of origin, there is a demonstrated pattern amongst LGBTQIA+

176. *Id.*

177. *The U.S. Adult and Under-Age-18 Populations: 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/adult-and-under-the-age-of-18-populations-2020-census.html [https://perma.cc/HB8H-GP6P].

178. *Compare* Brooke Migdon, *US LGBTQ+ Population Hits 20 Million*, HILL (Dec. 14, 2021), https://thehill.com/changing-america/respect/diversity-inclusion/585711-us-lgbtq-population-hits-20-million [https://perma.cc/835U-6F9A] ("At least 20 million adults in the U.S. identify as lesbian, gay, bisexual or transgender, according to a new analysis of government data, representing nearly 8 percent of the nation's total adult population."), *with* Andrew R. Flores & Kerith J. Conron, *Adult LGBT Population in the United States*, THE WILLIAMS INST. 1 (Dec. 6, 2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Dec-2023.pdf [https://perma.cc/L87B-UJWQ] ("[W]e estimate that 5.5% of U.S. adults identify as LGBT . . . . There are almost 13.9 million (13,942,200) LGBT adults in the U.S.").

179. Estimates vary, but one study found that 87% of adults in the United States said they knew someone who was gay or lesbian, while only 30% said they knew someone who was transgender. *Vast Majority of Americans Know Someone Who Is Gay, Fewer Know Someone Who Is Transgender*, PEW RSCH. CTR. (Sept. 18, 2016), https://www.pewresearch.org/religion/2016/09/28/5-vast-majority-of-americans-know-someone-who-is-gay-fewer-know-someone-who-is-transgender [https://perma.cc/TDQ7-CCDN].

180. *See generally* Nina Jackson Levin et al., *"We Just Take Care of Each Other": Navigating 'Chosen Family' in the Context of Health, Illness, and the Mutual Provision of Care Amongst Queer and Transgender Young Adults*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Oct. 2020, at 1, 1 (describing how LGBTQIA+ people often construct their family groups and associated support systems by choice rather than by biological ties).

people of building alternative forms of kinship—chosen family—outside of and in addition to families of origin.[181]

Beyond the familial context, LGBTQIA+ people face increased challenges related to both acceptance and discrimination in public, especially for those who are marginalized on multiple axes and those who live in rural areas.[182] The frequency of anti-LGBTQIA+ hate crimes across the country has increased every year for the last three years,[183] and fatal violence particularly against Black transgender women and femmes is at epidemic levels.[184] All of these facts point to the insufficient integration of the LGBTQIA+ community in society, meaning legislatures are less likely to treat the community "with full concern and respect."[185]

The "discrete" element "refers to the ease of identification or visibility of the group's common characteristic."[186] For both wealth and disability analysis under the Equal Protection Clause, this prong was key: The Supreme Court refused to grant

181. *See id.* ("[M]any [queer and trans] folks relate with chosen families and with their families of origin, while some relate exclusively with chosen family as a primary kin network.").

182. *See generally Where We Call Home: LGBT People in Rural America*, MOVEMENT ADVANCEMENT PROJECT (Apr. 2019), https://www.lgbtmap.org/file/lgbt-rural-report.pdf [https://perma.cc/NQ6A-AT6Q] (describing the benefits and difficulties of living in rural America as an LGBTQIA+ person, including increased vulnerability to discrimination).

183. *See* Press Release, Delphine Luneau, Hum. Rts. Campaign, New FBI Data: Anti-LGBTQ+ Hate Crimes Continue to Spike, Even as Overall Crime Rate Declines (Sept. 23, 2024), https://www.hrc.org/press-releases/new-fbi-data-anti-lgbtq-hate-crimes-continue-to-spike-even-as-overall-crime-rate-declines [https://perma.cc/Q4NQ-A4VN] (describing the rising trend in violence against LGBTQIA+ people). Not all anti-LGBTQIA+ violence (or other violence) is documented or documentable. These studies should be considered as just the tip of the iceberg. *See* LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE, AT 10 (1998) ("No one knows how many trans lives have been lost to police brutality and street-corner bashing. The lives of trans people are so depreciated in this society that many murders go unreported.").

184. *See* Pamuela Halliwell et al., *Characterizing the Prevalence and Perpetrators of Documented Fatal Violence Against Black Transgender Women in the United States (2013–2021)*, VIOLENCE AGAINST WOMEN (forthcoming 2025) (on file with the Minnesota Law Review) (conducting a systematic analysis of publicly-available data to find "age, geographic, and gun-related fatal violence disparities among Black transgender women").

185. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

186. *See* Mitten et al., *supra* note 103, at 273.

heightened scrutiny to either class in part because the Court could not properly identify the scope of the class.[187] For the disability community, the Supreme Court held the class to be too "large and amorphous" to qualify as a discrete group.[188] For sexual orientation and gender identity, that could prove to be a problem as well. As discussed, the name, composition, and nuances of the LGBTQIA+ community have changed over time.[189] But the same is true for other protected classes, including race.[190] If accepted as a protected class, SOGI will evolve just as other protected classes have. The Court need not predict the future nuances of sexual orientation and gender identity to hold that SOGI is a protected class.

Still, this Note has the benefit of hindsight and can learn from the wealth and disability analyses. To ensure the best chance that a SOGI class might be recognized for heightened protection, scholars should define it as clearly as possible.

As a starting point, SOGI would encompass sexual orientation and gender identity as classes. In this case, "sexual orientation" could be defined as someone's "enduring physical, romantic and/or emotional attraction to another person,"[191] while "gender

187. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1973) (critiquing the lower court for ignoring the fact that "the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms"); *Cleburne*, 473 U.S. at 445 (finding that disabled people constitute a "large and amorphous class" such that it is "difficult to find a principled way to distinguish [them from] a variety of other groups").

188. *See id.* at 445.

189. *See* Blakemore, *supra* note 6 (explaining the evolution of the LGBTQIA+ label); *see also* L.W. v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023) (finding that the "huge variety of gender identities and expressions" encompassed by the term "transgender" precludes the group's immutability).

190. *See, e.g.*, Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 572 (1995) (discussing the confusing nature of the Supreme Court's jurisprudence on "ethnicity," sometimes encompassed by "national origin" and sometimes encompassed by "race"); *see also id.* at 605–06 (describing the nineteenth-century interpretation of the term "race" as inclusive of "many groups defined by ancestry and ethnicity," including "Jews, Hindus, [and] Swedes").

191. *Glossary of Terms: LGBTQ*, GLAAD, https://glaad.org/reference/terms [https://perma.cc/UGF4-RY7T]. A list of sexual orientations may include, but is not limited to, lesbian, gay, bisexual, aromantic, pansexual, asexual, queer, and heterosexual. While romantic orientations are often thought of as separate from sexual orientation, they should be included in this label for administrability purposes. *See generally Asexuality, Attraction, and Romantic Orientation*, UNIV.

identity" could be defined as someone's "internal, deeply held knowledge of their own gender."[192] This latter term would ideally encompass sex/gender, subsuming and replacing traditional sex discrimination jurisprudence.[193] If not, "sex" discrimination could remain as a relic of the "biological" past, with "gender identity" taking on all of the socially-constructed elements of sex/gender including gender expression.[194] Even if not done so explicitly, the recognition of protections for sexual orientations and (transgender) gender identities could set the stage for the eventual preemption of current sex/gender jurisprudence.

Scholars have discussed the final component of this factor, immutability, at length.[195] In the context of sexual orientation and gender identity, a few main questions arise. First, is being LGBTQIA+ a choice? And don't some LGBTQIA+ people realize later in life that they aren't actually LGBTQIA+? Or switch identities within the community? Of course, the answers to the two latter questions are both "yes"—many people "come out" multiple times throughout their lives, claiming new labels, reconfiguring their existing identities, or deciding that a label they once

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OF N.C. AT CHAPEL HILL LGBTQ CTR., https://lgbtq.unc.edu/resources/exploring-identities/asexuality-attraction-and-romantic-orientation [https://perma.cc/LR6H-3MVP].

192. *Glossary of Terms: Transgender*, GLAAD, https://glaad.org/reference/trans-terms [https://perma.cc/FPD4-5S8S]. A list of gender identities may include, but is not limited to, intersex, agender, genderqueer, nonbinary, queer, gender-non-conforming, Two-Spirit, genderfluid, transgender, man, and woman. As terms, "transgender" and "cisgender" are technically "gender modalities" rather than gender identities in themselves, but they could be incorporated into this list as impermissible bases of discrimination on their own or in combination with another label (e.g., transgender man). *See Transgender and Nonbinary Identities*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender [https://perma.cc/XCQ5-6C74] (defining a "gender modality" as "[t]he relationship between your gender identity and the sex you were assigned at birth").

193. *See infra* notes 259–64 (describing the issues with traditional sex discrimination law).

194. Though there are problems with the idea that "sex" is biological while "gender" is socially constructed. *See* discussion *infra* note 260.

195. *See, e.g.*, M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 2 (2009) (arguing that immutability is unnecessary for sexual orientation to attain suspect status); Graham, *supra* note 110, at 200 (outlining three state supreme courts' analysis of immutability in legalizing same-sex marriage); Halley, *supra* note 111, at 506 (arguing that "legal arguments from biological causation should be abandoned").

claimed was not or is no longer accurate.[196] The idea of proactively claiming an identity like sexual orientation or gender identity requires some interpretation, which may change over time. But the fact of interpretation (and re-interpretation) does not necessarily mean that choice is involved.[197]

Professor Saray Ayala provides a useful example: If you are tasked with activating a machine you have never seen before and you do not have an instruction manual, you may try a variety of things to get it working until you figure it out.[198] But if you are given an instruction manual, "you will probably follow it without considering different alternatives."[199] Both paths require interpretation—"figuring out or making sense" of the machine—but only the first requires choice.[200] Simply put, some people are given the instruction manual for their identities early on and things just click; some have to figure things out, sorting through alternatives to find the best fit; and some who thought they had it figured out come to realize they had the wrong manual, or

196. Studies are limited, especially for nonmedical transition, but there is an estimated 2% regret rate for gender-affirming surgery and 1.9% for nonsurgical medical transition. Liam Knox, *Media's 'Detransition' Narrative Is Fueling Misconceptions, Trans Advocates Say*, NBC NEWS (Dec. 19, 2019), https://www.nbcnews.com/feature/nbc-out/media-s-detransition-narrative-fueling-misconceptions-trans-advocates-say-n1102686 [https://perma.cc/8XEW-5843]. One study found that 8% of surveyed transgender people reported detransitioning, but over half of those did so only temporarily and a majority did so due to pressure from a parent. *Id.* Only 0.4% of those who detransitioned reported doing so because they realized transitioning wasn't right for them. *Id.* While detransitioning is a real and valid experience, opponents of gender-affirming care often inflate these stories and use them as a political weapon "to challenge the scientific validity of all gender-affirming care." AJ Eckert & Quinnehtukqut McLamore, *Detransition, Retransition, and What Everyone Gets Wrong*, SCI.-BASED MED. (May 14, 2023), https://sciencebasedmedicine.org/detransition-retransition-and-what-everyone-gets-wrong [https://perma.cc/HKR8-7CUQ].

197. Ayala, *supra* note 169, at 264.

198. *Id.* at 259–60.

199. *Id.* at 260.

200. *Id.*

there is more to discover.[201] No pathway is less worthy of respect.[202]

Even if choice were always involved, this does not defeat the claim of a suspect class. As previously stated, religion is an established suspect class which for some involves an active choice amongst alternatives while, for others, it is set in stone.[203] The physical ability to opt in or out of a particular religion does not preclude "religion" from being a suspect class. Neither does the fact that someone's religion is not necessarily apparent just by looking at them.[204]

When considering the immutability of SOGI, scholars should consider it in parallel with religion in two main respects: (1) changing one's particular label (e.g., "Catholic" to "Jewish," "lesbian" to "bisexual") does not affect the suspect nature of the classification ("religion" and "SOGI"); and (2) these are identities that someone should not have to change, especially at the direction of the government, even if they could.[205] If immutability need be assessed in this analysis, which is debatable,[206] scholars and courts can use this definition to protect classifications that play a "central role" in "a person's fundamental right to self-

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201. Leslie Feinberg put it eloquently:

> I feel it's possible to say that at this moment in time, our destinies are determined by the constant interaction between the ship we are fitted with, the direction we set for ourselves, and the forces in society that affect our course—including the gale winds of bigotry, the undertow of discrimination, and the deeply carved channels of poverty and inequality.

FEINBERG, *supra* note 183, at 31–32.

202. And, while this should go without saying, the idea that cisgender men pretend to be transgender women just to harm others is a red herring which scholars have debunked and exposed as a cloak for anti-transgender prejudice. *See* Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring*, TIME (May 2, 2016), https://time.com/4314896/transgender-bathroom-bill-male-predators-argument [https://perma.cc/8YVB-S2T8].

203. *See supra* notes 67, 113–14 and accompanying text.

204. *Cf.* Windsor v. United States, 699 F.3d 169, 183 (2d Cir. 2012) ("Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference." (internal citation omitted)), *aff'd on other grounds*, 570 U.S. 744 (2013).

205. *See supra* notes 113–18 and accompanying text.

206. *See supra* note 115 and accompanying text (describing immutability as not "strictly necessary").

determination."[207] Some state courts have already held that sexual orientation is immutable on this very basis.[208]

4. The Political Powerlessness of LGBTQIA+ People

Finally, if courts consider the relative political powerlessness of the LGBTQIA+ community, it is clear the LGBTQIA+ community does not have the political power to protect itself because of its relative population, its disproportionately low representation in politics, and the deluge of targeted anti-LGBTQIA+ statutes. As discussed, the population of the LGBTQIA+ community is relatively small: about 5–8% of U.S. adults.[209] Smaller populations are less able to use the democratic process to secure protection.[210] Even with its small size, the proportion of LGBTQIA+ people in elected positions in the United States does not reflect the proportion of LGBTQIA+ people in the general population. One estimate puts the proportion of elected officials who identify as LGBTQIA+ at just 0.23% for 2023.[211] Compared to the overall LGBTQIA+ population, this is a deficit of a magnitude over thirty.

Outside of the political arena, LGBTQIA+ people face discrimination in other aspects of public life which likely contribute to their political powerlessness. A recent study found that forty-seven percent of LGBTQIA+ workers faced discrimination at their job at some point in their lives.[212] There is also mounting evidence that LGBTQIA+ students face unique risks at schools,

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207. Graham, *supra* note 110, at 197 (quoting Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008)).

208. Leslie, *supra* note 87, at 1593 (first citing *Kerrigan*, 957 A.2d at 438; and then citing Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009)).

209. *See supra* note 178.

210. Transcript of Oral Argument, *supra* note 133, at 129 ("When you're 1 percent of the population or less, [it's] very hard to see how the democratic process is going to protect you.").

211. *Out for America 2023*, LGBTQ VICTORY INST. (June 7, 2023), https://victoryinstitute.org/out-for-america-2023 [https://perma.cc/QM2U-GT8J].

212. Brad Sears et al., *LGBTQ People's Experiences of Workplace Discrimination and Harassment*, THE WILLIAMS INST. 2 (Aug. 2024), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Aug-2024.pdf [https://perma.cc/4LMM-HDZQ]. Even with the recent Supreme Court expansion of LGBTQIA+ protections at work, twenty-four percent of respondents reported experiencing harassment specifically within the prior five years. *Id.* at 4 ,12 (citing Bostock v. Clayton County, 140 S. Ct. 1731 (2020)).

not just for bullying and harassment,[213] but also for censorship.[214] Florida's infamous Parental Rights in Education Act,[215] better known as the "Don't Say Gay Bill," is one example of censorship in schools. This bill banned classroom instruction about sexual orientation and gender identity for Florida public school students in kindergarten through third grade.[216] The Florida Board of Education later expanded the law to ban such instruction for public school students in all grades, including high schoolers.[217] This bill, which inspired a wave of copycats across other states,[218] is one of the twenty-nine anti-LBTQIA+ bills

213. Joseph G. Kosciw et al., *The 2021 National School Climate Survey*, GLSEN 117–21 (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf [https://perma.cc/4YKW-V9SG] (cataloging experiences of anti-LGBTQIA+ harassment and assault in schools over time).

214. *See, e.g.*, Leila Rafei, *How LGBTQ Voices Are Being Erased in Classrooms*, ACLU (June 7, 2022), https://www.aclu.org/news/lgbtq-rights/how-lgbtq-voices-are-being-erased-in-classrooms-censorship [https://perma.cc/PTN2-7G9T]; Laura Beth Nielsen et al., *Misgendering, Academic Freedom, the First Amendment, and Trans Students*, 73 CASE W. RSRV. L. REV. 1177 (2023) (arguing that the First Amendment does not protect misgendering students in the classroom but nevertheless concluding that misgendering in the classroom harms students and breaks professional norms); Andrew Koppelman, *The Emerging First Amendment Right to Mistreat Students*, 73 CASE W. RSRV. L. REV. 1209 (2023) (arguing that recent First Amendment precedents allow for misgendering and mistreating students).

215. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (enacted as Act of Mar. 28, 2022, ch. 2022-22, 2022 Fla. Laws 248).

216. Eesha Pendharkar, *Florida Just Expanded the 'Don't Say Gay' Law. Here's What You Need to Know*, EDUC. WK. (Aug. 19, 2023), https://www.edweek.org/policy-politics/florida-just-expanded-the-dont-say-gay-law-heres-what-you-need-to-know/2023/04 [https://perma.cc/HSC7-39VC] ("Under the original Parental Rights in Education law, which was signed into law last year, instruction on gender identity and sexual orientation was banned for K-3 students, but teachers in grades 4-12 were allowed to offer this kind of instruction if it was deemed developmentally appropriate.").

217. *See id.* ("[U]nder the expansion, . . . all public school students will be banned from learning about these topics, unless required by existing state standards or as part of reproductive health instruction that students can opt out of.").

218. All Things Considered, *Hundreds of Anti-LGBTQ Bills Have Already Been Introduced This Year. Here May Be Why*, NPR, at 01:24 (Apr. 14, 2022), https://www.npr.org/2022/04/14/1092904560/hundreds-of-anti-lgbtq-bills-have-already-been-introduced-this-year-here-may-be-why [https://perma.cc/D6KR-KUYU] ("It's spreading, really, like a kind of hateful, misguided wildfire in state legislatures.").

passed into law in 2022.[219] The next year saw seventy-five anti-LGBTQIA+ bills become law,[220] inspiring prominent LGBTQIA+ organizations to describe this moment as a "National State of Emergency for LGBTQ+ Americans"[221] and a "war on LGBTQ people in America."[222] While 2024 saw a slight dip in the number of anti-LGBTQIA+ bills to become law (forty-six),[223] one journalist reflected that this was less likely a sign of success for LGBTQIA+ advocates, but rather a sign that legislators had "already eviscerated" LGBTQIA+ rights with the prior two years of legislation.[224]

Even before the 2022 legislative push to strip LGBTQIA+ rights, several federal courts had found that the LGBTQIA+ community represents a class that is sufficiently politically powerless to justify a heightened level of scrutiny.[225] Like women

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219. *2022 State Equality Index*, HUM. RTS. CAMPAIGN FOUND. (2023), https://reports.hrc.org/2022-state-equality-index#summary-state-developments-2022 [https://perma.cc/AV5X-EZ8W].

220. *See* Jo Yurcaba, *From Drag Bans to Sports Restrictions, 75 Anti-LGBTQ Bills Have Become Law in 2023*, NBC NEWS (Dec. 17, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/75-anti-lgbtq-bills-become-law-2023-rcna124250 [https://perma.cc/7XQZ-E4ZU].

221. Violet Lhant, *The Fight Against Anti-LGBTQ+ Extremism: A Look Ahead at the 2024 State Legislative Session*, EQUAL. MAG. (2024), https://www.hrc.org/magazine/2024-winter/the-fight-against-anti-lgbt-extremism [https://perma.cc/B6BX-C3MV] ("Last year, for the first time in our history, the Human Rights Campaign declared a national state of emergency for LGBTQ+ Americans in recognition of the record-breaking number of anti-LGBTQ+ bills signed into law.").

222. *Under Fire: The War on LGBTQ People in America*, MOVEMENT ADVANCEMENT PROJECT 1 (Feb. 2023), https://www.mapresearch.org/file/Under%20Fire%20report_MAP%202023.pdf [https://perma.cc/R3F9-ZTJW].

223. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU (Dec. 6, 2024) https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024 [https://perma.cc/KX45-RV4M] (tracking forty-nine bills that were passed into law in 2024).

224. Ryan Thoreson, Opinion, *As Fewer Anti-LGBTQ Bills Pass, The Fight Gets Harder*, WASH. BLADE (June 27, 2024), https://www.washingtonblade.com/2024/06/27/opinion-fewer-anti-lgbtq-bills-pass-fight-harder [https://perma.cc/E4MX-PJ4E].

225. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020) ("Transgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process."); Windsor v. United States, 699 F.3d 169, 184 (2d Cir. 2012) ("We conclude that homosexuals are still significantly encumbered in this respect."), *aff'd on other grounds*, 570 U.S. 744 (2013); Watkins v. U.S. Army, 875 F.2d 699, 727 n.30 (9th Cir. 1989) (en

when the Supreme Court considered their Equal Protection Clause claims in the 1970s, the LGBTQIA+ community today faces "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[226] Making up an even smaller portion of the population and experiencing antagonistic legislation, harassment, and fatal violence,[227] this group is sufficiently politically powerless to justify a heightened level of scrutiny.

When the Supreme Court recognizes a new protected class it considers many, if not all, of these factors. The Court has yet to analyze these factors in the context of sexual orientation or gender identity, and certainly not a united SOGI class. This Section analyzed each factor and found that they all apply to SOGI: the history of discrimination of LGBTQIA+ people is long and unyielding; the class has so far proven politically powerless in achieving redress for historical and present harms; neither sexual orientation nor gender identity is relevant to someone's ability to contribute to society; and the LGBTQIA+ community is a socially unintegrated group that continues to be pushed to the margins of society based on characteristics that they should not have to change even if they could. Given these facts, the Supreme Court should recognize SOGI as a protected class receiving strict scrutiny under the Equal Protection Clause.

B. WHY MERGE SEXUAL ORIENTATION & GENDER IDENTITY

Sexual orientation and gender identity should be treated as one class because they are uniquely tied. Before the words

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banc) (Norris, J., concurring) ("[H]omosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination."); Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020) ("[T]ransgender people constitute a minority lacking in political power.").

226. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). Importantly, the fact that a group can get its claim in front of the Supreme Court has not been enough to torpedo their claims of political powerlessness. *See* Yoshino, *Paradox*, *supra* note 124, at 539. Absent any political power, the group would "never even get on the Court's radar." *Id.* Groups thus must have enough political power to raise their case, but not enough to achieve meaningful redress through the legislative process. *See id.*

227. *See Anti-LGBTQ Extremist File*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbtq [https://perma.cc/R46V-XNPT] (explaining the methods hate groups use to target LGBTQIA+ people).

"homosexual" and "transgender" were coined,[228] people deviated from European sexual and gender norms,[229] states criminalized them for it,[230] and communities fought that criminalization.[231] At the time, the lines between homosexual and transgender were not just blurry—they did not exist.[232] Treating sexual orientation and gender identity as a singular protected class makes sense in the context of this history, and is both socially and legally more practical than splitting the LGBTQIA+ community in two.[233]

1. Sexual Orientation and Gender Identity Have Been, and Will Continue to Be, Intertwined

It is impossible to look back on history and assign modern terms to acts, identities, and people in a different social context.[234] Whether a crossdresser from the eighteenth century, for example, would identify with the modern meanings of "gay" and/or "transgender" is lost to history. But there is a clear

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228. Karoly Maria Benkert likely coined the term "homosexuality" in the late nineteenth century. *Homosexuality*, STAN. ENCYCL. OF PHIL., https://plato.stanford.edu/entries/homosexuality [https://perma.cc/E76H-FXJP]. Dr. John Oliven likely coined the word "transgender" in the late twentieth century. Cristan Williams, *Transgender*, 1 TRANSGENDER STUD. Q. 232, 233 (2014).

229. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 4 (1983) ("[Before the nineteenth century, people] engaged in what we would describe as homosexual behavior, but neither they nor the society in which they lived defined persons as essentially different in kind from the majority because of their sexual expression.").

230. *See A History of LGBT Criminalisation*, *supra* note 150 (describing the existence of anti-sodomy laws in as early as 1290); *id.* (describing England's first civil anti-sodomy law passed in 1533 and later "exported around the world under British colonial rule").

231. *See id.* (describing France's decriminalization of same-sex sexual activity in 1791).

232. WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 1 (1999) ("For most of American history, there was no state regulation of 'gay' people—people not conforming to rigid sexual and gender roles—because the categories of sexuality and gender were not well conceptualized until after the Civil War.").

233. At least one other author has argued recently for a united SOGI class, though the piece differed in the second novel aspect of this Note by arguing for intermediate scrutiny instead of strict scrutiny. *See generally* Erik Fredricksen, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J. 910 (2023).

234. *See* Kapitan, *supra* note 18 (criticizing the application of modern terms to historical figures who lacked that terminology).

history of criminalization of deviations from sexual and gender norms. These laws used a variety of terms including *sexual deviancy*, *sodomy*, *crossdressing*, *gross indecency*, *hooliganism*, *impersonation*, and *disguise*.[235] These laws do not have perfect analogues in modern day. The people that they criminalized do not have perfect analogues in modern day. But this history parallels, leads into, and arguably encompasses the criminalization of the modern LGBTQIA+ community.[236]

The social and legal landscape in the United States shifted for sexual and gender minorities in the nineteenth and twentieth centuries. Terminology changed, laws changed, and people changed.[237] While a complete historical analysis is outside the scope of this Note, LGBTQIA+ people have a shared past through criminalization, community, and advocacy.[238] For the

235. *See A History of LGBT Criminalisation*, *supra* note 150 (describing the various mechanisms used to criminalize sexual and gender deviancy).

236. *See, e.g.*, Manuela López Restrepo, *The Anti-Drag Bills Sweeping the U.S. Are Straight from History's Playbook*, NPR (Mar. 6, 2023), https://www.npr.org/2023/03/06/1161452175/anti-drag-show-bill-tennessee-trans-rights-minor-care-anti-lgbtq-laws [https://perma.cc/8DSZ-8VLT] (comparing modern anti-drag bills to historical crossdressing bans); CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO 4 (2014) ("[C]ross-dressing laws had remarkable longevity and became a key tool for policing lesbian, gay, and transgender communities in the mid-twentieth century."). Black queer and trans people continue to be disproportionately policed for deviating from sexual norms. *See* Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 11, 18 (2016) ("Beyond policing of prostitution, policing of sexual offenses more broadly similarly serves as a site of racially discriminatory policing, and sex offender registries represent an ongoing site of discrimination and punishment of sexual and gender non-conformity.").

237. *See, e.g.*, JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS 372 (3d ed. 2012) ("Along with medical technologies, the political emphasis on sexual choice within the expanding gay liberation and feminist movements provided a context for the transgender political identity that took shape after the 1980s." (internal citations omitted)).

238. The community's coalition can be traced at least as far back as the second half of the nineteenth century, when scholars documented a continuum of sexuality and gender identity where "same-sex desire is adjacent to and sometimes merges into cross-gender expression." SIMON JOYCE, LGBT VICTORIANS: SEXUALITY AND GENDER IN THE NINETEENTH-CENTURY ARCHIVES 75 (2022) (citing prominent scholars including Richard von Krafft-Ebing, Magnus Hirschfeld, and Karl Heinrich Ulrichs).

most part, that remains true today.[239]

2. Treating SOGI as a Single Class is Socially and Legally Practical

The unity of the LGBTQIA+ community is also practical. In a world with increasing recognition of intersectionality and multiple-marginalization, due in no small part to the advocacy and scholarship of Black women, it makes sense to recognize that many "LGB" people are also "Q" and "TIA+."[240] In a world with increasing transphobia and trans exclusion, it makes sense to be explicit that the rights of cis lesbian women, for example, are deeply intertwined with the rights of trans people.[241] One will not be achieved without the other.[242]

Over the last decade, historically gay and lesbian organizations have changed their names and policies to better recognize the interdependence of LGBTQIA+ struggles.[243] With increased

239. Unfortunately, however, the severing of transgender people from the queer community is largely a modern project, and one "designed to paint transgender people as threats to the hard-fought gains of cisgender women over the past century." Fradella, *supra* note 159, at 280 (citing Judith Butler, *Why Is the Idea of 'Gender' Provoking Backlash the World Over?*, GUARDIAN (Oct. 23, 2021), https://www.theguardian.com/us-news/commentisfree/2021/oct/23/judith-butler-gender-ideology-backlash [https://perma.cc/CLX9-6Q42]).

240. *See, e.g.*, Bonnie J. Morris, *A Brief History of Lesbian, Gay, Bisexual, and Transgender Social Movements*, AM. PSYCH. ASS'N (July 21, 2017), https://www.apa.org/topics/lgbtq/history [https://perma.cc/YZA8-PYJS] (outlining the queer movement and intersectionality); Maya Campbell, Note, *"Perceived to Be Deviant": Social Norms, Social Change, and New York State's "Walking While Trans" Ban*, 110 CALIF. L. REV. 1065, 1066 (2022) (exploring societal boundaries and marginalization).

241. *See* FEINBERG, *supra* note 183, at 17 ("[W]omen's oppression can't be effectively fought without incorporating the battle against gender oppression. The two systems of oppression are intricately linked. And the populations of women and trans people overlap.").

242. Cisgender gay and lesbian people are often thought of as threats to gender norms, especially butch lesbians. *See* Sherrie A. Inness, *Flunking Basic Gender Training*, *in* LOOKING QUEER 234, 235 (Dawn Atkins ed., 1998) ("Adopting and often transforming traits traditionally associated with men, butches threaten masculinity more than they imitate it; they colonize it." (quoting Alisa Solomon, *Not Just a Passing Fancy: Notes on Butch*, THEATER, No. 1, 1993, at 35, 37)).

243. *See, e.g.*, *GLAD Now Stands for GLBTQ Legal Advocates & Defenders*, GLBTQ LEGAL ADVOCS. & DEFS. (Feb. 23, 2016), https://www.glad.org/glad-now-stands-glbtq-legal-advocates-defenders [https://perma.cc/BLH9-SKQT] ("Gay & Lesbian Advocates & Defenders (GLAD) . . . is announcing a new name:

visibility comes more nuanced terminology and identities,[244] but the communities' struggles and goals have often been one and the same.[245]

This overlapping history also means that addressing SOGI together makes sense legally. The Court saw this practicality in a statutory context, merging the cases of two gay men and one transgender woman to find that Title VII of the Civil Rights Act of 1964 prohibited employment discrimination based on sexual orientation and gender identity.[246]

In the equal protection context, the Supreme Court should find that the Fourteenth Amendment forbids state discrimination based on sexual orientation and gender identity. The Court could treat these as two different classes or merge them into one, as this Note advocates; but protecting only one of these categories leaves all LGBTQIA+ people, and others who are suspected as threats to sexual and gender roles, at risk.[247]

C. CONSEQUENCES TO STATES

Although the Supreme Court has not established a new protected class in decades, if the test for determining a new suspect

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GLBTQ Legal Advocates & Defenders (GLAD)."); Press Release, GSA Network, GSA Network Unveils New Name and Tagline (Apr. 17, 2016), https://gsanetwork.org/press-releases/gsa-network-unveils-new-name-and-tagline [https://perma.cc/H6JA-2GK3] ("Gay-Straight Alliance Network is now Genders & Sexualities Alliance Network . . . . GSA Network's new name underscores its focus on all genders and sexualities."); *PFLAG: Evolution of a Name*, PFLAG, https://pflag.org/pflag-evolution-of-a-name [https://perma.cc/2YW6-SBDH] (chronicling the evolution of the organization's name over time including as POG (Parents of Gays), PFLAG (Parents, Families and Friends of Lesbians and Gays), and finally in 2014 as PFLAG with no acronymic meaning).

244. *See* Pelecanos, *States as Laboratories: Colorado Constitution (Reactants) + Independent State Constitutionalism (Catalyst) = Constitutional LGBTQ+ Protections (Products)*, 101 DENV. L. REV. 319, 342–43 (2024) ("It would be best to create inclusive sexual orientation and gender identity protections. Historically, cultures did not always see a sharp distinction between sexual orientation and gender identity . . . .").

245. *See* John M. Ohle, Note, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER, RACE & JUST. 237, 240–42 (2004) (describing the unification of gay men and lesbians, and then bisexual people, and then transgender people in the fight for liberation).

246. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) ("An individual's homosexuality or transgender status is not relevant to employment decisions.").

247. *See supra* note 241 and accompanying text.

class is taken seriously it should be clear that the SOGI qualifies.[248] How the Court rules on this question is of considerable consequence to the LGBTQIA+ community. This Note identifies four potential pathways of the Supreme Court,[249] and this Section considers the impact of each on current state actions and legislation.[250]

1. If Anti-LGBTQIA+ Legislation is Only Subject to Rational Basis Review

If legislation that discriminates based on sexual orientation and/or gender identity is only subject to rational basis review, it is nearly guaranteed to be upheld under an Equal Protection Clause analysis.[251] States can pass laws singling out LGBTQIA+ people for differential treatment, and then later rationalize this discrimination by drawing a post-hoc connection to "*some* legitimate governmental purpose."[252] Tennessee's ban of gender-affirming care for minors, for example, could be upheld on the basis of so-called medical purpose despite the discriminatory nature of that wording and its effect on transgender people. If subject only to rational basis review, anti-LGBTQIA+ discrimination would be treated like pregnancy discrimination: permitted as long as there is some "rational basis" for it, even if it has

248. Eyer, *supra* note 70, at 1461 ("And taking this test seriously, it becomes clear that the existing protected classes should not be considered a 'closed' set—there are other social groups which satisfy the criteria for discrimination against them to be deemed 'suspect' or 'quasi-suspect.'").

249. *See supra* Part III (summarizing the four potential paths that the Supreme Court might take in *United States v. Skrmetti*).

250. While the Court will ultimately only choose one path in *Skrmetti*, this Author hopes to engage with each pathway to explain the benefits and drawbacks.

251. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (per curiam) (explaining that rational basis review is "a relatively relaxed standard" whereby the action of a legislature "is presumed to be valid."); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (applying rational basis review to uphold disability classifications); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (applying rational basis review to uphold wealth classifications).

252. United States v. Brucker, 646 F.3d 1012, 1017 (7th Cir. 2011) (quoting Smith v. City of Chicago, 457 F.3d 643, 652 (7th Cir. 2006)).

a discriminatory effect on a certain group of already-marginalized people.[253]

2. If Anti-LGBTQIA+ Legislation Is Subject to Intermediate Scrutiny Because It Is Sex Discrimination

One of the most common arguments by proponents of LGBTQIA+ rights is that discrimination based on sexual orientation and/or gender identity is discrimination on the basis of sex, and thus should be subject to intermediate scrutiny.[254] In some ways, this argument works well. First, the Supreme Court has already established a strong line of case law in the context of sex discrimination,[255] allowing LGBTQIA+ litigants to join decades of work rather than having to carve out a new path.[256] Second, this logic fits within several common (mis)understandings: that sex is an immutable biological trait,[257] and that, consequently, a transgender person violates "sex" stereotypes when they act in conformance with the expectations of their gender.[258]

Despite all that, this argument struggles because it misinterprets the motivation behind gender-based discrimination,

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253. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 496–97, 497 n.20 (1974) (holding that pregnancy discrimination is not sex discrimination and is subject to rational basis review).

254. This follows similar logic to that proposed—and eventually established—for Title VII. *But see infra* notes 262–63 and accompanying text (critiquing this logic).

255. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–99 (1976) (describing the development of sex discrimination jurisprudence).

256. *See* Ohle, *supra* note 245, at 277 ("It seems that as a matter of judicial ease, it is simply easier to increase the range of the sex classification to include all forms of gender deviance because then the courts would not have to grapple with developing a new category or level of scrutiny." (citations omitted)).

257. For a response to this misconception, see Alexandra Kralick, *We Finally Understand That Gender Isn't Binary. Sex Isn't, Either.*, SLATE (Nov. 13, 2018), https://slate.com/technology/2018/11/sex-binary-gender-neither-exist.html [https://perma.cc/6MZ3-3J8T] ("Science keeps showing us that sex also doesn't fit in a binary, whether it be determined by genitals, chromosomes, hormones, or bones . . . ."); Fuentes, *supra* note 57 ("The production of gametes does not sufficiently describe sex biology in animals, nor is it the definition of a woman or a man.").

258. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (finding a transgender plaintiff had "sufficiently pleaded claims of sex stereotyping and gender discrimination" by alleging that a "failure to conform to sex stereotypes concerning how a man should look and behave" was the "driving force behind [the] Defendant's actions").

including anti-transgender discrimination.[259] If "sex" and "gender" are taken to have distinct meanings, with "sex" being biological and "gender" being socially constructed,[260] even discrimination against cisgender women is not "sex" discrimination *per se*. As Professor Katherine Franke has pointed out, "[w]hen women are denied employment, for instance, it is not because the discriminator is thinking 'a Y chromosome is necessary in order to perform this kind of work.'"[261]

The same is true for a woman fired for being lesbian or transgender: It is not because of her chromosomes (or any other "biological" trait that has traditionally been associated with sex) that an employer might think she cannot do her job. Firing someone for being a lesbian is discrimination based on sexual orientation and firing someone for being transgender is discrimination based on gender identity. By relying on "sex" at all, the "because of sex" argument fails because it "overstates the extent to which 'sex' and the body are responsible for discrimination . . . while understating the pernicious importance of discrimination that occurs along gender lines."[262] This was and remains an issue in the Title VII context,[263] and this Author hopes

259. *See* Ezie, *supra* note 43, at 174 (explaining that the strictly biological view of sex misunderstands the reasons why people discriminate on the basis of gender (citing Franke, *supra* note 11, at 40)).

260. There are serious and valid critiques of this distinction, and it is used here only for argument's sake. *See, e.g.*, Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 278–92 (2005) (critiquing the sex/gender distinction for, among other things, "cut[ting] off bodies from minds" and "tak[ing] the power to self-define from transgender people and hand[ing] it to non-transgender people and the medical establishment").

261. Ezie, *supra* note 43, at 174–75 (quoting Franke, *supra* note 11, at 36).

262. *Id.* at 174.

263. For plaintiff Aimee Stephens, a transgender woman, the Supreme Court compared her to a cisgender woman who was assigned female at birth: If both identify as women but only one was assigned male at birth, the Court argued that the transgender woman must have been, in a way, fired because she was "assigned male at birth." *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) ("[T]he employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."). This incorrectly assumes that transgender people are primarily discriminated against because of their "sex assigned at birth" rather than on their identity as transgender or specifically as a transgender woman. The *Bostock* Court also found that discrimination against "homosexual" people was illegal

to avoid it for the Equal Protection Clause—a hope which seems plausible due to the absence of the word "sex" (or "gender," for that matter) in the Equal Protection Clause's text.[264]

The determination of "sex" for many cisgender people—people whose gender identity aligns with the sex assigned to them at birth, and sometimes also the chromosomes, external genitalia, secondary sex characteristics, and gender presentation that correspond to outdated understandings of binary sex—may seem simple enough, but what about for intersex people and transgender people? What about for cisgender people whose hormone levels do not match the levels thought to be associated with their "sex"?[265] Or whose presentation differs from Eurocentric gender norms? What does "sex" mean when someone's body or "biology"—whether at birth or later in life, whether by choice, force, or circumstance—does not accord with cis-normative understandings of sex? Theories based on biological sex "render[] those with unruly and trangressive [sic] bodies—[for example], transgender and intersex persons—unintelligible in traditional sex equality frameworks."[266] This is especially problematic again for Black trans women and femmes, who experience increased rates of surveillance, harassment, and violence from both government and individual actors.[267]

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under Title VII because it inherently involved invidious sex discrimination, which again misplaces the heart of the discrimination from sexual orientation to some unclear and potentially inaccurate definition of "sex." *See* discussion *supra* note 11 and accompanying text. This, too, potentially leaves out people with nonbinary sexual orientations and gender identities. *See* Rachel Eric Johnson, Comment, *Discrimination Because of Sex[ual Orientation and Gender Identity]: The Necessity of the Equality Act in the Wake of* Bostock v. Clayton County, 47 BYU L. REV. 685, 702–03 (2022) (arguing that bisexual and nonbinary people would be better served by Title VII's sex stereotyping precedents); *see also* Jack B. Harrison, *"Because of Sex,"* 51 LOY. L.A. L. REV. 91, 191–92 (2018) (same); Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 835–38 (2020) (same).

264. *Compare* U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection of the laws to "any person"), *with* 42 U.S.C. § 2000e-2 (prohibiting discrimination "because of . . . sex").

265. *See, e.g.*, Melissa Block, *Olympic Runner Caster Semenya Wants to Compete, Not Defend Her Womanhood*, NPR (July 28, 2021), https://www.npr.org/sections/tokyo-olympics-live-updates/2021/07/28/1021503989/women-runners-testosterone-olympics [https://perma.cc/WUA3-789J] (explaining that female track athletes with naturally high testosterone levels have been unfairly prohibited from competing against other female athletes in track competitions).

266. Ezie, *supra* note 43, at 174.

267. *See* Halliwell et al., *supra* note 184, at 12–14.

Ultimately, the conflation and confusion between the terms "sex" and "gender" is a problem above and beyond the legal sphere, which this Note does not seek to remedy and could not if it tried.[268] In the legal context, however, this Note recommends that courts move away from the language of "sex" in order to better accommodate not only binary gender identities (including transgender women and transgender men) and binary sexual orientations (including gay and lesbian people), but also people with non-binary gender identities and sexual orientations, including bisexual, asexual, genderfluid, nonbinary, Two-Spirit, and intersex people.

The argument that discrimination against LGBTQIA+ people is sex discrimination may be practically convenient[269] and legally tenable,[270] but it does not reflect the realities of LGBTQIA+ people or LGBTQIA+ discrimination. When the Supreme Court attempted this line of reasoning in the context of employment discrimination, it left LGBTQIA+ rights, sex discrimination jurisprudence, and cis/trans solidarity on shaky ground.[271] With no specific "sex" language in the Equal Protection Clause, the Supreme Court should and can do better for cis and trans people alike.

3. If Anti-LGBTQIA+ Legislation Is Subject to Intermediate Scrutiny Because Sexual Orientation and Gender Identity Are Protected Classes in Themselves

The other way to apply intermediate scrutiny to SOGI-based legislation is by finding that sexual orientation and gender identity are quasi-suspect classes in themselves. The Fourth and Ninth Circuits held that transgender people are protected as their own class under the Equal Protection Clause, without the need to rely on definitions of "sex."[272] In *Karnoski v. Trump*, the

268. For more on this distinction, see sources cited *supra* note 11.

269. *See infra* notes 281–82 and accompanying text.

270. *See supra* notes 255–58 and accompanying text.

271. *See* Schoenbaum, *supra* note 263, at 880 ("[T]he [*Bostock*] decision fails to elucidate how transgender plaintiffs further the anti-stereotyping aims of sex discrimination law . . . . This can cause harm legally, when transgender rights claims are pitted against religious liberty defenses, and socially, when solidarity is sought between transgender rights and women's rights.").

272. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020) (applying intermediate scrutiny partially on the grounds that "transgender people constitute at least a quasi-suspect class"); Karnoski v.

Ninth Circuit reviewed President Donald Trump's 2018 policy banning transgender people from serving in the military.[273] The court found that the policy, "[o]n its face," differentiated between people "on the basis of transgender status."[274] Because of the facial distinction based solely on "transgender status," the Ninth Circuit found that the applicable level of scrutiny should be "something more than rational basis but less than strict scrutiny."[275] It remanded the case to the district court with instructions to apply intermediate scrutiny.[276]

This argument overcomes some of the difficulties associated with following in the footsteps of sex discrimination law. It certainly sidesteps the definitional issues: Instead of arguing that anti-transgender discrimination is discrimination based on "sex," for example, courts can simply argue that it is discrimination based on being transgender. There is no need to dive into the meanings of sex, gender, or gender nonconformity. A policy that states "transgender people cannot do *A*" will simply be reviewed under intermediate scrutiny, acknowledging that such a policy treats transgender people differently. This argument also succeeds in reflecting the actual animosity at issue in anti-transgender discrimination: anti-transgender animus, rather than discrimination based on someone's idea of sex.[277]

But this argument is not a panacea to the issues of intermediate scrutiny. The main obstacle to this analysis is that it lacks the justification that sex/gender has—at least according to the Supreme Court—for applying this middle level of scrutiny. According to the case law, sex/gender discrimination is subject to intermediate scrutiny instead of strict scrutiny because there is something different about it, as compared to say race, that makes state-sanctioned discrimination on that basis potentially more justifiable. In particular, there are "biological differences"

Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (per curiam) ("We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.").

273. *Karnoski*, 926 F.3d at 1189 n.4.

274. *Id.* at 1201.

275. *Id.*

276. *Id.* at 1202.

277. *See supra* notes 259–64 and accompanying text (critiquing the categorization of anti-transgender discrimination as sex discrimination).

that might justify discriminatory treatment.[278] That is, at best, an outdated test in the sex/gender context.[279] But instead of revising it, the Court might extend it to another context: the LGBTQIA+ community.

Without clear biological differences between LGBTQIA+ and non-LGBTQIA+ people to serve as a basis for state intervention, it seems that practical concerns justify this argument. The Court last granted heightened scrutiny to a new class in 1977.[280] Its perceived animosity toward expanding the list of suspect classes is likely why very few scholars have delved into this Note's central argument.[281] Instead of arguing for a new suspect class, the hope is that the Supreme Court *might* be open to a new quasi-suspect class. But even that is not guaranteed.[282]

To be clear, if the only two options are some protection or no protection, this Author agrees with this strategy. But for the sake of this Note and the dutiful application of the Equal Protection Clause, this Author argues that the Court could and should find the creation of a new suspect class justified for SOGI.

4. If Anti-LGBTQIA+ Legislation Is Subject to Strict Scrutiny

If it is possible to grant a new suspect class, this Note makes the argument that the LGBTQIA+ community qualifies as one. A country that treated all SOGI-based legislation as suspect would look fundamentally different than the country of the past decade. It is likely that none of the hundreds of anti-LGBTQIA+ bills introduced in state legislatures would survive strict scrutiny's "narrow tailoring" test. Bills that specifically named LGBTQIA+ identities would have to be rewritten; bills that were

278. Nguyen v. Immigr. & Naturalization Servs., 533 U.S. 53, 73 (2001).

279. *See supra* note 57 and accompanying text.

280. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) [hereinafter Yoshino, *New Equal Protection*] (discussing the Court's application of intermediate scrutiny to legitimacy of birth in *Trimble v. Gordon*, 430 U.S. 762, 766–76 (1977))); *see also* 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, 502 (2015) (describing reasons for the Court's reluctance to extend heightened scrutiny).

281. At least one scholar believes that the window of recognizing new suspect classes "has closed." Yoshino, *New Equal Protection*, *supra* note 280, at 757.

282. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (overturning the Fifth Circuit's determination that disability was a quasi-suspect class subject to intermediate scrutiny).

facially neutral but had a disproportionate impact on this community would have to be properly justified.[283]

Five years ago, before the Supreme Court ruled on *Students for Fair Admissions v. President of Harvard College*, the drawbacks of this Note's argument would look fundamentally different. Today, the primary drawback is that courts will use strict scrutiny to overrule affirmative efforts to support LGBTQIA+ people, in addition to (and possibly even more often than[284]) policies that discriminate against them. This outcome was solidified by *Students for Fair Admissions*, in which the Supreme Court used strict scrutiny to invalidate race-based affirmative action admissions policies.[285] The Court found that these policies "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points."[286]

The Court ultimately used strict scrutiny to invalidate a policy that supported racial minorities;[287] if it reviewed LGBTQIA+ classifications under strict scrutiny, it would likely do the same. This is because the Supreme Court has taken an "anti-classification" approach to equal protection, as opposed to an "anti-subordination" approach.[288] An anti-classification approach "views the constitutional problem as classifying people by [a suspect

283. *See* Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring . . . require[s] serious, good faith consideration of workable [class]-neutral alternatives . . . ."). *But see* Yoshino, *New Equal Protection*, *supra* note 280, at 767 (finding that the Supreme Court's current strict scrutiny approach often upholds facially-neutral discriminatory policies).

284. *See* discussion *infra* note 292.

285. *See* Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2175 (2023).

286. *Id.*

287. More recently, the executive branch under Trump's second administration employed similar arguments in its efforts to invalidate diversity, equity, and inclusion (DEI) policies. *See, e.g.*, Exec. Order No. 1415, 90 Fed. Reg. 8339 (Jan. 29, 2025) (describing DEI efforts as "illegal and immoral discrimination programs"); Exec. Order No. 14,170, 90 Fed. Reg. 8621 (Jan. 30, 2025) ("Federal hiring should not be based on impermissible factors, such as one's commitment to illegal racial discrimination under the guise of 'equity' . . . ."); Exec. Order No. 14,185, 90 Fed. Reg. 8763 (Feb. 3, 2025) (describing DEI efforts in the military as "invidious race and sex discrimination").

288. Kim Forde-Mazrui, *Why the Equal Rights Amendment Would Endanger Women's Equality: Lessons from Colorblind Constitutionalism*, 16 DUKE J. CONST. L. & PUB. POL'Y 1, 34 (2021).

class]."[289] Any state action that classifies people based on a suspect class, for any purpose, is viewed as a problem. The "anti-subordination" approach, by contrast, locates the problem in "the impact of laws on historically subordinated groups."[290] This latter approach allows for affirmative action policies to distinguish based on a suspect class like race because the problem is not the classification itself, but rather the *use* of the classification to subordinate certain groups.[291] Since the modern Supreme Court takes the former approach and finds the mere distinction of a suspect class as the constitutional issue, affirmative efforts to advance the rights of the LGBTQIA+ community would likely be overturned upon the application of strict scrutiny.[292]

There is some hope in the fact that the Court has not always utilized strict scrutiny in this way.[293] The Court only recently began "blurr[ing] the line between the benign and invidious use of racial classifications."[294] In one earlier case, the Court explicitly stated: "Not every decision influenced by race is equally objectionable."[295] If the Supreme Court returned to the traditional framework of strict scrutiny analysis and refocused on historical subordination, there is a chance that favorable legislation for any suspect class, including a potential SOGI class, would survive strict scrutiny.

D. IF NOT, THEN WHAT?

Even if an idealized Supreme Court would apply these factors and find that the LGBTQIA+ community is a suspect class, the ideological lean of the current Court suggests that it would be unlikely to rule in favor of LGBTQIA+ protections in any

289. *Id.*

290. *Id.*

291. *Id.*

292. *See id.* at 34–35; *see also* Yoshino, *New Equal Protection*, *supra* note 280, at 767 (finding that an anti-subordination approach "get[s] it exactly backward," overturning affirmative action policies because of their explicit wording but upholding most discriminatory policies because they are facially-neutral, despite their discriminatory impact).

293. *See, e.g.*, *supra* note 102 and accompanying text (focusing on classifications involving "prejudice").

294. Ezie, *supra* note 43, at 194.

295. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

arena.[296] Based on the past few years, it seems that the Court is more likely to roll back protections for marginalized groups than expand them.[297] In the event that the Supreme Court is not a feasible path to pursue LGBTQIA+ protections, Congress and the states may be viable alternatives.

1. Protections Through Congress: The Equal Rights Amendment and the Equality Act

Absent action from the Supreme Court, Congress is another logical arena in which to fight for increased protections for marginalized people.[298] The Equal Rights Amendment and the Equality Act are two proposed methods for expanding discrimination protections for the LGBTQIA+ community, though each has their costs.

First introduced to Congress in 1923, the Equal Rights Amendment (ERA) has endured a difficult century-long battle

296. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/SG9N-V6V5] (discussing the current Supreme Court's highly conservative jurisprudence and the threat it poses to groups such as the LGBTQIA+ community). The last several years has seen a rollback in protections. *See, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321–22 (2023) (finding a Colorado anti-discrimination law that prohibited discrimination on the basis of sexual orientation unconstitutional as-applied to the plaintiff on First Amendment grounds); *see also* Amy Howe, *Supreme Court Rules Website Designer Can Decline to Create Same-Sex Wedding Websites*, SCOTUSBLOG (June 30, 2023), https://www.scotusblog.com/2023/06/supreme-court-rules-website-designer-can-deny-same-sex-couples-service [https://perma.cc/ZZX5-KNDK] (discussing the Supreme Court's decision in *303 Creative*).

297. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (finding that the right to have an abortion is not "deeply rooted in this Nation's history and tradition"); Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2175–76 (2023) (overturning affirmative actions as violative of the Equal Protection Clause of the Fourteenth Amendment); *see also Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (arguing that the Supreme Court "should reconsider all of this Court's substantive due process precedents" including same-sex marriage); Quint Forgey & Josh Gerstein, *Justice Thomas: SCOTUS 'Should Reconsider' Contraception, Same-Sex Marriage Rulings*, POLITICO (June 24, 2022), https://www.politico.com/news/2022/06/24/thomas-constitutional-rights-00042256 [https://perma.cc/3B27-G5LH].

298. *See* Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 283 (2002) (arguing that "the political branches have a distinct deliberative advantage over the judiciary in ensuring that racial minorities are protected against discrimination").

through Congressional approval and state ratification.[299] While one scholar argues that the ERA would "provide the most durable protections for sexual orientation and gender minorities" out of most alternatives, the ERA suffers from two major issues.[300] First, after a century of debate, its language is outdated. The ERA prohibits discrimination "because of sex," and does not explicitly include protections on the basis of sexual orientation or gender identity.[301] Such protections could be implied, as they were for Title VII,[302] but that leaves open the various critiques of using "sex" to understand SOGI.[303] A further revision of the ERA to clarify these terms seems infeasible at this stage of the process.[304] The second and related problem is that the deadline to enact the ERA has technically already passed.[305] Congress has already waived the deadline once and, "[t]o take effect, Congress would need to waive the deadline again, which is without precedent."[306]

The Equality Act is a potentially stronger and more plausible avenue for LGBTQIA+ discrimination protections. In a recent iteration, the Equality Act contains explicit language prohibiting "discrimination on the basis of sex, gender identity, and sexual orientation."[307] By explicitly including sexual orientation and gender identity, the Equality Act would circumvent the ERA's interpretation issues.[308] The Equality Act also does not have the same limitations that a constitutional amendment has

299. *Equal Rights Amendment*, BRITANNICA (Mar. 8, 2024), https://www.britannica.com/topic/Equal-Rights-Amendment [perma.cc/Z8VD-66Z4].

300. Sarah Blazucki, *The Equal Rights Amendment and the Equality Act: Closing Gaps Post-*Bostock *for Sexual Orientation and Gender Identity*, 26 UDC L. REV. 21, 30 (2023).

301. *Id.*

302. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) (holding that discrimination based on gender identity or sexual orientation constitutes sex discrimination under Title VII).

303. *See supra* notes 260–67 (describing the limitations of sex-based tests for LGBTQIA+ discrimination).

304. *See* Blazucki, *supra* note 300, at 30.

305. *Id.* at 32.

306. *Id.*

307. H.R. 5, 117th Cong. (1st Sess. 2022).

308. *See* Blazucki, *supra* note 300, at 33 ("A distinct benefit of the Equality Act is that it would consolidate protections for sex, sexual orientation, and gender identity, smoothing out some of the inconsistencies across laws, regulations, and agency guidance.").

and can instead be reintroduced each year and passed into law by a simple majority of Congress.[309] If passed, it would amend the Civil Rights Act of 1964 and enshrine some of the Supreme Court's most impactful Title VII cases into law.[310]

Like the other methods described in this Note, the Equality Act is unlikely to come to fruition due to the political leaning and structural issues of the enacting body.[311] Even if it were passed, it could be overturned by a subsequent Congress or Supreme Court case.[312] For at least two years after the 2024 election, Republicans will control the House, Senate, and Presidency,[313] suggesting that the Equality Act will not make it past reintroduction.[314]

2. Protections Through States: Learning from *Obergefell*

One other avenue for expanding discrimination protections for the LGBTQIA+ community lies in states. State constitutions as well as the laws, courts, and policies of local and state governments provide ample opportunities for enshrining LGBTQIA+ protections. Almost thirty years before same-sex/gender marriage would be achieved at the federal level, the Supreme Court issued perhaps the most anti-LGBTQIA+ ruling in its history in *Bowers v. Hardwick*, upholding a Georgia anti-sodomy law which criminalized certain sex acts between consenting adults.[315] LGBTQIA+ activists were rightfully distraught. With federal protections seemingly out of reach, they shifted strategies "from federal litigation to a nearly exclusive focus on state

309. *See id.* at 33–34.

310. *Fact Sheet: The Equality Act Will Provide Long Overdue Civil Rights Protections for Millions of Americans*, THE WHITE HOUSE (June 25, 2021), https://www.bidenwhitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-the-equality-act-will-provide-long-overdue-civil-rights-protections-for-millions-of-americans [https://perma.cc/866K-97NA].

311. *See* Blazucki, *supra* note 300, at 33–34.

312. *See id.*

313. *See* Melissa Quinn, *Final House Race Decided One Month After Election Day*, CBS NEWS (Dec. 4, 2024), https://www.cbsnews.com/news/house-results-2024-seats-undecided [https://perma.cc/D8PP-KP98].

314. *But cf.* FEINBERG, *supra* note 183, at 141 (critiquing the "'lesser-of-two-evils' politics of waiting to get another Democrat in office").

315. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

constitutional law."[316] Where the federal government provided no protection, states could step in and supplement. Activists used an incremental, state-by-state strategy to "pry open the door to relationship recognition for same-sex couples,"[317] taking the country from the horrific decision in *Bowers* through its overturning in *Lawrence v. Texas* and ultimately to the securing of federal marriage equality in *Obergefell v. Hodges*.[318]

A fight for expanded LGBTQIA+ protections against discrimination could similarly start with state courts, choosing specific jurisdictions in which to launch litigation in support of a nationalized strategy.[319] While state and local governments have jurisdiction over fewer people than the federal government, action at these lower levels may prove to be the most prudent and sustainable tool for expanding and enshrining LGBTQIA+ protections.

No path is perfect. There are benefits and drawbacks to congressional and state activism, just as there are in the Supreme Court context. But a diversity of tactics and an organized base of supporters will be necessary to make it through not just the next four years but the next four decades, protecting LGBTQIA+ people for the long term.

CONCLUSION

The Supreme Court is poised to decide the future of constitutional protections for transgender people in *United States v. Skrmetti*. This Note avoided predicting the case's outcome and instead proposed a novel argument not yet before the Court: the unification of sexual orientation and gender identity into a single suspect class. This would solve some of the problems of sex discrimination jurisprudence, recognize that the liberation of sexual and gender minorities is bound up together, and protect LGBTQIA+ people from the explicitly discriminatory laws that

316. Leonore Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255, 271 (2020).

317. *Id.* at 271.

318. *Bowers*, 478 U.S. at 196 (upholding anti-sodomy laws); *Lawrence*, 539 U.S. at 578 (overruling *Bowers* and finding anti-sodomy laws unconstitutional); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that the fundamental right to marry extends to same-sex/gender couples).

319. *See* Carpenter & Margolis, *supra* note 316, at 308 (noting the opportunity for success through state court strategies).

permeate state legislatures. This would also represent a huge shift from the current Court's political ideology. Until the Supreme Court is willing to recognize new suspect classes, support LGBTQIA+ rights, and switch back to an anti-subordination approach for strict scrutiny, the outcomes of this Note will not be fully realized. In the meantime, find your community, get organized, and remember that "hope is a discipline."[320]

320. *Hope is a Discipline: Mariame Kaba on Dismantling the Carceral State*, INTERCEPT (Mar. 17, 2021), https://theintercept.com/2021/03/17/intercepted-mariame-kaba-abolitionist-organizing [https://perma.cc/VVM7-8UJD].