

2017

The Geography of Equal Protection

Christopher R. Leslie

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Leslie, Christopher R., "The Geography of Equal Protection" (2017). *Minnesota Law Review*. 162.
<https://scholarship.law.umn.edu/mlr/162>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Article

The Geography of Equal Protection

Christopher R. Leslie[†]

Equal protection doctrine should play a central role in the evolution of gay rights jurisprudence. After all, gay Americans simply want to be afforded legal rights equal to those of their heterosexual family members, coworkers, and neighbors. Historically, however, most equal protection claims challenging anti-gay laws have failed. Most of these failures flowed from courts' refusal to apply heightened scrutiny to sexual orientation discrimination. By evaluating anti-gay laws under the more deferential rational basis standard, judges generally uphold laws with the purpose and effect of denying equality to millions of Americans.

Many judges who refuse to treat sexual orientation as a suspect classification justify their holdings by asserting that gay men and lesbians are not politically powerless and, thus, are not entitled to heightened scrutiny. It is puzzling that judges claim that gay men and lesbians have so much political power given that the federal government, dozens of state governments, and hundreds of local governments have enacted laws to discriminate against gay people.

Several scholars have criticized courts for applying the political powerlessness factor of equal protection analysis inconsistently and without a proper measurement tool. This Article adds another critique: courts generally fail to consider the geography of political power. Minorities can have political power in some locations but not others. Judicial conclusions regarding political power are based primarily on where judges look for evidence. This Article demonstrates how courts misapply the po-

[†] Chancellor's Professor of Law, University of California Irvine School of Law. The author thanks Erwin Chemerinsky, Catherine Fisk, Doug NeJaime, Tony Reese, and Bertrall Ross for comments on earlier drafts, and the participants in the UC Irvine School of Law workshop for early feedback on the project. Copyright © 2017 by Christopher R. Leslie.

litical power component of equal protection analysis when determining whether a classification is suspect. This is most easily observed in the judicial treatment of sexual orientation.

Using the decades-old debate over whether laws that discriminate based on sexual orientation should be subject to heightened scrutiny, this Article shows how courts generally have mishandled the geographic dimension of the political power inquiry. Using sexual orientation as a case study to explore the geography of political power is appropriate, given the legal vulnerability of the millions of gay and lesbian Americans targeted by anti-gay laws.¹ For well over half a century, gay Americans have existed as an “unrecognized minority” relegated to second-class citizenship—if recognized as citizens at all.²

Part I of this Article briefly reviews the basics of equal protection analysis. Courts are split on whether to apply heightened scrutiny or rational basis review to laws and policies that discriminate based on sexual orientation. The level of scrutiny applied in equal protection analysis is particularly important in gay rights litigation. Courts tend to uphold anti-gay laws when applying rational basis review, but almost always invalidate anti-gay laws when heightened scrutiny is employed. Thus, because the level of scrutiny is often outcome determinative, the probability of courts protecting gay Americans from discrimination is often a function of whether judges conclude that sexual orientation is a suspect classification. To determine this, courts generally consider four factors: whether the members of the group: (1) have historically been subjected to discrimination; (2) share a defining characteristic unrelated to their ability to perform or contribute to society; (3) share a defining immutable characteristic; and (4) lack political power. Courts almost uniformly find that the first two factors describe gay people. While courts have split on the third factor, the modern trend is to

1. See Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 53 (2010) (“[W]hether to recognize sexual orientation as a suspect classification is the critical issue for the Court's suspect classification jurisprudence.”).

2. DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* 13 (1951) (“Thus the homosexuals constitute what can be termed the unrecognized minority. We are a group by reason of the fact that we have impulses in common that separate us from the larger mass of people we are a minority, not only numerically, but also as a result of a caste-like status in society.”); see also *In re Longstaff*, 538 F. Supp. 589, 593 (N.D. Tex. 1982), *aff'd In re Longstaff*, 716 F.2d 1439, 1451 (5th Cir. 1983) (denying citizenship to petitioner because of his homosexuality).

treat sexual orientation as immutable. This makes the fourth factor—political powerlessness—critical in determining whether sexual orientation is a suspect classification.

Part II focuses on the political power component of equal protection analysis. The purpose of the political power factor is to ensure legal protections for minorities who face discrimination because of a failed political process. Although many courts have held this factor to be determinative in denying heightened scrutiny of anti-gay laws, courts have not clearly defined political power for the purposes of suspect classifications. Part II reviews the well-recognized problems with the political power inquiry. First, and foremost, courts have not constructed an actual measure of political power. Second, courts apply the political power factor inconsistently by treating gays as too politically powerful to warrant heightened scrutiny, while simultaneously granting heightened scrutiny to many groups—including straight, white men—who have considerably more political power than gays. Ultimately, courts often apply the political power factor in a manner that is impossible to satisfy because judges ignore truly powerless groups.

Part III introduces a new critique of political power analysis in equal protection jurisprudence based on the geography of political power. Gay Americans face discrimination from every level of government. The federal government has long discriminated against gay people—from prohibiting their immigration and governmental employment for most of the twentieth century to, more recently, forbidding the recognition of legal same-sex marriages. In the absence of federal-level protections, gay Americans are also subject to discriminatory laws imposed by their state governments. Before 1960, all states criminalized private sexual conduct between consenting adult same-sex couples through sodomy laws, laws that remained in place in a dozen states until invalidated by the Supreme Court in *Lawrence v. Texas*.³ Until 2003, all states banned same-sex marriage. Although the Supreme Court struck down sodomy laws and same-sex marriage bans as violating the U.S. Constitution,⁴ many state governments continue to enact and enforce explicitly anti-gay laws, including prohibiting gay individuals and couples from adopting children, legally authorizing anti-gay discrimination by both government officials and private in-

3. 539 U.S. 558 (2003).

4. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

dividuals who operate public accommodations, and forbidding cities from including sexual orientation in their local nondiscrimination ordinances. In contrast to these relatively gay-hostile states, some states have enacted gay-protective laws, such as including sexual orientation in non-discrimination laws covering employment and public accommodations.

Part IV discusses how courts fail to appreciate these regional variations in political power when determining whether gays have political power. In many cases, courts have relied upon evidence of political power in geographic areas that are irrelevant to the actual political process that produced the anti-gay law being challenged. For example, in equal protection challenges to federal laws and policies—such as the military's prohibition on gay servicemembers—many courts have held that sexual orientation is not a suspect classification because a handful of states and several cities have adopted gay-inclusive nondiscrimination laws. These courts have never explained why these isolated non-federal victories are relevant to whether gays have political power to affect federal anti-gay laws, such as those being challenged in a particular case. Similarly, when evaluating equal protection challenges to anti-gay state laws, courts often find that gays have political power—and thus do not qualify for heightened scrutiny—by pointing to gay-protective laws in *other* states. This makes little sense. The fact that the California legislature does a relatively good job of protecting gay rights should not mean that anti-gay legislation in Oklahoma gets substantial judicial deference. To do so would essentially punish gay citizens in Oklahoma for the political victories achieved by gay citizens in California. Part IV explains that courts make a fundamental error when they examine the wrong geographic area when discussing the political power factor.

Finally, Part V considers the legal implications of these geographic issues for equal protection analysis. The most straightforward solution to the problem of regional variations in political power would be for courts to consider whether gay people have meaningful political power with respect to the specific legislative body that enacted the anti-gay law that is being challenged. While this could solve the problems highlighted in Part IV, it would create larger problems of asymmetrical constitutional protections, as the same law could fail heightened scrutiny in some states (where gays are determined to be politically powerless) and yet survive rational basis in other states

(where gays are determined to be politically powerful). Part V explains that given the regional variations of political power, coupled with the need for uniform application of equal protection analysis across the nation, the most prudent approach is to eliminate the political power inquiry altogether and instead rely on other factors that better indicate whether a challenged law is likely a product of prejudice. The factors of historical discrimination and whether the members of the affected group share a defining characteristic related to their ability to perform or contribute to society are better geared for this purpose.

I. EQUAL PROTECTION DOCTRINE

A. THE MECHANICS OF EQUAL PROTECTION

The Equal Protection Clause protects members of disadvantaged groups from discriminatory laws and policies imposed by political majorities.⁵ Scholars have advanced competing theories to explain the purpose of the Equal Protection Clause. For example, under anti-subordination theory, “the Equal Protection Clause should be understood to bar those government actions that have the intent *or* the effect of perpetuating traditional patterns of hierarchy.”⁶ In contrast, anti-classification theory argues that “the government may not classify people either overtly or surreptitiously on the basis of a forbidden category.”⁷

Whatever the theoretical underpinnings, equal protection analysis proceeds in three steps.⁸ In the first step, the judge determines whether the challenged law classifies people based on a particular trait. In the second step, the court determines the level of scrutiny associated with that classification. Finally, in

5. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) (“The function of the Equal Protection Clause is to protect disadvantaged groups . . . against the effects of past and present discrimination by political majorities.”).

6. Helen Norton, *The Supreme Court’s Post-Racial Turn Toward a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 206 (2010).

7. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003); see also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1064 n.16 (2011) (describing the two competing theories).

8. See, e.g., *Kan. One-Call Sys., Inc. v. State*, 274 P.3d 625, 635 (Kan. 2012) (listing the three steps in explaining equal protection analysis under the Fourteenth Amendment and the state constitution’s Bill of Rights).

the third step, the court applies the appropriate level of scrutiny—arrived at in step two—and determines whether the challenged law violates the Equal Protection Clause.

Regarding the second step, the Supreme Court has delineated three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review.⁹ These represent descending levels of scrutiny. Under strict scrutiny, the government has the burden of proving that the challenged law's classifications "are narrowly tailored measures that further compelling governmental interests."¹⁰ For over half a century, courts have applied strict scrutiny to government actions that infringe fundamental rights or discriminate based on race or national origin.¹¹ The test was sufficiently rigid that Gerald Gunther once described the Warren Court's approach as "'strict' in theory and fatal in fact,"¹² a characterization from which the Burger Court later distanced itself.¹³ In any case, laws that discriminate based on race are generally struck down as violating the Equal Protection Clause.

Under intermediate scrutiny, "restrictions 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.'"¹⁴ "Substantially related," in turn, requires that the proffered explanation be "exceedingly persuasive," and "not hypothesized or invented *post hoc* in response to litigation."¹⁵ Courts apply intermediate scrutiny to government actions that discriminate based on gender and illegitimacy.¹⁶ The application of heightened scrutiny to gender discrimination in the 1970s was particularly significant, given

9. See *Plyler v. Doe*, 457 U.S. 202, 215–21 (1982), *superseded by statute*, Personal Responsibility and Work Opportunity Act (PRWORA), Pub. L. 104-193, 110 Stat. 2105 (1996) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009.

This Article will refer to strict scrutiny and intermediate scrutiny collectively as "heightened scrutiny," as distinguished from rational basis review.

10. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

11. *Barnes & Chemerinsky*, *supra* note 7, at 1078.

12. *Id.* at 1079 (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

13. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in the judgment and dissenting in part).

14. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)).

15. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

16. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008).

the Court's prior decisions to endorse such discrimination.¹⁷ As Professor Bertrall Ross explains, "[T]he intermediate level of scrutiny was a mechanism through which the Court could differentiate between laws based on 'real' gender differences and those based on stereotypes."¹⁸ This level of heightened scrutiny has proven powerful in addressing the historic discrimination faced by American women.¹⁹

Under rational basis review, "a statutory classification must be rationally related to a legitimate governmental purpose."²⁰ Non-suspect classifications are reviewed under this standard, which is typically extremely deferential.²¹ The government "has no obligation to produce evidence to sustain the rationality of a statutory classification."²² The vast majority of government actions survive this level of scrutiny.²³

In addition to federal equal protection claims, civil rights lawyers can also pursue state equal protection claims. Many state constitutions define equal protection guarantees more broadly than the U.S. Constitution,²⁴ which supplies a floor of protection upon which state constitutions can provide greater

17. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding Illinois prohibition against women practicing law), *abrogated by Reed v. Reed*, 404 U.S. 71 (1971).

18. Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1594–95 (2013) (citation omitted).

19. See, e.g., *Virginia*, 518 U.S. 515 (using heightened scrutiny to strike down Virginia's exclusion of women from citizen-soldier program offered at Virginia Military Institute).

20. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

21. *Heller v. Doe*, 509 U.S. 312, 319 (1993).

22. *Id.*

23. *Barnes & Chemerinsky*, *supra* note 7, at 1077–78 ("Not surprisingly, few government actions have ever been found unconstitutional under this test.").

24. See, e.g., *Ramos v. Town of Vernon*, 761 A.2d 705, 723 (Conn. 2000) ("[D]epending upon the facts and circumstances, the state constitution may afford greater protection than the federal constitution with regard to equal protection claims." (citing *Barton v. Ducci Elec. Contractors, Inc.*, 730 A.2d 1149 (Conn. 1999))); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948–49 (Mass. 2003) ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life."); *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999) ("[T]he Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development.").

protection.²⁵ Similar to the federal approach, many state courts apply one of three different levels of scrutiny, depending on the characteristic upon which the challenged law discriminates.²⁶ In determining the proper level of scrutiny, state courts examine similar considerations to federal courts, including immutability and political power.²⁷ However, because state courts are often more protective in their applications of equal protection doctrine, state courts may invalidate under the state constitution's equal protection clause—or its equivalent—state laws that would survive scrutiny under federal law.²⁸ Gay rights advocates have used this fact to successfully challenge state laws that discriminate based on sexual orientation.²⁹ Nevertheless, many state courts treat rational basis review as similarly deferential under state constitutional analysis.³⁰ Thus, the level of scrutiny remains important in state courts.

B. THE IMPORTANCE OF THE LEVEL OF SCRUTINY

The debate over the proper level of scrutiny is not merely academic. Scholars have long noted that the level of scrutiny is

25. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 420 (Conn. 2008) (“[F]ederal constitutional and statutory law establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights.” (quoting *State v. Morales*, 657 A.2d 585, 590 (Conn. 1995))).

26. *See, e.g., id.* at 423 (“We therefore apply the same three-tiered equal protection methodology that is applied under the federal equal protection clause for purposes of our state constitution.”).

27. *See, e.g., id.* at 429 (“Nevertheless, because the court has identified the immutability of the group’s distinguishing characteristic and the group’s minority status or relative lack of political power as potentially relevant factors to the determination of whether heightened judicial protection is appropriate, we, too, shall consider those factors for purposes of our inquiry under the state constitution.”).

28. *See, e.g., id.* at 420 (“Therefore, although we may follow the analytical approach taken by courts construing the federal constitution, our use of that approach for purposes of the state constitution will not necessarily lead to the same result as that arrived at under the federal constitution.” (citing *State v. Marsala*, 579 A.2d 58, 62–63 (Conn. 1990))).

29. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (holding that the “Iowa marriage statute violates the equal protection clause of the Iowa Constitution”).

30. *See, e.g., Conaway v. Deane*, 932 A.2d 571, 604 (Md. 2007) (“A statute subject to rational review often passes constitutional muster.” (citing *Hargrove v. Bd. of Tr. of Md. Ret. Sys.*, 529 A.2d 1372, 1383 (1987)), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

often dispositive in equal protection cases.³¹ This is particularly true in gay rights litigation. Applying rational basis review, federal courts have upheld state laws that criminalized private homosexual conduct between consenting adults,³² state laws that ban gays from adopting children,³³ and the military's anti-gay policies for decades.³⁴ Gay litigants generally lose under the rational basis standard.³⁵

The major area where courts have used rational basis to strike down anti-gay laws is atypical: same-sex marriage bans. Prior to *United States v. Windsor*,³⁶ which struck down DOMA, most courts employed rational basis review to uphold both state and federal laws that prohibited the legal recognition of same-sex relationships, including marriage and rights associated with marriage.³⁷ Some state courts applied heightened scrutiny

31. See Barnes & Chemerinsky, *supra* note 7, at 1076 (“First, the rigid levels of scrutiny mean that unless alleged government discrimination receives heightened scrutiny the odds are overwhelming that the government will prevail.”); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

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

33. See *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004).

34. See, e.g., *Cook v. Gates*, 528 F.3d 42, 65 (1st Cir. 2008) (upholding “Don’t Ask, Don’t Tell”); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (upholding pre-DADT military policy to exclude gay servicemembers); see also *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 565 (9th Cir. 1990) (upholding discriminatory policy to deny security clearances to gay applicants and employees).

35. One key exception is *Romer v. Evans*, in which the Supreme Court struck down Colorado’s amendment 2—which precluded local governments from prohibiting discrimination based on sexual orientation—under rational basis review. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996). Some commentators explained *Romer* as an example of so-called “rational basis with bite.” While the prospect of applying rational basis with bite to anti-gay legislation is promising, *Romer* has not prevented lower courts from upholding such legislation under rational basis review. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 761 (2011) (collecting examples); *id.* (“Rational basis with bite review is not equivalent to formal heightened scrutiny.”).

36. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

37. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (upholding DOMA); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (upholding New York same-sex marriage ban); *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005) (denying same-sex couple standing to bring wrongful death suits); *Phillips v. Wis. Pers. Comm’n*, 482 N.W.2d 121, 123–24 (Wis. Ct. App. 1992) (denying family health insurance for same-sex partners).

under their state versions of the Equal Protection Clause to strike down their states' bans on same-sex marriage.³⁸ Before *Windsor*, the level of scrutiny was largely outcome determinative in same-sex marriage cases.³⁹ In this era, some judges explicitly noted that discriminatory marriage laws that would be invalidated under heightened scrutiny would survive rational basis review.⁴⁰ For example, when the Maryland Court of Appeals upheld that state's same-sex marriage prohibition under rational basis review, the court's chief judge noted that the law would not survive constitutional analysis if it were subjected to heightened scrutiny.⁴¹

The potency of rational basis review—as applied to same-sex marriage bans—changed considerably following Justice Kennedy's majority opinion in *Windsor*. After *Windsor* made a clear legal case for why state same-sex marriage bans were un-

38. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

Immediately prior to *Windsor*, some federal courts held DOMA to be unconstitutional under rational basis review. See, e.g., *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012) (striking down DOMA); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 342 (D. Conn. 2012) (same).

Some courts debate the question of the appropriate standard of review for discrimination based on sexual orientation by concluding that the challenged policy does not survive rational basis review and thus determining whether sexual orientation is a suspect classification is unnecessary. The Massachusetts Supreme Court and the Federal District Court for the District of Massachusetts did so explicitly by concluding that the state's ban on same-sex marriage failed the rational basis test. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (“This court need not address these arguments, however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test.”); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.”). *But see id.* at 980 (Sosman, J., dissenting) (“Although ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples.”).

39. Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1086–87 (2014).

40. See *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 9–10.

41. *Conaway v. Deane*, 932 A.2d 571, 697 (Md. 2007) (Bell, C.J., dissenting), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also *Anderesen v. King Cty.*, 138 P.3d 963, 983 (Wash. 2006) (“Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

constitutional, federal and state courts invoked *Windsor* to invalidate discriminatory state marriage laws, using both rational basis review⁴² and heightened scrutiny.⁴³ While courts used rational basis to strike down same-sex marriage bans, the situation is uncharacteristic because the Supreme Court had entered the fray. Rational basis was sufficient in these post-*Windsor* marriage cases because the Supreme Court had clearly signaled the unconstitutionality of same-sex marriage bans. Absent such clear guidance from the Supreme Court, gay litigants do not fare so well.

The marriage cases aside, when courts apply rational basis review, courts more often than not uphold laws that discriminate against gay Americans.⁴⁴ In contrast, in cases in which the court has applied heightened scrutiny, anti-gay laws have almost invariably been struck down as violating equal protection.⁴⁵ Sexual orientation provides a natural experiment to witness the importance of the level of scrutiny because courts are divided on whether or not to apply heightened scrutiny to anti-gay laws. The following Section explains why courts have reached different conclusions.

42. See *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).

43. See *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014); *Love v. Beshear*, 989 F. Supp. 2d. 536, 545 (W.D. Ky. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014); *Greigo v. Oliver*, 316 P.3d 865, 884 (N.M. 2013).

44. See *supra* notes 31–35 and accompanying text.

45. The history of same-sex marriage also shows how political actors perceive that heightened scrutiny matters because anti-gay laws cannot survive close inspection. In the wake of the Hawaii Supreme Court decision holding that same-sex marriage bans were a form of sex discrimination subject to strict scrutiny under Hawaiian law, Congress was so concerned that same-sex marriage bans would not survive heightened scrutiny on remand that it passed DOMA. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (“Although [Hawaii’s] decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA) . . .”). After the Ninth Circuit held (in a non-marriage case) that sexual orientation was a suspect classification, Nevada stopped defending its same-sex marriage ban because its Republican leaders did not believe the ban could survive heightened scrutiny.

C. SCRUTINY AND SEXUAL ORIENTATION

The Supreme Court has not clearly and consistently applied a definitive test for determining whether a classification is suspect and, thus, warrants heightened scrutiny. From the Court's equal protection opinions, however, lower courts have divined a set of functional criteria. In considering claims that sexual orientation should be treated as a suspect classification, courts generally evaluate four factors: (1) whether the class has historically been subjected to discrimination; (2) whether the class members share a defining characteristic related to their ability to perform or contribute to society; (3) "whether the class exhibits 'obvious, immutable, or distinguishing characteristics that define them as a discrete group';" and (4) "whether the class is 'a minority or politically powerless.'"⁴⁶ Most courts invoke these factors when discussing whether sexual orientation is a suspect classification.⁴⁷

46. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)), *aff'd*, 133 S. Ct. 2675 (2013).

47. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 606 (Md. 2007), *abrogated* by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Historically, some courts eschewed the factor test and relied on state sodomy laws to decline heightened scrutiny of anti-gay laws. After the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled* by *Lawrence v. Texas*, 539 U.S. 558 (2003), a substantive due process case, upheld the constitutionality of state sodomy laws—which criminalized private sexual conduct between consenting adults—lower courts held that "if the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'" *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994); see also *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."). Some judges criticized this line of reasoning by noting that *Bowers* did not involve any equal protection claim. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc). The error of using *Bowers* to deny treating sexual orientation as a suspect classification has been abated by the Supreme Court's reversal of *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003). Courts have explained that "reasoning . . . that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012); see also *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 465 (Conn. 2008) ("[I]n *Lawrence v. Texas*, the United States Supreme Court overruled *Bowers*, thus removing the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a quasi-suspect class.").

This four-factor test is easier to articulate than to apply with any consistency or precision. Laying out a numbered list creates an appearance of structure and definiteness that is illusory because it remains unclear “how these criteria are weighted or what combination triggers heightened scrutiny.”⁴⁸ For example, some courts believe that the first two factors are more important than the last two.⁴⁹ But other courts have required all four factors, essentially treating the four factors as four elements.⁵⁰ Yet even the Supreme Court sometimes omits individual factors in its discussions.⁵¹

Applying these criteria, both federal and state courts have split on the issue of whether sexual orientation constitutes a suspect classification. While many courts have held that laws that discriminate against gay Americans are subject to heightened scrutiny,⁵² most courts have held to the contrary.⁵³ The

48. Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 739 (2008); see also Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 168 (2011) (“The Court has never described how the factors exist in relation to each other, explained which factors are to be given priority, or clarified how much weight to assign any particular factor.”).

49. See *Kerrigan*, 957 A.2d at 427 (“It is evident, moreover, that immutability and minority status or political powerlessness are subsidiary to the first two primary factors . . .”).

50. See, e.g., *Conaway*, 932 A.2d at 606.

51. See *Varnum v. Brien*, 763 N.W.2d 862, 888 n.16 (Iowa 2009) (“The Supreme Court has not required, nor even discussed, every factor in every case.”).

52. See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (“*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”); *Windsor v. United States*, 699 F.3d 169, 181–82 (2d Cir. 2012) (“In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.”), *aff’d*, 133 S. Ct. 2675 (2013); *Golinski*, 824 F. Supp. 2d at 989 (“Here, having analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny.”); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“[W]e conclude that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution’s equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision.”), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *invalidated by Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Kerrigan*, 957 A.2d at 412 (“[S]exual orientation constitutes a qua-

first two factors are easily satisfied. First, no one seriously challenges the fact that gay people have historically suffered from significant discrimination.⁵⁴ Courts and commentators have noted that government officials and society at large have subjected known and suspected homosexuals to castration, lobotomies, shock therapy, aversion therapy, witch hunts, and widespread discrimination, making it impossible for many gay people to live safe, productive, and healthy lives.⁵⁵ Thus, courts uniformly conclude that “gay persons have been subjected to such severe and sustained discrimination because of our culture’s long-standing intolerance of intimate homosexual conduct.”⁵⁶ Second, sexual orientation is irrelevant to one’s capabilities. Over the past two to three decades, courts have finally come to recognize that “sexual orientation . . . bears no relation whatsoever to an individual’s ability to perform, or to participate in, or contribute to, society.”⁵⁷ These first two factors, thus,

si-suspect classification for purposes of the equal protection provisions of the state constitution, and, therefore, our statutes discriminating against gay persons are subject to heightened or intermediate judicial scrutiny”); *id.* at 444 (stating that the court had “little difficulty in concluding that gay persons are entitled to heightened constitutional protection despite some recent political progress”).

53. *Kerrigan*, 957 A.2d at 464 (“[T]he vast majority of federal circuit courts that have considered the issue have concluded that sexual orientation is not a suspect or quasi-suspect classification, and, consequently, legislation that classifies on the basis of sexual orientation is subject to rational basis review.”).

54. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from the denial of certiorari) (“[H]omosexuals have historically been the object of pernicious and sustained hostility”); see also *Conaway*, 932 A.2d at 606 (noting that there is “a history of purposeful unequal treatment” of gay and lesbian persons); *Andersen v. King Cty.*, 138 P.3d 963, 1029 (Wash. 2006) (Bridge, J., dissenting) (“Legal authorities do not dispute the fact that gays and lesbians have been subjected to a history of discrimination.”), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Dean v. District of Columbia*, 653 A.2d 307, 344–45 (D.C. 1995) (Ferren, J., dissenting) (“Discrimination against homosexuals has been pervasive in both the public and the private sectors.”), *abrogated by Obergefell*, 135 S. Ct. 2584; EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 66 (1999) (“In fact, *no* court has ever denied suspect-class status to gays and lesbians on the ground that they have not suffered a history of discrimination.”).

55. See, e.g., *Conaway*, 932 A.2d at 609.

56. *Kerrigan*, 957 A.2d at 433.

57. *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994), *rev’d on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996) (“If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of ‘staying in the [c]loset’ and of ‘coming

are not particularly important in denying heightened scrutiny of anti-gay laws.

Regarding the third factor, several opinions have held that sexual orientation is not a suspect classification because homosexuality is mutable.⁵⁸ The immutability factor used to provide the major hurdle to courts treating sexual orientation as a suspect classification. However, the significance and application of the immutability factor have evolved. First, many courts treat immutability as less important than the first two factors.⁵⁹ Second, some courts have reframed the immutability factor to be less about the impossibility of changing a characteristic than about the reprehensibility of the state demanding someone change that characteristic. The Connecticut and Iowa Supreme Courts, for example, held that sexual orientation satisfied the immutability factor because “the identifying trait is ‘so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change [it].’”⁶⁰ Most modern opinions, however, hold that “[s]exual orientation and sexual identity are immutable.”⁶¹ This is consistent with the bulk of

out’ would not exist; their impediment would betray their status.”); *see also Conaway*, 932 A.2d at 609 (“[H]omosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society . . .”).

58. *See, e.g., Conaway*, 932 A.2d at 616 (“In the absence of some generally accepted scientific conclusion identifying homosexuality as an immutable characteristic . . . we decline . . . to recognize sexual orientation as an immutable trait . . .”); *Andersen*, 138 P.3d at 974 n.6 (noting that although the Court “recognize[d] that th[e] question [of whether homosexuality is an immutable trait] is being researched and debated across the country . . . and . . . offer[ed] no opinion as to whether such a showing may be made at some later time,” plaintiffs in that case failed to make a showing of immutability).

59. *See In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“[I]mmutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes.”).

60. *Kerrigan*, 957 A.2d at 438 (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989)); *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009).

61. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000); *see also High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d, 375, 377 (9th Cir. 1990) (Canby, J., dissenting) (“There is every reason to regard homosexuality as an immutable characteristic for equal protection purposes. . . . Sexual identity is established at a very early age; it is not a matter of conscious or controllable choice.”); *Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997) (“Same-sex sexual orientation persists in all societies and has proven to be almost completely resistant to change or ‘treatment,’ despite widespread discrimination and social pressure against homosexuals.”), *rev’d on other grounds*, 155 F.3d 628 (2d Cir. 1998); *Equal. Found. of Greater Cincinnati, Inc.*, 860 F. Supp. at 426 (“Sexual orientation is set in at a very early age . . . and is not only involuntary, but is unamenable to change.”); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1,

scientific research, which proves that sexual orientation has a large genetic component and is neither chosen nor changeable by individual willpower.⁶² For these reasons, the immutability factor is less of an impediment to treating sexual orientation as a suspect classification.

With the first two factors favoring heightened scrutiny for sexual orientation and the evolving understanding of the immutability factor, the political power inquiry has become the focus for most courts considering whether sexual orientation is a suspect classification. If gay Americans lack political power, they should be entitled to heightened scrutiny. However, what should be a relatively straightforward inquiry is anything but, as Part II explains.

II. THE POLITICAL POWER INQUIRY

A. THE ORIGINS AND PURPOSE OF THE POLITICAL POWER INQUIRY

The political power component of equal protection analysis has its roots in the most famous footnote in constitutional law. The Supreme Court in Footnote Four of *Carolene Products* noted the importance of “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”⁶³ Footnote Four provided the basis for considering whether the political process has failed to protect minority rights such that the courts should provide more thorough oversight. Subsequent courts have converted the footnote’s language into an inquiry as to whether the members of a group targeted by—or disproportionately impacted by—a law or government action are politically powerless.

34–35 (D.C. 1987) (“[H]omosexuality is as deeply ingrained as heterosexuality. . . . Neither homosexuals nor heterosexuals are what they are by design.”).

62. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 787 (3d ed. 2006) (“[R]ecent research suggests that sexual orientation is immutable and not a matter of individual choice.”); *see also* *Jantz v. Muci*, 759 F. Supp. 1543, 1547–48 (D. Kan. 1991) (finding that the overwhelming majority of scientific evidence indicated that sexual orientation could not be changed and is not subject to voluntary control).

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

Courts and scholars have posited a range of related rationales for examining whether the members of a group lack political power before giving that group the protection of heightened scrutiny. The equal protection doctrine—including the political power inquiry—serves the function of correcting failures of the political process.⁶⁴ Greater scrutiny is necessary when members of a minority “are relatively powerless to protect their interests in the political process.”⁶⁵ Conversely, groups that have meaningful political power can use the political process to protect their rights, and thus do not require heightened scrutiny.⁶⁶

When groups cannot protect themselves through the ordinary operation of law-making and law enforcement, courts need to more closely scrutinize laws that discriminate against those groups. In an academic article, Justice Lewis Powell explained that the *Carolene Products* opinion established that “there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us.”⁶⁷ These groups are entitled to heightened scrutiny of laws and policies that discriminate against their members.⁶⁸

Furthermore, laws that target politically powerless groups are more likely to reflect prejudice.⁶⁹ The Supreme Court in *Cleburne* noted that “when a statute classifies by race, alien-

64. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 80 (1980); Darren Lenard Hutchinson, “*Not Without Political Power*: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*,” 65 *ALA. L. REV.* 975, 981 (2014) (“[A] fundamental justification for the suspect class doctrine . . . [is] to correct political process failures.”); see also GERSTMANN, *supra* note 54, at 27 (“The challenge, then, is for the Court to properly identify those groups that are so powerless or despised that they cannot effectively participate in the pluralistic political process. These groups are ‘suspect classes’ and should be strongly protected by the courts.”).

65. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973).

66. *Watkins v. U.S. Army*, 875 F.2d 699, 726–27 (9th Cir. 1989) (Norris, J., concurring) (“Courts are understandably reluctant to extend heightened protection under equal protection doctrine to groups fully capable of securing their rights through the political process.”).

67. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 *COLUM. L. REV.* 1087, 1089 (1982).

68. *Id.* (noting that courts should use heightened scrutiny to review legislation that would harm minorities because they are unable to protect themselves in the legislative process).

69. See *Watkins*, 875 F.2d at 712 n.4 (9th Cir. 1989) (Norris, J., concurring) (“Discriminations that burden some despised or politically powerless groups are so likely to reflect antipathy against those groups that the classifications are inherently suspect and must be strictly scrutinized.”).

age, or national origin[,] . . . such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”⁷⁰ If the targeted group does not have political power, then prejudice can prevail and lawmakers have little incentive to protect that minority’s rights.⁷¹ This combination of prejudice and political powerlessness warrants requiring the government to prove that the challenged law is “suitably tailored to serve a compelling state interest.”⁷²

Different courts have afforded varying weight to the political power inquiry. On the one hand, some judges and scholars have taken the position that political powerlessness is not necessary to entitle a group to heightened scrutiny.⁷³ For example, some federal judges have held that political powerlessness “is not essential for recognition as a suspect or quasi-suspect class.”⁷⁴ Similarly, some states do not require political powerlessness as an element.⁷⁵ Other judges, however, have observed

70. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) (“[A]s a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling [gay persons] out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping.”).

71. *Cleburne*, 473 U.S. at 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part) (“The ‘political powerlessness’ of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs.”).

72. *Id.* at 440 (“For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.”).

73. *See, e.g., Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989–90 (S.D. Ohio 2013), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (“Lack of political power is *not* essential for recognition as a suspect or quasi-suspect class . . .”); *Varnum v. Brien*, 763 N.W.2d 862, 894 (Iowa 2009) (“Supreme Court jurisprudence establishes that a group’s current political powerlessness is not a prerequisite to enhanced judicial protection.”); *see also* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 6 (2010) (detailing the history of political powerlessness as a consideration in equal protection cases).

74. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014), *appeal dismissed sub nom. Whitewood v. Sec’y Pa. Dep’t of Health*, 621 Fed. App’x 141 (3d Cir. 2015).

75. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (“Although some California decisions in discussing suspect classifications have referred to a group’s ‘political powerlessness’, our cases have not identified a

that although political powerlessness is not strictly required, the factor can help establish heightened scrutiny.⁷⁶ Some courts give less weight to the political power factor than other factors.⁷⁷ One reason that some courts have not emphasized the political power factor is the difficulty in applying the factor across different groups. For example, the Connecticut Supreme Court noted that “the court has accorded little weight to a group’s political power because that factor, in contrast to the other criteria, frequently is not readily discernible by reference to objective standards.”⁷⁸

Conversely, many other courts have treated the political power inquiry as highly relevant.⁷⁹ For example, in *San Antonio Independent School District v. Rodriguez*,⁸⁰ the Supreme Court denied heightened scrutiny to the poor, in part because they have not been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁸¹ Professor Darren Lenard

group’s current political powerlessness as a necessary prerequisite for treatment as a suspect class.”).

76. *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring 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.”); *Obergefell*, 962 F. Supp. 2d at 989 (“Lack of political power is not essential for recognition as a suspect or quasi-suspect class, but the limited ability of gay people as a group to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate based on sexual orientation.” (citation omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp.2d 968, 989 (N.D. Cal. 2012) (noting that the political powerlessness “factor is not an absolute prerequisite for heightened scrutiny,” though finding that gay men and lesbians lack political power).

77. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 454 n.52 (Conn. 2008) (“[T]o the extent that the Supreme Court has considered the political power of a group in determining whether it is entitled to suspect or quasi-suspect class status, it has accorded that prong the least amount of weight.”).

78. *Kerrigan*, 957 A.2d at 428 (“Thus, an attempt to quantify a group’s political influence often will involve a myriad of complex and interrelated considerations of a kind not readily susceptible to judicial fact-finding.”).

79. See, e.g., *In re Marriage Cases*, 183 P.3d at 466 (Baxter, J., concurring in part and dissenting in part) (“[S]everal courts holding that sexual orientation is not a suspect class have focused particularly on a determination that, in contemporary times at least, the gay and lesbian community does not lack political power.”); see also Hutchinson, *supra* note 64, at 1015 (“*Frontiero*, *Plyler*, and *Rowland* all lead to the conclusion that Brennan (and the Court) has considered political powerlessness relevant to the suspect class doctrine and to the application of heightened scrutiny.”).

80. 411 U.S. 1 (1973).

81. *Id.* at 28.

Hutchinson has noted that “legal scholars and courts have overwhelmingly treated political powerlessness as a significant factor in the suspect class doctrine.”⁸² Indeed, some scholars argue that courts sometimes treat political powerlessness as the most important criterion.⁸³

Most importantly for our purposes, courts have treated the political power inquiry as dispositive when holding that sexual orientation is not a suspect classification. For example, in evaluating its state ban on same-sex marriage, the Maryland Court of Appeals concluded:

While there is a history of purposeful unequal treatment of gay and lesbian persons, and homosexual persons are subject to unique disabilities not truly indicative of their abilities to contribute to society, we shall not hold that gay and lesbian persons are so politically powerless that they constitute a suspect class.⁸⁴

A federal district court considering the military’s prohibition on gay servicemembers “reject[ed] plaintiff’s argument that homosexuals constitute a suspect class” because “[a]lthough plaintiff may have submitted sufficient evidence to create a triable issue of material fact as to whether homosexuality is an ‘immutable’ characteristic, he has failed to submit any pertinent evidence tending to establish that homosexuals lack legislative power.”⁸⁵ Similarly, the trial court in *Romer* held that “[h]omosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements to be found a suspect class.”⁸⁶ These cases

82. Hutchinson, *supra* note 64, at 1016; *see also* Levy, *supra* note 1, at 44 (“[R]elative political powerlessness was an important consideration in many cases recognizing or declining to recognize a suspect class or classification, and the Court has never rejected it as a factor in determining whether to heighten scrutiny.”).

83. *E.g.*, Strauss, *supra* note 48, at 153 (“[S]ome courts consider political powerlessness to be the ultimate question and view the other factors as subissues.”).

84. *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007). The court also declined to find that sexual orientation was immutable, but the court suggested that its decision on immutability was influenced by its earlier holding that gay people were not politically powerless. *See id.* at 616 (“In the absence of some generally accepted scientific conclusion identifying homosexuality as an immutable characteristic, and in light of the other indicia used by this Court and the Supreme Court in defining a suspect class, we decline on the record in the present case to recognize sexual orientation as an immutable trait and therefore a suspect or quasi-suspect classification.”).

85. *Dahl v. Sec’y of U.S. Navy*, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993).

86. *Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586, at *12 (Colo. Dist. Ct. Dec. 14, 1993), *aff’d*, 882 P.2d 1335 (Colo. 1994), *aff’d*, 517 U.S. 620 (1996).

demonstrate that the political power factor can be decisive in denying heightened scrutiny of anti-gay laws.⁸⁷

B. PROBLEMS WITH THE POLITICAL POWER INQUIRY

The political power factor can be both controlling and confusing. This Section reviews several critiques of the factor. First, it remains unclear how political power is measured, as illustrated by the conflicting approaches that courts have taken regarding the political power of gay people. Second, comparing groups granted heightened scrutiny to those denied heightened scrutiny exposes important inconsistencies in equal protection jurisprudence. Finally, this Section explores how courts have made the political power factor impossible to satisfy.

1. The Measurement of Political Power

While judges have discussed political power for decades, they have never developed any accepted criteria for measuring such power. By way of a case study, courts have split on the factual question of whether gays are politically powerless because courts have employed different measurement criteria and have sometimes interpreted the same standard dissimilarly to reach contradictory conclusions.⁸⁸ For example, judges finding that gays have considerable political power note that some laws exist to protect gay people's rights.⁸⁹ Such judges have also

87. See GERSTMANN, *supra* note 54, at 81 ("Thus, along with the perception that homosexuality is a behavioral rather than an immutable characteristic, the perception of substantial gay and lesbian political power has proven to be a major obstacle to gays and lesbians attaining suspect-class status."); see also *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 454 (Conn. 2008) (noting that dissent's "view [that] gay persons are not entitled to heightened protection, even though they meet the first three criteria, because the political power of gay persons overrides those three considerations").

88. Compare *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013) ("As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it."), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), with *Conaway*, 932 A.2d at 609 ("[W]e shall not hold that gay and lesbian persons are so politically powerless that they constitute a suspect class."), *abrogated by Obergefell*, 135 S. Ct. 2584 (2015).

89. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990), *abrogated by United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), as recognized in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014); *In re Marriage Cases*, 183 P.3d 384, 466–67 (Cal. 2008) (Baxter, J., concurring and dissenting), *superseded by constitutional amend-*

tried to lower the bar for proving that gays have political power by arguing that it is sufficient that gays can attract the attention of lawmakers.⁹⁰ Conversely, courts finding that gays lack political power often emphasize the absence of relevant laws to protect gay Americans from discrimination.⁹¹ Furthermore, these courts have noted that the existence of anti-gay laws shows that gays do not have political power.⁹²

Putting gay legislative victories in context, many judges have emphasized the difficulty that gays face trying to overcome the deep-seated prejudice against members of the LGBT community. Most notably, in the Supreme Court's first opportunity to consider the issue, Justice William Brennan, joined by Justice Thurgood Marshall, recognized that gay people "are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'"⁹³ Building on this theme, the Second Circuit explained that "[t]he question is not whether homosexuals have achieved political successes

ment, CAL. CONST. art. 1, § 7.5 (2008), as recognized in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

90. See *High Tech Gays*, 895 F.2d at 574; *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1102 (D. Haw. 2012), vacated, 585 Fed. App'x 413 (9th Cir. 2014); *Dahl*, 830 F. Supp. at 1324.

91. E.g., *Obergefell*, 962 F. Supp. 2d at 989 ("One way gay men, lesbians, and bisexuals' lack of power is demonstrated is by the absence of statutory protections for them."); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014) ("While the gay rights movement has undoubtedly gained recognition as a vigorous force and has influenced public policy to some extent, there remains an absence of statutory, anti-discrimination protections which may indicate continuing political weakness."); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013) ("The fact that gays and lesbians lack significant political power in Michigan is amply demonstrated by the fact that there are no laws prohibiting discrimination on the basis of sexual orientation . . ."); *Varnum v. Brien*, 763 N.W.2d 862, 894–95 (Iowa 2009) (noting the absence of inclusive marriage laws); see also *Kerrigan*, 957 A.2d at 461 ("[T]he political advances that gay persons have attained afford them inadequate protection . . .").

92. E.g., *De Leon v. Perry*, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014) ("[T]he history of same-sex marriage bans across the nation illustrates the historical lack of political power possessed by gays and lesbians."); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (noting "there is no federal anti-discrimination legislation and no protection in most states from sexual orientation discrimination").

93. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.⁹⁴ This, gay Americans cannot yet do, as the Connecticut Supreme Court noted that “the relatively modest political influence that gay persons possess is insufficient to rectify the invidious discrimination to which they have been subjected for so long.”⁹⁵ Similarly, the Iowa Supreme Court concluded that “gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation.”⁹⁶ Gay people have to overcome so much historical prejudice that true political power, including the ability to make political compromises with other more powerful groups, is still inaccessible despite some isolated successes.⁹⁷ In contrast, those courts finding that gays have political power ignore this dynamic and argue that just because gays are targeted by anti-gay laws does not mean that they do not have political power.⁹⁸

Courts have also diverged in their treatment of the significance of openly gay elected lawmakers. The Seventh Circuit found political power in the fact that “[*Time Magazine*] reports

94. *Windsor v. United States*, 699 F.3d 169, 184 (2d Cir. 2012); see also *Golinski*, 824 F. Supp. 2d at 989 (“In sum, the basic inability to bring about an end to discrimination and pervasive prejudice, to secure desired policy outcomes and to prevent undesirable outcomes on fundamental matters that directly impact their lives, is evidence of the relative political powerlessness of gay and lesbian individuals.”).

95. *Kerrigan*, 957 A.2d at 461.

96. *Varnum*, 763 N.W.2d at 895; see also *Griego v. Oliver*, 316 P.3d 865, 882–83 (N.M. 2013) (“Refocusing on the contention that the LGBT community is not politically powerless, we recognize that they have had some recent political success regarding legislation prohibiting discrimination against them. However, we also conclude that effective advocacy for the LGBT community is seriously hindered by their continuing need to overcome the already deep-rooted prejudice against their integration into society, which warrants our application of intermediate scrutiny in this case.”).

97. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 937 (N.D. Cal. 2010).

98. *E.g.*, *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (reversing trial court holding that gay people constitute a quasi-suspect class entitled to heightened scrutiny), *vacated*, 518 U.S. 1001 (1996); *Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586, at *11–12 (D. Colo. 1993); *State v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986) (upholding Missouri’s sodomy law under rational basis review), *abrogated by* *Glossip v. Mo. Dep’t of Transp. & Highway Patrol Emps. Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013); see also *Hutchinson*, *supra* note 64, at 1001 (critiquing trial court’s analysis in *Evans v. Romer*); Emily K. Baxter, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 903–04 (2007) (same).

that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual.”⁹⁹ The court did not explain how this created political power sufficient to eliminate the need for heightened scrutiny. Conversely, more courts have noted that exceedingly few gay individuals hold positions of power.¹⁰⁰ These low numbers limit the ability of gay people “to prevent legislation hostile to their group interests.”¹⁰¹ Some courts note that pointing to the rare examples of openly gay politicians better illustrates a lack of political power rather than its abundance.¹⁰²

Courts also disagree on the legal implications of the closet. For example, one Nevada district court judge, in holding that gays have political power, argued that gays did not have it so bad because, although sodomy laws had criminalized the very identity of gay men and lesbians, “the need or desire to keep

99. *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (concluding that “[h]omosexuals are not without political power”); see also *Kerrigan*, 957 A.2d at 441 (indicating that the defendants unsuccessfully argued “that gay persons are not entirely without political power” in part “because some gay persons serve openly in public office”).

100. *E.g.*, *Kerrigan*, 957 A.2d at 447 (“No openly gay person ever has been appointed to a United States Cabinet position or to any federal appeals court. In addition, no openly gay person has served in the United States Senate, and only two currently serve in the United States House of Representatives.”); see also *Andersen v. King Cty.*, 138 P.3d 963, 1030 (Wash. 2006) (Bridge, J., concurring in dissent) (“But there are other indicators. In Washington, there are only four openly gay legislators—none in a statewide executive or judicial capacity.”), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL’Y 385, 394–95 (2010) (“The current number of LGBTs serving in our law-making institutions is far short of proportional representation. Only .69%, or three, members of Congress are openly LGBT. Only .01%, or seventy-four, of our states’ legislative representatives are openly LGBT.”).

101. *Watkins v. U.S. Army*, 875 F.2d 699, 727 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment).

102. See *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (“The recent articles BLAG cites are exceptions and not the rule. While President Obama nominated four openly-gay judges, there are literally hundreds of federal judges nationwide.”).

For a critique of counting public representatives to measure a group’s political power, see Strauss, *supra* note 48, at 159 (“Determining a group’s political powerlessness by the number of public representatives of that group in positions of power suffers from three problems. First, numbers are not an accurate measure of power. Second, courts do not employ a clear definition of underrepresentation or adequate representation. Third, this factor suggests that the level of scrutiny must be constantly reevaluated over time, a task that is not embraced by courts.”).

one's sexual orientation secret because of such laws, though perhaps regrettable, would have no effect on one's ability to vote, serve on a jury, or otherwise participate in American democracy."¹⁰³ Most courts to consider the issue, however, recognize that the ability of gay Americans to exert political influence is significantly diminished by the fact that discrimination forces gay people to conceal their sexual orientation. For example, a federal judge in Kansas noted that when gay people are forced to conceal their sexual orientation in order to avoid "the harsh penalties imposed by society on persons identified as homosexual . . . [i]t may allow a given individual to escape from the discrimination, abuse, and even violence which is often directed at homosexuals, but it ensures that homosexuals as a group are unheard politically."¹⁰⁴ This echoes Justice Brennan's observation: "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."¹⁰⁵ Fear of public hostility and prejudice, including physical violence, keeps many gays, including legislators, in the closet.¹⁰⁶ Closeted representatives often do not protect the LGBT community,¹⁰⁷ and often are among the most aggressively anti-gay legislators, in an attempt to conceal their homosexuality.¹⁰⁸ Ultimately, the closet prevents gay people from mobilizing to advance a pro-equality political agenda,¹⁰⁹ and that means that "the voices of many homosexuals are not even heard, let alone counted."¹¹⁰

103. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1011 (D. Nev. 2012), *rev'd sub nom.* *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

104. *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992); *see also* *Dean v. District of Columbia*, 653 A.2d 307, 349 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) ("Prejudice has prevented some homosexuals from coming out of the 'closet' and joining gay rights organizations that can increase their political power."), *abrogated by Obergefell*, 135 S. Ct. 2584.

105. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting).

106. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989 (S.D. Ohio 2013), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

107. Powers, *supra* note 100, at 394.

108. *See, e.g.*, ROBERT BAUMAN, *THE GENTLEMAN FROM MARYLAND: THE CONSCIENCE OF A GAY CONSERVATIVE* (1986) (giving an autobiographical account of the life of a closeted, "ultraconservative" congressman who was arrested by the FBI for soliciting sex with an underage male prostitute).

109. *Windsor v. United States*, 699 F.3d 169, 184–85 (2d Cir. 2012); *see also* Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Mo-*

In concluding that sexual orientation is a suspect classification, many courts have examined *relative* political power. Some courts finding gays to satisfy the political powerlessness factor have noted that “the standard is not whether a minority group is entirely powerless, but rather whether they suffer from *relative* political weakness.”¹¹¹ While gay Americans have achieved greater political and social acceptance as they have come out of the closet and disproved prejudice-based stereotypes, any absolute gains are offset and diminished by the political influence of opponents of gay rights who are often more powerful, with deep pockets and an obsession for opposing equal rights.¹¹² Because of this organized opposition, gays must work harder and longer to achieve basic rights, which suggests

rality and the Trial of Colorado’s Amendment 2, 21 FORDHAM URB. L.J. 1057, 1067–68 (1994) (noting that Professor Kenneth Sherrill has “explained that the fear of many lesbians, gay men and bisexuals of identifying themselves and coming together for public advocacy inhibits political organizing”); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 8 (1994) (“Precisely because [homosexuals] are often anonymous (that is, not known to be homosexual) and diffuse (that is, not tightly organized), they face large barriers to exerting adequate political influence. . . . The ability to conceal can actually make things worse from the standpoint of exercising political power.”).

110. *Watkins v. U.S. Army*, 875 F.2d 699, 727 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (“In addition, homosexuals as a group are handicapped by structural barriers that operate to make effective political participation unlikely if not impossible. First, the social, economic, and political pressures to conceal one’s homosexuality operate to discourage gays from openly protesting anti-homosexual governmental action.”); see also *Dean v. District of Columbia*, 653 A.2d 307, 349–50 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part).

111. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 n.7 (N.D. Cal. 2012) (emphasis added) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985) and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

112. DAVID RAYSIDE, ON THE FRINGE: GAYS AND LESBIANS IN POLITICS 14 (1998) (“[I]n the United States, . . . opponents of gay and lesbian rights have been able to mobilize grassroots support on a scale unimaginable for gay activist organizations.”); see also RAYSIDE, *supra*, at 9 (“But any analysis of the political significance of such resources [controlled by gay Americans] must take into account the extraordinary power of the American Christian right.”); Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 538 (2012) (noting that in the litigation over California’s Proposition 8, “Professor Gary Segura of Stanford . . . observed that the political power of opponents to gay rights (specifically certain religious denominations) significantly diminished the political power of the gay community”).

Even when the LGBT community obtains political success, their gains are often repealed through referenda. *Griego v. Oliver*, 316 P.3d 865, 883 (N.M. 2013).

that gays suffer a relative deficit of political power.¹¹³ In contrast to the above analysis, those courts asserting that gay people have significant political power have not considered these issues of relativity.

This brief review of how courts have evaluated the political power of gay Americans demonstrates how difficult it is to measure political power with any precision or consistency. What exactly courts mean by political powerlessness remains elusive.¹¹⁴ There are many indicia that courts sometimes invoke, but there is no uniformity across cases. Even when judges agree on *what* gets weighed, disagreement prevails on *how* to weigh.¹¹⁵

2. The Symmetry of Political Power

Courts have been unable to apply a coherent standard of “politically powerless” across groups. This failure is evident in the incongruence of which groups receive heightened scrutiny compared to gay people. For example, women get heightened scrutiny even though they are a majority of the population¹¹⁶ and have more political power than gays;¹¹⁷ indeed, gay Americans have less political power now than women did when the Supreme Court provided intermediate scrutiny to women in the 1970s.¹¹⁸ Similarly, as a political force, gay Americans arguably

113. See Hutchinson, *supra* note 64, at 1005.

114. See Lawrence Friedman, *Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions*, 50 WASHBURN L.J. 61, 76 (2010) (“Application of that factor involves inquiries into the meaning of political events that may well defy judicial understanding or the possibility of judicial limitation; political events often cannot be reduced to a single meaning.”).

115. See *id.* at 75–76.

116. *Dean v. District of Columbia*, 653 A.2d 307, 338 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) (“And, of course, women are not a minority.”); see also Levy, *supra* note 1, at 42 (“It is hard to see how complete political powerlessness could be a requirement in light of *Frontiero* and *Craig v. Boren*, insofar as women make up at least half of the voting population.”).

117. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013) (“The relative lack of political influence of gay people today stands in contrast to the political power of women in 1973, when a plurality of the Court concluded in [*Frontiero*] that sex-based classifications required heightened scrutiny.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 461 (Conn. 2008) (“Today, moreover, women have far greater political power than gay persons, yet they continue to be accorded status as a quasi-suspect class.”); Powers, *supra* note 100, at 395.

118. *Varnum v. Brien*, 763 N.W.2d 862, 895 (Iowa 2009) (“Gays and lesbians certainly possess no more political power than women enjoyed four dec-

have less power than African Americans.¹¹⁹ Yet courts that hold gays have too much political power to receive heightened scrutiny never compare the two groups.¹²⁰ There is simply no reasonable way to reconcile the political power analysis of those cases that deny heightened scrutiny of anti-gay laws and those that afford such protection to women and racial minorities.¹²¹

Moreover, because courts have treated gender and race as suspect classifications—instead of simply treating women and racial minorities as protected classes—laws that adversely affect men and Caucasians also receive heightened scrutiny.¹²² Thus, the Supreme Court has applied heightened scrutiny to

ades ago when the Supreme Court began subjecting gender-based legislation to closer scrutiny.”); *Kerrigan*, 957 A.2d at 452 (“With respect to the comparative political power of gay persons, they presently have no greater political power—in fact, they undoubtedly have a good deal less such influence—than women did in 1973, when the United States Supreme Court, in *Frontiero*, held that women are entitled to heightened judicial protection.”).

119. *Kerrigan*, 957 A.2d at 453 (“[G]ay persons clearly lack the political power that African-Americans and women possess today.”); *Dean*, 653 A.2d at 351 (“[H]omosexuals—because of their tendency, overall, toward anonymity and diffusion, rather than discreetness and insularity—tend to have considerably less political power than African-Americans, a protected racial minority.”).

120. GERSTMANN, *supra* note 54, at 83 (“[C]ourts are applying a very different standard to gays and lesbians than they have been applying to other groups. No court has been willing to evaluate the political power of women or racial minorities by the same standard that they have applied to gays and lesbians.”); *see also* Baxter, *supra* note 98, at 904.

121. *See* GERSTMANN, *supra* note 54, at 81 (“The only logical standard of comparison is other suspect or quasi-suspect classes such as racial minorities or women. If these groups are sufficiently powerless to be suspect or quasi-suspect classes, then logically gays and lesbians must be, at a minimum, more politically powerful than these groups if they are in fact too powerful to be a suspect or quasi-suspect class.”).

One could argue that courts focus on the *classification* when dealing with race and gender, but focus on the *class* when dealing with anti-gay laws. But this is an explanation, not a reconciliation. Why, after all, should courts look at classifications for some equal protection claims and classes for others?

122. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (finding that male jurors have an equal protection right to jury selection procedures that are free from historical prejudice); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”).

This suspect classification approach is inconsistent with a political power requirement because both men and women cannot be politically powerless, just as both whites and nonwhites cannot simultaneously lack political power. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 502–03 (2004).

strike down a state law that allowed women between the ages of eighteen and twenty-one to purchase low-alcohol beer, but not similarly aged men.¹²³ The men bringing the suit were not required to prove lack of political power; they could not have.¹²⁴ Similarly, laws that affect white people adversely receive heightened scrutiny from courts.¹²⁵ When white plaintiffs challenge affirmative action policies as violating the Equal Protection Clause, courts have applied strict scrutiny.¹²⁶ These plaintiffs have never had to show that white people are politically powerless. Courts have avoided the inquiry because it would be ludicrous to conclude that white people in America do not have political power when they occupy the vast majority of seats in Congress and every state legislature. Thus, race-based classifications receive strict scrutiny without any inquiry into the plaintiffs' political power.¹²⁷

Caucasians and men receive heightened scrutiny because courts are applying the anti-classification theory of equal protection, as opposed to the anti-subordination theory. While anti-classification theory may provide a justification for treating all racial and gender classifications as suspect, courts have explained neither why sexual orientation is an acceptable classification nor why the political power factor is employed against gay plaintiffs but not white or male plaintiffs pursuing equal protection claims. No court that has refused to apply heightened scrutiny to anti-gay laws has ever attempted to explain how gay Americans have too much political power to qualify for greater protection but Caucasians and men do not. Because this state of affairs is indefensible, courts do not defend it; most courts, however, choose to perpetuate it. All of this illustrates an asymmetry in the application of the political power factor that suggests that courts are, at best, inconsistent and, at worst, disingenuous.

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

124. Eskridge, *supra* note 73, at 12–13 (“Moreover, the Court’s gender discrimination cases often involved male plaintiffs who were disadvantaged by gender-based state policies, such as Oklahoma’s rule that eighteen- to twenty-year-old women could purchase three percent beer but same-aged men could not—the policy struck down in *Craig v. Boren*. At almost half of the population, and by far the wealthier half, men are far from politically powerless.”).

125. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

126. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–96 (1989).

127. Eskridge, *supra* note 73, at 12 (“If political powerlessness was a requirement for strict scrutiny, almost all of these affirmative action cases were wrongly decided.”).

3. The Impossibility of Political Powerlessness

Another major problem with the political power inquiry is that courts apply the factor impractically in a manner that is all but impossible to satisfy. In order to establish that it is politically powerless and entitled to heightened scrutiny, a group must have some modicum of political power.¹²⁸ Women and racial minorities, for example, did not receive heightened scrutiny until they had attained sufficient political power.¹²⁹ The truly powerless do not receive protection from the courts¹³⁰ because that group “will never even get on the Court’s radar”¹³¹ and “the Court will not even recognize its existence.”¹³² Professor Kenji Yoshino refers to this phenomenon as “the paradox of political power.”¹³³

128. Eskridge, *supra* note 73, at 24–25 (“[T]he U.S. Supreme Court’s practice inverts the demands of the political powerlessness requirement. When a social group is totally powerless, the Court will not subject the group’s stigmatizing trait to heightened scrutiny. Once the minority has achieved some political power, then the Court may intervene with strict scrutiny, intermediate scrutiny, or rational basis with bite.”); Yoshino, *supra* note 112, at 539 (“As a matter of practice, a group usually must have significant political power before the Court grants it heightened scrutiny.”).

129. Yoshino, *supra* note 112, at 541–42 (“When women were granted heightened scrutiny in 1976, the Congress had passed the Equal Rights Amendment and many states had ratified it.”); *Varnum v. Brien*, 763 N.W.2d 862, 894 (Iowa 2009).

It may seem odd to talk about the political power of women and racial minorities if heightened protection for gender and racial discrimination are based on anti-classification theory, and not anti-subordination theory. But the fact that women and racial minorities did not receive heightened scrutiny until they had sufficient political power suggests that the boundary between anti-classification theory and anti-subordination theory is porous and confusing.

130. See Eskridge, *supra* note 73, at 19 (“The hypothesis that emerges from these cases is that, as a matter of its own practice, the U.S. Supreme Court will not provide a high level of equal protection scrutiny when the state is deploying a suspicious classification against a minority that is totally powerless.”).

131. Yoshino, *supra* note 112, at 539.

132. *Id.* at 541.

133. *Id.* (“A paradox of political power attends judicial review. It could be stated as follows: *A group must have an immense amount of political power before it will be deemed politically powerless by the Court.*”).

The dynamic plays out in the relationship between state and federal protection of minorities. The Supreme Court generally will not move much more quickly than the majority of states have moved on a particular issue. For example, the Supreme Court declined to hold miscegenation laws and sodomy laws unconstitutional until the vast majority of states had already repealed or invalidated these laws. The Court’s inclination to wait until the states have acted creates a problem, however, because if the states have moved to protect

For decades, gay people were too politically powerless to have their claims taken seriously by the judiciary. When, in the 1970s, gay couples first argued that same-sex marriage bans were unconstitutional, courts rejected the couples' constitutional arguments out of hand, often "without discussion."¹³⁴ The Supreme Court dismissed appeals of such losses "for want of a substantial federal question," despite the fact that same-sex couples were arguing that the challenged marriage prohibitions violated the U.S. Constitution.¹³⁵ The Court's disdain for the rights of gay people was hardly surprising given that the Supreme Court in *Boutilier v. Immigration & Naturalization Service*¹³⁶ held that "Congress intended the phrase 'psychopathic personality' to include homosexuals" and that homosexuals were properly excluded from the country.¹³⁷ Professor Eskridge has explained that "[o]ne sad lesson from *Boutilier* is that if a minority group is totally powerless, because of social prejudice or pervasive stereotyping, the Equal Protection Clause will not protect that group."¹³⁸ In short, the same social prejudice that produces anti-gay laws leads judges to protect these laws from judicial invalidation.¹³⁹

Ultimately, the Supreme Court will only label a group as politically powerless if the group can hit an undefined sweet spot with the perfect combination of the presence and absence of political power.¹⁴⁰ As the judicial treatment of gay people

a group, then courts might claim that this shows that the group has political power and is, thus, not entitled to heightened scrutiny.

134. *Baker v. Nelson*, 191 N.W.2d 185, 186 n.2 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

135. *Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

136. 387 U.S. 118 (1967).

137. *Id.* at 120.

138. Eskridge, *supra* note 73, at 18.

139. *See id.* ("If social prejudice is so pervasive, will not judges themselves be prejudiced, to some extent, against the minority group? Chief Justice Warren and Justice Black, leaders of the Warren Court revolution in race and criminal procedure, were prejudiced against gay people. It was easy for such judges to believe that all males who have ever had sex with men were 'homosexuals,' that 'homosexuals' are 'psychopaths,' and that judges should support state pogroms against such 'psychopathic' people.")

140. *See id.* at 19 ("Heightened scrutiny will be possible only once the minority group has shown some political power, albeit not enough to sweep away all of the encrusted, and irrational or unproductive, discrimination against its members.")

One could argue that noncitizens did not have political power when the Supreme Court decided *Graham v. Richardson*, 403 U.S. 365 (1971). The *Gra-*

shows, that sweet spot may not exist. For decades, gays were legally labeled as psychopaths and criminals,¹⁴¹ labels that were both a cause and a consequence of gay people being politically powerless.¹⁴² Courts sometimes used the lack of *legislative* protection for gay people as the reason to deny heightened scrutiny and, thus, reduce any *judicial* protection for gay people targeted by discriminatory laws.¹⁴³ But any movement towards equality was used against gay people seeking heightened scrutiny of remaining anti-gay laws.¹⁴⁴ In short, the necessary sweet spot of “political powerlessness” is either ephemeral or fictional.

III. A GEOGRAPHICAL LENS OF EQUAL PROTECTION ANALYSIS

A. THE LOCUS OF DISCRIMINATION

Gay Americans live in every state, in every county, of the United States. Wherever they live, gay people face the risk—and often, the reality—of discrimination by their own government. This Section reviews how all levels of government have discriminated against, and failed to protect, the LGBT population.

1. Federal Discrimination

The federal government has actively and passively supported discrimination against gay Americans. First, Congress and federal agencies have enacted unequivocally anti-gay laws and policies. During the mid-to-late twentieth century, Congress excluded homosexuals from immigrating by labeling them as psychopathic personalities.¹⁴⁵ The federal government has long discriminated against gay employees in ways both subtle and overt. President Eisenhower issued an executive order to prohibit all homosexuals from all government employment.

ham Court never mentioned political power in its opinion.

141. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000) (explaining how sodomy laws stigmatize gays by labeling them as criminals).

142. Eskridge, *supra* note 73, at 26–27.

143. See *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001).

144. See *Conaway v. Deane*, 932 A.2d 571, 614 n.56 (Md. 2007) (“The irony is not lost on us that the increasing political and other successes of the expression of gay power works against Appellees in this part of our analysis of the level of scrutiny to be given the statute under review.”).

145. *Boutilier v. INS*, 387 U.S. 118 (1967).

During the McCarthy era, “literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian.”¹⁴⁶ For the entirety of the twentieth century, the U.S. military officially forbade openly gay and lesbian Americans from serving their country in uniform. Congress codified this policy in 1993 with the so-called “Don’t Ask, Don’t Tell” (DADT) policy, “pursuant to which a service member who has engaged in, intends to engage in or is likely to engage in homosexual conduct will be ordered separated from the armed services.”¹⁴⁷ When states began to consider recognizing same-sex marriage, Congress passed the misnamed Defense of Marriage Act (DOMA), which prohibited federal agencies from treating legally married same-sex couples as being married for the purposes of federal law, including for tax, immigration, and Social Security purposes, among others.

Although the most strident anti-gay federal policies are no longer in place, the successes in eliminating them largely come not from the political power of gays but from judicial protection. Courts, for example, were critical in reversing the federal government’s anti-gay employment policies.¹⁴⁸ More recently, when Congress did eventually repeal DADT in 2011, it did so in the shadow of a federal court decision invalidating the policy as unconstitutional and permanently enjoining the federal government from enforcing the policy.¹⁴⁹ Judicial action, in this case, spurred and informed the legislative action. And DOMA would still prevent federal recognition of same-sex marriage but for the Supreme Court’s opinion in *Windsor*, striking the law down.¹⁵⁰

146. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432–33 n.25 (Conn. 2008) (quoting GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 6 (2004)); *see also* DAVID JOHNSON, *THE LAVENDER SCARE* (2004) (describing the persecution of gays and lesbians during the McCarthy era).

147. *Kerrigan*, 957 A.2d at 432 n.25.

148. *See, e.g.*, *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (holding that an employee’s alleged homosexuality did not justify dismissal); *Scott v. Macy*, 402 F.2d 644 (D.C. Cir. 1968) (reversing an action of the United States Civil Service Commission denying an applicant public employment “on the ground that he had engaged in ‘immoral conduct’”); *Soc’y for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973) (reinstating a gay employee who had been improperly discharged from his federal civil service position).

149. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

150. *United States v. Windsor*, 133 S. Ct. 2675 (2013); *see infra* note 238

Furthermore, Congress has declined to pass anti-discrimination laws to protect gay Americans. For over four decades, the Employment Non-Discrimination Act (ENDA) has been introduced in Congress. ENDA would merely add sexual orientation to the categories of characteristics on which employers may not discriminate. Despite the fact that a majority of Americans support the measure, Congress has failed to protect gay workers against invidious discrimination.¹⁵¹ In addition to ENDA, Congress has declined to enact proposed legislation that would address health disparities for LGBT Americans and improve their access to the health care system.¹⁵² Before *Windsor* and *Obergefell* made same-sex marriages legal across the country, Congress refused to pass legislation to “prohibit the taxation of benefits provided for domestic partners under employers’ health plans” and to “permit Americans to sponsor their same-sex partner for family-based immigration.”¹⁵³ If gay Americans really had political power at the federal level, it would be relatively easy to include sexual orientation into existing nondiscrimination laws.

Finally, Congress has explicitly carved out gay Americans from the protection of broad-based civil rights legislation. For example, when Congress enacted the Americans with Disabilities Act of 1990, it unequivocally excluded gay men, lesbians, and bisexuals from protection from discrimination.¹⁵⁴ Even when adopting the Hate Crime Statistics Act of 1990, Congress stipulated that “[n]othing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality.”¹⁵⁵ While less harmful than aggressively discriminatory policies, like DADT and DOMA, these carve-outs communicate Congress’s disdain and disrespect for gay Americans.

(discussing the irony of anti-gay legislators defending DOMA while claiming that gays have too much political power to qualify for heightened scrutiny).

151. Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 964 (2012); William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 69–72 (2001).

152. Powers, *supra* note 100, at 396 n.87.

153. *Id.*

154. 42 U.S.C. § 12211 (2012) (“[H]omosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.”).

155. Hate Crime Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 § 2(b); see also Joseph M. Fernandez, *Bringing Hate Crime into Focus—the Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 278 (1991).

2. State Discrimination

State-based anti-gay discrimination has been a distinct problem for gay Americans since the nation's founding. Until the 1960s, every state in the union criminalized homosexual conduct through sodomy laws. These laws made private same-sex activity between consenting adults illegal. Criminal penalties were excessive to the point of irrational cruelty. As of the mid-1950s, at least nine states had a twenty-year maximum sentence for such private conduct, Connecticut had a thirty-year maximum sentence and North Carolina had sixty years; the laws of Colorado, Georgia, and Nevada provided for a life sentence for a sodomy conviction.¹⁵⁶ States, however, did not primarily enforce their sodomy laws through criminal prosecutions. Various state boards relied on sodomy laws to deny professional licenses to gay men and lesbians in many fields, including medicine, law, and teaching.¹⁵⁷ Many private employers followed suit and maintained policies against employing gay men and lesbians, who were considered *de facto* criminals.¹⁵⁸ Sodomy laws were also used to deny redress to any gay man or lesbian fired on account of sexual orientation. The courts reasoned that if gay men and lesbians were criminals because of their sexual orientation, surely their sexual orientation could not be the basis for an employment discrimination claim.¹⁵⁹ Sodomy laws were also used to rationalize taking children away from their gay parents, to prevent gays from organizing to protect their rights, and to justify discrimination against gay men and lesbians in immigration,¹⁶⁰ housing,¹⁶¹ and enforcement of solicitation statutes.¹⁶² Finally, sodomy laws also encouraged anti-gay violence¹⁶³ and deterred police departments

156. Bernard C. Glueck, Jr., *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 190 (1957).

157. Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 512–13 (2005) (“Mere suspicion of homosexuality was enough to fire a teacher for violating the state’s sodomy law.”).

158. *Id.*; see also William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 911 (1997) (“In 1961, virtually all state and federal government agencies discriminated against employees thought to be gay or lesbian, a discrimination aped by the private sector.”).

159. *E.g.*, *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

160. Leslie, *supra* note 141, at 164–68.

161. *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992).

162. Leslie, *supra* note 141, at 162–63.

163. Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 233; see also Leslie, *supra* note 141, at 122–27.

from protecting gay victims of crimes.¹⁶⁴ In short, even gay men and lesbians who did not violate sodomy laws were considered presumptive felons and, consequently, discriminated against. States slowly began to abolish their sodomy laws, until the Supreme Court in *Lawrence v. Texas* in 2003 ruled them unconstitutional. But the discrimination regarding employment and family law—often associated with sodomy laws—remained in most jurisdictions.

The family law regimes of many states are infused with anti-gay prejudice. When same-sex couples sought marriage equality, most states amended their state constitutions or civil codes to explicitly prohibit any legal recognition of same-sex marriages. Although *Obergefell* has extended the constitutional right to marry to include same-sex couples, many states continue to discriminate against gay families. For example, some states expressly prohibit adoptions by gays and lesbians.¹⁶⁵ As with federal anti-gay laws, their demise is more likely through judicial invalidation than legislative repeal.¹⁶⁶

Like the federal government, most states have declined to protect their gay citizens and visitors from invidious discrimination; both private and governmental actors are free to discriminate against members of the LGBT community.¹⁶⁷ In the aftermath of *Obergefell*, many states are proposing so-called religious freedom laws that would explicitly authorize and empower discrimination against gay individuals and couples.¹⁶⁸

164. Leslie, *supra* note 141, at 124–25.

165. See, e.g., MISS. CODE ANN. § 93-17-3(5) (2016) (“Adoption by couples of the same gender is prohibited.”); UTAH CODE ANN. § 78B-6-102(4) (LexisNexis 2012) (“The Legislature specifically finds that it is not in a child’s best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”). Michigan amended its adoption laws to allow publicly funded adoption agencies to refuse adoptions to same-sex couples if this conflicts with the agency’s religious beliefs. MICH. COMP. LAWS ANN. § 710.23g (West 2015).

166. See, e.g., Fla. Dep’t of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 91 (Fla. Dist. Ct. App. 2010) (striking down Florida’s prohibition on gays adopting children).

167. Hutchinson, *supra* note 64, at 1031 (“Today, most states still permit discrimination on the basis of sexual orientation by private and governmental actors.”).

168. See Jacquelyn Cooper, *Modern Day Segregation: States Fighting to Legally Allow Businesses To Refuse Service to Same-Sex Couples Under the Shield of the First Amendment*, 15 RUTGERS J.L. & RELIGION 413, 414 (2014) (“Over half a dozen states have introduced bills that would allow businesses, religious organizations, and even public servants to not recognize same-sex marriage and, as a result, discriminate against gay individuals.”).

Social conservatives have focused their anti-gay efforts primarily at the state, not the federal, level.¹⁶⁹ Many states do not have meaningful gay rights organizations in place to either make the affirmative case for gay equality or to defend themselves against anti-gay legal campaigns.¹⁷⁰

3. Local Discrimination

Many local governments actively target gay people for discrimination. Local governments regularly permit or require discrimination against gay police officers, firefighters, and city clerks. Local school districts routinely discriminate against teachers and school administrators.¹⁷¹ Local discrimination often finds voice in ballot initiatives—often spearheaded by politically powerful religious groups—to excise sexual orientation from local nondiscrimination ordinances.¹⁷² The voters of Cincinnati, for example, amended that city’s charter to excise the LGBT community from the city’s antidiscrimination ordinances and to preclude restoring any protected status.¹⁷³ Some cities use their zoning power to deny gay and gay-friendly establishments necessary licenses to operate.¹⁷⁴ Indeed, some local officials have declared their cities to be “straight town[s]” where gay people are not welcome.¹⁷⁵ Gays do not have political power in areas where the electorate views itself as religiously opposed

169. See AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 113–14 (2012).

170. See generally *id.* (noting how absence of state organizations proves detrimental to gay equality).

171. See, e.g., *Milligan-Hitt v. Bd. of Trs.*, 523 F.3d 1219 (10th Cir. 2008). Many state laws also discriminate against gay students. For example, “in nine states, school officials are statutorily prohibited from providing LGBT students with the information, advice, or acknowledgement necessary to support this vulnerable student population.” Jillian Lenson, *Litigation Primer Attacking State “No Promo Homo” Laws: Why “Don’t Say Gay” Is Not O.K.*, 24 TUL. J.L. & SEXUALITY 145, 146–47 (2015); see also *id.* at 147 (“These laws convey an unambiguous message that homosexuality is so immoral that even its very existence must be denied.”).

172. See STONE, *supra* note 169, at 8 (“And in a survey of local nondiscrimination ordinances from 1972 to 1993, more than one out of three passed ordinances that include sexual orientation was challenged in efforts to overturn it. If anything, this data suggests an underestimation of attempted anti-gay direct legislation.”).

173. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 289 (6th Cir. 1997).

174. Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 584 (2013).

175. *Id.* at 584 n.117 (2013) (discussing the proclamation of Gulfport, Mississippi councilman Billy Hewes).

to homosexuality, and gays are unlikely to avoid discrimination in such regions in the short term without judicial protection.¹⁷⁶

B. THE REGIONAL VARIATION OF POLITICAL POWER OF GAY AMERICANS

Making accurate, sweeping generalizations about the political power of gay Americans nationwide is difficult. The legal treatment of gay Americans varies wildly across states. Legislatures in some states have acted to protect their gay citizens from discrimination, while others have endorsed discrimination. Voters in statewide initiatives have generally opposed equality for their gay brethren, but exceptions exist when voters have supported gay rights.

1. Comparisons of Gay Political Power Across States

Some states may be characterized as gay protective. In mid-twentieth century America, states were relatively equal in their mistreatment of—and their failure to protect—gay people. Beginning in 1961, however, differences began to emerge. In that year, Illinois repealed its sodomy law. Eventually other states followed suit until by the mid-1980s, half of the states had eliminated their sodomy laws through either legislative repeal or judicial invalidation. Beyond ceasing the criminalization of sexual orientation, states in the 1980s began affirmatively protecting gay people from discrimination. Beginning in Wisconsin in 1982, several states have included sexual orientation in their statewide antidiscrimination laws.¹⁷⁷ Some gay-protective states include sexual orientation in their hate-crimes statutes.¹⁷⁸ During the national debate over same-sex marriage, most states legalized same-sex marriage through judicial action, but a few states achieved marriage equality through legislative votes or statewide referenda. These are indicia of political power.

176. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 445 (Conn. 2008) (“Feelings and beliefs predicated on such profound religious and moral principles are likely to be enduring, and persons and groups adhering to those views undoubtedly will continue to exert influence over public policy makers.”).

177. Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 286 (1994).

178. See, e.g., N.Y. PENAL LAW § 485.05 (McKinney 2008); *In re Joshua H.*, 17 Cal. Rptr. 2d 291, 293 (Cal. App. Dep’t Super. Ct. 1993) (upholding California’s hate crime statute that included sexual orientation).

California stands as an example of a state whose legislature has moved to protect its gay citizens on a variety of fronts. By statute, California bans discrimination based on sexual orientation in health care plans,¹⁷⁹ insurance,¹⁸⁰ housing,¹⁸¹ employment,¹⁸² jury service,¹⁸³ and education.¹⁸⁴ More broadly, California's Unruh Act ensures that, regardless of sexual orientation, all persons "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."¹⁸⁵ California has also been at the forefront in gay-protective legislation, being the first state to enact laws requiring the teaching of gay history in public schools and prohibiting anti-gay reparative therapy. These legislative victories suggest that gay Californians possess a modicum of political power.¹⁸⁶

In contrast to gay-protective states, such as California, gay people clearly lack political power in the many states that have been affirmatively hostile to gay rights. Gays are essentially politically powerless in states whose sodomy laws were invalidated only by *Lawrence v. Texas*.¹⁸⁷ After all, gay people in the

179. CAL. HEALTH & SAFETY CODE § 1365.5(a) (West 2016) ("No health care service plan or specialized health care service plan shall refuse to enter into any contract or shall cancel or decline to renew or reinstate any contract because of . . . sexual orientation . . .").

180. CAL. INS. CODE § 10140(a) (West 2013) ("[S]exual orientation shall not, of itself, constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for that insurance.").

181. CAL. GOV'T CODE § 12955 (West 2011).

182. *Id.* § 12940.

183. CAL. CIV. PROC. CODE § 231.5 (West 2006).

184. ROBERT D. LINKS, CALIFORNIA CIVIL PRACTICE CIVIL RIGHTS LITIGATION § 11:6 (West 2016) ("The prohibition against sexual orientation discrimination in the Education Code was accomplished by the insertion of the phrase 'or any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code' into [the Education Code].").

185. CAL. CIV. CODE § 51(b) (West 2016).

186. Yet, even protective states remain problematic. In California, after the state's supreme court held that denying same-sex couples the right to marry violated the California Constitution, the voters overturned the decision by amending the state constitution with Proposition 8, which precluded same-sex marriages. A federal judge struck down Proposition 8 as unconstitutional under heightened scrutiny. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

187. 539 U.S. 558 (2003). Several states, including Texas, took great efforts to defend their sodomy laws against invalidation, often through procedural manipulations. Christopher R. Leslie, *Procedural Rules or Procedural Pretexts?: A Case Study of Procedural Hurdles in Constitutional Challenges to the*

thirteen states that continued to criminalize homosexuality until *Lawrence* had insufficient political power to prevent themselves from being labeled as felons and thus subject to employment discrimination, having their children taken away in custody disputes, and other collateral consequences.¹⁸⁸ Still today, approximately half of the states do not include sexual orientation in their statewide nondiscrimination laws;¹⁸⁹ this makes it legal for employers, landlords, and retailers to discriminate against gay people, potentially rendering gay people jobless, homeless, and unable to shop in stores or eat in restaurants.¹⁹⁰ In most states, these are not innocent omissions; indeed, several states have tried or proposed to prevent any city within the state from including sexual orientation in its local nondiscrimination ordinance.¹⁹¹ Moreover, the multitude of anti-gay state laws are all evidence that the gay people targeted by these laws lack political power.¹⁹²

The political powerlessness of gays is also demonstrated by states trying to silence gay people. By making it legal to discriminate based on sexual orientation, states attempt to force gay people into the closet in order to prevent them from exercising power. In the 1980s, Oklahoma defended the constitutionality of its law that provided for the termination of teachers who advocated “private homosexual activity,” which meant that “[a] teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute” could be fired for exercising his or her free speech rights.¹⁹³ The Tenth Circuit struck down the law as violating

Texas Sodomy Law, 89 KY. L.J. 1109, 1149 (2001); see also Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine To Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 40–44 (arguing that state courts have invoked federal standing doctrine to argue that because sodomy laws are not enforced, there is no injury).

188. Leslie, *supra* note 141, at 137–68 (describing examples of employment discrimination, custody discrimination, discrimination against gay organizations, discriminatory enforcement of solicitation statutes, and immigration discrimination against homosexuals).

189. See *supra* note 167 and accompanying text.

190. Even in states without statewide protection, gays may have protection against discrimination in cities with local nondiscrimination ordinances that include sexual orientation, though some states have tried to nullify such local protections. See *infra* notes 213–14 and accompanying text.

191. See *infra* note 214 and accompanying text.

192. See *infra* notes 197–99, 211–14 and accompanying text.

193. Nat'l Gay Task Force v. Bd. of Educ. of Okla. City, 729 F.2d 1270, 1274 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985).

the First Amendment,¹⁹⁴ a decision upheld by an equally divided Supreme Court.¹⁹⁵ Today, nine states continue to try to prevent students from knowing that gay people can be well-adjusted and happy;¹⁹⁶ these states have enacted so-called “No Promo Homo” laws, which forbid school teachers from discussing homosexuality except as a mechanism for transmitting diseases.¹⁹⁷ For example, Texas law provides that “[c]ourse materials and instruction relating to sexual education or sexually transmitted diseases should include: . . . (8) emphasis . . . that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code.”¹⁹⁸ The law still exists more than a decade after the Supreme Court held section 21.06 unconstitutional in *Lawrence v. Texas*. Texas is not exceptional in this regard.¹⁹⁹

The fact that so many unconstitutional laws, such as Oklahoma’s anti-speech law, are enacted to discriminate against gays also shows an absence of political power. Most notably, the Supreme Court has struck down state sodomy laws and state same-sex marriage bans. These decisions followed from the first Supreme Court decision to strike down an anti-gay state law, *Romer v. Evans*, which invalidated Colorado’s amendment 2.²⁰⁰ Lower federal courts have invalidated anti-gay state laws, generally on grounds unrelated to equal protection. For example,

194. *Id.*

195. *Nat’l Gay Task Force*, 470 U.S. at 903.

196. Lenson, *supra* note 171, at 147 (listing Alabama, Arizona, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Utah as having “No Promo Homo” or “Don’t Say Gay” laws); *see also* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1359 (2000) (suggesting that public education is a common locus of no promo homo policies).

197. *See, e.g.*, S.C. CODE ANN. § 59-32-30(A)(5) (2014) (“The program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”).

198. TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 1991).

199. *See, e.g.*, ALA. CODE § 16-40A-2 (1992) (“Course materials and instruction that relate to sexual education or sexually transmitted diseases should include all of the following elements: . . . (8) An emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.”).

200. *See supra* notes 35, 109, and accompanying text.

Alabama enacted a law that forbade the use of public funds by any college or university to recognize or support any group that “promote[d] a lifestyle or actions prohibited by the sodomy and sexual misconduct laws,” which effectively denied funds (and on-campus banking privileges) to student gay rights organizations.²⁰¹ The Eleventh Circuit held that the law violated the First Amendment.²⁰² State courts, too, have invalidated anti-gay state laws. For example, the Arkansas Supreme Court struck down a child welfare regulation that provided that “[n]o person may serve as a foster parent if any adult member of that person’s household is a homosexual” as violating the separation of powers doctrine.²⁰³ These anti-gay laws illustrate both the inability of gays to protect themselves in the political process and the need for judicial scrutiny.

Some judges have suggested that these judicial victories are evidence of the political power of gay Americans. For example, in holding that gay people have too much political power to qualify for heightened scrutiny, the Maryland Court of Appeals reasoned, in part, that “judicial trends toward reversing various forms of discrimination based on sexual orientation underscore an increasing political coming of age.”²⁰⁴ The court is mistaken; judicial invalidation of unconstitutional laws does not demonstrate political power. Courts are—at least theoretically—not political. The fact that the federal and state governments are passing unconstitutional anti-gay laws and that gay people consistently need judicial protection to invalidate these

201. *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1545 (11th Cir. 1997) (quoting ALA. CODE § 16-1-28 (1995)).

202. *Id.* at 1550.

203. *Dep’t of Human Servs. v. Howard*, 238 S.W.3d 1, 3, 8 (Ark. 2006) (quoting Ark. Reg. § 200.3.2 (Jan. 1999)).

204. *Conaway v. Deane*, 932 A.2d 571, 613 (Md. 2007), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Maryland Supreme Court implied that the Supreme Court’s decision in *Romer v. Evans*, in which the court struck down amendment 2, demonstrated that gays had political power. *Id.* at 612–13 (discussing *Romer* and *Lawrence*, and indicating that “[e]volutionary legal developments highlighting changing views toward gay, lesbian, bisexual, and transgender persons are not limited to statutory and regulatory enactments”).

Courts should not be using *Romer* as evidence that gays have political power. The episode behind *Romer* shows the utter lack of political power that gay people had in Colorado in the early 1990s. The fact that the court system protected gays from unconstitutional discrimination is not evidence of political power; rather, it should be evidence that the political process failed to protect gays from discrimination, which is an argument in favor of heightened scrutiny for gay citizens.

discriminatory laws is stronger evidence of the lack of political power that gay Americans endure.

In some states, gays are constantly under attack from anti-gay legislators. Oklahoma stands as an example. In the first month of 2016 alone, Oklahoma legislators introduced at least twenty-six anti-LGBT bills, including proposed laws that would allow businesses to discriminate against gay individuals and gay couples, would allow adoption agencies to refuse service to gay people, would deter gay students from talking to school counselors by requiring outing such students to their (potentially homophobic) parents, would prevent municipalities in Oklahoma from passing gay-inclusive nondiscrimination laws, and would specifically allow conversion therapy against gay youth, including “physical pain, such as electroshock or electroconvulsive therapy, touch therapy, pornography exposure or vomit-induction therapy, in order to . . . eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.”²⁰⁵

Some might interpret the eventual failure of some anti-gay proposals to become law as proof of gay political power. It is not. Even successes at the ballot box or state legislatures in defeating proposed anti-gay laws are not necessarily evidence of political power because gay Americans are largely playing defense. Politically powerful opponents of basic equality constantly force gay Americans to spend their time, energy, and resources to defend themselves against anti-gay legislative proposals and initiatives. Indeed, this is the strategy of equality opponents: distract gay people and their allies and force them to play defense so that they have insufficient resources to make affirmative gains towards equality.²⁰⁶ For example, “an anti-gay campaign industry developed . . . in Oregon, ‘where the drafting, circulation, and qualification of antigay initiatives

205. Mark Joseph Stern, *The Latest Anti-Gay Oklahoma Bills Are Almost Too Crazy To Believe*, SLATE: OUTWARD (Jan. 28, 2016), http://www.slate.com/blogs/outward/2016/01/28/oklahoma_anti_gay_bills_on_conversion_therapy_and_blood_testing_are_crazy.html (quoting the forms of aversion therapy that a proposed law would protect from legal challenge); see also Zack Ford, *Oklahoma Sets New Record for Attempts To Discriminate Against LGBT People*, THINKPROGRESS (Jan. 28, 2016), <https://thinkprogress.org/oklahoma-sets-new-record-for-attempts-to-discriminate-against-lgbt-people-8f24d927bbe2#.3qskwmkkr> (listing dozens of proposed anti-gay laws in Oklahoma).

206. See STONE, *supra* note 169, at 6 (summarizing Religious Right tactics such as changing the type, subject, and jurisdiction of anti-gay referendums and initiatives).

became something of a cottage industry.’ Through the coordinated efforts of one group, the Religious Right can flood LGBT communities with anti-gay ballot initiatives, depleting resources and dividing group efforts.”²⁰⁷ When gay rights groups had to defend against statewide DOMA initiatives, they could not effectively lobby for nondiscrimination protections or hate-crimes legislation.²⁰⁸ In many of these battles over gay rights, a “win” does not advance gay rights; it merely preserves a status quo that is often unfavorable to gay equality.²⁰⁹ Resources are also diverted from other activities to make life better for gay people in hostile areas. In short, opponents of civil rights win even if appears that they lose because their goal was to distract and divert, not to necessarily achieve a majority of votes.

In sum, this brief sketch demonstrates that gays can have political power in some states, but not others.

2. Regional Variations of Political Power Within States

In addition to inter-state differences regarding the political power of gays, intra-state differences also exist. In many states, some cities have enacted gay-inclusive nondiscrimination ordinances. This creates asymmetries within states, especially in those without statewide nondiscrimination laws that include sexual orientation. In small conservative towns, officials are more likely to commit, than to guard against, anti-gay discrimination.²¹⁰ Gay people in rural areas are often particularly in need of legal protections.²¹¹ Consequently, rural gays are often politically powerless and badly need heightened scrutiny to preserve their rights.²¹² The asymmetry of legal protections can

207. *Id.* at 10 (quoting Todd Donovan et al., *Direct Democracy and Gay Rights Initiatives After Romer*, in *THE POLITICS OF GAY RIGHTS* 165 (Craig A. Rimmerman et al. eds., 2000)).

208. *Id.* at 135.

209. *See id.* at 44.

210. Boso, *supra* note 174, at 601–02 (“[W]here local and state politicians represent predominately conservative, older, and blue-collar constituencies, and where progay groups spend little time and resources . . . local lawmakers are not likely to combat antigay discrimination independently . . .”).

211. *Id.* at 566 (“Sexual minorities are uniquely vulnerable in many small towns and rural areas. Social discrimination and limited economic opportunities can leave them restricted in their ability to live freely and comfortably in their homes, and many predominately rural places lack even basic legal protections from discrimination based on sexual orientation.”).

212. *See id.* at 602 (“For rural sexual minorities, then, courts often provide the most realistic and affordable avenue for vindicating rights.”).

compel many gay people to move from relatively hostile cities to more protective—or at least less discriminatory—cities.²¹³

Some states have considered eliminating these intra-state variations by affirmatively denying nondiscrimination protections to gays statewide. Gay-hostile states not only refuse to protect gay people; many have tried to prevent all cities within their state from including sexual orientation in local nondiscrimination ordinances. For example, in response to Aspen, Boulder, and Denver adopting gay-inclusive nondiscrimination laws, Colorado voters passed amendment 2, which would have prevented any discrimination claim based on sexual orientation anywhere in the state. After the Supreme Court struck down amendment 2 for singling out gay people for non-protection, several states have proposed more facially neutral schemes to achieve a similar result to amendment 2. In Arkansas and Tennessee, legislators enacted state laws that preclude municipalities from protecting any groups not included in statewide nondiscrimination laws.²¹⁴ Because these states refuse to protect gay people from discrimination, these laws prevent localities from doing so as well and essentially nullify any political power enjoyed by gays at a local level.

In sum, whether gay Americans have political power depends on where they reside. Gays in California may possess some meaningful political power while gays in Oklahoma do not. Gays in Austin may possess political power even though Texas does not have a statewide gay-inclusive nondiscrimination law. In contrast, gays in Fayetteville, Arkansas may not have meaningful political power because even though the city is

Judicial recourse is critical in these jurisdictions because, as Professor Doug NeJaime explains, “[c]ourts generally have an obligation to hear and consider a group’s grievance, even when lawmakers do not provide a forum. And because courts enjoy some degree of independence, they may advance the group’s cause even when political actors and the general public remain relatively hostile.” Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 665 (2012).

213. See, e.g., Blank & Rosen-Zvi, *supra* note 151, at 958 (arguing that some cities use their powers to improve the lives of gay and lesbian residents).

214. ARK. CODE ANN. § 14-1-403(a) (West 2015) (“A county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.”); TENN. CODE ANN. § 7-51-1802(a)(1) (West 2016) (“No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner from [state law].”).

gay-friendly, the state legislature has forbidden all Arkansas cities from protecting their gay residents and visitors against discrimination. Political power is, in effect, a function of geography.

IV. IMPLICATIONS FOR EQUAL PROTECTION JURISPRUDENCE

When courts discuss whether a group seeking heightened scrutiny possesses political power, they tend to make sweeping pronouncements, untethered to geography. This Part shows that the answer to the question of whether a group is politically powerless depends on where you look. And courts often look in the wrong place.

A. FEDERAL LAW, STATE/LOCAL LENS

In cases involving equal protection challenges to federal laws, courts invoke examples of gay legislative victories at the state and local level in order to deny heightened scrutiny and to uphold anti-gay laws under rational basis review. For example, in 1989, the Seventh Circuit upheld the U.S. Army's policy of disqualifying gay men and lesbians from military service.²¹⁵ In reversing a lower court's decision to apply heightened scrutiny, the appellate court held that sexual orientation did not constitute a suspect classification, in part, because "[h]omosexuals are not without political power."²¹⁶ The court came to this conclusion based on three data points: "one congressman is an avowed homosexual, and . . . there is a charge that five other top officials are known to be homosexual," and "the Mayor of Chicago participated in a gay rights parade."²¹⁷ Yet, the Seventh Circuit is not the only court to conclude that a single mayor's participation in a gay rights parade means that gays have nationwide political power relevant to political control over military policy.²¹⁸ Given that the anti-gay policy at issue is federal, mayoral support for civil rights is immaterial.

215. *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989).

216. *Id.* at 466 n.9.

217. *Id.*

218. *See Steffan v. Cheney*, 780 F. Supp. 1, 8–9 (D.D.C. 1991) ("It is beyond doubt that the homosexual community has been able to reach out and gain the attention of politicians of all sorts. One need only remember St. Patrick's Day 1991 in New York City to see Mayor David Dinkins marching in the traditionally Irish-Catholic parade with homosexual groups and activists who were important supporters during his tough mayoral campaign."), *rev'd sub nom.*

Other courts have followed the same approach of denying heightened scrutiny—based on isolated state and local examples of gay political power—and then upholding federal anti-gay policies under rational basis review.²¹⁹ Perhaps most notably, the Ninth Circuit in *High Tech Gays v. Defense Industrial Security Clearance Office*²²⁰ considered an equal protection challenge to the Department of Defense’s (DoD) long-maintained policy of requiring expanded investigations of all gay applicants for Secret and Top Secret clearances. This policy effectively precluded gay men and lesbians from working in both governmental and private positions that required security clearances.²²¹ The Ninth Circuit refused to apply heightened scrutiny because gay Americans “are not without political power.”²²² To support its conclusion, the court noted that Wisconsin barred employment discrimination on the basis of sexual orientation, that California has barred violence against persons or property based on sexual orientation, that Michigan has barred the denial of care in health facilities on the basis of sexual orientation, that New York had an executive order prohibiting sexual orientation discrimination, and that nine cities included sexual orientation in nondiscrimination ordinances.²²³ Relying on these atypical state-based instances of nondiscrimination, the court applied rational basis review and upheld the DoD’s anti-gay policy.²²⁴ The court never attempted to explain how gay-inclusive laws in a few states translated into gays having political power vis-à-vis Congress or the DoD.

This judicial invocation of non-federal examples of gay political power in cases challenging federal laws is inappropriate and misleading. In a different Ninth Circuit challenge to the

Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *aff’d sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994).

219. *See, e.g., id.* at 8 n.15 (upholding the military’s anti-gay policy after denying heightened scrutiny, in part, because several cities “have passed anti-discrimination regulations concerning homosexuals” and “California, Michigan, New York and Wisconsin all have various statewide legislation or regulations which benefit homosexual groups”).

220. 895 F.2d 563 (9th Cir. 1990), *abrogated by* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014).

221. *Id.* at 569 n.5.

222. *Id.* at 574.

223. *Id.* at 574 n.10. The court also asserted that, based on *Bowers*, “because homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.” *Id.* at 571.

224. *Id.* at 580–81.

military gay-exclusion policy, the Army argued that gay people “cannot be politically powerless because two states, Wisconsin and California, have passed statutes prohibiting discrimination against homosexuals.”²²⁵ Although the majority avoided the equal protection issues by deciding the case on estoppel principles, Judge Norris, in concurrence, explained the folly of the Army’s position: “Two state statutes do not overcome the long and extensive history of laws discriminating against homosexuals in all fifty states. Moreover, at the national level—the relevant political level for seeking protection from military discrimination—homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination.”²²⁶ In other words, the courts in these cases are using the wrong lens; it matters little if some states provide protection to gay Americans when the policy being challenged is federal and gay Americans do not have political power at the federal level.

Despite employing the wrong lens, cases like *High Tech Gays* have proven instrumental in upholding a litany of anti-gay laws. Subsequent courts have relied on *High Tech Gays* for the proposition that gays have political power and, therefore, are not entitled to heightened scrutiny.²²⁷ More importantly, over a dozen judicial opinions have relied on *High Tech Gays* to deny heightened scrutiny to gay people and to uphold anti-gay policies to fire government attorneys,²²⁸ to terminate foreign service officers,²²⁹ to deny security clearances to private employees requiring them,²³⁰ to uphold DADT,²³¹ to uphold DOMA,²³² to uphold sodomy laws,²³³ and to uphold state same-

225. *Watkins v. U.S. Army*, 875 F.2d 699, 727 n.30 (9th Cir. 1989) (en banc) (Norris, J., concurring).

226. *Id.* (citation omitted).

227. *See, e.g., Dahl v. Sec’y of U.S. Navy*, 830 F. Supp. 1319, 1323 (E.D. Cal. 1993).

228. *See Shahrar v. Bowers*, 70 F.3d 1218, 1227–28 (11th Cir. 1995), *reh’g en banc granted, opinion vacated*, 78 F.3d 499 (11th Cir. 1996), *aff’d en banc*, 114 F.3d 1097 (11th Cir. 1997).

229. *See U.S. Info. Agency v. K.R.C.*, Civ. A. No. 87–1740(CRR), 1991 WL 166683, at *2 n.6 (D.D.C. Aug. 12, 1991), *aff’d*, 989 F.2d 1211 (D.C. Cir. 1993).

230. *See Dubbs v. CIA*, 769 F. Supp. 1113, 1116–17 (N.D. Cal. 1990).

231. *See Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997).

232. *See Smelt v. Cty. of Orange*, 374 F. Supp. 2d 861, 875, 880 (C.D. Cal. 2005), *aff’d in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006).

233. *See Lawrence v. State*, 41 S.W.3d 349, 353–54, 354 n.8 (Tex. App. 2001), *rev’d*, 539 U.S. 558 (2003).

sex marriage bans²³⁴—in states never mentioned in *High Tech Gays*. None of these federal or state anti-gay laws involved laws from the states in which the Ninth Circuit found gays to have political power. And yet, these courts held that because gays enjoyed political power in a very few states, sexual orientation is not a suspect classification in any state or when challenging any federal law. As a result, because gay people in a handful of states and two handfuls of cities received some measure of protection from irrational discrimination, courts treated all gay people as having political power over the federal government, including the armed services, and in states and localities that are decidedly anti-gay.

Defenders of anti-gay federal laws continue to highlight atypical examples of states protecting their gay citizens. Congress notably employed this strategy when defending DOMA. After President Obama and Attorney General Eric Holder determined that DOMA was unconstitutional and declined to defend its constitutionality, some members of the House of Representatives created the Bipartisan Legal Advisory Group (BLAG) to defend DOMA in court.²³⁵ BLAG argued that gay Americans possess political power, that heightened scrutiny is therefore inapplicable, and that DOMA can survive rational basis review. To make its case, BLAG emphasized that a handful of state legislatures had voted to recognize same-sex marriages and more states had granted same-sex couples most of the rights associated with marriage.²³⁶ BLAG argued that gay “[p]laintiffs cannot maintain that they are part of a class that faces ‘discrimination [that] is unlikely to be soon rectified by legislative means.’”²³⁷ This assertion is curious given that the discrimination at issue was DOMA. How exactly would marriage discrimination “soon [be] rectified by legislative means” when the members of BLAG had committed themselves to en-

234. See, e.g., *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1099 (D. Haw. 2012), *vacated and remanded*, 585 F. App'x 413 (9th Cir. 2014); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

235. *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

236. Memorandum of Law in Support of Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 18–19, *Windsor*, 833 F. Supp. 2d 394 (No. 10-CV-8435) [hereinafter *BLAG Brief*]. BLAG also noted that several states had same-sex marriage as a result of judicial rulings. This is not an indication of political power.

237. *Id.* at 12 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

suring that DOMA would be neither repealed nor invalidated?²³⁸ One federal judge noted that these arguments were unpersuasive in light of the fact that “since 1990 anti-gay marriage statutes or constitutional amendments have been passed by 41 states and are continuing to be proposed and passed.”²³⁹ A far better indicator of the relevant political power of gays was DOMA itself, a federal law designed to discriminate against gay couples and one that illustrates the political powerlessness of gays nationally.²⁴⁰

B. STATE LAW, A DIFFERENT STATE’S LENS

In challenges to anti-gay state laws, courts emphasize that *other* states—besides the one whose law is alleged to violate equal protection guarantees—have protected gay rights. For example, a court considering Nevada’s ban on same-sex marriage held that “homosexuals have meaningful political power to protect their interests,” because “homosexuals recently prevailed during the 2012 general elections on same-sex marriage ballot measures in the States of Maine, Maryland, and Washington, and they prevailed against a fourth ballot measure that would have prohibited same sex marriage under the Minnesota Constitution.”²⁴¹ From these four data points, the court sweep-

238. BLAG accused the DOMA challengers of being “oblivious to the irony of maintaining that homosexuals have limited political power” when the DOJ supported their position. *Id.* at 12–13.

Yet BLAG was equally oblivious to the irony of arguing that gays have abundant political power when the congresspeople behind BLAG had passed a federal law to require discrimination against gay couples, had passed special legislation and spent millions of dollars to defend this discriminatory law, and were actively arguing that same-sex couples were not entitled to equal protection under the law. That Congress had affirmatively taken all of these actions to hurt gay Americans is proof positive that gays lack political power at the federal level.

BLAG noted that Obama had nominated a handful of openly gay judges (one of whom was recently confirmed), that corporate America was more supportive of gay rights, and that gay candidates were winning state and local elections. *Id.* at 13–17. But BLAG did not explain how any of these translated into political power vis-à-vis Congress.

239. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 331 (D. Conn. 2012).

240. See *Rush*, *supra* note 45, at 722–23 (“Indeed, one logically could conclude that passage of the Defense of Marriage Act (DOMA), defining marriage as between a man and a woman, and the efforts of many states to pass laws limiting marriage to a man and a woman, are the ultimate evidence of just how politically powerless gays are *throughout the country*,” (emphasis added) (footnotes omitted)).

241. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1013 (D. Nev. 2012), *rev’d*

ingly rejected the claim that “homosexuals do not have the ability to protect themselves from discrimination through democratic processes such that extraordinary protection from majoritarian processes is appropriate.”²⁴² The court never explained why these four hard-fought state victories (in generally gay-supportive states) proved that gays have political power in Nevada, let alone nationwide.

In addition to looking in the wrong state, courts misinterpret the evidence that they find in other states. For example, a Texas appellate court upheld that state’s ban on same-sex marriage under rational basis after concluding that gay people are not a “politically powerless minority.”²⁴³ The court’s sole support was the fact that forty-six percent of Colorado voters opposed amendment 2 and over forty-seven percent of California voters opposed a referendum banning same-sex marriages.²⁴⁴ In both of these non-Texas examples, voters adopted explicitly anti-gay laws.²⁴⁵ It is almost nonsensical that political losses in Colorado and California are evidence that gays possess political power in Texas.

Courts analyzing the political power factor in cases involving challenges to anti-gay state laws have also sometimes used a national lens. For example, a district court in Nevada upheld that state’s ban on same-sex marriage under rational basis review after holding that the gay plaintiffs were not entitled to heightened scrutiny because gays were not politically powerless.²⁴⁶ After noting that President Obama had announced his support for marriage equality and had directed the Attorney General not to defend DOMA in court, the judge concluded that the fact “[t]hat the homosexual-rights lobby has achieved this indicates that the group has great political power.”²⁴⁷ It is inter-

sub nom. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

242. *Id.*

243. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 673 (Tex. App. 2010).

244. *Id.*

245. For more information on amendment 2, see *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). For more information on California’s referendum, see *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

246. See *Sevcik*, 911 F. Supp. 2d at 1008.

247. *Id.* While the court sees this evidence of political power, the DOJ’s decision to not defend DOMA was more likely driven by its lawyers’ independent determination that DOMA was, in fact, unconstitutional. See *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 330 (D. Conn. 2012) (“This Court agrees that BLAG’s ‘contention that a two-year-old letter from a gay rights advocacy group was the pivotal consideration in the Administration’s reas-

esting that the court emphasized the current president's opposition to DOMA while ignoring the significance of Congress enacting an anti-gay law specifically designed to harm gay families.²⁴⁸ The court noted that Congress has refused to include sexual orientation "under Title VII's protections," but gave this no weight because it concluded that the political power factor "weighs greatly in favor of rational basis review."²⁴⁹

Some state courts hearing challenges to anti-gay state laws and evaluating whether gay people lack political power have, in fact, used the proper state lens. In these cases, different courts have reached different conclusions. Some state supreme courts have found that gay people lack political power within the state and are entitled to heightened scrutiny.²⁵⁰ In contrast, other state supreme courts have found that gay people possess political power in the state.²⁵¹ This demonstrates the legal significance of regional variations in political power.

assessment of the law or that it demonstrates that gay men and lesbians have political power is speculative at best." (quoting *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012))).

248. Furthermore, presidential preferences are an inappropriate measure of a group's political power for several reasons. First, while President Obama's endorsement of equality is welcomed, the views of the President are largely irrelevant to how the lives of gay Americans are lived and how their rights are denied. Second, presidential preferences do not necessarily translate into policy. Prior to President Obama, the president most supportive of gay rights was President Clinton, who campaigned in 1992 on his commitment to equal rights for gay Americans. His personal commitment to nondiscrimination did not prevent him from signing "Don't Ask, Don't Tell" and the mislabeled Defense of Marriage Act, the two major pieces of gay-related legislation enacted during the Clinton era, both which codified discrimination against gay servicemembers and same-sex couples, respectively. Third, this measure is too ephemeral. Obama's Republican challenger in 2012 was Mitt Romney, a decidedly anti-gay candidate. If Romney had won, would gays then be considered politically powerless for equal protection purposes? The determination of political power cannot turn on quadrennial elections.

249. *Sevcik*, 911 F. Supp. 2d at 1008.

250. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 447 n.42 (Conn. 2008) ("Although we recognize that Connecticut is a leader in terms of the number of openly gay and lesbian lawmakers elected to the legislature, we view that fact as indicative of the political weakness of gay persons nationwide, and not as indicative of the political strength of gay persons in this state.").

251. See *In re Marriage Cases*, 183 P.3d 384, 467 (Cal. 2008) (Baxter, J., concurring in part and dissenting in part) ("[G]ays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded." (emphasis added)), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Baehr v. Lewin*, 852 P.2d 44, 53 (Haw. 1993) (noting, but rejecting, the lower court's factual finding that "homosexuals in Hawaii have not been relegated to

C. THE PURPOSE OF THE POLITICAL POWER FACTOR AND WHY THE CORRECT LENS MATTERS

As explained in Part II, the purpose of the political power factor is to determine whether the political process has failed to protect a minority from mistreatment. When the political process targets a minority for discrimination, courts employ heightened scrutiny to ensure that the challenged law is not the product of prejudice.²⁵² This seems straightforward, but the language of the political power factor lends itself to misinterpretation because it speaks in the singular of “the” political process as if only one political process existed. For example, the Supreme Court has noted the need for heightened scrutiny when minorities “are relatively powerless to protect their interests in *the political process*.”²⁵³ State courts, too, refer to “the political process” as though one political machine controlled the whole country.

The American political system, however, is composed of literally thousands of political processes. Every state, county, city, and school board has its own political process. The federal government, too, has multiple political processes given that—in addition to Congress—the regulatory agencies and military branches have significant autonomy in developing policies. To determine whether an anti-gay law is the result of a prejudicial, failed political process, one must first determine which political process is relevant.

Courts err when they look at *any* political process instead of examining *the* political process that created the challenged law. Gays have no voice in many of the political processes in the United States. Indeed, many political processes are decidedly anti-gay. If the purpose of the political power factor is to determine whether a challenged law is the product of prejudice, then the relevant political process is the one that created the law. Thus, when Congress enacts anti-gay laws, such as DOMA

a position of ‘political powerlessness.’ . . . [T]here is no evidence that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii” (quoting the circuit court’s evidentiary findings)), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Andersen v. King Cty.*, 138 P.3d 963, 974–75 (Wash. 2006) (“The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.”), *abrogated by Obergefell*, 135 S. Ct. 2584.

252. See *supra* notes 64–72 and accompanying text.

253. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (emphasis added).

or DADT, the relevant inquiry is whether gay Americans have political power in Congress. Federal courts evaluating anti-gay federal laws should not look at state progress when determining whether or not gays are politically powerless. State-based analysis provides no evidence as to whether the federal political process has failed in a manner that warrants heightened scrutiny of federal laws that target gay Americans. In other words, did the political process that created the challenged law fail? Was this process tainted by prejudice?

Similarly, state courts err when they look to out-of-state examples of gay political victories in order to hold that gays have political power more broadly. Equal protection claims based on state constitutions, being evaluated in state courts, should necessarily involve a state-centric view of the elements used to determine suspect classifications. When applying equal protection under a state constitution, the court is determining only whether laws targeting gays are suspect in that state. This, in turn, should be a function of whether gays are politically powerless in that state. That gays have a modicum of political power in Maine is irrelevant to whether sexual orientation is a suspect classification in Alabama. The inquiry for equal protection purposes should not focus on gay people in other states who are unaffected by the discriminatory law. Rather, the inquiry should ask whether those gay people targeted by the discriminatory law are politically powerless.

When courts can look outside of the relevant political process for evidence of political power, it exacerbates the problem of cherry-picking. Using isolated examples of local successes to generalize about national political power results in false extrapolations.²⁵⁴ Yet judges and attorneys do this often when asserting that gay Americans possess too much political power to qualify for suspect classification. For example, in arguing that gays had political power, BLAG emphasized the fact that California had enacted a law that required the state's "public school textbooks to include historical contribution[s] of lesbian, gay, bisexual, and transgendered ('LGBT') Americans," but ignored

254. *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992) ("The Ninth Circuit's position in *High Tech Gays* not only exaggerates the significance of recent anti-discrimination efforts, it suffers from a more fundamental error. It mistakenly assumes that scattered, piecemeal successes in local legislation are proof of political power, and hence an invalidation of the use of heightened scrutiny in governmental classifications based on sexual orientation.").

the fact that no other state had a similar law and many states had proposed or maintained laws that forbid any discussion of homosexuality in public schools.²⁵⁵ More importantly, given the case's influence in denying heightened scrutiny of anti-gay laws,²⁵⁶ the *High Tech Gays* court picked atypical examples to support its sweeping assertions about the political power of gay Americans.²⁵⁷ Noting that the Ninth Circuit had cited "anti-discrimination provisions in three states, an executive order in New York, and a series of local ordinances," a federal judge in Kansas explained that *High Tech Gays* court had presented "an inaccurate, and exaggerated, view of recent state anti-discrimination legislation."²⁵⁸ The Kansas judge noted that the Ninth Circuit's source, a special edition of the *Harvard Law Review*, "conclude[d] that discrimination against homosexuals is pervasive, and recent changes in the law too inadequate to provide adequate protection."²⁵⁹ The Ninth Circuit erred by looking at individual victories to infer a pattern of political power. The court also failed to appreciate that the exception proves the rule: the fact that these successes stand out shows that they are, in fact, exceptional.²⁶⁰

V. MOVING FORWARD

Part IV explained how, in equal protection cases challenging anti-gay laws, a disconnect exists between the source of the anti-gay law and where courts look for evidence to determine

255. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 330–31 (D. Conn. 2012).

256. See *supra* notes 227–34 and accompanying text.

257. See, e.g., *Watkins v. U.S. Army*, 875 F.2d 699, 727 n.30 (9th Cir. 1989) (Norris, J., concurring in the judgment); *BLAG Brief*, *supra* note 236, at 18–19.

258. *Jantz*, 759 F. Supp. at 1549.

259. *Id.* at 1550. This case also illustrates how courts engaging in cherry-picking often overemphasize examples of gay victories while simultaneously disregarding evidence of anti-gay prejudice animating anti-gay laws. For example, after Colorado's vote passed Amendment Two, a federal judge—considering an Equal Protection challenge to the Navy's anti-gay policy—discounted this by asserting that "evidence that one state has enacted legislation preventing homosexuals from participating in its political process is insufficient to support the conclusion that homosexuals generally lack political power as a class." *Dahl v. Sec'y of U.S. Navy*, 830 F. Supp. 1319, 1325 n.9, (E.D. Cal. 1993). It seems incongruent for judges to require gay plaintiffs to show that gays "generally" lack political power but then have judges refute plaintiffs' evidence of political powerlessness with atypical examples.

260. See *Pedersen*, 881 F. Supp. 2d at 330 ("Moreover, an event's newsworthiness could very well indicate that the event is aberrational or exceptional as opposed to an ordinary or commonplace occurrence.").

whether gays have political power. This leads to inaccurate assessments about the political power of gay people targeted by anti-gay laws. This disconnect also means that gay people in gay-hostile states are essentially being penalized for the legislative victories achieved by gays in other states. This Part considers three potential judicial responses to address the geographic problems currently associated with the political power factor.

First, one possible approach is for courts to make geographically tailored findings of political power such that the political power inquiry is tethered to the political unit that enacted the challenged law. One could argue that the test for whether a minority group is politically powerless should focus on whether that group has political power vis-à-vis decision-makers who have enacted the challenged law. If the political power factor is intended to determine whether the political process that created the discriminatory law was a product of prejudice, then it makes sense to examine *that* political process, not others. Thus, in an equal protection challenge to DOMA or DADT, courts would examine whether gays have political power vis-à-vis Congress and the President, not whether gays have political power with respect to the state legislatures in California and Wisconsin.²⁶¹ Similarly, when considering whether gays challenging a discriminatory state law have political power, courts would examine the political status of gays in *that* state, not in other states.²⁶²

Such an approach would increase accuracy, but would create disuniformity. Because gay people have different levels of political power in different states, if courts apply the political power factor in a state-specific manner, then sexual orientation could be a suspect classification in some states but not others. If different levels of scrutiny are applied in different states, this could result in similar laws being valid in some states and unconstitutional in others. For example, Wisconsin was the first state to prohibit discrimination based on sexual orientation in employment, housing, education, and public accommodations. Nevertheless, following positive votes in both houses of the Wisconsin legislature, in 2006 the Wisconsin electorate voted to amend their state constitution to prohibit same-sex marriages.

261. See *Watkins*, 875 F.2d at 727 n.30.

262. See *supra* notes 250–51 and accompanying text.

In Oklahoma, a relatively gay-hostile state,²⁶³ the legislature and voters similarly amended their state constitution in 2004. Suppose gay citizens of each state challenged their state's same-sex marriage ban as violating the 14th Amendment. It is possible that because gay people in Wisconsin could be found to have political power while gay people in Oklahoma could be found not to have such power, the marriage prohibition would receive rational basis review in Wisconsin but be subject to heightened scrutiny in Oklahoma. The same law could survive judicial review in Wisconsin, yet be declared unconstitutional in Oklahoma because of the stricter scrutiny. Such lack of uniformity could prove unpalatable.²⁶⁴

Some judges already appear unlikely to embrace geographically customized findings. For example, in a case challenging D.C.'s ban on same-sex marriage, Judge Ferren explicitly observed that "for purposes of evaluating constitutional norms, the focus on political power, or powerlessness, has to be national, not local, lest constitutional rights vary from city to city."²⁶⁵ While Ferren's observation is not precedential, most judges would probably find it persuasive.

Second, if judges are reticent to increase the accuracy of their political power findings at the expense of uniformity, courts could hold that if a group is politically powerless in any part—or any significant part, however defined—of the country, then that group should be considered politically powerless for the purpose of the suspect classification test's political power factor. This approach ensures uniformity at the expense of complete accuracy, but does so in a manner that favors the targets of discriminatory laws. So long as gays are politically powerless in several states, gays should be considered politically powerless for equal protection purposes, full stop.²⁶⁶ Gay people

263. See, e.g., *Nat'l Gay Task Force v. Bd. of Educ. of Okla. City*, 729 F.2d 1270, 1274 (10th Cir. 1984) (striking down Oklahoma law that punished public school teachers for publicly supporting gay rights), *aff'd*, 470 U.S. 903 (1985).

264. This disuniformity may be permissible for state courts applying equal protection analysis under their state constitutions. See *supra* notes 37–38 and accompanying text. Applying different levels of scrutiny, however, would create serious problems if state courts were holding their state laws were violating the Equal Protection Clause of the U.S. Constitution, as state supreme courts often do. See, e.g., *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (striking down California's miscegenation law as violating the U.S. Constitution).

265. *Dean v. District of Columbia*, 653 A.2d 307, 351 (D.C. 1995) (Ferren, J., dissenting).

266. This approach makes sense in that race-based laws and gender-based

currently satisfy this standard easily: most states do not include sexual orientation in their nondiscrimination laws and many states enact explicitly anti-gay laws.²⁶⁷ Furthermore, gays do not have power at the national level, as shown by Congress's failure to protect gay Americans from discrimination and its frequent efforts to target gays with discriminatory laws such as DOMA and DADT.²⁶⁸ Under this approach, given that gay people can satisfy the other factors of suspect classification and lack political power in many parts of the country, sexual orientation would be considered a suspect classification and anti-gay laws would receive heightened scrutiny everywhere.

Third, to the extent that accuracy and uniformity are inherently in tension, examining the geographic quandaries posed by the political power factor counsels courts to abandon the factor altogether. If using disparate levels of scrutiny across states is deemed impractical or unacceptable but any uniform, national assertions regarding political power would be inaccurate, then this suggests that the political power inquiry itself is ill-conceived and ill-equipped to perform the task of determining which groups warrant heightened scrutiny. The political power factor is largely unnecessary. The key trigger for labeling a classification to be suspect should be that the challenged law is likely the product of prejudice, not sound public policy.²⁶⁹ This is established with the first two factors: that the group has historically been discriminated against and that the characteristic is unrelated to the group members' ability to contribute to society.²⁷⁰ Once these factors are established, the political power

laws receive heightened scrutiny without any individualized findings regarding political power.

267. See *supra* notes 165, 167, and accompanying text.

268. See generally Blank & Rosen-Zvi, *supra* note 151, at 963 (detailing the lack of comprehensive federal protection of gays and lesbians); Powers, *supra* note 100 (explaining that gays and lesbians were not proportionately represented because there were only three openly gay representatives in Congress).

269. See *Plyler v. Doe*, 457 U.S. 202, 216–17 n.14 (1982) (“Several formulations might explain our treatment of certain classifications as ‘suspect.’ Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. . . . Classifications treated as suspect tend to be irrelevant to any proper legislative goal.”).

270. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 426–27 (M.D. Pa. 2014) (noting that these two factors are the “most meaningful”); *De Leon v. Perry*, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014), *aff’d sub nom.* *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (finding compelling the argument that “the history of same-sex marriage bans across the nation illustrates the historical lack of political power possessed by gays and lesbians”). *But see* *Dahl v. Sec’y of U.S.*

inquiry provides little additional insight.²⁷¹ Political powerlessness may correlate with prejudice but is not a prerequisite.²⁷²

Removing any explicit inquiry into a group's political power should not fundamentally change the underlying insights of *Carolene Products* because, in a sense, the political powerlessness element seems self-evident. When gay litigants are in court challenging a law that discriminates against gay people, it is necessarily true that gay citizens did not have sufficient political power either to stop the law from being passed or to ensure its imminent repeal. If gays had political power, they would not need to seek protection from courts against discriminatory laws. Furthermore, the factors of historic discrimination and relevance should sufficiently establish a group's lack of political power. If a law discriminates based on a trait irrelevant to ability, that suggests that improper bias or stereotyping has infected the political process.²⁷³ Similarly, courts should provide greater scrutiny to laws that discriminate against historically discriminated-against groups because we have reason to believe that the political process has failed those groups.

Navy, 830 F. Supp. 1319, 1324 n.7 (E.D. Cal. 1993) ("It is undisputed that homosexuals have historically been discriminated against, but this does not necessarily mean that they therefore lack political power. . . ."); see also *In re Marriage Cases*, 183 P.2d 384, 444 (Cal. 2008) ("Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification."); Hutchinson, *supra* note 64, at 1010 ("Echoing the analysis in *Kerrigan* and *Varnum*, Eskridge also asserts that history of discrimination and relevance of the stigmatized trait are the only essential factors in a determination to apply heightened scrutiny.").

271. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 428 n.21 (Conn. 2008) ("[T]he significance of the [political powerlessness] test pales in comparison to the question[s] of whether . . . the characteristic bears any relationship to the individual's ability to function in society, whether the group has suffered a history of discrimination based on misconceptions of that factor and whether that factor is the product of the group's own volition." (quoting *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 437–38 n.17 (S.D. Ohio 1994))).

272. See Eskridge, *supra* note 73, at 20 ("Political powerlessness may cast light on the perseverance of prejudice and stereotyping that harm the minority, and it may be a prudential consideration in the U.S. Supreme Court's exercise of its power of judicial review when applying the Equal Protection Clause.").

273. See Strauss, *supra* note 48, at 165 ("Since overt evidence of bias is difficult to ascertain, the Court uses relevance as a proxy.").

Many scholars have called on courts to eliminate the political power inquiry for various reasons.²⁷⁴ The inquiry is too easy to manipulate.²⁷⁵ In discussing political power, judges are sometimes results-oriented.²⁷⁶ Professor Evan Gerstmann has argued that “the judicial exercise of ostensibly evaluating whether such groups as the poor, the elderly, and gays and lesbians meet the Court’s criteria for suspect-class status is actually a charade.”²⁷⁷ Politically powerful groups receive heightened scrutiny, in part, because “the Burger Court’s affirmative action jurisprudence reflected a shift from antistatutory to anticlassification.”²⁷⁸ This suggests that the Court cares more about preventing invidious classifications than protecting the politically powerless; yet, the political power factor remains in place, largely to prevent the expansion of heightened scrutiny. Thus, the Supreme Court has not afforded heightened scrutiny to any new group since the 1970s.²⁷⁹ Given that many groups have suffered a history of discrimination for immutable characteristics unrelated to their abilities—like sexual orientation—the political power inquiry has served as a useful tool for denying heightened scrutiny to the victims of targeted discrimination. Professor Hutchinson notes, “Because the Court has usually invoked political process theory to deny judicial solicitude, some scholars have argued that the suspect class doctrine op-

274. See, e.g., Eskridge, *supra* note 73, at 20 (“Consider the nature of constitutional rights, the institutional legitimacy of the judiciary, and the purpose of the Equal Protection Clause. All point in the same direction: political powerlessness should not be a requirement for strict scrutiny.”); see also *Equal Found. of Greater Cincinnati, Inc.*, 860 F. Supp. at 437–38 n.17 (stating that whether a particular group is entitled to recognition as suspect or quasi-suspect class “should not be controlled by . . . a group’s ability to pass or fail [the] . . . political power test. . . . [R]elative political power cannot even be a particularly weighty factor, let alone a controlling one”).

275. See Hutchinson, *supra* note 64, at 1006 (discussing how the Supreme Court “inconsistently applies the political powerlessness factor”).

276. See GERSTMANN, *supra* note 54, at 55 (explaining how the Justices wanted to avoid “creat[ing] any new suspect or quasi-suspect classes”).

277. *Id.* at 56 (“The three-tiered framework was set up to keep new groups out, not to let them in, and the Court has shown no inclination to add new suspect or quasi-suspect classes. This has created an especially difficult situation for gays and lesbians.”).

278. Ross, *supra* note 18, at 1597 (citing Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1292 (2011) and Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9, 10 (2003)).

279. Levy, *supra* note 1, at 53 (“The Court has not recognized any new suspect classifications since the 1970s . . .”).

erates merely as a gatekeeping mechanism, rather than as an honest effort to protect politically powerless classes.”²⁸⁰ In short, the political power inquiry often seems to be pretextual, an afterthought used to deny heightened scrutiny of anti-gay laws.

Ultimately, eliminating the political power factor makes more sense than trying to address the problem of courts looking for political power in the wrong places. Solving the geography problem would not solve the problems with the political power inquiry more broadly, including the fact that courts cannot agree on what constitutes political power and often perform questionable analysis on the issue. For example, the district court in *Dahl v. Secretary of the United States Navy* upheld the military’s anti-gay policy under rational basis review by asserting that gay people were not entitled to heightened scrutiny because “[t]he recent Congressional and executive dialogue concerning homosexuals’ ability to serve in the military demonstrates that, despite their apparent inability to assert direct control over Congress, homosexuals have a significant ability to attract Congress’s attention.”²⁸¹ Congress paid attention to gays solely in order to discriminate against them. The court looked in the right place—Congress—but bungled the analysis. Under the *Dahl* court’s approach, any time that gay people are targeted by anti-gay laws, that law should be reviewed under rational basis precisely because gays attracted the attention of those wishing to do them harm.²⁸²

CONCLUSION

The political power inquiry of equal protection analysis is deeply flawed. It fails to take account of regional variations in political power. Too often, judges cite isolated and irrelevant

280. Hutchinson, *supra* note 64, at 993.

281. 830 F. Supp. 1319, 1324 (E.D. Cal. 1993).

282. In another case challenging the military’s anti-gay policy, *Steffan v. Cheney*, the court correctly looked for evidence of political power at the congressional level but incorrectly found it based on a largely irrelevant anecdote. The court concluded that because thirty-three members of Congress had sent a letter “urging the Secretary of Defense, a defendant in this case, to comply with certain discovery requests. . . . [T]he homosexual community have been able to move well and gain attention in political circles . . . [and, thus, the] plaintiff has not been able to show that he is a member of a suspect class.” *Steffan v. Cheney*, 780 F. Supp. 1, 9 (D.D.C. 1991), *aff’d sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994). The court never explained—because it could not—how having approximately six percent of congressional legislators sign a letter asking for mere cooperation with discovery requests translates into political power over Congress to change the military’s anti-gay policy.

anecdotes in order to make sweeping claims about the nationwide political power of gay Americans. As a result, the politically powerless gay residents of Oklahoma are denied heightened scrutiny of anti-gay laws because legislators in California have seen the wisdom of gay-inclusive nondiscrimination policies. For courts determined to deny heightened scrutiny to gay Americans, the political power inquiry provides an easily manipulated element. Ultimately, this Article provides additional support for eliminating the political power component of the suspect classification test altogether.