

**GAYAFFIRMATIVE ACTION: THE CONSTITUTIONALITY
OF SEXUAL ORIENTATION-BASED AFFIRMATIVE
ACTION POLICIES**

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ABSTRACT

Twenty-five years ago, the U.S. Supreme Court established a consistency principle in its race-based equal protection cases. That principle requires courts to apply the same strict scrutiny to racial classifications designed to benefit racial minorities—such as affirmative action policies—as they do to laws invidiously discriminating against them.

The new consistency principle, under which discrimination against whites is subject to strict scrutiny, conflicted with the Court's established criteria for declaring a group to be a suspect or quasi-suspect class entitled to heightened scrutiny, which focused on such considerations as the history of discrimination against the group and its political powerlessness.

As a result of this tension, the Court's line of precedents for identifying new suspect and quasi-suspect classes has gone dormant, and the Court has not since considered whether any additional such classes exist. Instead, when confronted with plausible candidates for heightened scrutiny, such as gays and lesbians, the Court has engaged in sporadic application of stealth rational basis review.

In this Article, I use a hypothetical equal protection challenge to a sexual orientation-based affirmative action policy as a vehicle for proposing a roadmap for harmonizing these competing lines of precedent. I demonstrate that, in light of the consistency principle, an aggrieved heterosexual can bring a challenge to such a policy and seek heightened equal protection scrutiny even though the Court has yet to establish heightened scrutiny for laws discriminating against gays and lesbians.

I conclude that such a harmonization of the Court's equal protection precedents will reinvigorate the Court's moribund precedents for identifying new suspect and quasi-suspect classes. Moreover, I conclude that announcing heightened scrutiny in such a case would present a

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particularly appealing vehicle to the Court's center, represented by Justice Kennedy, whose jurisprudence demonstrates both support for gay rights and hostility toward affirmative action policies.

INTRODUCTION

For much of American history, knowledge that a current or prospective student or employee was gay, lesbian, bisexual, or transgender was likely to result in the person losing their employment¹ or being expelled from their college or university.² Yet, as developments in both the judicial and legislative spheres have simultaneously resulted in the invalidation of laws criminalizing same-sex sexual activity³ and the validation of same-sex relationships,⁴ many employers and institutions of higher education have stopped treating one's status as a sexual minority as a negative consideration and have instead come to view it as irrelevant to employment and admissions decisions.

Still, what if—just as with racial minorities and women—public universities and employers decided not merely to react to the history of discrimination against sexual minorities by treating such status as irrelevant, but instead treated it as a *positive* consideration in making employment and admissions decisions? In other words, could a public employer or university decide that it would henceforth treat a prospective student's or employee's status as a sexual minority as a “plus” factor, or even establish specific hiring and admissions quotas? To justify doing so, would they have to point to their own specific history of discriminating against sexual minorities, or could they rely instead on general societal discrimination against that group? Could they instead justify such a policy on the grounds that it contributes to the diversity of the workplace or classroom, as a way to increase the provision of services to the LGBT community, or as a means of providing role models for LGBT youth? Moreover, if a heterosexual individual aggrieved by such a policy brought an equal protection⁵ challenge against it, what level of judicial scrutiny

1. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432–33 & n.25 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009).

2. See, e.g., WILLIAM WRIGHT, *HARVARD'S SECRET COURT: THE SAVAGE 1920 PURGE OF CAMPUS HOMOSEXUALS* (2005); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 749–50 (1997).

3. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

4. See PETER NICOLAS & MIKE STRONG, *THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS)* 3–10 (5th ed. 2014).

5. This Article refers to “equal protection” generally as opposed to the Equal Protection Clause of the Fourteenth Amendment to encompass not only the latter—which is applicable only to the

would a court apply to such a claim? Would the policy be subject only to the highly deferential rational basis review, or could the petitioner argue for intermediate, strict, or the “more searching form”⁶ of rational basis review? What impact would the level of scrutiny have on the constitutionality of such a policy?

Although such affirmative action policies are yet to be established—at least as a formal matter—the foundation necessary for developing them in the future is being laid, as public entities begin to collect data on the sexual orientation of prospective applicants. For example, in December 2012, the University of Iowa became the first public university to include questions about their applicants’ sexual orientation and gender identity on their admission applications.⁷ Subsequently, several public law schools began to include such a question on their admission applications.⁸ In addition, in 2013, Scholastica⁹—a website that facilitates the submission of manuscripts to law reviews—created controversy amongst legal academics by asking authors to indicate their sexual orientation and gender identity in their profiles and forwarding that information to law review editors, including those at public universities.¹⁰ This led to claims that law reviews housed at public universities that made selection decisions based

states—but also to the “equal protection” component of the Due Process Clause of the Fifth Amendment, which applies to the federal government and is identical in scope. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 226–27 (1995).

6. *See Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

7. *See University of Iowa Becomes First School to Add Sexual Orientation Question to Application*, FOX NEWS (Dec. 12, 2012), <http://www.foxnews.com/us/2012/12/12/university-iowa-becomes-first-school-to-add-sexual-orientation-question-to/>, archived at <http://perma.cc/8LNW-6VW8>. Although the University of Iowa was the first public university to do so, it was preceded by Elmhurst College, a private college. *See Eric Hoover, Elmhurst College Will Ask Applicants About Sexual Orientation*, CHRONICLE OF HIGHER EDUC. (Aug. 23, 2011), http://chronicle.com/blogs/headcount/elmhurst-college-will-ask-applicants-about-sexual-orientation/28553?sid=at&utm_source=at&utm_medium=en, archived at <http://perma.cc/KKJ2-QMN2>.

8. *See Mary Sette, New Question Considered for LGBT Law Applicants*, GW HATCHET (Feb. 4, 2013), <http://www.gwhatchet.com/2013/02/04/a-new-question-for-lgbt-law-applicants/>, archived at <http://perma.cc/J4LW-YWWS>.

9. For more a more detailed description of Scholastica, browse the website at <https://scholasticahq.com>.

10. *See, e.g., Josh Blackman, Journals on Scholastica “Ask Authors to Submit Demographic Information” for “Diversity Initiatives,” JOSH BLACKMAN’S BLOG* (Feb. 11, 2013), <http://joshblackman.com/blog/2013/02/11/journals-on-scholastica-ask-authors-to-submit-demographic-information-for-diversity-initiatives/>, archived at <http://perma.cc/M5L9-HNT4>; *Scholastica’s Diversity Question*, PRAWFSBLAWG (Feb. 13, 2013), <http://prawfsblawg.blogs.com/prawfsblawg/2013/02/scholasticas-diversity-question.html>, archived at <http://perma.cc/G9EH-62CL>; Dave Hoffman, *Scholastica & Law Review Selection*, CONCURRING OPINIONS (Feb. 13, 2013), <http://www.concurringopinions.com/archives/2013/02/scholastica-law-review-selection.html>, archived at <http://perma.cc/WJT3-GA96>.

on such criteria were open to a constitutional challenge on equal protection grounds.

The constitutionality of affirmative action policies targeted at sexual minorities—herein dubbed “gayaffirmative action”—stands at the intersection of three distinct lines of equal protection precedents. The first, culminating in the Court’s 2013 opinion *Fisher v. University of Texas at Austin*¹¹ and hereinafter referred to as the *Adarand*¹² line of precedent, has made it increasingly more difficult for public entities to implement affirmative action policies targeted at racial minorities. It has done so by applying a principle of “consistency” that requires such policies to be subject to the same “strict scrutiny” that the Court applies to state action discriminating against racial minorities.¹³ As a result, the Court has held that justifications for race-based affirmative action policies, such as creating role models for minority children,¹⁴ increasing the provision of services to minority communities,¹⁵ and as a remedy for general past societal discrimination, are constitutionally insufficient.¹⁶ Instead, only a handful of rationales that the Court has deemed to be “compelling”—such as the interests in remedying the government entity’s *own* past discrimination against that group (as contrasted with general past societal discrimination)¹⁷ and the interest in creating a diverse student body¹⁸—are constitutionally sufficient to justify such policies. Moreover, applying strict scrutiny, the Court has held that even when invoking this narrow set of constitutionally sufficient justifications for such policies, the means of accomplishing those rationales must be very finely tuned and individualized and thus cannot be accomplished through such means as setting quotas.¹⁹

11. 133 S. Ct. 2411 (2013).

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

13. *See id.* at 224, 227, 229–30.

14. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497–98 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986) (plurality opinion).

15. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310–11 (1978) (Powell, J.). The opinion is somewhat unclear on whether the Court did not find this interest to be sufficiently compelling, or if instead the policy was not sufficiently narrowly tailored to achieving that goal, or both.

16. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731–32 (2007) (plurality opinion); *Croson*, 488 U.S. at 496–97; *Wygant*, 476 U.S. at 274.

17. *See supra* note 16.

18. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

19. *See Fisher*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 334.

The second line of equal protection precedent, culminating in the Court's 2013 opinion in *United States v. Windsor*²⁰ and hereinafter referred to as the *Moreno*²¹ line of precedent, has made it increasingly difficult for governmental entities to discriminate *against* sexual minorities by declaring unconstitutional laws that discriminate on that basis.²² In this line of cases, the Court has side-stepped the question whether laws discriminating on the basis of sexual orientation should be subject to heightened judicial scrutiny. Rather, in each of the cases in this line of precedents, the Court invoked its earlier holding in *United States Department of Agriculture v. Moreno*²³ that “a bare . . . desire to harm a politically unpopular group” is not a legitimate governmental interest even under rational basis review.²⁴

The third line of equal protection precedent—which has sat dormant since the Court announced its principle of “consistency” and hereinafter referred to as the *Frontiero*²⁵ line of precedent—sets forth the criteria for deciding whether or not to accord heightened scrutiny to a given classification when challenged on equal protection grounds. Because this line of precedent predates the “consistency” line of precedent, many of the factors focus on the specific *class* against whom state action is directed (such as African Americans or women) rather than the *classification* employed (such as race or sex). Included among the factors are (1) whether the group against whom the classification is directed has suffered from a history of discrimination; (2) whether the group is politically powerless; (3) whether the characteristic at issue is obvious or visible; (4) whether the characteristic at issue bears any relationship to ability to perform or contribute to society; and (5) whether the characteristic at issue is immutable.²⁶

20. 133 S. Ct. 2675 (2013).

21. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

22. See *Windsor*, 133 S. Ct. at 2675 (declaring federal Defense of Marriage Act unconstitutional, applying equal protection component of Fifth Amendment's Due Process Clause); *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003) (declaring state sodomy laws violate Fourteenth Amendment's Due Process Clause, but acknowledging Equal Protection Clause as a conceivable alternative basis for doing so); *id.* at 579 (O'Connor, J., concurring) (applying Equal Protection Clause); *Romer v. Evans*, 517 U.S. 620 (1996) (declaring Colorado's Amendment 2 unconstitutional under the Equal Protection Clause).

23. 413 U.S. at 534–35.

24. *Id.* See *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring); *Romer*, 517 U.S. at 634–35.

25. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

26. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000); *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *City of Cleburne v. Cleburne Living Ctr.*,

A gayaffirmative action policy that fell short of the standards imposed by the Court for race-based affirmative action policies would effect a merger of these three lines of equal protection cases and would require the Court to resolve a number of difficult questions that have been percolating in the background of equal protection jurisprudence ever since the Court switched its focus—at least so far as race and sex are concerned—from suspect classes to suspect classifications.

Consider, for example, a public medical school that establishes an affirmative action policy designed to increase the number of gay and transgender medical students, and, ultimately, doctors. Suppose that the school cites two rationales for the policy: a desire to provide LGBT youth with positive role models, and a desire to increase the provision of medical services to members of the LGBT community, which the school believes have special medical needs that are often overlooked by heterosexual doctors. Moreover, suppose that, instead of merely considering it a “plus” factor in making admissions decisions, the school dedicates five percent of the seats in its class to sexual minorities, estimating that to be their percentage of the general population.

While such a policy, if race-based, would clearly not pass constitutional muster if challenged by an aggrieved white individual, the constitutionality of such a policy, when challenged by a heterosexual similarly aggrieved by it, turns on the answers to a number of important questions, nearly all of which remain open. If such a law is subject merely to rational basis review, would it pass constitutional muster? Will the Court eventually apply the *Frontiero* line of precedent to hold that laws discriminating *against* sexual minorities are subject to intermediate or strict scrutiny? If so, will the *Adarand* line of precedent compel the Court to hold that laws discriminating against heterosexuals are similarly subject to that heightened level of judicial scrutiny? If heightened scrutiny is not established for laws that discriminate against sexual minorities at the time an aggrieved heterosexual brings suit, could he simultaneously invoke the criteria for applying heightened scrutiny to laws that discriminate against sexual minorities set forth in the *Frontiero* line of precedent, coupled with the “consistency” principle set forth in the *Adarand* line of precedent, to justify the application of intermediate or strict scrutiny to the law? To the extent that there was evidence that the policy was motivated by “animus” against heterosexuals, could the aggrieved plaintiff seek to have the Court

Inc., 473 U.S. 432, 442–46 (1985); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976); *Frontiero*, 411 U.S. at 684–88; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

apply the “more searching form” of rational basis review set forth in the *Moreno* line of precedent, in reliance on the ground that heterosexuals are a “politically unpopular group?” Finally, if the state in which the medical school is located has established precedent subjecting laws discriminating against sexual minorities to a higher level of scrutiny as a matter of state constitutional law than that applicable under federal equal protection jurisprudence, and the plaintiff invokes that state constitutional provision, would the state be compelled as a matter of federal equal protection jurisprudence to apply the principle of “consistency” and extend heightened scrutiny to laws discriminating against heterosexuals?

This Article proceeds in five parts. Part I provides a brief overview of equal protection jurisprudence in general and traces the development of the *Frontiero*, *Adarand*, and *Moreno* lines of precedent. Part II of this Article demonstrates that—in the absence of heightened equal protection scrutiny for sexual orientation classifications—a quota-based gayfirmative action policy justified by such goals as creating role models for LGBT youth and providing services to the LGBT community would easily pass constitutional muster under traditional rational basis review. Part III independently examines the *Frontiero* and *Adarand* lines of precedent to demonstrate that laws discriminating *against* sexual minorities should eventually be deemed by the Court to be subject to intermediate or strict scrutiny and that the “consistency” principle likely will require that same level of scrutiny to be applied to laws discriminating against heterosexuals. Part IV of this Article addresses the question whether a heterosexual individual aggrieved by such an affirmative action policy can argue for heightened scrutiny—even in the absence of precedent establishing intermediate or strict scrutiny for laws discriminating against sexual minorities—either by invoking the *Frontiero* and *Adarand* lines of precedent in tandem or invoking the *Moreno* line of precedent. Part V of this Article addresses the question whether a state with established precedent subjecting laws discriminating against sexual minorities to a higher level of scrutiny as a matter of state constitutional law than that applicable under federal equal protection jurisprudence would be compelled as a matter of federal equal protection jurisprudence to apply the principle of “consistency” and extend heightened scrutiny to laws discriminating against heterosexuals.

This Article proposes that these three lines of equal protection precedent can best be harmonized by formally recognizing two separate methods of obtaining heightened equal protection scrutiny that are an outgrowth of the factors identified in the *Frontiero* line of precedent. Under this approach, the political powerlessness factor stands on its own

as a basis for obtaining a “more searching form” of rational basis review for laws targeting a politically unpopular group. This is represented by the *Moreno* line of precedent and is focused exclusively on the relative political power of the class impacted by any given law, making it a “one way” form of review that can only be invoked by situation-specific powerless classes of persons who are the targets of legislative animus. The remaining factors, coupled with the *Adarand* line of precedent, can be abstracted in a way that is focused on the nature of the classification employed rather than the specific class impacted by any given law, making the intermediate or strict scrutiny that follows from application of those precedents something that can be invoked, in the first instance, not only by classes of persons that are relatively politically powerless, but rather by anyone who is classified using suspect or quasi-suspect criteria.

This Article concludes that announcing heightened scrutiny in such a case—which under the consistency principle would benefit gays and lesbians in battles over marriage equality, parenting rights, and the like—would present a particularly appealing vehicle to the Court’s center, represented by Justice Kennedy, whose jurisprudence to date simultaneously demonstrates support for gay rights and hostility toward affirmative action policies.

I. BACKGROUND

A. *Overview of Equal Protection Jurisprudence*

Modern-day equal protection jurisprudence is characterized by tiered levels of scrutiny, whereby the level of scrutiny varies depending upon the classification involved or the right affected. The tiered approach was described by the Court in its 1988 decision *Clark v. Jeter*²⁷ as follows:

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, . . . we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate

27. 486 U.S. 456 (1988).

scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.²⁸

Under the tiered approach, the higher the level of scrutiny, the greater the judicial scrutiny of both the legislative end sought to be accomplished by the law and the means for achieving that end. At the lowest level of review—rational basis—the end need only be legitimate (and need not even be the real rationale for the law, but merely a hypothesized one), and the means employed to achieve that end need only be “rationally related” to achieving it, allowing for substantial over- and under-inclusiveness.²⁹ At the opposite extreme—strict scrutiny—the end must be compelling and the means employed to achieve that end “narrowly tailored” so as to eliminate over- or under-inclusiveness.³⁰ Between the two is intermediate scrutiny, which requires an “important” government interest and a means that is “substantially related” to achieving that end.³¹

Much of the complexity of modern-day equal protection jurisprudence can be traced to two competing forces that have shaped it: a general desire on the part of the Supreme Court to distance itself from the *Lochner*³² era—a period in which the Court was subject to heavy criticism for interfering with and second-guessing the legislative process through an aggressive interpretation of its powers under the Due Process Clauses—coupled with a desire to maintain a safety valve that allows the Court to step in and strike legislation down that targets a vulnerable group.

The roots of these two competing forces appear in the Court’s 1938 post-*Lochner* decision in *United States v. Carolene Products Co.*,³³ where the Court—after rejecting a substantive due process challenge to a federal statute—describes the similarly deferential “rational basis” standard applicable to equal protection challenges:

The . . . equal protection clause . . . does not compel . . . Legislatures to prohibit all like evils, or none. A Legislature may hit at an abuse which it has found, even though it has failed to strike at another.

. . . .

28. *Id.* at 461 (citations omitted).

29. *See* *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–16 (1993); *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

30. *See* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

31. *See* *Clark*, 486 U.S. at 461.

32. *See* *Lochner v. New York*, 198 U.S. 45 (1905).

33. 304 U.S. 144 (1938).

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.³⁴

The Court subsequently reiterated the deferential nature of its default level of equal protection scrutiny in *Williamson v. Lee Optical, Inc.*:³⁵

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.³⁶

Yet, in what has been termed “the most celebrated footnote in constitutional law,”³⁷ the *Carolene Products* Court set forth an important caveat:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: 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

34. *Id.* at 151–52.

35. 348 U.S. 483 (1955).

36. *Id.* at 489 (citations omitted).

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

relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.³⁸

But how has the Court come to decide that certain classifications are subject to intermediate or strict scrutiny, while others are entitled merely to rational basis review? Moreover, how is it that a caveat in *Carolene Products* referring to the possibility of heightened scrutiny for discrimination against “discrete and insular *minorities*” has come to result in the application of heightened judicial scrutiny for discrimination against whites? Finally, if heightened scrutiny is inapplicable, does rational basis review ever result in the invalidation of legislation, and if so, when? The answers to these questions are provided, respectively, by the *Frontiero*, *Adarand*, and *Moreno* lines of equal protection precedent.

B. Development of the Frontiero, Adarand, and Moreno Lines of Precedent

1. Factors Required to Accord Heightened Scrutiny: The Frontiero Line of Precedent

The roots of what today is referred to as strict scrutiny grew out of dictum in a pair of cases decided by the U.S. Supreme Court during World War II involving a curfew for and the internment of persons of Japanese ancestry. Although the measures were upheld by the Court, the decisions used language suggesting that equal protection claims involving race would be subject to more rigorous scrutiny than run-of-the-mill equal protection claims. The Court wrote that “racial discriminations are in most circumstances irrelevant and therefore prohibited,”³⁹ and that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and thus that “courts must subject them to the most rigid scrutiny.”⁴⁰

Yet, it was not until the 1960s that this promising dictum bore fruit, with the Court citing it in both its 1964 decision *McLaughlin v. Florida*,⁴¹ declaring unconstitutional a law prohibiting interracial cohabitation, and its 1967 decision *Loving v. Virginia*,⁴² declaring unconstitutional a law prohibiting interracial marriage. In *McLaughlin*, the Court began to sketch

38. *Carolene Products*, 304 U.S. at 152 n.4 (citations omitted).

39. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

40. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

41. 379 U.S. 184, 192 (1964).

42. 388 U.S. 1, 11 (1967).

out the heightened level of review the Court would employ for racial classifications, specifically distinguishing *Lee Optical* and holding that a racial classification “will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy,”⁴³ a standard that the Court reiterated in *Loving*.⁴⁴ The Court would for some time vacillate in the language it used to describe the strength of the state interest—a vacillation to which it attributed no importance⁴⁵—and would ultimately rephrase the standard as one requiring that it be narrowly tailored to further a compelling governmental interest.⁴⁶

With cases such as *McLaughlin* and *Loving* making clear that strict scrutiny could result in the invalidation of laws challenged on equal protection grounds, litigants began to contend that strict scrutiny should be available to challenge laws targeting other disadvantaged groups, such as aliens, the poor, women, the elderly, the mentally retarded, and children born out of wedlock. In a series of cases decided in the 1970s and the 1980s, the Court accepted the claims of some of these groups and rejected others. In so doing, the Court set forth a series of factors designed to distinguish those classifications that, like race or national origin, merited heightened equal protection scrutiny.

The Court first considered expanding the number of groups entitled to strict scrutiny in its 1971 decision *Graham v. Richardson*,⁴⁷ where it addressed the question whether laws discriminating against aliens were subject to strict scrutiny. The Court—with little analysis—concluded that they were, quoting from the caveat contained in *Carolene Products*’ famous footnote and concluding that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”⁴⁸

Two years later, in *San Antonio Independent School District v. Rodriguez*,⁴⁹ the Court rejected an argument that a law discriminating against the poor was subject to heightened scrutiny. Without citation to any cases, the Court concluded that the poor, which it described as a “large, diverse, and amorphous class,” has “none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a

43. *McLaughlin*, 379 U.S. at 194, 196.

44. *See Loving*, 388 U.S. at 11.

45. *See In re Griffiths*, 413 U.S. 717, 722 n.9 (1973).

46. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

47. 403 U.S. 365 (1971).

48. *Id.* at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

49. 411 U.S. 1 (1973).

position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁵⁰

Rodriguez thus appeared to identify two considerations—a group’s history of discrimination and its lack of political power—as relevant in determining whether or not to apply heightened scrutiny to laws discriminating against that group.

Less than two months later, a plurality of the Court—in *Frontiero v. Richardson*⁵¹—concluded that strict scrutiny was required for laws that discriminate against women. The Court identified six considerations that it believed, like race and national origin, made strict scrutiny appropriate. First, it noted the history of discrimination against women was comparable to that of African Americans.⁵² Second, it noted the “high visibility” of a person’s sex.⁵³ Third, while acknowledging that women as a group were not “a small and powerless minority,” it nonetheless took note of their relative lack of political power.⁵⁴ Fourth, it noted that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”⁵⁵ Fifth, it differentiated sex from non-suspect statuses—such as intelligence or physical ability—on the ground that it “frequently bears no relation to ability to perform or contribute to society.”⁵⁶ Finally, it took note of the fact that Congress had enacted legislation designed to combat sex discrimination, and held that the fact that a coequal branch of government has concluded that sex discrimination is invidious is a relevant consideration in deciding whether to accord a class heightened scrutiny.⁵⁷ Although only a plurality opinion and thus arguably offering limited precedential value,⁵⁸ nearly all of the factors have been reaffirmed in some fashion in subsequent Court decisions.

Three years later, in 1976, the Court issued a pair of decisions rejecting arguments that discrimination on the basis of age or illegitimacy should be subject to strict scrutiny. The Court—citing *Rodriguez*—concluded in *Massachusetts Board of Retirement v. Murgia*⁵⁹ that, unlike those discriminated against on the basis of race or national origin, the elderly

50. *Id.* at 28.

51. 411 U.S. 677 (1973).

52. *Id.* at 684–85.

53. *Id.* at 686.

54. *Id.* at 686 & n.17.

55. *Id.*

56. *Id.*

57. *Id.* at 687–88.

58. See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1010–11 (D. Nev. 2012).

59. 427 U.S. 307 (1976) (per curiam).

have not experienced “a history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”⁶⁰ Furthermore, citing *Carolene Products*, the Court noted that “old age does not define a ‘discrete and insular’ group” because it “marks a stage that each of us will reach if we live out our normal span.”⁶¹ The *Murgia* Court seemed to reinforce three of the *Frontiero* factors: the absence of a history of discrimination, the fact that old age is related to ability to perform or contribute to society, and the fact that age is mutable and thus old age is a classification that nearly all persons will eventually experience.

With respect to illegitimacy, the Court acknowledged in *Mathews v. Lucas*⁶² that the status was in some ways analogous to race and national origin; it is “not within the control of the illegitimate individual”—thus making it *effectively* immutable—and that status “bears no relation to the individual’s ability to participate in and contribute to society.”⁶³ But it contrasted illegitimacy with race and sex—the latter of which the Court assumed to be subject to strict scrutiny based on the plurality opinion in *Frontiero*⁶⁴—on the ground that it “does not carry an obvious badge,” and as a result of that invisibility, the illegitimate did not experience the “pervasive[] . . . historic[al] legal and political discrimination” experienced by women and African Americans.⁶⁵ Yet, despite the Court’s unwillingness to declare illegitimacy a suspect class, it nonetheless did—in cases decided both prior and subsequent to *Mathews*—declare unconstitutional on equal protection grounds laws that discriminated on the basis of illegitimacy. The Court, while not specifying the level of scrutiny it was applying, focused on the unjustness of laws that target a status over which the illegitimate child lacks control, thus focusing on effective immutability.⁶⁶ Moreover, the *Mathews* Court acknowledged that the standard to be applied in evaluating such laws was “not a toothless one,”⁶⁷ and in subsequent cases, the Court acknowledged that laws

60. *Id.* at 313 (quoting *Rodriguez*, 411 U.S. at 28).

61. *Id.* at 313–14.

62. 427 U.S. 495 (1976).

63. *Id.* at 505.

64. *See id.* at 506.

65. *Id.* at 506.

66. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 769–70 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972).

67. *Mathews*, 427 U.S. at 510.

discriminating on the basis of illegitimacy were entitled to “somewhat heightened review.”⁶⁸

In the final days of 1976, the Court in *Craig v. Boren*⁶⁹ once again revisited the question regarding equal protection scrutiny for laws that discriminate on the basis of sex. In the intervening years since *Frontiero*, the Court had decided several other equal protection challenges based on sex, but had disposed of them without definitively resolving the standard of review.⁷⁰ Moreover, *Craig* differed from *Frontiero*: the discrimination complained about in *Craig* directly targeted men, not women. The Court for the first time announced what has since come to be known as intermediate scrutiny. Without citation to any particular cases (leading to a charge by Justice Rehnquist in dissent that the test had been created out of “thin air”),⁷¹ the Court wrote that “previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁷² The Court did not discuss or revisit the factors it had identified in *Frontiero* and built upon in subsequent cases, nor how those factors would impact the determination whether to accord a group intermediate or strict scrutiny.

Six years passed before the Court gave serious consideration to a claim that a group should be accorded heightened equal protection scrutiny. In 1982, in *Plyler v. Doe*,⁷³ the Court rejected the idea that laws discriminating against *illegal* aliens in general were subject to heightened scrutiny, noting that the status was the product of “voluntary action” in illegally entering the country and thus could not be said to be immutable.⁷⁴ However, with respect to laws discriminating against the *children* of illegal aliens—at least those involving education—the Court viewed their status, like that of illegitimate children, as effectively immutable, and appeared to apply something akin to intermediate scrutiny.⁷⁵

The Court last engaged in an in-depth application of the factors for determining whether a given classification was entitled to heightened equal protection scrutiny in 1985 with *City of Cleburne v. Cleburne Living*

68. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

69. 429 U.S. 190 (1976).

70. See *id.* at 198 (collecting cases).

71. *Id.* at 220 (Rehnquist, J., dissenting).

72. *Id.* at 197.

73. 457 U.S. 202 (1982).

74. *Id.* at 219 n.19.

75. *Id.* at 218–30.

Center Inc.,⁷⁶ which addressed whether discrimination against the mentally retarded should be subject to intermediate scrutiny. In deciding that it should not be, the Court addressed and refined many of the factors set forth in its earlier cases.⁷⁷ The Court first acknowledged that mental retardation is an immutable characteristic, but that—unlike race or sex—it *does* relate to their ability to perform.⁷⁸ Next, the Court noted the great deal of federal and state legislation enacted to protect the mentally retarded, which the Court viewed as a sign that the mentally retarded are not politically powerless.⁷⁹ As such, the *Cleburne* Court effectively nullified the sixth *Frontiero* factor, which viewed the enactment of anti-discrimination legislation by a coequal branch as further evidence of a group's suspect nature.⁸⁰ The Court went on to refine what it means to be "politically powerless," indicating that it does not mean "powerless to assert direct control over the legislature," but instead that the group has "no ability to attract the attention of the lawmakers."⁸¹ Finally, the Court relied on a consideration first noted by the *Rodriguez* Court: the fact that the group was "large and amorphous" militated against according them heightened scrutiny.⁸²

The following year, in *Lyng v. Castillo*,⁸³ the Court gave short shrift to a claim that discrimination against "close relatives" should be subject to heightened scrutiny. While short on analysis, the opinion is salient because it reorganized the factors in a way that presented some of them in the disjunctive. The *Lyng* Court thus identified the three relevant inquiries as (1) whether the group has suffered a history of discrimination; (2) whether the group exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (3) whether they are either a minority or politically powerless.⁸⁴

The Court's 1988 decision in *Clark v. Jeter*⁸⁵—involving discrimination on the basis of legitimacy—marked the last time that the Court formally announced a heightened level of scrutiny under the equal protection clause for a previously unrecognized group. As with *Craig*,

76. 473 U.S. 432 (1985).

77. *See id.*

78. *See id.* at 442–43.

79. *See id.* at 443–45.

80. *See Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973).

81. *Cleburne*, 473 U.S. at 445 (emphasis added).

82. *See id.* at 445–46.

83. 477 U.S. 635, 641 (1986).

84. *Id.* at 638. *Accord Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987).

85. 486 U.S. 456 (1988).

however, the Court did not engage in any sort of analysis of the factors identified in its earlier cases, but simply characterized its earlier decisions as standing for the proposition that intermediate scrutiny was the appropriate standard.⁸⁶

Since its decision in *Lyng*, the Court has rarely mentioned the relevant factors for accordng a group heightened scrutiny, and when it has done so, they have only been mentioned in passing,⁸⁷ as the Court in a majority opinion has not in any subsequent case analyzed a claim for heightened class-based equal protection scrutiny.⁸⁸ As will be shown in the section that follows, this silence on the Court's part starting in the late 1980s can be directly tied to the rise of the "consistency" line of precedent that took root at the same time.

2. *The Rise of the Consistency Requirement: The Adarand Line of Precedent*

In terms, the Equal Protection Clause appears to be neutral and of broad application, providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸⁹ However, the Clause itself was part of a series of amendments to the U.S. Constitution enacted with the specific purpose of protecting the recently emancipated slaves, and in the first decision interpreting it, the Court in 1873 suggested that it not only was limited to claims of racial discrimination, but further that it operated in a one-way fashion so as to protect only African Americans:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.⁹⁰

86. *See id.* at 461.

87. *See Vieth v. Jubelirer*, 541 U.S. 267, 293–94 (2004); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000); *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

88. Justice Scalia mentioned the factors in a 1996 dissent in which he suggested that sex should be downgraded to rational basis review on the theory that women—who constitute a majority of the electorate—cannot reasonably be described as a discrete and insular minority unable to employ the political process. *See United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting).

89. *See* U.S. CONST. amend. XIV, § 1.

90. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

With regard to the first suggested limitation, history would show, as Justice Rehnquist would later note, that the “Court has proved Mr. Justice Miller a bad prophet with respect to nonracial classification.”⁹¹ With regard to the second suggested limitation, seven years later, in *Strauder v. West Virginia*,⁹² the Court, in declaring unconstitutional on equal protection grounds a statute excluding African Americans from grand and petit juries, indicated—albeit in dicta—that the Clause would *not* necessarily operate in a one-way fashion, *at least if whites were in the minority* in a given jurisdiction:

If in those States *where the colored people constitute a majority of the entire population* a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.⁹³

Of course, this question was for most of U.S. history a theoretical one, since every law the Court confronted until the 1970s involved discrimination *against* African Americans.⁹⁴ But in 1978, the Court for the first time confronted the question whether a race-based affirmative action policy benefiting racial minorities was to be subjected to the same strict scrutiny applied to laws that invidiously discriminated against them. The Court, in *Regents of University of California v. Bakke*,⁹⁵ declared unlawful a medical school’s affirmative action policy under which sixteen of one hundred seats were reserved for racial minorities. The Court could not agree on a rationale, but the opinion penned by Justice Powell—announcing the judgment of the Court—declared that such classifications should be subject to strict scrutiny, reasoning that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”⁹⁶ Justice

91. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 178 (1972) (Rehnquist, J., dissenting).

92. 100 U.S. 303 (1880).

93. *Id.* at 308 (emphasis added).

94. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–18 (1995).

95. 438 U.S. 265 (1978).

96. *Id.* at 289–90.

Powell's opinion in *Bakke* was thus the first opinion in which the concept of "consistency" had been suggested outside of dictum.

In *Bakke*, four Justices avoided the equal protection issue altogether, deciding the case on statutory grounds,⁹⁷ while the remaining four Justices indicated that the application of strict scrutiny to a law discriminating against whites was inconsistent with the factors for according heightened scrutiny set forth in its earlier cases. These same four Justices noted that whites as a class are "not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁹⁸ Justice Powell acknowledged that many of the Court's decisions had considered factors such as "discreteness and insularity," but concluded that these considerations were relevant to deciding "whether or not to add *new* types of classifications to the list of 'suspect' categories."⁹⁹ In Justice Powell's view, racial and ethnic classifications were *sui generis*, and thus subject to strict scrutiny "without regard to these additional characteristics."¹⁰⁰

It was not until 1989 in *City of Richmond v. J.A. Croson Co.*¹⁰¹ that five Justices signed onto opinions declaring that race-based affirmative action policies benefiting racial minorities were to be subjected to the same strict scrutiny applied to laws that invidiously discriminated against them, and not until 1995 in *Adarand Constructors, Inc. v. Peña*¹⁰² that the Court made clear that this standard applied not only to equal protection claims brought against the states, but also those brought against the federal government. Yet, in the intervening years, there were a number of developments in equal protection jurisprudence outside of race that foreshadowed the application of strict scrutiny to all race-based affirmative action policies.

First, as indicated above, in 1976, the Court announced for the first time in *Craig v. Boren*,¹⁰³ that laws discriminating on the basis of sex were to be subject to intermediate scrutiny. However, *Craig* was a case in which *men*, not women, were bringing the constitutional challenge on the ground

97. *Id.* at 408–11 (Stevens, Stewart, Rehnquist, J.J., and Burger, C.J., concurring in part and dissenting in part).

98. *Id.* at 357 (Brennan, White, Marshall, and Blackman, J.J., concurring in part and dissenting in part) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

99. *Id.* at 290 (emphasis added).

100. *Id.*

101. 488 U.S. 469 (1989).

102. 515 U.S. 200 (1995).

103. 429 U.S. 190 (1976).

that the law disadvantaged men. Accordingly, in *Craig*, the Court in effect adopted the principle of consistency *sub silentio*, at least so far as sex was concerned. Writing in dissent, Justice Rehnquist noted the inconsistency between the Court's rationale for applying heightened scrutiny to laws disfavoring women in *Frontiero* and its decision to accord heightened scrutiny to laws disfavoring men:

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in *Frontiero* to support its invocation of strict scrutiny. There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.¹⁰⁴

In *Mississippi University for Women v. Hogan*,¹⁰⁵ a post-*Craig*, pre-*Croson* decision, the Court reaffirmed the consistency principle (without so labeling it), emphasizing that the fact that a law "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review."¹⁰⁶ In turn, a plurality of the Court in a pre-*Croson* case cited *Hogan* in a race-based affirmative action case for the general proposition that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."¹⁰⁷

The second intervening development occurred in 1985, when the Court issued its decision in *City of Cleburne v. Cleburne Living Center, Inc.*¹⁰⁸ In addition to its application of the *Frontiero* and other factors from its prior cases, the Court also indicated another reason for declining to subject laws discriminating against the mentally retarded to intermediate scrutiny:

It may be . . . that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. . . . Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to

104. *Id.* at 219 (Rehnquist, J., dissenting).

105. 458 U.S. 718 (1982).

106. *Id.* at 723.

107. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986).

108. 473 U.S. 432 (1985).

justify its efforts in these terms may lead it to refrain from acting at all.¹⁰⁹

Thus, the *Cleburne* Court seemed to take as given a general underlying consistency principle that would require laws designed to benefit the mentally retarded to be subjected to the same heightened scrutiny that they were seeking in *Cleburne* to have applied to laws discriminating against them.

Given the opinion of Justice Powell in *Bakke* and the assumption of consistency underlying some of the Court's non-race equal protection cases, the Court's 1989 decision in *Croson* requiring the application of strict scrutiny to state affirmative action policies benefiting racial minorities¹¹⁰ is perhaps somewhat less shocking than it first appears. Nonetheless, like Justice Rehnquist in *Craig*, Justice Marshall, dissenting in *Croson*, noted how the decision was at odds with the Court's decisions setting forth the factors for deciding whether or not to accord heightened scrutiny to a class.¹¹¹ It is thus not surprising that the *Frontiero* line of cases went dormant around this same time, since the two lines of precedent are—at least as presently configured—difficult to reconcile.

Still, it was possible even after *Croson* for the Court to limit the scope of its consistency principle in two distinct ways. First, *Croson* involved an equal protection clause challenge against a *state*. Because the Equal Protection Clause of the Fourteenth Amendment does not apply against the federal government, litigants must instead invoke the “equal protection” principle that the Court has found embodied within the Due Process Clause of the Fifth Amendment.¹¹² Because the sources of protection differ, it remained possible to subject them to different standards. Second, the facts of *Croson* itself were akin to the hypothetical jurisdiction described by the Court over 100 years earlier in *Strauder*:

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central

109. *Id.* at 444.

110. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring).

111. *See id.* at 553–54 (Marshall, J., dissenting). Ironically, Justice Rehnquist quietly joined the majority opinion.

112. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

arguments for applying a less exacting standard to “benign” racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. . . .

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.¹¹³

Given this unusual factual scenario, it was thus possible in future cases to limit *Croson* to the situation in which a racial classification is made *and* the race negatively impacted by the classification is in the minority in the particular jurisdiction in which it is implemented.

The Court briefly flirted with the first distinction, holding just one year later in *Metro Broadcasting, Inc. v. FCC*¹¹⁴ that benign racial classifications imposed by the federal government were subject only to intermediate scrutiny.¹¹⁵ But just five years later, the Court in *Adarand* overturned *Metro Broadcasting*, emphasizing not only the newly coined principle of “consistency”—that the “standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification”¹¹⁶—but also the newly coined principle of “congruence”—that “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”¹¹⁷ Moreover, unlike *Croson*, the affirmative action policy at issue was federal, and thus enacted in a jurisdiction in which African Americans and the other groups benefiting from the policy were squarely in the minority. Thus, by 1995, the consistency principle was firmly rooted in equal protection jurisprudence, at least with respect to sex and race discrimination.

113. *Croson*, 488 U.S. at 495–96.

114. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

115. *See id.* at 564–65.

116. *Adarand*, 515 U.S. at 222 (quoting *Croson*, 488 U.S. at 494).

117. *Id.* at 224 (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

3. Rational Basis “Plus” Review: The *Moreno* Line of Precedent

In 1973—the same year that the Court issued its decision in *Frontiero* setting forth the factors for determining when to apply heightened equal protection scrutiny, the Court in *U.S. Department of Agriculture v. Moreno*¹¹⁸ also considered an equal protection challenge to the constitutionality of an amendment to a federal statute, the Food Stamp Act, which rendered ineligible to participate in the program any household containing an individual who is unrelated to any other member of the household. On its face, the Act created two rather neutral-looking classes of persons, those living in “households all of whose members are related to one another,” and those living “in households containing one or more members who are unrelated to the rest.”¹¹⁹ Yet, the Court noted, lurking in the background of the Act was an effort to target a particular group, specifically, “hippies” and “hippie communes.”¹²⁰

It would have been quite a stretch for the *Moreno* Court to apply the *Frontiero* factors and conclude that hippies were a suspect class. The Court did not attempt to do so, nor did it purport to be applying anything more than rational basis scrutiny.¹²¹ Yet, after reciting the evidence that the purpose of the amendment was to target hippies and hippie communes, the Court wrote:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that *a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.*¹²²

The Court then proceeded to declare the law unconstitutional,¹²³ applying what can perhaps be referred to as an aggressive or heightened form of rational basis review. Indeed, even the concurring opinion—which agreed with the result in the case—acknowledged that the law would pass traditional rational basis review.¹²⁴

118. 413 U.S. 528 (1973).

119. *Id.* at 529.

120. *Id.* at 534.

121. *See id.* at 533–34.

122. *Id.* at 534 (emphasis added).

123. *Id.* at 538.

124. *See id.* at 542–44 (Douglas, J., concurring).

To be sure, *Moreno* did not mark the first instance in which the Court purported to apply rational basis review to an equal protection claim but in truth applied something more substantial. In the two years immediately preceding *Moreno*, the Court issued a pair of decisions, *Reed v. Reed*¹²⁵ and *Weber v. Aetna Casualty & Insurance Co.*,¹²⁶ which declared unconstitutional laws discriminating, respectively, on the basis of sex and legitimacy. In each case, the Court purported to apply only rational basis review¹²⁷—which virtually always results in upholding the validity of the law under the deferential standard articulated in cases such as *Carolene Products* and *Lee Optical*—yet nonetheless declared the laws to violate the equal protection clause. In fact, *Weber* was itself preceded three years earlier by *Levy v. Louisiana*,¹²⁸ in which the Court did much the same thing with respect to illegitimacy discrimination. One might thus contend that this marked an era in which the Court more generally sought to transform rational basis review into something more substantial and less deferential than the test articulated in *Carolene Products* and *Lee Optical*.

Yet, as I have remarked elsewhere,¹²⁹ what distinguishes the heightened rational basis review in cases such as *Reed* and *Weber* on the one hand from *Moreno* on the other is the subsequent trajectory of the decisions. *Reed* and *Weber* are what I have described as “transitional rational basis plus” cases, in which the Court: mouths the language of rational basis while in fact applies what appears to be some form of heightened scrutiny; subsequently explicitly holds that laws discriminating on that basis are subject to heightened scrutiny; and re-characterizes its earlier decisions as actually applying heightened scrutiny despite their use of rational basis parlance.¹³⁰ Both *Reed* and *Weber* followed this pattern, with the Court eventually subjecting sex and illegitimacy classifications to intermediate scrutiny and so characterizing the earlier decisions.¹³¹

Moreno, by contrast, is not a “transitional rational basis plus” case. It was the first and last time that the Court addressed a claim involving discrimination against “hippies” and “hippie communes.” The Court did not go on to subsequently hold that “hippies” are a suspect class (or, in

125. 404 U.S. 71 (1971).

126. 406 U.S. 164 (1972).

127. See *Weber*, 406 U.S. at 175–76; *Reed*, 404 U.S. at 75–76.

128. 391 U.S. 68 (1968).

129. See PETER NICOLAS, SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CONSTITUTION 267, 282–83 (2013).

130. See *id.* at 267.

131. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682–84 (1973).

post-*Adarand* lingo, that “hippiness” or “hippie orientation” is a suspect classification). Rather, *Moreno* is what I have described as a “fleeting rational basis plus case,” in which the Court applies an intermittent form of heightened rational basis review based on the specific facts of the case, namely, what it sees as a temporary breakdown in the political process whereby a law appears to be enacted for the purpose of harming a politically unpopular group, albeit a group which does not merit heightened scrutiny under the *Frontiero* factors.¹³²

In his book *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection*, Evan Gerstmann contends that the Court decided to create intermediate scrutiny and to re-characterize its earlier decisions striking down laws discriminating on the basis of sex and legitimacy as applying such scrutiny for the specific purpose of returning rational basis review to its *Carolene Products-Lee Optical* roots and preventing litigants from citing cases such as *Reed*, *Levy*, and *Weber* for the more general proposition that rational basis review is not toothless but in fact substantial.¹³³

Gerstmann may well be correct about the intent of the Court, or at least some of its members, in acknowledging intermediate scrutiny, and subsequent to the creation of intermediate scrutiny in 1976, *Moreno* lay dormant for some time. Yet the development of the consistency line of precedent in the second half of the 1980s, whose tension with the *Frontiero* line of cases halted the development of that line of cases, simultaneously resulted in the reemergence of *Moreno*’s “fleeting rational basis plus” standard of review.

Moreno first resurfaced in the Court’s 1985 decision *Cleburne v. Cleburne Living Center, Inc.*¹³⁴ As noted above, *Cleburne* marked the last time that the Court engaged in an in-depth analysis of the factors that determine whether or not to apply heightened equal protection scrutiny. It also was a case that provided an early signal of the establishment of the consistency principle, with its assumption that applying heightened scrutiny to laws discriminating against the mentally retarded would result in the application of that same level of scrutiny to laws designed to benefit the mentally retarded.¹³⁵

132. See NICOLAS, *supra* note 129, at 282–83.

133. See EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* 42–44, 52–53 (1999).

134. 473 U.S. 432 (1985).

135. See *id.* at 443–45.

Yet, after rejecting the application of anything greater than rational basis review to the law at issue, the *Cleburne* Court proceeded to declare the law unconstitutional as applied. The Court began its analysis by quoting *Moreno* for the proposition that “some objectives—such as ‘a bare . . . desire to harm a politically unpopular group’—are not legitimate state interests.”¹³⁶ The Court then applied a level of scrutiny to the law, akin to *Moreno*, that lacked the deference normally associated with traditional rational basis review.¹³⁷ Moreover, like *Moreno*, the Court did not characterize the classification at issue in the case as suspect or quasi-suspect.¹³⁸

This departure from traditional rational basis review in *Cleburne* was noted by Justice Marshall, who penned a separate opinion. Justice Marshall characterized *Moreno* as an “intermediate review decision[] masquerading in rational-basis language,”¹³⁹ and similarly characterized the majority’s opinion in *Cleburne*:

[T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called “second order” rational-basis review rather than “heightened scrutiny.” But however labeled, the rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical* . . . and [its] progeny.¹⁴⁰

Specifically, Justice Marshall identified three ways the analysis in *Cleburne* differed from traditional rational basis review: (1) it focused on the underinclusiveness of the law, whereas traditional rational basis review permits substantial underinclusiveness; (2) it looked for evidence in the record to support the alleged rationale for the law, even though traditional rational basis review does not require support in the record; and (3) it appeared to place the burden on the government, whereas with traditional rational basis the burden is on the challenger.¹⁴¹ Justice Marshall went on to articulate the twin dangers associated with the majority’s approach:

The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar

136. *Id.* at 446–47 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

137. *See id.* 447.

138. *See id.*

139. *Id.* at 459 n.4 (Marshall, J., concurring in part and dissenting in part).

140. *Id.* at 458.

141. *See id.* at 458–59.

and searching “ordinary” rational-basis review—a small and regrettable step back toward the days of *Lochner v. New York*. Moreover, by failing to articulate the factors that justify today’s “second order” rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.¹⁴²

Consistent with Justice Marshall’s critique, the Court, in subsequent cases—at least in subsequent cases in which it was not inclined to overturn the law at issue—rejected arguments by litigants that *Moreno* and *Cleburne* established a more rigorous standard of review, instead describing them as a mere application of the traditional rational basis test.¹⁴³

C. *At the Crossroads: The Gay Rights Cases*

In 1985—the same year in which the Court issued its opinion in *Cleburne* rejecting intermediate scrutiny for laws targeting the mentally retarded while simultaneously applying *Moreno*-style rational basis review to strike down the law—the Court declined to grant certiorari in a case raising the question whether discrimination against gay or bisexual persons violated the equal protection guarantee.¹⁴⁴ Justice Brennan, joined by Justice Marshall, penned a dissent from the denial of certiorari, noting that such classifications should be subject to heightened scrutiny because the targeted group is an insular minority that has suffered from a history of discrimination and also is politically powerless, at least once its members are open about their sexual orientation.¹⁴⁵ The following year, in *Bowers v. Hardwick*,¹⁴⁶ the Court rejected a substantive due process challenge to a sodomy law as applied to gays and lesbians, but in a footnote made clear that it was not addressing any possible equal protection challenge to the law.¹⁴⁷

142. *Id.* at 459–60 (internal citations omitted).

143. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001); *Lyng v. Int’l Union, UAW*, 485 U.S. 360, 370 n.8 (1988); *Lyng v. Castillo*, 477 U.S. 635, 638–39 (1986).

144. *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985).

145. *See id.* at 1014 (Brennan, J., dissenting from denial of certiorari).

146. 478 U.S. 186 (1986).

147. *See id.* at 196 n.8.

It would not be until a decade later, in 1996, that the Court, in *Romer v. Evans*,¹⁴⁸ would have the opportunity to consider an equal protection challenge to a law targeting gays and lesbians. At issue in the case was the constitutionality of Amendment 2 to Colorado's Constitution, a voter initiative that both repealed existing state and local laws regarding non-discrimination on the basis of sexual orientation and prohibited the future enactment of such laws.¹⁴⁹ By this point in time, the consistency principle was firmly established—*Adarand* had been decided the previous year—and thus the factors identified by the *Frontiero* Court seemed no longer applicable. After all, why demand that a group suffer a history of discrimination and be politically powerless before extending heightened scrutiny to laws discriminating against that group only to turn around and apply the same level of scrutiny to laws discriminating against its counterpart, who not only lacked either of those qualities but used its extensive political power to impose that history of discrimination?

Thus, rather than invoking the *Frontiero* factors to determine whether discrimination against gays and lesbians was subject to intermediate or strict scrutiny, the Court instead first stated that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”¹⁵⁰ Next, it cited *Moreno*'s holding that a bare desire to harm a politically unpopular group does not constitute a legitimate government interest.¹⁵¹ Finally, the Court declared Amendment 2 unconstitutional on the ground that it failed rational basis review, despite a number of rationales for the law—such as protecting the associational rights of others and preserving resources to fight more serious types of discrimination¹⁵²—that would likely have sufficed under traditional rational basis review. Writing in dissent, Justice Scalia not only explained why the law passed traditional rational basis review, but also took issue with the Court's characterization of gays and lesbians as “politically unpopular,” contending that the group “enjoys enormous influence in American media and politics” and had the support of forty-six percent of those who voted on Amendment 2 despite comprising no more than four percent of the population.¹⁵³

148. 517 U.S. 620 (1996).

149. *See id.* at 623–24.

150. *Id.* at 634.

151. *See id.* at 634–35.

152. *See id.* at 635–36.

153. *Id.* at 642–43, 652 (Scalia, J., dissenting).

Had *Romer* represented a sporadic instance of discrimination against a group that otherwise failed to satisfy the factors the Court had previously identified for applying heightened scrutiny, it would have fit nicely in the *Moreno-Cleburne* line of cases as an instance of “fleeting rational basis plus” review. Yet *Romer* was preceded by a history of discrimination against gays and lesbians, including the presence of criminal sodomy laws that were still on the books in many states. Moreover, *Romer* was followed by an aggressive campaign to prohibit same-sex marriage by means not only of statutory enactments—such as the federal Defense of Marriage Act—but also numerous amendments to state constitutions banning same-sex marriage and similar legal unions.¹⁵⁴ Indeed, in the years since *Romer* was decided, the Court—or at least some portion of it—has thus far twice invoked the *Moreno-Cleburne-Romer* line of cases as a basis for striking down a law discriminating against gays and lesbians.¹⁵⁵

First, in *Lawrence v. Texas*,¹⁵⁶ the Court once again considered a constitutional challenge to laws criminalizing sodomy. But the law at issue in *Lawrence* differed from that at issue in *Bowers*. While the latter was ostensibly applicable to all, including heterosexuals, the former applied only to same-sex sodomy.¹⁵⁷ Thus, *Lawrence* presented not only an opportunity for the Court to reconsider its substantive due process holding in *Bowers*, but also a clear equal protection challenge. Yet the Court, while describing the equal protection argument as a “tenable” one, opted instead to reconsider and overturn its decision in *Bowers*.¹⁵⁸

Although the majority in *Lawrence* side-stepped the equal protection argument, Justice O’Connor—who was part of the majority in *Bowers* and did not wish to overrule that case’s substantive due process holding—penned a separate concurring opinion declaring the sodomy law at issue unconstitutional on equal protection grounds.¹⁵⁹ Yet, like the Court in *Romer*, she did not consider the question whether intermediate or strict scrutiny was applicable. Rather, Justice O’Connor cited *Moreno*, *Cleburne*, and *Romer* as standing for the proposition that “[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down

154. See generally NICOLAS & STRONG, *supra* note 4.

155. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

156. *Lawrence*, 539 U.S. at 558.

157. See *id.* at 562–64, 574–75.

158. See *id.* at 574–75, 578.

159. See *id.* at 579 (O’Connor, J., concurring).

such laws under the Equal Protection Clause.”¹⁶⁰ She cabined the scope of what she characterized as a heightened form of rational basis review, noting that it is most likely to result in declaring unconstitutional laws that “inhibit[] personal relationships.”¹⁶¹ Justice Scalia, while disagreeing with Justice O’Connor’s opinion, characterized it as a heightened form of equal protection scrutiny, noting that under the test as she articulated it, “laws exhibiting a desire to harm a politically unpopular group are invalid *even though* there may be a conceivable rational basis to support them.”¹⁶²

Most recently, in *United States v. Windsor*,¹⁶³ the Court once again considered an equal protection challenge involving discrimination against gays and lesbians, specifically, the federal Defense of Marriage Act, which defines marriage as between a man and a woman and refuses to recognize marriages validly entered into in states where same-sex marriage is lawful. Yet the Court declined to affirm the decision on the same basis as the Second Circuit, which applied the *Frontiero* factors to arrive at the conclusion that gays and lesbians are a quasi-suspect class and thus laws discriminating against them are subject to intermediate scrutiny.¹⁶⁴ Rather, the Court once again quoted *Moreno*’s holding regarding a bare desire to harm a politically unpopular group, as well as its prior decision in *Romer*.¹⁶⁵ The Court then identified the harms DOMA inflicts on same-sex couples and declared it unconstitutional.¹⁶⁶ The Court did not, however, consider the various rationales for DOMA to determine whether it was sufficiently tailored to those rationales to survive rational basis, intermediate, or strict scrutiny. Indeed, unlike the *Moreno*, *Cleburne*, and *Romer* opinions, the Court in *Windsor* did not even purport to be applying rational basis scrutiny, but was instead murky on exactly what level of review it was applying, as Justice Scalia’s dissent was quick to point out.¹⁶⁷

While *Romer*, *Lawrence*, and *Windsor* each delivered victories to the gay-rights plaintiffs, the decisions suffer from the limitations Justice Marshall identified in his separate opinion in *Cleburne*. Specifically, the murkiness of the decisions has left lower courts “in the dark,” and while

160. *See id.* at 580 (emphasis added).

161. *Id.*

162. *See id.* at 601 (Scalia, J., dissenting) (internal quotation marks omitted).

163. 133 S. Ct. 2675 (2013).

164. *See Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013).

165. *See Windsor*, 133 S. Ct. at 2692–93.

166. *Id.* at 2693–96.

167. *See id.* at 2706 (Scalia, J., dissenting).

this has resulted in some victories for proponents of gay rights, the Court's failure to clearly state in any of these decisions that heightened scrutiny is in play has resulted in some lower courts invoking traditional rational basis principles to reject equal protection claims brought by gays and lesbians.¹⁶⁸

Moreover, with the Court having issued not one but three increasingly murky equal protection decisions involving gay rights and set to issue yet another decision in 2015,¹⁶⁹ this line of cases—despite its repeated citation to *Moreno*—is starting to look less like fleeting rational basis plus and more like the transitional rational basis plus cases that ultimately resulted in the establishment of intermediate scrutiny for laws discriminating on the basis of sex and illegitimacy. The Court's willingness to make that final step in the transition process may to some extent be hampered by what appears to be an irreconcilable tension between the *Frontiero* and *Adarand* lines of precedent. The remainder of this Article, through its analysis of the constitutionality of gayfirmative action policies, seeks to provide the Court with a roadmap for reconciling those precedents to make the prospect of declaring sexual orientation to be a suspect or quasi-suspect classification a realistic one.

II. AFFIRMATIVE ACTION AND TIERED SCRUTINY

A. Race-Based Affirmative Action and Strict Scrutiny

Between the Court's 1978 decision in *Bakke* and its 2013 decision in *Fisher*, the Court has in two different ways made it increasingly difficult for public entities to engage in race-based affirmative action. First, it has thus far identified only a handful of goals that satisfy strict scrutiny's requirement that the governmental interest be compelling, while in the meantime explicitly rejecting numerous others. Second, even when public entities have sought to further those goals the Court has recognized as compelling, strict scrutiny's requirement that the means used to accomplish those goals be "narrowly tailored" to achieving those goals—including its requirement that the state actor consider race-neutral alternatives and use race as a factor only when holistically evaluating

168. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012).

169. See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571).

applicants—has significantly limited the circumstances under which a race-based affirmative action policy will pass constitutional muster.

To date, the U.S. Supreme Court has acknowledged only two justifications for race-based affirmative action policies that satisfy strict scrutiny's requirement that the government have a compelling interest for drawing distinctions on the basis of race. First, a governmental entity can implement an affirmative action policy as a remedy for past discrimination. However, this form of remedial affirmative action is narrowly circumscribed; the governmental entity seeking to implement the policy cannot rely merely on general *societal* discrimination on the basis of race.¹⁷⁰ Rather, such a remedial policy satisfies the compelling interest prong of the strict scrutiny test only if the *very governmental actor* seeking to implement the policy was doing so as a remedy for past discrimination that the entity *itself* engaged in, or based on a specific finding of private discrimination within its jurisdiction of which a governmental entity was effectively a passive participant.¹⁷¹ Moreover, to justify an affirmative action policy on such a basis, there must be a "strong basis in evidence" that the prior discrimination actually occurred.¹⁷² Second, at least in the context of higher education,¹⁷³ a governmental entity can implement a race-based affirmative action policy—without pointing to a prior specific history of discrimination—on the ground that it contributes to the attainment of a diverse student body from which educational benefits flow.¹⁷⁴

In addition to its rejection of general societal discrimination as a justification for implementing race-based affirmative action policies, the Court has thus far rejected three other proposed justifications for such policies. First, the Court has rejected the interest in "racial balancing," or the interest in having a workforce or classroom whose racial mix tracks

170. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731–32 (2007) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497–98 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

171. See *Shaw*, 517 U.S. at 910; *Croson*, 488 U.S. at 497–98; *Wygant*, 476 U.S. at 274–76. Moreover, where the latter is involved, the discrimination must be tied directly to the specific field or profession in which the governmental actor wishes to implement the affirmative action policy and the percentage of *qualified* minorities in the jurisdiction. See *Croson*, 488 U.S. at 497–98.

172. See *Shaw*, 517 U.S. at 909; *Croson*, 488 U.S. at 500, 510; *Wygant*, 476 U.S. at 277.

173. The Court has suggested that the diversity rationale might not even suffice in the context of elementary and secondary education. See *Parents Involved*, 551 U.S. at 724–25.

174. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 325, 327–33 (2003).

racial demographics.¹⁷⁵ Second, the Court has rejected the “role model” theory, whereby having people of specific races in given professions—such as teaching—will allow them to serve as positive role models for children of the same race.¹⁷⁶ Third, the Court has held that admitting minorities into specific professional programs, such as medicine, on the theory that they will be more likely to provide needed services to minority communities, is likewise not a compelling governmental interest.¹⁷⁷

Moreover, even when an affirmative action policy is enacted for the purpose of remedying specific past discrimination or furthering the interest in educational diversity, the policy must still satisfy the narrow tailoring requirement. In both contexts, this requires a serious consideration of race-neutral alternatives.¹⁷⁸ Furthermore, in both contexts, the use of specific quotas¹⁷⁹ or means that otherwise rely on race in a mechanical, nonindividualized fashion—such as awarding a certain number of points in an admissions scheme for being a member of a given race¹⁸⁰—are prohibited. Rather, race can only be a factor that is part of a highly individualized analysis of each applicant.¹⁸¹ In addition, the Court has indicated that race-based affirmative action policies must be time limited and thus cannot be infinite in duration.¹⁸² Finally, the impact on non-minorities must be considered and minimized.¹⁸³

In sum, as a direct result of the development of the consistency principle in equal protection jurisprudence, it is now extremely difficult for governmental entities to enact affirmative action policies—at least race-based ones—that will pass constitutional muster.

175. See *Parents Involved*, 551 U.S. at 729–30; *Grutter*, 539 U.S. at 329–30; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

176. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995); *Croson*, 488 U.S. at 497–98; *Wygant*, 476 U.S. at 274–76.

177. See *Bakke*, 438 U.S. at 310–11. The opinion is somewhat unclear on whether the Court did not find this interest to be sufficiently compelling, or if instead the policy was not sufficiently narrowly tailored to achieving that goal, or both.

178. See *Fisher*, 133 S. Ct. at 2420; *Grutter*, 539 U.S. at 334, 339–43; *Adarand*, 515 U.S. at 237–38; *Croson*, 488 U.S. at 507.

179. See *Fisher*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 334; *Croson*, 488 U.S. at 507–08.

180. See *Parents Involved*, 551 U.S. at 722–23; *Grutter*, 539 U.S. at 337; *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003); *id.* at 280 (O’Connor, J., concurring).

181. See *Fisher*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 334; *Croson*, 488 U.S. at 507–08.

182. See *Grutter*, 539 U.S. at 341–42; *Croson*, 488 U.S. at 510.

183. See *Grutter*, 539 U.S. at 341.

B. Sex-Based Affirmative Action and Intermediate Scrutiny

In the post-*Croson/Adarand* era, some courts misinterpreted the decisions as requiring that *all* affirmative action policies, without regard to their nature, were subject to strict scrutiny, or at least viewed the issue as unresolved. For example, although *Craig* held that sex discrimination is subject only to intermediate scrutiny, some courts held or suggested that *Croson* and *Adarand*, which were decided subsequent to *Craig*, effectively modified *Craig*'s holding, at least so far as affirmative action was concerned.¹⁸⁴ In still other cases—involving a mix of race-based and sex-based affirmative action—courts did not apply a lower level of scrutiny to the sex-based portions of the policies because both aspects satisfied the higher strict scrutiny standard.¹⁸⁵

Yet with the passage of time, the overwhelming majority of federal courts have held that it is not the nature of the government conduct at issue—*i.e.*, the fact that they are enacting an affirmative action policy—but rather the nature of the classification employed therein that determines the level of scrutiny to be applied.¹⁸⁶ Several such courts have noted that, although it seems odd that it is thus easier to enact affirmative action policies benefiting women than racial minorities, such a result follows logically from *Croson*.¹⁸⁷ Indeed, in his dissent in *Adarand* in which he criticized the Court's principle of consistency, Justice Stevens explained why he considered the holding to be such an anomaly when considered in tandem with the Court's tiered levels of equal protection scrutiny:

[T]he Court may find that its new “consistency” approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply “intermediate scrutiny” to cases of invidious

184. See, e.g., *Builders Ass'n v. Cnty. of Cook*, 256 F.3d 642, 644 (7th Cir. 2001); *Brunet v. City of Columbus*, 1 F.3d 390, 403–04 (6th Cir. 1993); *Milwaukee Cnty. Pavers Ass'n v. Fielder*, 922 F.2d 419, 422 (7th Cir. 1991); *Long v. City of Saginaw*, 911 F.2d 1192, 1196–97 (6th Cir. 1990).

185. See, e.g., *Associated Gen. Contractors of America, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1195–96 (9th Cir. 2013); *W. States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 990 n.6 (9th Cir. 2005).

186. See *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010); *Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438, 441–42 & n.14 (5th Cir. 1998); *Cohen v. Brown Univ.*, 101 F.3d 155, 182–83 (1st Cir. 1996); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1579–80 (11th Cir. 1994); *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1000–01 (3d Cir. 1993); *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 930–31 (9th Cir. 1991); *Shuford v. Ala. State Bd. of Educ.*, 897 F. Supp. 1535, 1550–51 (M.D. Ala. 1995).

187. See *Seibels*, 31 F.3d at 1579–80; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1001.

gender discrimination and “strict scrutiny” to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today’s lecture about “consistency” will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.¹⁸⁸

The consequences of subjecting sex-based affirmative action policies only to intermediate scrutiny are significant. Because intermediate scrutiny is less demanding, both in terms of the ends identified by the government and the means employed for achieving those ends, governmental entities have much greater flexibility in implementing such policies.

First, with respect to ends, lower courts have identified a number of governmental interests that, while insufficient to justify race-based affirmative action policies, suffice to justify sex-based ones. For example, lower courts have held that general *societal* discrimination in the relevant economic sector *can* suffice to justify such policies.¹⁸⁹ Moreover, proof of the prior discrimination need not satisfy the “strong basis in evidence” standard, but instead need only be supported by evidence “sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.”¹⁹⁰ In addition, the evidence need not be tied to the percentage of *qualified* women, but instead can be tied to demographics.¹⁹¹ Finally, although racial balancing is not considered to be a compelling governmental interest, sex balancing might be a sufficiently important governmental interest strong enough to withstand intermediate scrutiny.¹⁹²

With respect to means, although not explicit in the decisions, given that the courts permit reference to the percentage of women in the population rather than the percentage of qualified women and are willing to consider

188. 515 U.S. 200, 247 (1995) (Stevens, J., dissenting).

189. See *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 910 (11th Cir. 1997); *Seibels*, 31 F.3d at 1580; *Coral Constr. Co.*, 941 F.2d at 932. See also *Concrete Works of Colo., Inc. v. City of Denver*, 321 F.3d 950, 960 (10th Cir. 2003) (noting the precedent so holding, but not deciding the issue).

190. *Tippett*, 615 F.3d at 242 (quoting *Eng’g Contractors*, 122 F.3d at 910); see *Concrete Works*, 321 F.3d at 959–60; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1000–01).

191. See *Seibels*, 31 F.3d at 1582.

192. See *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 104–05 (4th Cir. 2011).

general societal discrimination, “goals” that are somewhat more “quota-like” in nature—in that they are tied more directly to the percentage of women in the general population—seem to be more likely to pass muster than similar race-based goals. In other respects, courts have held governmental entities to some similar requirements with respect to means, including a requirement that the remedies be time-limited in nature.¹⁹³ Indeed, in the brief period of time in which the Supreme Court itself applied intermediate scrutiny to race-based affirmative action policies, it subjected them to two of the requirements associated with strict scrutiny: that they be time-limited in nature and that the impact on non-minorities be taken into account.¹⁹⁴

C. *Non-Suspect Affirmative Action and Rational Basis Review*

In litigation over gay rights on such issues as same-sex marriage, the constitutionality of sodomy laws, and same-sex parenting, opponents of gay rights have maintained a litigation stance that discrimination on the basis of sexual orientation is subject to nothing more than traditional rational basis review. In some instances, lower courts have agreed, and have accepted rather fanciful rationales for such laws that, at best, are “rationally related” to achieving those goals in the *Carolene Products-Lee Optical* sense.¹⁹⁵ If that indeed is the appropriate level of review for sexual orientation discrimination, what sort of flexibility would governmental entities have in establishing gayaffirmative action policies? Although the issue has not specifically come up in any reported cases, the bulk of authority would suggest that governmental entities would have an extraordinary amount of flexibility, both with respect to the justifications for establishing such policies and the means employed for accomplishing those goals.

As an initial matter, just as courts have held that sex-based affirmative action policies are subject only to intermediate scrutiny, so too courts have held, and commentators have noted, that affirmative action policies based on non-suspect classifications—such as disability, veteran status, marital

193. See *Danskine v. Miami Dade Fire Dep’t*, 253 F.3d 1288, 1301 (11th Cir. 2001); *Christian v. United States*, 46 Fed. Cl. 793, 812 (2000) (but this seems to be lumping it in with strict scrutiny for race); *Seibels*, 31 F.3d at 1570.

194. See *Metro Broad., Inc. v. FCC.*, 497 U.S. 547, 594–97 (1990), *overruled by Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995).

195. See *generally, e.g., DeBoer v. Snyder*, 772 F.3d 388, 404–06 (6th Cir. 2014); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1111–19 (D. Haw. 2012).

status, tribal status, language ability, and the like—are only subject to rational basis review.¹⁹⁶ Moreover, commentators such as Ruthann Robson and David Strauss have noted that, under existing precedent, gayffirmative action policies would only be subject to rational basis review.¹⁹⁷ This is also consistent with the Supreme Court’s *Batson*¹⁹⁸ line of cases—holding that peremptory challenges based on race or sex will, respectively, fail strict and intermediate scrutiny—while those based on non-suspect grounds are subject to only rational basis review and are generally permissible.¹⁹⁹

What, then, would such review allow for? Recall that rational basis review is far more deferential than both strict and intermediate scrutiny, requiring only “legitimate” government interests and means to accomplish those interests that are “rationally related” to those interests. Moreover, they need not even be the real motivations behind the law; hypothetical rationales created *post hoc* suffice to uphold the constitutionality of such laws. In addition, because the fit requirement is quite loose, such laws can paint with a broad brush and thus can be overinclusive, underinclusive, or both.

Consider the hypothetical medical school discussed in the introduction that seeks to establish a quota-based system for increasing the number of gay and transgender students at its school, with the stated goals of creating role models for LGBT youth and improving the delivery of health services to LGBT persons. Surely, both of those are “legitimate” governmental interests, even if they are not “compelling” under strict scrutiny. After all, youth of all stripes benefit from seeing people in positions of authority that look like them, and surely members of the gay and transgender community have unique medical concerns that are no doubt sometimes overlooked by heterosexual practitioners (consider, as examples, such things as sexual disease transmission and the need for hormone treatment and sex-reassignment surgery).

196. See *Pemberthy v. Beyer*, 19 F.3d 857, 871 & n.19 (3d Cir. 1994); *Contractors Ass’n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1001 (3d Cir. 1993); *Krueth v. Indep. Sch. Dist. No. 38*, 496 N.W.2d 829, 835–37 (Minn. Ct. App. 1993); *Ascher v. Kulongoski*, 910 P.2d 372, 374 (Or. 1996); Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Constructors, Inc. v. Pena*, 101 DICK. L. REV. 281, 295–98 (1997); Donna Thompson-Schneider, *Paved with Good Intentions: Affirmative Action After Adarand?*, 31 TULSA L.J. 611, 634 (1996).

197. See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 719 n.48 (2002); David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 13.

198. *Batson v. Kentucky*, 476 U.S. 79 (1986).

199. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–45 (1994).

Indeed, three different lines of precedent provide support for the conclusion that a “role model” rationale for a gayaffirmative action policy would pass rational basis review. First, there is case law holding that a law which allows more senior non-Indian tenured teachers to be laid off before laying off less senior Indian ones survives the rational basis review applied to tribal status²⁰⁰ on the theory that doing so ensures the existence of role models for Indian youth.²⁰¹ Second, the Seventh Circuit has upheld a city law granting benefits to cohabiting partners of same-sex but not opposite-sex partners of school employees, on the theory that the school district has an interest in providing LGBT youth with adult LGBT role models and such a scheme helps to attract such individuals to work in the school system.²⁰² Finally, support for such a “role model” theory can be found in the many lower court decisions upholding laws banning same-sex marriage and same-sex parenting on the theory that the children of such relationships will statistically be heterosexual and thus be in need of heterosexual role models.²⁰³ Surely if that is so, then an affirmative action policy based on a theory that LGBT youth need LGBT adult role models should similarly satisfy rational basis review.

Moreover, a quota-based system that reserves a certain percentage of the seats in the class for LGBT students should satisfy the fit prong of the rational basis test, since it need only be rationally related to the goal.²⁰⁴ If a governmental entity thinks that providing LGBT youth with LGBT role models and increasing medical services to the LGBT community are worthwhile goals, then surely producing doctors in rough proportion to their percentage of the population is a “rational” way of furthering those goals. Moreover, if, under intermediate scrutiny, it is permissible for governmental entities to tie their admission and hiring goals to demographics, then under rational basis review, it is undeniable that such a method is permissible.

To be sure, the prospect of gayaffirmative action policies springing up at colleges and universities nationwide might be the nightmare of many

200. See *Morton v. Mancari*, 417 U.S. 535 (1974).

201. See *Krueth*, 496 N.W.2d at 835–37.

202. See *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606–07 (7th Cir. 2001).

203. See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 822 & n.19 (11th Cir. 2004); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1116 (D. Haw. 2012); *Fla. Dep’t of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993) *aff’d in relevant part*, 656 So. 2d 902 (Fla. 1995); *Donaldson v. State*, 292 P.3d 364, 370 (Mont. 2012) (Rice, J., concurring); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *In re Opinion of the Justices*, 530 A.2d 21, 25 (N.H. 1987).

204. See *Robson*, *supra* note 197.

opponents of gay rights. Indeed, it might be the sort of trigger that would spur at least some social conservatives to argue for heightened equal protection scrutiny for sexual orientation discrimination.²⁰⁵

III. SERIAL APPLICATION OF THE *FRONTIERO* AND *ADARAND* LINES OF PRECEDENT

In this part, I sketch out what might be described as a traditional approach to obtaining heightened scrutiny of a gayfirmative action policy. In so doing, I assume the continued, independent vitality of both the *Frontiero* and *Adarand* lines of precedent. I further assume that the path to consistency follows the same path as did that for race and sex, namely, that heightened scrutiny is first established in a case involving a law discriminating against the minority group—in this instance gay and transgender persons—and that in a subsequent case, an aggrieved heterosexual seeks to obtain heightened scrutiny of a gayfirmative action policy by invoking the precedent identifying sexual minorities as a suspect class in tandem with the *Adarand* line of precedent.

A. *Sexual Minorities and the Frontiero Factors*

Much judicial ink has been spilt on the question whether gays and lesbians are a suspect class. In this section, I briefly sketch out the arguments in favor of treating gays and lesbians as a suspect or quasi-suspect class based on the many reported cases that have already addressed the issue. Virtually no cases address the question whether transgender persons are a suspect or quasi-suspect class, despite the fact that the arguments for so holding are almost certainly even stronger.

To recap, pre-*Frontiero* cases spoke of the question whether the group at issue was a “discrete and insular” minority with a history of discrimination and a lack of political power, and also rejected heightened scrutiny for large, diverse, and amorphous classes.²⁰⁶ *Frontiero* identified six relevant considerations: (1) history of discrimination; (2) visibility of the characteristic; (3) political powerlessness; (4) an immutable characteristic determined solely by accident of birth; (5) relationship to ability to perform or contribute to society; and (6) the fact that a coequal

205. *But cf. Irizarry*, 251 F.3d at 608–09 (noting that Lambda Legal Defense and Education Fund, a gay rights organization, filed a brief on behalf of the aggrieved heterosexual in the case, arguing that heightened scrutiny should apply).

206. *See supra* notes 47–50 and accompanying text.

branch of government has recognized the discrimination at issue as invidious.²⁰⁷ *Cleburne* effectively eliminated the sixth *Frontiero* factor by treating it as a factor demonstrating that the group has political power.²⁰⁸ Moreover, *Cleburne* arguably narrowed the definition of political powerlessness, describing such groups as having “no ability to attract the attention of the lawmakers.”²⁰⁹ Finally, the *Lyng* Court grouped and presented many of the factors in the disjunctive, identifying the relevant inquiries as: (1) whether the group has suffered a history of discrimination; (2) whether the group exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) whether they are either a minority or politically powerless.²¹⁰

Nearly every court to consider the matter, even those that hold that gays and lesbians are *not* a suspect or quasi-suspect class, has found that two of the *Frontiero* factors—a history of discrimination²¹¹ and no effect on ability to perform or contribute to society²¹²—point in *favor* of heightened scrutiny. Accordingly, much of the debate in lower court opinions centers on the three remaining considerations: immutability, political powerlessness, and the visibility of the trait at issue.

With respect to immutability, those courts rejecting heightened scrutiny for gays and lesbians note that the scientific evidence remains unclear on the question whether sexual orientation is immutably set at birth or determined at a later point in time, whether by environment or choice.²¹³

207. See *supra* notes 51–57 and accompanying text.

208. See *supra* notes 79–80 and accompanying text. Nonetheless, at least one lower court has considered this factor and found that it points in favor of subjecting discrimination against gays and lesbians to heightened scrutiny. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 450–51 (Conn. 2008).

209. See *supra* notes 81–82 and accompanying text.

210. See *supra* note 84.

211. See *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989); *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987–88 (S.D. Ohio 2013); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 959–60 (E.D. Mich. 2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314–18 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985–86 (N.D. Cal. 2012); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008); *Kerrigan*, 957 A.2d at 432–34; *Fla. Dep’t of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1226 (Fla. Dist. Ct. App. 1993) *aff’d in relevant part*, 656 So. 2d 902 (Fla. 1995); *Varnum v. Brien*, 763 N.W.2d 862, 889–90 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 609–11 (Md. 2007).

212. See *Windsor*, 699 F.3d at 182–83; *Watkins*, 875 F.2d at 725; *Obergefell*, 962 F. Supp. 2d at 988–89; *Bassett*, 951 F. Supp. 2d at 959–60; *Pedersen*, 881 F. Supp. 2d at 318–20; *Golinski*, 824 F. Supp. 2d at 986; *In re Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 434–36; *Cox*, 627 So. 2d at 1226; *Varnum*, 763 N.W.2d at 890–92; *Conaway*, 932 A.2d at 609.

213. See *Conaway*, 932 A.2d at 614–16; *Andersen v. King Cnty.*, 138 P.3d 963, 974 (Wash. 2006). Some decisions have also refused to treat sexual orientation as immutable on the ground that it

With respect to political powerlessness, those courts rejecting heightened scrutiny for gays and lesbians rely on *Cleburne* for the proposition that this requires a showing that the group has *no* political power. Those courts note that gays and lesbians have achieved political successes and thus—in the words of *Cleburne*—have the ability to “attract the attention of the lawmakers.”²¹⁴ These courts point to specific political successes—such as repeal of Don’t Ask, Don’t Tell and the legislative expansion of anti-discrimination and marriage rights²¹⁵—open support by political leaders,²¹⁶ and an increase in the number of openly gay elected officials.²¹⁷

Finally, with respect to visibility, at least one court has noted that, unlike race or sex, sexual orientation is not readily visible, making the case for heightened scrutiny distinguishable from that for women in *Frontiero*: “[T]he continued discrimination against women in 1973 was largely due to the high visibility of the sex characteristic, a visibility that the characteristic of homosexuality does not have to nearly the same extent as gender.”²¹⁸

Courts finding that gays and lesbians are a suspect or quasi-suspect class often begin with a threshold determination that, strictly speaking, none of these remaining three factors are required.²¹⁹ In support of this threshold determination, these courts first note that, as indicated above, the

is “behavioral” and thus fundamentally different from race and sex. *See High Tech Gays*, 895 F.2d at 573–74; *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). These pre-*Lawrence* decisions, however, seem to be conflating the status of being gay with conduct associated with that status. Indeed, some of these decisions did not bother with or gave short shrift to the *Frontiero* factors on the theory that the Court’s decision in *Bowers*—rejecting a substantive due process claim challenging sodomy laws—effectively prevented consideration of equal protection claims brought by gays and lesbians. *See High Tech Gays*, 895 F.2d at 571; *Ben-Shalom*, 881 F.2d at 464–65; *Woodward*, 871 F.2d at 1076; *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

214. *High Tech Gays*, 895 F.2d at 574 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985)); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1010 (D. Nev. 2012) (same); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1101–02 (D. Haw. 2012) (quoting *High Tech Gays*, 895 F.2d at 574); *see Ben-Shalom*, 881 F.2d at 466 & n.9; *Conaway*, 932 A.2d at 611–14; *Andersen*, 138 P.3d at 974–76..

215. *See Sevcik*, 911 F. Supp. 2d at 1008, 1013; *Conaway*, 932 A.2d at 611–14; *Andersen*, 138 P.3d at 974–75.

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

217. *See id.*

218. *Id.* at 1011.

219. *See Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987 (S.D. Ohio 2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 326–27 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012); *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008); *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 426–27 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009).

Court has, in its most recent summary of the factors in *Lyng*, presented many of them in the disjunctive. Thus, a showing of political powerlessness is not strictly required because the question is whether the group is a minority *or* politically powerless, and gays and lesbians, under any estimate of their percentage of the population, constitute a minority.²²⁰ Moreover, a showing of immutability or visibility is not strictly required because the question is whether the group exhibits obvious, immutable, *or* distinguishing characteristics that define them as a discrete group.²²¹

Separate and apart from the disjunctive presentation of these factors in cases such as *Lyng*, these courts note how many of the existing classifications accorded heightened equal protection scrutiny lack one or more of these characteristics. First, with respect to immutability, these courts point out that several suspect and quasi-suspect characteristics can in fact be changed: people can change their sex through surgery,²²² aliens can change their status by becoming naturalized,²²³ the status of children as illegitimate can be changed through the marriage of their biological parents or other legitimization procedures,²²⁴ and indeed, it is possible to change one's racial appearance with pigment injections.²²⁵ Indeed, so far as alien status is concerned, the Supreme Court has expressly rejected the argument that it should not be accorded strict scrutiny merely because an alien has the ability to change that status by becoming naturalized.²²⁶

Second, with respect to the visibility of the trait, several courts have noted that neither one's status as an alien nor as illegitimate carries an obvious badge.²²⁷ In addition, they note that, at least in some instances, people can mask their national origin—such as by changing their names or customs—and that lighter-skinned African Americans and Latinos can pass as white.²²⁸

Finally, with respect to political powerlessness, several courts have compared the political power of gays and lesbians today with that of

220. See *Kerrigan*, 957 A.2d at 439–40.

221. See *Windsor*, 699 F.3d at 183.

222. See *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014).

223. See *Windsor*, 699 F.3d at 183 n.4; *Watkins*, 875 F.2d at 726; *Wolf*, 986 F. Supp. 2d at 1013; *Obergefell*, 962 F. Supp. 2d at 990–91; *Pedersen*, 881 F. Supp. 2d at 320; *In re Marriage Cases*, 183 P.3d at 442.

224. See *Windsor*, 699 F.3d at 183 n.4; *Watkins*, 875 F.2d at 726; *Obergefell*, 962 F. Supp. 2d at 990–91; *Pedersen*, 881 F. Supp. 2d at 320; *Kerrigan*, 957 A.2d at 427 n.20.

225. See *Watkins*, 875 F.2d at 726.

226. See *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

227. See *Windsor*, 699 F.3d at 183–84; *Pedersen*, 881 F. Supp. 2d at 322.

228. See *Watkins*, 875 F.2d at 726.

women and African Americans at the times they were deemed to be suspect classes and have noted that the latter were certainly not wholly without political power then, and indeed had far more power than gays and lesbians do today.²²⁹

Despite these threshold arguments, many courts finding gays and lesbians to be a suspect or quasi-suspect class have nonetheless considered the immutability, political powerlessness, and visibility factors and have found that they point in favor of heightened scrutiny.

First, with respect to the immutability factor, numerous court decisions—particularly more recent ones—point to evidence demonstrating that sexual orientation is set at birth or shortly thereafter.²³⁰ Moreover, many courts, after noting the various types of classifications that are theoretically mutable but nonetheless accorded heightened scrutiny, refine the test as one not requiring *strict* immutability. Rather, these courts hold, changing the characteristic at issue must be both “relatively” beyond their control and so integral to their identity that it would be inappropriate to require them to change it to avoid discrimination.²³¹ So defined, these courts conclude that sexual orientation—like sex, race, and alienage—should be treated as immutable because, even if theoretically subject to change, it is difficult to do and something that is integral to one’s identity.

Second, with respect to political powerlessness, these courts identify several ways in which gays and lesbians are relatively politically powerless, noting such things as the absence of statutory protections,²³² the widespread enactment of anti-gay laws—such as those prohibiting sodomy

229. See *Windsor*, 699 F.3d at 184; *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014); *Obergefell*, 962 F. Supp. 2d at 990; *Pedersen*, 881 F. Supp. 2d at 326–27; *Kerrigan*, 957 A.2d at 442, 452–54 & n.52; *Varnum v. Brien*, 763 N.W.2d 862, 894 (Iowa 2009). Moreover, several state courts deciding the issue on state law grounds note that this factor does not make much sense, given that if one were to focus on the current political power of African Americans and women, they should no longer receive heightened scrutiny. See *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008); *Kerrigan*, 957 A.2d at 453; *Varnum*, 763 N.W.2d at 894.

230. See *Obergefell*, 962 F. Supp. 2d at 990–91; *Bassett v. Snyder*, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013); *Pedersen*, 881 F. Supp. 2d at 322; *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012); *Fla. Dep’t of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1226 (Fla. Dist. Ct. App. 1993) *aff’d in relevant part*, 656 So. 2d 902 (Fla. 1995).

231. See *Windsor*, 699 F.3d at 183 n.4; *Watkins*, 875 F.2d at 726; *Obergefell*, 962 F. Supp. 2d at 990–91; *Bassett*, 951 F. Supp. 2d at 960; *Pedersen*, 881 F. Supp. 2d at 325–26; *Golinski*, 824 F. Supp. 2d at 986–87; *In re Marriage Cases*, 183 P.3d at 442–43; *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d at 893; *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013).

232. See *Obergefell*, 962 F. Supp. 2d at 989; *Bassett*, 951 F. Supp. 2d at 960; *Pedersen*, 881 F. Supp. 2d at 327–28; *Griego*, 316 P.3d at 883–84.

and marriage²³³—the absence of significant numbers of openly gay elected officials,²³⁴ the group’s small size and dispersion,²³⁵ and the risks of being “out of the closet” that make it hard for gays and lesbians to organize to exercise political power.²³⁶ Moreover, these courts cite a different quote from *Cleburne* that seems to suggest that the question of political powerlessness turns not on whether the group is wholly lacking in political power, but rather whether the group’s political power is such that the existing discrimination against the group is unlikely to soon be rectified by legislative means.²³⁷

Finally, with respect to visibility, and taking into consideration traits such as illegitimacy, alienage, and national origin that likewise are not visible, these courts recast this factor as meaning that the trait becomes obvious once the person seeks to obtain some government benefit for which disclosure of such facts is necessary, and note that for gays and lesbians, their sexual orientation, even if not normally readily visible, becomes apparent when they do such things as seek to obtain a license to marry someone of the same sex.²³⁸

In sum, although there is precedent on both sides of the issue, there are certainly persuasive arguments for why discrimination against gays and lesbians should be subjected to heightened scrutiny under the equal protection clause based on the *Frontiero* factors. Moreover, although there is a dearth of precedent on the issue,²³⁹ the above arguments apply with equal if not greater force for transgender persons. So far as minority status or political powerlessness is concerned, they represent an even smaller percentage of the population and have far less political influence than gays and lesbians. Moreover, the discrimination against the group is far more significant, as even jurisdictions that ban discrimination on the basis of sexual orientation often fail to guard against discrimination on the basis of

233. See *Obergefell*, 962 F. Supp. 2d at 987–88; *Bassett*, 951 F. Supp. 2d at 960; *Pedersen*, 881 F. Supp. 2d at 314–18; *Kerrigan*, 957 A.2d at 447–50 & n.43; *Cox*, 627 So. 2d at 1226; *Varnum*, 763 N.W.2d at 889–90; *Griego*, 316 P.3d at 883–84.

234. See *Windsor*, 699 F.3d at 184–85; *Watkins*, 875 F.2d at 727; *Bassett*, 951 F. Supp. 2d at 960; *Pedersen*, 881 F. Supp. 2d at 328; *Kerrigan*, 957 A.2d at 446–47; *Griego*, 316 P.3d at 882.

235. See *Obergefell*, 962 F. Supp. 2d at 989.

236. See *Windsor*, 699 F.3d at 185; *Watkins*, 875 F.2d at 727; *Obergefell*, 962 F. Supp. 2d at 989–90; *Cox*, 627 So. 2d at 1226; *Griego*, 316 P.3d at 882–83.

237. See *Windsor*, 699 F.3d at 184–85; *Obergefell*, 962 F. Supp. 2d at 989–90; *Pedersen*, 881 F. Supp. 2d at 329; *Golinski*, 824 F. Supp. 2d at 987; *Kerrigan*, 957 A.2d at 444; *Varnum*, 763 N.W.2d at 894.

238. See, e.g., *Windsor*, 699 F.3d at 183–84.

239. The only federal court decisions to give it attention many decades ago held that heightened scrutiny was inapplicable because the trait is not an immutable one. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

gender identity. In addition, the scientific research to date shows the status of being transgender to be immutable; one cannot change their psychological gender.²⁴⁰ Furthermore, the characteristic becomes visible when a person seeks to alter their physical sex to conform to their psychological sex. Finally, there is no evidence that being transgender bears any relationship to one's ability to perform and contribute to society.

Accordingly, for the purposes of the remainder of this section and the next section, this Article assumes that gay and transgender persons qualify as classes entitled to heightened equal protection scrutiny, and proceeds to consider the impact of that assumption on the ability of heterosexuals aggrieved by gayaffirmative action policies to likewise argue for heightened equal protection scrutiny.

B. Sexual Minorities and Adarand Consistency

Assume, for the reasons set forth in the previous subsection, that the U.S. Supreme Court eventually concludes that gay and transgender persons qualify as suspect or quasi-suspect classes entitled to heightened scrutiny, or that the relevant circuit of the U.S. Court of Appeals has precedent so holding, as does the Second Circuit.²⁴¹ Suppose further that a gayaffirmative action policy is established, and an aggrieved heterosexual seeks to challenge it. With heightened scrutiny already established for discrimination *against* sexual minorities, the question whether the plaintiff can likewise argue for heightened scrutiny turns solely on the question whether *Adarand's* principle of consistency would apply to an equal protection claim brought by a heterosexual claiming sexual orientation discrimination.

In many ways, it seems hard to argue that *Adarand's* consistency principle should not apply to sexual orientation claims. After all, as demonstrated in Part I of this Article, the seeds of the consistency principle were sown long before *Croson* and *Adarand* were decided, with the Court applying it *sub silentio* to sex classifications²⁴² and assuming that it would apply if the Court treated the mentally retarded as a quasi-suspect class.²⁴³ In line with this general trajectory, one lower court has concluded that the consistency principle would apply to policies granting

240. See *In re Heilig*, 816 A.2d 68, 75–77 (Md. 2003).

241. See *Windsor*, 699 F.3d at 181–85.

242. See *supra* notes 103–07 and accompanying text.

243. See *supra* notes 108–09 and accompanying text.

preferential treatment to other suspect groups, such as aliens,²⁴⁴ and the handful of courts and commentators that have addressed the issue have indicated that the same result would follow for sexual orientation.²⁴⁵

Yet despite the allure of having a “consistency” principle that applies consistently across all classifications, it might nonetheless be possible to argue against it being extended to encompass sexual orientation classifications. As an initial matter, it is worth emphasizing that the Court has applied it only in the contexts of sex and race discrimination. In addition, although *Cleburne* seems to assume its application more generally, that assumption was not necessary to deciding the case. Moreover, many of the cases in the *Adarand* line emphasize the importance of *racial* classifications and suggest that race *is* different. For example, in *Bakke*, Justice Powell suggested that race and ethnicity were *sui generis*.²⁴⁶ Justice O’Connor did much the same in *Adarand*, in which she focused specifically on the long history of misuse of race as a basis for treating all racial classifications with skepticism.²⁴⁷ And the specific language of the consistency principle in both *Croson* and *Adarand* was not written in general terms but rather in specific reference to race.²⁴⁸

However, I would suggest a more critical distinction in both the race and sex cases that would explain why a consistency principle was necessary in those cases but is not necessary in the context of sexual orientation. Specifically, one needs to consider the *context* of the initial heightened scrutiny cases involving race and sex to see why a consistency principle made sense for those two types of classifications.

The two race cases in which strict scrutiny was first clearly articulated—*McLaughlin* and *Loving*—involved laws criminalizing interracial pairings of different sorts.²⁴⁹ In any given pairing, it is unclear which person is being discriminating against. Indeed, the Court in these cases had to rebut arguments, based on its own precedent, that no racial discrimination was involved at all because whites and non-whites were equally prohibited from engaging in the conduct with people of opposite

244. See *Pimentel v. Dreyfus*, 670 F.3d 1096, 1107 (9th Cir. 2012). See generally *Pemberthy v. Beyer*, 19 F.3d 857, 871 n.19 (3d Cir. 1994).

245. See *Commonwealth v. Chau*, No. 08-P-2043, 2010 WL 165526, at *3 (Mass. App. Ct. Apr. 27, 2010); David A. Strauss, *supra* note 197.

246. See *supra* notes 99–100 and accompanying text.

247. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–27 (1995).

248. See *id.* at 224, 227; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion).

249. See *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

rac²⁵⁰. Thus, viewing the strict scrutiny standard as applying consistently whenever race is taken into account, without looking to the race of the specific plaintiff, made sense given the context in which these cases arose. Because consistency was necessary to deciding these cases, it would have been difficult, or at least awkward, for the Court to back away from that in subsequent cases in which a principle of consistency was not strictly necessary.

The early sex discrimination cases in which heightened scrutiny was recognized similarly involved situations in which a consistency prism was necessary because it was unclear whether men or women were being discriminated against, as each of these early cases involved a denial of benefits to spouses. Keep in mind that these cases were decided in a world in which same-sex marriage was not in existence, and so all married pairings were necessary male-female. For example, at issue in *Frontiero* was the constitutionality of a federal statutory scheme whereby male members of the armed forces automatically received medical and other benefits for their wives because they were presumed to be dependent upon their husbands, whereas female members of the armed forces could receive such benefits for their husbands only if they could first prove the dependence.²⁵¹ Were such laws discriminating against the female servicemembers, or their male husbands who were denied the benefits? Indeed, in *Frontiero*, the servicemember and her husband brought suit jointly.²⁵² Other pre-*Craig* cases involved similar circumstances, such as a provision of the Social Security Act allowing a surviving wife to receive benefits based on the earnings of her deceased husband but not providing for a surviving husband to do the same based on the earnings of his deceased wife.²⁵³ Who was discriminated against in that case, the earning wife whose social security benefits effectively had less value than those of a male earner, or the surviving male spouse who was denied the benefits? Thus, just as with cases like *McLaughlin* and *Loving*, a principle of consistency made sense. And having established that principle early on, subsequently backing away from it would have been difficult.

While I thus believe that there are significant ways in which the Court can distinguish the existing *Adarand* line of cases, it is nonetheless conceivable, indeed likely, that the Court would extend its rationale to

250. See *Loving*, 388 U.S. at 10–11; *McLaughlin*, 379 U.S. at 188–91.

251. See *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973) (plurality opinion).

252. See *id.* at 680 & n.4.

253. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–38 (1975).

encompass sexual orientation classifications. For purposes of the next Part, I assume that to be the Court's likely trajectory.

IV. MUST A HETEROSEXUAL "WAIT IN LINE" TO OBTAIN HEIGHTENED SCRUTINY?

Thus far, the U.S. Supreme Court has not designated gays and lesbians to be a suspect or quasi-suspect class entitled to intermediate or strict equal protection scrutiny, and there is only one federal circuit—the Second—with precedent so holding.²⁵⁴ (The Ninth Circuit, without specifying the level of review, recently held that the scrutiny for discrimination against gays and lesbians is “heightened.”²⁵⁵) Accordingly, if an equal protection challenge is brought against a gayaffirmative action policy by an aggrieved heterosexual outside of the Second and Ninth Circuits, the legal question is not merely whether *Adarand*'s consistency principle applies outside of the contexts of race and sex discrimination. The question is whether a heterosexual can invoke heightened scrutiny without that level of scrutiny having first been established for laws discriminating against sexual minorities. There are five possible responses to this question:

1. No, he must first wait for that level of scrutiny to be established in a case involving discrimination *against* sexual minorities, and only then seek extension of that level of scrutiny to discrimination against heterosexuals by invoking that new precedent in conjunction with *Adarand*.
2. Yes, but in so doing, he must argue the various ways in which the *Frontiero* factors demonstrate that *heterosexuals* are politically powerless, have suffered from a history of discrimination, and the like.
3. Yes, but in so doing, he must argue the various ways in which the *Frontiero* factors demonstrate that his opposite, i.e., gays and lesbians, are politically powerless, have suffered from a history of discrimination, and the like.

254. See *Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

255. See *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014).

4. Yes, by invoking the *Moreno* line of cases and contending that heterosexuals are a politically unpopular group.
5. Yes, and in so doing, he must get the court to think about the *Frontiero* factors in a more abstract way that harmonizes them with the *Adarand* principle.

I can envision litigants arguing for and lower courts accepting each of the first four responses. As I explain below, although the first three responses might be said to follow mechanically from the Court's precedents, they are largely nonsensical if one accepts the *Adarand* line of precedent as settled law that is applicable across the board. The fourth response, while raising some interesting questions about the scope of the *Moreno* line of cases, seems unlikely to bear fruit. Only the fifth response, if accepted, will ultimately harmonize the *Frontiero*, *Adarand*, and *Moreno* lines of precedent.

A. *The Mechanical Responses*

The first three responses are emblematic of a lawyer or jurist who has memorized and can recite complex constitutional doctrine, but does not, in truth, understand it. I address each of them briefly here, cognizant of the possibility that a lower court may nonetheless feel compelled to accept one of them on the theory that it is for the Supreme Court, not lower courts, to blaze new trails.

The first response—that an aggrieved heterosexual must wait until a sexual minority establishes heightened scrutiny in a case involving discrimination against sexual minorities before arguing for its extension to laws discriminating against heterosexuals—treats these two lines of precedent as artificially independent and hopelessly wooden. After all, if heterosexuals will be able to instantly and forever after invoke that level of heightened scrutiny upon the establishment of the same in a case involving discrimination against sexual minorities, what sensible concept of constitutional law would force the aggrieved heterosexual to sit idly waiting for that precedent to first be established?

There is, however, one possible defense of this first response. It may be that the Court intends *Adarand* consistency to follow not instantly from recognition of a group as suspect or quasi-suspect, but rather with a delay. After all, that was the pattern followed for race and, to a lesser extent,

sex.²⁵⁶ During this lag period, laws discriminating against the group are subject to heightened scrutiny, while those designed to benefit them are not, allowing legislatures greater flexibility to remedy the history of discrimination against the group. But at some point, the political power of the suspect or quasi-suspect group may shift, such that the political powerlessness arguments for heightened scrutiny may no longer hold, as Justice Scalia has suggested is the case for women.²⁵⁷ Moreover, it need not (and probably never would) shift to the point that the minority group becomes the majority;²⁵⁸ rather, it suffices that they progress politically to the point that they can, at least in some instances, hold the balance of power.²⁵⁹ Yet because the Court never downgrades a suspect or quasi-suspect group once it has recognized them as such,²⁶⁰ the Court's solution to this change in political power is to apply the *Adarand* consistency principle as a way of *effectively* downgrading the group's heightened scrutiny.

The second response—that an aggrieved heterosexual must demonstrate that *heterosexuals* are politically powerless, have suffered from a history of discrimination, and the like—is a response that has on occasion been given by courts when a law appearing to give preferential treatment to a minority group (for which heightened scrutiny has not been established) has been challenged, such as for laws that appear to discriminate against heterosexuals or the wealthy.²⁶¹ This response tracks the dissents of Justice Rehnquist in *Craig* and Justice Marshall in *Croson*, who contended that heightened scrutiny should not be extended, respectively, to men and whites on the theory that those groups do not satisfy the *Frontiero* factors.²⁶² Yet, as demonstrated above, the Court rejected those dissents. To be sure, in those cases, the *Frontiero* and *Adarand* lines of cases were invoked serially, not in tandem. But given the change that *Adarand* has made to the legal landscape, allowing heightened scrutiny for heterosexuals only if they can show that *they* have suffered

256. See *supra* text accompanying notes 51–58, 69–72, 89–117.

257. See *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting).

258. But see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295–97 (1978).

259. See *Ohio Contractors Ass'n v. City of Columbus*, 733 F. Supp. 1156, 1158–59 (S.D. Ohio 1990).

260. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 502 n.25 (Conn. 2008) (Borden, J., dissenting).

261. See *Irizary v. Bd. of Educ.*, 251 F.3d 604, 610 (7th Cir. 2001); *Jensen v. Franchise Tax Bd.*, 100 Cal. Rptr. 3d 408, 414 (Cal. Ct. App. 2009).

262. See *supra* text accompanying notes 104, 111.

from a history of discrimination and are politically powerless would seem to unduly straightjacket equal protection jurisprudence.

The third response is perhaps the least mechanical of this group. Under this response, heterosexuals are free to argue for heightened scrutiny in the first instance, invoking the *Frontiero* and *Adarand* lines of precedent. Moreover, it is not necessary for them to show that *heterosexuals* satisfy the *Frontiero* factors, which they almost surely would not. Rather, so long as they can show that their opposite—gays and lesbians—can do so, they can establish heightened equal protection scrutiny across the board for sexual orientation. While certainly a plausible way to reconcile the *Frontiero* and *Adarand* lines of precedent, it is an awfully bizarre way to ask the heterosexual plaintiff to make the case for why heightened equal protection scrutiny should apply to his case, to wit, by speaking of the political powerlessness and history of discrimination against a group to which he does not belong. Perhaps the answer is that the plaintiff's role in this scenario is bizarre because *Adarand* itself is an aberration. That might be so, but the Court clearly accepts *Adarand* and is unlikely to reconcile the two lines of cases in such a Frankensteinesque manner.

B. Heterosexuals as a "Politically Unpopular Group"?

Perhaps the way for an aggrieved heterosexual to obtain some form of heightened scrutiny is the same way that gays and lesbians have thus far achieved it: by invoking *Moreno*-style "fleeting rational basis plus" review under fact patterns that show evidence of animus in the legislative history. Consider in this regard the medical school affirmative action policy set forth in the introduction, with a new caveat. At the faculty meeting, while introducing the policy, the lead sponsor states, "The best thing about this policy is I'm guaranteed to see five percent fewer 'breeders' each time I walk into class." The faculty receive the policy with laughter and vote resoundingly in favor of it. Assume further that the medical school has a lesbian dean and sexual minorities in a variety of key leadership positions.

This hypothetical raises important questions of what it means to be a "politically unpopular group" within the meaning of the *Moreno-Cleburne-Romer* line of cases. To be politically unpopular seems to be another way of saying that a group is politically powerless, thus overlapping with one of the *Frontiero* factors. Is it about political power generally—say a group's national political power—or is it a more localized, case-specific analysis of a group's political power in a given circumstance, such that a group that is politically powerful in general may be politically neutered in a given context, as was the case under the facts

of *Crososon*²⁶³ or the hypothetical jurisdiction in *Strauder* in which whites were in the minority?²⁶⁴

A review of lower court precedent addressing the issue suggests that the analysis whether a group qualifies as politically unpopular is often not done at the micro-level, but rather at a macro-level. For example, despite the fact that numerous political bodies have enacted laws targeting Walmart, courts have rejected arguments that the retailer or other similar, generally powerful entities should be characterized as “politically unpopular group[s]” within the meaning of *Moreno* and its progeny.²⁶⁵ In contrast, lower courts have held that groups such as day laborers²⁶⁶ and the homeless²⁶⁷ satisfy *Moreno*’s definition. The bulk of lower court precedent thus seems to align the analysis here with the political powerlessness analysis associated with the application of the *Frontiero* factors, limiting the application of fleeting rational basis review to situations involving a minority group—albeit not one that qualifies generally for intermediate or strict scrutiny—being disadvantaged by the majority²⁶⁸ that is historically unpopular and politically vulnerable.²⁶⁹ Such a characterization might encompass hippies, the mentally retarded, day laborers, and the homeless but not a large and otherwise powerful retailer. Under this limited interpretation of *Moreno*’s scope, heterosexuals would not seem to qualify as a “politically unpopular group.”

On the other hand, some courts do seem to conduct a more micro-level analysis, focusing on the particular geographic and political context in which a given targeted group operates. For example, even though there is significant support for abortion rights generally and Planned Parenthood and other abortion providers specifically, numerous lower courts have held that Planned Parenthood qualifies as a politically unpopular group, noting

263. See text accompanying note 113.

264. See text accompanying notes 92–93.

265. See *Mountain Water Co. v. Mont. Dep’t of Pub. Serv. Regulation*, 919 F.2d 593, 599 (9th Cir. 1990) (holding that private utility companies do not meet the definition of a politically unpopular group); *Retail Indus. Leaders Ass’n v. Fielder*, 435 F. Supp. 2d 481, 501 (D. Md. 2006). *But see* *Walmart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023, 1037–39 (E.D. Cal. 2007) (noting the dearth of precedent on this issue, and holding that the argument was not “totally without merit”).

266. See *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 552 n.4 (S.D.N.Y. 2006).

267. See *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1113 (E.D. Cal. 2012); *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12-3159, 2012 WL 3235317, at *23 (E.D. Pa. Aug. 9, 2012) (collecting cases).

268. See *Williams v. King*, 420 F. Supp. 2d 1224, 1250–53 (N.D. Ala. 2006), *aff’d sub nom. Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

269. See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012); *Powers v. Harris*, 379 F.3d 1208, 1224 (10th Cir. 2004); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 n.6 (10th Cir. 1991).

its unpopularity among some segments of the population.²⁷⁰ Viewed through this prism, it seems plausible that heterosexuals could—in the right political and geographic context (such as a factual context akin to that in *Croson*)—satisfy the definition.

The Court—speaking through Justice Kennedy—in its *Moreno* line of cases appears to endorse the micro-approach over the macro-approach. In *Kelo v. City of New London*,²⁷¹ Justice Kennedy stated that “a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.”²⁷² So described, the standard seems to be of universal application, and not limited to traditionally vulnerable parties.

To be sure, a criticism of considering a micro-level analysis would note Justice White’s comment in *Cleburne* that “[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.”²⁷³ But of course there, Justice White was speaking of the possibility of applying the strong medicine of either intermediate or strict scrutiny. In contrast, fleeting rational basis plus review is seldom that blunt of a tool.

Yet another criticism might be that since there is almost always some political loser in any political decision, this interpretation of *Moreno* would signal a return to the *Lochner* days of heavy-handed rational basis review to scrutinize and strike down legislation. However, there are several limitations on the scope of *Moreno*-style review that make it unlikely to be a significant intrusion into legislative powers.

First, in order for its heightened standard to apply, the cases suggest that there needs to be some evidence of animus in the legislative record, or a desire to punish or target a particular group.²⁷⁴ Thus, in the absence of such evidence, this more intense review does not take place.

270. See *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 545–46 (9th Cir. 2004); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 205 (4th Cir. 2000); *Planned Parenthood v. Minnesota*, 612 F.2d 359, 361 (8th Cir. 1980), *aff’d*, 448 U.S. 901; *Planned Parenthood v. Cansler*, 877 F. Supp. 2d 310, 327 (M.D.N.C. 2012); *Planned Parenthood v. Dreyzehner*, 853 F. Supp. 2d 724, 737–38 (M.D. Tenn. 2012).

271. 545 U.S. 469 (2005).

272. *Id.* at 491 (Kennedy, J., concurring).

273. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985).

274. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Cleburne*, 473 U.S. at 448; *Johnson v. Robison*, 415 U.S. 361, 383 n.18 (1974); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973).

Second, even when *Moreno*-style review applies, it is more akin to “hard look” administrative review than true heightened scrutiny. Thus, according to the Court, the presence of evidence of animus in the record “does not a constitutional violation make”;²⁷⁵ so long as there is a rational basis for the law, the Court will still uphold it in spite of that evidence.²⁷⁶

Finally, in her concurring opinion in *Lawrence*, Justice O’Connor suggested a third limitation on *Moreno*-style review: in general, it is only likely to result in laws inhibiting personal relationships being declared unconstitutional, and does not apply to ordinary economic legislation.²⁷⁷

Of course, even if the micro-level approach to *Moreno* were to rule the day, it likely would not ultimately help an aggrieved heterosexual in the affirmative action hypothetical described above. To be sure, the statement by the policy’s sponsor might be sufficient evidence of animus to have a court give the policy a hard look, but it is likely that the court will also find a variety of rational bases for such a law, independent of that animus. Finally, unlike the laws at issue in cases such as *Moreno*, *Cleburne*, and *Romer*, it would be hard to characterize an affirmative action policy as inhibiting personal relationships, at least in the way Justice O’Connor suggested, which appeared to focus primarily on intimate settings and the home.

C. A New Paradigm

In my view, the best way to harmonize the *Moreno*, *Frontiero*, and *Adarand* lines of cases is to formally re-conceptualize them as representing two distinct paths to obtaining heightened equal protection scrutiny, and to realign and abstract the *Frontiero* factors in a way that aligns with the distinct purposes of these two different categories of heightened equal protection scrutiny.

Moreno-style review is fleeting, not permanent. It is not designed to identify a suspect or quasi-suspect trait and thereafter apply heightened

275. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

276. See *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 654 (7th Cir. 2013); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1021 (8th Cir. 2012); *Cook v. Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008); *Univ. Prof’ls of Ill. v. Edgar*, 114 F.3d 665, 668 (7th Cir. 1997); *N.Y. Trawlers Ass’n v. Jorling*, 16 F.3d 1303, 1310 (2d Cir. 1994); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1104–05 (D. Haw. 2012) (noting that it applies only where there is a bare desire to harm a group, not where there are other justifications for the law).

277. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring); *accord* *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009); *Powers v. Harris*, 379 F.3d 1208, 1223–25 (10th Cir. 2004); *Hope for Families & Cmty. Serv., Inc., v. Warren*, 721 F. Supp. 2d 1079, 1152 n.75 (M.D. Ala. 2010).

scrutiny to laws discriminating on that basis. Rather, it is designed for breakdowns in the political process, like when a legislature selects a particular course of conduct with the purpose of targeting and harming a situation-specific, politically unpopular group. In this circumstance, the target of the legislation can truly be said to be politically powerless, and the Court's temporary intervention would seem to be consistent with footnote four of *Carolene Products*, which is concerned generally with breakdowns in the political process.²⁷⁸ Accordingly, the "political powerlessness" consideration that is often a part of the *Frontiero* analysis is best excised from that context and considered part of the criteria for fleeting rational basis plus review, with political powerlessness defined at the micro-level rather than at the macro-level.

This leaves four other major factors for courts to consider in deciding whether permanent intermediate or strict scrutiny is appropriate for particular classifications under a *Frontiero-Adarand* analysis. Of these, three of them are already well-suited to *Adarand*'s consistency principle, and thus do not require any abstraction or re-characterization at all: immutability, visibility, and relationship to ability to perform or contribute to society. Consider each of these in the context of sexual orientation. If homosexuality is immutable, visible, and unrelated to ability to perform or contribute to society as those terms have been defined in the case law, then heterosexuality is likewise immutable,²⁷⁹ visible, and unrelated to ability to perform or contribute to society. The same holds for other types of suspect or quasi-suspect classifications, such as sex and race.

That leaves the history of discrimination factor. This factor can easily be re-characterized so that the question is not whether the specific class that the plaintiff is a member of has suffered a history of discrimination, but instead whether there has been a history of *misuse* of a generally irrelevant characteristic. While the actual history will in virtually every instance involve solely misuse targeting the minority group, in the long run, concern over misuse of a generally irrelevant characteristic is a concern for all. Many of the decisions in the *Adarand* line of cases seem to suggest a concern that, given a long history of misuse of a generally irrelevant characteristic, once the minority has been able to obtain some

278. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that heightened scrutiny is warranted both when there is "legislation which restricts those *political processes* which can ordinarily be expected to bring about repeal of undesirable legislation" as well as when there is "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those *political processes* ordinarily to be relied upon to protect minorities") (emphasis added).

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

degree of political power, the reverberations of history are likely to result in retaliatory action aimed at the majority group.²⁸⁰ Thus, such a history of misuse warrants greater scrutiny by the courts whenever that characteristic comes into play. Indeed, the Court's more recent decisions discuss the history of misuse of race or sex in opinions in which the aggrieved plaintiff is white or male.²⁸¹

To be sure, there are many critics of *Adarand's* consistency principle, and they might find my proposed refinement of the *Frontiero* factors abhorrent to their preferred interpretation of the Equal Protection Clause. But *Adarand* is here to stay, and the unresolved tension between it and the *Frontiero* line of cases has done much to harm efforts to advance the rights of sexual minorities and other minority groups because it has effectively stalled the development of the *Frontiero* line of cases. Only by providing a map for the Court to harmonize the two lines of cases is there hope for the Court to add to its list of suspect and quasi-suspect classifications.

V. THE RELEVANCE OF STATE CONSTITUTIONS

Suppose that little or none of what I have discussed thus far comes to fruition. Instead, the Court explicitly holds that under the U.S. Constitution, discrimination against gays and lesbians is entitled only to rational basis scrutiny. Or the Court reserves judgment on that question but holds that until that issue is resolved, a heterosexual cannot successfully invoke heightened scrutiny. Under those circumstances, is there any other way that an aggrieved heterosexual plaintiff can obtain heightened equal protection scrutiny of a gayaffirmative action policy?

It is an elemental principle of constitutional law that the U.S. Constitution sets a floor, not a ceiling, and thus that states are able to interpret parallel provisions in their own constitutions to provide greater protections than are provided by the U.S. Constitution.²⁸² Moreover, the Court has made clear that this principle extends to how states interpret their analogues to the Equal Protection Clause.²⁸³ Numerous states have

280. See generally *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 495–96 (1989) (plurality opinion); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295–99 (1978).

281. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–39 (1994); *Shaw v. Reno*, 509 U.S. 630, 650–51 (1993).

282. See, e.g., *California v. Greenwood*, 486 U.S. 35, 43 (1988); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

283. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981).

opted to do so in various contexts, with many states applying strict instead of merely intermediate scrutiny to classifications based on sex²⁸⁴ or legitimacy.²⁸⁵ Moreover, a number of states have applied intermediate or strict scrutiny instead of merely rational basis review to classifications based on age,²⁸⁶ wealth,²⁸⁷ or disability.²⁸⁸ And most relevant to this Article, several states have held that discrimination against gays and lesbians is subject to intermediate or strict scrutiny, including California,²⁸⁹ Connecticut,²⁹⁰ and Iowa.²⁹¹

Thus, suppose the gayaffirmative action policy at issue were established at a state university in California, Connecticut, or Iowa. Would courts in those states apply the *Adarand* principle, as a matter of state constitutional law, to subject laws discriminating against heterosexuals to intermediate or strict scrutiny? *Must* they do so as a matter of federal constitutional law?

As to the first question, only a handful of decisions have addressed the issue—all outside of the context of sexual orientation discrimination—and they have provided mixed results (many others have simply applied the consistency rule without discussion).²⁹² For example, California courts, which have long applied strict scrutiny to sex-based discrimination, have held that such scrutiny also applies to affirmative action policies designed to benefit women.²⁹³ In contrast, California courts, which have also held that laws that discriminate against the poor are subject to strict scrutiny (at least in some circumstances), have rejected an argument that consistency

284. See *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 539–40 (Cal. 1971) (en banc); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974); *Commonwealth v. Chou*, 741 N.E.2d 17, 24 n.6 (Mass. 2001); *State v. Burning Tree Club, Inc.*, 554 A.2d 366, 386 (Md. 1989); *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 977–78 (Or. 1982); *In re McLean*, 725 S.W.2d 696, 697–98 (Tex. 1987); *Peters v. Narick*, 270 S.E.2d 760, 763–66 (W. Va. 1980).

285. See *Taylor v. Hoffman*, 544 S.E.2d 387, 392 (W. Va. 2001); *Adkins v. McEldowney*, 280 S.E.2d 231, 233 (W. Va. 1981).

286. See *Hamm v. Phila. Bd. of Educ.*, 9 Pa. D. & C.3d 388, 393 (Pa. Ct. Com. Pl. 1979); *State v. Anderson*, 996 So. 2d 973, 1010–11 (La. 2008).

287. See *Serrano v. Priest*, 557 P.2d 929, 950–51 (Cal. 1976), *supplemented by* 569 P.2d 1303 (Cal. 1977).

288. See *Rayhall v. Akim Co.*, 819 A.2d 803, 813 (Conn. 2003); *Frandsen v. Cnty. of Brevard*, 800 So. 2d 757, 759–60 (Fla. Dist. Ct. App. 2001); *Breen v. Carlsbad Mun. Schs.*, 120 P.3d 413, 419–23 (N.M. 2005).

289. See *Strauss v. Horton*, 207 P.3d 48, 78 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384, 441–44 (Cal. 2008).

290. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431–82 (Conn. 2008).

291. See *Varnum v. Brien*, 763 N.W.2d 862, 885–96 (Iowa 2009).

292. See, e.g., *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974); *Commonwealth v. Chou*, 741 N.E.2d 17, 24 n.6 (Mass. 2001); *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 977–78 (Or. 1982); *In re McLean*, 725 S.W.2d 696, 697–98 (Tex. 1987).

293. See *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 25–26 (Cal. Ct. App. 2001).

requires an extension of that level of scrutiny to laws that discriminate against the wealthy.²⁹⁴ Moreover, Connecticut courts, which accord strict scrutiny to laws that discriminate against the disabled, do not extend that same level of scrutiny to laws that discriminate in their favor.²⁹⁵

As to the second question, it would appear that states are free to impose differing levels of scrutiny on laws discriminating against sexual minorities and those discriminating against heterosexuals and not run afoul of the Equal Protection Clause of the U.S. Constitution so long as federal precedent accords only rational basis scrutiny to such classifications. To be sure, a state constitutional provision can be deemed to run afoul of the federal Equal Protection Clause,²⁹⁶ and the Court has made clear that a state constitutional provision that is interpreted so as to expansively grant rights to one group can, in the course of so doing, violate the federal constitutional rights of another and be subject to challenge on that ground.²⁹⁷

But the *Adarand* line of cases does not declare a federal constitutional right to have a “consistent” level of scrutiny applied across the board by state courts interpreting state analogues to the federal Equal Protection Clause. Instead, those decisions set a federal floor for equal protection review, requiring a minimum of strict scrutiny for racial classifications and intermediate scrutiny for sex classifications. Thus, a state that opted to apply intermediate scrutiny to laws discriminating against women but only rational basis review to laws discriminating against men would run afoul of the federal Equal Protection Clause, as would a state that opted to apply strict scrutiny to laws discriminating against racial minorities but only intermediate scrutiny to laws discriminating against whites.

Yet, if a state decided to satisfy the federal constitutional floor for one class—such as heterosexuals—and to impose a higher level of scrutiny for its counterpart—sexual minorities—the constitutionality of that scheme would turn on whether it satisfies the level of federal equal protection scrutiny normally applied to those types of classifications. If the federal Equal Protection Clause thus provides only for rational basis review of sexual orientation classifications, the federal constitutional question would

294. See *Jensen v. Franchise Tax Bd.*, 100 Cal. Rptr. 3d 408, 414 (Cal. Ct. App. 2009); *People v. Mitchell*, 36 Cal. Rptr. 2d 150, 156 (Cal. Ct. App. 1994).

295. See *Pasquariello v. Stop and Shop Cos., Inc.*, 916 A.2d 803, 813 (Conn. 2007); *Rayhall v. Akim Co.*, 819 A.2d 803, 814 (Conn. 2003).

296. See *Romer v. Evans*, 517 U.S. 620, 623 (1996).

297. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (noting that expansive interpretation of state’s analogue to First Amendment can run afoul of federal Takings Clause to the extent it provides a right to engage in that conduct on the private property of others).

reduce itself to whether it is rational for the state constitution to subject such laws to differing levels of scrutiny depending upon the class impacted. The same deference under that standard that results in upholding the constitutionality of most specific laws discriminating on a non-suspect basis should likewise result in upholding the constitutionality of such a state constitutional scheme.

In this sense, inconsistency by states via the application of their analogues to the federal Equal Protection Clause is no different than any other form of inconsistency that occurs when a state chooses to discriminate in favor of or against any given class. If a state's decision to discriminate *against* sexual minorities is subject only to rational basis review under the federal Equal Protection Clause when a state chooses to permit only heterosexuals to marry or adopt children, then logically its decision to discriminate in *favor* of sexual minorities through the application of a more stringent level of scrutiny under the state analogue to the federal Equal Protection Clause should similarly be subject only to rational basis review.

In sum, it may be that an aggrieved plaintiff living in one of the handful of states that have applied heightened scrutiny under their state constitutions to laws discriminating against sexual minorities might, as a matter of state constitutional law, persuasively argue for extension of that standard to laws discriminating against heterosexuals. But if a state declines to do so, a federal constitutional challenge to such a scheme rises or falls on the same arguments as those involved in determining whether to have heightened scrutiny under the federal Equal Protection Clause for sexual orientation classifications.

CONCLUSION

In this Article, I have demonstrated the various ways in which a heterosexual plaintiff could challenge a sexual orientation-based affirmative action policy. I have argued that such a plaintiff should be able to argue for heightened equal protection scrutiny for sexual orientation classifications without waiting for that standard to first be established in a case involving discrimination against sexual minorities. In the course of so doing, I have provided a roadmap for harmonizing several of the Court's parallel and sometimes contradictory lines of equal protection precedent.

While at first glance, it might seem strange to use such a case to establish heightened equal protection scrutiny for sexual orientation classifications, it would not be the first time the Court has furthered the longer-term interests of minorities in a case in which the aggrieved party

was in the majority. As an example, the Court first declared the constitutionality of hate crimes statutes in a case in which the victim was white and the perpetrators were black.²⁹⁸ Moreover, with Justice Kennedy as the swing vote in (and author of) each of the major gay rights cases decided by the Court, his support for gay rights coupled with his general distaste for affirmative action might make such a case the perfect factual setting for the Court to announce heightened scrutiny for sexual orientation discrimination and also resolve a longstanding tension in the Court's equal protection precedents. It may be that the Court will instead choose to establish heightened scrutiny for sexual orientation classifications in a more traditional way. Specifically, the Court is set to issue an opinion in 2015 addressing the question whether state laws prohibiting same-sex marriage violate equal protection.²⁹⁹ The Court might opt to apply heightened equal protection scrutiny in that case, and in a subsequent case address the question whether that same level of heightened scrutiny would apply to laws that discriminate in favor of sexual minorities. Anticipating that possibility, this Article has likewise provided a roadmap for harmonizing the tension in the Court's equal protection precedents in such a serial fashion.

298. See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

299. See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571).