FINDING LGBTS A SUSPECT CLASS: ASSESSING THE POLITICAL POWER OF LGBTS AS A BASIS FOR THE COURT'S APPLICATION OF HEIGHTENED SCRUTINY

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ABSTRACT

In this Article I argue the U.S. Supreme Court should find lesbian, gay, bisexual, and transgender persons ("LGBTs") to be a politically powerless minority group and apply heightened scrutiny to statutes treating LGBTs differently as a result. This argument buttresses the already strong reasoning by which the Court should find LGBTs a suspect class and could perhaps serve as the tipping point in the Court's equal protection analysis.

LGBTs are a politically powerless minority group because they are grossly underrepresented in our nation's legislative bodies. As a result, the ability of these institutions to respect and consider the needs of LGBTs is compromised. Direct and proportional representation of LGBTs is necessary to ensure the interests of LGBTs are taken into account. LGBT legislators are more likely than non-LGBT legislators to understand the needs of the LGBT community, champion those needs, identify the impact of facially neutral legislation on LGBTs, and serve as allies for each other in efforts to pass legislation addressing the needs of LGBTs. Because the number of LGBTs currently serving in our nation's legislative bodies is far short of proportional, Americans have reason to doubt the constitutionality of statutes enacted by these bodies that treat LGBTs differently. Applying heightened review to statutes treating LGBTs differently is necessary to remedy this flaw in our nation's lawmaking process and ensure equal protection.

I. INTRODUCTION

In recent years our nation has begun to engage in a legal, political, social, and moral debate concerning the liberties of lesbian, gay, bisexual, and transgender persons ("LGBTs"), including the right to marry and adopt children. It is likely that the United States Supreme Court will weigh in on one or more of these issues in the coming years, particularly given the current constitutional challenge to California's Proposition 8—the voter-approved

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constitutional amendment banning same-sex marriage—pending in federal court.[1]

In this Article I argue the Court should find LGBTs a suspect class, and apply heightened scrutiny to statutes treating LGBTs differently, on the basis that LGBTs are a politically powerless minority group. Such review by the Court would make it difficult for discriminatory laws like those limiting marriage to unions between a man and a woman to survive constitutional muster.[2] Although the Supreme Courts in California,[3] Connecticut,[4] and Iowa[5] have recently employed heightened scrutiny in striking laws limiting marriage to opposite-sex couples, the U.S. Supreme Court has never done so.

This Article argues LGBTs are a politically powerless minority because they are grossly underrepresented in our nation's legislative bodies. As a result, the ability of these institutions to respect and consider the needs of LGBTs is compromised. Americans have reason to doubt the constitutionality of statutes enacted by these bodies that treat LGBTs differently. Close scrutiny by the courts is necessary to remedy this flaw in the legislative process and to ensure such statutes afford equal protection under the law. This argument buttresses the already strong reasoning by which the Court could find LGBTs a suspect class and could perhaps serve as the tipping point in the Court's analysis.

II. EQUAL PROTECTION ANALYSIS

The 14th amendment to the U.S. Constitution states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[6] This equal protection clause requires that similarly situated people be treated similarly.[7] A statute which treats similarly situated people differently is subject to challenge under the equal protection clause.[8]

Lawmakers have the initial discretion to ensure the laws they pass afford equal protection.[9] Hence, statutes which draw classifications between groups of people withstand constitutional muster if there is a legitimate justification for the classification, and the classification is rationally or fairly related to that goal.[10] However, statutes that draw distinctions based on "suspect"

1. *See* Perry v. Schwarzenegger, No. 09-CV-2292 (N.D. Cal. filed May 22, 2009) (challenging the constitutionality of Proposition 8, a voter-approved amendment to the California Constitution recognizing marriage as a union between only a man and a woman).

2. *See In re* Marriage Cases, 43 Cal. 4th 757, 840-41, 857 (2008) (holding sexual orientation a suspect classification under California's equal protection clause and finding California's limitation on marriage to only opposite-sex couples unconstitutional as a result).

3. *Id.*

4. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008) (holding a statutory ban on same-sex marriage unconstitutional on equal protection grounds).

5. *See* Varnum v. Brien, 763 N.W. 2d 862 (Iowa 2009) (holding a state statute defining marriage as between only a man and a woman in violation of the equal protection provision of the Iowa Constitution).

6. U.S.CONST. amend. XIV, § 1.

7. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 (1982) (striking a state law denying free public education to undocumented children on equal protection grounds).

8. *See Kerrigan*, 957 A.2d at 421-22.

9. *See Plyler*, 457 U.S. at 216.

10. *Id.*

classifications, such as race or sex, are subject to a "more searching judicial inquiry" or heightened level of judicial review under equal protection analysis.[11] This is because suspect classifications "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[12]

As a result, statutes that treat suspect classes differently must be "precisely tailored to serve a compelling governmental interest."[13] For example, there must be an "exceedingly persuasive justification" for laws that distinguish based on sex, and that distinction must substantially relate to the achievement of the justification.[14]

III. APPLICATION OF EQUAL PROTECTION ANALYSIS TO LAWS DISTINGUISHING BASED ON SEXUAL ORIENTATION

To date, the U.S. Supreme Court has applied heightened scrutiny to laws that discriminate based on several "suspect" classifications: race, alienage, and national origin.[15] It has also applied such scrutiny to "quasi-suspect"[16] classes including sex and illegitimacy.[17] But neither the Supreme Court, nor the majority of state courts, have considered sexual orientation a suspect classification or applied heightened scrutiny to statutes distinguishing on that basis.[18]

The Court's decision in *Lawrence v. Texas*,[19] overruling *Bowers v. Hardwick*[20] and finding a Texas sodomy statute unconstitutional on the basis that it violated the liberty and privacy interests protected by the Fourteenth Amendment, could signal the Court's readiness to apply heightened scrutiny to statutes distinguishing based on sexual orientation. In the past, several courts relied on *Bowers,* where the Court upheld a statute criminalizing sodomy, in concluding

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11. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

12. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (upholding a zoning ordinance under equal protection analysis and finding mental retardation not a quasi-suspect classification).

13. *Plyler*, 457 U.S. at 217.

14. United States v. Virginia, 518 U.S. 515, 533–34 (1996) (finding the male-only admission policy of a state-supported college in violation of the equal protection clause).

15. *See Cleburne*, 473 U.S. at 440.

16. This Article makes no distinction between "suspect" classes, to which the Court affords its strictest level of scrutiny, and "quasi-suspect" classes, to which the Court affords an intermediate level of scrutiny. Courts have generally applied the same reasoning in determining whether a classification merits strict or intermediate scrutiny. *See Kerrigan*, 957 A.2d at 430.

17. *See id.* at 426.

18. The Supreme Courts of California, Connecticut, and Iowa, respectively, have applied heightened scrutiny to statutes distinguishing based on sexual orientation. *See In re* Marriage Cases, 43 Cal. 4th 757 (2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008); Varnum v. Brien, 763 N.W. 2d 862 (Iowa 2009).

19. 539 U.S. 558 (2003).

20. 478 U.S. 186, 190-91 (1986) (rejecting a substantive due process claim with respect to a sodomy statute on the basis that the Constitution confers no fundamental right to engage in homosexual sodomy).

that LGBTs are not a suspect class.[21] In *Ben-Shalom v. Marsh*,[22] for example, the court reasoned: "If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."[23]

Courts have generally afforded heightened scrutiny to suspect classes because these groups: (1) have faced social stigmatization and/or historical discrimination;[24] (2) bear an immutable characteristic beyond the control of the individual;[25] and (3) bear a characteristic that has no relation to a person's ability to contribute to society.[26]

Some courts have also considered whether groups are a minority or whether they are politically powerless—lacking sufficient political power to protect themselves against the passage of laws which deny them equal protection.[27] Courts have described these groups as "discrete and insular minorities," the discrimination against which "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities."[28] Courts consider these discrete and insular minorities to be "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[29]

Strong support exists for the argument that statutes distinguishing based on sexual orientation merit heightened review because LGBTs meet the criteria courts have consistently employed to determine whether a class is suspect.[30]

First, substantial authority supports the notion that LGBTs have been subject to historical discrimination.[31] For example, our country has criminalized homosexual conduct in the past and dismissed persons from military service based solely on their identification as LGBTs.[32] Moreover, LGBTs have been

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21. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (holding that homosexuals are not a suspect class because the Constitution confers no fundamental right to engage in sodomy per *Bowers*). *See also* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (relying on *Bowers* for the proposition that homosexuality is behavioral, not immutable), *cert. denied*, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (holding laws distinguishing based on sexual orientation not subject to heightened scrutiny because *Bowers* upheld a state law criminalizing homosexual conduct).

22. 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

23. *Id*. at 464.

24. *See* Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (applying heightened scrutiny to a federal statute requiring servicewomen, but not servicemen, to prove the dependency of their spouses in order to access additional benefits).

25. *Id.* at 686.

26. *Id.*

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

28. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

29. Plyler v. Doe, 457 U.S. 202, 218 n.4 (1981) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

30. *See* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 36 (D.C. Cir. 1987) ("[S]exual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court to apply strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause.").

31. *See Gay Rights Coal.*, 536 A.2d at 36; *Kerrigan*, 957 A.2d at 432-33; *In re* Marriage Cases, 43 Cal. 4th 757, 841 (2008).

32. *See Varnum*, 763 N.W. 2d at 889.

victims of a significant number of hate crimes in this country.[33] Even courts concluding LGBTs are not a suspect class acknowledge that LGBTs have suffered a history of discrimination.[34]

Second, significant case law supports the notion that sexual orientation bears no relation to individuals' ability to participate and contribute to society.[35] This point is critical to courts' analysis. If there is no real difference in the ability of LGBTs compared to non-LGBTs, legislation treating LGBTs differently is likely to be motivated by prejudice or an inaccurate stereotype.[36] In this respect, LGBTs are similar to racial minorities[37] and women,[38] but different from the developmentally disabled, which the Supreme Court has concluded are not a suspect class.[39]

Third, courts have begun to consider sexual orientation to be an immutable characteristic on the basis that it is a defining trait of personhood "which may be altered [if at all] only at the expense of significant damage to the individual's sense of self."[40]

Finally, LGBTs are considered a minority group on the basis that they are estimated to be between five and ten percent of the population.[41]

Despite the above analysis providing a strong basis for the Court to deem LGBTs a suspect class, the Court has not yet done so. A finding by the Court that LGBTs are politically powerless would provide yet an additional justification for application of heightened scrutiny, and perhaps serve as the tipping point in the Court's analysis.

However, some courts have concluded LGBTs are without sufficient political power.[42] Others have diverged from this view.[43] The Supreme Court

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33. Statistics maintained by the Federal Bureau of Investigation indicate that in 2008 17.6% of the victims of hate crimes were targeted based on their sexual orientation. Federal Bureau of Investigation Unifrom Crime Reports, *available at* http://www.fbi.gov/ucr/hc2008/victims.

34. *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986) *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *High Tech Gays,* 895 F.2d at 573.

35. *See Gay Rights Coal.*, 536 A.2d at 36; Equal. Found. v. City of Cincinnati, 860 F. Supp 417, 437 (S.D. Ohio 1994), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996); *Kerrigan*, 957 A.2d at 435; *In re Marriage Cases*, 43 Cal. 4th at 841.

36. *See Varnum*, 763 N.W. 2d at 890.

37. *See* United States v. Virginia, 518 U.S. 515, 533 n.6 ("The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin"); Grutter v. Bollinger, 539 U.S. 306, 326, 343 (2003) (applying strict scrutiny to a law school admissions policy that considered race, among other factors, and holding the policy did not violate the equal protection clause of the Constitution).

38. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (noting "the sex characteristic frequently bears no relation to ability to perform or contribute to society".)

39. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

40. *See Kerrigan*, 957 A.2d at 438-39 (quoting Jantz v. Muci, 759 F. Supp 1543 (D. Kan. 1991)); *see also In re Marriage Cases*, 43 Cal. 4th at 842 (quoting Egan v. Canada, 2 S.C.R. 513 (1995) for the proposition that sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs"); *Gay Rights Coal.*, 536 A.2d 1 at 36; *Jantz,* 759 F. Supp. at 1551 (finding sexual orientation a "central and defining aspect" of every person), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993).

41. *See Kerrigan*, 957 A.2d at 440 n.30.

has never specifically defined what it means for a group to be politically powerless, nor has it articulated a particular measure of political power.[44]

IV. FINDING LGBTS A POLITICALLY POWERLESS MINORITY GROUP

A. Respect for LGBTs in the Legislative Process

In order to determine whether LGBTs are politically powerless, the Court must ascertain whether they are respected in our nation's legislatures—whether their interests are fully taken into account in the majoritarian process.[45] Justice Marshall stated in his dissenting opinion in *Cleburne* that the political powerlessness of a group is indicative of "a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs."[46] Marshall illustrates this idea by pointing out that minors technically lack political power in the sense that the law affords them neither the right to vote nor the right to represent themselves in our nation's legislatures.[47] Yet the courts do not apply heightened scrutiny to laws treating minors differently because legislators have an understanding of and respect for young people. As Marshall states, legislators "were once themselves young, typically have children of their own, and certainly interact regularly with minors."[48] Similarly, in *Board of Retirement v. Murgia*,[49] the Court deemed the elderly not to be a politically powerless minority group because "it marks a stage that each of us will reach if we live out our normal span."[50] As Marshall reasons, a group that most legislators can identify with or relate to is socially integrated, and thus "treated in legislative arenas with full concern and respect."[51] A group that is socially isolated does not receive the same concern and respect.

Applying Marshall's analysis to LGBTs, there is no question LGBTs have suffered social isolation.[52] For example, in the past LGBTs have been deemed

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42. *See, e.g.*, *Kerrigan*, 957 A.2d at 461; *Varnum*, 763 N.W. 2d at 895; *Gay Rights Coal.*, 536 A.2d at 37; Watkins v. U.S. Army, 847 F.2d 1329, 1348-49 (9th Cir. 1988) (holding homosexual orientation a suspect classification and finding army regulations requiring dismissal of all homosexuals from the army unconstitutional under the Equal Protection Clause), *abrogated on other grounds*, 875 F.2d 699, 704-05 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

43. *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (finding homosexuals are not without political power); Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) ("In these times homosexuals are proving they are not without growing political power."), *cert. denied*, 494 U.S. 1004 (1990); Steffan v. Cheney, 780 F. Supp. 1, 7–8 (D.D.C. 1991) ("[H]omosexuals as a class enjoy a good deal of political power in our society . . . ."), *rev'd on other grounds sub nom.*, Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993).

44. *See Varnum*, 763 N.W. 2d at 893-4; *Kerrigan*, 957 A.2d at 441.

45. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985); *Kerrigan*, 957 A.2d at 429 n.22.

46. *See Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., dissenting).

47. *Id.*

48. *Id.*

49. 427 U.S. 307 (1976).

50. *Id*. at 313–14.

51. *Id.*

52. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 444-46, (Conn. 2008).

mentally ill, and many still believe homosexuality is "morally reprehensible."[53] Even further, intimate conduct between gay persons has been considered a crime throughout our nation's history.[54]

Unlike youth or old age, most non-LGBT legislators cannot identify with being LGBT.[55] Moreover, many non-LGBT legislators lack important contact with the LGBT community that could help them relate to LGBTs. For example, because the LGBT population is estimated to be only five to ten percent of the population,[56] most non-LGBT legislators likely do not have immediate family members who are openly LGBT. This is even more likely to be the case for the significant number of non-LGBT legislators across our nation representing rural areas where the LGBT population is less concentrated.[57]

B. Respect for LGBTs Measured by Direct Representation in Our Nation's Law-Making Institutions

Respect for LGBTs in our nation's legislative bodies can be measured by the number of openly LGBT representatives serving in those bodies.[58] In the past, the Court has considered the direct representation of minorities in our government in determining whether a group is politically powerless.

For example, the low number of women serving in our nation's decision-making councils was a central factor the Court relied on in concluding that statutes distinguishing based on sex are subject to heightened review.[59] In *Frontiero v. Richardson,* the Court acknowledged that while women technically are not minorities, women are politically powerless because they face discrimination in the "political arena."[60] The Court cited "vast" underrepresentation of women in the political process, noting that, at that time in 1973, no women served in the United States Senate, only fourteen women served in the House of Representatives, and no women had ever served on the U.S. Supreme Court or as President of the United States.[61]

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53. *Id.* at 444-45.

54. *See id.* at 444.

55. *See* Watkins v. U.S. Army, 847 F.2d 1329, 1348 (9th Cir. 1988) ("[M]any elected officials are likely to have difficulty understanding or emphasizing with homosexuals."), *abrogated on other grounds*, 875 F.2d 699, 704-05 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

56. *See Kerrigan*, 957 A.2d at 440 n.30.

57. Ninety percent of the nation's LGBT population lives in metropolitan areas. Joshua Lynsen, *More Americans Coming Out In Rural Areas,* N.Y. BLADE, Feb. 2, 2007, *available at* http://www.law.ucla.edu/williamsinstitute/press/MoreAmericansComingOutInRuralAreas.html.

58. *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (citing discrimination against women in the "political arena" in concluding women are a suspect class); Equal. Found. v. City of Cincinnati, 860 F. Supp 417, 439 (S.D. Ohio 1994), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996) (finding the LGBT community a politically powerless minority on the basis that "[O]penly gay, lesbian and bisexual individuals are almost entirely absent from the 'Nation's decisionmaking councils' as were women at the time of the *Frontiero* decision."); *Kerrigan*, 957 A.2d at 446 ("Insofar as gay persons play a role in the political process, it is apparent that their numbers reflect their status as a small and insular minority.")

59. *See Frontiero*, 411 U.S. at 686 n.17.

60. *Id.*

61. *Id.*

A similar analysis of the extent to which openly LGBT persons are represented in our nation's legislatures should instruct the Court's determination of whether LGBTs are politically powerless—whether they are respected in the legislative process. There is no question openly LGBT legislators have a direct understanding of the experience and needs of LGBTs. Moreover, the greater the number of openly LGBT representatives serving in a legislative body, the more opportunity for non-LGBT legislators to interact with LGBTs and gain a better understanding of the LGBT experience and perspective. Direct representation of LGBTs impacts the ability of our nation's legislative bodies to respond to the needs of this minority community.

1. LGBT Legislators More Likely to Champion the LGBT Community

The presence of openly LGBT legislators creates respect for LGBTs within that legislative body. By virtue of being LGBT, openly LGBT legislators are incentivized to champion legislation specifically designed to benefit and protect LGBTs. For example, two of the three openly LGBT members in the 111th Congress have sponsored legislation specifically designed to address the needs of LGBTs.

Representative Barney Frank of Massachusetts introduced the *Employment Non-Discrimination Act*,[62] which proposes to extend federal employment discrimination protections to include discrimination based on sexual orientation and gender identity. Similarly, Representative Tammy Baldwin of Wisconsin has introduced both the *Domestic Partnership Benefits and Obligations Act*,[63] which would require the federal government to provide the same benefits to its LGBT civilian employees as those already provided to its employees with different-sex spouses and the *Ending Health Disparities for LGBT Americans Act*,[64] designed to make the nation's health care system more equitable for LGBTs.

Moreover, research suggests that as the number of LGBTs serving in state legislatures increases, so does the number of bills introduced in and adopted by those institutions that are helpful to LGBTs.[65]

2. LGBT Legislators More Likely to Identify the Impact of Facially Neutral Legislation on LGBTs

Openly LGBT legislators are more likely to identify the impact on LGBTs of legislation which, on its face, does not specifically address LGBTs. This is important because non-LGBT legislators—particularly those with little or no contact with the LGBT community—are less cognizant of and sensitive to the needs and concerns of LGBTs.[66] For example, the health care debate during the

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62. *See* S.1584, 111th Cong. (2009), H.R. 3017, 111th Cong. (2009).

63. *See* S.1102, 111th Cong. (2009), H.R. 2517, 111th Cong. (2009).

64. *See* H.R. 3001, 111th Cong. (2009).

65. *See* Donald P. Haider-Markel, *Representation and Backlash: The Positive and Negative Influence of Descriptive Representation*, 32 LEGIS. STUD. Q. 107, 117 (2007).

66. *See* Jantz v. Muci, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (finding that homosexuals have limited political power and stating, "By diminishing contact between the heterosexual majority and avowed homosexuals, the majority loses any perspective on concerns in the homosexual community and is deprived of the resulting sensitivity to those concerns."), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993).

111th Congress did not specifically address the rights of LGBTs because the goal was to reform the system and expand insurance coverage for all Americans. Yet Tammy Baldwin led an effort in the House to amend its health care reform legislation to: (1) assist people with AIDS in accessing drugs under Medicare; and (2) include data collection on the health of LGBTs.[67]

3. LGBT Legislators More Dependent on other LGBT Legislators to Pass Legislation Addressing the LGBT Community

Openly LGBT legislators rely upon other LGBT legislators to build the support necessary to pass legislation designed to benefit and protect LGBTs. Most legislation pending in the House of Representatives during the 111th Congress addressing the needs of LGBTs and sponsored by an openly LGBT member of Congress is co-sponsored by another openly LGBT member of Congress.

Openly LGBT legislators are less likely to be able to depend on help from non-LGBT legislators who may fear backlash from their constituents for supporting the LGBT community.[68] Non-LGBT legislators championing protection for LGBTs are at risk of becoming real or perceived targets of prejudice,[69] particularly in the parts of the country that have taken proactive steps to limit LGBT rights in recent years.[70] The presence of openly LGBT legislators who can serve as needed allies and educate non-LGBT legislators as to the needs of the community creates respect in the legislature for LGBTs.

In sum, direct representation of LGBTs in our nation's legislatures is paramount to ensuring LGBTs are respected by this branch of government. Such legislators are more likely to champion issues relevant to the LGBT community, identify the impact of facially neutral legislation on LGBTs, serve as allies for each other in efforts to pass legislation addressing the LGBT community, and educate their colleagues as to the LGBT experience.

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67. *See* H.R. 3962, 111th Cong. (2009).

68. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 452 (Conn. 2008) (noting that "potential allies from outside the gay [and lesbian] community may think twice about allying their fortunes with such a despised population.") (brackets in original).

69. *See, e.g.*, *Jantz*, 759 F. Supp. at 1550 ("Politicians seeking to limit the impact of anti-homosexual prejudices through legislation are themselves the target of prejudice."); Watkins v. U.S. Army, 847 F.2d 1329, 1348 (9th Cir. 1988) ("Elected officials sensitive to public prejudice may refuse to support legislation that even appears to condone homosexuality."), *abrogated on other grounds*, 875 F.2d 699, 704–05 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

70. Since 2004, 26 states have passed constitutional bans on same-sex marriage: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wisconsin. Same-sex marriage has been defeated by the voters in every state—31 in total—in which it has been put on the ballot. *See* Glenn Adams and David Crary, *Maine Voters Reject Gay-Marriage Law*, WASH. TIMES, Nov. 4, 2009. Moreover, Congress enacted the Defense of Marriage Act in 1996 which states that no state is required to honor a same-sex marriage under the laws of another state, 28 U.S.C. § 1738C (2006), and explicitly defines marriage as a union between a man and woman only. 1 U.S.C. § 7 (2006). In addition, Arkansas passed a ballot initiative in 2008 forbidding adoption by unmarried adults. *See* Unmarried Couple Adoption Ban, Ark. Ballot Initiative 1 (2008).

C. LGBTs Must Be Proportionately Represented in Our Nation's Legislatures To Ensure These Institutions Respect LGBTs

1. Standard of Measurement

At a minimum, LGBTs must be represented in our nation's legislatures at a level proportional to the LGBT population at large, which is estimated to be between five and ten percent.[71] This will give Americans reasonable confidence that LGBTs' interests will be respected in the law-making process, and that the legislatures will not pass statutes that discriminate against LGBTs in violation of the equal protection clause.

It is insufficient to argue that LGBTs are politically powerful because there is one openly LGBT member of Congress,[72] or alleged closeted legislators. Closeted representatives cannot create the respect for the LGBT community in the legislatures as described above in Section IV.A. They may even oppose legislation addressing LGBTs to stymie suspicion about their sexual orientation.[73]

Given the history of discrimination against LGBTs, trivial representation of LGBTs is also not enough to create respect for the LGBT community. The court in *Steffan v. Cheney*,[74] which held sexual orientation is not a suspect classification, found LGBTs "enjoy a good deal of political power," and stated, "just because there are only a few members of Congress who are openly homosexual does not mean that homosexuals as a class are without influence." The court reasoned: "[t]here are not many medical doctors in Congress either, and yet that profession is exceptionally well represented on Capitol Hill."[75] But this type of reasoning signals a lack of appreciation for the life experience of LGBTs. Medical doctors have always been among the most respected of professionals in our nation and have not suffered from the type of discrimination, isolation, and hatred that the LGBT community has endured throughout our nation's history.[76]

2. Application of Standard

Although society may be becoming more accepting of LGBTs, representation of LGBTs in our nation's legislatures remains dismal at best. The Supreme Court of Connecticut recently concluded that LGBTs are a political underclass based on the diminutive number of LGBTs serving in our nation's political and judicial institutions.[77]

The current number of LGBTs serving in our law-making institutions is far short of proportional representation. Only .69%, or three, members of Congress

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71. *See supra* note 41.

72. *See* Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

73. *See Watkins*, 847 F.2d at 1348 ("[T]he social, economic, and political pressures to conceal one's homosexuality commonly deter many gays from openly advocating pro homosexual legislation . . . .").

74. 780 F. Supp. 1, 7–8 (D.D.C. 1991), *rev'd on other grounds sub nom.*, Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993).

75. *Id.* at 9.

76. *See supra* Section IV.A.

77. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 447 (Conn. 2008).

are openly LGBT. Only .01%, or seventy-four, of our states' legislative representatives are openly LGBT. Moreover, only one statewide elected official is openly LGBT. No openly LGBT person has ever served in the U.S. Senate, on the Supreme Court, or as President of the United States. Overall, .089% or 445 of the 500,000 elected officials in America are openly LGBT.[78]

These facts confirm LGBTs are severely underrepresented in our nation's law-making institutions, making it difficult for them to command respect for their interests as described above in Section IV.B. The Court should consider LGBTs a politically powerless minority group on this basis and apply heightened scrutiny to legislation passed by these institutions which treat LGBTs differently.

V. MEASURING THE POLITICAL POWER OF LGBTS BASED ON ISOLATED LEGISLATIVE VICTORIES IS NOT ACCURATE AND TOO NARROW

Many courts have concluded LGBTs are politically powerful based on a record of legislation protecting LGBTs.[79] One court even relied on legislative debate hostile to LGBTs to conclude they are successful in capturing Congress' attention.[80] Indeed, litigants arguing LGBTs are not a suspect class have cited legislative victories as conclusive evidence they are politically powerful and not a suspect class.[81] This conclusion is inaccurate and based on evidence that is too narrow.

First, it is inaccurate because the legislative protections and rights that have been afforded to LGBTs are much less than the protections afforded women when the Court deemed them a suspect class per *Frontiero* in 1973. For example, in *Frontiero* the Court noted that Congress had afforded women protection against discrimination under Title VII of the Civil Rights Act of 1964, protection against disparate pay under the Equal Pay Act of 1963, and passed the Equal Rights Amendment.[82] Yet today many fundamental protections afforded to women and racial minorities are still not available to LGBTs, such as protection against employment discrimination, the right to openly serve in the military, and the ability to sponsor a same-sex partner for family-based immigration. Other rights, such as marriage, domestic partnership, family and medical leave for unmarried same-sex partners, and the right to adopt children are available to LGBTs in some states but not others. Furthermore, in recent years our government has adopted laws that are openly hostile to LGBTs. The federal

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78. An inventory of current openly LGBT elected representatives is maintained by the Gay & Lesbian Leadership Institute, *at* http://www.glli.org/out_officials (last visited September 4, 2009).

79. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990); *Steffan*, 780 F. Supp. at 9.

80. *See* Dahl v. Sec'y of the U. S. Navy, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993) (finding homosexuals without political power, noting, "[R]ecent Congressional and executive dialogue concerning homosexuals' ability to serve in the military demonstrates that, despite their apparent inability to assert direct control over Congress, homosexuals have a significant ability to attract Congress' attention.").

81. *See In re* Marriage Cases, 43 Cal. 4th 757, 843 (2008).

82. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 687 (1973); *Kerrigan*, 957 A.2d at 452 (finding that gay persons in Connecticut hold less political power than women did when *Frontiero* was decided in 1973, based in part on legislation enacted to protect women).

government, for example, passed Don't Ask Don't Tell[83] and the Defense of Marriage Act.[84] Moreover, many states have passed laws and/or constitutional amendments prohibiting LGBTs from adopting children[85] or banning same-sex marriage.[86] This is of no surprise given the severely low number of openly LGBT legislators serving in our nation's legislatures.

Second, concluding LGBTs are politically powerful based on isolated legislative victories is too narrow a measure of whether LGBTS are respected in the legislative process. For example, it does not measure the extent to which legislation addressing LGBT needs has been introduced but never enacted or ushered to the top of the legislative agenda by party leadership.[87] Moreover, as discussed above in Section IV.B.2., focusing on legislation specifically regarding LGBTs does not measure whether their interests have been considered and respected regarding legislative issues facially neutral to LGBTs such as health care reform.

Finally, analyzing isolated legislative victories fails to take into account the willingness of legislators to assist LGBTs in other ways. For example, it does not measure the extent to which legislators earmark funding within the

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83. *See* 10 U.S.C. § 654 (2006) (prohibiting openly LGBT persons, or persons found to have engaged in homosexual acts or to have married or attempted to marry a person of the same-sex, from serving in the military).

84. *See* 28 U.S.C. § 1738C (2006) (stating that no state shall be required to recognize a same-sex relationship recognized as a marriage under the laws of another state); 1 U.S.C. § 7 (2006) (defining marriage as a union between a man and woman).

85. Five states—Arkansas, Florida, Michigan, Mississippi and Utah—prohibit same-sex couples from jointly petitioning for adoption. *See* Unmarried Couple Adoption Ban, Ark. Ballot Initiative 1 (West Supp. 2008) (prohibiting a person co-habitating with a sexual partner outside of marriage from becoming a foster or adoptive parent); MICH. COMP. LAWS ANN. § 710.24 (permitting adoption by a a "person, together with his wife or her husband, if married." The state attorney general issued an opinion stating that same-sex couples married in other states may not adopt, but one member of that couple may adopt in Michigan as a single person. Op. Att'y Gen. 7160 (Mich. 2004)); MISS. CODE ANN. § 93-17-3(5) (Supp. 2009) ("Adoption by couples of the same gender is prohibited."); UTAH CODE ANN. § 78B-6-117(3) (prohibiting adoption by a "a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state") (2008). In addition, Florida prohibits any "homosexual" person from adopting. *See* FLA. STAT. ANN. Section 63.042(3) (West) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.")

86. *See supra* note 70.

87. The following bills addressing the needs of the LGBT community have been introduced in Congress, but have not been enacted as of May 9, 2010: (1) the Employment Non-Discrimination Act, S.1584, 111th Cong. (2009), H.R. 3017, 111th Cong. (2009), would provide protections against employment discrimination on the basis of sexual orientation; (2) the Domestic Partnership Benefits and Obligations Act, S. 1102, 111th Cong. (2009), H.R. 2517, 111th Cong. (2009), would provide the benefits afforded to different sex spouses to LGBT federal civilian employees; ; (3) the Tax Equity for Domestic Partner and Health Plan Beneficiaries Act, S. 1153, 111th Cong. (2009), H.R. 2625, 111th Cong. (2009), would prohibit the taxation of benefits provided for domestic partners under employers' health plans; (4) the Early Treatment for HIV Act, S. 833, 111th Cong. (2009), H.R. 1616, 111th Cong. (2009), would provide states the option of covering low-income HIV-positive people under Medicaid, before they become disabled, and provide an increased federal match for this purpose; (5) the Uniting American Families Act S. 424, 111th Cong. (2009), H.R. 1024, 111th Cong. (2009), would permit Americans to sponsor their same-sex partner for family-based immigration; (6) the Military Readiness Enhancement Act, H.R. 1283, 111th Cong. (2009), would repeal Don't Ask, Don't Tell, the policy prohibiting LGBTs from openly serving in the military; and (7) the Ending Health Disparities for LGBT Americans Act, H.R. 3001, 111th Cong. (2009), would make the nation's health care system more equiptable for LGBTs.

appropriations bill for LGBT-related causes, or help LGBT constituent groups access government services.

VI. ASSESSING THE POLITICAL POWER OF LGBTS IS A CRITICAL CONSIDERATION UNDER EQUAL PROTECTION ANALYSIS DESPITE REAL OR PERCEIVED ELECTORAL GAINS OF OTHER GROUPS AFFORDED SUSPECT STATUS

Some may argue the political power of a minority group is now a moot factor under equal protection analysis. As the argument goes, courts continue to apply heightened scrutiny to statutes distinguishing based on race or sex despite real or perceived electoral gains by women and racial minorities.[88]

However, this argument ignores important distinctions between the treatment of LGBTs as compared to women and racial minority groups in this country. Our country affords women and racial minorities legal protection against discrimination, yet the states and the federal government have passed numerous laws which explicitly deny equal treatment for LGBTs.[89] This is why assessing the political power of LGBTs to protect themselves against passage of such laws by our legislative institutions is not only relevant but critical to the Court's equal protection analysis when reviewing laws treating LGBTs differently.

VII. ADDRESSING THE COUNTER MAJORITARIAN DIFFICULTY

Others question whether the Court's application of heightened scrutiny is appropriate given the democratic principles upon which our government was founded. Judicial review of statutes passed by the legislature, a co-equal branch of government, raises the counter majoritarian difficulty—the concern that it is undemocratic for the courts to thwart the will of the legislature when, according to the courts, the actions of the legislature stand in violation of the Constitution.

Over time, our country has become more willing to recognize judicial review as a tool necessary to uphold our constitutional values. According to Justice Marshall in *Cleburne*, this is because "[s]hifting cultural, political and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause."[90] For example, most Americans are likely to agree that it was appropriate for the Court to review and strike the following: (1) a Virginia law making it a felony for a white person to marry a colored person;[91] and (2) a federal law requiring a servicewoman to prove her spouse's dependency in order to access enhanced benefits, but not imposing the same requirement on servicemen.[92] This is because our country's views regarding the abilities, rights, and roles of racial minorities and women

88. *See In re* Marriage Cases 43 Cal. 4th 757, 842-43 (2008).

89. *See* discussion of rights and protections afforded to women and racial minorities, but not LGBTS *supra* Section V.

90. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (concurring in part and dissenting in part).

91. *See* Loving v. Virginia, 388 U.S. 1 (1967).

92. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

have progressed over time, perhaps in part because of the Court's action in those cases.

The debate regarding the counter majoritarian difficulty could be renewed if the Court were to afford heightened scrutiny to another suspect class like LGBTs. Our society has not reached a consensus regarding the rights of LGBTs (unlike racial minorities or women) or the appropriateness of statutes which treat LGBTs differently. In recent years the federal government and many states have passed laws limiting the rights of LGBTs,[93] while a few states have passed laws extending rights to LGBTs.[94]

The Court could address the counter majoritarian difficulty by deeming LGBTs a suspect class under the reasoning I set forth in this Article. Our nation's legislative institutions are flawed with respect to LGBTs because they do not respect the concerns of this community and heightened review should be afforded to remedy the problem. Heightened judicial review is appropriate and required in this case precisely because a co-equal branch of government is unable to ensure equal protection of the laws for LGBTs and adherence to the Constitution.

VIII. CONCLUSION

Because LGBTs are grossly underrepresented in our nation's legislative bodies, the ability of these institutions to respect the concerns of LGBTs and ensure equal protection of the laws is compromised. Americans have reason to doubt the constitutionality of statutes passed by these institutions that treat LGBTs differently. It is imperative that the Court apply heightened scrutiny to such statutes. Our Constitution demands nothing less.

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93. *See supra* notes 70 and 83-85.

94. New Hampshire recognizes same-sex marriage as of January 1, 2010. *See* N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2009). Vermont recognizes same-sex marriage as of September 1, 2009. *See* VT. STAT. ANN. tit. 15 § 8 (Supp. 2009).