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# SUSPICIOUS CLOSETS: STRENGTHENING THE CLAIM TO SUSPECT CLASSIFICATION AND SAME-SEX MARRIAGE RIGHTS

MARGARET BICHLER\*

**Abstract:** Ever since gay marriage was legalized in Massachusetts in 2003, the gay marriage debate has consumed much of the American political conscience. While many important questions concerning equal protection, the institution of marriage, and modern conceptions of family have been asked, few have stopped to question what (aside from Judeo-Christian moral issues) makes homosexuals so wrong—so undeserving of the right to marry and have a family. The process of deviant identity construction and the optional “closet” must be comprehended in order for the gay claim to equal protection and suspect classification to be fully considered and appropriately evaluated. Once gays are properly regarded as a suspect class, laws prohibiting gay marriage will, in all likelihood, fail strict scrutiny analysis.

## INTRODUCTION

Recent polls indicate that Americans might soon be willing to accept *civil unions* between homosexual couples.<sup>1</sup> However, the same polls reaffirm both American society’s refusal to accept *gay marriage* and a general disdain for homosexual individuals.<sup>2</sup> As the debate centers on the pros and cons of gay marriage, little or no discussion focuses on what exactly makes any debate over gay rights so heated.<sup>3</sup>

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<sup>1</sup> Gary Langer, *Most Oppose Gay Marriage; Fewer Back an Amendment*, ABCnews.com, June 5, 2006, <http://abcnews.go.com/US/Politics/story?id=2041689&page=1> (last visited Jan. 15, 2008). The poll results indicated that 58% of Americans believe gay marriage should be illegal, and 45% think civil unions giving equal rights to gay couples should be legal. *Id.* When 1002 adult Americans were asked whether they believed homosexuality should be considered an acceptable alternative lifestyle, 41% replied that it should not. Gallup Poll, May 8–11, 2006, [pollingreport.com](http://www.gallup.com/poll/2006/05/081106/civil.htm), <http://www.pollingreport.com/civil.htm> (last visited Jan. 15, 2008).

<sup>2</sup> See Langer, *supra* note 1; Gallup Poll, *supra* note 1.

<sup>3</sup> See Josh Smith, Op-Ed., *Meaning of Marriage*, PHOENIX, Sept. 29, 2004, [available at](http://www.loyolaphoenix.com/news/2004/09/29/) <http://www.loyolaphoenix.com/news/2004/09/29/> (follow the “Debate Ensues over Gay

The debate is fueled by the frequently unacknowledged historical process by which the homosexual identity was labeled perverse by those in the fields of science, medicine, psychology, and media over the last century.<sup>4</sup> This process and the resulting gay identity of deviance explain, to some extent, the general scorn for homosexual individuals and their pursuit of equality.<sup>5</sup> Because of this attitude of aversion, gays exist in a structure commonly referred to as the “closet”—effectively giving gay individuals the option of “coming out” and being discriminated against or remaining closeted and being treated equally to heterosexual individuals.<sup>6</sup> Moreover, laws prohibiting gay marriage reinforce and maintain the notion that homosexuality is inherently wrong.<sup>7</sup> Statutes that criminalize sodomy (whether limited to homosexual sodomy or not) deny gays equal rights and imply a moral and social inferiority to gay relationships and homosexuals themselves.<sup>8</sup> The process by which homosexuals have been labeled deviant, the resulting closet, and the precarious legal status of gay individuals are highly suspect.<sup>9</sup> Only when this background becomes an integral part of the gay marriage debate, and every debate concerning gay rights, can the legal claims of gay individuals be properly weighed and evaluated.<sup>10</sup> This backdrop can and should serve to

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Marriage” hyperlink under “Discourse”). Smith summarizes the reasons cited for opposing gay marriage in America, which focus primarily on Christian doctrine, the well-being of children raised by gay parents, and the possibility that the legalization of gay marriage will lead down a slippery slope into the acceptance of polygamy, bestiality, and the like. *Id.*

<sup>4</sup> See MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION, 42–43, 97–101, 105–06 (1990). Foucault explains the process by which the homosexual identity was constructed as deviant. *Id.* at 101.

<sup>5</sup> *Id.* at 100–01.

<sup>6</sup> EVE SEDGWICK, THE EPISTEMOLOGY OF THE CLOSET 67–68 (1990).

<sup>7</sup> *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003) (explaining that laws prohibiting gay marriage are based on prejudice against gays).

<sup>8</sup> TEX PENAL CODE ANN. § 21.06 (1993); GA. CODE ANN. § 16–6–2 (1984); see *Lawrence v. Texas*, 539 U.S. 558, 582, (2003) (O’Connor, J., concurring) (explaining that a Texas law prohibiting homosexual sodomy legally sanctioned discrimination against homosexuals in the areas of employment, family issues, and housing); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1982) (Blackmun, J., dissenting) (stating that the Georgia statute prohibiting all acts of sodomy denied “individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity”).

<sup>9</sup> See FOUCAULT, *supra* note 4, at 101; SEDGWICK, *supra* note 6, at 68–70, 86.

<sup>10</sup> See FOUCAULT, *supra* note 4, at 101, 104–05; SEDGWICK, *supra* note 6, at 18–20, 69–71. The construction of the deviant identity and closet structure are what make the homosexual population a suspect class; the requirement of denying one’s identity in order to achieve social and legal equality is the very type of evil targeted by the Equal Protection Clause and suspect classification. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 163 (1980); FOUCAULT, *supra* note 4, at 43, 101; SEDGWICK, *supra* note 6, at 69–71.

strengthen the gay claim to suspect classification within equal protection doctrine.<sup>11</sup>

The Equal Protection Clause of the Fourteenth Amendment declares that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>12</sup> This clause was ratified to stop southern states from enacting discriminatory statutes that attempted to maintain the social and political inferiority blacks had suffered as slaves.<sup>13</sup> Since its ratification, the purpose of the clause has been expanded to protect the interests of other socially and politically unpopular groups from a potentially ill-motivated legislature.<sup>14</sup> For the most part, the very process of democracy ensures that people’s interests are pursued by the legislature in its lawmaking—people vote for legislators whose interests align with their own and the need for reelection maintains that alignment.<sup>15</sup> But history has demonstrated that the democratic process can malfunction; a legislature representative of the majority can and will pass laws to the specific disadvantage of minority groups.<sup>16</sup> The Equal Protection Clause works to correct such malfunction by prohibiting state legislation that denies persons equal protection under the laws or, in other words, that discriminates between similarly situated individuals.<sup>17</sup> The clause, “by its explicit concern with equality among the persons within a state’s jurisdiction,” is the Constitution’s clearest recognition that a voice and a vote will not always guarantee good-faith representation of everyone.<sup>18</sup>

Equal protection doctrine distinguishes between classifications,<sup>19</sup> and explains that a suspect classification is one which serves to disadvantage members of a group that has been historically discriminated against, denied political power, and is discrete and insular.<sup>20</sup> Such a

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<sup>11</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); ELY, *supra* note 10, at 82, 155–57.

<sup>12</sup> U.S. CONST. amend. XIV, § 1.

<sup>13</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 652 (2d ed. 2005).

<sup>14</sup> *Id.* at 617–19.

<sup>15</sup> ELY, *supra* note 10, at 82.

<sup>16</sup> *Id.* at 103.

<sup>17</sup> *Id.* at 98.

<sup>18</sup> *Id.*

<sup>19</sup> CHERMERINSKY, *supra* note 13, at 619–20. In addressing equal protection claims, courts apply one of three tests depending on the individual or group making the claim: rational basis, heightened scrutiny, or strict scrutiny. *Id.*

<sup>20</sup> *Bakke*, 438 U.S. at 357; *Carolene Prods.*, 304 U.S. at 152–53 n.4. For the purposes of this paper, “discrete” refers to one’s ability to identify an insular gay community or individual, and *not* the idea that one can or should censor their personal expression of the gay identity.

classification is treated by the court as inherently suspicious, or suspect; accordingly, it will only be upheld if it can withstand strict scrutiny analysis, which requires that the law be narrowly tailored to achieving a compelling government interest.<sup>21</sup> Racial classifications have consistently been regarded as suspect because racial minorities have historically been disenfranchised from the political process and have a signifying trait (skin color) that is immutable and readily visible.<sup>22</sup> John Hart Ely, a prominent constitutional law scholar, examines equal protection doctrine in his book *Democracy and Distrust*.<sup>23</sup> Perhaps the most compelling aspect of Ely's consideration of suspect classification is his analysis of its purpose—namely, to identify the cases in which the democratic process has failed an unpopular minority leaving them vulnerable to mistreatment by the majority.<sup>24</sup>

Despite the rigid criteria for suspect classification, the doctrine's purpose of detecting and stopping efforts by the majority to subjugate a socially unpopular group reveals that the gay population is one such population deserving of its protection.<sup>25</sup> Homosexuals have thus far been denied suspect classification because they do not fit neatly within the parameters drawn by the Court.<sup>26</sup> However, the history of constructed deviance and the unique situation of closeted existence, coupled with Ely's analysis of the aims of suspect classification, will reveal a population more suspiciously situated than any this country has ever seen.<sup>27</sup>

This note seeks to provide a comprehensive understanding of the process by which homosexuals came to be assigned a deviant and perverse identity and then to use this understanding to strengthen their claim to suspect classification and to marriage rights. Part I will situate the reader within the landmark court decisions that have punctuated the battle for gay rights in the United States and the discourse that has defined the gay marriage debate ever since that battle achieved minor success with the legalization of gay marriage in Massachusetts in 2003. Part II will summarize the process by which medical, scientific, and

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<sup>21</sup> See *Bakke*, 438 U.S. at 357; *Carolene Prods.*, 304 U.S. at 152–53 n.4.

<sup>22</sup> See CHEMERINSKY, *supra* note 13, at 653.

<sup>23</sup> See ELY, *supra* note 10, at 135–80.

<sup>24</sup> See *id.* at 152–53, 161.

<sup>25</sup> See *id.* at 145–46, 163.

<sup>26</sup> *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (stating that the Supreme Court has never determined homosexuals to be a suspect class).

<sup>27</sup> See ELY, *supra* note 10, at 155–58 (explaining that more and more scholars are suggesting that legislation rooted in stereotype should be regarded as suspicious); FOUCAULT, *supra* note 4, at 43, 101; SEDGWICK, *supra* note 6, at 71.

popular discourse created and maintained a perverse implantation and the resulting closet. Part III will examine the purpose of the Equal Protection Clause and suspect classification, the complexities of the gay claim to suspect classification given the optional closet, and will then use this peculiar situation to strengthen that claim. Finally, Part IV will argue that if the laws banning gay marriage were subjected to strict scrutiny review they would be ruled unconstitutional.<sup>28</sup>

## I. DISCOURSE OF DEVIANCE: THE LEGAL AND SOCIAL UNDERSTANDING OF THE GAY MARRIAGE DEBATE

Meaningful discourse on gay rights has been exchanged on both the legal and social fronts, but what has frequently made this exchange caustic is the underlying assumption of a deviant and perverse homosexual identity.<sup>29</sup> This typically unacknowledged assumption is crucial to understanding the unique social and legal circumstance of being gay.<sup>30</sup> Most importantly, only when the process of perverse identity construction is understood and accounted for can the claim by gay men and women to equal marriage rights, and equality in general, be properly evaluated within the framework of suspect classification.<sup>31</sup>

### A. *From Bowers to Lawrence: The Process of Progress*

The current legal battle for gay rights began in 1986 with the landmark case of *Bowers v. Hardwick*, in which a Georgia citizen challenged a state statute prohibiting all acts of sodomy after he was arrested and charged with its violation.<sup>32</sup> Hardwick's defense argued that engaging in consensual sodomy was a private and intimate act protected from state prohibition by the guarantee of privacy under the Ninth Amendment of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.<sup>33</sup> Accordingly, the Supreme Court phrased the issue as "whether the Federal Constitution confers a

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<sup>28</sup> Though the same process which has labeled gays deviant and perverse has also worked to craft the perceived deviance of transgendered and bisexual individuals, this note will focus specifically on the gay population and its claim to equal marriage rights because, to date, this is where the debate and its surrounding discourse has focused.

<sup>29</sup> See FOUCAULT, *supra* note 4, at 43, 101, 104–05.

<sup>30</sup> See *id.* at 43, 101; SEDGWICK, *supra* note 6, at 67–68, 71.

<sup>31</sup> See ELY, *supra* note 10, at 155–58, 163; FOUCAULT, *supra* note 4, at 43, 101; SEDGWICK, *supra* note 6, at 69–71.

<sup>32</sup> 478 U.S. 186, 188 (1986). Hardwick was never prosecuted but challenged the constitutionality of the statute in a civil suit. *Id.*

<sup>33</sup> *Id.* at 189.

fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal . . . .”<sup>34</sup> The Court ultimately held that the Constitution does not confer such a right, nor does the fundamental right to privacy extend to protect homosexual sodomy.<sup>35</sup> Justice Blackmun dissented, arguing that if the fundamental right to privacy “means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an ‘abominable crime not fit to be named among Christians.’”<sup>36</sup> The *Bowers* decision provided a serious setback in the fight for gay rights as statutes prohibiting gays from physical intimacy stood as good law across the nation.<sup>37</sup>

Justice Blackmun’s argument that the right to privacy protected individuals’ right to control “the nature of their intimate associations with others” finally found support in the 2003 decision of *Lawrence v. Texas*.<sup>38</sup> In Texas, this time, a citizen was prosecuted for violation of a state statute specifically prohibiting *homosexual sodomy*.<sup>39</sup> Because this statute prohibited only homosexual sodomy, the Court evaluated the issues of privacy and due process present in *Bowers*, and the additional issue of whether a statute such as this violated one’s right to equal protection of the laws.<sup>40</sup> Justice Kennedy, writing for the majority, opined:

The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

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<sup>34</sup> *Id.* at 190.

<sup>35</sup> *Id.* at 192, 195.

<sup>36</sup> *Id.* at 199–200 (Blackmun, J., dissenting) (citing *Herring v. State*, 119 Ga. 709, 721 (1904)).

<sup>37</sup> See *Bowers*, 478 U.S. at 196.

<sup>38</sup> See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

<sup>39</sup> *Lawrence*, 539 U.S. at 564. This case was thus distinguished from *Bowers* because the Georgia statute had prohibited *all* acts of sodomy. *Id.* at 566.

<sup>40</sup> *Id.* at 564.

. . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice.*<sup>41</sup>

The majority held that the right to privacy and the guarantee of liberty in the Due Process Clause did, in fact, protect individuals from criminal prosecution for engaging in intimate acts.<sup>42</sup> The *Lawrence* Court thus overruled *Bowers* and effectively invalidated any state laws prohibiting sodomy.<sup>43</sup>

Notably, the *Lawrence* court based its decision and the overruling of *Bowers* primarily on the right to privacy and the fundamental liberties guaranteed by the Due Process Clause of the Fourteenth Amendment; the majority declined to decide the issue on equal protection grounds.<sup>44</sup> The majority explained that the equal protection challenge was “tenable” but that a decision on equal protection grounds would leave the *Bowers* holding intact—a holding recognized by the *Lawrence* Court as demeaning to the homosexual population.<sup>45</sup> Even though the Court hinted that an equal protection claim would have been successful, it said nothing to suggest what level of scrutiny it would have applied.<sup>46</sup> Justice O’Connor concurred and evaluated the law under the rational basis test, ignoring all possibility that the gay population is a suspect class.<sup>47</sup> She determined that the Texas statute failed even ra-

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<sup>41</sup> *Id.* at 567 (emphasis added).

<sup>42</sup> *Id.* at 578.

<sup>43</sup> *See id.*

<sup>44</sup> *Lawrence*, 539 U.S. at 574–75.

<sup>45</sup> *Id.* This very point brought Justice O’Connor to write a concurring opinion in which she explained that *Bowers* should not have been overturned by *Lawrence*; *Lawrence* should have been decided on equal protection grounds alone because the statute at issue prohibited only homosexual sodomy. *Id.* at 579–80 (O’Connor, J., concurring).

<sup>46</sup> *See id.* at 574–75 (majority opinion).

<sup>47</sup> *See id.* at 579–80 (O’Connor, J., concurring).

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. . . . And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.

*Id.* at 583.

tional basis review, the lowest level of scrutiny, because it was not rationally related to a legitimate government purpose.<sup>48</sup>

Despite the *Lawrence* Court's refusal to analyze the equal protection claim, Justice O'Connor's declaration that moral disapproval of a group was not a legitimate state interest was quickly drawn upon by the Massachusetts Supreme Judicial Court.<sup>49</sup> In the case of *Goodridge v. Department of Public Health*, the court legalized gay marriage within the state.<sup>50</sup> Here, seven gay couples applied for marriage licenses within the state and were denied on the ground that Massachusetts did not recognize same-sex marriage.<sup>51</sup> The couples brought suit against the Department of Public Health, the state agency that had denied the applications.<sup>52</sup> The court evaluated the statute under rational basis, and, citing specifically to Justice O'Connor's concurrence in *Lawrence*, held that the denial of the right to enter into a civil marriage failed; the majority reasoned that:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into a civil marriage and, on the other, protection of public health, safety or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual . . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.<sup>53</sup>

After decades of refusal by the courts to acknowledge gay relationships, the *Lawrence* Court ended the criminalization of such relationships and the *Goodridge* decision took a dramatic step in declaring them both legitimate and legally equal to heterosexual relationships.<sup>54</sup> With the le-

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<sup>48</sup> *Id.*

<sup>49</sup> See *Lawrence*, 539 U.S. at 579–80 (O'Connor, J., concurring) (2003); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968, 973 (Mass. 2003).

<sup>50</sup> 798 N.E.2d. at 968, 973.

<sup>51</sup> *Id.* at 313–15.

<sup>52</sup> *Id.* at 316.

<sup>53</sup> *Id.* at 341–42, 344.

<sup>54</sup> *Lawrence*, 539 U.S. at 578; *Goodridge*, 798 N.E.2d. at 969–70.

galization of gay marriage, even in a single state, came a national debate over marriage, sexuality, and the role of the courts.<sup>55</sup>

### B. *America up in Arms: A Violent Reaction to Goodridge*

The proclamation in *Goodridge* that there was no rational basis for the same-sex marriage ban met with much social resistance.<sup>56</sup> President Bush did not hesitate to confront the country with his moral disdain regarding the decision.<sup>57</sup> On February 24, 2004, the President informed America that “[t]he union of a man and woman is the most enduring human institution . . . honored and encouraged in all cultures and by every religious faith.”<sup>58</sup> President Bush proceeded to call upon Congress to support an amendment to the U.S. Constitution that would forever define and protect marriage as “a union of man and woman as husband and wife . . . .”<sup>59</sup> Even when the proposed amendment was finally defeated in 2006, its supporters vowed not to give up until marriage was codified in the Constitution as the union of a man and a woman.<sup>60</sup> A similar determination has driven forty-five states to adopt statutes and constitutional amendments defining traditional marriage and banning gay marriage.<sup>61</sup>

The will of the people, echoed in their support of state legislation banning gay marriage, is undoubtedly informed by the scholarly, religious, and popular discourse dissecting the issues inherent in gay mar-

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<sup>55</sup> *Goodridge*, 798 N.E.2d. at 969–70; Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage*, N.Y. TIMES, Oct. 27, 2006, at A1.

<sup>56</sup> *Goodridge*, 798 N.E.2d. at 973; Stolberg, *supra* note 55.

<sup>57</sup> See Press Release, White House, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The proposed Federal Marriage Amendment was defeated in the Senate in June 2006, but even with its defeat, Republican Senators vowed eventual success. Shailagh Murray, *Same-Sex Marriage Ban Is Defeated*, WASH. POST, June 8, 2006, at 1. Senator Sam Brownback of Kansas promised not to give up: “We’re making progress, and we’re not going to stop until marriage between a man and a woman is protected . . . in the courts, protected in the Constitution, but most of all, protected for the people and for the future of our children in this society.” *Id.*

<sup>60</sup> Murray, *supra* note 59. An ABC News poll, released in June 2006, reported that forty-two percent of Americans supported the Federal Marriage Amendment. *Id.*

<sup>61</sup> *Id.* Polls taken during the 2006 elections showed that support for legislation banning gay marriage in many states was wavering. Kirk Johnson, *Gay Marriage Losing Punch as Ballot Issue*, N.Y. TIMES, Oct. 14, 2006, at A1. This trend is attributable to increased support of gay marriage at the polls as many gay activist groups have worked diligently to increase voter turnout. See *id.*

riage.<sup>62</sup> Christian scholars, including Pope John Paul II, have declared that gay marriage must be illegal because it is a moral abomination.<sup>63</sup> But the U.S. Supreme Court swiftly addressed this morality-based justification for laws that disadvantage gay people when it explained in *Lawrence* that moral disapproval of a group does not qualify as a legitimate government interest.<sup>64</sup>

Moral arguments thus discounted, scholars have focused largely on history and sociology in an attempt to articulate a legitimate, if not a compelling, government interest.<sup>65</sup> These formulations attempt to provide a legally sound defense of traditional marriage and, in turn, a legally sound argument for the prohibition of gay marriage.<sup>66</sup> The arguments have centered primarily on: (1) the importance of heterosexual marriage and family to the proper upbringing of children, and (2) the

<sup>62</sup> See FOUCOULT, *supra* note 4, at 43, 97–102.

<sup>63</sup> Rebecca Allison, *Pope Calls for Halt to 'Evil Gay Marriages'*, GUARDIAN (London), Aug. 1, 2003, at 1. Pope John Paul II issued a papal note in which he informed all Catholic legislators of a moral duty to oppose all measures aimed at legalizing gay marriage:

There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law.

. . . .

Legal recognition of homosexual unions or placing them on the same level as marriage would mean not only the approval of deviant behaviour . . . but would also obscure basic values which belong to the common inheritance of humanity.

*Gay Unions Defy God Says Vatican*, GUARDIAN (London), Aug. 1, 2003, at 12.

In an even more radical tone, Dr. James Dobson, a Christian radio show host, foretold the downfall of the traditional and biblical family unit and the suffering of children raised by gay parents. James Dobson, *Ten Arguments Against Gay Marriage*, available at <http://www.nogaymarriage.com/tenarguments.asp> (last visited Jan. 15, 2008). For Dobson, the allowance of gay marriage would inevitably compromise the moral nature of public schools, force foster parents to "affirm homosexuality in children and teens," and allow every homosexual to leach expensive health insurance benefits from his or her now legally-recognized spouse. *Id.*

<sup>64</sup> See *Lawrence*, 539 U.S. at 583.

<sup>65</sup> See George Dent, *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 420, 428–29 (2004); Dwight Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL'Y 543, 552 (2004) (arguing that gay marriage should be illegal for the sake of childrens' upbringing). Dent describes the benefits children reap when raised by heterosexual married parents and argues that the traditional meaning of marriage should not be altered because it has historically provided incentive to heterosexual couples by recognizing their union and providing them with a sense of honor. Dent, *supra*, at 428–29.

<sup>66</sup> See Dent, *supra* note 65, at 420, 429; Duncan, *supra* note 65, at 552.

historical, cultural, and social meaning of marriage that cannot and should not be reconceptualized.<sup>67</sup>

Those who oppose gay marriage and assert the well-being of children as a legitimate or compelling interest explain that children can only come about through heterosexual union, and so common sense dictates that children are better raised by a mother and a father.<sup>68</sup> Furthermore, the argument goes, children raised by married biological parents fare better by every measure—physical and mental health, academic performance, social adjustment, and obedience to the law.<sup>69</sup> Finally, gay marriage opponents argue that gay parents will not have the same devotion to the responsibility of raising children that heterosexual parents have, because biological parents are responsible for the very creation of the children.<sup>70</sup>

Supporters of gay marriage are equally concerned with the well-being of children.<sup>71</sup> They point to studies that not only debunk social myths and stigmas traditionally attached to the “gay lifestyle” but also demonstrate that homosexual and heterosexual lifestyles are remarkably similar, especially when it comes to parenting skills.<sup>72</sup> In fact, the American Psychological Association (APA) has stated that not a single study has found that children raised by gay parents are in any way disadvantaged compared to those raised by heterosexual parents.<sup>73</sup> Moreover, the APA has cited research that actually suggests lesbian and gay parents are better parents than heterosexual couples; same-sex couples are less likely to use physical punishment, are more likely to use reasoning in admonishing their children, and are more in-tune with their children’s feelings.<sup>74</sup> In short, extensive studies deflate the arguments

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<sup>67</sup> See Dent, *supra* note 65, at 420, 429; Duncan, *supra* note 65, at 552.

<sup>68</sup> Duncan, *supra* note 65, at 552.

<sup>69</sup> Dent, *supra* note 65, at 428–29. Notably, the study Dent uses to support his argument was explained in a *New York Times* article that never explicitly compares heterosexual and homosexual parents, but instead explains that social scientists have reached a consensus concerning single-parent families. See *id.* at 429 n.43. The study views the single-parent family as the reason for “decades of child poverty, delinquency, and crime” and states that a growing body of social research concludes that the most supportive household contains two biological parents in a low-conflict marriage. *Id.*

<sup>70</sup> *Id.* at 432.

<sup>71</sup> See Adrienne Butcher, *Selective Constitutional Analysis in Lawrence v. Texas*, 41 Hous. L. Rev. 1407, 1425 (2004).

<sup>72</sup> Butcher, *supra* note 71, at 1425.

<sup>73</sup> AM. PSYCHOLOGICAL ASS’N, LESBIAN AND GAY PARENTING 15 (2005), available at <http://www.apa.org/pi/lgbc/publications/lgpconclusion.html> (last visited Jan. 15, 2008).

<sup>74</sup> *Id.* at 8.

that heterosexual, biological, married parents are more fit to raise children.<sup>75</sup>

Opponents of gay marriage also cite the importance of maintaining the historical, cultural and social meaning of marriage.<sup>76</sup> They argue that the meaning of marriage should not be compromised because it has historically acted as a source of honor for heterosexual couples.<sup>77</sup> Further, there is a “consensus offered by history—spanning time and space and cultural and religious differences—that marriage is uniquely a relationship between the sexes, naturally related to procreation and the upbringing of children . . . .”<sup>78</sup> Because society has an interest in future generations, the argument goes, and because the conjugal acts between men and women create these future generations, society has an interest in promoting and protecting laws that reserve marriage for the union of one man to one woman.<sup>79</sup>

Advocates of gay marriage counter that marriage has meant many different things historically and that the term still varies in meaning depending on cultural and social values.<sup>80</sup> For much of history, most cultures have endorsed and practiced polygamy—one man marrying several women.<sup>81</sup> Moreover, marriages were generally arranged by parents whose decisions as to who would be a good spouse for their child were often not informed by said child’s love interests, but instead by a desire to achieve social goals or to obtain social goods.<sup>82</sup> In this way, marriage was “largely a matter of business: cementing family ties, forging social and economic alliances, providing social status for men and economic security for women, conferring dowries, and so on.”<sup>83</sup> If nothing else, history clearly indicates that procreation along with successful child-rearing was never the *single* purpose and reason for the institution of marriage, much less that there was one single reason for marriage at all.<sup>84</sup> The supposed deeply embedded historical, social, and

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<sup>75</sup> See *id.*

<sup>76</sup> See Dent, *supra* note 65, at 420; Duncan, *supra* note 65, at 550.

<sup>77</sup> Dent, *supra* note 65, at 421.

<sup>78</sup> Duncan, *supra* note 65, at 551.

<sup>79</sup> See Sen. Orrin G. Hatch, *Like It or Not . . . The Marriage Amendment Is the Democratic Way*, NATIONAL REVIEW ONLINE, July 8, 2004, <http://www.nationalreview.com/comment/hatch200407080829.asp>.

<sup>80</sup> JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 13–17 (2004).

<sup>81</sup> *Id.* at 15.

<sup>82</sup> *Id.* at 16.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 13–17.

cultural meaning of marriage appears to be more of a mutable relationship between two or more parties.<sup>85</sup>

Though the arguments on both sides of the gay marriage debate have encouraged and even demanded careful contemplation by the American public, they have also left many important questions unasked.<sup>86</sup> The courts, the legislatures, and the American public need to be well-informed of the politics and the history involved in the creation of the deviant homosexual identity that has ignited the debate; only then can the gay claim to suspect classification and marriage rights be properly evaluated.<sup>87</sup>

## II. QUEER CONSTRUCTION: IDENTITY POLITICS AND THE MAKING OF GAY PERVERSION

*The ideal King reigns over everything as far as the eye can see. His eye. What he cannot see is not royal, not real. He sees what is proper to him. To be real is to be visible to the King.*<sup>88</sup>

Meaningful engagement in the gay marriage debate requires both an informed understanding of legal precedent and reasoning, and a critical consciousness of the process by which gay identities have been labeled perverse.<sup>89</sup> Acquiring such consciousness, in turn, requires a basic knowledge of the process by which these identities have been historically constructed through the production and dissemination of scientific and legal discourse.<sup>90</sup> Michel Foucault explains this process in theoretical terms, and provides a real-life example through a review of the past one-hundred years of scientific and medical discourse focused on the homosexual deviant.<sup>91</sup> Throughout, Marilyn

<sup>85</sup> See RAUCH, *supra* note 80, at 13–17.

<sup>86</sup> See *id.*; Dent, *supra* note 65, at 419–20; Duncan, *supra* note 65, at 550.

<sup>87</sup> See FOUCAULT, *supra* note 4, at 37–40, 101–02, 103–04.

<sup>88</sup> MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 3 (1983). Frye summarizes the process by which homosexuals have been defined out of the King's reality when she explains that dictionaries generally agree that "sex" or "sexual intercourse" involves the genital union of a male and a female. See *id.* at 4. At the same time, a "homosexual" is defined as a person who has sex with another of the same gender. See *id.* Therefore, semantics have effectively rid the King's reality of homosexuals as, according to these strictly contradictory definitions, they are both logically and naturally impossible. *Id.* at 6.

<sup>89</sup> See FOUCAULT, *supra* note 4, at 37–40, 101; FRYE, *supra* note 88, at 6; SEDGWICK, *supra* note 6, at 4–6, 75.

<sup>90</sup> FOUCAULT, *supra* note 4, at 97–98, 101.

<sup>91</sup> See *id.*

Frye's metaphor of "the King" is useful to understanding the ultimate reality of identity politics: discourse dominantly produced by a heterosexual white male majority (the King) has served throughout history to define many minority populations out of reality by creating ideas of their inferiority, depravity, and ineptitude.<sup>92</sup> Most recently, this process has focused on the gay minority and laws attempting to ban its meaningful existence are only some of the more serious manifestations of identity politics.<sup>93</sup>

### A. *Power-Knowledge and the Docile Body*

Foucault begins by defining the power-knowledge dichotomy, or the idea that power is knowledge and knowledge is power.<sup>94</sup> For Foucault, the ability and opportunity to participate in the discursive realm is a crucial form and generator of power.<sup>95</sup> Discourse, according to Foucault, serves two very powerful purposes within society: (1) informing, and indeed, forming individual identities; and (2) generating widespread notions about normalcy which ultimately create social norms enforced by the general population.<sup>96</sup> Discourse is the very means by which individuals inform their own identities and their perceptions of the identities of others.<sup>97</sup> One who creates knowledge thus exercises power by generating conceptions that will be spread among the masses, absorbed, duplicated, and ultimately imposed on or internalized by another individual in creating her identity.<sup>98</sup> For example, a young girl will learn from the time she is a toddler what are acceptable feminine activities and attributes.<sup>99</sup> While early instruction will come from her parents, as a young adult, she will be influenced by countless books, magazine articles, clothing ads, and the like as she is exposed to

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<sup>92</sup> See FRYE, *supra* note 88; SEDGWICK *supra* note 6, at 4–5.

<sup>93</sup> See TEX. PENAL CODE ANN. § 21.06 (1993) (Texas statute prohibiting gay sodomy held unconstitutional in *Lawrence v. Texas*); GA. CODE ANN. § 16–6–2 (1984) (Georgia statute prohibiting sodomy upheld in *Bowers v. Hardwick*); FOUCAULT, *supra* note 4, at 83, 101, 103–04; Kavan Peterson, *50-state Rundown on Gay Marriage Laws*, Nov. 3, 2004, <http://www.state-line.org/live/printable/story?contentId=15576> (explaining that in the six months following the legalization of gay marriage in Massachusetts, voters in eleven states approved state constitutional amendments codifying marriage as a heterosexual union); *infra* notes 223–233 and accompanying text (discussing other manifestations of identity politics).

<sup>94</sup> See FOUCAULT, *supra* note 4, at 100.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 38–39, 97–101.

<sup>97</sup> See *id.* at 97–101.

<sup>98</sup> See *id.*

<sup>99</sup> See FOUCAULT, *supra* note 4, at 98–99, 120–21.

the popular discourse of femininity.<sup>100</sup> Foucault theorizes that this process is effective because bodies are docile, capable of being “sub-jected, used, transformed, and improved” by such internalization and imposition.<sup>101</sup> At the same time, the discourse becomes even more effective when accepted by a majority that inherently creates widespread ideas and judgments about what is “normal.”<sup>102</sup> This transition results in a social norm, internalized by individuals, which will further discipline or control them by demanding conformance lest they be labeled outcasts.<sup>103</sup> Thus, the power of knowledge creation and dissemination does not depend solely on one individual’s internalization of its message, but instead is buttressed with the acceptance by a majority who will enforce its message regardless of the individual.<sup>104</sup>

These theories of power-knowledge and the docile body are evident in Foucault’s *History of Sexuality*, in which he explains that sexual identities have not always existed.<sup>105</sup> In fact, we only came to attach identities to sexual acts during the eighteenth century when the fields of medicine, psychiatry, and education produced discourse of sexual identity and the self.<sup>106</sup> Prior to this attachment, homosexual acts were

<sup>100</sup> See *id.*

<sup>101</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 136 (1995).

<sup>102</sup> *Id.* at 184.

<sup>103</sup> See JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER* 1–3 (1997); FOUCAULT, *supra* note 101, at 184. FOUCAULT explains that school, factory, barrack, and prison designs evolved as the powerful came to understand the watchful gaze as an effective disciplinary tool. FOUCAULT, *supra* note 101, at 172–74. The power of the social norm was similarly recognized and implemented as a society-wide application of what had been so effective in disciplining the criminal few. *Id.* at 184.

<sup>104</sup> See BUTLER, *supra* note 103, at 1–3. Butler expands on Foucault’s theory, and explains that docile bodies and malleable blank identities are vulnerable to the power, the discourse, and the social norms created and disseminated by the powerful, and enforced by the watchful gaze:

As a form of power, subjection is paradoxical. To be dominated by a power external to oneself is a familiar and agonizing form power takes. To find, however, that what “one” is, one’s very formation as a subject, is in some sense dependent upon that very power is quite another . . . . [P]ower is not simply what we oppose but also, in a strong sense, what we depend on for our existence and what we harbor and preserve in the beings that we are . . . .  
 . . . [P]ower that at first appears external, pressed upon the subject, pressing the subject into subordination, assumes a psychic form that constitutes the subject’s self-identity.

*Id.*

<sup>105</sup> FOUCAULT, *supra* note 4, at 37–39, 103–05.

<sup>106</sup> *Id.* at 37–39, 103–05.

performed without the individual ever being labeled as a certain type, let alone a certain type of pervert.<sup>107</sup> Foucault explains:

[Sexuality] is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in a few major strategies of knowledge and power.<sup>108</sup>

Notably, even once sexual acts were attached to sexual identities by discourse, homosexual identities were not immediately named deviant, or at least homosexuality was not understood as more deviant than heterosexuality.<sup>109</sup> As late as the early 1900s, medical journals were defining heterosexuality as the “abnormal or perverted appetite toward the opposite sex.”<sup>110</sup> Homosexual and heterosexual thus refer to historically specific identities and practices contingent on ideas of masculinity, femininity, and lust.<sup>111</sup> In other words, sexual identities are not permanent or fixed realities, but are defined by ever-changing medical discourse; only within the last 100 years has the homosexual been defined as perverse and abnormal and the heterosexual defined as normal.<sup>112</sup>

### B. *Perverse Implantation: The Process of Constructing Gay Deviance*

Prior to the nineteenth century, there was no specific identity attached to those individuals who engaged in acts that are now considered homosexual.<sup>113</sup> The homosexual, as a person, did not exist.<sup>114</sup> Be-

<sup>107</sup> See *id.* at 105–06.

<sup>108</sup> *Id.* at 105.

<sup>109</sup> Jonathan Ned Katz, *Homosexual and Heterosexual Questioning in Terms*, in *QUEER WORLD* 177, 178 (Martin Duberman ed., 1997).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *id.*

<sup>113</sup> SEDGWICK, *supra* note 6, at 2; Jennifer Terry, *Anxious Slippages Between “Us” and “Them”*: A Brief History of the Scientific Search for Homosexual Bodies, in *DEVIANT BODIES* 129, 131 (Jennifer Terry & Jacqueline Urla eds., 1995). Sedgwick explains that, as of the turn of the nineteenth century, there was a “world-mapping by which every given person, just as he or she was necessarily assignable to a male or female gender, was now considered necessarily assignable as well to a homo- or hetero-sexuality.” SEDGWICK, *supra* note 6, at 2. Even the *Lawrence* Court noted this historical appearance of the homosexual identity and further explained that American laws targeting same-sex couples did not exist until the late 1900s. See *Lawrence v. Texas*, 539 U.S. 558, 570 (2003).

<sup>114</sup> Terry, *supra* note 113, at 129, 131.

ginning in the late 1800s, homosexuality was defined as deviant and was understood as representing an individual's tendency toward perverse acts, "as evidence of innate moral inferiority as well as biological deficiency."<sup>115</sup> Homosexuality came to be conceptualized as the adaptive result of cultural advancement; the homosexual population consisted of those bodies that had lost their adaptive ability, and so as culture progressed, their nervous systems were broken down by stress, and their primitive instincts ran free.<sup>116</sup> Beginning in the early 1900s, experts developed the theory of sexual inversion, explaining that the gay population embodied physical and behavioral characteristics of the opposite sex.<sup>117</sup> Some experts even asserted that gays comprised a third biological sex.<sup>118</sup>

During the first half of the twentieth century, popular scientific discourse focused less on what caused homosexuality and more on how to identify members of the gay population.<sup>119</sup> Historically, this was a period in which the threat of a declining white race was at the forefront of the political and social consciousness in America as interracial relations and perverse sexual behavior (homosexuality, prostitution, and overpopulation of the poor) were viewed as a threatening deterioration of all social hygiene standards.<sup>120</sup> In the 1930s and 40s, the Sex Variant Study was conducted by various scientists in New York City in order to determine the signifying physical characteristics of sex variants from the complexion of skin to the shape and size of genitals.<sup>121</sup> Detecting the signs of homosexuality was intricately connected to the larger socially eugenic campaign to foster marriage and reproduction among the fit.<sup>122</sup> The Sex Variant Study is an obvious example of the process by which discourse created by scientific experts and

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 132.

<sup>117</sup> *Id.* at 135.

<sup>118</sup> *Id.* Terry explains that during this same period, Freud believed that many who displayed homosexual tendencies contributed a great deal to society and were of high moral and intellectual standing. *Id.* at 136. In fact, according to Terry, Freud's work on homosexuality forced other scientists to question their own stances as he argued that homosexuals could not be placed in one strict typology as their sexual preferences, in many ways, were not much different than those of their heterosexual counterparts. *Id.* at 137.

<sup>119</sup> See Terry, *supra* note 113, at 138.

<sup>120</sup> *Id.* at 139. To be sure, the phenomenon was not limited to the Americas; gays were some of the first individuals sent to concentration camps in Nazi Germany. Harry Oosterhuis, *Medicine, Male Bonding and Homosexuality in Nazi Germany*, 32 *J. CONTEMP. HIST.* 187, 187 (1997).

<sup>121</sup> Terry, *supra* note 113, at 138.

<sup>122</sup> *Id.*

applied to docile bodies has historically rendered gay bodies deviant others.<sup>123</sup> Scholar Jennifer Terry observed that the study was “as much an effort to construct and maintain hygienic heterosexuality as it was to investigate homosexuality.”<sup>124</sup>

More recent scientific and medical research has focused, once again, on what causes homosexuality.<sup>125</sup> Genetic studies have focused on heritability by attempting to determine whether there is a higher occurrence of homosexuality in genetically identical pairs of twins as opposed to non-genetically identical pairs.<sup>126</sup> Experts involved in psychoendocrine studies have examined the correlation between prenatal hormone levels and adult homosexuality.<sup>127</sup> These scientists search for a cause of homosexuality by attempting to locate and scrutinize abnormal amounts of, or insensitivity to, androgens in the uterus that can, hypothetically, later result in sexual ambiguity or abnormal sexual tendencies toward members of the same sex.<sup>128</sup> Neuroanatomic studies of late have been most concerned with the hypothalamus; some have found a correlation between an enlarged hypothalamus and homosexuality while others have found a correlation between a shrunken hypothalamus and homosexuality.<sup>129</sup> Finally, geneticists claim to have

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<sup>123</sup> See FOUCAULT, *supra* note 4, at 101; Terry, *supra* note 113, at 153.

<sup>124</sup> Terry, *supra* note 113, at 153. Not all experts were in agreement that there was something inherently wrong with homosexuals. *Id.* at 154. Dr. Alfred Kinsey noted that the analysis of the data in the Sex Variant Study was based on an assumption that homosexuality and heterosexuality are mutually exclusive traits inherent in fundamentally different kinds of individuals. *Id.* According to Kinsey’s own research, between a quarter and a third of all males in any mixed-aged group had some homosexual experience. *Id.* at 155. Homosexuality was not a rare phenomenon but a type of behavior that could potentially involve up to half of the entire male population. *Id.*

<sup>125</sup> Heino Meyer-Bahlberg, *Psychobiologic Research on Homosexuality*, in QUEER WORLD, *supra* note 109, at 285, 286.

<sup>126</sup> See *id.* Journalist Neil Swidey summarizes the most recent advancements in this area of research and explains that instances in which one identical twin identifies with the opposite sex and the other identifies as his own biological sex have scientists questioning whether the cause of homosexuality is entirely attributable to either nature or nurture. Neil Swidey, *What Makes People Gay*, BOSTON GLOBE, Aug. 14, 2005, at 2. After all, as identical twins, the boys began as genetic clones and have been raised in the same environment by the same set of parents. *Id.*

<sup>127</sup> Meyer-Bahlberg, *supra* note 125, at 289.

<sup>128</sup> *Id.* These studies are limited by a general dearth of data comparing the prenatal hormonal makeup of homosexuals and heterosexuals. *Id.* at 290.

<sup>129</sup> *Id.* at 292–93. Scientists Swaab and Hoffman found that the volume of the suprachiasmatic nucleus in a sample of homosexual men was 1.7 times as large as that in heterosexual men. *Id.* The fundamental problem with this assertion has to do with the fact that the specific nucleus has no known role for determining sexual orientation so abnormalities in its size cannot be concluded to influence homosexual orientation. *Id.*

located the biological cause of homosexuality in genes located on the X chromosome.<sup>130</sup> Whether the cause of homosexuality is located in the hypothalamus or on the X chromosome, the source of its supposed deviance can be located in the search itself.<sup>131</sup>

The very persistence of current attempts to find the cause of homosexuality and the resulting discourse bespeak continuing disdain for the gay population.<sup>132</sup> But even if homosexuality is proven to be a biological phenomenon, as long as mainstream discourse maintains the perverse implantation—the process of creating perverse gay identities via discourse—there will be no social acceptance of the gay population.<sup>133</sup>

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The pinnacle of modern research concerning the cause of homosexuality came in 1991, when neuroscientist and gay activist Simon LeVay published a paper that linked homosexual behavior to brain structure. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, *SCI.*, Aug. 30, 1991, at 1034–37; Susan Lindee & Dorothy Nelkin, *Creating Natural Distinctions*, in *QUEER WORLD*, *supra* note 109, at 312. According to his research, based on the postmortem examination of the brains of forty-one persons, nineteen of them gay males who had died of AIDS, homosexual males had a smaller hypothalamus than their heterosexual counterparts. LeVay, *supra*, at 1034–37.

<sup>130</sup> Lindee & Nelkin, *supra* note 129, at 312. At publication, scientists were continuing to search for a genetic cause of homosexuality. Swidey, *supra* note 126. A five-year genetic study of 1000 gay brother pairs was underway in North America, funded by the National Institutes of Health. *Id.*

<sup>131</sup> See Katz, *supra* note 109, at 178.

<sup>132</sup> See *id.* Some gay advocates claim that locating a cause of homosexuality in biological factors would result in wider social acceptance and less tolerance of discrimination against gays. Swidey, *supra* note 126.

<sup>133</sup> See FOUCAULT, *supra* note 4, at 97–101. Luckily, for the sake of equal rights in America (which theoretically involves the realities of all persons, not just the King), power-knowledge is not exclusively a tool of the scientific and legal actors so influenced by the politics of the majority. See generally ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* (1997) (discussing the ways in which members of the gay community have come to theorize their own identities in a body of discourse known as “Queer Theory”). Having had their own bodies fall victim to the wars of identity politics, the gay population has produced its own theory of identity: queer theory. See *id.* at 1–2. Much of the discourse emanating from gay subcultures centers on the term queer, rather than gay or homosexual. *Id.* at 3. Queer is a term defined according to the collective ideologies and worldviews of the gay population. See *id.* at 3. Perhaps the most important characteristic of queer is its resistance to definition and its inherent indeterminacy as this quality allows for flexibility and political efficacy. See *id.*

Queer theory locates and exploits the incoherencies within the dominant heterosexist culture and demonstrates the impossibility of any “natural” sexuality while expanding its borders to include the issues of many different sexualities; the focus of queer theory is not just on homosexuality but stretches from cross-dressing to hermaphroditism to gender ambiguity. *Id.* at 3. Within this framework of queer theory and inclusive instead of exclusive identity politics, one finds that the queer population is more than cognizant of the process by which it has been made deviant and, wary of this construction, has sought to reimagine a process that the individual can be involved in. See *id.*

### C. *Suspicious Motivation to Maintain the "Other"*

Perhaps even more important than understanding the different ways in which experts have tried to explain homosexuality, then, is understanding why such experts have been so dedicated, so persistent, so determined to do so.<sup>134</sup> Marilyn Frye astutely points out: "Where there is manipulation, there is motivation . . . the meaning of this erasure (from the King's reality) and of the totality and conclusiveness of it, has more to do, I think, with the maintenance of phallocratic reality as a whole."<sup>135</sup> Other scholars have echoed this theory, suggesting that the creation of homosexuality as a "third sex" leaves assumptions about heterosexuality and gender polarity in place by placing the variants in a category of other.<sup>136</sup> Patriarchal heterosexist society depends in large part on static gender roles and a norm of heterosexual relationships in which women succumb to male dominance; where men and women defy this norm, the foundation of male dominance fails.<sup>137</sup>

The perverse implantation, or the process by which homosexuals were labeled deviant, is not the first use of power-knowledge to disadvantage an entire class of persons in order to maintain a powerful white heterosexist majority: blacks and women have suffered similar stigmatization.<sup>138</sup> Not surprisingly, here again, stereotypes were used

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Queer theorists explain that identity in every form and embodiment can no longer afford to be seen as a stable and unchanging thing; instead identity should be conceptualized more as a performance, a process, and a myth. *Id.* at 86. The performance of one's identity is not innate, but is a process of learning, perfecting, and discovering. *Id.*

But queer theory inevitably arises from the margins, and is thus largely inconsequential to the persistent efforts of mainstream discourse to create homosexual deviance. See FOUCAULT, *supra* note 4, at 98; Bidy Martin, *Sexual Practice and Changing Lesbian Identities in DESTABILIZING THEORY: CONTEMPORARY FEMINIST DEBATES* 93, 95–97 (Michelle Barrett & Anne Phillips eds., 1992); SEDGWICK, *supra* note 5, at 4–5. Bidy Martin, a lesbian feminist explains: "We are not always confronted with direct, coercive efforts to control what we do in bed, but we are constantly threatened with erasure from discursive fields where the naturalization of sexual and gender norms works to obliterate actual pluralities." Martin, *supra*, at 95. The creation of queer theory is in itself a threat to "the King" as it challenges the "epistemological and political terms in which" homosexuality and other perverse behaviors have been closeted—effectively erased—for the benefit of the powerful heterosexual population. *See id.*

<sup>134</sup> See FRYE, *supra* note 88, at 8.

<sup>135</sup> *Id.*

<sup>136</sup> Martin, *supra* note 133, at 97.

<sup>137</sup> *See id.*

<sup>138</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 4, 56 (1999).

to support legal and social discrimination.<sup>139</sup> Largely scientific and anthropological discourse worked to create a lesser, more primitive, deviant black population that was then exposed to slavery, social inequality, and blatant discrimination.<sup>140</sup> The process began with colonial powers and slave-owning countries intent on justifying the dehumanizing torture of black individuals.<sup>141</sup> Historian Sven Lindqvist examines the work of French scientist George Cuvier, who, during the 1800s, ranked humans into racial categories and explained that the facial features of “negroid” races indicated their evolutionary proximity to the primates.<sup>142</sup> Early American schools of polygeny supported the view that blacks were another form of life, a separate biological species—one not capable of participating in the “equality of man”—scientists continuously studied the brains and bodies of blacks in order to substantiate these claims with scientific evidence.<sup>143</sup> As recently as the early 1990s, scientists Richard Herrnstein and Charles Murray published *The Bell Curve*, a text that summarized several studies providing scientific evidence that claims to prove an inherent inferiority in blacks based on IQ test scores.<sup>144</sup>

Historically, the same structures of power-knowledge that worked to create an inferior class of black citizens rendered the female identity one of fragility, lesser intelligence, hysterical sexuality, and emotional instability.<sup>145</sup> Medical literature documenting the hysterical and unstable mental condition of women has appeared throughout history.<sup>146</sup> During the late eighteenth and early nineteenth centuries, scientists and doctors explained the female orgasm as the only means by which the female body and mind could be stabilized.<sup>147</sup> Men, informed by the popular discourse, routinely took their wives to medical

<sup>139</sup> See *id.*

<sup>140</sup> *Id.* at 56.

<sup>141</sup> See SVEN LINDQVIST, *EXTERMINATE ALL THE BRUTES* iv, 99 (Joan Tate trans., 1997).

<sup>142</sup> See *id.*

<sup>143</sup> Stephen Jay Gould, *American Polygeny and Craniometry*, in *THE RACIAL ECONOMY OF SCIENCE* 92 (Sandra Harding ed., 1993).

<sup>144</sup> See RICHARD HERRNSTEIN AND CHARLES MURRAY, *THE BELL CURVE* 317–40 (1996); Stephen Jay Gould, *Curveball*, in *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* 11, 15 (Stephen Fraser ed., 1995).

<sup>145</sup> FOUCAULT, *supra* note 4, at 54, 97–99; RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM* 8 (1999).

<sup>146</sup> FOUCAULT, *supra* note 4, at 104; MAINES, *supra* note 145, at 21–24. Maines documents over 2500 years of discourse regarding the hysteria of femininity. MAINES, *supra* note 145, at 21–24. In fact, the very word “hysteria” is derived from a Greek word meaning “that which proceeds from the uterus.” *Id.* at 21.

<sup>147</sup> MAINES, *supra* note 145, at 32–36.

doctors who would bring the woman to orgasm so to purge her body of fluids believed to cause hystericism and insanity.<sup>148</sup> Exaggerated stereotyping, buttressed by the belief that women were inherently unstable individuals, held that women were unsuited to the work of the world and should remain in the home.<sup>149</sup> Such an understanding has long driven all-male societal power structures, and continues to be informed by scientific studies today.<sup>150</sup>

When blacks and women acted to challenge laws that disadvantaged them because of such stereotypes, they often met with little success as the courts adopted the constructed inferiority as reason to uphold the laws.<sup>151</sup> For example, in the case of *Scott v. Sandford*, in which Dred Scott, a slave, sued for his freedom, the Supreme Court explained that from the time the American Government was founded, African-Americans had been considered “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations . . . .”<sup>152</sup> Similarly, in *Bradwell v. Illinois*, in which the plaintiff filed suit after having been denied admission to a local bar because she was a married woman, the Court stated:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belong to the domain and functions of womanhood.<sup>153</sup>

America is thus well-acquainted with the process of constructing lesser identities for the purpose of maintaining the superiority of white heterosexual males.<sup>154</sup> Commonly held stereotypes of the ineptitude of blacks and women alike have been carefully crafted by scientific realms

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<sup>148</sup>*Id.* at 8–9.

<sup>149</sup> ELY, *supra* note 10, at 164.

<sup>150</sup>*See id.*; Ben Clerkin & Fiona Macrae, *Men Are More Intelligent Than Women, Claims New Study*. DAILY MAIL, Sept. 14, 2006, [http://www.dailymail.co.uk/pages/live/articles/news/news.html?in\\_article\\_id=405056&in\\_page\\_id=1770](http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=405056&in_page_id=1770). Most recently, scientists have claimed that lower IQ scores have shown that women are of inferior intelligence when compared to men. *Id.*

<sup>151</sup> *See Bradwell v. Illinois*, 83 U.S. 130, 141 (1908); *Scott v. Sandford*, 60 U.S. 393, 407 (1857).

<sup>152</sup> *Scott*, 60 U.S. at 407.

<sup>153</sup> *Bradwell*, 83 U.S. at 141.

<sup>154</sup> *See supra* notes 138–141 and accompanying text.

dominated by white heterosexual males basically seeking to maintain superiority by deeming all others inferior.<sup>155</sup> The construction of gay deviance is, in this way, strikingly similar to that of blacks and women.<sup>156</sup>

### III. STAY IN OR FACE THE CONSEQUENCES: THE PECULIARITIES OF THE GAY CLAIM TO SUSPECT CLASSIFICATION

What separates the construction of gay deviance from the construction of black and female inferiority is the social structure commonly known as the closet that provides homosexuals with the option of concealment.<sup>157</sup> The closet has been defined by some as the defining structure for gay oppression in modern times.<sup>158</sup> Because of the closet, gays, unlike blacks or women, have the option of hiding their homosexual identity and being treated equally or “coming out” and suffering both legal and social discrimination.<sup>159</sup> Arguably, laws that discriminate against gays are the most effective means by which the appeal of the closet is maintained; for only through full-time closeting and denial of one’s homosexual desire can a gay individual fully participate in society as an equal, get married, have a family, and obtain other social goods.<sup>160</sup> The possibility of the closet differentiates the classification of gay people from that of blacks and women, thus complicating the gay claim to suspect classification.<sup>161</sup> This complication should not preclude, but inform, the gay claim to suspect classification.<sup>162</sup> The purpose and policy that buttress current equal protection doctrine, taken together with the suspicious circumstance of the optional closet, solidify the gay claim to suspect classification.<sup>163</sup>

In order to expand on existing doctrine and fairly examine the gay claim to equal protection, the purpose and the ideals inherent in the Equal Protection Clause must be first fully understood.<sup>164</sup> An ex-

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<sup>155</sup> See FRYE, *supra* note 88, at 8.

<sup>156</sup> See *id.*

<sup>157</sup> See SEDGWICK, *supra* note 6, at 67–68, 75.

<sup>158</sup> *Id.* at 71.

<sup>159</sup> See *id.* at 67–71, 75. In an attempt to define queer existence into reality in their own terms, the process and significance of “coming out” were defined and embraced by the homophile movements of the 1970s; homosexuality was celebrated and those who claimed this identity demanded that it be “avowed publicly until it is no longer a shameful secret but a legitimately recognized way of being in the world.” JAGOSE, *supra* note 133, at 38.

<sup>160</sup> See SEDGWICK, *supra* note 6, at 5–6, 18–21.

<sup>161</sup> See ELY, *supra* note 10, at 163; SEDGWICK, *supra* note 6, at 67–71, 75.

<sup>162</sup> See ELY, *supra* note 10, at 163; SEDGWICK, *supra* note 6, at 71.

<sup>163</sup> See ELY, *supra* note 10, at 103, 135–41; SEDGWICK, *supra* note 6, at 67–71, 75.

<sup>164</sup> See U.S. CONST. amend. XIV, § 1; see ELY, *supra* note 10, at 81–82.

amination of the criteria for suspect classification illuminates the ways in which the gay circumstance does not fall neatly within the bounds of existing equal protection doctrine.<sup>165</sup> Despite apparent imperfections, once the gay claim to suspect classification is evaluated against the backdrop of constructed deviance that has resulted in an optional closet, the gay population's situation appears even more suspicious than that of historically suspect classes.<sup>166</sup>

A. *Official Motivation Matters: Equal Protection as a Check on the Majority*

The Equal Protection Clause does not require that every law treat everyone equally; laws are often written specifically for the purpose of sorting people out for differential treatment.<sup>167</sup> Because of the necessity of distinction, three levels of scrutiny are applied within equal protection doctrine to determine whether a law distinguishes in a way indicative of democratic malfunction and thus violates the clause: strict scrutiny, intermediate scrutiny, and rational basis.<sup>168</sup> Strict scrutiny is reserved for those laws that affect a suspect class, or a discrete and insular minority that has faced a history of purposefully unfair treatment and political powerlessness.<sup>169</sup> To survive, the law must be narrowly tailored to achieve a compelling government interest.<sup>170</sup> Intermediate scrutiny is applied to laws that affect a quasi-suspect class, or a group that historically has been disadvantaged but does not meet the requirements of suspect classification; the law will be held valid only if it is substantially related to an important government purpose.<sup>171</sup> Rational basis is the default level of scrutiny applied to all laws that do not affect a suspect or quasi-suspect class; the law will pass muster as long as it is rationally related to a legitimate government interest.<sup>172</sup>

<sup>165</sup> See ELY, *supra* note 10, at 163–64.

<sup>166</sup> See *id.* at 103, 135–41; SEDGWICK, *supra* note 6, at 67–68, 75.

<sup>167</sup> ELY, *supra* note 10, at 135. For example, laws that set age requirements for drinking, driving and smoking treat people differently. See *id.* Thus, the constitutionality of most laws cannot be determined simply by looking at the results of the law, but rather, should be approached by reviewing the process by which the law was passed and the reasons for legislative approval. *Id.* at 136.

<sup>168</sup> See CHEMERINSKY, *supra* note 13, at 618–20; ELY, *supra* note 10, at 103. Democratic malfunction exists where a legislature representative of the majority passes legislation to disadvantage a minority group. ELY, *supra* note 10, at 103.

<sup>169</sup> CHEMERINSKY, *supra* note 13, at 619.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 619–20.

## 1. Traditional Suspect Classification Criteria and Analysis

The level of scrutiny applied thus depends on who is being singled out for differential treatment by the law.<sup>173</sup> The doctrine subjects laws singling out quasi-suspect or suspect classes to a form of heightened scrutiny because when a group of individuals possess the characteristics that define a suspect class, the courts will assume that the legislature is attempting to subjugate them or is making judgments based on stereotypes.<sup>174</sup> A class that has historically been subjected to unfair treatment, has little or no political power by which they may change their situation, and is comprised of members who are easily identifiable and isolated from most of society, is in a socially and politically peculiar situation.<sup>175</sup> Legislation that not only disregards the class's situation but singles it out for differential treatment is closely scrutinized.<sup>176</sup>

In applying intermediate or strict scrutiny, the courts seek the true purpose of the law and to determine whether that purpose is constitutional.<sup>177</sup> Locating the true purpose necessarily involves examining the often unspoken motivation of the legislature, which is important because “it is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics, or even because the official doing the choosing doesn’t like them.”<sup>178</sup> The historical process by which gays have been defined as a deviant and perverse class has informed stereotypes regarding the fitness of gays to be married, have children, serve in the military, and the like; such stereotypes have inevitably influenced Congress and state legislatures alike which have passed laws that reinforce the deviant identity and solidify the stereotypes.<sup>179</sup> At first glance, there is something peculiar about the social and political situation of gays and about the closet itself—the option of claiming one’s identity and being discriminated against or denying it and being treated equally is no option at all.<sup>180</sup> Legislation that imposes this option should be subjected to heightened review.<sup>181</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> See CHEMERINSKY, *supra* note 13, at 619–20; ELY, *supra* note 10, at 103.

<sup>175</sup> See CHEMERINSKY, *supra* note 13, at 619–20; ELY, *supra* note 10, at 151.

<sup>176</sup> See CHEMERINSKY, *supra* note 13, at 619–20; ELY, *supra* note 10, at 103, 151–53.

<sup>177</sup> See ELY, *supra* note 10, at 137–38.

<sup>178</sup> *Id.* at 137.

<sup>179</sup> See 10 U.S.C. § 654 (2000) (popularly known as the “Don’t Ask, Don’t Tell” policy, this federal statute effectively prohibits gays from engaging in homosexual acts or claiming their sexual identity while in the military); *supra* notes 114–133 and accompanying text.

<sup>180</sup> See SEDGWICK, *supra* note 6, at 48–49.

<sup>181</sup> *See id.*

## 2. An Alternative Criterion for Suspect Classification

The strictly defined standards of suspect classification may not always be sufficient to determine whether or not a group should be considered suspect.<sup>182</sup> As Ely points out, the discrete and insular requirement could potentially fail the black population, the one group everyone seems to agree should be suspect: though blacks are still discrete, many argue they are no longer insular as they participate in the larger society and are no longer legally segregated.<sup>183</sup> Further, the requirement of political powerlessness is complicated: both women and blacks have, at some historical point, been denied the right to vote as a group, but both have since been afforded that right and have now been able to vote for decades.<sup>184</sup> Additionally, a voice and a vote are not always enough to ensure adequate political participation and representation.<sup>185</sup>

Because of these complexities, scholars have come to suggest that classifications rooted in stereotype should be regarded as suspicious.<sup>186</sup> In order to decide if a legislature had an unconstitutional motive in passing an act, the generalizations and stereotypes underlying the act must be understood.<sup>187</sup> Key factors in deciding whether a stereotype is acceptable for government use include its origin, who created it, and whether the stereotype serves the interests of those affected by it.<sup>188</sup> Where the legislators of those they represent stand to gain socially or legally from the generalizations behind the questioned law, certain dangers inherent in any balancing process become intensified and may result in "an undervaluation of the interest in individual fairness."<sup>189</sup> In other words, legislators are likely to accept and promote those stereotypes flattering to themselves even if the promotion of such beliefs comes at a social and legal cost to others; cost itself is likely to be underestimated, therefore undervaluing the individual fairness that is key to representative democracy.<sup>190</sup>

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<sup>182</sup> See ELY, *supra* note 10, at 149.

<sup>183</sup> *Id.*

<sup>184</sup> See *id.*

<sup>185</sup> See *id.* at 135.

<sup>186</sup> *Id.* at 155. Ely explains: "Legislation on the basis of 'stereotype' is thus legislation by generalization, the use of a classification believed in statistical terms to be generally valid without leaving room for proof of individual deviation. That, however, is the way legislation ordinarily proceeds, as in most cases, it must." *Id.*

<sup>187</sup> ELY, *supra* note 10, at 158.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *id.*

If classifications based on stereotype were treated as suspect, gays would probably constitute a suspect class given the long and well-documented history of discourse that ultimately resulted in a stereotyped perverse identity and a closet in which to conceal that identity.<sup>191</sup> That the stereotypes have an origin in medical and scientific discourse created primarily by the powerful white heterosexual male majority and that the maintenance of the stereotypes benefits the same majority would confirm the notion that there is something ill-motivated about legislation that capitalizes on the deviant identity and disadvantages those who claim it.<sup>192</sup> Within this analytical scheme, the resemblance between the classifications of blacks and women and that of gays is striking: all have been based on stereotypes constructed by the power structures of medicine and science and codified by legislatures determined to maintain social and political superiority.<sup>193</sup> Blacks have been a suspect class since the inception of equal protection doctrine and women were once considered a suspect class.<sup>194</sup> The gay population, it would follow, having been subject to the same social and political disenfranchisement *because* of stereotype and its codification, should be regarded as a suspect class.<sup>195</sup> As such, laws that single them out for mistreatment should be subject to strict scrutiny.<sup>196</sup>

Of course, analyzing suspect classification as classification based on stereotype is, to date, a purely academic exercise because courts have not strayed meaningfully from their three-tier system of analyzing equal protection claims.<sup>197</sup> Nevertheless, the Supreme Court has noted the unacceptability of legislation based on prejudice toward a specific group—namely, that laws based on stereotypes cannot even survive rational basis review because maintaining stereotypes can never serve

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<sup>191</sup> See *supra* notes 112–133 and accompanying text.

<sup>192</sup> See ELY, *supra* note 10, at 158 (explaining that even where legislators do not reap tangible rewards from contested legislation, there are “psychic rewards in self-flattering generalizations”); FRYE, *supra* note 88, at 8; Donna Haraway, SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE 149, 150 (1991); Martin, *supra* note 133, at 97; Kari Karsjens & Joanna Johnson, *White Normativity and Subsequent Critical Race Deconstruction of Bioethics*, 3 AM. J. BIOETHICS 22, 22–23.

<sup>193</sup> See *supra* notes 122–134 and accompanying text.

<sup>194</sup> CHEMERINSKY, *supra* note 13, at 652, 755. The Supreme Court regarded women as a suspect class for a period of time. *Id.* at 755. Eventually, however, the Court determined that, because there were real physiological differences between men and women, laws distinguishing between the sexes would be upheld as long as the laws could withstand intermediate scrutiny. *Id.* Thus, women are currently treated as a quasi-suspect class. *Id.*

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*; *supra* notes 122–134 and accompanying text.

<sup>197</sup> CHEMERINSKY, *supra* note 13, at 618–20.

even a legitimate state interest.<sup>198</sup> In keeping with any court's likely analysis, however, the remaining examination of the gay claim to suspect classification will focus on traditional suspect classification criteria.<sup>199</sup>

### B. *Analyzing the Gay Claim to Suspect Classification*

Though the social and political situation of gay individuals is different from that of other suspect classes, it is equally if not more peculiar.<sup>200</sup> A legislature that acts to reinforce that situation should be required to offer compelling justification.<sup>201</sup> Suspect classification requires that the group be a discrete and insular minority which has suffered a history of purposefully unfair treatment and political powerlessness.<sup>202</sup> Only when an individual is decided to be part of a suspect group will one's legal claims of discrimination be examined under strict scrutiny.<sup>203</sup> The gay claim to suspect classification is complicated because the closet provides each individual the option of concealing the very trait that is discriminated against—a choice not afforded any other suspect class to date.<sup>204</sup> This peculiarity both skews and strengthens the analysis of the gay claim to suspect classification: (1) only those who have come out and claimed their gay identity are discrete, insular, and discriminated against, and (2) the very fact that coming out is optional renders the class, as a whole, politically disjointed and powerless.<sup>205</sup> The implied ultimatum forcing gay individuals to remain closeted or come

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<sup>198</sup> See, e.g., *Romer v. Evans* 517 U.S. 620, 632 (1996) (holding that a Colorado state amendment failed rational basis review because its only justification was general hostility and animus toward gay people); *City of Cleburne, Tex. v. Cleburne Living Ctr.* 473 U.S. 432, 432–33 (1985) (declaring a law unconstitutional because it served no legitimate purpose and was instead based on irrational prejudice toward and fear of the mentally retarded); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[B]are congressional desire to harm a politically unpopular group cannot serve as a legitimate government interest.”).

<sup>199</sup> CHEMERINSKY, *supra* note 13, at 618–20.

<sup>200</sup> See *id.*; ELY, *supra* note 10, at 163; SEDGWICK, *supra* note 6, at 68–72, 75.

<sup>201</sup> See CHEMERINSKY, *supra* note 13, at 618–20; ELY, *supra* note 10, at 163; SEDGWICK, *supra* note 6, at 68–72, 75.

<sup>202</sup> CHEMERINSKY, *supra* note 13, at 618–20.

<sup>203</sup> *Id.*

<sup>204</sup> Mab Segrest, *Race and the Invisible Dyke*, in *DANGEROUS LIAISONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY* 48 (Eric Brandt ed., 1999).

<sup>205</sup> See ELY, *supra* note 10, at 163; SEDGWICK, *supra* note 6, at 18, 69–71; Segrest, *supra* note 204, at 48; Kenneth Sherrill, *The Political Power of Lesbians, Gays and Bisexuals*, 29 *POL. SCI. & POL.* 469, 469–72 (1996).

out and face the consequences is itself incredibly suspicious.<sup>206</sup> Legislation that solidifies the ultimatum should be subject to strict scrutiny.<sup>207</sup>

### 1. Discrete and Insular Minority

Requiring that a group be a discrete and insular minority before it can be considered a suspect class ensures that suspect classification is reserved for groups that are “race-like” in that their members are an easily identifiable minority generally isolated from the majority.<sup>208</sup> This situation lends itself to discrimination by the majority because members of the suspect group are easily identified for purposeful mistreatment and, as part of a socially isolated minority, are less capable of bringing about change in their situation via the political process.<sup>209</sup>

The gay population is clearly a minority: studies estimate that gays comprise only three to thirteen percent of the population.<sup>210</sup> But they are discrete only once they refuse the security of the closet, and even then they are insular in a way that is unique among suspect classes.<sup>211</sup> Whereas blacks generally do not have the option of not being discrete, gays do because they can closet the trait being discriminated against.<sup>212</sup> Mab Segrest, a feminist scholar, explains that incentives exist to pass as white “under a regime of white supremacy” just as they exist to pass as a heterosexual “under heterosexist regimes.”<sup>213</sup> In other words, had their identity been concealable behind closet doors, the black plight for equal protection and suspect classification would have been of a similar nature to that of homosexuals.<sup>214</sup>

<sup>206</sup> See ELY, *supra* note 10, at 163; Segrest, *supra* note 204, at 48.

<sup>207</sup> See ELY, *supra* note 10, at 163; Segrest, *supra* note 204, at 48.

<sup>208</sup> See ELY, *supra* note 10, at 151–55. Ely argues that being “race-like” does not depend solely on being recognizable and isolated from the rest of society. *Id.* There was more to the severe social disadvantages suffered by African Americans before the Civil Rights movement than physical visibility and segregation—there was a colonial culture in which scientists and anthropologists alike created discourse defining African Americans and other black populations as an inferior race. See *id.*; *supra* notes 122–134 and accompanying text. Given the similar process by which gays have been defined as deviant and perverse, they are “race-like” and deserving of suspect classification. See ELY, *supra* note 10, at 155; *supra* notes 122–134 and accompanying text.

<sup>209</sup> See *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); ELY, *supra* note 10, at 151–55.

<sup>210</sup> Sherrill, *supra* note 205, at 469.

<sup>211</sup> See SEDGWICK, *supra* note 6, at 48–49.

<sup>212</sup> See *id.* at 71; Segrest, *supra* note 204, at 48.

<sup>213</sup> Segrest, *supra* note 204, at 48.

<sup>214</sup> See *id.*

For the gay individual, insularity is intricately tied to discreteness: many of those who choose to come out also choose to remain discrete by isolating themselves from the rest of society and residing in gay-majority communities.<sup>215</sup> Those who succumb to the social and legal pressure to remain closeted generally refuse to associate with the gay-majority communities.<sup>216</sup> As a result, many gay individuals are not insular in the sense anticipated by the Supreme Court because they live dispersed among the heterosexual population.<sup>217</sup> This dispersion results in their political isolation and inability to change their situation via the democratic process.<sup>218</sup> Ultimately, when gay individuals naturally opt for social and legal equality by remaining in the closet, they compromise the discreteness and insularity of gays as a class and thus their claim for suspect classification.<sup>219</sup>

As if the social discrimination were not powerful enough, the laws that discriminate against gays consistently *discourage* gay individuals from being discrete or insular lest they be denied certain rights like marriage and adoption.<sup>220</sup> Thus, the stereotype of the homosexual pervert and the closet will be maintained if the current standards of suspect classifications are strictly applied because gays, in an attempt to avoid discrimination, choose to be neither discrete nor insular.<sup>221</sup> In order to fulfill the purpose of the Equal Protection Clause, the courts must recognize the profoundly unique and suspicious position of the gay population.<sup>222</sup>

## 2. History of Purposeful Unfair Treatment

The option of closeted existence is not only embraced by many gay individuals as a means to avoid discreteness and insularity but also as a means to avoid unfair treatment.<sup>223</sup> Homosexuals who have come

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<sup>215</sup> Sherrill, *supra* note 205, at 469.

<sup>216</sup> *See id.*

<sup>217</sup> *See Carolene Prods.*, 304 U.S. at 152; Sherrill, *supra* note 205, at 469.

<sup>218</sup> *See Carolene Prods.*, 304 U.S. at 152–53 n.4; Sherrill, *supra* note 205, at 469.

<sup>219</sup> *See Carolene Prods.*, 304 U.S. at 152–53 n.4; SEDGWICK, *supra* note 6, at 48–49; Segrest, *supra* note 204, at 48; Sherrill, *supra* note 205, at 469.

<sup>220</sup> *See* SEDGWICK, *supra* note 6, at 48–49; Sherrill, *supra* note 205, at 469.

<sup>221</sup> *See* SEDGWICK, *supra* note 6, at 48–49; Sherrill, *supra* note 205, at 469.

<sup>222</sup> *See Carolene Prods.*, 304 U.S. at 152–53 n.4; SEDGWICK, *supra* note 6, at 48–49; Segrest, *supra* note 204, at 48; Sherrill, *supra* note 205, at 469.

<sup>223</sup> *See* SEDGWICK, *supra* note 6, at 48–49; Segrest, *supra* note 204, at 48; Sherrill, *supra* note 205, at 469.

out are denied many social goods and opportunities.<sup>224</sup> For example, gay marriage is prohibited by all states but Massachusetts, and Florida denies all adoption rights to gay individuals.<sup>225</sup> Those who admit that they are gay during a job interview are less likely to be hired, and even if they are hired, workplace harassment of gay employees is rampant.<sup>226</sup> Gay people who claim their identity risk losing even the basic ability to exist in public without falling victim to a hate crime.<sup>227</sup>

While all of the consequences of “coming out” undoubtedly encourage the gay population to remain closeted, a particularly egregious example of purposeful unfair treatment suffered by the gay population is the commission of hate crimes.<sup>228</sup> In early 2006, an eighteen-year-old male went to a gay bar in Massachusetts where he attacked two patrons with a hatchet, shot them both in the head, and then shot a third patron in the abdomen.<sup>229</sup> This horrific instance is just one of many striking examples of hate crimes targeting the gay

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<sup>224</sup> See SEDGWICK, *supra* note 6, at 45 (explaining that gay individuals out of the closet are frequently denied jobs and housing); Ramone Johnson, Where Is Gay Adoption Legal? <http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt.htm> (last visited Jan. 15, 2008) (explaining that Florida prohibits all gay adoption and many states prohibit adoption by a gay couple); National Conference of State Legislatures, Same Sex Marriage, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Jan. 15, 2008) [hereinafter NCLS, Same Sex Marriage] (stating that, to date, only Massachusetts issues marriage licenses to gay couples, three states allow gay couples to enter into civil unions, and three states provide some rights to gay couples); Press Release, Federal Bureau of Investigation, FBI Releases Its 2005 Statistics on Hate Crime (Oct. 16, 2006) [hereinafter 2005 Hate Crime Statistics], available at <http://www.fbi.gov/ucr/hc2005/pressrelease.htm> (stating that hate crimes against gay individuals comprised 14.2% of all hate crimes in 2005).

<sup>225</sup> Johnson, *supra* note 224; NCLS, Same Sex Marriage, *supra* note 224.

<sup>226</sup> SEDGWICK, *supra* note 6, at 45; Harriet Schwartz, *Work Can Really Be Hell—Discrimination Against Gays*, ADVOCATE, June 10, 1997, available at [http://findarticles.com/p/articles/mi\\_m1589/is\\_n735/ai\\_20164883](http://findarticles.com/p/articles/mi_m1589/is_n735/ai_20164883). Schwartz describes several instances of discrimination against gays in the workplace. *Id.* One employee recounts how his co-workers cut out a picture of his head and pasted it on the body of a man in a picture of a gay threesome and then posted it on the bulletin board for all to see. *See id.* The same employee was later humiliated when co-workers painted his car with slanderous comments about his sexual orientation, videotaped it, and then showed it to a group of trainees; the employee ultimately quit and filed suit. *Id.*

<sup>227</sup> See Sherrill, *supra* note 205, at 469; 2005 Hate Crime Statistics, *supra* note 224. Gays were the target of fourteen percent of all hate crimes committed in 2005, which is striking considering that gays comprise as little as three percent of the population according to some estimates. *See* Sherrill, *supra* note 205, at 469; 2005 Hate Crime Statistics, *supra* note 224.

<sup>228</sup> *See* Sherrill, *supra* note 205, at 471; 2005 Hate Crime Statistics, *supra* note 224.

<sup>229</sup> Rose Arce et al., *Man, 18, Sought After Gun, Hatchet Attack at Gay Bar*, CNN, Feb. 2, 2006, <http://www.cnn.com/2006/US/02/02/gay.shooting/>.

population; of all hate crimes committed in 2005, those directed at gay individuals comprised the third largest category.<sup>230</sup>

Here again, the purposeful unfair treatment is only suffered by those who refuse to closet their identities, and so the threat of suffering social and legal turmoil works to maintain the appeal of the closet and, in turn, to prevent the gay class as a whole from coming out and suffering unfair treatment.<sup>231</sup> Given the threat of social and legal disadvantage as well as outright violence, it is understandable why many gay individuals welcome the option of the closet.<sup>232</sup> But such an unfortunate option must not compromise their claim to suspect classification; instead, the choice and the awful consequences that make the closet so appealing must be considered suspicious.<sup>233</sup>

### 3. History of Political Powerlessness

Because the threat of social and legal injustice maintains the appeal of the closet so efficiently, the gay class, as a whole, is unable to unify politically.<sup>234</sup> Professor Kenneth Sherrill points out:

The relative political powerlessness of gay people stands in a contradistinction to their depiction by advocates of 'traditional values' as a powerful movement advancing a 'gay agenda' in American politics. . . . [T]he attention paid to the occasional electoral victories of openly lesbian and gay candidates distorts the reality that fewer than one tenth of 1 percent of all elected officials in the United States are openly lesbian, gay, or bisexual.<sup>235</sup>

Rare local victories, according to Sherrill, are not indicative of the national political power of the group.<sup>236</sup>

Not only are gays a small minority (three to thirteen percent of the population), unlike other minorities that are typically grouped together geographically, gays are rarely found in gay-majority

<sup>230</sup> See 2005 Hate Crime Statistics, *supra* note 224.

<sup>231</sup> See Schwartz, *supra* note 226; SEDGWICK, *supra* note 6, at 45, 48; 2005 Hate Crime Statistics, *supra* note 227.

<sup>232</sup> See SEDGWICK, *supra* note 6, at 45–48.

<sup>233</sup> See *Carolene Prods.*, 304 U.S. at 152–53 n.4; ELY, *supra* note 10, at 163; SEDGWICK, *supra* note 6, at 48–49; Segrest, *supra* note 204, at 48; Sherrill, *supra* note 205, at 469.

<sup>234</sup> Sherrill, *supra* note 205, at 469.

<sup>235</sup> *Id.*

<sup>236</sup> See *id.*

neighborhoods where their political power could be maximized.<sup>237</sup> As a result, in a representative democracy, gay voters must depend on the support of heterosexuals if they are to make advancements on the political front.<sup>238</sup> But this support does not come easily because candidates who want to win are unlikely to create a platform that supports the rights of an unpopular minority group like gays.<sup>239</sup> Potential heterosexual advocates are further deterred by the fear that they might be perceived (and mistreated) as a homosexual if they pursue the gay agenda.<sup>240</sup> Finally, because a vast majority of gay individuals are born into heterosexual homes, they are raised to accept heterosexual norms and are expected to act as if they are heterosexual.<sup>241</sup> Thus, upon entering into adulthood and considering political beliefs, a gay individual is likely to struggle with what a gay political agenda would entail.<sup>242</sup> The individual struggle translates into a class-wide deficiency in political unification and collective identity.<sup>243</sup>

Ultimately, the precarious political situation of the gay class is only worsened by the ever-beckoning closet which promises safety from mistreatment but simultaneously prevents the gay population from engaging in meaningful political organization.<sup>244</sup> So, though the gay population may not be considered politically powerless in the traditional sense of having been denied the right to vote, the mechanics of the closet and the fear of social and legal reprisal work to render the gay class unable to unify, unable to form alliances with the powerful, and largely unable to determine what gay political consciousness would even look like.<sup>245</sup>

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Sherrill, *supra* note 205, at 470. Not only are gays drastically outnumbered, they are severely unpopular among American political groups. *Id.* Studies estimate that the gay population is the object of severe distaste—only illegal aliens, who are neither citizens nor voters, are disliked more. *Id.*

<sup>240</sup> *Id.* at 471.

<sup>241</sup> *Id.* at 469–72.

<sup>242</sup> *Id.* at 469, 472.

<sup>243</sup> *Id.* at 472. Sherrill explains: “The formation of political consciousness requires discussion and the development of a shared sense of conditions and grievances, as well as the development of proposed remedies for the grievances and of appropriate courses of action to bring about those remedies.” *Id.*

<sup>244</sup> See Sherrill, *supra* note 205, at 469–71.

<sup>245</sup> *Id.*

#### IV. STATUTES BANNING GAY MARRIAGE LIKELY FAIL STRICT SCRUTINY REVIEW

If the courts recognize the peculiar circumstance of the gay population and the ways in which the closet defines and strengthens their claim to suspect classification, laws discriminating against gay individuals will be subject to strict scrutiny review.<sup>246</sup> In order for laws banning gay marriage to survive, the government must demonstrate that they are narrowly tailored to achieve a compelling government interest.<sup>247</sup>

Of the arguments offered by opponents of gay marriage, for example, that heterosexual parents are best-suited to raise children and that the historical meaning of marriage must be preserved, it is likely that only the promotion of the well-being of children could be considered a compelling government interest.<sup>248</sup> First, it can be shown that marriage does not have one historical meaning but is instead a socially and culturally specific construct that has evolved from the union of many to the union of two.<sup>249</sup> Second, compelling government interests are generally limited to the promotion of health, safety, and welfare, none of which seem to include the preservation of socially-constructed ideals of marriage.<sup>250</sup>

Though the promotion of the well-being of children could be accepted as a compelling government interest, a state that bans gay marriage but allows individual gay adoption will probably be unsuccessful in arguing that its marriage laws are narrowly tailored to achieve the interest.<sup>251</sup> A state government defending a law that denies gay marriage rights cannot justify the legislation as a measure to

<sup>246</sup> See CHEMERINSKY, *supra* note 13, at 618–20; SEDGWICK, *supra* note 6, at 48.

<sup>247</sup> CHEMERINSKY, *supra* note 13, at 618–20.

<sup>248</sup> See *Lawrence v. Texas*, 539 U.S. 558, 601–02 (2003) (Scalia J., dissenting) (explaining that because the Court refused to accept that promotion of morality was a legitimate interest justifying the Texas anti-sodomy law, preservation of traditional marriage would probably fail to justify marriage laws banning gay marriage, because it was merely a kinder way of describing a State's moral disapproval of same-sex couples); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (stating that, beyond doubt, a state has a compelling interest in promoting the physical and psychological well-being of minor children); Dent, *supra* note 65, at 420, 429; Duncan, *supra* note 65, at 552.

<sup>249</sup> RAUCH, *supra* note 80, 13–17.

<sup>250</sup> See CHEMERINSKY, *supra* note 13, at 619–20; RAUCH, *supra* note 80, at 13–17.

<sup>251</sup> See CHEMERINSKY, *supra* note 13, at 619–20; Johnson, *supra* note 224. Many states allow gay individuals to adopt children and deny adoption rights to gay couples. Johnson, *supra* note 224. The Supreme Court has concerned itself with policy inconsistencies in applying equal protection analysis. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (explaining that where a state university proposed the promotion of women's educational success as justification for its policy of accepting only women but allowed men to fully participate as auditors, the policy was not narrowly tailored).

promote the proper upbringing of children when it legally allows gay individuals to adopt and raise children.<sup>252</sup>

Laws banning all gay marriage for the purpose of promoting the proper upbringing of children fail strict scrutiny analysis in another regard: such laws are, at once, both too narrow and too broad.<sup>253</sup> A statute prohibiting gay marriage in order to promote the best interests of children is too narrow in that it fails to prevent unfit, heterosexual individuals from becoming parents.<sup>254</sup> If the state interferes with an unfit parent's rights at all, for example by removing the child from the home, it is only after the individual parent has demonstrated a willingness and ability to harm the child.<sup>255</sup> At the same time, the statute is too broad; by prohibiting all gay marriage it prohibits some couples who have no interest in having children from attaining the benefits of marriage and inevitably prevents those gay couples who would be excellent parents from having and raising children as a married couple.<sup>256</sup> Marriage laws that deny gays equal rights thus violate the constitutional guarantee of equal protection, but such violation only becomes clear only once gays are considered a suspect class.

#### CONCLUSION

Though the gay marriage debate has forced significant reflection about the importance of marriage and family, it has also involved a heated exchange regarding the assumed deviance and perversion of gay individuals. This discussion is problematic in that it consistently disregards the process by which the gay identity was constructed as inferior to the heterosexual identity—the same process created the black identity inferior to the white and the female identity lesser to the male. The optional closet was constructed alongside the perverse implantation distinguishing the gay situation from that of blacks and

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<sup>252</sup> See *Hogan*, 458 U.S. at 730.

<sup>253</sup> See *Romer v. Evans*, 517 U.S. 620, 622 (1996) (explaining that a Colorado amendment that prohibited gay anti-discrimination legislation from being passed was at once too narrow and too broad to even pass rational basis muster).

<sup>254</sup> See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT AND THE ADOPTION ALTERNATIVE* 7–8 (1999).

<sup>255</sup> See *id.* (arguing that the state is too deferential to parents' rights and too hesitant to remove a child from the home when she is known to have been abused).

<sup>256</sup> AM. PSYCHOLOGICAL ASS'N, *supra* note 73, at 8. Some studies have even found that having married parents matters most to the successful upbringing of children; such studies could support an argument that banning gay marriage is counter to the best interest of children because gay individuals can adopt children in many states but cannot provide them the benefit of married parents. See Dent, *supra* note 65, at 447 n.43.

women: gays can conceal their supposed perversion by refusing to “come out” whereas blacks and women never had such an option. The closet and the option of concealment give gay individuals the option of either denying their sexual identity or expressing it and being discriminated against. If the gay claim to constitutional equal protection is ever to be fairly evaluated, the nuances of the closet and the ways in which it informs their claim to suspect classification must be fully understood by courts and legislatures alike.

In order to be considered a suspect class, a group must be a discrete and insular minority population that has suffered a history of purposefully unfair treatment and political powerlessness. Social and legal discrimination continuously encourage gay people to remain in the closet, which potentially compromises their claim to suspect classification. Only gays who are discrete, who come out, are discriminated against in employment and housing opportunities, fall victim to hate crimes, are denied marriage and adoption rights, and the like. The court must acknowledge the ultimatum of “stay in or face the consequences” as suspicious in itself, thus recognizing gays as a suspect class and subjecting laws that discriminate against them to strict scrutiny review. Once subjected to more searching review, laws banning gay marriage will likely be held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.