GET IT RIGHT, FLORIDA: WHY THE FLORIDA SUPREME COURT SHOULD RULE THAT EQUAL PROTECTION CLAIMS OF SEXUAL ORIENTATION DISCRIMINATION RECEIVE INTERMEDIATE SCRUTINY

Alvan Balent, Jr.*

I. INTRODUCTION

The topic of gay rights is commonly referred to as the civil rights issue of the twenty-first century, and this movement is currently focused on achieving marriage equality for same-sex couples. Since the landmark ruling in *United States v. Windsor*[1] by the U.S. Supreme Court, the state and federal court systems across this nation have been replete with challenges to state statutory and constitutional same-sex marriage bans. In all of these cases, the plaintiffs have alleged that these prohibitions violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution, and to date, the courts have favored marriage equality in all but five instances: Tennessee's Roane County Circuit Court,[2] Louisiana's Eastern Federal District Court,[3] Puerto Rico's Federal District Court,[4] the Sixth Cir-

 Alvan Balent, Jr. graduated from Vassar College and received his juris doctorate, cum laude, from Florida State University College of Law. He serves as assistant general counsel for Florida's Eleventh Judicial Circuit Court and would like to thank his friends and family, as well as the staff of this Journal, for their much-appreciated assistance with this Article.

1. 133 S. Ct. 2675, 2696 (2013) (striking Section 3 of the Defense of Marriage Act [DOMA], which denied federal recognition of same-sex marriages).

2. Mark Joseph Stern, *Court Upholds Same-Sex Marriage Ban as Constitutional in Startling Reversal of Pro-Gay Trend*, SLATE (Aug. 11, 2014, 4:11 PM), http://www.slate.com/blogs/outward/2014/08/11/supreme_court_upholds_gay_marriage_ban_for_first_time_since_windsor.html (noting that the Tennessee case, Borman v. Pyles-Borman, No. 2014-CV-36 (Tenn. 9th Cir. Ct. Aug. 5, 2014), was the first time, post-*Windsor*, that a court upheld a same-sex marriage ban).

3. Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014). This decision marked the first time, post-*Windsor*, that a *federal* judge upheld a same-sex marriage ban. James Queally & Michael Muskal, *Bucking Trend, Federal Judge Upholds Gay Marriage Ban in*

cuit Court of Appeals,[5] and Florida's Thirteenth Judicial Circuit Court.[6] This nearly unanimous final outcome, though, has been reached via different legal reasoning, especially in regard to the equal protection analysis. This divergence stems from the fact that "the [U.S.] Supreme Court has yet to expressly state the level of scrutiny that courts are to apply to [equal protection] claims based on sexual orientation."[7] Some courts have consequently found sexual orientation to constitute a protected class and thus applied heightened scrutiny,[8] whereas some have just subjected same-sex marriage bans to the standard rational basis review.[9]

This split has even appeared in Florida, where four state circuit court judges have found Florida's same-sex marriage bans[10] unconstitutional. Chief Judge Luis M. Garcia of the Sixteenth Judicial Circuit subjected these laws to "the heightened rational basis test,"[11] which, as shown below, is an unrecognized form of judicial review; and Judges Dale C. Cohen, Diana Lewis, and

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Louisiana, L.A. TIMES (Sept. 3, 2014, 5:13 PM), http://www.latimes.com/nation/nationnow/la-na-nn-louisiana-marriage-ban-20140903-story.html.

4. Conde-Vidal v. Garcia-Padilla, No. 3:14-cv-01253-PG, ___ F. Supp. 3d ___, 2014 WL 5361987 (D.P.R. Oct. 21, 2014).

5. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014). The Sixth Circuit hears appeals from federal courts in Kentucky, Michigan, Ohio, and Tennessee.

6. Judge Laurel M. Lee cited Florida's same-sex marriage prohibitions and found that she lacked jurisdiction to rule on a same-sex divorce petition because "[t]here is no valid marriage to be dissolved under the laws of Florida." José Patiño Girona, *Tampa Judge Won't Grant Gay Divorce*, TAMPA TRIB. (May 12, 2014), http://tbo.com/news/breaking-news/tampa-judge-wont-grant-gay-divorce-20140512/. This decision was appealed and is currently before Florida's Second District Court of Appeal (DCA). Shaw v. Shaw, No. SC14-1664, slip op. (Fla. Sept. 5, 2014), *available at* http://www.floridasupremecourt.org/pub_info/summaries/briefs/14/14-1664/Filed_09-05-2014_Disposition_Order.pdf#search=14-1664 (declining "pass through" jurisdiction under Article V, Section 3(b)(5), of the Florida Constitution and remanding the case to the Second DCA).

7. Lee v. Orr, No. 13-cv-8719, 2013 WL 6490577, at *2 n.1 (N.D. Ill. Dec. 10, 2013); *see also* Wolf v. Walker, 986 F. Supp. 2d 982, 1009–12 (W.D. Wis. 2014) (noting how the appellate courts have not "provided definitive guidance on whether sexual orientation discrimination requires heightened scrutiny").

8. *See, e.g.*, *Wolf*, 986 F. Supp. 2d at 1012–14 (identifying and applying four factors in determining that sexual orientation qualifies as a protected class and heightened scrutiny is appropriate: (1) historical discrimination against the class; (2) ability of class members to contribute to society; (3) immutability of the class's defining characteristic; and (4) the class's lack of political power).

9. *See, e.g.*, Baskin v. Bogan, 12 F. Supp. 3d 1144, 1160 (S.D. Ind. 2014) (relying on the Seventh Circuit's decision in *Schroeder v. Hamilton School District*, 282 F.3d 946 (7th Cir. 2002), in applying rational basis review).

10. FLA. CONST. art. I, § 27; FLA. STAT. §§ 741.04(1), 741.212 (2014).

11. Huntsman v. Heavilin, No. 2014-CA-305-K, slip op. at 9 (Fla. 16th Cir. Ct. July 17, 2014), *available at* http://freemarry.3cdn.net/112670b9c77c0c6fe0_4em6bqjl2.pdf.

Sarah I. Zabel, of the Fifteenth, Seventeenth, and Eleventh Judicial Circuits, respectively, applied ordinary "rational basis review."[12] However, Judge Zabel indicated in her order that she would have likely applied heightened scrutiny but for being "bound"[13] by *D.M.T. v. T.M.H.*,[14] a case Chief Judge Garcia did not discuss.[15] The Florida Supreme Court, though, is virtually destined to review at some point a case involving sexual orientation discrimination, and thus, this standard of review discrepancy can potentially be resolved.

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12. *In re* Estate of Bangor, File No. 50-2014-CP-001857XXXXMB, slip op. at 9 (Fla. 15th Cir. Ct. Aug. 5, 2014), *available at* http://www.flprobatelitigation.com/files/2014/01/502014CP001857_same-sex-marriage-case1.pdf; *In re* Marriage of Brassner, No. 13-012058 (37), slip op. at 11 (Fla. 17th Cir. Ct. Aug. 4, 2014), *available at* http://www.eqfl.org/sites/default/files/Broward%20Ruling.pdf; Pareto v. Ruvin, No. 2014-1661-CA-24, slip op. at 31 (Fla. 11th Cir. Ct. July 25, 2014), *available at* http://www.nclrights.org/wp-content/uploads/2014/07/Pareto-Marriage-Equality-Decision-July-25-2014.pdf. The *Pareto* and *Huntsman* decisions have been consolidated before the Third DCA, where a motion is pending to send the case directly to the Florida Supreme Court. Jonathan Kendall, *Appeals Court Denies Pam Bondi's Motion to Stay Gay Marriage Cases*, MIAMI NEW TIMES (Aug. 28, 2014, 4:38 PM), http://blogs.miaminewtimes.com/riptide/2014/08/pam_bondis_stay_denied_cases_merged.php. The *Brassner* decision was vacated and reissued because the State did not initially receive proper notice, and the *Bangor* decision was not appealed, as it was just an "as-applied" challenge. Steve Rothaus, *Pam Bondi Doesn't Appeal Broward Judge's Ruling that Florida Gay Marriage Ban Is Unconstitutional*, MIAMI HERALD (Sept. 4, 2014, 7:30 PM), http://www.miamiherald.com/news/local/community/broward/article1988702.html; Steve Rothaus, *Broward Judge Vacates Gay Marriage Ruling, Says State Wasn't Properly Notified*, MIAMI HERALD (Sept. 9, 2014, 5:00 PM), http://www.miamiherald.com/news/local/community/broward/article2084450.html; Dan Sweeney, *Broward Judge Again Overturns Gay Marriage Ban*, SUN-SENT. (Dec. 8, 2014, 5:11 PM), http://www.sunsentinel.com/local/broward/fl-gay-marriage-brassner-broward-20141208-story.html.

13. *Pareto*, slip op. at 28. Given the hierarchical structure of the court system, Judge Zabel was in fact bound by *D.M.T.*, and it is not uncommon for the appellate courts to chastise the trial courts for not following established precedent. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

14. 129 So. 3d 320 (Fla. 2013).

15. United States District Judge Robert L. Hinkle has also found that Florida's same-sex marriage bans are unconstitutional. Brenner v. Scott, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014). Judge Hinkle's analysis, however, mainly focused on due process rather than equal protection grounds, *id.* at 1287–91, and because marriage is a fundamental right, he applied strict scrutiny. *Id.* at 1288. He, nonetheless, opined that Florida's same-sex marriage prohibitions were unconstitutional under any level of judicial review. *Id.* at 1291. This decision has been appealed. Dan Sweeney, *Bondi Appeals Same-Sex Marriage Decision*, SUN-SENT. (Sept. 4, 2014), http://articles.sun-sentinel.com/2014-09-04/news/fl-gay-marriage-federal-appeal-20140904_1_marriage-decision-gay-and-lesbian-couples-largest-lgbt-rights-organization.

In *D.M.T.*, the Florida Supreme Court stated that "[s]exual orientation has not been determined to constitute a protected class and therefore sexual orientation does not provide an independent basis for using heightened scrutiny to review State action that results in unequal treatment to homosexuals."[16] After summarizing current equal protection jurisprudence and the *D.M.T.* case, this Article discusses the shortcomings of this statement. The Article then concludes by echoing Judge Zabel's suggestion that "the question of what level of judicial scrutiny applies to sexual orientation discrimination be revisited on appeal,"[17] a position subsequently seconded by Judge Cohen.[18] More specifically, this Article advocates for the Florida Supreme Court to find that said discrimination is subject to intermediate scrutiny.

II. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[19] However, for government to function, this constitutional "promise . . . must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[20] Therefore, the U.S. Supreme Court has held that, so long as "a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[21] This threshold test is otherwise known as "rational basis review," and it "requires deference to reasonable . . . legislative judgments."[22] Any plausible, i.e., nonarbitrary or irrational, policy explanation can consequently

16. 129 So. 3d at 341–42 (applying rational basis review in an as-applied constitutional challenge to Florida's assisted reproductive technology statute).

17. *Pareto*, slip op. at 31.

18. *In re* Marriage of Brassner, No. 13-012058 (37), slip op. at 11 (Fla. 17th Cir. Ct. Aug. 4, 2014), *available at* http://www.eqfl.org/sites/default/files/Broward%20Ruling.pdf.

19. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

20. Romer v. Evans, 517 U.S. 620, 631 (1996).

21. *Id.*

22. Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012).

"provide a rational basis for the classification."[23] The Court, nonetheless, "insist[s] on knowing the relation between the classification adopted and the object to be attained" because it is the search for this "link" that "gives substance to the Equal Protection Clause."[24]

However, laws that impair fundamental rights or target suspect classes, such as "race, alienage, or national origin,"[25] are subject to strict or heightened scrutiny, under which the State must prove that the law is "narrowly tailored" toward furthering a "compelling [governmental] interest."[26] Complicating this analysis is the fact that the Supreme Court has also established a mid-level form of review for certain classifications, such as those based on sex, that it deems "quasi-suspect," and the distinction between a "suspect" and "quasi-suspect" class is unclear.[27] Laws targeting quasi-suspect groups receive intermediate scrutiny, under which the State must show that the law is "substantially related" to an "important governmental objective[ ]."[28]

III. THE D.M.T. *CASE*

As stated above, the U.S. Supreme Court has not explicitly held that sexual orientation is a protected class, hence the Florida Supreme Court applied the default standard of judicial review, rational basis, in *D.M.T. v. T.M.H.*[29] In *D.M.T.*, two women, who were in a long-term relationship, decided to conceive and raise a child together via assisted reproductive technology.[30] T.M.H. provided the egg, and D.M.T. gave birth to their child.[31] Sadly, the couple's relationship deteriorated, with D.M.T. ultimately "ab-

23. *Id.* (internal citation and quotations omitted).

24. *Romer*, 517 U.S. at 632.

25. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

26. Reno v. Flores, 507 U.S. 292, 302 (1993); City of Dallas v. Stanglin, 490 U.S. 19, 23 (1989).

27. Love v. Beshear, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014) (discussing the apparentness of a class member's definitive characteristic to the casual observer as one way of distinguishing between suspect and quasi-suspect classes in the absence of clear instruction from the Supreme Court); *see* United States v. Virginia, 518 U.S. 515, 532–34 (1996) (describing the history and application of the Court's "exceedingly persuasive" standard for gender discrimination review).

28. *Virginia*, 518 U.S. at 524.

29. 129 So. 3d 320, 341–42 (Fla. 2013).

30. *Id.* at 327.

31. *Id.*

scond[ing] with the child" and T.M.H. filing suit "to establish her parental rights to the child and also to reassume parental responsibilities."[32] D.M.T. responded by seeking summary judgment because Florida's assisted reproductive technology law expressly requires egg and sperm donors to relinquish all parental right and obligation claims over the donation or resulting child regardless of a couple's intent.[33] The trial judge reluctantly agreed, but on appeal, the Florida Supreme Court held, in relevant part, that the laws at issue were applied in a manner that lacked "a rational basis" and thus violated the equal protection clauses of the U.S. and Florida constitutions.[34]

IV. THE CASE FOR HEIGHTENED SCRUTINY

Though a nondiscriminatory result was reached in *D.M.T.*, the Florida Supreme Court analyzed whether to apply rational basis review in just one short paragraph of a forty-six page opinion.[35] Such curt reasoning is somewhat odd given that *D.M.T.* was issued six months after *Windsor*, and *Windsor* clearly changed the judicial landscape on the issue of gay rights. The Court's reasoning, moreover, proves to be highly unpersuasive upon close examination.

A. Quasi-Dicta

First, as a preliminary matter, the Florida Supreme Court's comments about sexual orientation receiving rational basis scrutiny are dicta in some respects even though the Court went on to apply rational basis review in *D.M.T.*

> "[D]ictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject." [But as] a general rule, [trial] courts should be guided by the views of [an appellate court], . . . even when . . . expressed in

32. *Id.*
33. FLA. STAT. §§ 742.13(2), 742.14 (2008); *D.M.T.*, 129 So. 3d at 330.
34. *D.M.T.*, 129 So. 3d at 330, 341–44, 347.
35. *Id.* at 341–42.

> dicta, but, when dicta is not supported by reasoning, its persuasive force is greatly diminished.[36]

More specifically, the Court *never explicitly held* that sexual orientation discrimination is subject to rational basis review; the Court instead said that it applies rational basis scrutiny because "[s]exual orientation *has not been determined* to constitute a protected class."[37] The Court, in other words, seems to have assumed without actually deciding this important aspect of the law.

The foregoing excerpt also appears less like binding authority when viewed in context with the rest of the *D.M.T.* decision because, in the very next paragraph, the Court seems to limit its analysis to just "*this* claim," i.e., "*[t]he specific question*" presented.[38] The Court's comment, therefore, appears to only address sexual orientation discrimination within the specific statutory scheme for assisted reproductive technology rather than addressing the constitutionality of sexual orientation discrimination as a whole. The *D.M.T.* case is thus analogous to *In re Adoption of X.X.G.*,[39] where the Third District Court of Appeal (DCA) only examined "whether there [was] a rational basis for [S]ubsection 63.042(3)," Florida's now-defunct same-sex adoption ban.[40]

B. Cited Caselaw Distinguishable

Second, in support of the statement that sexual orientation is not an independent basis for heightened scrutiny, the Florida Supreme Court cited *Romer v. Evans* and *In re Adoption of X.X.G.*, but neither case is on point.[41] For instance, the parties in *X.X.G.* stipulated that Florida's gay adoption ban was subject to rational basis review, and thus, the Third DCA did not address whether heightened scrutiny applied.[42] An amicus brief in *X.X.G.*,

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36. Wolf v. Walker, 986 F. Supp. 2d 982, 1011 (W.D. Wis. 2014) (internal citations omitted).

37. *D.M.T.*, 129 So. 3d at 341 (emphasis added).

38. *Id.* at 342 (emphasis added) ("Accordingly, we apply a rational basis analysis to our review of *this* claim. *The specific question* we confront is whether the classification between heterosexual and same-sex couples drawn by the assisted reproductive technology statute bears some rational relationship to a legitimate state purpose." (emphasis added)).

39. 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).

40. *Id.* at 83.

41. *D.M.T.*, 129 So. 3d at 342.

42. *In re Adoption of X.X.G.*, 45 So. 3d at 83.

furthermore, raised the heightened scrutiny argument, but the Third DCA expressly declined to address the issue.[43]

Similarly, while the U.S. Supreme Court professed to apply rational basis review in *Romer* to strike down, on equal protection grounds, a state constitutional amendment that discriminated on the basis of sexual orientation, a lower court must "[consider] what the [Supreme] Court actually did, rather than [just dissect] isolated pieces of text."[44] One, therefore, cannot ignore the overall consensus amongst the academic and legal commentary on *Romer* that the review applied in this case is more aptly described as "rational basis with bite," i.e., heightened scrutiny.[45] This view was even articulated in *Romer* itself as Justice Scalia, in dissent, noted that *Romer*'s outcome "cannot be justified by *normal* 'rational basis' analysis."[46] Justice O'Connor subsequently cited *Romer* and echoed this sentiment.[47]

Moreover, when *Romer* is viewed in conjunction with *Lawrence v. Texas*[48] (striking down state sodomy laws) and *United States v. Windsor*, it becomes clear that the Supreme Court is applying tougher scrutiny to sexual orientation discrimination.[49] For instance, as explained in the extremely thorough and highly persuasive *SmithKline* opinion, the Ninth Circuit Court of Appeals concluded that the Supreme Court applied heightened scru-

43. *Id.* at 83 n.5 ("We do not reach the argument advanced in the amicus brief filed by Talbot D'Alemberte and the Public Interest Law Center at the Florida State University College of Law which contends that a fundamental right to adopt was recognized in *Grissom v. Dade County* and *Bower v. Conn. Gen. Life Ins. Co.*" (citations omitted)).

44. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480 (9th Cir. 2014) (internal quotation omitted).

45. *See, e.g.*, EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 18 (2d ed. 2008) ("Some scholars, including [this author], have argued that the *Romer* Court actually applied a level of scrutiny somewhat greater than rational basis review" because "[t]he Court seemed unusually skeptical of [the state's] professed reasons for [the law]."); Jerald W. Rogers, Note, Romer v. Evans*: Heightened Scrutiny Has Found a Rational Basis—Is the Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals?*, 45 U. KAN. L. REV. 953, 958 n.54 (1997).

46. Romer v. Evans, 517 U.S. 620, 640 (1996) (Scalia, J., dissenting) (emphasis added).

47. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied *a more searching form* of rational basis review to strike down such laws under the Equal Protection Clause." (emphasis added)).

48. 539 U.S. 558 (2003).

49. *See SmithKline*, 740 F.3d at 481–83 (concluding *Windsor* applied heightened scrutiny to equal protection claims involving sexual orientation); Witt v. Dep't of Air Force, 527 F.3d 806, 817 (9th Cir. 2008) (concluding that *Lawrence* applied heightened scrutiny to substantive due process claims involving sexual orientation).

tiny in *Windsor* because it (1) ignored all "conceivable" justifications for DOMA not asserted by the law's defenders; (2) required the government to "justify" the discrimination; (3) considered the law's harmful impact to the disadvantaged group; and (4) did not afford the law a presumption of validity.[50] All of these things are inconsistent with true rational basis review.[51]

C. Contrary Caselaw

Relatedly, the Florida Supreme Court's proposition in *D.M.T.* that "[s]exual orientation has not been determined to constitute a protected class"[52] ignores the growing body of contrary caselaw. This body of law first appeared in 1993 with the Hawaii Supreme Court's landmark decision, *Baehr v. Lewin*,[53] which not only recognized sexual orientation as a protected class, but also was the first court case to recognize same-sex marriage.[54] Since 1993, but before *Windsor*, the state supreme courts of Connecticut,[55] California,[56] and Iowa,[57] as well as the Second Circuit Court of Appeals,[58] have also found sexual orientation to be a protected class. The number of courts reaching the same conclusion has only ballooned since *Windsor*, with the New Mexico Supreme Court;[59] federal district courts in Ohio,[60] Wisconsin,[61] Pennsylvania,[62] Ida-

50. *SmithKline*, 740 F.3d at 481–83.

51. *See* United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (noting that the majority opinion's "central propositions are taken from rational-basis cases . . . , [b]ut the Court certainly does not *apply* anything that resembles that deferential framework" (emphasis in original)).

52. D.M.T. v. T.M.H., 129 So. 3d 320, 341 (Fla. 2013).

53. 852 P.2d 44 (Haw. 1993).

54. *Id.* at 67. Although this decision was superseded by statute, Hawaii recently amended its laws to permit same-sex marriage. *See* HAW. REV. STAT. § 572-1 (2013) (listing the prerequisites to the formation of a marriage contract, regardless of the two individuals' gender).

55. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431–32 (Conn. 2008).

56. *In re* Marriage Cases, 183 P.3d 384, 427, 442 (Cal. 2008). As stated in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013), this decision was superseded by constitutional amendment (Proposition 8), but this amendment was subsequently invalidated. *See also* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (recognizing that the majority of California citizens voted to "strip gay and lesbian individuals of their rights").

57. Varnum v. Brien, 763 N.W.2d 862, 895–96 (Iowa 2009).

58. Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012). The Second Circuit hears appeals from federal courts in Connecticut, New York, and Vermont.

59. Griego v. Oliver, 316 P.3d 865, 884 (N.M. 2013).

60. Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

ho,[63] Kentucky,[64] and Nebraska;[65] and the Ninth[66] and Seventh[67] Circuit Courts of Appeals joining the fray. While there is caselaw to support the Florida Supreme Court's position in *D.M.T.*,[68] many of the federal courts—such as those in Texas,[69] Indiana,[70] Michigan,[71] and Mississippi[72]—that rejected gay marriage bans via rational basis review have similarly voiced Judge Zabel's point that the heightened scrutiny argument is quite compelling, but rational basis sufficed. These courts just opted to leave the level of scrutiny question for appeal (or urged for its revisiting).

Nonetheless, the growing number of heightened scrutiny rulings indicates an emerging "national consensus" in favor of greater constitutional protection for homosexuals.[73] This signal is only reinforced when the post-*Windsor* avalanche of court victories for marriage equality are viewed as a whole and in conjunction with those states that legalized same-sex marriage via legislation or constitutional amendment. Doctrinal developments in less than a year on the gay rights issue are thus diminishing *D.M.T.*'s precedential value.

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61. Wolf v. Walker, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014).

62. Whitewood v. Wolf, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014).

63. Latta v. Otter, 19 F. Supp. 3d 1054, 1076 (D. Idaho 2014).

64. Love v. Beshear, 989 F. Supp. 2d 536, 547 (W.D. Ky. 2014).

65. Waters v. Ricketts, No. 8:14CV356, slip op. (D. Neb. filed Mar. 2, 2015) *available at* http://www.ketv.com/blob/view/-/31562686/data/47173986/-/jvgctfz/-/gay-marriage-ruling.pdf.

66. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014). The Ninth Circuit hears appeals from federal courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

67. *See* Baskin v. Bogan, 766 F.3d 648, 655–58, 671–72 (7th Cir. 2014) (noting "the ultimate convergence" of its analysis with that found in other cases and citing *SmithKline*). The Seventh Circuit hears appeals from federal courts in Illinois, Indiana, and Wisconsin.

68. *See, e.g.*, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 9 (1st Cir. 2012) (applying the rational basis test and refusing to extend the intermediate scrutiny analysis to sexual orientation classifications).

69. De Leon v. Perry, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014).

70. Baskin v. Bogan, 12 F. Supp. 3d 1144, 1160 (S.D. Ind. 2014).

71. DeBoer v. Snyder, 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, Bourke v. Beshear, 135 S. Ct. 1042 (2015).

72. Campaign for S. Equal. v. Bryant, No. 3:14-CV-818-CWR-LRA, WL 6680570, at *14 (S.D. Miss. Nov. 25, 2014).

73. *See* Roper v. Simmons, 543 U.S. 551, 551 (2005) (finding the execution of people under eighteen unconstitutional because "a national consensus has developed against [it]").

D. "Indicia of Suspectness"[74]

Also entirely absent from the Florida Supreme Court's reasoning in *D.M.T.* on the standard of review for sexual orientation discrimination is the four-factor test the U.S. Supreme Court has established for determining whether a class is protected. These benchmarks examine whether the class

(1) has experienced "a history of purposeful unequal treatment";[75]

(2) exhibits a character trait that "frequently bears no relation to ability to perform or contribute to society";[76]

(3) displays "obvious, immutable, or distinguishing characteristics that define them as a discrete group";[77] and

(4) is "a minority or politically powerless."[78]

While all of these factors are relevant, the first two are the most important,[79] but these first two factors are ironically the least disputed. Analysis of these standards, nevertheless, reveals that homosexuality constitutes a protected class for heightened scrutiny purposes.

1. History of Discrimination

First, it is incontrovertible that homosexuals have faced a shamefully long history of discrimination. For example,

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74. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (coining said phrase).

75. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).

76. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).

77. Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (citations omitted).

78. *Id.*

79. *See* Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class. . . . Nevertheless, [they] are indicative . . . ."); *see also Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in part and dissenting in part) ("No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide.").

> [i]n terms of government-sanctioned discrimination, in 1952, Congress prohibited gay men and women from entering the country or securing citizenship. In 1953, President Eisenhower issued an executive order banning the employment of homosexuals and requiring that private contractors currently employing gay individuals search out and terminate them. Although the ban on hiring gay employees was lifted in 1975, federal agencies were free to discriminate against homosexuals in employment matters until President Clinton forbade the practice in 1998. Beginning in World War II, the military developed systematic policies to exclude personnel on the basis of homosexuality, and, following the war, the Veterans Administration denied GI benefits to service members who had been discharged because of their sexuality.
>
> Within our lifetime, gay people have been the targets of pervasive police harassment, including raids on bars, clubs, and private homes; portrayed by the press as perverts and child molesters; and victimized in horrific hate crimes. Gay and lesbian persons have been prevented from adopting and serving as foster parents, and the majority of states prohibit same-sex marriage.
>
> Perhaps most illustrative of the pervasive historic discrimination faced by gays and lesbians was the widespread and enduring criminalization of homosexual conduct. Before the 1960s, all states punished sexual intimacy between men, and, until the publish of *Lawrence* . . . in 2003, thirteen states categorized sodomy as a felony offense. Our country's military continued to make sodomy a crime until 2013.[80]

The courts, furthermore, have soundly rejected all counterarguments on this point as meritless.[81]

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80. Whitewood v. Wolf, 992 F. Supp. 2d 410, 427–28 (M.D. Pa. 2014) (internal citations omitted).

81. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); Rowland v. Mad River Local Sch. Dist., 470 U.S. 1001, 1014 (1985) (Brennan, J., dissenting) ("Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" (internal citations omitted)); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (stating that "homosexuals have suffered a history of discrimination"); Ben–Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (stating that "the strong objection to homosexual conduct . . . has prevailed in Western culture for the past seven centuries").

2. Ability to Contribute to Society

Similarly, "it is axiomatic that sexual orientation has no relevance to a person's capabilities as a citizen" to impact or contribute to society.[82]

3. Immutability

Some, nonetheless, argue that sexual orientation is a matter of choice and is thus not immutable. However, "the relevant inquiry is not whether a person *could*, in fact, change a characteristic, but rather whether the characteristic is so integral to a person's identity that it would be inappropriate to require [him or] her to change it to avoid discrimination."[83] Here, the characteristic is sexual orientation, which, at its core, is a form of sexual expression, and sexual expression is something that is "fundamental to a person's identity"[84] and "an integral part of human freedom."[85] It, therefore, is highly inappropriate to ask or expect someone to change his or her sexual orientation even if said choice were possible.

4. Political Power

As to political power, the final "indicia of suspectness" category, some point to the gay community's recent political successes, such as the repeal of the military's "Don't Ask, Don't Tell" policy, and argue that homosexuals are not politically powerless. However, if this factor merely examined whether a group has "achieved political successes over the years,"[86] then "virtually no group would qualify as a suspect or quasi-suspect class."[87] Instead, this criterion assesses the overall "vulnerability of a class in the political process due to its size or political or cultural history,"[88] and under this lens, the nationwide same-sex marriage bans plainly illustrate that homosexuals are a politically power-

82. *Whitewood*, 992 F. Supp. 2d at 428.
83. Love v. Beshear, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014) (emphasis in original).
84. De Leon v. Perry, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014).
85. Lawrence v. Texas, 539 U.S. 558, 577 (2003).
86. Windsor v. United States, 699 F.3d 169, 184 (2d Cir. 2012).
87. *Love*, 989 F. Supp. 2d at 546.
88. *Id.*

less minority as they still lack "the strength to politically protect themselves from wrongful discrimination."[89]

E. Independent State Ground for Heightened Scrutiny

Moreover, because the states are sovereign entities in America's federalist system of government, the federal Constitution is not the only document that protects individual rights and liberties. "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [U.S.] Supreme Court's interpretation of federal law."[90] Out of "[r]espect for the independence of state courts" in this federalist system, the U.S. Supreme Court has stated that it will not review state court cases where the "decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds" from federal law.[91] The U.S. Constitution, though, is the "supreme Law of the Land,"[92] and thus, state constitutions "may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits."[93] In other words, "the federal Constitution . . . represents the floor for basic freedoms; [a] state constitution, the ceiling."[94] There nonetheless exists a genuinely adequate and independent state ground to apply tougher judicial scrutiny to sexual orientation discrimination claims in Florida: Article 1, Section 2, of Florida's Constitution.

Under the heading, "Basic Rights," Article 1, Section 2, provides that

> [a]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposi-

89. *Windsor*, 699 F.3d at 184.

90. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

91. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

92. U.S. CONST. art. VI, cl. 2.

93. Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992).

94. *Id.* at 962.

> tion and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.[95]

This provision serves as the equal protection clause of Florida's constitution, and its plain text indicates that it has greater substantive reach than the Equal Protection Clause of the Fourteenth Amendment.[96] In *D.M.T.*, though, the Florida Supreme Court summarily dismissed the notion that Article 1, Section 2, prohibits sexual orientation discrimination. More specifically, the Court cited *In re Adoption of X.X.G.* (the same-sex adoption case) and stated that unlike gender, Article 1, Section 2, "does not separately recognize sexual orientation as a protected class, and thus we do not rely on [this provision] to apply a heightened scrutiny . . . to statutes discriminating on the basis of sexual orientation."[97] However, as discussed above, *X.X.G.* is not on point because the parties stipulated to rational basis review.[98] It, furthermore, is patently unclear how any court can ensure that "[a]ll natural persons, female and male alike, are equal before the law" unless Article 1, Section 2, implicitly forbids sexual orientation discrimination.[99] Sexual expression, after all, is "fundamental to a person's identity"[100] and "an integral part of human freedom."[101]

Inferring that Article 1, Section 2, bars sexual orientation discrimination is also consistent with its historical evolution. Over the course of seven constitutional conventions or revisions, the text of now-Article 1, Section 2, has continuously been expanded so that it protects more categories of people. For instance, only "all freemen" were "equal" and had "certain inherent and indefeasible rights" according to then-Article 1, Section 1, of Flor-

95. FLA. CONST. art. I, § 2.

96. *See* Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985) ("Since the . . . Florida Constitution . . . expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.").

97. D.M.T. v. T.M.H., 129 So. 3d 320, 342 (Fla. 2013) (citing *In re* Adoption of X.X.G., 45 So. 3d 79, 81, 83 (Fla. 3d Dist. Ct. App. 2010)).

98. *In re Adoption of X.X.G.*, 45 So. 3d at 83.

99. FLA. CONST. art. I, § 2.

100. De Leon v. Perry, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014).

101. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

ida's first constitution in 1838.[102] The Article's protections were extended to "all men" in 1868;[103] to "all natural persons" in 1968;[104] and most recently, in 1998, to "[a]ll natural persons, female and male alike"[105] without any textual distinction for sexual orientation differences like there were for race and sex in the 1838 constitution. In short, Article 1, Section 2, now applies to "all" Floridians, and through these multiple revisions, this provision's substantive protections have also been textually expanded to encompass more substantive rights. For example, in addition to having a fundamental right to "pursue[ ] their own happiness"[106] since 1838, Floridians, since 1968, have the right to be "rewarded for industry"[107] and, since 1998, cannot be discriminated against for a "physical disability."[108]

Moreover, when Article 1, Section 2, is read in conjunction with now-Article 1, Section 1's mandate that the enunciation of certain rights in the constitution "shall not be construed to deny or impair [other rights] retained by the people,"[109] it becomes clear that Article 1, Section 2, should be read broadly. A literal reading of Article 1, Section 2, would make it impossible for Floridians to realize their un-enunciated Article 1, Section 1 rights, thus rendering Article 1, Section 1, a hollow constitutional promise. Therefore, Article 1, Section 2, of the Florida Constitution inherently prohibits sexual orientation discrimination as it is "a basic rule of statutory [and constitutional] construction [that] provides that [no one intends] to enact useless provisions, and courts should avoid readings that would render part of a statute [or constitution] meaningless."[110]

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102. FLA. CONST. of 1838, art. I, § 1; Fla. Constitution Revision Comm'n, *Constitution of 1838*, FSU.EDU, http://www.law.fsu.edu/crc/conhist/1838con.html (last visited Apr. 27, 2015) [hereinafter *Constitution of 1838*].

103. FLA. CONST. of 1868, art. I, § 1; Fla. Constitution Revision Comm'n, *Constitution of 1868*, FSU.EDU, http://www.law.fsu.edu/crc/conhist/1868con.html (last visited Apr. 27, 2015) [hereinafter *Constitution of 1868*].

104. FLA. CONST. of 1968, art. I, § 2; Fla. Constitution Revision Comm'n, *Constitution of 1968*, FSU.EDU, http://www.law.fsu.edu/crc/conhist/1968con.html (last visited Apr. 27, 2015) [hereinafter *Constitution of 1968*].

105. FLA. CONST. art. I, § 2.

106. *Id.*; *Constitution of 1838*, *supra* note 102.

107. FLA. CONST. art. I, § 2; *Constitution of 1968*, *supra* note 104.

108. FLA. CONST. art. I, § 2.

109. *Id.*

110. *See* Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 198–99 (Fla. 2007) (discussing statutory interpretation that applies to constitutions just as it applies to statutes).

V. CONCLUSION

Based on the foregoing, the only remaining question is what form of heightened scrutiny should be applied to sexual orientation discrimination claims—strict or intermediate—but to date, all courts that have addressed this issue have persuasively settled on intermediate. Sexual orientation, after all, "is most similar to sex among the different classifications that receive heightened protection," and gender is a quasi-suspect class.[111]

However, as indicated by the same-sex marriage cases collectively, discrimination based on sexual orientation "cannot withstand constitutional review regardless of the standard."[112] The Florida Supreme Court, therefore, could very well resolve a sexual orientation discrimination controversy without addressing whether homosexuality is a protected class for equal protection analysis purposes.[113] It, though, "is emphatically the province and *duty* of the judicial department to say what the law is,"[114] and thus, avoiding this issue would constitute a dereliction of judicial responsibility. The *D.M.T.*, *X.X.G.*, and same-sex marriage cases collectively demonstrate that sexual orientation discrimination regrettably permeates many facets of our society and impacts all

111. Wolf v. Walker, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014) (citing Doe v. City of Belleville, 119 F.3d 563, 593 n.27 (7th Cir. 1997) ("There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like 'fag,' for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation. Observations in this vein have led a number of scholars to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination."), *abrogated by* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)); *see also* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187 (1988) (asserting that "contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender"); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 617–33 (1992) (arguing that homophobia stems, in part, from the desire to maintain traditional gender roles).

112. Love v. Beshear, 989 F. Supp. 2d 536, 547 (W.D. Ky. 2014) (recognizing that Kentucky's ban on same-sex marriage cannot withstand any level of constitutional review); *see also* De Leon v. Perry, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014) (deciding that Texas' ban on same-sex marriage could not even withstand the "most deferential rational basis level of review"); DeBoer v. Snyder, 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014) (refusing to apply a higher level of scrutiny because the same-sex marriage ban failed to survive rational basis).

113. *Cf.* Bostic v. Schaefer, 760 F.3d 352, 375 n.6 (4th Cir. 2014) (declining to address whether sexual orientation is a protected class).

114. Marbury v. Madison, 5 U.S. 137, 177 (1803) (emphasis added).

aspects of many people's lives. The issue of whether the Constitution shields a citizen's sexual orientation itself from discrimination is consequently one of tremendous public importance that is also likely to continue coming before the courts.

Moreover, by *not* holding that homosexuality is a protected class, the Florida Supreme Court implies that the law is more tolerant of sexual orientation discrimination than it is of race or gender discrimination. Rational basis review, after all, gives great deference to the State and upholds a law for any plausible and sane reason, even if said reason is conceived post hoc.[115] It, therefore, is possible for some form of sexual orientation discrimination to have a rational basis, yet true equality in the eyes of the law mandates the rejection of discrimination whenever possible. Discriminating on the basis of sexual orientation, furthermore, is highly peculiar, and the U.S. Supreme Court has long held that "[d]iscriminations of an unusual character *especially suggest careful consideration* to determine whether they are obnoxious to the constitutional provision [of equal protection]."[116] Only applying rational basis review to sexual orientation discrimination thus furthers the idea that homosexuals are second-class citizens, and "[o]ur Constitution . . . neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[117] Accordingly, the Florida Supreme Court should (1) recognize homosexuality as a quasi-suspect class; (2) hold that laws targeting sexual orientation are subject to intermediate scrutiny; and thus (3) require the State to prove that said laws are "substantially related" to furthering "important governmental objective."[118]

115. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (upholding a state regulation prohibiting eye exams in optical retail locations because the court could not "say that the regulation ha[d] no rational relation to" a reasonable state objective).

116. Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928) (emphasis added).

117. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

118. United States v. Virginia, 518 U.S. 515, 559 (1996).