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Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination

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NOTES

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I. INTRODUCTION

Consider the following scenario: Jerry, an outstanding graduate of Superior University's business school, has worked for Moneytree &

Cashdollar, a prestigious investment banking firm, for three years. In that period, Jerry's hard work and keen instincts helped increase Moneytree's revenues by several million dollars. In addition, Jerry received two awards for landing important new clients. The firm's managing partners have discussed promoting Jerry to junior vice president, an executive position typically reserved for qualified fifth year employees. Jerry's supervisors and peers enthusiastically commend his dedication and skill. Two weeks before the vote on his promotion, Jerry lured a particularly valuable client away from a competing firm, thus all but ensuring his ascent to junior vice president. The partners consider Jerry the consummate candidate. Unbeknownst to the partners, Jerry is also a homosexual.

One week prior to the vote, Moneytree's personnel director sat down with Jerry to explain the potential changes in his benefits package. Jerry knew that some companies offer benefits to their employees' same-sex partners and inquired whether Moneytree would do the same. Visibly shocked, the director explained that the firm never had considered such an option. Jerry did not push the issue. After Jerry left his office, however, the director immediately phoned a managing partner and informed him of Jerry's inquiry. Both agreed that Jerry's homosexuality presented a problem. The partner called a board meeting, and the board decided that promoting Jerry to an executive position would be disadvantageous to the firm. The partners informed Jerry of their decision, citing his "unacceptable lifestyle."¹ Jerry argued that his sexual orientation had nothing to do with his work and never had affected his professional relationships. Despite Jerry's protests, the partners refused to reconsider their position.

Certain that he has a valid employment discrimination claim, Jerry seeks relief under Title VII of the Civil Rights Act of 1964 (Title VII).² Title VII defines unlawful employment practices to include: (1) the failure or refusal to hire any individual; (2) the discharge of any individual; or (3) the discrimination against any individual with respect to employment compensation, terms, conditions, or privileges because of the individual's race, color, religion, sex, or national origin.³ Additionally, Title VII prohibits the limitation, segregation, or classification of employees or applicants based on these personal characteristics when this limitation would deprive individuals of employment opportunities or other-

1. The speed and severity of Moneytree's response may seem unrealistic, but in fact, this fictitious company's actions are less drastic than those taken by a Shell Oil Industry subsidiary, which summarily fired a 19-year veteran manager upon discovering his homosexuality. See Bob Cohn, *Discrimination: The Limits of the Law*, Newsweek 38 (Sept. 14, 1992).

2. 42 U.S.C. §§ 2000e et seq. (1988 & Supp. 1991).

3. 42 U.S.C. § 2000e-2(a)(1).

wise adversely affect their status as employees.⁴ Because Moneytree refused to promote him because of his homosexuality, Jerry styles his claim as discrimination based on sex. Both the Equal Employment Opportunity Commission (EEOC)⁵ and the federal district court deny the validity of his claim, holding Title VII inapplicable to discrimination against homosexuals. If Jerry had been a female, or a black male, and Moneytree had based its blatant discrimination upon those characteristics, Title VII clearly would provide Jerry with a remedy.⁶ But Moneytree declined to promote Jerry—supposedly the “consummate” candidate—solely because of his sexual orientation, and federal law currently allows this blatant discrimination.

Although Title VII has helped to alleviate unfair discrimination against women and racial minorities, the judiciary’s reluctance to interpret the statute to protect homosexuals has prevented Congress from achieving its ultimate imperative: to “prevent the perpetuation of stereotypes and a sense of degradation” in the workplace.⁷ Congress intended Title VII to prevent the injuries that occur when individuals are mistreated because they possess certain personal characteristics and to encourage employers to make valid decisions based solely on an individual’s qualifications for the job.⁸

This Note will show that in order to fulfill the ultimate goals of Title VII, Congress must amend the statute to protect homosexuals from employment discrimination. Part II of this Note examines the legislative history of the original statute and its subsequent amendments to illustrate the congressional motives behind the passage of Title VII. Part II also traces the judiciary’s interpretation of Title VII’s goals and notes that no court has applied the statute to prohibit discrimination based upon the sexual orientation of employees.

Using an equal protection analogy, Part III explores the characteristics that Title VII protects and concludes that each protected characteristic represents a suspect or quasi-suspect class for purposes of constitutional analysis. Part III further argues that sexual orientation

4. 42 U.S.C. § 2000e-2(a)(2).

5. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4, created the Equal Employment Opportunity Commission (EEOC) to investigate claims of employment discrimination under Title VII, as well as to negotiate such claims and to provide plaintiffs with notices to sue if negotiations failed. See 42 U.S.C. § 2000e-5(b). The President appoints the five members of the EEOC with the advice and consent of the Senate, and each member serves a five-year term. 42 U.S.C. § 2000e-4(a). The chairman of the EEOC appoints officers, agents, attorneys, administrative law judges, and other employees. EEOC procedural regulations are defined in 29 C.F.R. § 1601.1-.93 (1992).

6. Title VII specifically addresses discrimination based on an employee’s or applicant’s sex in terms of gender (male or female) or race. 42 U.S.C. § 2000e-2(a)(1) and (2). See notes 3 and 4 and accompanying text.

7. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990).

8. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989).

contains all of the elements necessary to form a suspect or quasi-suspect classification and therefore deserves the same protection afforded Title VII characteristics.

Part IV contends that Title VII protects private employees from discrimination in a manner similar to the way that the Equal Protection Clause protects state⁹ and federal¹⁰ employees. Sexual orientation bears the judicial hallmarks of suspect or quasi-suspect classifications; therefore, it merits rigorous protection under the Constitution and under Title VII. The courts have rejected sexual orientation as a suspect classification, however, and have refused to expand the meaning of "sex" under Title VII to include sexual orientation. This Note concludes that Congress should amend Title VII explicitly to prohibit discrimination based on sexual orientation in order to fulfill the statute's mandate and thereby eliminate discrimination based on a trait that, like race, skin color, religion, gender, or national origin, is not indicative of an individual's capacity to perform a job.

II. CRAFTING THE BOW AND ARROW: THE HISTORY AND PURPOSE OF TITLE VII

In passing Title VII, Congress hoped to remedy the unequal treatment certain classes of individuals¹¹ suffered at the hands of employers or fellow employees. Although Congress did not intend Title VII to guarantee jobs to all citizens regardless of qualifications, it clearly required the "removal of artificial, arbitrary, and unnecessary barriers to employment" when such barriers represented invidious discrimination based on impermissible classifications.¹² The statute currently considers "impermissible" any classification based on race, color, religion, sex, or national origin.¹³ As originally proposed, however, the bill did not prohibit discrimination based on sex.

9. U.S. Const., Amend. XIV, § 1.

10. U.S. Const., Amend. V.

11. The Act specifically targeted discrimination against blacks. At the time of passage, Title VII represented the only law "aimed at the economic causes of black oppression." Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1111 (1971). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (stating that Title VII purported to "eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

12. *McDonnell Douglas Corp.*, 411 U.S. at 800-01 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

13. 42 U.S.C. § 2000e-2(a)(2).

A. *The Sex Amendment: A "Stroke of Misfired Political Tactics"*¹⁴

Legislative history indicates that the authors of the original civil rights bill never contemplated prohibiting discrimination based on an individual's sex.¹⁵ Rather, Representative Howard Smith of Virginia, one of the bill's principal opponents, proposed the addition of sex in an attempt to ensure its defeat.¹⁶ Much to his dismay, the House passed the amendment¹⁷ and ultimately the entire Civil Rights Act. Despite its ironic and inauspicious beginnings, Title VII's sex discrimination provision today provides countless women with equal employment opportunities.¹⁸

The amendment's hasty introduction and passage leave little history from which to divine the intended boundaries of the concept of "sex."¹⁹ Congressional debate on the amendment fills only eight pages of the Congressional Record.²⁰ Additionally, the House Committee on the Judiciary and the House Committee on Education and Labor heard no relevant testimony before considering the bill.²¹ The House entertained no comparable amendments and received no special interest petitions to add sex to the bill.²² Moreover, examining the statute's language itself provides scant assistance—Section 2000e(k) of the Act states only that the terms "because of sex" or "on the basis of sex"

14. Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 *Hastings L. J.* 305, 312 (1968).

15. Records of the House committee hearings on Title VII, 110 *Cong. Rec.* 2567-84 (Feb. 8, 1964), lack any discussion regarding sex discrimination, presumably because Congress originally sought only to address employment discrimination based on race and national origin. See I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 *Colum. L. Rev.* 1158, 1167 (1991).

16. 110 *Cong. Rec.* at 2577. In support of his amendment, Smith facetiously claimed that every woman should have the right to a "husband of her own." *Id.* See also Kanowitz, 20 *Hastings L. J.* at 310-11 (cited in note 14).

17. The amendment passed by a vote of 168 to 133. 110 *Cong. Rec.* at 2584.

18. The amendment's passage has been described variously as "an accidental result of political maneuvering [rather] than . . . a clear expression of congressional intent to bring equal job opportunities to women," Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 *Minn. L. Rev.* 877, 884 (1967), and a "mischievous joke perpetrated on the floor of the House . . ." *Sex and Nonsense*, *New Republic* 10 (Sept. 4, 1965). Today, however, courts acknowledge Title VII's importance in eradicating sex discrimination. See, for example, *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977) (recognizing the congressional purpose of outlawing all sex-based discrimination); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (finding that the 1972 Equal Employment Opportunity Amendments clearly intended to "remedy the economic deprivation of women as a class").

19. Ruling in favor of transsexual Karen Ulane in her discrimination suit against Eastern Airlines, Judge Grady of the United States District Court for the Northern District of Illinois pointed out that the sex amendment's legislative history is "hardly a gold mine of information." *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

20. 110 *Cong. Rec.* at 2577-84 (cited in note 15).

21. *Id.* at 2582.

22. *Id.*

include, but are not limited to, discrimination based on pregnancy, childbirth, or related medical conditions.²³

B. *The Courts' Traditional Notion of Sex*

Individuals seeking relief under Title VII have called on the courts to interpret "sex" numerous times, but the judiciary has not strayed from the traditional definition's safe harbor. Despite creative, logical arguments advanced by plaintiffs, the courts prefer to rely on the dearth of legislative history underlying the sex provision to support a plain reading of the term.²⁴ EEOC rulings denying Title VII's application to homosexual discrimination claims²⁵ provide additional support, as does Congress's repeated refusal to amend Title VII to include sexual orientation.²⁶ In addition, some courts contextually have inferred a traditional definition of sex from the relative immutability of the status-based characteristics of race, color, national origin, and religion.²⁷ According to the courts' narrow definition, the only kind of sex discrimination actionable under Title VII is that which would not have occurred but for the victim's gender.

1. The Sexual Orientation Cases

Citing the current narrow definition of sex, courts continually construe Title VII as inapplicable to homosexual plaintiffs' employment discrimination claims. The Fifth Circuit Court of Appeals tackled one of the first of these claims in *Smith v. Liberty Mutual Insurance Company*.²⁸ Liberty Mutual Insurance declined to accept Smith's applica-

23. 42 U.S.C. § 2000e(k).

24. See, for example, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979); *Holloway*, 566 F.2d at 662.

25. See, for example, EEOC Dec. No. 76-75, Emp. Prac. (CCH) ¶ 6495 (1976). The EEOC defines sex as referring to "a person's gender, an immutable characteristic with which a person is born." *Id.* at 4266. Homosexuality is, on the other hand, but a "condition . . . relate[d] to a person's sexual proclivities or practices, not to his or her gender." *Id.* See also EEOC Dec. No. 76-67, Emp. Prac. (CCH) ¶ 6493 (1976).

26. See, for example, Civil Rights Act Amendments of 1981, Hearings on H.R. 1454 before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97th Cong., 2d Sess. 1-2 (1982); Civil Rights Amendments Act of 1979, Hearings on H.R. 1974 before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 96th Cong., 2d Sess. 6-7 (1980).

27. See, for example, *Dillon v. Frank*, 1992 U.S. App. LEXIS 766, *12-13 (6th Cir.); *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986). The *DeCintio* court explained: "The other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion or nationality. "Sex" when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender." 807 F.2d at 306.

28. 569 F.2d 325 (5th Cir. 1978).

tion for employment as a mail room clerk because the interviewer considered him effeminate.²⁹ Smith, a black male, filed a sex discrimination suit against Liberty Mutual, arguing that Title VII forbids employers from rejecting job candidates based on sexual preference or affectations.³⁰ The Fifth Circuit disagreed, gleaning from sparse legislative history Congress's singular intent to guarantee equal employment opportunities for males and females through the sex provision.³¹ The court found that Liberty Mutual rejected Smith based not upon his male gender, but upon his stereotypically female affectations.³² The court refused to extend Title VII's protections to this questionable situation without a stronger congressional mandate because providing Smith relief would do nothing to further the cause of equal opportunity for men and women per se.³³

One year later, in *DeSantis v. Pacific Telephone & Telegraph Company, Inc.*,³⁴ the Ninth Circuit cited *Smith* when it affirmed the dismissal of a sex discrimination complaint. DeSantis, a homosexual male, claimed that Pacific Telephone and Telegraph (PT&T) refused to hire him because a supervisor considered him gay.³⁵ In addition, DeSantis alleged that PT&T officials publicly stated that they would not hire homosexuals.³⁶ Following its own precedent,³⁷ the court held that sex discrimination as envisioned by Congress only encompassed gender-

29. *Id.* at 326.

30. *Id.*

31. *Id.* at 326-27.

32. *Id.* at 327. Today, the court might hold Title VII applicable to Smith's claim, provided it was couched not in terms of sex discrimination based on sexual preference but in terms of sex discrimination based on impermissible sexual stereotyping. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (permitting a plaintiff to introduce evidence showing that sex stereotyping played a part in the defendant's refusal to admit the plaintiff to partnership in order to prove sex discrimination). For a more detailed discussion of *Price Waterhouse v. Hopkins*, see notes 113-29 and accompanying text.

33. *Smith*, 569 F.2d at 327 (quoting *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975)).

34. 608 F.2d 327 (9th Cir. 1979).

35. *Id.* at 328. Two other homosexual males joined DeSantis's complaint. One alleged that constant on-the-job harassment forced him to quit after only three months in order to preserve his health, and another employee quit after four years under similar circumstances. *Id.* In addition, the latter's personnel file was marked "not eligible for rehire," and PT&T rejected his applications for employment in 1974 and 1976. *Id.*

36. *Id.*

37. Two years before *DeSantis*, the Ninth Circuit rejected the sex discrimination claim of a female employee undergoing a sex transformation. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). The *Holloway* court's examination of legislative history unearthed no congressional intent other than the intent to restrict sex to its traditional, gender-based meaning. *Id.* at 662-63. Discrimination based on transsexuality did not fall, therefore, under the purview of Title VII. *Id.* at 664. For further discussion of cases involving transsexual discrimination, see notes 65-102 and accompanying text.

based discrimination; therefore, Title VII did not prohibit discrimination based on effeminacy or homosexuality.³⁸

A full decade passed before the courts of appeals again addressed discrimination based on sexual orientation. The Eighth Circuit's short opinion in *Williamson v. A.G. Edwards and Sons*³⁹ proved a predictable and less than satisfying reprise for homosexual employees, however. Relying on *DeSantis*, the *Williamson* court tersely stated that Title VII does not prohibit discrimination against homosexuals.⁴⁰

The Sixth Circuit did not have the opportunity to examine the issue fully in *Ruth v. Children's Medical Center*,⁴¹ but supported the traditional interpretation of other circuit courts. The defendant fired Ruth, a homosexual pharmacist, for failing to check prescriptions prepared by pharmacy technicians. Ruth alleged that the defendant discriminated against him based on sex because females who failed to check prescriptions were not fired.⁴² The district court magistrate granted the defendant summary judgment to the extent that Ruth alleged discrimination based on his homosexuality. The magistrate noted that Title VII used the term sex to "refer only to membership in a class delineated by gender."⁴³ Although Ruth failed to challenge this part of the holding, the circuit court gratuitously remarked that they would have affirmed the magistrate's "correct statement of the law on this issue."⁴⁴

*Dillon v. Frank*⁴⁵ provided the Sixth Circuit with the opportunity *Ruth* had denied it. Ernest Dillon had worked for the United States Post Office for seven years, the first four without incident. During the next three years, however, his co-workers, believing that he was gay, verbally and physically abused him.⁴⁶ Upon the advice of his psychiatrist, Dillon finally resigned.⁴⁷ He filed a formal complaint with the EEOC, which it ultimately rejected on grounds that Title VII's prohibition of sex discrimination did not apply to sexual orientation.⁴⁸ On ap-

38. *DeSantis*, 608 F.2d at 329-30, 332.

39. 876 F.2d 69 (8th Cir. 1989).

40. *Id.* at 70.

41. 1991 U.S. App. LEXIS 19062 (6th Cir.).

42. *Id.* at *1.

43. *Id.* at *15.

44. *Id.*

45. 1992 U.S. App. LEXIS 766 (6th Cir.).

46. *Id.* at *1-3. Dillon's difficulties began when a fellow employee started calling him a "fag" and saying that "Dillon sucks dicks." *Id.* at *2. This verbal abuse continued for five months, climaxing in a beating that severely injured Dillon. *Id.* Although the Post Office fired the assailant, "[w]hat had begun as a one-man band expanded into a full orchestral assault of verbal abuse" when other employees continued to harass Dillon. *Id.* at *2-3.

47. *Id.* at *3.

48. *Id.* at *3-4.

peal, the federal district court also held Title VII inapplicable to discrimination based on sexual preference or orientation.⁴⁹

Although the court affirmed the district court's holding, its opinion carefully explored various angles on the sexual orientation issue. Dillon did not allege specifically that his homosexuality entitled him to Title VII protection;⁵⁰ the court therefore spent little time examining whether the statute proscribes discrimination against homosexuals *per se*. Instead, the court simply invoked the reasoning of the *Smith*, *DeSantis*, and *Williamson* holdings and hearkened back to its own dicta in *Ruth*.⁵¹

The court spent considerably more time analyzing Dillon's proposed analogy between his circumstances and those of individuals who recovered under Title VII sexual harassment claims based on hostile work environments.⁵² Dillon argued that Title VII clearly proscribes hostile work environments resulting from sexual harassment (verbal and otherwise); therefore, harassment based on his perceived sexual orientation, rather than his gender, similarly should be proscribed.⁵³ In essence, Dillon reasoned that his co-workers harassed him for being homosexual precisely because he was a male, giving him a valid Title VII claim.⁵⁴ Although the court found Dillon's analogy appealing,⁵⁵ it held that Title VII recognizes hostile work environment claims only when the harassment complained of is based on impermissible criteria.⁵⁶ The court decided that Dillon's co-workers harassed him because they believed he was a homosexual, not because he was a male.⁵⁷ The court

49. *Id.* at *4-5.

50. *Id.* at *12-13.

51. *Id.* See also notes 28-44 and accompanying text.

52. *Dillon*, 1992 U.S. App. LEXIS 766 at *13-14. Dillon cited cases in which women, subjected to demeaning and cruel verbal abuse, secured remedies under Title VII. See, for example, *Wall v. AT&T Technologies, Inc.*, 754 F. Supp. 1084 (M.D.N.C. 1990); *Bennett v. New York City Dep't. of Corrections*, 705 F. Supp. 979 (S.D.N.Y. 1989); *Porta v. Rollins Envir. Serv. (NJ), Inc.*, 654 F. Supp. 1275 (D.N.J. 1987), *aff'd*, 845 F.2d 1014 (3d Cir. 1988). Dillon also pointed to cases in which courts permitted plaintiffs subjected to homosexual advances to sue under Title VII. See, for example, *Parrish v. Washington Nat'l Ins. Co.*, 1990 U.S. Dist. LEXIS 13934 (N.D. Ill.); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

53. *Dillon*, 1992 U.S. App. LEXIS 766 at *14-15.

54. *Id.* at *15.

55. The court found the analogy appealing because of the cruel treatment Dillon suffered and its similarity to the facts in cases involving heterosexual hostile environment claims. *Id.* at *18.

56. *Id.* at *20. The impermissible criteria contemplated by Title VII only include race, color, sex as gender, religion, and national origin. 42 U.S.C. § 2000e-2(a). See notes 24-27 and accompanying text for a discussion of the traditional, narrow interpretation of sex.

57. *Dillon*, 1992 U.S. App. LEXIS 766 at *22. The court found only one case that squarely addressed Dillon's type of argument. In *Carreno v. Local Union No. 226, Int'l Brotherhood of Elec. Workers*, 1990 U.S. Dist. LEXIS 13817 (D. Kan.), the plaintiff, who was living with another man in a homosexual relationship, suffered verbal abuse from his co-workers. *Id.* at *3. He filed

again looked to other circuit court decisions to support its finding that Dillon had no hostile work environment claim under Title VII because homosexuality is not an impermissible criterion upon which to discriminate.⁵⁸

Dillon also advanced an argument separate from the hostile work environment claim. He pointed out that the Supreme Court allowed sex stereotyping evidence to prove sex discrimination in *Price Waterhouse v. Hopkins*.⁵⁹ Dillon proposed that he suffered discrimination based on such stereotyping because his co-workers deemed him insufficiently "macho."⁶⁰ The Sixth Circuit indicated, however, that the *Price Waterhouse* holding meant only that Title VII prohibited stereotyping based on impermissible criteria.⁶¹ Applying this narrow interpretation, the court held that the remarks made to Dillon bore no relationship to his gender per se, and thus found no sex discrimination.⁶²

Although the Sixth Circuit affirmed the dismissal of Dillon's case somewhat reluctantly,⁶³ the message from the circuits is clear: Title VII does not now, nor did it ever, protect individuals from arbitrary employment discrimination based upon their sexual orientation.⁶⁴

2. The Transsexual Cases

Several courts have addressed an issue closely related to the sexual orientation question—does Title VII's sex discrimination proscription apply to discrimination against transsexuals? Their unanimous answer, like those of the courts examining sexual orientation claims, has been no. In *Voyles v. Ralph K. Davies Medical Center*,⁶⁵ the District Court for the Northern District of California considered a Title VII claim brought by Charles Voyles, Jr., also known as Carol Voyles, who worked

suit under Title VII, claiming that the harassment had risen to the level of a hostile work environment. *Id.* at *4. In order to establish a prima facie hostile work environment claim, plaintiffs must demonstrate their membership in a protected group. *Id.* at *6 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The court held that Carreno had failed to plead a prima facie case under Title VII because his co-workers discriminated against him based not on his gender, but on his sexual orientation. *Carreno*, 1990 U.S. Dist. LEXIS 13817 at *7, *9.

58. *Dillon*, 1992 U.S. App. LEXIS 766 at *22.

59. *Id.* at *15. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), involved a woman who was effectively denied partnership because she was not considered feminine enough. For a more detailed examination of *Price Waterhouse* and sex stereotyping, see notes 113-29 and accompanying text.

60. *Dillon*, 1992 U.S. App. LEXIS 766 at *15.

61. *Id.* at *28.

62. *Id.* at *28-29.

63. The court explained that "[w]hile we sympathize with [Dillon's] plight, we are constrained to hold that he has not stated a cause of action under Title VII." *Id.* at *2 (emphasis added).

64. See notes 28-62 and accompanying text.

65. 403 F. Supp. 456 (N.D. Cal. 1975).

for the defendant as a hemodialysis technician.⁶⁶ Shortly after Voyles, a woman, notified the director of personnel that she intended to undergo sexual reassignment surgery, the medical center discharged Voyles on grounds that a sex change would adversely affect her patients and co-workers.⁶⁷ Voyles, like many sexual orientation plaintiffs, argued that discrimination based on her transsexuality violated Title VII's sex discrimination prohibition.⁶⁸ The court, like many of the sexual orientation courts, found no congressional intent to proscribe any conduct other than that which would not have happened had the victim been a member of the opposite sex.⁶⁹ The court claimed that it could find no indication in the legislative history or case law interpreting Title VII that Congress intended sex discrimination to encompass transsexual discrimination "or any permutation or combination thereof."⁷⁰

In *Powell v. Read's, Inc.*,⁷¹ the District Court for the District of Maryland dismissed the Title VII claim of a male who was living as a woman in preparation for sex change surgery.⁷² The defendant fired Sharon Powell, also known as Michael Powell, legally a male, on her first day as a waitress.⁷³ The court emphasized that Title VII addresses discrimination because of the "status of sex or because of sexual stereotyping, rather than on discrimination due to a change in sex."⁷⁴ Relying on an EEOC ruling that denied transsexuals protection against discrimination under existing law, the court stated that Title VII is not "susceptible to an interpretation which would embrace transsexuals."⁷⁵

The Seventh,⁷⁶ Eighth,⁷⁷ and Ninth⁷⁸ Circuits also have declined to interpret Title VII's sex discrimination provision to include transsexual discrimination claims. The circuit courts relied on the dearth of legislative history regarding the sex amendment and the rejection of liberaliz-

66. *Id.* at 456. A hemodialysis technician assists patients whose kidneys function improperly (or do not function at all) during dialysis, when the patient's blood is passed through a hemodialyzer and thereby cleansed of toxins. See *Black's Medical Dictionary* 315-16 (West, 35th ed. 1987); *Stedman's Medical Dictionary* 633 (Anderson Co., 5th ed. 1982).

67. *Voyles*, 403 F. Supp. at 456.

68. *Id.* at 457.

69. *Id.* In a footnote, the court noted that the economic deprivation specifically suffered by women prompted the enactment of the sex discrimination provision. *Id.* at 457 n.1 (citing *Baker v. California Land Title Co.*, 507 F.2d 895, 896 n.2 (9th Cir. 1974)).

70. *Voyles*, 403 F. Supp. at 457.

71. 436 F. Supp. 369 (D. Md. 1977).

72. *Id.* at 370-71.

73. *Id.* at 370.

74. *Id.* at 371 (emphasis in original).

75. *Id.* The court acknowledged that EEOC rulings are not binding, but nevertheless cited the ruling as additional support. *Id.*

76. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

77. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982).

78. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

ing amendments to conclude that Congress intended a traditional, gender-based definition of sex.⁷⁹ Interestingly, although the Seventh Circuit's opinion in *Ulane v. Eastern Airlines, Inc.*⁸⁰ mirrored the unanimous holdings of the other circuits, it did not merely affirm the lower court's decision. Rather, the court of appeals reversed the district court's holding,⁸¹ which was favorable to the transsexual plaintiff, in order to reconcile the outcome with prevailing precedent.

Eastern Airlines hired the plaintiff, then Kenneth Ulane, as a pilot in 1968.⁸² Prior to his employment with Eastern, Ulane had served in the United States Army for four years.⁸³ With Eastern, Ulane progressed from Second to First Officer and served as a flight instructor.⁸⁴ In 1979, psychiatrists diagnosed Ulane as a transsexual.⁸⁵ He began taking hormones and underwent sex reassignment surgery in 1980.⁸⁶ Subsequent to the surgery, the state of Illinois issued Ulane a revised birth certificate indicating that "Karen Frances Ulane" had been born a female.⁸⁷ The Federal Aviation Administration (FAA) also certified Ulane⁸⁸ for flight status as a female.⁸⁹ Eastern knew nothing of Ulane's transsexuality, until she attempted to return to work after her

79. *Ulane*, 742 F.2d at 1084-85; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662-63.

80. 742 F.2d 1081 (7th Cir. 1984).

81. *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821 (1983), rev'd, 742 F.2d 1081 (7th Cir. 1984).

82. *Ulane*, 742 F.2d at 1082.

83. *Id.* While in the military, Ulane flew several combat missions in Vietnam, for which he earned the Air Medal of Honor with eight clusters, the Vietnam Service Medal, and the Army Commendation Medal for exceptionally meritorious service. D. Douglas Cotton, Note, *Ulane v. Eastern Airlines: Title VII and Transsexualism*, 80 Nw. U. L. Rev. 1037, 1037 n.3 (1986). An honor graduate of the Army flight school, Ulane was honorably discharged in 1968. *Id.* at 1037.

84. *Ulane*, 742 F.2d at 1082-83. Eastern Airlines considers the position of flight instructor an honor. Cotton, 80 Nw. U. L. Rev. at 1037 n.5. In fact, during his twelve years with Eastern, Ulane flew over 8,000 air miles and received commendations for exceptional performance. *Id.* at 1037 nn.4 & 6. Ulane's fellow pilots also elected him several times to represent them in the pilots' union. *Id.* at 1037.

85. *Ulane*, 742 F.2d at 1083. Prior to this diagnosis, Ulane had sought psychiatric and medical assistance in dealing with the fact that he had "felt like a female" since early childhood. *Id.* In a footnote, the court defined transsexualism as a "condition that exists when a physiologically normal person . . . experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex." *Id.* at 1083 n.3. The court further distinguished transsexuals from "homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress . . . for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born." *Id.*

86. *Id.* at 1083.

87. *Id.*

88. Ulane hereinafter is referred to with feminine pronouns.

89. *Ulane*, 742 F.2d at 1083. Ulane successfully completed a series of rigorous physical, psychological, and psychiatric examinations in pursuit of her FAA First Class Medical Certificate. Cotton, 80 Nw. U. L. Rev. at 1038 (cited in note 83).

reassignment surgery.⁹⁰ Upon her return, Ulane offered to undergo any required examinations or retraining before reassuming flight duty.⁹¹ Without attempting to examine or retrain Ulane,⁹² Eastern fired her.⁹³

Ulane timely filed a claim with the EEOC, which issued her a right to sue notice.⁹⁴ Ulane then brought a Title VII suit in federal district court, alleging that Eastern had discriminated against her as a female and as a transsexual.⁹⁵ The district court found for Ulane on both counts.⁹⁶ Unlike other courts that had considered the issue, the *Ulane* court construed the lack of legislative history as leaving room for a liberal rather than narrow interpretation of sex.⁹⁷ Rejecting a traditional, gender-based interpretation of sex, Judge Grady remarked that the question of sex was not straightforward and that a liberal approach to sex was appropriate because doubt existed in the medical community about the gender of transsexuals.⁹⁸ In his opinion, the term sex properly applied to transsexuals, both in a literal and scientific sense; therefore, he supported Ulane's claim of sex discrimination under Title VII.⁹⁹

The Seventh Circuit quickly reversed the district court's renegade opinion, stating that Title VII provides no protection for transsexu-

90. *Ulane*, 742 F.2d at 1083.

91. Cotton, 80 Nw. U. L. Rev. at 1038 (cited in note 83).

92. *Id.*

93. *Ulane*, 742 F.2d at 1082. Eastern explained one of the reasons that it gave for Ulane's discharge: "To the extent the operation and the counseling . . . changed [Ms. Ulane] from male to female, [she was] changed . . . from the person Eastern has hired into a different person." *Ulane*, 581 F. Supp. at 832. Eastern also stated that it would not have hired Ulane "had it known [she] contemplated or might in the future contemplate such an action." *Id.* The district court found the last statement a "virtual admission of discrimination . . . based on sex within the meaning of the statute." *Id.*

94. *Ulane*, 742 F.2d at 1082.

95. *Id.*

96. *Id.*; *Ulane*, 581 F. Supp. at 839.

97. *Ulane*, 581 F. Supp. at 825. The district court stated that Title VII, as a remedial statute, should be liberally construed. *Id.* at 824. Because "there is not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term, 'sex,' would include transsexuals," the court applied the term in what it believed the most reasonable way to comport with Title VII's remedial purpose. *Id.* at 825.

98. *Id.* at 823. Judge Grady specifically stated: "Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about that question simply never occurred to me. I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex." *Id.* The evidence to which Judge Grady referred raised unresolved questions of whether sex is primarily chromosomal or psychological, as reflected in an individual's "sexual identity" and influenced by social and self-perception. *Id.* at 823-25. Judge Grady found the latter more persuasive. *Id.* at 825.

99. *Id.* at 825.

als.¹⁰⁰ Although the court of appeals agreed that remedial statutes such as Title VII should be construed liberally, it described its interpretive duty as circumscribed by Congress's intent.¹⁰¹ The court again turned to the legislative history and observed that the dearth of information on the sex amendment and the circumstances of its introduction and passage indicated Congress's clear intent to address only a traditional notion of sex.¹⁰² Absent an explicit congressional mandate, therefore, the circuit courts that have addressed the transsexuality issue consistently refuse to expand the concept of sex.

3. The Sex-Plus Cases

The courts often have addressed Title VII's application to discrimination against homosexuals or transsexuals but rarely have ruled on other types of allegedly sex-based discrimination. Opinions in these few cases, however, further bolster the courts' narrow, gender-based interpretation of sex. In *DeCintio v. Westchester County Medical Center*,¹⁰³ the Second Circuit considered male physical therapists' sex discrimination claims alleging that a female colleague had been hired at a higher salary based on a recommendation by the program administrator, with whom she was romantically involved.¹⁰⁴ In this case, the plaintiffs argued that discrimination on the basis of sex encompassed preferential treatment because of sexual liaisons and sexual attractions.¹⁰⁵ The court of appeals held such an overbroad definition "wholly unwarranted"¹⁰⁶ and interpreted the language and legislative history of Title VII to proscribe only differentiations based on an individual's gender, rather than his or her sexual affiliation.¹⁰⁷

100. The court explained that "[w]hile we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals." *Ulane*, 742 F.2d at 1084. The court felt constrained, no doubt, by the overwhelming weight of adverse precedent. See notes 24-64 and accompanying text.

101. Specifically, the court stated that there existed "reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress." *Id.* at 1086. The Court of Appeals emphasized that unless otherwise defined, words used in statutes should be given their ordinary, common meaning. In the court's view, to ignore that principle of statutory construction would amount to judicial legislating. *Id.*

102. *Id.* at 1085. The court surmised that "[h]ad Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate." *Id.*

103. 807 F.2d 304 (2d Cir. 1986).

104. *Id.* at 305.

105. *Id.* at 306.

106. *Id.*

107. *Id.* at 306-07. The court asserted that the plaintiffs suffered prejudice not because they were male, but because the program administrator preferred to hire his girlfriend. *Id.* at 308. In other words, because the plaintiffs would have been discriminated against whether they were male or female, they did not raise a valid sex discrimination claim. *Id.*

The District Court for the Middle District of Louisiana dealt with a unique "sex-linked" discrimination claim in *Cairo v. OH Material Corporation*.¹⁰⁸ Cairo alleged that he was fired because he refused to allow his supervisor to date his wife.¹⁰⁹ Because the supervisor, a heterosexual male, presumably would not have cared to date a female employee's spouse, Cairo contended that he was discriminated against because he was a male.¹¹⁰ The district court rejected this inventive argument, however, because it found no causal connection between Cairo's sex¹¹¹ and the alleged discrimination.¹¹²

4. The Sex Stereotyping Case—*Price Waterhouse v. Hopkins*

Although the Supreme Court denied certiorari in several sexual orientation cases, it affirmatively answered the question of whether Title VII prohibits sex discrimination based on sex stereotyping. In *Price Waterhouse v. Hopkins*,¹¹³ the Court admitted sexually stereotypical remarks as evidence of gender-motivated discriminatory action.¹¹⁴

Ann Hopkins had worked for Price Waterhouse for five years when partners in her office proposed her for partnership.¹¹⁵ In support of her candidacy, some partners praised Hopkins's skill in obtaining valuable government contracts as well as her competence, productivity, and character.¹¹⁶ Other partners, however, negatively referred to Hopkins's aggressive personality.¹¹⁷ One partner described her as "macho," another remarked that she "overcompensated for being a woman," and a third recommended that she take "a course at charm school."¹¹⁸ In a genuine attempt to help Hopkins improve her chances for partnership after her candidacy had been placed on hold, one partner advised her to "walk more femininely, . . . wear make-up; have her hair styled, and

108. 710 F. Supp. 1069 (M.D. La. 1989).

109. *Id.* at 1070.

110. *Id.*

111. The court adopted the now-familiar narrow definition of sex, concluding that it referred only to "membership in a class delineated by gender." *Id.* at 1071.

112. *Id.*

113. 490 U.S. 228 (1989).

114. *Id.* at 251.

115. *Id.* at 233. The Court noted that at the time of Hopkins's candidacy, 7 of 662 partners in the firm were female. *Id.* Of the 88 individuals proposed for partnership, Hopkins was the only woman. *Id.*

116. *Id.* at 233-34. Hopkins undoubtedly was qualified for partnership. Judge Gesell of the federal district court specifically found that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." *Id.* at 234.

117. *Id.* at 234-35.

118. *Id.* at 235.

wear jewelry."¹¹⁹ When the partners refused to repropose Hopkins for partnership the next year, she sued for sex discrimination under Title VII.¹²⁰

In support of her claim, Hopkins offered evidence that Price Waterhouse relied in part on sex stereotyping to make its decision.¹²¹ In light of the evidence, Judge Gesell decided that Price Waterhouse had discriminated against Hopkins on the basis of sex by acknowledging the partners' sexually stereotyping comments.¹²² The Supreme Court cautioned that although sexually stereotypical remarks do not prove automatically that sex motivated an employment decision, such remarks may constitute evidence that gender played a part in the determination.¹²³ Affirming the legal relevance of sex stereotyping, the Court prohibited discrimination based on such stereotyping and held that employers could not base evaluations or promotions on an employee's failure to display sexually stereotypical traits.¹²⁴

Although *Price Waterhouse* clearly establishes that Title VII proscribes reliance on gender-based sex stereotypes, homosexual plaintiffs have not prevailed on stereotyping claims in the lower courts.¹²⁵ For example, in *Dillon v. Frank* the plaintiff raised a stereotyping argument that his co-workers abused him because they did not perceive him to be "macho" enough.¹²⁶ The Sixth Circuit rejected this contention, stating that Dillon provided no evidence that his co-workers based their com-

119. *Id.*

120. *Id.* at 231-32.

121. Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified that sex stereotyping likely influenced the partners' decision-making process. *Id.* at 235. According to Fiske, Hopkins's "uniqueness" and the subjective nature of the partners' evaluations made it likely that the sex stereotyping produced the sharply critical remarks. *Id.* at 236.

122. Judge Gesell noted that Price Waterhouse "consciously g[ave] credence and effect to partners' comments that resulted from sex stereotyping." *Id.* at 237. Judge Gesell also concluded that "[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers." *Id.* at 236 (brackets in original).

123. *Id.* at 251. For example, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

124. The court stated: "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

125. For example, the plaintiffs in both *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), and *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979), suffered harassment because they were considered effeminate. Under *Price Waterhouse*, these plaintiffs presumably would have had a valid sex stereotyping argument; however, courts decided both cases a decade before *Price Waterhouse*. See note 32 and accompanying text.

126. 1992 U.S. App. LEXIS 766 *15 (6th Cir.).

ments on the belief that Dillon's homosexual practices were acceptable in females but unacceptable in males.¹²⁷ The court's myopic focus on Dillon's homosexual practices rather than his homosexual status ignored the fact that many individuals initially prejudge homosexuals because they perceive gay men as unmasculine and gay women as unfeminine.¹²⁸ Presently, however, plaintiffs discriminated against on the basis of their sexual orientation are unable to use *Price Waterhouse's* otherwise valid sex stereotyping argument successfully.¹²⁹

III. SIGHTING THE TARGET: DISCRIMINATION AGAINST MEMBERS OF SUSPECT AND QUASI-SUSPECT CLASSES

A cursory examination of Title VII's provisions reveals that the statute forbids arbitrary discrimination based on characteristics considered suspect or quasi-suspect for equal protection purposes.¹³⁰ The rationale behind the inclusion of such traits is easily understood—characteristics such as race, religion, sex, and national origin typically have nothing to do with employment qualifications. Moreover, public actions based on such characteristics merit heightened scrutiny under the Constitution; therefore, protection from similarly motivated private actions under a civil rights statute seems a natural corollary. In enacting Title VII, Congress provided private employees¹³¹ the protection that the Due Process¹³² and Equal Protection¹³³ Clauses always have provided for state and federal employees.

127. *Id.* at *27-28.

128. See Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. Cal. L. Rev. 797, 821 n.150 (1984).

129. For an extensive discussion of sex stereotyping and a persuasive argument that courts can extend Title VII protection to homosexuals simply by extending sex stereotyping analysis to sexual orientation cases, see Capers, 91 Colum. L. Rev. at 1158-87 (cited in note 15).

130. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding racial classifications suspect and subject to strict judicial scrutiny); *Mississippi U. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (finding gender classifications quasi-suspect and subject to heightened judicial scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (finding national origin classifications suspect and subject to strict judicial scrutiny). Although the Court does not consider religion a suspect class per se, it ranks as a fundamental right guaranteed by the Free Exercise Clause of the Constitution and thus merits strict scrutiny under equal protection analysis. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). See also U.S. Const., Amend. I. For descriptions of strict and heightened scrutiny, see note 135. Classifications based on non-suspect characteristics, such as wealth, merit rational basis scrutiny, which requires only that the classification be rationally related to a legitimate governmental interest. See *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

131. Congress subsequently amended Title VII to bring state and federal executive branch employees within its purview. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e).

132. U.S. Const., Amend. V; U.S. Const., Amend. XIV, § 1.

133. U.S. Const., Amend. XIV, § 1.

A. *The Nature of Suspect or Quasi-Suspect Classes*

In determining which classes merit suspect or quasi-suspect status, the courts have relied on several criteria—whether the group historically has suffered discrimination, whether the group exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” and whether the group is a minority or is politically powerless.¹³⁴ Once a class achieves suspect or quasi-suspect status, any legislation that discriminates on the basis of membership in that class automatically receives heightened judicial scrutiny.¹³⁵

The Supreme Court uses the Equal Protection Clause primarily as an instrument for eliminating state-sponsored, invidious racial discrimination.¹³⁶ To help achieve this worthwhile goal, the Court subjects statutes based upon racial classifications to the highest level of judicial scrutiny, strict scrutiny.¹³⁷ Satisfying this burden is difficult, because strict scrutiny analysis, in effect, presumes that classifications based on race are arbitrary and unrelated to any legitimate governmental purpose.¹³⁸ Accordingly, the government bears the burden of demonstrating that the law is necessary to address a compelling interest and is narrowly tailored to address that interest.

In *Loving v. Virginia*,¹³⁹ the Court applied strict scrutiny to strike down an anti-miscegenation statute.¹⁴⁰ The statute prohibited marriages between whites and “coloreds,” punishing each party equally.¹⁴¹ The State argued that providing equal punishment for both whites and blacks rendered the statute nondiscriminatory.¹⁴² Rejecting this contention, the Court held that, regardless of “equal application,” the stat-

134. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)) (*High Tech Gays I*). If the court does not find the group a minority or politically powerless, it will ask in the alternative whether the classification burdens a fundamental right. *Id.*

135. Strict scrutiny demands that the legislation at issue address a compelling state interest and seek to achieve that interest by narrowly tailored means. See *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987). Quasi-suspect classifications, such as those based upon gender or illegitimacy, give rise to a heightened standard of scrutiny, which asks that the statute be “substantially related to a legitimate state interest.” *Id.* (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)).

136. See *Loving*, 388 U.S. at 10.

137. *Id.* at 11. See also note 135.

138. See *Loving*, 388 U.S. at 10-11. See also *Korematsu*, 323 U.S. at 216 (noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).

139. 388 U.S. 1 (1966).

140. *Id.* at 11. The statute prohibited marriage between “colored” persons and white persons, prescribing up to five years in prison for the “felony” of interracial marriage. *Id.* at 4.

141. The statute provided that a white person who intermarried with a “colored” person faced the same penalty as a “colored” person who intermarried with a white person. *Id.*

142. *Id.* at 8.

ute's use of racial classifications to deny Virginia's citizens the right to marry violates the very principle of the Equal Protection Clause.¹⁴³

Often, only a blurry line exists between a classification based upon race and one based upon national origin.¹⁴⁴ For example, many courts cite *Korematsu v. United States*¹⁴⁵ as support for the inherent suspect nature of classifications based on national origin.¹⁴⁶ The Court actually framed the constitutional issue, however, in terms of race and ancestry.¹⁴⁷ Despite the cloudy distinction, the Court saw fit to apply strict scrutiny to a World War II military order that excluded all persons of Japanese ancestry from a West Coast military area.¹⁴⁸ Although the Court ultimately upheld the order,¹⁴⁹ it recognized the suspect nature of a classification based upon national origin.

The Equal Protection Clause also protects against sex discrimination, particularly involving women. In *Frontiero v. Richardson*,¹⁵⁰ the Supreme Court declared classifications based upon sex inherently suspect and therefore subject to heightened judicial scrutiny.¹⁵¹ The Court referenced a longstanding history of discrimination against women in the educational, employment, and political arenas.¹⁵² By affording sex

143. *Id.* at 12. The Court held that "equal application does not immunize [a] statute [containing racial classifications] from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9.

144. See, for example, Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 *Georgetown L. J.* 89, 107 n.108 (1984). Sherry suggests that the Court considers national origin the equivalent of race, ostensibly because most examples of discrimination based upon national origin involve Asians (a racial group) or Hispanics (popularly perceived as a racial group). *Id.*

145. 323 U.S. 214 (1944).

146. See, for example, *Frontiero v. Richardson*, 411 U.S. 677, 682 n.9 (1973) (citing *Korematsu*, among other cases, as support for the suspectness of classifications based on national origin).

147. See *Korematsu*, 323 U.S. at 223 (asserting that "Korematsu was not excluded from the Military Area because of hostility to him or his race"); *id.* at 226 (Roberts, J., dissenting) (stating that "it is the case of convicting a citizen . . . based on his ancestry, and solely because of his ancestry"); *id.* at 233 (Murphy, J., dissenting) (noting that "[s]uch exclusion . . . falls into the ugly abyss of racism").

148. *Id.* at 216.

149. In upholding the order, the Court deferred to the power of the military to protect the United States during times of war. *Id.* at 223.

150. 411 U.S. 677 (1973).

151. *Frontiero*, a female Air Force officer, sought increased benefits for her husband. The relevant statutes provided that spouses of male officers automatically were considered dependents for purposes of receiving increased benefits, but spouses of female officers could be considered dependents only if they in fact were dependent upon their wives for more than one-half of their support. *Id.* at 678-80. *Frontiero's* application was denied for failure to satisfy the statutory dependency standard. *Id.* The Court found the statutes unconstitutional under strict scrutiny analysis because they differentiated between male and female military officers solely for administrative convenience. *Id.* at 690-91.

152. *Id.* at 684-86. The Court characterized this discrimination as "'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* at 684. Discrimination

suspect status, the *Frontiero* court paved the way for strict judicial scrutiny of such arbitrary statutes.

The Court later announced, however, that gender-based classifications would be judged on a less strict standard of scrutiny because gender was a quasi-suspect, rather than a suspect class.¹⁵³ The Court subsequently applied this standard to strike down an Oklahoma statute prohibiting the sale of beer to males under twenty-one and females under eighteen,¹⁵⁴ but the quasi-suspect nature of gender classifications consistently merits a higher level of scrutiny than rational basis.¹⁵⁵ The Court has distinguished classifications based on sex from non-suspect classifications based on intelligence or physical disability, recognizing that sex usually bears no relation to an individual's capacity to perform or contribute to society.¹⁵⁶ Statutes that incorporate classifications based on sex discriminate against males or females without contemplating their individual abilities,¹⁵⁷ thus involving the "very kind of arbitrary legislative choice forbidden by the [Constitution]."¹⁵⁸

Although religion is not a suspect classification per se, strict scrutiny also applies to statutes that burden the exercise of a fundamental right.¹⁵⁹ The Free Exercise Clause specifically guarantees citizens the right to religious beliefs free from governmental interference.¹⁶⁰ The Fourteenth Amendment, incorporating the Free Exercise Clause, provides that no state shall deny individuals equal protection of the laws solely because of their religious beliefs or practices.¹⁶¹ Classifications based upon religion therefore merit strict judicial scrutiny.

against females resulted in "statute books . . . laden with gross, stereotyped distinctions between the sexes," as well as relative political powerlessness for women. *Id.* at 685.

153. *Mississippi U. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982).

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

155. *Id.* at 197. The heightened scrutiny applied in gender cases demands that the classifications serve important governmental objectives and be substantially related to their achievement. *Id.*

156. *Frontiero*, 411 U.S. at 686.

157. *Id.* at 686-87.

158. *Id.* at 690 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) (brackets in original).

159. See, for example, *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1962) (holding that when unemployment benefit provisions had the effect of penalizing Sherbert for observing her Sabbath Day, "no showing merely of a rational relationship to some colorable state interest would suffice;" rather, the statute must further a compelling state interest by narrowly tailored means).

160. U.S. Const., Amend. I. (stating: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

161. U.S. Const., Amend. XIV.

B. Sexual Orientation as a Suspect or Quasi-Suspect Classification

Several courts have addressed claims that homosexuals possess all of the criteria required of a suspect class,¹⁶² but currently, not one has accorded gays and lesbians such status. The Tenth Circuit recently reversed the one decision that held sexual orientation to be a suspect classification, but left the inherent suspect status of homosexuality unexamined by disposing of the case on different grounds.¹⁶³ In *Jantz v. Muci*,¹⁶⁴ the District Court for the District of Kansas considered a civil rights claim alleging an infringement of equal protection rights.¹⁶⁵ Vernon Jantz, a schoolteacher, claimed that the defendant, a public school principal, denied him a teaching position based on his perception that Jantz exhibited "homosexual tendencies."¹⁶⁶ In evaluating Jantz's equal protection claim, the court carefully analyzed the nature of sexual orientation, concluding that sexual orientation is not a matter of choice and that homosexuals suffer extreme discrimination because of their status; classification based on sexual orientation is therefore inherently suspect.¹⁶⁷

162. See, for example, *High Tech Gays I*, 895 F.2d at 563, reh'g denied, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375 (9th Cir. 1990) (*High Tech Gays II*); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991). In *Watkins v. U.S. Army*, 847 F.2d 1329 (9th Cir. 1988) (*Watkins I*), the Ninth Circuit held in part that homosexuals constituted a suspect class for equal protection purposes. The opinion was withdrawn, however, a year later. In *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (*Watkins II*), the court of appeals held that the defendant was estopped from barring the plaintiff's reenlistment solely because of his acknowledged homosexuality. The *Watkins II* court did not reach the constitutional issues raised in *Watkins I*. Id. at 705. Nevertheless, the concurrence of Judge Norris, who had written the *Watkins I* opinion, reemphasized, in nearly identical language, his original conclusion that homosexuals constituted a suspect class. Id. at 711-31 (Norris, J., concurring).

163. *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992). The court held that the defendant, a school principal, was entitled to qualified immunity from the plaintiff's civil rights claim. Id. at 630.

164. 759 F. Supp. 1543 (D. Kan. 1991), rev'd, 976 F.2d 623 (10th Cir. 1992).

165. Id. at 1543. Jantz filed suit under 42 U.S.C. § 1983 (1988), a federal constitutional tort statute.

166. Id. The defendant, school principal Cleofas Muci, claimed that he selected another candidate because he was more qualified than Jantz. Id. at 1545. Jantz challenged Muci's proposed explanation, citing the testimony of Muci's secretary, who acknowledged that she made an offhand comment to Muci that Jantz reminded her of her husband, whom she believed to be homosexual. Id. Jantz also cited the school social studies coordinator, who testified that when he questioned Muci about his decision not to hire Jantz, Muci replied that it was because of Jantz's "homosexual tendencies." Id.

167. The court specifically stated:

Sexual orientation is not a matter of choice; it is a central and defining aspect of the personality of every individual. Homosexuals have been and remain the subject of invidious discrimination. No other identifiable minority group faces the dilemma dealt with every day by the homosexual community—the combination of active and virulent prejudice with the lack of an effective political voice. . . . Accordingly, the court finds that a governmental classification based on an individual's sexual orientation is inherently suspect.

Id. at 1551.

1. A History of Discrimination

The *Jantz* court pointed out that homosexuals have experienced continuous and extremely intense discrimination.¹⁶⁸ Even courts that have declined to extend suspect status to homosexuals agree that gays and lesbians historically have been subjected to purposeful discrimination.¹⁶⁹ In fact, one court noted, "Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society."¹⁷⁰ This discrimination exists not only in the public and private employment context but is pervasive throughout every aspect of society.¹⁷¹ Judges Canby and Norris of the Ninth Circuit Court of Appeals, dissenting from the denial of a rehearing en banc in *High Tech Gays II*,¹⁷² insightfully pointed out that this history of intense and pervasive discrimination makes it probable that any different treatment is simply a product of past prejudice,¹⁷³ rather than a legitimate classification necessary to achieve a pressing government goal. According to Judges Canby and Norris, the judiciary should not endorse the discrimination by refusing to subject classifications based on sexual orientation to strict or heightened scrutiny.¹⁷⁴

Discrimination against homosexuals often is violent in nature, as evidenced by nationwide instances of "gay bashing."¹⁷⁵ Last year in Portland, Maine, youths pursued a community development worker with AIDS, throwing rocks and yelling, "Hey, faggot, we're going to get you."¹⁷⁶ Gay advocates indicate that "[d]rive-by slurs and egg-tossings have given way . . . to nail-studded baseball bats and switchblades."¹⁷⁷ The federal government cannot claim ignorance of these violent forms of homosexual discrimination. For example, in passing the Hate Crimes Statistics Act of 1990 (HCSA),¹⁷⁸ it specifically directed the Depart-

168. Id. at 1549.

169. See, for example, *High Tech Gays I*, 895 F.2d at 573.

170. *High Tech Gays II*, 909 F.2d at 377 (quoting *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987)).

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

172. *High Tech Gays II*, 909 F.2d at 376 (Canby, J., dissenting).

173. Id. at 376-77.

174. Id.

175. *Jantz*, 759 F. Supp. at 1549. The *Jantz* court cited a study that found that homosexuals are victimized more often than any other minority group. Id. The National Gay and Lesbian Task Force Policy Institute estimates that anti-gay harassment and violence increased 31% in 1991 in the cities of New York, San Francisco, Chicago, Boston, and Minneapolis-St. Paul. See *Gays Under Fire*, Newsweek 34, 36 (Sept. 14, 1992).

176. *Gays Under Fire*, Newsweek at 35.

177. Id. at 36.

178. Pub. L. No. 101-275, 104 Stat. 140 (1990). For further discussion of HCSA, see Peter M. Cicchino, Bruce R. Deming, and Katherine M. Nicholson, Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 Harv. C.R.-C.L. L. Rev. 549, 554-55 (1991).

ment of Justice to collect and publish information about crimes manifesting prejudice against a victim's sexual orientation.¹⁷⁹ The statute also covers crimes that involve violence based on race, religion, or ethnicity¹⁸⁰—not coincidentally, characteristics nearly identical to those protected by Title VII.¹⁸¹

Much of the discrimination based on sexual orientation stems from incorrect stereotyping.¹⁸² People often view homosexual males as effeminate and homosexual females as masculine; however, research indicates that mannerisms alone do not indicate homosexuality.¹⁸³ Contrary to popular sentiment, homosexuals do not seek to “convert” the straight population of America,¹⁸⁴ nor are they more likely to molest children than heterosexuals.¹⁸⁵ The National Association for Health, the American Psychiatric Association, and the Surgeon General agree that homosexuality is not a mental illness,¹⁸⁶ yet many believe that homosexuals are “sick.” Although sexual orientation “implies no impairment in judgment, stability, reliability or general social or vocational capabilities,”¹⁸⁷ homosexuals continue to suffer unwarranted discrimination based on these stereotypes.¹⁸⁸

2. An Immutable Characteristic

In declining to apply heightened scrutiny to legislation that discriminates on the basis of sexual orientation, courts have declared that homosexuality is not immutable and therefore cannot be suspect.¹⁸⁹ These courts maintain that sexual orientation is “fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes,”¹⁹⁰ because homosexuality is primarily “behavioral” in character. The *Jantz* court pointed out that

179. HCSA, 104 Stat. at 140.

180. *Id.*

181. 42 U.S.C. § 2000e-2.

182. For a general discussion of such stereotypes, see Miller, 57 S. Cal. L. Rev. at 821-24 (cited in note 128).

183. *Id.* at 821 n.150.

184. *Id.* at 821-22.

185. *Id.* at 822-23. In fact, the opposite seems to be true. See *id.* at 823.

186. *Id.* at 823-24. As early as 1935, Sigmund Freud classified homosexuality as a “variation of the sexual function,” rather than as an illness. *Id.* at 824.

187. *Jantz*, 759 F. Supp. at 1548.

188. See notes 113-29 and accompanying text for a discussion of reliance on sex stereotyping as valid evidence of sex discrimination under Title VII.

189. See *High Tech Gays I*, 895 F.2d at 573; *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Steffan v. Cheney*, 780 F. Supp. 1, 6-7 (D.D.C. 1991).

190. *High Tech Gays I*, 895 F.2d at 573. The Ninth Circuit further stated that the “behavior or conduct of such already recognized classes is irrelevant to their identification.” *Id.* at 573-74.

these findings are unsupported by legal, scientific, or medical authority.¹⁹¹

Many recent studies lend scientific credence to the claim that sexual orientation is, for the most part, immutable. In 1990, Professor Dick Swaab, Director of the Netherlands Institute for Brain Research in Amsterdam, and his colleagues found that in homosexual men the area of the brain known as the suprachiasmatic nucleus possessed twice the number of cells and was twice as large as in heterosexual men.¹⁹² A year later, Dr. Simon LeVay of the Salk Institute for Biological Studies in San Diego found that an area located in the anterior hypothalamus known as INAH-3 was half the size in homosexual men as in heterosexual men.¹⁹³ More recently, two anatomists at the University of California at Los Angeles reported that the anterior commissure of the brain, which connects the two hemispheres, was larger in homosexual men than in heterosexual men.¹⁹⁴ Although the researchers admit that it is unlikely that the structural differences could cause homosexuality, all agree that the variations most likely result from the brain's response to the sex hormones that influence early development.¹⁹⁵

In addition, other researchers have reported that genetics may influence sexual orientation. Psychology Professor Michael Bailey of Northwestern University in Chicago studied the incidence of homosexuality in related men.¹⁹⁶ Professor Bailey found that in fifty-two percent of the pairs of identical twins, both were homosexual, as opposed to twenty-two percent of the fraternal twins and only eleven percent of the adoptive brothers.¹⁹⁷ One neuroscientist who discovered that homosexual men scored midway between men and women on tests of spatial and verbal ability believes that "[i]t is as though, in a neurological sense, homosexual men are a third sex."¹⁹⁸ Even if biology is not one hundred percent responsible for sexual orientation, most researchers believe that sexual orientation most often is determined before pu-

191. *Jantz*, 759 F. Supp. at 1547.

192. Sharon Kingman, *Nature, Not Nurture?*, *The Independent* 56, 56 (Oct. 4, 1992). Scientists believe that the suprachiasmatic nucleus is involved in regulating the biological clock. *Id.*

193. *Id.* INAH-3 is known to regulate sexual behavior in male monkeys. *Id.*

194. *Id.*

195. *Id.* at 56-57.

196. Bailey studied 25 pairs of identical twins, each of whom share identical genes; fraternal twins, who have similar genes; and adoptive brothers, who possess completely unrelated genes. *Id.* Bailey conducted a similar study of lesbians and their sisters and discovered similar results. *Id.* at 57.

197. *Id.*

198. *Id.* at 56. Sandra Witelson, a neuroscientist at McMaster University in Hamilton, Ontario, performed the tests along with Cheryl McCormick, a psychologist at McGill University in Montreal. *Id.*

berly¹⁹⁹ and most likely is immutable.²⁰⁰ This evidence strongly rebuts the courts' belief that homosexuality is primarily behavioral in nature. Moreover, it undermines the *Steffan* court's assumption that sexual orientation is chosen, rather than preordained, and thus not an immutable characteristic.²⁰¹

Evidence from these studies should convince the judiciary that sexual orientation is relatively intractable, but according to the *Jantz* court's interpretation of "immutability," such evidence may not even be necessary. The *Jantz* court emphasized that "complete and absolute immutability simply is not a prerequisite for suspect classification."²⁰² By way of example, the court explained that although race, gender, and alienage might be mutable in some cases, discrimination on the basis of such classes still compels heightened judicial scrutiny.²⁰³ Although traits such as race or sexual orientation may be altered or concealed, such a change would be very difficult and perhaps costly, financially and otherwise.²⁰⁴ Immutability more accurately might describe, therefore, central, defining traits that may be altered only at the "expense of significant damage to the individual's sense of self."²⁰⁵ Sexual orientation also is a central, defining identity trait; under the *Jantz* court's

199. See, for example, *High Tech Gays II*, 909 F.2d at 377 (Canby, J., dissenting) (stating that "[s]exual identity is established at a very early age; it is not a matter of conscious or controllable choice").

200. See Shelley Page, *The Biology of Being Gay*, *The Ottawa Citizen* E1 (May 24, 1992). Dr. Ken Zucker, head of the Child and Adolescent Gender Identity Clinic at the Clarke Institute of Psychiatry in Toronto, believes that many professionals in the field have come to realize that, in most cases, "you can't make a man prefer sex with a woman if that's not his true sexual orientation." *Id.* The Alfred C. Kinsey Institute for Sex Research concluded from empirical studies: "[H]omosexuality is as deeply ingrained as heterosexuality. . . . There is no reason to think it would be any easier for homosexual[s] . . . to reverse their sexual orientation than it would be for heterosexual[s] . . . to become predominantly or exclusively homosexual." See *Gay Rights Coalition v. Georgetown U.*, 536 A.2d 1, 34-35 (D.C. App. 1987) (quoting Alan P. Bell, Martin S. Weinberg, and Sue Kiefer Hammersmith, *Sexual Preference—Its Development in Men and Women* 190, 222 (Indiana U., 1981)).

201. *Steffan*, 780 F. Supp. at 7.

202. *Jantz*, 759 F. Supp. at 1548. See also *High Tech Gays II*, 909 F.2d at 377 (Canby, J., dissenting) (noting that the Supreme Court has "more than once recited the characteristics of a suspect class without mentioning immutability").

203. *Jantz*, 759 F. Supp. at 1548. The court pointed out that aliens may obtain citizenship, gender may be surgically changed, and lighter skinned blacks could pass as white. *Id.* For example, "[d]iscrimination on the basis of race would not become permissible merely because a future scientific advance permits the change in skin pigmentation." *Id.*

204. *Id.*

205. *Id.* *High Tech Gays II* sets forth another practical alternative to absolute immutability: "The real question is whether discrimination on the basis of the class's distinguishing characteristic amounts to an unfair branding or resort to prejudice." *High Tech Gays II*, 909 F.2d at 377 (Canby, J., dissenting).

definition of immutability, therefore, discrimination against sexual orientation significantly violates an individual's character.²⁰⁶

3. Political Powerlessness

Fortunately for the homosexual community, several states and cities have enacted laws forbidding discrimination based upon sexual orientation in various contexts, including employment.²⁰⁷ Unfortunately, some courts choose to view these relatively minor advances in gay civil rights as evidence that homosexuals wield political power.²⁰⁸ Furthermore, the *Steffan* court cites recent AIDS legislation as proof that homosexuals exercise political power in the issues that affect them.²⁰⁹ The courts would have to disqualify every group from attaining (or maintaining) suspect or quasi-suspect status, however, if they determine the amount of political power by the passage of relevant legislation.²¹⁰ Although such legislation certainly is a step in the right direction, it cannot compare to the volumes of law dedicated to eliminating discrimination based on race or gender.²¹¹ Conversely, the failure of countless proposals to add sexual orientation to Title VII's list of protected characteristics represents the most obvious indication that the homosexual community wields little political clout.

4. Sexual Conduct Versus Sexual Orientation

Many courts have refused to grant homosexuals suspect status because the Supreme Court has upheld statutes that criminalize homosex-

206. *Jantz*, 759 F. Supp. at 1548. See also Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1303 (1985).

207. Eight states currently prohibit such discrimination: Wisconsin (Wis. Stat. Ann. §§ 111.31 et seq. (West, 1988)); Connecticut (Conn. Gen. Stat. Ann. §§ 46a-81a et seq. (West, 1993)); New Jersey (N.J. Stat. Ann. §§ 10:5-10:12 (West, 1993)); Vermont (1992 Vt. Laws 135); California (Cal. Lab. Code §§ 1102.1 et seq. (West, 1982 & Supp. 1983)); Minnesota (Minn. Stat. Ann. § 609.2231 (West, 1993)); Massachusetts (Mass. Gen. Laws Ann. ch. 151B, § 4 (West, 1993)); Hawaii (Hawaii Rev. Stat. § 378-2 (1992)). Major American cities with anti-discrimination laws include New York, Los Angeles, Washington, San Francisco, Boston, Atlanta, Detroit, Philadelphia, Houston, Denver, and Baltimore. See Paul W. Valentine, *Baltimore Outlaws Homosexuality Discrimination*, Wash. Post A2 (May 24, 1988).

208. See *High Tech Gays I*, 895 F.2d at 574; *Steffan*, 780 F. Supp. at 7-9.

209. *Steffan*, 780 F. Supp. at 9. The court opined that homosexuals exercise political power "not only with respect to themselves, but also with respect to issues of the day that affect them." *Id.* at 7-8.

210. See *High Tech Gays II*, 909 F.2d at 377-78 (Canby, J., dissenting). The court compared the legislative successes of the homosexual community with those of the black community, which already constitutes a suspect class. *Id.* Blacks are protected by three federal constitutional amendments, several federal civil rights acts, and anti-discrimination laws in 48 states. *Id.* By comparison, "and by absolute standards as well," homosexuals as a class are politically powerless. *Id.*

211. *Jantz*, 759 F. Supp. at 1550.

ual sodomy.²¹² Describing judicially sanctioned criminalization of “the behavior that defines the class” as state-sponsored discrimination, the *Padula v. Webster* court declined to conclude that any state discrimination against the class deserves heightened scrutiny.²¹³ In the context of equal protection, however, a court should be concerned with the status of the class, not its activities.²¹⁴ Sexual orientation itself has not been criminalized.²¹⁵ Moreover, *Bowers v. Hardwick*²¹⁶ allows homosexual sodomy to be criminalized but does not address the full range of homosexual conduct. Because homosexuality is a status, an individual would be engaging in homosexual conduct “while playing bridge just as much as while engaging in sexual activity.”²¹⁷

The foregoing analysis reveals that sexual orientation clearly satisfies the criteria that define suspect classifications. Homosexuals historically and currently suffer from widespread, pernicious discrimination based on ignorance and fear.²¹⁸ Scientific research strongly indicates that individuals do not choose to be homosexual; rather, genetics, hormones, and environment combine to determine sexual orientation at an early age.²¹⁹ Sexual orientation is immutable because it plays a tremendous part in defining an individual’s personhood.²²⁰ As a minority class, homosexuals wield very little political power.²²¹ Finally, sexual orientation connotes a status that should not be defined solely by the sexual conduct that may accompany it.²²² As a suspect classification, sexual orientation deserves the heightened protection presently afforded race, sex, religion, and national origin.

212. See, for example, *High Tech Gays I*, 895 F.2d at 571; *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). See also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding homosexual sodomy criminally actionable despite the Due Process Clause).

213. *Padula*, 822 F.2d at 103. The *Padula* court declared that “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” *Id.*

214. *High Tech Gays II*, 909 F.2d at 380 (Canby, J., dissenting). See also Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1165-70 (1988). Professor Sunstein states that the criminalization of homosexual conduct is irrelevant when considering an equal protection challenge. *Id.* at 1167.

215. *Watkins I*, 847 F.2d at 1346.

216. 478 U.S. 186 (1986).

217. *High Tech Gays II*, 909 F.2d at 380 (Canby, J., dissenting).

218. See notes 168-88 and accompanying text.

219. See notes 191-201 and accompanying text.

220. See notes 202-06 and accompanying text.

221. See notes 207-11 and accompanying text.

222. See notes 212-217 and accompanying text.

IV. ENLARGING THE BULL'S-EYE: ONE STEP CLOSER TO THE IDEAL AMERICAN WORKPLACE

The Equal Protection Clause and Title VII ultimately seek to protect historically disadvantaged minority groups from discrimination based upon traits that reveal nothing about an individual's capacity to perform a job or to contribute to society. Not coincidentally, both proscribe discrimination based upon race, sex, national origin, and religion, none of which bear any relation to an individual's worth as a productive employee or citizen. This Note argues that sexual orientation contains all of the elements that the courts require of a suspect class; thus, it should stand on equal footing with the other classes protected by the Equal Protection Clause and Title VII. By analogy, therefore, Title VII should protect individuals from employer discrimination based solely upon their sexual orientation.

Analogy alone will not compel the courts' decisions, however, especially in the face of overwhelmingly adverse precedent. Although the current social and political climate supports bold judicial action,²²³ the majority of the courts' forays into the sexual orientation issue, as it relates to both equal protection and Title VII, represent prime examples of judicial restraint.²²⁴ For example, having discerned Congress's narrow view of sex under Title VII from the dearth of legislative history and the subsequent failure of several sexual orientation amendments, the *Ulane* court declined to "judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation."²²⁵ Although the court admitted its obligation to construe remedial statutes

223. Professor William Eskridge argues that courts should interpret remedial statutes such as Title VII dynamically, "in light of their present societal, political and legal context." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1479 (1987). Society's growing awareness of and concern about sexual orientation issues stems from increased activism and efforts by states, municipalities, and private corporations to afford homosexuals equal rights in employment, housing, and other areas, as well as from the devastating effects of AIDS on the homosexual community. Judge Patricia Wald of the District of Columbia Circuit accordingly observed: "Our changing social and political climate may at last be consigning overt, obvious discrimination against gays and lesbians to the historical dust bin of Jim Crow laws." *United States Info. Agency v. Krc*, 989 F.2d 1211, 1227 (D.C. Cir. 1993) (Wald, J., dissenting in part).

224. The Ninth Circuit Court of Appeals, however, recently dared to apply an "active" rational basis review to the military's ban on homosexual members. *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991). The *Pruitt* court warned that government policies that merely give effect to social prejudices regarding sexual orientation cannot meet the rational basis standard. The court declared that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 1165 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

225. *Ulane*, 742 F.2d at 1086. For a discussion of *Ulane*, see notes 80-102 and accompanying text.

such as Title VII liberally, it hesitated to overstep its interpretive bounds and infringe on Congress's legislative prerogatives.²²⁶

Several courts have relied on the *Ulane* rationale to refuse homosexual employees protection under Title VII.²²⁷ Although this conservatism from the federal courts is not surprising, in light of Title VII's broad remedial goal and the current discrimination faced by homosexuals in the workplace, the courts' cautious approach seems almost negligent. Despite the courts' acknowledgment that Title VII mandates a broad interpretation to satisfy its remedial purpose of eliminating employment discrimination,²²⁸ such an interpretation has failed to materialize.

The courts also have recognized that Congress deliberately structured Title VII loosely to allow for the statute's application to future modes of employment discrimination.²²⁹ This open framework invites the evolution of Title VII protection through judicial interpretation, rather than through legislative amendments. Moreover, the homosexual community has failed to achieve protection from discrimination through amendments because Congress, as a whole, is unsympathetic to the needs of such politically powerless minorities.²³⁰ The democratic

226. *Ulane*, 742 F.2d at 1086.

227. See, for example, *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (quoting *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975)) (holding that "the prohibition on sexual discrimination could not be 'extend[ed] . . . to situations of questionable application without some stronger Congressional mandate'"). The court in *Dillon v. Frank* also felt "constrained to hold that [Dillon] has not stated a cause of action under Title VII," but admitted that it "sympathize[d] with [Dillon's] plight." *Dillon*, 1992 U.S. App. LEXIS 766 at *2.

228. Title VII "requires an interpretation animated by the broad humanitarian and remedial purposes underlying the federal proscription of employment discrimination." *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977) (quoting *Coles v. Penny*, 531 F.2d 609, 616 (D.C. Cir. 1976)).

229. In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), the Fifth Circuit Court of Appeals explained that: "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Id.* at 238.

Title VII's open construction may not reflect so noble an inspiration, however. According to Professor Randy Barnett, some statutes "are deliberately rendered vague to enable politicians to support particular legislation that pleases certain constituencies without alienating others." Randy E. Barnett, *Foreward: Judicial Conservatism v. A Principled Judicial Activism*, 10 Harv. J. L. & Pub. Pol. 273, 288 (1987).

230. Powerless, stigmatized minorities, such as homosexuals, are "perpetual losers" in the political arena. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L. J. 1287, 1296 (1982). The discrete and insular nature of these minorities prevents their participation in the political process, while popular prejudice interferes with the legislature's ability to protect them. *Id.* See also Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 Iowa L. Rev. 1059, 1063 (1974) (explaining that regardless of minority participation in the political process, prejudice remains a critical factor in preventing lawmakers from protecting disfavored

system consistently has failed members of the homosexual community, yet the courts, just as consistently, have declined to remedy this injustice.²³¹

The courts seem to fear that by "rush[ing] in to remedy . . . the failings of the political processes, [they] deprive[] those processes of an opportunity to function."²³² The courts' inaction, therefore, effectively places the ball in Congress's court. Accordingly, Congress itself must amend Title VII to proscribe employment discrimination based upon sexual orientation, thus fulfilling the statute's broad remedial goals.

Admittedly, proposals to add sexual orientation to Title VII's list of protected characteristics have failed many times. Legislators have hesitated to expand Title VII to include what they perceive to be a lifestyle choice or a matter of personal conviction. For example, Senator John Glenn supported his opposition to one amendment by explaining that "Title VII now covers matters of race, creed, sex, color and national origin. . . . These are all matters of religious or genetic attributes. I do not believe it is advisable to broaden and extend Title VII into areas of personal behavior."²³³

This Note argues that sexual orientation may have a biological origin and, at any rate, is not merely a "lifestyle choice" any more than religion is.²³⁴ Sexual orientation simply plays no role in qualifying an individual for a particular job.²³⁵ Other bodies of government have recognized and acted successfully upon this fact by offering homosexuals

minorities); *Senate Bill Would Ban Job Discrimination Against Gays*, 27 Daily Labor Rep. (BNA) A2 (Feb. 8, 1983) (quoting Senator Paul Tsongas as stating that protection of homosexuals is "a very explosive and sensitive political issue" for which it is difficult to muster support among members of Congress).

231. See generally *Plyler v. Doe*, 457 U.S. 202 (1982). In *Plyler*, the Supreme Court struck down on equal protection grounds a state statute denying funds to schools that enrolled undocumented alien children. *Id.* Chief Justice Burger dissented from the activist opinion, claiming that: "[T]he Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense' . . . [I]t is not the function of the Judiciary to provide 'effective leadership' simply because the political branches of government fail to do so." *Id.* at 242-43 (Burger, C.J., dissenting).

232. *Id.* at 253.

233. Dan Balz, *Glenn Seeks to Reassure N.Y. Backer; Stance Against Rights Bill for Homosexuals at Issue*, Wash. Post A2 (Nov. 16, 1983).

234. See notes 191-206 and accompanying text.

235. Compare Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. Pitt. L. Rev. 329, 332 (1983) (stating that "no person should be deemed, by virtue of an irrelevant factor, less deserving of respect, concern, and opportunity for self-fulfillment, or more deserving of subordination to or domination by others").

protection from discrimination.²³⁶ Congress should, and indeed must, follow suit in order to fulfill the goals of Title VII.

V. CONCLUSION

Revisit the original scenario. Should Congress choose to amend Title VII to prohibit employment discrimination based on sexual orientation, Jerry certainly would prevail on his discrimination claim. By amending Title VII to proscribe discrimination based on sexual orientation, Congress would strengthen its longstanding commitment to "bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities."²³⁷ By the partners' own admission, Jerry excelled in his position. His sexual orientation neither detracted from nor enhanced his investment banking talents. Jerry's homosexuality had absolutely no effect on his job performance and thus could not possibly provide a legitimate reason for refusing to promote him. By enlarging Title VII's target to include invidious discrimination based on sexual orientation, Congress not only would vindicate the rights of homosexuals to enjoy the same employment opportunities currently afforded other qualified individuals but also would bring society one step closer to the ideal, nondiscriminatory workplace Congress envisioned when it enacted Title VII.

Marie Elena Peluso

236. For example, the state of Wisconsin has protected homosexuals from discrimination for more than a decade without "elevat[ing] homosexuals to a special status, [or] . . . burden[ing] the system." J. Jennings Moss, *Wisconsin Set State Precedent on Gay Rights*, Wash. Times A7 (Apr. 25, 1993). The federal Department of Transportation recently celebrated a "gay pride" month and has enacted a policy prohibiting discrimination against workers on the basis of their sexual orientation. Joyce Price, *DOT to Celebrate Gay Pride Month; Aim Is "Diversity, Not Special Rights,"* Wash. Times A1 (June 11, 1993). Homosexual federal civil service employees have enjoyed a modicum of protection since 1969, when the District of Columbia Circuit Court of Appeals held that due process required the government to demonstrate a "specific connection" between an employee's sexual conduct and the "efficiency of the service." *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969). The Federal Personnel Manual accordingly provides that homosexuality per se is not grounds for rejection or discharge from federal service except when the "sexual conduct affects job fitness." *Determining Suitability for Federal Employment*, Fed. Personnel Man. 8 (Supp. 631-1, 1975).

237. Cotton, 80 Nw. L. Rev. at 1052 (cited in note 83) (citing H.R. Rep. No. 238, 92d Cong., 1st Sess. 5 (1971)).

