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## Scrutiny of the Venire, Scrutiny from the Bench: *Smithkline Beecham Corp. v. Abbott Laboratories* and the Application of Heightened Scrutiny to Sexual Orientation Classifications

### Cover Page Footnote

J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2010, American University. The author would like to thank his parents, Carol and Tedd Williams, and his brother, Riley, for their unconditional love and support, Professors Sarah Duggin, Megan La Belle, and Laurie Lewis for all that they have done to make this Note possible, the editors and staff of the Catholic University Law Review for their efforts in bringing this Note to publication, and Brian Esposito, whose love and sense of humor make the workload that much easier to carry. This Note is dedicated to the memory of the author's friend, Sarah Phenix Brewer, whose tireless work and kind soul changed the world.

SCRUTINY OF THE VENIRE, SCRUTINY FROM THE  
BENCH: *SMITHKLINE BEECHAM CORP. V. ABBOTT  
LABORATORIES* AND THE APPLICATION OF  
HEIGHTENED SCRUTINY TO SEXUAL  
ORIENTATION CLASSIFICATIONS

*Parker Williams*<sup>+</sup>

Many younger people may see changing attitudes toward gay men and lesbians<sup>1</sup> as an inevitable social progression.<sup>2</sup> However, until recently, the disparate treatment of gay people under the law did not raise a significant constitutional question.<sup>3</sup> In 1972, the U.S. Supreme Court in *Baker v. Nelson*<sup>4</sup> dismissed an appeal by two gay men who were denied a marriage license “for want of [a] substantial federal question.”<sup>5</sup> In doing so, the Supreme Court affirmed the lower court’s conclusion that a state’s interest in protecting different-sex<sup>6</sup> marriage, an “institution . . . as old as the book of Genesis,” was a

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1. This Note uses the phrase “gay men and lesbians” solely for semantics. The court in *SmithKline Beecham Corp. v. Abbott Laboratories* held that “heightened scrutiny applies to classifications based on sexual orientation” which would likely extend to bisexual men and women, as “sexual orientation” typically encompasses bisexuality. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 489 (9th Cir.), *en banc reh’g denied*, 759 F.3d 990 (9th Cir. 2014). *See also Lesbian, Gay, Bisexual, Transgender*, AM. PSYCHOL. ASS’N, <http://www.apa.org/topics/lgbt/index.aspx> (last visited Apr. 14, 2015) (discussing various sexual orientations).

2. *See, e.g.*, Carol Morello, *Poll: 3 in 4 Americans Say Same-Sex Marriage Is Inevitable*, WASH. POST (June 6, 2013), [http://www.washingtonpost.com/local/poll-3-in-4-americans-say-same-sex-marriage-is-inevitable/2013/06/06/9e921da6-cea8-11e2-8845d970ccb04497\\_story.html](http://www.washingtonpost.com/local/poll-3-in-4-americans-say-same-sex-marriage-is-inevitable/2013/06/06/9e921da6-cea8-11e2-8845d970ccb04497_story.html) (stating that a 2013 Pew Research Center Poll found that “[seventy-two] percent [of respondents] called same-sex marriage inevitable”); *see also Changing Attitudes on Gay Marriage*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewforum.org/2014/09/24/graphics-slideshow-changing-attitudes-on-gay-marriage/> (representing that according to Pew Research Center polling data, the percentage of respondents born in 1981 or later who supported same-sex marriage rose from fifty-one percent in 2003 to sixty-seven percent in 2014).

3. *See infra* notes 4–8 and accompanying text.

4. 409 U.S. 810 (1972).

5. *Id.* at 810.

6. This Note employs the term “different-sex” in lieu of “opposite-sex” or “traditional” because it best aligns with the intention of the author, which is to be as objective and respectful as

“commonsense and . . . constitutional” objective that justified divergent treatment between different-sex and same-sex couples in the issuance of marriage licenses.<sup>7</sup> The protection of certain longstanding beliefs about sexual morality prevailed under rational basis review, the most deferential level of judicial scrutiny,<sup>8</sup> for many years after *Baker*.<sup>9</sup>

Nevertheless, in the past twenty years or so, lower federal courts have begun applying a more “searching form of . . . review”<sup>10</sup> to sexual orientation classifications.<sup>11</sup> While many recent cases impacting the lesbian, gay, bisexual, and transgender community (LGBT) have concerned issues surrounding marriage,<sup>12</sup> one recent non-marriage case altered how some courts scrutinize sexual orientation classifications: *SmithKline Beecham Corp. v. Abbott Laboratories*.<sup>13</sup> *SmithKline* involved an illegal peremptory strike during voir dire in a lawsuit over a licensing agreement for Human Immunodeficiency Virus (HIV) medications.<sup>14</sup>

In *SmithKline*, SmithKline sued Abbott claiming “antitrust, contract, and unfair trade practice (UPTA)” violations associated with a contract for the licensing and pricing of HIV medications.<sup>15</sup> During voir dire, Abbott exercised

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possible. Specifically, the Note intends to be respectful to everyone who does not identify their sex or gender(s) based on traditional norms. *See generally Trans, Genderqueer, and Queer Terms Glossary*, UNIV. OF WIS.-MADISON LGBT CAMPUS CTR., [http://lgbt.wisc.edu/documents/Trans\\_and\\_queer\\_glossary.pdf](http://lgbt.wisc.edu/documents/Trans_and_queer_glossary.pdf) (last visited Feb. 16, 2015) (discussing various conceptions of gender).

7. *Baker v. Nelson*, 191 N.W.2d 185, 186–87 (Minn. 1971) (comparing the distinction between “a marital restriction based merely upon race and one based upon the fundamental difference in sex”).

8. STEVEN J. EAGLE, REGULATORY TAKINGS § 1-9(f)(1), at 1-113 to -114 (5th ed. 2014).

9. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (concluding that a state’s moral disapproval of homosexual activity served as a rational basis for an anti-sodomy law), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); *Andersen v. King Cnty.*, 138 P.3d 963, 985 (Wash. 2006) (en banc) (finding that “limiting marriage to opposite-sex couples” survived rational basis review because it “further[ed] the State’s interests in procreation and encouraging families with a mother and father”).

10. *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) (“When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review . . .”).

11. *See id.* at 564 (majority opinion) (reviewing a state statute criminalizing homosexual conduct under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 624–28 (1996) (conducting an in-depth review of a Colorado constitutional amendment eviscerating state ordinances prohibiting anti-homosexual discrimination).

12. *See, e.g., Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013) (holding that proponents of different-sex marriage in California lacked standing to challenge a U.S. District Court’s overturning of the state’s same-sex marriage ban); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down the Defense of Marriage Act (DOMA) because it failed to “recognize[] and accept[] state definitions of marriage” so as to “deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages”).

13. 740 F.3d 471, 474 (9th Cir.), *en banc reh’g denied*, 759 F.3d 990 (9th Cir. 2014).

14. *Id.*

15. *Id.*

its first peremptory challenge against the only openly gay member of the jury pool.<sup>16</sup> SmithKline challenged the strike as impermissible discrimination on the basis of sexual orientation under the principles announced in *Batson v. Kentucky*,<sup>17</sup> where the Supreme Court held that purposeful discrimination during jury selection based on race was not constitutionally permissible.<sup>18</sup> Chief Judge Claudia Wilken, the presiding judge, expressed uncertainty about whether *Batson* extended to sexual orientation or civil cases, but ultimately denied the challenge.<sup>19</sup>

After the jury returned a mixed verdict, SmithKline appealed the decision to the U.S. Court of Appeals for the Ninth Circuit.<sup>20</sup> SmithKline argued that Abbott's peremptory strike was unconstitutional, and, therefore, it tainted the jury pool and necessitated a new trial.<sup>21</sup> After considering the arguments, the Ninth Circuit held explicitly that the peremptory strike violated *Batson* because "heightened scrutiny" applied to sexual orientation classifications in jury selection and that equal protection principles forbid striking a juror because of sexual orientation.<sup>22</sup>

*SmithKline* is significant for the LGBT community because it adds sexual orientation to the small group of classifications, such as race<sup>23</sup> and gender,<sup>24</sup> which cannot be the basis for peremptory strikes in the Ninth Circuit.<sup>25</sup> Furthermore, *SmithKline* reaffirms that gay men and lesbians can make meaningful contributions to civic life and may not be prevented from contributing to the judicial process based on their sexual orientation.<sup>26</sup>

By holding unambiguously that equal protection forbids peremptory strikes because of sexual orientation, *SmithKline* advances the progress made in one of the Supreme Court's more recent sexual orientation cases, *United States v. Windsor*,<sup>27</sup> toward applying heightened scrutiny to sexual orientation

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16. *Id.* The venire is the "panel of persons selected for jury duty and from among whom the jurors are to be chosen." BLACK'S LAW DICTIONARY 1789 (10th ed. 2014).

17. 476 U.S. 79, 100 (1986).

18. *Id.* at 97–98, 100 ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action . . . [the] petitioner's conviction [will] be reversed.").

19. *SmithKline*, 740 F.3d at 474–75.

20. *Id.* at 475.

21. *Id.* at 475, 488–89.

22. *Id.* at 472, 475–76, 484, 489.

23. See, e.g., *Batson*, 476 U.S. at 89 (prohibiting peremptory strikes based on race).

24. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (prohibiting peremptory strikes based on gender).

25. See Ian Bartrum, *The Ninth Circuit's Treatment of Sexual Orientation: Defining "Rational Basis Review With Bite"*, 112 MICH. L. REV. FIRST IMPRESSIONS 142, 149 (2014) (discussing the significance of *SmithKline* in the Ninth Circuit).

26. *SmithKline*, 740 F.3d at 485.

27. 133 S. Ct. 2675 (2013).

classifications.<sup>28</sup> *SmithKline* explicitly applied heightened scrutiny to a sexual orientation classification,<sup>29</sup> whereas *Windsor* emphasized principles of federalism; specifically, a state's right to define marriage as it pleases.<sup>30</sup> As a result, the Ninth Circuit will demand that sexual orientation classifications be "narrowly tailored" and advance a "significant government interest."<sup>31</sup>

This Note will examine why the Ninth Circuit correctly applied heightened scrutiny to a sexual orientation classification, as well as *SmithKline*'s implications for future application of the standard in federal courts. First, this Note summarizes the different levels of judicial scrutiny that federal courts have applied in recent years. It then analyzes the origins of preemptory strikes and the "*Batson* Challenge." Next, this Note draws on these foundations to explore the Ninth Circuit's decision in *SmithKline Beecham Corp. v. Abbott Laboratories*. This Note concludes by arguing that the Ninth Circuit's analysis was appropriate and that *SmithKline* will continue to influence lower federal courts, and perhaps someday the Supreme Court, to apply heightened scrutiny to sexual orientation classifications.

### I. THE ORIGINS AND TIERS OF MODERN JUDICIAL SCRUTINY

Modern judicial scrutiny originated during the New Deal Era.<sup>32</sup> While federal courts asserted their authority to review federal and state actions more than a century before that period,<sup>33</sup> they continued to grapple with determining how far legislation's presumption of constitutionality extended.<sup>34</sup>

This question concerned not only what level of deference to afford legislative and executive actions, but also the "nature of law and the relative importance of asserted rights."<sup>35</sup> Proponents of the theory that the law "emanat[es] from the

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28. See *SmithKline*, 740 F.3d at 484 ("[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection."); see also Bartrum, *supra* note 25, at 148–50 (observing how the Ninth Circuit in *SmithKline* looked to *Windsor*, which in turn "relied heavily on heightened-review cases").

29. *SmithKline*, 740 F.3d at 483–84.

30. *Windsor*, 133 S. Ct. at 2692. See also Zachary D. Caplan, *How an Antitrust Case Changed the Gay Marriage Debate*, LAW360 (May 21, 2014), <http://www.law360.com/articles/540178/how-an-antitrust-case-changed-the-gay-marriage-debate> ("[I]n *Windsor*, the Supreme Court rested its decision largely on federalism concerns and avoided the equal protection issue.")

31. EAGLE, *supra* note 8, § 1-9(f)(4), at 1-121 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)) (internal quotation marks omitted).

32. See *id.* § 1-9(e)–(f), at 1-110.2 to -113 (discussing the foundational cases for modern judicial scrutiny, such as *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), as being cases of the New Deal era).

33. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 436–37 (1819) (concluding that the states did not have the constitutional authority to tax a bank established by Congress).

34. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 21–22 (1992).

35. EAGLE, *supra* note 8, § 1-9(e), at 1-110.2 to -110.3.

state g[ave legislation] a strong presumption” of constitutionality.<sup>36</sup> On the other hand, advocates of a “presumption of liberty” approach emphasized the need to “place a strong burden on the state to justify any limitation on the exercise of liberty.”<sup>37</sup> The Supreme Court has not adopted either doctrine explicitly, but has instead applied the presumption it deems appropriate on a case-by-case basis.<sup>38</sup>

*United States v. Carolene Products Co.*<sup>39</sup> changed how courts examine the constitutionality of state actions.<sup>40</sup> However, it did not involve any of the controversial issues of the times, such as fair wages<sup>41</sup> or safe employment conditions,<sup>42</sup> but rather milk.<sup>43</sup> In 1923, Congress passed the Filled Milk Act, which “prohibit[ed] the shipment in interstate commerce of . . . milk compounded with any fat or oil other than milk fat.”<sup>44</sup> The Court addressed whether the Act exceeded congressional authority “to regulate interstate commerce or infringe[d] the Fifth Amendment” by “depriving [Carolene Products of] its property without due process of law.”<sup>45</sup> The Supreme Court upheld the Act as constitutional under Congress’s power to regulate interstate commerce.<sup>46</sup>

But for several features,<sup>47</sup> *Carolene Products* may have become an otherwise infrequently cited case from the New Deal Era that built upon President

36. EAGLE, *supra* note 8, § 1-9(e), at 1-110.3. Compare JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 248 (Robert Campbell ed., 5th ed. 1885) (stating that courts should view the legislative acts of the appointed legislature of the states as “legally invalid” if they conflict directly with the Constitution of the “ulterior legislatures” comprised of “citizens appointing the ordinary legislature”), with *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (concluding that a limitation on private property owners resulting from state regulations of property rights did not amount to a taking under the Fifth Amendment nor overstep the state’s ability to impose reasonable property restrictions).

37. EAGLE, *supra* note 8, § 1-9(e), at 1-110.3 (citing Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1993)).

38. *Id.*

39. 304 U.S. 144 (1938).

40. See William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 531 (2005) (stating that *Carolene Products* “has played an important role in the development of the three-tiered scrutiny scheme”).

41. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386 (1937) (concerning the constitutionality of a minimum wage law).

42. See, e.g., *United States v. Darby*, 312 U.S. 100, 109 (1941) (concerning Congress’s ability to regulate working conditions under the Fair Labor Standards Act).

43. *Carolene Prods.*, 304 U.S. at 145–46.

44. *Id.*

45. *Id.* at 146–47.

46. *Id.* at 154.

47. *Carolene Products* extended a trend from other New Deal cases that placed the burden upon the citizen to prove a regulation’s unconstitutionality, rather than requiring the government to assert the right to exercise its police power. EAGLE, *supra* note 8, § 1-9(e)(1), at 1-111 to -113. See *Carolene Prods.*, 304 U.S. at 152 (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to

Roosevelt's emphasis on state regulation in a variety of industries.<sup>48</sup> *Carolene Products* is most famous for its fourth footnote.<sup>49</sup> Footnote four discusses the presumption of a law's constitutionality:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, national, or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>50</sup>

The Court's minor footnote established the foundation for the judicial evaluation of legislation's constitutionality.<sup>51</sup>

Around the turn of the twentieth century, the Supreme Court earned the ire of many by striking down legislation designed to regulate areas encompassing the quality of workers' lives.<sup>52</sup> During this time, the Court sought to "reassert its authority" with a "new constitutional rhetoric" to better mirror new political and social attitudes.<sup>53</sup> Through *Carolene Products*, the Court dispensed with the

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preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); *see also* *Kovacs v. Cooper*, 336 U.S. 77, 90–92 (1949) (Frankfurter, J., concurring) ("Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions.") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (internal quotation marks omitted)). According to Steven Eagle, "[i]n . . . *Kovacs v. Cooper*, the Court elaborated upon footnote four of *Carolene Products* by constructing a doctrine of a preferred position for civil rights over property rights." EAGLE, *supra* note 8, § 1-9(f)(5), at 1-123 (footnote omitted).

48. EAGLE, *supra* note 8, § 1-9(e)(1), at 1-111 to -113.

49. *See id.* § 1-9(e)(1), at 1-111 (stating that Justice Powell once called the footnote "the most celebrated footnote in constitutional law" (quoting Lewis Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (internal quotation marks omitted))).

50. *Carolene Prods.*, 304 U.S. at 152–53 n.4 (citations omitted).

51. *See* EAGLE, *supra* note 8, § 1-9(e)(1), at 1-111 to -113 (discussing the impact of *Carolene Products*).

52. *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (striking down a law prohibiting interstate commerce in goods made with child labor); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a statute limiting working hours based on "freedom of master and employé [sic] to contract"); *see also* Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361, 405 (2013) ("[T]he [Supreme] Court's decisions striking down social legislation in the name of protecting laissez-faire capitalism had been triggering legislative and public ire since the beginning of the era . . .").

53. *See* EAGLE, *supra* note 8, § 1-9(e)(1), at 1-112 to -113 (quoting Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 714–15 (1985) (explaining how the Supreme

constitutional notion of liberty-of-contract and “[i]nstead . . . proposed to make the ideals of the victorious activist Democracy serve as a primary foundation for constitutional rights in the United States.”<sup>54</sup>

*Carolene Products* hinted at the possibility of a tiered system of review, where legislation would be examined under one of three levels of scrutiny<sup>55</sup> to determine whether it violates due process or equal protection principles.<sup>56</sup> The first, and most deferential level of review, is rational basis, which presumes that legislation is constitutional if it “has a rational relationship to a legitimate governmental purpose and if no fundamental right or that of a protected class is affected.”<sup>57</sup> Federal courts often apply rational basis review when examining economic legislation.<sup>58</sup> However, the presumption of constitutionality has occasionally caused courts to speculate about a potential explanation for legislation and its nexus with the challenged classification.<sup>59</sup>

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Court reconfigured its method for analyzing the constitutionality of legislation in the 1930s by embracing New Deal Era values and rejecting the laissez-faire emphasis on individual rights)).

54. *Id.* § 1-9(e)(1), at 1-113 (quoting Ackerman, *supra* note 53, at 715). *See also* *Ferguson v. Skrupa*, 372 U.S. 726, 730, 732–33 (1963) (upholding a Kansas law regulating debt adjustment procedures and affirming that it is not the role of the judiciary to substitute its own wisdom for that of the states regarding business and industrial regulations).

55. Arguably, federal courts may apply a fourth tier of scrutiny that falls in between rational basis and heightened scrutiny, sometimes referred to as “covert heightened scrutiny,” “second order rational basis,” or “rational basis with bite.” EAGLE, *supra* note 8, § 1-9(f)(3), at 1-117 (internal quotation marks omitted) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring)); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1612 (2d ed. 1988); Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24 (1972). A prominent case applying “rational basis with bite” was *City of Cleburne v. Cleburne Living Center, Inc.*, where the Court applied the standard to classifications for the mentally disabled. *See* EAGLE, *supra* note 8, § 1-9(f)(3), at 1-117 to -118. *Cleburne* concluded that while the mentally disabled were not a quasi-suspect class, they would still be protected from unfair discrimination by equal protection review analyzing their liberty interests against the government’s asserted interests. *Cleburne*, 473 U.S. at 446.

56. EAGLE, *supra* note 8, § 1-9(f)(1), at 1-113.

57. *Id.* Rational basis originates from the principle that “legislation must seek to promote legitimate public purposes . . . and that the government must pursue its ends by reasonable means.” *Id.* at 1-114 (internal quotation marks omitted) (citing Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 315–16 (1993)). In particular, legislation regulating economic affairs receives a “very high” level of deference. *Id.* *See also* *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (concluding that “statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it”).

58. *See* EAGLE, *supra* note 8, § 1-9(f)(1), at 1-114 (“The Supreme Court regularly employs the rational basis test in reviewing statutes with social as well as economic purposes.”).

59. *See id.* (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (speculating about the reasons a state legislature could have made certain medical examinations prerequisites for obtaining or copying lenses, and stating that it was the role of the legislature to weigh the consequences of the new laws it enacts)).

The second, and arguably least-developed level of scrutiny is “intermediate” or heightened scrutiny.<sup>60</sup> Heightened scrutiny determines whether the challenged classification is “narrowly tailored to serve a significant government interest.”<sup>61</sup> Specifically, heightened scrutiny applies to groups that have “suffered a history of discrimination” and where the classification lacks a relationship with the individual’s ability to contribute to the community.<sup>62</sup> Courts will also analyze the political power of a classified group, as well as whether the group’s “defining characteristic is immutable” or otherwise unchangeable.<sup>63</sup>

Heightened scrutiny analyzes the contested classification’s importance and requires a close nexus between the classification and an important government objective.<sup>64</sup> Moreover, heightened scrutiny demands an examination of the impact on the aggrieved parties, thus compelling the government to articulate how the legislation advances its objective and “discourage[es] after-the-fact justifications for the classification.”<sup>65</sup> Courts apply heightened scrutiny to classifications and subject matters such as sex, illegitimacy, and the right to travel.<sup>66</sup>

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60. See, e.g., Larry Hoekstra II, *Where the Fundamental Issue is the Absence of a Fundamental Right: Intrastate Movement and the Constitutionality of Juvenile Curfew Laws*, 9 WHITTIER J. CHILD & FAM. ADVOC. 137, 142 (2009) (“Intermediate scrutiny is the newest method of equal protection analysis, developed . . . to bridge the gap between rational basis review and strict scrutiny.”).

61. See EAGLE, *supra* note 8, § 1-9(f)(4), at 1-121 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)) (internal quotation marks omitted). *Perry* applied heightened scrutiny to find that a school district’s denial of access to its internal mail system to a union other than the recognized teacher’s union did not offend First Amendment principles. *Perry Educ. Ass’n*, 460 U.S. at 45–46.

62. See Brief of Amici Curiae Lambda Legal and Twelve Other Legal and Public Interest Organizations in Support of Plaintiff-Appellee SmithKline Beecham Corporation DBA GlaxoSmithKline and in Support of Reversal of the Judgment Below at 12–13, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir.) (Nos. 2011-17357, 2011-17373) (“[H]eighted scrutiny is warranted where a classified group has ‘experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.’”) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)), *en banc reh’g denied*, 759 F.3d 990 (9th Cir. 2014).

63. Brief for Amici Curiae Lambda Legal, *supra* note 62, at 13 (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that the “disadvantaged class” in the case, “comprised [of] parents, children, and siblings,” did not qualify as a suspect or quasi-suspect class and therefore was ineligible for heightened scrutiny in part because of a lack of “immutable . . . characteristics that define them as a discrete group”)).

64. See EAGLE, *supra* note 8, § 1-9(f)(4), at 1-121 to -122 (discussing the showing required of the government in order for legislation to pass muster under heightened scrutiny).

65. *Id.* § 1-9(f)(4), at 1-122. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (indicating that the Court’s skepticism toward Virginia’s arguments for banning women from the Virginia Military Institute reflected an acknowledgement of the nation’s history of sex-based discrimination).

66. See EAGLE, *supra* note 8, § 1-9(f)(4), at 1-121 to -122 (citing *Mills v. Habluetzel*, 456 U.S. 91, 98–101 (1982) (applying heightened scrutiny to a Texas law imposing a time limit for

The third and highest level of review is strict scrutiny.<sup>67</sup> Strict scrutiny assumes that some government actions may burden “fundamental rights” and must be “intense[ly] review[ed]” to determine if a compelling government objective exists and whether the classification is narrowly tailored.<sup>68</sup> Strict scrutiny represents a pushback against the laissez-faire attitude that dominated the early twentieth century.<sup>69</sup>

In order to trigger strict scrutiny, a plaintiff must allege a violation of a fundamental right.<sup>70</sup> The Supreme Court has held a number of rights to be “fundamental,” including the freedom to exercise one’s religion,<sup>71</sup> “the freedom of association,”<sup>72</sup> and the “freedom of expression from content-based regulation.”<sup>73</sup> Some classifications, such as those based on race, are also subject to strict scrutiny.<sup>74</sup> Moreover, in addition to many of the enumerated rights in the Constitution, the Court has declared a number of other rights to be

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seeking paternal support for illegitimate children and concluding that it was not substantially related to Texas’s purported interests); *Craig v. Boren*, 429 U.S. 190, 202–04 (1976) (rejecting an Oklahoma law that treated men and women differently with regard to the minimum age permitted to purchase 3.2% beer); *Zemel v. Rusk*, 381 U.S. 1, 14–15 (1965) (reaffirming that the right to travel is constitutionally protected while analyzing a challenge to the refusal by the Secretary of State to validate travel to Cuba)).

67. See *EAGLE*, *supra* note 8, § 1-9(f)(5), at 1-122 (discussing strict scrutiny’s application of extremely rigorous review to “preserve liberty and equality”).

68. *Id.*; see *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“To satisfy strict scrutiny, the State must demonstrate that its . . . legislation is narrowly tailored to achieve a compelling interest.”).

69. See *EAGLE*, *supra* note 8, § 1-9(f)(5), at 1-122 (“Strict scrutiny represents a continuation of existing notions of natural rights-based, substantive due process, after economic substantive due process was repudiated in the economic arena . . .”).

70. See *id.* (“The notion of ‘strict scrutiny’ is predicated on the idea that statutes and regulations reflecting the popular will may burden fundamental rights or work against racial or other minorities.”).

71. *Id.* § 1-9(f)(5), at 1-123 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205, 215 (1963) (confirming that a citizen’s right to exercise his or her religion is a fundamental liberty in the Constitution)).

72. See *id.* (citing *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958) (declaring that the freedom of association is indivisible from the constitutional concept of liberty and enhances other First Amendment rights), *rev’d on other grounds*, 360 U.S. 240 (1959)).

73. See *id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395–96 (1992) (overturning a city ordinance that banned bias-motivated conduct because it was not sufficiently tailored and had a chilling effect on the freedom of expression)).

74. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (maintaining that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification” and thus the appropriate standard of review for all racial classifications is “strict scrutiny” (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989)) (internal quotation marks omitted)), *rev’d on other grounds* sub nom. *Adarand Constructors v. Slater*, 528 U.S. 216 (2000); see also *Palmore v. Sidoti*, 466 U.S. 429, 430–32 (1984) (affirming that strict scrutiny was the appropriate standard of review when the State impermissibly gave custody to the father in a custody case after the mother remarried an African American man).

“fundamental” as well, including private and consensual sexual activity,<sup>75</sup> marriage,<sup>76</sup> abortion,<sup>77</sup> and the right to be free from racial discrimination in municipal land use regulations.<sup>78</sup>

## II. THE ORIGINS AND ROLE OF PEREMPTORY CHALLENGES IN THE AMERICAN JUDICIAL PROCESS

While peremptory challenges have not been declared a fundamental right, they are designed to help ensure a fair trial for the defendant.<sup>79</sup> Peremptory challenges date back to at least the fourteenth century.<sup>80</sup> Defendants charged with a felony were entitled to thirty-five peremptory challenges during this period, but the King had an unlimited number of challenges.<sup>81</sup> Moreover, the King did not have to provide any explanation for a peremptory challenge if a full jury was empaneled.<sup>82</sup>

The Sixth Amendment of the U.S. Constitution guarantees the defendant a fairly selected jury.<sup>83</sup> The Supreme Court has limited the requirement of

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75. See EAGLE, *supra* note 8, § 1-9(f)(5), at 1-123 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (limiting a state’s ability to pass laws that effectively regulate private sexual conduct); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut law that imposed excessive regulations on private and consensual sexual conduct by banning the use of contraceptives)).

76. See *id.* (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978) (reaffirming that marriage is a fundamental right and is essential to the liberty established by the Due Process Clause of the Fourteenth Amendment)); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (concluding that marriage is a “basic civil right[]” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) (internal quotation marks omitted)).

77. See EAGLE, *supra* note 8, § 1-9(f)(5), at 1-123 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (discerning that the fundamental nature of the rights at issue guided the Court to reaffirm the central holding in *Roe v. Wade*); *Roe v. Wade*, 410 U.S. 113 (1973) (deciding that the fundamental rights included in the concept of liberty in the Fourteenth Amendment include the right to terminate a pregnancy)).

78. See *id.* (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (observing that a single discriminatory act by the government, using its zoning power, may give rise to an equal protection violation if certain criteria are met)).

79. See John J. Neal, *Striking Batson Gold at the End of the Rainbow? Revisiting Batson v. Kentucky and its Progeny in Light of Romer v. Evans and Lawrence v. Texas*, 91 IOWA L. REV. 1091, 1093–94 (2006) (discussing how parties can use peremptory challenges to remove potentially biased jurors).

80. See *id.* at 1095 & n.19 (discussing the origins of the peremptory challenge during King Edward’s reign).

81. *Id.* at 1095.

82. See *id.* (“[T]he Crown’s challenges were unlimited, and only upon the failure to impanel a full jury was the Crown required to establish cause.”).

83. See *id.* at 1096 & n.27 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)).

empanelling an “impartial jury” to mean that a “fair cross-section” of the community is represented on the jury as much as possible.<sup>84</sup>

The Constitution does not require that Congress “enact [peremptory challenges] . . . to facilitate the system of impaneling an impartial jury.”<sup>85</sup> Nevertheless, in 1790, Congress provided that a defendant being tried for treason would receive thirty-five peremptory challenges and twenty for other felony proceedings “punishable by death.”<sup>86</sup> In the nineteenth century, Congress enacted legislation allowing states to pass their own laws providing for the “designation and empanelling of juries” in both civil and criminal cases.<sup>87</sup> Currently, each party has three peremptory challenges in civil cases, but the trial judge has discretion to provide additional challenges where the parties are joint or severable.<sup>88</sup>

Congress and the courts did not address discrimination targeting minority groups for much of the nation’s first century.<sup>89</sup> However, in 1879, the Supreme Court, in the case of *Strauder v. West Virginia*,<sup>90</sup> addressed discrimination in jury empanelling.<sup>91</sup> *Strauder* analyzed the constitutionality of a West Virginia statute limiting jury service to white males.<sup>92</sup> Ultimately, the Supreme Court struck down the statute and held that a person was denied equal protection when members of his or her own race were systematically excluded from juries.<sup>93</sup> *Strauder* did not stand for the proposition that a jury must be the same race as the defendant in order to ensure a fair trial.<sup>94</sup> Rather, the Court limited its

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84. See *id.* at 1096 n.27 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (requiring that one of the elements of a fair cross-section violation is that the defendant must show an excluded group to be part of a “‘distinctive group’ in the community”); *Taylor v. Louisiana*, 419 U.S. 522, 526–28 (1975) (finding that the exclusion of women from juries absent a written declaration of their desire to serve as potential jurors deprived a criminal defendant of his Sixth Amendment “fair cross section” rights under the guarantee of an impartial jury)).

85. *Id.* at 1096 (citing *Stilson v. United States*, 250 U.S. 583, 586 (1919)).

86. *Id.* (citing Act for Regulating the Military Establishment of the United States, ch. 10, § 30, 1 Stat. 119, 199 (1790)).

87. *Id.* at 1097 (citing Amendment to Act to Establish the Judicial Courts of the United States, ch. 47, 5 Stat. 394, 394 (1840)) (internal quotation marks omitted).

88. *Id.* at 1096–97 n.30 (citing 28 U.S.C. § 1870 (2012)).

89. See, e.g., *Ableman v. Booth*, 62 U.S. 506, 526 (1858) (upholding a law permitting the capture of fugitive slaves); *Scott v. Sanford*, 60 U.S. 393, 422 (1856) (holding that even free African Americans were not citizens).

90. 100 U.S. 303 (1879).

91. Neal, *supra* note 79, at 1098 (citing *Strauder*, 100 U.S. at 310).

92. *Id.* (citing *Strauder*, 100 U.S. at 305).

93. *Strauder*, 100 U.S. at 310.

94. See Neal, *supra* note 79, at 1098 (citing *Strauder*, 100 U.S. at 305). The Court further concluded that:

We do not say that . . . a State may not prescribe the qualifications of its jurors, and in doing so make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.

We do not believe the Fourteenth Amendment was ever intended to prohibit this. *Strauder*, 100 U.S. at 310.

holding to the intentional exclusion of jurors based on race, and discussed the adverse consequences of purposeful discrimination “based on a group characteristic.”<sup>95</sup> At a time when Jim Crow laws were in their nascence, and the Supreme Court was still a few years away from limiting Congress’s ability to pass remedial legislation addressing racial discrimination, *Strauder*’s proposition was extraordinary.<sup>96</sup>

Almost a century after *Strauder*, in 1965, the Supreme Court, in *Swain v. Alabama*,<sup>97</sup> analyzed peremptory challenges and the makeup of juries.<sup>98</sup> In *Swain*, an African American man was convicted of rape and sentenced to death.<sup>99</sup> In challenging the conviction, he argued that Alabama discriminated purposefully against every African American venire member during voir dire.<sup>100</sup> The Supreme Court held that the defendant’s equal protection rights were not violated because there was insufficient state action; specifically, the defense counsel’s role did not have a sufficient nexus to the role traditionally fulfilled by a state actor.<sup>101</sup> While *Swain* represented a step backward from the progress made in *Strauder*, it also held that the constitutional prohibition on intentional exclusion in voir dire extended to all “identifiable group[s] in the community” who may fall victim to prejudice.<sup>102</sup> Although not readily apparent in *Swain*, this extension would be crucial for other groups arguing against purposeful discrimination in voir dire.

#### A. *Batson v. Kentucky and Discriminatory Selection in Voir Dire Proceedings*

Two decades after *Swain*, in *Batson v. Kentucky*,<sup>103</sup> the Supreme Court revisited racially discriminatory peremptory challenges.<sup>104</sup> In *Batson*, the prosecutor used his peremptory challenges to strike all the African-American members on the venire.<sup>105</sup> The Supreme Court held that racially discriminatory peremptory challenges violated the Equal Protection Clause.<sup>106</sup> *Batson* asserted that prosecutors “must articulate a neutral explanation related to the particular

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95. Neal, *supra* note 79, at 1098 (citing *Strauder*, 100 U.S. at 309, 310, 312).

96. Compare *Strauder*, 100 U.S. at 310 (holding that state legislation excluding African Americans from the venire violates the African American defendant’s equal protection rights under the Fourteenth Amendment), with *The Civil Rights Cases*, 109 U.S. 3, 18–19 (1883) (holding, almost four years later, that the Fourteenth Amendment did not give Congress authority to dictate antidiscrimination laws to the States).

97. 380 U.S. 202 (1965).

98. Neal, *supra* note 79, at 1098 (citing *Swain*, 380 U.S. at 205, 209).

99. *Swain*, 380 U.S. at 203.

100. *Id.* at 202–03.

101. *Id.* at 221–22, 227.

102. Neal, *supra* note 79, at 1099 (quoting *Swain*, 380 U.S. at 204–05) (internal quotation marks omitted).

103. 476 U.S. 79 (1986).

104. Neal, *supra* note 79, at 1099 (citing *Batson*, 476 U.S. at 93).

105. *Batson*, 476 U.S. at 83.

106. *Id.* at 97–98.

case to be tried” for a peremptory strike to be upheld.<sup>107</sup> Ultimately, the Supreme Court concluded that the African-American jurors were struck illegally from the venire based on invidious racial discrimination.<sup>108</sup>

Moreover, the Supreme Court noted that the impact of discriminatory peremptory strikes reached well beyond the courtroom, stating that “[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community,” and that purposeful discrimination in the jury selection process “undermine[s] public confidence in the fairness of our system of justice.”<sup>109</sup>

Less than a decade later, the Supreme Court extended *Batson*’s protection to gender classifications in *J.E.B. v. Alabama ex rel. T.B.*<sup>110</sup> *J.E.B.* involved a challenge to the discriminatory use of peremptory strikes against men in Alabama.<sup>111</sup> However, the crux of the decision focused on the history of discrimination against women in civic participation.<sup>112</sup> Applying heightened scrutiny, which is the standard the Court typically uses to review sex-based classifications,<sup>113</sup> the Supreme Court held that Alabama’s actions were unconstitutional.<sup>114</sup> As the Court noted, heightened scrutiny required the State to establish both “an exceedingly persuasive justification” for the classification and a close nexus between the classification and the justification.<sup>115</sup> Keeping in line with *Strauder* and *Batson*, the Court reiterated the dual harms to the community at-large and the judiciary’s legitimacy when discrimination is permitted in the courtroom.<sup>116</sup> Additionally, it declared that discriminatory

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107. *Id.* See *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972) (confirming that “affirmations of good faith” that individual peremptory challenges were not illegal “are insufficient” to prove that a discriminatory intent was not present in the strike).

108. *Batson*, 476 U.S. at 87 (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (reaffirming that *Strauder* stood for the proposition that racially motivated strikes from a jury pool are constitutionally impermissible)).

109. Neal, *supra* note 79, at 1099–1100 nn.53–54 (quoting *Batson*, 476 U.S. at 87) (internal quotation marks omitted). The Court further stated, “[d]iscrimination within the judicial system is most pernicious because it is a ‘stimulant to that . . . prejudice which is an impediment to securing . . . equal justice which the law aims to secure to all others.’” *Batson*, 476 U.S. at 87–88 (quoting *Strauder*, 100 U.S. at 308).

110. 511 U.S. 127, 128–29 (1994).

111. Neal, *supra* note 79, at 1104 (citing *J.E.B.*, 511 U.S. at 129).

112. *Id.* The Court noted that “[g]ender-based peremptory strikes were hardly practicable” for many years because “until the 20th century, women were completely excluded from jury service.” *J.E.B.*, 511 U.S. at 131.

113. Neal, *supra* note 79, at 1104 (citing *J.E.B.*, 511 U.S. at 136).

114. See *J.E.B.*, 511 U.S. at 129, 136–37.

115. Neal, *supra* note 79, at 1104 (quoting *J.E.B.*, 511 U.S. at 136–37) (internal quotation marks omitted).

116. *J.E.B.*, 511 U.S. at 140 (warning that litigants could be harmed if discrimination contaminated judicial proceedings, and that the community could be harmed if the judicial system allowed its credibility to be degraded by discrimination).

strikes imparted the message that certain members of the community were unqualified or unworthy to participate in a vital civic duty—jury duty.<sup>117</sup>

### III. LOWER FEDERAL COURTS' PREVIOUS TREATMENT OF SEXUAL ORIENTATION CLASSIFICATIONS

While some groups, such as racial minorities and women, achieved progress for their agendas through the courts in the latter half of the twentieth century,<sup>118</sup> gay men and lesbians often faced a more arduous path in their push for equal rights. Indeed, *Baker's* rationale represented the norm for how federal courts and society treated gay men and lesbians for many years.<sup>119</sup> Many courts, including the Ninth Circuit, acknowledged that gay men and lesbians have experienced purposeful discrimination “in the public and private spheres” throughout the country’s history.<sup>120</sup> This treatment, and the underlying disapproval of gay men and lesbians, extended to national security concerns regarding gay men applying for security clearances,<sup>121</sup> immigration law,<sup>122</sup> reenlistment in the U.S. Army,<sup>123</sup> and disparate sentencing guidelines for unlawful voluntary sexual acts committed by homosexual minors.<sup>124</sup> No court

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117. *See id.* at 142 (“The message [striking a venire member based on pernicious stereotypes] sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.”)

118. *See, e.g.,* *Reed v. Reed*, 404 U.S. 71, 74 (1971) (striking down an Idaho law giving men preference over women in the administration of estates as contrary to equal protection principles); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (concluding that racial segregation in public schools violates the Equal Protection Clause).

119. *See supra* notes 4–9 and accompanying text; *see also* Brief for Amici Curiae Lambda Legal, *supra* note 62, at 14–15 (discussing instances where the Court has recognized the social discrimination that gay men and lesbians have faced).

120. Brief for Amici Curiae Lambda Legal, *supra* note 62, at 42.

121. *See High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 577–78 (9th Cir. 1990) (recognizing that requiring gay agents to undergo expanded background checks because the Department of Defense received counterintelligence that the KGB was blackmailing gay American agents does not create a genuine issue of a constitutional violation, “even if [the expanded security clearance regulation was] based on continuing ignorance or prejudice” that gay men are more likely to compromise national secrets).

122. *See Boutilier v. INS*, 387 U.S. 118, 118–21 (1967) (affirming an alien’s deportation based on the alien qualifying as having a “psychopathic personality” after admitting to previously engaging in homosexual activity (internal quotation marks omitted)).

123. *See Watkins v. U.S. Army*, 875 F.2d 699, 706 (1989) (rejecting the Army’s contention under the *Mindes* Doctrine that reenlisting an openly gay recruit would adversely impact military policies or affairs). *See generally Mindes v. Seaman*, 453 F.2d 197, 200–02 (5th Cir. 1971) (prescribing a balancing test for courts to employ in deciding whether to review an internal military personnel action).

124. *See State v. Limon*, 122 P.3d 22, 24 (Kan. 2005) (overturning a conviction under Kansas’s “Romeo and Juliet” law regulating sexual activities between minors because the State did not have a rational basis for creating statutory classifications based on homosexual conduct).

addressing a sexual orientation discrimination claim has ever concluded that gay men and lesbians have *not* experienced purposeful discrimination.<sup>125</sup>

A. *A Shift in Course for Gay Rights: Romer v. Evans*

The seemingly ironclad rationale underlying decisions such as *Baker* and *Bowers* began to show cracks as the judiciary's analysis of sexual orientation classifications started changing in the mid 1990s.<sup>126</sup> *Romer v. Evans*<sup>127</sup> appeared to introduce a more rigorous standard of review for these classifications than courts had typically applied.<sup>128</sup> In *Romer*, Colorado voters passed a constitutional provision that repealed all municipal ordinances enacted to protect gay men and lesbians from discrimination.<sup>129</sup> The Supreme Court struck down the law under rational basis review, finding that it “fail[ed], indeed defie[d], even [the rational basis] conventional inquiry.”<sup>130</sup> Yet the Supreme Court went beyond traditional rational basis review, criticizing the amendment's intent as well as its disconnect from any legitimate state interest.<sup>131</sup> The Supreme Court, using stronger language than rational basis usually affords, noted that if equal protection principles were to have any meaning, then a “bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>132</sup>

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125. See Brief for Amici Curiae Lambda Legal, *supra* note 62, at 14–15 (discussing the Court's long history of acknowledging discrimination against gay men and lesbians and stating that “no court to consider this issue has ever ruled otherwise”).

126. See *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (holding that a constitutional amendment in Colorado burdening gay men and lesbians did not pass rational basis review).

127. 517 U.S. 620 (1996).

128. Neal, *supra* note 79, at 1106–07 (noting that the *Romer* Court “based its decision on a rational-basis standard of review and a finding of invidious discrimination,” and that “[a]lthough the traditional *Batson* claim has required the affected individual to belong to a class afforded at least heightened scrutiny . . . *Romer* . . . is encouraging to a *Batson* claim based on invidious discrimination toward gay and lesbian jurors”).

129. *Romer*, 517 U.S. at 624.

130. *Id.* at 632.

131. Neal, *supra* note 79, at 1106 (quoting *Romer*, 517 U.S. at 632). The Court further held that “[w]e must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.” *Id.* at 1107 (quoting *Romer*, 517 U.S. at 635) (internal quotation marks omitted).

132. *Romer*, 517 U.S. at 631–36 (alteration in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted) (criticizing the intent and lack of a nexus to a legitimate state interest underlying the Colorado amendment).

*B. The Recognition of the Privacy Interests and Humanity of Gay Men and Lesbians: Lawrence v. Texas*

The progression toward a more critical level of review continued in *Lawrence v. Texas*.<sup>133</sup> In *Lawrence*, two men were arrested and charged with violating a Texas anti-sodomy law by engaging in private and consensual sexual acts.<sup>134</sup> The Supreme Court struck down the Texas statute on due process grounds, concluding that it violated the mens' right to privacy.<sup>135</sup> Despite this due-process-based rationale, the Supreme Court also determined that the mens' right to equal protection under the law and the liberty interest in private conduct safeguarded by due process are inextricably intertwined, and a holding for one furthers both interests.<sup>136</sup>

As in *Romer*, the Supreme Court's analysis went beyond merely searching for a legitimate state interest, but, instead, concluded that Texas "cannot demean [gay men and lesbians'] existence or control their destiny by making their private sexual conduct a crime," and that the statute "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>137</sup> Compared with *Bowers*, which was less than twenty years old when *Lawrence* was decided, the Supreme Court's language in *Lawrence* marked a significant departure from how courts typically reviewed sexual orientation classifications.<sup>138</sup>

In her concurring opinion, Justice O'Connor compared *Lawrence* to other Supreme Court cases striking down legislation under equal protection principles where it "inhibit[ed] personal relationships," and concluded that *Lawrence* should have been decided under equal protection principles as well.<sup>139</sup> The majority acknowledged Justice O'Connor's equal protection argument, but indicated that if the Court were to invalidate the statute under the Equal Protection Clause, then "some might question whether a prohibition would be

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133. 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct . . . [it] can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

134. *Id.* at 563. The deviate sexual intercourse statute made it illegal for persons of the same sex to engage in acts of sodomy, but was not applicable to persons of different sexes. *Id.* at 563–64.

135. *Id.* at 578.

136. *Id.* at 575.

137. *Id.* at 578. See Neal, *supra* note 79, at 1109 (recognizing that equal protection principles supplemented the Court's holding, which was based solely on due process grounds).

138. Compare *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (opining that a majoritarian disapproval of homosexuality is indeed a sufficiently rational basis for a state statute criminalizing consensual homosexual conduct), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003), with *Lawrence*, 539 U.S. at 578 (overturning *Bowers* and asserting that people are entitled to respect and privacy with regard to the intimate aspects of their lives).

139. *Lawrence*, 539 U.S. at 579–80 (O'Connor, J., concurring). See also Neal, *supra* note 79, at 1108.

valid if drawn . . . to prohibit the conduct both between same-sex and different-sex participants.”<sup>140</sup>

*C. A Watershed Moment for the Gay Rights Movement: United States v. Windsor*

A decade later, the Supreme Court’s landmark decision in *United States v. Windsor*<sup>141</sup> significantly altered how courts analyze sexual orientation classifications.<sup>142</sup> In *Windsor*, the surviving spouse in a same-sex marriage, Edith Windsor, sued to recover taxes she paid after being denied the estate tax exemption for surviving spouses.<sup>143</sup> Windsor was denied the exemption because she was excluded from the federal definition of “spouse.”<sup>144</sup>

The Supreme Court struck down the applicable portion of the Defense of Marriage Act (DOMA), stating that it violated due process and equal protection principles.<sup>145</sup> In the majority opinion, which relied heavily on federalism grounds,<sup>146</sup> Justice Kennedy did not state explicitly what level of scrutiny he applied to the classification in DOMA.<sup>147</sup> However, in language resembling heightened scrutiny, Justice Kennedy concluded that DOMA’s “disparate treatment” of same-sex couples could not survive any level of scrutiny because it violated “basic due process and equal protection principles applicable to the Federal Government.”<sup>148</sup>

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140. *Lawrence*, 539 U.S. at 575 (majority opinion).

141. 133 S. Ct. 2675 (2013).

142. *See id.* at 2695–96 (striking down Section 3 of the Defense of Marriage Act on the basis that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”).

143. *Id.* at 2682.

144. *Id.*

145. *Id.* at 2693, 2695–96.

146. *Id.* at 2692. Justice Kennedy’s opinion in *Windsor* relied largely on notions of federalism and the role of the State in defining marriage, and thus did not directly address the level of scrutiny the Court applied: “[t]he State’s power in defining the marital relation is of central relevance in this case.” *Id.*

147. *See Bartrum, supra* note 25, at 147 (stating that Justice Kennedy “declined to specify the level of scrutiny at work”). Additionally, the U.S. Court of Appeals for the Second Circuit applied heightened scrutiny in *Windsor*: “[H]omosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect . . . .” *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff’d* 133 S. Ct. 2675 (2013). *See also* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (determining that gay men and lesbians are the kind of minority group that “strict scrutiny was designed to protect”), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012), *vacated for lack of jurisdiction sub. nom. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

148. *Windsor*, 133 S. Ct. at 2693. Justice Kennedy, while declining to specify if he applied heightened scrutiny to DOMA’s classification, observed that DOMA had the effect of “tell[ing] . . . the world[] that [same-sex couples’] otherwise valid marriages are unworthy of federal recognition,” thereby placing them in an “unstable . . . second-tier marriage” and “humiliat[ing] . . . children now being raised by same-sex couples.” *Id.* at 2694.

As in *Lawrence*, Justice Kennedy used language more consistent with a higher standard of scrutiny than rational basis, framing the “liberty of the person protected by the Fifth Amendment” as a core constitutional right.<sup>149</sup> Additionally, Justice Kennedy affirmed the strength of this right through the reverse incorporation of the Equal Protection Clause, observing that while the Fifth Amendment protected citizens from having their liberties oppressed by the federal government, the Fourteenth Amendment’s equal protection guarantee further indemnified and memorialized this protection.<sup>150</sup> Such language and analysis was a far cry from the presumption of constitutionality that rational basis review typically entails.<sup>151</sup> Justice Kennedy’s opinion dealt a significant blow to the arguments in support of DOMA, thus suggesting that state objectives for sexual orientation classifications, once thought to be legitimate, might no longer suffice.<sup>152</sup>

#### IV. *SMITHKLINE*: THE PEREMPTORY STRIKE THAT BEGAN TO CHANGE THE NINTH CIRCUIT’S REVIEW OF SEXUAL ORIENTATION CLASSIFICATIONS

##### A. *A Contract, a Price Increase, and a Lawsuit*

In 2002, Abbott and GSK entered into a contract for the licensing and marketing of several HIV medications.<sup>153</sup> Later, GSK brought a lawsuit in the U.S. District Court for the Northern District of California, alleging that Abbott “increase[ed] the price of [its drug] fourfold” after signing the contract to “drive business” toward a different drug it produced separately.<sup>154</sup> SmithKline brought “antitrust, contract, and unfair trade practice (UTPA) claims,” contending that Abbott violated the contract and the law when it gave SmithKline marketing rights to the HIV drug in combination with a drug Abbott produced before increasing the price of the licensed drug significantly.<sup>155</sup>

##### B. *Voir Dire and a Batson Challenge for Sexual Orientation*

During voir dire, Chief Judge Claudia Wilken asked the potential jurors questions based on their jury questionnaires, after which the attorneys for Abbott

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149. See *id.* at 2695–96 (discussing “[t]he liberty protected by the Fifth Amendment’s Due Process Clause” and “it[s] . . . prohibition against denying to any person the equal protection of the laws” in the context of state recognition of same-sex marriage).

150. See Bartrum, *supra* note 25, at 147 (quoting *Windsor*, 133 S. Ct. at 2695).

151. See generally EAGLE, *supra* note 8, § 1-9(f)(1), at 1-114 (discussing rational basis review and the generous deference it accords legislation).

152. See *Windsor*, 133 S. Ct. at 2689, 2696 (stating that although the classification in *Windsor* “had been deemed both necessary and fundamental” for hundreds of years, the classification serves “no legitimate purpose” from today’s perspective).

153. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir.), *en banc reh’g denied*, 759 F.3d 990 (9th Cir. 2014).

154. *Id.*

155. *Id.*

and SmithKline were permitted to engage in further questioning.<sup>156</sup> When Chief Judge Wilken questioned Juror B, the only openly gay member of the venire, he made several references to his “partner” and repeatedly used the word “he” when answering questions that involved information about his partner.<sup>157</sup> Chief Judge Wilken also referred to Juror B’s partner using the word “he” when she asked questions.<sup>158</sup> Additionally, Juror B revealed information regarding his job as a computer technician for the Ninth Circuit, that he took medication produced by Abbott or SmithKline, and that “he had friends with HIV.”<sup>159</sup>

Abbott’s lawyer, Jeffrey I. Weinberger, questioned Juror B briefly after Chief Judge Wilken.<sup>160</sup> Weinberger’s first question to Juror B was whether Juror B knew anything about the medications his friends infected with HIV were taking.<sup>161</sup> Juror B responded, “[n]ot really.”<sup>162</sup> Weinberger followed up by asking whether Juror B knew if any of his friends with HIV were taking any of the medications at issue in the case, including Norvir, Kaletra, and Lexiva.<sup>163</sup> Juror B once again expressed no knowledge or personal experience with any of the medications, although he acknowledged “he had heard of Kaletra.”<sup>164</sup> Weinberger asked Juror B a total of five questions, all concerning his knowledge about the drugs at issue, and none regarding his ability to “decide the case fairly and impartially.”<sup>165</sup>

Later, Abbott exercised its first peremptory challenge against Juror B.<sup>166</sup> SmithKline’s lawyer, Joseph R. Saveri, immediately brought a *Batson* challenge,<sup>167</sup> asserting that Abbott exercised its peremptory strike in a “discriminatory way.”<sup>168</sup> Saveri was concerned that Juror B was struck simply because he was gay and because the case was significant for the LGBT community.<sup>169</sup> Chief Judge Wilken responded with several points requiring clarification regarding the *Batson* challenge: (1) she was unsure whether *Batson* extended to civil cases; (2) she did not know if *Batson* applied to sexual orientation; and (3) she did not know whether venire members were being targeted based on sexual orientation as only one member was struck on this

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 473, 474.

161. *Id.* at 474.

162. *Id.* (internal quotation marks omitted).

163. *Id.* at 474–75.

164. *Id.* at 475.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

basis.<sup>170</sup> Chief Judge Wilken also questioned whether *Batson* would even apply in this case because “the evil of *Batson* is not that one person of a given group is excluded, but that everyone is.”<sup>171</sup>

Following these questions, Chief Judge Wilken provided Weinberger an opportunity to give an alternative basis for the peremptory strike, which he declined, stating, “I will stand on the first three [reasons listed by Chief Judge Wilken], your honor . . . . I have no idea whether he is gay or not.”<sup>172</sup> Saveri pointed out that Juror B “said on voir dire that he had a male partner.”<sup>173</sup> Weinberger responded that it was his first challenge and that there was no established pattern of jurors being eliminated from the jury pool based on sexual orientation.<sup>174</sup> Chief Judge Wilken denied the challenge, but indicated that she “would reconsider her ruling if Abbott struck other gay men.”<sup>175</sup>

The jury returned a mixed verdict after a four-week trial.<sup>176</sup> Both parties appealed to the Ninth Circuit, with GSK arguing for a new trial on the grounds that Abbott “unconstitutionally used a peremptory strike” based on sexual orientation.<sup>177</sup>

### C. Deciding the Merits of GSK’s *Batson* Challenge

On appeal, the Ninth Circuit addressed two central questions: (1) “whether the [Equal Protection Clause] prohibits discrimination based on sexual orientation in jury selection”; and (2) “whether classifications based on sexual orientation are subject to a standard higher than rational basis review.”<sup>178</sup> The court had to examine *Batson*’s history and purpose to determine whether its protections applied to sexual orientation, as well as whether jurisprudence indicated that gay men and lesbians qualified for a higher standard of judicial review.<sup>179</sup>

The court conducted a *Batson* analysis, which consists of a “three-part inquiry”: “First, the party challenging the peremptory strike must establish a prima facie case of intentional discrimination. Second, the striking party must give a nondiscriminatory reason for the strike. Finally, the court determines, on the basis of the record, whether the party raising the challenge has shown purposeful discrimination.”<sup>180</sup>

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 474.

179. *See id.* at 479–80 (discussing *Batson*’s holding and reasoning, as well as courts’ evolving actions in analyzing classifications based on sexual orientation).

180. *Id.* at 476 (citing *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006)).

In order to bring a successful *Batson* challenge, SmithKline needed to “produce evidence that [(1)] the prospective juror is a member of a cognizable group”; (2) that Abbott’s counsel used a peremptory strike against the individual illegally because of his membership in that cognizable group; and “[3)] the totality of the circumstances” compels the conclusion that the strike was prompted by the relevant characteristics of the group in question.<sup>181</sup>

The Ninth Circuit found that SmithKline successfully established a prima facie case showing that Abbott had engaged in intentional discrimination.<sup>182</sup> It observed that although SmithKline could not establish that Abbott had engaged in a pattern of discrimination because Juror B was the only openly gay member of the venire, SmithKline still met its burden of proof partly because “a strike of the lone member of the minority group is a ‘relevant consideration’ in determining whether a prima facie case has been established.”<sup>183</sup> The court stated that *Batson*’s principle of promoting jury diversity would be undercut even if the sole member of a minority group could be struck based only upon his or her membership in that group.<sup>184</sup>

Inferences regarding Abbott’s potential fear that Juror B might not be impartial due to “influence[] by concern in the gay community over Abbott’s decision to increase the price of its HIV drug” also affected the court’s analysis.<sup>185</sup> The court further found that controversy over the pricing of HIV and AIDS medications in the LGBT community and reliance on “impermissible stereotypes” served as the basis for Abbott’s strike.<sup>186</sup> As a result, the court found that SmithKline successfully “established a prima facie case” because it demonstrated that discrimination had occurred.<sup>187</sup>

Weinberger’s conduct was another significant factor in the court’s determination that Abbott acted impermissibly.<sup>188</sup> Weinberger chose not to offer a neutral reason for striking Juror B, opting instead simply to adopt the reasons Chief Judge Wilken gave for being skeptical of the validity of SmithKline’s *Batson* challenge.<sup>189</sup> The Ninth Circuit not only pointed out that

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181. *Id.* (quoting *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009)) (internal quotation marks omitted).

182. *Id.*

183. *Id.* (quoting *Crittenden v. Ayers*, 624 F.3d 943, 955 (9th Cir. 2010)).

184. *Id.* See *United States v. Chinchilla*, 874 F.2d 695, 698 n.5 (9th Cir. 1989) (“[A]lthough the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant’s rights to a fair and impartial jury.”).

185. *SmithKline*, 740 F.3d at 476.

186. *Id.* at 477.

187. *Id.*

188. *Id.*

189. *Id.* The Ninth Circuit also found that Chief Judge Wilken’s logic was erroneous. *Id.* at 477 n.2. For example, she was unsure whether *Batson* extended to civil cases; the court pointed out that this was “clearly incorrect,” as the Supreme Court in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991), held that a party in a civil case may raise a *Batson* challenge. *Id.*

Chief Judge Wilken's reasons for being skeptical of the challenge were incorrect,<sup>190</sup> but also that Weinberger's assertion that he did not know that Juror B was gay was inconsistent with the record, and thus an unsatisfactory basis for a strike.<sup>191</sup> For example, the court noted that Juror B repeatedly referred to his partner using masculine pronouns.<sup>192</sup> Furthermore, it held that merely denying a discriminatory intent was not sufficient to uphold the preemptory strike.<sup>193</sup>

In fact, the court found Abbott's denial of a discriminatory intent "had the opposite effect of that intended."<sup>194</sup> Because there was no factual basis to support Abbott's denial, it "undermine[d] [Weinberger's] argument that his challenge was not based on intentional discrimination."<sup>195</sup> For these reasons, the court concluded that Abbott had engaged in a discriminatory practice when it exercised its strike against Juror B.<sup>196</sup>

Abbott offered "several neutral reasons" to the Ninth Circuit for its preemptory strike, all of which the court found highly doubtful.<sup>197</sup> Based on the facts, the court found that "[SmithKline] . . . established a prima facie case [of discrimination], Abbott offered no nondiscriminatory reason for its strike . . . , and Abbott does not now offer in its . . . appeal any colorable neutral explanation."<sup>198</sup> Indeed, the court reviewed the entire record and found that "even based on a 'cold record,' that [Abbott's] stated reasons for striking [Juror

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190. *Id.* The court additionally found Chief Judge Wilken's reason that *Batson* is inapplicable when "only a single member of [a] given group is excluded," was in legal error, as "[t]he [C]onstitution forbids striking even a single prospective juror for a discriminatory purpose." *Id.* (alteration in original) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)) (internal quotation marks omitted).

191. *Id.* at 477–78.

192. *Id.* at 477.

193. *Id.* at 477–78.

194. *Id.*

195. *Id.* at 478.

196. *Id.* In analyzing whether SmithKline had established a prima facie case successfully, the court looked to *Johnson v. California*, which proclaimed:

In the unlikely hypothetical in which [counsel] declines to respond to a[n] . . . inquiry regarding his justification for making a strike, the evidence . . . would consist not only of the original facts from which the prima facie case was established, but also [counsel's] refusal to justify his strike in light of the court's request.

*Id.* (quoting *Johnson v. California*, 545 U.S. 162, 171 n.6 (2005)) (internal quotation marks omitted).

197. *Id.* Abbott offered the following four reasons for the preemptory strike on appeal: (1) that Juror B "had lost friends to AIDS"; (2) that Juror B knew "many people in the legal field"; (3) that Juror B's job as a computer technician at the Ninth Circuit in San Francisco would give him undue influence over the other jurors in deliberations; and (4) that Juror B was the only member of the venire to testify that "he had heard of any of the three drugs at issue." *Id.* at 478 n.4. The court found the first three of the reasons to be "pretextual" and that the "record cast[ed] strong doubt on the fourth." *Id.* For instance, regarding Abbott's first proffered reason, the court observed that nothing in "the record shows that Juror B had friends who died of complications due to HIV or AIDS." *Id.*

198. *Id.* at 479.

B] was a pretext for purposeful discrimination.”<sup>199</sup> Consequently, the court held that SmithKline had successfully established its *Batson* challenge.<sup>200</sup>

#### D. Extending *Batson* to Sexual Orientation

After determining that Abbott purposefully discriminated against Juror B based on his sexual orientation, the court then analyzed “whether *Batson* prohibits [peremptory] strikes based on sexual orientation” by analyzing *Batson* and *J.E.B.*<sup>201</sup> *J.E.B.* reasoned that when an illegal peremptory strike was permitted, not only the excluded juror, but also the defendant and the community at-large suffered.<sup>202</sup> These two decisions are initially distinguishable: race and gender were afforded more exacting scrutiny when *Batson* and *J.E.B.* were respectively decided, whereas the *SmithKline* court cited several cases applying rational basis to sexual orientation classifications.<sup>203</sup> Nonetheless, to support its assertion that rational basis was no longer the proper standard for reviewing sexual orientation, the court also addressed more recent decisions, such as *Witt v. Department of the Air Force*,<sup>204</sup> which applied heightened scrutiny to sexual orientation on due process grounds, and *United States v. Windsor*.<sup>205</sup>

The court evaluated *Windsor* “by considering what the [Supreme] Court actually did, rather than by dissecting isolated pieces of text.”<sup>206</sup> It also drew from *Witt*, which read heightened scrutiny into *Lawrence*’s analysis via three factors: (1) disregarding the potential “post-hoc rationalizations for a law, required under rational basis review”; (2) “requir[ing] a ‘legitimate state interest’ to ‘justify’” the injury imposed on a group, which is more consistent with heightened scrutiny; and (3) looking at cases that the Supreme Court analyzed to determine whether heightened scrutiny was applied.<sup>207</sup> Using this analytical method, the court held that “*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation

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199. *Id.* (alterations in original) (quoting *United States v. Alanis*, 335 F.3d 965, 969 n.5 (9th Cir.), amended by 2003 U.S. App. LEXIS 14204 (9th Cir. July 16, 2003)) (internal quotation marks omitted).

200. *Id.*

201. *Id.* (“[P]arties may . . . exercise their peremptory challenges to remove from the venire any group . . . of individuals normally subject to ‘rational basis’ review.” (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994)) (internal quotation marks omitted)).

202. *J.E.B.*, 511 U.S. at 140.

203. *SmithKline*, 740 F.3d at 480 (citing *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (applying rational basis review to sexual orientation classifications)).

204. 527 F.3d 806 (9th Cir. 2008).

205. *SmithKline*, 740 F.3d at 480 (citing *Witt*, 527 F.3d at 821–22) (stating that *Witt* applied heightened scrutiny to a substantive due process claim regarding the military’s Don’t Ask, Don’t Tell policy, rather than an equal protection claim, based on the rationale in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

206. *Id.* (quoting *Witt*, 527 F.3d at 816) (internal quotation marks omitted).

207. *Id.* at 480–81 (quoting *Witt*, 527 F.3d at 817).

[classifications].”<sup>208</sup> Drawing on the concern expressed for gay men and lesbians, the focus on resulting inequality from state action, and the “[n]otably absent” presumption of constitutionality that accompanies rational basis review, the court stated, “[i]n short, *Windsor* requires heightened scrutiny” and that “*Windsor*’s heightened scrutiny applies to classifications based on sexual orientation.”<sup>209</sup>

Subsequently, the court moved on to determine whether *Batson* applied to sexual orientation classifications.<sup>210</sup> The court looked to relevant factors, such as reinforcing unfounded stereotypes about gay men and lesbians, the long-term and systematic exclusion of gay men and lesbians from democratic institutions, and the “threaten[ed] . . . impartiality of the judiciary” to reach its conclusion that *Batson* forbade peremptory strikes based on sexual orientation.<sup>211</sup>

#### V. *SMITHKLINE*’S IMPACT FOR GAY MEN AND LESBIANS: A MORE EQUAL FOOTING IN THE JURY ROOM AND BEYOND

*SmithKline* represents an important step in bolstering legal protections for gay men and lesbians by subjecting sexual orientation classifications, including in the nation’s most vital civic functions, to a more exacting form of scrutiny.<sup>212</sup> The decision removed sexual orientation as a classification that can serve as a basis for a peremptory strike within the Ninth Circuit’s jurisdiction, and sexual orientation classifications in jury selection are now subject to the same standard of review as certain other classifications, such as gender.<sup>213</sup> Moreover, the Ninth Circuit has expressly rejected the argument that *SmithKline* is not binding precedent and has continued to apply heightened scrutiny to sexual orientation classifications.<sup>214</sup>

Whereas previous cases, such as *Romer*, *Lawrence*, and *Windsor*, all applied some hidden form of review that was “more searching” than rational basis,

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208. *Id.* at 481.

209. *Id.* at 483.

210. *Id.* at 484.

211. *Id.* at 484–86.

212. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (asserting that the privilege of jury duty is second only to the right to vote as an opportunity for the average citizen to make a contribution to the nation’s “democratic process”); see also *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) (opining that the ability for an “ordinary citizen[’s]” ability to serve on a jury provides him or her a “valuable opportunity to participate in a process of government,” and could lead to a greater regard for the laws in general).

213. See *SmithKline*, 740 F.3d at 489 (applying “heightened scrutiny” to sexual orientation classifications); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (applying “heightened scrutiny” to gender-based classifications).

214. See *Rolando v. Fox*, 23 F. Supp. 2d 1227, 1232–33 (D. Mont. 2014) (rejecting the argument that the rational basis standard in *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), is binding precedent in the Ninth Circuit, and thus applying heightened scrutiny to invalidate Montana’s same-sex marriage ban).

*SmithKline* expressly applied heightened scrutiny.<sup>215</sup> Moreover, the *SmithKline* court announced that it was prepared to state the level of scrutiny it applied, even if the Supreme Court was not.<sup>216</sup> It also set a tougher standard for states to justify unequal treatment of gay men and lesbians by requiring that “[the State’s] actions are necessary to significantly further an important governmental interest; and . . . that no less burdensome approach is likely to achieve the same results.”<sup>217</sup>

*SmithKline* not only represents a “watershed moment” for gay men and lesbians in terms of civic participation; it also reaffirms the entire trial process’s integrity and specifically determines who can be part of a jury.<sup>218</sup> As with race and sex, sexual orientation classifications are now included among those groups that “reinforce[] the constitutional urgency of ensuring that individuals are not excluded from [the] most fundamental institutions because of their [innate characteristics].”<sup>219</sup> *SmithKline*’s rationale will likely extend to LGBT issues and causes outside of the courtroom, “such as Arizona’s recently vetoed bill[, because it] would have permitted businesses to refuse service to [gay men and lesbians].”<sup>220</sup>

Unlike the U.S. Court of Appeals for the Second Circuit’s decision in *Windsor*,<sup>221</sup> which was ultimately overshadowed by the Supreme Court’s later decision, *SmithKline* is the first circuit-level decision to explicitly apply heightened scrutiny to a sexual orientation classification that has not been reviewed by the Supreme Court.<sup>222</sup> *SmithKline* furthered *Witt*’s holding so that due process and equal protection claims based on sexual orientation classifications will be reviewed under heightened scrutiny.<sup>223</sup>

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215. See Bartrum, *supra* note 25, at 149–50 (“The Ninth Circuit . . . made explicit what every reasonable observer already knew—that *Romer*, *Lawrence*, and *Windsor* each applied something more searching than traditional rational basis review—[and the Ninth Circuit] provided a standard with which to analyze sexual-orientation cases moving forward.”).

216. *Id.*

217. *Id.* at 150.

218. Anna M. Martinez, *Striking Jurors Based on Sexual Orientation is Discriminatory*, 91 DENV. U. L. REV. ONLINE 71, 74 (2014).

219. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir.), *en banc reh’g denied*, 759 F.3d 990 (9th Cir. 2014).

220. Martinez, *supra* note 218, at 74 (citing S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014)).

221. *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012) (holding that “DOMA is . . . not substantially related to the important government interest of encouraging procreation.”), *aff’d* 133 S. Ct. 2675 (2013).

222. See Martinez, *supra* note 218, at 74. A spokesman for Abbott Laboratories confirmed in early August 2014 that the company would not seek certiorari. See Dan Levine, *Update 1-Drug Company Won’t Appeal Gay Rights Ruling to Top U.S. Court*, REUTERS (Aug. 5, 2014), available at <http://www.reuters.com/article/2014/08/05/abbvie-gsk-gay-idUSL2N0QB2N720140805>.

223. See Bartrum, *supra* note 25, at 149 (“[T]he decision extended the rationale of *Witt* so that, at least in the Ninth Circuit, heightened judicial scrutiny now applies to both due process and equal protection claims brought on the basis of sexual orientation.”).

One issue in the lives of gay men and lesbians that *SmithKline* has already influenced is the ongoing same-sex marriage debate.<sup>224</sup> While *SmithKline* did not address whether a constitutional right to same-sex marriage exists, it has affected constitutional arguments and analysis closely related to that question.<sup>225</sup> *Latta v. Otter*,<sup>226</sup> a recent Ninth Circuit case, cited *SmithKline* in concluding that Idaho and Nevada's same-sex marriage bans are unconstitutional.<sup>227</sup> *Latta* noted that Nevada's same-sex marriage ban was only sustained in the district court because *SmithKline* had not been decided at the time the district court heard the case.<sup>228</sup> As directed by *SmithKline*, the *Latta* court applied heightened scrutiny, noting that even Nevada Governor Brian Sandoval stated that "[a]ny uncertainty regarding the interpretation of *Windsor* was . . . dispelled by *SmithKline*."<sup>229</sup>

*Latta* is not the only case influenced by *SmithKline*. Several recent petitions for a writ of certiorari to the Supreme Court have cited *SmithKline* to argue that the Court should apply heightened scrutiny to sexual orientation classifications.<sup>230</sup> Other courts have used *SmithKline* to strike down state laws banning same-sex marriages.<sup>231</sup>

*SmithKline*'s impact is unlikely to stop with *Latta* and these other recent decisions because *SmithKline*'s rationale provides a roadmap to find due process and equal protection violations in discriminatory laws.<sup>232</sup> Even ardent same-sex

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224. See Caplan, *supra* note 30 (stating that *SmithKline* "gave . . . many federal district courts . . . that have overturned gay marriage bans a pathway to conclude that the denial of marriage to same-sex couples violates equal protection").

225. *Id.*

226. 771 F.3d 456 (9th Cir.), *vacated in part*, 135 S. Ct. 345 (2014).

227. *Id.* at 464–65.

228. *Id.* at 464 (citing *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), *rev'd sub nom.* *Latta v. Otter*, 771 F.3d 456 (9th Cir.), *vacated in part*, 135 S. Ct. 345 (2014)).

229. *Id.* at 465 (alterations in original) (internal quotation marks omitted).

230. See Response to Petition for Writ of Certiorari at 7, *Bogan v. Baskin*, 766 F.3d 648 (7th Cir.) (No. 14-277), *cert. denied*, 135 S. Ct. 316 (2014) (citing *SmithKline* in its analysis of the Seventh Circuit's decision in *Baskin*); Brief for Respondents at 16–17, *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir.) (No. 14-124), *cert. denied*, 135 S. Ct. 265 (2014) (citing *SmithKline* to argue that the Supreme Court should take up its case to resolve a circuit split and apply heightened scrutiny to sexual orientation classifications); Brief for Respondents at 27, *Smith v. Bishop*, 760 F.3d 1070 (10th Cir.) (No. 14-136), *cert. denied*, 137 S. Ct. 271 (2014) (arguing that based on a recent string of cases, including *SmithKline*, the Supreme Court should apply heightened scrutiny to sexual orientation classifications "that single out gays and lesbians for discriminatory treatment").

231. See, e.g., *Baskin*, 766 F.3d at 671 (discussing *SmithKline* and its analysis of *Windsor* in striking down state same-sex marriage prohibitions); see also *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1141 (D. Or. 2014) (stating that the court "could independently conclude the Supreme Court did what *SmithKline* persuasively concluded it did" by applying heightened scrutiny to a sexual orientation classification). It must be noted that when *Geiger* was decided, an active Ninth Circuit judge had made a *sua sponte* call for an en banc rehearing of the case that was ultimately denied after *Geiger* was decided. *Id.* As a result, *SmithKline* was not "a truly final and binding decision" when *Geiger* was decided. *Id.*

232. See Caplan, *supra* note 30 (discussing the "explosive" impact *SmithKline* is likely to have on challenges to discriminatory laws and practices); see also *Majors v. Jeanes*, No. 2:14-cv-00518

marriage opponents acknowledge that the bell cannot be unrung now that some courts have found due process and equal protection violations in classifications largely based on the moral disapproval of gay people.<sup>233</sup> However, not every court that cites *SmithKline* has followed its rationale.<sup>234</sup> Some courts have been skeptical of the reasoning expressed in *SmithKline* and decisions influenced by *SmithKline*, creating a circuit split that only the Supreme Court can resolve.<sup>235</sup>

When the Supreme Court hears and decides the same-sex marriage cases coming from the Sixth Circuit this term, it can examine its own trend, including *Romer*, *Lawrence*, and *Windsor*, all of which reviewed sexual orientation classifications with criteria resembling something more than rational basis.<sup>236</sup> The Supreme Court can observe the overwhelmingly one-sided circuit split in same-sex marriage cases<sup>237</sup> to resolve whether gay men and lesbians are being treated fairly under the law in its current form, or to treat them as a suspect or

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JWS, 2014 WL 4541173, at \*3 (D. Ariz. Sept. 12, 2014) (noting that *SmithKline* eviscerated any remaining notion that gay men and lesbians still represented a classification that was only entitled to rational basis review).

233. See *United States v. Windsor*, 133 S. Ct. 2675, 2709–10 (2013) (Scalia, J., dissenting) (“How easy it is, indeed how inevitable, to reach the same conclusion [that same-sex marriage bans are unconstitutional] with regard to state laws . . . . In sum, that Court which finds it so horrific that Congress robbed same-sex couples of the ‘personhood and dignity’ which state legislatures conferred upon them, will . . . be . . . appalled by state legislatures’ irrational and hateful failure to acknowledge that ‘personhood and dignity’ in the first place . . . . [I]t is just a matter of listening and waiting for the other shoe.” (citations omitted)). Laws limiting marriage to different-sex couples, both at the state and federal levels, have largely been justified on the basis of protecting “traditional” views of morality and the family unit structure. See, e.g., H.R. REP. NO. 104-664, at 16 (1996) (stating that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality” (footnote omitted)); 1995 Idaho Sess. Laws, 334, 335 (“It is the intent of this act to promote the stability and best interests of marriage and the family [by inserting the phrase ‘between a man and a woman’ into the state’s marriage law]. . . . Its stability is basic to morality and civilization . . .”).

234. See *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 917 n.8 (E.D. La. 2014) (stating that the court was “not persuaded by” *SmithKline*). In upholding Louisiana’s same-sex marriage ban, under rational basis review, the court said, “[i]f the Supreme Court meant to apply heightened scrutiny, it would have said so.” *Id.* at 917.

235. Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/> (noting that, with the Sixth Circuit upholding same-sex marriage bans and the Fourth, Seventh, Ninth, and Tenth Circuits striking them down, the Supreme Court may find it necessary to resolve this “stark” split of “fundamental constitutional significance”).

236. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (discussing DOMA’s “interference with the equal dignity of same-sex marriages” as permitted by state governments); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (discussing the privacy and “respect” that should be accorded to gay men and lesbians involved in consensual sexual practices); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (stating that the Colorado constitutional amendment repealing anti-discrimination provisions in ordinances protecting gay men and lesbians lacked a “legitimate governmental interest” (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted)).

237. See Denniston, *supra* note 235.

quasi-suspect class like *SmithKline*, and arguably *Windsor*, did.<sup>238</sup> In view of this circuit split, the Supreme Court would be correct to find that marriage, which was declared a fundamental right in *Loving v. Virginia*,<sup>239</sup> extends equally to same-sex couples. Additionally, the Supreme Court now has both its own precedent and a sweeping legal trend in courts across the nation to support a decision declaring gay men and lesbians to be, at minimum, a quasi-suspect classification, if not a suspect classification.<sup>240</sup>

In addition to its impact on legal arguments for same-sex marriage and *voir dire*, *SmithKline* establishes that sexual orientation has no adverse bearing on a person's ability to contribute to the community.<sup>241</sup> The Executive Branch has endorsed this view, with the former U.S. Attorney General stating that "[r]ecent evolutions in legislation . . . and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives."<sup>242</sup> Indeed, courts have acknowledged this proposition for many years.<sup>243</sup>

*SmithKline*'s conclusion that no link exists between sexual orientation and the ability to contribute to society undercuts many of the arguments oppositionists to LGBT rights advance as "legitimate" bases for discriminatory laws.<sup>244</sup> The Ninth Circuit correctly found that preemptory strikes on the basis of sexual orientation "continue [a] deplorable tradition [in the United States] of treating

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238. See Bartrum, *supra* note 25, at 147–49 (discussing the Supreme Court's focus on DOMA's impact on the equality of gay men and lesbians in *Windsor*).

239. 388 U.S. 1, 12 (1967) (affirming that marriage is one of the most rudimentary rights in civil society).

240. See Bartrum, *supra* note 25, at 149–50 (commenting that national momentum in the judicial arena appears to be building in favor of applying heightened scrutiny to sexual orientation classifications).

241. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir.), *en banc reh'g denied*, 759 F.3d 990 (9th Cir. 2014). In determining that equal protection disallows striking a potential juror based on sexual orientation, the *SmithKline* court cited *J.E.B.*'s conclusion that "gender-based strikes send a message 'that certain individuals . . . are presumed unqualified by state actors to decide important questions.'" *Id.* at 484 (alteration in original) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994)) (internal quotation marks omitted).

242. Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to the Hon. John A. Boehner, Speaker, U.S. House of Reps. (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

243. See *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society." (internal quotation marks omitted)); see also *Equality Found. of Greater Cincinnati, Inc. v. Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) ("[S]exual orientation . . . bears no relation . . . to an individual's ability to . . . participate in, or contribute to, society. . . . If homosexuals were afflicted with [an] impediment . . . the entire phenomenon of 'staying in the [c]loset' and of 'coming out' would not exist; their impediment would betray their status."), *rev'd on other grounds and vacated*, 54 F.3d 261 (6th Cir. 1995). See generally *Conaway v. Deane*, 932 A.2d 571, 609–14 (Md. 2007) (concluding that a person's sexual orientation does not correlate with his or her ability to contribute to society).

244. *SmithKline*, 740 F.3d at 485–86; see *supra* notes 232–33 and accompanying text.

gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals."<sup>245</sup> Indeed, *SmithKline* eliminates the notion that gay men and lesbians cannot fully "participate in perfecting democracy and guarding our ideals of justice," a modest idea that nevertheless many courts are only beginning to incorporate into their analyses.<sup>246</sup> *SmithKline*'s concepts of allowing gay men and lesbians to be treated fairly under the law and participate fully in society are ones that will carry over to many different areas such as marriage, employment, and housing, thus ensuring that the nation's high ideal of equality is realized a little more. At its core, *SmithKline* stands for a simple proposition of fairness: that an otherwise qualified person should be allowed to bring his or her viewpoint and experiences forward to contribute to the nation's civic functions.

#### VI. CONCLUSION

The U.S. Constitution has been described as "the story of the extension of . . . rights and protections to people once ignored or excluded."<sup>247</sup> *SmithKline* furthered those protections to a group of people long ostracized and kept to society's fringes. Lower federal courts are altering the manner in which they examine sexual orientation classifications quite rapidly, and *SmithKline* is a noteworthy and foundational case in this trend. Where some courts previously applied rational basis "with bite,"<sup>248</sup> *SmithKline* explicitly applied heightened scrutiny when it extended *Batson*'s protections to gay men and lesbians in the vital civic task of jury duty.

Because of the trend toward heightened scrutiny that *SmithKline* helped generate, proponents of disparate treatment under the law based on sexual orientation classifications will have to show a more significant nexus to an important government interest to justify that treatment. It may be a difficult task, given that the courts have eviscerated many of their traditional arguments.

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245. *Id.* at 485.

246. *Id.*; see *supra* notes 212–32 and accompanying text.

247. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

248. See Bartrum, *supra* note 25, at 147.

