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State Courts, Federal Courts, and Legal Scholars Have Determined That LGBT People Have Experienced a Long History of Discrimination

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Chapter 7: State Courts, Federal Courts, and Legal Scholars Have Determined That LGBT People Have Experienced a Long History of Discrimination

Equal protection analysis, as articulated by the United States Supreme Court¹ and followed by most states in interpreting state constitutions, requires that a suspect class must historically have been subjected to discrimination. Every state and federal court that has substantively considered whether sexual orientation is a suspect class has held that LGBT people have faced a long history of discrimination. In addition, dozens of legal scholars have also concluded that LGBT people have suffered the requisite history of discrimination to qualify sexual orientation to be a suspect class. In making these determinations, many of these courts and scholars have explicitly considered employment and other forms of discrimination by public employers, including state, local, and federal government employers. These findings, unanimously agreed upon by state and federal courts, provide substantive evidence that LGBT people have experienced a widespread practice of unconstitutional discrimination by state governments. In at least one case, the court indicated that even the government party to the litigation did not dispute that this requirement is met. And in another, the court cited characterizations of LGBT people in the brief filed by the government as indicia of the history of discrimination suffered by LGBT people. This section describes the case law and scholarly literature that address the history of discrimination requirement of suspect class determination.

¹ See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (listing history of discrimination as one of the requirements for suspect class determination under equal protection analysis).

A. State Courts' Determinations of a History of Discrimination Against LGBT

People

Judicial opinions from appellate courts in seven states - California,² Connecticut,³ Iowa,⁴ Maryland,⁵ Montana,⁶ Oregon,⁷ and Washington,⁸ including six of those states' highest courts - have all agreed that LGBT people have faced a long history of discrimination, no matter how the court ultimately ruled on whether sexual orientation is a suspect classification. In doing so, some have specifically discussed employment discrimination against LGBT people by state, local, and federal government employers. For example, in 2008, Maryland's highest court found that "[h]omosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments"⁹ and that "homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society."¹⁰ In 2009, the Iowa Supreme Court reviewed the long history of discrimination against LGBT people, including that "public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure."¹¹ In addition, a concurring opinion filed by a justice of the Supreme Court of Montana in 2004 describes how LGBT people have been marginalized by their "government and institutions" in Montana, including citing a number of cases documenting discrimination by state and local governments to show that "gays and lesbians

² *Strauss v. Horton*, 46 Cal. 4th 364, 411-12 (2009); *In re Marriage Cases*, 43 Cal. 4th 757 (2008). See also *In Re Marriage Cases*, 49 Cal. Rptr. 3d 675 (2006).

³ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

⁴ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁵ *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

⁶ *Snetsinger v. Montana University System*, 104 P.3d 445 (Mont. 2004).

⁷ *Shineovich and Kemp v. Shineovich*, 229 Or. App. 670 (2009); *Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Or. App. 1998).

⁸ *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) ("There is no dispute that gay and lesbian persons have been discriminated against in the past." - and indicating that even the government party to the lawsuit did not dispute that contention).

⁹ *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) (Maryland S. Ct. 2008).

¹⁰ *Id.* at 610.

¹¹ *Varnum v. Brien*, 763 N.W.2d at 889.

historically have been the focus of discriminatory treatment in the workplace.”¹² These cases and opinions from state appellate courts are summarized in Table 7-A.

¹² *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 455 (Mont.2004) (Nelson, J., specially concurring).

Table 7-A. State Appellate Courts Determinations of a History of Discrimination Against LGBT People

State	Court	Year	Citation	History of Discrimination Analysis
California	California Court of Appeal	2006	<u>In re Marriage Cases</u> , 49 Cal. Rptr. 3d 675 (Cal. App. 2006), <i>review granted and superseded</i> , 149 P.3d 737 (Cal. 2006), <i>rev'd</i> , 43 Cal. 4th 757 (2008).	As many courts do, the majority took as true that there has been a history of discrimination against homosexuals. 49 Cal. Rptr. 3d at 713 (stating that requirement of history of discrimination “would seem to be readily satisfied”). In his concurring opinion, Justice Parrilli underscored the point by stating that “[t]he struggles gay men and lesbians have faced to become who they <i>are</i> individually is not to be understated.” 49 Cal. Rptr. 3d at 730 (Parrilli, J., concurring (emphasis in original)). Justice Kline’s concurring and dissenting opinion acknowledges that the record of discrimination against lesbians and gay men is long and well known. In it, he explains that in Western culture since “the time of Christ” the prevailing attitude towards LGBT people has “been one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment. . . . Courts have recognized that ‘[t]he aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.’” 49 Cal. Rptr. 3d at 756 (Kline, J., concurring and dissenting). He notes that the California Legislature officially acknowledged this history in its findings regarding the California Domestic Partner Rights and Responsibilities Act of 2003. 49 Cal. Rptr. 3d at 756 (citing Cal. Fam. Code §§ 297 <i>et seq.</i>). He further relates how, because of their sexual orientation, lesbians and gay men have been denied the custody of their children, denied employment opportunities, subjected to harassment and violence, and have been treated as “deviants, in need of treatment.” 49 Cal. Rptr. 3d at 756-57.
California	California Supreme Court	2008	<u>In re Marriage Cases</u> , 43 Cal. 4th 757 (2008).	The court cites <u>People v. Garcia</u> , 77 Cal. App. 4th 1269 (2000), which found that lesbians and gay men share a history of persecution comparable to that of Blacks and women and that “outside of racial and religious minorities, no group has suffered such ‘pernicious and sustained hostility’ and such immediate and severe opprobrium as homosexuals.” 43 Cal. 4 th at 840.
California	California Supreme Court	2009	<u>Strauss v. Horton</u> , 46 Cal. 4th 364 (2009).	The California Supreme Court reaffirmed its finding in <u>In re Marriage Cases</u> above that gay men and lesbians have suffered a long history of discrimination. 46 Cal. 4 th at 411-12. In his dissent, Justice Moreno quoted the Iowa Supreme Court in <u>Varnum v. Brien</u> , 763 N.W.2d 862

				(Iowa 2009), for its finding that “[g]ay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation. The long and painful history of discrimination against gays and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of the country until very recently. Additionally, only a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor. Public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure. School-yard bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice. At the same time, lesbian and gay people continue to be frequent victims of hate crimes.” 46 Cal. 4 th at 498-99 (citations omitted; quoting <u>Varnum</u> , 763 N.W.2d at 889).
Connecticut	Connecticut Supreme Court	2008	<u>Kerrigan v. Comm’r of Pub. Health</u> , 957 A.2d 407 (Conn. 2008).	“Of course, gay persons have been subjected to such severe and sustained discrimination because of our culture’s long-standing intolerance of intimate homosexual conduct.” 957 A.2d at 433. “Fifty years ago, no openly gay people worked for the federal government. In fact, shortly after ... Dwight Eisenhower [became the president in 1953, he] issued an executive order that banned homosexuals from government employment, civilian as well as military, and required companies with government contracts to ferret out and fire their gay employees. At the height of the McCarthy witch-hunt, the [Department of State] fired more homosexuals than communists. In the 1950s and 1960s literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian.” 957 A.2d at 433 n.25. Furthermore, the court notes that until <i>Lawrence</i> , sodomy was criminalized in many states. 957 A.2d at 433. Homosexuals were considered “deviants,” many states even forcing them by statute to undergo psychological evaluations. 957 A.2d at 434 nn.27.
Iowa	Iowa Supreme Court	2009	<u>Varnum v. Brien</u> , 763 N.W.2d 862 (Iowa 2009).	“The long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently.... [o]nly a few years ago persons identified as homosexual were dismissed from military service regardless of past dedication and demonstrated valor. Public employees identified as gay or lesbian have been thought to pose security risks due to a perceived risk of extortion resulting from a threat of public exposure. School-yard bullies have psychologically ground children with apparently gay or lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice.” 763 N.W.2d at 889 (citations omitted). “[T]his

				history of discrimination suggests any legislative burdens placed on lesbian and gay people as a class 'are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.'" 763 N.W.2d at 889.
Maryland	Maryland Court of Appeals	2007	<u>Conaway v. Deane</u> , 932 A.2d 571 (Md. 2007).	"Homosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments." 932 A.2d at 609. "It is clear that homosexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society." 932 A.2d at 610. The court traces the history of discrimination against LGBT people in the United States from the turn of the twentieth century through the "Red Scare" of the late 1910s to early 1920s, to the 1950s when a U.S. Senate investigations subcommittee found that "homosexuals and other sex perverts" were unsuitable for employment by the federal government. The court noted that laws before 1900 criminalized "gender inversion," which included, but was not limited to, "cross-dressing, prostitution," and other indecencies. 932 A.2d at 609. Many LGBT people were viewed as "heretics, degenerates, or psychopaths." 932 A.2d at 609. Even in the 20 th century, the medical profession "accepted the degeneracy theory of homosexuality." 932 A.2d at 609. Homosexuals were also considered "security risks because of their susceptibility to blackmail" and barred from public employment. 932 A.2d at 609. The <i>Conaway</i> Court also discusses the "Kulturkampf," a period spanning from 1946 to 1961, in which it is believed that as many as a million gay and lesbian persons were prosecuted criminally under state statutes aimed at prohibiting consensual same-sex adult intercourse (both public and private), kissing, holding hands, or other forms of "public lewdness." 932 A.2d at 610. Further, the court recognized that until the Supreme Court's decision in <i>Lawrence v. Texas</i> , 539 U.S. 558 (2003), it was not unconstitutional under the Fourteenth Amendment for a state to enact legislation making it a crime for two consenting adults of the same sex to engage in sexual conduct in the privacy of their home. 932 A.2d at 610.
Montana	Montana Supreme Court	2004	<u>Snetsinger v. Mont. Univ. Sys.</u> , 104 P.3d 445 (Mont. 2004).	"It is overwhelmingly clear that gays and lesbians have been historically subject to unequal treatment and invidious discrimination." 104 P.3d at 455 (Nelson, J., specially concurring). "Gays and lesbians share a history of persecution comparable to that of blacks and women." 104 P.3d at 456 (Nelson, J., specially concurring) (citation omitted). The concurrence further describes how LGBT people have been marginalized by their government in Montana. It cites a string of cases from several different states to show that "gays and lesbians historically have been the focus of discriminatory treatment in the workplace," including cases documenting

				discrimination by state and local governments. 104 P.3d at 455 (Nelson, J., specially concurring) (citations omitted). The concurrence describes how LGBT people have been accused of being pedophiles and child molesters and stereotyped as Communists and security risks. 104 P.3d at 455 ((Nelson, J., specially concurring). Other examples of discrimination discussed include: in 1953, President Eisenhower issued Executive Order 10,450, “requiring the dismissal of all homosexual government employees;” until 1965, homosexual aliens could not be admitted to the United States “because they were classified as sexual deviants under 8 U.S.C. § 1182(a)(4); and gay and lesbian parents are frequently denied custody of their children because of their sexual orientation and irrespective of their parenting ability. 104 P.3d at 455 (Nelson, J., specially concurring).
Oregon	Oregon Court of Appeals	1998	<u>Tanner v. Oregon Health Sci. Univ.</u> , 971 P.2d 435 (Or. App. 1998).	“[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.” 971 P.2d at 447.
Oregon	Oregon Court of Appeals	2009	<u>Shineovich v. Shineovich</u> , 229 Or. App. 760 (2009).	“[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.” 229 Or. App. at 681 (quoting <u>Tanner v. OHSU</u> , 971 P.2d 435, 447 (Or. App. 1998).
Washington	Washington Supreme Court	2006	<u>Andersen v. King County</u> , 138 P.3d 963 (Wash. 2006).	<p>“[T]here is no dispute that gay and lesbian persons have been discriminated against in the past.” 138 P.3d at 974 (indicating that even the parties did not dispute this point).</p> <p>In an opinion in which he concurred in Judge Fairhurst's dissent, Justice Bridge provides a detailed history of sexual orientation discrimination, from prohibition, to 1930s Hollywood, to the McCarthy era, to the late 1990s, “when gays and lesbians could be barred from federal employment solely on the basis of their sexual orientation.” 138 P.3d at 1030 (Bridge, J., concurring in Judge Fairhurst's dissent). Justice Bridge also states that, “[w]hen reviewing laws that discriminate against gays and lesbians, there is no justification for courts to ignore the ‘pernicious and sustained hostility’ gays and lesbians suffered through the decades and continue to face.” 138 P.3d at 1030 (Bridge, J., concurring in Judge Fairhurst's dissent).</p>

B. Federal Court Determinations That LGBT People Have Suffered a Long History of Discrimination

Similarly, all fifteen federal judicial opinions that have substantively addressed sexual orientation as a suspect classification have agreed that LGBT people have suffered a long history of discrimination. These opinions have focused not only on discrimination by private actors but also on discrimination by state, local, and federal governments. For example, in 1989, the Ninth Circuit observed that "[d]iscrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools... ." ¹³ In 1995, the Sixth Circuit concluded "Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation." ¹⁴ Also in 1995, a District of Columbia Court of Appeals justice cited examples of such discrimination in a dissent, including that: "[b]eing identified with homosexuality has been the basis of refusals to hire, the ruin of careers, undesirable military discharges, denials of occupational licenses... ." ¹⁵ These cases and opinions are summarized in Table 7-B.

¹³ *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

¹⁴ *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 264 n.1 (6th Cir. 1995) (quoting trial court findings), *rev'd and vacated* by 54 F.3d 261 (6th Cir. 1995), *cert. granted, judgment vacated*, 518 U.S. 1001 (1996).

¹⁵ *Dean v. D.C.*, 653 A.2d 307, 334 (D.C. 1995) (quoting Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 Women's Rts. L. Rep. 143, 157 (1988)).

Table 7-B. Federal Court Determinations That LGBT People Have Suffered a Long

History of Discrimination

Court	Year	Citation	History of Discrimination Analysis
U.S. Supreme Court	1985	<u>Rowland v. Mad River Local Sch. Dist.</u> , 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of <i>cert.</i>).	In explaining his dissent from a denial of <i>cert.</i> , Justice Brennan, joined by Justice Marshall, concluded, “Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.'” 470 U.S. At 1014 (Brennan, J., dissenting from denial of <i>cert.</i> (quoting <u>Plyler v. Doe</u> , 457 U.S. 202, 216 (1982))).
6th Circuit	1995	<u>Equal. Found. of Greater Cincinnati v. City of Cincinnati</u> , 54 F.3d 261 (6th Cir. 1995), <i>cert. granted</i> , <i>vacated</i> , 518 U.S. 1001 (1996).	"Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation." 54 F.3d at 264 n.1.
7th Circuit	1989	<u>Ben-Shalom v. Marsh</u> , 881 F.2d 454 (7th Cir. 1989).	“Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree.” 881 F.2d at 465.
9th Circuit	1988	<u>Watkins v. U.S. Army</u> , 847 F.2d 1329 (9th Cir. 1988), <i>rehearing en banc granted</i> , 847 F.2d 1362 (1988), <i>opinion withdrawn on rehearing</i> , 875 F.2d 699 (1989), <i>cert. denied</i> , 498 U.S. 957 (1990).	The court noted that the Army conceded that “it is indisputable that 'homosexuals have historically been the object of pernicious and sustained hostility'. More recently, Judge Henderson echoed the same harsh truth: 'Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society.’” 847 F.2d at 1345 (quoting <u>High Tech Gays v. Defense Industrial Security Clearance Office</u> , 668 F. Supp. 1361 (N.D. Cal.1987), which was later reversed in part and vacated in part). The <u>Watkins</u> court further explained that homosexuals have been the frequent victims of violence and have been excluded from jobs, schools, housing, churches, and even families. 847 F.2d at 1345, citing a 1984 law review note. The court concluded that “the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.” 847 F.2d at 1345.
9th Circuit	1989	<u>Watkins v. U.S. Army</u> , 875 F.2d 699 (1989), <i>cert. denied</i> , 498 U.S. 957 (1990).	"Discrimination against homosexuals has been pervasive in both the public and private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches. . . . Moreover, reports of violence against homosexuals have become commonplace in our society. In sum, the discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.” 875 F.2d at 724 (Norris, J., concurring) (citations omitted).
9th Circuit	1990	<u>High Tech Gays v. Def. Indus. Sec. Clearance</u>	"we do agree that homosexuals have suffered a history of discrimination.”895 F.2d at 573.

		<u>Office</u> , 895 F.2d 563 (9th Cir. 1990), <i>rehearing and rehearing en banc denied</i> , 909 F.2d 375 (9th Cir. 1990).	
9th Circuit	1990	<u>High Tech Gays v. Def. Indus. Sec. Clearance Office</u> , 909 F.2d 375 (9th Cir. 1990).	"The panel agrees that the first criterion is met; homosexuals have suffered a history of discrimination." 909 F.2d at 376 (Canby, J., dissenting from denial of rehearing <i>en banc</i> and citing majority opinion, 895 F.2d at 573).
9th Circuit	2008	<u>Witt v. Dep't of Air Force</u> , 527 F.3d 806 (9th Cir. 2008).	In his partial concurrence partial dissent, Judge Canby explained that "My reasons for concluding that such classifications are suspect are fully set out in my dissent from denial of en banc review in <i>High Tech Gays</i> , and I will not belabor the matter here. Suffice it to say that homosexuals have 'experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'" 527 F.3d at 824-25 (citations omitted) (Canby, J., concurring in part and dissenting in part).
District of Columbia Court of Appeals	1995	<u>Dean v. District of Columbia</u> , 653 A.2d 307 (D.C. App. 1995)	In considering whether homosexuals had been subjected to a history of purposeful discrimination, Judge Ferren quoted Justice Brennan's often-quoted conclusion in <i>Rowland</i> "that 'homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.'"" 653 A.2d at 344 (Ferren, J., concurring in part and dissenting in part and quoting <u>Rowland v. Mad River Local School Dist.</u> , 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of <i>cert.</i>)). Judge Ferren listed examples from scholarly literature and other courts of the history of pervasive discrimination, including: "[b]eing identified with homosexuality has been the basis of refusals to hire, the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, to the custody of children and visitation rights, denials of national security clearances and denials of the right to enter the country... . Discrimination against homosexuals has been pervasive in both the public and the private sectors. Legislative bodies have excluded homosexuals from certain jobs and schools, and have prevented homosexuals marriage. In the private sphere, homosexuals continue to face discrimination in jobs, housing and churches." 653 A.2d at 344-45 (Ferren, J., concurring in part and dissenting in part) (citations omitted).

Northern District of California	1987	<u>High Tech Gays v. Def. Indus. Sec. Clearance Office</u> , 668 F. Supp. 1361 (N.D. Cal. 1987), <i>rev'd in part, vacated in part</i> , 895 F.2d 563 (9th Cir. 1990), <i>rehearing and rehearing en banc denied</i> , 909 F.2d 375 (9th Cir. 1990).	The court acknowledged that “[l]esbians and gay men have been the object of some of the deepest prejudice and hatred in American society. Some people's hatred for gay people is so deep that many gay people face the threat of physical violence on American streets today.” 668 F. Supp. at 1369. In cataloguing this “pervasive discrimination,” 668 F. Supp. At 1369 & 1370, the court further quoted Justice Brennan’s dissent from denial of <i>cert.</i> in <i>Rowland v. Mad River Local School District</i> , 470 U.S. 1009, 1014 (1985) (Brenna, J., dissenting from denial of <i>cert.</i>)(“homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely ... to reflect deep-seated prejudice rather than ... rationality.’”). The <u>High Tech Gays</u> court also stated that “[f]or years, many people have branded gay people as abominations to nature and considered lesbians and gay men mentally ill and psychologically unstable.” 668 F. Supp. at 1369.
Eastern District of Wisconsin	1989	<u>Ben-Shalom v. Marsh</u> , 703 F. Supp. 1372 (E.D. Wis. 1989), <i>rev'd</i> , 881 F.2d 454 (7th Cir. 1989), <i>cert. denied</i> , 494 U.S. 1004 (1990).	The court recognized that “[h]omosexuals have suffered a history of purposeful discrimination.” 703 F. Supp. At 1379. It quoted Justice Brennan's statement that “homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely ... to reflect deep-seated prejudice rather than ... rationality.’” 703 F. Supp. at 1379 (quoting <u>Rowland v. Mad River Local School District</u> , 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of <i>cert.</i>)). The <u>Ben-Shalom</u> court further elaborated that “Such hostility is evident in the very pleadings in this case wherein homosexuals are analogized to kleptomaniacs and arsonists.” 703 F. Supp. at 1379.
District of Columbia	1991	<u>Steffan v. Cheney</u> , 780 F. Supp. 1 (D.D.C. 1991), <i>rev'd</i> , <u>Steffan v. Aspin</u> , 8 F.3d 57 (D.C. Cir. 1993), <i>rehearing en banc, judgment vacated, on rehearing en banc</i> , <u>Steffan v. Perry</u> , 41 F.3d 677 (D.C. Cir. 1994).	“Homosexuals have suffered a history of discrimination and still do, though possibly now to a less degree.” 780 F. Supp. at 5 (quoting <u>Ben-Shalom v. Marsh</u> , 881 F.2d 454, 465-66 (7th Cir. 1989)).
Eastern District of California	1993	<u>Dahl v. Secretary of U.S. Navy</u> , 830 F. Supp. 1319 (E.D. Cal. 1993).	The court accepted as “undisputed that homosexuals have historically been discriminated against.” 830 F. Supp. at 1324 n.7(citations omitted).
Southern District of Ohio	1994	<u>Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati</u> , 860 F. Supp. 417 (S.D. Ohio 1994), <i>rev'd and vacated</i> , 54 F.3d 261 (6th Cir. 1995), <i>cert.</i>	The court found as one of its findings of fact: “13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.” 860 F. Supp. at 426. The court concluded that “gays, lesbians and

		<i>granted, judgment vacated</i> , 518 U.S. 1001 (1996).	bisexuals have been stigmatized throughout history based on erroneous stereotypes and mischaracterizations regarding their sexual orientation. Gays, for example, have been characterized as effeminate mental defects with a proclivity towards pedophilia, and a host of other deviant sexual practices. Gays have been subjected to pervasive private discrimination as well as public discrimination on the local, state and federal levels." 860 F. Supp. At 436 (footnote and citations omitted). The court noted that the campaign literature under consideration in the case "accused homosexuals of habitually engaging in a wide range of activities, some of which allegedly involve the use of rodents, fists, and other objects." 860 F. Supp. at 436 n.16.
Eastern District of New York	1997	<u>Able v. U.S.</u> , 968 F. Supp. 850 (E.D.N.Y. 1997), <i>rev'd</i> , 155 F.3d 628 (2d Cir. 1998).	Court discusses the "bleak" history of discrimination of homosexuals over the centuries, which suggest that "laws imposing disabilities on gay men and lesbians are based on prejudice." 968 F. Supp. at 854-56, 862, 862-63.

C. Legal Scholars Determinations That LGBT People Have Suffered a Long History of Discrimination

In addition to state and federal courts, a number of legal scholars have also concluded that LGBT people have been subjected to a long history of discrimination when considering whether sexual orientation is a suspect classification. Table 7-C provides a summary of the law review articles with the most substantive discussions about LGBT people having suffered such a history of discrimination. These scholars incorporate into their discussions cases from the two prior tables, as well as other examples of unconstitutional state, local, federal and private employment discrimination against LGBT people.

Harris Miller's *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*,¹⁶ is a foundational article cited frequently in other articles and case law documenting the history of discrimination against LGBT people. In it, Miller lays out the history of discrimination based on sexual orientation evident in various forms of official discrimination, including sodomy statutes, government employment decisions, and immigration policies.¹⁷ Miller's article also cites useful outside sources, statistics, and accounts of discrimination.¹⁸ Other frequently cited articles include: Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. Tex. L. Rev. 205, 243-44 (1993); Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. Rev. 221, 244-49 (1993); and Kenji Yoshino, *Suspect Symbols: The Literary*

¹⁶ Harris M. Miller, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984).

¹⁷ See *id.* At 799-807, 821-25.

¹⁸ See *id.*

Argument for Heightened Scrutiny for Gays, 96 Colum. L. Rev. 1753, 1772-93 (1996).¹⁹ One author even poses the question whether judges themselves may be perpetuating stereotypes and anti-gay bias, as evidenced by the perfunctory manner in which they often perform the equal protection analysis.²⁰ In addition, articles written during and after the AIDS epidemic describe the increased stigmatization of and violence against gay men that occurred during the last three decades.²¹ At least one scholar specifically recounts the particularly difficult history of transgender people.²²

Many of these scholars detail unconstitutional employment discrimination by federal, state, and local governments and place it in the context of a larger system of government discrimination.²³ In a 2008 law review article, one scholar summarizes: “Lesbians, gay men, bisexuals, and transgendered people were the objects of specific criminal laws against cross-dressing and homosexual solicitation, as well as generic sodomy laws; saw books, movies, radio programs, and even art depicting their point of view censored or denigrated by the state; were excluded from service in the United States armed forces; *were barred from federal or state government employment*; ... could not adopt children or even retain custody of their own biological children; [and] were excluded from entering the United States or even becoming

¹⁹ Although not included on Exhibit C (because they do not specifically discuss the constitutional suspect class analysis), three additional resources provide invaluable background information and analysis of the history of discrimination against LGBT people: Jonathan Katz’s *Gay American History* (Penguin Group 1976); John D’Emilio’s *Sexual Politics, Sexual Communities* (University of Chicago Press 1983); and Posner, *supra* note 2.

²⁰ Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1772-93 (1996).

²¹ Kurt D. Hermansen, *Analyzing the Military’s Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151, 175-76 (1992); Murphy, *infra* note 23, at 351.

²² Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 903-04 (2007).

²³ See, e.g., Marie Elena Peluso, *Tempering Title VII’s Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1554 (1993) (“This discrimination exists not only in the public and private employment context but is pervasive throughout every aspect of society”); Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 351 (1995) (“Gay men and lesbians are also discriminated against in employment, in both the public and the private sectors.”).

American citizens.”²⁴ Yale Law Professor William Eskridge summarizes the history of discrimination as follows: “[Y]ou could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or ...become a U.S. citizen, use the U.S. mails for your informational magazines, *obtain some professional and business licenses*, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or ...actually have intercourse with someone of the same sex.” (emphasis added)²⁵ Another legal scholar writing in 2000 concludes: “*Being identified with homosexuality has been the basis of the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, denials of national security clearances and denials of the right to enter the country. It is clear that homosexuals have endured a pattern of purposeful discrimination throughout history that has intruded on every aspect of their public and private lives.*”²⁶ Finally, an American Law Reports annotation summarizing cases where LGBT employees have brought constitutional claims against government employers concludes: “Employment discrimination against gay, lesbian, and bisexual persons has a long history of acceptance... .Contemporary courts have been more willing than their predecessors to scrutinize such employment discrimination under a variety of constitutional theories.”²⁷

²⁴ Alison Lorenzo, *Constitutional Law—Equal Rights Amendment, Equal Protections, and Due Process—The Right of Same-Sex Marriage is Not Fundamental, Prohibiting Same-Sex Marriage Does Not Constitute Gender-Based Discrimination, and Restrictions on the Right of Marriage are Rationally Related to the State’s Interest in Regulation of Marriage. Conaway v. Deane*, 932 A.2D 571 (MD. 2007), 39 RUTGERS L.J. 1003 nn. 122-124 (2008) (emphasis added).

²⁵ Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL’Y 203, 233-39 & accompanying notes (1997) (discussion re: “the suspect class argument”).

²⁶ Pamela M. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1128 (2000) (emphasis added).

²⁷ Robin Cheryl Miller, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391 (2002 & supps.).

Table 7-C. Legal Scholars Determinations That LGBT People Have Suffered a Long History of Discrimination

Author	Title	Citation / Year	Relevant Discussion	Notes & Highlights from Article
Harris M. Miller II	AN ARGUMENT FOR THE APPLICATION OF EQUAL PROTECTION HEIGHTENED SCRUTINY TO CLASSIFICATIONS BASED ON HOMOSEXUALITY	57 S. Cal. L. Rev. 797 (1984)	See pp. 799-807; 821-25.	This is a foundational article regarding LGBT suspect classification and is cited in many later articles and cases. Part I of this article surveys the forms of official discrimination against gays, including sodomy statutes, ineligibility for government employment, such as the military or elementary schools, immigration policies prohibiting the entry of gays, segregation of gays in prison, lack of legislative protection against discrimination, and discrimination in the area of family law. “Gays in America have historically faced pervasive discrimination. This discrimination appears as both “homophobia” and the acceptance and perpetuation of incorrect stereotypes. At times this discrimination has reached hysterical proportions.”
Harvard Law Review Association	THE CONSTITUTIONAL STATUS OF SEXUAL ORIENTATION: HOMOSEXUALITY AS A SUSPECT CLASSIFICATION	98 Harv. L. Rev. 1285 (1985)	See footnotes 1-9, 88-90 and accompanying text.	The article describes how in 1985: <ul style="list-style-type: none"> • Twenty-three states and the District of Columbia still had in force criminal statutes proscribing private, consensual sodomy. • Only the state of Wisconsin and approximately 30 cities proscribed discrimination on the basis of sexual preference. • Only California's ‘public accommodations’ statute had been interpreted to protect gays.
Adrienne K. Wilson	SAME-SEX MARRIAGE: A REVIEW	17 Wm. Mitchell L. Rev. 539 (1991)	See discussion and accompanying footnotes, p. 555.	“More recently, discrimination has appeared in the form of homophobia. Discrimination has at times even reached ‘hysterical proportions.’ “Although not as harsh, contemporary society continues to maintain a hostile attitude toward homosexuality. Continued discrimination and prejudice suffered by homosexuals provides support for the use of suspect classification for homosexuals.”
Kendall Thomas	BEYOND THE PRIVACY PRINCIPLE	92 Colum. L. Rev. 1431 (1992)	See discussion and accompanying footnotes, pp. 1462-70.	“Over the course of American history, gay men and lesbian women have been discursively marked as ‘faggots’ (after the pieces of kindling used to burn their bodies), ‘monsters,’ ‘fairies,’ ‘bull dykes,’ ‘perverts,’ ‘freaks,’ and ‘queers.’ Their intimate associations have been denominated ‘abominations,’ ‘crimes against nature,’ and ‘sins not fit to be named among Christians.’ This symbolic violence has produced and been produced by congeries of physical violence.” “Gay men and lesbians in America have been ‘condemned to death by choking, burning and drowning; ... executed, [castrated], jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited, [lobotomized, shock-treated, psychoanalyzed and] declared insane, driven to insanity, to suicide, murder, and self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated ... castigated ...

				<p>despised [and degraded].”</p> <p>“The continuity between the seventeenth-century experience and homophobic violence in our own time is startling. Violence against gay men and lesbians-on the streets, in the workplace, at home-is a structural feature of life in American society. A study commissioned by the National Institute of Justice (the research arm of the U.S. Department of Justice) concluded that gay men and women “are probably the most frequent victims [of hate violence today].”</p>
Kurt D. Hermansen	ANALYZING THE MILITARY’S JUSTIFICATIONS FOR ITS EXCLUSIONARY POLICY: FIFTY YEARS WITHOUT A RATIONAL BASIS	26 Loy. L.A. L. Rev. 151 (1992)	See discussion and accompanying footnotes, pp. 175-76.	<p>“Lesbians and gay men remain the subject of significant and virulent stereotyping in modern society. Gay men are believed by many to be effeminate and lesbians to be masculine. Many assert that lesbians and gay men proselytize children to homosexuality and molest children. Further, lesbians and gays are considered by large numbers of individuals to be mentally ill.”</p> <p>“The Supreme Court has focused on the historical background of the discrimination in deciding whether to apply strict scrutiny. Historically, American society has discriminated intensely against lesbians and gays. In finding jobs, securing housing- indeed, in nearly every aspect of social existence-sexual orientation-based discrimination has been a persistent facet of life in the United States.”</p> <p>“The deeply ingrained societal prejudice against lesbians and gays also manifests itself in widespread violence against this group. Research indicates that lesbians and gays are physically abused and assaulted because of their sexual orientation. Law enforcement officials report that violence against lesbians and gays is both significant and, perhaps in part due to the AIDS epidemic, increasing.”</p>
Renee Culverhouse & Christine Lewis	HOMOSEXUALITY AS A SUSPECT CLASS	34 S. Tex. L. Rev. 205 (1993)	See discussion and accompanying footnotes, pp. 243-44.	<p>This article addresses false stereotypes of homosexuals as preying on young children, engaging in improper conduct, and being mentally ill.</p> <p>“To date, only two states (Wisconsin and Massachusetts) have civil rights statutes that protect homosexuals. Legislation in three other states (California, New York, and Michigan) provides some protection for homosexual groups by prohibiting discrimination based on sexual orientation in such areas as the use of health facilities and access to state employment. Recently, several large cities have enacted anti-discrimination regulations aimed at protecting homosexuals. However, for practical purposes, no state protection is available to homosexuals against discrimination by the private sector, and there are no federal statutes barring such discrimination.”</p>

Stephen Zamansky	COLORADO'S AMENDMENT 2 AND HOMOSEXUALS' RIGHT TO EQUAL PROTECTION OF THE LAW	35 B.C. L. Rev. 221 (1993)	See discussion and accompanying footnotes, pp. 244-49.	<p>“Homosexuals are saddled with unique disabilities because of both prejudice and inaccurate stereotypes. They have been subjected to a long history of public and private denigration, condemnation, violence and discrimination. Such discrimination is widespread throughout society. As Judge Norris of the United States Court of Appeals for the Ninth Circuit said, ‘the discrimination faced by homosexuals is no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens and people of a particular national origin.’”</p>
Marie Elena Peluso	TEMPERING TITLE VII'S STRAIGHT ARROW APPROACH: RECOGNIZING AND PROTECTING GAY VICTIMS OF EMPLOYMENT DISCRIMINATION	46 Vand. L. Rev. 1533 (1993)	See discussion and accompanying footnotes, beginning p. 1554.	<p>“The <i>Jantz</i> court pointed out that homosexuals have experienced continuous and extremely intense discrimination. Even courts that have declined to extend suspect status to homosexuals agree that gays and lesbians historically have been subjected to purposeful discrimination. In fact, one court noted, ‘Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society.’”</p> <p>“This discrimination exists not only in the public and private employment context but is pervasive throughout every aspect of society.”</p> <p>“Judges Canby and Norris of the Ninth Circuit Court of Appeals, insightfully pointed out that this history of intense and pervasive discrimination makes it probable that any different treatment is simply a product of past prejudice, rather than a legitimate classification necessary to achieve a pressing government goal. The judiciary should not endorse the discrimination by refusing to subject classifications based on sexual orientation to strict or heightened scrutiny.”</p>
Eric A. Roberts	HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE: A REMEDY TO DISCRIMINATION BASED ON SEXUAL ORIENTATION	42 Drake L. Rev. 485 (1993)	See discussion and accompanying footnotes, pp. 497-501.	<p>“In light of the extensive history of discrimination against homosexuals, this element of the Bowen test is clearly satisfied.”</p> <p>“Today, discrimination against gays and lesbians continues to flourish. The public, the judiciary, and the armed forces acknowledge and promote, in one form or another, invidious discrimination against homosexuals. This discrimination appears in two forms: hostile attitudes expressed by heterosexuals towards homosexuals, and the existence and perpetuation of false stereotypes regarding homosexuals.”</p> <p>“Discriminatory treatment has also appeared in the courts. In November 1989, a Texas district court judge was publicly censured for remarks he made following the sentencing of the murderer of two homosexuals.”</p>
Spiro P. Fotopoulos	THE BEGINNING OF THE END FOR THE MILITARY'S TRADITIONAL POLICY ON HOMOSEXUALS: STEFFAN	29 Wake Forest L. Rev. 611 (1994)	See discussion and accompanying footnotes, beginning p. 618. See also	<p>“The origin of our society's bias against homosexuals goes back over two hundred years to colonial America. In the early 1700's, strict laws against homosexuality existed; these lasted until after the American Revolution. In many colonies, homosexuality was punishable by death.”</p>

	V. ASPIN		discussion beginning p. 642.	The author notes that at the time the article was published almost one half of the states still criminalize the act of sodomy .
Fernando J. Gutierrez, Ed.D., J.D.	GAY AND LESBIAN: AN ETHNIC IDENTITY DESERVING EQUAL PROTECTION	4 Law & Sexuality 195 (1994)	See discussion and accompanying footnotes, beginning p. 217.	This article looks at the similarities in discrimination against homosexuals and African Americans.

Nancy E. Murphy	QUEER JUSTICE: EQUAL PROTECTION FOR VICTIMS OF SAME-SEX DOMESTIC VIOLENCE	30 Val. U. L. Rev. 335 (1995)	See discussion and accompanying footnotes, beginning p. 351.	<p>“The gay and lesbian communities have been consciously, consistently, and vigorously discriminated against in America since colonial times. The AIDS crisis has resulted in an increased stigmatization of homosexuals.”</p> <p>“Gay men and lesbians are also discriminated against in employment, in both the public and the private sectors.”</p> <p>“Gay men and lesbians are often discriminated against in housing in the form of zoning ordinances which exclude gay men and lesbians through the use of narrow definitions for the purpose of zoning single-family residential areas.”</p> <p>“Gay men and lesbians face discrimination in the receipt of economic benefits and government services.”</p> <p>“Perhaps the most egregious form of discrimination is the denial of gays and lesbians of custody or visitation with their children.”</p>
Kenji Yoshino	SUSPECT SYMBOLS: THE LITERARY ARGUMENT FOR HEIGHTENED SCRUTINY FOR GAYS	96 Colum. L. Rev. 1753 (1996)	See discussion pp. 1772-93.	<p>This article contains a detailed discussion of the perfunctory manner in which courts perform the Equal Protection Clause test.</p> <p>“While every court to engage in the inquiry has concluded that gays have suffered a history of discrimination, many have not reached the inquiry because they consider it</p>

				pre-empted by <i>Bowers v. Hardwick</i> . Given that this unwillingness to entertain a gay Equal Protection claim may stem in part from anti-gay bias, these courts are perhaps the ones most in need of this analysis.”
E. Gary Spitko	A BIOLOGIC ARGUMENT FOR GAY ESSENTIALISM- DETERMINISM: IMPLICATIONS FOR EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS	18 U. Haw. L. Rev. 571 (1996)	See p. 607.	This article notes that every federal court that has considered the issue has concluded that gay people have suffered a history of discrimination on account of their classification as gay people.
Andrea M. Kimball	ROMER V. EVANS AND COLORADO'S AMENDMENT 2: THE GAY MOVEMENT'S SYMBOLIC VICTORY IN THE BATTLE FOR CIVIL RIGHTS	28 U. Tol. L. Rev. 219 (1996)	See discussion and accompanying footnotes, p. 241.	<p>“Gays face numerous forms of discrimination, both state-sponsored and in the private sector. Gays are forbidden from marrying, adopting children, and even gay forms of 'lovemaking' are illegal in most states.”</p> <p>“In the private sector, no federal law, and only a few state laws prohibit an employer from terminating an employee based solely on sexual orientation. For gays in the military, discrimination is institutionalized.”</p> <p>“Most would agree that gays suffer from a societal stigma that regards homosexuals as 'child molesters,' 'AIDS carriers,' and 'perverts.' Since gays have suffered from such bias and prejudice, the traditional discrimination requirement for suspect class status for homosexuals is easily satisfied.”</p>
Jon-Peter Kelly	ACT OF INFIDELITY: WHY THE DEFENSE OF MARRIAGE ACT IS UNFAITHFUL TO THE CONSTITUTION	7 Cornell J.L. & Pub. Pol'y 203 (1997)	See discussion and accompanying footnotes, pp. 233-39.	<p>“Documented incidents of historical discrimination are legion--easily satisfying the 'history of discrimination' criterion.”</p> <p>“William Eskridge lists several legal discriminations suffered by homosexuals in this century alone: '[Y]ou could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or (if you slipped in by mistake) become a U.S. citizen, use the U.S. mails for your informational magazines, obtain some professional and business licenses, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or (heaven forbid) actually have intercourse with someone of the same sex.’”</p>
Celena R. Mayo	THE ROAD NOT TAKEN: ABLE V. UNITED STATES,	16 N.Y.L. Sch. J. Hum. Rts.	See footnotes 209-213 and accompanying text.	The Eastern District of New York in <i>Able</i> noted that homosexuals have a “bleak history” of discrimination, both “in this country and elsewhere.” “Because of the immediate and

	EQUAL PROTECTION, DUE DEFERENCE, AND RATIONAL BASIS REVIEW	407 (1999)		severe opprobrium often manifested against homosexuals or one so identified publicly, members of this group are particularly powerless to pursue their rights openly in the public arena.”
Evan Gerstmann	THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION	The University of Chicago Press (1999)	See Chapter 4, “Class Based-Analysis and the Courts,” pp. 62-66.	This book provides a brief analysis of the history of discrimination against LGBT people.
Pamela M. Jablow	VICTIMS OF ABUSE AND DISCRIMINATION: PROTECTING BATTERED HOMOSEXUALS UNDER DOMESTIC VIOLENCE LEGISLATION	28 Hofstra L. Rev. 1095 (2000)	See discussion beginning p. 1128.	<p>“A historical review of the treatment of gays and lesbians demonstrates the purposeful discrimination to which they have been subjected. Courts that have addressed this issue have conceded that homosexuals have endured a history of hostility and discrimination.”</p> <p>“Since colonial times, gay and lesbian communities in America have been consistently, deliberately, and vigorously discriminated against.”</p> <p>“During the 1950s, homosexuality became embroiled in Senator Joseph McCarthy's attack on government agencies. McCarthy's persecution had enduring effects in the following decade. Homosexuality became the justification for doctors and lawyers to lose their licenses and also was a permissible foundation for divorce and loss of child custody.”“</p> <p>“Being identified with homosexuality has been the basis of the ruin of careers, undesirable military discharges, denials of occupational licenses, denials of the right to adopt, denials of national security clearances and denials of the right to enter the country. It is clear that homosexuals have endured a pattern of purposeful discrimination throughout history that has intruded on every aspect of their public and private lives.”</p>
Alvin C. Lin	SEXUAL ORIENTATION ANTIDISCRIMINATION LAWS AND THE RELIGIOUS LIBERTY PROTECTION ACT: THE PITFALLS OF THE COMPELLING STATE INTEREST INQUIRY	89 Geo. L.J. 719 (2001)	See discussion beginning p. 741.	“In his vigorous dissent from the denial of certiorari in <i>Rowland v. Mad River Local School District</i> , Justice Brennan asserted that 'homosexuals constitute a significant and insular minority of this country's population'” subject to 'pernicious and sustained hostility' and 'deep-seated prejudice' He noted that 'discrimination based on sexual preference has been found by various courts to infringe upon fundamental constitutional rights.’”
Ann M. Reding	LOFTON V. KEARNEY: EQUAL PROTECTION MANDATES EQUAL	36 U.C. Davis L. Rev. 1285 (2003)	See footnotes 129-137 and accompanying text.	“Courts have recognized the long history of discrimination against homosexuals. Justice Brennan specifically stated that 'homosexuals have historically been the object of pernicious and sustained hostility.' In addition, homosexuals are often the victims of hate

	ADOPTION RIGHTS			crimes and violence, and employers frequently exclude homosexuals from job opportunities based on their sexual orientation.”
Lindsay Gayle Stevenson	MILITARY DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION: "DON'T ASK, DON'T TELL" AND THE SOLOMON AMENDMENT	37 Loy. L.A. L. Rev. 1331 (2004)	See footnote 63.	The footnote cites Samuel A. Marcossou, <i>Constructive Immutability</i> , 3 U. Pa. J. Const. L. 646, 648-49 (2000), for the proposition that “the wide consensus of scholars that sexual orientation... should be a suspect classification subject to the most exacting judicial scrutiny”. The footnotes in this article also cite a number of sources for the proposition that the private and public sectors have discriminated against homosexuals because of their status—there have been numerous reports of violence related to homosexuals, of schools and employers refusing to accept homosexual candidates for jobs, and of same-sex partners being prevented from marrying.
Ryan E. Mensing	A NEW YORK STATE OF MIND: RECONCILING LEGISLATIVE INCREMENTALISM WITH SEXUAL ORIENTATION JURISPRUDENCE	69 Brook. L. Rev. 1159 (2004)	See footnote 36 and accompanying text regarding a New York State Legislative statement acknowledging a history of discrimination against LGBT persons.	“Many residents of New York have encountered prejudice on account of their sexual orientation, and this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.”
Ronald J. Krotoszynski, Jr. & E. Gary Spitko	NAVIGATING DANGEROUS CONSTITUTIONAL STRAITS: A PROLEGOMENON ON THE FEDERAL MARRIAGE AMENDMENT AND THE DISENFRANCHISEMENT OF SEXUAL MINORITIES	76 U. Colo. L. Rev. 599 (2005)	See footnote 126.	The authors, citing state cases which apply strict scrutiny, argue that sexual orientation classifications merit heightened equal protection scrutiny because gays and lesbians have suffered a long history of discrimination despite the fact that their sexual orientation bears no relationship to their ability to contribute to society.
Cassie Coleman	LOVE OR CONFUSION? COMMON LAW MARRIAGE, HOMOSEXUALITY AND THE MONTANA SUPREME COURT IN SNETSINGER V. MONTANA UNIVERSITY SYSTEM	66 Mont. L. Rev. 445 (2005)	See pp. 457-60.	“Like other classes of people who have obtained suspect class status such as women and racial minorities, homosexuals have historically been subjected to such a degree of unequal treatment so as to warrant classification as a suspect class. For example, the United States denied admission to homosexual aliens until 1965 based on their status as 'psychopaths.' Homosexuals have repeatedly been discriminated against in employment and continue to be discriminated against by the U.S. Department of Defense.”

Jeffrey A. Williams	RE-ORIENTING THE SEX DISCRIMINATION ARGUMENT FOR GAY RIGHTS AFTER LAWRENCE V. TEXAS	14 Colum. J. Gender & L. 131 (2005)	See text accompanying footnotes 60-66.	“Moreover, the vast weight of authority seems to recognize that a history of purposeful unequal treatment clearly <i>does</i> exist.... . Even earlier, a leading authority noted, 'after all, what more palpable discrimination could there be than to criminalize the conduct that defines the class.' This sentiment is pervasive.”
Diana Elkind	THE CONSTITUTIONAL IMPLICATIONS OF BATHROOM ACCESS BASED ON GENDER IDENTITY: AN EXAMINATION OF RECENT DEVELOPMENTS PAVING THE WAY FOR THE NEXT FRONTIER OF EQUAL PROTECTION	9 U. Pa. J. Const. L. 895 (2007)	See pp. 903-904.	<p>“The transgender community is also a demonstrable suspect class because of the history of disparate treatment the group has suffered. As Dylan Vade points out, '[t]ransgender people are discriminated against in many areas of life, from employment and housing, to health care and custody rights.’”</p> <p>“Transgender people are disproportionately affected by poverty and frequently rely upon public assistance programs such as welfare, Medicaid, and foster care. Additionally, the combination of poverty and employment discrimination leads to a disproportionate number of transgender people participating in criminalized economies; therefore, gender nonconforming people are also disproportionately represented in the criminal justice system, court-mandated treatment programs, and prisons.”</p>
Evangelos Kostoulas	ASK, TELL, AND BE MERRY: THE CONSTITUTIONALITY OF "DON'T ASK, DON'T TELL" FOLLOWING LAWRENCE V. TEXAS AND UNITED STATES V. MARCUM	9 U. Pa. J. Const. L. 565 (2007)	See discussion and accompanying footnotes, pp. 585-87.	“The Court has alluded to several justifications for the application of strict scrutiny, which include a long history of past discrimination Homosexuals have been subjected to a range of discriminatory acts in the distant and recent past, including being categorized as mentally ill, incarcerated for not remaining celibate, and excluded from hate crime legislation despite being targets of such crimes.”
Alison Lorenzo	CONSTITUTIONAL LAW-- EQUAL RIGHTS AMENDMENT, EQUAL PROTECTION, AND DUE PROCESS--THE RIGHT OF SAME-SEX MARRIAGE IS NOT FUNDAMENTAL, PROHIBITING SAME-SEX MARRIAGE DOES NOT CONSTITUTE GENDER-BASED DISCRIMINATION, AND RESTRICTIONS ON THE RIGHT OF MARRIAGE ARE RATIONALLY RELATED TO THE STATE'S	39 Rutgers L.J. 1003 (2008)	See footnotes 122-124.	<p>The lengthy footnotes in this article discuss the history of violence against homosexuals from the beginning of the twentieth century to the present.</p> <p>“Lesbians, gay men, bisexuals, and transgendered people were the objects of specific criminal laws against cross-dressing and homosexual solicitation, as well as generic sodomy laws; saw books, movies, radio programs, and even art depicting their point of view censored or denigrated by the state; were excluded from service in the United States armed forces; were barred from federal or state government employment; suffered under the stigma of laws or policies barring schools from depicting sexual or gender minorities positively or requiring them to denigrate such minorities; could not obtain state recognition of their intimate relationships[,] and could not adopt children or even retain custody of their own biological children; [and] were excluded from entering the United States or even becoming American citizens.”</p>

	INTEREST IN REGULATION OF MARRIAGE. CONAWAY V. DEANE, 932 A.2D 571 (MD. 2007).			
Robin Cheryl Miller	FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AS PROHIBITING DISCRIMINATION IN EMPLOYMENT ON BASIS OF GAY, LESBIAN, OR BIXSEXUAL ORIENTATION OR CONDUCT	96 A.L.R.5th 391 (2002 & supps.)	Provides a broad summary of relevant case law and various fact patterns.	This annotation collects and analyzes state and federal cases discussing whether employment discrimination on the basis of sexual orientation violates a federal or state constitutional provision. “Employment discrimination against gay, lesbian, and bisexual persons has a long history of acceptance. In particular, many agencies of the Federal Government have, at least in the past, expressly precluded the employment of homosexuals, and the military continues to do so. Contemporary courts have been more willing than their predecessors to scrutinize such employment discrimination under a variety of constitutional theories.”
L. Camille Hebert	SEXUAL ORIENTATION DISCRIMINATION AS VIOLATION OF EQUAL PROTECTION	2 Empl. Privacy Law § 9:5	See text accompanying footnotes 24-27.	“Even courts that have refused to grant suspect class status to gay men and lesbians generally have recognized that they have in fact suffered a history of discrimination, including the Supreme Court.”