COMMENTS

BURDEN OF PROOF: HOW INTERSECTIONALITY CAN INFORM OUR VIEW OF THE EQUAL PROTECTION INTENT REQUIREMENT

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INTRODUCTION

People like order, and we find comfort in discerning patterns in objects or ideas that portray similar characteristics—it is the natural way to process information. However, when done inartfully, classification can lead to erasure and often happens when society tries to group people. These classifications frequently mask the experiences of the people who exist in a subgroup of a larger category and result in overlooked needs of those intersectional minorities. In the equal protection context, it can lead to disproportionate discrimination of subgroup members.

Black[1] LGBT people are an example of this phenomenon. As the LGBT community continues its fight for equal protection, advocates have advanced several arguments to analogize the LGBT struggle to other, officially recognized, "protected classes."[2] One particularly effective argument has been the comparison between the civil rights struggles of Black Americans in the 1950s–80s to the current fight for civil rights faced by LGBT Americans. However, while this argument has proven to be persuasive to many, it has also created a perceived dichotomy between the Black and LGBT communities. This, in turn, has subordinated the identity of Black LGBT people by

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1 This Comment uses the terms "Black" and "person of color." These phrases are not used interchangeably. The term "Black" refers to the specific racial minority of Americans, which does not necessarily include recent immigrants from African countries. When referring to "person of color," this Comment includes Hispanic/Latinos, African/Black Americans, Asian Americans, and other racial minorities. The latter term is used primarily when there is insufficient sociological research on the specific Black population for a given fact, statistic, or situation.

2 In this Comment, "protected class" refers to a racial, social, political, sexual, or gender-based group that the Supreme Court has recognized as deserving a heightened form of scrutiny. *See infra* Part I.A.

typecasting the general LGBT community as analogous to, but distinct from, the Black community.

By subordinating this subgroup in popular rhetoric, we lose the opportunity to fully understand (1) the problems facing the larger Black and LGBT community, and (2) the way in which intersectional groups are affected by larger power structures, which can also highlight the aspects of the law that are problematic to the two subordinated classes to which the intersectional group belongs. This is particularly true of the current debate surrounding the LGBT community, equal protection, and heightened standards of scrutiny.

While many scholars discuss the importance of extending some form of heightened scrutiny to the LGBT community,[3] these articles predominantly discuss the negative effects of the current standard of scrutiny in the context of the LGBT community as a whole. The social sciences also devote significant commentary to the equally important issue of how race and sexuality intersect within the LGBT community,[4] but there is relatively little discussion of how that intersection informs the heightened scrutiny debate.[5] Unfortunately, this avoidance leads to the further marginalization of LGBT minorities and can delay the ultimate goal of LGBT equality.[6]

This Comment unites these two bodies of scholarly work to highlight the problems of intent in the equal protection framework. It will discuss the way

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3 *See, e.g.*, Nicholas Drew, *A Rational Basis Review That Warrants Strict Scrutiny: The First Circuit's Equal Protection Analysis in* Massachussetts v. Department of Health and Human Services, 54 B.C. L. REV. E. SUPP. 43, 52–56 (2013) (arguing that the First Circuit should have applied heightened scrutiny to discrimination against "homosexuals"); Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 386–90 (2010) (calling on courts to apply heightened scrutiny to statutes that treat LGBTs differently); Mark Strausser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 Pepp. L. Rev. 1021, 1027 (2011) ("Arguably, sexual orientation should be recognized as a classification triggering heightened scrutiny.").

4 *See, e.g.*, Adele M. Morrison, *It's [Not] a Black Thing: The Black/Gay Split over Same-Sex Marriage—A Critical [Race] Perspective*, 22 TUL. J. L. & SEXUALITY 1, 8 (2013) (discussing how viewing the dominant normative aspects of the identities of "blackness" and "gayness" as "straightness" and "whiteness," respectively, can subordinate the influences of the Black LGBT group); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1468–69 (2009) (situating the perspective of Black "men who have sex with men" in the broader context of HIV laws).

5 This may be the result of a rejection of intersectionality discussions by several prominent scholars in the field. *See* Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1365 (2000) (discussing the hesitation of scholars such as Richard D. Mohr, Bruce Bawer, Marshall Kirk, and Hunter Madsen in applying an intersectional framework because such efforts are "wasteful" and that they "Balkanize" and hobble gay rights theory and activism).

6 *See* Hutchinson, *supra* note 5, at 1360 (explaining that a comparative approach to race and sexual orientation reflects a "broader marginalization of persons of color . . . who are excluded from essentialist queer theories and politics.").

in which a proposed Kansas statute, the Kansas CARE Act,[7] would likely result in a greater disproportionate impact on Black LGBT couples than either heterosexual Black couples or white LGBT couples while still operating within the constitutionally appropriate boundaries of the Equal Protection Clause. Through this analysis, we see that Black LGBT people are ultimately left without remedy under either strict scrutiny (as Black people) or rational basis plus (as LGBT people) because of the equal protection intent requirement.

Part I explains current equal protection precedent for challenging a facially neutral law by (1) describing the general framework of heightened scrutiny surrounding suspect classifications and, (2) discussing the special rational basis plus analysis that the Court has often used in the LGBT context. Part II provides a demographic snapshot of Black LGBT people in America, which will provide a basis for analysis when discussing the Kansas CARE program. Part III applies Part II to a hypothetical equal protection challenge brought by a family harmed by the CARE program, highlighting the multiplicative negative effects the legislation would have on Black LGBT people. Finally, Part IV advocates for a modification of the intent requirement in equal protection jurisprudence in light of the difficulties presented.

I. CURRENT LGBT EQUAL PROTECTION JURISPRUDENCE

At its core, the Equal Protection Clause protects each person from invidious, discriminatory action by the state.[8] Because laws necessarily recognize distinctions in the behaviors of different groups, not all equal protection claims are, in fact, created equal. While legislative differentiation is a form of discrimination, it is "discrimination" as understood without the negative connotation with which the word is so often associated.[9] As it is the purpose of legislatures to make these benign distinctions, they are deemed constitutionally acceptable.

In order to avoid tension with the fundamental legislative mandate to make distinctions and the Fourteenth Amendment's goals of equality, the Equal Protection Clause functions as a proscription against any intention by the legislature to make *impermissible* differentiations.[10] The following sections discuss how intent informs the traditional equal protection framework and the current rational basis plus review applied to LGBT people.

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7 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess. (Kan. 2015), http://www.kslegislature.org/li_2016/b2015_16/measures/sb158.

8 Julie A. Greenberg, *Unequal Protection for Sex and Gender Nonconformists*, *in* CONTROVERSIES IN EQUAL PROTECTION CASES IN AMERICA: RACE, GENDER AND SEXUAL ORIENTATION 201, 205 (Anne Richardson Oakes ed., 2015).

9 *Compare Discriminate, v.*, OXFORD ENGLISH DICTIONARY (3d ed. 2017) (definition 1) ("[T]o serve to differentiate, to distinguish.") *with id.* (definition 4) ("[T]o treat a person or group in an unjust or prejudicial manner, esp. on grounds of race, gender, sexual orientation, etc.").

10 Washington v. Davis, 426 U.S. 229, 239 (1976).

A. Traditional Equal Protection Jurisprudence and Suspect Classifications

Typically, a challenged law's survival depends upon which level of scrutiny the court applies.[11] As equal protection jurisprudence evolved, it became apparent that any classification seeking heightened scrutiny must be sufficiently analogous to the paradigmatic case—race—to be afforded heightened scrutiny.[12] In subsequent years, a handful of groups have been categorized as "suspect" and have been granted different degrees of scrutiny as their situations relate to and differ from the paradigmatic case. For example, courts recognize classifications based on race, alienage, and national origin as warranting strict scrutiny,[13] while gender and illegitimacy warrant intermediate scrutiny.[14]

A court applying strict scrutiny is at its least deferential. It requires the government to prove that a challenged law serves a compelling purpose that cannot be achieved through another, less discriminatory, means[15] and is narrowly tailored to avoid over- and under-inclusiveness.[16] By contrast, the court's least exacting form of inquiry—rational basis review—will presume a challenged law is constitutional[17] and uphold the law as long so it is rationally related to a legitimate governmental purpose.[18] This deference also allows significant over- and under-inclusiveness, which accepts certain unintentional negative effects on certain groups in order to accomplish the legislature's goal. Intermediate scrutiny exists between the two extremes of rational

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11 *See* Eugene Doherty, *Equal Protection under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference*, 16 OHIO N. U. L. REV. 591, 595 (1989) ("If strict scrutiny virtually insures that a statute will fail judicial review, and if application of the classic rational basis test yields the opposite result, then it would seem as if the Court's only real 'decision' is about which standard to apply."). *But cf.* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory but fatal in fact.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995))); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–96 (2006) (questioning the notion that strict scrutiny is "fatal in fact" while still recognizing that only about one third of laws survive the standard).

12 *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505–06 (1976) (contrasting the severity and pervasiveness of discrimination against women and African Americans with the treatment of illegitimates); Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973) (comparing the historic discrimination against and political power of women to that of African Americans).

13 *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that racial classifications are subject to strict scrutiny); *see also* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule gives way, however, when a statute classifies by race, alienage, or national origin. . . . [T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.").

14 Clark v. Jeter, 486 U.S. 456, 461 (1988).

15 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 9.1, at 687 (4th ed. 2011).

16 *See Cleburne*, 473 U.S. at 440.

17 ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 82 (2006).

18 *See Clark*, 486 U.S. at 461 (discussing the equal protection framework in the context of illegitimacy); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (low income); Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (licensed vs. non-licensed opthamologists frame-fitting).

basis and strict scrutiny, and requires the government to show that a challenged law is substantially related to an important–though not compelling–government purpose.[19]

Notably, the legislature's intent when passing the challenged law is a necessary component of each level of scrutiny,[20] and it is the plaintiff who bears the burden of proof. In practice, this burden is frequently insurmountable. Legislators who avoid openly voicing their discriminatory desires can pass detrimental laws, because "[a]n inference drawn from congressional silence" is not credible when contrary to textual evidence.[21] Even if some questionable statements are made on the legislative floor, the statements of a few legislators within the legislative history are often insufficient proof that the majority of the governing body shared those beliefs because such statements cannot be imputed to the whole.[22] And, in many instances, statistical evidence of a significant disparate impact is insufficient to prove legislative intent.[23] With such high barriers, it can often become nearly impossible to prove intent. As a result, many statutes that result in the subordination of certain classes withstand scrutiny.

1. Rational Basis Plus

Lesbian, gay, bisexual, and transgender people have not been afforded heightened scrutiny by the United States Supreme Court[24] and, as such, are subject to rational basis review. Initially, when applying rational basis review, the lack of heightened scrutiny for the LGBT community as a class seems concerning. This level of review traditionally favors the government, as the Court has been explicit in its deference to the right of state and federal legislatures to make laws.[25] Under rational basis, the actual purpose of the

19 CHEMERINSKY, *supra* note 15, § 9.1, at 687; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a drinking law that discriminated by gender).

20 *See, e.g.*, *Williamson*, 348 U.S. at 487–88; Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

21 Burns v. United States, 501 U.S. 129, 136 (1991).

22 *See* United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); S. Wine and Spirits of America, Inc. v. Div. of Alcohol and Tobacco Control, 731 F.3d 799, 807 (8th Cir. 2013) (explaining that an article that purports to explain one of the sponsors' intentions for a particular bill were insufficient to impute to the whole).

23 Statistical disparities have been deemed insufficient in the context of Section 2 of the Voting Rights Act, which is derived from the Fifteenth Amendment, but is similarly scrutinized for intent. *See* Ryan P. Haygood, *Disregarding the Results: Examining the Ninth Circuit's Heightened Section 2 "Intentional Discrimination" Standard in* Farrakhan v. Gregoire, 111 COLUM. L. REV. SIDEBAR 51, 56–57 (2011).

24 *See infra* notes 31–50 and accompanying text.

25 Nebbia v. New York, 291 U.S. 502, 537 (1934) (declaring that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose"); Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 423

law need not be legitimate as long as there *could be* some legitimate purpose that is rationally related to the law's enactment.[26] In fact, the justification that a court uses to legitimate a particular law need not even be argued by the legislature, but can be hypothesized ex post by the Court itself.[27]

Under this framework, homophobic and transphobic legislators could hypothetically present a bill with a clear bias for lesbian, gay, bisexual, and trans persons, only to escape invalidation by providing an ex post, hypothetically legitimate purpose when confronted by the courts. In practice, however, the Court has not applied such a minimal standard of review towards the LGBT class since *Baker v. Nelson*, which denied certiorari in a case appealing Minnesota's denial of marriage licenses to same-sex couples in 1972.[28] Rather, the Court has created an unofficially recognized but frequently used standard referred to as "rational basis plus"[29] or "rational basis with bite."[30] While the Court has explicitly declined to grant heightened scrutiny to many politically unpopular classes,[31] it has nonetheless consistently probed the legislature's actual purpose when enacting a challenged law that negatively affects such groups.[32] The Supreme Court applies this standard in cases that challenge laws which disproportionately affect LGBT individuals.

United States Department of Agriculture v. Moreno was the Court's first significant deviation from traditional rational basis review.[33] The case questioned the

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(1952) (reiterating that the Court "do[es] not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare").

26 *See Williamson*, 348 U.S. at 487–88 (hypothesizing about why the Oklahoma legislature could have rationally determined that only ophthalmologists could reframe lenses).

27 *Id.*

28 409 U.S. 810 (1972) (mem.) (dismissing for want of substantial federal question) *dismissing appeal from* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). While the Court also denied that there was a fundamental right implication in *Bowers v. Hardwick*, this argument was due process-based. The equal protection claim was not preserved by the plaintiffs and was therefore not reviewed. *See* Bowers v. Hardwick, 478 U.S. 186, 201–02 (1986) (Blackmun, J. concurring) (disagreeing with the dismissal of the equal protection issue).

29 *See, e.g.*, Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 755–56 (2015) (describing the nature and origins of rational basis plus review).

30 *See, e.g.*, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–80 (1987) (describing the evolution of rational basis "with bite" after the Supreme Court's 1985 term, which invalidated four statutes under supposed rational basis review).

31 While the Court in *Obergefell* did reference *Frontiero*, *Zablocki*, and *Loving* in its equal protection justification, pointing perhaps to a possibility of a heightened scrutiny statute, it did not in fact apply a heightened scrutiny standard. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

32 *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973) (overturning a facially neutral law that negatively impacted "hippie communes"); *Cleburne*, 473 U.S. at 432 (declaring a municipal zoning law unconstitutional as applied to a home for the mentally handicapped); *see also* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (overturning the Defense of Marriage Act as discriminatory against LGBT individuals).

33 413 U.S. 528 (1973). In two previous cases, *Reed v. Reed*, 404 U.S. 71 (1971), and *Weber v. Aetna Casualty & Ins. Co.*, 406 U.S. 164 (1972), the Court applied a more substantial form of rational basis

constitutionality of an amendment to the Food Stamp Act, which barred non-related persons living in the same household from receiving food stamps.[34] Under traditional rational basis review, the Government's assertion that the amendment was enacted to minimize fraud in the Food Stamp program[35] should have been a sufficiently legitimate purpose to which the amendment was rationally related. However, the *Moreno* majority rejected this claim and instead looked to the Act's stated purpose and the legislative history surrounding the amendment to find the law's true intent—discrimination against hippies[36]—and disallowed a "bare congressional desire to harm a politically unpopular group" as an illegitimate governmental interest.[37]

Throughout the 1980s, the Court applied this more searching rational basis review to overturn a host of challenged laws. For example, in *Cleburne v. Cleburne Living Center*, the Court declined to apply intermediate scrutiny to the mentally handicapped but still declared a municipal zoning law unconstitutional by using *Moreno's* "politically unpopular group" language.[38] This line of precedent was extended to the LGBT community in *Romer v. Evans*, a case in which the Court ruled unconstitutional a Colorado referendum seeking to disallow anti-discrimination protection for LGBT persons.[39] In declaring the law unconstitutional, the Court once again cited *Moreno's* "politically unpopular group" language to hold that the law could not pass rational basis review because the government did not have a legitimate interest in denying these protections to a traditionally marginalized group.[40] Moreover, the Court went far beyond the traditional requirements of rational basis review by noting the law's simultaneous over- and under-inclusivity,[41] probing the legislature's actual animosity towards LGBT people, and dismissing the Government's argument that it had a legitimate interest in ensuring citizens the freedom to associate.[42]

Almost a decade later, the Court became more explicit in its intention to apply a skeptical rational review in LGBT-related challenges. In *Lawrence v. Texas*, which overturned a Texas anti-sodomy law on due process and equal protection grounds, Justice O'Connor stated that for laws harming politically

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review, but these cases are often seen as transitional moves towards rational basis plus. *See* Nicholas, *supra* note 29, at 756.

34 413 U.S. at 529.

35 *Id.* at 533, 535.

36 *Id.* at 534.

37 *Id*.

38 *Cleburne*, 473 U.S. at 446–47 (quoting *Moreno*, 413 U.S. at 534).

39 517 U.S. 620, 633 (1996).

40 *Id.* at 634–35.

41 *Id.* at 633.

42 *Id.* at 634–35.

unpopular groups, "a more searching form of rational basis" is applied.[43] Finally, in *United States v. Windsor* in 2013, which struck down the Defense of Marriage Act, and *Obergefell v. Hodges*, which overturned the Ohio, Tennessee, Michigan, and Kentucky laws banning same-sex marriage, the Court ignored plaintiffs' arguments to extend intermediate scrutiny to LGBT people while simultaneously scrutinizing the legitimacy of the law.[44]

Undoubtedly, the Court's less deferential rational basis plus has served as an important vehicle in the advancement of LGBT rights. However, the framework retains the same problematic standard as all other levels of scrutiny: it is the plaintiff who first bears the burden of proving legislative intent. As previously discussed, the *Moreno* court noted the existing legislative history showed a clear intent to prevent hippies from receiving food stamps,[45] and *Cleburne* relied on the zoning board's admission that the ordinance was passed in response to the community's "negative attitudes" towards people with intellectual disabilities as proof of an illegitimate legislative intent.[46] In the LGBT context, *Romer*,[47] *Lawrence*,[48] and *Windsor*[49] all noted the existence of an impermissible desire to harm LGBT people either in the legislative history or on the face of the legislation.

Post *Obergefell*, this intent requirement will likely continue to pose a difficult barrier for the advancement of LGBT people. With legislatures on notice that it is now impermissible to discriminate against LGBT people on the face of legislation, it is likely that these bodies will be more careful in disguising intent in legislative history and resort to the same facially-neutral language that has proven effective in thwarting equal protection cases in the race context.[50] More troublingly, this discrimination may also intersect with

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43 Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (emphasis added).

44 United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *cf.* Windsor v. United States, 699 F.3d 169, 184–85 (2d. Cir. 2012) (applying intermediate scrutiny to the Defense of Marriage Act after comparing LGBT persons to women).

45 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

46 Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

47 517 U.S. at 631 (looking at statutory language to determine that the law, on its face, "imposes a special disability upon [LGBT] persons alone.").

48 539 U.S. at 581–82 (O'Connor, J. concurring) (noting that, aside from criminalizing one particular type of sexual conduct that effectively "brands all homosexuals as criminals," Texas had in the past stipulated that its anti-sodomy law "legally sanctions discrimination against homosexuals in a variety of ways.").

49 133 S. Ct. at 2693–95 (looking to the legislative history, text of statute, and name of the Act to discover the purpose).

50 Indeed, North Carolina's HB2, colloquially referred to as the "Bathroom Bill," is but one recent example of this shift. The bill has been widely decried as having the practical effect of both stigmatizing trans people and foreclosing safe access to restrooms for trans people. *See* GAVIN YAMEY, DUKE GLOBAL HEALTH INSTITUTE, POLICY BRIEF: HOW HB2 THREATENS THE HEALTH OF NORTH CAROLINIANS, 2–4 (2016), https://globalhealth.duke.edu/sites/default/files/policybrief-how_hb2_threatens_the_health_of_north_carolinians.pdf. However, the bill's stated purpose is to provide businesses with "consistent statewide laws and obligations." H.R. 2, 2016 Gen. Assemb., 2d Extra Sess., 2016 N.C. Sess. Laws 3.

other types of discrimination—i.e. race, class, gender, etc.—to create multiplicative layers of discriminations for these subgroups.

II. RACE, LAW, & BLACK LGBT FAMILIES

As previously mentioned, this comment evaluates the potential equal protection challenges to a hypothetical foster care law that, without directly eliminating same-sex couples as candidates, would negatively and disproportionately affect the group. This hypothetical legislation is modeled after proposed Kansas Senate Bill No. 158, commonly referred to as the Kansas CARE Act, which sought to enact a new CARE family program for fostering families in early 2015.[51]

The Act is a prime case study to analyze an equal protection challenge. If enacted, CARE would likely exclude most LGBT people from a Kansas foster care placement program designed to provide greater monetary support and parental discretion. It would also disproportionately harm potential Black foster care families. However, this law would be multiplicatively harmful to Black LGBTs, who, because of current precedent surrounding intent, would be unable to challenge this law either on the basis of race or sexual orientation.

Also, unlike other laws that could also be challenged under other federal legistion, the Fourteenth Amendment would likely provide the only avenue of relief.[52] While the federal government does pass legislation that affects state foster care systems, the current federal framework is limited primarily to creating funding incentives which ensure that foster care programs exist in each state and that there are adequate measures in place to prevent child abuse.[53] These laws provide significant leeway for the state legislatures to determine the ways in which the federal laws are implemented in their individual states and often allow states to choose whether to opt into federal programs.[54] As such, foster care law is particularly well-suited to serve as a case

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51 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess. (Kan. 2015).

52 When the CARE Act was under consideration, Congress was considering the Equality Act, H.R. 3185, 114th Cong. (2015), which would amend the Civil Rights Act of 1964 to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation. If enacted, the Equality Act could have provided another avenue of redress for potential litigation. For the purpose of this comment, I intend to focus on a law that is entirely within the purview of a state's jurisdiction. The Kansas Act Against Discrimination, which is the state's main anti-discrimination legislation, does not protect against discrimination based on sexual orientation. KAN. STAT. ANN. § 44-1009(a)(1)–(9) (2012).

53 Anne Lacquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J. L. & PUB. POL'Y 267, 286–90 (2009) (discussing the current framework of laws surrounding foster care).

54 *See* THE CHILDREN'S BUREAU, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION, 1 (2015) ("The primary responsibility for child welfare services rests with the States. Each State has its own legal and administrative structures and programs that address the needs of children and families."); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA'S CHILDREN 12–13 (2014) (discussing the financial incentives granted

study for an equal protection argument because they are unlikely to be resolved through federal legislative means that can create non-constitutional rights of action.[55]

Many scholars have already written on the problematic nature of the disparate impact faced by LGBT families. What is often overlooked, however, is how LGBT families of color—particularly Black LGBT families—would disproportionately experience this disparate impact. The disproportionately negative outcome facing these particular families deserves to be considered in the general discussion of why such laws are problematic. The next subsection will provide an academic, demographic snapshot of Black LGBT families in order to provide necessary context when considering the potential discriminatory impact of the CARE Act and how such laws cause a greater negative effect on both the Black and LGBT communities as a whole than may have otherwise been thought.

A. Situating Black LGBT Families into the Broader Black & LGBT Family Dynamic

1. A Brief Note on Intersectionality

Before delving into the Black LGBT family framework, it is important to first highlight the way in which this comment discusses that intersectional group. Intersectionality is the overarching idea that social identities "are organizing features of social relationships, and how these social identities mutually constitute, reinforce, and naturalize one other."[56] This can be understood as both an individual experience, as a way to better understand the interdependent nature of greater societal power structures,[57] or to focus particularly on those with multiple subordinate statuses (i.e., Black feminist theory).[58] This comment uses an intersectional framework to focus on two subordinated statuses—those who are both Black and LGBT—to highlight the multifaceted discrimination likely to be faced by this particular group in the context of a proposed bill as a way to better understand the governmental power affecting both the Black and LGBT communities as wholes.[59]

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to states in exchange for general increased state-based legislation and enforcement, as well as explaining the varying degrees of state participation in the program).

55 *Cf.* Equality Act, H. R. 3185, 114th Cong., (2015) (proposing an amendment to the Civil Rights Act to prohibit discrimination on the basis of sexual orientation).

56 Leah R. Warner & Stephanie A. Shields, *The Intersections of Sexuality, Gender, and Race: Identity Research at the Crossroads* 68 SEX ROLES 803, 803–4 (2013).

57 *Id.*

58 *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (recognizing the inherent problem with ignoring intragroup differences and how those tensions create greater marginalization for the internally marginalized within a particular group).

59 Due to the availability of research on the subject, this comment primarily focuses on Black lesbian, gay, and bisexual families. However, some of the relied upon studies focus generally on families of

Until relatively recently, the Black LGBT experience has been largely overlooked in the discourse of LGBT equality.[60] This erasure has many root causes, including the staffing of advocacy groups, tokenization, and hostility to intersectionality in either traditionally Black or queer "safe spaces,"[61] but is often attributed to the LGBT movement's early comparison of its struggle to the civil rights struggle of Black Americans in the 1950s–80s.[62] This controversial comparison became the focal point for people who disparaged the comparison as disrespectful and inappropriate,[63] and continues to be an important comparison in today's legal discourse.[64] This comparison has created a dichotomy of sorts between the "Black experience" and the "LGBT experience."[65] Recognizing the intersectional identities of Black LGBT people is necessary to deconstruct the stereotype that the LGBT community is primarily affluent, well-educated, and white.[66] Contrary to this popular ste-

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color, which incorporate other groups who have experiences distinct from the general "Black LGBT" identity that are not fully considered in this comment.

60 *See, e.g.*, Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1363 (2000) ("[I]ntersectionality has addressed primarily, if not exclusively, the synergistic relationship between patriarchy and racial subordination.").

61 Ashleigh Shackelford, *The Politics of Erasure: Too Queer to Be Black, Too Black to Be Queer*, FOR HARRIET, http://www.forharriet.com/2015/12/the-politics-of-erasure-too-queer-to-be.html#axzz43aERxHIh (last visited Mar. 21, 2016) (discussing the erasure of the Black queer person in different spaces) .

62 *See* SEAN CAHILL & SARAH TOBIAS, POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILIES [hereinafter POLICY ISSUES] 27–28 (2007) (describing the efforts of the religious right for the past two decades as "pitting gay people against people of color" by constructing a narrative of "special rights" that are compared to civil rights).

63 *Id.*; Karen Bates, *African Americans Question Comparing Gay Rights Movement to Civil Rights*, NPR (July 2, 2015, 4:30 PM), http://www.npr.org/templates/transcript/transcript.php?storyId=419554758 (highlighting the differences between the LGBT movement and the Black civil rights movement); Paul Brandeis Raushenbush, *African-American vs. Gay Civil Rights Is a False Choice*, HUFFINGTON POST (May 20, 2014, 9:35 AM), http://www.huffingtonpost.com/paul-raushenbush/african-american-gay-civil-rights_b_5353878.html.

64 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2636 n.5 (2015) (Thomas, J. dissenting) (outlining the history of slavery and anti-miscegenation laws as an "offensive and inaccurate" comparator to marriage equality); Brief of the Organization of American Historians as *Amicus Curiae* in Support of Petitioners at 36–37, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (comparing the continued discrimination of the LGBT community to anti-miscegenation laws).

65 *See* Hutchinson, *supra* note 5, at 1365 (noting the main criticisms of intersectional theory in this arena as wasteful and likely to "hobble 'gay rights' theory"); THE NEW BLACK (California Newsreel 2013) (discussing the negative political consequences of comparing the Black civil rights movement to LGBT civil rights struggles) .

66 *See* Hutchinson, *supra* note 5, at 1378 ("The theoretical backdrop to anti-gay and lesbian rights discourse is an image of gays and lesbians as a "wealthy, white, privileged class, who, unlike traditional 'minorities,' do not merit legislative civil rights protection or heightened judicial review of their claims of governmental discrimination.").

reotype, non-white people are more likely to identify as LGBT when compared to their white peers.[67] The lifestyles of LGBT people of color—whether they are Black, Latino, Hispanic, or Asian—are quantitatively and qualitatively distinct from the affluent white stereotype and can create either additive or multiplicative challenges on the individual with that intersecting identity.[68] A failure to include these intersectional voices in depictions and understandings of what it means to be an LGBT person, in turn fails to consider how the impact of certain legislation will impact a large portion of the LGBT population.[69]

2. A Demographic Snapshot

With this background in mind, we can now situate Black LGBT (BLGBT) families within the larger framework of both Black and LGBT Americans. As a general, preliminary matter, many BLGBT people more readily associate with their racial identity as opposed to their sexuality. There are many reasons for this, but a predominant reason is that this group reports finding a greater sense of community within Black communities than within LGBT communities.[70] Also, for many BLGBT people, self-interest is linked to race. This often leads to a belief that equates making decisions that are "good for the race" to what is good for the BLGBT individual and/or that individual's family.[71] This is particularly true for young BLGBTs, who often balk at the tokenism in predominantly white LGBT spaces[72] and who recognize that the visual immutability of skin color creates camaraderie in protesting racial issues—for example, joining alongside other Black youth to protest police brutality—in a way that their sexuality does not. In contrast, more than half of BLGBT parents believe the LGBT community does not address their primary concerns: economic and racial injustice, and equality.[73]

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67 Gary J. Gates and Frank Newport, *Special Report: 3.4% of Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx (showing that while 4.6% of Blacks, 4.0% of Hispanics, and 4.3% of Asians identified as LGBT, only 3.2% of whites did, which was found to be statistically significant in spite of the larger general population of white Americans).

68 *See* Warner, *supra* note 56, at 804 (explaining the effects of systems of inequality on individuals with multiple subordinate statuses).

69 Mignon R. Moore, *Articulating a Politics of (Multiple) Identities: LGBT Sexuality and Inclusion in Black Community Life*, 7 DU BOIS REV.: SOC. SCI. RES. ON RACE 315, 316 (2010).

70 *Id.* at 318.

71 *Id.*

72 *See, e.g.*, Shackelford, *supra* note 61 (discussing her experiences attending queer spaces as a Black woman).

73 MOVEMENT ADVANCEMENT PROJECT ET AL., LGBT FAMILIES OF COLOR: FACTS AT A GLANCE 5 (2012).

For these reasons, as well as other societal factors that segregate communities by race,[74] Black LGBT families are highly likely to remain in Black communities and observe a majority of the community's norms. However, despite the desire to connect with the Black community, it is an unfortunate but persistent fact that Black communities are more likely to resist LGBT equality and their family members living as openly gay, lesbian, bisexual, or trans.[75] Often, this conversation is couched within religion, the idea of traditional family values, and the general repression of open discussions of sexuality.[76]

Traditionally, much of the Black community revolves around the Black Christian Church. For many, if not most, the Church is the center of information, education, and resources, and the necessity of that community is often prioritized above other desires or needs.[77] Whether social or professional, it is typically an ever-present force within all-Black gatherings. And while many churches have aggressively fought for gay rights, and many more have come forward in opposition to government intervention harming LGBT individuals without supporting the "lifestyle,"[78] there still remains a large portion of the Black community that wholly rejects the LGBT community and family members who identify with it.[79] Moreover, among the many Black people who do accept their LGBT family members, same-sex attraction is still considered a vice that should be managed or not discussed out of fear that it may "confuse the children,"[80] which can cause many Black LGBT families and youth to feel isolated and suppress their identities.[81] This, in turn, causes many BLGBT people to remain closeted for fear of rejection and perpetuates the group's erasure.

Moving to family dynamics, it is first important to note that while the perceived typical or stereotypical household model is a (married), two-parent household with children, less than 25% of American families comport with

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74 Alexander Kent & Thomas C. Frohlich, *The 9 Most Segregated Cities In America*, HUFFINGTON POST (Aug. 27, 2015, 3:36 PM), http://www.huffingtonpost.com/entry/the-9-most-segregated-cities-in-america_us_55df53e9e4b0e7117ba92d7f (explaining how federal segregationist policies in the 1930s, as well as the disproportionate economic fallout on Black communities, have perpetuated a cycle of segregated zip codes).

75 *See* Tonyia M. Rawls, *Yes, Jesus Loves Me*, *in* BLACK SEXUALITIES: PROBING POWERS, PASSIONS, PRACTICES, AND POLICIES 327 (Juan Battle & Sandra L. Barnes, eds. 2010) (discussing the ostracization of Black LGBT people by the community).

76 THE NEW BLACK (California Newsreel 2013) (discussing how church discourse framed the Black conversation about LGBT issues).

77 *Id.*

78 *Id.*

79 *See* Moore, *supra* note 69, at 317 (describing the greater degree of express disapproval of homosexuality and its perceived immorality).

80 THE NEW BLACK, *supra* note 76, at 33:42.

81 *Id.*

this family structure.[82] While many Black families do conform to the stereotypical model, a larger percentage of Black households live with extended family in networked family structures.[83] While all groups have extended families that they love and support in many ways, a networked structure is distinct from the stereotypical household model because of the normalcy and disproportionate degree of care and accepted responsibility towards non-spouses or -children. Network families accept and supply levels of responsibility and support to the entire system as commonly and as normally as do parents towards their children in the stereotypical family structure. As Black LGBT people are more likely to remain in their racial communities, the likelihood of being a member of a networked structure similarly increases.

Networked families increase the likelihood of a range of responsibilities for any LGBT person of color.[84] In addition to any biological children, Black LGBTs are more likely to have the additional responsibility of parenting other children within their network, including siblings, nieces and nephews, or grandchildren.[85] This in turn creates a unique assortment of housing, economic, and health concerns.[86] Importantly, this also creates unique obstacles in the legal sphere, as most of the policies which govern family life define "family" as the stereotypical framework.[87]

Despite struggles with acceptance, BLGBT families play a significant role within this framework and are actively involved in the creation of diverse and healthy Black families.[88] Overall, "an estimated 2 million children are being raised in LGBT families," and this figure is expected to increase in coming years.[89] Black same-sex couples, in particular, are more likely to raise children than their white peers.[90] Sixty percent of Black female same-sex households include a parenting mother, which is nearly the same rate as married heterosexual couples.[91] As of the 1990 census, 5% of partnered gay/bisexual men had children in their households.[92]

People of color are also more likely to be foster parents.[93] Currently, there are more than half a million children in the United States foster care

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82 *Family Recognition*, NATIONAL BLACK JUSTICE COALITION, http://www.nbjc.org/issues/family-recognition (last visited May 21, 2017).

83 Sean Cahill et. al., *Partnering, Parenting and Policy: Family Issues Affecting Black Lesbian, Gay, Bisexual, and Transgender (LGBT) People*, 6 RACE AND SOC'Y 85, 87 (2003) [hereinafter *Partnering*].

84 *Id.*

85 *Id.*

86 *Id.*

87 POLICY ISSUES, *supra* note 62, at 7.

88 MICHELE K. LEWIS & ISIAH MARSHALL, LGBT PSYCHOLOGY: RESEARCH PERSPECTIVES AND PEOPLE OF AFRICAN DESCENT 123 (2012).

89 MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 73, at 2.

90 *Id.*

91 LEWIS & MARSHALL, *supra* note 88, at 123.

92 *See Partnering*, *supra* note 83, at 88.

93 MOVEMENT ADVNCEMENT PROJECT ET AL., *supra* note 73, at 3.

system, with over 100,000 of those children awaiting adoption.[94] Approximately 14,100 children live with a lesbian or gay foster parent, which represents around 3% of total foster children.[95] More than half of these same-sex couples are people of color.[96]

Unfortunately, the high rate of fostering within Black LGBT communities is plagued with significant difficulties. While same-sex foster parents generally have the highest levels of education,[97] that statistic changes when looking only at Black same-sex families or same-sex families of color. For example, Black LGBT families are statistically less likely to have higher degrees of education and are more likely to struggle financially, with 32% of Black male same-sex couples and 28% of Black female families living in poverty.[98] The children raised in these families are also more likely to face the double discrimination of color and sexuality when going to school.[99]

These families also face restricted access to health insurance.[100] In many states where the majority of health insurance is provided by employers, Blacks are underrepresented in the percentage of employer-provided healthcare.[101] This reduced access to preventative and routine care has led to higher rates of disease and illness.[102] Additionally, until very recently, many states have refused to require the extension of benefits to LGBT partners (and only now extend to married couples).[103] Many LGBT families must purchase more expensive private insurance, which is a main underlying cause for why a disproportionate percentage of LGBT people go without healthcare.[104] Combining these two factors, Black LGBT families will likely continue to have disproportionately lower rates of healthcare, as the newly recognized marriage right will

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94 Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, THE WILLIAMS INST. & URBAN INST. (2007), http://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF.

95 *Id.* at 15.

96 MOVEMENT ADVNCEMENT PROJECT ET AL., *supra* note 73, at 3.

97 Gates et al., *supra* note 94, at 11.

98 MOVEMENT ADVNCEMENT PROJECT ET AL., *supra* note 73, at 3.

99 *Id*.

100 *Id*.

101 *Id*.

102 While the CDC explains that preventative healthcare helps to "avoid or delay the onset of disease [and] keep diseases...from becoming worse or debilitating," only about half of Americans use preventative services at the recommended rate. Those who underuse or forego preventative services are those Americans "experiencing social, economic, or environmental disadvantages." CDC, *Preventive Health Care*, (June 12, 2013), https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/preventivehealth.html.

103 Tara Siegel Bernard, *Fate of Domestic Partner Benefits in Question After Marriage Ruling*, N.Y. TIMES: YOUR MONEY (June 28, 2015), https://www.nytimes.com/2015/06/29/your-money/fate-of-domestic-partner-benefits-in-question-after-marriage-ruling.html.

104 MOVEMENT ADVNCEMENT PROJECT ET AL., *supra* note 73, at 3.

still require higher rates for what are now pre-existing conditions that may not have been present when the family was first created.

These struggles become more complex when they are recognized within the broader context of Black family life. As previously discussed, many Black families operate as networked families that include extended relatives. Isolation and rejection from family results in diminished opportunities of support with all groups, but has a greater likelihood of occurring in families where older generations provide primary supportive roles. Across races, acceptance of LGBT family members decreases as the age of the non-LGBT family member increases, which can cause added stress and increase the likelihood of rejection in these families. Families concerned about 'non-ideal'[105] living arrangements for children may be less likely to support the same-sex family members within their network, which in turn can lead to a lack of emotional and financial support that can prevent otherwise interested potential parents from fostering.[106]

This outcome is particularly alarming when looking at the rates of Black, LGBT, and BLGBT children currently waiting for placement within the foster care system. Approximately 24% of girls and 10% of boys aging out of the foster care system reported a sexual orientation other than heterosexual.[107] Black children are also overrepresented in the system—24% of children in foster care are Black,[108] even as Blacks represent only 13.3% of the overall population[109]—likely resulting from racist policies that remove Black children from their families at disproportionate rates when compared to their white peers for similar behavior.[110] As a combined identity, Black LGBT youth face constant, multifaceted struggles, including school bullying, lack of

105 The quoted phrase is used to depict the type of language used by some in older generations who disapprove of LGBT sexual identities—not as an appropriate or correct characterization of LGBT people.

106 Successful integration into life activities, of which fostering is one, requires, or is at least enhanced by, certain factors. *See* Yvette Taylor, *Complexities and Complications: Intersections of Class and Sexuality, in* THEORIZING INTERSECTIONALITY AND SEXUALITY 50 (Yvette Taylor, et. al., eds. 2011) (describing the requirement of capital and familial territory as influential factors in being a successful "out" person).

107 CHILD WELFARE INFORMATION GATEWAY, SUPPORTING YOUR LGBT YOUTH: A GUIDE FOR FOSTER PARENTS 4 (May 2013), https://www.childwelfare.gov/pubPDFs/LGBTQyouth.pdf.

108 CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS 2014, 9 (Mar. 2015), https://www.childwelfare.gov/pubPDFs/foster.pdf.

109 *U.S. Census Quick Facts*, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Mar. 4, 2017).

110 *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at vii (2002) (discussing the systems which remove Black children from their families through inferior treatment).

acceptance within the home, physical abuse, and damaging ideologies that diminish personal autonomy and self-worth.[111]

While there are a handful of specialized group home living options for LGBT youth that respect and allow the foster children to express their identities, most are found in large metropolitan areas, and none can possibly manage the thousands of LGBT youth that are currently in the foster care system.[112] Black, LGBT, and BLGBT youth would be well served by States who increase foster care opportunities with families who understand their unique needs. Laws that disincentivize BLGBT couples from providing an accepting foster care environment to these particular children harm these children regardless of whether those laws could be, in theory, rationally related to a legitimate government purpose.

B. Kansas Senate Bill No. 158 – CARE Family Program

With this framework in mind, we turn to the illustrative legislation: the suggested Kansas CARE program for foster parents. In early 2015, the Kansas Senate Judiciary Committee proposed a substantial addition to the state's foster care program.[113] The recommended program would dramatically increase the monetary compensation for CARE-approved families in relation to all other foster parents[114] and would provide CARE parents significant autonomy over where and how the child will be educated.[115] To be qualified for such benefits, however, a CARE family applicant would have to conform to the following criteria. The family must have:

(1) [Been a married][116] team for at least seven years, in a faithful, loving and caring relationship and with no sexual relations outside of the marriage;
(2) submit[ted] to a background check on the [married couple];
(3) no current use of tobacco by anyone in the family's home;
(4) no history of unlawful drug use by anyone in the family's home;

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111 *See generally* Benjamin Ashley, *The Challenge of LGBT Youth in Foster Care*, 1 TENN. STUDENT L. J. 47, 63 (2014) (calling for protections against harassment and bullying faced by LGBT youth in foster care).

112 *Id.* at 62–63 (recognizing the specialized group efforts of organizations like Green Chimneys in New York City, Gay and Lesbian Adolescent Social Services or "G.L.A.S.S." in Oakland, California, and the Waltham House in Massachusetts).

113 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess. (Kan. 2015).

114 *Id.* § 1(d)(4) ("The secretary shall pay each CARE family at a rate substantially higher than that of other foster care homes.").

115 *Id.* § 1(f)(1) ("a CARE family shall determine how best to meet the educational needs of any child placed with the family and shall have sole discretion in the educational placement of the child. . . . The secretary shall reimburse the CARE family for educational expenses incurred for each child who is not enrolled in a school district . . . .").

116 The following criteria are pulled directly from the proposed legislation. In light of *Obergefell v. Hodges*, it would be unlikely that any such legislation would use the "husband" and "wife" characterization for married persons, and so for the purposes of the hypothetical legislation in this comment, I have changed the wording accordingly.

(5) no alcoholic liquor or cereal malt beverages in the family's home;
(6) both [parties to the marriage] have attained at least a high school diploma or equivalent;
(7) [at least one of the married adults], or both, does not work outside the home; [and]
(8) the family is involved in a social group larger than the family that meets regularly, preferably at least weekly.[117]

S.B. 158's purported goal is to "avoid additional trauma to the [foster] children and give them a traditional home environment during the time they are in foster care."[118] Senator Forrest Knox, the bill's architect, championed the proposed legislation as an initial step to revolutionize the Kansas foster care program to incentivize "normal" families to enter the foster care system.[119] Eventually, the Senator hoped that the CARE program would replace current foster care criteria.[120] In light of *Obergefell*, the Kansas Senate has held the bill, whose original language used "married man and woman" rather than married couple. However, the bill still presents a particularly apt example of the type of legislation that an LGBT family could encounter in the near future.

This legislation, and legislation like it, would have an obvious disparate impact on the LGBT community in Kansas. *Obergefell v. Hodges*, which extended the fundamental marriage right to lesbian, gay, and bisexual people, is only two years old. As Kansas did not recognize same-sex marriages before this decision,[121] almost all same-sex couple applicants would fail to meet the first criteria for CARE program parents. While it is possible that some same-sex applicants lived in one of the very few states that recognized same-sex

117 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess., § 1(b)(1)–(8) (Kan. 2015). The bracketed changes reflect an attempt to ensure that the bill's language is grammatically correct and reflects the ability of gay and lesbian couples to be considered married in Kansas, which did not appear to be contemplated in this bill.

118 Joshua Vail, *Knox Seeking to Pilot New Class of Foster Families*, THE CHANUTE TRIBUNE, Feb. 17, 2015, http://www.chanute.com/news/article_411f1820-b71f-11e4-acd5-3733c02c96d7.html [hereinafter *Foster Families*] (discussing the testimony of 114th District Senator Forrest Knox at the Kansas Senate Judiciary Committee meeting about the purpose of S.B. 158).

119 Bryant Lowry, *Kansas Bill Would Reward Foster Parents Who Are Married, Faithful, and Alcohol-Free*, THE WICHITA EAGLE (Feb. 10, 2015), http://www.kansas.com/news/politics-government/article9711821.html. Specifically, the Senator promoted the bill because "we need more normal homes as foster homes. And how do you get normal? When I say normal, I just mean an ordinary home with a mom and dad who loves [sic] the kids. . . . It's no secret I'd like to see church people. In Chanute, Kansas, there's no synagogue. It's church people." *Id.*

120 *Id.*

121 *State of Kansas*, MARRIAGE EQUALITY USA, http://www.marriageequality.org/region_kansas (last visited Oct. 27, 2015).

marriage for more than seven years,[122] this criteria would still disproportionately affect same-sex couples.

Moreover, the social and economic position of BLGBT people[123] would result in this legislation doubly affecting these families. As previously discussed, BLGBT couples are more likely to have networked families and so are less likely to be married than their white peers and thus. Additionally, because of the heighted hostility towards LGBT people in Black communities, open BLGBT couples are more likely to be ostracized from their families and church communities, making them less likely to be a part of "a social group larger than the family that meets regularly, preferably at least weekly," as required by the eighth criterion.[124] Finally, due to the myriad issues relating to healthcare costs, familial responsibilities, and general access to education, BLGTB couples are less likely than both Black heterosexuals and White LGBT people to have the financial freedom to allow one spouse to stay at home full time.

III. RATIONAL BASIS PLUS AND DISPARATE IMPACT

A. Applying Rational Basis Plus

The qualifications for the proposed Kansas Care Act would likely eliminate most same-sex families from the potential CARE family pool. Section 1(b)(1) states that an applicant family must be comprised of a married team that has been together for at least seven years.[125] However, before the *Obergefell* decision in 2015, which extended the fundamental marriage right to same-sex couples, Kansas limited marriage to "two parties who are of the opposite sex."[126] While it is possible that some same-sex Kansas partners left the state to marry or were married out of state and moved to Kansas in the past few years, for the majority of same-sex couples, the CARE Act disqualifies them from participation in the program.

Unfortunately, however, if an aggrieved same-sex couple challenged the Kansas CARE Act, a federal court would likely rule the law constitutional, even under rational basis plus, because of the intent requirement that has been inserted into equal protection jurisprudence. Even under the Court's

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122 As of February 2016, only same-sex couples from four states—Massachusetts, Connecticut, Vermont, and Iowa—would comply with these requirements. *State-by-State History of Banning and Legalizing Gay Marriage, 1994–2005*, PROCON.ORG, http://gaymarriageprocon.org/view.resource.php?resourceID=004857 (last updated Feb. 16, 2016, 1:44 PM).

123 *See infra* Part III.A and accompanying text.

124 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess., § 1(b)(8) (Kan. 2015).

125 *Id.* § 1(b)(1).

126 KAN. STAT. § 23-2501 (2014), http://kslegislature.org/li_2014/m/statute/023_000_0000_chapter/023_025_0000_article/023_025_0001_section/023_025_0001_k.pdf.

most critical form of rational basis plus review, the plaintiff must still show that the challenged legislation is not a legitimate government interest.

While Senator Knox's statement may make the CARE Act may seem evidently discriminatory, the Supreme Court has made clear that statements made by one legislator cannot be used to impute an invidious intent to the entire legislative body where there is general silence in the legislative history.[127] Additionally, in *Burns v. United States*, the Court held that silence cannot be construed as invidious intent when the textual language does not require such a conclusion.[128]

S.B. 158 was introduced on February 5, 2015 by the Senate Committee on Judiciary,[129] and aside from one closed hearing, the only legislative evidence would be the original text of the bill,[130] which read "a husband and wife team married for at least seven years" rather than "a married team."[131] However, this alone would likely be insufficient to prove animus because, at the time of drafting, the state had a law defining marriage as between one man and one woman.[132] While a plaintiff could argue that this alone is enough to show "a bare . . . desire to harm a politically unpopular group,"[133] the novelty of the *Obergefell* decision would likely dissuade a tribunal from imputing discriminatory animus to a legislature that amended the law's problematic language after *Obergefell* made the statute's language problematic.

It is also unlikely that Senator Knox's statements to local Kansas news outlets will rise to a constitutionally problematic level. While his use of words like "normal" and "traditional"[134] families seem to be an employment of dog-

127 *See* United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); S. Wine and Spirits of America, Inc. v. Div. of Alcohol and Tobacco Control, 731 F.3d 799, 807 (8th Cir. 2013) (explaining that an article that purports to explain one of the sponsors' intentions for a particular bill were insufficient to impute to the whole).

128 Burns v. United States, 501 U.S. 129, 136 (1991).

129 *SB 158*, KSLEGISLATURE.ORG, http://www.kslegislature.org/li/b2015_16/measures/sb158/ (last visited May 21, 2017).

130 *Id.*

131 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess., § 1(b)(1) (Kan. 2015). As noted previously, this comment amended the original proposed legislation to replace the phrase "a husband and wife team" to "a married team" as the legislation was proposed before the *Obergefell* decision.

132 KAN. STAT. ANN. § 23-2501 (2016).

133 United States Dep't of Agr. v. Moreno, 413 U.S. 528, 534 (1973).

134 *See Foster Families*, *supra* note 118; Lowry, *supra* note 119.

whistle politics,[135] and his preference for "church people" (which, by the Senator's admission, excludes followers of Judaism)[136] shows perhaps a personal prejudice, those prejudices prove the opinion of only one of several legislators. Supreme Court precedent is clear that the opinion of one or two legislators is insufficient to impute a discriminatory intent to an entire assembly,[137] and is therefore unlikely to sway the Court away from its presumed deference.

A potential couple would be left with unwinnable arguments to prove a discriminatory intent. While the Care ACT would likely disqualify many families who would do an excellent job caring for foster children,[138] this is insufficient evidence to prove a bare desire to harm a politically unpopular group. Both federal and state research groups frequently present data on the trauma faced by children in foster care. If the legislature were to focus its priority on the wellbeing of children and incentives to recruit new foster families, as it has done in virtually every summary or commentary by the bill's promoter,[139] then there is no legislative evidence to show a desire to harm the LGBT community and the constitutional challenge fails. Because the plaintiff cannot prove intent, the constitutional claim fails, as mere disparate impact is always insufficient.[140]

B. The Disparate Impact on the Black LGBT Family

While disparate impact may be insufficient to win a constitutional challenge, it does not mean that the negative results felt by impacted communities are not severe. Here, the disparate impact felt by the general LGBT community described above is compounded on Black LGBT couples. While such couples would face the same constitutional barriers as their non-Black peers, the proposed law also creates significant hurdles for straight Black citizens, and so the effect is compounded for Black LGBTs as members of both groups. To begin, the statute frames the requirements of a CARE family

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135 Dog whistle politics is the employment of coded language surrounding political messaging that would mean one thing to the general population but has within it embedded, targeted, and often hurtful language towards a specific group. *See generally* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS (2014).

136 *See* Lowry, *supra* note 119.

137 *See* United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.")

138 *See supra* Part II.B and accompanying text.

139 *See,e.g.*, An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess. (Kan. 2015).

140 *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (holding that intent is required to prove an equal protection violation).

entirely discount networked families.[141] The first criteria of the program requires "a husband and wife"[142] couple (likely changed to a general married couple after *Obergefell*), which is reaffirmed by Senator Knox's desire to recruit "normal" families.[143] As previously mentioned, this stereotypical framework negatively affects a large percentage of Black networked families and the community's cultural trend toward networked family structures. Happy and functional families comprised of non-spousal/extended family units become disqualified for the program without adequate consideration of the health of the home.

Furthermore, the seventh criterion of the Act requires that at least one of the married adults, "or both, does not work outside the home."[144] Both straight and LGBT Black households are statistically more likely to have a lower median income, making it less likely that one spouse can remain inside the home.[145] Many of these families, if not already disqualified by the first criterion, would be disqualified by this rule.

Moreover, the proposed legislation's eighth criterion has a particular negative effect on Black LGBT individuals, which requires that the family be involved in a social group "larger than the family that meets regularly."[146] Both the plain language of the text and Senator Knox allude to a desire for "churchgoing" people to be involved in the CARE program.[147] This presents a particularly difficult situation for a Black LGBT person. While the Black community has traditionally revolved around the Church, and while Black LGBT people statistically prefer to remain within the Black community, the Black Church is often a great opposing force to LGBT equality.[148] Out Black LGBT people are therefore more likely to be rejected by these institutions than their white peers, even as they live and participate in the community.[149]

Finally, as previously mentioned, many Black LGBT people feel rejected by and reject general LGBT associations, which, as a cyclical problem, are commonly dominated by privileged white members of that community. This leads to feelings of tokenism and isolation, which decreases BLGBT participation, which in turn perpetuates the dominance of white community members. In this way, Black LGBT couples find themselves doubly shunned from opportunities to engage in community activities that would qualify them to

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141 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess., § 1(b)(1)–(8) (Kan. 2015).

142 *Id.* § 1(b)(1).

143 *See* Lowry, *supra* note 119.

144 *Id.* § 1(b)(7).

145 *See supra* notes 97–106 and accompanying text.

146 An Act Concerning the Revised Kansas Code for Care of Children, S. 158, 2015 Sess., § 1(b)(8).

147 *See* Lowry, *supra* note 119.

148 *See* Tonyia M. Rawls, *Yes, Jesus Loves Me*, *in* BLACK SEXUALITIES: PROBING POWERS, PASSIONS, PRACTICES, AND POLICIES 327 (Juan Battle & Sandra L. Barnes, eds. 2010) (discussing the ostracizing of Black LGBT people by their community and faith).

149 *Id.*

be CARE parents. Given the overt and subtle hurdles created for LGBT and Black communities within this proposed legislation, the compounded negative effects that these criteria would have in allowing Black LGBT families to become CARE families makes it highly unlikely that more than a handful of such families would qualify.

This is not to say that the State does not have a legitimate interest in regulating who becomes a foster parent—it makes logical sense to have at least one parent with a minimum level of education for the benefit of the foster child. There is also a rational basis for desiring a parent to remain in the home with the child or children and to encourage adults who are involved in the community to become foster parents. However, the legislation ignores cultural differences in certain communities and the general economic realities that require both parents to work, and removes otherwise loving potential foster families from the applicant pool. A two-parent working household, for example, does not result in significant negative impacts on children, and so the disproportionately negative impact that these requirements have on the certain communities do not seem to outweigh the benefit of diverse foster care options, particularly in light of the disproportionately high number of Black and LGBT children currently waiting for placement in the foster care system.

Despite this, the current framework provides no remedy for these families. While a Black LGBT couple may be more likely to feel the discriminatory impact of this law because of its negative effect on both Black and LGBT communities, their claim is as sure to fail as their straight Black or white LGBT peers. The CARE Act makes no facial mention of Black people or race at all, and both legislative and other secondary sources are devoid of any mention of a desire to limit Black Kansans from participating in the Care program. In fact, it is likely that there was no racial animus on the part of the Kansas legislators. Because the legislature did not intend any negative impact on the Black community, and because the legislative history does not show a consensus desire to harm a politically unpopular group (LGBT people), a Black LGBT couple would likely be unable to find remedy through a challenge based on either race or sexual orientation.

IV. A DIFFERENT TAKE ON EQUAL PROTECTION

The Kansas CARE program criteria would disproportionately inhibit Black LGBT families from enrolling in this advanced foster program while still operating within the constitutional bounds of current Equal Protection Clause jurisprudence. And while it is likely that proportionately greater numbers of BLGBT couples would be barred from the program, members from both the Black and LGBT communities as a whole would suffer as well. How, then, does an in-depth look at the particular Black LGBT subgroup add to the discussion or advancement of LGBT equality as a whole?

First, by looking at the intersections within any group, politicians, lawyers, and judges can more precisely identify the costs associated with a particular piece of legislation to determine if those costs outweigh the benefits that the law seeks to attain. In this instance, an intersectional analysis shows that the homes most likely to benefit some of the foster care system's most vulnerable children and teens (Black and LGBT youth) will be disproportionately rejected by and deterred from the Kansas CARE Program.

Second, an intersectional analysis highlights the weaknesses inherent in the current equal protection framework. As noted above, cultural and legal realities within both the LGBT and Black communities would allow the CARE Act to discriminate against these families while remaining constitutional. The Equal Protection Clause would protect neither group, even though the standard of review for LGBT communities is afforded a relatively low standard of scrutiny while race is afforded the highest that the Court can extend. Black LGBT families, existing in both worlds, feel this effect more acutely, and are as equally without remedy.

This is a direct result of the intent requirement embedded within each level of scrutiny. From *Moreno's* "bare . . . desire to harm a politically unpopular group"[150] language to the requirement in *Village of Arlington Heights v. Metropolital Housing Development Corp.* that a facially neutral law must be motivated by a desire to discriminate against a particular group,[151] the Court consistently requires that aggrieved plaintiffs prove that legislators intended to cause the resulting disparate harm that plaintiffs have experienced or will experience if the law is upheld. Too often, the necessity of concrete "proof" creates an insurmountable barrier.[152]

Prevailing social science uniformly shows that groups who are distrustful of other particular groups do not express that discomfort or dislike through overt epithets as they did in the 1960s and 1970s.[153] Moreover, enough cases have come before courts to put legislators on notice not to include direct mentions of a politically unpopular group on the face of the legislation or overtly in legislative records. And, even if a legislator affirmatively advocates the harm of a particular group, Supreme Court precedent rejects the notion

150 United States Dep't of Agr. v. Moreno, 413 U.S. 528, 534 (1973).

151 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

152 Eva Paterson & Susan K. Serrano, *Cuyahoga Falls v. Buckeye: The Supreme Court's "Intent Doctrine"—Undermining Viable Discrimination Claims and Remedies for People of Color*, *in* WE DISSENT: TALKING BACK TO THE REHNQUIST COURT 54, 64 (Michael Avery, ed. 2009).

153 *See, e.g.*, Shana Levin, *Social Psychological Evidence on Race and Racism*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 97, 99–102 (Mitchell J. Chang et. al. eds., 2003) (describing how "traditional" racism has given way to three generally new ways of thinking about racism). *See also* Paterson & Serrano, *supra* note 152, at 64.

that a legislator's active discrimination in the official legislative record can be used as proof that the entire lawmaking body intended to discriminate.[154]

The statements made by Senator Knox present a perfect example of how discriminatory desire is expressed in today's society. These statements are paradigmatic examples of symbolic prejudice. Such prejudice expresses negative feelings towards another group that the speaker believes is in some way "violating the traditional values they hold dear."[155] When the Senator remarked that "we need normal homes as foster homes. . . . I just mean an ordinary home with a mom and dad . . . . It's no secret I'd like to see church people,"[156] he never specifically referred to the LGBT community. However, these statements unfairly exclude the LGBT community from the norm by evoking well-known tensions between the community and those who would stereotypically identify as "church people." While the dichotomy between being "gay" and "churchgoing" is false, particularly in the Black LGBT community where members generally try to remain in Black communities highly influenced by the church, the implication of intent remains.

The implications of the Senator's statements may be easily understood to a reader but are less easily proven to a court. In all equal protection levels of scrutiny, the plaintiff bears the initial burden of proving the legislator's intent. As lawmakers bear no burden to prove their intent in the first instance, plaintiffs will find it increasingly difficult to prove intent through innuendo, particularly as societial animus evolves to more subtle forms of prejudice.

Equal protection jurisprudence must advance as expressions of prejudices advance. Legal scholars have for some time been in agreement that some change to the equal protection framework is needed, but disagree about the form of course correction.[157] However, despite the growing body of legal scholarship advocating change, it is unlikely that the intent requirement will

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154 *See* United States v. O'Brien, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); S. Wine and Spirits of Am., Inc. v. Div. of Alcohol and Tobacco Control, 731 F.3d 799, 807 (8th Cir. 2013) (explaining that an article that purports to explain one of the sponsors' intentions for a particular bill was insufficient to impute to the whole).

155 *See* Levin, *supra* note 153, at 101.

156 *See* Lowry, *supra* note 119.

157 *See, e.g.*, Sarah Erickson-Muschko, *What is the Purpose? Affirmative Action, DOMA, and the Untenable Tiered Framework for Equal Protection Review*, 101 GEO. L. J. 44, 45–46 (2013) (highlighting the inconsistent rationales for applying different levels of scrutiny to different laws depending upon the context in which the Court hears a case); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482–83 (2004) (critically examining whether the justifications that originally created the tiered framework still apply in the modern context); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 740–41 (2014) (attempting to resolve the flaw of suspect classifications in the modern tiered framework); Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1608–13 (2015) (arguing for the complete removal of the tiered classification framework to a form of heightened scrutiny based on rectifying a history of discrimination towards a particular group).

ever be entirely abandoned by the Court. It therefore becomes vital to find a way to modernize our conception of what constitutes "intent."

There are many ways to solve this problem, but it seems that the simplest answer, and perhaps the most effective, is rooted in Professor Henry Chambers' 2004 article, *Retooling the Intent Requirement Under the Fourteenth Amendment.*[158] Speaking in the context of race, Professor Chambers asserts that, given the malleability of the intent requirement, legislatures should be required to be aware of the obvious logical consequences that flow from their proposed laws and attribute those consequences to the legislature as if it were their intent.[159] He argues that while the unknowable purpose of the legislature is not irrelevant, the "presumed intent" inquiry is sensibly structured when courts focus on the discriminatory effects that will almost inevitably flow from the legislation.[160]

This solution is most sensible because it modernizes the courts' understanding of intent while avoiding the inevitable decades of confusion that would follow if the Court completely overruled the tiered scrutiny framework. Instead of confusion, courts could look at readily-available empirical evidence of the negative effects that legislation will have on a particular community as evidence of discrimination. Finally, and most importantly, courts could combat institutional structures of prejudice that evade review.

Some scholars argue that adequate implementation of the Equal Protection Clause requires doing away with the tiered scrutiny framework,[161] but overruling longstanding precedent can have lasting negative effects. Upending the entire framework will create massive uncertainty in state and federal executive branches, legislatures, and lower courts while an entirely new legal framework is created. It would destroy forty years of precedent and hundreds of Supreme Court and State Supreme Court decisions on the contours of the right, and would retard the equal protection conversation for years.

And yet, change seems necessary, and the Court retains the discretion and responsibility to overturn unworkable precedent[162] or precedent that no longer

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158 Professor Henry L. Chambers, Jr., is a constitutional and criminal professor at the University of Richmond School of Law. Henry Chambers, *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEM. POL. & C. R. L. REV. 611 (2004).

159 *Id.* at 627.

160 *Id.* at 620.

161 *See generally* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739 (2014) (attempting to resolve the flaw of suspect classifications in the modern tiered framework); Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1606 (2015) (arguing for the complete removal of the tiered classification framework to a form of heightened scrutiny based on rectifying a history of discrimination towards a particular group).

162 *Compare, e.g.*, Lochner v. New York, 198 U.S. 45, 63–65 (1905) (recognizing economic substantive due process) *with* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (overruling *Lochner*); Pennsylvania v. Union Gas Co., 491 U.S. 1, 14–19 (1989) (limiting sovereign immunity under the Fourteenth Amendment) *with* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 66 (1996) (overruling *Union Gas*).

comports with current notions of good governance.[163] The current standards for proving intent meet both criteria. By maintaining a standard that no longer defends against current methods of discrimination, the requirement fails to effectuate the Amendment's goals of maintaining equality. Thus, modifying the intent requirement to ease a plaintiff's burden of proof can allow substantive review of constitutionally problematic laws without eliminating the bulk of equal protection jurisprudence. The tiered scrutiny frameworks would remain, and a majority of the contours of the right would be preserved.

The most significant change would be a reworking of *Arlington Heights*, which first explained the burden of intent.[164] *Arlington Heights* instructed lower courts to look at specific factors to determine intent, including the "the legislative or administrative history," which "may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports,"[165] as well as "historical background" and the "specific sequence of events leading up to the challenged decision."[166] The Court was also clear that "[i]n many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population."[167]

An implied intent requirement modifies the Court's statements regarding disproportionate impact and adds an additional factor for plaintiffs to rely upon by allowing them to look at relevant data that was known and readily available to legislators at the time of enactment. For example, with the Kansas CARE Act, because the proposed legislation lists an assortment of criteria for applicants, legislators would be expected to know pertinent information about groups that would be affected by those criteria. Legislators would be expected to know that LGBT couples in Kansas were formally barred from entering into marriages with one another before the *Obergefell* decision and would therefore be disproportionately eliminated. Similarly, because income is a criterion, legislators would be expected to understand the social and racial statistics surrounding income inequality, and would be held accountable for understanding the logical effects of their decisions.

Critics might argue that legislators could not possibly be aware of every data point that could be affected by a particular bill. The implied intent requirement, however, does not require this significant burden. Rather, it requires only that legislators are held accountable for information obviously

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163 *Compare, e.g.*, Plessy v. Ferguson 163 U.S. 537, 548 (1896) (establishing that "separate but equal" comports with the requirements of equal protection) *with* Brown v. Board of Education 347 U.S. 483, 495 (1954) (overruling *Plessy*).

164 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

165 *Id.* at 268.

166 *Id.* at 267.

167 *Id.* at 266 n.15. *See also* Jefferson v. Hackney, 406 U.S. 535, 548 (1972) (rejecting a statistics-based theory of discrimination on the grounds that "given the heterogeneity of the Nation's population" the racial composition of any group of government beneficiaries would give rise to an inference of discrimination).

related to legislation. As discussed above, marriage equality and income inequality are topics that were widely discussed both before and at the time of proposal, and legislators cannot in good faith claim ignorance of those ideas. Legislators would not be held accountable for other, less apparent, disproportionately negative effects that the law may have. Instead, the burden would fall on groups most likely to be negatively affected to bring these issues to the legislators' attention before the bill is passed. In this way, the burden does not shift to the legislators entirely, but rather shifts a potential plaintiff's burden to an earlier point in time.

Under a presumed intent framework, intersectional understandings of the different groups that would be affected by new legislation would become critical and would foster greater interaction between historically marginalized groups and their government. Because legislators would only be held responsible for the obvious consequences of their actions, the legislature itself would not have the additional responsibility of conducting in-depth research on every possible demographic. Rather, analyses like the one conducted above would be created by interested private-sector parties and presented to legislatures to put them on notice of the potential harms of their legislation that they may have otherwise overlooked.

Most importantly, presumed intent would provide relief for plaintiffs who are currently underserved by the current equal protection framework. Black LGBT families in Kansas who would be disproportionately rejected from foster programs like the Kansas CARE program would have the ability to present their unique situation and highlight the bill's unfair negative effects on both them and the larger Black and LGBT communities to a legislature whose intent can be inferred by what it knew about its constituents, and could do so without fighting decades of Supreme Court precedent that imposes unwinnable hurdles for intent.

CONCLUSION

Many scholars argue the merits of extending heightened scrutiny to the LGBT community with varying degrees of success. These analyses are often conducted using the LGBT community as a whole to define the situation of the class. However, by analyzing judicial precedent through an intersectional framework, it becomes clear that the extension of heightened scrutiny may not provide the protection desired. Rather, one can see that the outmoded intent requirement embedded in equal protection jurisprudence would continue to pose problems even if heightened scrutiny is extended. Scholars, lawmakers, and judges should focus first on modernizing the intent requirement to more accurately reflect the ways in which animus is currently conveyed by both legislators and society.