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Are Gay Rights Clearly Established?: The Problems with the Qualified Immunity Doctrine

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ARE GAY RIGHTS CLEARLY ESTABLISHED? THE PROBLEMS WITH THE QUALIFIED IMMUNITY DOCTRINE

INTRODUCTION

"Texas and [the Tarrant County College District] do not like homosexuals." Jacqueline Gill learned this information from her department chair at Tarrant County College in Hurst, Texas, where Gill was a full-time temporary professor of English in 2009.[1] During the interview process, college officials informed her that teachers who successfully complete their initial one-year contract are "uniformly hired" into available permanent positions.[2] Despite receiving consistent high praise, Gill alleged that she was the only one, and far from the least qualified, among seven contract teachers who did not receive a full-time offer in 2010.[3] Gill's suit asserting violations of her equal protection rights by the department chair, the divisional dean, and the college settled out of court for $160,000 in March 2012, after the defendants' motions to dismiss and for judgment on the pleadings were denied.[4] In denying qualified immunity to the department chair and dean, the judge declared that the pleadings not only established a basis for the claim in violation of Gill's equal protection rights, but also because "in 2009, . . . the unconstitutionality of sexual-orientation discrimination lacking a rational relationship to a legitimate governmental aim was *clearly established*."[5] This ruling became an important indicator of the actual state of civil rights for sexual minorities when it recognized a clearly established constitutional guarantee related to sexual orientation despite the absence of statutory protections.[6]

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1. Gill v. Devlin, 867 F. Supp. 2d 849, 852 (N.D. Tex. 2012).

2. *Id.* at 851.

3. *Id.* at 852.

4. *Gill v. Devlin and Howell*, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/gill-v-devlin-and-howell (last visited Feb. 27, 2014).

5. *Gill*, 867 F. Supp. 2d at 857 (emphasis added).

6. *See id.* at 856–57. As of June 2014, only twenty-one states and the District of Columbia had laws or constitutional protections against employment discrimination on the basis of sexual orientation. *Equality Maps: Employment Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws (last visited June 16, 2014). These jurisdictions have clear, albeit not uniform, causes of action under state law for individuals who experience discrimination on the basis of sexual orientation.

Government officials who are sued under 42 U.S.C. § 1983 for violating an individual's constitutional rights are granted qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[7] Essentially, a plaintiff can only get her day in court if she can survive this initial obstacle of the government official's affirmative defense of qualified immunity. In *Gill v. Devlin*, the court provided a method to determine the existence of constitutional protection related to sexual orientation. It explained that by 2009, "the unconstitutionality of sexual-orientation discrimination lacking a rational relationship to a legitimate governmental aim [had been] clearly established."[8] It also stated that by 2009 a government actor should have known that discrimination against an individual on the basis of her sexual orientation violated her clearly established constitutional right, and that the actor would not be entitled to qualified immunity for such an action.[9]

Because the "clearly established" standard applied for qualified immunity is a high one, when a court grants or denies the immunity it should be demonstrating the sharp contours of a constitutional right. But if, as the *Gill* court held, it was clearly established that discrimination on the basis of sexual orientation was unconstitutional, then why did two other district court cases decided in the same year as *Gill* and featuring similar claims and facts come to different outcomes than *Gill*?[10]

Part II of this Comment provides the background for these three cases and suggests how the courts diverged in their reasoning.[11] Part III examines the qualified immunity doctrine through the lens of the constitutional rights associated with sexual orientation and demonstrates problems with the doctrine.[12] These problems hamper the courts' roles in clarifying constitutional rights and undermine the power of Supreme Court precedent that expanded the umbrella of constitutional protections.[13] Recent developments in the qualified immunity doctrine provide broader protection for defendants (particularly federal actors), make the standard of clearly established law more elusive, and discourage courts from defining rights in a way that

7. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

8. *Gill*, 867 F. Supp. 2d at 857.

9. *See id.*

10. *See generally* Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367 (N.D. Ohio Nov. 19, 2012); Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780 (D. Minn. Jan. 23, 2012).

11. *See infra* notes 19–69 and accompanying text.

12. *See infra* notes 70–213 and accompanying text.

13. *See infra* notes 76–82 and accompanying text.

puts government actors on notice of the existence of constitutional rights.[14] Constitutional protections for sexual minorities are a sharp lens for examining the qualified immunity doctrine because the key Supreme Court decisions eschew the standard legal formulations associated with the Equal Protection Clause and the Due Process Clause.[15] This characteristic allows less conscientious lower courts to skirt the key holdings or define the holdings with reference to dissenting arguments.[16]

Part IV suggests changes that should be made to restore the purpose of qualified immunity, which protects individuals from government actors clearly violating their known rights.[17] Currently the doctrine does not allow the courts to serve society by clarifying existing constitutional rights and interpreting those rights in light of society's evolved appreciation for human dignity.[18]

II. BACKGROUND

In 2012, three different homosexual plaintiffs brought employment discrimination claims before three different circuits. Each reached a different outcome. Jacqueline Gill and the Tarrant County College District settled after a Texas district court ruled that Gill had "plausibly alleged the violation of her clearly established equal-protection rights" and therefore denied qualified immunity to the defendants.[19] Sandra Ambris had her case dismissed by an Ohio district court that conflated her § 1983 equal protection claim with her employment discrimination claim under Title VII and rejected the applicability of the same Supreme Court decisions relied on by the *Gill* court.[20] Lastly, Sean Lathrop and the City of St. Cloud settled after a Minnesota district court ordered more fact development regarding whether he had alleged an equal protection violation.[21]

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14. *See infra* notes 83–94 and accompanying text.

15. *See infra* notes 95–144 and accompanying text.

16. *See infra* notes 145–162 and accompanying text.

17. *See infra* notes 214–222 and accompanying text.

18. *See infra* notes 214–215 and accompanying text.

19. Gill v. Devlin, 867 F. Supp. 2d 849, 859 (N.D. Tex. 2012); *see also Gill v. Devlin and Howell*, *supra* note 4.

20. Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *9–10 (N.D. Ohio Nov. 19, 2012); *cf. Gill*, 867 F. Supp. 2d at 856–57.

21. Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780, at *11 (D. Minn. Jan. 23, 2012); *see also St. Cloud Settles Officer's Discrimination Lawsuit*, WJON (Mar. 2, 2012), http://wjon.com/st-cloud-settles-officers-discrimincation-lawsuit/.

A. The Two Prongs of Qualified Immunity

The affirmative defense of qualified immunity arose in association with § 1983 claims to ensure that government officials would not be hampered by insubstantial suits.[22] This doctrine shields "government officials performing discretionary functions" from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[23] However, in explaining the rationale that even one of the highest government officials might not receive qualified immunity, the Supreme Court has emphasized the seriousness of the need for a measured and limited immunity for government officials: "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law."[24]

The traditional qualified immunity analysis involves a two-part objective query: (1) whether the facts alleged establish the violation of a federal statute or constitutional right; and (2) whether the right violated was a "clearly established statutory or constitutional right[] of which a reasonable person would have known."[25] In *Pearson v. Callahan*, the Court overturned a short-lived regime initiated by *Saucier v. Katz* that required courts to first address whether there was a violation of a constitutional right, and only then address the second prong of whether the right was clearly established.[26] Under *Pearson*, courts are no longer obligated to conduct a prong-one analysis if prong two

22. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1981). Congress originally passed the law now known as 42 U.S.C. § 1983 in 1871 as the first section of the "Ku Klux Klan Act." Enforcement Act of 1871, ch. 22, § 1, 17 Stat. 13, 13; *see also* KAREN M. BLUM & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 2 (1998), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/$file/Sect1983.pdf. The statute's modern existence as a civil cause of action against state officials who violate federal statutory or constitutional rights, regardless of whether they also violate state-based rights, began in 1961 with the Supreme Court's decision in *Monroe v. Pape*. *See id.*; *see also* Monroe v. Pape, 365 U.S. 167, 171–80 (1961). The Court applied § 1983 claims to government agencies through *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), extended a similar right of action to individuals whose constitutional rights had been violated by federal government officials.

23. *Harlow*, 457 U.S. at 818.

24. Mitchell v. Forsyth, 472 U.S. 511, 524 (1985).

25. *Id.* (quoting *Harlow*, 457 U.S. at 818); *see also* Greene v. Camreta, 588 F.3d 1011, 1021–22 (9th Cir. 2009) (granting qualified immunity under the second prong, but only after finding under the first prong that there had been a violation of the plaintiff's constitutional rights, and explaining that it utilized both prongs of the qualified immunity analysis so that it could "provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment"), *aff'd in part, rev'd in part*, 131 S. Ct. 2020 (2011).

26. Pearson v. Callahan, 555 U.S. 223, 227, 232 (2009) (citing Saucier v. Katz, 533 U.S. 194 (2001)).

results in there being no clearly established right.[27] Therefore, § 1983 cases need not identify a constitutional right that could then become "clearly established" by virtue of a court ruling and thereby put government actors on notice regarding future behavior.[28]

The Supreme Court has also recognized qualified immunity as an important protection for government officials from burdensome litigation by allowing a preliminary resolution of the question of law regarding whether the complaint alleges a violation of "clearly established law."[29] This means that the matter is typically ruled upon in summary judgment or motions to dismiss, either based on the pleadings or after narrow discovery on the immunity question alone.[30] Because the value is protecting an official from frivolous litigation, the Court has "repeatedly stressed the importance of resolving qualified immunity questions at the earliest possible stage of litigation."[31]

The "clearly established" requirement in qualified immunity analysis ensures that officials were on notice that their actions could violate an individual's right.[32] Furthermore, the Court has held that a single specific warning is not necessary to establish the right clearly, and neither is a general rule from a court's decision required: "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[33] There are two options for finding clearly established law in the absence of a statute or express constitutional right: "any cases of controlling authority in their jurisdiction," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[34]

B. Romer *and* Lawrence*: The Supreme Court Precedent Establishing Gay Rights*

An essential question raised by this Comment, then, is whether it is *clearly established law* that a government actor has violated an individ-

27. *Id.*

28. *See id.* at 236–37. It is possible for a defendant to win qualified immunity because the right was not clearly established under the second prong, but nonetheless appeal a first-prong holding that he violated the plaintiff's constitutional rights. *See Camreta*, 131 S. Ct. at 2029 (recognizing that the defendant would thereafter be barred from the conduct held to be a violation of a constitutional right and therefore had established an injury warranting standing for appeal).

29. *Mitchell*, 472 U.S. at 526.

30. *See* BLUM & URBONYA, *supra* note 22, at 87–89.

31. *Pearson*, 555 U.S. at 232 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)).

32. *See* Hope v. Pelzer, 536 U.S. 730, 739–40 (2002).

33. *Id.* at 740–41 (citing United States v. Lanier, 520 U.S. 259 (1997)).

34. Wilson v. Layne, 526 U.S. 603, 617 (1999).

ual's constitutional rights when he discriminates against that individual on the basis of sexual orientation. Two key Supreme Court cases undergird this question. *Romer v. Evans* struck down a 1992 Colorado constitutional amendment prohibiting all governmental action at any level of government designed to protect gays and lesbians.[35] The Court implicitly invoked equal protection grounds for its decision, beginning its opinion with an excerpt from Justice Harlan's dissent in *Plessy v. Ferguson*: "the Constitution 'neither knows nor tolerates classes among citizens.'"[36] In *Lawrence v. Texas*, the Court held that private, consensual sexual activity between adults of the same sex is protected by the Due Process Clause.[37] The defendants in *Lawrence* were convicted under the Texas homosexual conduct law, which criminalized oral and anal sex between two persons of the same sex.[38] The court reasoned that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[39] Together, *Romer* and *Lawrence* stand for the constitutional holdings that whether one considers the classification of an individual as homosexual, or whether one considers that individual's private sexual activity, the government has no legitimate interest in burdening individuals merely because they are homosexual or engage in private homosexual conduct.

It is important to note that Justice Scalia's dissents in both cases have been influential in limiting the precedential value of both *Romer* and *Lawrence*.[40] Justice Scalia criticized the *Romer* majority for engaging inappropriately in culture wars and argued that the challenged amendment was a legitimate, "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores" against political forces seeking to revise those mores.[41] Because at the time *Romer* was decided the Court had not yet struck down laws criminalizing sodomy, Justice Scalia also reasoned that laws prohibiting special protections on homosexuals were certainly constitutional if laws criminalizing homosexual conduct were.[42] Justice Scalia assailed the *Lawrence* opinion for failing to apply the appropriate substantive due

35. Romer v. Evans, 517 U.S. 620, 623–24 (1996).

36. *Id.* at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)).

37. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

38. *Id.* at 562–63 (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003), *declared unconstitutional by Lawrence*, 539 U.S. 558).

39. *Id.* at 578.

40. *See generally* Arthur S. Leonard, *Exorcising the Ghosts of* Bowers v. Harwick*: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519 (2009); *see also infra* notes 145–162.

41. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

42. *Id.* at 641.

process analysis: "[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'"[43]

C. Three Recent Sexual Orientation Discrimination Cases, Each Applying Supreme Court Precedent Differently

Justice Scalia's dissents aside, the majority opinions in *Romer* and *Lawrence* form the backbone for subsequent findings like *Gill* of unconstitutional discrimination on the basis of sexual orientation.[44] The *Gill* case involved a full-time, temporary English instructor who was told during the interview process that "instructors who successfully complete a contract teaching term and then apply for a permanent position are 'uniformly hired.'"[45] Gill was arguably quite successful; she received good feedback on her teaching in the fall and she was asked to take on teaching above her full-time load during the spring term.[46] Still, Gill's supervisor subjected her to a "lengthy diatribe about 'homosexuals' and how the Texas public views them."[47] Despite confirmation from the dean that he had not heard anything adverse about her teaching, Gill was not invited to interview for any of the seven open permanent instructor positions, even though the other six temporary instructors were interviewed and hired.[48]

Under the first prong of the qualified immunity analysis, the court determined that Gill had adequately pleaded that she "received treatment different from that received by similarly-situated individuals and that the unequal treatment stemmed from discriminatory intent."[49] The court then reviewed *Romer*, *Lawrence*, and the Fifth Circuit ruling in *Johnson v. Johnson*,[50] and ultimately determined that "a rea-

43. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

44. *See infra* notes 50–51.

45. Gill v. Devlin, 867 F. Supp. 2d 849, 851 (N.D. Tex. 2012).

46. *Id.* at 852, 856.

47. *Id.* at 852.

48. *Id.*

49. *Id.* at 855–56 (quoting Praylor v. Partridge, No. 7-03-CV-247-BD, 2005 WL 1528690, at *3 (N.D. Tex. June 28, 2005)).

50. Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) (denying qualified immunity to Texas correctional officers who allegedly denied protection from sexual assault to a prisoner because of his sexual orientation). The *Johnson* court reasoned that to deny the plaintiff protection because of his sexual orientation "serve[d] no legitimate penological objectiv[e]" and violated the Equal Protection Clause on a rational-basis standard. *Id.* at 532 (alteration in original) (quoting Farmer v. Brennan, 511 U.S. 825, 833 (1994)). It is important to recognize that even though *Johnson* set important Fifth Circuit precedent regarding the Equal Protection Clause's applicability to sexual orientation discrimination, the facts and outcome of the case were disastrous for

sonable person in [the defendants'] position would have understood that his conduct constituted sexual-orientation discrimination in violation of the Equal Protection Clause of the Constitution."[51]

In *Lathrop v. City of St. Cloud*, as in *Gill*,[52] the court began with the optional first prong of the qualified immunity analysis to evaluate whether the plaintiff had asserted a constitutional right.[53] Sean Lathrop was a highly commended officer in the St. Cloud Police Department until May 2009, when the defendants, key officials in the police department, learned that he was gay.[54] After his sexual orientation became known at work, Lathrop experienced "a 'concerted effort' to paper his file with disciplinary documents in an effort to force him to resign."[55]

The court acknowledged two potential challenges to the first-prong qualified immunity analysis: that sexual orientation implicates only a rational-basis review, and that this claim lacked the comparators—individuals similarly situated to the plaintiff—typically required for finding employment discrimination.[56] It resolved the first matter by echoing *Romer*, holding that the "[d]efendants have not alleged, nor does the Court find, that any legitimate governmental concerns would justify" the disparate treatment the plaintiff received because of his sexual orientation.[57] The court accepted the plaintiff's assertion that he was his own comparator: "the Department treated [*him*] differently after he requested to become an openly gay officer."[58] The court refused to grant the defendants qualified immunity because there were contestable issues regarding the prong-one question of whether there was a violation of the plaintiff's constitutional rights.[59]

In *Ambris v. City of Cleveland,* an Ohio district court evaluated a harbormaster's claim of discrimination in the workplace. The court utilized a strict reading of employment discrimination under Title VII

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the plaintiff, who ultimately lost a jury verdict despite a substantial record of having been subjected to rapes and other severe abuse with the full knowledge of the correctional officers. *See* JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE 92–93 (2011).

51. *Gill*, 867 F. Supp. 2d at 856–57 (citing *Johnson*, 385 F.3d at 532 ("[A] state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims." (alteration in original)).

52. *See id.* at 854.

53. Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780, at *17 (D. Minn. Jan. 23, 2012).

54. *Id.* at *1.

55. *Id.* at *2.

56. *Id.* at *6.

57. *Id.* at *7.

58. *Id.*

59. *Lathrop*, 2012 WL 185780, at *18–20.

and rejected applicable circuit precedent to grant summary judgment for the defendants without evaluating the substance of the allegations.[60] The harbormaster reported her supervisor for his incessant homophobic comments and repeatedly requested to be transferred out of his department.[61] Her requests to transfer were ignored, and two months after her report she was given disciplinary notice and put on administrative leave for allegedly awarding a contract to a relative of her significant other.[62] But her disciplinary hearing did not focus on the matter of the questionable contract bid, and instead centered on her sexual orientation and inquiries about her significant other.[63] Even in the face of a Sixth Circuit case that did not apply the Title VII framework to evaluate a § 1983 claim of discrimination related to sexual orientation,[64] the *Ambris* court applied the *Romer* holding to equal protection claims in the government employment context.[65]

The *Ambris* court claimed that the Sixth Circuit had not provided sufficient guidance on whether equal protection claims involving sexual orientation should be analyzed under Title VII.[66] The court's emphasis on the Title VII framework, which does not apply to sexual minorities, implicitly subverted the § 1983 claim regarding equal protection.[67] Moreover, the court minimized the existing Sixth Circuit precedent that could have been applied, reasoning that one circuit court ruling was insufficient and that there was "heavily conflicting case law" within the circuit.[68] The court did not cite to any cases that held differently than the one supporting availability of equal protection for sexual minorities.[69]

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60. *See* Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *2, *8–10 (N.D. Ohio Nov. 19, 2012).

61. *Id.* at *2–3.

62. *Id.* at *3.

63. *Id.*

64. *See* Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006) ("'The desire to effectuate one's animus against homosexuals . . . can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause.' . . . [Plaintiff] has offered sufficient evidence to create a genuine issue of material fact as to whether [defendants] were motivated by animus against homosexuals." (second alteration in original) (quoting Stemler v. City of Florence, 126 F.3d 856, 873–74 (6th Cir. 1997))).

65. *See Ambris*, 2012 WL 5874367, at *5–9 (discussing *Scarbrough*, 470 F.3d 250).

66. *See id.* at *8–10.

67. *Id.*

68. *Id.*

69. *See id.* at *8 ("[T]he heavily conflicting case law in the Sixth Circuit would tend to show that there is no 'clearly established right.' The Courts have been all over the place with regard to treating such claims for disparate treatment based on sexual orientation, so it would be difficult to say that Defendant . . . knew, or should have known, that he was violating a clearly established right.").

III. ANALYSIS

A. Qualified Immunity Fails as a Tool to Clarify Rights

Seventh Circuit Judge Richard Posner critiqued the qualified immunity doctrine over twenty years ago, remarking that "[t]he easiest cases don't even arise."[70] Judge Posner's point was that if a new claim had squarely fit the exact precedent in which the law or right had been clearly established, the doctrine could not provide meaningful protection from government officials who violate an individual's rights.[71]

But the *Gill*, *Lathrop*, and *Ambris* plaintiffs seemingly presented the easiest cases—there was clear animus in each allegation of discrimination, and clear precedent from *Romer* that "'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[72] Yet one plaintiff got her day in court,[73] a second received the opportunity to press the case that discrimination against him was indeed unconstitutional,[74] and the third did not even get an opportunity to have the substance of her issues heard.[75] These cases illuminate problems with the qualified immunity doctrine that are gaining significance: the analysis results in a defendant-friendly environment in which it is harder to identify clearly established rights, and courts do not serve society by clarifying and defining rights so that future actors are put on notice.

Despite the stated purpose of the first prong of the qualified immunity doctrine to put government actors on notice going forward, in practice, a ruling that there is a violation of a constitutional right without a ruling that the right was clearly established does not create effective notice.[76] Pamela Karlan has associated the qualified immunity

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70. K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (critiquing the immunity doctrine in determining that state foster care officials were not immune from liability in the harm caused to a child placed in dangerous foster care situations).

71. *See id.* ("It begins to seem as if to survive a motion to dismiss a suit on grounds of immunity the plaintiff must be able to point to a previous case that differs only trivially from his case. But this cannot be right.").

72. Romer v. Evans, 517 U.S. 620, 634 (1996) (alteration in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

73. Gill v. Devlin, 867 F. Supp. 2d 849 (N.D. Tex. 2012).

74. Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780 (D. Minn. Jan. 23, 2012).

75. Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367 (N.D. Ohio Nov. 19, 2012).

76. *See* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1924 (2007) ("While the Supreme Court has not decided if determining whether the law was 'clearly established' at the time of the underlying events 'should be evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court[s],' several courts of appeals have held that district court decisions cannot 'clearly estab-

doctrine with part of the Court's trend to "undermine[] the concept of the 'private attorney general' who brings suit to vindicate both her own claims and the broader public interest."[77] A court can issue declaratory and injunctive relief altering the practice of defendants who otherwise have qualified immunity from damage claims.[78] However, without attorney's fees or even minimal damages, a plaintiff may be reluctant to appeal a prong-one decision.[79] Moreover, a defendant may appeal the prong-one holding, but only by taking on the risk that an affirmation would create circuit-wide precedent, rather than a more limited district court holding.[80] When the Court in 2009 overturned the short-lived practice of requiring a prong-one analysis before prong two, it spared the district courts from tackling unnecessary constitutional questions when a reasonable person would not have known the right was clearly established (prong two).[81] Now that courts can rely primarily on prong two, as the *Ambris* court did,[82] and find that even if there were a right, it was not clearly established, an appeal is even less likely. And with fewer appeals, it is less likely that a right can be identified and established by court precedent.

The Supreme Court has acted recently to remove the "clearly established" label from a right if there is disagreement among the circuits.[83] In *Ashcroft v. al-Kidd*, the Court reversed the Ninth Circuit on both prongs of its qualified immunity analysis, holding that it was not a violation of the Fourth Amendment to seize an individual under a material witness warrant when the government official has no intent to use him as a witness, and that no jurisdiction had ruled in such a way to clearly establish that such an action would be unconstitutional.[84] A year later in *Reichle v. Howards*, the Court reversed the Tenth Circuit's denial of qualified immunity to Secret Service agents who vio-

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lish' constitutional law for purposes of § 1983 liability." (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32 (1982))).

77. *Id.* at 1927.

78. *Id.* at 1925–26.

79. *Id.*

80. *Id.*

81. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

82. Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *22–23 (N.D. Ohio Nov. 19, 2012) ("The Courts have been all over the place with regard to treating such claims for disparate treatment based on sexual orientation, so it would be difficult to say that Defendant Bahhur knew, or should have known, that he was violating a clearly established right.").

83. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011); *see also* Reichle v. Howards, 132 S. Ct. 2088 (2012).

84. *See al-Kidd*, 131 S. Ct. at 2080, 2083–84.

lated the First Amendment by arresting a suspect in retaliation for comments they heard him make against the Vice President under their protection.[85] The Court averred that qualified immunity will not be granted when the legal issue is defined at a "high level of generality."[86] Additionally, the Court held that when the impact of a new Supreme Court ruling has not yet been determined with regard to circuit-level precedent on a related question, the entire area is considered sufficiently in flux that a reasonable official should not be denied qualified immunity.[87]

Scholars and commentators have reacted to these two decisions with concern that the Court is developing a new doctrine for how courts may find "clearly established law." One commentator noted that the *Reichle* decision may have severely narrowed "clearly established law," particularly for circuit-level precedent, because it precluded finding the law clearly established in that circuit when "it was at least arguable" that the Supreme Court ruling affected the circuit precedent on a separate, but related issue.[88] And Orin Kerr added his concern on the *Reichle* ruling that circuit precedent, without consensus among other circuits, may no longer be sufficient to clearly establish the law in that home circuit.[89] While a third commentator viewed this decision as a narrow ruling, he nonetheless noted that the Court did not rule on the substance of the alleged violation, but only that the average federal agent would not have found clear guidance on the law due to the differences among circuits.[90]

The *Reichle* decision drew heavily on the *Pearson v. Callahan* and *al-Kidd* precedents to justify its focus only on the second, "clearly established" prong of qualified immunity analysis.[91] This line of cases may imply a significant change emerging to restrict the ability of lower courts to identify "clearly established" constitutional rights and

85. *Reichle*, 132 S. Ct. at 2089–90, 2093.

86. *Id.* at 2094 n.5 (rejecting an analogy related to a Fourteenth Amendment violation and its applicability to the case at bar's First Amendment issue because "we do not define clearly established law at such a 'high level of generality'" (quoting *al-Kidd*, 131 S. Ct. at 2084)).

87. *See id.* at 2095.

88. *See* Kent Scheidegger, *Circuit Precedent and "Clearly Established" Law*, CRIME & CONSEQUENCES BLOG (June 4, 2012, 9:27 AM), http://www.crimeandconsequences.com/crimblog/2012/06/circuit-precedent-and-clearly-.html (quoting *Reichle,* 132 S. Ct. at 2096).

89. *See* Orin Kerr, *Circuit Precedent and "Clearly Established" Law*, VOLOKH CONSPIRACY (June 6, 2012, 12:33 AM), http://www.volokh.com/2012/06/06/circuit-precedent-and-clearly-established-law/.

90. Lyle Denniston, *Opinion Recap: Narrow Ruling on Arrests*, SCOTUSBLOG (June 4, 2012, 12:55 PM), http://www.scotusblog.com/2012/06/opinion-recap-narrow-ruling-on-arrests/.

91. *See Reichle*, 132 S. Ct. at 2093.

thereby deny qualified immunity.[92] Justice Kennedy's concurrence in *al-Kidd* suggested a new paradigm for analyzing qualified immunity that would create a different standard for finding "clearly established law" when the defendants were federal officials.[93] The *Reichle* Court, rather than finding immunity only for a federal agent acting in a landscape of circuit disagreement, held, perhaps more broadly, that when it is arguable but not clear that a Supreme Court ruling may affect existing circuit precedent, the government official receives qualified immunity.[94]

The Supreme Court has, in the past few years, ruled in ways that may deter courts from prospectively establishing law through a prong-one analysis and that curtail the ability of lower courts to find "clearly established law" in their own precedents that run counter to the decisions of sister circuits. An implicit insistence seems to have emerged from these decisions that, absent a Supreme Court ruling or federal statute, only a true "consensus of persuasive authority" can define "clearly established law" for the denial of qualified immunity. Ultimately, the current state of the qualified immunity doctrine limits the ability of an individual to bring, as a "private attorney general," a claim that would clarify the contours of clearly established rights a government official may not violate.

B. The Clearly Established Constitutional Rights Regarding Sexual Orientation

Several key challenges arise in evaluating the constitutional guarantees associated with sexual orientation. Courts have traditionally been reluctant to address sexual orientation as a status akin to race, religion, or gender. Instead courts sometimes framed constitutional

92. *See* Lyle Denniston, *A New "Kennedy Doctrine*," SCOTUSBLOG (June 4, 2011, 2:14 PM), http://www.scotusblog.com/2011/06/a-new-kennedy-doctrine/.

93. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085–87 (2011) (Kennedy, J., concurring) ("A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And [she] need not guess at when a relatively small set of appellate precedents have established a binding legal rule. . . . [Otherwise] those officers would be deterred from full use of their legal authority.").

94. *See Reichle*, 132 S. Ct. at 2097. Justice Ginsburg's concurrence, joined by Justice Breyer, would have granted the immunity to the secret service agents in this case, not on the rationale imported from the Kennedy concurrence in *al-Kidd* and suggested by the petitioner, but because these agents have a special responsibility to defend against assassinations and must incorporate information such as statements heard into their immediate decision making. *Id.* at 2097–98 (Ginsburg, J., concurring).

issues raised by sexual minorities in terms of homosexual acts and conduct.[95] As Pamela Karlan explained:

> The situation of gay people provokes an "analogical crisis" because in some ways it involves regulation of particular acts in which gay people engage, and so seems most amenable to analysis under the liberty prong of the Due Process Clause, while in other ways it involves regulation of a group of people who are defined not so much by what they do in the privacy of their bedrooms, but by who they *are* in the public sphere.[96]

Furthermore, it is challenging to evaluate what rights exist in the rapidly changing landscape of legislation relating to sexual minorities, state and federal court decisions on specific issues like marriage and adoption, and social discourse on gay rights.

Equal protection—the right associated with the *Gill*, *Lathrop*, and *Ambris* decisions—traditionally focuses on an individual and her immutable characteristics, such as race, gender, or national origin, although it has also been used to address the rights of individuals sharing traits detested by the majority.[97] One's conduct, by contrast, is more often associated with Due Process Clause protections of a liberty right, such as privacy, education, or child rearing.[98] Despite such distinctions, these rights and the analysis of them are often intertwined. "Gay rights cases 'just can't be steered readily onto the strict scrutiny or the rationality track,' let alone onto the due process/conduct or the equal protection/status track."[99]

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95. *See* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 544–45 (1992). The *United States v. Windsor* decision is notable in part because it identified same-sex married couples as a class, and found that treating these couples differently than all other married couples violated the Equal Protection Clause. United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013). *Windsor* did not address gay individuals, however.

96. Pamela S. Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1457 (2004) (footnote omitted).

97. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

98. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding protected liberty interests in the marriage relationship and the bedroom); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that the rights of parents to determine the education of their children is a liberty protected under the Due Process Clause).

99. Karlan, *supra* note 96, at 1450 (footnote omitted) (quoting Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1993)).

In her analysis of *Lawrence v. Texas* shortly after it came down, Karlan closely associated the case with the *Loving v. Virginia* decision that struck down bans on interracial marriages,[100] explaining that both cases involved the interplay between the jurisprudence of liberty and the jurisprudence of equality.[101] Karlan argued that *Lawrence* crystallized a doctrine that had been evolving since *Griswold v. Connecticut* and *Loving*—that "'the substantive reach of liberty' under the Due Process Clause extends to the way individuals choose to conduct their intimate relationships."[102] Indeed, the Court in *United States v. Windsor* confirmed and expanded this reading when it interpreted the *Lawrence* holding as the constitutional protection of an individual's "moral and sexual choices."[103]

Both *Romer* and *Lawrence*, according to Karlan, "undermine[] the traditional tiers of scrutiny altogether," with *Romer* eschewing the levels-of-scrutiny analysis for equal protection claims and *Lawrence* avoiding the traditional strict scrutiny threshold for due process claims.[104] While these landmark cases addressing constitutional rights for sexual minorities may not adhere to the traditional methodology for judicial analysis, it does not follow that these decisions have not clearly established the law. Conscientious and discerning courts have applied the *Romer* and *Lawrence* holdings to confirm and vindicate the rights of sexual minorities violated by government actors,[105] and yet many courts have failed sexual minorities by ignoring or misinterpreting these precedents.[106]

1. The Clearly Established Law from Romer v. Evans

Despite its initial discussion of classifications, the *Romer* Court did not apply a typical classification assignment to sexual minorities and instead first found that the challenged amendment itself was not rational; that is to say, it bore no reasonable relationship to any legitimate government purpose.[107] The *Romer* Court's discussion of rational-basis review drew from some of the most deferential rational-

100. *See* Loving v. Virginia, 388 U.S. 1 (1967).

101. Karlan, *supra* note 96, at 1449.

102. *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 564 (2003)).

103. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013). Because the *Windsor* decision addressed the status and rights of same-sex couples, most of its reasoning does not relate to this Comment.

104. Karlan, *supra* note 96, at 1450.

105. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004).

106. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

107. Romer v. Evans, 517 U.S. 620, 635 (1996); *see also* Leonard, *supra* note 40, at 534–35.

basis cases in the Court's history.[108] Yet, the *Romer* Court distinguished the challenged government action in each of these prior cases from the Colorado constitutional amendment at issue because, in each, the burden to the classification bore "a rational relationship to an independent and legitimate legislative end" and was "not drawn for the purpose of disadvantaging the group burdened by the law."[109]

The *Romer* majority also discussed a second line of rational-basis reasoning, often referred to as "rational basis with bite,"[110] that applies a slightly more probing analysis to ensure "that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[111] Courts since *Romer* have wrestled with the issue of whether sexual orientation triggers a heightened scrutiny for equal protection analysis, but such efforts have either failed or found no traction with the Supreme Court. The Second Circuit's holding in *Windsor*, for instance, held that homosexuality was a classification like gender that required a heightened level of scrutiny;[112] however, the Supreme Court ignored this point in its *Windsor* decision.[113]

Without linking the facts to either a rational-basis, or a rational-basis-with-bite analysis, and without addressing whether sexual orientation is the type of classification that requires a heightened level of scrutiny, the *Romer* Court held that "[a] State cannot so deem a class of persons a stranger to its laws," and thereby declared the amendment unconstitutional.[114]

Two key post-*Romer* cases in the Seventh and Ninth Circuits demonstrate that discrimination on the basis of sexual orientation

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108. *See Romer*, 517 U.S. at 632 (citing New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947)).

109. *See id.* at 632–33.

110. The term "rational basis with bite" gained recognition in the mid-1980s in the wake of *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); the term is attributed to Victor Rosenblum. *See* David O. Stewart, *A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 112–14 (noting Rosenblum's description of the Court's analysis as "rational basis with teeth"); *see also* Emma Freeman, Note, *Giving* Casey *Back Its Bite: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 280 n.8 (2013).

111. *Romer*, 517 U.S. at 634 (alteration in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

112. Windsor v. United States, 699 F.3d 169, 181–82 (2d Cir.) ("In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority."), *aff'd on other grounds*, 133 S. Ct. 2675 (2012).

113. *See Windsor*, 133 S. Ct. at 2683–84 (acknowledging the grounds for the Second Circuit ruling, but then ignoring it in the majority decision).

114. *Romer*, 517 U.S. at 635.

would henceforth constitute a violation of equal protection under the law, and clearly established that a government official would not receive qualified immunity against such an allegation.[115] Both circuits denied qualified immunity to school officials whose actions and failures to act resulted in violations of the equal protection rights of gay and lesbian students.

In *Nabozny v. Podlesny*, the Seventh Circuit evaluated a § 1983 claim that school officials had violated a student's rights to equal protection under the law when they acted with deliberate indifference to the years of persistent verbal and physical abuse that the student suffered at the hands of his classmates.[116] The court explained its standards in evaluating an equal protection discrimination claim:

> The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. . . . [Discriminatory purpose] implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.[117]

Nabozny involved equal protection claims on the basis of both sexual orientation and gender. The student alleged that the school administrators acted with indifference because he was gay, and that this action was substantially different from the way they would have responded to a female student reporting similar types of abuse.[118] The court found gender-based discrimination by virtue of the school's different treatment of the male student and its departure from customary policy: the school "aggressively punished male-on-female battery and harassment," but not the abuse Nabozny suffered, which included a mock rape by classmates.[119] The court believed that "a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful."[120] The court acknowledged the recently published *Romer* decision, but because *Romer* was decided

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115. *See* Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996); Flores v. Moran Hill Unified Sch. Dist., 324 F.3d 1130, 1132 (9th Cir. 2003).

116. *Nabozny*, 92 F.3d 446, 449.

117. *Id.* at 453–54 (quoting Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982)).

118. *See id.* at 454.

119. *Id.* at 454–55.

120. *Id.* at 456. The question of whether equal protection rights could be asserted on the basis of sexual orientation discrimination was more challenging for the court without the availability of the *Romer* holding than the gender discrimination basis, but the court noted that the record provided sufficient evidence "that the discriminatory treatment was motivated by the defendants' disapproval of Nabozny's sexual orientation." *Id.* at 457. The court expressly reasoned that sexual orientation does situate individuals in an identifiable minority status subject to discrimination. *Id.*

after the *Nabozny* facts occurred, it could not be applied to a qualified immunity analysis.[121]

In *Flores v. Morgan Hill Unified School District*, the Ninth Circuit addressed the question of equal protection rights and qualified immunity for school officials alleged to have acted with deliberate indifference to peer-on-peer harassment and bullying based on the victims' sexual orientation.[122] The court upheld the district court's denial of qualified immunity for the school official defendants because the plaintiffs "show[ed] that the defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional."[123] The court noted that the Second Circuit, in addition to the Seventh Circuit in *Nabozny*,[124] had found deliberate indifference and improper motive in school officials who "respond[ed] to known peer harassment in a manner that is . . . clearly unreasonable."[125] In denying qualified immunity to the defendants, the court framed the issue broadly:

> The guarantee of equal protection . . . requires the defendants to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students. . . . The constitutional violation lies in the discriminatory enforcement of the policies, not in the violation of the school policies themselves.[126]

The *Nabozny* and *Flores* cases clearly demonstrate that post-*Romer* courts can find equal protection violations in the disparate treatment by government actors of homosexuals compared to similarly situated heterosexuals.

2. The Clearly Established Law from Lawrence v. Texas

Lawrence, as *Romer* before it, departed from the standard approach of determining whether the liberty at stake was fundamental and thereby deserving of a strict scrutiny analysis, and made a "magisterial but vague" description of the liberty interest without addressing

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121. *Id.* at 457 n.12. The court found "that reasonable persons in the defendants' positions in 1988 would have concluded that discrimination against Nabozny based on his sexual orientation was unconstitutional" because of a policy protecting students from sexual orientation discrimination that was in place at the time of the alleged discrimination. *Id.* at 457–58.

122. Flores v. Moran Hill Unified Sch. Dist., 324 F.3d 1130, 1132 (9th Cir. 2003).

123. *Id.* at 1134–35.

124. *Id.* at 1135 (citing Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999); *Nabozny*, 92 F.3d at 454).

125. *Id.* (second alteration in original) (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999)).

126. *Id.* at 1137–38.

whether to apply strict scrutiny.[127] The Court opted not to address the equal protection challenge to the statute, even though it had granted certiorari on both the Due Process Clause and Equal Protection Clause issues.[128] Nonetheless, as both Pamela Karlan and Laurence Tribe have argued, equal protection is deeply embedded in the *Lawrence* decision.[129] *Lawrence* derived its reasoning[130] from the privacy rights found in *Griswold v. Connecticut*,[131] *Eisenstadt v. Baird*,[132] *Roe v. Wade*,[133] and the post-*Bowers* decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[134] But the opinion ranged beyond these cases' conceptions of liberty as "the absence of interference" by the state;[135] instead, the Court "described the liberty at issue as gay people's right to 'control their destiny,' because '[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[136] However, because the same decision concludes that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal life of the individual,"[137] it can be inferred that there might be other situations in which a state could provide a legitimate interest that would justify such an intrusion. Indeed, *Lawrence* includes a long list of exceptions limiting the protection for individual sexual and moral choices.[138]

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127. Karlan, *supra* note 96, at 1450.

128. *See* Lawrence v. Texas, 539 U.S. 558, 564, 574–75 (2003).

129. *See* Karlan, *supra* note 96, at 1450–51; Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004). *See generally infra* notes 139–140 and accompanying text.

130. *See Lawrence*, 539 U.S. at 564–65, 573–74.

131. Griswold v. Connecticut, 381 U.S. 479 (1965) (finding protected liberty interests in the marriage relationship and the bedroom).

132. Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the liberty interests of the bedroom to unmarried persons and their right to decide for themselves whether to get pregnant).

133. Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman has a liberty right, albeit not an absolute one, to make decisions affecting her life and whether to abort a pregnancy).

134. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the substantial liberty rights inherent in personal decisions related to family relationships, procreation, and contraception), *quoted in Lawrence*, 539 U.S. at 574 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

135. Karlan, *supra* note 96, at 1452 (quoting ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 123 (1969)).

136. *Id.* (quoting *Lawrence*, 539 U.S. at 574, 578).

137. *Lawrence*, 539 U.S. at 578.

138. *Id.* (excluding from its holding sexual choices involving minors, individuals injured or coerced, public sexual conduct and prostitution, and government recognition of same-sex marriages).

Both Karlan and Tribe interpret the *Lawrence* decision as a significant "doctrinal innovation" linking the "due process *right to demand respect* for conduct protected by the substantive guarantee of liberty" with "[e]quality of treatment."[139] The Court in *Lawrence* identified the interrelatedness of the moral stigma attached to homosexual conduct and the ways in which laws against gay sex contributed to the social ostracization of homosexuals and burdened their rights to "equal liberty" through privacy inside the bedroom and dignity in society at large.[140]

Despite the powerful statement for both due process and equality rights in *Lawrence*, most courts have not confirmed it as clearly established law.[141] In one of the few lower court decisions to embrace *Lawrence* for its full meaning, the Fifth Circuit invalidated a Texas law grounded in morality justifications.[142] Holding that Texas's ban on sex toys "impermissibly burden[ed] the individual's substantive due process right to engage in private intimate conduct of his or her choosing,"[143] the court explained that "to uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive."[144] The Fifth Circuit, then, has unequivocally accepted the holding of *Lawrence*—that one's intrinsic human dignity encompasses moral and sexual choices, and that these choices are constitutionally protected.

3. Avoiding the Clearly Established Law of Romer *and* Lawrence

Rights related to sexual orientation provide a useful context for evaluating the doctrine of qualified immunity because of the unusual reasoning employed in *Romer* and *Lawrence*. By eschewing the standard forms of scrutiny applied in equal protection and due process considerations, these two cases, particularly *Lawrence*, have presented challenges to courts attempting to apply their holdings.[145]

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139. Tribe, *supra* note 129, at 1934 (alteration in original) (quoting *Lawrence*, 539 U.S. at 575); *see also* Karlan, *supra* note 96, 1449–50 ("*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality.").

140. Tribe, *supra* note 129, at 1896, 1898; *see also* Karlan, *supra* note 96, at 1458.

141. *See generally* LiJia Gong & Rachel Shapiro, *Sexual Privacy After* Lawrence v. Texas, 13 GEO. J. GENDER & L. 487 (2012).

142. Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008); *see also* Gong & Shapiro, *supra* note 141, at 510.

143. *Reliable Consultants, Inc.*, 517 F.3d at 738, 744.

144. *Id.* at 745.

145. *See* Gong & Shapiro, *supra* note 141, at 495 (surveying cases citing *Lawrence* and demonstrating that most courts have either found that *Lawrence* did not establish a new fundamental

A key challenge for courts attempting to apply the *Romer* and *Lawrence* holdings has been the influence of Justice Scalia's dissents in these cases. By invoking the culture wars in his *Romer* dissent and by ignoring the significant innovation in *Lawrence* of equating the harm to human dignity that occurs from societal homophobia with the criminalization of private, intimate relationships,[146] Justice Scalia provided strong rhetoric to undermine the majority holdings. Unscrupulous courts could dismiss *Romer* as merely a single round in an undecided political dispute over traditional mores,[147] and narrow *Lawrence* by claiming that it never explicitly characterized sodomy or anything else related to homosexual conduct as a fundamental right.[148] Moreover, Justice Scalia's dissents explicitly tie sexual conduct to the status of being a homosexual, committing the precise harm the *Lawrence* majority identified that came from stigmatizing individuals publically for their protected private relationships.

Arthur Leonard points out that the First, Eighth, and Eleventh Circuits have applied Justice Scalia's dissents.[149] Additionally, the Sixth Circuit demonstrated the influence of Justice Scalia's dissent in a key ruling on facts similar to *Romer*.[150] In a challenge to a law similar to the Colorado constitutional amendment struck down in *Romer* banning "special protections" for sexual minorities enacted in Cincinnati, the Supreme Court remanded the case for reconsideration in light of

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right necessitating heightened review or that the facts before them were outside the parameters of protection defined by Justice Kennedy in *Lawrence*).

146. *See supra* note 40.

147. *See, e.g.*, Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *9 (N.D. Ohio Nov. 19, 2012) (reasoning that "*Romer* was decided outside of an employment context," rather than acknowledging that *Romer*'s application was extremely broad and did include government employment within its context).

148. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815 (11th Cir. 2004) (narrowly reading *Lawrence* as a banning of sodomy laws in part because it did not identify the fundamental substantive due process right that would require heightened scrutiny).

149. Leonard, *supra* note 40, at 523 n.19 (citing Sylvester v. Fogley, 465 F.3d 851, 857 (8th Cir. 2006) (citing Justice Scalia's dissent in *Lawrence* to infer that because the majority decision said there was no legitimate state interest, it was employing a rational-basis, not strict scrutiny standard, and therefore had not held that "homosexual sodomy" is a fundamental right); Cook v. Rumsfeld, 429 F. Supp. 2d 385, 394–95 (D. Mass. 2006) (refusing to apply *Lawrence* as holding that there was a fundamental liberty interest in consensual adult relationships, because Justice Scalia's dissent refuted that interpretation, "and it might be expected that if [Justice Scalia's] statement wrongly characterized a principal holding of the case, the majority would have answered and corrected it. Contrary to the plaintiff's argument, it more plausibly appears that the majority's silence on that point amounted to acquiescence in the dissent's statement that the case did not hold what the plaintiffs here say it did."), *aff'd on other grounds sub nom.* Cook v. Gates, 528 F.3d 42 (1st Cir. 2008)); *see also Lofton*, 358 F.3d 804 (upholding Florida's ban on allowing gays to adopt children).

150. *See generally* Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).

the contemporaneous *Romer* decision.[151] However—in what Leonard characterized as a "willful misrepresentation of the *Romer* Court's handling of the Equal Protection analysis"[152]—the Sixth Circuit narrowed the *Romer* holding to being an objection to a generally applicable state law that interfered with local citizens' ability to create laws applicable only locally,[153] and upheld the ordinance because it was of a local rather than statewide scope.[154]

When courts employ Justice Scalia's dissents to limit the *Romer* and *Lawrence* holdings, they are set on an analytical path that further undermines the majority holdings. Significantly, when Justice Scalia framed *Lawrence* as a ban on laws prohibiting sodomy,[155] he asserted a very specific and narrow holding that would allow lower courts to avoid a broader generalization of the holding—that it is unconstitutional for the state to regulate laws governing private sexual choices because such laws harm human dignity.[156] In *Lofton v. Secretary of the Department of Children & Family Services*, for instance, when the Eleventh Circuit evaluated the constitutionality of Florida's ban on allowing gays to adopt, it narrowly viewed *Lawrence* as prohibiting sodomy laws and not as an assertion of the fundamental right to private, intimate relationships.[157] By doing so, the court could then accept the Florida government's rationale for not allowing sexual minorities to adopt children without triggering the protection of a fundamental right and the heightened scrutiny it would require.[158] Furthermore, by adopting Justice Scalia's narrow views, *Romer* became irrelevant to the court's reasoning; *Romer* could have been used to

151. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996).

152. Leonard, *supra* note 40, at 540.

153. *See Equal. Found. of Greater Cincinnati, Inc.*, 128 F.3d at 295–99.

154. *Id.* at 296 ("[T]he language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences . . . from the City. In stark contrast, Colorado Amendment 2's far broader language could be construed to exclude homosexuals from the protection of every Colorado state law . . . .").

155. *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

156. *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). Tribe and Dorf developed this concept in answer to Justice Scalia's formulation in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), regarding the identification of fundamental rights. Tribe & Dorf, *supra*, at 1058. Tribe and Dorf argued that values are embedded in any analysis of fundamental rights, but that the crucial process of determining fundamental rights need not be merely a reflection of a judge's personal values: "a typical judicial opinion distinguishes between essential and non-essential facts, and that by paying attention to such distinctions, judges trained in the method of the common law can generalize from prior cases without merely imposing their own values." *Id.* at 1059 (emphasis omitted).

157. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815 (11th Cir. 2004).

158. *See id.* at 818–20.

attack Florida's discrimination against gay people wishing to adopt as irrational animus against sexual minorities disguised as the need to protect and promote heterosexual norms.[159]

Though courts have less regularly applied *Lawrence* than *Romer*, when they have done so it has been the "zone of dignity" language that indicates what kind of moral and sexual choices are not protected under *Lawrence*.[160] *Lawrence* excluded from its protection sexual choices involving minors, individuals who were coerced or injured in relationships, public conduct, and prostitution.[161] Courts have effectively applied this "zone of dignity" aspect of *Lawrence* to interpret the holding as an as-applied decision to distinguish it from cases involving inequities in criminal codes between same-sex and different-sex minors, prostitution and "unnatural oral carnal copulation," and even a North Carolina law banning sodomy outright—which *Lawrence* at least should have been seen to have facially invalidated.[162]

Regardless of the motivation, the implication for the qualified immunity doctrine is that lower courts have not always found clearly established law, even when it should be by virtue of clear Supreme Court precedent.

C. Three Courts Tackle Similar Facts and Reach Different Results, Illustrating the Problem

Returning to the three cases of government employment discrimination introduced at the beginning of this Comment, the challenges presented by finding clearly established law become clear. Even with

159. The *Lofton* decision does not attack the circular reasoning of the state's asserted goal—preserving "traditional family values," *see id.*—because the entire decision is predicated on the position that the state's interest in promoting heterosexuality and inhibiting homosexuality is a legitimate one. Yet, there is no basis for the court's acceptance of such a goal as legitimate. Indeed, the Second Circuit's holding in *Windsor* that sexual orientation is a quasi-suspect status was in part to avoid placing the burden on the plaintiffs to prove a lack of legitimate purpose against arguments like "protection of traditional marriage . . . and the encouragement of 'responsible' procreation." *See* Windsor v. United States, 699 F.3d 169, 180 (2d Cir.), *aff'd on other grounds*, 133 S. Ct. 2675 (2012). In analyzing the *Windsor* decision, one commentator explored the competing conceptions of marriage raised by Justice Alito in his dissent—the "conjugal" and "consent-based" understandings. *See* Gerard Bradley, *Great Expectations*, SCOTUSBLOG (June 26, 2013, 6:23 PM), http://www.scotusblog.com/2013/06/great-expectations/. The "conjugal" understanding of marriage is about the union itself and the procreative purpose thought by defenders of marriage to be the intrinsic core of marriage. *Id.* By contrast, the "consent" understanding demonstrated by the majority in *Windsor* is about the persons who enter into marriage and the dignity conferred on them by the state's recognition of their choice to marry. *Id.*

160. *See* Gong & Shapiro, *supra* note 141, at 492.

161. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

162. Gong & Shapiro, *supra* note 141, at 501–03 (quoting State v. Thomas, 891 So. 2d 1233, 1234 (La. 2005)).

Supreme Court decisions addressing the issues presented broadly, district courts can be constrained by circuit court holdings in ways that undermine the power of *Romer* and *Lawrence*.

Ambris v. City of Cleveland demonstrates the misapplication of law and precedent when the court avoided addressing the plaintiff's claims that her government employers treated her differently than similarly situated heterosexual employees.[163] The court reasoned that it was bound by circuit precedent to treat the Title VII and the § 1983 claims under the same Title VII analysis.[164] However, the cases cited to support the required Title VII analysis addressed situations in which Title VII addressed the alleged harms;[165] whereas, sexual orientation discrimination is not protected under Title VII. Ambris's invocation of § 1983 was necessary because her equal protection claim could be addressed under that broader statute.[166] The court rigidly applied the precedents requiring a Title VII analysis for identical § 1983 claims even while acknowledging that the Sixth Circuit had affirmed that "a state action based on . . . animus [against homosexuals] alone violates the Equal Protection Clause."[167] The court went to great lengths to address and distinguish that case in which government employment discrimination related to sexual orientation was analyzed solely under § 1983 as an equal protection claim, and found that decision lacking an express abrogation of the Title VII analytical requirement.[168]

Furthermore, to address why qualified immunity was proper even if there had been a constitutional violation, the court narrowly construed *Romer* to distinguish it from the case at bar: "*Romer* is distinguishable from the facts in the present case. *Romer* was decided outside of an employment context. There is no mention of Title VII throughout the entire opinion . . . ."[169] Such a narrow reading of *Romer* is highly disingenuous, given that *Romer* struck down a Colorado constitutional amendment in part because of the broad range of

163. *See* Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *9–10 (N.D. Ohio Nov. 19, 2012).

164. *Id.* at *5–6.

165. *Id.*

166. *See id.* at *4 (citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that a transgendered firefighter had adequately alleged both Title VII and § 1983 equal protection claims on a theory of gender stereotyping and related retaliation); Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988) (addressing gender discrimination by university officials against a female professor under both Title VII and § 1983); Lautermilch v. Findlay City Sch, 314 F.3d 271 (6th Cir. 2003) (teacher sued school district claiming gender-stereotype discrimination)).

167. *Id.* at *6 (quoting Scarbrough v. Morgan Cnty. Bd. of Ed., 470 F.3d 250, 261 (6th Cir. 2006)).

168. *Id.* at *5–6.

169. *Id.* at *9.

impairments it imposed on homosexuals, specifically mentioning protections against employment discrimination.[170] Moreover, the *Ambris* court's analysis provides a textbook example of how a narrowed reading of a holding does injustice to the right being evaluated.[171]

Rather than proceeding as the *Gill* court did—accepting the pleadings as sufficiently showing a constitutional violation and then analyzing whether it was clearly established law[172]—the *Lathrop* court found "sufficient evidence to create a genuine issue of material fact as to whether the Defendant Officers violated Plaintiff's constitutional rights."[173] The *Lathrop* court stopped short of finding a constitutional violation, despite employing a *Romer*-type analysis; however, the judge was by no means looking to diminish the allegations of discrimination.[174] But it is possible that without a controlling case in the Eighth Circuit like the Fifth Circuit's *Johnson* precedent—upon which *Gill* relied in large part to find clearly a clearly established constitutional right[175]—this district court did not feel free to judge the allegations as consistent with a constitutional violation, let alone a clearly established one. Indeed, Eighth Circuit precedent may have hampered the *Lathrop* judge, as that circuit court had previously relied strongly on Justice Scalia's dissents in *Romer* and *Lawrence*.[176] At the same time, the *Lathrop* court also demonstrated its concern for the vindication of the plaintiff's rights by circumventing the potentially fatal flaw that the plaintiff provided no comparators in an employment discrimination allegation.[177] The portion of the decision analyzing the discriminatory workplace cited no precedent for the novel

170. Romer v. Evans, 517 U.S. 620, 629 (1996) ("Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.").

171. *See supra* note 156 and accompanying text (discussing levels of generality).

172. *See* Gill v. Devlin, 867 F. Supp. 2d 849, 856–57 (N.D. Tex. 2012).

173. Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780, at *7 (D. Minn. Jan. 23, 2012).

174. *See id.* at *11 ("It seems to the Court . . . that an overnight metamorphosis [in Plaintiff's job performance] is unlikely, and the Court concludes that a reasonable jury could find that Defendants discriminated against Plaintiff as a result of his sexual orientation.").

175. *See Gill*, 867 F. Supp. 2d at 856 (citing Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004)).

176. *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006) (citing Romer v. Evans, 517 U.S. 620, 648–51 (1996) (Scalia, J., dissenting)) (upholding Nebraska's ban against same-sex marriages); Sylvester v. Fogley, 465 F.3d 851, 857 (8th Cir. 2006) (citing Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting)) (holding that because the majority decision in *Lawrence* said there was "no legitimate state interest," it was employing a rational-basis rather than strict scrutiny standard, and therefore had not held that "homosexual sodomy" is a fundamental right).

177. *Lathrop*, 2012 WL 185780, at *7.

argument that the comparator was the plaintiff himself prior to when he came out at work.[178]

Gill represents the strongest plaintiff outcome of these three cases, and it relied in its reasoning on *Romer*, *Lawrence*, and its circuit precedent, *Johnson.* It correctly applied the standard of consideration for the defense's dispositive motion: it accepted as true all well-pled and nonconclusory allegations, and construed them in the light most favorable to the plaintiff.[179] It also accepted *Romer* and *Lawrence* as controlling, both to find reasonable the plaintiff's assertion that the defendants had violated the plaintiff's constitutional right to equal protection and to find that this right was clearly established law.[180] The defendants settled the suit, rather than test the facts of the violation in court.[181]

The *Gill* court did not look for ways to diminish the strength of the claim that there had been a violation of a clearly established right. The straightforward application of controlling authority from both the Supreme Court and the Fifth Circuit leaves the impression that the judge, a Republican appointee,[182] was likely applying the law without the influence of any personal beliefs or local societal norms on the analysis.

In the *Lathrop* and *Ambris* cases, however, the judges struggled with precedent to achieve a result that seems more related to personal or societal norms than to the law. The *Lathrop* judge, a Democrat appointee,[183] did not find that the facts as pleaded established a constitutional violation. Nonetheless, the *Lathrop* judge employed the optional first prong of the qualified immunity analysis and accepted a novel employment discrimination argument to avoid finding that the plaintiff had failed to state a claim.[184] Without circuit precedent, the judge may not have been in the position to claim that sexual orientation discrimination in the context alleged was a constitutional violation, let alone a clearly established one. However, he allowed the case

178. *See id.* at *6–7.

179. *See Gill*, 867 F. Supp. 2d at 854.

180. *Id.* at 856–57.

181. *Gill v. Devlin and Howell*, *supra* note 4.

182. Terry R. Means was nominated by George H.W. Bush in 1991. *Means, Terry R.*, *History of the Federal Judiciary: Biographical Directory of Federal Judges*, FED. JUD. CENTER [hereinafter *Federal Judge Directory*], http://www.fjc.gov/servlet/nGetInfo?jid=1607&cid=999&ctype=na&instate=na (last visited June 18, 2014).

183. Donovan W. Frank was nominated by William J. Clinton in 1998. *Frank, Donovan W.*, *Federal Judge Directory*, *supra* note 182, http://www.fjc.gov/servlet/nGetInfo?jid=2793&cid=999&ctype=na&instate=na.

184. *See* Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780, at *6 (D. Minn. Jan. 23, 2012).

to proceed so that such an assertion could be heard, as opposed to using the lack of clarity in his circuit to grant qualified immunity on the grounds that the right was not established.[185] We can infer from this case a considerable exercise of judicial discretion to at least promote the potential for a finding of a violation of a clearly established right.

In *Ambris* a Republican appointee[186] created an outcome more favorable to the defendants than Sixth Circuit precedent would support. The judge did not distinguish the analysis of the Title VII claim from the § 1983 claim and ignored the circuit precedent allowing a § 1983 claim in the employment context to go forward despite sexual orientation not being a suspect classification.[187] The judge then narrowly construed *Romer* to find it unrelated to employment cases instead of giving it the breadth of impact seen in controlling circuit precedent.

D. Rational-Basis Analysis Also Weakens Qualified Immunity Doctrine

A recent alteration in the Court's treatment of rational-basis review may present even further challenges to courts evaluating a qualified immunity defense in the context of constitutional protections for sexual minorities. Since the *Romer* Court affirmed that rational-basis scrutiny requires a "rational relationship to a legitimate governmental purpose,"[188] several decisions have emerged from the Roberts Court that have given scholars pause over whether the "legitimate government purpose" is still a steadfast requirement in rational review.[189] This development underscores the problems yet to arise for plaintiffs trying to avoid a grant of qualified immunity.

According to H. Jefferson Powell, Chief Justice Roberts and Justice Scalia have articulated a new doctrine regarding the rational-basis standard: that the review is only to enforce the Constitution's provision against irrational laws, and nothing more.[190] Rather than using

185. *Id.* at *7.

186. Christopher A. Boyko was nominated by George W. Bush in 2004. *Boyko, Christopher A.*, *Federal Judge Directory*, *supra* note 182, http://www.fjc.gov/servlet/nGetInfo?jid=3082&cid=999&ctype=na&instate=na.

187. Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at *5–9 (N.D. Ohio Nov. 19, 2012).

188. Romer v. Evans, 517 U.S. 620, 635 (1996).

189. *See generally* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217 (2011) (discussing District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010); Engquist v. Oregon Dep't of Ag., 553 U.S. 591 (2008)).

190. *See id.* at 228–29, 276.

rational-basis review as a tool to bridge the gap between explicit constitutional language and societal norms, or to show deference to the actions of the elected branches of government, the conservative justices are applying rational review only to prohibit law created "literally without reason."[191]

The *Romer* decision could be particularly vulnerable to this new line of jurisprudence on rational-basis review. The Colorado amendment was struck down for being nothing more than animus—a law literally without reason.[192] However, as the discussion above has demonstrated, courts have alternatively considered *Romer* a rational-basis or rational-basis-with-bite decision.[193] Powell explains that the Roberts Court conservatives would not feel burdened by this line of rational-basis-with-bite cases, because the need for a normative judgment that a government had a bad, or illegitimate, reason for a law is irrelevant as long as the government has some reason—that is, any rational basis—for the law.[194] This thinking, Powell argues, is a radical departure from accepted constitutional law, to which even Justice Scalia had previously subscribed in decisions holding that the need for a rational basis "cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest."[195]

The perception that the Roberts Court is moving away from considering whether a law is grounded in a legitimate government purpose comes from the distinction between government actors working in a rule-bound context and acting with legitimate discretion.[196] Rather than grounding rational-basis review in an assumption or even expectation of good faith adherence to the Constitution by government actors, the Roberts Court is demonstrating that "there is no normative element to rationality."[197] The key decision in which this line of thinking debuted is *Engquist v. Oregon Department of Agriculture*,

191. *See id.* at 255.

192. *Romer*, 517 U.S. at 635 ("It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . .").

193. *See supra* notes 108–113 and accompanying text.

194. *See* Powell, *supra* note 189, at 254–55.

195. *Id.* at 255–56 (quoting Lyng v. Int'l Union, UAW, 485 U.S. 360, 370 n.8 (1988)). The *Windsor* decision also falls within the line of more muscular rational-basis cases, but it may be the exception that proves Powell's thesis: the majority decision invoked a new, "careful consideration" level of review because of the suspicion of animus motivating the law. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013). Indeed, Justice Kennedy's analysis in *Windsor* may prove essential against the emerging view of rationality described by Powell, because it identifies a liberty interest that requires more careful review, even if there is no independent, equal protection justification for more than a rational treatment.

196. *See* Powell, *supra* note 189, at 263–64.

197. *Id.* at 275.

wherein the Court held that the class-of-one equal protection right does not apply to actions involving public employees.[198] The Court reasoned that when a government actor has clear standards for a decision, the application of equal protection under the law can be judged; however, the courts cannot easily discern equal protection in discretionary decisions that are "subjective and individualized" like a personnel action.[199] In other words, "the Constitution puts no equal protection constraint on the power of government to 'treat[] an employee differently from others for a bad reason, or for no reason at all,' at least if it does not make use of a group-based classification in doing so."[200]

The logic in the *Engquist* decision may extend beyond governmental personnel decisions because Justice Scalia referred to the *Engquist* treatment of rational-basis review in *District of Columbia v. Heller*.[201] *Enquist* could be applied to anything within the domain of an official's discretion: "His liability to judicial correction if he acts on the basis of race or sex only confirms [that] there is an external rule, externally enforced, that sets an outer bound to his domain of discretion. Within that domain, equal protection is silent."[202] According to Powell, "[t]axpayers have no duty of good faith to maximize the government's goals, and political officials, after *Engquist*, apparently have no duty of good faith to make discretionary decisions conform to the Constitution's goals."[203]

Here the impact on future treatment of the qualified immunity doctrine becomes clear and alarming to potential plaintiffs. Where the Constitution or a statute has not specifically enshrined an applicable prohibition or external rule—that is, when no existing suspect classification or enumerated right is implicated—the courts may in the future only evaluate a law against whether it is rational or whether it is irrational, with no consideration of whether the government purpose was legitimate or illegitimate.[204]

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198. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 609 (2008).

199. *See id.* at 602–03; *see also* Powell, *supra* note 189, at 263.

200. Powell, *supra* note 189, at 266 (alteration in original) (quoting *Engquist*, 553 U.S. at 606).

201. District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) ("But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, 'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee." (citations omitted) (citing *Engquist*, 553 U.S. 591)); *see also* Powell, *supra* note 189, at 272–73.

202. Powell, *supra* note 189 at 272.

203. *Id.*

204. *See id.* at 270–71.

The key to how the qualified immunity doctrine will survive this emerging approach to rational-basis review lies in the definition of discretion. In a case central to the establishment of the judge-made qualified immunity doctrine, the Court explained that the doctrine shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[205]

Romer's susceptibility to being ignored may depend on whether it is viewed as more closely allied with the highly deferential rational-basis cases or with the rational-review-with-bite cases. The first element in the *Romer* Court's reasoning illustrated the need to demonstrate that a classification bore merely a relationship, however tenuous, to a governmental goal.[206] The *Romer* Court adamantly rejected laws drawing classifications that disadvantaged a group and had no "independent and legitimate legislative end."[207] A law drawn for no purpose other than to disadvantage a specific group is, and should remain to be, seen as precisely the kind of irrational law the Constitution prohibits, even under the Roberts Court's articulation of rational-basis review. By contrast, the *Romer* majority's second line of reasoning, "that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,"[208] would become irrelevant under the Roberts Court's approach to rational-basis review and undermine its precedential value.

With *Windsor*, Justice Kennedy may have inoculated *Lawrence* and, to some degree, *Romer* against a narrowed reading that could be abrogated by this new approach to evaluating whether a government purpose is legitimate. By claiming in *Windsor* that the *Lawrence* holding found a constitutional protection for moral and sexual choices,[209] Justice Kennnedy specifically asserted that a state does not have the power to legislate on moral grounds to limit an individual's sexual choices. This assertion may provide a broader basis for interpreting *Lawrence* than the common formulation that moral disapproval is not a *legitimate* reason for a government to burden certain private, consensual conduct.[210]

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205. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

206. Romer v. Evans, 517 U.S. 620, 632 (1996).

207. *Id.* at 633.

208. *Id.* at 634 (alteration in original) (quoting U.S. Dep't of Agric. v. Moreno, 431 U.S. 528, 534 (1973)).

209. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

210. *See supra* notes 160–162 and accompanying text (discussing the "zone of dignity" holding of *Lawrence*).

The Court's emerging rational-basis doctrine may have an important impact on qualified immunity analysis. Imagine how much harder it would have been for the *Gill*, *Lathrop*, and *Ambris* plaintiffs to achieve a denial of qualified immunity if the courts were unable to find clear guidance in *Romer* or *Lawrence* that an individual's sexual orientation fit neatly into the suspect classification mold. Unless a court embraced *Romer* and *Lawrence* for their nontraditional approach to equal protection and due process analysis, the lowered bar of a rational-basis analysis would protect defendants and deny plaintiffs' access to the courts. Moreover, because § 1983 cases tend to involve a government official's actions, the Roberts Court's deference to an official's discretion would likely result in a stronger opportunity to receive immunity.

Despite the circuits' differing interpretations of *Romer* and *Lawrence*, there are two essential constitutional guarantees found in these decisions: that an individual's inherent dignity is protected against government actions arising from nothing other than animus against a classification such as one's sexual orientation,[211] and that this dignity creates a zone of protection around the moral and sexual choices made by two consenting adults.[212] Yet, these decisions are central to a still hotly contested question: in combining equal protection and due process liberty interests, the privacy rights established nearly forty years prior in *Griswold*, *Eisenstadt*, and *Roe* have become entitlements for everyone, but are gay people included in "everyone"?[213]

When government agents act in ways that burden the rights described in *Romer* and *Lawrence*, this hot-button question of whether gays are included in "everyone" heavily influences the outcome, even though the two decisions explain the rights clearly. Several factors contribute to this problem. First, the *Romer* and *Lawrence* methodology eschews the traditional approach to equal protection and due process analysis, and some courts have misrepresented these decisions. Second, the Supreme Court has developed an approach to rational-basis analysis that greatly broadens the appropriate discretion imbued in decisionmakers. Because of these first two conditions, the current state and possible future trends of qualified immunity analysis hampers courts' abilities to find clearly established law.

211. *Romer*, 517 U.S. at 635–36.

212. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

213. *See* Karlan, *supra* note 96, at 1456.

IV. IMPACT

In three cases of government officials denying their homosexual employees their clearly established equal protection rights, three different courts in three different circuits arrived at different conclusions regarding the availability of qualified immunity to the defendants.[214] These three cases demonstrate that the qualified immunity doctrine fails to serve its purpose of holding government officials accountable for violations of clearly established rights, but otherwise protecting them from unnecessary lawsuits that would distract them from their ministerial responsibilities. Courts could take two actions that would better facilitate the qualified immunity doctrine's purpose. First, courts should be more conscientious about evaluating issues against the relevant precedent in a way that embraces the methodology and true holding of that precedent. And second, courts should more often take on the difficult challenge of conducting a prong-one analysis to define the right implicated in the issues of a given case.

Conscientious evaluation of presented issues against existing precedent is not inherently objective, nor should we expect that most judges can readily leave the culture wars and their personal political beliefs at the door. Nonetheless, when courts deliberately narrow and undermine a majority decision by framing that holding through the dissent, they betray the weight of the precedent and they betray the parties relying on them for predictable outcomes of law. The Eighth Circuit, for instance, hampered the ability of the *Lathrop* court to immediately find that a constitutional right had been violated under the prong-one analysis, because it had undermined the *Lawrence* holding by misinterpreting its reasoning.[215]

Even if courts were to engage more conscientiously with precedent when analyzing qualified immunity defenses, the results may not always favor plaintiffs. For instance, the Roberts Court's move towards treating government employment decisions as purely discretionary without the need for a link to legitimate governmental purpose could have a negative impact on cases like *Gill*, *Lathrop*, and *Ambris*. Were a court to continue to interpret sexual orientation rights as tied to rational-basis scrutiny, that outcome would be nearly assured: there would no longer be a clearly established right in play.

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214. *See generally* Gill v. Devlin, 867 F. Supp. 2d 849 (N.D. Tex. 2012); Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367 (N.D. Ohio Nov. 19, 2012); Lathrop v. City of St. Cloud, Civil No. 10-2361 (DWF/LIB), 2012 WL 185780 (D. Minn. Jan 23, 2012).

215. *See supra* note 176.

The key to avoiding such negative outcomes for plaintiffs is for courts to employ the first prong of a qualified immunity analysis. The first prong requires the court to find a sufficient allegation that a constitutional right has been violated,[216] and if the courts conscientiously examined the *Romer* and *Lawrence* holdings in a prong-one analysis, they would see that the rights identified in those precedents do not employ the traditional levels-of-scrutiny methodology. They should appreciate that *Romer* holds "that a state policy that treats people adversely due to their sexual orientation requires at least some sort of non-discriminatory, non-moralistic justification in order to be found constitutional."[217] They should also accept that *Lawrence* provides constitutional protection for individuals' private sexual and moral choices.[218] Between these two powerful precedents, even purely discretionary actions of a government employer could not be based on discriminatory or moralistic grounds related to that person's sexual orientation. Therefore, even if rational basis included everything but the purely irrational, sexual orientation discrimination could still be unconstitutional because the Court has required that there be something more than moralistic grounds.

Another value of the prong-one analysis is demonstrated by the *Lathrop* court, which faced the challenge of circuit precedent that did not easily support a finding of clearly established law.[219] By first engaging prong one, the court was able to probe the question of whether a right had been violated.[220] Even though district courts in other circuits, like *Gill* in the Fifth Circuit, would have readily found the violation of equal protection in the *Lathrop* facts, the court was able to rule that there existed a genuine issue of material fact as to whether there was a right violation.[221] The prong-one inquiry allowed the case to stay active and no doubt helped the parties reach a settlement.[222]

It is tempting when reviewing how courts have misunderstood the *Romer* and *Lawrence* decisions to criticize the Supreme Court decisions for their avoidance of the traditional equal protection and due process analyses. The lack of levels-of-scrutiny language has indeed provided an excuse for the lower courts to misinterpret and misapply the holdings. It is also tempting to call on Congress to enact legislation that would include sexual orientation as a classification protected

216. *See supra* notes 25–28 and accompanying text.
217. Leonard, *supra* note 40, at 535.
218. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003).
219. *See generally Lathrop*, 2012 WL 185780.
220. *Id.* at *6–7.
221. *Id.*
222. *See supra* note 21 and accompanying text.

by civil rights laws like Title VII. However, enough courts have correctly understood *Romer* and *Lawrence* as clearly established constitutional protections for sexual minorities.

Rather, the problem in vindicating these rights in court lies with the qualified immunity doctrine. The Supreme Court's growing mistrust of anything short of a perfect consensus among circuits could allow less conscientious courts to undermine these high-court precedents on a national level. Furthermore, because prong-one-only rulings can create opportunities for both parties to appeal, district courts may be reluctant to engage in the hard work of finding a violation when a second-prong ruling that the violation was not clearly established would more often close the dispute and avoid appeal. If more district courts engaged the law and key precedential cases directly to determine if a violation of a right had been alleged, the qualified immunity doctrine could still serve our society by holding officials accountable when they have indeed violated an individual's clearly established right.

V. CONCLUSION

Oliver Wendell Holmes called the law a body of "systematized prediction."[223] For parties to have an ability to predict how the law will treat their claims once a right is established through federal legislation or Supreme Court precedent, the federal courts should be able to evaluate the same facts in the same way regarding the elements of that right. Qualified immunity doctrine already applies this predictability strongly in favor of a government defendant by requiring that he be granted immunity against damages unless it can be shown that he violated a plaintiff's clearly established constitutional right. Even when the right involves a topic caught up in the cultural wars, if the facts are close enough to the defined law, the results should be predictable.

Therefore, when three cases on facts that easily sufficed for allegations of equal protection violations came before three courts in three different circuits in the same year and resulted in three different outcomes, it is clear that there is a problem with the qualified immunity doctrine. Under the Roberts Court, the qualified immunity doctrine has become more generous to defendants with an increasing requirement for circuit unanimity and an emerging approach to rational-basis review that protects decisionmakers' discretion. The problems arising in qualified immunity doctrine are particularly apparent when evaluating constitutional rights related to sexual orientation, because the

223. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

key Supreme Court cases did not rely wholly on the established methodologies for equal protection and due process analysis.

In the hands of judges who unconscientiously apply precedent or wish to avoid hot-button social policy topics, the qualified immunity doctrine can prevent plaintiffs from vindicating their rights and further weaken the "private attorney general" approach to rights claims. During the civil rights era, the courts played a leading role in recognizing and expanding civil rights for people of color. In this era of gay civil rights, the courts should not be the slower and less reliable vehicle for recognizing implicit rights. If courts were to more regularly apply the prong-one analysis of qualified immunity and faithfully adhere to the actual holdings of Supreme Court precedent, the law related to civil rights violations under § 1983 could provide both parties with the predictability they need and deserve from the law.

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