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# THE NINTH CIRCUIT’S TREATMENT OF SEXUAL ORIENTATION: DEFINING “RATIONAL BASIS REVIEW WITH BITE”

*Ian Bartrum*\*

## INTRODUCTION

On February 10, Nevada’s Democratic attorney general decided to stop defending the state’s constitutional amendment banning same-sex marriage, which is currently under review in the U.S. Court of Appeals for the Ninth Circuit.<sup>1</sup> Perhaps even more surprising, Nevada’s Republican governor agreed with that decision, concluding that the “case is no longer defensible in court.”<sup>2</sup> Ironically, all of this came after the plaintiffs had lost their case in the district court.<sup>3</sup> But the federal constitutional landscape surrounding same-sex marriage is rapidly shifting, and in the nation’s largest circuit change is coming quickly indeed. The latest upheaval—the decision that in fact prompted Nevada’s about-face—is *SmithKline Beecham Corp. v. Abbott Laboratories*, in which the Ninth Circuit held that the Equal Protection Clause prohibits peremptory strikes against gay jurors.<sup>4</sup> The larger significance of *SmithKline*, however, is the court’s conclusion that the Supreme Court’s decision in *United States v. Windsor* requires it to apply heightened judicial scrutiny to equal protection claims based on sexual orientation.<sup>5</sup> This is consistent with the court’s 2008 decision—in the wake of *Lawrence v. Texas*<sup>6</sup>—that applied heightened scrutiny to such claims

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\* Associate Professor of Law, William S. Boyd School of Law, UNLV. Thanks to the editors of *First Impressions* for their hard work and guidance.

1. Sandra Chereb, *Nevada Officials Won’t Defend Gay Marriage Ban*, ASSOCIATED PRESS (Feb. 10, 2014, 10:21 PM), <http://bigstory.ap.org/article/nevada-ag-ends-fight-uphold-gay-marriage-ban>. The Nevada Constitution was amended in 2002 to provide that “[o]nly a marriage between a male and female person shall be recognized and given effect in this state.” NEV. CONST. art. I, § 21.

2. Chereb, *supra* note 1 (internal quotation marks omitted).

3. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

4. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014).

5. *Id.*

6. 539 U.S. 558 (2003).

brought under the Due Process Clause.<sup>7</sup> Thus, the Ninth Circuit has twice said what Justice Kennedy could not quite bring himself to say—that the Supreme Court exercises something more stringent than rational basis review in sexual orientation cases—and in doing so it perpetuated a split among the circuits that may eventually force the Court's hand.<sup>8</sup>

Similar doctrinal instability is emerging in the district courts. In December, Judge Shelby in Utah struck down the state's Amendment 3—which prohibited same-sex marriage—after applying strict scrutiny to the due process question and rational basis review to the equal protection claims.<sup>9</sup> And just last month, Judge Wright Allen in the Eastern District of Virginia took the same approach in striking down that state's statutory same-sex marriage ban.<sup>10</sup> Meanwhile, Judge Kern of the Northern District of Oklahoma did not address the Due Process Clause but nonetheless invalidated his state's constitutional prohibition for failing rational basis review under the Equal Protection Clause.<sup>11</sup> Thus, district courts within the Fourth and Tenth Circuits have concluded that strict scrutiny applies to due process challenges to same-sex marriage bans,<sup>12</sup> but these courts applied only rational basis to equal protection claims. All three judges, however, found that these bans failed to meet even the lowest level of constitutional scrutiny. Conversely, both the First and Eleventh Circuits have concluded that rational basis review is still the standard under the Due Process Clause;<sup>13</sup> but, again, the Ninth Circuit—far and away the nation's largest—has ruled that some form of heightened scrutiny applies to both kinds of claims.<sup>14</sup> All of this begs for some doctrinal clarity, and it seems likely that—despite their best efforts—the justices may face the same-sex marriage question again sooner rather than later. In the meantime, it is worth briefly exploring the Ninth Circuit's effort to establish some guiding principles.

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7. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (holding that *Lawrence* required heightened scrutiny under the Due Process Clause).

8. *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (concluding that *Lawrence* does not mandate strict scrutiny); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (same).

9. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013).

10. *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014).

11. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

12. It is important to note that these judges specifically found that same-sex *marriage* is a fundamental right but did not interpret *Lawrence's* approach to sexual orientation per se.

13. *Cook*, 528 F.3d at 61; *Lofton*, 358 F.3d at 817.

14. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008). Another trial on this issue began on February 25, 2014, in federal district court in Detroit. Ed White, *Michigan Gay-Marriage Ban at Stake in Rare Trial*, ASSOCIATED PRESS (Feb. 25, 2014, 5:05 PM), <http://bigstory.ap.org/article/2-week-trial-begin-michs-gay-marriage-ban>.

I. DUE PROCESS: *WITT V. DEPARTMENT OF THE AIR FORCE*

Major Margaret Witt had served in the U.S. Air Force for nineteen years and was just one year short of earning her pension when she was discharged for being gay.<sup>15</sup> Prior to learning of her sexual orientation, the Air Force had in fact awarded Witt several medals and regularly featured her in its promotional and recruiting materials.<sup>16</sup> The department's attitude changed, however, after allegations surfaced that Witt was in a long-term relationship with another woman, and eventually a military tribunal concluded that she "had engaged in homosexual acts and had stated she was a homosexual" in violation of the "Don't Ask, Don't Tell" ("DADT") policy.<sup>17</sup> The secretary of the Air Force ordered Witt honorably discharged, and she sued in the Western District of Washington challenging DADT as a violation of the Due Process Clause.<sup>18</sup> The district court dismissed Witt's suit for failing to state a claim, and she brought her appeal to the Ninth Circuit.<sup>19</sup>

The Ninth Circuit began its opinion by noting that the doctrinal framework surrounding substantive due process had changed in 2003 with the Supreme Court's decision in *Lawrence v. Texas*.<sup>20</sup> In *Lawrence*, the Court struck down Texas's statutory ban on gay sodomy for infringing on the individual "liberty" interest embedded in the concept of substantive due process.<sup>21</sup> The Court did not, however, recognize a fundamental right to sexual intimacy or privacy, nor did it, at least explicitly, apply anything more stringent than rational basis review.<sup>22</sup> Rather, Kennedy concluded as follows:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.

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15. *Witt*, 527 F.3d at 809–10.

16. *Id.* at 809.

17. *Id.* at 810. The DADT policy was promulgated by the Department of Defense in accordance with the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 571, 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (2012)), and it was repealed by the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111–321, 124 Stat. 3515 (effective Sept. 20, 2011).

18. *Witt*, 527 F.3d at 810.

19. *Id.* at 809.

20. *Id.* at 811.

21. *Lawrence*, 539 U.S. at 564–65.

22. *See id.* at 578 (concluding that the law furthered "no legitimate state interest").

The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>23</sup>

The search for a “legitimate state interest,” of course, is characteristic of rational basis review, and so many commentators—as well as the First and Eleventh Circuits—concluded that *Lawrence* had applied only this most deferential standard.<sup>24</sup> The Ninth Circuit, however, decided to reassess *Lawrence* by looking “at what the [Supreme] Court actually *did*, rather than dissecting isolated pieces of text.”<sup>25</sup>

When it undertook this inquiry, three factors led the Ninth Circuit to conclude that *Lawrence* actually requires some sort of heightened scrutiny for due process claims based on sexual orientation.<sup>26</sup> First, *Lawrence* explicitly overruled *Bowers v. Hardwick*, which had applied rational basis review to uphold Georgia’s prohibition on sodomy seventeen years earlier.<sup>27</sup> Yet the *Lawrence* Court did not second-guess *Bowers*’s particular application of the rational basis standard but concluded only that the earlier Court had “fail[ed] to appreciate the extent of the liberty at stake.”<sup>28</sup> Second, the cases that *Lawrence* relied on all engaged in some form of heightened scrutiny, and notably missing from the Court’s discussion was *Romer v. Evans*,<sup>29</sup> an intervening case that applied rational basis review to a question involving sexual orientation.<sup>30</sup> And finally, *Lawrence* highlighted the particular “intrusion into the personal and private life of the individual” that Texas must “justify” in order to save its statute.<sup>31</sup> Such a particularized justification is not typically necessary under rational basis review, where “regardless of the liberty involved, any hypothetical rationale for the law [will] do.”<sup>32</sup>

With this issue decided, the Ninth Circuit set about establishing the criteria for a new, slightly heightened form of judicial scrutiny—in essence, the court attempted to delineate the contours of what commentators have

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23. *Id.* (citations omitted) (internal quotations marks omitted).

24. *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004).

25. *Witt*, 527 F.3d at 816 (emphasis in original).

26. *Id.* at 816–18.

27. *Id.* at 817 (citing *Bowers v. Hardwick*, 487 U.S. 186 (1986)).

28. *Id.* (quoting *Lawrence*, 539 U.S. at 567).

29. 517 U.S. 620 (1996).

30. *Witt*, 527 F.3d at 817 (finding that the Court relied on *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Services, International*, 431 U.S. 678 (1977), but not on *Romer*).

31. *Id.* at 814 (quoting *Lawrence*, 539 U.S. at 578).

32. *Id.* at 817.

for years labeled “rational basis review with bite.”<sup>33</sup> For guidance, the court turned to another 2003 Supreme Court decision—*Sell v. United States*—which considered whether the government can forcibly medicate mentally ill defendants to render them competent for trial.<sup>34</sup> There, the Supreme Court balanced the defendant’s “significant” liberty interest in declining drugs against the state’s “legitimate” and “important” interest in reducing the dangers an inmate presents to himself and others.<sup>35</sup> The Ninth Circuit suggested that this type of review is similar to the so-called intermediate scrutiny generally applied in gender discrimination cases<sup>36</sup> and identified three relevant considerations:

First, a court must find that *important* governmental interests are at stake. . . . Second, the court must conclude that [the state’s action] will *significantly further* the concomitant state interests. . . . Third, the court must conclude that [the state’s action] is *necessary* to further those interests. The Court must find that any alternative, less intrusive [actions] are unlikely to achieve substantially the same results. . . .<sup>37</sup>

The Ninth Circuit then remanded the case for findings relevant to this heightened standard,<sup>38</sup> and the district court concluded that, in the particular case of Witt, DADT failed to pass constitutional muster.<sup>39</sup>

By reading *Lawrence* holistically, then, the Ninth Circuit concluded that due process claims based on sexual orientation deserve heightened judicial scrutiny; and by tacking on *Sell*, the court set out the specific standards that this review entails. In so doing, the court both acknowledged what most observers have known for years—that there is a different rational basis review at work in sexual-orientation cases—and endeavored to bring some clarity to the doctrine in this area. But the Ninth Circuit did not extend its holding to equal protection cases, which the Supreme Court’s opinion in *Lawrence* had done nothing to change.

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33. This may have begun with Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 20–22 (1972) (assessing the difference between traditional rational basis review and newer, more stringent applications).

34. *Witt*, 527 F.3d at 818 (citing *Sell v. United States*, 539 U.S. 166, 179 (2003)).

35. *Id.* (quoting *Sell*, 539 U.S. at 178).

36. *Id.* at 818 n.7 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

37. *Id.* at 818–19 (quoting *Sell*, 539 U.S. at 180–81).

38. *Id.* at 822.

39. *Witt v. U.S. Dep’t of the Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

II. EQUAL PROTECTION: *SMITHKLINE BEECHAM CORP. V. ABBOTT LABORATORIES*

Equal protection doctrine did change last summer, however, with the Supreme Court's decision to strike down Section 3 of the Defense of Marriage Act ("DOMA") in *United States v. Windsor*.<sup>40</sup> Writing for the majority, Kennedy proceeded very much as he had in *Lawrence*: he again declined to specify the level of scrutiny at work and again concluded that the government had failed to "justify [DOMA's] disparate treatment" of same-sex couples.<sup>41</sup> Moreover, Kennedy similarly identified the "liberty of the person protected by the Fifth Amendment" as the constitutional right at stake, a protection made only more robust by the reverse incorporation of the Equal Protection Clause: "While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."<sup>42</sup> Unlike in *Lawrence*, the Court did rely on several cases that explicitly applied rational basis review—the kind "with bite"—to strike down laws under the Equal Protection Clause,<sup>43</sup> but in the end it scrutinized DOMA in very much the same way it had Texas's antisodomy statute in 2003.<sup>44</sup>

The Ninth Circuit did not have to wait long to apply *Windsor's* equal protection guidance in the same way it had *Lawrence's* due process guidance. That opportunity came in a lawsuit between two pharmaceutical companies—GlaxoSmithKline ("GSK") and Abbott Laboratories—that was filed in the Northern District of California.<sup>45</sup> The dispute centered on a licensing agreement between the two corporations regarding an HIV treatment drug.<sup>46</sup> GSK claimed that Abbott had sold it a license to market the drug and then—after Abbott developed a newer product—increased the price of the licensed drug fourfold to boost its competitive advantage.<sup>47</sup> The increasing price of HIV medications had garnered significant attention in the gay community, and during jury selection Abbott used its first

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40. 133 S. Ct. 2675 (2013).

41. *Id.* at 2693.

42. *Id.* at 2695.

43. *See id.* at 2693 (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973), and *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

44. It is certainly worth noting that *Windsor* also relied on federalism concerns and the states' traditional role in regulating marriage, *id.* at 2692–94, but the ultimate approach to the equal protection claim remains quite similar to that taken in *Lawrence*.

45. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014).

46. *Id.*

47. *Id.*

peremptory strike to remove the only self-identified gay person in the jury pool.<sup>48</sup> GSK challenged the strike as a violation of *Batson v. Kentucky*,<sup>49</sup> which prohibits peremptory strikes made on the basis of race.<sup>50</sup> The district court denied the challenge, and GSK appealed to the Ninth Circuit.<sup>51</sup>

The Ninth Circuit acknowledged that the “central question” in the case—whether *Batson* applies to strikes made against gay jurors—turned on whether “classifications based on sexual orientation are subject to a standard higher than rational basis review.”<sup>52</sup> That question, in turn, required the court to interpret the basis of the Supreme Court’s decision in *Windsor*.<sup>53</sup> Judge Reinhardt conceded that *Windsor* had not explicitly announced the appropriate standard of review but then quickly invoked *Witt* to explain the approach he would take: “When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent ‘by considering what the Court actually did, rather than by dissecting isolated pieces of text.’”<sup>54</sup> Reinhardt then looked to the three factors identified in *Witt* to determine whether *Windsor* employed a heightened level of scrutiny.<sup>55</sup>

First, Reinhardt pointed out that, as in *Lawrence*, the *Windsor* Court did not consider “possible” or “conceivable” post-hoc rationalizations for the challenged law, which is the normal practice under rational basis review.<sup>56</sup> Rather, the Supreme Court inquired into DOMA’s “design, purpose, and effect” and carefully examined the available legislative history to determine Congress’s *actual* motivations.<sup>57</sup> Second, like *Lawrence*, the *Windsor* Court asked whether a legitimate purpose might “justify” DOMA’s disparate treatment of gay couples.<sup>58</sup> Reinhardt explained that, when applying rational basis review, the Court is typically “unconcerned with the inequality that results from the challenged state action,” but in *Windsor* Kennedy was deeply troubled by the indignity that DOMA visited on same-sex couples—in effect treating them as second-class citizens.<sup>59</sup> Finally, Reinhardt observed

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48. *Id.*

49. 476 U.S. 79 (1986).

50. *SmithKline*, 740 F.3d at 475.

51. *Id.* at 474.

52. *Id.*

53. *Id.* at 480.

54. *Id.* (quoting *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008)).

55. *Id.* at 480–81.

56. *Id.* at 481.

57. *Id.* at 481–82 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013)).

58. *Id.* at 482.

59. *Id.*



that, as was true in *Lawrence*, the Supreme Court in *Windsor* relied heavily on heightened-review cases.<sup>60</sup> With these three factors in mind, the Ninth Circuit reached an unequivocal conclusion:

In sum, *Windsor* requires that we reexamine our prior precedents, and *Witt* tells us how to interpret *Windsor*. Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. *Lawrence* previously reached the same conclusion for purposes of due process. Thus, there can no longer be any question that gays and lesbians are no longer a group or class of individuals normally subject to rational basis review.<sup>61</sup>

In the context of jury strikes, this conclusion was critically important because the Supreme Court has permitted the use of “peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review.”<sup>62</sup> All that was left for the Ninth Circuit to decide, then, was whether the application of heightened scrutiny was “sufficient”—or “merely necessary”—to find an equal protection violation.<sup>63</sup> Relying on *J.E.B. v. Alabama*, which extended *Batson* to challenges based on gender, Reinhardt identified two guiding factors: (1) whether the relevant class has “a history of exclusion from jury service”; and (2) whether that class has suffered “the prevalence of invidious group stereotypes.”<sup>64</sup> Because the court was able to conclude—fairly easily—that gays and lesbians met both these criteria, it held that Abbott’s use of the peremptory strike was unconstitutional.<sup>65</sup> Perhaps more importantly, the decision extended the rationale of *Witt* so that, at least in the Ninth Circuit, heightened judicial scrutiny now applies to both due process and equal protection claims brought on the basis of sexual orientation.

#### CONCLUSION

When the Ninth Circuit handed down *Witt*, President Obama and then-Solicitor General Kagan declined to take an appeal to the Supreme Court.<sup>66</sup> At the time, it seemed that most advocates of DADT believed that the administration made that decision because it was afraid the Supreme

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60. *Id.* at 483.

61. *Id.* at 484.

62. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 141, 143 (1994).

63. *SmithKline*, 740 F.3d at 484.

64. *Id.* (internal quotations omitted).

65. *Id.* at 489.

66. Jess Bravin & Laura Meckler, *Obama Avoids Test on Gays in Military*, WALL ST. J. (May 19, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB124268952606832391>.

Court would reverse the Ninth Circuit.<sup>67</sup> If that fear was perhaps well-founded in 2009, it is certainly less so now. In the wake of *SmithKline* and the district court cases discussed above, opponents of federal constitutional protection for gay people and same-sex couples must feel much less confident in their position. Circuit courts are now deeply split on the issue, and the prevailing winds are blowing west. The Ninth Circuit has not only made explicit what every reasonable observer already knew—that *Romer*, *Lawrence*, and *Windsor* each applied something more searching than traditional rational basis review—but it has also provided a standard with which to analyze sexual-orientation cases moving forward. To paraphrase the court, to justify intrusions into sexual privacy or disparate treatment of gay people, the state must demonstrate (1) that its actions are necessary to significantly further an important governmental interest; and (2) that no less burdensome approach is likely to achieve the same results. This seems like an eminently sensible test, and it is one that the justices would do well to adopt when this question inevitably makes its way back onto their docket.

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67. See, e.g., Ed Whelan, *SG Kagan's Subversion of "Don't Ask, Don't Tell" Law*, NAT'L REV. ONLINE BENCH MEMOS (May 19, 2009, 12:22 PM), <http://www.nationalreview.com/bench-memos/50138/sg-kagans-subversion-dont-ask-dont-tell-law/ed-whelan>.