
RECENT EXECUTIVE ORDER

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — EXECUTIVE ORDER PROHIBITS FEDERAL GOVERNMENT AND CONTRACTOR EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION OR GENDER IDENTITY. — Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

The debate over lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights centers on some of the defining civil rights issues of our time.¹ It is unsurprising, then, that this debate is playing out in a rapidly developing legal setting. On July 21, 2014, President Barack Obama signed Executive Order 13,672² to prohibit the federal government from employment discrimination on the basis of gender identity³ and prohibit federal contractors from employment discrimination on the basis of sexual orientation or gender identity.⁴ Although the presidential directive constitutes an important and high-profile victory for LGBTQ Americans, the accomplishment does not evince that these populations are no longer vulnerable. Both the history of presidential action to protect minorities and the relative weakness of executive or-

¹ See, e.g., Jaime Fuller, *Holder Calls LGBT Rights One of the 'Civil Rights Challenges of Our Time,'* WASH. POST: POST POLITICS (Feb. 4, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/04/holder-calls-lgbt-rights-one-of-the-civil-rights-challenges-of-our-time> [<http://perma.cc/E2HJ-5KBM>]; Maureen McCarty, *Joe Biden: Transgender Discrimination is 'Civil Rights Issue of Our Time,'* HRC BLOG (Oct. 31, 2012), <http://www.hrc.org/blog/entry/joe-biden-transgender-discrimination-is-civil-rights-issue-of-our-time> [<http://perma.cc/8KCL-45W6>]; Noah Rothman, *Wasserman Schultz: Gay Marriage is 'The Civil Rights Issue of Our Generation,'* MEDIAITE (May 15, 2012, 11:52 AM), <http://www.mediaite.com/tv/wasserman-schultz-gay-marriage-is-the-civil-rights-issue-of-our-generation/> [<http://perma.cc/8L4B-B4RR>]. As illustrated in these examples, the national conversation generally continues to presuppose that the available genders are limited to male and female and that the available orientations are limited to lesbian, gay, bisexual, and straight. Except when referencing legal language to the contrary, this comment nevertheless refers to LGBTQ rights (“Q” for the reappropriated term “queer,” which functions as a catchall encapsulating “LGBT” and “other”) because the commonly used legal terms in this context — “gender identity” and “sexual orientation” — do not in themselves imply any of the boundaries presupposed in the national coverage and thus presumably cover other statuses — for example, intersex (identity) and asexuality (orientation).

² 79 Fed. Reg. 42,971 (July 23, 2014).

³ A previous executive order already prohibited the federal government from discriminating on the basis of sexual orientation. See Exec. Order No. 13,087, 3 C.F.R. 191 (1999).

⁴ Exec. Order No. 13,672, §§ 1–2, 79 Fed. Reg. at 42,971. In addition to immediately banning employment discrimination in the federal government on the basis of gender identity, Executive Order 13,672 provided that the ban on discrimination by federal contractors on the basis of sexual orientation or gender identity would take effect within ninety days, during which time the U.S. Secretary of Labor was required to prepare regulatory text. *Id.* § 3, 79 Fed. Reg. at 42,971. In the interim, the Department issued a directive indicating that its existing regulations should be interpreted to prohibit discrimination on the basis of gender identity. See U.S. DEP’T OF LABOR, DIRECTIVE 2014-02, GENDER IDENTITY AND SEX DISCRIMINATION (2014), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html [<http://perma.cc/T7YG-6Q5U>].

ders as compared to statutory protections strongly suggest that Executive Order 13,672 should not be taken to show that LGBTQ Americans are so politically powerful that they fail to merit heightened judicial protection under the Equal Protection Clause — even assuming the dubious proposition that a court finding of significant power should preclude such protection in the first place.

Executive Order 13,672 is the product of decades of organizing and advocacy for LGBTQ rights generally⁵ and of several years of efforts focused specifically on obtaining an executive order with 13,672's employment protections.⁶ Although most Americans mistakenly believe federal law already prohibits discrimination on the basis of sexual orientation and identity in all workplaces,⁷ no such law exists, and employment discrimination against LGBTQ workers very much remains a reality.⁸ Interest in securing an executive order like 13,672 increased as the Employment Non-Discrimination Act of 2013⁹ (ENDA) stalled in Congress. This legislation, like its predecessors that LGBTQ supporters have repeatedly introduced in Congress in various forms since

⁵ See generally, e.g., ERIC MARCUS, MAKING GAY HISTORY (2002); Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in CREATING CHANGE 451, 457–68 (John D'Emilio et al. eds., 2000).

⁶ See, e.g., Jackie Calmes, *Obama Won't Order Ban on Gay Bias by Employers*, N.Y. TIMES, Apr. 11, 2012, <http://www.nytimes.com/2012/04/12/us/politics/obama-wont-order-ban-on-gay-bias-by-employers.html>; Timothy M. Phelps, *Gay Rights Groups Press Obama for Anti-Discrimination Order*, L.A. TIMES (Mar. 14, 2014, 5:11 PM), <http://www.latimes.com/nation/la-na-obama-gays-20140315-story.html> [<http://perma.cc/6R3K-XRJP>].

⁷ See, e.g., Emma Margolin, *The Fight for ENDA: Think You Can't Be Fired for Being Gay? Think Again*, MSNBC.COM (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/thomas-roberts/the-fight-enda-think-you-cant-be-fired> [<http://perma.cc/382N-X463>] (noting that a 2011 survey found that ninety percent of voters mistakenly thought that federal law already protects LGBTQ Americans from employment discrimination).

⁸ See, e.g., BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> [<http://perma.cc/4VTA-PFLM>] (reviewing research and concluding that “LGBT people and their non-LGBT coworkers consistently report having experienced or witnessed discrimination based on sexual orientation or gender identity in the workplace,” *id.* at 2); András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 605 (2011) (finding in a controlled study that job applications from men listing participation in a gay college student group on their résumés were forty percent less likely to result in job interviews); Sunnive Brydum, *Meet the People Fired for Being LGBT in 2013*, ADVOCATE.COM (Dec. 18, 2013, 5:30 AM), <http://www.advocate.com/year-review/2013/12/18/meet-people-fired-being-lgbt-2013?page=full> [<http://perma.cc/6BQU-NS5F>] (noting that twenty-nine states allow employment discrimination against gays, lesbians, and bisexuals and that thirty-three allow discrimination against transgender workers, and listing a sample of LGBTQ Americans who claim they were fired out of animus).

⁹ S. 815, 113th Cong. (2013).

1974,¹⁰ would nationally ban employment discrimination on the basis of sexual orientation or gender identity.¹¹ In 2013, the U.S. Senate passed the bill with a bipartisan filibuster-proof majority,¹² but even before ENDA gained approval in the Senate, Speaker of the House John Boehner expressed opposition to calling a vote on the bill on the contradictory theories that its workplace protections were redundant with existing law and that adding such protections would open the courts to a new category of frivolous lawsuits.¹³ With no congressional path forward for ENDA, supporters of the bill's goals redirected their energy toward obtaining executive action instead.¹⁴ More than two hundred members of Congress¹⁵ joined in urging President Obama to issue an executive order banning LGBT workplace discrimination by federal contractors.¹⁶ Upon signing the order, President Obama credited the "passionate advocacy" of the movement's supporters.¹⁷

Although it is evidence of LGBTQ political power, Executive Order 13,672 should not preclude courts from finding that LGBTQ populations require heightened protection under the Equal Protection Clause. Analogous presidential actions in the context of racial discrimination, along with subsequent findings of vulnerability by the U.S. Supreme Court, demonstrate that groups can achieve major political successes without forfeiting such judicial protections. Furthermore, although the Supreme Court has indicated that being "politically powerless" is an important criterion for determining whether a group should receive elevated protection,¹⁸ it has also found that minorities are not necessarily precluded from such protection by demonstrations

¹⁰ See Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CENTER FOR AM. PROGRESS (July 19, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> [<http://perma.cc/H3K9-Z4HB>].

¹¹ S. 815 § 4.

¹² Burgess Everett, *Senate Passes Gay Rights Bill in Historic Vote*, POLITICO (Nov. 8, 2013, 10:03 AM), <http://www.politico.com/story/2013/11/enda-vote-senate-99538.html> [<http://perma.cc/4DWN-4K89>].

¹³ See Chris Johnson, *Boehner Sees 'No Basis or No Need' for ENDA*, WASH. BLADE (Nov. 14, 2013), <http://www.washingtonblade.com/2013/11/14/boehner-says-no-need-for-enda/> [<http://perma.cc/Y4RJ-J2CE>]; Jake Sherman, *Spokesman: John Boehner Against the Employment Non-Discrimination Act*, POLITICO (Nov. 4, 2013, 8:31 PM), <http://www.politico.com/story/2013/11/enda-legislation-john-boehner-99308.html> [<http://perma.cc/9RX2-MC4T>].

¹⁴ See, e.g., sources cited *supra* note 6.

¹⁵ Amanda Terkel & Jennifer Bendery, *Democratic Support Grows for Obama to Sign ENDA Executive Order*, HUFFINGTON POST (Mar. 24, 2014, 1:59 PM), http://www.huffingtonpost.com/2014/03/20/democrats-enda-executive-order_n_5002868.html [<http://perma.cc/PCK9-JWYU>].

¹⁶ Amanda Terkel, *Nearly 200 Lawmakers Call on Obama to Sign ENDA Executive Order (UPDATE)*, HUFFINGTON POST (Mar. 20, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/03/18/enda-executive-order_n_4986841.html [<http://perma.cc/UR8M-6YTU>].

¹⁷ President Barack Obama, Remarks at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination> [<http://perma.cc/P8U8-6TPC>].

¹⁸ *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

of significant political power.¹⁹ Moreover, because executive orders are relatively weak compared to congressional statutes and because LGBTQ workers still lack a federal antidiscrimination statute, LGBTQ Americans should not be precluded from heightened judicial protection even if political powerlessness were a necessary prerequisite.

Whenever government action divides burdens and benefits unequally among groups, the Equal Protection Clause raises questions about the propriety of such line drawing. Most divisions need only withstand “rational basis” review, which is highly deferential to lawmakers and upholds legal classifications as long as they meet a minimum requirement of rationality.²⁰ Suspect or quasi-suspect classifications, however, must survive either “strict” scrutiny or “heightened” (“intermediate”) scrutiny — more demanding examinations of the government’s objectives and methods — because they raise the suspicion of illegitimate efforts to politically disempower an unpopular group and thus deny it equal protection under the law.²¹ A passing, but now seminal, suggestion in *United States v. Carolene Products Co.*²² that “more searching judicial inquiry” may be necessary for protecting “discrete and insular minorities”²³ is generally seen as the “genesis of [these] heightened standards of judicial review.”²⁴ Determining whether a classification qualifies for greater-than-rational-basis scrutiny is an inexact and somewhat inconstant exercise; Justice Thurgood Marshall once noted that any given factor associated with a group “may be relevant,” but that “[n]o single talisman can define those groups . . . warranting heightened or strict scrutiny.”²⁵ However, the

¹⁹ Indeed, the Court rarely departs dramatically from public opinion, and its protection of minority groups usually arises as groups gain access to democratic power structures, not while they are still truly powerless. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (arguing that the Court acts in response to political constituencies present in the democratic process).

²⁰ See, e.g., *Fort Smith Light & Traction Co. v. Bd. of Improvement of Paving Dist. No. 16*, 274 U.S. 387, 391–92 (1927) (upholding requirement that trolley companies pave adjacent roads and that in effect applied to only a single trolley company).

²¹ In particular, the Court has found that government actions based on race, citizenship, or national origin merit strict scrutiny, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985), and that sex-based claims merit heightened or intermediate scrutiny, see, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²² 304 U.S. 144 (1938).

²³ *Id.* at 153 n.4.

²⁴ *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting). However, the Justices have recently expressed disagreement about *Carolene Products*’s significance in equal protection jurisprudence. Compare *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1644–45 (2014) (Scalia, J., concurring in the judgment) (minimizing the significance of the *Carolene Products* footnote), with *id.* at 1668 (Sotomayor, J., dissenting) (expansively reading the footnote to require the Court to consider the participation of minorities in the political process).

²⁵ *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part).

Court frequently requires that a minority group face a degree of political powerlessness in order to merit strict or heightened review.²⁶

The Supreme Court has not yet reached the question of whether discrimination upon the basis of LGBTQ identity should be subject to either strict or heightened scrutiny. However, commentators are actively engaging in a debate on the question, particularly as it relates to LGBTQ political power.²⁷ Writing of gays and lesbians in *Romer v. Evans*,²⁸ Justice Scalia staked out the position early on that “[i]t is . . . nothing short of preposterous to call ‘politically unpopular’ a group which enjoys enormous influence in American media and politics.”²⁹ In 2013, during oral arguments in *United States v. Windsor*,³⁰ Chief Justice Roberts pointedly asked counsel seeking the federal recognition of state-approved same-sex marriage: “You don’t doubt that the lobby supporting the enactment of [same-sex marriage] laws in different States is politically powerful, do you?”³¹ In its respondent brief for the same case, the Bipartisan Legal Advisory Group of the U.S. House of Representatives contended that the Court should limit itself to rational basis review in cases involving sexual orientation status,³² and in its reply brief, the group supported that position by arguing that gay and lesbian Americans “[a]re [h]ardly [p]olitically [p]owerless.”³³ Providing further evidence that the question has moved to the fore, lower courts

²⁶ See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). In addition to political powerlessness, the Court has also required, variously, a history of discrimination, see, e.g., *Virginia*, 518 U.S. at 531–32, an ability to participate in society, see, e.g., *Cleburne*, 473 U.S. at 440–41, and that a minority’s defining characteristic be “immutable,” see, e.g., *Lyng*, 477 U.S. at 638, but these factors are not discussed here and are assumed satisfied for the purposes of analyzing the political powerlessness factor. See also *Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012) (applying the four factors to find gays and lesbians deserving of heightened scrutiny), *aff’d*, 133 S. Ct. 2675 (2013).

²⁷ See, e.g., Darren Lenard Hutchinson, “Not Without Political Power”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975 (2014); see also Affidavit of Gary M. Segura, Ph.D. at 4, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156), 2010 WL 604592 (“Gays and lesbians do not possess a meaningful degree of political power . . .”), *aff’d*, 682 F.3d 1 (1st Cir. 2012).

²⁸ 517 U.S. 620 (1996).

²⁹ *Id.* at 652 (Scalia, J., dissenting); see also *id.* at 645–46 (“The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.” (citations omitted)).

³⁰ 133 S. Ct. 2675 (2013).

³¹ Transcript of Oral Argument at 107, *Windsor*, 133 S. Ct. 2675 (No. 12-307), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_c18e.pdf [<http://perma.cc/B5F6-KZJ8>].

³² Brief on the Merits for Respondent at 24–28, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 267026, at *24–28.

³³ Reply Brief on the Merits for Respondent at 17, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 1143561, at *17.

that have been striking down same-sex marriage bans — in what may be an attempt to lay the groundwork for a Supreme Court ruling on the question — have seemingly gone out of their way to argue that scrutiny greater than rational basis should apply in this context.³⁴ Doubtless, then, the President’s new executive order will provide Justice Scalia and others with further ammunition in resisting the application of strict or heightened scrutiny.

However, analogous legal acts throughout history have favored other discrete and insular groups that the Court has nevertheless subsequently found to merit heightened protection. Citing a “long bipartisan tradition” of executive actions, President Obama highlighted that administrations have acted unilaterally to protect minorities from employment discrimination before.³⁵ President Franklin Roosevelt issued Executive Order 8802,³⁶ which banned discrimination on the basis of race in the defense industry — as a concession in exchange for black leaders withdrawing the threat of a march on Washington, D.C.³⁷ — years before the Court began assessing racial discrimination under strict scrutiny³⁸ and indeed well before the Court was done developing and refining this application.³⁹ Presidents as ideologically distinct as Lyndon Johnson and Richard Nixon reaffirmed these protections, which expanded over time to cover religion, sex, and national origin and to apply across the federal workforce and to federal contractors.⁴⁰ In the mid-1980s, President Ronald Reagan proposed an order to diminish the effects of President Johnson’s order but abandoned the idea when Congress, including “stiff opposition from within [Reagan’s] own

³⁴ See, e.g., *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482 n.16 (E.D. Va. 2014) (arguing that heightened scrutiny applies, despite not needing to reach the question). Meanwhile, several courts that have faced the scrutiny question directly have reversed themselves and applied heightened scrutiny. Compare, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990) (finding that rational basis scrutiny applies), with *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (reversing and interpreting new Supreme Court jurisprudence as requiring heightened scrutiny for claims based on sexual orientation).

³⁵ President Barack Obama, Remarks at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination> [<http://perma.cc/W29U-A7HB>] (referencing Executive Order 8802 and its subsequent augmentations).

³⁶ 3 C.F.R. 957 (1938–1943).

³⁷ See *JIM CROW AMERICA* 169 (Catherine M. Lewis & J. Richard Lewis eds., 2009). As the Lewises’ account highlights, this executive order occurred along the path away from a peerless and singular sociopolitical environment, that of the Jim Crow era. At most, the path of LGBTQ rights is one that runs parallel — but is not equivalent.

³⁸ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (announcing that racial classifications are “immediately suspect” and deserve “the most rigid scrutiny”).

³⁹ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying *Korematsu*’s “most rigid scrutiny” to a race-based statute); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (reaffirming that strict scrutiny applies to racial classifications in all settings).

⁴⁰ See Exec. Order No. 11,246, 3 C.F.R. 167 (Supp. 1965) (President Johnson); Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970) (President Nixon).

party,⁴¹ threatened to respond by codifying President Johnson's anti-discrimination order.⁴² In the face of this bipartisan support for workplace protections, courts nevertheless continued requiring more than mere rational basis scrutiny for laws affecting these classes. President Obama's new executive order — however important a victory for LGBTQ advocates — should not suggest that LGBTQ Americans are undeserving of heightened protection from discriminatory actions.

Furthermore, executive orders are often signs of a presidency in an inferior place of power in relation to congressional opposition. Upon first examination, such directives may appear to be demonstrations of relative power. They are often high profile and reflect an issue having received direct presidential attention. Unlike legislative actions, which require dealmaking and compromises and during which any individual lawmaker has limited and shared power, executive orders are the product of individual action by a single lawmaker, making their use a unique exercise of unilateral power. Nevertheless, executive orders, especially ones that are limited in scope in comparison to their legislative analogues, can be tacit admissions of legislative failure and of the fact that relative power lies with a President's opponents in Congress.⁴³ As the presidential scholar Richard Neustadt noted: “[D]ecisive [action is] a painful last resort, a forced response to the exhaustion of all other remedies, suggestive less of mastery than failure — the failure of attempts to gain an end by softer means.”⁴⁴ A President's central power with regard to legislation is, arguably, the power to persuade Congress,⁴⁵ and thus a failure to do exactly this at any of the numerous stages a proposal goes through on its long way through both chambers represents defeat. Moreover, executive orders represent weakness as compared to statutes because statutory revocation requires the assent — and attention — of hundreds of members of Congress, whereas a subsequent President can countermand a previous executive order singlehandedly.

Executive Order 13,672 itself is the product of such presidential failure at influencing Congress. LGBTQ advocates would have preferred ENDA, as it would apply to all workplaces and would not run

⁴¹ NICHOLAS LAHAM, *THE REAGAN PRESIDENCY AND THE POLITICS OF RACE* 91 (1998).

⁴² *Id.* at 87.

⁴³ See Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 452 (1999) (noting that some scholars contend that “[s]ince executive orders are a unilateral presidential tool, presidents might use them to compensate for congressional opposition”). *But see id.* (arguing that executive orders constitute a presidential power in their own right); see also KENNETH R. MAYER, *WITH THE STROKE OF A PEN* (2001) (same).

⁴⁴ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 24 (1990).

⁴⁵ See generally *id.* (“Presidential power is the power to persuade.” *Id.* at 11.).

the risk of subsequent revocation by a single opponent in the White House. Some advocates thus saw the prospect of an executive order as “low-hanging fruit” rather than as the preferred outcome.⁴⁶ Certainly President Obama acted with the support of over 200 members of Congress, but these officials represented a legislative minority.⁴⁷ Furthermore, the President was still a solitary actor in a formal sense; he acted with their support but not on their authority. Finally, Executive Order 13,672 lacks the built-in permanence of statute. When President Reagan nearly countermanded an existing order, he resisted only when faced with the opposition of a majority of Congress and the threat of harder-to-revoke statutory codification. President Obama’s order lacks that protection. Given that today’s Congress failed to codify workplace protections by passing ENDA, it is unlikely that advocates would have the votes to codify Executive Order 13,672 if the directive were threatened with revocation. In an arena as contested as discrimination law, the legal form of protections matters, not just the results embodied by the substantive protections that the law affords.

The ability of LGBTQ advocates to secure the issuance of Executive Order 13,672, while a significant victory, suggests in the context of ENDA’s nonpassage that its supporters represent a minority movement that still faces major opposition in Congress.⁴⁸ The lack of a legislative success analogous to the Civil Rights Act of 1964⁴⁹ implies that courts should consider LGBTQ populations as being in a place of comparative political powerlessness. The passage of the Civil Rights Act did not preclude the continued application of strict scrutiny to race-based policies, even though obtaining the Act demonstrated greater minority group power (at least in the employment discrimination context) than having to settle for an executive order. Similarly, then, President Obama’s executive order should not preclude courts from finding that policies implicating LGBTQ status merit review under strict or heightened scrutiny.

⁴⁶ Phelps, *supra* note 6 (quoting Gregory Nevins, Staff Attorney at Lambda) (internal quotation mark omitted).

⁴⁷ On a related note, the low representation of openly LGBTQ individuals in government is another indicator of political powerlessness. See Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL’Y 385, 395–97 (2010).

⁴⁸ Cf. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 153–61 (2011) (arguing that high-profile outlier victories can make LGBTQ Americans seem more politically powerful than they actually are).

⁴⁹ 42 U.S.C. §§ 2000e to 2000e-17 (2012).