THE BENEFITS OF UNEQUAL PROTECTION

Beginning with Massachusetts in 2004, a number of states have legalized same-sex marriage.[1] At the same time, the federal government does not recognize same-sex marriages.[2] As a result, in states allowing them to marry, same-sex couples may be nominally equal to their opposite-sex peers but in practice face substantially higher federal tax burdens and other disadvantages.[3]

In response, a number of employers, both private and public, have begun offering a "gross-up" to employees in same-sex marriages.[4] The gross-up is designed to eliminate the tax disparity between similarly situated same-sex and opposite-sex couples by increasing the pre-tax salaries of employees in same-sex marriages.[5] To date, nine Fortune 100 companies have adopted same-sex gross-up policies, and many others are considering following suit.[6] As these policies become more common, it is likely that they will spread with increasing speed as employers try to retain their competitive edge against one another,[7] and there is no indication that the trend would reverse even if the Supreme Court strikes down federal marriage restrictions.[8] With the spread of

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[1] *See, e.g.*, Kimberly N. Chehardy, *Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law*, 8 CONN. PUB. INT. L.J. 131, 134 (2009).

[2] *See, e.g.*, Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923, 933 (2010).

[3] *See, e.g.*, Tara Siegel Bernard, *Some Tax Breaks Unavailable to Same-Sex Couples*, N.Y. TIMES (Apr. 16, 2012, 10:30 AM), http://bucks.blogs.nytimes.com/2012/04/16/some-tax-breaks-unavailable-to-same-sex-couples.

[4] *See* Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES (Dec. 14, 2010, 4:39 PM), http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits.

[5] *See id.*

[6] This figure includes companies that provide gross-ups for either same-sex married couples or same-sex domestic partners. *See id.* The nine companies are Bank of America (number 13 on the Fortune 100 list in 2012), J.P. Morgan Chase (16), Apple (17), Microsoft (37), Cisco (64), Morgan Stanley (68), Google (73), Goldman Sachs (80), and American Express (95). *See id.*; *Fortune 500*, CNNMONEY (May 21, 2012), http://money.cnn.com/magazines/fortune/fortune500/2012/full_list. The Fortune 100 list, though a helpful tool, understates the growing number of employers offering same-sex gross-ups because such gross-ups are most common in sectors that generally feature non–publicly traded, nonprofit, or foreign employers — sectors such as law, financial services, consulting, higher education, and public interest. *See* Bernard, *supra* note 4.

[7] *See* Kelley M. Butler, *"Gross-Up" to Get a Leg Up as Employer of Choice, Attorney Says*, EMPLOYEE BENEFIT NEWS (Nov. 30, 2010, 12:56 PM), http://ebn.benefitnews.com/blog/ebviews/gross-up-provides-tax-equity-to-domestic-partners-2684785-1.html.

[8] The Supreme Court has granted certiorari to review the constitutionality of one federal law responsible for many of the inequalities facing individuals in same-sex marriages — the Defense of Marriage Act, 1 U.S.C. § 7 (2006) (DOMA) — and many commentators believe the Court will strike DOMA down. *See* United States v. Windsor, 133 S. Ct. 786 (2012); Neal Devins & Tara Grove, *Commentary on Marriage Grants: Article III & Same-Sex Marriage*, SCOTUSBLOG (Dec. 8, 2012, 3:44 PM), http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-article-iii-same-sex-marriage. But even if the Court invalidates DOMA, the legal relevance of same-sex

same-sex gross-ups, a relatively rare phenomenon has occurred: the private sector has taken upon itself the task of helping to equalize the conditions for a minority group that has long been, and in many ways remains, an object of the majority's contempt.[9] Perhaps unsurprisingly, same-sex gross-up policies have received a fair deal of media interest,[10] most of which praises them.[11] Yet even though some commentators have noted that same-sex gross-ups could ultimately face legal challenges as they become more popular,[12] they remain largely unex-

gross-ups will not vanish. First, the filing status provision of the tax code that limits joint filing eligibility to opposite-sex spouses does not depend on DOMA: DOMA defines all occurrences of the terms "marriage" and "spouse" throughout the U.S. Code, but the filing status provision operates through its own terms. *See* 26 U.S.C. § 6013 (2006) ("A *husband and wife* may make a single return jointly of income taxes . . . ." (emphasis added)). This inequality in filing status may cost same-sex couples hundreds or even thousands of dollars annually, *see infra* note 27, and therefore could be a sufficient basis for employers to choose to continue providing gross-ups even if the Court invalidates DOMA and thereby alleviates the health insurance tax disparity. Moreover, it seems unlikely that the Court would reach out sua sponte to invalidate all similar provisions in the U.S. Code; it is particularly unlikely to identify and strike down this provision on the same basis as DOMA because courts have traditionally exercised significant deference toward Congress's tax policy decisions, even when those decisions implicate fundamental rights. *See, e.g.*, Druker v. Comm'r, 697 F.2d 46, 51 (2d Cir. 1982) (declining to strike down a marriage tax penalty even though it related to the fundamental right to marry). Finally, even if the Court were to extend its holding to all relevant tax provisions, another interesting logistical problem would arise: would employers with gross-up policies have to deduct the amounts already paid for the year from their employees' remaining paychecks? If not, a heterosexual employee could argue that his or her coworkers in same-sex marriages were granted a bonus with no basis other than administrative difficulty.

[9] Near the height of the civil rights era, for example, the Supreme Court held in a four-page per curiam opinion that a Florida law prohibiting homosexual fornication was valid. *See* Wainwright v. Stone, 414 U.S. 21, 21–22 (1973) (per curiam). Over a decade later, even the Court's most liberal members were willing to concede that prohibitions on homosexual activity could reasonably square with constitutional protections. *See* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1016 (1985) (Brennan, J., dissenting from denial of certiorari) (acknowledging that a ban on "homosexual *conduct*" could be "held valid under application of traditional equal protection principles"). As recently as 2004, serious national movements for constitutional amendments disfavoring homosexuals came "close" to the number of votes needed to pass in Congress. *See, e.g.*, *Bush Calls for Ban on Same-Sex Marriages*, CNN (Feb. 25, 2004), http://articles.cnn.com/2004-02-24/politics/elec04.prez.bush.marriage_1_single-state-or-city-marriage-rights-marriage-licenses. And, of course, the private response embodied in same-sex gross-ups is relevant only because public laws continue to disfavor homosexuals today. *See, e.g.*, 1 U.S.C. § 7 (limiting the definition of marriage to opposite-sex couples).

[10] *See, e.g.*, Bernard, *supra* note 4; Diane Macedo, *Google Raises Eyebrows with New Gay-Only Employee Benefit*, FOXNEWS.COM (July 1, 2010), http://www.foxnews.com/tech/2010/07/01/google-raises-eyebrows-new-gay-employee-benefit; Todd A. Solomon, *Will More Corporations Adopt the Practice of Tax Gross-Ups for Domestic Partner Benefits?*, HUFFINGTON POST (July 19, 2010, 5:17 PM), http://www.huffingtonpost.com/todd-a-solomon/will-more-corporations-ad_b_651784.html.

[11] *See, e.g.*, Tara Siegel Bernard, *For Gay Employees, an Equalizer*, N.Y. TIMES, May 21, 2011, at B1 (describing employers calling the gross-up "the right thing to do"); Solomon, *supra* note 10.

[12] *See, e.g.*, Bernard, *supra* note 11 ("One of the biggest obstacles to adopting the gross up policy has been concern about the cost and legal implications."); Macedo, *supra* note 10; David Sha-

plored by legal academics and courts.[13] As a result, an important question remains unaddressed: are same-sex gross-ups legal?

This Note answers that question and examines its broader implications for legal protection of minorities. Advocates for various minority groups have long urged legislators and courts to adopt greater statutory[14] and constitutional[15] protections for their groups. Those advocates, however, may be operating under the questionable assumption that increased protections are strictly beneficial for the groups they are designed to help. But well-intentioned legal reforms could actually invalidate same-sex gross-ups, meaning that there may be certain benefits to unequal legal protection regimes, at least in some contexts, that scholars and advocates have not yet considered.

Part I explains the concept of same-sex gross-ups as a well-intentioned effort by employers. Part II analyzes the legality of gross-ups under federal and state antidiscrimination statutes, while Part III examines the validity of those policies, when implemented by public employers, under the U.S. Constitution. Those sections conclude that, while gross-ups most likely are legal under existing doctrine, they would likely be invalidated under the more rigorous statutory and constitutional standards that gay rights supporters have advocated. Finally, Part IV discusses the implications of this finding, observing that less stringent standards may often benefit minority groups more than more stringent standards. Specifically, less stringent standards may serve as one-way filters, allowing beneficial policies like gross-ups but prohibiting malicious policies, whereas more stringent standards typically re-

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dovitz, *Taking Same-Sex Benefits to New Level*, HUM. RESOURCE EXECUTIVE ONLINE (July 20, 2010), http://www.hreonline.com/HRE/story.jsp?storyId=481343402.

[13] *See* Charles A. Sullivan, *Google & Gays*, WORKPLACE PROF BLOG (July 13, 2010), http://lawprofessors.typepad.com/laborprof_blog/2010/07/google-gays.html.

[14] *See, e.g.*, Laura C. Hoffman, *Sub-Minimum Wage or Sub-Human? The Potential Impact on the Civil Rights of People with Disabilities in Employment*, 17 PUB. INT. L. REP. 14, 16 (2011) (disability); Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKC L. REV. 643, 646 (2005) (sexual orientation); Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111, 111 (1996) (poverty); Gerrit B. Smith, Note, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231, 236 n.25 (2005) (linguistic minorities).

[15] *See, e.g.*, John W. Parry, *Executive Summary & Analysis*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 408, 408 (1995) (disability); Christine L. Bella & David L. Lopez, Note, *Quality of Life — At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89, 117–19 (1994) (homelessness); Andrea L. Claus, Student Article, *The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHX. L. REV. 151, 182 (2011) (sexual orientation); Julie R. Steiner, Comment, *Age Classifications and the Fourteenth Amendment: Is the* Murgia *Standard Too Old to Stand?*, 6 SETON HALL CONST. L.J. 263, 291–92 (1995) (age); Jeffrey A. Williams, Student Article, *Re-Orienting the Sex Discrimination Argument for Gay Rights After* Lawrence v. Texas, 14 COLUM. J. GENDER & L. 131, 142–48 (2005) (sexual orientation).

quire two-way equality, protecting the politically weak group from malicious policies but protecting its stronger counterpart against affirmative action[16] policies as well. Overall, this conclusion suggests that it may be worthwhile to reconsider the assumption that heightened scrutiny is an unabashed good for the minority group it protects.

I. THE MECHANICS OF THE SAME-SEX GROSS-UP

The discrepancy between federal and state law has important ramifications for same-sex spouses. The federal government's refusal to recognize same-sex marriages often results in quantitative disadvantages deriving from the federal tax code.[17] For example, same-sex spouses may not file joint tax returns,[18] and an individual in a same-sex marriage may not claim any children in the household as dependents if his or her spouse has a higher adjusted gross income.[19] Furthermore, a number of specific tax credits and deductions are unavailable to same-sex couples.[20] One of the largest areas of disparity is the taxation of employer-provided health insurance benefits, which are taxable when provided to same-sex spouses but not when provided to opposite-sex spouses.[21] That disparity can cost same-sex households hundreds or even thousands of dollars per year.[22]

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[16] This Note uses the term "affirmative action" in a loose sense to refer to any policy designed to improve the status of any traditionally disadvantaged minority group, regardless of the context in which it is implemented. It would therefore include not only traditional affirmative action policies such as hiring preferences but also benefits such as same-sex gross-ups or Social Security benefits for the mentally disabled.

[17] *See, e.g.*, Bernard, *supra* note 3. Beyond material disadvantages, the lack of federal recognition may also cause individuals in same-sex marriages to feel undervalued or unequal. *See id.*

[18] 26 U.S.C. § 6013 (2006) ("A *husband and wife* may make a single return jointly of income taxes . . . ." (emphasis added)); *see also* 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, . . . the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[19] *See* 26 U.S.C. § 152(c)(4)(B) (2006).

[20] *See* MOVEMENT ADVANCEMENT PROJECT ET AL., UNEQUAL TAXATION AND UNDUE BURDENS FOR LGBT FAMILIES 11–14 (2012), *available at* http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf (listing several credits and deductions unavailable to same-sex couples).

[21] *See* 26 C.F.R. § 1.106-1 (2012) (excluding employer-provided health insurance from income only to the extent that it covers the taxpayer, "his spouse, or his dependents").

[22] A 2007 report estimated that this additional tax burden cost employees in same-sex marriages an average of $1069 per year in extra taxes when compared to their counterparts in opposite-sex marriages — and that amount is almost certainly an underestimate of today's costs, given the continually increasing cost and value of health insurance. Bernard, *supra* note 11. Other estimates place the increased cost well over $4000 per year in certain cases. *See* Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES, Oct. 3, 2009, at A1.

With Congress[23] and the courts[24] unlikely to adjust these federal tax policies, many employers have taken it upon themselves to close this disparity through same-sex gross-ups.[25] Under a gross-up policy, an employer will increase ("gross up") the salaries of employees in same-sex marriages in order to increase their after-tax income, making it comparable to the after-tax income of their coworkers in opposite-sex marriages.[26]

The following table provides an example of how gross-ups work. The table shows two employees, *A* and *B*, who both make $50,000. Each is married without children, and each has employer-provided health insurance covering spouses; the coverage for the spouses is valued at $6000. However, *A* is married to a same-sex spouse, whereas *B* is married to an opposite-sex spouse.[27] The insurance coverage that *A*'s spouse receives will therefore be included in *A*'s income, while the coverage that *B*'s spouse receives will not be included in *B*'s income. *A*'s employer could choose to target this particular disparity and gross up *A*'s income to eliminate the effects of that asymmetrical taxation.[28]

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[23] *See, e.g.*, Solomon, *supra* note 10. Congress has unsuccessfully attempted to address these tax policies in the past; for example, a provision in early drafts of the health care bill, *see* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.), would have eliminated the health insurance disparity, but it was removed before the bill was passed. *See* Bernard, *supra* note 4.

[24] *See supra* note 8.

[25] *See, e.g.*, Bernard, *supra* note 4 (listing employers that have implemented same-sex gross-up policies). Notably, these policies are not simply direct dollar transfers; rather, tax law requires that employers wishing to gross up their employees pay out significantly more than those employees will actually receive. A gross-up worth $1200 to $1500 to an employee, for instance, can cost an employer over $2000. *See id.* This affirmation by employers may also help to mitigate some of the psychic harms that the federal government's nonrecognition causes. *See, e.g.*, Bernard, *supra* note 11 ("The gesture itself validates [gay employees'] relationship[s] with their partners at a time when the government has not.").

[26] *See* Bernard, *supra* note 11.

[27] The table also assumes, for simplicity, that *B* and *B*'s spouse file separately. Under federal law, *B* and *B*'s spouse would be able to file jointly, whereas *A* and *A*'s spouse would not. *See* 26 U.S.C. § 6013 (2006). Because of the different brackets for married individuals filing jointly, *B*'s household liability would differ from *A*'s for reasons other than health insurance if *B* filed jointly. Although the details are beyond the scope of this Note, consider a simple example: Suppose both *A*'s spouse and *B*'s spouse earned $20,000 each in addition to *A*'s and *B*'s $50,000. Since *B* and *B*'s spouse can file jointly but *A* and *A*'s spouse must file separately, *A*'s household would owe a total of $8542.50 in federal income taxes based on 2013 brackets and deductions, while *B*'s household would owe $7777.50. *See* Rev. Proc. 2013-15, 2013-5 I.R.B. 444. By virtue of being unable to file jointly, *A*'s household taxes are $765 higher than *B*'s.

[28] While many gross-up policies currently focus on health insurance as the largest source of tax inequality, it is possible to offer a gross-up for any tax provision that treats two groups differently. An employer could, for instance, gross up a homosexual employee's salary to compensate for her inability to file a joint tax return or could gross up a student's salary to compensate for the higher tax rates he faces as someone else's dependent.

	A	*A*, with gross-up	*B*
Filing status	Single	Single	Married, filing separately
Cash salary	$ 50,000.00	$ 52,000.00	$ 50,000.00
Total income[29]	$ 56,000.00	$ 58,000.00	$ 50,000.00
Standard deduction[30]	$ 6,100.00	$ 6,100.00	$ 6,100.00
Taxable income[31]	$ 49,900.00	$ 51,900.00	$ 43,900.00
Tax liability[32]	$ 8,403.75	$ 8,903.75	$ 6,903.75
After-tax income	$ 41,596.25	$ 43,096.25	$ 43,096.25

There are several ways in which an employer can structure a gross-up, such as tailoring it to each employee's specific tax rates, which requires employees to provide their employers with their previous year's tax returns, or adopting a "one size fits all" plan, which simply estimates average tax burdens.[33] In practice, employers that have implemented same-sex gross-ups have used a variety of designs in structuring their plans.[34]

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[29] Income includes the value of all goods and services received, minus anything that the federal government excludes from the definition of income. *See generally, e.g.*, MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 96–98 (6th ed. 2009). *A*'s income is therefore $6000 higher than the cash wage that *A*'s employer pays because it includes the value of the health insurance that *A*'s spouse receives from the employer; the insurance for *B*'s spouse is explicitly excluded under federal law, *see* 26 C.F.R. § 1.106-1 (2012).

[30] The standard deduction is an amount that the government effectively allows all individuals to shield from tax liability each year. *See generally* GRAETZ & SCHENK, *supra* note 29, at 228–29, 421–24. For the 2013 values, see Rev. Proc. 2013-15, 2013-5 I.R.B. 444.

[31] Taxable income is total income minus deductions. *See* GRAETZ & SCHENK, *supra* note 29, at 26.

[32] This chart uses 2013 federal brackets and rates, which are listed in Rev. Proc. 2013-15, 2013-5 I.R.B. 444.

[33] Todd A. Solomon & Brian J. Tiemann, *Issues to Consider in Providing a Tax Gross-Up for Employees Covering Same-Sex Spouses and Partners Under the Employer's Medical, Dental, and Vision Plans*, 4 BLOOMBERG L. REP., no. 2, 2011, *available at* http://www.mwe.com/info/pubs/solomon_tiemann_tax_gross-up_for_employees.pdf. Many other variations could exist. For example, gross-ups could be paid in weekly paychecks or as a year-end bonus; they could be structured to account for federal income taxes alone, or also for the federal wage tax and any relevant local taxes; and they could be designed to address disparate tax treatment with respect to any number of features, including filing status, healthcare coverage, and more. *See id.*

[34] For example, the City of Cambridge, Massachusetts — the first public employer to adopt a same-sex gross-up — uses a one-size-fits-all approach that provides a quarterly stipend of "20% of

II. THE SAME-SEX GROSS-UP UNDER FEDERAL AND STATE ANTIDISCRIMINATION STATUTES

Despite the increasing popularity of same-sex gross-ups, there have been no legal analyses of those policies, either in court cases or in academia. It is not difficult to imagine the context for a legal challenge to same-sex gross-up policies: An employee in an opposite-sex marriage sues her employer, alleging that the employer is unfairly paying her less than her coworker solely because of her sexual orientation. Because her coworker is married to a same-sex spouse but she is married to an opposite-sex spouse, the plaintiff would claim, the employer deliberately denied her a bonus without any basis in the quality of her work. Such a plaintiff could attempt to state claims under Title VII of the Civil Rights Act of 1964,[35] the Equal Pay Act,[36] and state antidiscrimination laws.

The first potential basis for a plaintiff's claims is Title VII. The law establishes, in relevant part, that "[i]t shall be an unlawful employment practice . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin."[37] Given its language, Title VII almost certainly cannot support a challenge to same-sex gross-up policies because it does not include sexual orientation as a protected category. Although there is a vibrant academic debate over whether Title VII ought to be read to include sexual orientation,[38] the courts have over-

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the reported taxable income imputed to the employee, for both health and dental fund benefits." Letter from Robert W. Healy, City Manager, to City Council (May 23, 2011), *available at* http://www2.cambridgema.gov/cityClerk/cmLetter.cfm?action=search&item_id=19380. The City chose twenty percent "as the best estimate of the marginal tax rate for more persons who would be eligible for this benefit." *Id.; see also* Tara Siegel Bernard, *Yale and Columbia Reimburse Gay Employees for Extra Taxes*, N.Y. TIMES (Dec. 20, 2011, 11:45 AM), http://bucks.blogs.nytimes.com/2011/12/20/yale-and-columbia-reimburse-gay-employees-for-extra-taxes (discussing Yale University's fixed dollar amount plan and Syracuse University's hybrid plan); Kathleen Pender, *Who Pays Tax on Domestic Partner Benefits?*, SFGATE (July 8, 2010, 4:00 AM), http://www.sfgate.com/business/networth/article/Who-pays-tax-on-domestic-partner-benefits-3259655.php (discussing Kimpton Hotels and Restaurants' individualized plan).

[35] 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[36] 29 U.S.C. § 206(d) (2006).

[37] 42 U.S.C. § 2000e-2(a).

[38] *Compare, e.g.*, Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 LAW & SEXUALITY 61, 69–73 (2011) (arguing that Title VII can support sexual orientation stereotyping claims), *with* William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 527–39 (2011) (acknowledging that Title VII in its current form does not support claims based on sexual orientation and advocating an amendment that would establish them). *See generally* Michael Sachs, Comment, *The Mystery of Title VII: The Various Interpretations of Title VII as Applied to Homosexual Plaintiffs*, 19 WIS. WOMEN'S L.J. 359 (2004) (identifying multiple interpretations of Title VII, both including and excluding protection for sexual orientation). One leading academic theory for reading sexual orientation into Title VII is that discrimination be-

whelmingly agreed that it does not. While the Supreme Court has not addressed this issue directly, every circuit to consider the question has concluded that Title VII does not protect sexual orientation.[39]

Plaintiffs could also try to ground their claims in the Equal Pay Act, but that approach likewise fails. The Equal Pay Act provides that "[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work."[40] Like Title VII, this language makes no provision for sexual orientation. Creative plaintiffs could attempt to argue, under either the Equal Pay Act or Title VII, that same-sex gross-ups are based on sex: a man married to a woman, for instance, would be ineligible for a gross-up, but if he were a woman married to that same spouse, he would be eligible. Courts, however, have rejected such arguments, acknowledging their creativity but ultimately deeming them "incorrect."[41]

Perhaps recognizing that federal antidiscrimination statutes do not protect sexual orientation, many congressmen and commentators have advocated new legislation to prohibit workplace discrimination against individuals on the basis of sexual orientation. Specifically, the Employment Non-Discrimination Act[42] (ENDA), which has been introduced in nearly every session of Congress since 1994,[43] would create a sexual orientation provision paralleling the protections of Title VII. The bill's language directly mirrors Title VII's, declaring that "[i]t shall be an unlawful employment practice . . . to . . . discriminate against any individual with respect to the compensation . . . of the individual,

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cause of sexual orientation is inherently discrimination "because of" sex: since the victim is not conforming to the stereotypes surrounding his or her gender (including being attracted to individuals of the opposite sex), discrimination on the basis of his or her sexuality is necessarily discrimination because of sex. *See generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). This argument, however, is unlikely to succeed in court. *See* sources cited *infra* note 41 and accompanying text.

[39] *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Richardson v. BFI Waste Sys. of N. Am., Inc., No. 00-30008, 2000 WL 1272455, at *1 (5th Cir. Aug. 15, 2000) (per curiam); Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007); U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992).

[40] 29 U.S.C. § 206(d).

[41] Cleaves v. City of Chicago, 68 F. Supp. 2d 963, 967 (N.D. Ill. 1999); *see also* Foray v. Bell Atl., 56 F. Supp. 2d 327, 329–30 (S.D.N.Y. 1999).

[42] H.R. 1397, 112th Cong. (2011).

[43] Sung, *supra* note 38, at 497, 501.

because of such individual's actual or perceived sexual orientation or gender identity."[44]

Unlike Title VII and the Equal Pay Act, then, ENDA's plain language would clearly reach a compensation differential deliberately and explicitly based on an employee's sexual orientation. The fact that the differential is benign, or is attempting to benefit an otherwise disfavored class of individuals, should be irrelevant; courts have consistently held that Title VII's classifications protect minorities and majorities alike,[45] and the close similarity between ENDA's language and Title VII's indicates that the same constructions should govern.[46] Likewise, the fact that gross-ups apply only to a subset of homosexual employees (those in same-sex marriages) should be irrelevant, because courts have held that policies remain discriminatory even when they do not fall neatly along demographic divides so long as they wholly exclude one particular class of individuals from a certain benefit.[47] Since employers with gross-ups would offer higher pay to certain homosexual employees and would not allow heterosexual employees to receive the same benefit, they would be in violation of ENDA. Ironically, then, legislation designed to benefit individuals in same-sex marriages could have the unintended consequence of invalidating private attempts to do the same.[48] If Congress passes ENDA, it ought to consider the

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[44] H.R. 1397.

[45] *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–83 (1976) (holding that Title VII bars discrimination against whites as well as blacks); *cf.* Brennan v. Metro. Opera Ass'n, 729 N.Y.S.2d 77, 80 (App. Div. 2001) (observing that sexual orientation provision in state anti-discrimination law protects heterosexuals from discrimination favoring homosexuals). The Court has, on rare occasions, approved actions by private employers favoring minorities, but such preferential policies must meet very stringent criteria, one of which is that the rights of nonminorities may not be unduly trammeled. *See* Corey A. Ciocchetti & John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U. PA. J. BUS. L. 283, 300–01 (2010). Gross-ups probably cannot be justified on those grounds, however, because the ineligibility of heterosexual employees would most likely constitute the undue trammeling that the doctrine disallows, since the gross-up is denied to all heterosexual employees at all times. A limited benefit granted (or denied) only in a few rare instances, such as a hiring preference, may be permissible. *See id*.

[46] *See, e.g.*, Jeremy S. Barber, Comment, *Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 524–25 (2002). Obviously, Title VII would not govern the interpretation of ENDA with respect to the many aspects in which they are facially different. *See, e.g.*, Regina L. Stone-Harris, Comment, *Same-Sex Harassment — The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269, 319–20 (1996). The material provisions of ENDA governing a challenge to same-sex gross-ups, however, would generally run directly parallel to those of Title VII.

[47] *See, e.g.*, Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199–200 (1991) (invalidating policy that treated gender groups differently, even though there may have been a benign explanation aside from gender); Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (per curiam) (noting that policy excluding some women may be invalid even if it does not necessarily favor all men).

[48] Many commentators have proposed alternatives to ENDA; most focus on amending Title VII to include sexual orientation and gender identity as protected classifications. *See, e.g.*, Sung,

bill's likely effect on same-sex gross-ups and, if it wishes to allow private employers to continue the practice, include a proper exemption.

Importantly, at least nineteen states plus the District of Columbia have already passed legislation that, like ENDA, prohibits employment discrimination (including in terms of compensation) based on sexual orientation.[49] In these states, providing same-sex gross-ups may actually be an illegal discriminatory employment practice. These state laws typically make it unlawful for employers "to discriminate against [an employee] in compensation" on account of his or her sexual orientation.[50] Given this language, an employee ineligible to receive a gross-up would be able to state a prima facie case under the state law: the ineligible employee suffered discrimination in compensation insofar as she received less than her peers solely because their sexual orientation differed from hers. A defendant could argue, and a state court could accept, that the antidiscrimination laws should be read to prohibit only malicious discrimination and not to bar efforts that are designed to *remedy* existing biases, even though those efforts distinguish employees on the basis of sexual orientation.[51] The language of most

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supra note 38, at 494. Those proposals, however, would have the same effect as ENDA, since including "sexual orientation" as a protected category without also exempting gross-ups would render pay differentials based on sexual orientation invalid.

[49] *See* CAL. GOV'T CODE § 12940(a) (Deering 2010); COLO. REV. STAT. § 24-34-402(1)(a) (2011); CONN. GEN. STAT. § 46a-81c (2011); DEL. CODE ANN. tit. 19, § 711(a) (2005 & Supp. 2010); D.C. CODE § 2-1402.11(a) (LexisNexis 2001); HAW. REV. STAT. § 378-2(1)(A) (1993); 775 ILL. COMP. STAT. ANN. 5/2-102(A) (West 2011); ME. REV. STAT. ANN. tit. 5, § 4572 (2002); MD. CODE ANN., STATE GOV'T § 20-606(a) (LexisNexis 2009); MASS. GEN. LAWS ch. 151B, § 4 (2010); MINN. STAT. § 363A.08(2) (2010); NEV. REV. STAT. ANN. § 613.330(1) (LexisNexis 2006); N.H. REV. STAT. ANN. § 354-A:7(I) (2009); N.J. STAT. ANN. § 10:5-12 (West 2002); N.M. STAT. ANN. § 28-1-7(A) (2004); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010); OR. REV. STAT. § 659A.030(1) (2011); R.I. GEN. LAWS § 28-5-7(1) (2003); WASH. REV. CODE § 49.60.180 (2010); WIS. STAT. ANN. § 111.321 (West 2002) (prohibiting discrimination based on sex, which includes sexual orientation as defined by WIS. STAT. ANN. § 111.36(1)(d)). Two additional states prohibit employment discrimination on the basis of sexual orientation generally but do not make specific reference to compensation. *See* IOWA CODE ANN. § 216.6 (West 2009); VT. STAT. ANN. tit. 21, § 495(a) (2009). On the whole, this legislation should be relevant in the context of same-sex gross-ups only in those states allowing same-sex marriage, since the disparate tax treatment (and, therefore, the impetus for employers to establish gross-ups) exists only in states that allow marriages not recognized by the Internal Revenue Code. It may still be relevant in other states for those companies that provide domestic partner gross-ups to individuals in same-sex partnerships but not to individuals in opposite-sex partnerships, but such policies are beyond the scope of this Note, primarily because they provide a plausible basis other than sexual orientation — namely, ability to marry — for the pay differentials they create. *See, e.g.*, Irizarry v. Bd. of Educ. of Chi., 251 F.3d 604, 610 (7th Cir. 2001) ("It was rational for the board to refuse to extend domestic-partnership benefits to persons who can [marry] if they wish . . . .").

[50] *E.g.*, CAL. GOV'T CODE § 12940(a).

[51] *Cf. Irizarry*, 251 F.3d at 606, 609–11 (rejecting argument that policy providing benefits to same-sex but not opposite-sex domestic partners, implemented in an effort to remedy the effects of same-sex partners' being unable to marry and claim such benefits through traditional means, impermissibly discriminated against opposite-sex domestic partners); Howard Univ. v. Green, 652

state antidiscrimination statutes does not explicitly support such a conclusion, but the interpretation is at least a plausible one and could be persuasive if the legislative history supported it. No state cases have yet addressed same-sex gross-ups,[52] meaning that the door is still open to reaching this result.[53]

More so than existing federal laws, then, state antidiscrimination laws with sexual orientation provisions would appear to pose a threat to same-sex gross-up policies. There is a possibility that state courts could save gross-up policies by construing those statutes to prohibit only malicious discrimination. But if courts confine themselves to the plain text of the statutes, proponents of same-sex gross-ups may need to seek a legislative solution to preserve those policies.[54]

III. THE SAME-SEX GROSS-UP AND CONSTITUTIONAL PROTECTIONS

Federal and state statutes provide the only limits on the ability of private employers to provide gross-ups to their employees; and, under current law, federal statutes do not appear to outlaw such practices, although certain state laws may. Public employers[55] who wish to pro-

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A.2d 41, 49 n.11 (D.C. 1994) (observing that sexual orientation provision in municipal law does protect heterosexuals, but that it was primarily designed to benefit disadvantaged homosexuals).

[52] One reason why no such cases have yet arisen is that most employers who adopted same-sex gross-up policies relatively early may also have workplace environments unlikely to breed resentment toward such policies and, therefore, unlikely to generate dissatisfied employees who would commence litigation. *See, e.g.*, Sullivan, *supra* note 13 (explaining that corporate culture at Google most likely prevents employees from suing the company to challenge the policy).

[53] An employer could also claim that the distinction is based on marital status rather than sexual orientation. This argument, however, is unpersuasive. Many states also prohibit employment discrimination based on marital status. *See, e.g.*, N.Y. EXEC. LAW § 296(1)(a). Moreover, even when an employer's policy is not banned under a marital status discrimination provision, many courts have rejected arguments that a policy depended on marital status rather than sexual orientation when used to defend policies *disadvantaging* homosexual employees. *See, e.g.*, Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 443 (Or. Ct. App. 1998) (explaining that a policy formally relying on a neutral basis such as marital status still violates antidiscrimination laws if it still "has the effect of screening out members of a protected class at a significantly higher rate than others" (quoting Spurgeon v. Stayton Canning Co., 759 P.2d 1104, 1107 (Or. Ct. App. 1988)) (internal quotation marks omitted)). Since gross-up policies are clearly intended to remedy complications arising from the treatment of sexual orientation and facially depend, at least in part, on employees' sexual orientation, a court would need to deliberately ignore the policy's intent to find it neutral with respect to sexual orientation.

[54] One example of a partial solution is Illinois's law, which prohibits employment discrimination based on sexual orientation but specifically reserves the ability — although for public employers only — to institute affirmative action policies. *See* 775 ILL. COMP. STAT. ANN. 5/1-102(A), (H).

[55] The term "public employers" in this context refers to state actors — that is, those governmental and quasi-governmental entities to which the Fourteenth Amendment applies. *See generally* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (discussing the state action requirement of the Fourteenth Amendment). Such employers would thus include, among others, states and municipalities, public school systems, and prisons. This Note focuses on state governments because

vide gross-ups, however, must also comply with the Fourteenth Amendment's Equal Protection Clause and its analogues in state constitutions.

A. Same-Sex Gross-Ups Under Traditional Equal Protection Tiers of Scrutiny

When deciding Equal Protection Clause cases, the Supreme Court has traditionally relied on three tiers of scrutiny, the choice of which depends on how "suspect" the relevant classification is.[56] Strict scrutiny is the most stringent equal protection test; under it, laws are presumptively invalid, and the burden is on the government to show that they "are narrowly tailored measures that further compelling governmental interests."[57] Rational basis review is at the opposite end of the spectrum: laws assessed under the rational basis standard are presumptively valid, and the burden falls on the challenger to prove that they are not "rationally related to a legitimate state interest."[58] Finally, intermediate scrutiny falls somewhere between those two bound aries, sustaining only those laws that are "substantially related to a[n] . . . important governmental interest."[59]

The Court has clearly identified the proper levels of scrutiny for several different classifications. Race, religion, nationality, and alienage are treated as suspect classes evaluated under strict scrutiny; gender and illegitimacy as quasi-suspect classes evaluated under intermediate scrutiny; and all other classifications, including age and mental disability, as nonsuspect classes evaluated under the rational basis standard.[60] The level of scrutiny that governs sexual orientation cases, however, remains ambiguous.[61]

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the federal government is unlikely to adopt a policy directly contravening a congressional enactment, but the analysis for any federal policy would be identical to that for state policies. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that the Equal Protection Clause imposes the same level of scrutiny on federal actors as it does on states with respect to racial classifications).

[56] Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2772 (2005).

[57] *E.g.*, *Adarand*, 515 U.S. at 227; *see also, e.g.*, Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 4 (2000).

[58] *E.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[59] *E.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

[60] *See, e.g.*, Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 PEPP. L. REV. 1021, 1025 (2011); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of* Bowers v. Hardwick, 22 GA. L. REV. 773, 797–98 (1988).

[61] *See, e.g.*, Kristina Brittenham, Note, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough*, 45 B.C. L. REV. 869, 889 (2004); *see also infra* pp. 1361–62.

Unsurprisingly, the different tiers of traditional equal protection scrutiny would produce a range of results for gross-up policies. Under strict scrutiny, such policies would almost certainly be invalid unless they were individually tailored to each employee's tax situation, and even then, the question remains a close one.[62] The narrow tailoring requirement of the strict scrutiny test demands that government policies be neither over- nor underinclusive.[63] Any gross-up not directly linked to each employee's specific tax bracket — including those using a fixed dollar amount, a fixed percentage of income,[64] or a benefits cap — would therefore not be narrowly tailored, since it would over- or undercompensate certain recipients and thus would not equalize all employees. Moreover, even if a narrowly tailored gross-up can be designed, it is unlikely that it would be supported by a compelling government interest. While the Supreme Court has recognized that remedying the effects of private discrimination may constitute a compelling state interest,[65] it has not recognized a compelling state interest in remedying public — and, indeed, federally sanctioned — discrimination.[66] Thus, a gross-up policy would likely fail under strict scrutiny.

Under intermediate scrutiny, the outcome would be far less clear, and would depend largely on the structure of the gross-up. Remedying the effects of ongoing discrimination that are imposed by the federal tax code and are contrary to a state's public policy could plausibly

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[62] A court could potentially decide that the strict and intermediate scrutiny tests do not require two-way equality with respect to homosexuals — that is, that those tests should invalidate policies created to harm homosexuals but not those designed to help them. Such a conclusion is unlikely, however, given that the Court has held that these constitutional standards run both ways — that is, they also protect a dominant group from policies benefitting a weaker one for all other classes of elevated scrutiny that the Court has established. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986) (invalidating a policy under strict scrutiny because it placed too much of the burden on white employees, while admitting that the policy was designed to promote valid goals); Craig v. Boren, 429 U.S. 190, 210 (1976) (invalidating, under intermediate scrutiny, a policy that prohibited underage males from buying low-alcohol beer but allowed underage females to do so). *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004) (distinguishing between "antisubordination," which requires only one-way equality, and "anticlassification," which requires two-way equality, and observing the trend toward the latter in heightened scrutiny cases).

[63] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326–29 (2007).

[64] Although a fixed percentage would result in a different dollar amount for each employee, it would not be narrowly tailored to remedying the employee's tax inequities because it would simply estimate a tax bracket rather than use the actual one, and thus would either over- or underpay the employee.

[65] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 625–26 (1984).

[66] This issue poses a unique federalism question: can a state claim a compelling interest in countering the effects of a federal statute? Longstanding Supreme Court precedent suggests not. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 437 (1819) (prohibiting a state from resisting federal policies through taxation). Note, however, that for purposes of state constitutional analysis, such an interest could still be considered "compelling" according to state constitutional law.

constitute the requisite "important" government interest.[67] However, whether the policy is "substantially related" to that interest may be more variable. A plan tailored to individual employees' tax brackets, for instance, is very closely related to remedying those effects and should be valid, but a court could reasonably conclude that a one-size-fits-all plan is too imprecise to be considered "substantially" related.[68]

Finally, under the traditional rational basis standard, a gross-up would certainly be upheld. Even if there is some question in terms of whether the interest of remedying the effects of discrimination in the tax code is substantial, it certainly is at least legitimate. Since grossing up the salaries of same-sex employees promotes equality in at least some way, and possibly even to a degree that satisfies intermediate scrutiny, it would pass the rational basis test.[69]

It is not clear, however, that any of these traditional analyses would govern same-sex gross-ups. Sexual orientation is the classification that has received perhaps the most unusual treatment under the Equal Protection Clause. In 1986, the Court in *Bowers v. Hardwick*[70] upheld a state law prohibiting homosexual sodomy on rational basis grounds under the Due Process Clause.[71] Just ten years later, in *Romer v. Evans*,[72] the Court, this time on rational basis grounds under the Equal Protection Clause, struck down a Colorado state constitutional

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[67] *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986) (holding that state antidiscrimination policy represents an important government interest).

[68] Courts would have wide latitude in deciding this issue. Perhaps the best guidepost is *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam). In *Califano*, the Supreme Court upheld a federal policy designed to compensate women for past employment discrimination by allowing them to exclude more of their lowest earning years from the calculation of their Social Security basis than men. *Id.* at 314–16. In some ways, this policy was tailored to individual circumstances in that it kept Social Security benefits at least loosely tied to each woman's income rather than giving all women a flat bonus. In other respects, however, it could easily have been seen as overbroad, since it also benefitted women who did not experience any discrimination. One-size-fits-all gross-ups could be compared to either of these two aspects. On one hand, a flat benefit regardless of the actual tax consequences that each employee faces could be compared to the application of the Social Security policies in *Califano* to all women regardless of the degree of discrimination they actually faced, indicating that the gross-ups should be equally permissible. On the other hand, the Social Security plan in *Califano* altered each woman's benefits based on her own unique employment history, whereas a one-size-fits-all gross-up would operate regardless of each individual's unique tax status, indicating that the gross-ups are more overbroad than the *Califano* program and might therefore fail under intermediate scrutiny.

[69] *See, e.g.*, Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 288 (2011) ("[Traditional] rational-basis review [is] so deferential as to amount to virtually no review at all. Even the most egregiously unfair laws could survive this kind of scrutiny." (footnote omitted)).

[70] 478 U.S. 186 (1986).

[71] *Id.* at 189. While the state law technically applied to all sodomy regardless of sexual orientation, *see id.* at 188 & n.1, the Court considered the law only as it applied to homosexual sodomy, *see id.* at 188 n.2.

[72] 517 U.S. 620 (1996).

amendment prohibiting state and local legislatures from passing anti-discrimination laws in favor of homosexuals.[73] Finally, in 2003, the Court in *Lawrence v. Texas*[74] overruled *Bowers*, declaring that prohibitions on homosexual sodomy had no rational basis under the Due Process Clause and were thus unconstitutional.[75]

Interestingly, all of the Court's sexual orientation cases have purported to use a rational basis standard, declining to make sexual orientation a protected class.[76] Ordinarily, rational basis review is extremely deferential and only rarely is sufficient to invalidate a law.[77] The fact that the Court's sexual orientation jurisprudence has resulted in substantially less deference than one would expect under ordinary rational basis review[78] has led many commentators to call the standard "rational basis with bite."[79] Since same-sex gross-ups are entirely dependent upon sexual orientation classifications, the important question that must be confronted in any challenge to a public employer's same-sex gross-up policies is what precisely "rational basis with bite" permits and prohibits.[80]

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[73] *Id.* at 635.

[74] 539 U.S. 558 (2003).

[75] *Id.* at 578.

[76] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756, 776–81 (2011).

[77] *See, e.g.*, Smith, *supra* note 56, at 2773–74 (collecting examples of deferential applications of the rational basis test).

[78] Under ordinary rational basis review, the ex post articulation of any rational policy should be sufficient to justify a law, regardless of its actual motives or effects. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (upholding retirement law on the basis of ex post justification despite evidence that the law as enacted worked against interests Congress likely thought it was vindicating); City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (accepting ex post justifications for policy that appeared to work in part against its stated goals). In sexual orientation cases, however, the Court has invalidated laws even though they could claim a plausible rational basis, such as promoting the associational rights of citizens or preserving public resources to focus on other forms of discrimination. *See Romer*, 517 U.S. at 635.

[79] *See, e.g.*, Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67, 88 (2008); Mark Strasser, Essay, *Equal Protection at the Crossroads: On* Baker*, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 936 (2000); Yoshino, *supra* note 76, at 759; Pamela Glazner, Comment, *Constitutional Law Doctrine Meets Reality: Don't Ask, Don't Tell in Light of* Lawrence v. Texas, 46 SANTA CLARA L. REV. 635, 639 (2006); Daniel Milstein, Note, *'Til Death Do Us File Joint Income Tax Returns (Unless We're Gay)*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 451, 476 n.213 (2011); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793 (1987); Smith, *supra* note 56, at 2774, 2784. Some commentators have termed this standard "rational basis plus." *See, e.g.*, William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 523 (2005).

[80] Of course, if the public employer is an entity of a state whose constitution protects sexual orientation with intermediate or strict scrutiny, state constitutional analysis will be important as well. *See, e.g.*, Strauss v. Horton, 207 P.3d 48, 73 (Cal. 2009) (noting state's protection of sexual orientation under a strict scrutiny standard); Gunn v. Lane Cnty., 20 P.3d 247, 251 (Or. Ct. App. 2001) (same); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (noting state's protection of sexual orientation under intermediate scrutiny). In states that treat sexual orientation as a strict scrutiny category, a court would likely apply the state's strict scrutiny test to inva-

B. What Is Rational Basis with Bite?

Commentators — and, in a few rare instances, courts — have identified a wide range of cases employing rational basis with bite. There is generally consensus that *Romer* and *Lawrence* rely on this standard,[81] as does *City of Cleburne v. Cleburne Living Center*.[82] Many commentators also identify *U.S. Department of Agriculture v. Moreno*[83] and *Plyler v. Doe*[84] as canonical examples. A number of other cases have been proposed as exemplifying the rational basis with bite standard,[85] but none have generated the same consensus as these five "classical" rational basis with bite cases.

Together, these cases indicate that the rational basis with bite standard should be thought of as a two-part test. The reviewing court must first decide whether the law targets or works principally to the disadvantage of a politically unpopular group.[86] If it does, the court

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lidate the gross-up, *see supra* TAN 62–66, and thereby avoid the murkier federal constitutional question. *See generally* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001) (discussing the constitutional avoidance canon). The first public employer to offer a same-sex gross-up, the City of Cambridge, Massachusetts, does not face a state constitutional problem — yet — because the Massachusetts Supreme Judicial Court has explicitly declined to examine whether sexual orientation is protected by strict scrutiny. *See* Commonwealth v. Washington W., 928 N.E.2d 908, 912 & n.4 (Mass. 2010).

[81] *See, e.g.*, Yoshino, *supra* note 76, at 760; Sarah Finnane Hanafin, Note, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 466–67 (2011); Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2389 (2007); Smith, *supra* note 56, at 2785; Joshua S. Stillman, Note, *The Costs of "Discernible and Manageable Standards" in* Vieth *and Beyond*, 84 N.Y.U. L. REV. 1292, 1326 (2009).

[82] 473 U.S. 432 (1985) (invalidating as irrational a zoning law that prohibited construction of a living center for the mentally disabled); *see, e.g.*, Yoshino, *supra* note 76, at 760; Hanafin, *supra* note 81, at 466; Pettinga, *supra* note 79, at 793–94; Smith, *supra* note 56, at 2774 n.38; Stillman, *supra* note 81, at 1325–26 & n.195; *The Supreme Court, 1999 Term — Leading Cases*, 114 HARV. L. REV. 179, 188 (2000); Steven P. Wieland, Note, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address* Varnum v. Brien, 94 IOWA L. REV. 413, 421–22 (2008).

[83] 413 U.S. 528 (1973) (invalidating a provision denying welfare to households including unrelated individuals because it was based on malice toward hippie communes); *see, e.g.*, Yoshino, *supra* note 76, at 760; Stillman, *supra* note 81, at 1325–26 & n.195; Wieland, *supra* note 82, at 421.

[84] 457 U.S. 202 (1982) (invalidating a policy excluding illegal immigrants from public schools because it imposed substantial costs but only weakly furthered its stated goals); *see, e.g.*, Lau, *supra* note 79, at 88 n.120; Hanafin, *supra* note 81, at 467; Stillman, *supra* note 81, at 1325 & n.192.

[85] *See, e.g.*, Pettinga, *supra* note 79, at 787–800; *see also* Wieland, *supra* note 82, at 421.

[86] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). While past rational basis with bite cases have dealt only with policies that operate to the detriment of a protected group, the possibility remains open that it could apply to all policies treating that group differently, whether for a good or bad reason. A court could base such treatment on the notion that the classification itself falls under the rational basis with bite standard, just as other classifications fall under intermediate or strict scrutiny standards, or on the

must then evaluate the law under a standard somewhat more rigorous than ordinary rational basis review, discarding any purported justifications for the law that are based on animus and scrutinizing the remaining justifications to ensure that there is a meaningful connection between the law's goals and its operation.[87]

In *Moreno*, for instance, the Supreme Court struck down a policy denying food stamps to households of unrelated individuals because the policy "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[88] The Court explained that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[89] After discarding that animus-based justification, the Court determined there was no remaining legitimate interest observable in the law's operation.[90] Likewise, in *Plyler*, the Court struck down a Texas law prohibiting illegal immigrants from attending public schools on the grounds that it achieved no substantial policy benefit and that the "stigma" imposed by the policy was overwhelming.[91] Although the Court acknowledged that the interest of saving state fiscal resources remained even after discarding animus-based rationales, it concluded that the law's relationship to that interest was extremely attenuated and therefore could not sustain a policy operating against a politically unpopular group.[92] In *Cleburne*, the Court invalidated a zoning ordinance restricting the areas in which mentally disabled individuals could live. It held that the zoning policy evinced "a continuing antipathy or prejudice" toward the mentally disabled and was based largely on "negative attitudes, or fear," and that there were no other — and therefore no legitimate — state interests at play.[93]

Lower courts that have carefully followed the Supreme Court's precedents regarding sexual orientation have applied this same test.[94]

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notion that separate treatment is itself a detriment, regardless of intent. *Cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (plurality opinion) (explaining that it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)) (internal quotation mark omitted)). If a court determined that the case was governed by traditional rational basis and not rational basis with bite, the same-sex gross-up would certainly survive.

[87] *See, e.g.*, Pettinga, *supra* note 79, at 780 (arguing that rational basis with bite is equivalent to intermediate scrutiny); Smith, *supra* note 56, at 2794.

[88] *Moreno*, 413 U.S. at 534.

[89] *Id.* (emphasis omitted).

[90] *Id.* at 535–36. The government purported to identify several other interests, but the Court determined that they were not rationally borne out by the evidence. *See id.*

[91] Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

[92] *See id.* at 224–30.

[93] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443, 448 (1985).

[94] *See, e.g.*, Witt v. Dep't of the Air Force, 527 F.3d 806, 813 (9th Cir. 2008) ("Having carefully considered *Lawrence* and the arguments of the parties, we hold that *Lawrence* requires something more than traditional rational basis review . . . .").

Recently, for instance, the First Circuit in *Massachusetts v. U.S. Department of Health & Human Services*[95] sustained an equal protection challenge to the federal Defense of Marriage Act[96] (DOMA).[97] The court conscientiously declined to apply either intermediate scrutiny or traditional rational basis review, instead noting that Supreme Court precedent indicated that this two-part test should govern.[98] Although it did not disqualify any of DOMA's purported justifications as based on animus, the First Circuit concluded that each of the various justifications offered was at best only weakly related to the operation of the law.[99] Therefore, the court showed the bite of the rational basis with bite standard and invalidated DOMA.

C. The Same-Sex Gross-Up Under Rational Basis with Bite

Given this understanding of the standard for analysis, a same-sex gross-up should almost certainly withstand constitutional scrutiny. A plaintiff challenging the policy would argue that the policy violated the Equal Protection Clause by disadvantaging individuals in opposite-sex marriages relative to those in same-sex marriages.[100] As *Romer* and *Lawrence* demonstrated, homosexuals are certainly a politically unpopular group triggering the heightened scrutiny of rational basis with bite. A reviewing court would therefore carefully examine the justifications for a public employer's gross-up policy. Those policies are not motivated by animus toward heterosexual employees; therefore, the defendant would simply need to show that there are meaningful ties between the policy and the aims it seeks to achieve. The employer could then argue that such interests include ensuring that all employees are provided a fair benefits package that does not increase

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[95] 682 F.3d 1 (1st Cir. 2012).

[96] 1 U.S.C. § 7 (2006).

[97] *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d at 17.

[98] *See id.* at 10 ("Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.").

[99] *See id.* at 14–16 (explaining, for example, that a justification based on fiscal savings was inadequate because evidence suggested that the fiscal impact might actually be negative, and that a justification based on supporting child-rearing environments in traditional marriages was belied by the structure of the law, which provided no additional benefits to traditional marriages).

[100] The plaintiff would most likely have standing if he or she applied for the gross-up and was denied. The plaintiff could then sue, arguing that the employer illegally denied him or her greater compensation on the basis of his or her sexual orientation. The fact that the plaintiff was not left any worse off as a result of the denied bonus would probably be irrelevant to the question of standing. *Cf.* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 979 (9th Cir. 2011) (holding that employee denied promotion, though not necessarily worse off from that denial, had standing to challenge promotion policy); Phillips v. Cohen, 400 F.3d 388, 397 (6th Cir. 2005) (same); *cf. also* Senter v. Gen. Motors Corp., 532 F.2d 511, 517 (6th Cir. 1976) (explaining that courts should take a liberal approach to standing in Title VII cases in order to remain faithful to Congress's policy goals, and citing authority from multiple circuits suggesting the same).

their tax liability. Courts have held that the goal of remedying the effects of inherently discriminatory structures through active employer efforts is a valid one,[101] and gross-up policies obviously work directly toward it.[102] Thus, since there is an animus-free interest that the policy meaningfully works to vindicate, the same-sex gross-up policy should be valid under a rational basis with bite analysis.

IV. THE BENEFITS OF UNEQUAL PROTECTION

Interestingly, then, the rational basis with bite standard allows a degree of asymmetry in the law: it permits certain benign actions that would benefit the protected group, such as the same-sex gross-up, but it prohibits many actions that would disadvantage the group, such as the criminal laws at issue in *Lawrence*. In other words, it preserves a fairly substantial degree of flexibility for states to enact affirmative action policies, which are rarely tainted with animus and almost always can survive a rational basis review but are much less likely to survive higher levels of scrutiny.[103]

This flexibility stands in sharp contrast to the relative rigidity of higher levels of scrutiny. For example, race was the category animating the adoption of the Equal Protection Clause,[104] and minority races have historically been at a significant disadvantage and could substantially benefit from affirmative action programs.[105] Even so, many affirmative action plans that would almost certainly survive under a

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[101] *See, e.g.*, Irizarry v. Bd. of Educ. of Chi., 251 F.3d 604, 606–07 (7th Cir. 2001) (identifying as valid interests attracting homosexual employees and moving homosexuals toward parity with heterosexuals, even if through indirect measures).

[102] Courts have given little guidance in terms of how direct this relationship must be. It is clear that the extreme attenuation ordinarily allowed as the minimum sufficient connection under the rational basis test is insufficient to survive rational basis with bite, *see Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d at 15–16, but the refusal to apply the "intermediate scrutiny" label likely indicates that the intermediate scrutiny requirement of "substantial" relation is too exacting, *see id.* at 8–10; *but see* Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012) (holding that intermediate scrutiny applies to sexual orientation classifications). While it is unclear whether gross-ups are sufficiently related to the interests they vindicate to survive intermediate scrutiny, *see supra* pp. 1360–61, the fact that they could at least plausibly be "substantially" related to those interests means that they should pass the lower rational basis with bite standard.

[103] The same-sex gross-up exemplifies the distinction: even though certain gross-up mechanisms could survive intermediate or even strict scrutiny, many would not. *See supra* pp. 1360–61. In fact, those gross-ups that would not survive intermediate or strict scrutiny are likely to be the easiest for public employers to implement, since they require the fewest individual calculations and are therefore the most easily administrable. The lower level of scrutiny, however, would permit them all. It would thereby make employers more likely to adopt gross-ups, since it would reduce administrative difficulties and preserve a greater degree of flexibility in designing those policies.

[104] *See, e.g.*, Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 269–70 (1997).

[105] *See generally, e.g.*, Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503 (2009).

rational basis inquiry have failed under the strict scrutiny applied to racial classifications.[106] Likewise, in the context of gender, laws attempting to benefit women in light of their historical disadvantage,[107] which would almost certainly survive rational basis review, have been invalidated under intermediate scrutiny.[108] On the other hand, states would be free to implement almost any affirmative action program under a rational basis with bite standard, assuming that they were not motivated by a bare desire to harm the majority group.[109]

Given that rational basis with bite protects minorities against intentionally discriminatory action while allowing them to benefit from affirmative action, an important question remains: what legal safeguards are unavailable to minorities protected by this lower standard rather than by strict scrutiny? The answer is unclear. It may be possible that rational basis with bite cannot protect against legislation with disparate impacts: since almost all legislation that merely results in disparate impacts has some legitimate policy goal behind it, that legislation would be upheld under a rational basis or rational basis with bite standard.[110] Perhaps even certain forms of segregation could still impact minorities under a rational basis with bite standard. For example, the military's "don't ask, don't tell" policy,[111] which excluded openly gay individuals from serving and which was repeatedly upheld under rational basis with bite, would have been invalidated imme-

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[106] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003) (undergraduate admissions); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (federal subcontractors); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (state contractors).

[107] *See, e.g.*, Heather Nelson, *"Fatal in Fact"?: An Examination of the Viability of Affirmative Action for Women in the Post-*Adarand *Era*, 21 WOMEN'S RTS. L. REP. 151, 151–52 (2000).

[108] *See, e.g.*, Lamprecht v. FCC, 958 F.2d 382, 399 (D.C. Cir. 1992) (invalidating gender-based affirmative action program for distribution of broadcasting permits). Unlike in the context of race, there are a significant number of cases upholding gender-based affirmative action. *See, e.g.*, Coral Const. Co. v. King Cnty., 941 F.2d 910, 932–33 (9th Cir. 1991) (upholding funding set-aside program for women-owned businesses). The intermediate scrutiny standard thus does allow a wider degree of latitude for states to implement affirmative action policies than does the strict scrutiny standard, but it also leaves significantly less latitude than does rational basis with bite.

[109] The strict and intermediate scrutiny standards certainly do not in themselves require symmetrical treatment of majorities and minorities. However, given the tendency of the Supreme Court to favor symmetry in cases arising under both standards, there is no reason to believe that the same would not hold true for other classifications that become subject to elevated scrutiny.

[110] *See, e.g.*, Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1075–76 (1979). *But see* Peter Brandon Bayer, *Rationality — And the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 23 n.65 (1988). Of course, intermediate and strict scrutiny protections have not been particularly successful in addressing disparate impacts either, *see* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495–96 (2003), so the loss resulting from rational basis with bite protection relative to other standards may be minimal.

[111] 10 U.S.C. § 654(b) (2006), *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

diately if sexual orientation were protected by strict scrutiny.[112] And, under a deferential rational basis standard, a protected minority would risk having developments in empirical social science justify new disadvantages not motivated by animus.[113]

Perhaps the greatest loss, though, is certainty. While rational basis with bite has the *potential* to grant a protected group all of the same benefits that strict scrutiny does without the attendant loss of the ability to pursue meaningful affirmative action programs, in practice, it may not be quite so robust. The Supreme Court has never openly stated when it has applied the rational basis with bite standard; lower courts therefore have little guidance regarding when they should apply this more searching inquiry.[114] As a result, lower courts often revert to the less protective traditional rational basis test.[115] While rational basis with bite may carry significant benefits for the classes it protects, those benefits will mean little if the lower courts cannot consistently apply the standard. If, however, the courts were to formalize the standard rather than leaving it as an unspoken understanding — and indeed, some courts seem willing to do so[116] — then it may be possible

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[112] *See, e.g.*, Witt v. Dep't of the Air Force, 527 F.3d 806, 817 (9th Cir. 2008) ("Few laws survive such scrutiny, and ['don't ask, don't tell'] most likely would not."). Then again, it is possible to argue that the "don't ask, don't tell" policy should have been invalidated under a proper application of the rational basis with bite standard. Faced with a law that allowed a strong inference of animus toward homosexuals, courts following the rational basis with bite standard should have made a much more searching investigation of the government's proffered justifications rather than merely deferring to findings in the congressional record, *see id.* at 821, and should have upheld the law only if those goals were actually met and were sufficiently weighty to overcome the substantial stigma that the policy created. *Cf.* Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

[113] Returning to the "don't ask, don't tell" example, suppose that, after the policy's repeal, a set of highly reliable scientific studies found that military discipline, cohesion, and effectiveness actually were substantially improved by excluding homosexuals, and Congress therefore chose to reenact the policy. Such a scenario would certainly work to the detriment of homosexuals, but it would also likely survive a rational basis with bite inquiry, since it would not be based on animus and would have a solid grounding in empirical studies to justify a meaningful relationship to legitimate goals. That same policy probably would not survive a strict scrutiny analysis, though, because even though military effectiveness probably constitutes a compelling government interest, wholesale exclusion of a class of people, without reference to whether any individual member of that class would improve military effectiveness, is not narrowly tailored to that objective. *Cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289, 316, 319 (1978) (opinion of Powell, J.) (holding that a policy that "totally excluded" members of certain classes was not narrowly tailored); *In re* Griffiths, 413 U.S. 717, 725 (1973) (holding that a "wholesale ban" on bar admission for aliens was not narrowly tailored to state's interests).

[114] *See* Smith, *supra* note 56, at 2794–95.

[115] *See id.* at 2805, 2810–11.

[116] Many state courts have openly identified the Supreme Court's unspoken standard. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 879 n.7 (Iowa 2009); Conaway v. Deane, 932 A.2d 571, 605 & n.37 (Md. 2007); Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 460–61 (Wis. 2005). Additionally, several lower federal courts have begun to do the same, albeit typically in softer language. *See, e.g.*, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012); Am. Exp. Travel Related Servs. Co. v. Kentucky, 641 F.3d 685, 692 (6th Cir.

for minorities to claim significant protections while still retaining the ability to benefit from meaningful affirmative action programs.[117]

CONCLUSION

Same-sex gross-ups present a novel solution by the private sector to an issue that the public sector has failed to resolve. But they also present novel legal questions. On the whole, it would appear that same-sex gross-up policies are very likely to be upheld under federal antidiscrimination laws and, for public employers, under the Equal Protection Clause. Counterintuitively, though, legislation designed to achieve social parity based on sexual orientation, such as ENDA and various state laws, may have the unintended consequence of invalidating beneficial programs such as gross-ups. Likewise, although many minority rights advocates have historically argued for increased protections and new protected classifications under equal protection doctrine, doing so could likely result in the invalidation of gross-ups and other beneficial policies.

An important implication from the analysis of same-sex gross-ups, then, is that advocates, academics, and lawmakers ought to reconsider the assumption that increased statutory and constitutional protection is an unequivocal good. Specifically, lower degrees of protection may allow an asymmetrical legal structure that heightened protections would prohibit. The benefits to be gained under a one-way scheme of unequal protection may not necessarily outweigh the benefits that certain minorities could obtain by gaining heightened protection, but they should at least be considered among the potential costs of such a move.

2011); *Witt*, 527 F.3d at 813; Deen v. Egleston, 601 F. Supp. 2d 1331, 1343 (S.D. Ga. 2009); S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1048–49 (D.S.D. 2002); Am. Fed'n of Gov't Emps., AFL-CIO v. United States, 195 F. Supp. 2d 4, 12 & n.3 (D.D.C. 2002).

[117] The same costs and benefits attach to existing and proposed statutory protections. In the absence of statutory protections like ENDA, employers are free to take their own initiatives to remedy social inequities facing homosexual employees. Under ENDA, however, those policies would be illegal unless advocates could procure a well-designed carveout that could anticipate all types of affirmative action programs that employers could undertake without operating so broadly that it would continue to allow malicious forms of discrimination. Obviously, ENDA would have significant benefits as well. For example, a homosexual employee whose supervisor fires him because he is homosexual and "homosexuals do not work at" that company has no recourse under existing federal statutes but would be able to sue under ENDA. Cruz v. PS1 Contemporary Art Ctr., No. 10-CV-4899 RRM JMA, 2011 WL 3348097, at *3 (E.D.N.Y. Aug. 1, 2011). This Note does not suggest that being unprotected by antidiscrimination statutes is better than being protected; rather, it suggests that there are certain costs to that protection that have been largely underexplored.