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Framing the *Loving* Analogy: Same-Sex Marriage, Gender Classifications and Heightened Scrutiny under the Equal Protection Clause

By Luiz Antonio Salazar Arroyo

Introduction

It has been 15 years since the Hawaii Supreme Court in *Baehr v. Lewin* became the first court to declare that a law requiring marriage to be between a man and a woman creates an impermissible gender classification triggering heightened scrutiny.¹ With that holding, the claim that denying same-sex couples the right to marriage constitutes gender discrimination went from being a mere academic debate and became a legal reality.² However, despite other major victories for same-sex marriage advocates in the last 15 years,³ *Baehr* remains the only state high court to accept the claim that laws denying same-sex couples the right to marriage constitutes gender discrimination.⁴ The gender discrimination argument, instead, remains relegated to t concurring and dissenting opinions.⁵

¹ 852 P.2d 44, 64, 67 (Haw. 1993). The Court also held that the Hawaii Constitution requires all gender classifications are to be evaluated using strict scrutiny. *Id.* at 67.

² See Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461, 461 (2007).

³ See, e.g., *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (requiring state legislature to allow either same-sex marriage or same-sex civil unions); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003) (requiring the state to allow same-sex marriage); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (requiring the state to allow same-sex civil unions); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that homosexual sodomy laws are unconstitutional).

⁴ Widiss, *supra* note 2, at 461.

⁵ See, e.g., *Conaway v. Deane*, 932 A.2d 571, 677-686 (Md. 2007) (Battaglia, J., dissenting); *Anderson v. King County*, 158 Wn.2d 1, 115-20 (Wash. 2006) (Fairhurst, J., dissenting); *Hernandez v. Robles*, 855 N.E. 2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 971, (Mass. 2003) (Greaney, J., concurring); *Baker v. State*, 744 A.2d 864, 905-07 (Vt. 1999) (Johnson, J., dissenting and concurring).

The gender discrimination argument relies heavily on the Supreme Court's decision in *Loving v. Virginia*, where the Court held that miscegenation laws, which forbid marriage between white and colored people, create impermissible racial classifications in violation of the Equal Protection Clause.⁶ Advocates for same-sex marriage have argued that if laws banning interracial marriages are unconstitutional because they constitute racial discrimination, then laws banning same-sex marriages are also unconstitutional because they constitute gender discrimination.⁷ This has come to be known as the *Loving* Analogy. The analogy yields a strong parallel that has gained great acceptance in the legal academic community, where the *Loving* analogy's supporters greatly outnumber its critics.⁸ However, as previously mentioned this great support of the *Loving* analogy in the academic community has failed to persuade judges into accepting the gender discrimination claim and invalidating laws that ban same-sex marriage.

Facing this abundant rejection of the *Loving* analogy by state high courts, this article takes a different approach to strengthen the claim that laws that require marriage to be between a man and a woman constitute gender discrimination in violation of the Equal Protection Clause. This article looks past the Supreme Court's single decision of *Loving v. Virginia* to the Court's entire equal protection jurisprudence. By analyzing the

⁶ 388 U.S. 1, 11-12 (1967).

⁷ See generally Marc A. Fajer, *Can Two Real Men Eat Quiche Together: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992); Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994) [hereinafter Koppleman, *Sex Discrimination*]; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1 (1994); Andrew Koppleman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145 (1988) [hereinafter Koppleman, *Miscegenation Analogy*]; Robert Wintemute, Comment, *Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in Mossop, Egan and Layland*, 39 McGill L.J. 429 (1994).

⁸ See Lynn D. Wardle & Lincoln C. Oliphant, *Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L.J. 117, 124-25, 128, 170-77 (2007) (containing appendixes demonstrating the imbalance in legal literature between supporters of same-sex marriage and critics of the same); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. Rev. 1, 18-23, 96-101 (1996) (containing appendixes demonstrating the same).

framework of modern equal protection analysis, this article displays that any marriage law that defines marriage as only being between a man and a woman makes a facial gender classification and, therefore, must be subjected to intermediate scrutiny.

Modern equal protection analysis uses a two-step framework to determine whether a law is unconstitutional.⁹ Under the first step, a reviewing court must determine what is the appropriate level of scrutiny to be applied based on the classification made by the law.¹⁰ Under the second step, the reviewing court must determine whether the law passes the appropriate level of scrutiny.¹¹ With equal protection analysis broken down into this two-step approach, this article shows that the criticism directed at the *Loving* analogy is incorrect or misguided when applied to the first step of modern equal protection analysis.¹²

Part I of this article lays out the two-step framework for modern equal protection analysis and gives a brief background of how the framework was created and developed by the Supreme Court. Part II explains the *Loving* analogy and how it has been used to argue that laws requiring marriage to be between a man and a woman constitute gender discrimination in violation of the Equal Protection Clause. Part III uses the modern Equal Protection framework to address criticism of the *Loving* analogy and demonstrates why that criticism is inapplicable to the first step of modern equal protection analysis in determining whether the marriage laws create a gender classification triggering heightened scrutiny. The article concludes by stating that the Equal protection Clause requires a reviewing court to subject a law that requires marriage to be between a man

⁹ See *infra* Part I.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part I.

¹² See *infra* Part III.

and a woman to intermediate scrutiny because such a law would make a facial gender classification.

I. The Equal Protection Clause

A. The Framework of Modern Equal Protection Analysis

The Fourteenth Amendment of the Constitution provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹³ However, the Supreme Court has explained that “[m]ost laws classify, and many affect certain groups unevenly.”¹⁴ Not of these laws can be unconstitutional under the Equal Protection Clause otherwise legislature would have a very difficult time enacting laws. To determine whether a law violates the Equal Protection Clause, the Supreme Court applies a rigid two-step framework with the first step determining what level of scrutiny should be used by the reviewing court based on the classification made by the law, and the second step determining whether the law passes that level of scrutiny.¹⁵

In determining the appropriate level of scrutiny, the first step requires the reviewing court to determine what type of classification the law makes.¹⁶ There are two ways to prove a classification. A law can either make a classification on its face, or it can make a classification as applied.¹⁷ A law makes a classification on its face when it by its

¹³ U.S. CONST. amend. XIV, § 1.

¹⁴ *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979).

¹⁵ See JOHN E. NOWAK & RONALD D. ROTUNDA, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 214-15 (3d ed. 1999). Although Dean Chemerinsky describes equal protection analysis as a three-step process, his framework does not differ from the one I describe in this paper. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES 669-74 (3d ed 2006) (“all equal protection issues can be broken down into three questions: What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?”). Because this Article does not contest the level of scrutiny that should be applied to certain classifications, and instead relies on the levels of scrutiny already established by the Supreme Court, Dean Chemerinsky’s second step of determining what is appropriate level of scrutiny to be applied to a certain classification becomes unnecessary.

¹⁶ See CHERMERINSKY, *supra* note 15, at 670-71.

¹⁷ See *id.* at 670-71; NOWAK & ROTUNDA, *supra* note 15, at 255-56; LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1465-88, 1502-14 (2d ed. 1988).

very own terms “draws a distinction among people based on a particular characteristic.”¹⁸ The classic example of a law making a classification on its face can be found in the Supreme Court’s decision of *Strauder v. West Virginia*.¹⁹ In *Strauder*, the Supreme Court found a West Virginia law that required for jurors to be ““white male persons who are twenty-one years of age and who are citizens of this State”” to be in violation of the Equal Protection Clause.²⁰ The Court concluded “that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes, because of their color, amounts to a denial of the equal protection of the laws to a colored man”²¹ By stating that white people could serve as jurors while black people could not, the law by its own terms drew a distinction among people solely on the basis of race. Thus, the law on its face made a racial classification.²²

The second way a law can make a classification is when it is facially neutral, but it creates a classification as applied.²³ A clear example of a law that is facially neutral but makes a classification as applied can be found in *Yick Wo v. Hopkins*.²⁴ *Yick Wo* involved a law that required the consent of the city board of supervisors before a laundry could be operated in a wooden building, but did not require such consent if it was operated in a brick or stone buildings.²⁵ The law was facially neutral with respect to race because by its own terms, the only distinction it made was between wooden buildings and brick or stone buildings. Despite its facial neutrality, the Court noted that in its application the law

¹⁸ CHEMERINSKY, *supra* note 15, at 670; NOWAK & ROTUNDA, *supra* note 15, at 255-56 (“the law may establish the classification on its face.” This means that the law by its own terms classifies persons for different treatment.”).

¹⁹ 100 U.S. (10 Otto) 303 (1879).

²⁰ *Id.* at 305.

²¹ *Id.* at 310.

²² See CHEMERINSKY, *supra* note 15, at 696-97; TRIBE, *supra* note 17, at 1466.

²³ See CHEMERINSKY, *supra* note 15, at 670-71; NOWAK & ROTUNDA, *supra* note 15, at 255-56; TRIBE, *supra* note 17, at 1502-14.

²⁴ 118 U.S. 356 (1886).

²⁵ See *id.* at 365.

allowed the board of supervisors to withhold consent from 200 petitions all filed by Chinese applicants, but grant consent to 80 petitions filed by non-Chinese applicants.²⁶ Based on this discriminatory effect, the Supreme Court found the law as applied to be in violation of the Equal Protection Clause despite its facial neutrality.²⁷

However, since *Yick Wo*, the Supreme Court has made clear that discriminatory effect is not enough to prove a classification when a law is facially neutral.²⁸ In *Washington v. Davis*, the Court made clear that for a law to make a classification as applied, it must be shown that the law has both a discriminatory effect and a discriminatory purpose.²⁹ In that case, the Court stated that *Yick Wo* was correctly decided because “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”³⁰ In a later case, the Supreme Court explained that such a distinction between facially explicit classifications and facially neutral classifications is needed because “the Fourteenth Amendment guarantees equal laws, not equal results.”³¹

Once the reviewing court has determined the proper classification under the step one, the second step of the modern equal protection framework requires the court to engage in a “means ends” analysis based on the classification.³² The court must determine

²⁶ *Id.* at 374.

²⁷ *Id.* at 373-74 (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal of the Constitution.”).

²⁸ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“we have not held that a law, neutral on its face . . . is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another”).

²⁹ See *id.* at 239-40.

³⁰ *Id.* at 242.

³¹ *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

³² See *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 280 (“[u]nder strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly tailored to accomplish that purpose”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (“[under rational basis review,] the Equal Protection Clause requires only a rational means to serve a legitimate end”); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972). (“legislative means must substantially further legislative ends.”); see also

whether the ends the government seeks to achieve by the classification are permissible and whether the means employed by the government are closely related enough to the ends to justify the classification.³³ A reviewing court does this by utilizing “an elaborate system of judicial review composed of multiple levels of scrutiny,” which applies a specific level of scrutiny depending on what classification the court determined the law makes under step one.³⁴

Strict Scrutiny has been used by the Supreme Court to evaluate classifications based on race,³⁵ national origin³⁶ and alienage.³⁷ The Court has referred to these classifications as suspect.³⁸ Under strict scrutiny review, classifications are upheld if they are narrowly tailored to serve a compelling governmental interest.³⁹ The burden falls on the government to defend the use of such classifications.⁴⁰ Although strict scrutiny is the highest level of scrutiny and most laws cannot survive it, the Supreme Court has stated

CHEMERINSKY, *supra* note 15, at 673-74; NOWAK & ROTUNDA, *supra* note 15, at 205-08; TRIBE, *supra* note 17, at 1440.

³³ Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 186 (2003).

³⁴ Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 161 (1984); *see City of Cleburne*, 473 U.S. at 439-42; CHESTER JAMES ANTIEAU & WILLIAM J. RICH, 2 MODERN CONSTITUTIONAL LAW 5-9 (2d ed. 1997); CHEMERINSKY, *supra* note 15, at 673-74; ROTUNDA & NOWAK, *supra* note 15, at 213-15; TRIBE, *supra* note, at 1436-618; Gunther, *supra* note 32, at 8

³⁵ *See, e.g., Gratz v. Bollinger*, 539 U.S. 244 (2003) (using strict scrutiny to invalidate an undergraduate admissions program that used a numerical quantification for race, which made race a decisive factor for some students).

³⁶ *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (using strict scrutiny to uphold the exclusion of Japanese-American citizens to internment camps during World War II).

³⁷ *See, e.g., Graham v. Richardson*, 493 U.S. 365 (1971) (using strict scrutiny to invalidate a Pennsylvania law that made aliens ineligible to receive public assistance and a Arizona law that made aliens ineligible to receive public assistance unless they had resided in the state for at least 15 years).

³⁸ *Frontiero v. Richardson*, 411 U.S. 677, 682, 688 (1973); *see also* Tribe, *supra* note 17, at 1465; Purvi S. Patel, *Equal Protection*, 8 GEO. J. GENDER & L. 145, 148 (2007).

³⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁴⁰ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007).

that it is not “strict in theory, but fatal in fact.”⁴¹ Therefore, it is possible for a law to pass strict scrutiny.⁴²

Intermediate Scrutiny has been used by the Supreme Court to evaluate classifications based on gender⁴³ and illegitimacy⁴⁴. Commentators have referred to these classifications as quasi- or semi-suspect.⁴⁵ Under intermediate scrutiny review, classifications are upheld if they are substantially related to serve an important governmental objective.⁴⁶ In *United States v. Virginia*, the Court further elaborated that, in addition, intermediate scrutiny requires the “reviewing court to determine whether the proffered justification is ‘exceedingly persuasive’”, and the “burden of justification is demanding and it rests entirely on the State.”⁴⁷

Rational Basis review has been used by the Supreme Court to evaluate all other classifications including economic and social⁴⁸, wealth⁴⁹ and age⁵⁰. The Court has referred to these classifications as non-suspect.⁵¹ Under rational basis review, classifications are upheld if they bear a rational relationship to a legitimate governmental purpose.⁵² This is

⁴¹ *Adarand*, 515 U.S. at 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., dissenting)). In a landmark article, Gerald Gunther was the first to claim that strict scrutiny is “strict in theory, but fatal in fact.” Gunther, *supra* note 32, at 8.

⁴² *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (using strict scrutiny to uphold a public law school admission policy that used race as one factor among others).

⁴³ *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (using intermediate scrutiny to invalidate a state military university’s exclusion of women).

⁴⁴ *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988) (using intermediate scrutiny to invalidate a law requiring a nonmarital child to establish paternity within six years of birth in order to seek support from his father).

⁴⁵ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (referring to the lower court’s holding that mental disability classifications receive intermediate scrutiny as finding that mental disability is “a quasi-suspect classification”); *see also Patel, supra* note 38, at 151.

⁴⁶ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

⁴⁷ 518 U.S. at 533 (citing *Hogan*, 458 U.S. at 724) (citation omitted).

⁴⁸ *See, e.g.*, *Williamson v. Lee Optical*, 348 U.S. 483 (1955). (using rational basis review to uphold a law that favored optometrists over opticians).

⁴⁹ *See, e.g.*, *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). (using rational basis review to uphold a tax system that allowed wealthy neighborhoods to have a great amount to spend on education while poor neighborhoods have little).

⁵⁰ *See, e.g.*, *Mass. Board of Retirement v. Murgia*, 427 U.S. 307 (1976). (using rational basis review to uphold a law that required police officers to retire at the age of 50).

⁵¹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

⁵² *Romer v. Evans*, 517 U.S. at 631.

a highly deferential standard of review where the Court has, at times, even resorted to creating its own justifications in order to uphold a law.⁵³ Some commentators have claimed that the Supreme Court has engaged in a more searching form of rational basis review when dealing with certain non-suspect classifications, such as sexual orientation,⁵⁴ disability⁵⁵ and undocumented alienage,⁵⁶ which has come to be termed rational basis with “bite.”⁵⁷ An alternative rationale for such rulings is that the “Court is simply deciding that certain laws lack a legitimate purpose or are so arbitrary as to be unreasonable.”⁵⁸ Under either rationale it is clear that rational basis review is still the lowest standard of review and is less searching than intermediate or strict scrutiny.

There are two main reasons for the Court to maintain a rigid tiered analysis for equal protection claims. First, it allows the Supreme Court to instruct lower courts on when to provide a more searching inquiry, and if a more searching inquiry is needed, the appropriate interests and assumptions that laws may be based on.⁵⁹ Second, it prevents lower courts from second-guessing economic and commercial classifications and bringing back “the days of *Lochner v. New York*.”⁶⁰ The first reason may seem fairly obvious, but to properly understand the second reason, a brief history of heightened scrutiny is necessary.

⁵³ See, e.g., *Williamson*, at 487; see also *Gunther*, *supra* note 32, at 45.

⁵⁴ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996). (using rational basis review to invalidate a state initiative that repealed all laws prohibiting discrimination against gays, lesbians and bisexuals).

⁵⁵ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). (using rational basis review to invalidate an ordinance that required a special permit for operation of a home for the mentally disabled).

⁵⁶ See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982). (using rational basis review to invalidate a law that required only undocumented aliens to pay for public schooling).

⁵⁷ See *Gunther*, *supra* note 32, at 18-24; *Shaman*, *supra* note 34, at 165-68; see also *CHEMERINSKY*, *supra* note 15, at 680. Laurence Tribe has referred to this second version of rational basis review as “covertly heightened scrutiny.” *TRIBE*, *supra* note 16, at 1443-46. In her concurring opinion to *Lawrence v. Texas*, 539 U.S. 558, Justice O’Connor stated that the Supreme Court utilizes two different forms of rational basis review. *Id.* at p. 580 (O’Connor, J., concurring) (“[w]hen a law exhibits . . . a [bare] desire to harm a politically unpopular group, we have applied a more searching form of rational basis review”).

⁵⁸ *CHEMERINSKY*, *supra* note 15, at 680; see, e.g., *Lawrence*, 539 U.S. at 601 (rejecting Justice O’Connor’s statement that the Supreme Court has applied two different forms of rational basis review).

⁵⁹ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 460, 478 (Marshall J., dissenting).

⁶⁰ See *id.* at 460 (citation omitted).

B. The Background of Heightened Scrutiny

In *Lochner v. New York*, the Supreme Court held that freedom of contract was a basic right protected as a liberty under the due process clause.⁶¹ The Court explained that the government could only interfere with the freedom of contract to serve a valid police purpose related to “safety, health, morals and general welfare of the public.”⁶² Under *Lochner*, a Court reviewing economic legislation must inquire: “Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?”⁶³ This means-ends inquiry allowed the Court to carefully scrutinize and ultimately invalidate social and economic legislation in the name of laissez-faire economic theory.⁶⁴ This new standard of review protecting a laissez-faire economy was strongly criticized in Justice Holmes’ famous dissent.⁶⁵ “The Fourteenth Amendment does not enact Mr. Hebert Spencer’s Social Statics. . . . [The] constitution is not intended to embody a particular economic theory.”⁶⁶ The Court’s ruling in *Lochner* came to symbolize an era from 1897 to 1937 of overreaching judicial review by the Court in the name of economic substantive due process.⁶⁷

⁶¹ 198 U.S. 45, 53 (“[t]he right to purchase or to sell labor is part of the liberty protected by [the 14th Amendment]”).

⁶² *Id.*

⁶³ *Id.* at 56.

⁶⁴ See TRIBE, *supra* note 17, at 568-74.

⁶⁵ See *Lochner*, 198 U.S. at 74-76.

⁶⁶ *Id.* at 75.

⁶⁷ See CHEMERINSKY, *supra* note 15, at 608-29; TRIBE, *supra* note 17, at 567-86. Although *Lochner* is considered the seminal case of the substantive due process era, most constitutional scholars actually consider the period to have begun seven years earlier with the Court’s decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). See CHEMERINSKY, *supra* note 15, at 613-14; JOHN E. NOWAK & RONALD D. ROTUNDA, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 585-86 (3d ed. 1999);

The *Lochner* era was seen as a horrible time for the Supreme Court and has drawn criticism from both commentators and Judges for the last 60 years.⁶⁸ *Lochner v. New York* has held “a position of infamy rivaled only by *Plessy v. Ferguson* and *Dred Scott v. Stanford*.”⁶⁹ Building on Justice Holmes’ dissent, many critics of the *Lochner* era have claimed that the unequal bargaining power between employers and employees during the time made freedom of contract illusory, and the Court was simply choosing to favor employers and corporations over workers and consumers while ignoring social realities.⁷⁰ Another criticism of the *Lochner* era is that the Court was highly inconsistent with its rulings,⁷¹ but perhaps the strongest criticism of the era is that unelected judges were acting as a superlegislature by substituting their own economic values for those of popularly elected legislature to protect rights that were not expressly in the Constitution.⁷² This has led *Lochner* to be frequently referred to as an example of “‘judicial activism’: an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”⁷³

Eventually the *Lochner* era met its end when the Court’s laissez-faire ideal clashed with the Great Depression and President Franklin Roosevelt’s New Deal legislation.⁷⁴ In 1937, *Lochner* was finally overruled by the Court in *West Coast Hotel v.*

TRIBE, *supra* note 17, at 567; Jack M. Balkin, “*Wrong the Day It was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 685-86 (2005).

⁶⁸ See CHEMERINSKY, *supra* note 15, at 620-21.

⁶⁹ Balkin, *supra* note 69, at 682.

⁷⁰ CHEMERINSKY, *supra* note 15, at 620; TRIBE, *supra* note 17, at 578-79; Balkin, *supra* note 69, at 686.

⁷¹ CHEMERINSKY, *supra* note 15, at 620; NOWAK & ROTUNDA, *supra* note 67, at 588; Fallon, *supra* note 40, at 1287.

⁷² CHEMERINSKY, *supra* note 15, at 620; NOWAK & ROTUNDA, *supra* note 67, at 599-600; TRIBE, *supra* note 17, at 580; Balkin, *supra* note 69, at 686-87.

⁷³ Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 874. For explanations of the term “judicial activism,” see William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Kennan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441 (2004).

⁷⁴ See CHEMERINSKY, *supra* note 15, at 621; TRIBE, *supra* note 17, at 578-81.

Parrish.⁷⁵ In that case, the Court also laid the foundation for rational basis review by stating that “regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process.”⁷⁶ One year later, in *United States v. Caroline Products Co.*, the Supreme Court solidified the rational basis test by holding that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.”⁷⁷ However, in a very famous footnote, the Court explained that the rational basis test would not be used to evaluate every law.

There may be narrower scope for operation of the presumption of constitutionality when the legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . . It is unnecessary to consider now whether legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment. . . . Nor need we inquire . . . whether *prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry*.⁷⁸

This footnote became the basis for the multi-tiered system of judicial review.⁷⁹ In *Caroline Products*, the Supreme Court was “unequivocal in its rejection of *Lochner*,” but it “reserved the possibility that some rights might merit more judicial protection than economic liberties.”⁸⁰ In the wake of the *Lochner* era, the Court wanted to show deference to legislature, but absolute deference would result in judicial abstention at the expense of

⁷⁵ 300 U.S. 379, 391 (1937) (“[t]he Constitution does not speak of freedom of contract”).

⁷⁶ *Id.*

⁷⁷ 304 U.S. 144 (1938).

⁷⁸ *Id.* at 152-53 n.4 (emphasis added).

⁷⁹ See ANTIEAU & RICH, *supra* note 34, at 5; CHEMERINSKY, *supra* note 15, at 539-40; NOWAK & ROTUNDA, *supra* note 15, at 217; TRIBE, *supra* note 17, at 582.

⁸⁰ Fallon, *supra* note 40, at 1288.

the politically powerless.⁸¹ The Court developed the multi-tiered system of judicial review, which was originally composed of only strict scrutiny and rational basis review - intermediate scrutiny was created later - to allow the Court to show deference to the legislature in most instances while also protecting minority interests when the government makes suspect or quasi-suspect classifications.⁸² Further, the use of the Equal Protection Clause rather than the Due Process Clause allowed the Supreme Court to engage in means-ends analysis while avoiding being associated with the *Lochner* Era.⁸³ After viewing the history and formation of modern equal protection analysis, it becomes clear that maintaining a rigid-tiered framework helps prevent lower courts from acting as super-legislatures and bringing back “the days of *Lochner v. New York*” by instructing

⁸¹ See NOWAK & ROTUNDA, *supra* note 15, at 213-17. The problem of trying to balance these competing interests was explained by Professors Tussman and tenBroek:

The United States Supreme Court attempts to meet these difficulties by maintaining that it is not its function, as it reviews legislation, to substitute its views about what is desirable for that of the legislature. It thus bows in the direction of the functional separation theory. But at the same time the Court speaks of judicial self-restraint as the answer to the undemocratic aspects of the check and balance system. Kept apart from each other, the essential incompatibility of these two attitudes often escapes notice. For self-restraint is no virtue if the Court has a unique function to perform. If, on the other hand, the self-restraint is justified, the belief in a unique judicial function is untenable. These difficulties plague the Court at ever stage in the process of applying the equal protection clause.

Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF L. REV. 341, 366 (1949).

⁸² See ANTIEAU & RICH, *supra* note, at 5-6. Professor Fallon offered the following explanation for why a tiered form of judicial review was able to balance the competing interests of deference to the legislature with protecting the politically powerless:

[S]trict judicial scrutiny . . . rose to prominence as the solution to the generic problem confronting the Warren Court. That problem involved the crafting of formulas to protect “preferred” or fundamental rights that were too important to be enforced only by a rational basis test, but that the Supreme Court could not reasonably define as wholly categorical or unyielding. . . . To count as a solution to the problem, a doctrinal structure needed, among other things, to impose discipline, or at least the appearance of discipline, on judicial decisionmaking and thus to escape the taint of both *Lochner*esque second-guessing of legislative judgments and of flaccid judicial “balancing.” When conjoined with highly deferential rational basis review of regulation of ordinary liberties, the strict scrutiny formula fit the bill. It furnished a determinate-looking structure that made invalidation of particular statutes seem driven by doctrinal necessity. At the same time, it held out the promise that well-drawn statutes to protect vital governmental interests could survive.

Fallon, *supra* note 40, at 1270-71.

⁸³ See Gunther, *supra* note 32, at 43; see also NOWAK & ROTUNDA, *supra* note 67, at 596-97. During the *Lochner* era, equal protection arguments were fairly weak. This lead Justice Holmes to at one time refer to equal protection challenges as “the usual last resort of constitutional arguments.” *Buck v. Bell*, 274 U.S. 200, 208 (1927).

them to only engage in a more searching form of judicial review in limited instances where the Supreme Court deems it appropriate.

II. The Loving Analogy and Sex Discrimination

In *Loving v. Virginia*, the Supreme Court found laws that made it a crime for a white person to marry a colored person violate the Equal Protection Clause.⁸⁴ The statutes at issue in *Loving* included an anti-miscegenation law which provided: “‘If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony’”⁸⁵ Although the law clearly punished people on the basis of a racial classification, the State of Virginia contended that because the laws “punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.”⁸⁶ In response to the State’s “equal application” argument, the Supreme Court stated: “In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”⁸⁷ The Court also explained that statements made in Congress around the time of passage of the Fourteenth Amendment did not command a different result, and that the Court’s holding in *Pace v. Alabama*⁸⁸ - a case accepting the “equal application” argument - “‘represent[ed] a limited view of the Equal Protection Clause which has not withstood’” subsequent Supreme Court decisions.⁸⁹ The Court then stated that “[t]here can be no question that Virginia’s

⁸⁴ 388 U.S. 1, 12 (1967).

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* at 9.

⁸⁸ 106 U.S. 583 (1883).

⁸⁹ *Loving*, 388 U.S. at 9-10 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964)).

miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.”⁹⁰ The Court then subjected the Virginia laws to strict scrutiny,⁹¹ and it held that the laws failed to pass strict scrutiny because “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies the classification,” as the anti-miscegenation laws were clearly “designed to maintain White Supremacy.”⁹²

Today, every state except for Massachusetts has a law that prohibits same-sex marriage by, explicitly or implicitly, requiring marriage to be between only a man and a woman.⁹³ Proponents of same-sex marriage have attempted to invalidate those laws by analogizing those laws to the laws at issue in *Loving v. Virginia* and claiming that they constitute gender discrimination. Professor William Eskridge offered the following explanation of the *Loving* analogy based on the Hawaii Supreme Court’s ruling in *Baehr v. Lewin*:

The state prohibition against same-sex marriage in *Baehr* is on its face sex discrimination in exactly the same way that the prohibition against different-race marriage was held to be race discrimination by *Loving*. In *Loving* a marriage between a *black* man and a black woman was legal, but one between a *white* man and a black woman was not. The only variable (the item that changed, in italics) was the race of one partner. *Loving* held that to be a classification-based race discrimination. In *Baehr* a marriage between a *man* and a woman was legal, but

⁹⁰ *Id.* at 11

⁹¹ *Id.* at 11-12.

⁹² *Id.* at 11.

⁹³ See ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83, § 1; GA. CONST. art. I, §IV, PI; HAW. CONST. art. I, § 23; KAN. CONST. art. XV, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, §25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.D. Const. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; ORE. CONST. art. XV, § 5a; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; ALA. CODE §30-1-19; ARIZ. REV. STAT. § 25-101; CAL. FAM. CODE § 308.5; COLO. REV. STAT. § 14-2-104; CONN. GEN. STAT. §45a-727a; DEL. CODE ANN. tit. 13, § 101; FLA. STAT. § 741.212; IDAHO CODE ANN. § 32-201; 750 ILL. COMP. STAT. 5/201, 5/212; IND. CODE § 31-11-1-1; IOWA CODE § 595.2; ME. REV. STAT. ANN. tit. 19-A, §§ 650, 701; MD. CODE ANN., FAM. LAW § 2-201; MINN. STAT. §§ 517.01, 517.03; N.H. REV. STAT. ANN. §§ 457:1, 457:2; N.J.S.A. 37:1-1, -3; N.M. STAT. § 40-1-18; N.Y. DOM. REL. LAW §§ 12, 50; N.C. GEN. STAT. §§ 51-1, 51-1.2; 23 PA. CONS. STAT. §§ 1102, 1704; R.I. GEN. LAWS §§ 15-1-1, 15-1-2, 15-2-1; S.C. CODE ANN. § 20-1-15; S.D. CODIFIED LAWS § 25-1-1; TENN. CODE ANN. § 36-3-113; VT. STAT. ANN. tit. 15, § 8; VA. CODE ANN. §§ 20-45.2, 20-45.3; WASH. REV. CODE § 26.04.020(1)(c); W. VA. CODE § 48-2-104(c); WIS. STAT. §§ 765.001(2), 765.01; WYO. STAT. ANN. § 20-1-101.

one between a *woman* and a woman was not. The only variable (the italicized term) was the sex of one partner. *Baehr* held that to be a classification-based sex discrimination.⁹⁴

Drawing an analogy between the current marriage laws and the Jim Crow anti-miscegenation laws of the past can have a strong effect on people in persuading them to invalidate the marriage laws.⁹⁵ Yet, despite the strength of this analogy, few judges have been willing to accept the claim that marriage laws requiring marriage to be between a man and a woman constitute gender discrimination.⁹⁶

Many proponents of same-sex marriage such as Professor Andrew Koppleman have tried to reinforce the gender discrimination argument by claiming that not only does the *Loving* analogy show that Supreme Court doctrine supports the gender discrimination claim, but legal doctrine aside, these marriage laws reinforce gender stereotypes by forcing people to accept traditional gender roles.⁹⁷

[T]he stigmatization of the homosexual has something to do with the homosexual's supposed deviance from traditional sex roles. "Our society" . . . "uses the male heterosexual-homosexual dichotomy as a central symbol for all the rankings of masculinity, for the division on any grounds between males who are 'real men' and have power and males who are not. Any kind of powerlessness or refusal to compete becomes imbued with the imagery of homosexuality." Similarly, the denunciation of feminism as tantamount to lesbianism is depressingly familiar.⁹⁸

Gender stereotypes command that men cannot be homosexual because they must be the dominant and powerful gender, and women cannot be homosexual because they should be subservient to men.⁹⁹ "Real men are and should be sexually attracted to women, and

⁹⁴ WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 162-63 (1996).

⁹⁵ See David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201, 205 (stating that the *Loving* analogy is "a subtle way of telling people that they are no different than a bunch of Jim Crow racists, and ought to be ashamed of themselves").

⁹⁶ See sources cited *supra* notes 1, 5

⁹⁷ See sources cited *supra* note 7.

⁹⁸ Koppleman, *Sex Discrimination*, *supra* note 7, at 234-35 (footnote omitted) (quoting JOSEPH PLECK, *MEN'S POWER WITH WOMEN, OTHER MEN, AND SOCIETY* 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980)).

⁹⁹ See *id.* at 234-57.

real women invite and enjoy that attraction.”¹⁰⁰ Because homosexuality breaks up these stereotypes, marriage laws help reinforce gender stereotypes by restricting and condemning homosexual conduct.¹⁰¹ Other supporters of same-sex marriage have claimed that the reason why judges have failed to accept the *Loving* analogy is that lawyers have failed to articulate the traditional gender role claim.¹⁰²

While displaying that marriage laws reinforce traditional gender stereotypes is important to help judges understand and accept the *Loving* analogy, looking at the other side of the coin and strengthening the doctrinal claim is just as important.¹⁰³ The claim that marriage laws reinforce gender stereotypes can be very useful when a court has reached the second step of heightened scrutiny analysis. States would have to justify that their marriage laws are the proper “means” to bring about their “ends” when part of the “ends” is maintaining gender stereotypes. However, most reviewing courts have failed to even subject these laws to heightened scrutiny. Under mere rational basis review, the claim that these laws reinforce gender stereotypes is not nearly as powerful as it would be under heightened scrutiny, which demands a much closer fit between the governmental “means” and their “ends” and shifts the burden to the State to justify upholding its laws. This why it is important to strengthen the doctrinal claim that marriage laws must be subjected to intermediate scrutiny¹⁰⁴ because these laws make a facial gender

¹⁰⁰ Law, *supra* note 7, at 196.

¹⁰¹ See Koppleman, *Sex Discrimination*, *supra* note 7, at 234-57.

¹⁰² See Widiss, *supra* note 2, at 461-64

¹⁰³ See Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 113-14 (2002) (claiming that “proponents of the sex discrimination argument have been too hasty in merely substituting sex for race in a miscegenation analogy” and the doctrinal argument must be strengthened).

¹⁰⁴ Although the Supreme Court has made clear that gender classifications trigger intermediate scrutiny, *see United States v. Virginia*, 518 U.S. 515, (1996), several States like Hawaii subject gender classification to strict scrutiny. *See Patel*, *supra* note 38, at 173-75. This is because as part of federalism, States are free to offer more protection under their State Constitution than is contained in the U.S. Constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1979). In the States that use strict scrutiny for gender

classification.¹⁰⁵ The following section will evaluate each of the criticisms offered by commentators and judges against the *Loving* analogy and display that none of the criticism has any merit when applied to the first step of heightened scrutiny analysis – whether the law makes a suspect or semi-suspect classification. Therefore, a judge must hold that marriage laws, which require marriage to be between a man and a woman, should be subjected to intermediate scrutiny because they draw a facial classification based on gender.

III. Criticism of the Loving Analogy and the Gender Discrimination Claim

A. The Supreme Court has Already Rejected the *Loving* Analogy

As a preliminary matter, it should first be addressed whether courts should even look to Supreme Court jurisprudence in determining whether marriage laws make gender classifications triggering heightened scrutiny. Critics of the *Loving* Analogy have claimed that the Supreme Court has already considered and rejected the analogy, and, therefore, *Loving* cannot be used to support a claim that the U.S. Constitution or any other constitution requires states to legalize or recognize same-sex marriages.¹⁰⁶ In *Baker v. Nelson*, the Minnesota Supreme Court ruled that prohibiting same-sex marriage “does not offend the . . . 14th Amendment[] to the United States Constitution.”¹⁰⁷ Specifically, the court ruled that there is no fundamental right to same-sex marriage and that excluding

classification, it is even more crucial for same-sex marriage proponent to convince the reviewing court to subject the marriage laws to heightened scrutiny based marriage law’s use of a facial classification.

¹⁰⁵ Although most same-sex marriage cases are brought as state constitutional claims, and state constitutional provisions may vary from federal ones, Jeffrey A. Williams, *The Equal Application Defense*, 9 U. PA. J. CONST. L. 1207, 1215-16 (2007), a federal constitutional analysis of the gender discrimination claim will still be useful to same-sex marriage proponents. Article VI of the Constitution provides: “This Constitution . . . shall be the Supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Supremacy clause requires that all state courts and officials provide at a minimum as much protection for civil liberties as is contained within the Constitution. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹⁰⁶ See Jeffery J. Ventrella, *Square Circles?! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681, 700-02 (2004); Wardle & Oliphant, *supra* note 8, at 137-43.

¹⁰⁷ 191 N.W.2d 185, 187 (1971).

same-sex couples from marriage does not violate the Equal Protection Clause.¹⁰⁸ The court also expressly rejected the *Loving* analogy.¹⁰⁹ The Minnesota Supreme Court explained, “*Loving* does indicate that not all state restrictions upon the right to marry are beyond the reach of the Fourteenth Amendment. But in commonsense and in constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”¹¹⁰ *Baker* was appealed to the U.S. Supreme Court but was dismissed for want of a substantial federal question jurisdiction.¹¹¹ However, this dismissal was not like most Supreme Court denials of review. Because the decision was appealed under former 28 U.S.C. 1257(2)¹¹², a provision providing for mandatory appellate review by the Supreme Court, rather than through a petition for writ of certiorari, critics of the *Loving* analogy claim that lower courts should give the Court’s dismissal of *Baker v. Nelson* precedential value.¹¹³

When the Supreme Court reviews a case within its appellate jurisdiction under 1257(2), the Court has explained that “[v]otes to affirm summarily, and to dismiss for want of substantial federal question . . . are votes on the merits of the case.”¹¹⁴ “[L]ower courts are bound by summary decisions by this Court ‘until such time as the Court informs [them] that [they] are not.’”¹¹⁵ Critics contend that this means that the Supreme Court’s summary dismissal of *Baker* should be treated as binding precedent that the Supreme Court has considered the *Loving* analogy and rejected it.¹¹⁶ Indeed, many federal

¹⁰⁸ *Id.* at 186-87.

¹⁰⁹ *Id.* at 187.

¹¹⁰ *Id.*

¹¹¹ *Baker v. Nelson*, 409 U.S. 810 (1972).

¹¹² 62 Stat. 929 amended by 84 Stat. 590.

¹¹³ *See Ventrella, supra note 106*, at 701; Wardle & Oliphant, *supra note 8*, at 140-41 (“[c]iting an older Supreme Court decision as supporting a position when that very argument was later asserted before and squarely rejected by the Supreme Court in a subsequent case is a fundamental error.”)

¹¹⁴ *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting *Ohio ex rel. Price*, 360 U.S. 246, 247 (1959)).

¹¹⁵ *Id.* at 344-45.

¹¹⁶ *See Ventrella, supra note 106*, at 702; Wardle & Oliphant, *supra note 8*, at 140.

and state court decisions have recognized that *Baker v. Nelson* is a binding decision on the merits and held that it is binding precedent that laws that prohibit same-sex marriage are constitutional.¹¹⁷ However, this does not tell the whole story.

The Supreme Court has also stated that summary dismissals lose their precedential value when “doctrinal developments indicate otherwise.”¹¹⁸ The critics of the *Loving Analogy* that claim that *Baker* should be given precedential value have failed to analyze whether there has been a doctrinal shift in the Court’s treatment of gender classifications under the Equal Protection Clause.¹¹⁹ Half of the decisions treating *Baker* as binding precedent failed to analyze whether there has been a doctrinal shift in any of the areas of relevant law.¹²⁰ The other half only analyzed whether there had been a doctrinal shift based on *Lawrence v. Texas*, a case about homosexual conduct and the right to privacy, and *Romer v. Evans*, a case about equal protection and sexual orientation.¹²¹ This begs the question, what about gender classifications and the Equal Protection Clause? Has there been a doctrinal shift in that area of the law?

¹¹⁷ See *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976); *Wilson v. Ake*, (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Hernandez v. Robles*, 855 N.E.2d 1, 17, n.4 (N.Y. 2006) (Grafteo, J., concurring); *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 503-04 (Cal. 2004) (Kennard, J., concurring and dissenting); *Hernandez v. Robles*, 26 A.D.3d 98, 115 (N.Y. App. Div. 2005); *Morrison v. Sadler*, 821 N.E.2d 15, 20 (Ind. App. 2005); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. App. Div. 1993). *But see* *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 872-74 (C.D. Cal. 2005), *aff’d and vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu* 315 B.R. 123, 135-38 (Bkrtcy, W.D. Wash. 2004).

¹¹⁸ *Hicks*, 422 U.S. at 344.

¹¹⁹ See *Ventrella*, *supra* note 106, at 700-02 (failing to analyze whether there have been doctrinal shifts since *Baker*); *Wardle & Oliphant*, *supra* note 8, at 142-43 (analyzing whether there has been a doctrinal shift based on *Lawrence* and *Romer*).

¹²⁰ See *McConnell v. Nooner*, 547 F.2d at 56; *Adams v. Howerton*, 486 F. Supp. at 1124; *Hernandez v. Robles*, 855 N.E.2d at 17, n.4 (Grafteo, J., concurring); *Hernandez v. Robles*, 26 A.D.3d at 115; *In re Cooper*, 187 A.D.2d at 134.

¹²¹ See *Wilson v. Ake*, 354 Supp. 2d at 1304-05 (rejecting that *Lawrence* created a doctrinal shift); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th at 1126-28 (Kennard, J., concurring and dissenting) (rejecting that *Lawrence* created a doctrinal shift); *Morrison v. Sadler*, 821 N.E.2d at 20 (rejecting that *Lawrence* created a doctrinal shift); *Langan v. St. Vincent’s Hops. of N.Y.*, 25 A.D.3d at 92-94 (rejecting that *Lawrence* or *Romer* created a doctrinal shift).

Indeed, such a doctrinal shift has occurred in terms of gender discrimination claims since the Supreme Court's summary dismissal of *Baker v. Nelson* in 1972. At this time, gender classifications had not begun to receive heightened scrutiny. In 1971, in *Reed v. Reed*, the Supreme Court for the first time found a law to be in violation of the Equal Protection Clause due to gender discrimination.¹²² However, the Court failed to use heightened scrutiny and invalidated the law under only rational basis review.¹²³ Over the next few years, the court remained divided over the appropriate level of scrutiny for gender discrimination.¹²⁴ It was not till 1976, in *Craig v. Boren*, that a majority of the Court decided that gender classifications trigger intermediate scrutiny.¹²⁵ Thus, there was a tremendous doctrinal shift in Equal Protection Clause's treatment of gender classifications between 1972 and 1976. By requiring intermediate scrutiny, the Supreme Court changed the entire test that States must pass to uphold their gender classifications. Now the burden was on States to justify their laws, and States would be required to demonstrate a much closer relationship between their governmental "means" and "ends" than under rational basis review.¹²⁶ In *United States v. Virginia*, the Court recognized this doctrinal shift in gender discrimination jurisprudence and explained "the Court in post-*Reed* decisions, has carefully inspected official action that closes a door or denies

¹²² 404 U.S. 71 (1971).

¹²³ *Reed v. Reed*, 404 U.S. at 76 ("[t]he question present by this case . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the [statute]").

¹²⁴ *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero v. Richardson*, four justices would have invalidated the gender classifications at issue using strict scrutiny, but Justice Stewart and Justice Powell both wrote concurring opinions rejecting strict scrutiny for gender classifications and holding that the law was unconstitutional based on the Court's holding in *Reed v. Reed*. *Id.* at 688 (plurality opinion) ("classifications based on sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny"); *id.* at 691 (Stewart, J., concurring); *id.* at 691-92 (Powell, J., concurring).

¹²⁵ 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to those objectives").

¹²⁶ *See United States v. Virginia*, 518 U.S. 515, 533 (1996).

opportunity to women (or to men).”¹²⁷ Because the adoption of intermediate scrutiny by the Court represents a large doctrinal shift in the Court’s treatment of gender classifications,¹²⁸ the Supreme Court’s summary dismissal of *Baker v. Nelson* should not be taken as binding precedent with respect to claims that marriage laws constitute gender discrimination.

In fact, the one court to consider whether there has been a doctrinal shift in the Supreme Court’s treatment of gender classification under the Equal Protection Clause failed to treat *Baker v. Nelson* as binding precedent based on the Court’s post-Reed decisions.¹²⁹ In that case, the district court held: “Although a sex-based classification was first recognized one year before *Baker* in *Reed v. Reed*, the concept did not full develop till later. Also, the application of the intermediate – or ‘heightened’ – scrutiny standard to sex-based classifications came after *Baker*. It is unlikely *Baker*, decided before these concepts developed, could be held to be binding precedent.”¹³⁰ If *Baker v. Nelson* cannot be held as binding precedent with respect to gender discrimination claims, then lower

¹²⁷ *Id.* at 532-33; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).

¹²⁸ It might also be argued that *United States v. Virginia* represented another doctrinal shift in the Supreme Court’s review of gender classifications. *Cf. Virginia*, 515 U.S. at 559 (Reinquist, CJ., dissenting) (claiming that the phrase “exceedingly persuasive justification” used by the majority “introduces an element of uncertainty respecting the appropriate test [for gender classifications]”). Some commentators have claimed that the Supreme Court applied a more stringent level of scrutiny in *United States v. Virginia* for gender classification although it appears that the Court reaffirmed the use of the traditional intermediate scrutiny test in *Nguyen v. Immigration and Naturalization Services*, 533 U.S. 53, 60 (2001). Patel, *supra* note 38, at 157.

¹²⁹ See *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 873-74 (C.D. Cal. 2005).

¹³⁰ *Id.* (citations omitted). The *Smelt* court also clarified that its holding was not inconsistent with the Supreme Court’s ruling in *Rodriguez de Quijas v. Shearson-American Express, Inc.*, 490 U.S. 477 (1989). *Smelt*, 374 F. Supp. 2d at 874, n.19. In *Rodriguez*, the Supreme Court held that it was improper for lower federal courts to refuse to follow one of the Court’s decision because it believed that later Supreme Court decisions had undermined the Court’s reasoning in that case although they did not overrule the actual holding. See *Rodriguez*, 490 U.S. at 484. The *Smelt* Court distinguished *Rodriguez* because that case dealt with the binding effect of full Supreme Court opinions rather than the binding effect of summary dismissals. *Smelt*, 374 F. Supp. 2d at 874, n.19.

courts should be free to look at the Supreme Court's equal protection jurisprudence for guidance in reviewing claims that marriage laws constitute gender discrimination.¹³¹

B. Marriage Laws Burdens Men and Women Equally.

The most frequent criticism of the gender discrimination claim is that marriage laws do not make a gender classification because they burden men and women equal.¹³²

“Men and women are treated identically by [marriage laws]; neither may marry a person of the same sex. [Marriage laws] therefore do[] not make any ‘classification by sex’ and [they do] not discrimination on account of sex.”¹³³ This claim sponsored many judges¹³⁴ and commentators¹³⁵ has come to be known as the “equal application” defense.

However, the “equal application” defense is one of the main reasons why same-sex marriage proponents have analogized the current marriage laws to the anti-miscegenation laws in *Loving v. Virginia*. *Loving* expressly rejected the contention that because a statute burdens different races equally, it does not make an express racial classification, which should be subjected to strict scrutiny.¹³⁶ Proponents of same-sex marriage are also quick to point out that this is not surprising because the Court also

¹³¹ It can also be argued that the other claims addressed in *Baker v. Nelson* have also experienced a doctrinal shift based on the Supreme Court's rulings in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Romer v. Evans*, 517 U.S. 620 (1996), and *Zablocki v. Redhail*, 434 U.S. 374 (1978). See *In Re Kandu*, 315 B.R. 123, 137-38 (Bkrtcy. W.D. Wash. 2004); see also *Smelt*, 374 F. Supp. 2d at 873.

¹³² Williams, *supra* note 105, at 1214-19.

¹³³ *Anderson v. King County*, 158 Wn.2d 1, 48 (Wash. 2006).

¹³⁴ See, e.g., *Conaway v. Deane*, 932 A.2d 571, 598 (Md. 2007); *Anderson*, 158 Wn.2d at 48 (Wash. 2006); *id.* at 91 (Alexander, C.J., concurring); *Hernandez v. Robles*, 855 N.E.2d 1, 6-7 (N.Y. 2006); *id.* at 15-16 (Grafano, J., concurring); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 974-75 (Mass. 2003) (Spina J., dissenting); *id.* at 991 (Cordy, J., dissenting); *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44, 71-72 (Haw. 1993) (Heen, J., dissenting); see also *Lawrence v. Texas*, 539 U.S. 558, 599-600 (2003) (Scalia, J. dissenting) (claiming that same-sex sodomy laws and law banning same-sex marriage do not violate the equal protection clause because these laws apply equally to men and women).

¹³⁵ See, e.g., Craig M. Bradley, *The Right not to Endorse Gay Rights: A Reply to Sunstein*, 70 Ind. L.J. 29, 30 n.9 (1994); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 241 (1998) [hereinafter Richard Duncan]; William C. Duncan, “*The Mere Allusion to Gender*”: *Answering the Charge that Marriage is Sex Discrimination*, 46 ST. LOUIS L.J. 963, 968-70 (2002) [hereinafter William Duncan]; Sunstein, *supra* note 7, at 18-20; Wardle, *supra* note 8, at 84.

¹³⁶ *Loving v. Virginia*, 388 U.S. 1, 8-10 (1967).

faced and rejected the “equal application” defense three years earlier in *McLaughlin v. Florida*.¹³⁷ In that case, the Supreme Court held that a Florida law that prohibited a white person and a black person from habitually cohabitating a room at night unless they were married violated the Equal Protection Clause.¹³⁸ In that case, like in *Loving*, the Court recognized that the law applied equally to both races but still held that the law made a racial classification and subjected it to strict scrutiny.¹³⁹

However, same-sex marriage proponents should not stop at *McLaughlin*. The “equal application” defense was also rejected ten years earlier by the Supreme Court in *Brown v. Board of Education*.¹⁴⁰ The entire notion of the “separate but equal” doctrine previously endorsed by the Supreme Court in *Plessy v. Ferguson*¹⁴¹ was that racial classifications were permissible as long as both races were benefited or burdened equally. Segregation was constitutional so long as each race was given equal facilities. Thus, even though segregation laws expressly required white people access to certain facilities and black people access to different facilities, each race still received the same benefits and burdens. In *Brown*, the Supreme Court invalidated laws that required white children and black children to attend racially segregated schools although these schools were substantially equal with respect to school facilities.¹⁴² The Court held that “in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.”¹⁴³ Thus, the denunciation of segregation and Jim Crow laws by the Supreme Court in *Brown* was also a rejection of the “equal application”

¹³⁷ See Clark, *supra* note 103, at 125-27; Koppleman, *Sex Discrimination*, *supra* note 7, at 210-11.

¹³⁸ *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964).

¹³⁹ See *id.* at 191-92 (“inquiry under the Equal Protection Clause, does not end with a showing of equal application among members of the class The courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose”)

¹⁴⁰ 347 U.S. 483 (1954); see Clark, *supra* note 103, at 163-64.

¹⁴¹ 163 U.S. 537 (1896).

¹⁴² See *Brown*, 347 U.S. at 486-491.

¹⁴³ *Id.* at 495.

defense. If the mere “equal application” of the law cannot be used as a defense to heightened scrutiny, then marriage laws, which make gender classifications, should be reviewed under intermediate scrutiny even though they burden men and women equally.

Marriage laws should be reviewed under intermediate scrutiny because even though they burden both genders equally, they make a facial gender classification. As previously stated a law makes a classification on its face when it by its very own terms “draws a distinction among people based on a particular characteristic.”¹⁴⁴ For instance, in *Loving*, despite the equal application of the statutes, the Court stated that the laws made a racial classification and explained that “[t]here can be no question that Virginia’s miscegenation statutes *rest solely upon distinctions drawn according to race*. The statutes proscribe generally accepted conduct if engaged in by members of different races.”¹⁴⁵ By their own terms, marriage laws draw a distinction on who an individual person may marry solely on basis of that person’s gender. If a law expressly states that only a man and a woman can get married, then the law prohibits a man from marrying another man while a woman is permitted to do so. The only thing prevent the man from marrying another man is his gender. Since marriage laws proscribe certain conduct solely on the basis of a person’s gender, it creates a facial gender classification, which triggers intermediate scrutiny.¹⁴⁶

¹⁴⁴ CHEMERINSKY, *supra* note 15, at 670.

¹⁴⁵ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis added).

¹⁴⁶ Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitution Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 634 (2005); Williams, *supra* note 105, at 1221-22. Professor Stephen Clark makes a similar claim and argues that marriage laws make a gender-based classification because they do not pass the but-for test.” See Clark, *supra* note 103, at 132-40. Meaning that they create a gender-based classification because under marriage laws a man would be able to marry another man but-for his gender. See *id.* For a claim that the same-sex sodomy laws at issue in *Lawrence v. Texas* make a facial gender classification, see Mark Strasser, *Monogamy Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of Lawrence v. Texas*, 15 S. CAL REV. L. & WOMEN’S STUD. 95, 124-33 (2005).

The “equal application” argument is also inconsistent with the text of the Equal Protection Clause, which states that “[n]o State shall . . . deny any *person* . . . the equal protection of the laws.”¹⁴⁷ The use of the word “person” in the amendment has led the Supreme Court to hold that “the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups.” If the focus of the Equal Protection Clause is on individual people rather than groups, then it is improper to analyze a homosexual person’s claim of gender discrimination by looking at whether the law burdens men and women equally as groups.¹⁴⁸ The only relevant inquiry should examine the individual homosexual person’s marriage rights. If a man cannot marry other man because of his gender, then he is not provided with the same equal protection of the laws as a woman who is free marry a man. It does not matter if when you look at the two groups as a whole, there are parallel burdens.

Critics have also pointed out that the Virginia anti-miscegenation laws had only illusory equal application because “the law at issue in *Loving* did not prohibit all interracial marriages, only those involving whites.”¹⁴⁹ The statutes at issue in *Loving* prevented white people from marrying non-white people while they permitted interracial marriages between non-whites.¹⁵⁰ Thus, “the antimiscegenation statute [in *Loving*] did not treat blacks and whites identically,” so it is different from marriage laws that do treat each gender equally.¹⁵¹ While this shame equality might have been true in *Loving*, it was not true in a recent case where the Supreme Court still subjected the government action to strict scrutiny despite its “equal application” to members of different races. In *Johnson v.*

¹⁴⁷ U.S. CONST. amend. XIV, § 1.

¹⁴⁸ Krotoszynski & Spitko, *supra* note 146, at 629-30.

¹⁴⁹ William Duncan, *supra* note 135, at 967, 970 (“*Loving* did not treat all races equally, but singled out whites as a superior class”).

¹⁵⁰ See *Loving v. Virginia*, 388 U.S. 1, 4-7 (1967).

¹⁵¹ *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006).

California, the Supreme Court held that a California Department of Corrections (CDC) policy of making cell assignments for new prisoners on the basis of race created an express racial classification triggering strict scrutiny.¹⁵² The CDC's policy separated all races from each other equally; for example, "Japanese-Americans [were] housed separately from Chinese-Americans."¹⁵³ Thus, the policy did not have the same white/non-white separation that was contained in *Loving* and was not an illusory "equal application." Indeed, in that case the "equal application" defense was raised by the CDC, and, of course, the Supreme Court rejected it.¹⁵⁴ The Court stated, "The CDC's ["equal application"] argument ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.'"¹⁵⁵ Thus, the equal burden placed on men and women by marriage laws, cannot change the fact that such laws rely on facial gender classifications triggering intermediate scrutiny even if such burdens are truly equal.

The "equal application" defense has long been rejected by the Supreme Court as an exception to the rule that facial suspect or semi-suspect classifications trigger heightened scrutiny. A law that by its own terms restricts conduct on the basis of race or gender triggers heightened scrutiny, strict or intermediate respectively, regardless of whether equal burdens are placed on the respective members of each race or gender.

C. Same-Sex Marriage Bans Lack the Invidious Intent that was Contain in *Loving*

To reinforce the "equal application" defense and the contention that marriage laws do not make gender classifications, many critics of the *Loving* analogy have attempted to distinguish *Loving* from the same-sex marriage laws by pointing out that

¹⁵² 543 U.S. 499, 505-09, 515 (2005).

¹⁵³ *Id.* at 502.

¹⁵⁴ *Id.* at 506.

¹⁵⁵ *Id.* (quoting *Shaw v. Reno* 509 U.S. 630, 651 (1993)).

while anti-miscegenation laws were clearly designed to discriminate against racial minorities, marriage laws are not clearly designed to discriminate against women.¹⁵⁶ “Virginia’s antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination.”¹⁵⁷ “[T]he Court in *Loving* determined that, although the statute applied on its face equally to all races, the underlying purpose was to sustain White Supremacy and to subordinate African-Americans and other non-Caucasians as a class.”¹⁵⁸ In making these arguments, critics of the *Loving* analogy are adding an element to facial classifications. Even though marriage laws make a facial gender classification, these critics claim that an inquiry into whether there is discriminatory intent must be made before heightened scrutiny is triggered. While many same-sex marriage proponents claim that marriage laws do contain invidious intent because they subjugate people into traditional gender roles,¹⁵⁹ such a showing is not necessary in determining whether the marriage laws trigger intermediate scrutiny. All that a court should consider is whether those laws make a facial gender classification, and since they do, the reviewing court should subject those laws to intermediate scrutiny.

This requirement of discriminatory intent misreads *Loving*. In *Loving*, the Court only determined that the sole purpose of the laws were to maintain White Supremacy after the Court subjected the laws to strict scrutiny.¹⁶⁰ Thus, the Court in *Loving* did not make a determination of whether there was discriminatory intent during its consideration

¹⁵⁶ See *Conaway v. Deane*, 932 A.2d 571, 600-01 (Md. 2007); *Anderson v. King County*, 158 Wn.2d 1, 49-51 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *id.* at 15 (Grafano, J., concurring); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 992 (Mass. 2003) (Cordy, J., dissenting); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *Bradley*, *supra* note 135, at 32-33; Richard Duncan, *supra* note 135, at 243; *see also* *Lawrence v. Texas*, 539 U.S. 600 (2003) (Scalia, J., dissenting) (rejecting the *Loving* analogy as applied to same-sex sodomy laws); *Wardle*, *supra* note 8, at 82.

¹⁵⁷ *Baker*, 191 N.W.2d at 187.

¹⁵⁸ *Conaway*, 932 A.2d at 601.

¹⁵⁹ *See* source cited *supra* note 7.

¹⁶⁰ *See* Clark, *supra* note 103, at 128-29, 149-50; Andrew Koppleman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 523 (2001).

of whether the laws made race classifications triggering strict scrutiny. Not only does the requirement of discriminatory intent misread *Loving*, but it fails to consider that the Court in *McLaughlin* invalidated a anti-miscegenation law that like the one in *Loving* burdened both races equally without stating that the law was purposed on maintaining White Supremacy.¹⁶¹ In response to this, one court has actually claimed that although *McLaughlin* did not mention invidious intent, the facts are so similar to *Loving* it should be assumed that invidious intent was the basis for the Court subjecting the law to strict scrutiny.¹⁶² However, even if this claim were true, it fails to consider the Supreme Court's subsequent equal protection jurisprudence and how the framework of heightened scrutiny works.¹⁶³

In the Supreme Court's affirmative action cases, it has repeatedly rejected the notion that an inquiry into the intent of laws should be done before heightened scrutiny is triggered. The Court has stated that all racial classifications regardless of invidious or benign intentions should be subjected to strict scrutiny.¹⁶⁴ Likewise, the Court has subjected gender-based affirmative action programs to intermediate scrutiny despite their benign intentions.¹⁶⁵ The Court has explained that it would be irrational to consider the alleged intentions of certain classification prior to strict scrutiny. "Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are motivated by illegitimate notions of racial inferiority or simple racial politics."¹⁶⁶ In essence, the Court is saying that the entire purpose of strict scrutiny is to determine

¹⁶¹ See *Conaway v. Deane*, 932 A.2d 571, 601-02 (Md. 2007).

¹⁶² *Id.*

¹⁶³ See Williams, *supra* note 105, at 1221-24.

¹⁶⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹⁶⁵ See *Califano v. Webster*, 430 U.S. 313, 316-17 (1977).

¹⁶⁶ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

whether the intent of the government in pursuing its classifications is legitimate.

Therefore, it is only during the second step of heightened scrutiny analysis when the Court is engaging in its “means-ends” analysis “to ‘smoke out’ illegitimate uses” of government classifications does the reviewing court consider discriminatory intent.¹⁶⁷

This rule of not considering discriminatory intent until the second step of heightened scrutiny analysis is also consistent with the idea of suspect and semi-suspect classifications and it is consistent with the entire framework of heightened scrutiny analysis itself. The Supreme Court has stated that when the government bases legislative classification on gender or race these two factors rarely provide a relevant or sensible ground for different treatment.¹⁶⁸ That is why the Supreme Court has labeled them suspect or semi-suspect and subjected them to a higher standard of review. Essentially, the notion that some classifications are questionable on their face requiring the Court to engage in a higher level of inquiry into their purpose and effect is the entire basis for having a heightened scrutiny framework.¹⁶⁹ If the government could avoid heightened scrutiny at the outset by simply claiming that there is no invidious intent contained in their laws, then the framework of heightened scrutiny analysis would be meaningless. The government would be free to make any gender or racial classifications it desires as long as it can come up with a benign reason for it. The affirmative action cases have prevented this possibility from occurring. Those cases make clear that when a law makes a facial classification an inquiry into the government’s motives for making such classifications should only occur after the reviewing court has determined the appropriate level of

¹⁶⁷ See *id.*; Krotoszynski & Spitko, *supra* note 146, at 632-33; Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 *How. L.J.* 75, 106 (2007); Strasser, *supra* note 146, at 126.

¹⁶⁸ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

¹⁶⁹ See *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938).

scrutiny.¹⁷⁰ Therefore, a reviewing court should not determine whether marriage laws are based on a discriminatory purpose, until after the court has subjected the laws to intermediate scrutiny because they make a facial gender classification.

It should be noted that in all the affirmative action cases, the laws at issue burdened one race while another race was benefited.¹⁷¹ It might be argued that laws that burden members of different races or genders equally represent a special circumstance where such a look into discriminatory intent is necessary before heightened scrutiny is applied. However, on this point the Supreme Court's recent case of *Johnson v. California* is instructive. As previously mentioned, that case dealt with a prison policy that equally burdened members of each race. Despite this "equal application," the Court failed to conduct any inquiry into the presence of discriminatory intent before apply strict scrutiny to the racial classification.¹⁷² Not only did the Court in *Johnson* fail to conduct such an inquiry, the Court rejected the CDC's attempt to claim that such classifications were benign and should not be subjected to strict scrutiny since the policy was based on a need to control prison violence caused by race-based prison gangs.¹⁷³ In *Johnson*, the Court reiterated that the purpose of heightened scrutiny is to "smoke out" illegitimate uses of suspect or semi-suspect classifications.¹⁷⁴ Thus, even when the law burdens members of both races or genders equally, as long as the law makes a facial classification, heightened scrutiny should be triggered without any determination of whether invidious discriminatory intent is present.

¹⁷⁰ See Krotoszynski & Spitko, *supra* note 146, at 632-33; Williams, *supra* note 105, at 1224.

¹⁷¹ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2755-56 (2007) (including a black child while excluding a white child from a predominantly white school with all things being equal); *Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003) (including minimally qualified minorities while excluding minimally qualified whites from Michigan's undergraduate admissions).

¹⁷² See *Johnson v. California*, 543 U.S. 499, 505-09 (2005).

¹⁷³ *Id.* at 507

¹⁷⁴ *Id.* at 506.

By implanting a requirement of invidious intent, critics of the *Loving* analogy are confusing express facial classifications with facially neutral classifications, which the Supreme Court has required a showing of discriminatory purpose before heightened scrutiny can be applied. In fact, some commentators and judges have actually referred to the marriage laws as being facially neutral.¹⁷⁵ However, it is incorrect to compare the marriage laws to the facially neutral laws that were at issue in cases such as *Washington v. Davis*¹⁷⁶ and *Personnel Administrator of Massachusetts v. Feeney*.¹⁷⁷ In *Davis*, the law at issue was a police entrance exam that caused a higher percentage of blacks to fail than whites.¹⁷⁸ In *Feeney*, the law at issue was a Massachusetts statute that gave veterans hiring preferences in state jobs over non-veterans when at the time men composed 98% of the veteran population.¹⁷⁹ Unlike the laws in *Davis* and *Feeney*, which never expressly mentioned race or gender, marriage laws speak in express gender terms by stating that marriage can only be between a man and a woman. Laws make facial classifications by drawing a distinction among people through its express terms based on a particular characteristic.¹⁸⁰ The facial classification in *Davis* drew a distinction between people that passed the test and people that failed the test not race. The facial classification in *Feeney* drew a distinction between people who were veterans and people that who were non-veterans not gender. Marriage laws by their express terms¹⁸¹ draw a distinction on who a

¹⁷⁵ See, e.g., *Conaway v. Deane*, 932 A.2d 571, 601 (Md. 2007); *Hernandez v. Robles*, 7 N.E.3d 338, 376 (N.Y. 2006) (Grafano, J., concurring); *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Dean v. Dist. of Columbia*, 653 A.2d 307, 363 (D.C. 1995) (Steadman, J., concurring); see also William Duncan, *supra* note 135, at 968; Wardle, *supra* note 8, at 84.

¹⁷⁶ 426 U.S. 229 (1976).

¹⁷⁷ 442 U.S. 256 (1979).

¹⁷⁸ *Davis*, 426 U.S. at 235.

¹⁷⁹ *Feeney*, 442 U.S. at 259

¹⁸⁰ CHEMERINSKY, *supra* note 15, at 670.

¹⁸¹ Although marriage laws make an express gender classification because they state that only a man and a women are permitted to marry, *Johnson v. California* displays that a law can make a facial racial classification without expressly mentioning race. In *Johnson*, the Court held that the CDC's policy made an express racial classification even though it was unwritten because in the policies' application prisoners had

certain person can marry by their gender - whether that person is male or female. Marriage laws draw a distinction based solely on gender rather than any neutral characteristic.

A further distinction, between the marriage laws and the laws in *Davis* and *Feeney*, is displayed by examining the effects of the laws' express terms. Despite the discriminatory effect of the law in *Davis* some black people did pass the test. Thus, the test was not an absolute bar to black people from entering the police force. Likewise, in *Feeney*, despite the discriminatory effect of the law some women were veterans. Thus, the law was not an absolute bar to women from receiving a hiring preference. Marriage laws, on the other hand, are an absolute bar to same-sex marriage. Due to the express terms of marriage statutes, under no circumstances may a man marry another man although a woman is allowed to, and the sole basis for this distinction is the person's gender. Therefore, marriage laws are not facially neutral and do not require a finding of discriminatory purpose before they trigger intermediate scrutiny. Marriage laws like the laws in *Loving*, *McLaughlin* and *Johnson* make facial classifications despite their equal application to members of different races or genders. While the existence or nonexistence of a discriminatory intent against men or women is relevant once the court engages in intermediate scrutiny review, it has no relevance in the initial determination of whether marriage laws create a facial gender classification.

D. Gender Classification Can be "Separate but Equal"

Some critics of the *Loving* analogy have claimed that unlike racial classifications, gender classifications can be "separate but equal" without triggering heightened

a zero percent chance of being housed with a member of a different race. *See Johnson v. California*, 543 U.S. 499, 502, 508-09 (2005). Therefore, if marriage laws were not in existence, but marriage licenses were still only give to men and women, then the law would still make a facial classification despite the lack of express gender terms.

scrutiny.¹⁸² Professor Stephen Clark has stated that the marriage laws do not create a gender classification triggering intermediate scrutiny because while “separate but equal” has been explicitly invalidated in the context of race by *Brown*, it has not in the context of gender.¹⁸³ Gender “equality law has no analogue to *Brown v. Board of Education* or any parallel proposition that merely drawing a sex-based line is inherently unequal or necessarily stamps one sex or the other with a badge of inferiority.”¹⁸⁴ Clark argues that “the subjection of women and men to ‘mirror image restrictions’ triggers skeptical scrutiny only if the restrictions are not actually ‘mirror image’ or, in another words, if the resulting opportunities afforded each sex are ‘different in kind’ or unequal in their tangible or intangible qualities.”¹⁸⁵

Professor Clark’s claim relies on a footnote in an article by Professor Craig M. Bradley. Bradley stated, “A statute that prohibits men from using the ladies room (and vice versa) in public buildings would also make gender relevant but would not require heightened scrutiny. In every case in which the Court has granted intermediate scrutiny, the plaintiff has claimed to be disadvantaged *vis a vis the opposite sex*. Here, by contrast, both sexes have been subjected to mirror image restrictions.”¹⁸⁶ Bradley fails to mention that the Supreme Court has only faced gender classifications that disadvantage one gender over the other. Therefore, the Court has always granted intermediate scrutiny because the Supreme Court has never had the chance to face a law that made a facial gender classification that burdens both genders equally. However, that cannot stand for the proposition that when the Court actually does face a gender classification that burdens

¹⁸² See Bradley, *supra* note 135, at 30, n.9; Clark, *supra* note 103, at 112-13, 160-71; Wardle, *supra* note 8, at 85

¹⁸³ See Clark, *supra* note 103, at 160-171.

¹⁸⁴ *Id.* at 165.

¹⁸⁵ *Id.* at 167.

¹⁸⁶ Bradley, *supra* note 135, at 30, n.9 (citations omitted) (emphasis in original).

both genders equally in the first instance, the Court would not subject that law to intermediate scrutiny because it makes a facial gender classification.

Professor Clark's "separate but equal" claim also relies on language found in the Supreme Court's landmark gender discrimination case *United States v. Virginia*.¹⁸⁷ Clark claims that the Supreme Court in *Virginia* stated that "separate but equal" may be permissible in the context of gender.¹⁸⁸ Clark mainly bases this assertion on language found in *Virginia*, where the Supreme Court invalidates the Virginia Military Institute's exclusion of women by determining that VMI has not provided a suitable "separate but equal" substitute for women in creating the Virginia Women's Institute for Leadership.¹⁸⁹ However, in *Virginia*, the Supreme Court mentioned that "separate but equal is permissible" while it was engaging in intermediate scrutiny review.¹⁹⁰ Therefore, it appears that the Court will only consider the "separate but equal" defense during the second step of heightened scrutiny analysis, and that laws that make gender classifications will be subjected to intermediate scrutiny even if it is claimed that a "separate but equal" substitute exists.

It might seem plausible to think that the "separate but equal" doctrine might be permissible in the context of gender while it is not in the context of race. It is quite common to see the "separate but equal" doctrine at place through gender classification in everyday life. Men and women go to separate bathrooms, and men and women place on separate basketball teams. However, as Justice Marshall once said, "A sign that says 'men only' looks very different on a bathroom door than on a courthouse door."¹⁹¹ "Separate but equal" seems permissible in the context of gender because America has not

¹⁸⁷ 518 U.S. 515 (1996).

¹⁸⁸ See Clark, *supra* note 103, at 166-68.

¹⁸⁹ See *id.*

¹⁹⁰ See *Virginia*, 518 U.S. at 551-54.

¹⁹¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468-69 (1985) (Marshall, J., dissenting).

experienced the same form of segregation with respect to gender as it has with race. If a similar regime were in existence with respect to gender, and men and women used separate water fountains or rode on different train cars, most commentators would probably agree that such laws would make impermissible gender classifications in violation of the Equal Protection Clause. So, what is the difference between a law that requires the genders to use separate bathrooms and one that requires that to use separate railroad cars?

The difference seems to be that one is based on a legitimate governmental purpose while the other is not. A reviewing court determines whether a law serves a legitimate purpose during the second step of heightened scrutiny review when the court engages in its “mean-ends analysis” not during the first step. Therefore, it seems to be more correct to say that gender classifications like the requirement of separate bathrooms are valid because they pass intermediate scrutiny rather than because they do not trigger intermediate scrutiny than to say that they do not trigger heightened scrutiny at all. In his article, Clark argues that the “separate but equal” doctrine would still prevent absurd results from following such as laws that require men and women to walk on different sides of the street because the Supreme Court in *Plessy* rejected a similar argument about laws requiring members of different races to walk on different sides of the street.¹⁹² However, under the “separate but equal” regime, laws that required people to ride in different train cars or use different water fountains were not considered absurd and were acceptable under *Plessy*’s precedent.¹⁹³ After all, it is permissible to make gender classifications so long as they are founded on legitimate inherent or biological differences

¹⁹² See Clark, *supra* note 103, at 167-68.

¹⁹³ See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896).

between men and women.¹⁹⁴ Because a reviewing court should consider whether the “separate but equal” gender classifications are permissible once the Court engages in intermediate scrutiny review, the marriage laws should still trigger intermediate scrutiny even though they make a “separate but equal” classification.

E. Race and Gender Classifications are Different

The “separate but equal” claim rejected in the previous section seems to be based on a more fundamental distinction between *Loving v. Virginia* and same-sex marriage cases - that race and gender classifications are different, and that the constitution provides a different level of protection to reflect this difference.¹⁹⁵ Indeed, one criticism of the *Loving* analogy is that race classifications are different from gender classifications because race is not comparable to gender.¹⁹⁶

The Supreme Court has recognized that there is a difference between racial and gender classifications and stated that sex unlike race is not a proscribed classification.¹⁹⁷ While the Court no longer recognizes that inherent or biological differences based on race can be a reason for upholding a racial classification, inherent differences between men and women are “enduring” and “cause for celebration.”¹⁹⁸ Therefore, “there are differences between males and females that the constitution necessarily recognizes.”¹⁹⁹

¹⁹⁴ See, e.g., *Nguyen v. INS*, 533 U.S. 53, 68 (2001); *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (“there are differences between males and females that the constitution necessarily recognizes”).

¹⁹⁵ See *Clark*, *supra* note 103, at 114 (“in order to make the micscegenation analogy work doctrinally, it must be reformulated to acknowledge the fundamental differences race equality law and sex equality law”).

¹⁹⁶ See *William Duncan*, *supra* note 135, at 964-68; *Wardle & Oliphant*, *supra* note 8, at 153-60; *Wardle*, *supra* note 8, at 83. Critics have also pointed out that sexual orientation discrimination is different from race discrimination because gender and sexual orientation does not have the same bitter historical background as racial discrimination. See *Dwight G. Duncan, How Brown is Goodridge? The Appropriation of a Legal Icon*, 14 B.U. PUB. INT. L.J. 27, 34-35 (2004) (using the differences in the history of racial discrimination and the history of sexual orientation discrimination to distinguish *Brown v. Board of Education* from *Goodridge v. Department of Public Health*). The legacy of sexual orientation discrimination in America does not contain slavery, lynching and disenfranchisement. *Id.* at 35.

¹⁹⁷ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁹⁸ *Id.* at 533-34; see also *Wardle & Oliphant*, *supra* note 8, at 156.

¹⁹⁹ *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981).

Indeed, the Supreme Court has upheld laws containing gender classifications if they are based on the inherent or biological differences between men and women.²⁰⁰ If race and gender classification are constitutionally different, then it would be inappropriate to use Supreme Court cases such as *McLaughlin*, *Loving* and *Johnson* to stand for the proposition that marriage laws make a facial classification because those cases were about race not gender.

The framework of heightened scrutiny clearly recognizes the existence of a difference between racial classifications and gender classifications during the second step of heightened scrutiny analysis. Racial classifications are reviewed under the highest level of judicial review, strict scrutiny, while gender classifications are reviewed under a middle level of judicial review, intermediate scrutiny. Part of the basis for having a lower level of review for gender classifications is that unlike race, gender classifications can be based on inherent differences between men and women. Thus, the lower standard of review facilitates acceptance of these inherent or biological differences.²⁰¹ However, this article does not focus on the second step of heightened scrutiny. This article focuses only on the first step of heightened scrutiny analysis and the determination of whether marriage laws make facial classifications triggering intermediate scrutiny. Therefore, although the second step of heightened scrutiny analysis recognizes a difference between race and gender classification, the only relevant determination is whether the first step of heightened scrutiny analysis also recognizes a difference between race and gender classifications. Or phrased differently, is there a constitutional distinction between how

²⁰⁰ See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001); *Michael M.*, 450 U.S. 464 (1981) (upholding a state statutory rape law that only applied to men against a challenge that it constituted sex discrimination in violation the Equal Protection Clause); see also William Duncan, *supra* note 135, at 964-68.

²⁰¹ See *Nguyen*, 533 U.S. at 68; *Virginia*, 518 U.S. at 533-34; *Michael M.*, 450 U.S. at 478.

gender-based laws make facial classifications and how race-based laws make facial classification?

All the major constitutional law treatises do not draw a distinction between race and gender with regard to the determination of whether laws make a facial classification or a neutral classification.²⁰² More importantly, it does not appear that the Supreme Court draws a distinction either. In the previously mentioned case *Washington v. Davis*²⁰³, the Supreme Court first drew the distinction between laws that make facial classifications automatically triggering heightened scrutiny and laws that are facially neutral requiring a showing of discriminatory purpose before they trigger heightened scrutiny. A few years later in *Personnel Administrator of Massachusetts v. Feeney*, the Court extended the rule contained in *Davis* to also apply to gender classifications.²⁰⁴ In *Feeney*, the Court failed to state that there was any difference between racial and gender classification when it comes to drawing the line between facial classifications and facially neutral classifications²⁰⁵ In fact, the Court held that the “principles [enunciated in *Davis*] apply with equal force in a case involving alleged gender discrimination.”²⁰⁶ Further, in subsequent decisions, when explaining the difference between facial and neutral classifications the Supreme Court has cited to *Feeney* even though the claim at issue was

²⁰² ANTIEAU & RICH, *supra* note 34, at 123 (“[t]he line between de jure and de facto discrimination applies with equal force in the context of both race and gender classifications”); CHEMERINSKY, *supra* note 15, at 757 (“[the] two major ways of proving a gender classification . . . are identical to the two methods of demonstrating a racial classification”); *see also* NOWAK & ROTUNDA, *supra* note 15, at 254-56 (explaining the three ways of establishing a classification or equal protection purposes without making any distinction between racial classifications and gender classifications); TRIBE, *supra* note 17, at (explaining how to prove discriminatory purpose to invalidate facially neutral government action while referring to both race discrimination and sex discrimination cases and making no distinctions between the two).

²⁰³ 426 U.S. 229, 239-42 (1976).

²⁰⁴ 442 U.S. 256, 273-74 (1979).

²⁰⁵ *Id.* at 273-74.

²⁰⁶ *Id.* at 274.

race discrimination not gender discrimination.²⁰⁷ Therefore, the Supreme Court does not appear to distinguish between racial and gender classifications in drawing the line between facial classifications and neutral classifications.

Critics of the *Loving* analogy may argue that the inherent differences between men and women nullify the claim that marriage statutes rest on gender stereotypes.²⁰⁸ But, they can only argue this once the court has determined the appropriate level of scrutiny that marriage laws should be reviewed under. Since there is no distinction between race and gender in how courts determine whether the law makes a facial classification, the Supreme Court's decisions in *McLaughlin*, *Loving* and *Johnson* support the claim that marriage laws create facial gender classifications triggering intermediate scrutiny.

F. Same-Sex Marriage Bans Seek to Integrate the Two Genders

Critics of the *Loving* analogy have claimed there is a difference between laws that integrate and laws that segregate.²⁰⁹ A “powerful distinction between same-sex marriage and inter-racial marriage is that inter-racial marriage (and [*Loving v. Virginia*]) integrates the subject classes, whereas same-sex marriage (and court decisions like *Goodridge v. Department of Public Health*]) mandating same-sex marriage embody a state rule allowing segregation of the subject classes.”²¹⁰ “Laws against miscegenation were designed to segregate the races, reinforcing the socially disadvantaged position of African Americans. By contrast, the traditional definition of marriage calls for mixing of the genders-not segregation-and therefore cannot be understood as an attempt to

²⁰⁷ See, e.g., *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991); see also *Hunt v. Cromartie*, 526 U.S. 541, 558 (1999) (Stevens, J., concurring).

²⁰⁸ See William Duncan, *supra* note 135, at 968.

²⁰⁹ See Randy Beck, *The City of God and the Cities of Men: A Response to Jason Carter*, 41 GA. L. REV. 113, 148 n.154 (2006); Richard Duncan, *supra* note 135, at 243; Duncan, *supra* note 196, at 32-33 (drawing a distinction between state-mandated integration at issue in *Goodridge v. Department of Public Health* and state mandated segregation at issue in *Brown v. Board of Education*); Wardle & Oliphant, *supra* note 8, at 160.

²¹⁰ Wardle & Oliphant, *supra* note 8, at 160.

disadvantage either gender.”²¹¹ This distinction has also been used to differentiate the same-sex marriage cases from *Brown v. Board of Education*.²¹² “[H]ad *Brown* overturned a regime of integrated public schools and allowed for racially segregated public schools, then the *Brown* opinion would be analogous to [same-sex marriage cases]. But this is exactly the opposite of what *Brown* did.”²¹³ One commentator even went as far as to claim that “one could assert that *Goodridge* [the Massachusetts case that found same-sex marriage bans to be unconstitutional under the state constitution] represents the revival of ‘separate but equal.’”²¹⁴

Now this is a true factual distinction that can be drawn between the segregation laws at issue in *Brown* and *Loving* and the laws at issue in the same-sex marriage cases, but it is unclear what this distinction has to do with the constitutional validity of marriage laws. The Supreme Court has never stated that whether a law involves integration or segregation can be a factor to be considered in equal protection analysis. In fact, the Supreme Court has frequently faced racial integration programs in the same area as *Brown*, public education, and has subjected such programs to strict scrutiny.²¹⁵ In these cases, the Supreme Court has stated that mandating schools to retain a certain level of racial integration amounts to racial balancing,²¹⁶ which is “patently unconstitutional”²¹⁷

²¹¹ Randy Beck, *supra* note 209, at 148 n.154 (citations omitted).

²¹² 347 U.S. 483 (1954).

²¹³ Duncan, *supra* note 196, at 32-33.

²¹⁴ *Id.* at 33.

²¹⁵ See, e.g., *Parents Involved in Comm. Schs. v. Wash. Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007) (using strict scrutiny to evaluate a public school busing program seeking to enhance racial integration); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (using strict scrutiny to evaluate a public law school admissions program seeking the same); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (using strict scrutiny to evaluate a public undergrad university admission program seeking the same).

²¹⁶ See *Parents Involved*, 127 S.Ct. at 2753-59 (Roberts, J., plur. opinion); *Grutter*, 539 U.S. at 329; see also *Freeman v. Pitts*, 503 U.S. 467, 494-500 (1992) (stating that schools previously segregated by the *de jure* segregation laws struck down in *Brown* have no duty to maintain a certain level of racial integration unless it can be shown that the imbalance was caused by a constitutional violation).

²¹⁷ *Grutter*, 539 U.S. at 329; see also *Parents Involved*, 127 S.Ct. at 2753, 2757 (Roberts, J., plur. opinion) (quoting *Grutter*).

and “is not to be achieved for its own sake.”²¹⁸ Further, not only has the Court subjected these integration programs to strict scrutiny, in all but one of its decisions,²¹⁹ the Court ultimately held that the programs violated the 14th Amendment.²²⁰ Thus, one cannot claim that the difference between integration and segregation has any constitutional significance in terms of whether the law makes a suspect or semi-suspect classification and the appropriate level of scrutiny to be applied to a given law. Even though marriage laws mandate integration, they still make a gender classification triggering intermediate scrutiny.

Also, the factual distinction that critics draw between segregation laws and marriage laws fails to recognize a more important and constitutionally significant factual distinction. There is a difference between laws that *require* integration or segregation and laws that merely *permit* integration or segregation. For instance, what made the previously mentioned racial integration programs unconstitutional was that they forced the inclusion or exclusion of certain individuals solely on the basis of their race.²²¹ This was the same problem with the segregation laws in *Loving* and *Brown*. In *Loving* and *Brown*, the laws forced the inclusion or exclusion of certain individuals from public education and marriage solely on the basis of the race.²²² The difference between mandating segregation or integration and merely permitting it in the area of marriage can be illustrated by the following example. If a state enacted a law requiring people to marry someone from a different race, most legal scholars would not have much trouble determining that the law violates the equal protection clause by making an impermissible

²¹⁸ *Freeman*, 503 U.S. at 494.

²¹⁹ *See Grutter*, 539 U.S. at 342-43.

²²⁰ *See Parents Involved*, 127 S.Ct at 2751-61, 2768; *Gratz*, 539 U.S. at 275.

²²¹ *See Parents Involved*, 127 S.Ct at 2768; *Gratz*, 271-73.

²²² *See Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Brown v. Board of Education*, 347 U.S. 483, 487-88 (1954).

racial classification. Yet, such a law would create gender integration and would not be designed with the invidious purpose of maintaining White Supremacy.

Laws permitting marriage only between a man and a woman require the inclusion or exclusion of people to marriage solely on the basis of their gender. Thus, although marriage laws require integration rather than segregation they are factually analogous to the laws at issue in *Loving* and *Brown*. On the other hand, the right to same-sex marriage does not require gender segregation nor does it mandate the inclusion or exclusion of anyone on the basis of gender. It merely permits it, and leaves people to choose whether to marry someone from the same sex or the opposite sex just as *Brown* and *Loving* allowed people to choose who they could marry and where they wanted to go to school.

G. Characterizing Same-Sex Marriage Bans Misses the Key Moral Wrong

Professor Ed Stein makes an interesting non-doctrinal criticism of the gender discrimination argument for same-sex marriage. Stein claims that while the gender discrimination argument might have theoretical value, it is morally wrong because it mischaracterizes the true harm of same-sex marriage bans.²²³ He bases this theory on the idea that same-sex marriage bans are not so much about sex discrimination as they are about animus towards homosexuals.²²⁴ To explain this principle, Stein explains that many scholars have noted that a significant purpose of the miscegenation statutes at issue in *Loving* was to protect white women from black men, and that based on this point, one could make an argument that the anti-miscegenation laws constituted gender discrimination.²²⁵ However, making such an argument would be incorrect because it mischaracterize the true class disadvantaged by the laws, racial minorities, and it

²²³ Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 503-05 (2001).

²²⁴ *Id.* at 503.

²²⁵ *Id.* at 496-97.

“overemphasizes the way [those] laws disadvantage[d] women as compared to the ways they disadvantaged people of color.”²²⁶

However, Stein fails to consider that blacks were not the class most burdened by anti-miscegenation statutes. To be sure during the Jim Crow era there were plenty of black people that had no interest in marrying a white person. Miscegenation statutes would serve as no burden or impediment to such people. The class most victimized and directly burdened by the miscegenation laws then were actually members of interracial/miscegenist couples.²²⁷ Under Stein’s reasoning, the Court in *Loving* should have identified the more direct harm and animus towards interracial/miscegenist couples and expanded the framework of heightened scrutiny so that laws that make interracial/miscegenist classifications should be subjected to strict scrutiny. However, it would be inappropriate for the Supreme Court to unnecessarily expand the framework of heightened scrutiny when the Court could simply have held that the laws make a racial classification triggering strict scrutiny. This is also why it would have been inappropriate for the Supreme Court to characterize the anti-miscegenation statutes as gender discrimination. In *Loving*, it was unnecessary to do so because, at the time, gender classifications were not subjected to heightened scrutiny, and it would be unnecessary to expand the framework of heightened scrutiny to encompass gender classifications when the statutes could simply be invalidated as racial discrimination. The reasoning would not change even if at the time of *Loving*, gender classifications triggered heightened scrutiny. If both race and gender triggered heightened scrutiny, then the reviewing court would be free to hold that anti-miscegenation laws made racial classifications triggering strict

²²⁶ *Id.* at 479.

²²⁷ *Cf.* Clark, *supra* note 103, at 140-141 (claiming that the victim class of a law that discriminates against individuals who are both female and African American is not all women or all African Americans, but only African American women).

scrutiny because the Court could choose between the two classifications to find the more appropriate one without expanding the framework of heightened scrutiny. This is not the case with homosexual classifications, which would require an expansion of the heightened scrutiny framework since the Supreme Court has not held that homosexual classifications trigger heightened scrutiny.

Reviewing courts must be very careful about expanding the framework of heightened scrutiny. One of the reasons for maintaining the framework of heightened scrutiny is to prevent courts from engaging in the reprehensible judicial activism that was contained in the *Lochner* era decisions.²²⁸ Expanding the framework of heightened scrutiny to encompass new classifications when it is unnecessary to do so risks erosion of the line between certain civil liberties, which needs the court's protection, and economic liberties, which should be decided by politically accountable representatives. Since the Supreme Court has yet to hold that homosexual laws make a suspect or semi-suspect classification triggering heightened scrutiny, a reviewing court should consider such laws under intermediate scrutiny because they make a gender classification rather than unnecessarily expand the framework of heightened scrutiny to encompass homosexual classifications.

Stein has also claimed that the gender discrimination claim and the *Loving* analogy do not reach all antigay laws because some antigay laws do not make use of gender terminology.²²⁹ For an example of such a law, Professor Stein points to the military's "don't ask, don't tell" policy, which only allows the military to discharge soldiers only if they are actually homosexual even if they have engage in same-sex sexual

²²⁸ See *supra* Part I.B.

²²⁹ See *id.* at 509-10.

conduct.²³⁰ If the gender discrimination argument does not reach such laws, then it may seem necessary for a court to expand heightened scrutiny by making homosexual classifications suspect or semi-suspect, so that the framework can reach laws like the “don’t ask, don’t tell” policy. However, commentators has disputed this claim and argued that the gender discrimination claim would reach laws targeted directly at homosexuals because in order to enforce such laws the government still has to make determinations based on the gender of the person affected by the laws and the gender of the person they are attracted to.²³¹ Professor Koppleman has explained that Stein’s reasoning would have allowed the anti-miscegenation laws to remain enforceable as long as the language of the laws was change to exclude interracial couples from getting married rather than excluding white people from marrying black people.²³² Even if the language was changed to bar interracial couples from marriage, the laws would still clearly make a racial classification and constitute racial discrimination.²³³ Because of this ambiguity of whether antigay laws that do not use gender terminology still make gender classifications, it would be appropriate to for the reviewing court to refrain from expanding heightened scrutiny to include homosexual classifications as a suspect or semi-suspect classification when reviewing marriage laws that use gender terminology and make clear gender classifications. The Court could them make a determination on whether antigay laws that do not use gender terminology fail to make a gender classification necessitating an expansion of the heightened scrutiny framework when it actually faces a law like the “don’t ask, don’t tell” policy.

²³⁰ *Id.*

²³¹ Koppleman, *supra* note 160, at 527; Krotoszynski & Spitko, *supra* note 146, at 637-38 (“a person’s sexual orientation cannot be disaggregated from a person’s sex”).

²³² Koppleman, *supra* note 160, at 527.

²³³ *Id.*

Conclusion

This article has shown that any law that requires marriage to be between a man and a woman kames a facial gender classification and triggers intermediate scrutiny. Therefore, for such a law to pass constitutional muster, the State must show the law is substantially related to serve an important government objective.²³⁴ The State’s justification for the law must be exceedingly persuasive, and the burden for the justification rests entirely on the State.²³⁵

Justice Holmes stated in his dissent to *Lochner*, “[The Constitution] is made for people of fundamentally differing views.”²³⁶ Therefore, judges should not be so quick to brush aside the gender discrimination claim because it might seem strange to them at first or because they personally have moral objections to same-sex marriage. “Morality comes into play in assessing law, and perhaps, reforming it, but that is but that is not the business of the judge.”²³⁷ It is important that judges follow the framework of heightened scrutiny and review marriage laws under intermediate scrutiny to remain faithful to *Caroline Product’s* famous footnote. That footnote requires judges to engage in a more meaningful review when laws prejudice against discrete and insular minorities.²³⁸ Based on this footnote, the Supreme Court has found that one situation where courts should engage in more meaningful review is when laws make gender classifications. Therefore, judges should follow the Supreme Court’s commands and subject marriage laws to intermediate scrutiny because judicial abstention can be just as reprehensible as judicial activism when civil rights are at stake.

²³⁴ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

²³⁵ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

²³⁶ *Lochner v. New York*, 198 U.S. 45, 76 (1905).

²³⁷ Robert Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 28 (2003).

²³⁸ *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938).

However, getting judges to review marriage laws under intermediate scrutiny is not enough by itself to invalidate those laws. Even though under intermediate scrutiny the burden on proof lies on the government to prove that its gender classifications are substantially related to an important government objective, same-sex marriage proponents still must rebut assertions made by the government that its classification are legitimate and do not constitute gender discrimination. Fortunately, there have been many articles explaining how marriage laws constitute gender discrimination by reinforcing gender stereotypes.²³⁹ This article will help allow same-sex marriage proponents to reach intermediate scrutiny and be able to make that claim under the correct standard of review.

²³⁹ See sources cited *supra* note 7.