Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex

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I. Introduction

The Fourteenth Amendment to the United States Constitution precludes states from denying equal protection of the laws, and state constitutions contain analogous protections. In several cases, plaintiffs have challenged state same-sex marriage bans, arguing that such statutes violate state or federal equal protection guarantees.

Some state supreme courts have held that the state’s same-sex marriage ban violates the state constitution’s equal protection guarantees, whereas other supreme courts have reached the opposite conclusion. This lack of uniformity is unsurprising, both because the language in one state constitution might differ from that of another and because, even where the language is the same, the jurisprudence in the respective states fleshing out the depth and breadth of the guarantees might differ. What seems more surprising is that courts cannot even agree about whether same-sex marriage bans employ a sex-based classification. Yet, if courts are having difficulty in determining that, then there are important implications both for analyses regarding the constitutionality of same-sex marriage bans in particular and for any analyses of equal protection guarantees more generally.

Part II of this article discusses federal equal protection jurisprudence, focusing on the indicia for the differing tiers of scrutiny. Part III discusses some state supreme court attempts to analyze whether same-sex marriage bans violate equal protection guarantees, explaining how some of the adopted approaches are incompatible with current federal equal protection doctrine. The article concludes that unless the Court makes clear how some of these approaches involve basic misunderstandings of current doctrine, equal protection jurisprudence will either become even more inconsistent or, even worse, may coalesce around a doctrine rejected almost half a century ago.

II. Federal Protections

Equal protection guarantees are not designed to impose unreasonable limitations on the ability of legislators to craft solutions to promote the public welfare but merely to prevent states from arbitrarily imposing burdens on disfavored individuals. In some cases, it is unclear whether the state is invidiously discriminating or is simply promoting the public good as a general matter, which almost invariably involves a distribution of burdens and
benefits to which some will object. To help courts assess in a particular case whether a classification is legitimate or, instead, offends constitutional guarantees, the Court has offered some helpful guidelines.

A. The Tiers

The United States Supreme Court has long recognized that some "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy--a view that those in the burdened class are not as worthy or deserving as others."\(^1\) When such factors are used, there is a presumption that the classification is not promoting a legitimate state purpose and should be struck down.

Classifications that likely reflect prejudice are exactly the sorts that are less likely to be rectified through the usual legislative processes. The Court has suggested that where "such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."\(^2\) Thus, in part because certain classifications are likely to be the product of animus rather than a desire to promote legitimate state objectives and in part because the normal correction mechanism within the political process may not operate properly when these groups are involved, the Court will view certain classifications "with skepticism, if not a jaundiced eye."\(^3\)

To help courts determine whether classifications should be examined very closely or instead with greater deference, the Court has developed a system employing differing levels of scrutiny for three different kinds of classes: suspect classes, quasi-suspect classes, and a catch-all category that includes the rest.\(^4\) Suspect classifications will rarely be upheld,\(^5\) whereas classification falling into the catch-all category are rarely struck down.\(^6\)

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2. Id.
5. See Lawrence O. Gostin, Public Health Theory and Practice in the Constitutional Design, 11 Health Matrix 265, 310 (2001) (“Where the Court sees certain touchstones of constitutional concern such as a suspect classification or the violation of a fundamental right, the government almost invariably loses.”).
6. See Michael Anthony Lawrence, The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause, 2010 Cardozo L. Rev. de novo 139, 151 (2010) (“Under this standard of review the great majority of government actions are heavily presumed as valid and are almost always upheld.”).
Classifications that are suspect will be examined with the closest scrutiny—a statute employing such a classification will only be upheld only if it is narrowly tailored to promote a compelling state interest.\(^7\)

Classifications that are quasi-suspect will be subjected to somewhat less exacting scrutiny—a statute employing such a classification will be upheld only if it is substantially related to the promotion of an important state interest.\(^8\)

Finally, the remaining classification will be examined with much more forgiving scrutiny—a statute examined under rational basis review will be upheld as long as the classification is rationally related to the promotion of a legitimate state interest.\(^9\)

B. The Indicia of Suspectness

A classification will be treated as suspect or quasi-suspect under certain conditions. The classification must involve a group that has certain indicia: it must be “discrete and insular;”\(^10\) members of the group must have a disability over which they do not have control;\(^11\) the defining characteristic of the group must not bear a rational relationship to a legitimate state purpose;\(^12\) and the group must have “experienced a ‘history of purposeful unequal treatment’ or have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”\(^13\) Further, group membership must be stigmatized by society and thus, for example,

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\(^7\) Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

\(^8\) Clark v. Jeter, 486 U.S. 456, 461 (1988) (“To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”).

\(^9\) Romer v. Evans, 517 U.S. 620, 631 (1996) (“if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end”). One of the most forgiving applications of the rational basis text was offered in Williamson v. Lee Optical, 348 U.S. 483 (1955). See id. at 487-88 (“But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).


members cannot be expected to be able to secure equal treatment through the political process.\(^\text{14}\) Where a group has those indicia, it will be designated as a suspect or quasi-suspect class.\(^\text{15}\)

When a group or class has the relevant indicia, the Court will subject the classification to increased scrutiny.\(^\text{16}\) For example, once the Court recognized that statutes targeting women should be subjected to heightened scrutiny, the Court started subjecting statutes targeting men or women for adverse treatment to close scrutiny. Then, the Court suggested that expressly classifying on certain bases would itself be enough to trigger heightened or strict scrutiny, even without evidence of “targeting” members of the class for adverse treatment.\(^\text{17}\)

The Court has offered examples of suspect status—race,\(^\text{18}\) religion,\(^\text{19}\) nationality\(^\text{20}\) and alienage\(^\text{21}\) --and examples of quasi-suspect status—gender\(^\text{22}\) and illegitimacy.\(^\text{23}\) While members of the Court have sometimes suggested that other classes, “not now classified as suspect . . . are unfairly burdened by invidious discrimination unrelated to the individual worth of their members,”\(^\text{24}\) the Court has been reluctant to recognize new suspect or quasi-suspect classifications.\(^\text{25}\)

\(^{14}\) Cf. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (“the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

\(^{15}\) But see notes 26-27 and accompanying text infra (discussing whether the Court’s current reluctance to expand the list of suspect or quasi-suspect classes indicates an unwillingness on the part of the Court to apply the existing indicia to other classes).

\(^{16}\) See, for example, Adarand Constructors, Inc., 515 U.S. at 227 (“all racial classifications must be analyzed by a reviewing court under strict scrutiny”) (emphasis added); Craig v. Boren, 429 U.S. 190, 197 (1976) (“classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”) (emphasis added).

\(^{17}\) Cf. for example, Mark Strasser, Interpretations of Loving in Lawrence, Baker, and Goodridge: On Equal Protection and the Tiers of Scrutiny, 13 Widener L.J. 859, 870 (2004) (“Express classifications on the basis of race will trigger strict scrutiny even where there is no malicious purpose behind the classification.”).


\(^{20}\) San Antonio, 411 U.S. at 105 (Marshall, J., dissenting) (describing the “highly suspect character of classifications based on . . . nationality”).

\(^{21}\) Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (“the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny”).

\(^{22}\) Craig, 429 U.S. at 197 (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

\(^{23}\) Trimble v. Gordon, 430 U.S. 762, 767 (1977) (indicating that illegitimacy is subjected to intermediate scrutiny).

\(^{24}\) Murgia, 427 U.S. at 320 (Marshall, J., dissenting).

This reluctance needs further examination. It might mean, for example, that the Court is unwilling to add new indicia to the list or relax the degree to which a group must have the relevant indicia when another class seeks to be recognized as suspect or quasi-suspect. Or, it might mean that the Court is unwilling to recognize a new class as suspect or quasi-suspect even if the group has the indicia to the same extent as do the existing classes. The former view might be understandable if, for example, great difficulties would be created were the implicit standards changed, e.g., because relaxing the standard would somehow open up the floodgates to a whole host of classes no less deserving of special solicitude. However, the latter view seems much less justifiable, because it suggests that suspect and quasi-suspect status are not being decided on the merits but, instead, in light of other criteria. It would be most ironic if a particular group was not given protected status because some on the Court believed that stigmatizing a group historically subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities was nonetheless somehow permissible and appropriate.

C. Threshold Levels

One difficulty posed by the Court’s indicia approach is its utter indeterminacy. The Court has never made sufficiently clear whether a class must have all or merely most of the indicia, whether certain indicia are more important than others, or the extent to which particular indicia must be met. By failing to explain the degree to

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26 Cf. Cleburne, 473 U.S. at 445-46


28 For one interpretation of the Supreme Court’s jurisprudence in this area, see Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 426 (Conn. 2008)
which the differing indicia must be met, the Court makes it more difficult for lower courts to make reasoned assessments regarding which additional classes, if any, should be recognized as triggering a higher level of scrutiny. Basically, lower courts might adopt one of two different approaches: (1) they might simply refuse to recognize any new classes, instead waiting for the Supreme Court to do so, or (2) they might examine those classes that have already been recognized as triggering increased scrutiny and try to discern the degree to which the existing indicia must be possessed in light of the degree to which the recognized classes had those indicia.

Consider, for example, the degree to which it is necessary that individuals in the class be unable to change the characteristic that is the basis for the classification. Race is very difficult if not impossible to change, whereas the same cannot be said of religion. The same point might be noted when contrasting ancestry with alienage--one cannot change who one’s ancestors were but one can change one’s alienage status, e.g. by becoming a United States citizen. So, too, it is difficult if not impossible to change one’s sex, whereas one’s illegitimacy status can be changed much more readily if one’s parents will cooperate.

The United States Supreme Court, however, consistently has identified two factors that must be met, for purposes of the federal constitution, if a group is to be accorded such status. These two required factors are: (1) the group has suffered a history of invidious discrimination [citing United States v. Virginia, 518 U.S. 515, 531-32 (1996)] . . . and (2) the characteristics that distinguish the group’s members bear “no relation to [their] ability to perform or contribute to society.” [citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)] . . . The United States Supreme Court also has cited two other considerations that, in a given case, may be relevant in determining whether statutory provisions pertaining to a particular group are subject to heightened scrutiny. These two additional considerations are: (1) the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control [citing Lyng v. Castillo, 477 U.S. 635, 638 (1986) . . . and (2) the group is “a minority or politically powerless.” [citing Bowen v. Gilliard, 483 U.S. 587, 602 (1987)]

Cf. Citizens for Equal Protection v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006) (treating orientation as non-suspect after noting that “the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes”).

See notes 62-68 and accompanying text infra (discussing the Connecticut Supreme Court’s analysis of whether orientation is a classification triggering heightened scrutiny).

Historically, legislatures would define race differently. Some states would determine race by going back three generations, some would go back four, and some would use a one-drop rule. See Paul Finkelman, Book Review, The Color Of Law The Color-Blind Constitution. By Andrew Kull. Cambridge: Harvard University Press, 1992. pp. X, 301, $35.00, 87 Nw. U. L. Rev. 937, 955 n.96 (1993). Arguably, it was possible for some individuals to change their (legal) race either by lobbying the legislature or by moving to another state with a different definition of who belonged to which race.

Indeed, one’s freedom to change one’s religion is itself protected. See 22 U.S.C.A. § 6402 (13) (discussing internationally recognized rights to religious freedom including the right to change one’s religion).


Sex reassignment surgery might be understood as making one’s body in accord with one’s sex rather than as changing one’s sex. See Amanda S. Eno, The Misconception of “Sex” in Title VII: Federal Courts Reevaluate
Arguably, orientation should be recognized as a classification triggering heightened scrutiny. However, the United States Supreme Court has heard cases involving members of the LGBT (lesbian, gay, bisexual, and transgender) community and has never recognized that orientation triggers intermediate or strict scrutiny.

In Bowers v. Hardwick, for example, the Court upheld a Georgia law making consensual sodomy a crime. The Court restricted its analysis to due process guarantees, and so did not even address equal protection. Nonetheless, there is reason to think that the Court would have been unwilling to find that orientation triggered heightened scrutiny and, indeed, some read Bowers as endorsing homophobia.

Transsexual Employment Discrimination Claims. 43 Tulsa L. Rev. 765, 771 (2008) (“Some transsexual individuals seek medical treatment to correct their physical body. Transition is the process by which individuals go through hormone therapy and sex reassignment to change themselves to align with their gender identity.”).

See, for example, Mary F. Radford, Wills, Trusts, Guardianships, and Fiduciary Administration, 60 Mercer L. Rev. 417, 429 (2008) The Georgia General Assembly added a provision in 2005 that allows the parents of a child born out of wedlock to engage in a “voluntary legitimation” of the relationship between the father and the child. Under O.C.G.A. § 19-7-22(g)(2), the mother and father of a child born out of wedlock can legitimate the father-child relationship if both parents sign a voluntary acknowledgement of paternity that also includes an acknowledgement of legitimation.

See notes 62-68 and accompanying text infra.

Justice Brennan suggested that orientation should trigger closer scrutiny. See Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) [H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is “likely ... to reflect deep-seated prejudice rather than ... rationality.” [citing Plyler v. Does, 457 U.S. 202, 216 n.14 (1982)] State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.


Bowers only addressed due process guarantees. See id. at 196 n.8 (1986) (“Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.”).

See id. at 202 n.2 (Blackmun J., dissenting) (mentioning a way to avoid “the more controversial question whether homosexuals are a suspect class”).

See Joseph J. Wardenski, A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth, 95 J. Crim. L. & Criminology 1363, 1394 (2005) (discussing “Bowers, a prominent symbol of legally-sanctioned homophobia”). See also Watkins v. U.S. Army, 837 F.2d 1428, 1453 (9th Cir. 1988) (Reinhardt, J., dissenting), superceded by 847 F.2d 1329 (9th Cir. 1988), withdrawn on reh'g by 875 F.2d 699 (9th Cir. 1989) (“[T]he anti-homosexual thrust of Hardwick, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear.”). But see Stemler v. City of Florence 126 F.3d 856, 873 (6th Cir. 1997) (“It is inconceivable that Bowers stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation.”).
Even when reaching a more favorable result for the LGBT community, the Court did not suggest that orientation was a protected classification. In \textit{Romer v. Evans}, the Court addressed the constitutionality of Colorado’s Amendment 2, which read:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The \textit{Romer} Court did not expressly address whether sexual orientation constitutes a suspect or quasi-suspect class, instead suggesting that this amendment was unconstitutional even on rational basis review. The Court likened what was before it to what had been before the Court in \textit{Department of Agriculture v. Moreno}, in which the Court had struck down legislation targeting a particular class (hippies) on rational basis grounds. The \textit{Moreno} Court had noted that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Basically, the \textit{Romer} Court was suggesting that the passage of Amendment 2 was motivated by animus and thus had to be struck down.

Two different points might be made about the \textit{Romer} Court’s analysis. First, there was no need for the Court to reach whether orientation was a suspect or quasi-suspect classification if the law at issue could not even

\begin{enumerate}
\item[] 517 U.S. 620 (1996).
\item[] Id. at 624.
\item[] Id. at 632.
\item[] See \textit{id.} at 634-35.
\item[] 413 U.S. 528 (1973).
\item[] Id. at 534 (“The legislative history that does exist, however, indicates that that amendment was intended to prevent societal ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”).
\item[] \textit{Id.}
\item[] See \textit{Romer}, 517 U.S. at 634 (“laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected”).
\end{enumerate}
pass rational basis review. The Court noted that “even in the ordinary equal protection case calling for the most
deferential of standards, we insist on knowing the relation between the classification adopted and the object to be
attained.”\textsuperscript{50} Thus, because the statute could not even pass that low level of review, there was no need to reach the
question of whether the statute at issue would pass a more demanding test.

A different point is sometimes made about Romer’s citation of Moreno.\textsuperscript{51} Justice O’Connor has suggested
that the Court has unofficially recognized two different tiers within the catch-all category subject to rational basis
scrutiny.\textsuperscript{52} Economic legislation triggers the least demanding review because it can most readily be rectified by
normal political processes.\textsuperscript{53} However, when a law targets “a politically unpopular group, . . . [the Court applies] a
more searching form of rational basis review.”\textsuperscript{54} It may be that the Court has implicitly decided not to recognize any
new suspect or quasi-suspect classes but will instead recognize gradations within the category subjected to rational
basis scrutiny.\textsuperscript{55}

Lawrence v. Texas,\textsuperscript{56} the case in which the Court overruled Bowers, does not cast much light on the level
of scrutiny triggered by classifications on the basis of orientation. First, the Court struck down the Texas law
criminalizing same-sex sodomy on due process grounds,\textsuperscript{57} although the Court did suggest that Texas’s statute was

\textsuperscript{50} Id. at 632.
\textsuperscript{51} See notes 45-48 and accompanying text supra.
\textsuperscript{52} See Lawrence, 539 U.S. at 580 (O’Connor, J., concurring in the judgment)

We have consistently held, however, that some objectives, such as “a bare ... desire to harm a
politically unpopular group,” are not legitimate state interests. Department of Agriculture v.
Moreno, 413 U.S. at 534. See also Cleburne v. Cleburne Living Center, 473 U.S. at 446-447;
Romer v. Evans, 517 U.S. at 632. When a law exhibits such a desire to harm a politically
unpopular group, we have applied a more searching form of rational basis review to strike down
such laws under the Equal Protection Clause.

\textsuperscript{53} See id. at 579-80 (O’Connor, J., concurring in the judgment) (“Laws such as economic or tax legislation that are
scrutinized under rational basis review normally pass constitutional muster, since ‘the Constitution presumes that
even improvident decisions will eventually be rectified by the democratic processes.’”) (citing Cleburne v. Cleburne
Living Center, 473 U.S. 432, 440 (1985)).

\textsuperscript{54} Id. at 580 (O’Connor, J., concurring in the judgment).

\textsuperscript{55} But see id. at 601 (Scalia, J., dissenting)

Justice O’Connor simply decrees application of ‘a more searching form of rational basis review’ to
the Texas statute... The cases she cites do not recognize such a standard, and reach their
conclusions only after finding, as required by conventional rational-basis analysis, that no
conceivable legitimate state interest supports the classification at issue..

\textsuperscript{56} 539 U.S. 558 (2003).
\textsuperscript{57} Id. at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct
without intervention of the government.”).
also constitutionally suspect on equal protection grounds.\textsuperscript{58} Once again, because the classification at issue was unconstitutional in any event, it was not necessary to address whether classifying on the basis of orientation should raise the level of scrutiny employed by the Court, either up to the intermediate scrutiny associated with gender or to the heightened rational basis scrutiny discussed by Justice O’Connor in her \textit{Lawrence} concurrence in the judgment.\textsuperscript{59} Thus, the Court simply has not offered an analysis of the appropriate level of scrutiny for classifications on the basis of orientation in light of the relevant indicia, instead leaving that task to others.

\section*{III. State Courts and Suspect Constitutional Classifications}

When state supreme courts have analyzed the constitutionality of local same-sex marriage bans on equal protection grounds, they often address two distinct issues—whether orientations is a protected classification under the state constitution and whether same-sex marriage bans classify on the basis of sex. The analyses of the latter are rather surprising if only because they are so radically different that they do not seem to be interpreting the same guarantees. This utter lack of consensus about how to apply the standard equal protection jurisprudence may bode poorly for future analyses implicating equal protection guarantees, regardless of which group is claiming to be unconstitutionally targeted by the classification at issue.

\subsection*{A. Orientation as a Protected Classification under the State Constitution}

Several state courts have addressed whether sexual orientation is a classification triggering strict or heightened review under their respective state constitutions. When doing so, they take into consideration the indicia articulated by the Supreme Court, although that of course does not end the analysis. As should not be surprising, some state supreme courts have concluded that orientation is not a classification triggering heightened scrutiny,\textsuperscript{60} whereas others have reached the opposite conclusion.\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{58}See \textit{id.} at 574 (“[C]ounsel for the petitioners and some amici contend that \textit{Romer} provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument.”).
\item \textsuperscript{59}Id. at 580 (O’Connor, J., concurring in the judgment).
\item \textsuperscript{60}See Conaway v. Deane, 932 A.2d 571, 629 (Md. 2007).
\item \textsuperscript{61}See, for example, Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 412 (Conn. 2008) (“for the same reasons that classifications predicated on gender are considered quasi-suspect for purposes of the equal protection
Consider the analysis offered by the Connecticut Supreme Court in Kerrigan v. Commissioner of Public Health. The court discussed each of the enumerated criteria, noting that orientation had the relevant indicia when considered in light of those classifications already recognized as meeting the articulated standards. The court explained:

Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society. The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.

The court rejected that members of the LGBT community were too politically powerful to be considered a class worthy of protection, noting that sex was declared a quasi-suspect classification at a time when women as a class were considered more powerful than members of the LGBT community are today. As the court explained, given that orientation meets the other indicia and that members of the LGBT community are not as powerful as were members of another group when that classification was held to trigger heightened scrutiny, it would be at the very least unfair not to recognize that orientation triggers heightened scrutiny as well.

provisions of the United States constitution, sexual orientation constitutes a quasi-suspect classification for purposes of the equal protection provisions of the state constitution.

We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation. Gays and lesbians certainly possess no more political power than women enjoyed four decades ago when the Supreme Court began subjecting gender-based legislation to closer scrutiny. Additionally, gay and lesbian people are, as a class, currently no more powerful than women or members of some racial minorities.

Because gay persons, like women, fully satisfy the first three criteria of the suspectness inquiry, it would be manifestly unfair to the plaintiffs, and to gay persons generally, to ignore or dismiss the analysis and result of Frontiero, [Frontiero v. Richardson, 411 U.S. 677 (1973)] which correctly concluded that women were not so politically powerful as to obviate the need for heightened judicial scrutiny of gender-based classifications.
The court considered whether orientation is an immutable characteristic, noting that different courts had reached different conclusions about whether orientation is in fact immutable but also noting that there is no requirement in the jurisprudence that the characteristic be immutable. One need only consider some of the classifications that have been recognized as triggering heightened or strict scrutiny to see that immutability is not required.

The Washington Supreme Court reached very different conclusions when trying to decide whether orientation triggered heightened scrutiny. For example, the court reasoned that because some protective legislation had been passed, it was obvious that the LGBT community was not completely powerless. Yet, presumably, if the presence of express protective legislation is indicative of power, then the presence of express protection within the United States Constitution would certainly seem to be indicative of power and would obviate the need to find additional protections within Fourteenth Amendment guarantees. Yet, were that the relevant test, one would have assumed that sex could not be a protected classification because, after all, the Nineteenth Amendment to the United State Constitution affords express protection on the basis of sex. So, too, one might have assumed that race would not be a suspect classification, because the Fifteenth Amendment to the United States Constitution affords express protection on the basis of race, which would allegedly establish that racial minorities were and are not powerless.

The difficulty with the Washington court’s approach was not that it examined whether members of the LGBT community were powerful but that the threshold degree of powerlessness used to disqualify the class as being suspect or quasi-suspect was artificially low and might have been used to disqualify classes that had already been recognized as meeting the relevant standard. Instead, the Washington court should have considered the degree of

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66 Id. at 436-37.
67 Id. at 437.

Although we do not doubt that sexual orientation-heterosexual or homosexual—is highly resistant to change, it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable, because, even if it is not, the plaintiffs nonetheless have established that they fully satisfy this consideration.

68 See notes 31-35 and accompanying text supra.
69 Andersen v. King County, 138 P.3d 963 (Wash. 2006).
70 Id. at 974-75 (“The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.”).
71 U.S. Const. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).
72 U.S. Const. amend. XV §1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).
powerlessness of the recognized classes at the time of recognition as establishing the relevant baseline.\textsuperscript{73} Or, perhaps, the court should have considered the current degree of powerlessness of the recognized classes as setting the relevant baseline.\textsuperscript{74} 

The same point might be made about the Washington court’s analysis of whether orientation is immutable. The court explained that because sexual orientation had not been established as an immutable characteristic\textsuperscript{75} and because the immutability of the characteristic was still subject to debate,\textsuperscript{76} the classification would not be treated as suspect. Yet, this would mean that religion could not be a suspect classification, since orientation is more difficult to change than one’s religion.\textsuperscript{77} So, too, it is easier to change one’s alienage or illegitimacy status than one’s orientation.\textsuperscript{78} Basically, if the Washington court’s approach were correct, some of the classifications currently recognized as suspect or quasi-suspect could not be so recognized.

While there is much to be said for the proposition that orientation should be treated as a suspect or quasi-suspect classification, a separate question is whether same-sex marriage bans already make use of a protected

\textsuperscript{73} See notes 64-65 and accompanying text supra (noting the Connecticut Supreme Court’s comparing degrees of powerlessness).

\textsuperscript{74} See In re Marriage Cases, 183 P.3d 384, 443 (Cal. 2008), superseded by constitutional amendment as stated in Strauss v. Horton, 207 P.3d 48 (2009) (“if a group’s current political powerlessness were a prerequisite to a characteristic’s being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications”). See also Virginia 518 U.S. at 575 (Scalia, J., dissenting) (“It is hard to consider women a “discrete and insular minorit[y]” unable to employ the “political processes ordinarily to be relied upon,” when they constitute a majority of the electorate.”).

\textsuperscript{75} Andersen, 138 P.3d at 974.

\textsuperscript{76} See id. at n.6

\textsuperscript{77} See Richard A. Posner, Sex and Reason 296-97 (Harvard University Press, 1992) (suggesting that it may be harder to change one’s sexual orientation than one’s religion).


The American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers confirmed in an amicus brief in support of the petitioners in Lawrence that they consider sexual orientation an immutable characteristic, stating that it “is a normal variant of human sexual expression,” that “is not a mental or psychological disorder,” and is “highly resistant to change.”
classification and thus should be examined with at least heightened scrutiny. Various courts have considered this claim, and there has been a surprising lack of consensus about how this issue should be resolved.

B. Classifications on the Basis of Sex

Several courts have addressed whether same-sex marriage bans classify on the basis of sex. Both their conclusions and their analyses have varied so greatly that one cannot help but conclude that there is no common understanding about how the equal protection guarantees are supposed to be applied. But if that is so, then there are important implications for equal protection analyses more generally and not only those involving LGBT plaintiffs.

a. Hawaii

More than fifteen years ago, the Hawaii Supreme Court in *Baehr v. Lewin* 79 analyzed that state’s marriage statute, which included in relevant part that “the marriage contract, . . . shall be only between a man and a woman.” 80

The court made two points: (1) “Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female;” 81 and (2) “the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.” 82 Basically, the Hawaii Supreme Court examined the express language of the statute and noted that the statute precluded males from marrying males and females from marrying females, but allowed males to marry females as long as no other limitations was violated, e.g., the parties were old enough and were not too closely related by blood. 83 The court concluded that the statute facially classified on the basis of sex.

A separate question was whether the classification was sufficiently closely tailored to support sufficiently important interests for such a classification to be upheld. That depended upon the level of scrutiny imposed by the

79 852 P.2d 44 (Haw. 1993).
81 *Baehr*, 852 P.2d at 60.
82 *Id.*
83 See *Haw. Rev. Stat.* § 572-1

In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that:

1. The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is the result of the issue of parents married or not married to each other;
2. Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2.
state constitution for sex-based classifications—under the Hawaii Constitution, classifications on the basis of sex are examined with strict scrutiny.\textsuperscript{84}

In his \textit{Baehr} dissent, Justice Heen denied that the Hawaii statute classified on a forbidden basis, noting that “HRS § 572-1 treats everyone alike and applies equally to both sexes.”\textsuperscript{85} Yet, it is unclear whether he was asserting that the classification is not sex-based, because it allegedly affects the sexes equally,\textsuperscript{86} or is sex-based but not invidiously,\textsuperscript{87} because a statute might classify on the basis of sex but nonetheless be permissible.\textsuperscript{88}

Justice Heen noted, “A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has.”\textsuperscript{89} He then suggested that the statute should be examined in light of the rational basis test,\textsuperscript{90} thereby implying that the statute did not classify on the basis of gender. Yet, the United States Supreme Court has already explained that this is not the proper way to analyze whether a statute classifies on a particular basis.

Consider \textit{McLaughlin v. Florida},\textsuperscript{91} in which the Court examined Florida’s making interracial fornication or adultery a separate crime in addition to the state’s general prohibition of fornication and adultery.\textsuperscript{92} The Court explained that the statute under which Dewey McLaughlin and Connie Hoffman\textsuperscript{93} were charged could only apply to

\textsuperscript{84} See \textit{Baehr}, 852 P.2d at 67 (“sex is a ‘suspect category’ for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the ‘strict scrutiny’ test”).
\textsuperscript{85} Id. at 71 (Heen, J., dissenting).
\textsuperscript{86} See id. at 72 (Heen, J., dissenting) (“HRS § 572-1 does not discriminate on the basis of gender”).
\textsuperscript{87} See id. at 71 (Heen, J., dissenting) (suggesting that the classification “does not effect an invidious discrimination”).
\textsuperscript{88} See, for example, Michael M. v. Sonoma County Superior court, 450 U.S. 464 (1981) (upholding sex-based classification).
\textsuperscript{89} \textit{Baehr}, 852 P.2d at 71 (Heen, J., dissenting).
\textsuperscript{90} Id. (Heen, J., dissenting) (“the issue is whether the statute rationally furthers a legitimate state interest”).
\textsuperscript{91} 379 U.S. 184 (1964).
\textsuperscript{92} See id. at 185-86.

Section 798.01 forbids living in adultery and s 798.02 proscribes lewd cohabitation. Both sections are of general application, both require proof of intercourse to sustain a conviction, and both authorize imprisonment up to two years. Section 798.03 also of general application, proscribes fornication and authorizes a three-month jail sentence. The fourth section of the chapter, 798.04, makes criminal a white person and a Negro’s living together in adultery or fornication. A one-year prison sentence is authorized. The conduct it reaches appears to be the same as is proscribed under the first two sections of the chapter. Section 798.05, the section at issue in this case, applies only to a white person and a Negro who habitually occupy the same room at nighttime.

\textsuperscript{93} See \textit{McLaughlin v. State}, 153 So.2d 1, 2 (1963) (suggesting that the defendants were Dewey McLaughlin and Connie Hoffman).
an interracial couple.\textsuperscript{94} That said, however, the Court noted that “all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty.”\textsuperscript{95} Notwithstanding this equal application, the Court struck down the statute as a violation of equal protection guarantees.\textsuperscript{96} The Court pointed out,

\begin{quote}
Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose-in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.\textsuperscript{97}
\end{quote}

The \textit{McLaughlin} Court explained that a racial classification was at issue,\textsuperscript{98} equal application to whites and blacks notwithstanding. A separate issue involved an analysis of the statute’s constitutionality, which might include a variety of factors, e.g., that a criminal statute was at issue\textsuperscript{99} and that the classification triggered strict scrutiny.\textsuperscript{100}

The same point about classification might be made in the civil context. In \textit{Loving v. Virginia},\textsuperscript{101} the Court examined Virginia’s anti-miscegenation statutes.\textsuperscript{102} The Court struck down the statutes, including the statute that

\begin{quote}
\textsuperscript{94} \textit{McLaughlin}, 379 U.S. at 188 (‘It is readily apparent that s 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple.’).
\textsuperscript{95} \textit{Id}. at 187 (“We deal with the single issue of equal protection and on this basis set aside these convictions.”).
\textsuperscript{96} \textit{Id}. at 191.
\textsuperscript{97} \textit{Id}. (“We deal here with a racial classification.”).
\textsuperscript{98} \textit{See id}. (noting that the classification was “embodied in a criminal statute”).
\textsuperscript{99} \textit{See id}. at 192 (‘racial classifications [are] ‘constitutionally suspect,’ Bolling v. Sharpe, 347 U.S. 497, 499 (1954) and subject to the ‘most rigid scrutiny,’ Korematsu v. United States, 323 U.S. 214, 216 (1944)”).
\textsuperscript{100} 388 U.S. 1 (1967).
\textsuperscript{101} \textit{Id}. at 4-5.
\end{quote}

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating s 20-58 of the Virginia Code:

‘Leaving State to evade law.-If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in s 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.’

Section 20-59, which defines the penalty for miscegenation, provides:

‘Punishment for marriage.-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 and shall be punished by confinement in the penitentiary for not less than one nor more than five years.’

Other central provisions in the Virginia statutory scheme are s 20-57, which automatically voids
declared racial intermarriages void, concluding that they were “designed to maintain White Supremacy.”

However, at least two points must be made. First, the Loving Court noted that the statutes would have been struck down even were that not the intent and, second, there was no doubt that what was at issue were racial classifications.

That the Loving Court struck down Virginia’s marriage laws involving racial classifications does not establish that sex-based classifications must also be struck down. Whether sex-based classifications are constitutional depends upon the implicated interests of the state and the tightness of fit between the classification and the promotion of those interests. While the federal standard used to determine whether sex-based classifications pass muster is not as demanding as the federal standard determining the constitutionality of racial classifications, the former standard nonetheless requires that “a party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification’ for the classification.”

Justice Heen’s analysis was mistaken in at least two respects. First, one does not determine whether a statute classifies on a particular basis by looking at whether different groups are affected differently. As McLaughlin illustrates, a classification might result in an equal imposition of burdens across groups and nonetheless classify on a basis triggering closer scrutiny.

A separate issue is whether the classification violates constitutional guarantees, and it might be important to see who is adversely affected when answering that question. But that analysis does not involve determining the basis of the classification (that question has already been decided), but whether the standards used to determine whether the constitutional permissibility of such a classification have been met.

b. Vermont

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103 Id. at 11.
104 See id. at 11 n.11 ("we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races").
105 Id. at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").
106 See Virginia, 518 U.S. at 533 ("The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (citing Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982))).
107 See id. at 524 (citing Mississippi Univ. for Women, 458 U.S. at 724).
108 But see note 98 and accompanying text supra (suggesting that equal application would not save Florida’s racial classification from being struck down as a violation of equal protection guarantees).
In *Baker v. State*, the Vermont Supreme Court found that the state’s same-sex marriage ban violated state constitutional guarantees under a particular provision of the Vermont Constitution—the Common Benefits Clause. The *Baker* court began its analysis by identifying the type of classification embodied in the statute. The court recognized that the “marriage statutes apply expressly to opposite-sex couples [and] . . . exclude anyone who wishes to marry someone of the same sex.”

One might think that the court’s recognition that the statute expressly excluded on the basis of the sex or gender of the would-be spouse would be enough to establish that the statute classified on the basis of sex. However, surprisingly, the *Baker* court reasoned that “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex.” Basically, the *Baker* court adopted the Heen method of identifying the basis of classification, United States Supreme Court precedent to the contrary. The *Baker* court failed to recognize that a statute not singling out a group for disparate treatment still might be using a classification triggering heightened scrutiny, e.g., statutes that focus on the racial identity of the members of would-be marital couples. Ironically, the very case cited by the *Baker* court in support of its position, namely, *Personnel Administrator of Massachusetts v. Feeney*, actually undermined the Vermont court’s analysis.

The *Feeney* Court examined a Massachusetts veterans’ preference statute that “operate[d] overwhelmingly to the advantage of males.” The Court distinguished between two kinds of classifications—those that facially involve a protected classification and those that involve a neutral classification that might have a disparate impact on a protected class. The *Feeney* Court explained that certain classifications “in themselves supply a reason to infer antipathy,” paradigmatically race. Such a “classification, regardless of purported motivation, is presumptively

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110 *Id.* at 867 (“We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”).
111 *Id.* at 880 (“The first step in our analysis is to identify the nature of the statutory classification.”).
112 *Id.*
113 *Id.* at 880 n.13 (emphasis added)
114 See notes 91-107 and accompanying text *supra*.
115 See *Baker*, 744 A.2d at 880 n.13.
117 See notes 118-29 and accompanying text *infra*.
118 *Feeney*, 442 U.S. at 259.
119 *Id.* at 272.
120 *Id.*
invalid and can be upheld only upon an extraordinary justification.”121 Here, the Court is suggesting that a statute expressly using a racial classification must be examined with strict scrutiny—it will not do to say, for example, that the racial classification is benign.122 Even an allegedly non-invidiously motivated statute using a protected classification will be examined closely for fear that it is “motivated by an invidious purpose.”123

Subjecting express racial classifications to strict scrutiny will not alone eradicate invidious discrimination, because individuals intent on invidiously discriminating might try to do so in a more subtle way. After all, laws classifying on allegedly neutral grounds might nonetheless target on the basis of race.124 To prevent individuals from invidiously discriminating via an allegedly neutral classification, the Court will strictly scrutinize “a classification that is ostensibly neutral but is an obvious pretext.”125

What would count as a classification that is ostensibly neutral? Here, the Feeney Court is discussing a classification that involves a non-race-related term that allegedly is being used to target on the basis of race in a more subtle manner. The Baker court misunderstood how the term “neutral” was being used, mistakenly thinking that the Feeney Court was talking about a policy that was neutral in the sense that the races were affected equally. But that could not have been the Court’s meaning, because the Court had just offered McLaughlin as an example of a facial, racial discrimination, and McLaughlin involved a racial classification that had been applied to the races equally.126

To understand what the Feeney Court was doing, it is helpful to consider the classification that had been at issue. The challenged classification used a neutral term, i.e., “veteran,” that on its face was not associated with gender.127 Indeed, the Court pointed out that there were both male and female veterans.128

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121 Id.
122 See Johnson v. California, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context, even for so-called “benign” racial classifications.”).
123 Feeney, 442 U.S. at 272.
124 See Alexander v. Sandoval, 532 U.S. 275, 306 n.13 (2001) (Stevens, J., dissenting) (“Many policies whose very intent is to discriminate are framed in a race-neutral manner.”).
125 Feeney, 442 U.S. at 272.
126 Id.
127 See id. at 275 (“the definition of ‘veterans’ in the statute has always been neutral as to gender”).
128 Id. (“Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military.”).
Where a classification, neutral on its face, is challenged as offending equal protection guarantees, the Court uses a specific test to determine whether the neutral classification has been used to impose a burden on a protected class. The *Feeney* Court explained,

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.\(^{129}\)

Consider a statute that permits a man to marry a woman but not a man, and a woman to marry a man but not a woman. Suppose that a court for whatever reason reads such a statute as gender-neutral. The *Feeney* twofold inquiry tells the court to reconsider whether in fact the classification is gender-based. The question to be decided is not whether the genders are treated equally but simply whether gender is the basis of the classification. Only if the classification is not gender-based should the next questions be considered.

Suppose that a neutral classification is nonetheless challenged as discriminatory on the basis of gender. Given that there is no gender-linked term in the statute, the only way that one could plausibly argue that the classification was in fact discriminatory on the basis of gender would be to show disparate impact. But, the Court suggests, where there is no express classification, one must show both disparate impact and an intent to discriminate.

Suppose that the *Baker* analysis were applied in *McLaughlin* and the Court had required disparate impact even when a facial racial classification was used. In that event, the Court would presumably have said that because whites and blacks were affected equally by the statute, rational basis scrutiny should be used. But this is exactly what *McLaughlin* did not say, since *McLaughlin* imposed strict scrutiny notwithstanding the equal application.

> In her concurring and dissenting *Baker* opinion, Justice Johnson pointed out that “an individual’s right to marry a person of the same sex is prohibited solely on the basis of sex.”\(^{130}\) As she rightly suggested, once the gender-based classification was established, it was incumbent upon the state to establish that the statute was sufficiently “narrowly tailored to further important, if not compelling, interests.”\(^{131}\)

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\(^{129}\) Id. at 274.

\(^{130}\) See *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part).

\(^{131}\) See id. (Johnson, J., concurring in part and dissenting in part).
It is not claimed here that the Baker court was somehow blinded by its desire to avoid at all costs the conclusion that same-sex relationships should not be given legal recognition. On the contrary, the Baker court held that the Common Benefits Clause required that the state offer legal recognition to same-sex relationships, so the court’s misapplication of Feeney cannot plausibly be attributed to that kind of result-oriented reasoning. Nonetheless, the Baker court misapplied the relevant equal protection guarantees in a way that simply cannot account for the existing federal jurisprudence.

c. New York

The New York Court of Appeals addressed the constitutionality of that state’s same-sex marriage ban in Hernandez v. Robles. The court dismissed the equal protection argument in one paragraph, noting:

The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in Loving: the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.

Yet, as the Court has repeatedly made clear, there is no requirement that one group be subordinated to another in order for a protected classification to be struck down. Indeed, such a requirement flies in the face of the jurisprudence--certain classifications are presumptively prohibited because so rarely legitimate. To invalidate a statute that expressly uses a protected classification only if the statute can be shown to subordinate is to return to a jurisprudence explicitly repudiated in McLaughlin, where the McLaughlin Court explained that judicial “inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation.”

Not only did the New York court offer an interpretation of equal protection guarantees which hearkened back to the days of Pace v. Alabama, where the Court upheld Alabama’s punishing interracial fornication more

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133 Id. at 10-11.
134 See notes 91-107 and accompanying text supra (discussing Loving and McLaughlin).
135 McLaughlin, 379 U.S. at 191.
severely than intra-racial fornication, but it offered a very unusual analysis of suspect and quasi-suspect jurisprudence more generally. The court considered whether orientation might be a suspect or quasi-suspect class under the New York Constitution. The court suggested that it might “apply heightened scrutiny to sexual preference discrimination in some case,” but would not when reviewing “legislation governing marriage and family relationships.”

Why are those areas excluded? Because the court decided that a “person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve children best.” Yet, evidence was presented to the court that children were thriving when raised by LGBT parents, which is to say that one’s “preference” for sexual partners of the same sex was simply not correlated with one’s ability to parent. That evidence did not win the day, because “the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households.”

The New York court’s analysis was startling in a number of respects. First, New York permits second-parent adoption, so two members of a same-sex couple might each be recognized as the legal parent of the same child. This means that New York accepts that LGBT adults are good parents. However, the state has nonetheless decided that it will not permit same-sex parents raising a child together to marry, even though doing so would help those children and would not in any way hurt the children who are being raised in different-sex families.

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136 See Pace v. State, 106 U.S. 583, 585 (1883), overruled by McLaughlin v. Florida, 379 U.S. 184 (1964)
137 Hernandez, 855 N.E.2d at 11.
138 Id.
139 Id.
140 Id. at 7-8.
141 Id. at 8 (emphasis added).
142 See In re Jacob, 660 N.E.2d 397 (N.Y. 1995)
143 See Hernandez, 855 N.E.2d at, 32 (Kaye, C.J. dissenting)
144 The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare.
The New York court distinguished what was before it from the “kind of sham equality that the Supreme Court confronted in Loving.” Yet, the court failed to pay close enough attention to the issues raised in Loving.

Virginia supported its antimiscegenation law by arguing that the state’s “legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’” The state was claiming that the children of interracial couples were inferior, i.e., that children were better when produced by intra-racial couples than when produced by interracial couples. What proof did the state have that its contention was true? None. But the state argued that none was required because the races were being treated equally, i.e., that because equal protection guarantees were not offended by a statute that did not treat the races differently, mere rational basis scrutiny should be employed. The Loving Court explained Virginia’s position:

The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

With respect to which judgment should the Court defer to the wisdom of the legislature? With respect to the claim that children would be better off if they were not produced by interracial couples. Apparently, if the New York court had been deciding Loving and if the state could show that the statute was not promoting white supremacy e.g., because the state could somehow show that its interest was in maintaining the purity of all races and not just the white race, then the New York court would have decided the case differently. After all, if the state could

144 Id. at 30 (Kaye, C.J. dissenting) (“while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the exclusion of gay men and lesbians from marriage in no way furthers this interest”).
145 Id. at 11.
146 Loving, 388 U.S. at 7.
147 See Naim v. Naim, 87 S.E.2d 749, 752 (Va.1955)
   It was said in that case that the question was one of difference between the races, not of superiority or inferiority, and that the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures.
148 Loving, 388 U.S. at 8.
show that the interracial marriage ban was not “in substance anti-black legislation,” then plaintiffs could not have claimed that the statute was designed to subordinate one race to another and rational basis would have appropriately been used. If rational basis scrutiny was used, then the court would presumably have deferred to the legislature’s judgment about what was best for children, because it could not be shown beyond doubt that the legislature was wrong. But this is a fundamental misunderstanding of Loving, where the Court made clear, “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” The Loving Court was not saying that interracial marriage bans were only unconstitutional when involving an attempt to subordinate one race to another but instead that they were unconstitutional “even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”

In her masterful dissent, Chief Judge Kaye argued that the New York law violated equal protection guarantees because it discriminated both on the basis of gender and on the basis of orientation. She explained, “That the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex.” Regrettably, the New York court simply chose to ignore that its approach had already been rejected in Loving.

e. Washington

The Washington Supreme court offered an analysis much like that of the New York Court of Appeals, rejecting the equal protection argument in a cursory and conclusory fashion. The Washington court reasoned, “If plaintiffs’ case were truly analogous to Loving, we would first have to find that DOMA [the Washington statute banning same-sex marriage] discriminates on the basis of sex and then conclude that the right to marriage is violated

149 Hernandez, 855 N.E.2d at 11.
150 Cf. id. at 11 (“Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.”).
151 Loving, 388 U.S. at 12.
152 Id. at 11 at n.11.
153 See Hernandez, 855 N.E.2d at 27 (Kaye, C.J. dissenting)
Homosexuals meet the constitutional definition of a suspect class, that is, a group whose defining characteristic is “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others” [citing Cleburne, 473 U.S. at 440] Accordingly, any classification discriminating on the basis of sexual orientation must be narrowly tailored to meet a compelling state interest
154 Id. at 29 (Kaye, C.J. dissenting).
155 See id. (Kaye, C.J., dissenting) (“The ‘equal application’ approach to equal protection analysis was expressly rejected by the Supreme Court in Loving.”).
because of the restriction due to sex discrimination. However, as the State urges, DOMA treats men and women the same." Yet, Loving did not establish that differential racial treatment had to be established before strict scrutiny would be employed for a racial classification. On the contrary, the very use of a racial classification triggered strict scrutiny, just as the very use of a racial classification in MelLaughlin had triggered strict scrutiny, equal application to the races notwithstanding. But that means that the Washington court should indeed have found that the statute classified on the basis of sex, thus triggering closer scrutiny. The court would then have decided whether the state same-sex marriage ban passed muster under this closer scrutiny.

Would the Washington court have struck down the statute when employing closer scrutiny? While such a result is not foreordained simply by virtue of the imposition of higher scrutiny, the court implied that it would indeed have felt compelled to strike down the statute, perhaps because Washington subjects gender classifications to strict scrutiny.

Of course, it could be that the Washington jurisprudence for determining whether a statute classifies on the basis of gender differs from the federal jurisprudence in a crucial way, e.g., by requiring that classifications affect the sexes differently in order for higher scrutiny to be employed under state constitutional guarantees. Even if that were so, however, the federal jurisprudence does not so require, which means that the Washington statute should have been subjected to intermediate if not strict scrutiny.

f. California

In In re Marriage Cases, the California Supreme Court understood that the California statute precluded a man from marrying a man but not a woman and a woman from marrying a woman but not a man, but reasoned that

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156 Andersen, 138 P.3d at 989 See also Conaway v. Deane, 932 A.2d 571, 598 (Md. 2007) (“Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct.”).

157 Andersen, 138 P.3d at 989 (suggesting that in that case the court would “conclude that the right to marriage is violated because of the restriction due to sex discrimination”).

158 See Darrin v. Gould, 540 P.2d 882, 888 (Wash. 1975) (“[W]e hold that the classification based upon sex . . . is inherently suspect and therefore must be subject to strict judicial scrutiny.”)

159 See Andersen, 138 P.3d at 988 (“The purpose of the ERA “is to end special treatment for or discrimination against either sex.”) (citing Marchioro v. Chaney, 582 P.2d 487, 491 (1978)).

160 See notes 118-31 and accompanying text supra.


162 Id.

Plaintiffs argue that because a woman who wishes to marry another woman would be permitted to do so if she were a man rather than a woman, and a man who wishes to marry another man would
there was no discrimination because no one could marry someone of the same sex.\textsuperscript{163} The court understood that the statute at issue in Virginia in \textit{Loving} permitted a white person to marry a white person and a black person to marry a black person but precluded a white person from marrying a black person. However, the California court pointed out, the antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in \textit{Perez}) “the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.”\textsuperscript{164}

Regrettably, there was no discussion of whether the Virginia statute would have been upheld had it been established that Virginia was trying to preserve the purity of all races. Such a question would not have undermined the California court’s contention that Virginia’s attempt to promote white supremacy violated constitutional guarantees—rather, it simply would have helped underscore that Virginia’s statute was unconstitutional whether or not it was trying to promote white supremacy. But since that is so, \textit{Loving} is not so easily distinguished, because the state’s attempt to promote racial supremacy was sufficient but not necessary to establish the unconstitutionality of the state’s artificial restriction of marriage.

The California Supreme Court explained that courts have recognized that a statute that treats a couple differently based upon whether the couple consists of persons of the same race or of different races generally reflects a policy disapproving of the integration or close relationship of individuals of different races in the setting in question, and as such properly is viewed as embodying an instance of \textit{racial discrimination} with respect to the interracial couple and both of its members.\textsuperscript{165}

Yet, one would have thought from the court’s previous analyses that treating interracial couples differently from intra-racial couples would involve racial discrimination only if there was some implicit or explicit attempt to be permitted to do so if he were a woman rather than a man, the statutes must be seen as embodying discrimination on the basis of sex.

\textsuperscript{163} \textit{Id.} at 436. (“In drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes do not treat men and women differently. Persons of either gender are treated equally and are permitted to marry only a person of the opposite gender.”)

\textsuperscript{164} \textit{Id.} at 437 (citing \textit{Perez v. Lippold}, 198 P.2d 17, 23 (Cal. 1948)).

\textsuperscript{165} \textit{Id.}
privilege one race over another. Without any such showing, one still could claim that the statute was classifying on
the basis of race but would need more before one could show disparate impact upon one race or another.

The California court contrasted the statute precluding interracial couples from marrying from one precluding
same-sex couples from marrying by suggesting that:

a statute or policy that treats men and women equally but that accords differential treatment either
to a couple based upon whether it consists of persons of the same sex rather than opposite sexes,
or to an individual based upon whether he or she generally is sexually attracted to persons of the
same gender rather than the opposite gender, is more accurately characterized as involving
differential treatment on the basis of sexual orientation rather than an instance of sex
discrimination, and properly should be analyzed on the former ground.\footnote{Id. See also Conaway, 932 A.2d at 605 (“While Family Law § 2-201 does not draw a distinction based on sex, the legislation does differentiate implicitly on the basis of sexual preference.”).}

Here, the court suggests that because there is no disparate impact on the basis of sex and there is such an impact
on the basis of orientation, the statute should be examined in light of its discriminating on the basis of orientation
rather than sex. Certainly, the court was correct to recognize that such a statute would impose a burden on the LGBT
community but a separate question is whether such a statute should in addition be examined in light of its using a
sex-based classification.

Consider the statute that precludes interracial marriage out of a desire to protect the integrity of all races. For
purposes here, let us assume that the statute is not designed to privilege one race over others and does not have the
effect of privileging one race over others. While such a statute classifies on the basis of race, it \textit{ex hypothesi} does not
have a disparate racial impact. Yet, \textit{Loving} teaches that such a statute should be examined with strict scrutiny even if
it does not have a disparate racial impact and even if the purpose behind it is to promote racial integrity generally.
But if that is so, then the fact that the races are affected equally does not immunize a race-based classification from
strict scrutiny. So, too, even if in fact a same-sex marriage ban affects the sexes equally, that should not immunize
the statute from scrutiny for using a sex-based classification.
Ironically, the California court did not even have to reach the question of whether the state’s same-sex marriage ban classified on the basis of sex, because the court held that orientation was a suspect classification under the California Constitution. One infers that the court wanted to choose the “correct” classification to subject to strict scrutiny, as if a classification could not discriminate on the basis of both sex and gender.

A court believing that it had to choose the “correct” classification for constitutional review when considering a same-sex marriage challenge might be tempted to focus solely on the group on whom the burden has primarily if not exclusively been imposed, namely, the LGBT community. Yet, limiting one’s focus to the intended target may well contradict the existing jurisprudence. For example, no court would suggest that a race- or gender-based classification in a statute should be reviewed in light of the rational basis test as long as the statute was designed to impose a burden on the poor. So, too, a classification normally triggering closer scrutiny should not be subjected to more deferential review merely because the group intended to bear most of the burden has not yet been held to trigger more careful review.

One of the difficulties posed by an analysis requiring that disparate impact be shown before the level of scrutiny is raised is that the higher level of scrutiny is imposed to discover some of the non-obvious adverse effects of employing certain classifications. Consider, for example, the former admissions policy of the Mississippi University for Women (MUW), which precluded males from taking nursing courses for credit. On its face, such a policy

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167 For example, the Iowa Supreme court did not address whether that state’s same-sex marriage ban offended equal protection guarantees on the basis of gender because the court found that orientation was protected under the state constitution. See Varnum v. Brien 763 N.W.2d 862, 896 (Iowa 2009) (“Accordingly, we hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.”).

168 See Marriage Cases, 183 P.3d at 442 (“sexual orientation should be viewed as a suspect classification for purposes of the California Constitution’s equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision”). By the same token, the Supreme Judicial Court of Massachusetts did not address whether that state’s same-sex marriage ban should be examined because it found that the ban could not even pass rational basis review. See Goodridge v. Department of Public Health, 798 N.E.2d 941, 961 (Mass. 2003) (“we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.”).

169 But see note 153 and accompanying text supra (discussing Chief Judge Kaye’s dissenting opinion in Hernandez in which she suggested that the New York same-sex marriage ban discriminated on the basis of both sex and gender).

170 See San Antonio, 411 U.S. at 28 (holding that poverty is not a suspect classification).


Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's
might seem to advantage rather than disadvantage women.\footnote{Id. at 727 (“The State's primary justification for maintaining the single-sex admissions policy of MUW’s School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action.”).} Yet, the \textit{Mississippi University for Women} Court worried that MUW’s admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.\footnote{Id. at 724.} The Court has made clear that when “determining the validity of a gender-based classification,”\footnote{Id. at 740.} the analysis “must be applied free of fixed notions concerning the roles and abilities of males and females.”\footnote{Id. at 724-25.} Such an analysis cannot be properly performed if the Court is going to approach classifications based on gender with a deferential eye.

The Supreme Court has suggested, “‘Inherent differences’ between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.”\footnote{Virginia, 518 U.S. at 533(emphasis added).} At least one issue to be examined is whether same-sex marriage bans are based on stereotypical understandings of the roles of the men and women, either as parents\footnote{See notes and accompanying text supra (discussing the refusal by the New York Court of Appeals to give sufficient credit to the parenting abilities of LGBT parents, evidence supporting those abilities notwithstanding) \footnote{See Linda C. McClain, Essay, The “Male Problematic” and the Problems of Family Law: A Response to Don Browning’s “Critical Familism,” 56 \textit{Emory L.J.} 1407, 1410-11 (2007) (discussing the view that women are supposed to domesticate men).} or as romantic partners.\footnote{Cf. Andersen, 138 P.3d at 989 (“plaintiffs fail to show that gay and lesbian persons are excluded from marriage on account of or in order to perpetuate gender stereotyping”).} But analysis of whether particular classifications promote fixed notions about the proper roles of the sexes is much less likely to take place under rational basis review,\footnote{Cf. Andersen, 138 P.3d at 989 (“plaintiffs fail to show that gay and lesbian persons are excluded from marriage on account of or in order to perpetuate gender stereotyping”).} which is one of the reasons that closer scrutiny is employed for sex-based classifications.

\textbf{IV. Conclusion}

Same-sex marriage bans impose significant and undeserved burdens on LGBT families and should be struck down. Arguably, orientation should be treated as a suspect or quasi-suspect classification, because the class has the relevant indicia as much as or more than some of those classes already recognized.

baccalaureate program. Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit.
A separate question, however, is whether same-sex marriage bans should trigger closer scrutiny because using a protected classification. Those courts denying that such scrutiny should be employed have suggested that men must be treated differently from women in order for heightened scrutiny to be triggered. But the argument that express classifications applied equally do not trigger close scrutiny was rejected decades ago. Unless the United States Supreme Court makes clear that this is a fundamental misunderstanding of how equal protection guarantees work, it seems safe to assume that some courts will try to adopt this kind of approach in other cases.

To say that closer scrutiny should be employed when express sex-based classifications are employed is not to say that such classifications must be struck down. Rather it is merely to say that the state’s burden is higher when it chooses to use a presumptively invalid classification.180 As long as a state can offer “an ‘exceedingly persuasive justification’ for the classification,”181 the same-sex marriage ban will pass muster, at least on federal grounds.

Express use of a protected classification triggers closer scrutiny, and any contrary holding will return us to an age when “separate but equal” will only result in deferential review. Presumably, no one would advocate returning to that bygone era, and it is nothing short of amazing that some courts, whether upholding or striking down same-sex marriage bans, do not appreciate that their reasoning commits us to a return to a jurisprudence that has been repudiated for decades.

180 See Feeney, 442 U.S. at 272.
181 Virginia, 518 U.S. at 524 (citing Mississippi Univ. for Women, 458 U.S. at 724).