Laboratories of Constitutionality: How State High Courts Paved the Way for Federal Courts to Invalidate Prohibitions on Same-Sex Marriage

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Part I: Introduction

Since its inception, the legal institution of marriage has been understood to be exclusively heterosexual. This understanding has been so pervasive, and the possibility of same-sex marriage so inconceivable, that marriage statutes in at least forty states did not contain language explicitly reserving marriage to heterosexual couples\(^1\) until after the Hawaii Supreme Court brought the issue of same-sex marriage to the national news in 1993.\(^2\) Moreover, unless a legislature explicitly provides otherwise, the common law only recognizes marriage between a man and a woman, even in states, such as New Mexico,\(^3\) where the marriage statutes contain no gender-specific language.

As recently as ten years ago, a person could not marry a person of the same sex anywhere on Earth. After nearly a decade of increasingly rapid expansion, now seven foreign nations\(^4\) and four American states\(^5\) permit same-sex marriage.\(^6\) The sudden acceptance of same-sex marriage in a growing number of jurisdictions and the concomitant backlash has brought what was previously a marginal issue to the forefront of constitutional law.

Since the Hawaii Supreme Court’s landmark ruling, beginning in 1999, nine state supreme courts have ruled on the validity under their constitutional schemes of statutes barring same-sex couples from marrying.\(^7\) Of those states without a constitutional amendment defining marriage currently or at the time of a legal challenge to such definition, and in which the legislature has not explicitly permitted same-sex marriage, in more than half a state court has ruled definitively on the constitutionality of excluding same-sex couples from marriage.\(^8\)

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\(^{2}\) Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that Hawaii’s marriage statute classifies on the basis of sex by excluding same-sex couples and therefore must be subjected to strict scrutiny), superseded by constitutional amendment, HAW. CONST. art. 1 § 23.

\(^{3}\) New Mexico law defines marriage solely as a “civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential.” N.M. STAT. § 40-1-1 (2008).


\(^{6}\) New Hampshire will begin permitting same-sex marriages on 1 January 2010, 2009 N.H. Laws 59 § 10, and Maine’s same-sex marriage law is on hold pending a referendum in November.

\(^{7}\) *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), superseded in relevant part by constitutional amendment, CAL. CONST. art. 7 § 5; Kerrigan; Varnum; Conaway v. Deane, 932 A.2d 571 (Md. 2007); Goodridge; Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Baker v. State, 744 A.2d 864 (Vt. 1999); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

\(^{8}\) In addition to the ten states referenced earlier, the New Mexico Supreme Court ruled on the issue in Dunlap v. Madrid, No. 28,730 (N.M. July 8, 2004), available at http://www.domawatch.org/cases/newmexicodunlapymadrid/040708Order.pdf, letting stand the opinion of the attorney general that same-sex marriages are not authorized by the state’s gender-neutral marriage statute. The states without constitutional definitions of marriage and without...
Interestingly, despite all this action on the state level, no federal lawsuits on the issue had been filed recently until *Perry v. Schwarzenegger*, challenging California’s Proposition 8. One of the explanations for this is undoubtedly a fear on the part of proponents of same-sex marriage that the Supreme Court might issue a “bad” ruling; that is, a ruling that ends up being worse than no ruling at all.

Another likely explanation for the absence of federal challenges prior to *Perry* is *Baker v. Nelson*, in which the Supreme Court dismissed on the merits for “want of [a] substantial federal question” an appeal from a Minnesota Supreme Court ruling holding that limiting marriage to opposite-sex couples did not violate the Federal Constitution. And while such dismissals are typically binding on lower courts, they are not if “doctrinal developments indicate otherwise.” Since *Baker* and *Bowers v. Hardwick*, cases in which the Court was evidently unwilling to provide any judicial protection for homosexuals qua homosexuals, there have undeniably been “doctrinal developments.”

If *Romer* dealt a serious blow to the validity of the *Hardwick* holding, its 2003 *Lawrence v. Texas* decision not only repudiated the reasoning that underpinned the central holding in *Hardwick*, it explicitly overruled the precedent. Indeed, the Court’s groundbreaking declaration in *Lawrence* that moral disapproval of homosexuals is insufficient for a statute to be upheld, even under rational basis review, completely eviscerated not only *Hardwick*, but also any argument that moral disapproval alone can justify an infringement of individual liberty.

In light of *Loving v. Virginia*, and *Turner v. Safly*, the Court clearly sees a “substantial federal question” in the denial of the capacity to marry on a discriminatory basis. It therefore

court cases challenging statutory marriage laws are Delaware, Illinois, Indiana, Minnesota, North Carolina, Pennsylvania, Rhode Island, West Virginia, and Wyoming.


10 CAL. CONST. art. 1, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

11 Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that there is no constitutional protection for homosexual sodomy), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003), is a perfect example of such a ruling. Lower courts used the Supreme Court’s dismissal of gay rights in *Hardwick* to set back gay rights in other arenas. See, e.g., High Tech Gays v. Def. Ind. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (“Other circuits are in accord and have held that although the Court in *Hardwick* analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis, by the *Hardwick* majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.”).


14 Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (“[T]he lower courts are bound by summary decisions by this Court ‘until such time as the Court informs [them] that [they] are not.’”).

15 *Hicks*, 422 U.S. at 344 (“[I]nferior federal courts are bound by the fact that the Court has branded a question as unsubstantial … except when doctrinal developments indicate otherwise … .”)

16 *Hardwick*.

17 Justice Scalia seems to think it did, see *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).


19 *Id.* at 578.

20 *Id.* at 582 (“Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).


cannot be said that *Baker* retains validity because of the traditional latitude given in our federal system to states when it comes to marriage law.

At the very least, subsequent developments, combined with the Court’s historical protection of the *federal* constitutional right to marriage, significantly undermine the binding precedential value of *Baker*. Lower federal courts have the authority to hear a challenge to laws excluding same-sex couples from marriage. But is the time ripe for such a suit?

As I mentioned earlier, a good number of state high courts have already ruled on the constitutionality of statutory exclusions of same-sex couples from marriage under their own constitutions. Five state supreme courts have ruled such exclusions unconstitutional, three have sustained them, and two have ruled that their constitutions required at least a kind of “separate-but-equal” arrangement, in which the court required the state legislature to grant to same-sex couples seeking to marry all of the rights and responsibilities of marriage, but allowed the legislature to choose between amending the marriage statutes or creating a parallel relationship recognition system in which same-sex unions were given some other name, such as “civil union” or “domestic partnership.” Moreover, in most of the cases the dissenters provided cogent and powerful arguments for the losing side.

Every state has a different constitution, and every state supreme court has the final authority to interpret its meaning. Because of this, even state constitutional provisions with wording that is identical to that of a provision of the United States Constitution may be interpreted to provide more protection than the Federal Constitution provides.

That being said, however, many state constitutions do contain language very similar to the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. And despite the freedom to interpret such provisions however they wish, many

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24 See, e.g., Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“[T]he right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”); Carey v. Pop. Servs. Int’l, 431 U.S. 678, 684-85 (1977) (“[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage ….”); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (“[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Oklahoma v. Skinner*, 316 U.S. 535, 541 (1942) (Marriage is “one of the basic civil rights of man”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [the liberty guaranteed by the 14th Amendment] denotes not merely freedom from bodily restraint but also the right of the individual … to marry ….”). *See also* Maynard v. *Hill*, 125 U.S. 190 (1888) (recognizing importance of marriage in our society); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (relating privacy rights to marriage and procreation); *Turner* (extending right to marry to prisoners).


26 *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”).

27 See, e.g., *CALIF. CONST.* art. 1, § 7(a) (“A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws….”); *HAW. CONST.* art. 1, § 5 (“No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws ….”); *CONN. CONST.* art. 1, § 1 (“All men … are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.”) and § 4 (“No person shall be … deprived of life, liberty or property without due process of law….”); *IOWA CONST.* art. 1, § 6 (“[T]he general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”) and § 9 (“No person shall be deprived of life, liberty, or property, without due process of law.”); *MASS. CONST.* Decl. of Rights, art. 7 (“Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and for the profit, honor, or private interest of any one man, family, or class of men ….”) and art. 12 (“[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or
state supreme courts have chosen to employ tests very similar to those prescribed by the United States Supreme Court when interpreting analogous provisions of their state constitutions. Some state high courts whose states’ constitutions do not contain equal protection or due process provisions have even interpreted such provisions into other parts of their constitutions.28

The rulings and dissents of the nine state supreme courts that have definitively addressed the constitutionality under their state constitutions of marriage statutes that exclude same-sex couples provide persuasive analysis to which federal courts may well look for inspiration, now that they have been called upon to interpret the extent of the Federal Constitution’s protection of the rights of same-sex couples.

The purpose of this article is to present, through the lens of the state high court rulings, the various paths of constitutional interpretation that are available to a federal judge adjudicating the constitutionality of preventing same-sex couples from marrying, focusing specifically on the argumentation espoused by state high court justices in support of same-sex marriage, but taking into account the counterarguments that persuaded other high courts to uphold marriage restrictions.

Part II will address substantive due process analysis, Part III will take on equal protection, Part IV will subject the exclusion of same-sex couples from marriage to the three levels of scrutiny, and Part V will consider possible remedies, should the exclusion be found unconstitutional.

Part II: Substantive Due Process

(a) United States Supreme Court Substantive Due Process Jurisprudence

Before going into the rulings and opinions of the state high court justices it is worth reviewing the guidelines set by Supreme Court for conducting substantive due process analyses. When a plaintiff seeks to invalidate a statute or other governmental action on the basis that it infringes his or her substantive due process rights, the Supreme Court attempts to ascertain

privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”); N.Y. CONST. art. 1, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”) and § 11 (“No person shall be denied the equal protection of the laws … .”); WASH. CONST. art. 1, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”) and § 12 (“No law shall be passed granting to any citizen, class of citizens … privileges or immunities which upon the same terms shall not equally belong to all citizens … .”).

Maryland and New Jersey are perfect examples. Compare N.J. CONST. art. 1, § 1 (“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”) with Lewis v. Harris, 908 A.2d 196, 211 (N.J. 2006) (“Although our State Constitution nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee.”); and compare Md. CONST. Decl. of Rights, art. 24 (“No man ought to be taken or imprisoned or dispossessed of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”) with Conaway v. Deane, 932 A.2d 571, 603 n.33 (Md. 2007) (“There is no express equal protection provision found within Article 24, [but it] ‘embodies … the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment.’”).
whether the infringed right is “fundamental.”29 If the Court deems a right “fundamental,” any governmental infringement upon that right must survive strict scrutiny.30

It is immediately apparent, then, that the crux of federal substantive due process jurisprudence is the issue of whether a right is “fundamental.” Unhelpfully, the Court has not settled on a definitive, clear-cut standard for answering this question. In a well-known passage, the Court explained that it protects those “fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”31 That is a particularly high bar for a right to reach. Nevertheless the right to marry unequivocally qualifies as fundamental under this standard.32

But the inquiry does not end there. All acknowledge that marriage is a fundamental right. But does the fundamental right to marriage encompass the right of two people of the same sex to marry? Clearly same-sex marriage is not “deeply rooted” in this—or any—country’s “history and tradition.”33

Moreover, in Michael H. v. Gerald D., the Court indicated that when evaluating whether or not a right qualifies as fundamental, it “refer[s] to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”34 Less than ten years later, in Washington v. Glucksberg, the Court was already backing away from this stark formulation, concluding instead that a “‘careful description’ of the asserted fundamental” right was required.35

However, the extent to which any of this is still controlling was thrown seriously in doubt by the Court’s landmark Lawrence v. Texas ruling, in which the Justices held that the kind of descriptive specificity of the asserted right required by Michael H. or Glucksberg “demeans the claim the individual put forward ….”36 Without explicitly overruling its more restrictive precedents, Lawrence eviscerated them and established a much more encompassing, empathetic standard for identifying fundamental rights.

(b) State High Court Analyses

It is in the shadow of this somewhat confused background that the state high court justices conducted their separate analyses under their own state constitutions.

(i) Decisions Finding that the Fundamental Right to Marry Includes Same-Sex Couples

The Supreme Judicial Court of Massachusetts was not the first court of last resort in the United States to rule definitively on the constitutionality of preventing same-sex couples from

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29 Zablocki v. Redhail, 434 U.S. 378, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless [it meets strict scrutiny]….”). See also United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting the court will more closely scrutinize laws that discriminate against “discrete and insular minorities” and when certain other rights are infringed).
30 Zablocki, 434 U.S. at 388 (“A statutory classification [that] significantly interferes with the exercise of a fundamental right … cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).
32 And under numerous Supreme Court precedents. See footnote 19, supra.
33 As I noted at the beginning of this piece, the first legal same-sex marriage in the history of recorded civilization occurred approximately eight years ago.
35 Glucksberg, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
marring. Of course, it was the first in the nation to hold that marriage statutes may not constitutionally exclude same-sex couples. Perhaps not coincidentally, it was also the first in the nation to rule after the Supreme Court handed down *Lawrence*, and its opinion relies heavily upon the expansive language in *Lawrence* defining and extolling liberty.

In its opinion, the Supreme Judicial Court outlined all of the federal precedents that classified marriage as a fundamental right. From there the court followed the spirit of *Lawrence*, determining that “the right to marry means little if it does not include the right to marry the person of one’s choice … .” The court drew particularly on two landmark precedents to guide its reasoning: the California Supreme Court’s *Perez v. Sharp*, which invalidated that state’s anti-miscegenation laws, and *Lawrence*.

In *Perez*, the judicial philosophy of which guided the United States Supreme Court in *Loving v. Virginia*, the California Supreme Court held that the “essence of the right to marry is freedom to join in marriage with the person of one’s choice.” Though it may not have been clear sixty-one years ago, when *Perez* was handed down, that language of freedom logically applies equally to individuals who would choose to marry a person of their own sex as it would to individuals who would marry a member of the opposite sex.

Before *Lawrence*, the government of the United States or of any state had perfect justification to restrict that freedom to choose whom to marry. The Court had explicitly permitted the government to restrict, invasively if need be, certain non-fundamental individual liberties, if majoritarian moral sentiment underlay such restrictions. Moreover, as noted earlier, *Michael H.* elaborated a standard under which an alleged right was only fundamental to the degree that there existed a tradition of protection of that right at the most specific level for which such a tradition could be identified. These precedents created a climate that would have been downright hostile to any claim to a right to same-sex marriage.

All of this changed when *Lawrence* was handed down, however, and the Supreme Judicial Court of Massachusetts recognized this. The court held that when “a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance … because of a single trait … history must yield to a more fully developed understanding of the invidious quality of the discrimination.” Then, citing *Lawrence*, the court noted that the Supreme Court “has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate

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37 The Supreme Court of Hawaii began the process, ruling that restrictions on same-sex marriage must pass strict scrutiny. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). Later, the Vermont Supreme Court held that the state must offer its same-sex couples the same rights and responsibilities that it offers its opposite-sex couples, but that it may refer to such unions by different terms. Baker v. State, 744 A.2d 864 (Vt. 1999). Vermont chose to call them civil unions. 2000 Vt. Acts & Resolves 91.
40 *Goodridge*, 798 N.E.2d at 957.
41 Id. at 958.
42 Perez v. Sharp, 198 P.2d 17 (Cal. 1948).
44 *Perez*, 198 P.2d at 21.
conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support.”

The California Supreme Court made a similar determination, ruling that courts should “focus[] on the substance of the constitutional right at issue—that is, the importance to an individual of the freedom ‘to join in marriage with the person of one’s choice’—in determining whether the statute impinged upon the plaintiffs’ fundamental constitutional right.” The court believed that Lawrence clearly stood for the proposition that constitutional rights “properly should be understood in a broader and more neutral fashion so as to focus upon the substance of the interests that the constitutional right is intended to protect.”

Chief Judge Kaye of the New York Court of Appeals was similarly persuasive in her argumentation. After reiterating the assertion that Lawrence and Loving required the right at issue more properly to be recognized as the right to marry a person of one’s choosing, she noted that “the Supreme Court has repeatedly held that the fundamental right to marry must be afforded even to those who have previously been excluded from its scope—that is, to those whose exclusion from the right was ‘deeply rooted.’

Chief Judge Kaye then compared the prohibition of same-sex marriage to historical prohibitions of interracial marriage, astutely observing that “even though it was the ban on interracial marriage—not interracial marriage itself—that had a long and shameful national tradition, the Supreme Court determined that interracial couples could not be deprived of their fundamental right to marry.”

Justice Fairhurst of the Supreme Court of Washington noticed that the Supreme Court actually has a long tradition of defining expansively the right at hand, noting for example, that “in Meyer v. Nebraska and Pierce v. Society of Sisters, the Court considered whether there was a fundamental right to decisions in educating one’s children, not whether there was a fundamental right to have your children learn German or attend a private school.” She continued:

Likewise, in Skinner v. Oklahoma, the Court asked whether there was a fundamental right to be free from unwarranted government intrusion into decisions whether to have children, not whether a convicted criminal had a fundamental right to reproduce. In Zablocki, and Turner, the Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions to marry, not whether delinquent fathers or inmates had a fundamental right to marry. Perhaps most relevant and important here, in Loving the Court asked whether there was a fundamental right to marry, not whether there was a fundamental right to interracial marriage.

Justice Greaney of the Supreme Judicial Court of Massachusetts articulated perhaps the most logical opposition to the idea that same-sex marriage is not a fundamental right because there is no history or tradition supporting it when he wrote that “[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the

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48 Id. (citation omitted).
50 Id. at 421 (citing Lawrence, 539 U.S. at 565-77).
52 Id. at 20.
53 Id.
54 Andersen v. King County, 138 P.3d 963, 990 (Wash. 2006) (Fairhurst, J., dissenting) (citations omitted).
55 Id. (citations omitted).
(ii) Decisions Finding No Right to Same-Sex Marriage

The New York Court of Appeals was the first state high court to address marriage restrictions after Massachusetts’s Supreme Judicial Court. In its decision, the court summarily rejected any comparison with Lawrence on the basis that Lawrence involved “state intrusion on intimate, private activity,” while the exclusion of same-sex couples from marriage, unlike the sodomy statutes at issue in Lawrence, was not “essentially arbitrary.”

The only other analysis from the Court of Appeals on the issue was its seemingly novel conclusion that Lawrence, rather than implicitly overturning Washington v. Glucksberg, created a second category, where the “definition of a fundamental right for due process purposes may be either too narrow or too broad,” and that a protecting a right to same-sex marriage would fit in the latter category.

The New Jersey Supreme Court followed the Court of Appeals’s lead, ruling several months later that it is required to “exercise the utmost care” before finding new rights, which place important social issues beyond public debate. The New Jersey court feared that including same-sex couples in the fundamental right to marry would “bypass[] the democratic process as the primary means of effecting social change,” apparently forgetting that the main purpose of a countermajoritarian court is to remove certain fundamental rights from the purview of democratic horse-trading.

The Supreme Court of Washington’s reasoning when it rejected the contention that there exists a fundamental right to same-sex marriage under the Washington Constitution closely matched that of the New Jersey and New York courts. It relied on Glucksberg to find no history or tradition of such a right, though it acknowledged that courts may look to recent history.

The plurality opinion in Washington also noted that Lawrence explicitly did not rule on the constitutionality of refusing to recognize same-sex marriages—though any other holding would

58 Hernández v. Robles, 855 N.E.2d 1, 6 (N.Y. 2006).
59 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (holding that when searching for fundamental rights, such rights should be carefully defined).
60 Hernández, 855 N.E.2d at 5-6.
62 Id. at 211.
63 Id. at 230-31 (Poritz, C.J., concurring in part and dissenting in part) (citation omitted).
64 Andersen v. King County, 138 P.3d 963, 976-77 (Wash. 2006).
65 Id. at 979 (“[T]he Court specifically said the case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Lawrence, 539 U.S. at 578.”).
undoubtedly have been dictum. The plurality further noted that though *Lawrence* may seem to have been couched in fundamental rights language, ultimately the opinion applied the rational basis test.

(c) Conclusion

Ultimately, the difference between the state high court justices who found the exclusion of same-sex couples to violate their state constitution’s guarantee of due process and the justices who did not can be boiled down to whether the justice viewed *Lawrence* or *Glucksberg* to be more properly applicable to the situation. Certainly neither case could be considered *controlling*, as each justice was interpreting his or her own state’s constitution, not the Federal Constitution. Nevertheless, every opinion cited either *Lawrence* or *Glucksberg* in defense of its conclusion; some, of course, relied more heavily on federal cases than others.

And while the outcome of any challenge on substantive due process grounds to laws refusing to recognize same-sex marriage will likely be determined by the Supreme Court’s choice of whether to define “carefully” or more broadly the fundamental rights at stake, the move from *Michael H.* to *Glucksberg* to *Lawrence* suggests the Court is leaning toward broader interpretations.

Chief Justice Poritz of the New Jersey Supreme Court noticed how devastating a ruling *Lawrence* was for the concept that fundamental rights must be defined narrowly. In her dissent, she quoted verbatim Justice Kennedy’s memorable lines in *Lawrence*, which warned that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” More dangerous words to the continuing viability of *Michael H.* and *Glucksberg* could hardly be conceived.

If the Supreme Court were to agree that a state’s—or the federal government’s—prohibition of same-sex marriage constituted an infringement of a fundamental right, it would subject that prohibition to strict scrutiny. If it finds no infringement of a fundamental right, it would subject the prohibition to the rational basis test. I treat the possible outcomes of the Court’s application of each of the levels of scrutiny to such prohibitions below, in Part IV.

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66 *See, e.g.*, id. at 990 n.17 (Fairhurst, J., dissenting) (noting that Justice O’Connor’s assertion in her Lawrence concurrence that “other reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group” constituted “mere dicta” and implying that any similar statement by the majority would have been as well).

67 Id. at 977 n.9.


69 *Reno v. Flores*, 507 U.S. 292, 201-02 (1993) (“[T]he [Constitution’s] guarantee of ‘due process of law’ … include[s] a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”)

70 United States v. Beach Commc’ns, 508 U.S. 307, 313 (1993) (“[A] statutory classification that [does not] infringe[] fundamental constitutional rights must be upheld against … challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

71 For example, any tax that takes into account a person’s income in determining the applicable tax bracket treats people differently on the basis of their income, a law barring the sale of firearms to convicted felons treats people
the equal protection of the laws” in every one of these circumstances? Perhaps some tremendously literal lawyers would conclude that it has. In any case, such an interpretation would be impractical, conceivably requiring the invalidation of most every governmental action.

Therefore the Supreme Court has determined that certain governmental classifications will be subjected to more searching judicial scrutiny than most statutes, which generally benefit from a presumption of constitutionality. For example, race-based classifications must be subjected to strict scrutiny, and sex-based classifications are subjected to intermediate scrutiny. Any classification that is not subjected to heightened scrutiny must survive the highly deferential rational basis test.

Once the Court determines that a classification is suspect or quasi-suspect, it must finally determine whether a challenged statute actually discriminates on the basis of that classification. This is not difficult if the discrimination is facial. The situation is more complex if the discrimination is not facially apparent. In this case, plaintiffs have the burden of showing not only that the governmental action in question has a discriminatory impact, but also that it was motivated by a discriminatory intention. Finally, after answering all the requisite questions, the Court makes a determination as to which level of scrutiny the governmental action must survive, and applies the appropriate test.

(b) State High Court Analyses
(i) Sex Discrimination

Looking at the plain language of marriage statutes that preclude same-sex marriage, the sexual classification, at least at first blush, practically jumps off the page. Indeed, look at how we describe such laws: statutes that prohibit same-sex marriage. A representative law is California’s Proposition 8, which reads, “[o]nly marriage between a man and a woman is valid or recognized in California.” In fact, if such statutes were made gender-neutral, they would be essentially meaningless.

differently on the basis of their past convictions, and a law that allows only citizens to vote treats people differently on the basis of their citizenship.

72 U.S. CONST. amend. XIV, § 1.
73 See, e.g., Romer v. Evans, 517 U.S. 620, 631 (1996) (“The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”); Clements v. Fashing, 457 U.S. 957, 967 (1982) (“Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution.”).
78 For example, it would not be controversial to determine that a law stating, for example, that “homosexuals may not adopt children in Florida” facially discriminates on the basis of sexual orientation.
79 See Palmer v. Thompson, 403 U.S. 217, 224 (1971) (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”).
80 See Washington v. Davis, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).
81 CAL. CONST. art. 1 § 7.5.
82 Assuming, of course, that polygamous unions are already forbidden elsewhere in the law, a law that read something like “only marriage between a person and a person is valid or recognized” would be absurd.
The Supreme Court of Hawaii was the first state high court to address the question of whether statutes that prevented same-sex couples from marrying constituted sex discrimination. In that case, the court found that Hawaii’s marriage law, which limits marriage to its traditional definition, “on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex,” and therefore “[it] establishes a sex-based classification.”

Interestingly, no other state high court has accepted this line of analysis. In fact, except for in Vermont, not even the dissenters thought that excluding same-sex couples from marriage amounted to sex discrimination.

The Washington Supreme Court gave a typical response to claims of sex discrimination on the part of the marriage statutes when it ruled that “[m]en and women are treated identically under [Washington’s Defense of Marriage Act, which] therefore does not make any ‘classification by sex,’ and … does not discriminate on account of sex.” The New York Court of Appeals added that “[t]he limitation [of marriage to opposite-sex couples] does not put men and women in different classes, and give one class a benefit not given to the other … . [T]he legislation … [does not] subordinate either men to women or women to men as a class.” The Maryland Court of Appeals and Supreme Court of Vermont handed down almost identical holdings.

The California Supreme Court suggested that “in realistic terms, a statute or policy that treats same-sex couples differently from opposite-sex couples … does not treat an individual man or an individual woman differently because of his or her gender but rather accords differential treatment because of the individual’s sexual orientation.”

One of the dissenting justices in Vermont’s case laid out an extended rebuttal to the majority’s rejection of the contention that excluding same-sex couples from marriage constitutes discrimination on the basis of sex:

A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians … . [A]n individual’s right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. … The State[ argues] … that the marriage statutes do not discriminate on the basis of sex because they treat similarly situated males the same as similarly situated females. Under this argument, there can be no sex discrimination here because “if a man wants to marry a man, he is barred; a woman seeking to marry a woman is barred in precisely the same way. For this reason, women and men are not treated

84 Id. at 70.
86 Andersen v. King County, 138 P.3d 963, 988 (Wash. 2006).
88 Conaway v. Deane, 932 A.2d 571, 598 (Md. 2007) (“The limitations on marriage effected by [Maryland’s marriage statute] do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class … . Rather, the statute prohibits equally both men and women from the same conduct.”); Baker v. State, 744 A.2d 864, 879 n.13 (Vt. 1999) (“[T]he 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.”).
89 In re Marriage Cases, 183 P.3d 384, 437 (Cal. 2008), superseded in non-relevant part by constitutional amendment, CAL. CONST. art. 1 § 7.5.
differently.” But consider the following example. Dr. A and Dr. B both want to marry Ms. C …. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.90

Finally, the Hawaii Supreme Court foresaw the line of arguments against its finding of sex discrimination and provided a powerful counterargument:

The rationale underlying [this] belief [that prohibiting same-sex couples from marrying does not constitute sex discrimination], however, was expressly considered and rejected in Loving:

“Thus, the State contends that, because its miscegenation statutes 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. . . . [W]e reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscriptions of all invidious discriminations . . . . 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.”

Substitution of “sex” for “race”… yields the precise case before us together with the conclusion that we have reached.91

As logical and compelling as the sex discrimination claim may be, there has been very little support in the state courts for a Supreme Court decision accepting that claim. Of the state high courts that have been presented with such a claim, only Hawaii has accepted it. Five state supreme courts have explicitly rejected it,92 and four others implicitly rejected it by not even addressing the contention in their opinions.93

This near unanimity in rejection does not portend well for a federal sex-discrimination claim. The fact that the only state high court justices to find discrimination on the basis of sex were on the two earliest courts to rule on marriage restrictions, and did so at the beginning of the modern era of judicial recognition of the rights of homosexuals, is likely indicative of the nascent state of sexual orientation jurisprudence and the negative precedent set by Hardwick.

However, if the Court were to accept the contention that same-sex marriage prohibitions constituted discrimination on the basis of sex, it would apply the intermediate scrutiny test,94 which I will treat in Part IV.

(ii) Sexual Orientation Discrimination

Even if the Court found that, for the purposes of the Federal Constitution, traditional marriage statutes do not discriminate on the basis of sex, it could almost certainly be persuaded

90 Baker, 744 A.2d at 905-06 (Johnson, J., concurring in part and dissenting in part) (citations omitted).
92 California, Maryland, New York, Washington, and Vermont. See above for a discussion of these courts’ opinions.
93 Connecticut, Iowa, Massachusetts, and New Jersey.
that they discriminate on the basis of sexual orientation. In fact, none of the state high court opinions even questioned that such statutes do just that. The Court must then decide what level of scrutiny sexual orientation classifications merit.

It is occasionally asserted that the United States Supreme Court has determined, at least tacitly, that sexual orientation classifications should only be subjected to the rational basis test.\footnote{See, e.g., Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1288 (C.D. Utah 1998).} Perhaps the most commonly cited case in support of this view is \textit{Romer v. Evans}.\footnote{Romer v. Evans, 517 U.S. 620 (1996).} In \textit{Romer}, the Court held that Colorado’s Amendment 2, which specifically targeted homosexuals and imposed a political burden upon them, was only explainable by animus towards homosexuals, and therefore did not even have a rational relationship to any legitimate state interest.\footnote{Id. at 632 (“[Amendment 2 is] inexplicable by anything but animus toward the class that it affects… [and] lacks a rational relationship to legitimate state interests.”).}

That is, the Court felt it unnecessary to address the question of whether sexual orientation constituted a suspect class because the governmental action in question did not stand up to the simplest rational basis test. The Court rarely goes further than is necessary to suit the case at hand, and a Supreme Court ruling on this issue will almost certainly require that the law in controversy presumptively pass the rational basis test so that the Court is required to dig deeper.

In another landmark case, \textit{Lawrence v. Texas}, the Supreme Court invalidated Texas’s sodomy law.\footnote{Lawrence v. Texas, 539 U.S. 558 (2003).} But instead of addressing it from the perspective of discrimination against a minority, the Court found sodomy laws to be an impermissible infringement upon citizens’ liberty to arrange their own lives, specific with respect to intimacy.\footnote{Id. at 562 (“Liberty presumes an autonomy of self that includes freedom of… intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.”).}

All of this goes to prove that federal precedent is not particularly helpful when it comes to the determination of whether sexual orientation is a suspect class. In Supreme Court jurisprudence, this is a question of first impression.

The Court has recognized several factors that guide it when determining whether a classification qualifies as suspect or quasi-suspect; that is, whether such a classification ought to be subjected to strict or intermediate scrutiny, respectively. In general, these are: firstly, whether there exists a history of invidious discrimination against the group;\footnote{See, e.g., Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 438 (1985) (“[I]n light of the history of ‘unfair and often grotesque mistreatment’ of the retarded, discrimination against them was ‘likely to reflect deep-seated prejudice.’”).} secondly, whether the trait that defines the group bears any relation to an individual’s ability to contribute to society;\footnote{What differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society … [and therefore] statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”.} thirdly, whether the trait that defines the group is immutable;\footnote{Lyng v. Castillo, 477 U.S. 635, 638 (1986) (“Close relatives are not a ‘suspect’ or ‘quasi-suspect’ class … [because] they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group ….”).} and finally, whether the group is politically powerless, or a minority.\footnote{See Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (“Close relatives are not a ‘suspect’ or ‘quasi-suspect’ class … [because] they are not a minority or politically powerless.”); Lyng, 477 U.S. at 638 (same).}
Despite this nice, concise list of factors that comprise the test for determining the appropriate level of scrutiny, it is not necessary for all four factors to be present in order for a classification to receive heightened judicial scrutiny. The Iowa Supreme Court laid out in detail a list of United States Supreme Court cases in which the Court neither required nor even mentioned every prong of the inquiry.\textsuperscript{104}

The Supreme Court of Iowa then noted that though not all factors are necessarily present, it seems that a history of discrimination and a recognition of the irrelevance of the trait to an individual’s societal contribution are always present when heightened scrutiny is applied, whereas the other two—political powerlessness and immutability—are supplementary.\textsuperscript{105}

Bearing this important caveat in mind, I look at the prongs of the test from the perspective of the state high court opinions analyzing them.

1. History of Invidious Discrimination

Whether homosexuals have been subjected to a long history of invidious discrimination need hardly be discussed. I doubt there are many who have not perpetrated or witnessed some form of discrimination against homosexuals. Unsurprisingly, no court has disputed the contention.

The Supreme Court of California summed up the situation nicely when it wrote, “[o]utside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium as homosexuals.”\textsuperscript{106}

Even the Supreme Court of Washington, which took pains to deny almost all of the plaintiffs’ claims, conceded that “[t]here is no dispute that gay and lesbian persons have been discriminated against in the past.”\textsuperscript{107} Maryland’s Court of Appeals, despite ruling that sexual orientation is not a suspect or quasi-suspect classification, observed that “[h]omosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments.”\textsuperscript{108}

The Supreme Court of Connecticut summed up the historical situation perfectly when it wrote that, “[f]or centuries, the prevailing attitude towards gay persons has been one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.”\textsuperscript{109}


\textsuperscript{105} Id. at 899 (“[T]he first two factors—history of intentional discrimination and relationship of classifying characteristic to a person’s ability to contribute—have always been present when heightened scrutiny has been applied . . . [while] the last two factors—immutability of the characteristic and political powerlessness of the group—[seem] to supplement the analysis . . . .”).

\textsuperscript{106} In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (citation omitted) (internal quotation marks omitted), superseded in non-relevant part by constitutional amendment, CAL. CONST. art. 1 § 7.5.

\textsuperscript{107} Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006).

\textsuperscript{108} Conaway v. Deane, 932 A.2d 571, 609 (Md. 2007).

As the Iowa Supreme Court astutely concluded, “[t]he long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently.”\textsuperscript{110} Clearly, the long and painful history of discrimination against homosexuals by both private and governmental actors militates strongly in favor of heightened scrutiny.

2. Irrelevance to Societal Contribution

The second necessary factor when determining whether a classification should receive heightened scrutiny is a determination that the trait that defines the classification is irrelevant to an individual’s contribution to society. For example, intelligence is not a suspect or quasi-suspect classification because intelligence affects how individuals function in and contribute to society.\textsuperscript{111}

This prong should not be much more controversial than the first one. As with the history of discrimination, the state high courts did not spend much time addressing it. Typical was the Supreme Court of California’s terse acknowledgement that this requirement “would seem to be readily satisfied in the case of gays and lesbians ….”\textsuperscript{112} One state high court, while mentioning that suspect qualifications cannot be based on traits that influence a person’s contribution to society, completely failed to analyze, however cursorily, whether sexual orientation fulfills this criterion.\textsuperscript{113} This silence perfectly illustrates just how widely acknowledged it now is that a person’s sexual orientation is completely irrelevant to his or her worth as an individual, and as a member of the body politic.

The Connecticut Supreme Court observed:

\begin{quote}
Indeed, because an individual’s homosexual orientation “implies no impairment in judgment, stability, reliability or general social or vocational capabilities,” the observation of the United States Supreme Court that race, alienage and national origin—all suspect classes entitled to the highest level of constitutional protection—“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,” is no less applicable to gay persons.\textsuperscript{114}
\end{quote}

The Iowa Supreme Court, which is the latest state supreme court to hand down an opinion on the constitutionality of excluding same-sex couples from marriage, noted that “none of the same-sex marriage decisions from other state courts around the nation have found a person’s sexual orientation to be indicative of the person’s general ability to contribute to society.”\textsuperscript{115} Again, it is inconceivable that the United States Supreme Court would fail to apply heightened scrutiny to sexual orientation qualifications because it did not accept the applicability of this prong.

3. Immutability

\textsuperscript{110} Varnum v. Brien, 763 N.W.2d 862, 889 (Iowa 2009).

\textsuperscript{111} Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (“[W]hat differentiates sex from … nonsuspect classes [like] intelligence … is that the sex characteristic frequently bears no relation to ability to perform or contribute to society ….”).

\textsuperscript{112} Marriage Cases, 183 P.3d at 442 (citation omitted) (internal quotation marks omitted).

\textsuperscript{113} Andersen, 138 P.3d at 974.


\textsuperscript{115} Varnum, 763 N.W.2d at 890.
Unlike race, national origin, sex, legitimacy, and other currently recognized suspect and quasi-suspect classifications, sexual orientation is generally not ascertainable at birth. Indeed, unlike any other suspect or quasi-suspect classification—except perhaps religion—it is frequently possible for a person to conceal his or her sexual orientation. This has led to a long-running dispute over whether or not homosexuals elected to join a historically despised minority against whom overt discrimination is, in many areas of this country and facets of its society, both rampant and legally sanctioned.

To be sure, scientists have not located a “gay gene” as they have, for example, isolated the genes that determine race and gender. The mere fact of this scientific uncertainty has been enough, in some cases, for a state high court to rule that for the purposes of the suspect class inquiry sexual orientation was not immutable.\(^{116}\)

Former Washington Supreme Court Justice Bobbe Bridge, in her dissent from the majority’s conclusion that sexual orientation is not immutable for the purposes of determining suspect class status, provided an excellent counterargument to this inflexible approach, admonishing the court that “should not conclude that homosexuality is mutable because reasonable minds disagree about the causes of homosexuality or because some religious tenets forbid gays and lesbians from ‘acting on’ homosexual [feelings:] [i]nstead, courts should ask whether the characteristic … is one governments have any business requiring a person to change.”\(^{117}\)

It is this mentality, that “a person’s sexual orientation is so integral an aspect of one’s identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment,”\(^{118}\) that dominated the immutability analysis of the three state supreme courts that determined that sexual orientation classifications merited heightened review.\(^{119}\)

Indeed, in refusing to hold the immutability prong to require complete and “absolute[\(] impervious[\)] to change,”\(^{120}\) these state courts were not “activist,” nor were they creating from whole cloth an entirely novel form of jurisprudence. Not only did this construction of the immutability prong accord with numerous federal cases,\(^{121}\) but it accords with common sense as

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\(^{116}\) Conaway v. Deane, 932 A.2d 571, 616 (Md. 2007) (“In the absence of some generally accepted scientific conclusion identifying homosexuality as an immutable characteristic … we decline on the record in the present case to recognize sexual orientation as an immutable trait and therefore a suspect or quasi suspect classification. See Andersen … .”); Andersen, 138 P.3d at 974 (“The plaintiffs do not cite … any secondary authority or studies in support of the conclusion that homosexuality is an immutable characteristic. … [P]laintiffs must make a showing of immutability and they have not done so in this case.”).

\(^{117}\) Andersen, 138 P.3d at 990 n.78 (Bridge, J., concurring in the dissent).

\(^{118}\) In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008), superseded in non-relevant part by constitutional amendment, CAL. CONST. art. 1 § 7.5.

\(^{119}\) See id.; Kerrigan, 957 A.2d at 437-38; Varnum, 763 N.W.2d at 893.

\(^{120}\) Varnum, 763 N.W.2d at 892.

\(^{121}\) The Supreme Court of Connecticut, Kerrigan, 957 A.2d at 437 n.29, compiled an exhaustive list of federal court holdings that have concluded that sexual orientation should be considered immutable despite scientific uncertainty as to its theoretical capacity for change, from which the following excerpt was taken: “Hernandez-Montiel v. [INS], 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity are immutable.”); … Able v. United States, 968 F. Supp. 850, 864 (E.D.N.Y 1997) (“Same-sex sexual orientation persists in all societies and has proven to be almost completely resistant to change or ‘treatment,’ despite widespread discrimination and social pressure against homosexuals.”), rev’d on other grounds, 155 F.3d 628 (2d Cir. 1998); Equal. Found. of Greater Cincinnati v. Cincinnati, … 860 F. Supp. 426 (“Sexual orientation is set … at a very early age … and is not only involuntary, but is unnamable to change.”); Jantz v. Muci, … 759 F. Supp. 1547, 1548 [(D. Kan. 1991), rev’d on other grounds, 976 F.2d 623 (10th Cir. 1992), cert. denied, 508 U.S. 952 (1993)] (according to “the overwhelming weight of
well. Few traits are theoretically impervious to any change. Sex can be changed by operation, as
can the outward signs that distinguish the races. Should sex or race, for example, lose their
protected status because an individual is *theoretically* capable of escaping legal discrimination by
availing him- or herself of a drastic, fundamentally life-changing procedure?

As the Iowa Supreme Court illustrated, the purpose of the immutability prong never was to
require that a group that receives judicial protection be beyond any theoretical capacity to
change. Instead, the requirement for immutability generally “separate[s] truly victimized
individuals from those who have invited discrimination by changing themselves so as to be
identified with the group.”

In summary, the immutability of a characteristic “is a factor in determining the appropriate
level of scrutiny because the inability of a person to change a characteristic that is used to justify
different treatment makes the discrimination violative of the rather ‘basic concept of our system
that legal burdens should bear some relationship to individual responsibility.’”

Few would argue, given the ferocious discrimination and abuse to which homosexuals
remain subjected in all but a few parts of this country, that a person would capriciously change
his or her sexual orientation, as if it were akin to dyeing one’s hair, or getting a tattoo, and
thereby invite such mistreatment. In light of this, the debate over whether sexual orientation
could be changed, if at all, through intensive and painful therapy, seems largely academic.

Ultimately, as noted above, Supreme Court precedent makes very clear that a finding of
immunity is not integral to a classification’s suspect or quasi-suspect status. Therefore,
those state high courts that refused to focus on the literal and scientific immutability of sexual
orientation, but looked instead at precedent, the purpose of the immutability requirement, and the
social, moral, and practical consequences of requiring a person to change his or her sexual
orientation to avoid discrimination will undoubtedly serve as models for the United States
Supreme Court when it is called upon to make a similar determination.

4. Political Powerlessness

The last prong of the suspectness test requires that the group in question be either “a minority
or politically powerless.” This language clearly requires *either* that the group seeking suspect
classification be a minority *or* that it be politically powerless.

Of course, this either/or formulation rests upon one simple word in the Court’s opinions—
“or”—but that word is deliberate, unambiguous, and repeated, and thus it would not be
appropriate to assume that it was an oversight or a semantic slip-up. Rather, it seems clear that

[122] Varnum, 763 N.W.2d at 893.
[123] Id. at 892 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion) (internal
quotation marks removed)).
[124] The American Psychological Association, after conducting an exhaustive review of related literature and
scientific studies, has concluded that there is not enough evidence to support a conclusion that efforts to change
sexual orientation work, and adopted a resolution asking mental health professionals to avoid telling clients that they
can change their sexual orientation. Insufficient Evidence That Sexual Orientation Change Efforts Work,
[125] See, e.g., Nyquist v. Maucler, 432 U.S. 1, 9 n.11 (1977) (abandoning immutability requirement and scrutinizing
classification of resident aliens closely despite aliens’ voluntary status as residents); Mass. Bd. of Retirement v.
Murgia, 411 U.S. 1, 23 (1973) (omitting any reference to immutability); San Antonio Sch. Dist. v. Rodriguez, 427
the Court only intended that it be necessary that one of the two distinct pieces of this requirement be fulfilled in order to qualify as a suspect class. According to the Connecticut Supreme Court:

In its most recent formulation of the test for determining whether a group is entitled to suspect or quasi-suspect classification, however, the [United States Supreme Court] has indicated that this factor is satisfied upon a showing either that the group is a minority or that it lacks political power … . When this approach is applied to the present case, there is no doubt that gay persons clearly comprise a distinct minority of the population. Consequently, they clearly satisfy the first part of the disjunctive test and, thus, may be deemed to satisfy this prong of the suspectness inquiry on that basis alone.\(^{127}\)

The high courts of Maryland, New York, and Washington, which have declined to apply heightened scrutiny to sexual orientation classifications generally determined that homosexuals have too much political power to fulfill this prong, ignoring not only the clear language of the Supreme Court requiring either minority status or political powerlessness, but apparently also the awkward incompatibility of this refusal with the heightened scrutiny those courts accord to gender classifications, despite the fact that women comprise a majority of the population in all three states.\(^{128}\)

The Washington Supreme Court dismissed the political powerlessness prong, remarking simply that several state and municipal laws protect homosexuals, and several gays and lesbians were elected to office in the previous election.\(^{129}\) Along similar lines, though not quite so dismissively, the Maryland Court of Appeals rejected claims of political powerlessness in that state because “Maryland statutes protect against discrimination based on sexual orientation in several areas of the law” and because the body of “Maryland appellate opinions” provides “substantial” protections for gay, lesbian, bisexual, and transgender persons.\(^{130}\)

Unhelpfully, the Court of Appeals admitted that the irony that these proclamations of how much protection courts and the legislature have given gays resulted in the court refusing to protect gays was not lost on them.\(^{131}\) In fact, the dissenters in the Washington case pointed out that there is “sadly strong evidence indicating that the attention of lawmakers does not always translate into personal and political power.”\(^{132}\)

But regardless of what can be said of the political power of gays and lesbians in Maryland or Washington, whether homosexuals actually have any significant political power on a federal level is questionable at best. Gays are prevented from having their legal marriages recognized by the federal government for any purpose,\(^{133}\) and from serving in the military without hiding their sexual orientation.\(^{134}\) No federal law protecting homosexuals has ever been approved. The Supreme Court of Connecticut, ruling after the courts in Washington and Maryland, found the argument that gays have too much political power to be protected by the courts almost ridiculous, writing that “of the one-half million people who hold a political office at the local,

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\(^{129}\) Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006) (“[S]everal state statutes and municipal codes provide protection against discrimination based on sexual orientation and … a number of openly gay candidates were elected to national, state, and local offices in 2004.”).

\(^{130}\) Conaway v. Deane, 932 A.2d 571, 611, 612 (Md. 2007).

\(^{131}\) Id. at 614 n.56.

\(^{132}\) Andersen, 138 P.3d at 990 (Bridge, J., concurring in dissent).


state and national level, only about 300 are openly gay ...” and noting that no “openly gay person ever has been appointed to a United States Cabinet Position or to any federal appeals court ...” nor has any openly gay person “served in the United States Senate.”

The Connecticut Supreme Court noted that even though an African American has been elected President of the United States, race still is a suspect class, and even though there are currently more women than men in the United States, gender classifications are still subjected to intermediate scrutiny, concluding that “[i]t is apparent, then, that the political powerlessness aspect of the suspectness inquiry does not require a showing that the group seeking recognition as a protected class is, in fact, without political power.”

But even if there were some significant indicia of some political power on a federal level, as there were in Connecticut, California, and Iowa when those courts rendered their judgments on same-sex marriage, that would not be dispositive. Along these lines, the California Supreme Court remarked: “Indeed, 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.”

Following the lead of its California and Connecticut counterparts, the Iowa Supreme Court declared itself “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.”

The United States Supreme Court, as it does with so many of the questions that arise when analyzing the constitutionality of excluding same-sex couples from marriage, has ample state high court precedent on both sides of the political powerlessness prong of the suspectness inquiry. But the analysis of the Supreme Courts of California, Connecticut, and Iowa, finding that homosexuality fulfills that prong, is much more compelling and rests on much sounder logic and federal precedent than do the decisions of the state supreme courts that went the other way, especially considering the particularly relevant fact of the heightened scrutiny accorded to race and sex classifications.

(c) Conclusion

It is remarkable to note that two of the four prongs of the suspectness inquiry are not, and honestly could not be, disputed by opponents of same-sex marriage. Interestingly, these two prongs are those that, as I noted in the beginning of this section, were always present when the United States Supreme Court applied heightened scrutiny to statutory classifications.

On the other hand, the two disputed prongs of the inquiry, namely, immutability and political powerlessness, historically have not been required of all classifications obtaining heightened scrutiny. Former United States Supreme Court Justice Thurgood Marshall straightforwardly explained the flexibility of the suspectness inquiry in an opinion that merits extensive quotation:

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136 Id. at 444 n.35.
137 Id. at 444 n.34.
138 Id. at 444.
139 In re Marriage Cases, 183 P.3d 384, 443 (Cal. 2008), superseded in non-relevant part by constitutional amendment, CAL. CONST. art. 1 § 7.5.
141 Varnum, 763 N.W.2d at 889 n.16.
142 Id.
No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened scrutiny; experience, not abstract logic, must be the primary guide. The “political powerlessness” of a group may be relevant … but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors … .

The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs. Statutes discriminating against the young have not been common [and] need [not] be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

The discreteness and insularity warranting a “more searching judicial inquiry” … must therefore be viewed from a social and cultural perspective as well as political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure.143

Ultimately, three state high courts, applying the federal suspectness inquiry despite interpreting their own state constitutions, articulately and exhaustively demonstrated that homosexuality fulfills all four prongs of the inquiry, despite the fact that fulfilling all is demonstrably unnecessary. Their cogent analyses have paved the way for the Supreme Court to extend heightened scrutiny to sexual orientation classifications.

**Part IV: Levels of Scrutiny**

(a) **Rational Basis Review**

(i) **United States Supreme Court Rational Basis Jurisprudence**

By now, the Court will have determined what level of review it will accord statutes that prohibit same-sex couples from marrying. As I have shown above, the various state high courts that have ruled on the issue have compellingly illustrated numerous justifications for heightened scrutiny, independently on due process and equal protection grounds.

But even if the Court rejects all of the arguments that would justify heightened scrutiny, the marriage statutes’ exclusion of same-sex partners must still survive the rational basis test.144 And though rational basis analysis does put a heavy burden on the challenger of a governmental


action, it is not a “toothless” test. The Supreme Judicial Court of Massachusetts, the first court of last resort in the United States to declare a law that prevented same-sex couples from marrying to be unconstitutional, did so after applying the rational basis test.

The rational basis test is essentially a judicial inquiry in which the Court presumes the constitutionality of the statute in question and asks only whether there is a rational relationship between the classification in the statute and a legitimate governmental interest. Moreover, the legitimate state interest to which the statute is purportedly rationally related need not be the one put forward by the government in defense of the statute, nor need it even be the interest or purpose that is obviously the one motivating the statute’s enactment or enforcement; rather, any conceivable legitimate interest is acceptable.

There is no test for what constitutes a “legitimate” state interest, though the Court has given some indication of what cannot be considered a legitimate governmental interest. Similarly, there is no concrete elucidation of what constitutes a rational relation, but statutes that are arbitrary, capricious, or irrational by definition do not fulfill the requirement that an action be rationally related to a legitimate interest, and therefore would be unconstitutional under the rational basis test.

(ii) State High Court Analyses

As I noted above, the rational basis test is not “toothless.” Nevertheless, it is a tremendously deferential analysis, as evidenced by the fact that, of the four state supreme courts that applied rational basis scrutiny to marriage restrictions, three upheld them.

The first task in conducting rational basis review is naturally determining the conceivable legitimate state interests. Of course, in the rare instance that there are none, the analysis ends there. Once a legitimate governmental interest is identified, it is necessary to determine if the challenged statute rationally can be considered to further that interest.

The highest courts of Maryland, Massachusetts, New York, and Washington all disposed of their marriage cases with the rational basis test, which they and their dissenters thoroughly explored as it applies to marriage restrictions. Their language and analyses are particularly

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146 Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("[W]e conclude that the marriage ban does not meet the rational basis test ….").
148 Fritz, 449 U.S. at 179 (“Where … there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’ ….”) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).
149 For example, “making the private realm of family life conform to some state-designated ideal” is not a legitimate state interest. Hodgson v. Minnesota, 497 U.S. 417, 452 (1990) (internal quotation marks omitted). Neither is a bare “desire to harm a politically unpopular group,” USDA v. Moreno, 413 U.S. 528, 534 (1973), or majoritarian moral disapproval, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”).
150 E.g., Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 84 (1978) (“[T]his Court … defer[s] to … congressional judgment unless it is demonstrably arbitrary or irrational.”);
151 See, e.g., Romer v. Evans, 517 U.S. 620, 635 (1996) (“The breadth of the Amendment is so far removed from [the justifications Colorado advanced for it] that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests … . We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.”).
helpful because under their jurisprudence, the rational basis test is either identical or very similar to the federal test.\textsuperscript{152}

In searching for a justification for the marriage restrictions at issue here, it is difficult not to conclude, as did the Supreme Court of Iowa, that religious dogma and belief underlie most opposition to same-sex marriage.\textsuperscript{153} But in our secular Republic, religious disapproval is clearly not a legitimate governmental purpose for a law,\textsuperscript{154} and so I will present the various non-religious state interests advanced in the rational basis marriage cases.

1. Uniformity with Other Jurisdictions

Before the ruling of the Supreme Judicial Court of Massachusetts finding that same-sex couples had a right to marry under that state’s constitution, no jurisdiction in the United States permitted same-sex marriage. And so, even though Congress had enacted the Defense of Marriage Act,\textsuperscript{155} which purported to use the Full Faith and Credit Clause\textsuperscript{156} to allow any state to refuse to recognize same-sex marriages from other states, the Department of Public Health and various amici curiae in the Massachusetts case argued that allowing same-sex marriage in Massachusetts would lead to interstate conflict,\textsuperscript{157} the avoidance of which was claimed to be a legitimate governmental interest.

The Massachusetts court summarily rejected this contention, determining that “considerations of comity [should not] prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution” because in our federal system, “each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.”\textsuperscript{158}

This argument lost even more potency once Massachusetts began recognizing same-sex marriages, which Chief Judge Kaye of the New York Court of Appeals noted when she remarked that it would now be impossible for any state to have marriage laws that are completely uniform.

\textsuperscript{152} See Conaway v. Deane, 932 A.2d 571, 649-50 (Md. 2007) (“[A] court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude the [governmental] actions were irrational.”) (alterations in original) (citation omitted); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 960 (“[T]he rational basis test requires that ‘an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.’”) (citation omitted); Hernandez v. Robles, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting) (“[R]ational-basis review … requires that the classification ‘rationally further a legitimate state interest’ … .”) (citation omitted); Andersen v. King County, 138 P.3d 963, 980 (Wash. 2006) (“Under rational basis review, plaintiffs have the burden of proving that the classification drawn by the law is not rationally related to a legitimate state interest. The statute is presumed constitutional.”) (citations omitted).

\textsuperscript{153} Varnum v. Brien, 763 N.W.2d 862, 904 (Iowa 2009) (“[R]eligious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage ….”).

\textsuperscript{154} See Zorach v. Clauson, 343 U.S. 306, 312 (1952) (“There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated … and … the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.”)


\textsuperscript{156} U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”).

\textsuperscript{157} Goodridge, 798 N.E.2d at 967.

\textsuperscript{158} Id.
with all the other states.\textsuperscript{159} Chief Judge Kaye went on to note that, for example, New York’s “marriage laws \textit{currently} are not uniform with those of other states” because they permit first cousins to marry, but that this has not caused any legal difficulties because “well-settled principles of comity resolve any conflicts,” as they would with any “disparity involving the recognition of same-sex marriages.”\textsuperscript{160} But most importantly, as Chief Judge Kaye wrote, “and most fundamentally, to justify the exclusion of gay men and lesbians from civil marriage because ‘others do it too’ is no … justification for the discriminatory classification . . . .”\textsuperscript{161}

Of course this alleged state interest would be even less legitimate in a federal case, and particularly in a United States Supreme Court case, when it might very well cut the other way. For example, if the Supreme Court were to refuse to invalidate marriage restrictions, the laws of several states would still permit same-sex marriage, and therefore there would be a lack of uniformity, whereas complete nationwide symmetry on the issue could be achieved if the Court extended the right to same-sex marriage throughout the country.

2. Conservation of Resources

Another possible legitimate state interest occasionally proffered is that of conserving scarce state resources. However, as Justice Greaney of the Supreme Judicial Court of Massachusetts noted, Supreme Court precedent does not permit a “State’s wish to conserve resources” to be “accomplished by invidious distinctions between classes of citizens.”\textsuperscript{162}

As the Supreme Court of Iowa noted, “[e]xcluding any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally ‘rational’ way. Yet, such classifications so obviously offend our society’s collective sense of equality that courts have not hesitated to provide added protection against such inequalities.”\textsuperscript{163} For these obvious reasons, and undoubtedly also because doing so would seem manifestly arbitrary and unjust, no court has found this argument persuasive, and the Supreme Court would not either.

3. Tradition

Another conceivable, and much more commonly advanced, governmental interest is the desire to maintain, or “protect” the traditional definition of marriage. Though the Iowa Supreme Court noted that this rationale is likely religious at its core,\textsuperscript{164} state high courts have analyzed it from a secular perspective.

Taking the tradition rationale head-on, the Supreme Judicial Court of Massachusetts opined that “it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.”\textsuperscript{165} Chief Judge Kaye of the New York Court of Appeals wrote:

\begin{itemize}
\item\textsuperscript{159} Hernandez v. Robles, 855 N.E.2d 1, 33 (N.Y. 2006) (Kaye, C.J., dissenting).
\item\textsuperscript{160} Id.
\item\textsuperscript{161} Id. at 34.
\item\textsuperscript{162} Goodridge, 798 N.E.2d at 972 (Greaney, J., concurring) (referencing Plyler v. Doe, 457 U.S. 202, 216-17, 227 (1982)).
\item\textsuperscript{163} Varnum v. Brien, 763 N.W.2d 862, 903 (Iowa 2009).
\item\textsuperscript{164} Id. at 904 (“The belief that the ‘sanctity of marriage’ would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition.”).
\item\textsuperscript{165} Goodridge, 798 N.E.2d at 961 n.23.
\end{itemize}
To say that discrimination is “traditional” is to say only that [it] has existed for a long time. A classification, however, cannot be maintained merely “for its own sake.” Instead, the classification … must advance a state interest that is separate from the classification itself. Because the “tradition” of excluding gay men and lesbians from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of “history.”

Moreover, the Massachusetts court explained that allowing same-sex couples to marry does not “undermine the institution of civil marriage” because “[r]ecognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage,” but instead will “reinforce[] the importance of marriage to individuals and communities.”

Justice Fairhurst of the Supreme Court of Washington similarly rejected such an argument, opining that marriage derives its unique power from the civil contract between the consenting parties and the state, not from the exclusion of same-sex couples.

Indeed, the weaknesses inherent in the tradition-as-legitimate-state-interest argument are made all the more evident by the failure of any of the state supreme courts to cite it as a justification for upholding marriage restrictions.

Three more conceivable legitimate state interests, all of which relate to children, have been raised in most same-sex marriage lawsuits, and, for the purposes of the rational basis test, have fared much better than the state interests discussed above.

4. Promotion of Stability in Opposite-Sex Couples

The first of the children-related interests is the need to promote stability in opposite-sex relationships for the sake of children. The New York Court of Appeals provided a typical articulation of this contention when it held that “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability … in opposite-sex couples than in same-sex relationships” because “[h]eterosexual intercourse has a natural tendency to lead to the birth of children” while “homosexual intercourse does not.” Therefore, the Legislature could determine that because of the possibility of accidental childbirth in heterosexual relationships they need some form of extra inducement to stay together. The Supreme Court of Washington came to an almost identical conclusion in its marriage case.

Justice Fairhurst responded to this by acknowledging that although promoting marriage for opposite-sex couples may be a legitimate state interest, preventing same-sex couples from marrying is not rationally related to this end because doing so “will not encourage [opposite-sex] couples who have children to marry or to stay married for the benefit of their children.” The

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166 Hernandez, 855 N.E.2d at 3 (Kaye, C.J., dissenting) (citing Romer v. Evans, 517 U.S. 620, 635 (1996)).
167 Goodridge, 798 N.E.2d at 965.
168 Andersen v. King County, 138 P.3d 963, 990 (Wash. 2006) (Fairhurst, J., dissenting).
169 Hernandez, 855 N.E.2d at 7.
170 Id.
171 Andersen, 138 P.3d 963, 982 (Wash. 2006) (“The State reasons that no [non-heterosexual] relationship has the potential to create, without third party involvement, a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples. The legislature could also have found that encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.”).
172 Id. at 990 (Fairhurst, J., dissenting).
majority of the Supreme Judicial Court of Massachusetts and Chief Judge Kaye of the New York Court of Appeals refuted their colleagues’ reasoning in strikingly similar passages.\(^\text{173}\)

5. Promotion of an Optimal Environment in Which to Raise Children

Some defendant governments in marriage lawsuits have claimed as a legitimate rationale for denying the right to marry to same-sex couples their desire to ensure that children are raised in the “optimal” setting; namely, by opposite-sex parents.\(^\text{174}\) In refuting this assertion, the dissenters in Washington and New York, in addition to the majority in Massachusetts, repeated that preventing same-sex couples from marrying would not cause more opposite-sex couples to raise children.\(^\text{175}\)

But the justices who believed that the challenged marriage restrictions fail the rational basis test went farther than just to reiterate that they will have no effect on opposite-sex couples. They contend that the restrictions not only do not further this particular state interest, but rather that they undermine it altogether.

As Chief Judge Kaye wrote, “[c]ivil marriage provides tangible legal protections and economic benefits to married couples and their children . . . . Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare, as defendants do not dispute.”\(^\text{176}\) Moreover, the Supreme Court of Vermont reasoned that, “[i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks the State argues the marriage laws are designed to secure against.”\(^\text{177}\)

Justice Fairhurst best articulated the irrationality of the state’s attempt to further the best interests of children by preventing same-sex couples from marrying:

Rather than furthering legitimate interests, denial of the right to marry will certainly harm children of same-sex couples, couples to whom the State has given its blessing to adopt or beget children through artificial means, but upon whom the State has turned its back once those children are integrated into their families. It is those children who actually do and will continue to suffer by denying their

\(^\text{173}\) Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 963 (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth’s proffered goal . . . .”); Hernandez, 855 N.E.2d at 30 (Kaye, C.J., dissenting) (“But 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.”).

\(^\text{174}\) See Goodridge, 798 N.E.2d at 962 (“The department’s first stated rationale . . . shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the ‘optimal’ setting.”); Hernandez, 855 N.E.2d at 7 (“The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”); Andersen, 138 P.3d at 983 (“The State also argues that rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children.”).

\(^\text{175}\) Goodridge, 798 N.E.2d at 963 (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.”); Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting) (“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.”); Andersen, 138 P.3d at 990 (Fairhurst, J., dissenting) (“Even if such a goal is valid, which seems unlikely, denying same-sex couples the right to marry has no hope of increasing such child rearing.”).

\(^\text{176}\) Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

parents the right to marry. … In that way, [Washington’s Defense of Marriage Act] degrades the interests asserted by the State rather than furthers them.\(^{178}\)

Moreover, as Chief Judge Kaye astutely noted, the State may not “legitimately seek either to promote heterosexual parents over homosexual parents … or to discourage same-sex parenting” because “granting such a preference to heterosexuals would be an acknowledgment of purposeful discrimination against homosexuals, thus constituting a flagrant equal protection violation.”\(^{179}\)

6. The Procreation Rationale

Of all the conceivable legitimate state purposes, the argument that the government has a need to incentivize or promote procreation has gained the widest currency, as it underpinned the decisions of the Maryland Court of Appeals and the Supreme Court of Washington, which found that their respective states’ marriage restrictions survived the rational basis test.\(^{180}\)

Much of the United States Supreme Court’s discussion of the fundamental right to marriage includes language referencing, either explicitly or implicitly, its importance with respect to procreation.\(^{181}\) The Maryland Court of Appeals used this history to justify its uncontroversial holding that “safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest.”\(^{182}\)

However, the Court of Appeals went further, determining that “marriage enjoys its fundamental status due … to its link to procreation.”\(^{183}\) The Court went on to acknowledge the argument, already raised to counter the contention marriage restrictions are rationally related to previously discussed legitimate state interests, that “the marriage statute is not linked sufficiently to the interests in procreation because allowing same-sex couples to marry will not impact interests in procreation in that [o]pposite-sex couples will continue to bring children into their families regardless of whether same-sex couples are permitted to marry.”\(^{184}\) Nevertheless, the Court of Appeals found that there did exist a rational relationship because “the Legislature [did] not act[.] wholly unreasonably in granting recognition to the only relationship capable of bearing children traditionally within the marital unit … ”\(^{185}\)

The Supreme Court of Washington, in almost identical argumentation, found that “marriage is traditionally linked to procreation and survival of the human race,” and since “[h]eterosexual couples are the only couples who can produce biological offspring,” the marriage restriction was rationally related to promoting procreation.\(^{186}\) This is the case even though there are many opposite-sex couples who do not have and do not intend to have children, and despite the fact

\(^{178}\) Andersen, 138 P.3d at 990 (Fairhurst, J., dissenting).
\(^{179}\) Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting).
\(^{180}\) Conaway v. Deane, 932 A.2d 571, 630 (Md. 2007) (“We agree that the State’s asserted interest in fostering procreation is a legitimate governmental interest. … The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and … an implicit restriction on [same-sex] marriage. We conclude that there does exist a sufficient link.”); Andersen, 138 P.3d at 983 (“Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”).
\(^{182}\) Conaway, 932 A.2d at 630.
\(^{183}\) Id. (emphasis added).
\(^{184}\) Id. at 631 (internal quotation marks omitted).
\(^{185}\) Id. at 633.
\(^{186}\) Andersen v. King County, 138 P.3d 963, 982-83 (Wash. 2006).
that many same-sex couples raise children and have children through adoption or artificial means, because the rational basis test is extraordinarily permissive, and over- and underinclusiveness are tolerable.\textsuperscript{187}

Prior to all this argumentation, however, the Supreme Judicial Court of Massachusetts fiercely attacked the procreation argument in a stirring and persuasive passage:

The judge in the Superior Court … [held] that “the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.” This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [Massachusetts’s marriage statute] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.\textsuperscript{188}

In its ending remarks on the validity of the procreation rationale, the Supreme Judicial Court likened the prohibition on same-sex marriage to blatant discrimination against homosexuals previously invalidated by the Supreme Court:

The “marriage is procreation” argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like “Amendment 2” to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly “identifies persons by a single trait and then denies them protection across the board.” In doing so, the State’s action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worth of respect.\textsuperscript{189}

Chief Judge Kaye noted that “even the Lawrence dissenters observed that ‘encouragement of procreation’ could not ‘possibly’ be a justification for denying marriage to gay and lesbian couples, ‘since the sterile and the elderly are allowed to marry.’”\textsuperscript{190} The Chief Judge pointed out the lack of a rational relationship between the encouragement of procreation and marriage restrictions by observing that “there are many ways in which the government could rationally promote procreation,” such as by giving financial incentives to couples who have children, but marriage restrictions are not one of those ways, because “no one rationally decides to have children because gays and lesbians are excluded from marriage.”\textsuperscript{191}

\textsuperscript{187} Id.
\textsuperscript{189} Goodridge, 798 N.E.2d at 962 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).
\textsuperscript{191} Id.
Chief Judge Kaye also attacked the assertion that the Supreme Court has made clear in its opinions finding marriage to be a fundamental right that procreation was the *ratio decidendi*:

In holding that prison inmates have a fundamental right to marry—even though they cannot procreate—the Supreme Court has made it clear that procreation is not the sine qua non of marriage. “Many important attributes of marriage remain … after taking into account the limitations imposed by prison life … . [I]nmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship.” Nor is there any conceivable rational basis for allowing prison inmates to marry, but not homosexuals. It is, of course, no answer that inmates could potentially procreate once they are released—that is, once they are no longer prisoners—since, as non-prisoners, they would then undeniably have a right to marry even in the absence of *Turner*.

After reviewing all of the rights that marriage provides that do not relate to children or procreation, Chief Judge Kaye concluded, writing that “[t]he breadth of protections that the marriage laws make unavailable to gays and lesbians is ‘so far removed’ from the State’s asserted goal of promoting procreation that the justification is, again, ‘impossible to credit.’”

(iii) Conclusion

Ultimately, rational basis is an extraordinarily weak form of judicial review. As I mentioned, of the courts that applied rational basis, only one struck the statute down. The justices who determined that the marriage restrictions violated the rational basis test employed eloquent logic and stirring argument; their analysis was stellar and exceedingly persuasive. The courts that upheld the statutes seemed to acknowledge the flaws in their argumentation and meekly hid behind the extremely permissive nature of the rational basis test itself.

Therein lies the crux of the debate. Just how attenuated may a statute be from its undergirding interest before it must be stricken down? Justice Fairhurst contends that “[t]he denial of the right to marry to an entire class of persons is completely unrelated to the proffered state interests” and “[t]hus, [the Defense of Marriage Act] is not merely underinclusive and/or overinclusive, it is wholly irrational.” She charged that the plurality in Washington’s marriage case was looking at “the issue of whether allowing opposite-sex couples the right to marry is rationally related to the State’s supposed interests” instead of whether preventing same-sex couples from marrying was so related.

Chief Judge Kaye similarly believed that the New York Court of Appeals was framing the question incorrectly when it conducted its rational basis test, proclaiming that it is “not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages” because the “relevant question here is whether there exists a rational basis for *excluding* same-
sex couples from marriage, and ... whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally furthered by the exclusion.”

That the arguments in favor of the marriage restrictions’ constitutionality are so weak, even under rational basis scrutiny, does not bode well for their acceptance by the Supreme Court. It is likely that the Court will follow the path it began with *Romer v. Evans*, and continued in *Lawrence v. Texas*, by invalidating marriage restrictions under the rational basis test. If not, there is ample justification for applying heightened scrutiny to the restrictions, in which case they will certainly fall.

(b) *Intermediate Scrutiny*

(i) *United States Supreme Court Intermediate Scrutiny Jurisprudence*

As elaborated earlier in this article, only an equal protection challenge can lead to intermediate scrutiny; substantive due process claims can result only in rational basis or strict scrutiny. Currently, only classifications based on gender or legitimacy are subjected to intermediate scrutiny—though more classifications may be added based on the four prongs of the suspectness inquiry.

Writing for the Court in *United States v. Virginia*, Justice O’Connor provided an overview of intermediate scrutiny analysis, reaffirming its basic structure in an excellent summary:

"Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. 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.’” The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of [the group] … . “Benign” justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."

In other words, where rational basis scrutiny requires a rational relation to a legitimate governmental interest, intermediate scrutiny requires a substantial relation to an important governmental interest.

But perhaps the most important distinction between rational basis and intermediate scrutiny with respect to marriage exclusion litigation, is the fact that unlike with the former, in which a court can invent any conceivable purpose to which the governmental action in question may be

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198 Romer v. Evans, 517 U.S. 620, 635 (1996) (“We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective.”).

199 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

200 Clark v. Jeter, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”).


202 *Id.* at 532-33, 535-36 (quoting Miss. Univ. for Women v. Hogan, 457 U.S. 718, 724 (1982)).
related, for the purposes of the latter, the governmental purpose must actually be the one the state actor intended.

(ii) State High Court Analyses

The Supreme Courts of Connecticut and Iowa determined that under their respective state constitutions, sexual orientation classifications merit intermediate scrutiny. It is important to note that this is not because the courts deemed sexual orientation classifications unworthy of strict scrutiny, but simply because, like the United States Supreme Court, they did not reach the question whether strict scrutiny should be applied, having determined that intermediate scrutiny was sufficient to find the laws unconstitutional. As with the rational basis analysis, these state supreme courts applied intermediate scrutiny tests under their state constitutions that are functionally indistinguishable from the federal test, a fact that considerably strengthens the weight of their conclusions.

The power of heightened scrutiny immediately becomes evident in reading the Iowa and Connecticut cases when the courts categorically refuse even to address the validity of any state interests not proffered by the governments in defense of their actions. Those interests that were raised by the states predictably mirrored many of the same state interests addressed in the rational basis section.

1. Conservation of Resources

The conservation of scarce state resources rationale is quintessentially suited for surviving rational basis review; it is not likely that a court will determine that a simple desire to save money in any way motivated the exclusion of same-sex couples from civil marriage. This is especially so in those states that elected to establish civil unions, domestic partnerships, or other means of recognizing same-sex unions, thereby negating most of the pecuniary savings that result from preventing same-sex couples from marrying.

Nevertheless, the Iowa Supreme Court responded extensively to the contention that the need to conserve government resources constituted an important governmental interest that could justify preventing same-sex couples from marrying. It noted that in intermediate scrutiny, there is significantly less tolerance for over- and underinclusiveness than in rational basis scrutiny, and found that excluding same-sex couples from marriage was both highly over- and underinclusive for the purposes of conserving resources. This demonstrated that “the trait of sexual

204 Varnum, 763 N.W.2d at 896 (“Because we conclude Iowa’s same-sex marriage statute cannot withstand intermediate scrutiny, we need not decide whether classifications based on sexual orientation are subject to a higher level of scrutiny.”). See Kerrigan, 957 A.2d at 430 (indicating that plaintiffs contended homosexuals constituted a quasi-suspect—not suspect—class and therefore the court applied a more lenient analysis of the suspectness test).
205 Kerrigan, 957 A.2d at 476 (quoting Virginia, 518 U.S. at 532-33, to outline Connecticut’s intermediate scrutiny standard); Varnum, 763 N.W.2d at 896-97 (quoting Clark, 486 U.S. at 461, and Virginia, 518 U.S. at 532-33, to outline Iowa’s intermediate scrutiny standard).
206 Kerrigan, 957 A.2d at 477 n.79 (explaining that because intermediate review only looks at the actual reasons the legislature created the classification at issue, extraneous justifications posited by the dissenters and various amici will not be considered); Varnum, 763 N.W.2d at 897 n.24 (“We need not independently analyze … alternative justifications as they are not offered to support the Iowa statute.”).
207 Varnum, 763 N.W.2d at 903 (“[T]he exclusion of same-sex couples is over-inclusive because many same-sex couples, if allowed to marry, would not use more state resources than they currently consume as unmarried couples. … Just as exclusion of same-sex couples from marriage is a blunt instrument, however, it is also significantly
orientation is a poor proxy for regulating aspiring spouses’ usage of state resources,” and therefore “the sexual-orientation-based classification does not substantially further the suggested governmental interest, as required by intermediate scrutiny.”

2. Tradition

The Supreme Court of Connecticut believed the effort to preserve the traditional definition of marriage was the true justification for preventing same-sex couples from marrying. In response to the claim that such an effort constituted an important governmental interest, however, the court held:

When tradition is offered to justify preserving a statutory scheme that has been challenged on equal protection grounds, [courts] must determine whether the reasons underlying that tradition are sufficient to satisfy constitutional requirements. Tradition alone never can provide sufficient cause to discriminate against a protected class, for “[n]either the length of time a majority [of the populace] has held its convictions [nor] the passions with which it defends them can withdraw legislation from [the] [c]ourt’s scrutiny.”

Relying upon the maintenance of tradition as a governmental objective, the Iowa Supreme Court observed, “transforms the equal protection analysis into the question of whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage,” which “is, of course, an empty analysis.”

The only way endeavoring to preserve the traditional definition of marriage could constitute a legitimate reason for preventing same-sex couples from marrying would be if “expanding marriage to include others in its definition would undermine the traditional institution,” a proposition for which the court found “no legitimate notion.”

3. Promotion of Optimal Environment in Which to Raise Children

The Iowa Supreme Court agreed that ensuring that children are raised in the optimal environment is an important governmental objective, but it disputed the assertion that opposite-sex parents provided such an environment. Nevertheless, the court assumed, arguendo, the rationality of the marriage restrictions for the purposes of ensuring that children are raised in the optimal environment, and analyzed the restrictions for over- and underinclusiveness.
Of course, “[a] statute is under-inclusive when the classification made in the statute ‘does not include all who are similarly situated with respect to the purpose of the law,’” and is over-inclusive “‘when the classification made in the statute includes more persons than those who are similarly situated with respect to the purpose of the law.”216 Increasing over- and/or underinclusiveness increases “the difficulty in demonstrating [that] the classification substantially furthers the legislative goal.”217

The Iowa Supreme Court determined that Iowa’s marriage restriction was over-inclusive with respect to the governmental interest of ensuring an optimal environment in which to raise children because not all same-sex couples do or will raise children, and so the ban “include[d] a consequential number of ‘individuals within [its] purview who are not afflicted with the evil the statute seeks to remedy.’”218

More importantly, it was underinclusive not only because it did not “exclude from marriage other groups of parents—such as child abusers, sexual predators … and violent felons—that are undeniably less than optimal parents,” but also because “[q]uite obviously, the statute [did] not prohibit same-sex couples from raising children.”219

Ultimately, the Iowa Supreme Court reasoned that:

The ban on same-sex civil marriage can only logically be justified as a means to ensure the asserted optimal environment for raising children if fewer children will be raised within same-sex relationships or more children will be raised in dual-gender marriages. Yet, the same-sex-marriage ban will accomplish these outcomes only when people in same-sex relationships choose not to raise children without the benefit of marriage or when children are adopted by dual-gender couples who would have been adopted by same-sex couples but for the same-sex civil marriage ban. We discern no substantial support for this proposition. These outcomes, at best, are minimally advanced by the classification. Consequently, a classification that limits civil marriage to opposite-sex couples is simply not substantially related to the objective of promoting the optimal environment to raise children.220

4. Promotion of Stability in Opposite-Sex Relationships

Echoing a refrain that has unsurprisingly become repetitive in the analysis of possible governmental interests for preventing same-sex couples from marrying, the Iowa Supreme Court found that although “[t]he stability of opposite-sex relationships is an important governmental interest, … the exclusion of same-sex couples from marriage is not substantially related to that objective.”221

The court said little else on this matter, again, because it bears such similarities to the other procreation- and children-related interests that states have offered to justify excluding same-sex couples from marriage. Moreover, unlike with rational basis, the court’s simple acknowledgment that a law affecting only same-sex couples cannot possibly alter the stability for opposite-sex

216 Id. at 899-900 (citation omitted).
217 Id. at 900.
218 Id. (citation omitted).
219 Id. at 900-01.
220 Id. at 901 (footnote omitted).
221 Id. at 902.
couples means that there cannot be a *substantial* relationship between the proffered interest and the classification.

5. The Procreation Rationale

The argument that a state can prevent same-sex couples from marrying in an effort to incentivize procreation was pithily rejected by the Iowa Supreme Court, which observed that “[i]f procreation is the true objective, then the proffered classification must work to achieve that objective.” Therefore, “the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to ‘become’ heterosexual in order to procreate within the present traditional institution of civil marriage,” which is an outcome the court found unsupported by the “briefs, the record, [its] research, and common sense … .”

What’s more, the court found the statute to be “significantly under-inclusive with respect to the objective of increasing procreation because it [did] not include a variety of groups that do not procreate for reasons such as age, physical disability, or choice,” which demonstrates that “the classification is not substantially related to the asserted legislative purpose.”

(iii) Conclusion

Like with most challenged statutes, a confrontation with intermediate scrutiny almost certainly dooms marriage restrictions. Of those rationales for excluding homosexuals from marriage, the courts in Connecticut and Iowa demonstrated that few are the actual justifications for the laws, and none are important governmental interests that are *substantially furthered* by preventing such couples from marrying.

(c) Strict Scrutiny

(i) United States Supreme Court Strict Scrutiny Jurisprudence

Strict scrutiny is the most exacting of constitutional standards for governmental actions. Actions subjected to strict scrutiny must be “justified by a compelling governmental interest” and “necessary … to the accomplishment’ of their legitimate purpose.”

Unsurprisingly, the Court has not developed a test for or enunciation of what constitutes a compelling governmental purpose, though it has identified a few, such as protecting the country in times of war, or encouraging diversity in higher education.

However, the Court has ruled that in order for an action to be necessary to further an end, the “means chosen by the State to effectuate its purpose must be ‘narrowly tailored to the

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222 Id. at 901-02.
223 Id. at 902.
224 Id.
225 Id.
achievement of that goal,’” which means that the Court must determine whether any “lawful alternative [or] less restrictive means could have been used.”

That this standard is more exacting than intermediate scrutiny is readily apparent: the governmental objective a classification serves must be compelling rather than merely important, and the classification must be necessary, rather than substantially related, to achieving that objective. It is frequently said that strict scrutiny is “strict in theory, but fatal in fact.” This is said so often that the Court has felt the need to respond in an attempt to stave off such a mentality. It remains the case, however, that few statutes that meet with strict scrutiny live to tell the tale.

(ii) The California Decision

The Supreme Court of California is the only court of last resort in the United States to have determined that sexual orientation is a suspect classification and to have used strict scrutiny to invalidate a prohibition on same-sex marriage. Nevertheless, given the legendary fatality of strict scrutiny, California’s invalidation of the marriage restriction would undoubtedly be typical of any court to apply that level of scrutiny. As with the other standards of review, it is useful to note that California’s strict scrutiny is essentially identical to federal strict scrutiny.

The California Supreme Court’s decision, however, is unique because it was the first decision on the constitutionality of marriage restrictions to be handed down in an American jurisdiction that, contemporaneously with the decision, provided same-sex couples a separate legal structure through which they could acquire essentially the same rights and responsibilities as married couples.

This fact significantly diminished the plausibility of numerous possible state interests treated in earlier sections, such as the need to promote procreation or child raising in the optimal environment. The Supreme Court of California noted that the absence of any substantive

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231 Id. at 280 n.6.
233 E.g., Grutter, 539 U.S. at 327-28 (“Strict scrutiny is not ‘strict in theory, but fatal in fact.’ … [N]ot all [governmental classifications subject to strict scrutiny] are invalidated by it.”).
235 Of course the Supreme Court of Hawaii also determined that a marriage restriction identical to the one at issue in California’s case should be subjected to strict scrutiny, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), but it did so on sex discrimination grounds. Before the court had the chance to apply strict scrutiny, Hawaii amended its constitution to remove such marriage restrictions from judicial scrutiny. HAW. CONST. art. 1 § 23.
236 See In re Marriage Cases, 183 P.3d 384, 446 (Cal. 2008) (“T]he state must demonstrate … that the state interest is a constitutionally compelling one that justifies the disparate treatment prescribed by the statute in question. Furthermore … the state must demonstrate that the distinctions drawn by the statute … are necessary to further that interest.”), superseded in non-relevant part by constitutional amendment, CAL. CONST. art. 1 § 7.5.
difference in treatment between same-sex and opposite-sex couples by the State of California completely undermined the contention that a governmental preference for opposite-sex couples for the purposes of raising or bearing children was the actual motivation for the statutory classification at issue.\textsuperscript{238}

This observation on the part of the California Supreme Court, combined with the lack of any other state high courts electing to apply strict scrutiny, means that my analysis and presentation must necessarily be abbreviated. However, the theoretical governmental interests not addressed in this section were well handled by the courts that applied intermediate and rational basis scrutiny.

1. Tradition

Having dismissed all children-related state interests, the court proceeded to reject the notion that the now familiar tradition rationale constituted a compelling state interest. First, the court found that “permitting same-sex couples access to the designation of marriage” would neither “alter the substantive nature of the legal institution of marriage,” nor disparage any of “the rights and benefits of marriage currently enjoyed by opposite-sex couples.”\textsuperscript{239}

But “[w]hile retention of the limitation of marriage to opposite-sex couples is not needed to preserve the rights and benefits of opposite-sex couples, the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children.”\textsuperscript{240}

The California Supreme Court believed that:

[T]he long and celebrated history of the term “marriage” and the widespread understanding that this word describes a family relationship unreservedly sanctioned by the community [meant that] statutory provisions that continue to limit access to this designation exclusively to opposite-sex couples—while providing only a novel, alternative institution for same-sex couples—likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.\textsuperscript{241}

This opinion reinforced the harm specifically caused by the preservation of the traditional definition of marriage. Because California, in all practical, treated its same-sex and opposite-sex couples equally, the court was able to explain poignantly the harm caused by even such a symbolic action.

(iii) Conclusion

With that, the court rejected the only plausibly compelling state interest presented to it by the state. Of course, it is unlikely that substantive equality will exist on a federal level, as it did in California at the time of the California Supreme Court’s opinion, when the United States Supreme Court addresses this issue. This means that the California court’s analysis will likely be

\textsuperscript{238} Marriage Cases, 183 P.3d at 452 n.72 (“Because the governing California statutes permit same-sex couples to adopt and raise children and additionally draw no distinction between married couples and domestic partners with regard to the legal rights and responsibilities relating to children raised within each of these family relationships, the asserted difference in the effect on children does not provide a justification for the differentiation in nomenclature set forth in the challenged statutes.”).
\textsuperscript{239} Id. at 451.
\textsuperscript{240} Id. at 452.
\textsuperscript{241} Id.
of somewhat limited value insofar as it summarily dismissed any procreation- or child-related state interests.

Despite this, it bears emphasis that the strict scrutiny standard is exceedingly rigorous. Every court that applied intermediate scrutiny—a more forgiving analysis—to marriage restrictions invalidated them. It is wholly inconceivable that the Supreme Court could find that preventing same-sex couples from marrying is the least restrictive means available to encourage procreation, for example, or to ensure that children are raised in the optimal environment.

**Part V: The Remedy—Civil Union or Civil Marriage?**

*(a) Introduction*

If the Supreme Court determines that the right to marry applies to same-sex couples, or that preventing same-sex couples from marrying violates the Equal Protection Clause of the Federal Constitution, the question then becomes, “How is the constitutional violation cured?” At first the answer might seem obvious: merely eliminate those several words in the laws that prevent same-sex couples from getting married.

Indeed, this is the simple remedy sought and received in all previous successful federal challenges to restrictions on the right to marry. For example, when faced with Virginia’s 276-year-old definition of marriage, which excluded interracial couples, the Supreme Court simply invalidated any law that prohibited interracial marriage.

However, after determining that their states’ same-sex marriage prohibitions impermissibly discriminated against same-sex couples, the Supreme Courts of New Jersey and Vermont left it up to their respective legislatures whether to allow same-sex couples to marry, or to create a separate—but equal, of course!—legal structure for them. Perhaps unsurprisingly, both legislatures chose to create “civil unions” instead of expanding their definition of marriage. The precedent created by these two state courts merits inspection to determine its feasibility and desirability as a federal remedy.

*(b) State High Court Analyses*

**1. Civil Unions**

The Supreme Court of Vermont was the first state supreme court to determine that same-sex couples were entitled to the same benefits and obligations that the marital contract bestowed upon opposite-sex couples. After doing so, however, the court opted to leave the means to redress the constitutional deficiency of Vermont’s marriage statutes up to the Legislature. After extolling the virtues of democracy and playing down the authority and wisdom of the judiciary, ironically after having removed all but the question of nomenclature in the same-

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244 *Loving*, 388 U.S. at 12 (“[T]he freedom to marry … a person of another race … cannot be infringed by the State.”).
246 *Baker*, 744 A.2d at 886 (“We hold only that plaintiffs are entitled under … the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate ….”).
247 Id. at 888 (“Our mandate is predicated upon a fundamental respect for the ultimate source of constitutional authority [impliedly, the people and their representatives].”).
sex marriage debate in Vermont from the political sphere—the court wrote of its fear of the “‘destabilization’” or “disruptive and unforeseen consequences” that might result from a “sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage.” The court did not articulate exactly how this could result from eliminating the gender requirements of the marriage laws.

The Supreme Court of New Jersey took a slightly different tack and, having likewise concluded that same-sex couples could not be denied substantively equal treatment, then proceeded to ask whether, given that substantive equality, same-sex couples were further entitled to the word “marriage.”

Because the Supreme Court of New Jersey doubted that “a name itself [could be] of constitutional magnitude,” it elected to avoid the issue altogether, punting it to the “democratic process” that has always been “[t]he great engine for social change in this country.”

It must have slipped the New Jersey court’s mind that although the courts have not always been on the right side of history, perhaps the biggest social change in the last century, namely the dismantling of de jure racial segregation, was begun and almost entirely carried out by the courts prior to the intervention of the democratic process in 1964 in the form of the Civil Rights Act.

2. Rejection of Civil Unions as a Constitutional Substitute for Equal Access to Marriage

The decision of the Supreme Courts of Vermont and New Jersey to stop short of taking their decisions to their logical conclusion is puzzling largely because if there is any “fixed star in our constitutional constellation,” it should be that the concept of “separate but equal” is oxymoronic and repugnant to our constitutional and societal principles. Strangely, the Vermont and New Jersey courts seemed not to realize or accept that creating a parallel institution that is supposedly substantively equal to an existing institution is constitutionally indistinguishable from creating parallel facilities that are supposedly substantively equal to existing facilities.

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248 Id. (“[I]t cannot be doubted that judicial authority is not ultimate authority. It is certainly not the only repository of wisdom.”).
249 Id. at 887.
250 Lewis, 908 A.2d at 221 (“[P]laintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples. … Whatever path the Legislature takes, our starting point must be to presume the constitutionality of legislation. We will give … deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution.”).
251 Id.
252 Id. at 222 (“Our role here is limited … and therefore we must steer clear of the swift and treacherous currents of social policy … .”).
253 Id. at 223.
254 Plessy v. Ferguson, 163 U.S. 537 (1896), and Korematsu v. United States, 323 U.S. 214 (1944), come to mind, though it is instructive to note that in both cases the courts were refusing to right a wrong created by the elected branches.
This is remarkable especially because after the Supreme Court’s landmark decision in *Brown v. Board of Education*\textsuperscript{258} declaring segregation unconstitutional, courts have largely attempted to steer clear of repeating the segregationist errors of the past. As the dissenter in the Vermont case pointed out, “when the California Supreme Court struck down a state law prohibiting … interracial marriages, the Court did not suspend its judgment to allow the Legislature an opportunity to enact a separate licensing scheme for interracial marriages.”\textsuperscript{259}

On a different note, in attacking the propriety of leaving the ultimate resolution of the case up to the vicissitudes of the legislative branch, Chief Justice Poritz and her fellow dissenters on the New Jersey Supreme Court took issue with the majority’s implication that same-sex marriage is simply a social issue, writing that “[t]he question of access to civil marriage by same-sex couples is not a matter of social policy but of constitutional interpretation.”\textsuperscript{260}

More to the point, Chief Justice Poritz took the majority of her court to task for seeming to dismiss the importance of the word “marriage:”\textsuperscript{261}

We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as “real” marriage, that such lesser relationships cannot have the name of marriage.\textsuperscript{262}

The California Supreme Court similarly believed that:

Because of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term “marriage” is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution that has been established for same-sex couples to be considered a mark of second-class citizenship.\textsuperscript{263}

The Iowa Supreme Court succinctly addressed the “separate but equal” difficulties that would arise if it allowed the state to provide civil unions instead of marriage licenses, holding: Iowa[‘s] [marriage law] is unconstitutional because the [State] has been unable to identify a constitutionally adequate justification for excluding plaintiffs from the institution of civil marriage. A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution. This record, our independent research, and the appropriate equal protection analysis do not suggest the existence of a

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\textsuperscript{258} *Brown*, 347 U.S. at 483.


\textsuperscript{260} Lewis v. Harris, 908 A.2d 196, 231 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (internal quotation marks removed).

\textsuperscript{261} Lewis, 744 A.2d at 221 (“Raised here is the perplexing question—‘what’s in a name?’—and is a name itself of constitutional magnitude … ? … Under our equal protection jurisprudence … plaintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.”).

\textsuperscript{262} Lewis, 744 A.2d at 226-27 (Poritz, C.J., concurring and dissenting).

\textsuperscript{263} In re Marriage Cases, 183 P.3d 384, 452 (Cal. 2008), superseded in non-relevant part by constitutional amendment, CAL. CONST. art. 1 § 7.5.
justification for such a legislative classification that substantially furthers any governmental objective.

Ultimately, the Supreme Judicial Court of Massachusetts articulated the most eloquent rejection of the constitutionality of a “separate but equal” scheme such as civil unions when it wrote:

The … absolute prohibition of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex … couples to second-class status. The denomination of this difference … as merely a “squabble over the name to be used” so clearly misses the point that further discussion appears to be useless. If … the proponents of [civil unions] believe that no message is conveyed by eschewing the word “marriage” and replacing it with “civil union” for same-sex “spouses,” we doubt that the attempt to circumvent the court’s decision in Goodridge would be so purposeful. For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain.

(c) Conclusion

When faced with this issue, the Supreme Court may be tempted to avoid the inevitable political firestorm that will be the result of any opinion by following the steps of the state courts that have remedied the substantive inequalities while failing to end the unequal governmental classification itself. It may also do so because it does not want to remove a “social issue” from the purview of democratic decision-making, or simply because it does not think there is enough public support for same-sex marriage.

However, of the state high courts that have been faced with the choice of simply striking the discriminatory language in marriage laws or giving the legislature time to establish a separate and theoretically equal system, most elected to provide the simplest relief and strike the unconstitutional language.

There are also serious concerns about the practicality and constitutionality of establishing a nation-wide parallel relationship recognition system that were not present in the state courts. These concerns would almost certainly guarantee that if the Supreme Court were to accept that prohibitions on same-sex marriage violated the Federal Constitution, it would heed the eloquent words of the high court of Massachusetts and its remedy would be a simple declaration that such exclusions are unconstitutional.

266 Opinion of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).
267 “It has been said by some, not always tongue-in-cheek, that the “Supreme Court follows the election returns.” Steven G. Calabresi, Thayer’s Clear Mistake, 88 NW. U.L. REV. 269, 272 (1993) (“Mr. Dooley’s dictum about the Supreme Court’s tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago.”).
268 With a few exceptions, such as those cases in footnote 189, supra, the regulation of marriage is an issue that, to a large degree, is left to the individual states in our federal system. Anne C. Dailey, Federalism and Families, 143 U. PA. L. REV. 1787, 1790 (1995) (“States enjoy exclusive authority over family law … because of the fundamental role of localism in the federal design.”).
Part VI: Conclusion

Many state high courts have been faced with the necessity of responding to same-sex couples’ claims that their exclusion from the civil institution of marriage violates their constitutional rights. These courts have rendered decisions both for and against the plaintiffs, for various reasons.

In their usually thorough and erudite opinions, the state high court justices, both in majority and in dissent, provided powerful reasoning and compelling language. Because so many of the state constitutions have been interpreted to be coextensive with the Federal Constitution, at least when it comes to the tests used to answer the important questions in a constitutional inquiry, their analyses should be instructive to any federal court that takes on the issue.

The most persuasive opinions were those following the long American tradition in which courts extended constitutional protections to groups disfavored by a tyrannical majority. Those courts that turned the plaintiff same-sex couples down did so by narrowly relying upon an illogical or impractical conclusion; for example, that it is rational to limit marriage to opposite-sex couples because heterosexuals might be tempted not to procreate if gays could marry, or that homosexuals do not deserve heightened judicial protection because they have too much political power—though, apparently, women and African-Americans do not—or because science has not located a “gay gene.”

Perhaps the most intriguing note on which to end is Justice Scalia’s interpretation of the ultimate effect of the Court’s ruling in Lawrence v. Texas\(^\text{269}\) on the future of same-sex marriage litigation:

> Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned…. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.\(^\text{270}\)

\(^{269}\) Lawrence v. Texas, 539 U.S. 558 (2003).

\(^{270}\) Id. at 604-05 (Scalia, J., dissenting).