

GAY RIGHTS, EQUAL PROTECTION, AND THE CLASSIFICATION-FRAMING QUANDARY

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INTRODUCTION

When the U.S. Supreme Court granted certiorari to hear and decide two cases involving same-sex marriage in its 2012 Term, there was rampant speculation among legal pundits regarding the outcome, scope, and rationale of those decisions. One case involved a challenge to the portion of the federal Defense of Marriage Act (“DOMA”) refusing to recognize same-sex marriages for federal law purposes,¹ and the other involved a challenge to California’s Proposition 8 (an amendment to the state’s constitution prohibiting same-sex marriage enacted after the state’s highest court had declared such a right to exist).² In deciding the cases, would the Court rule in favor of the gay and lesbian plaintiffs? Would it issue a sweeping decision giving gays and lesbians the right to marry nationwide, or a narrower decision limited to the facts of those specific cases? Would the Court declare sexual orientation to be a suspect or quasi-suspect classification for equal protection purposes; decide that the plaintiffs’ fundamental right to marry had been infringed; or apply some stealth form of “rational basis plus” scrutiny to declare the laws unconstitutional? Would the Court even reach the merits, or instead dispose of both cases on procedural grounds?

Ultimately, the Court delivered victories for the gay and lesbian plaintiffs in both cases, although neither decision broached the more sweeping questions regarding the fundamental right to marry or whether sexual orientation classifications should be subjected to heightened equal protection scrutiny. Instead, the Court disposed of *Hollingsworth v. Perry*³ on standing

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¹ See *Windsor v. United States*, 699 F.3d 169, 175 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013). Specifically, the case involved a challenge to that portion of DOMA providing that “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7 (2012).

² See *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

³ 133 S. Ct. 2652 (2013).

grounds, thereby allowing a federal district court decision declaring Proposition 8 unconstitutional to stand.⁴ In *United States v. Windsor*⁵ the Court struck down the section of DOMA that refused to recognize same-sex marriages for federal law purposes.⁶ The Court applied what appeared to be rational basis equal protection scrutiny,⁷ or arguably “rational basis plus” with some substantive due process and federalism principles thrown in.⁸

Commentators and lower courts will speculate for some time on the actual holding and potential sweep of the Court’s decision in *Windsor*, as well as how the Court might have resolved *Perry* on the merits. Of at least equal and perhaps greater importance, however, is a subtle yet critical unresolved threshold question lurking in the background of these two decisions, as well as in numerous other cases percolating in the lower courts regarding claims by gay and lesbian plaintiffs. This unresolved question is vital to mounting a successful equal protection challenge: is there any “discrimination” as equal protection precedents define that concept, and if so, what is the nature of the classification?

⁴ Following this procedural path is consistent with the Court’s post-*Brown v. Board of Education*, 347 U.S. 483 (1954), pre-*Loving v. Virginia*, 388 U.S. 1 (1967), encounters with challenges to laws banning interracial marriage. See *Naim v. Naim*, 350 U.S. 985 (1956) (mem.) (deciding not to reach the merits of a case challenging Virginia’s law prohibiting interracial marriage on the ground that inadequacy of the factual record and the inability of the lower courts to rectify that inadequacy “leaves the case devoid of a properly presented federal question”). These cases illustrate the convenient method of “disposing of a case while avoiding judgment on the constitutional issue that it raises” when—for political reasons—the Court is not yet prepared to issue a decision invalidating a law but also does not wish to give it the Court’s stamp of approval. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 169 (1962).

⁵ 133 S. Ct. 2675 (2013).

⁶ *Id.* at 2682.

⁷ Deciding the case on narrow grounds is consistent with the Court’s history with gay rights cases specifically and cases touching on sensitive social issues generally. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (declaring a sodomy law targeting same-sex sodomy to violate substantive due process, without articulating the level of scrutiny applied); *Romer v. Evans*, 517 U.S. 620, 624, 635-36 (1996) (declaring an amendment to Colorado’s constitution prohibiting protected status for those with a “homosexual, lesbian or bisexual orientation” unconstitutional on equal protection grounds without articulating the level of scrutiny applied (internal quotation marks omitted)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring racially segregated schools to be unconstitutional on equal protection grounds without articulating the level of scrutiny applied or the potential applicability of the principle outside of school segregation).

⁸ See *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (“I think the majority goes off course . . . but it is undeniable that its judgment is based on federalism.”); *id.* at 2706 (Scalia, J., dissenting) (“In accord with my previously expressed skepticism about the Court’s ‘tiers of scrutiny’ approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases But the Court certainly does not *apply* anything that resembles that deferential framework.” (citation omitted)); *id.* at 2707 (“The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) . . .”).

To those unfamiliar with the peculiarities of equal protection jurisprudence, the question seems absurd. *Of course* there is discrimination, at least in the sense that most people think of the term: gays and lesbians wish to marry, but they are prohibited by state law from doing so. However, a threshold requirement for bringing an equal protection claim is a showing that the law in question intentionally discriminates against a given class of persons. This threshold showing is satisfied when a law—on its face—discriminates against a given class of persons.⁹ But when a law is facially neutral, mere evidence that it has a discriminatory effect on a given class of persons is typically insufficient to satisfy this threshold requirement.¹⁰ Absent evidence that a facially neutral law was either administered in a discriminatory manner or motivated by a discriminatory purpose, there is no discrimination within the meaning of the Equal Protection Clause and thus the claim fails at the outset.¹¹

Invoking this line of cases, supporters of laws prohibiting same-sex marriage, same-sex adoption, and benefits for unmarried same-sex partners—and many of the judicial opinions addressing their constitutionality—note that such laws, on their face, make no reference whatsoever to the sexual orientation of the people seeking to marry, adopt, or obtain benefits.¹² Proponents further note that no inquiry regarding anyone’s sexual orientation is made at any point in the process of enforcing the laws.¹³ Rather, proponents argue that these laws inquire only into the sex of the applicants, requiring merely that the applicants be of different sexes.¹⁴ Thus defenders of these laws declare that gays and lesbians are not discriminated against since they remain free to marry, jointly adopt a child, or seek benefits for a partner, so long as the person they seek to marry, jointly adopt a child with, or seek benefits for is of the opposite sex. Under these laws, the argument goes, heterosexuals are likewise prohibited from marrying, jointly adopting a child with, or seeking benefits for someone of the same sex.

Proponents acknowledge that such laws might disproportionately *impact* gays and lesbians, but they note that when a law is facially neutral mere evidence that it has a discriminatory effect, without more, fails to satisfy the threshold requirement for making out an equal protection claim. As such, it becomes unnecessary for the court to determine the level of judicial scrutiny applicable to laws that discriminate on the basis of sexual orientation, or whether the laws at issue satisfy that level of judicial scrutiny.¹⁵

⁹ See *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

¹⁰ See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

¹¹ See *infra* notes 32-65.

¹² See *infra* notes 52-65 and accompanying text.

¹³ See *infra* notes 56-58 and accompanying text.

¹⁴ See *infra* notes 56-58 and accompanying text.

¹⁵ See *infra* notes 56-65.

In response to such arguments, opponents of such laws contend that this only strengthens their case. After all, *sex* discrimination is already subject to intermediate scrutiny under the Equal Protection Clause,¹⁶ and the contention that the laws are facially about *sex* and not sexual orientation thus makes the case for applying heightened scrutiny more straightforward.¹⁷ Yet once again, defenders of such laws—and many of the judicial opinions addressing their constitutionality—ask, “Where is the *discrimination*?” Yes, they acknowledge, *sex* is taken into account, but there is no *sex discrimination*, in that men and women are treated in exactly the same way. Both men and women are equally prohibited from marrying someone of the same sex. Thus, under the “equal application” theory,¹⁸ these courts conclude that bans on same-sex marriage are also neutral as to *sex*.¹⁹ Accordingly, while opponents of such laws assert facial discrimination on the bases of sexual orientation and *sex*, supporters of such laws contend that the laws are facially neutral on both.

Other laws currently being challenged in the lower courts are arguably even further removed from being facially discriminatory on the basis of sexual orientation or *sex*. Laws being challenged in Arizona and Michigan, for example, do not explicitly say anything on their face about gay or lesbian persons or even same-sex couples. The Arizona law provides that health benefits can only be provided to the children or “spouse” of public employees. Only when the law is considered in conjunction with Arizona’s constitutional ban on same-sex marriage does the discrimination against same-sex couples—and by extension, gay and lesbian persons—become apparent.²⁰ The Michigan law provides that health benefits can only be provided to those who are married to, a dependent of, or otherwise eligible to inherit from a public employee under the state’s law of intestate succession.²¹ As with the Arizona law, it is only by reference to other laws—including the state’s ban on same-sex marriage—that the discrimination becomes evident.²²

¹⁶ See, e.g., *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁷ See *infra* notes 152-155 and accompanying text.

¹⁸ See *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding a law punishing interracial fornication and adultery more severely than the same conduct involving persons of the same race), *overruled in part* by *McLaughlin v. Florida*, 379 U.S. 184 (1964); see also *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (referring to it as the “‘equal application’ theory”).

¹⁹ See *infra* notes 156-161 and accompanying text.

²⁰ See *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011) (citing ARIZ. CONST. art. XXX, § 1; ARIZ. REV. STAT. ANN. § 38-651(O) (2011)).

²¹ See MICH. COMP. LAWS ANN. § 15.583 (West Supp. 2013).

²² See MICH. CONST. art. I, § 25 (declaring marriage between one man and one woman the only form of marriage permissible); I.R.C. § 152 (2006) (defining dependents under the Internal Revenue Code); MICH. COMP. LAWS ANN. §§ 551.7, .271 (West 2006) (governing solemnization and recognition

Cases involving constitutional claims of discrimination against gays and lesbians can thus be divided into three categories, each of which is arguably an additional step removed from being discriminatory for equal protection purposes. The first category consists of those laws that are clearly discriminatory for equal protection purposes in that they facially provide for unequal treatment because of a person's specific sexual orientation. Colorado's Amendment 2 is a rare example of such a law.²³ Amendment 2 subjected those with a "homosexual, lesbian, or bisexual orientation" to differential treatment and was declared unconstitutional by the U.S. Supreme Court in *Romer v. Evans*.²⁴

The second category of claims involves same-sex conduct laws that discriminate against conduct only when it is performed by two people of the same sex, such as same-sex marriage, adoption, sexual conduct, or sharing of benefits.²⁵ When such laws are challenged on equal protection grounds, they can theoretically be defended on the ground that they neither discriminate on the basis of sexual orientation nor sex. As far as sexual orientation is concerned, such laws can be characterized as facially neutral in that they do not prohibit gays and lesbians from marrying, adopting, and the like—so long as they do not seek to do so with someone of the same sex.²⁶ Similarly, conduct-based laws can be characterized as facially neutral because one who engages in same-sex marriage, adoption, sexual conduct, or sharing of benefits need not *necessarily* be gay or lesbian. Such laws can also be defended on the ground that they do not discriminate on the basis of sex, since men and women are treated equally. Under conduct-based laws, both sexes are prohibited from engaging in same-sex conduct.

The third category of claims includes cross-referenced same-sex conduct laws that are arguably yet another step removed from being facially discriminatory.²⁷ On their face, cross-referenced same-sex conduct laws neither call out gay and lesbian individuals nor same-sex couples for differential treatment. Rather, such laws provide that some sort of benefit is only available to those who satisfy another, cross-referenced statute, such as the state's marriage laws. It is only in conjunction with those cross-referenced statutes that the discrimination against same-sex couples, and by extension gays and lesbians, becomes apparent—such as when cross-referenced marriage laws prohibit same-sex marriage.

In this Article, I attempt to resolve the classification-framing quandary created by equal protection claims brought by gays and lesbians against

of marriages); MICH. COMP. LAWS ANN. §§ 700.2101-.2103 (West 2002) (providing rules of intestate succession).

²³ See COLO. CONST. art. II, § 30b.

²⁴ 517 U.S. 620, 624, 635-36 (1996) (internal quotation marks omitted).

²⁵ See *infra* note 52-65 and accompanying text.

²⁶ See *infra* note 52-65 and accompanying text.

²⁷ See *infra* notes 189-206 and accompanying text.

laws falling into these latter two categories. The quandary is the result of two separate lines of equal protection precedents invoked in tandem in the same-sex marriage, benefit, and conduct cases. The first of these is a line of cases requiring that, in the absence of facial discrimination, plaintiffs successfully identify a law's discriminatory purpose, or show that the law is being applied in an inequitable manner.²⁸ The second line of cases holds that even when a law references sex on its face, the law is nonetheless considered facially neutral so long as its restrictions apply equally to members of both sexes.²⁹ In response to the resulting classification-framing quandary, this Article will consider whether it is possible for gay and lesbian plaintiffs to navigate between the Scylla of the discriminatory purpose requirement and the Charybdis of the equal application theory so as to satisfy the threshold requirement for bringing equal protection challenges against such laws. This Article demonstrates that although these laws raise complex framing issues, they should be characterized as purposefully discriminating on the bases of sexual orientation and sex, as well as against same-sex couples, and that any of three characterizations should suffice to get same-sex conduct equal protection claims past the threshold discrimination inquiry.

Part I of this Article examines the application of the discriminatory purpose requirement to claims that same-sex conduct laws discriminate on the basis of sexual orientation. Part II examines the application of the equal application theory to claims that same-sex conduct laws discriminate on the basis of sex. Part III considers an alternative method of framing such claims—as discrimination against same-sex *couples*—to navigate between the discriminatory purpose requirement and the equal application theory. Part IV considers cross-referenced same-sex conduct laws and whether they are distinguishable from laws that directly reference same-sex conduct. Part V surveys the Supreme Court's existing gay rights precedents to determine the extent to which the Court has provided guidance on how to resolve the classification-framing quandary presented by laws regulating same-sex conduct.

I. SEXUAL ORIENTATION DISCRIMINATION AND THE SCYLLA OF THE DISCRIMINATORY PURPOSE REQUIREMENT

A threshold requirement for making out an equal protection claim is a showing that a law discriminates against a given class.³⁰ If a statute overtly discriminates on some basis, such facial discrimination standing on its own

²⁸ See *infra* Part I.A.

²⁹ See *infra* Part I.B.

³⁰ *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

suffices to satisfy this threshold requirement.³¹ Thus, for example, if a statute in terms provides a preference for men over women, or a statute denies a right to someone because they are African-American, the threshold requirement is satisfied.

A. *Proving Discriminatory Purpose in the Absence of Facial Discrimination*

With the passage of time and knowledge of the constitutional ramifications of enacting discriminatory laws, fewer and fewer laws in the United States have drawn race-based, sex-based, or other types of classifications on their face. However, although facially neutral, laws would be intentionally administered in a discriminatory manner so as to burden a targeted class of persons. Thus, for example, in *Yick Wo v. Hopkins*³² the U.S. Supreme Court was confronted with a facially neutral statute that required laundries to be located in certain types of buildings absent a waiver.³³ In practice, however, every Chinese applicant was denied a waiver while all but one non-Chinese applicant was granted a waiver.³⁴ The Court held that the threshold requirement for making out an equal protection claim is satisfied when a law, although facially neutral, is administered in a discriminatory manner.³⁵ In addition, and in the absence of direct proof of discriminatory administration, one passage in the opinion appeared to suggest that the extreme discriminatory effect of the law, *standing alone*, sufficed to satisfy the threshold requirement of an equal protection claim:

[W]hile this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified.³⁶

While *Yick Wo* may have suggested that discriminatory effects, standing alone, are sufficient, that conclusion was not required for the decision and therefore arguably left the question open. When directly confronted

³¹ See *id.*

³² 118 U.S. 356 (1886).

³³ *Id.* at 357.

³⁴ *Id.* at 374.

³⁵ *Id.* at 373-74 (“Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

³⁶ *Id.* at 374.

with this issue in 1976, the U.S. Supreme Court in *Washington v. Davis*³⁷ made explicit what it indicated had been foreshadowed by its earlier cases—namely, that, at least as a general rule, discriminatory effects alone do not suffice to make out an equal protection claim:

[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.

...
Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.³⁸

In *Davis*, Justice Stevens wrote a separate concurring opinion in which he discussed the relevance of *extreme* discriminatory effects:

[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion v. Lightfoot*, 364 U.S. 339, or *Yick Wo v. Hopkins*, 118 U.S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect.³⁹

Gomillion v. Lightfoot,⁴⁰ cited by Justice Stevens, had similar facts to *Yick Wo* in that the discriminatory effects were quite stark. There, the Alabama legislature redrew the boundaries of the city of Tuskegee so as to create an oddly shaped twenty-eight sided figure that had the effect of removing 395 of the 400 African-American voters from the city without removing a single Caucasian voter.⁴¹

Davis, at least when considered in conjunction with Justice Stevens's concurrence, appeared to leave open the possibility that *extreme* discriminatory effects might suffice on their own to make out an equal protection claim. The theoretical justification for this exception to the general rule is that extreme discriminatory effects likely cannot be explained on any ground other than discriminatory intent. Indeed, a year later, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁴² the Court

³⁷ 426 U.S. 229 (1976).

³⁸ *Id.* at 239, 242 (citation omitted).

³⁹ *Id.* at 254 (Stevens, J., concurring).

⁴⁰ 364 U.S. 339 (1960).

⁴¹ *See id.* at 341.

⁴² 429 U.S. 252 (1977).

explained the ways in which one could prove discriminatory purpose, and left open the narrow possibility that extreme evidence of discriminatory effect might be sufficient for an equal protection claim:

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.⁴³

The *Village of Arlington Heights* Court went on to detail the types of “other evidence” that normally would be used to prove discriminatory purpose when a law was facially neutral, including the sequence of events leading up to the challenged decision; the legislative or administrative history; and possibly the testimony of individual legislators.⁴⁴

Several years later, in *McCleskey v. Kemp*,⁴⁵ the Court acknowledged that in some instances, evidence of extreme discriminatory effect alone could suffice as the sole proof of discriminatory purpose. The Court noted “statistical proof normally must present a ‘stark’ pattern to be accepted as the sole proof of discriminatory intent under the Constitution,” and cited *Yick Wo* and *Gomillion* as paradigmatic examples.⁴⁶

However, the narrowness of any potential *Yick Wo-Gomillion* exception is emphasized by the Court’s unwillingness to apply it in *Personnel Administrator of Massachusetts v. Feeney*.⁴⁷ At issue in that case was an equal protection challenge to a state veterans’ preference in hiring.⁴⁸ Because 98 percent of veterans in the state were men, the hiring preference had a rather glaringly disparate impact on women.⁴⁹ Yet the Court held that this did not suffice to make out a sex-based equal protection claim, even though state lawmakers were *aware* of the impact it would have.⁵⁰ The Court held that proving discriminatory purpose requires plaintiffs to show that lawmakers “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁵¹

⁴³ *Id.* at 266 (footnotes omitted) (citations omitted).

⁴⁴ *See id.* at 267-68. The Court also made clear that the discriminatory purpose need not be the sole, dominant, or even primary purpose behind a law or official governmental action; rather, it suffices that it was a “motivating factor.” *See id.* at 265-66.

⁴⁵ 481 U.S. 279 (1987).

⁴⁶ *Id.* at 293.

⁴⁷ 442 U.S. 256 (1979).

⁴⁸ *Id.* at 259.

⁴⁹ *Id.* at 269-71.

⁵⁰ *Id.* at 278-79.

⁵¹ *Id.* at 279.

Collectively, the Court's cases from *Yick Wo* through *Feeney* provide three possible methods of bringing an equal protection challenge against a facially neutral law. The first method involves proving that the law, although facially neutral, is not administered in a way that discriminates against those of a given race, sex, sexual orientation, or other class, rather than in an evenhanded manner. The second method involves proving that a law has a discriminatory effect on a given class, and that there is evidence that the law was enacted *because of* that discriminatory effect. The third method—the possible *Yick Wo-Gomillion* exception—involves a law whose discriminatory effects on a given class are so stark that discriminatory purpose can be inferred even in the absence of direct proof.

B. *Discriminatory Purpose and Sexual Orientation*

Lower courts have frequently entertained the first method of challenging a facially neutral law that is selectively enforced against sexual minorities. For example, in most states in which sodomy or the solicitation of sodomy has been criminalized, the law was truly neutral in that it applied not just to sodomy engaged in by people of the same sex but also to sodomy performed by people of opposite sexes. As a result, courts concluded that such sodomy laws, on their face, do not discriminate against gays and lesbians and could not be challenged on equal protection grounds, regardless of the disproportionate effect such laws may have had on gays and lesbians compared to the rest of the general public.⁵² Yet such courts acknowledged that evidence of selective enforcement of such laws would suffice to make out an equal protection claim.⁵³ Similarly, courts have recognized that laws criminalizing public sex are facially neutral, yet the courts have left open the possibility of challenging them on equal protection grounds when coupled with evidence of selective enforcement against gays and lesbians.⁵⁴

⁵² See *Stewart v. United States*, 364 A.2d 1205, 1207 (D.C. 1976) (“The above statute, by its very terms, proscribes specific conduct and does not single out any particular group of persons. The statute applies to acts between men, between women, and between a man and a woman. Similarly, § 22-3502 makes no distinction between sodomitic acts committed by homosexuals, heterosexuals, or bisexuals. In view of its universal applicability, we must conclude that our sodomy statute is neutral on its face.” (citation omitted)); *State v. Baxley*, 656 So. 2d 973, 978 (La. 1995) (“[T]he statute, on its face, is neutral. It applies equally to all individuals—male, female, heterosexual and homosexual. The statute punishes *conduct*—solicitation with the intent to engage in oral sex or anal sex for compensation. The statute does not single out gay men or lesbians for punishment.” (footnote omitted)); *Branche v. Commonwealth*, 489 S.E.2d 692, 696 (Va. Ct. App. 1997) (“Code §§ 18.2-29 and 18.2-361, on their face, are gender neutral and apply equally to males and females. If either a heterosexual male or female solicited another to engage in a consensual act of oral sodomy, he or she would be subject to prosecution for felony criminal solicitation.”).

⁵³ See, e.g., *Stewart*, 364 A.2d at 1208; *Branche*, 489 S.E.2d at 696.

⁵⁴ See, e.g., *Gaymon v. Esposito*, Civil Action No. 11-4170 (JLL), 2012 WL 1068750, at *11 (D.N.J. Mar. 29, 2012); *Hope v. City of Long Beach*, No. CV 04-4249 DT (RZx), 2005 WL 6009954, at

These laws are unquestionably facially neutral. It is realistic to think of them being enforced against heterosexuals in the absence of selective enforcement. Thus characterization as facially neutral makes sense.

But in reliance on *Davis* and its progeny, lower courts confronting laws whose neutrality seems less apparent have characterized those laws, when challenged by gays and lesbians, as facially neutral. For example, laws prohibiting same-sex marriage, denying rights to same-sex couples (such as adopting children), or punishing consensual same-sex sodomy⁵⁵ have been challenged on Equal Protection Clause grounds. Defenders of such laws have contended, and some judges have held, that a threshold requirement for stating an equal protection claim is lacking since these laws are facially neutral on sexual orientation.

The argument embraced in such holdings is that the laws, on their face, say nothing whatsoever about the sexual orientation of the individuals involved. For example, when a couple applies for a marriage license, no inquiry is made into their sexual orientation. Gay men and lesbians are perfectly free to marry, so long as they marry someone of the opposite sex.⁵⁶ Similarly, laws prohibiting same-sex sodomy say nothing about the sexual orientation of the individuals involved; they merely prohibit such conduct when it occurs between two persons of the same sex.⁵⁷ Likewise, laws prohibiting recognition of same-sex adoption are also facially neutral and equally prohibit two heterosexual people of the same sex from adopting.⁵⁸

*6 (C.D. Cal. Aug. 15, 2005); *see also* Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 657-58 (Mass. 2006) (Marshall, C.J., concurring) (upholding the constitutionality of Massachusetts's reverse evasion statute—whereby the state would not permit non-residents to marry if their home state would not permit such a marriage—as applied to out-of-state same-sex couples wishing to marry, and noting that such laws are facially neutral in that they apply to restrictions on heterosexual marriage as well, but leaving open the possibility that such a law could be challenged if selectively enforced only against same-sex couples).

⁵⁵ At least prior to the U.S. Supreme Court's decision with regard to same-sex sodomy in *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁶ *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012); *In re Marriage Cases*, 183 P.3d 384, 465 (Cal. 2008) (Baxter, J., concurring in part and dissenting in part); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 521 n.11 (Conn. 2008) (Zarella, J., dissenting); Dean v. District of Columbia, 653 A.2d 307, 362-63 (D.C. 1995) (Steadman, A.J., concurring); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting); Hernandez v. Robles, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring); Andersen v. King Cnty., 138 P.3d 963, 997 (Wash. 2006) (Johnson, J., concurring).

⁵⁷ *See* Lawrence v. State, 41 S.W.3d 349, 353 (Tex. Ct. App. 2001) (en banc), *rev'd*, 539 U.S. 558 (2003).

⁵⁸ *See* Finstuen v. Edmondson, 497 F. Supp. 2d 1295, 1307-08 (W.D. Okla. 2006) (“[T]he Amendment requires Oklahoma agencies and courts to refuse recognition to one of a child’s parents if that child was adopted in some other state by two persons of the same sex. The Amendment, on its face, has the same impact whether the adoptive same-sex parents were homosexual or heterosexual; thus, sexual orientation is not the focus of the statute.” (footnote omitted)), *aff’d in part, rev’d in part sub nom.* Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 710 (Cal. Ct. App. 2006) (“[T]he Legislature’s manifest purpose in enacting the 1977 amendments to

In an apparent endorsement of a non-essentialist, more fluid way of thinking about sexuality which puts traditionally conservative jurists in the same camp as many queer theorists,⁵⁹ these judges posit that two people of the same sex might marry even though they are not gay,⁶⁰ and that not everyone who engages in same-sex sexual conduct is gay.⁶¹ In this way, these judges distinguish such laws from the law at issue in *Romer*, which explicitly provided for differential treatment of those having a “homosexual, lesbian, or bisexual orientation.”⁶²

Exemplary of this reasoning is the Hawaii Supreme Court’s decision in *Baehr v. Lewin*:⁶³

“Homosexual” and “same-sex” marriages are not synonymous; by the same token, a “heterosexual” same-sex marriage is, in theory, not oxymoronic. . . . Parties to “a union between a man and a woman” may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.⁶⁴

To be sure, many of these judges reason that laws prohibiting same-sex marriage have a discriminatory *effect* on gays and lesbians, but citing *Feeney*, they conclude that such discriminatory effects are not actionable in the

Family Code, section 300, was to exclude same-sex couples from the institution of marriage. Likewise, the exclusionary intent of California voters who passed Proposition 22 could not be more clear. Ballot arguments in favor of the initiative raised the specter of same-sex couples moving to this state and forcing California to recognize marriages they entered elsewhere, even though California law would not have authorized the marriage. The intent of this measure, as with the Legislature’s 1977 Family Code amendments, was clearly to prohibit gays and lesbians from marrying their same-sex partners.” (citations omitted)).

⁵⁹ See generally Robin L. West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 434-35 (2005).

⁶⁰ See, e.g., *Dean*, 653 A.2d at 362-63 (Steadman, A.J., concurring) (“To the extent it is exclusive, it is exclusive evenly of all same-sex couples, who may, for whatever reason, wish to enter that legal status.”).

⁶¹ See, e.g., *Lawrence*, 41 S.W.3d at 353 (“On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual ‘orientation.’ Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct.”).

⁶² See *Dean*, 653 A.2d at 362 (D.C. 1995) (Steadman, A.J., concurring) (“My initial difficulty with a postulate of appellants’ analysis . . . is its treatment of the marriage statute as the equivalent of a statute expressly addressed to an assertedly suspect class. The marriage statute is simply not the same as, say, a statute prohibiting the employment of homosexuals. Cf. *Evans v. Romer*, 882 P.2d 1335 (Colo.1994) (holding that Amendment 2, which prohibited the state and municipalities from passing legislation to protect homosexuals, infringing on plaintiffs’ right to vote in violation of the Equal Protection Clause.”).

⁶³ 852 P.2d 44 (Haw. 1993).

⁶⁴ *Id.* at 51 n.11.

absence of evidence that the laws were enacted because of—not in spite of—those effects.⁶⁵

C. *Responding to Claims that Same-Sex Conduct Laws are Facially Neutral*

There are at least three responses to this line of argument. First, one can accept the characterization of these laws as facially neutral but invoke the second method of challenging such laws—that they have a discriminatory effect on gays and lesbians and were enacted *because of* that discriminatory effect. Second, one can invoke the third method of challenging such a law, accepting the facially neutral characterization but demonstrating that the discriminatory impact on gays and lesbians is so extreme—akin to *Yick Wo* and *Gomillion*—that courts should deem the threshold requirement for making out an equal protection claim satisfied. Finally, one can argue that these judges are making a distinction without a difference, that for all practical purposes to draw distinctions on the basis of a desire to enter into a same-sex marriage or to engage in same-sex conduct is tantamount to or merely a proxy for sexual orientation, and thus it is unsound to treat these laws as facially neutral.

Consider the first response to this line of argument. Under this approach, one argues that the laws, although facially neutral, were enacted *because of* their discriminatory impact on gays and lesbians. Litigants employing this argument will have far greater success challenging one of the many recently enacted state laws and constitutional amendments prohibiting same-sex marriage, because nearly all of those laws and amendments were in reaction to court decisions granting same-sex couples the right to marry.

Litigants will be much less successful with this approach if they challenge marriage laws written long ago, before lawmakers even conceived of gays and lesbians as a distinct class of persons. In this regard, a statement by the U.S. Supreme Court in its 2003 decision in *Lawrence v. Texas*,⁶⁶ in which the Court explained how its earlier decision in *Bowers v. Hardwick*⁶⁷ had erred in finding a long-standing history of laws directed against homosexuality, is instructive:

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . The English prohibition was understood to include relations between men and women as well as relations between men and

⁶⁵ See *In re Marriage Cases*, 183 P.3d 384, 465 (Cal. 2008) (Baxter, J., concurring in part and dissenting in part); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 521-23 (Conn. 2008) (Zarella, J., dissenting).

⁶⁶ 539 U.S. 558 (2003).

⁶⁷ 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

men. . . . The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.

. . . American laws targeting same-sex couples did not develop until the last third of the 20th century. . . .

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution.⁶⁸

For example, most of what might be described as the second wave of same-sex marriage legal challenges—those brought in the late 1990s and in the 2000s⁶⁹—were brought in states such as Massachusetts, Maryland, New York, and Vermont.⁷⁰ None of those states had enacted either defense-of-marriage acts or constitutional amendments banning same-sex marriage. Because the courts in those states might interpret ambiguously worded marriage statutes to permit same-sex marriage, the opportunities for successfully challenging laws banning same-sex marriage were greatest in those states. Also, the absence of constitutional amendments meant that there were no obstacles to declaring the laws unconstitutional on state constitutional grounds. Yet these advantages came with a disadvantage if such laws are treated as facially neutral on sexual orientation: to the extent these laws were written long before legislators conceived of gays and lesbians as a distinct class of persons, evidence of discriminatory intent was lacking. This lack of evidence of intent led some judges in those states to conclude that the threshold for bringing an equal protection claim had not been satisfied.⁷¹

In contrast, it has been much easier to uncover record evidence that same-sex marriage laws were designed to target gays and lesbians during what may be described as the third wave of same-sex marriage challenges.⁷²

⁶⁸ *Lawrence*, 539 U.S. at 568, 570 (citations omitted).

⁶⁹ The first wave of same-sex marriage legal challenges—discussed in greater detail in Part II—began in the early 1970s.

⁷⁰ See, e.g., *Conaway v. Deane*, 932 A.2d 571, 581 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006); *Baker v. State*, 744 A.2d 864, 867-68 (Vt. 1999).

⁷¹ See, e.g., *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 644 (Mass. 2006) (Spina, J., concurring) (“When §§ 11 and 12 were enacted in 1913, same-sex marriage was not visible on the horizon of our jurisprudence, suggesting that the Legislature did not, in fact, promulgate these statutes for the express purpose of discriminating against same-sex couples.”); *Hernandez*, 855 N.E.2d at 20 (Grafano, J., concurring) (“Plaintiffs concede that the Domestic Relations Law was not enacted with an invidiously discriminatory intent—the Legislature did not craft the marriage laws for the purpose of disadvantaging gays and lesbians.”).

⁷² See *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1310-11 (W.D. Okla. 2006) (“Here, the Amendment was clearly targeted at preventing recognition of homosexual parents. Defendants’ briefs are replete with arguments demonstrating the Amendment targets homosexuals, and Defendants admit as undisputed Plaintiffs’ fact no. 13 which states the Amendment was intended to ‘protect Oklahoma children from being targeted for adoption by gay couples across the nation and to ensure that children

Examples include cases brought in the 2000s in states like California or Oklahoma that had enacted statutes and/or constitutional amendments prohibiting same-sex marriage or recognition of same-sex adoption.⁷³ Most states where same-sex marriage is no longer permitted fall into this category, and characterizing these laws as facially neutral should no longer pose an obstacle to bringing an equal protection challenge in such states.

With regard to the second response to arguments of facial neutrality, as indicated above the Court's decisions appear to have left open the possibility of bringing an equal protection challenge to an otherwise facially neutral law based on extreme evidence of discriminatory effect alone. Working from cases such as *Yick Wo* and *Gomillion*, the argument is that extreme discriminatory effects cannot be explained by anything other than discriminatory intent.⁷⁴ Or, to quote Justice Stevens concurring in *Davis*, "when the disproportion is as dramatic as in *Gomillion v. Lightfoot*, 364 U.S. 339, or *Yick Wo v. Hopkins*, 118 U.S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect."⁷⁵ Same-sex marriage, adoption, and benefits bans, however charitably framed and despite their theoretical application to heterosexuals, seem quite suitable for invoking the *Yick Wo-Gomillion* exception. However, the challenge for gay and lesbian plaintiffs in invoking the exception is the uncertainty over whether or not the exception truly exists, for the Court seems to have virtually limited those cases to their facts, typically invoking them merely as a foil to contrast with the more modest discriminatory effects in post-*Davis* cases.⁷⁶ However, if the exception does exist, no other modern-day equal protection challenge presents as "stark" a discriminatory effect, nor one that is more akin to the effects present in *Yick Wo* and *Gomillion*, as is seen in cases challenging laws prohibiting same-sex marriage and other same-sex conduct.

The third response is to challenge what can perhaps best be described as the "sophistry"⁷⁷ behind the contention that sexual orientation and same-

are raised in traditional family environments."), *aff'd in part, rev'd in part sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

⁷³ *Id.* at 1311.

⁷⁴ See Plaintiff-Appellees' Response Brief at 19, *Collins v. Diaz*, 656 F.3d 1008 (9th Cir. 2011) (No. 10-16797) ("[I]ntentional discrimination 'may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [group] than another.'" (alteration in original) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886))); Amicus Curiae Brief of Professor William N. Eskridge, Jr. in Support of Parties Challenging the Marriage Exclusion at 53, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) ("Because 'the impact' of the same-sex marriage exclusion 'falls virtually exclusively on gay men and lesbians,' this case is not materially different from *Yick Wo*." (citation omitted)).

⁷⁵ See *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

⁷⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 293 & n.12 (1987); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁷⁷ *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008).

sex conduct—such as the desire to marry or engage in sexual activity with someone of the same sex—are distinguishable. Ironically enough, this status-conduct divergence was actually a litigation strategy developed by *advocates* of gay rights. The strategy was born out of necessity, as a way of removing *Bowers* as an obstacle to challenging other types of laws discriminating against gays and lesbians. In response to a substantive due process challenge, *Bowers* upheld the constitutionality of Georgia's sodomy law as applied to sodomy between two people of the same-sex.⁷⁸ Although not decided on equal protection grounds, many lower courts viewed the decision as effectively foreclosing such a claim.⁷⁹ The solution was to create a doctrinal distinction between homosexual *conduct* and homosexual *status*.⁸⁰ By characterizing *Bowers* as a conduct case, gay rights advocates were able to contend that laws discriminating against people merely because they are gay are distinguishable, and thus subject to constitutional challenge, *Bowers* notwithstanding.⁸¹ Exemplary of this line of reasoning is the following excerpt from Judge Norris's concurring opinion in *Watkins v. United States Army*,⁸² involving a challenge to the military's then-existing ban on service by gays and lesbians:

[W]hile *Hardwick* does indeed hold that the due process clause provides no substantive privacy protection for acts of private homosexual sodomy, nothing in *Hardwick* suggests that the state may penalize gays merely for their sexual orientation. In other words, the class of persons involved in *Hardwick*—those who engage in homosexual sodomy—is not congruous with the class of persons targeted by the Army's regulations—those with a homosexual orientation. *Hardwick* was a "conduct" case; *Watkins*' is an "orientation" case.⁸³

⁷⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁷⁹ *See, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989) ("Although the Court analyzed the constitutionality of the statute on a due process rather than an equal protection basis, *Hardwick* nevertheless impacts on the scrutiny aspects under an equal protection analysis. The majority held that the Constitution confers no fundamental right upon homosexuals to engage in sodomy. If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result." (footnote omitted)); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.").

⁸⁰ *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617 (1993).

⁸¹ *See id.*; Jonathan Pickhardt, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 931 (1998).

⁸² 875 F.2d 699 (9th Cir. 1989) (en banc).

⁸³ *Id.* at 716-17 (Norris, J., concurring) (citation omitted).

With *Bowers* overruled by *Lawrence* and thus the need for status-conduct divergence eliminated as a strategic tool for advancing gay rights, advocates for same-sex marriage have contended, and courts have begun to accept, that status and conduct are indistinguishable in this context. Representative of this perspective is the California Supreme Court's decision in *In re Marriage Cases*:⁸⁴

By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender. A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation. In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation.⁸⁵

The *In re Marriage Cases* majority reinforced its conclusion by quoting an amicus brief by a group of mental health organizations explaining that sexual orientation is best thought of in *relational* rather than *individual* terms:

Sexual orientation is commonly discussed as a characteristic of the *individual*, like biological sex, gender identity, or age. This perspective is incomplete because sexual orientation is always defined in relational terms and necessarily involves relationships with other individuals. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is by acting—or desiring to act—with another person that individuals express their heterosexuality, homosexuality, or bisexuality. . . . Consequently, sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.⁸⁶

The artificial divide between status and conduct in the context of same-sex marriage becomes even more apparent if one seeks to apply it to interracial marriage. One might characterize those who fall in love and seek

⁸⁴ 183 P.3d 384 (Cal. 2008).

⁸⁵ *Id.* at 440-41 (footnote omitted); *accord* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 n.24 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009); *see also* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (noting that plaintiff's "desire to marry another woman arises only because she is a lesbian"); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) ("However, the legislation does confer advantages on the basis of sexual preference. Those who prefer relationships with people of the opposite sex and those who prefer relationships with people of the same sex are not treated alike, since only opposite-sex relationships may gain the status and benefits associated with marriage.").

⁸⁶ *In re Marriage Cases*, 183 P.3d at 441 n.59 (internal quotation marks omitted).

to marry someone of another race as “transracially oriented.”⁸⁷ Thus, the argument would go, bans on interracial marriage do not discriminate against the transracially oriented, because such individuals remain free to marry so long as they marry someone of the same race. Such laws, one could contend, are not about the “status” of being transracially oriented, but rather the “conduct” of seeking to marry someone of the same race.

For all of these reasons, the contention that laws prohibiting same-sex marriage or same-sex sodomy do not discriminate against gays and lesbians and are therefore facially neutral for equal protection purposes seems, in the words of one high court, “to blink at reality.”⁸⁸ On the contrary, it would seem obvious to most neutral observers that a law banning same-sex marriage or criminalizing same-sex sodomy is directed at gays and lesbians as a class.

D. *The Supreme Court Blinks at Reality*

Any argument that such laws are facially neutral might seem akin to making the argument that a law targeting pregnancy is in no way necessarily targeted at women as a class; or that a law targeting membership in an Indian tribe is in no way necessarily targeted at those who are racially or ethnically Native American. There is a problem with those analogies, however. In a pair of cases decided on the same day that foreshadowed the Court’s decision in *Washington v. Davis*, the U.S. Supreme Court held that, for equal protection purposes, such laws do not constitute sex or race discrimination, respectively.

1. *Geduldig v. Aiello* and the Pregnant-Nonpregnant Person Distinction

The first case, *Geduldig v. Aiello*,⁸⁹ drew what can best be described as a razor-thin line between pregnancy and sex discrimination for equal protection purposes. At issue in that case was the constitutionality of a disability insurance system administered by California.⁹⁰ Under California law, participation in the program was mandatory for all private sector employees in the state unless covered by an approved private plan.⁹¹ The plan excluded all pregnancy-related disability claims, provoking an equal protection chal-

⁸⁷ *Cf. id.* at 435 (noting that it would be unconstitutional to prohibit interracial marriage but permit interracial couples to instead enter into an alternative scheme entitled a “transracial union”).

⁸⁸ *Kerrigan*, 957 A.2d at 431 n.24.

⁸⁹ 417 U.S. 484 (1974).

⁹⁰ *Id.* at 486.

⁹¹ *Id.* at 487.

lunge that the exclusion constituted discrimination on the basis of sex.⁹² After concluding that the state's interest in excluding such claims had been to keep premiums low by excluding particularly expensive coverage risks,⁹³ the Court explained that there was no sex discrimination warranting heightened scrutiny:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.⁹⁴

In addition to finding that there was no facial sex discrimination, the Court also concluded that there was no discriminatory intent behind the law.⁹⁵

One might also view *Geduldig* as implicitly rejecting invocation of the *Yick Wo-Gomillion* exception, on the theory that pregnancy discrimination negatively impacts 100 percent of women, which is perhaps even starker than the pattern present in those two cases.⁹⁶ Yet that might be reading too much into *Geduldig*. After all, in *Yick Wo*, virtually all people of Chinese descent were negatively impacted by the administrative scheme, while virtually all people of non-Chinese descent benefited. Thus, there were no Chinese persons on the “winning” side of the ledger. In contrast, many nonpregnant women were on the winning side of the ledger in *Geduldig* to the extent they benefited from the lower premiums, a point emphasized by the *Geduldig* Court. Indeed, the Court's subsequent decision in *Feeney* seems to make much the same point with the veterans' preference at issue there, noting the presence of many men on the losing side of the ledger and at least some women on the winning side.⁹⁷

⁹² *Id.* at 489-90.

⁹³ *Id.* at 492-96.

⁹⁴ *Id.* at 496 n.20; *see also id.* at 496-97 (“There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”)

⁹⁵ *Geduldig*, 417 U.S. at 496.

⁹⁶ *See* William N. Eskridge, Jr., *America's Statutory “constitution,”* 41 U.C. DAVIS L. REV. 1, 39 n.175 (2007) (noting the inconsistency between *Geduldig* and *Yick Wo*).

⁹⁷ *See* *Pers. Adm'r v. Feeney*, 442 U.S. 256, 275 (1979) (“Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too

Two years after deciding *Geduldig*, and in the same year *Washington v. Davis* was decided, the Court reaffirmed its *Geduldig* holding and extended it to encompass statutory claims of sex discrimination under Title VII.⁹⁸ Two years later, in 1978, Congress overruled that decision by enacting the Pregnancy Discrimination Act (“PDA”), which amended the definition of the phrases “because of sex” and “on the basis of sex” as used in Title VII to include “because of or on the basis of pregnancy, childbirth, or related medical conditions.”⁹⁹ However, the Court’s equal protection holding in *Geduldig*—at least for now—remains good law.

2. *Morton v. Mancari* and the Racial-Political Indian Distinction

In *Morton v. Mancari*,¹⁰⁰ issued on the same day as *Geduldig*, the same majority of Justices that drew a distinction between laws targeting pregnancy and those targeting sex also drew a distinction between laws targeting the *ethnic or racial* status of being an Indian and those targeting the *political* status of membership in a federally recognized tribe. At issue in the case was an equal protection challenge to a federal statute and accompanying regulations that gave a hiring preference to “Indians.”¹⁰¹ The Court explained that only rational basis scrutiny applied because only the *political* status of being an Indian, not the ethnic or racial status of being one, was at play in the statutory and regulatory scheme:

Contrary to the characterization made by appellees, this preference does not constitute “racial discrimination.” Indeed, it is not even a “racial” preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be “an Inhabitant of that State for which he shall be chosen,” Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.¹⁰²

In a footnote, the Court elaborated on the distinction:

many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.”); *accord id.* at 281 (Stevens, J., concurring).

⁹⁸ See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133-40 (1976).

⁹⁹ See 42 U.S.C. § 2000e(k) (2006); *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp’t Opportunity Comm’n*, 462 U.S. 669, 676-80 (1983).

¹⁰⁰ 417 U.S. 535 (1974).

¹⁰¹ *Id.* at 537.

¹⁰² *Id.* at 553-54 (footnote omitted).

The preference is not directed towards a “racial” group consisting of “Indians”; instead, it applies only to members of “federally recognized” tribes. This operates to exclude many individuals who are racially to be classified as “Indians.” In this sense, the preference is political rather than racial in nature.¹⁰³

E. *Criticism and a Narrowing of Geduldig and Mancari*

Both the *Geduldig* and *Mancari* decisions are open to, and have been the subject of, intense and continuing criticism for what many view as the Court making artificial distinctions.¹⁰⁴ In both cases, although the Court can point to a non-suspect characteristic—pregnancy in *Geduldig* and tribal membership in *Mancari*—the group impacted is necessarily a subset of a suspect class.¹⁰⁵ Thus, while it is true that not *all* women get pregnant, *only* women can get pregnant, and thus the only people harmed by discrimination against those who are pregnant are women. Similarly, under the legal scheme at issue in *Mancari*, those who were politically Indian were a subset of those who are racially or ethnically Indian, since the regulations enacted to carry out the statutory preference for “Indians” provided that the preference was available only for those who were *both* “one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe.”¹⁰⁶ The criticisms of the reasoning pursued by the Court in *Geduldig* and *Mancari* are perhaps best summed up by a federal district court responding to similar reasoning pre-*Geduldig*:

[I]t might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; “If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind.”¹⁰⁷

Despite these sound criticisms, *Geduldig* and *Mancari* remain good law. Both cases present potentially significant obstacles to equal protection arguments that laws discriminate on the basis of sexual orientation whenever

¹⁰³ *Id.* at 553 n.24.

¹⁰⁴ See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 725 (2001).

¹⁰⁵ See generally *id.* at 725 n.152; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983-84 (1984); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 285 (1984); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 800-03 (1991).

¹⁰⁶ See *Mancari*, 417 U.S. at 553 n.24. The statute itself provides that:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Indian Reorganization Act, 25 U.S.C. § 472 (2006).

¹⁰⁷ *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1157 (W.D. Pa. 1974).

er they prohibit same-sex marriage, same-sex adoption, same-sex sexual activity, or the receipt of benefits for same-sex partners. To see how, start by accepting the disputed assertion that *only* gays and lesbians seek same-sex marriage, seek to adopt a child jointly with someone of the same sex, or seek benefits for a partner of the same-sex. Then assume that discrimination on the basis of sexual orientation is subject to heightened scrutiny—itsself an as yet undecided equal protection issue. Under *Geduldig* and *Mancari*, the fact that gays and lesbians are merely a subset of the class of people who could seek to engage in the conduct at issue might still immunize a statute from being deemed discriminatory on the basis of sexual orientation. After all, just as some women in *Geduldig* chose not to get pregnant, and just as in *Mancari* some people who are racially or ethnically Indian are not or choose not to be members of a Federally-recognized tribe, so too some gays and lesbians could choose not to marry, adopt children, engage in same-sex sexual activity, or seek benefits for a same-sex partner.

Returning to comparisons with interracial marriage, however, and taken to its logical extreme, this line of reasoning would suggest that *Loving v. Virginia*¹⁰⁸ should not have been treated as a case about race. True, the law impacted *some* racial minorities—those who chose to marry outside of their race—but this was merely a subset of the larger group of racial minorities, many of whom chose not to marry outside of their race (the law in *Loving* also impacted some *majority* whites who wished to marry outside of their race, a point whose relevance is taken up in Part II of this Article). As one commentator has put it:

Analogous categories include left-handed African-Americans, Asian-American citizens of California, and Latino government employees. True, the category does not include all members of a particular racial group, but then neither did the categories “black schoolchildren” in *Brown*, or “Japanese-American residents of the West Coast” in *Korematsu v. United States*, or “nonminority applicants to medical school” in *Bakke*. In all of these, the government had singled out individuals because of their race; it is irrelevant that other members of their race were not so singled out. If the government could discriminate against any given suspect group simply by subdividing the group with the aid of nonsuspect characteristics, the protection of the equal protection clause would quickly come to have little meaning. It cannot be, then, that the simple addition of a nonsuspect trait to a suspect one yields a nonsuspect class.¹⁰⁹

Indeed, it is perhaps because of these logical inconsistencies that, outside of *Mancari*, “the Court has never applied in any other situation *Geduldig*’s suggestion that a suspect classification could be rendered nonsuspect by the addition of a separate, nonsuspect criterion.”¹¹⁰

¹⁰⁸ 388 U.S. 1 (1967).

¹⁰⁹ See Williams, *supra* note 105, at 807 (footnotes omitted).

¹¹⁰ See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 571 n.151 (1996).

To date, the Court has not overruled either case, although four Justices recently signaled that they would vote to overrule what they described as *Geduldig*'s "Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon."¹¹¹ Moreover, the Supreme Court and lower federal courts have limited the potential reach of *Mancari* by applying strict scrutiny to laws that draw distinctions based purely on one's racial or ethnic Indian status, standing alone.¹¹² At the very least, the Court's more recent cases suggest that the Court would be unlikely to extend *Geduldig* or *Mancari* beyond their facts to encompass other things that can perhaps best be characterized as proxies for specific classes of persons.¹¹³

Before taking a closer look at those more recent cases, it is worth considering a hypothetical law that does not facially discriminate against someone for being "male" or "female." Rather, it draws distinctions based on whether a person has ovaries or testicles, or the presence or absence of a Y chromosome. Would that no longer be sex discrimination because the law, on its face, does not refer to sex? To some extent, this raises the question, what *is* sex?

This extreme example is distinguishable from the law at issue in *Geduldig*, in that *becoming* pregnant does not define what it means to be a woman. There are, of course, many people who are and remain women despite the fact that they never become pregnant. On the other hand, the multi-faceted definition¹¹⁴ of what it means to be a woman includes such factors as the presence of a Y chromosome and the presence of ovaries, thus making the hypothetical statute tantamount to facial sex discrimination.

What, then, about a law that discriminated not based on *actual* pregnancy, but rather on the *ability* or *capacity* to become pregnant, or to impregnate someone else? In the years immediately following *Geduldig*, one lower court distinguished *capacity* to become pregnant from pregnancy itself:

¹¹¹ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1344-47 & n.6 (2012) (Ginsburg, J., dissenting).

¹¹² See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (state violated Fifteenth Amendment by limiting class of voters for state trust to Native Hawaiians); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("Government discrimination against Indians based on race or national origin and not on membership or non-membership in tribal groups can be race discrimination subject to strict scrutiny."); *In re A.W.*, 741 N.W.2d 793, 807-10 (Iowa 2007) ("'Indian child' is a racial classification [and] . . . [c]lassifications based on race are 'presumptively invalid and can be upheld only upon an extraordinary justification.'"); see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03(2)(b) at 948-64 (2012 ed.) (discussing the tensions between political and racial aspects of the federal-tribal relationship).

¹¹³ See *infra* notes 115-130 and accompanying text.

¹¹⁴ Other factors include: internal morphologic sex (seminal vesicles/prostate versus vagina/uterus/fallopian tubes), external morphologic sex (genitalia), hormonal sex (predominance of androgens or estrogens), phenotypic sex (secondary sex characteristics, such as facial hair or breasts), and personal sexual identity. See *In re Heilig*, 816 A.2d 68, 73 (Md. 2003).

“[T]he ability to become pregnant” is simply not the classification in question. There is no benefit which is paid or denied to persons having or not having that ability. If there were such a distinction, if for example Narragansett had a different salary schedule for those who “had the capacity to become pregnant”, it would obviously be equivalent to sex discrimination. But that is not the situation before us. The classification is not “those with the capacity to become pregnant”; it is “those who are pregnant.” While the former defines a class which includes all women and excludes all men, and so is truly sex-based, the latter does not.¹¹⁵

Similarly, in 1991 the U.S. Supreme Court decided *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.*,¹¹⁶ a Title VII challenge to an employer’s policy of not hiring women *capable* of becoming pregnant. The stated reason for the policy was the potential risk to any child the employee might carry due to lead exposure.¹¹⁷ In holding that the policy violated Title VII, the Court made clear that the law was not facially sex neutral even without taking into account the amendments made by the PDA, and found that the Act only strengthened its conclusion:

The bias in Johnson Controls’ policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. . . . Respondent’s fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender. . . .

Nevertheless, the Court of Appeals assumed, as did the two appellate courts that already had confronted the issue, that sex-specific fetal-protection policies do not involve facial discrimination. These courts analyzed the policies as though they were facially neutral, and had only a discriminatory effect upon the employment opportunities of women. . . .

First, Johnson Controls’ policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees. . . . Johnson Controls’ policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.

Our conclusion is bolstered by the Pregnancy Discrimination Act (PDA) In its use of the words “capable of bearing children” in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.¹¹⁸

Although *Johnson Controls* was decided on statutory and not equal protection grounds, the Court’s decisions regarding sex discrimination under Title VII and the Equal Protection Clause sometimes cross-cite one another, as in

¹¹⁵ Narragansett Elec. Co. v. R.I. Comm’n for Human Rights, 374 A.2d 1022, 1025 (R.I. 1977).

¹¹⁶ 499 U.S. 187 (1991).

¹¹⁷ *Id.* at 191-92.

¹¹⁸ *Id.* at 197-99 (citations omitted); *see also* Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 332 (1993) (Stevens, J., dissenting) (“*Johnson Controls*, I had thought, signaled the Court’s recognition that classifications based on ability to become pregnant are necessarily discriminatory.”).

the Court's 1976 decision in *General Electric Co. v. Gilbert*,¹¹⁹ the case extending *Geduldig's* reasoning to Title VII.¹²⁰ *Johnson Controls* seems to suggest that a law targeting a trait that one can characterize as going to the essence of being male or female, such as capacity to get pregnant, would be treated as sex discrimination.

Dicta in two other cases decided by the Supreme Court also suggest the limited reach of the *Geduldig-Mancari* doctrine. First, in *Bray v. Alexandria Women's Health Clinic*,¹²¹ the Court acknowledged that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed."¹²² As an example, the Court stated that, for equal protection purposes, "[a] tax on wearing yarmulkes is a tax on Jews."¹²³

Second, in *Hernandez v. New York*,¹²⁴ the Supreme Court upheld as race-neutral a prosecutor's decision to exercise peremptory challenges to strike two prospective Latino jurors. The prosecutor contended that he struck the jurors not because they were Latino but because they spoke Spanish and did not indicate to the prosecutor's satisfaction that they would be able to defer to the court interpreter's translation of Spanish testimony into English.¹²⁵ The Court plurality rejected an argument that this constituted ethnicity discrimination, noting that the record demonstrated that the jurors were struck neither because they were Latino nor for their Spanish-language ability, and in turn accepted the prosecutor's justification.¹²⁶ However, the plurality left open the possibility that peremptory strikes made *solely* on the basis of a jurors' Spanish-language ability might constitute a proxy for race discrimination:

In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or

¹¹⁹ 429 U.S. 125, 133-34 (1976).

¹²⁰ *See id.* at 133-34.

¹²¹ 506 U.S. 263 (1993).

¹²² *Id.* at 270.

¹²³ *Id.*

¹²⁴ 500 U.S. 352 (1991) (plurality opinion).

¹²⁵ *Id.* at 356-57.

¹²⁶ *Id.* at 360.

the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.¹²⁷

This statement by the plurality prompted Justice O'Connor, joined by Justice Scalia, to pen a separate concurring opinion expressing the view that the plurality was blurring the line in *Davis* between discriminatory intent and discriminatory effect, and suggesting that the Court was softening the rigidity of that distinction.¹²⁸ Indeed, several lower courts have subsequently held that *Hernandez* can be interpreted to mean that discrimination based on language can be treated as a proxy for *intentional* race discrimination in an equal protection challenge,¹²⁹ or at the very least, that it remains an open question.¹³⁰

F. *Applying Johnson Controls, Bray, and Hernandez to Same-Sex Conduct Laws*

Together, *Johnson Controls*, *Bray*, and *Hernandez* provide strong support for the conclusion that laws targeting same-sex marriage, adoption, and the like should be treated as sexual orientation discrimination for equal protection purposes. First, *Johnson Controls* recognized that a law that does not directly target a class, but instead targets a trait that goes to the essence of what it means to be a member of that class, is to be treated as facially discriminatory.¹³¹ For its part, *Hernandez* recognizes much the same point with regard to ethnic minorities, indicating that targeting someone based on their proficiency in a given language may be treated as tantamount to facial discrimination on the basis of race.¹³² Finally, *Bray* holds that “[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed,” and states as an example that “[a] tax on wearing yarmulkes is a tax on Jews.”¹³³

Consider, then, a law that prohibits same-sex marriage, or same-sex sexual activity. Under *Bray*, could one not classify such activities as “such

¹²⁷ *Id.* at 371-72 (citations omitted).

¹²⁸ *Id.* at 372-73, 375 (O'Connor, J., concurring).

¹²⁹ See *In re Rodriguez*, 487 F.3d 1001, 1009 (6th Cir. 2007); *Sandoval v. Hagan*, 197 F.3d 484, 509 & n.26 (11th Cir. 1999), *rev'd on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001); *People v. Gonzales*, 165 Cal. Rptr. 4th 620, 628-31 (Ct. App. 2008); *Despio v. State*, 895 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 2005).

¹³⁰ See *Kikumura v. Turner*, 28 F.3d 592, 599-600 (7th Cir. 1994); *Rodriguez-Ramirez v. Helder*, No. 06-5062, 2007 WL 2752362, at *9 (W.D. Ark. Sept. 20, 2007).

¹³¹ See *supra* notes 116-118 and accompanying text.

¹³² See *supra* notes 124-127 and accompanying text.

¹³³ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

an irrational object of disfavor” that “happen to be engaged in exclusively or predominantly by a particular class of people,” namely gays and lesbians, such that “an intent to disfavor that class can readily be presumed”?¹³⁴ Similarly, under *Johnson Controls* and *Hernandez*, could one not contend that the desire or propensity to engage in same-sex sexual activity or to enter into a same-sex marriage goes to the essence of what it means to be gay or lesbian?

To be sure, sexual orientation is complex and multifaceted, and the desire to engage in these activities may not *alone* go to the essence of what it means to be gay or lesbian. Rather, sexual orientation is often defined as some combination of desire, behavior, and self-identification.¹³⁵ Yet, as indicated above, sex is likewise multifaceted, being about much more than merely the capacity to become pregnant. And of course, ethnicity is about much more than language proficiency.¹³⁶ Yet both *Johnson Controls* and *Hernandez* together suggest that something can be viewed as targeting a multifaceted class even if it targets only *one* definitional facet of that class. Accordingly, without even considering the Court’s more recent decisions in cases involving sexual orientation which are examined in Part V, there is strong support for treating laws targeting “same sex” conduct as tantamount to sexual orientation discrimination for equal protection purposes.

II. SEX DISCRIMINATION AND THE CHARYBDIS OF THE EQUAL APPLICATION THEORY

In *Pace v. Alabama*,¹³⁷ the U.S. Supreme Court endorsed what would later be referred to as the “equal application” theory.¹³⁸ At issue in *Pace* was the constitutionality of a statutory scheme whereby interracial fornication and adultery were punished more severely than fornication and adultery between people of the same race. In *Pace*, the Court reasoned that such a statutory scheme did not actually discriminate at all on the basis of race:

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama The one prescribes, generally, a punishment for an of-

¹³⁴ *Id.*

¹³⁵ See generally EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 283 (1994).

¹³⁶ See *Pemberthy v. Beyer*, 19 F.3d 857, 869-70 & n.16 (3d Cir. 1994) (noting that language is not *equal* to ethnicity, because it is “only one of many components of ethnicity.”); Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 *LAW & SEXUALITY* 195, 215 (1994) (identifying numerous facets of ethnicity, including traditions, real or imagined genetic differences, territoriality, economic basis, religion, aesthetic cultural patterns, language, a sense of community, and group allegiance).

¹³⁷ 106 U.S. 583 (1883), *overruled in part by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

¹³⁸ See *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *McLaughlin*, 379 U.S. at 191.

fense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. . . . Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.¹³⁹

Given *Pace*, the Court's decision in *Plessy v. Ferguson*¹⁴⁰ thirteen years later—which upheld a Louisiana law requiring white and “colored” persons to ride in separate train cars—is unsurprising. *Plessy* formally ushered in the era of “separate but equal,” which was relied upon to justify segregation in all aspects of public life until 1954, when the U.S. Supreme Court held in *Brown v. Board of Education*¹⁴¹ that segregated schools violated the Equal Protection Clause, concluding that “in the field of public education the doctrine of ‘separate but equal’ has no place.”¹⁴²

Two post-*Brown* decisions, both involving laws containing race-based classifications, addressed the continued vitality of *Pace*'s “equal application” theory. The first case, *McLaughlin v. Florida*,¹⁴³ involved a Florida law similar to that at issue in *Pace* itself. The Florida law criminalized cohabitation by unmarried persons, but only if one was “white” and the other “negro” (a separate state law prohibited interracial marriage, but no challenge to that law was raised in the case).¹⁴⁴ The Florida Supreme Court relied on *Pace* and upheld an equal protection challenge to the law.¹⁴⁵ In reversing and declaring the Florida law unconstitutional, the U.S. Supreme Court wrote:

In this situation, *Pace v. Alabama* is relied upon as controlling authority. In our view, however, *Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. . . .

Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what *Pace* ignored and what must be faced here.¹⁴⁶

McLaughlin paved the way for the Court's decision three years later in *Loving v. Virginia*, declaring Virginia's law criminalizing interracial mar-

¹³⁹ *Pace*, 106 U.S. at 585.

¹⁴⁰ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁴¹ 347 U.S. 483 (1954).

¹⁴² *Id.* at 495.

¹⁴³ 379 U.S. 184 (1964).

¹⁴⁴ *Id.* at 184.

¹⁴⁵ *See* *McLaughlin v. State*, 153 So. 2d 1, 2-3 (Fla. 1963), *rev'd*, 379 U.S. 184.

¹⁴⁶ *McLaughlin*, 379 U.S. at 188, 191 (citation omitted).

riage unconstitutional. In *Loving*, the State of Virginia invoked *Pace* and the Court again rejected its application:

[T]he State argues that the meaning of the Equal Protection Clause . . . is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. 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. . . .

. . . .
The State finds support for its “equal application” theory in the decision of the Court in *Pace v. Alabama*, 106 U.S. 583 (1883). . . . However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated “*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.” *McLaughlin v. Florida*, 379 U.S. at 188. . . .

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.¹⁴⁷

A. *Applying the Loving Analogy to Same-Sex Conduct Laws*

Given what would appear to be *Loving*’s clear rejection of *Pace*’s “equal application” theory of equal protection doctrine, it is no surprise that advocates of same-sex marriage would invoke *Loving* as a basis for applying intermediate scrutiny to laws prohibiting same-sex marriage, sodomy, adoption, and the like, arguing that such laws draw facial distinctions on the basis of sex. Just as “equal application” of the ban to all races in *McLaughlin* and *Loving* did not insulate the laws in question from being treated as drawing race-based classifications subject to strict scrutiny, so the “equal application” of laws banning same-sex marriage, sodomy, adoption, and the like to both men and women does not insulate them from being treated as drawing sex-based classifications subject to intermediate scrutiny.

In the first wave of judicial challenges to laws prohibiting same-sex marriage, this sort of analogy to *Loving* was dispensed with rather summarily or ignored altogether,¹⁴⁸ but that is not particularly significant given the state of equal protection jurisprudence at the time the challenges were brought. These cases were adjudicated in the early 1970s, at a time when the U.S. Supreme Court was still formally applying only rational basis review to sex-based classifications under the Equal Protection Clause.¹⁴⁹ Not until 1973 did a plurality of the U.S. Supreme Court indicate that heightened scrutiny applied to sex-based classifications,¹⁵⁰ and not until 1976 did

¹⁴⁷ *Loving v. Virginia*, 388 U.S. 1, 7-8, 10-11 (1967).

¹⁴⁸ See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974).

¹⁴⁹ See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

¹⁵⁰ See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

a majority of the Court endorse that conclusion.¹⁵¹ Thus, the *Loving* analogy would have done little to advance the cause of the challengers to early same-sex marriage laws, since even if characterized as drawing sex-based classifications the laws would only have been subject to rational basis review.

Yet by the 1990s, when the second wave of judicial challenges to laws prohibiting same-sex marriage began, intermediate scrutiny for sex-based classifications was firmly established and made the *Loving* argument far more potent. As a result of these doctrinal developments, in the 1993 case of *Baehr v. Lewin* the Supreme Court of Hawaii became the first court to declare a state law prohibiting same-sex marriage unconstitutional on equal protection grounds. The court characterized the law at issue as drawing a sex-based classification and therefore subject to heightened scrutiny. In drawing that conclusion, the *Baehr* court quoted the language excerpted above from *Loving* and held that “[s]ubstitution of ‘sex’ for ‘race’ . . . yields the precise case before us together with the conclusion that we have reached.”¹⁵²

Concurring opinions in two other second wave decisions in Vermont and Massachusetts likewise relied on the *Loving* analogy in determining that such laws contained sex-based classifications subject to heightened scrutiny. In *Baker v. State*,¹⁵³ Justice Johnson of the Vermont Supreme Court provided a specific example to demonstrate the sex discrimination inherent in the law:

[C]onsider the following example. Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. 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.¹⁵⁴

Justice Greaney of the Massachusetts Supreme Judicial Court provided a similar example concurring in *Goodridge v. Department of Public Health*.¹⁵⁵ Yet despite the “creative”¹⁵⁶ and at least “superficially attractive”¹⁵⁷ analogy between the anti-miscegenation laws at issue in *Loving* and

¹⁵¹ See *Craig v. Boren*, 429 U.S. 190, 208-09 (1976).

¹⁵² 852 P.2d 44, 68 (Haw. 1993).

¹⁵³ 744 A.2d 864 (Vt. 1999).

¹⁵⁴ *Id.* at 906 (Johnson, J., concurring in part and dissenting in part). To emphasize her point, Justice Johnson indicated that to hold otherwise would mean that “a statute that required courts to give custody of male children to fathers and female children to mothers would not be sex discrimination” since both sexes are treated equally as a group. *Id.* at 906 n.10.

¹⁵⁵ 798 N.E.2d 941, 970-71 (Mass. 2003) (Greaney, J., concurring).

¹⁵⁶ See *Lawrence v. State*, 41 S.W.3d 349, 365 (Tex. App. 2001) (en banc) (Fowler, J., concurring), *rev'd on other grounds sub nom. Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁵⁷ *Goodridge*, 798 N.E.2d at 992 n.13 (Cordy, J., dissenting).

laws prohibiting same-sex marriage, the *Loving* analogy for treating such laws as sex-based classifications has been rejected in every subsequent challenge, even by courts that otherwise declare the laws constitutionally infirm on some other basis.

In distinguishing *Loving*, most judicial opinions note the *Loving* Court's indication that the statute at issue did not, in fact, treat all of the races equally. Rather, as the *Loving* Court indicated, "[w]hile Virginia prohibits whites from marrying any nonwhite . . . Negroes, Orientals, and any other racial class may intermarry without statutory interference."¹⁵⁸ These judicial opinions then draw attention to the following passage in *Loving*: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."¹⁵⁹ These courts thus conclude that the evil involved in *Loving* was not the equal application to different races, but rather a combination of the fact that the application was not, in fact, equal as well as the fact that the classifications were motivated by "White Supremacy." Thus, these courts conclude, in the absence of evidence that the bans on same-sex marriage were motivated by notions of male or female superiority akin to the notions of "White Supremacy" underlying the anti-miscegenation statutes, the *Loving* analogy does not hold¹⁶⁰ and such laws are appropriately characterized as facially neutral so far as sex is concerned.¹⁶¹

¹⁵⁸ *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967).

¹⁵⁹ *Id.* at 11.

¹⁶⁰ See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) ("The laws at issue here are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived. . . . Here, there is no indication of any intent to maintain any notion of male or female superiority. . . . In *Loving*, the elements of the disability were different as between Caucasians and non-Caucasians, whereas here, the burden on men and women is the same. The distinction might be gender based if only women could marry a person of the same sex, or if only women could marry a transgendered person, or if the restriction included some other asymmetry between the burdens placed on men and the burdens placed on women."); *In re Marriage Cases*, 183 P.3d 384, 437 (Cal. 2008) ("The decisions in *Perez* and *Loving v. Virginia*, however, are clearly distinguishable from this case, because the antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in *Perez*) 'the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.'" (citations omitted)); *Conaway v. Deane*, 932 A.2d 571, 600-02 (Md. 2007) ("The Supreme Court was able to see beyond the superficial neutrality of the legislative enactment, however, and determined that '[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.' Thus, the Court in *Loving* determined that, although the statute applied on its face equally to all races, the underlying purpose was to sustain White Supremacy and to subordinate African-Americans and other non-Caucasians as a class. The reasoning behind this conclusion was based, at least in part, on the fact that '[w]hile Virginia prohibits whites from marrying any nonwhite . . . , Negroes, Orientals, and any other racial class may intermarry without statutory interference.' . . . Absent some showing that Family Law § 2-201 was

B. *Resurrecting the Ghost of Pace v. Alabama*

There are several problems with this method of distinguishing *Loving*. First, the rejection of *Pace*'s "equal application" theory first appeared three years before *Loving* in *McLaughlin*, which made no reference to "White Supremacy."¹⁶² One court has acknowledged that in *McLaughlin*, the Court "did not hold expressly that the latent purpose behind the cohabitation statute at issue was based on White Supremacy," but nonetheless characterizes the *McLaughlin* Court's reasoning as "exceedingly similar to that employed

'designed to subordinate either men to women or women to men as a class,' we find the analogy to *Loving* inapposite. Because there is no evidence in the record before us that the Legislature intended with Family Law § 2-201 to differentiate between men and women as classes on the basis of some misconception regarding gender roles in our society, we conclude that the [Maryland Equal Rights Amendment] does not mandate that the State recognize same-sex marriage based on the analogy to *Loving*." (alterations in original) (citations omitted)); *Goodridge*, 798 N.E.2d at 992 (Cordy, J., dissenting) ("Of course, a statute that on its face treats protected groups equally may still harm, stigmatize, or advantage one over the other. Such was the circumstance in *Loving v. Virginia* While the statute purported to apply equally to whites and nonwhites, the Court found that it was intended and structured to favor one race (white) and disfavor all others (nonwhites). The statute's legislative history demonstrated that its purpose was not merely to punish interracial marriage, but to do so for the sole benefit of the white race. As the Supreme Court readily concluded, the Virginia law was 'designed to maintain White Supremacy.' . . . By contrast, here there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage men or women in particular. Moreover, no one has identified any harm, burden, disadvantage, or advantage accruing to either gender as a consequence of the Massachusetts marriage statute." (citations omitted)); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) ("This is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class."); *id.* at 19-20 (Grafano, J., concurring) ("Plaintiffs cite *Loving* for the proposition that a statute can discriminate even if it treats both classes identically. This misconstrues the *Loving* analysis because the antimiscegenation statute did not treat blacks and whites identically—it restricted who whites could marry (but did not restrict intermarriage between non-whites) for the purpose of promoting white supremacy. Virginia's antimiscegenation statute was the quintessential example of invidious racial discrimination as it was intended to advantage one race and disadvantage all others, which is why the Supreme Court applied strict scrutiny and struck it down as violating the core interest of the Equal Protection Clause. In contrast, neither men nor women are disproportionately disadvantaged or burdened by the fact that New York's Domestic Relations Law allows only opposite-sex couples to marry—both genders are treated precisely the same way. As such, there is no gender classification triggering intermediate scrutiny."); *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) ("Although the concurring and dissenting opinion invokes the United States Supreme Court decision in *Loving v. Virginia*, the reliance is misplaced. There the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy." (citations omitted)).

¹⁶¹ See, e.g., *Sevcik*, 911 F. Supp. 2d at 1005; *Conaway*, 932 A.2d at 601-02; *Baker*, 744 A.2d at 880 n.13.

¹⁶² See *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); see also *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 876 (C.D. Cal. 2005), *aff'd in part, vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006).

in *Loving*.”¹⁶³ The reasoning of the two cases is indeed “exceedingly similar,” but that does not change the fact that the *McLaughlin* Court nowhere made reference to the possibility that the law in question was motivated by notions of racial superiority.

Second, and perhaps more significantly, this method of distinguishing *Loving* ignores the full context of a footnote in which the *Loving* Court noted the lack of even-handedness of the Virginia statute. In full, the footnote reads as follows:

Appellants point out that the State’s concern in these statutes, as expressed in the words of the 1924 Act’s title, “An Act to Preserve Racial Integrity,” extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia’s miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve “racial integrity.” *We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the “integrity” of all races.*¹⁶⁴

Reading this footnote in context, it is apparent that the Court mentioned the “White Supremacy” and lack of evenhandedness as aspects of the law that would confound the statute’s constitutional infirmity,¹⁶⁵ rather than being necessary to the decision.¹⁶⁶ Indeed, a logical corollary of distinguishing *Loving* on the basis of “White Supremacy” would seem to be that anti-miscegenation laws could be resurrected and would be constitutionally permissible,¹⁶⁷ at least so long as they were even-handed in both intent and effect.

¹⁶³ *Conaway*, 932 A.2d at 601 n.30.

¹⁶⁴ *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967) (emphasis added).

¹⁶⁵ *Cf. Romer v. Evans*, 517 U.S. 620, 630 (1996) (“If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we.”).

¹⁶⁶ *See Smelt*, 374 F. Supp. 2d at 876 (C.D. Cal. 2005) (“Defendants contend *Loving* is not controlling because the *Loving* Court recognized the true discriminatory purpose behind the anti-miscegenation laws was to ‘maintain White Supremacy.’ Here, Defendants argue, the purpose of DOMA is not to elevate one sex over the other. This Court cannot accept this ‘lack of discriminatory intent’ argument. First, *Loving* stated the laws’ discriminatory intent was not essential to its holding: ‘[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.’” (alteration in original) (citation omitted) (quoting *Loving*, 388 U.S. at 11 & n.11)), *aff’d in part, vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Conaway*, 932 A.2d at 685 (Battaglia, J., dissenting) (“The Court reached its holding independently of the issue of discriminatory intent, however, ‘find[ing] the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the “integrity” of all races.’ Clearly, the Court found no legitimate purpose in the racial classifications themselves, regardless of the proffered justification.” (alteration in original) (citation omitted)).

¹⁶⁷ *See Lawrence v. State*, 41 S.W.3d 349, 370 (Tex. App. 2001) (en banc) (Anderson, J., dissenting) (“[I]f 21.06 does not contain a sex-based classification because it applies equally to men and wom-

A third problem with distinguishing *Loving* on the basis of racial superiority is that doing so is inconsistent with numerous post-*Loving* decisions by the U.S. Supreme Court involving laws that could fairly be described as containing even-handed racial classifications that were clearly not grounded in “White Supremacy.” For example, in *Powers v. Ohio*,¹⁶⁸ the Supreme Court rejected an argument that race-based peremptory challenges by prosecutors should not be subject to strict scrutiny since jurors of all races are equally subject to being challenged based on their race:

We reject as well the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving v. Virginia*, 388 U.S. 1 (1967).¹⁶⁹

Similarly, in *Johnson v. California*,¹⁷⁰ the U.S. Supreme Court considered the constitutionality of a California Department of Corrections (“CDC”) policy segregating all new prisoners by race for their first 60 days of imprisonment. The rationale for the policy was to prevent interracial violence between members of rival race-based gangs, and the 60-day period was used to determine whether a prisoner might pose a danger to others.¹⁷¹ The Court once again rejected an argument that strict scrutiny should not apply because the law was neutral:

The CDC claims that its policy should be exempt from our categorical rule because it is “neutral”—that is, it “neither benefits nor burdens one group or individual more than any other group or individual.” In other words, strict scrutiny should not apply because all prisoners are “equally” segregated. The CDC’s argument ignores our repeated command that “racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.” Indeed, we rejected the notion that separate can ever be equal—or “neutral”—50 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), and we refuse to resurrect it today.¹⁷²

Indeed, as a more general matter, a focus on the invidious purpose behind the anti-miscegenation law at issue in *Loving* (and, by extension, the

en, then the anti-miscegenation statutes in *Loving* did not contain a race-based classification, with the logical corollary that *Loving* was wrongly decided.”), *rev’d on other grounds*, 539 U.S. 558 (2003).

¹⁶⁸ 499 U.S. 400 (1991).

¹⁶⁹ *Id.* at 410.

¹⁷⁰ 543 U.S. 499 (2005).

¹⁷¹ *Id.* at 502-03.

¹⁷² *Id.* at 506 (citations omitted); *see also* Hernandez v. Robles, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting) (applying the *Loving* analogy to a law prohibiting same-sex marriage and citing *Johnson* in support of that conclusion).

same-sex marriage cases) is inconsistent with the Court's affirmative action cases, in which the Court has repeatedly rejected the argument that the level of scrutiny to be applied to facially discriminatory racial classifications should vary depending upon the benign or invidious purpose behind the law at issue.¹⁷³

The fourth and final problem with using purpose to distinguish *Loving* is that its focus on men and women being treated equally as groups is less consistent with modern U.S. Supreme Court equal protection precedent than focusing on discrimination experienced by an *individual* who wishes to marry a particular person but is denied the right to do so solely because of sex. In modern cases applying strict scrutiny to race-based affirmative action programs, the Court has repeatedly emphasized that equal protection principles are designed to protect *individuals*, not *groups*, and thus when government classifies an individual on the basis of race—such as a white applicant denied the benefit of a race-based affirmative action program—that *individual* is entitled to demand that the classification be subject to strict scrutiny review.¹⁷⁴

As a separate basis for distinguishing *Loving*, at least one jurist has held that the *Loving* analogy should be rejected because it arose in the context of race-based classifications, while laws prohibiting same-sex marriage instead involve sex classifications. Specifically, the court noted that, “To date, the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently. Supreme Court precedent has only found sex-based classifications in laws that have a disparate impact on one sex or the other. This case is not in that category.”¹⁷⁵

It is true, of course, that race-based and sex-based classifications *are* different so far as the Equal Protection Clause is concerned, with the former being subject to strict scrutiny and the latter being subject to intermediate scrutiny. But aside from the difference in the level of scrutiny, the Court has not applied a different set of equal protection principles to cases involving race and those involving sex, and indeed has frequently extended cases involving racial classifications to cases involving sex classifications, noting

¹⁷³ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

¹⁷⁴ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742-43 (2007); *Grutter*, 539 U.S. at 326; *Peña*, 515 U.S. at 227; see also *Andersen v. King Cnty.*, 138 P.3d 963, 1039 (Wash. 2006) (Bridge, J., dissenting) (“The *Loving* Court recognized the individual character of the freedom at stake: ‘[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.’ . . . In every instance where a man is denied the ability to marry the man of his choice, but a woman is not, that man bears a burden that the woman does not.” (citations omitted)).

¹⁷⁵ *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 876-77 (C.D. Cal. 2005) (internal citation omitted), *aff'd in part, vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006).

that the former are “premised on equal protection principles that apply equally to gender discrimination.”¹⁷⁶

In sum, the repeated resurrection of what can only be described as the ghost of *Pace v. Alabama* in cases challenging bans on same-sex marriage is inconsistent with the U.S. Supreme Court’s modern equal protection precedents. The Court has clearly, and repeatedly, rejected the idea that “equal application” of a law using suspect lines insulates it from heightened scrutiny; that the level of scrutiny varies depending upon the benign or invidious purpose behind a facially discriminatory law; that the proper focus should be on group rather than individual equality; or that race-based and sex-based classifications are treated any differently, save for the difference in the level of scrutiny. In contrast to recent cases upholding same-sex marriage prohibitions as lacking an invidious purpose discriminating against men or women generally, lower courts would be conforming to U.S. Supreme Court precedent by treating bans on same-sex marriage, adoption, benefits, or conduct as sex discrimination against individuals and assessing their constitutionality as such.

C. *Why the Court Might Nonetheless Avoid the Loving Analogy*

In spite of strong doctrinal arguments in favor of treating laws that target same-sex conduct as a subset of sex discrimination, there are two pragmatic reasons why the U.S. Supreme Court might be reluctant to follow that path and would instead choose to characterize such laws as discriminating on the basis of sexual orientation.

First, and as implied above, the Court might wish to independently determine the appropriate level of judicial scrutiny for laws that discriminate on the basis of sexual orientation. One reason for wanting to do so is a belief that sex and sexual orientation are truly distinct, such that government might sometimes be justified in drawing distinctions on one of those bases but not the other, and treating sexual orientation as a subset of sex discrimination would prevent the Court from easily drawing such distinctions in future cases.

A second reason for treating such laws as discriminating on the basis of sexual orientation, and independently determining the appropriate level of judicial scrutiny to apply, is to make that level of scrutiny available in future cases in which the laws at issue target sexual orientation directly (as in the *Romer* case) and therefore cannot accurately be characterized as discriminating on the basis of sex.

Third, the *Loving* analogy, while appealing and doctrinally defensible, would require the Court to clearly and definitively extend its rejection of the equal application theory outside the realm of race discrimination. This is

¹⁷⁶ J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 128 (1994).

a step the Court might be unwilling to take for fear of any unintended consequences that such a decision might have for other laws involving separating the sexes. For example, the Court has not yet resolved the constitutionality of single-sex public education¹⁷⁷ and may, at some point, want to be able to uphold the practice by relying upon the “equal application” theory.¹⁷⁸

III. A THIRD PATH: COUPLES-BASED FRAMING

The *In re Marriage Cases* discussion examined in Part I regarding the relational rather than individual nature of sexual orientation suggests an alternative method of framing same-sex marriage cases. Raising a consideration separate from the issue of sex or sexual orientation discrimination, under this approach the correct focus is on the *couple* rather than the individual. Same-sex marriage cases, so the argument goes, should compare the treatment of same-sex couples on the one hand to opposite-sex couples on the other.

This alternative method of framing is the approach taken by the Vermont and Massachusetts high courts when addressing the constitutionality of state laws excluding same-sex couples from marriage. Thus, for example, the Massachusetts Supreme Judicial Court explained:

We use the terms “same sex” and “opposite sex” when characterizing the couples in question, because these terms are more accurate in this context than the terms “homosexual” or “heterosexual,” although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex.¹⁷⁹

This method of framing equal protection challenges to laws denying rights to same-sex couples has also been used recently—at least in part—by two federal courts of appeals. In *Diaz v. Brewer*,¹⁸⁰ the Ninth Circuit had before it a challenge to an Arizona law making benefits available only for the spouses of public employees and—when considered in light of the state’s prohibition on same-sex marriage—thus treating same-sex and op-

¹⁷⁷ See *United States v. Virginia*, 518 U.S. 515, 534 n.7 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 n.1 (1982).

¹⁷⁸ Alternatively, the Court could reject the equal application theory but nonetheless conclude that such a law satisfies intermediate scrutiny.

¹⁷⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 953 n.11 (Mass. 2003); see also *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999) (“The first step in our analysis is to identify the nature of the statutory classification. As noted, the marriage statutes apply expressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex.”).

¹⁸⁰ 656 F.3d 1008 (9th Cir. 2011).

posite-sex couples differently.¹⁸¹ In striking the law down, the Ninth Circuit did not focus *at all* on sexual orientation, addressing instead the differential treatment of same-sex and opposite-sex couples and finding the resulting discrimination to be irrational.¹⁸²

In *Windsor v. United States*,¹⁸³ the Second Circuit engaged in a hybrid analysis that focused in part on the sexual orientation of the individuals and in part on their status as part of a same-sex couple when considering a challenge to DOMA. In deciding whether or not to apply heightened scrutiny to a law discriminating on the basis of sexual orientation, the court had to assess one of the factors that the U.S. Supreme Court has identified for according a classification heightened scrutiny: the discreteness or visibility of the trait associated with the classification.¹⁸⁴ In concluding that intermediate scrutiny was the appropriate level of scrutiny to apply to DOMA, the *Windsor* court concluded that a focus on same-sex *couples* rather than homosexual *individuals* made it easier to characterize sexual orientation as a “discrete” or visible characteristic akin to sex or race, reasoning as follows:

The class affected by Section 3 of DOMA is composed entirely of persons of the same sex who have married each other. Such persons constitute a subset of the larger category of homosexuals; . . . there is nothing amorphous, capricious, or tentative about their sexual orientation. Married same-sex couples like Windsor and Spyer are the population most visible to the law, and they are foremost in mind when reviewing DOMA’s constitutionality.

We therefore conclude that sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals.¹⁸⁵

There is a clear advantage to framing same-sex marriage laws as discriminating against same-sex couples. Doing so eliminates the argument that such laws—when characterized as sexual orientation discrimination—are facially neutral, since under these laws the facial discrimination against same-sex couples is apparent (subject to one caveat considered *supra* in Part IV).

At first glance, this focus on couples as opposed to individuals seems inconsistent with the Court’s repeated admonishment that the Equal Protection Clause protects individuals, not groups.¹⁸⁶ Yet to frame the issue as one involving the rights of a *couple* is not the same as framing something as a *group* right. What the Court meant by its admonishment is that the Equal Protection Clause is there to protect all individuals—whether they be members of a minority group such as African Americans or members of a major-

¹⁸¹ *Id.* at 1010.

¹⁸² *Id.* at 1014-15.

¹⁸³ 699 F.3d 169 (2d Cir. 2012), *aff’d on other grounds*, 133 S. Ct. 2675 (2013).

¹⁸⁴ See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

¹⁸⁵ *Windsor*, 699 F.3d at 184 (citation omitted).

¹⁸⁶ See *supra* note 174 and accompanying text .

ity group such as whites—from racial discrimination, rather than only protecting members of minority groups from such discrimination.

A more significant concern is the extent to which switching the focus from gay and lesbian individuals to same-sex couples affects the question of whether heightened scrutiny is appropriate under the Equal Protection Clause. One of the other factors that the U.S. Supreme Court has identified for determining whether to apply heightened scrutiny to a given classification is whether the trait at issue can be characterized as “immutable.”¹⁸⁷ While one’s sexual orientation could fairly be characterized as immutable, is it fair to similarly characterize the act of forming a same-sex union, which is more volitional in nature?

To be sure, as the Second Circuit noted in *Windsor*, many of the other classifications for which the Court has recognized heightened scrutiny—alienage, illegitimacy, and national origin—involve characteristics that do not become apparent until the individuals undertake a volitional act that makes the trait visible.¹⁸⁸ Yet the Second Circuit in *Windsor*, unlike the Vermont and Massachusetts high courts and the Ninth Circuit in *Diaz*, did not engage in *pure* couples-based framing. Instead, it characterized same-sex couples as “a subset of the larger category of homosexuals,” and drew an analogy between alienage, illegitimacy, and national origin—all individual traits—on the one hand and *sexual orientation*—also an individual trait—on the other. In effect, then, the *Windsor* court did not actually perceive the statute as facially neutral as to sexual orientation. Instead, it viewed the statute as facially targeting a subset of homosexuals and considered the act of coupling as merely a volitional act that brought that underlying individual trait to light. The Second Circuit’s approach in *Windsor* is therefore fundamentally different from that of the Vermont and Massachusetts high courts and the Ninth Circuit in *Diaz*. There, the courts recognized same-sex couples but without recognizing any underlying immutable individual trait of sexual orientation. This latter approach makes it difficult to classify the act of coupling as immutable because choosing to be part of a same-sex couple is volitional in nature and thus might make it harder to persuade a court to apply heightened scrutiny on the basis of such a classification. Accordingly, while pure couples-based framing can help to overcome a defense that a law targeting same-sex conduct is facially neutral for equal protection purposes, asserting an equal protection claim around a couples-based approach may mean that the best a challenger can hope for is rational basis scrutiny. Obtaining heightened equal protection scrutiny likely requires that challengers characterize a law as targeted at sex or sexual orientation, or by means of a hybrid approach akin to that employed by the Second Circuit in *Windsor*. Thus, pure couples-based framing is best used only in those circumstances in which a court is unwilling to accept charac-

¹⁸⁷ See *Lyng*, 477 U.S. at 638; *Frontiero*, 411 U.S. at 686 (plurality opinion).

¹⁸⁸ See *Windsor*, 699 F.3d at 183-84.

terization of a same-sex-conduct law as drawing distinctions on the basis of sex or sexual orientation, and where rational basis review alone is sufficient to prevail.

IV. CROSS-REFERENCING AND THE RELEVANCE OF BEING AN ADDITIONAL STEP REMOVED

As indicated in the Introduction, there exists a category of laws which I have described as cross-referenced same-sex-conduct laws and which requires separate consideration. Such laws on their face make no mention whatsoever of sexual orientation and also do not—on their face—refer to same-sex couples. Thus, at least as a matter of first impression, such laws might be deemed as not facially discriminatory against same-sex couples, thus making it impossible for a court to follow even the alternative path described in Part III. Two statutes currently being challenged in the lower courts—one from Arizona and the other from Michigan—illustrate this problem.

The Arizona law provides that health benefits can only be provided to the children or “spouse” of public employees, and it is only when considered in conjunction with the state’s constitutional ban on same-sex marriage that the discriminatory impact on same-sex couples (and by extension, gay and lesbian persons) becomes apparent.¹⁸⁹ The Michigan law provides that health benefits can only be provided to those who are married to, a dependent of,¹⁹⁰ or otherwise eligible to inherit from a public employee under the state’s law of intestate succession.¹⁹¹ It is only by reference to other laws—including the state’s ban on same-sex marriage—that the discrimination becomes evident.¹⁹²

After a federal district court struck down the Arizona scheme on equal protection grounds, the state appealed.¹⁹³ In defending its law against an equal protection challenge, the State of Arizona contended that the law is facially neutral not only with regard to sexual orientation discrimination but also with the regard to the type of coupling involved:

Section O, despite the district court’s repeated assertions, does not distinguish between employees based on whether they are in a same-sex or opposite-sex relationship or, for that matter, whether they identify as heterosexual or homosexual. Rather, Section O distinguishes between married and unmarried employees, by affording benefits to an employee’s marital spouse but not an employee’s nonmarital partner. Simply put, Section O cares not about an

¹⁸⁹ See *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011).

¹⁹⁰ As defined by the Internal Revenue Code of 1986, I.R.C. §152 (1986).

¹⁹¹ See MICH. COMP. LAW SERV. § 15.583 (LexisNexis 2007).

¹⁹² *Supra* note 22.

¹⁹³ See *Collins v. Brewer*, 727 F. Supp. 2d 797, 814 (D. Ariz. 2010).

employee's sexual orientation or the sex of his or her partner; its distribution of benefits depends solely on an employee's marital status.¹⁹⁴

The Ninth Circuit, however, was unwilling to view the challenged statute stripped of its context: "Since in this case eligibility was limited to married couples, different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so. The Arizona Constitution, however, prohibits same-sex couples from doing so."¹⁹⁵

Similarly, a federal district court adjudicating the constitutionality of Michigan's law looked at the challenged law in full context:

Although the act does not use the term "sexual orientation," it both explicitly incorporates statutes that draw classifications based on sexual orientation and renders access to benefits legally impossible only for gay and lesbian couples. The Act incorporates the definitions in the Michigan marriage amendment and the intestacy statute. Both of those laws distinguish between opposite-sex couples, who are permitted to marry and can inherit under intestacy, and same-sex couples, who cannot.¹⁹⁶

This willingness to look beyond the four corners of a law to determine whether or not it is facially neutral or facially discriminatory is necessary if the guarantee of equal protection is to have any meaning. Surely a state cannot avoid equal protection scrutiny by writing a statute in a way that makes it appear to be facially neutral while nevertheless incorporating by reference other provisions that are facially discriminatory. In other words, when a statute incorporates by reference other provisions, the act of cross-referencing makes the latter part and parcel of the former.

The U.S. Supreme Court's precedents support this willingness to look beyond the four corners of a statute. In cases decided under the Fifteenth Amendment—which, like the equal protection guarantee of the Fourteenth Amendment, has been interpreted to have a discriminatory purpose requirement¹⁹⁷—the Court has been willing to dig beyond the face of a law to determine whether discriminatory intent exists. In those cases, in which the face of the challenged laws was neutral on race, the Court emphasized that the "[Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."¹⁹⁸ Moreover, in subsequent cases, the Court has cited these Fifteenth Amendment cases in support of the proposi-

¹⁹⁴ Brief of Amicus Curiae Center for Arizona Policy Supporting Defendants-Appellants and Reversal of the District Court Decision at 4-5, *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010) (No. 10-16797).

¹⁹⁵ *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011).

¹⁹⁶ *Bassett v. Snyder*, No. 12-10038, 2013 WL 3285111, at *18 (E.D. Mich. June 28, 2013).

¹⁹⁷ See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980), *superseded by statute as recognized in Thornburg v. Gingles*, 478 U.S. 30 (1986).

¹⁹⁸ *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (alteration in original) (citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

tion that “[t]he Equal Protection Clause is offended by ‘sophisticated as well as simple-minded modes of discrimination.’”¹⁹⁹

Like the Ninth Circuit, other lower courts have similarly been willing to look beyond the four corners of such ostensibly neutral laws. One of the earliest courts to do so was the Alaska Supreme Court in its 2005 *Alaska Civil Liberties Union v. State*²⁰⁰ decision. There, the Alaska Supreme Court rejected an argument that a benefits scheme was facially neutral when it classified people not on the basis of sex or sexual orientation but marital status and made benefits available to spouses of public employees but not unmarried domestic partners of the same sex.²⁰¹ The court began by examining the interplay between the challenged benefits scheme and the state’s prohibition of same-sex marriage:

Article I, section 25 was adopted by Alaska voters in 1998. Commonly known as the Marriage Amendment, it provides: “To be valid or recognized in this State, a marriage may exist only between one man and one woman.” It effectively prohibits marriage in Alaska between persons of the same sex. The plaintiff employees consequently cannot enter into the formal relationship—marriage—that the benefits programs require if the employees are to confer these benefits on their domestic partners.

Put another way, the plaintiff employees and their same-sex partners are absolutely precluded from becoming eligible for these benefits. Although all opposite-sex couples who are unmarried are also ineligible for these employment benefits, by marrying they can change the status that makes them ineligible.²⁰²

The court then treated the two separate provisions interchangeably in determining facial neutrality:

[U]nlike the neutral definition of “veteran” in *Feeney*, Alaska’s definition of the legal status of “marriage” (and, hence, who can be a “spouse”) excludes same-sex couples. By restricting the availability of benefits to “spouses,” the benefits programs “by [their] own terms classif[y]” same-sex couples “for different treatment.” Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of “marriage,” the partner of a homosexual employee can never be legally considered as that employee’s “spouse” and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.²⁰³

A second objection that defenders of cross-referenced same-sex conduct laws might raise is that the challengers’ real dispute is with the underlying restriction on same-sex marriage and not the denial of domestic partnership benefits, and thus unless they are willing to challenge that underlying law—or if that underlying law has already been adjudicated to be con-

¹⁹⁹ *United States v. Fordice*, 505 U.S. 717, 729 (1992); *accord* *Reynolds v. Sims*, 377 U.S. 533, 563 (1964).

²⁰⁰ 122 P.3d 781 (Alaska 2005).

²⁰¹ *Id.* at 788.

²⁰² *Id.* at 784 (footnote omitted).

²⁰³ *Id.* at 788-89 (alteration in original) (footnotes omitted).

stitutionally valid—they have no basis for challenging a benefits law premised on the underlying restriction.

Yet it would be inconsistent with Supreme Court precedent to conclude that those negatively impacted by such laws must bring their constitutional challenge against the underlying discriminatory scheme rather than taking the lesser step of challenging the denial of benefits to unmarried same-sex couples. Consider in this regard *McLaughlin*, where the challenge was brought not to Florida’s marriage laws but instead to its law banning interracial cohabitation.²⁰⁴ One could likewise have contended in that case that the challengers’ real dispute was with the ban on interracial marriage. After all, if only they could legally marry they would not be subject to prosecution for interracial cohabitation, since the law they were challenging punished only cohabitation between unmarried “whites” and “negroes.” Indeed, in defense of the law, the State of Florida described the cohabitation law as an adjunct to its ban on interracial marriage and characterized the latter as constitutionally valid, thus rendering the cohabitation law immune from challenge.²⁰⁵ Yet the Court viewed the two arguments as raising separate claims:

Florida’s remaining argument is related to its law against interracial marriage, which, in the light of certain legislative history of the Fourteenth Amendment, is said to be immune from attack under the Equal Protection Clause. Its interracial cohabitation law is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.

We reject this argument, without reaching the question of the validity of the State’s prohibition against interracial marriage or the soundness of the arguments rooted in the history of the Amendment. For even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment. “[A]ssuming, for purposes of argument only, that the basic prohibition is constitutional,” in this case the law against interracial marriage, “it does not follow that there is no constitutional limit to the means which may be used to enforce it.” Section 798.05 must therefore itself pass muster under the Fourteenth Amendment; and for reasons quite similar to those already given, we think it fails the test.

. . . We accordingly invalidate § 798.05 without expressing any views about the State’s prohibition of interracial marriage, and reverse these convictions.²⁰⁶

In sum, to the extent that a law cross-references other laws that facially discriminate against gays and lesbians or same-sex couples, they are indistinguishable from laws that themselves facially discriminate against gays and lesbians or same-sex couples and thus should be treated no differently for equal protection purposes. Moreover, those challenging such laws may do so even if the cross-referenced laws, standing alone, are constitutionally valid, or if they wish—for strategic purposes—to avoid adjudication of the constitutionality of the cross-referenced laws standing alone.

²⁰⁴ *McLaughlin v. Florida*, 379 U.S. 184, 186 (1964).

²⁰⁵ *Id.* at 195.

²⁰⁶ *Id.* at 195-96 (alteration in original) (footnote omitted) (citations omitted).

V. READING THE TEA LEAVES OF THE SUPREME COURT'S EXISTING GAY RIGHTS PRECEDENTS

The U.S. Supreme Court has only rarely adjudicated what might be described as “gay rights” cases. Moreover, of the ten cases that can arguably be so characterized, in only two—*Romer v. Evans* and *United States v. Windsor*—did a majority of the Court actually address an equal protection claim head-on. Of the remaining eight, five were decided on First Amendment grounds,²⁰⁷ two on substantive due process grounds,²⁰⁸ and one on standing grounds.²⁰⁹ *Romer* and *Windsor*, together with dicta in one of the First Amendment cases and separate opinions in one of the substantive due process cases, collectively shed some light on how the Court—or at least individual members of the Court—might resolve the classification-framing quandary for gay rights equal protection claims in the future.

A. *Romer v. Evans*

The majority opinion in *Romer* does little to illuminate the classification-framing quandary. In that case, the facial discrimination on the basis of sexual orientation could not have been more apparent. The amendment to the Colorado Constitution at issue in that case—Amendment 2—read as follows:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby *homosexual, lesbian or bisexual orientation*, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.²¹⁰

Amendment 2 thus explicitly focused on those of “homosexual, lesbian, or bisexual orientation,” making it clear that sexual minorities were the class targeted by the law, and thus raised no classification-framing difficulties.

²⁰⁷ See *John Doe #1 v. Reed*, 130 S. Ct. 2811, 2814 (2010); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2976 (2010); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 581 (1995).

²⁰⁸ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. 558.

²⁰⁹ See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

²¹⁰ See COLO. CONST. art. II, § 30b (emphasis added).

Justice Scalia's dissent in *Romer*, however—in which he contended that the equal protection challenge in the case was *effectively* foreclosed by the Court's 1986 decision in *Bowers*—suggests that at least he (and the other Justices who signed onto his dissent) might agree that homosexual *status* and *conduct* should be treated as one and the same for equal protection purposes:

If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: "If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.") . . . Respondents . . . counter *Bowers* with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2's application to individuals who do not engage in homosexual acts, but are merely of homosexual "orientation." Some Courts of Appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference. . . .

But assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct.²¹¹

B. *Lawrence v. Texas*

In contrast to the express discrimination against sexual minorities at issue in *Romer*, when the U.S. Supreme Court was presented with a challenge to the constitutionality of Texas's sodomy law in 2003, the discrimination was more subtle. In *Lawrence v. Texas*, the text of the statute at issue did not, in direct terms, target those who were gay, lesbian, or bisexual. Rather, it provided that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."²¹² The statute was challenged on the grounds that it violated substantive due process and alternatively that it was sex or sexual orientation discrimination in violation of the Equal Protection Clause.²¹³ *Lawrence* thus presented the lower courts—and ultimately the U.S. Supreme Court—with an opportunity to grapple with the classification-framing quandary.

In the Court of Appeals of Texas, the majority rejected the argument that the statute constituted a form of sex discrimination, rejecting the *Lov-*

²¹¹ *Romer v. Evans*, 517 U.S. 620, 641-42 (1996) (Scalia, J., dissenting) (citation omitted).

²¹² TEX. PENAL CODE ANN. § 21.06(a) (West 2011). In turn, Texas law defined "deviate sexual intercourse" to mean "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1). The statute itself was entitled "Homosexual Conduct," *id.* at § 21.06, although as indicated below, the Court distinguished orientation from conduct.

²¹³ *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

ing analogy for reasons similar to those found in other same-sex marriage cases:

Appellants claim Section 21.06 discriminates on the basis of sex because criminal conduct is determined to some degree by the gender of the actors. . . .

The State asserts the statute applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women. Thus, the State maintains the statute does not discriminate on the basis of gender. Appellants respond by observing that a similar rationale was expressly rejected in the context of racial discrimination [in *Loving*].

. . . . But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find appellants' reliance on *Loving* unpersuasive.²¹⁴

The Court of Appeals majority went on to characterize the statute as “gender-neutral on its face” and said the challengers bore the “burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose.”²¹⁵ In contrast, the dissent, drawing on the *Loving* analogy, viewed the sex discrimination as patent.²¹⁶

The Court of Appeals majority also concluded that the law was facially neutral on sexual orientation, relying in part on Dr. Alfred Kinsey's studies of human sexuality and his seven-point continuum:

On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual “orientation.” Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct. Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation.²¹⁷

However, the Court of Appeals of Texas acknowledged that a facially neutral statute can nonetheless be challenged on equal protection grounds if it was motivated by a discriminatory purpose and had a discriminatory ef-

²¹⁴ See *Lawrence v. State*, 41 S.W.3d 349, 357-58 (Tex. App. 2001) (en banc), *rev'd on other grounds*, 539 U.S. 558 (2003); *accord id.* at 365 (Fowler, J., concurring) (“That argument is creative, but misguided. In *Loving*, the Court struck down a statute because the statute furthered a loathsome discrimination—racism that implied a ‘superior’ white person marrying an ‘inferior’ black person does so at the risk of both being punished. The *Loving* court correctly recognized that this was the kind of discriminatory law sought to be vanquished by the Fourteenth Amendment; one that advanced the fallacy of racial superiority. However, *Loving* is not on point in this case because section 21.06 does not advance the fallacy of gender superiority.”).

²¹⁵ See *id.* at 359 (majority opinion).

²¹⁶ See *id.* at 368-69 (Anderson, J., dissenting).

²¹⁷ *Id.* at 353 (majority opinion) (footnote omitted).

fect.²¹⁸ The court then recognized that the 1973 change in the law to target only “homosexual sodomy” after a long history of criminalizing all sodomy, whether performed by persons of the same or different sex, sufficed to show a discriminatory purpose.²¹⁹

The case was thus teed up for the U.S. Supreme Court to address the equal protection claim and, in so doing, resolve the classification-framing quandary. Yet while characterizing the equal protection claim as “a tenable argument,” the Court opted instead to resolve the case on substantive due process grounds and overruled its earlier decision in *Bowers*,²²⁰ perhaps in part because of some of the challenges associated with framing the classification as debated in the lower court’s opinion. However, the Court went on to suggest that it viewed laws targeting homosexual conduct as synonymous with those targeting homosexual orientation:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres.²²¹

Moreover, Justice O’Connor, in a concurring opinion, concluded that the Texas law violated the Equal Protection Clause.²²² In so doing, she rejected the argument that the law did not discriminate on the basis of sexual orientation, relying in part on the majority’s linkage between conduct and orientation and on Justice Scalia’s dissenting opinion in *Romer*:

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. “After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” When a State makes homosexual conduct criminal, and not “deviate sexual intercourse” committed by persons of different sexes, “that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”²²³

Writing in dissent, Justice Scalia appeared to argue that the Texas law discriminated neither on the basis of sexual orientation nor sex. Justice

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

²²¹ *Id.* (emphasis added).

²²² *Id.* at 579 (O’Connor, J., concurring).

²²³ *Id.* at 583 (O’Connor, J., concurring) (citation omitted).

Scalia described the statute as facially neutral on both sex and sexual orientation, writing that “[o]n its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex.”²²⁴ Justice Scalia acknowledged that there is sex discrimination in the sense that liability turns on the sex of the partner with whom the acts are performed, but he rejected the *Loving* analogy and thus the conclusion that the statute should be analyzed as drawing a sex-based classification:

To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was “designed to maintain White Supremacy.” A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies.²²⁵

Justice Scalia then expressed skepticism—albeit grudging acceptance of—Justice O’Connor’s characterization of the statute as discriminating on the basis of sexual orientation.²²⁶

With *Bowers* no longer good law after *Lawrence*, it is not necessary for advocates of gay rights, or jurists who support their constitutional claims, to resort to the mental gymnastics of distinguishing homosexual conduct from homosexual status. Furthermore, the Court has never formally endorsed such a distinction. To the extent that such a distinction was ever implicit in the Court’s precedents, the majority and concurring opinions in *Lawrence* clearly move equal protection jurisprudence, so far as sexual-orientation discrimination is concerned, in the direction of status-conduct re-convergence. This important step will affect the way in which lower courts and the U.S. Supreme Court ultimately resolve the classification-framing quandary.

²²⁴ *Id.* at 599 (Scalia, J., dissenting).

²²⁵ *Id.* at 599-600 (Scalia, J., dissenting) (citations omitted).

²²⁶ *Lawrence*, 539 U.S. at 600-01 (Scalia, J., dissenting).

C. Christian Legal Society Chapter of the University of California,
Hastings College of the Law v. Martinez

In addition to *Lawrence*, a more recent gay rights case decided by the U.S. Supreme Court provides strong support for the concept of status-conduct re-convergence. In *Christian Legal Society v. Martinez*,²²⁷ the Court rejected a claim by a student group that it was seeking to discriminate not on the basis of status but rather on the basis of conduct. Although formally decided on First Amendment rather than equal protection grounds, the Court relied on both *Lawrence* and *Bray* to conclude that the propounded distinction was illusory:

CLS contends that it does not exclude individuals because of sexual orientation, but rather “on the basis of a conjunction of conduct and the belief that the conduct is not wrong.” Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2572, 156 L.Ed.2d 508 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.” (emphasis added)); *id.*, at 583, 123 S.Ct. 2472 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”); cf. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270, 113 S.Ct.753, 122 L.Ed.2d 34 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”).²²⁸

Indeed, the many lower court opinions examined earlier in this Article which have rejected efforts to characterize laws that target same-sex conduct as facially neutral as to sexual orientation have relied upon either the majority and/or concurring opinions in *Lawrence* or the Court’s decision in *Christian Legal Society* to conclude that—for equal protection purposes— “[h]omosexual conduct and identity together define what it means to be gay or lesbian.”²²⁹

D. *The Most Recent Developments*—Hollingsworth v. Perry and Windsor v. United States

In the Court’s most recent set of decisions involving gay rights, the classification-framing quandary was touched upon both in oral arguments and in one of the Court’s opinions. During oral arguments regarding the

²²⁷ 130 S. Ct. 2971 (2010).

²²⁸ *Id.* at 2990 (alteration in original) (citation omitted).

²²⁹ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); accord *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431 n.24 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 605-06 (Md. 2007); *Elane Photography, LLC v. Willock*, 284 P.3d 428, 437 (N.M. Ct. App. 2012).

constitutionality of California's Proposition 8 in *Hollingsworth v. Perry*, Justice Kennedy raised the question of whether the ban on same-sex marriage "can be treated as a gender-based classification," describing it as "a difficult question" that he was "trying to wrestle with."²³⁰ Although counsel for the defenders of Proposition 8 rejected that classification, they conceded that it qualified as a "sexual orientation" classification,²³¹ thus implicitly acknowledging the concept of status-conduct re-convergence evident in the Court's recent line of gay rights cases.

Since the Court resolved *Hollingsworth* on standing grounds, the Court's opinion in that case never faced the classification-framing quandary that Justice Kennedy touched upon during oral arguments. In *United States v. Windsor*, the Court addressed the equal protection challenge to DOMA on the merits.²³² Yet Justice Kennedy's majority opinion side-stepped the question of whether to treat DOMA's prohibition on recognizing same-sex marriages as sex-based discrimination or discrimination on the basis of sexual orientation. Indeed, the Court's opinion made no mention of the litigants' sexual orientation at all, never once using the terms "gay," "lesbian," or "homosexual" to describe the impacted class. Rather, Justice Kennedy opted for couples-based framing akin to that employed by the Ninth Circuit in *Diaz v. Brewer*, describing the impacted class as "those persons who are joined in same-sex marriages made lawful by the State."²³³

The framing employed by Justice Kennedy in *Windsor* provides some support for the couples-based method of framing, particularly when paired with the fact that the Court had been holding the petition for certiorari in *Diaz* but denied certiorari the day after issuing its opinion in *Windsor*.²³⁴ Yet the fact that the Court used that approach in *Windsor*—and perhaps tacitly approved of its use in *Diaz*—does not necessarily lead to the conclusion that the Court has resolved the question of whether to treat such laws as making sex-based or sexual orientation-based classifications. Both the Supreme Court in *Windsor* and the Ninth Circuit in *Diaz* struck down the laws at issue by applying rational basis scrutiny, at least as a formal matter. As a result, there was no need for either court to grapple with the complexities associated with following the sex or sexual orientation paths. In other words, since the laws at issue in both cases unquestionably facially discriminated against same-sex couples, and since the courts concluded that distinctions between same-sex and opposite-sex couples in those contexts could not withstand even rationality review, there was nothing to be achieved by framing the discrimination as sex-based (and thus employing

²³⁰ See Transcript of Oral Argument at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

²³¹ *Id.* at 14.

²³² *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

²³³ *Id.* at 2695.

²³⁴ See *Brewer v. Diaz*, 133 S. Ct. 2884 (2013) (mem.).

intermediate scrutiny) or sexual orientation-based (and resolving whether such classifications should be subject to heightened equal protection scrutiny). Thus, while cases such as *Windsor* and *Diaz* direct lower courts to the third, alternative method of framing in situations where a law is unconstitutional under the Equal Protection Clause regardless of the level of scrutiny, such decisions do not foreclose framing such laws as sex-based or sexual orientation-based classifications in cases in which a law might pass muster under rational basis review but not under intermediate or strict scrutiny.

CONCLUSION

As demonstrated in this Article, when assessing the constitutionality of laws that more subtly discriminate against gays and lesbians by targeting same-sex relationships rather than targeting sexual orientation explicitly, there are at least three ways to frame the discriminatory classification for equal protection purposes: as sex discrimination, sexual orientation discrimination, or discrimination against same-sex couples. All of these approaches are consistent with U.S. Supreme Court equal protection precedents and any of them would satisfy the threshold requirement for bringing an equal protection claim.

At present, litigants need not choose which of these paths to follow and can instead frame cases in the alternative by asking the court to find them constitutionally infirm no matter which method of framing is employed. Ultimately, however, lower courts and eventually the U.S. Supreme Court will have to face the issue directly and select from among the competing methods of framing.²³⁵ Whichever path the lower courts, and ultimately the U.S. Supreme Court, choose to follow in framing gay rights claims, one conclusion is clear: such claims should not falter on the ground that they fail to satisfy the threshold requirement of discriminating against a class. With that threshold requirement satisfied, courts can thus proceed to determine the appropriate level of scrutiny and determine whether the laws satisfy that level of scrutiny, rather than disposing of such claims without ever reaching the merits of the challengers' claims.

²³⁵ *But see In re Levenson*, 560 F.3d 1145, 1147 (Jud. Council 9th Cir. 2009) (holding that such a law involves both sex and sexual orientation discrimination); *In re Levenson*, 587 F.3d 925, 929 (9th Cir. 2009) (same).