

9-1-2013

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Suggested Citation

Catherine Jean Archibald, Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case, 34 N. Ill. U. L. Rev. 1 (2013).

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Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case

CATHERINE JEAN ARCHIBALD¹

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No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

-Fourteenth Amendment to the United States Constitution, Section 1

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No person shall . . . be deprived of life, liberty, or property, without due process of law.

-Fifth Amendment to the United States Constitution

I. INTRODUCTION

This year was a historic time in the gay rights movement. While the nation held its collective breath, the Supreme Court deliberated over the questions of whether same-sex couples have a right to marry and have their marriages recognized under federal law by virtue of the equal protection guarantees contained in the Fifth and Fourteenth Amendments of the United States Constitution.² In one decision issued last summer, the Supreme Court struck down part of DOMA, finding that same-sex couples married under state law must have their marriages recognized by the federal government.³ In its other same-sex marriage decision, however, the Supreme Court avoided the question, for now, of whether same-sex couples have a constitutional right to marry in the first place, finding instead that the petitioners in the case did not have standing to appeal the lower court decision.⁴ Thus, it is almost certain that the Supreme Court will address the question of whether same-sex couples have a constitutional right to marry in a later case brought by a proper petitioner.

When the Supreme Court does decide to address the constitutionality of the same-sex marriage exclusions still present in most state laws, it should not neglect to address the sex discrimination inherent in these exclusions.⁵ The Supreme Court, like many other courts, may find that same-sex

2. The text of the Equal Protection Clause of the Fourteenth Amendment states that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Fifth Amendment states that: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has held that the Due Process Clause of the Fifth Amendment, which applies to the federal government, includes the duties of the Equal Protection Clause of the Fourteenth Amendment, which applies to the states. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (noting that the approach to Fifth Amendment equal protection claims is the same as Fourteenth Amendment claims); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 981 (N.D. Cal. 2012) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)) (finding unjustifiable discrimination violates the Federal Due Process Clause because "[a]lthough the Fifth Amendment to the United States Constitution does not contain an Equal Protection Clause, the Fifth Amendment's Due Process Clause includes an equal protection component"). *See also Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (citing *Weinberger*, 420 U.S. at 638 n.2) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

3. *See United States v. Windsor (Windsor III)*, 133 S. Ct. 2675 (2013).

4. *See Hollingsworth v. Perry (Perry III)*, 133 S. Ct. 1521 (2013).

5. *See infra* Part III.

marriage exclusions, in discriminating on the basis of sexual orientation, need only pass, and do pass, a rational basis review.⁶ If it so decides, the Supreme Court should then examine whether the same-sex marriage exclusions pass intermediate scrutiny. The exclusions must pass intermediate scrutiny because under the Supreme Court's clear precedent, same-sex marriage exclusions are sex discrimination and sex classification, mandating at least an intermediate scrutiny review.⁷

To see the sex discrimination present in the laws, consider that individual men and women are prevented from marrying their particular partner simply because of their sex. When Lauren is denied a marriage license to marry Julie solely because Lauren is a woman and not a man, there can be no doubt that she (Lauren) has been discriminated against because of her sex.⁸ This sex discrimination is not remedied by the further sex discrimina-

6. See *infra* Part IV.A. There are many good reasons why the Court should use a heightened review to analyze sexual orientation discrimination, as many courts have found. See, e.g., *Windsor v. United States (Windsor II)*, 699 F.3d 169, 181-82 (2d Cir. 2012) (applying heightened scrutiny because of the sexual orientation discrimination present in a same-sex marriage exclusion); *Golinski*, 824 F. Supp. 2d at 982-90 (N.D. Cal. 2012) (same); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (same); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (same); *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008) (same). See also Ingrid M. Lofgren, *The Role of Courts Vis-à-Vis Legislatures in the Same-Sex Marriage Context: Sexual Orientation as a Suspect Classification*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 213 (2013) (arguing that sexual orientation discrimination should be judged with heightened scrutiny).

7. See *infra* Part III.

8. See *infra* Part III. See also, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) (holding that the opposite-sex marriage requirement classifies based on sex and implicates heightened scrutiny under Hawaii's equal protection clause); *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007) (finding that the opposite-sex marriage requirement impermissibly discriminates based on sex because "[e]ach Plaintiff would have been able to marry his or her partner had the Plaintiff been of a different sex"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.") *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999); *Conaway v. Deane*, 932 A.2d 571, 686 (Md. 2007) (Battaglia, J., dissenting) ("[A] man who wishes to marry another man is prevented from choosing his marriage partner purely on the basis of sex; likewise, a woman who wishes to marry another woman is prevented from choosing her marriage partner purely on the basis of sex. Manifestly, [Maryland's same-sex marriage prohibition] classifies on the basis of sex" and is thus prohibited sex discrimination.); *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) ("The exclusion of same-sex couples from civil marriage . . . discriminates on the basis of sex" because "a woman who seeks to marry another woman is prevented from doing so on account of her sex--that is, because she is not a man."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) ("That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from

tion of denying John a license to marry Henry. Two wrongs don't make a right.

There is a real danger that the Supreme Court could neglect this issue because when courts have addressed the legality of same-sex marriage exclusions, the sex discrimination present in the exclusions is often forgotten, ignored, or unseen, overshadowed by the more obvious sexual orientation discrimination present.⁹ When courts have decided that opposite-sex marriage requirements adhere to state or federal constitutions, they have based their decisions on the grounds that the marriage restrictions pass rational basis review, the most deferential review.¹⁰ These courts have completely neglected to address, or have not recognized, that there is sex discrimina-

obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law."); *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting) ("[T]his is a straightforward case of sex discrimination" because "the marriage statutes establish a classification based on sex" and "[a] woman is denied the right to marry another woman because her would-be partner is a woman . . . [and] a man is denied the right to marry another man because his would-be partner is a man . . . [t]hus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex."); *Andersen v. King Cnty.*, 138 P.3d 963, 1037-39 (Wash. 2006) (en banc) (Bridge, J., dissenting) (finding that Washington's same-sex marriage prohibition "discriminates on the basis of sex. A woman cannot marry the woman of her choice but a man can marry the woman of his choice. In other words, the only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman. Andersen should no more readily be prohibited from marrying her partner than she is from voting for president or practicing law"). See also Jennifer Levi, *Toward a More Perfect Union: The Road to Marriage Equality for Same-Sex Couples*, 13 WIDENER L.J. 831, 843 (2004) (stating that allowing opposite-sex marriage but not same-sex marriage is sex discrimination because if a person in a gay male relationship would be allowed to marry his partner if he were female, then the exclusion is based upon his sex); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219 (1994) (arguing that the idea that the behavior of sex with women is appropriate for one sex and not the other, and vice versa, is based on traditional sex-based gender roles and is therefore sex-based discrimination); Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 115-16 (2002); Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y 61, 88-92 (1999); Jeffrey Hubins, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?*, 23 WHITTIER L. REV. 239, 258-60 (2001); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 403 (2001).

9. The sexual orientation discrimination is not intrinsically more obvious than the sex discrimination present, but is more obvious in our culture, where sex classifications often go unnoticed. See generally Catherine Jean Archibald, *De-Clothing Sex-Based Classifications - Same-Sex Marriage is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 1-43 (2009).

10. See *infra* Part IV.

tion present in same-sex marriage exclusions, and therefore, these exclusions must withstand a heightened level of review.¹¹

This state of affairs is in direct contrast to the interracial marriage debate in this country that was resolved less than fifty years ago by the Supreme Court in *Loving v. Virginia*.¹² There, the Supreme Court had no trouble finding that laws limiting marriage to people of the same race constituted race discrimination. Because the Supreme Court recognized that the laws classified people on the basis of race, the Court applied the heightened level of review that racial classifications are subject to and invalidated the laws under this heightened review.¹³

However, Virginia's miscegenation laws at issue in *Loving* could have been considered sexual orientation discrimination, just as today's opposite-sex marriage requirements are most often characterized as sexual orientation discrimination. Most people have clear racial preferences in dating and marriage.¹⁴ People who are attracted to people of a different race than themselves, and who want to marry a person of a different race, are negatively affected by a same-race marriage requirement. By contrast, people attracted to people the same race as themselves, and who want to marry a person of the same race, are unaffected by a same-race marriage requirement.

If we called people attracted to people of the same race as themselves "homosexual" and people attracted to people of a different race "heterosexual,"¹⁵ then the law limiting marriage to same-race couples harmed "heterosexuals" and favored "homosexuals" in the same way that today a law limiting marriage to opposite-sex couples harms today's homosexuals and fa-

11. See, e.g., Hernandez, 855 N.E.2d at 10-11 (finding that the same-sex marriage prohibition is not sex discrimination because "[w]omen and men are treated alike--they are permitted to marry people of the opposite sex, but not people of their own sex" and upholding the opposite-sex marriage requirement under rational basis review); Andersen, 138 P.3d at 988 (en banc) (same); Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121, 127-28 (Wis. Ct. App. 1992) (same). See also *infra* notes 117-26 and accompanying text.

12. *Loving v. Virginia*, 388 U.S. 1 (1967).

13. See *id.*

14. See, e.g., Tina M. Harris & Pamela J. Kalbfleisch, *Interracial Dating: The Implications of Race for Initiating a Romantic Relationship*, 11 HOWARD J. COMM. 49, 49-64 (2000) (finding that study participants "were resistant to the idea of dating a person from another race"), available at <http://dx.doi.org/10.1080/106461700246715>; Raymond Fisman et al., *Racial Preferences in Dating: Evidence from a Speed Dating Experiment*, 75 REV. OF ECON. STUDIES 117 (2008) (noting that even though "under random matching 44% of all marriages would be inter-racial, a mere 4% of marriages in the U.S. are between partners of different race"), available at <http://www4.gsb.columbia.edu/cbs-directory/detail/494840/Raymond+Fismanat+2>.

15. This would be a reasonable word construction since the root "homo" simply means "same" and "hetero" means "different." See DICTIONARY.COM, <http://dictionary.reference.com/browse/homo?s=t>, <http://dictionary.reference.com/browse/hetero?s=t> (last visited Oct. 22, 2013).

vors today's heterosexuals.¹⁶ A same-race marriage requirement is racial classification and discrimination,¹⁷ although it also disproportionately harms people sexually attracted to and wanting to marry a partner of a different race. In the same way, the opposite-sex marriage requirement is sex classification and discrimination;¹⁸ although it also disproportionately

16. Although homosexual attraction and behavior has existed throughout human history, the concept of an identity based on this attraction and behavior only developed in the late 1800s. See *Perry v. Schwarzenegger (Perry D)*, 704 F. Supp. 2d 921, 965 (N.D. Cal. 2010).

17. See *Loving v. Virginia*, 388 U.S. 1 (1967).

18. See *infra* Part III; See also, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) (holding that the opposite-sex marriage requirement classifies based on sex and implicates heightened scrutiny under Hawaii's equal protection clause); *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007) (finding that the opposite-sex marriage requirement impermissibly discriminates based on sex because "[e]ach Plaintiff would have been able to marry his or her partner had the Plaintiff been of a different sex"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.") *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999); *Conaway v. Deane*, 932 A.2d 571, 686 (Md. 2007) (Battaglia, J., dissenting) ("[A] man who wishes to marry another man is prevented from choosing his marriage partner purely on the basis of sex; likewise, a woman who wishes to marry another woman is prevented from choosing her marriage partner purely on the basis of sex. Manifestly, [Maryland's same-sex marriage prohibition] classifies on the basis of sex" and is thus prohibited sex discrimination.); *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) ("The exclusion of same-sex couples from civil marriage . . . discriminates on the basis of sex" because "a woman who seeks to marry another woman is prevented from doing so on account of her sex--that is, because she is not a man."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) ("That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law."); *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting) ("[T]his is a straightforward case of sex discrimination" because "the marriage statutes establish a classification based on sex" and "[a] woman is denied the right to marry another woman because her would-be partner is a woman . . . [and] a man is denied the right to marry another man because his would-be partner is a man . . . [t]hus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex."); *Andersen v. King Cnty.*, 138 P.3d 963, 1037-39 (Wash. 2006) (en banc) (Bridge, J., dissenting) (finding that Washington's same-sex marriage prohibition "discriminates on the basis of sex. A woman cannot marry the woman of her choice but a man can marry the woman of his choice. In other words, the only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman. Andersen should no more readily be prohibited from marrying her partner than she is from

harms people sexually attracted to and wanting to marry a partner of the same sex (today's gays, lesbians, and bisexuals).

Under current Supreme Court equal protection jurisprudence, there is a three-tiered approach to analyzing a law that classifies individuals in granting different rights.¹⁹ The lowest, most deferential level of scrutiny is the "rational basis" level, which requires only that the challenged law be rationally related to a legitimate government interest.²⁰ This is the level of scrutiny that the Supreme Court and many other courts have used thus far to analyze sexual orientation discrimination.²¹

Heightened scrutiny refers to either "intermediate scrutiny" or "strict scrutiny."²² The "intermediate scrutiny" test requires that the classification be substantially related to an important government interest.²³ This test is used by the Supreme Court for classifications based on sex or illegitimacy.²⁴ The "strict scrutiny" test is the most demanding test, requiring that the classification be narrowly tailored to meet a compelling state interest.²⁵ This test is used by the Supreme Court for classifications based on race, national origin, and alienage.²⁶ Many courts have decided that sexual orientation

voting for president or practicing law"). *See also* Jennifer Levi, *Toward a More Perfect Union: The Road to Marriage Equality for Same-Sex Couples*, 13 WIDENER L.J. 831, 843 (2004) (allowing opposite-sex marriage but not same-sex marriage is sex discrimination because if a person in a gay male relationship would be allowed to marry his partner if he were female, then the exclusion is based upon his sex); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219 (1994) (arguing that the idea that the behavior of sex with women is appropriate for one sex and not the other, and vice versa, is based on traditional sex-based gender roles and is therefore sex-based discrimination); Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 115-16 (2002); Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y 61, 88-92 (1999); Jeffrey Hubins, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?*, 23 WHITTIER L. REV. 239, 258-60 (2001); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 403 (2001).

19. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

20. *See, e.g.*, *Ry. Express Agency v. New York*, 336 U.S. 106, 108 (1949).

21. *See, e.g.*, *Windsor III*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Andersen*, 138 P.3d 963 (en banc). *See infra* Part II.D for a discussion on *Windsor III*, 133 S. Ct. 2675. *See also infra* Part IV.B.

22. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1315 n.4 (11th Cir. 2011).

23. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (sex); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy).

24. *See, e.g.*, *Craig*, 429 U.S. at 197 (sex); *Virginia*, 518 U.S. at 533 (sex); *Lalli*, 439 U.S. at 265 (illegitimacy).

25. *See, e.g.*, *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995) (race); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry).

26. *See, e.g.*, *Adarand Constrs., Inc.*, 515 U.S. at 227 (race); *McLaughlin*, 379 U.S. at 191-92 (race); *Oyama*, 332 U.S. 633 (ancestry).

discrimination merits some form of heightened review.²⁷ There are many good reasons why sexual orientation discrimination should be judged with heightened scrutiny, and the Supreme Court may so decide in its next same-sex marriage case.²⁸ However, even if the Supreme Court does not decide that sexual orientation discrimination should be judged with heightened scrutiny, it should still find that same-sex marriage prohibitions should be judged with heightened scrutiny because of the sex discrimination present in the prohibitions, as this Article will show.

Part II of this Article will discuss the two same-sex marriage cases recently decided by the Supreme Court and how the Supreme Court avoided, for now, the question of whether state same-sex marriage prohibitions violate the Federal Constitution.

Part III will discuss the Supreme Court case *Loving v. Virginia*²⁹ and why same-sex marriage exclusions should be recognized as sex discrimination. It will contrast the reasoning of *Loving* with several state and federal cases that have not recognized same-sex marriage exclusions as sex discrimination and show that this difference in outcome is not justified under *Loving*.

Part IV will examine the consequence of recognizing same-sex marriage exclusions as sex discrimination for the inevitable future Supreme Court case addressing a state same-sex marriage prohibition. This part concludes that under the heightened review that laws classifying people based

27. See, e.g., *Windsor v. United States (Windsor II)*, 699 F.3d 169 (2d Cir. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 990 (N.D. Cal. 2012); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008).

28. See, e.g., *Windsor II*, 699 F.3d 169; *Golinski*, 824 F. Supp. 2d at 990; *Varnum*, 763 N.W.2d 862; *Kerrigan*, 957 A.2d 407; *In re Marriage Cases*, 183 P.3d at 399. The Supreme Court is not precluded by its prior cases from finding that sexual orientation discrimination merits heightened scrutiny. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating a law that discriminated on the basis of sexual orientation using rational basis review and so not needing to reach the question of whether a higher review was needed); *Romer v. Evans*, 517 U.S. 620 (1996) (same). See also *Windsor III*, 133 S. Ct. 2675 (2013) (invalidating Federal DOMA using rational basis review and not reaching the question of whether a higher review was needed); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 468 (Conn. 2008) (noting that the Supreme Court is not precluded by its prior cases from finding that sexual orientation discrimination should be judged with heightened scrutiny). Further discussion on why sexual orientation discrimination should be judged with heightened scrutiny is outside the scope of this paper, but can be found in numerous other scholarly articles. See, e.g., Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263 (1992); Harris M. Miller, II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

29. *Loving v. Virginia*, 388 U.S. 1 (1967).

on sex are subject to, the Supreme Court should find that state same-sex marriage prohibitions are unconstitutional.

II. THE TWO SAME-SEX MARRIAGE CASES DECIDED BY THE SUPREME COURT LAST TERM

In December 2012, the Supreme Court granted certiorari in two cases involving same-sex marriage.³⁰ In *Hollingsworth v. Perry*,³¹ the plaintiffs challenged a ballot initiative in California that amended California's Constitution to prohibit same-sex marriage. In *United States v. Windsor*,³² the plaintiff challenged Section 3 of DOMA, which defined marriage as between a man and a woman for federal purposes. In both cases, the usual defendants, the Obama administration and the State of California, decided not to defend the laws stating that in their opinions, the laws were unconstitutional.³³ Advocates of the contested laws were granted permission by the lower courts to defend the laws, but the Supreme Court decided in one case that the advocates should not have been granted permission to appeal.³⁴

A. *HOLLINGSWORTH V. PERRY*

In November 2008, Proposition 8, a ballot initiative passed by fifty-two percent of the California voters, added to California's Constitution the language: "Only marriage between a man and a woman is valid or recognized in California."³⁵ Two same-sex couples unable to marry because of Proposition 8 brought the case of *Perry v. Schwarzenegger* ("*Perry I*") in federal district court, claiming that Proposition 8 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it discriminated against them on the basis of sex and sexual orientation.³⁶

The United States District Court for the Northern District of California held a trial, heard testimony from a number of experts and lay witnesses, and ruled that California's prohibition on same-sex marriage violated the Fourteenth Amendment of the United States Constitution because it discriminated against gays and lesbians and was not rationally related to a le-

30. See *Perry III*, 133 S. Ct. 2562 (2012); *Windsor III*, 133 S. Ct. 2675 (2012).

31. *Perry III*, 133 S. Ct. at 2659.

32. *Windsor III*, 133 S. Ct. at 2684.

33. See *Perry I*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010); *Windsor v. United States (Windsor I)*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

34. See *Perry III*, 133 S. Ct. 2652 (2013) (finding that advocates of an anti-same-sex marriage initiative did not have standing to appeal the case).

35. See *Perry I*, 704 F. Supp. 2d at 927 (citing CAL. CONST. art. I, § 7.5).

36. See *id.*

gitimate governmental interest.³⁷ The court found that “[t]he trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex,”³⁸ and that Proposition 8 “enacted a private moral view without advancing a legitimate government interest.”³⁹ As it found Proposition 8 could not even pass the “rational basis” test, the most lenient standard under the Fourteenth Amendment, the court declined to address the question of whether sexual orientation discrimination merited a heightened level of review.⁴⁰

The proponents of Proposition 8 appealed the case, and the Ninth Circuit, before deciding the case, certified a question to the California Supreme Court: whether proponents had the right under California law to defend the constitutionality of an initiative when the state’s public officials decided not to defend it.⁴¹ The California Supreme Court answered in the affirmative,⁴² and, relying on that answer, in *Perry v. Brown* (“*Perry II*”),⁴³ the Ninth Circuit found that the proponents had standing under federal law to appeal the case because “the state has suffered a harm sufficient to confer standing and . . . [the proponents are] authorized by the state to represent its interest in remedying that harm.”⁴⁴ In a split decision, the Ninth Circuit upheld the district court’s decision on the merits but on different grounds.

The Ninth Circuit found that removing a right to marry that same-sex couples had held previously violated the Equal Protection Clause of the Fourteenth Amendment because that action could not withstand rational basis review. The Ninth Circuit explicitly addressed only the narrow question of “the validity of Proposition 8’s *elimination* of the rights of same-sex couples to marry,”⁴⁵ and not the broader question of “the constitutionality of denying same-sex couples the right to marry,”⁴⁶ because it was able to find Proposition 8 unconstitutional on the narrower question and, therefore, there was no need to address the broader question.⁴⁷

The Ninth Circuit relied heavily on the Supreme Court’s 1996 decision in *Romer v. Evans*,⁴⁸ which had ruled a Colorado ballot initiative unconsti-

37. *Id.* at 934.

38. *Id.*

39. *Id.* at 936, 973.

40. *See Perry I*, 704 F. Supp. 2d at 997. However, the court did note that “the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.” *Id.* (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)).

41. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

42. *See Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

43. *Perry v. Brown (Perry II)*, 671 F.3d 1052 (9th Cir. 2012).

44. *Id.* at 1072.

45. *Id.* at 1064.

46. *Id.* at 1064, 1081-82.

47. *Id.*

48. *Romer v. Evans*, 517 U.S. 620 (1996).

tutional because the initiative invalidated anti-discrimination protection for gays, lesbians, and bisexuals that many had previously enjoyed under local law. The Ninth Circuit found that without a legitimate purpose “the people of a state may [not] by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others in the state.”⁴⁹ It found no legitimate purpose for Proposition 8 and, therefore, affirmed the decision of the district court.

The plaintiffs in *Perry* alleged that California’s same-sex marriage prohibition constituted both sexual orientation discrimination and sex discrimination.⁵⁰ The district court briefly acknowledged that sex discrimination was present in the prohibition, stating that, “Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex.”⁵¹ However, after this brief acknowledgement, the court proceeded to analyze the sexual orientation discrimination only.⁵² The Ninth Circuit did not acknowledge or analyze the sex discrimination present in the opposite-sex marriage requirement. Both courts were able to find the provision unconstitutional, addressing only the sexual orientation discrimination present using rational basis review.

B. THE SUPREME COURT DECISION IN *HOLLINGSWORTH V. PERRY*

After losing the case in the Ninth Circuit, the proponents of Proposition 8 once again appealed, this time to the Supreme Court. In *Hollingsworth v. Perry* (“*Perry III*”),⁵³ in a split decision, the Supreme Court vacated and remanded the decision of the Ninth Circuit, finding that the proponents did not have standing to appeal the case and should not have been granted permission by the Ninth Circuit to appeal the district court’s opinion.⁵⁴ The Court reasoned that the proponents had not suffered a “concrete and particularized injury”;⁵⁵ the district court’s order declaring Proposition 8 unconstitutional had not “ordered [proponents] to do or refrain from doing anything”; and the proponents did not have an “injury that affects [them] in a ‘personal and individual way.’”⁵⁶ The Court found that proponents “had no ‘direct stake’ in the outcome of their appeal [and] [t]heir only

49. *Perry II*, 671 F.3d. at 1082.

50. *See Perry I*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010).

51. *Id.* at 995-96.

52. *Id.* at 996.

53. *Perry III*, 133 S. Ct. 2652 (2013).

54. *Id.*

55. *Id.* at 2661.

56. *Id.* at 2662 (citation omitted).

interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.”⁵⁷ The Court reasoned that “such a ‘generalized grievance’ . . . is insufficient to confer standing” under Article III of the Constitution which grants the Judiciary the power only to adjudicate actual “case[s] and controvers[ies].”⁵⁸

Therefore, the Supreme Court did not reach the merits of the case and avoided the question, for now, of whether same-sex couples have the right to marry under the Federal Constitution. Instead, the Court’s decision vacated the judgment of the Ninth Circuit, leaving the district court’s decision intact. Thus, same-sex marriage is once again legal in California.⁵⁹ However, the Supreme Court’s decision does not affect the status of same-sex marriage in states outside California.

Because the Supreme Court decided the case on standing grounds and declined to address the constitutionality of California’s same-sex marriage prohibition, it is virtually certain that the Supreme Court will address the issue in a future case with proper parties before it. The Supreme Court’s decision in *Perry III* does prevent future proponents of ballot initiatives from appealing unfavorable lower court decisions if the state agents usually responsible for defending the suits decide not to.⁶⁰ However, a similar case would reach the Supreme Court if the usual state agents do defend the case, or if the challengers to a same-sex marriage ban lose in the lower courts. As there are still over thirty states where same-sex marriage is prohibited,⁶¹ the issue is virtually certain to reach the Supreme Court again. When the Supreme Court does address the constitutionality of state same-sex marriage prohibitions, it should find these prohibitions unconstitutional because of the sex discrimination present in the prohibitions, as discussed below.⁶²

57. *Id.*

58. *Perry III*, 133 S. Ct. at 2662.

59. See Governor Brown Directs California Department of Public Health to Notify Counties that Same-Sex Marriages Must Commence, OFFICE OF GOVERNOR EDMUND G. BROWN JR. (June 28, 2013), <http://gov.ca.gov/news.php?id=18120> (noting that “marriage licenses must be issued to same-sex couples immediately”).

60. See Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 530-32 (2012).

61. See *Marriage Center*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited Dec. 19, 2013). See also *Windsor III*, 133 S. Ct. 2675, 2689 (2012) (noting that twelve states and the District of Columbia recognize and permit same-sex marriage).

62. See *infra* Parts III, IV.

C. *UNITED STATES V. WINDSOR*

In *United States v. Windsor*,⁶³ a New York resident sued in federal district court after she was assessed more than \$350,000 in federal inheritance tax that she would not have had to pay if her deceased spouse had been male instead of female. She challenged, under the equal protection guarantee of the Fifth Amendment,⁶⁴ Section 3 of DOMA, which provided that:

In 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.⁶⁵

Windsor’s complaint noted that if Windsor’s spouse “‘Thea’ were instead ‘Theo,’ her estate would have passed to [Windsor] tax-free. Solely because [Windsor] and Thea were both women, Thea’s estate was denied the [applicable] marital deduction.”⁶⁶ However, neither Windsor’s complaint nor her summary judgment brief explicitly alleged sex discrimination.⁶⁷ Instead, she alleged sexual orientation discrimination, and argued that sexual orientation discrimination should be analyzed under a strict scrutiny standard, but in any event, the discrimination could not even pass rational basis review.⁶⁸

The district court in *Windsor v. United States (Windsor I)*,⁶⁹ found that it was unnecessary to determine whether sexual orientation discrimination should be judged with heightened scrutiny as the discrimination present in

63. *Windsor I*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012). For a more in depth analysis of *Windsor I*, see Catherine Jean Archibald, *Is Full Marriage Equality for Same-Sex Couples Next? The Immediate and Future Impact of the Supreme Court's Decision in United States v. Windsor*, 48 VAL. U. L. REV. (forthcoming Mar. 2014), available at <http://ssrn.com/abstract=2312079>.

64. See *supra* note 2. Windsor brought her case under the Fifth Amendment because the Fourteenth Amendment applies to states, not the federal government. See *id.*

65. 1 U.S.C. § 7 (1996).

66. Complaint at 63, *Windsor I*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435 (BSJ)).

67. See Complaint, *Windsor I*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435 (BSJ)); Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment, *Windsor I*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435 (BSJ)) [hereinafter *Memo for SJ*].

68. See *Memo for SJ*, *supra* note 67, at 22.

69. *Windsor I*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

Section 3 of DOMA failed to pass even rational basis scrutiny.⁷⁰ In coming to this conclusion, the court noted that the Supreme Court performs a more thorough review under the rational basis test in its equal protection jurisprudence for laws that show “a desire to harm a politically unpopular group.”⁷¹

On appeal, the Second Circuit, in *Windsor II*,⁷² found that the federal law was subject to intermediate scrutiny and that it could not withstand that review.⁷³ The court seemed unsure that DOMA would fail the low-level rational basis review, noting that the defendants offered several rationales for the law, and that “a party urging the absence of any rational basis takes up a heavy load.”⁷⁴ The court noted that where a historically disadvantaged group is disadvantaged by a law, and rational basis applies, the review should perhaps be more “demanding,” but that there is “doctrinal instability in this area.”⁷⁵ The Second Circuit decided that it did not have to enter this “doctrinal instability” and determine whether there was a rational basis for Section 3 of DOMA, because it determined that intermediate scrutiny applied.⁷⁶

The Second Circuit decided that a law discriminating against homosexuals was subject to a heightened, intermediate scrutiny, because all four factors the Supreme Court uses to determine whether discrimination against a group is subject to heightened scrutiny were present.⁷⁷ The court noted that:

A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.⁷⁸

Although many other courts have also found that sexual orientation discrimination merits heightened review under equal protection guaran-

70. *Id.* at 401.

71. *Id.* at 402 (citing *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring)).

72. *Windsor II*, 699 F.3d 169 (2d Cir. 2012).

73. *Id.*

74. *Id.* at 180.

75. *Id.* at 180-81.

76. *Id.* at 181.

77. *Windsor II*, 699 F.3d at 181-82.

78. *Id.*

tees,⁷⁹ this finding by the Second Circuit is significant as it is the first time a federal circuit court has determined that DOMA should be subject to heightened review.⁸⁰ The Second Circuit then determined that Section 3 of DOMA could not withstand intermediate scrutiny, as has every court that has examined a same-sex marriage exclusion under heightened review.⁸¹

Although the Second Circuit noted that “the Supreme Court [has] ruled that sex-based classifications [are] subject to heightened scrutiny,”⁸² it did not recognize or discuss the fact that DOMA was a sex-based classification.

D. THE SUPREME COURT DECISION IN *UNITED STATES V. WINDSOR*

Like in *Hollingsworth v. Perry*, in deciding *United States v. Windsor*, the Supreme Court could have decided that the petitioners did not have standing to appeal the case, thus avoiding the question of whether same-sex couples have the right to have their marriages recognized by the federal government under the Federal Constitution. However, unlike in *Hollingsworth v. Perry*, in *United States v. Windsor (Windsor III)*,⁸³ the Supreme Court did reach the merits of the case, and found that Section 3 of DOMA was unconstitutional.

The Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) was granted permission by the district court to intervene and defend DOMA after the Obama Administration decided not to defend it.⁸⁴ The Supreme Court found that BLAG was a proper party, and did have standing to defend the provision before the Supreme Court, because a real controversy existed as the United States refused to issue Windsor her refund even while it professed to agree with her arguments; and

79. See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 990 (N.D. Cal. 2012) (finding that DOMA’s Section 3, by discriminating against homosexuals, must be subject to heightened scrutiny, and finding the law invalid under intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (examining Iowa’s same-sex marriage exclusion under intermediate scrutiny and finding it violated Iowa’s constitutional equal protection guarantee); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (examining Connecticut’s same-sex marriage exclusion under intermediate scrutiny and finding it violated Connecticut’s constitutional equal protection provisions).

80. See *Windsor II*, 699 F.3d at 209 (Straub, J., dissenting) (“Until the majority’s opinion, DOMA had never been held by the Supreme Court or any Circuit Court to involve a suspect or quasi-suspect classification.”) (citations omitted).

81. See *infra* Part IV.B.

82. *Windsor II*, 699 F.3d at 184 (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973)).

83. *Windsor III*, 133 S. Ct. 2675 (2013).

84. See *Windsor I*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

because BLAG was able to give a “sharp adversarial presentation of the issues.”⁸⁵

Addressing the merits of the case, the Supreme Court noted that “[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”⁸⁶ The Court then extensively discussed the States’ power over marriage and DOMA’s disruption of this power. However, the Court concluded “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”⁸⁷ Instead, the Court noted that DOMA is an unusual law given its significant departure from the history and tradition of leaving the definition of marriage to the states, and that “[dis]criminations of an unusual character . . . suggest careful consideration to determine whether they are obnoxious to the constitutional [equal protection] provision[s].”⁸⁸

Examining the history and the text of DOMA, the Court found that DOMA’s purpose and effect was to impose disadvantage and inequality on same-sex couples because it “operate[d] to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.”⁸⁹ Thus, the purpose and effect of DOMA was to “impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”⁹⁰

Though not explicitly addressing what level of equal protection review the Court was using, the Court’s language and reasoning showed that it used rational basis review to invalidate the law.⁹¹ The Court also did not explicitly state that it was examining discrimination based on sex or sexual orientation, instead defining the class of persons harmed by DOMA as “those persons who are joined in same-sex marriages made lawful by the State.”⁹² The Court noted that its “opinion and . . . holding are confined to those [in] lawful marriages.”⁹³ Thus, the *Windsor III* opinion has no immediate effect on the same-sex marriage prohibitions still present in over thirty states.

85. *Windsor III*, 133 S. Ct. at 2688.

86. *Id.* at 2689.

87. *Id.* at 2692.

88. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

89. *Id.* at 2693.

90. *Windsor III*, 133 S. Ct. at 2693.

91. *See id.* at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”). *See supra* notes 19-26 and accompanying text for an explanation of the language used by the Court for each level of scrutiny.

92. *Id.* at 2695.

93. *Id.* at 2696.

However, as Justice Scalia noted in his dissent, much of the Court's reasoning, finding that DOMA's same-sex marriage exclusion could not pass rational basis review because it imposed disadvantages on same-sex married couples and their families, could apply to challenges to state same-sex marriage prohibitions.⁹⁴

Nonetheless, lower courts could, and many probably will, distinguish the Supreme Court's decision in *Windsor III* in a future challenge to a state same-sex marriage prohibition.⁹⁵ First, the *Windsor III* decision involved a long discussion of federalism and how the states, not the federal government, have traditionally and historically had the power to define marriage.⁹⁶ While this fact weakened the federal DOMA's legitimacy, it would strengthen a state-law marriage restriction's legitimacy.⁹⁷

Second, the Supreme Court in *Windsor III* examined DOMA's unique legislative history, text, and effects,⁹⁸ all of which will differ from the history, text, and effects of any individual state same-sex marriage prohibition. Thus, future state and federal courts could attempt to distinguish *Windsor III* from a challenge to a state same-sex marriage prohibition on these grounds.⁹⁹

Thus, it is likely that in the future a case challenging a state-sex marriage prohibition will reach the Supreme Court. In this future case, the Supreme Court may decide to distinguish its reasoning in *Windsor III*, a possibility that is more likely if the composition of the Court changes, as *Windsor III* was a 5-4 decision. If it does so, before it finds a state same-sex marriage prohibition constitutional, it should not forget to analyze the sex discrimination present in same-sex marriage prohibitions, as discussed below.¹⁰⁰

94. *Id.* at 2709-10 (Scalia, J., dissenting) (citing *Windsor III*, 133 S. Ct. at 2694, 40 (majority opinion)). *Accord* Archibald, *Is Full Marriage Equality for Same-Sex Couples Next?*, *supra* note 63 (noting that much of the reasoning in *Windsor III* could be applied to future same-sex marriage cases addressing state same-sex marriage prohibitions).

95. *See Windsor III*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (noting that “[s]tate and lower federal courts should . . . distinguish away” when presented with challenges to state same-sex marriage prohibitions); *id.* at 2696 (Roberts, J., dissenting) (opining that the logic of the majority's opinion does not decide whether a state may prohibit same-sex marriage).

96. *Windsor III*, 133 S. Ct. at 2689 (majority opinion).

97. *See id.* at 2696-98 (Roberts, J., dissenting) (noting that the majority's federalism reasoning does not apply to a state's decision on a same-sex marriage limitation).

98. *See id.* at 2693-96 (majority opinion).

99. *Id.* at 2697 (Roberts, J., dissenting) (noting that the “statute-specific considerations [focused on by the majority] will . . . be irrelevant in future cases about different statutes”).

100. *See infra* Parts III, IV.

III. UNDER SUPREME COURT PRECEDENT, OPPOSITE-SEX MARRIAGE REQUIREMENTS ARE SEX DISCRIMINATION

Under clear Supreme Court precedent in the case of *Loving v. Virginia*,¹⁰¹ opposite-sex marriage requirements should be recognized as sex discrimination and thus subjected to heightened scrutiny under the federal constitutional equal protection guarantees.¹⁰² However, several state and federal courts have not recognized same-sex marriage exclusions as sex discrimination.¹⁰³ Thus, there is a danger that the Supreme Court could make the same mistake in its next same-sex marriage decision.

A. THE *LOVING V. VIRGINIA* SUPREME COURT DECISION

In *Loving v. Virginia*, an interracial married couple challenged Virginia state laws that prohibited and punished interracial marriages.¹⁰⁴ Virginia law at the time automatically voided all marriages between “a white person and a colored person.”¹⁰⁵ The Supreme Court found that the Virginia laws were impermissible under the Equal Protection Clause of the Fourteenth Amendment because they classified individuals based on their race.¹⁰⁶

The State of Virginia argued that because its laws “punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.”¹⁰⁷ Virginia then contended that because its laws did not discriminate based on race, they should be judged by a rational basis standard of review instead of the heightened scrutiny that a racially discriminatory law is subject to.¹⁰⁸ The Supreme Court called this argument the “Equal Application Theory” and soundly rejected it:

101. *Loving v. Virginia*, 388 U.S. 1 (1967).

102. *See infra* Part III.B.

103. *See infra* notes 117-23 and accompanying text.

104. *See Loving*, 388 U.S. at 4.

105. *Id.* A “white person” was defined as “such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons.” *Id.* at 5 n.4. A “colored person” was defined as “[e]very person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.” *Id.*

106. *Id.* at 6.

107. *Loving*, 388 U.S. at 8.

108. *Id.* *See supra* notes 19-28 and accompanying text for an explanation of the three tiers of scrutiny under current Supreme Court equal protection jurisprudence.

Because we reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. . . . In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. . . . 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. . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.¹⁰⁹

B. APPLICATION OF *LOVING* TO TODAY’S SAME-SEX MARRIAGE EXCLUSIONS

In the same way that Virginia’s laws prohibited interracial marriage “on the basis of racial classifications,”¹¹⁰ today’s same-sex marriage prohibitions prohibit same-sex marriage on the basis of sex classifications.¹¹¹ Just as Virginia’s laws “proscribe[d] generally accepted conduct [marriage] if engaged in by members of different races,”¹¹² same-sex marriage exclusions proscribe generally accepted conduct [marriage] if engaged in by members of the same sex. The Supreme Court subjected Virginia’s miscegenation

109. *Loving*, 388 U.S. at 8-9, 11-12.

110. *See id.* at 6 (noting that “Virginia . . . prohibit[s] . . . marriages on the basis of racial classifications”).

111. *See Hernandez v. Robles*, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting) (citing *Loving*, 388 U.S. at 8) (noting that “[t]he ‘equal application’ approach to equal protection analysis was expressly rejected by the Supreme Court in *Loving*” and therefore the opposite-sex marriage requirement must be recognized as sex discrimination). *See also infra* note 145 and accompanying text.

112. *Loving*, 388 U.S. at 11.

laws to the heightened standard of review that laws based on racial classifications and racial discrimination must pass to remain valid.¹¹³ Therefore, today's laws limiting marriage to opposite-sex couples must be subject to the heightened standard of review used for laws based on sex classifications and sex discrimination.¹¹⁴

Just as "the mere 'equal application' of a statute containing racial classifications [was not] enough to remove the classifications from the Fourteenth Amendment's" high bar on racial discrimination,¹¹⁵ so too the mere "equal application" of the same-sex marriage exclusions is not enough to remove the classifications from the Fourteenth Amendment's high bar on sex discrimination.

Although some courts and individual judges have recognized that same-sex marriage prohibitions are sex discrimination and therefore must be subject to the heightened level of review applicable to sex discrimination,¹¹⁶ many courts and individual judges have not recognized or addressed the sex discrimination present.¹¹⁷

113. See *Loving*, 388 U.S. 1.

114. See *supra* notes 19-28 and accompanying text for an explanation of the three tiers of scrutiny under current Supreme Court equal protection jurisprudence. See also *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (noting that a "party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification") (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

115. *Loving*, 388 U.S. at 8.

116. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion) (holding that the opposite-sex marriage requirement classifies based on sex and implicates heightened scrutiny under Hawaii's equal protection clause); *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007) (finding that the opposite-sex marriage requirement impermissibly discriminates based on sex because "[e]ach Plaintiff would have been able to marry his or her partner had the Plaintiff been of a different sex"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious."), *superseded by constitutional amendment* ALASKA CONST. art. I, § 25 (amended 1999); *Conaway v. Deane*, 932 A.2d 571, 686 (Md. 2007) (Battaglia, J., dissenting) ("[A] man who wishes to marry another man is prevented from choosing his marriage partner purely on the basis of sex; likewise, a woman who wishes to marry another woman is prevented from choosing her marriage partner purely on the basis of sex. Manifestly, [Maryland's same-sex marriage prohibition] classifies on the basis of sex" and is thus prohibited sex discrimination.); *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) (noting that "[t]he exclusion of same-sex couples from civil marriage . . . discriminates on the basis of sex, which provides a . . . basis for requiring heightened scrutiny"); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971-73 (Mass. 2003) (Greaney, J., concurring) (noting that the "classification [in the opposite-sex marriage requirement] is sex based is self-evident. The marriage statutes prohibit some applicants,

Many courts that have addressed the sex discrimination present in same-sex marriage prohibitions have been fooled by the same “equal application” argument that was rejected in *Loving*.¹¹⁸ These courts have stated

such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants’ gender”); *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting) (recognizing that the marriage statute classifies on the basis of sex); *Andersen v. King Cnty.*, 138 P.3d 963, 1037 (Wash. 2006) (Bridge, J., dissenting) (explaining that the opposite-sex marriage requirement discriminates based on sex because “the only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman. Andersen should no more readily be prohibited from marrying her partner than she is from voting for president or practicing law”). *See also* Jennifer Levi, *Toward a More Perfect Union: The Road to Marriage Equality for Same-Sex Couples*, 13 WIDENER L.J. 831, 843 (2004) (allowing opposite-sex marriage but not same-sex marriage is sex discrimination because if a person in a gay male relationship would be allowed to marry his partner if he were female, then the exclusion is based upon his sex); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219 (1994) (arguing that the idea that the behavior of sex with women is appropriate for one sex and not the other, and vice versa, is based on traditional sex-based gender roles and is therefore sex-based discrimination); Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 115-16 (2002); Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL’Y 61, 88-92 (1999); Jeffrey Hubins, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?*, 23 WHITTIER L. REV. 239, 258-60 (2001); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL’Y 397, 403 (2001).

117. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (analyzing Nebraska’s same-sex marriage prohibition under rational basis review, finding no violation of the United States Constitution, and not mentioning or addressing the sex discrimination present in the prohibition); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (upholding Indiana’s opposite-sex marriage requirement under a rational basis review and not mentioning the sex discrimination present); *Perry II*, 671 F.3d 1052, 1100 (9th Cir. 2012) (Smith, J., dissenting) (stating that the same-sex marriage prohibition “does not involve . . . a suspect classification and therefore should not be analyzed under any heightened scrutiny” despite the fact that plaintiffs argued that sex discrimination was present in the opposite-sex marriage requirement).

118. *See, e.g.*, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098-99 (Dist. Haw. 2012) (upholding Hawaii’s same-sex marriage prohibition under the federal constitution and finding no sex discrimination because the law “does not treat males and females differently as a class. It is gender-neutral on its face; it prohibits men and women equally from marrying a member of the same-sex”); *Conaway*, 932 A.2d at 598 (stating that “the marriage statute does not discriminate on the basis of sex . . . [because] the statute prohibits equally both men and women from the same conduct” and upholding Maryland’s same-sex marriage prohibition using rational basis review); *Hernandez*, 855 N.E.2d at 10-11 (finding that the same-sex marriage prohibition is not sex discrimination because “[w]omen and men are treated alike - they are permitted to marry people of the opposite sex, but not people of their own sex”); *Andersen*, 138 P.3d at 988 (en banc) (“Men and women are treated identically under [Washington’s] DOMA; neither may marry a person of the same sex. DOMA therefore does not make any ‘classification by sex,’ and it does not discriminate on account of sex.”); *Phillips v. Wis. Pers. Comm’n*, 482 N.W.2d 121, 127-28 (Wis. Ct. App. 1992) (same); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (upholding DOMA under rational basis review and finding no gender discrimination present in the provision because “[t]here is no

that the opposite-sex marriage requirement does not discriminate based on sex because it treats men and women equally, and “each sex is . . . prohibited from precisely the same conduct,”¹¹⁹ in that each may not marry someone of the same sex.¹²⁰ The courts look at whether a person is disadvantaged, compared to a differently-sexed person “similarly situated.”¹²¹ They then conclude that a woman who cannot marry a woman is in “like circumstance” as a man who cannot marry a man, both are disadvantaged to the same extent, and therefore there is no sex-based discrimination.¹²²

However, this is the very same “equal application” argument that was so soundly rejected in *Loving v. Virginia*.¹²³ The *Loving* Court found that even though the races were treated arguably “the same” by the miscegenation laws, in that people of each race could not marry someone of a different race,¹²⁴ the miscegenation laws were prohibited racial discrimination because *the rights of individual citizens* were determined and restricted based on race.¹²⁵

Many of the courts that have rejected the contention that same-sex marriage exclusions are sex discrimination have attempted to distinguish the Supreme Court’s decision in *Loving*.¹²⁶ These courts often note that in

evidence . . . that DOMA’s purpose is to discriminate against men or women as a class”); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006) (holding that the opposite-sex marriage requirement, is a law that “merely mentions gender,” treats both sexes equally, and is not impermissibly discriminatory) *rev’d.*, 183 P.3d 384 (Cal. 2008).

119. Baker, 744 A.2d at 880 n.13. *Accord* cases cited *supra* note 118.

120. See cases cited *supra* notes 118-19.

121. See Baker, 744 A.2d at 880 n.13.

122. See *id.*

123. See *supra* Part III.A.

124. See *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967) (finding the “racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming” that people of every race were equally prohibited from marrying outside their race).

125. *Id.* at 11-12 (“We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.”); *cf.* Baker, 744 A.2d at 906 n.10 (Johnson, J., concurring and dissenting) (“Under the State’s analysis, a statute that required courts to give custody of male children to fathers and female children to mothers would not be sex discrimination. Although such a law would not treat men and women differently, I believe it would discriminate on the basis of sex.”); *Andersen v. King Cnty.*, 138 P.3d 963, 1039 (Wash. 2006) (Bridge, J., dissenting) (noting that “under the equal application theory . . . a state law could require that upon dissolution of a marriage, all female children must reside with the mother and all male children must reside with the father . . . [or] could prohibit all people from holding jobs traditionally held by persons of the opposite sex”).

126. See, e.g., *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (Dist. Nev. 2012) (although noting that Nevada’s same-sex marriage prohibition “could be characterized as gender-based under the *Loving* reciprocal-disability principle” finding that *Loving* did not apply because whereas the interracial marriage ban in *Loving* was designed to maintain White Supremacy, “[h]ere, there is no indication of any intent to maintain any notion of male or female superiority”); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1097-98, 1119 n.22 (Dist. Haw. 2012) (upholding Hawaii’s same-sex marriage prohibition and finding

Loving, the Supreme Court found that the interracial marriage prohibition was motivated by “invidious racial discrimination” and designed to “maintain White Supremacy.”¹²⁷ They then find that because same-sex marriage exclusions are not motivated by invidious sex discrimination, *Loving*'s holding does not apply. However, this reasoning is incorrect for three reasons.

First, the Supreme Court in *Loving* found that Virginia's interracial marriage ban violated the Equal Protection Clause because it impermissibly classified people based on race, not because the laws at issue were motivated by invidious race discrimination or maintaining White Supremacy.¹²⁸ The Supreme Court itself noted that its holding was not dependent on a finding of discriminatory intent: “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.”¹²⁹ Although the

Loving “unpersuasive” because “*Loving* involved an invidious discrimination on the basis of race” whereas the same-sex marriage prohibition “does not discriminate on the basis of gender”); *Conaway v. Deane*, 932 A.2d 571, 601-02 (Md. 2007) (same); *Hernandez v. Robles*, 855 N.E.2d 1, 19-20 (N.Y. 2006) (same); *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 865 (N.Y. Sup. Ct. 2005) (same); *Baker*, 744 A.2d at 880 n.13 (same); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706, 708 (Cal. Ct. App. 2006) (upholding California's same-sex marriage ban and finding *Loving* did not apply because whereas in *Loving* the court found the law was designed to maintain White Supremacy, “[n]o evidence indicates California's opposite-sex definition of marriage was intended to discriminate against males or females”) *rev'd.*, 183 P.3d 384 (Cal. 2008). *See also* *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 508-09 (Conn. 2008) (Borden, J. dissenting) (same).

127. *See, e.g., Sevcik*, 911 F. Supp. 2d at 1005 (although noting that Nevada's same-sex marriage prohibition “could be characterized as gender-based under the *Loving* reciprocal-disability principle” finding that *Loving* did not apply because whereas the interracial marriage ban in *Loving* was designed to maintain White Supremacy, “[h]ere, there is no indication of any intent to maintain any notion of male or female superiority”); *Jackson*, 884 F. Supp. 2d at 1097-98, 1119 n.22 (upholding Hawaii's same-sex marriage prohibition and finding *Loving* “unpersuasive” because “*Loving* involved an invidious discrimination on the basis of race” whereas the same-sex marriage prohibition “does not discriminate on the basis of gender”); *Conaway*, 932 A.2d at 601-02 (same); *Hernandez*, 855 N.E.2d at 19-20 (same); *Seymour*, 790 N.Y.S.2d at 865 (same); *Baker*, 744 A.2d at 880 n.13 (same); *In re Marriage Cases*, 49 Cal. Rptr. 3d at 706, 708 (upholding California's same-sex marriage ban and finding *Loving* did not apply because whereas in *Loving* the court found the law was designed to maintain White Supremacy, “[n]o evidence indicates California's opposite-sex definition of marriage was intended to discriminate against males or females”) *rev'd.*, 183 P.3d 384 (Cal. 2008). *See also* *Kerrigan*, 957 A.2d at 508-09 (Borden, J. dissenting) (same).

128. *Loving*, 388 U.S. at 12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”). *See also* *Conaway*, 932 A.2d at 677-86 (Battaglia, J., dissenting) (quoting *Loving*, 388 U.S. at 11 n.11) (noting that “[t]he [*Loving*] 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””).

129. *Loving*, 388 U.S. at 11 n.11.

Court mentioned “invidious racial discrimination” several times, on all but one occasion, it did so to state its conclusion that *the interracial marriage ban itself* constituted invidious racial discrimination because of its very nature of restricting rights of citizens based on race.¹³⁰

In the same way, same-sex marriage exclusions should be recognized as invidious sex discrimination, because they restrict the rights of individuals based on sex and mete out different rights based on sex. The right to marry a man is a different right than the right to marry a woman, just as the right to marry a European-American is a different right than the right to marry an African-American.

Only once did the *Loving* Court note that the purpose of the interracial marriage ban was “invidious racial discrimination” and “maintain[ing] White Supremacy.”¹³¹ However, it did so only after the Court had found that the ban was subject to strict scrutiny because it classified individuals based on race.¹³² When the Court noted that the purpose of the interracial marriage ban was “invidious racial discrimination” and “maintain[ing] White Supremacy,” it was looking for a purpose of the ban that might meet the strict scrutiny test: it did not find one.¹³³ The only other time the *Loving* Court mentioned “White Supremacy” was to state background about the case: the court below had found that the doctrine of White Supremacy was sufficient reason to uphold the interracial marriage ban.¹³⁴

Second, Supreme Court precedent is clear that when a law on its face “classif[ies] citizens” on a prohibited ground, inquiry into motivation be-

130. *See id.* at 8 (noting that “the State contends that . . . its miscegenation statutes . . . do not constitute an invidious discrimination based upon race” and rejecting that contention later); *id.* (stating that “we reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations”); *id.* at 10 (stating that “the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States” and thus implying that the interracial marriage ban at issue, because of its racial classifications, constituted invidious discrimination); *id.* at 12 (evidencing its opinion that the interracial marriage ban was invidious racial discrimination because stating that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations”).

131. *Loving*, 388 U.S. at 11.

132. *See id.* at 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)) (finding that the laws banning interracial marriage, because they contained racial classifications, were subject to “the ‘most rigid scrutiny’ . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective” and then finding that “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification”).

133. *See id.*

134. *Id.* at 7.

hind the law is not relevant.¹³⁵ Just as the Supreme Court in *Loving* found that Virginia's laws prohibiting interracial marriage "contain[] racial classifications . . . which restrict the rights of citizens on account of race,"¹³⁶ so too do same-sex marriage exclusions, on their face, contain sex classifications which restrict the rights of citizens on account of sex.¹³⁷ There is no doubt that on the face of a same-sex marriage prohibition a woman is prevented, *solely because of her sex*, from marrying another woman.¹³⁸ Similarly, a man is prevented, *solely because of his sex*, from marrying another man. Therefore, as in *Loving*, the question of legislative intent is irrelevant in the determination of what level of scrutiny is applicable.¹³⁹

Third, even if an invidious discriminatory intent were necessary to find the same-sex marriage exclusions unconstitutional, such intent, or similar intent, can be found.¹⁴⁰ Just as the Supreme Court in *Loving* found that the Virginia laws prohibiting interracial marriage were motivated by an "invidious racial discrimination"¹⁴¹ that heightened review under the Equal Protection Clause was meant to prevent, so too are today's opposite-sex mar-

135. See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("When racial classifications are explicit, no inquiry into legislative purpose is necessary."); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."). See also *Conaway v. Deane*, 932 A.2d 571, 685 (Md. 2007) (Battaglia, J., dissenting) ("[I]t is well-settled that the question of discriminatory intent does not arise unless the threshold question of facial neutrality is answered in the affirmative.").

136. *Loving*, 388 U.S. at 8, 12.

137. See *supra* note 116. See also *Conaway*, 932 A.2d at 686 (Md. 2007) (Battaglia, J., dissenting) ("[A] man who wishes to marry another man is prevented from choosing his marriage partner purely on the basis of sex; likewise, a woman who wishes to marry another woman is prevented from choosing her marriage partner purely on the basis of sex. Manifestly, [Maryland's same-sex marriage prohibition] classifies on the basis of sex; because it would be necessary to consider the underlying legislative intent only if the same-sex marriage ban did not draw sex-based distinctions, the question of legislative intent is irrelevant. Just as in *Loving*, it is the nature of the classifications themselves that implicates strict scrutiny.").

138. See, e.g., *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring and dissenting) ("[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.").

139. See *id.* See also cases cited *supra* notes 135-38 and accompanying text.

140. Note that although "invidious" can mean "hateful," it can also mean "unfairly discriminating; injurious." See [DICTIONARY.COM](http://dictionary.reference.com/browse/invidious?s=t), <http://dictionary.reference.com/browse/invidious?s=t> (last visited Dec. 17, 2013).

141. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Note, however, that the Court subjected the laws to heightened scrutiny not because of this motivation, but rather because they classified people based on race. See *supra* notes 128-134 and accompanying text.

riage requirements based upon “invidious sex stereotypes and discrimination” that heightened review under the Equal Protection Clause is meant to prevent.¹⁴² A woman unable under state law to marry her female partner is in effect being subject to stereotypes about what kind of person a woman should be attracted to and marry and about the proper role for women in society.¹⁴³ As one court put it:

142. See, e.g., *Perry I*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (finding that California’s same-sex marriage prohibition “mandates that men and women be treated differently based only on antiquated and discredited notions of gender”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring) (noting that the challenge to the Massachusetts same-sex marriage ban “requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions in light of [Massachusetts’s equal protection guarantee]”); *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring and dissenting) (“[T]he sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women.”). See also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (holding that policy of excluding men from nursing school was illegitimate because it made “the assumption that nursing is a field for women a self-fulfilling prophecy”); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women.”); *Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020, 1029 (W.D. Mo. 1983) (“[G]ender based classification which results from ascribing a particular trait or quality to one sex . . . tends only to perpetuate ‘stereotypic notions’ regarding proper roles of men and women.”); cf. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 419 (Conn. 2008) (“[T]he very existence of the classification gives credence to the perception that separate treatment is warranted.”); see also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219 (1994) (arguing that the idea that the behavior of sex with women is appropriate for one sex and not the other, and vice versa, is based on traditional sex-based gender roles and is therefore sex-based discrimination); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 20 n.65 (1994) (noting that same-sex marriage bans are “part of a system of sex-role stereotyping”); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1171-75 (1999) (noting that same-sex marriage makes some people uncomfortable because their gender role expectations are upset).

143. See, e.g., *Perry I*, 704 F. Supp. 2d at 998 (finding that California’s same-sex marriage prohibition “mandates that men and women be treated differently based only on antiquated and discredited notions of gender”); *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring) (noting that the challenge to the Massachusetts’s same-sex marriage ban “requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions in light of [Massachusetts’s equal protection guarantee]”); *Baker*, 744 A.2d at 906 (Johnson, J., concurring and dissenting) (“[T]he sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women.”). See also *Hogan*, 458 U.S. at 730 (holding that policy of excluding men from nursing school was illegitimate because it made “the assumption that nursing is a field for women a self-fulfilling prophecy”); *Orr*, 440 U.S. at 283 (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women.”); *Force*, 570 F. Supp. at 1029 (“[G]ender based classification which results from ascribing a

Sex-role conformity remains embedded in [the contested] marriage law. As a condition of marriage . . . male Plaintiffs must conform to the State's view that men should fall in love with, be intimate with and marry only women, while female Plaintiffs must conform to the State's view that women should fall in love with, be intimate with and marry only men. In fact, these are old and overbroad stereotypes that do not reflect the diversity of individual men and women.¹⁴⁴

Many courts and individual judges have correctly noted that *Loving* mandates the conclusion that same-sex marriage exclusions are sex classification and discrimination and therefore must be judged with heightened scrutiny.¹⁴⁵

particular trait or quality to one sex . . . tends only to perpetuate 'stereotypic notions' regarding proper roles of men and women."); cf. Kerrigan, 957 A.2d at 419 ("[T]he very existence of the classification gives credence to the perception that separate treatment is warranted."). See also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219 (1994) (arguing that the idea that the behavior of sex with women is appropriate for one sex and not the other, and vice versa, is based on traditional sex-based gender roles and is therefore sex-based discrimination); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 20 n.65 (1994) (noting that same-sex marriage bans are "part of a system of sex-role stereotyping"); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1171-75 (1999) (noting that same-sex marriage makes some people uncomfortable because their gender role expectations are upset).

144. *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007), *aff'd*, 763 N.W.2d 862 (Iowa 2009).

145. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993) (plurality opinion) (finding that the *Loving* opinion mandated the finding that Hawaii's same-sex marriage ban was sex discrimination because "substitution of 'sex' for 'race'" in the *Loving* opinion could yield no other result); *Varnum*, 2007 WL 2468667, at *24 ("The Defendant argues that because the statute operates equally on men and women, the statute is not a sex-based classification warranting intermediate scrutiny. However, the United States Supreme Court in *Loving* rejected an identical line of reasoning with regard to race and held that despite the Virginia law's application to both white and black citizens, the statute nonetheless violated the Equal Protection Clause."); Goodridge, 798 N.E.2d at 971 (Greaney, J., concurring) (finding the same-sex marriage prohibition "strikingly similar to . . . Virginia's antimiscegenation laws [at issue in] *Loving v. Virginia*"); *Conaway v. Deane*, 932 A.2d 571, 685 (Md. 2007) (Battaglia, J., dissenting) (noting that in *Loving*, the Supreme Court "applied strict scrutiny to the Virginia statute despite its ostensibly equal application to both races"); *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) ("That the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex. The 'equal application' approach to equal protection analysis was expressly rejected by the Supreme Court in *Loving*."); *Andersen v. King Cnty.*, 138 P.3d 963, 1038 (Wash. 2006) (Bridge, J., dissenting) (noting that the "equal application theory [accepted by

IV. IMPLICATIONS OF A FINDING OF SEX DISCRIMINATION FOR THE NEXT SUPREME COURT SAME-SEX MARRIAGE CASE

When courts have subjected same-sex marriage prohibitions to rational basis review, there are mixed results, with some courts concluding that same-sex marriage prohibitions pass rational basis review, and some courts concluding that they do not.¹⁴⁶ However, when courts have used heightened review, either intermediate scrutiny or strict scrutiny, they have uniformly found that same-sex marriage prohibitions cannot withstand heightened scrutiny.¹⁴⁷

As discussed above, the Supreme Court will almost certainly address the constitutionality of state same-sex marriage prohibitions in a future case.¹⁴⁸ If in so doing, it decides to address sexual orientation discrimination first and apply a rational basis review, there is a possibility that it will find the sexual orientation discrimination present in the prohibitions constitutional.¹⁴⁹ If so, the Court should also address the sex discrimination present, and apply intermediate scrutiny to the prohibitions.¹⁵⁰ As discussed below, under the heightened review that sex discrimination is subject to, opposite-sex marriage requirements must be found unconstitutional.¹⁵¹

A. RATIONAL BASIS REVIEW

Many courts have judged same-sex marriage exclusions under constitutional equal protection guarantees using rational basis review.¹⁵² These courts apply rational basis review either because they conclude that sexual orientation discrimination should be judged with rational basis review¹⁵³ or

the majority], as applied to the institution of marriage, has already been rejected by the United States Supreme Court in *Loving*”).

146. See *infra* Part IV.A. See also Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281 (2011) (noting the split in court decisions using rational basis review).

147. See *infra* Part IV.B.

148. See *supra* Part II.

149. See *infra* Part IV.A. Note that the Court could distinguish its decision in *Windsor III*. See *supra* Part II.D.

150. See *supra* Part III.

151. See *infra* Part IV.B.

152. See, e.g., *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (Dist. Haw. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012); *Andersen v. King Cnty.*, 138 P.3d 963, 980 (Wash. 2006); *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

153. See, e.g., *Jackson*, 884 F. Supp. 2d 1065 (upholding Hawaii's same-sex marriage prohibition under the Fourteenth Amendment to the U.S. Constitution using rational basis review); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (Dist. Nev. 2012) (upholding Nevada's same-sex marriage prohibition under the Fourteenth Amendment to the U.S. Constitution using rational basis review); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (uphold-

because they conclude that because the discrimination present cannot even pass rational basis review, there is no reason to decide whether heightened review is necessary.¹⁵⁴

When courts have addressed same-sex marriage prohibitions under a rational basis review, their opinions are split on whether the prohibitions survive rational basis scrutiny.¹⁵⁵ Some courts, noting that rational basis review is extremely deferential to legislative decisions, have upheld the prohibitions.¹⁵⁶ They emphasize how deferential rational basis review is,

ing Maryland's same-sex marriage prohibition using rational basis review); *Bruning*, 455 F.3d 859 (upholding Nebraska's same-sex marriage prohibition under the Fourteenth Amendment to the U.S. Constitution using rational basis review); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (upholding New York's same-sex marriage prohibition using rational basis review); *Andersen*, 138 P.3d 963 (upholding Washington's same-sex marriage prohibition using rational basis review); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding Section 3 of DOMA under the Fifth Amendment to the Federal Constitution using rational basis review), *overruled by Windsor III*, 133 S. Ct. 2675 (2013); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (same); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (upholding Indiana's same-sex marriage prohibition under Indiana's constitution using rational basis review); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003) (upholding Arizona's same-sex marriage prohibition using rational basis review).

154. See, e.g., *Perry II*, 671 F.3d 1052 (9th Cir. 2012) (finding that California's same-sex marriage ban cannot pass rational basis review), *invalidated on other grounds by Perry III*, 133 S. Ct. 2562 (2013); *Massachusetts v. U.S. HHS*, 682 F.3d 1 (1st Cir. 2012) (finding that Section 3 of DOMA fails rational basis review); *Perry I*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (finding that California's same-sex marriage ban cannot pass rational basis review); *Windsor I*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (finding Section 3 of DOMA cannot pass rational basis review); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012) (finding that Section 3 of DOMA fails rational basis review); *Dragovich v. U.S. Dep't of the Treasury*, 872 F. Supp. 2d 944 (N.D. Cal. 2012) (finding that Section 3 of DOMA fails rational basis review); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 990 (N.D. Cal. 2012) (finding that DOMA's Section 3, by discriminating against homosexuals, must be subject to heightened scrutiny, and finding the law invalid under intermediate scrutiny, but in the alternative also finding it invalid under rational basis review); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (finding Section 3 of DOMA violated the Fifth Amendment of the Federal Constitution using rational basis review); *Goodridge*, 798 N.E.2d 941 (invalidating state same-sex marriage prohibition using rational basis review).

155. See cases cited *supra* notes 153-54.

156. See, e.g., *Jackson*, 884 F. Supp. 2d 1065 (upholding Hawaii's same-sex marriage prohibition under the Fourteenth Amendment to the U.S. Constitution using rational basis review); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (Dist. Nev. 2012) (upholding Nevada's same-sex marriage prohibition under the Fourteenth Amendment to the U.S. Constitution using rational basis review); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (upholding Maryland's same-sex marriage prohibition using rational basis review); *Bruning*, 455 F.3d 859 (upholding Nebraska's same-sex marriage prohibition under the Fourteenth Amendment to the U.S. Constitution using rational basis review); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (upholding New York's same-sex marriage prohibition using rational basis review); *Andersen*, 138 P.3d 963 (upholding Washington's same-sex marriage prohi-

often quoting the Supreme Court in stating that the legislative classification “may be based on rational speculation unsupported by evidence or empirical data.”¹⁵⁷

On the other hand, other courts note even though rational basis review is deferential, the rational must have “some footing in the realities of the subject addressed.”¹⁵⁸ They often follow the Supreme Court’s lead in *Romer v. Evans*¹⁵⁹ and note that rational basis review “is not indiscriminately deferential, [and] . . . ‘we insist on knowing the relation between the classification adopted and the objective to be attained.’”¹⁶⁰ Under this more thorough version of rational basis review, courts often find that same-sex marriage exclusions are invalid.¹⁶¹

bition using rational basis review); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding Section 3 of DOMA under the Fifth Amendment to the Federal Constitution using rational basis review), *overruled by Windsor III*, 133 S. Ct. 2675 (2013); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (same); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (upholding Indiana’s same-sex marriage prohibition under Indiana’s constitution using rational basis review); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003) (upholding Arizona’s same-sex marriage prohibition using rational basis review); *See also*, e.g., *Bruning*, 455 F.3d at 867 (finding that Nebraska’s same-sex marriage prohibition did not violate the United States Constitution because the court could not say there was no rational basis between the prohibition and state interests of responsible procreation and the “traditional notion that two committed heterosexuals are the optimal partnership for raising children”); *Perry II*, 671 F.3d at 1101 (Smith, J., dissenting) (noting that under rational basis review, a classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification” and finding encouraging responsible procreation and providing an optimal parenting environment for children to be rational basis for the same-sex marriage prohibition).

157. *Heller v. Doe*, 509 U.S. 312, 320 (1993). *See, e.g.*, *Jackson*, , 884 F. Supp. at 1102 (Dist. Haw. 2012) (upholding Hawaii’s opposite-sex marriage requirement under the federal constitution using rational basis review and noting that “the question is not whether the rationales set forth . . . are supported by empirical evidence, or are wise. Instead, it is whether Hawaii *could* have reasonably believed, or rationally speculated, that Hawaii’s marriage laws furthered any legitimate interest”); *Andersen*,, 138 P.3d at 980 (upholding Washington’s same-sex marriage prohibition under rational basis review). *Accord supra* note 153.

158. *Heller*, 509 U.S. at 321. *See, e.g.*, *Pedersen*, 881 F. Supp. 2d 294, 343 (Dist. Conn. 2012) (finding Section 3 of DOMA unconstitutional using an intermediate scrutiny review because sexual orientation discrimination should be subject to heightened review); *Perry I*, 704 F. Supp. 2d at 995 (invalidating same-sex marriage prohibition under federal equal protection guarantee using rational basis review); *Golinski*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012) (invalidating Section 3 of DOMA using intermediate scrutiny review).

159. *Romer v. Evans*, 517 U.S. 620 (1996).

160. *See, e.g., Pedersen*, 881 F. Supp. 2d at 334 (quoting *Romer*, 517 U.S. at 632) (finding that Section 3 of DOMA does not pass rational basis review). *See also* cases cited *supra* note 154 and accompanying text.

161. *See* cases cited *supra* note 154 and accompanying text.

For example, in the 2006 decision of *Citizens for Equal Protection v. Bruning*,¹⁶² the Eighth Circuit upheld, under the Equal Protection Clause of the United States Constitution, a Nebraska constitutional amendment limiting marriage to opposite-sex couples. Not addressing the sex discrimination present, the court found that the law should be analyzed with rational basis review because it discriminated based on sexual orientation.¹⁶³

Noting that “[r]ational-basis review is highly deferential,” and “a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification,”¹⁶⁴ the court upheld the law. The court found that the “intent of traditional marriage laws—to encourage heterosexual couples to bear and raise children in committed marriage relationships” was a legitimate governmental interest rationally related to the prohibition; therefore, the same-sex marriage prohibition passed rational basis review and was valid under the Equal Protection Clause of the United States Constitution.¹⁶⁵ The court did not analyze any of the judicial or secondary authorities that the defenders of the law put forth to support the rationale that denying same-sex couples the right to marry encourages heterosexuals to procreate responsibly but simply noted that “we cannot conclude that the State's justification ‘lacks a rational relationship to legitimate state interests.’”¹⁶⁶

Under this type of reasoning, as long as the rationales proffered “seem reasonable” to the court, or as long as the court thinks that reasonable legislators could believe the rationales, the law will be upheld.¹⁶⁷ This type of analysis is problematic in the context of a law affecting a class of individuals historically and unjustifiably discriminated against, because chances are good that the judge or judges will have been exposed to, and may sympathize with, many of the unjustifiable prejudices motivating the laws. As other courts that have examined the same-sex marriage prohibition more thoroughly have noted, modern social science has shown no difference in outcome for children raised by heterosexual or homosexual committed couples.¹⁶⁸ Other biases and prejudices against homosexuals that seemed so

162. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

163. *Id.* at 867.

164. *Id.* (quoting *F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 313 (1993)).

165. *Id.* at 868, 871.

166. *Id.* at 867-68.

167. *See Bruning*, 455 F.3d at 868. *See also Windsor II*, 699 F.3d 169, 201 (2d Cir. 2012) (Straub, J., dissenting) (stating that under rational basis review, “Congress’s ‘common sense’ regarding the needs of children” should take precedence over evidence given by “professional organizations and child welfare amici”).

168. *See, e.g., Perry II*, 671 F.3d 1052, 1069 n.4 (9th Cir. 2012) (citing *Perry I*, 704 F. Supp. 2d 921, 962-63, 969-70, 973, 980-81) (N.D. Cal. 2010) (noting that “marriage

obviously true and rational in the past have likewise been proven incorrect by modern scientific studies.¹⁶⁹

Other courts applying rational basis review have found no legitimate purpose for excluding same-sex couples from marriage and have therefore struck down the prohibitions.¹⁷⁰ For example, in *Perry I*,¹⁷¹ discussed above,¹⁷² the United States District Court for the Northern District of California found California's same-sex marriage ban violated the Fourteenth Amendment to the United States Constitution because it could not pass rational basis review.¹⁷³ The district court noted that the court must defer to a popular initiative if there "is at least a debatable question whether the underlying basis for the classification is rational."¹⁷⁴ However, citing *Romer v. Evans*, the district court noted that even under rational basis review a court must "insist on knowing the relation between the classification adopted and the object to be attained," and that the "classification [may] not [be] drawn for the purpose of disadvantaging the group burdened by the law."¹⁷⁵

The district court heard testimony and considered evidence presented by numerous witnesses from both sides.¹⁷⁶ The court examined carefully each reason given by proponents for California's same-sex marriage ban and all possible other reasons for the ban.¹⁷⁷ One by one the court analyzed each purported legitimate interest and found that it was either not legitimate or not rationally related to the opposite-sex marriage requirement.

The court found that preserving the traditional definition of marriage was not a legitimate interest because it is well settled in law that "[t]radition alone . . . cannot form a rational basis for a law."¹⁷⁸ Similarly, prohibiting same-sex couples from marrying was not rationally related to the purported interest of "proceeding with caution when implementing social changes" because the evidence presented showed that allowing same-sex marriage would benefit children of same-sex couples, would help California's economy, and would not result in any societal harm.¹⁷⁹

benefits spouses and children physically, psychologically, and economically . . . whether the spouses are of the same or opposite sexes" and that "children of same-sex couples . . . fare just as well as children raised by opposite-sex parents"). See also *infra* notes 192-199 and accompanying text.

169. See cases cited *supra* note 168.

170. See cases cited *supra* note 154.

171. *Perry I*, 704 F. Supp. 2d at 921.

172. See *supra* Part II.A.

173. *Perry I*, 704 F. Supp. 2d at 997.

174. *Id.* at 995 (citation omitted).

175. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

176. See *id.*

177. *Id.* at 930-31.

178. *Perry I*, 704 F. Supp. 2d at 998.

179. *Id.* at 998-99.

Next, the court found favoring opposite-sex parenting over same-sex parenting was not a legitimate interest because the evidence showed that same-sex parents are of “equal quality” to opposite-sex parents and that Proposition 8 did “not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents.”¹⁸⁰ Likewise, protecting the freedom of those who oppose marriage for same-sex couples was not rationally related to the same-sex marriage ban because Proposition 8 did “not affect any First Amendment right or responsibility of parents to educate their children.”¹⁸¹ Treating opposite-sex couples differently from same-sex couples was not a legitimate interest because the evidence clearly showed that “same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same.”¹⁸²

Analyzing all the evidence, the court found no legitimate rationale for California’s same-sex marriage ban. Instead, the court found that the evidence showed conclusively that the only bases for Proposition 8 were private, religious, and moral beliefs that homosexuality was inferior to heterosexuality.¹⁸³ The court held that such beliefs were not legitimate bases for law.¹⁸⁴ The court concluded that “[b]ecause Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.”¹⁸⁵

As the reasoning in *Perry I* shows, when courts scrutinize the rationales given for opposite-sex marriage requirements with any degree of rigor, they find the rationales unreasonable.¹⁸⁶ However, courts are split on whether, under rational basis review, they should subject the opposite-sex requirements to any degree of rigor.¹⁸⁷

B. HEIGHTENED REVIEW

In contrast to rational basis review where there is a split over how much rigor a court should subject a challenged law to, under heightened scrutiny there is no split. Every court that has examined a same-sex marriage exclusion under heightened scrutiny has found the provision invalid.¹⁸⁸ It is likely then that if the Supreme Court examines a state same-sex

180. *Id.* at 999-1000.

181. *Id.* at 1000.

182. *Id.* at 1001.

183. *Perry I*, 704 F. Supp. 2d at 1001-03.

184. *Id.*

185. *Id.* at 1003.

186. *See* cases cited *supra* note 154 and accompanying text.

187. *See* cases cited *supra* notes 155-161 and accompanying text.

188. *See, e.g., Windsor II*, 699 F.3d 169 (2d Cir. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 990 (N.D. Cal. 2012) (finding that DOMA’s Section 3, by discriminating against homosexuals, must be subject to heightened scrutiny, and finding the

marriage prohibition in a future case with heightened scrutiny, it will also find the exclusion unconstitutional.

Heightened scrutiny includes intermediate scrutiny and strict scrutiny. Under an intermediate scrutiny review, the lower level of heightened scrutiny, a party seeking to defend a discriminatory law must show that “the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁸⁹ The Supreme Court has held that a party seeking to uphold a statute under intermediate scrutiny review “carr[ies] the burden of showing an ‘exceedingly persuasive justification’ for the classification.”¹⁹⁰ In contrast to rational basis scrutiny, under heightened scrutiny, after-the-fact justifications are not permissible. Instead, “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”¹⁹¹

Examining these requirements, it is not hard to see why the same-sex marriage exclusions cannot withstand heightened review. As discussed above,¹⁹² many courts examining same-sex marriage exclusions under rational basis review have found the justifications offered not rational. Modern social scientific studies have discredited the purported rationales offered for same-sex marriage exclusions.¹⁹³ Any court considering these studies

law invalid under intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (examining Iowa’s same-sex marriage exclusion under intermediate scrutiny and finding it violated Iowa’s constitutional Equal Protection guarantee); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (examining Connecticut’s same-sex marriage exclusion under intermediate scrutiny and finding it violated Connecticut’s constitutional equal protection provisions); *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008) (finding California’s same-sex marriage exclusion invalid under California’s Constitution using heightened scrutiny because finding that sexual orientation discrimination merited strict scrutiny).

189. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)). *See also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (under intermediate scrutiny, the government must show that the classification at issue is “substantially related” to an “important governmental objective”).

190. *Hogan*, 458 U.S. at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)). *See also* *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

191. *Virginia*, 518 U.S. at 535–36; *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1995) (“[T]he State must show that the alleged objective was the legislature’s ‘actual purpose’ for the discriminatory classification.”).

192. *See supra* Part IV.A.

193. *See, e.g., Golinski*, 824 F. Supp. 2d at 991 (“More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.”); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (“Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-

and the uniformity in opinion in the scientific literature must draw the conclusion that the justifications for same-sex marriage exclusions are not “exceedingly persuasive justifications” and therefore cannot withstand heightened scrutiny.¹⁹⁴

For example, in the case of *Golinski v. United States Office of Personnel Management*,¹⁹⁵ the United States District Court for the Northern District of California subjected DOMA’s Section 3 to intermediate scrutiny because, like the Second Circuit in *Windsor II*.¹⁹⁶ It found that sexual orientation discrimination was subject to heightened review.¹⁹⁷ Under this heightened review, the court found DOMA’s Section 3 violated the equal protection guarantee of the Fifth Amendment. First, the court looked at the scientific literature available and found that “[m]ore than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.”¹⁹⁸

The court further noted that “[s]ince the enactment of DOMA, a consensus has developed among the medical, psychological and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.”¹⁹⁹ Thus, the

adjusted as those raised by heterosexual parents.”); *Perry I*, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010) (“The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents’ genders are irrelevant to children’s developmental outcomes.”); *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009) (“The research appears to strongly support the conclusion that same-sex couples foster the same wholesome environment as opposite-sex couples and suggests that the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else.”).

194. See *supra* Part IV.A

195. *Golinski*, 824 F. Supp. 2d at 991.

196. See *supra* Part II.D.

197. *Golinski*, 824 F. Supp. 2d at 989-90.

198. *Id.* at 991.

199. *Id.* (quoting *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010)) (citing American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, Coparent or second-parent adoption by same-sex parents, 109 PEDIATRICS 339 (2002), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics>); *ABA Policy Statement: Sexual Orientation, Parents, & Children*, AMERICAN PSYCHOLOGICAL ASSOCIATION (July 28 & 30, 2004), <http://www.apa.org/about/governance/council/policy/parenting.aspx>; *AMA Policies on GLBT Issues*, AMERICAN MEDICAL ASSOCIATION, <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.shtml> (last visited Oct. 22, 2013); *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, CHILD WELFARE LEAGUE OF AMERICA, <http://www.cwla.org/programs/culture/glb-tqposition.htm>

court found that same-sex couples “function as responsible parents,”²⁰⁰ and therefore, the government interest in encouraging responsible procreation and child-rearing was not furthered by the same-sex marriage exclusion.²⁰¹

Additionally, the court found that the denial of recognition for same-sex marriage “does nothing to support opposite-sex parenting, but rather merely serves to endanger children of same-sex parents by denying” them the “immeasurable advantages that flow from the assurance of a stable family structure, when afforded equal recognition under federal law.”²⁰²

In a similar fashion, the court found that the second reason proffered, “to defend and nurture the institution of traditional, opposite-sex marriage,” could not pass intermediate scrutiny because the same-sex marriage exclusion did not encourage opposite-sex couples to get married or to encourage gay or lesbian individuals to marry members of the opposite sex.²⁰³ Similarly, the court found the third reason proffered, “defending traditional notions of morality,” did not pass intermediate scrutiny because “[b]asing legislation on moral disapproval of same-sex couples does not pass any level of scrutiny.”²⁰⁴ The court found the rationale of “preserving scarce government resources” did not pass intermediate scrutiny because “the preservation of government resources cannot, as a matter of law, justify barring some arbitrarily chosen group from a government program.”²⁰⁵ In conclusion, the court found that Section 3 of DOMA could not pass heightened review, as have all other courts that have subjected same-sex marriage exclusions to heightened review.²⁰⁶

Therefore, if in its next same-sex marriage case the Supreme Court subjects a state same-sex marriage prohibition to heightened review, as this paper has argued that it should do because same-sex marriage prohibitions are sex discrimination,²⁰⁷ then the Court should find that the exclusions are

(last visited Oct. 22, 2013)). See also *Facts for Families Pages: Children with Lesbian, Gay, Bisexual and Transgender Parents*, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, (Aug. 2013),

http://www.aacap.org/AACAP/AACAP/Families_and_Youth/Facts_for_Families/Facts_for_Families_Pages/Children_with_Lesbian_Gay_Bisexual_and_Transgender_Parents_92.aspx (noting that “[c]urrent research shows that children with gay and lesbian parents do not differ from children with heterosexual parents in their emotional development or in their relationships with peers and adults”).

200. *Golinski*, 824 F. Supp. 2d at 992.

201. *Id.*

202. *Id.* (citations omitted).

203. *Id.* at 993-94.

204. *Id.* at 994.

205. *Golinski*, 824 F. Supp. 2d at 994 (citing *Plyler v. Doe*, 457 U.S. 202, 227, 229 (1982)).

206. See *supra* note 188 and accompanying text.

207. See *supra* Part III.

unconstitutional under the equal protection guarantee of the Fourteenth Amendment.

V. CONCLUSION

The Supreme Court made a momentous decision last summer when it decided that married same-sex couples must have their marriages, valid under state law, recognized by the federal government. However, the Supreme Court avoided, for now, deciding whether same-sex couples have a constitutional right to marry in the first place, leaving the same-sex marriage prohibitions still present in most states intact. Thus, it is almost inevitable that the Supreme Court will address the constitutionality of state same-sex marriage prohibitions in a future same-sex marriage case. If in deciding that future case, the Court decides that the same-sex marriage prohibitions, in discriminating against homosexuals, need only pass and do pass rational basis review, then the Court should not forget to analyze the exclusions under the heightened review that the sex discrimination also present in the exclusions requires. As courts have uniformly found, same-sex marriage exclusions cannot pass heightened review. Thus, when it addresses the question of whether same-sex couples have a constitutional right to marry, the Supreme Court must find that they do.