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THE MARRYING KIND

Zachary Herz

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THE MARRYING KIND

ZACHARY HERZ*

We are living in a Constitutional moment. In the span of half a century, LGBT people have been cast out, tolerated, accepted, and finally celebrated: In time with that shift, same-sex marriage has gone from absurdity, to threat, to fundamental right. This Article queries the links between those two processes and their potential implications for constitutional anti-discrimination law more broadly.

Specifically, this Article considers two features of equal protection jurisprudence that have entered into strange, silent conflict: the discriminatory purpose doctrine established in Washington v. Davis *and* Personnel Administrator of Massachusetts v. Feeney, *and the tendency of courts to treat same-sex marriage bans as straightforward sexual-orientation discrimination. According to a strict reading of this doctrine, same-sex marriage bans would only disproportionately impact gays and lesbians while facially classifying on the basis of sex. This Article shows how courts on both sides of the issue, uncomfortable with the implications of the discriminatory-purpose doctrine when applied to such bans, largely ignored discriminatory purpose in favor of analytic frameworks that better reflect the social realities of the same-sex marriage debate. This Article then considers Justice Kennedy's treatment of the classification problem in* Obergefell v. Hodges, *and the possible ramifications of Kennedy's holding that same-sex marriage bans demean gays and lesbians for the future of anti-discrimination law.*

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INTRODUCTION

A state civil service law gives a strong preference to applicants who are veterans of the armed forces. At the time this law is passed, women are actively discouraged from enlisting, and the class of veterans who are preferred for civil service jobs is correspondingly 98% male. A rejected female civil service applicant sues. Is this sex discrimination? *No*: The law does not ask whether an applicant is a man or a woman, merely whether they are a veteran or not a veteran. The fact that it is far more difficult for women to attain veteran status is irrelevant to the court's analysis.[1]

A state insurance program excludes pregnancy–related disabilities from coverage, while compensating workers who suffer identical disabilities with a different cause. A group of pregnant women sue. Is this sex discrimination? *No*: The Supreme Court holds that, even though the exclusion only affects women and can only affect women, it is not sex discrimination; the law does not ask if the worker is a man or a woman, only if he or she is a pregnant or a non-pregnant person. After all, a pregnant man would be treated in the same way.[2]

A state marriage law forbids two people of the same sex from entering into a legally valid marriage. A group of same-sex couples who wish to marry—all comprised of LGB[3] people, since the desire to

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1. *See* Pers. Adm'r. of Mass. v. Feeney, 442 U.S. 256, 277 (1979); *infra* notes 174-94 and accompanying text.

2. Geduldig v. Aiello, 417 U.S. 484, 494-95 (1974); *infra* notes 201-07.

3. *I.e.*, lesbian, gay, or bisexual. For the remainder of this Article, I will generally avoid the acronym and simply refer to the class of sexual minorities who are harmed by same-sex marriage bans as "gays and lesbians." I understand that this class is wildly underinclusive; many individuals in same-sex partnerships—and opposite-sex partnerships, for that matter—identify as bisexual, and they deserve better than to be erased from legal argument. But, as I explain further, many of the

enter into a same-sex marriage is overwhelmingly correlated with non-heterosexuality—sue. Is this sexual orientation discrimination?

No. Same-sex marriage bans,[4] which were held to be unconstitutional when put forward by the federal government in *United States v. Windsor*[5] and by state governments in *Obergefell v. Hodges*,[6] do not classify on the basis of sexual orientation, at least under equal protection jurisprudence as it has previously been understood. The point is jarring, but difficult to dispute; these bans can be applied without ever inquiring about the sexual orientation of the individuals wishing to marry, and as a formal matter they restrict gay people's and straight people's rights identically. The fact that the rights that remain are vastly less appealing to gay people merely proves disproportionate impact, and under *Personnel Administrator of Massachusetts v. Feeney* such impact only triggers Fourteenth Amendment scrutiny if the law in question was actually designed to harm the impacted group.[7]

This counterintuitive, but almost inarguable point played a strange and limited role in the last several years of same-sex marriage litigation. Litigants,[8] politicians,[9] and judges[10] argued over

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legal arguments for treating same-sex marriage bans as sexual orientation discrimination are premised on the idea that plaintiffs in these cases are rendered essentially unable to marry by bans on same-sex marriage. In such an analysis, gays and lesbians stand in a somewhat different position, and this Article focuses specifically on how courts have viewed them.

4. Note the use of "same-sex marriage" and "same-sex marriage bans." That's intentional. Laws defining marriage as between two members of the opposite sex are colloquially referred to either as same-sex marriage bans or as gay marriage bans; *see, e.g.*, Elliot Hannon, *Federal Judge Overturns Montana Gay Marriage Ban Effective Immediately*, SLATE.COM (Nov. 19, 2014), http://www.slate.com/blogs/the_slatest/2014/11/19/montana_s_gay_marriage_ban_struck_down.html.
The two terms are interchangeable in popular speech, but less so here, given my argument; a law forbidding two gay people from marrying, regardless of sex, would obviously classify on the basis of sexual orientation in a way that a law forbidding two people of the same sex from marrying, regardless of sexual orientation, might not.

5. United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013).

6. Obergefell v. Hodges, No. 14-556, slip op. at 22-23 (S. Ct. June 26, 2015).

7. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). For a longer explanation of the applicability of *Feeney* to same-sex marriage bans, see *infra* Part III.B.

8. *See, e.g.*, Brief for Petitioners at 16-17, *Obergefell*, No. 14-556.

9. *E.g.*, Sam Stein, *Obama Backs Gay Marriage*, THE HUFFINGTON POST (May 9, 2012), http://www.huffingtonpost.com/2012/05/09/obama-gay-marriage_n_1503245.html; *Republican 2016 Hopefuls Split on Gay Marriage*, PBS (June 26, 2015), http://www.pbs.org/newshour/rundown/republican-2016-hopefuls-split-gay-

the propriety of banning gay people from marrying, without paying too much attention to the fact that, under existing Supreme Court doctrine, the laws at issue did not ban gay people from marrying at all. Litigants attempting to raise this point[11] were met with ridicule.[12] Finally, after oral arguments suggesting that issues of equality were critically important to the justices,[13] the final decision in *Obergefell* went far out of its way to avoid painting same-sex marriage bans as anti-gay classifications and confined its discussion of equal protection to a brief aside.[14] In a context where nearly everyone on both sides of a highly contentious public issue agreed that *Feeney* didn't apply, the Court seemingly declined to address the question.

This Article primarily explores how same-sex marriage bans interact with issues of classification; the challenges these bans pose to the *Feeney* doctrine; and the variety of ways that courts have solved this problem, almost always without explicitly stating what makes same-sex marriage such a remarkable exception. Of course, one might ask: So what? While there have been some demagogic jabs from the far right,[15] the Court's ruling was in line with public

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marriage/.

10. *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 401-02, 421-22 (6th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Windsor v. United States, 699 F.3d 169 (2d Cir. 2012); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1139-40 (D. Ore. 2014). For simplicity's sake, and to differentiate the Second Circuit decision from the Supreme Court case that affirmed it using very different reasoning, I will refer to the former as *Windsor I* and the latter as simply *Windsor*.

11. *See, e.g.*, Brief for Family Research Council as Amicus Curiae Supporting Respondents at 26-30, *Obergefell*, No. 14-556; Brief for Respondent at 46-47, *Obergefell*, No. 14-556.

12. *See, e.g.*, Michael Fitzgerald, *Kentucky Governor Offers Ridiculous Argument to SCOTUS on Gay Marriage Ban*, TOWLEROAD (Apr. 1, 2015), http://www.towleroad.com/2015/04/kentucky-governor-offers-ridiculous-argument-to-scotus-on-gay-marriage-ban-video/; Andrew Wolfson, *Ky: No One Can Marry Same Sex, Ban Not Biased*, COURIER-JOURNAL, (Mar. 31, 2015), http://www.courier-journal.com/story/news/politics/2015/03/30/kentucky-one-can-marry-gays-gay-marriage-ban-biased/70684832/ (quoting Sam Marcosson, a professor at the University of Louisville's Brandeis School of Law, as calling Beshear's argument "embarrassing").

13. In particular, Justice Roberts strongly suggested that he was amenable to viewing the ban as violating the Equal Protection Clause's protections against sex discrimination. Transcript of Oral Argument at 61-62, *Obergefell*, No. 14-556.

14. *Obergefell*, No. 14-556, slip op. at 19-22.

15. Ahiza Garcia, *Mike Huckabee: I Will Not Accept Gay Marriage Ruling By 'Imperial Court,'* TALKINGPOINTSMEMO.COM (June 26, 2015), http://talkingpoints memo.com/livewire/mike-huckabee-gay-marriage-decision; Adam B. Lerner, *Ted*

opinion, at least according to recent polling.[16] *Obergefell* isn't going anywhere, and questioning the doctrinal basis of an ultimately rejected argument against marriage equality might seem a bit abstruse. But in fact, understanding how same-sex marriage bans interact with—and, I argue, destabilize—the *Feeney* doctrine serves two critical goals. The first is simply descriptive: Justice Kennedy's opinion in *Obergefell* could be charitably described as gnomic, and viewing it through the lens of *Feeney* provides a possible motivation for the decision's remarkable concern with positive dignitary rights as opposed to more traditional anti-discrimination theories that center on negative liberties.[17]

My other goal is more normative. The *Feeney* doctrine has made litigation difficult for victims of state discrimination-shielding laws that subordinate protected groups on the basis of hyper-formalist reasoning. Scholars have critiqued the disparate impact doctrine for decades,[18] but same-sex marriage bans cast *Feeney*'s flaws in sharp relief. In this context, *Feeney* runs counter to obvious social realities and generates results so absurd as to call the entire doctrine into question. Prior to *Obergefell*, there was reason to hope that the Court might address *Feeney* head on, as a few other courts have done in this context.[19] Instead, *Obergefell* put forward a new framework for protecting minority groups, which for all its obscurity has the potential to help a variety of plaintiffs.

Cruz: States Should Ignore Gay Marriage Ruling, POLITICO (June 29, 2015), http://www.politico.com/story/2015/06/ted-cruz-gay-marriage-ruling-reaction-npr-interview-119559.html; *Santorum Compares Supreme Court Ruling on Gay Marriage to* Dred Scott, FOX NEWS (Aug. 6, 2015), http://www.foxnews.com/politics/2015/08/06/santorum-compares-same-sex-marriage-decision-to-dred-scott-blasts-rogue-supreme.html.

16. Justin McCarthy, *U.S. Support for Gay Marriage Stable After High Court Ruling*, GALLUP (July 17, 2015), http://www.gallup.com/poll/184217/support-gay-marriage-stable-high-court-ruling.aspx.

17. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794-95 (2011).

18. *See, e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494-96 (2003); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-31 (1997); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 937-39 (1989).

19. *See In re* Marriage Cases, 757 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 n.24 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); *infra* notes 99-112 and accompanying text.

Remarkably, the interaction between same-sex marriage and the *Feeney* doctrine has not only been downplayed by courts, but also by scholars. While an increasingly imposing body of scholarly work argues that same-sex marriage bans are facial classifications on the basis of sex,[20] this work has not explicitly addressed the obvious corollary to this claim; that these laws' operation to prevent gay people from marrying would logically be mediated through the law of constitutional disparate impact. Other scholars have argued that these laws need to be understood as sexual orientation classifications, either as a result of the laws' social context[21] or because sexual orientation is so inherently relational that laws classifying certain relationships inevitably classify certain sexual orientations.[22] A more synthetic strain of scholarship, following in the footsteps of figures like Sylvia Law, calls into question both the entire distinction between sex and sexual orientation discrimination, claiming that the two are so similar in concept and aim as to require a focus on the sex classifications in anti-gay laws.[23]

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20. *See, e.g.*, Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010); William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1352 (2010) (noting that same-sex marriage bans constitute one of the few remaining sex distinctions in American law); Suzanne Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2015); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) ("If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex."); Christopher R. Leslie, *Embracing* Loving*: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1078, 1089-91 (2014).

21. *E.g.*, EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 48-70 (2008); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001).

22. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271 (2006); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1195-99 (2012). For a more specific engagement with this theory, *see infra* notes 247-52 and accompanying text.

23. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187 ("My central thesis is that contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender."); Cliff Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 925-28 (2011).

Other theories focus on the irrationality[24] or animus[25] of arguments against same-sex marriage, and in doing so serve as a possible response to scholars who caution against the tendency of more harm-focused litigation strategies to erase meaningful differences among individuals, and to instead put forward the discrete, monolithic classes that the Court's current view of discrimination requires.[26] Other work has been more explicitly skeptical of the entire structure of marriage litigation, either calling for a broader anti-subordination view of anti-gay discrimination generally,[27] or criticizing judges for giving gay-rights advocates a form of special treatment in courts.[28] This is the first article, to my knowledge, to seriously consider the doctrinal impact of same-sex marriage on our understanding of *Feeney* and how courts' creativity in extending constitutional protections to gays and lesbians could function outside of the narrow context of gay equality.[29] In a country that overwhelmingly understands bans on same-sex marriage to discriminate against gay people based on their impact alone, *Feeney*'s reasoning seems weaker than it ever has before.

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24. *E.g.*, Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431, 432-34 (2014).

25. *See, e.g.*, Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183; Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012) [hereinafter Pollvogt, *Animus*]; Susannah W. Pollvogt, *Windsor, Animus, and the Future of Equality*, 113 COLUM. L. REV. SIDEBAR 204 (2013) [hereinafter Pollvogt, *Future*], http://www.columbialawreview.org/Windsor-Animus _Pollvogt.

26. Mary Anne Case, *"The Very Stereotype the Law Condemns:" Constitutional Sex Discrimination as the Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

27. Darren L. Hutchinson, *"Not Without Political Power:" Gays and Lesbians, Equal Protection, and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1032-33 (2014).

28. Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. (manuscript at 16-22) (forthcoming 2016).

29. To my knowledge, two authors have addressed the potential impact of *Feeney* on same-sex marriage litigation. Russell Robinson reads the Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Windsor*, 133 S. Ct. 2675 (2013), as simple exceptions to the *Feeney* doctrine. Robinson, *supra* note 28 (manuscript at 22). This view might be correct, and the novel structures that have sprung up in this context may never be applied elsewhere. But these precedents may well be broader than that, and understanding how litigants can wield *Obergefell* and similar cases against disproportionately impactful laws strikes me as a valuable project. *See infra* notes 302-346 and accompanying text. Another recent piece by Peter Nicolas focuses more completely on same-sex marriage litigation, claiming that courts can nevertheless view these bans as discrimination on the basis of sexual orientation. Peter Nicolas, *Gay Rights, Equal Protection, and the Classification-Framing Quandary*, 21 GEO. MASON. L. REV. 329 (2014).

This Article proceeds in six parts. Part II considers the history of same-sex marriage litigation up to *Obergefell* and shows how, as courts became increasingly hostile to the sex-discrimination arguments that were prevalent in the early 1990s, they developed a variety of strategies for resolving the classification issues that same-sex marriage bans presented. Part III explores these issues in detail, explaining not only how the doctrine of disproportionate impact developed in cases like *Washington v. Davis*[30] and *Feeney* and how that doctrine might apply in the same-sex marriage context, but also how disproportionate impact has had devastating effects in race-discrimination and sex-discrimination litigation.

Part IV, a close analysis of *Obergefell*, shows how classification concerns actually animate many of the decision's more unusual rhetorical moves, including Kennedy's unexplained invocation of equal protection. Part V considers two potential motivations for *Obergefell*'s reasoning. First, *Obergefell* may be the beginning of a complex doctrinal story in which substantive due process serves as the linchpin of an idiosyncratic but remarkably positive view of minority protection. Alternately, *Obergefell* could be the end of a story, in which the democratic constitutional process described by Reva Siegel[31] and Jack Balkin,[32] among others, mandated a constitutional right to gay marriage—doctrine be damned. Part VI concludes.

I. THE CASE(S) FOR SAME-SEX MARRIAGE

Same-sex marriage advocates have had a remarkable track record in U.S. courts. Their victory was both swift and complete: Less than a quarter of a century after the 1993 Hawaii decision *Baehr v. Lewin*, the first case in which a court found a right to same-sex marriage,[33] the Supreme Court extended that right to all residents of the United States.[34] That short timeframe, however, hid a remarkably lively debate about which doctrinal framework to apply. Even in the two years between *Windsor* and *Obergefell*, when

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30. Washington v. Texas, 426 U.S. 229, 234-35 (1976).

31. Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006) (describing how new understandings of the Equal Protection Clause came about in no small part through feminists' attempts to change the Constitution through an Article V process in the form of the Equal Rights Amendment).

32. JACK M. BALKIN, LIVING ORIGINALISM 277-339 (2011).

33. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

34. Obergefell v. Hodges, No. 14-556, slip op. at 22-23 (S. Ct. June 26, 2015); *see infra* Part IV.

courts all but unanimously found that same-sex marriage bans violated the federal Constitution,[35] those same courts based their holdings on a sometimes-dizzying variety of doctrines, theories, and tests. Given that nearly all of these cases ended up the same way, it is difficult to view these disagreements as motivated by results-oriented thinking or raw political preferences.[36] Instead, these cases show the doctrinal confusion that exists in this particular space and judges' efforts to find the framework that best reflects our evolving equality commitments as applied to sexual minorities.

This Part considers the different doctrines that have been used to strike down same-sex marriage bans, and in particular how courts' growing tendency to view these bans as sexual orientation, and not sex, discrimination required creative solutions to the problems posed by the *Feeney* doctrine.

A. Classification Based on Sex

Early legal discussion of same-sex marriage bans largely considered them as potentially illicit sex classifications. Even leaving aside *Baker v. Nelson*, an extremely brief 1971 Minnesota Supreme Court opinion that constitutes the first judicial treatment of same-sex marriage bans,[37] same-sex marriage (or the specter thereof) played an important role in debates over the ratification of the Equal Rights Amendment ("ERA"), which would have forbidden states from drawing distinctions based on sex.[38]

Phyllis Schlafly, founder of the Eagle Forum and a major opponent of the Equal Rights Amendment, repeatedly argued that the Amendment's passage would lead to gay rights generally, and to same-sex marriage specifically, by preventing the government from

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35. In fact, plaintiffs were successful in striking down same-sex marriage bans in the first twenty-two marriage cases following *Windsor*, until *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), upheld Louisiana's ban. Other exceptions include *Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157, 167-68 (D.P.R. 2014), and the only circuit-level decision to reject a constitutional right to same-sex marriage after *Windsor*, *DeBoer v. Snyder*, 772 F.3d 388, 420-21 (6th Cir. 2014).

36. *See* Sherif Girgis, Windsor*: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971 (2014).

37. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) ("[I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.").

38. The relevant text of the Amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." GOV'T PRINTING OFF., PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES 49 (1992), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-8.pdf.

evaluating behavior in terms of the sexes of the parties engaged therein.[39] Famously, proponents of the ERA lost the battle while winning the war; while the ERA was only ratified by thirty-five states and is not part of the federal Constitution, in 1976 the Supreme Court held that sex classifications were nevertheless subjected to heightened scrutiny under the Equal Protection Clause.[40]

It is this sex classification doctrine that animated early same-sex marriage litigation. The first two state-level decisions to strike down same-sex marriage bans, the 1993 Hawaii decision *Baehr v. Lewin*[41] and the 1998 Alaska Superior Court decision *Brause v. Bureau of Vital Statistics*,[42] both found same-sex marriage bans to impermissibly classify on the basis of sex. Both cases made this point with remarkable brevity, largely because it struck each judge as self-evident: *Brause* tacked a brief addendum onto a more involved fundamental-rights argument,[43] and Chief Judge Moon's

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39. *See* MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS AND THE AMENDING PROCESS OF THE CONSTITUTION 102 ("Phyllis Schlafly still insisted that ERA . . . would mandate gay/lesbian rights."); Phyllis Schlafly, *Why the Equal Rights Amendment Failed*, *in* FEMINIST FANTASIES 119, 122 (2003) (originally published in 1986) ("ERA would put 'gay rights' into the U.S. Constitution because the word in the Amendment is 'sex,' not 'women.' Eminent authorities have stated that ERA would legalize the granting of marriage licenses to same-sex couples and generally implement the gay and lesbian agenda."); Phyllis Schlafly, Op-Ed, *ERA Is Redundant, Will Create Problems*, USA TODAY, May 23, 1983; Phyllis Schlafly, *Why Congress Must Amend the ERA*, PHYLLIS SCHLAFLY REPORT, November 1983.

40. Craig v. Boren, 429 U.S. 190, 197-98 (1976); Michael Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 984-85 (2002); (referring to the sex classification regime as a "de facto ERA"); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001) ("Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted."). *See also generally* Siegel, *supra* note 31 (using the failure of the ERA and concomitant development of sex classification doctrine as an example of popularly mediated constitutionalism).

41. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

42. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

43. *Id.* at *6 ("Were this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications. 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.").

opinion in *Baehr* simply noted that Hawaii's law,[44] "on its face and as applied, regulate[d] access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."[45]

The reasoning behind such a conclusion is remarkably simple. As Andrew Koppelman has explained in detail, a ban on same-sex marriage effectively assigns different marriage rights to men and to women.[46] In determining whether an individual is permitted to marry another individual in a state that forbids same-sex marriage, one must first ask the sexes of the individual in question and his or her intended spouse; therefore, sex is playing a role in the law's treatment of its citizens, and this serves to raise the bar of judicial scrutiny. It is true that such laws offer a fully complementary package of rights to members of each sex: men's marriage rights are restricted in a similar fashion to women's, and neither sex is disadvantaged vis-à-vis the other by the law. However, Koppelman points out that such "mirror-image" legislation can only survive judicial scrutiny by making the parties' sex a definitional component of some "artificial category"[47] at a greater level of abstraction than the concrete actions in which parties engage, like "homosexual sex" or "miscegenation," and that allowing lawmakers to impose such categories and then classify on the basis of the so-categorized behavior would destroy the Equal Protection Clause entirely.[48] To perform a simple thought experiment, we can all agree that legislators could not forbid "improper employment," if "improper employment" were defined as "compensating a woman for work performed as a doctor or a man for work performed as a nurse," even if such a regulation could be shown to burden both sexes equally. Such a law would mandate different treatment of men and women, even if the difference did not benefit one sex over the other, and the

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44. HAW. REV. STAT. § 572-1 (1985).

45. *Baehr*, 852 P.2d at 64. Of course, *Baehr*—and many of the other state supreme court cases considered in this Article—was interpreting a state constitution and not its federal counterpart, and in some decisions that found same-sex marriage bans to classify on the basis of sexual orientation, this difference was enormously powerful. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 890-96 (Iowa 2009) (holding that the Iowa Constitution subjects laws classifying on the basis of sexual orientation to heightened scrutiny). However, these cases followed federal constitutional law in their definition of facial classification; for example, *Varnum* based its holding of classification on the United States Supreme Court decisions *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1995). *Varnum*, 763 N.W.2d at 885; *see infra* notes 100-110 and accompanying text.

46. Koppelman, *supra* note 20, at 208-14.

47. *Id.* at 211.

48. *Id.* at 212.

legislation would therefore be subjected to intermediate scrutiny.[49] It is not at all clear, and was certainly not at all clear to the *Baehr* or *Brause* courts, why bans on same-sex marriage should not be subjected to the same reasoning.

Of course, one analytical flaw in this argument, originally raised by Edward Stein, is that it imposes a straightforward doctrinal framework onto a very different social reality, specifically onto the "actual and significant differences between sexism and homophobia [that exist] in contemporary American and other western societies."[50] However, even if there are aspects of homophobia that meaningfully differentiate it from a simple expression of cultural sexism,[51] this prejudice, particularly in the context of anxieties surrounding same-sex marriage, can be meaningfully understood as rooted in "traditional sex-based stereotypes."[52] Sylvia Law has argued that homophobia is best understood as a form of sexism: homosexual acts were considered destabilizing precisely because of the threat they posed to a gendered social order.[53] Building off of early sex-discrimination cases like *Frontiero v. Richardson*[54] that forbade lawmaking based on "fixed notions regarding the roles and abilities of males and females,"[55] this reading of homosexual behavior and same-sex partnerships interprets them as a threat to traditional notions of men's and women's relationships to each other and the outside world, and understands laws disapproving of same-sex unions as attempts to instantiate hierarchizing stereotypes. We can thus conceive of the sex-discrimination argument as two discrete, but linked, claims: that same-sex marriage bans *formally*

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49. *See* L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) (interpreting Title VII, a statute applying similar restrictions to private employers as the Equal Protection Clause does to state governments, as "preclud[ing] treatment of individuals as simply components of a racial, religious, sexual, or national class."); *see also* Leslie, *supra* note 20, at 1099-1103 (discussing the Supreme Court's jurisprudence embracing and then rejecting this reasoning in the context of race).

50. Stein, *supra* note 21, at 499.

51. *See generally* MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010) (discussing the role that notions of disgust play in many people's distaste for gay male sexuality).

52. Law, *supra* note 23, at 232.

53. *Id.* at 202 ("Simultaneous with the emergence of the possibility of homosexual identity, nineteenth century social condemnation of homosexuality intensified and sought to reinforce sharp differences in the meaning of gender.").

54. Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973) (plurality opinion) (holding that a policy of assuming male soldiers' wives to be dependent on their husbands, while requiring female soldiers to present proof of their husbands' dependency violated the Equal Protection Clause).

55. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

discriminate on the basis of sex, and *substantively* arise from a deeply and unacceptably gendered worldview.[56]

While the sex-discrimination theory was enormously persuasive within the legal academy, after *Baehr* and *Brause* it played only a minor role in same-sex marriage decisions. More specifically, sex discrimination became something of a creature of concurrences; individual judges claimed that same-sex marriage bans constituted formal sex classifications in *Baker v. State*,[57] *Goodridge v. Dep't of Public Health*,[58] and most recently, *Latta v. Otter*.[59] However, the majority opinions all struck down same-sex marriage bans on other grounds.[60] Of these concurrences, Judge Berzon's opinion in *Latta* is, to my knowledge, the first judicial opinion to seriously engage with both the formal and substantive theories of same-sex marriage bans as sex discrimination, and usefully shows how they intersect.[61] Berzon noted the self-evident sex classification underlying these bans,[62] as well as their disparate treatment of male-attracted men and male-attracted women under a sex-plus theory,[63] and the

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

57. Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

58. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring).

59. Latta v. Otter, 771 F.3d 456, 479 (9th Cir. 2014) (Berzon, J., concurring).

60. Suzanne Goldberg has recently demonstrated this point at some length and detail. Goldberg, *supra* note 20, at 2114-18. While a district court judge in Utah found that the state's same-sex marriage ban classified on the basis of sex, the Tenth Circuit upheld the court's ruling that the bans infringed on plaintiffs' fundamental right to marry without explicitly considering the sex-discrimination argument. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206, 1216 (D. Utah 2013), *aff'd,* 755 F.3d 1193 (10th Cir. 2014); *see also* Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 925 (2010) (referring to the "neglected" sex-discrimination argument). For other district-court decisions endorsing the sex-discrimination theory which were not taken up by appellate courts, see Rosenbrahn v. Daugaard, 61 F. Supp. 3d 845 (D.S.D. 2014); and Campaign for S. Equality v. Bryant, No. 3:14–CV–818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014). *See also infra* notes 284-285 and accompanying text (discussing the *Kitchen* district court's fundamental-rights reasoning).

61. *Latta*, 771 F.3d at 479 (Berzon, J., concurring).

62. *Id.* at 482 (Berzon, J., concurring) ("The 'right to marry a member of one's own sex' expressly turns on sex.").

63. *Id.* at 484-85 (Berzon, J., concurring). *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (formally endorsing the 'sex-plus' theory of discrimination, in which an employer commits discrimination by treating one subgroup of women worse than a similar subgroup of men even in the absence of disparities in treatment of men and women generally, as a reading of Title VII).

inapplicability or sheer implausibility of traditional defenses to this sort of classification.[64]

Having shown that same-sex marriage bans draw clear facial distinctions between men and women, Berzon then discussed the deeply gendered, deeply hierarchizing history of American marriage laws[65] in order to justify her application of the substantive theory of sex discrimination and finding that same-sex marriage bans were intended to support a marital policy that subordinated women.[66] While these theories are clearly distinct,[67] both can be used to support applying heightened scrutiny on the basis of sex discrimination, and have the advantages of being, respectively, analytically bulletproof[68] and sociologically true.

So why was this theory not more widely adopted? It may be that courts, understanding that recent bans on same-sex marriage have far more to do with sexual orientation than with sex,[69] shifted to frameworks that better reflected lived reality.[70] Alternately, Suzanne Goldberg has argued that litigants and judges found the sex-discrimination theory too destabilizing, since it implicitly questioned the sex-egalitarianism of a marriage regime in which most citizens, including most judges, participate.[71] By the 2000s, courts were much more comfortable treating same-sex marriage bans as sexual orientation discrimination; the fact that those bans

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64. *Latta*, 771 F.3d at 482-84 (Berzon, J., concurring).

65. *Id.* at 487-89 (Berzon, J., concurring).

66. *Id.* at 490 (Berzon, J., concurring) ("'[T]he sex-based classification contained in the[se] marriage laws,' as the only gender classification that persists in some states' marriage statutes, is, at best, 'a vestige of sex-role stereotyping' that long plagued marital regimes before the modern era . . . , and, at worst, an attempt to reintroduce gender roles.") (alterations in original, internal citation omitted) (quoting Baker v. State, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part)).

67. *Latta*, 771 F.3d at 485 (Berzon, J., concurring) ("Idaho and Nevada's same sex marriage laws not only classify on the basis of sex but also, implicitly and explicitly, draw on 'archaic and stereotypic notions' about the purportedly distinctive roles and abilities of men and women.").

68. Case, *supra* note 26, at 1215-22; Koppelman, *supra* note 20, at 208-14.

69. NUSSBAUM, *supra* note 51, at 115 (referring to anti-gay animus as "what's really going on" in the debate over same-sex marriage). This analysis is strongly supported by the debates over DOMA, which clearly revealed proponents to be far more concerned with distinguishing between homosexuals and heterosexuals than with separating men from women. *See* Andrew Rosenthal, *Infected by Animus*, N.Y. TIMES: TAKING NOTE (Mar. 28, 2013), http://takingnote.blogs.nytimes.com/2013/03/28/infected-by-animus/; *infra* notes 245-249 and accompanying text.

70. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 441 (Cal. 2008).

71. Case, *supra* note 26, at 1232; Goldberg, *supra* note 20, at 2129-30.

did not facially discriminate on the basis of sexual orientation, which was dispositive in *Baehr*,[72] was simply a hurdle to overcome.

B. Sexual Orientation Discrimination

While the first cases to address same-sex marriage did so through the lens of sex classification, later cases followed the broader societal discourse that framed same-sex marriage as a gay equality issue. During the debates over the ERA, same-sex marriage was a distraction, the gaudiest float in a parade of horribles including legalized prostitution, women in combat, and abortion on demand.[73] By contrast, the 1990s and 2000s were marked by a debate over the morality and desirability of same-sex marriage itself, and that debate was largely about the relative merits of "gay" versus "straight" sexuality and romantic commitments.[74]

Courts followed suit. The next major court decision finding a right to legal recognition for same-sex unions, the 1999 Vermont decision *Baker v. State*, focused on ensuring that the law "afforded every Vermonter its benefit and protection."[75] As Judge Moon noted in *Baehr*, however, same-sex marriage bans were technically sexual-orientation blind, and thus were sexual-orientation neutral under *Baehr*'s reading of equal protection.[76] Instead, the *Baker* court applied a very different doctrinal framework: the Vermont Constitution's Common Benefits Clause.[77] The court explicitly stated not only that common benefits jurisprudence placed vastly different requirements on lawmakers than did equal protection, but that those differences extended to the rhetoric of suspect class itself.[78] The court then found that the ban inappropriately excluded same-sex couples from the protection of Vermont's laws.[79]

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72. Baehr v. Lewin, 852 P.2d 44, 53 n.14 (Haw. 1993).

73. *See* Phyllis Schlafly, *How the Feminists Want To Change Our Laws*, 5 STAN. L. & POL'Y REV. 65, 67-71 (1994) (discussing the impact of sex equality doctrines on these three fields).

74. *Compare* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 178-80 (1996), and EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 189 (2004), *with, e.g.*, Robert P. George, *"Same-Sex Marriage" and Moral Neutrality*, *in* THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 75 (2001).

75. Baker v. State, 744 A.2d 864, 875 (Vt. 1999).

76. *Baehr*, 852 P.2d at 53 n.14.

77. VT. CONST. art. VII; *Baker*, 744 A.2d at 870.

78. *Baker*, 744 A.2d at 871.

79. *Id.* at 889.

Given the cases predating *Baker*, it is by no means clear if the court would have read the ban as a sex or sexual orientation classification for equal protection purposes.[80] But *Baker* opened the floodgates; the vast majority of courts that struck down same-sex marriage bans after *Baker* understood those bans as sexual orientation classifications.[81] This may have been a reaction to the very different political fortunes of *Baehr*, *Brause*, and *Baker*. The first two cases, which seemed to question the propriety of sex-differentiated marriage, were overturned in a public uproar.[82] By contrast, the campaign to overturn *Baker* via state constitutional amendment failed,[83] and Vermont became the first state to offer civil unions to same-sex couples.[84] Courts may have felt that decisions based on gay equality were more palatable to voters, or may have simply found *Baker*'s rhetoric to be a more natural fit than the formalism inherent in the sex-discrimination framework. These cases, however, generally proceeded under the federal Equal Protection Clause or close state constitutional equivalents; the problem of classification was still very much present. Courts addressed this issue in three ways: by using the looser structures of rational-basis review, by explicitly developing a more flexible classification standard, or by simply asserting that same-sex marriage bans classify on the basis of sexual orientation.

Courts treating same-sex marriage bans as irrational sexual orientation classifications had some precedent for the idea that anti-gay sentiment could lead to irrational lawmaking; 1996's *Romer v. Evans*.[85] In *Romer*, Justice Kennedy pointedly refused to apply heightened scrutiny to an amendment to the Colorado State Constitution forbidding localities from enacting sexual-orientation

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80. Like many later cases, *Baker* is accompanied by a concurring opinion rejecting the ban on sex-discrimination grounds; *id.* at 904-09 (Johnson, J., concurring in part and dissenting in part).

81. For the paucity of sex-discrimination cases following *Brause*, see Goldberg, *supra* note 20, at 2113-14.

82. William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,* 93 B.U. L. Rev. 275, 284 (2013); Goldberg, *supra* note 20, at 2106 n.57; ALASKA CONST., art. I § 25; HAW. CONST. art. 1, § 23.

83. Eskridge, *supra* note 82, at 285-86.

84. *An Act Relating to Civil Unions,* 2000 Vt. Acts & Resolves No. 91. Vermont continued to offer civil unions until 2009, when Vermont's House and Senate overrode Governor Jim Douglas's veto and extended marriage rights to same-sex couples. Abby Goudnough, *Gay Rights Groups Celebrate Victories In Marriage Push,* N.Y. TIMES (April 7, 2009), http://www.nytimes.com/2009/04/08/us/08vermont.html; *see also* 2009 Vt. Acts & Resolves 33.

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

protections into law. Instead, Kennedy found that the amendment was based on mere "animus,"[86] and thus failed the Equal Protection Clause's basic requirement that all laws be rationally related to a legitimate government purpose.[87] In *Romer* the anti-gay classification was clear, since Amendment 2 explicitly classified "homosexual, lesbian or bisexual orientation, conduct, practices or relationships"[88] as the sole target of the law.[89] Such a distinction is not necessary for rational-basis review, however. Since the rational basis test applies to any classification at all (like that between residents and nonresidents of a particular school district, or licensed

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86. *Id.* at 632. This invocation of animus, and the unusually searching review that followed its identification, has been enormously generative in later scholarship. As commentators have frequently noted, Kennedy's "rational basis with bite" analysis looks very different from traditional rational-basis review, under which any theoretical basis in fact, regardless of whether or not it influenced lawmakers, is sufficient to withstand constitutional scrutiny. *See* Carpenter, *supra* note 25, at 207 ("Having found such evidence [of animus], the Court would then skeptically scrutinize hypothesized justifications, departing from ordinarily deferential rational-basis review."); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMM. 257, 257 (1996); *see also* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12, 20-22 (1972) (originating the now-cliché term "rational basis with bite"). Some have claimed that *Romer* constitutes a form of *sub rosa* heightened scrutiny for sexual orientation classifications. *See, e.g.*, Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 40 (2014) (making this point in the context of *Windsor*); Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591 (2000). Others, such as Dale Carpenter, have argued that the presence of animus is itself so tainting as to obviate the tiered scrutiny associated with Equal Protection review and implicate a wholly new principle. Carpenter, *supra* note 25, at 285.

87. *Romer*, 517 U.S. at 633; *see also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (clarifying the rational-basis standard as applied to business regulation); Pollvogt, *Animus*, *supra* note 25, at 898-900 (discussing how rational-basis scrutiny, while generally an extremely lenient standard, is also the standard that courts generally purport to apply when considering legislation based on animus).

88. *Romer*, 517 U.S. at 624, 631 (quoting COLO. CONST. art. II, § 30b) ("Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.").

89. *Id.* at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause . . . .").

and unlicensed dentists), courts that view these bans as irrational can treat them as sexual orientation discrimination without having to address thorny classification issues.

In invoking rational basis to strike down same-sex marriage bans, courts most frequently used it to sidestep the question of what kind of scrutiny anti-gay classifications deserve. The first fully enforced decision extending marriage rights to same-sex couples, *Goodridge v. Department of Public Health*,[90] held that arguments about which tier of scrutiny to apply were effectively moot: "[B]ecause the statute [banning same-sex marriage in Massachusetts] does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny."[91] Similarly, the "Prop 8 case," *Schwarzenegger v. Perry*, based its decision on unusually well-developed findings of fact[92] and reserved judgment on which tier of scrutiny to apply.[93] Another obvious advantage of rational basis scrutiny is the rhetoric it allows judges to deploy; under rational basis review, judges who are so inclined are effectively required to condemn bans on same-sex marriage in the strongest possible terms, emphasizing their utter logical bankruptcy rather than their inability to meet the somewhat more demanding standards of heightened scrutiny. This can be a lot of fun.[94]

A less discussed advantage of rational basis scrutiny, however, is that it does not require judges to clearly identify the classifications at issue.[95] Every law is subject to rational basis review; while the effects these laws have on gays and lesbians might inform one's

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90. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

91. *Id.* at 961.

92. Schwarzenegger v. Perry, 704 F. Supp. 2d 921, 953-91 (N.D. Cal. 2010). Notably, *Perry* was one of the few cases considering the constitutionality of a ban on same-sex marriage not to be disposed of at the summary judgment stage; Judge Walker issued his opinion after an extensive and well covered public trial.

93. *Id.* at 997 ("As presently explained in detail, the Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review.").

94. As one example, Judge Posner's recent decision in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), which rejected Wisconsin's arguments in favor of its same-sex marriage ban as simply "implausible," was immediately noted as a "masterpiece of wit and logic." *Id.* at 671; Marc Joseph Stern, *Judge Posner's Gay Marriage Opinion Is a Witty, Deeply Moral Masterpiece*, SLATE.COM: OUTWARD (Sept. 5, 2014), http://www.slate.com/blogs/outward/2014/09/05/judge_richard_posner_s_gay_marriage_opinion_is_witty_moral_and_brilliant.html. *See also* Love v. Beshear, 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014) ("These arguments are not those of serious people.").

95. *See* Nicolas, *supra* note 29, at 378-79.

moral reasoning, those effects have no role in determining whether rational basis applies.[96] Therefore, the fact that these bans were formally sexual-orientation-blind was made irrelevant (or a point against the bans, since the formal classification is one based on sex). Rational basis scrutiny allowed judges to speak in the same language as policymakers or as regular people about same-sex marriage bans, without placing explicit legal significance on the discrimination that same-sex marriage bans clearly perpetuated on every level but their text. This analysis was also nearly universal in opinions rejecting attacks on same-sex marriage bans, featuring both in majority opinions in failed constitutional challenges and in dissents from holdings striking bans down.[97]

By contrast, several courts found not only that same-sex marriage bans classified on the basis of sexual orientation, but also that those sexual orientation classifications merited heightened scrutiny under state or federal constitutional provisions.[98] While federal courts generally asserted that same-sex marriage bans classified on the basis of sexual orientation, earlier state court decisions devoted some space to this topic and explained their reasoning in far more detail. By far the most extensive discussion of this classification problem can be found in the Iowa same-sex marriage case, *Varnum v. Brien*.[99] The case before the Iowa Supreme Court was somewhat oddly framed: the trial court's opinion had analyzed Iowa's ban on same-sex marriage as a classification based on sex,[100] and Polk County (the county in which Katherine Varnum had sought a marriage license) had argued that Iowa's definition of marriage did not enquire as to sexual orientation and was thus

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96. *Id.* at 378-79.

97. *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 413 (6th Cir. 2014) ("There is another impediment. The Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades."); Bostic v. Schaefer, 760 F.3d 352, 396 (4th Cir. 2014) (Niemeyer, J., dissenting) ("[N]either the Supreme Court nor the Fourth Circuit has ever applied heightened scrutiny to a classification based on sexual orientation."); Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 918 (E.D. La. 2014) ("[N]either the Supreme Court nor the Fifth Circuit has ever before defined sexual orientation as a protected class, despite opportunities to do so.").

98. *See, e.g.*, Windsor v. United States, 699 F.3d 169 (2d Cir. 2012); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

99. *Varnum*, 763 N.W.2d at 862.

100. Varnum v. Brien, No. CV 5965, 2007 WL 2468667 (D. Iowa Aug. 30, 2007) ("The Plaintiffs' own sex precludes them from marrying an individual of their choosing. Such a classification is sex-based . . . .").

neutral on the subject.[101] Justice Cady's response to this argument is both eloquent and revealing:

> It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class—their sexual orientation. *In re Marriage Cases*, 183 P.3d at 441. The benefit denied by the marriage statute—the status of civil marriage for same-sex couples—is so "closely correlated with being homosexual" as to make it apparent the law is targeted at gay and lesbian people as a class. See *Lawrence*, 539 U.S. at 583, 123 S.Ct. at 2486, 156 L.Ed.2d at 529 (O'Connor, J., concurring) [. . . .] The Court's decision in Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), supports this conclusion. *Romer* can be read to imply that sexual orientation is a trait that defines an individual and is not merely a means to associate a group with a type of behavior. *See Romer*, 517 U.S. at 632, 116 S.Ct. at 1627, 134 L.Ed.2d at 865-66 (holding an amendment to a

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101. *Id.* at 884 ("The County initially points out that section 595.2 does not explicitly refer to "sexual orientation" and does not inquire into whether either member of a proposed civil marriage is sexually attracted to the other. Consequently, it seizes on these observations to support its claim that the statute does not establish a classification on the basis of sexual orientation because the same-sex civil marriage ban does not grant or withhold the benefits flowing from the statute based on sexual preference. Instead, the County argues, section 595.2 only incidentally impacts disparately upon gay and lesbian people."). While defenders of same-sex marriage bans still raise this point, *see supra* note 11, it has largely receded from view, particularly in judicial opinions defending the constitutionality of such bans. *See infra* notes 112-117 and accompanying text. This relative absence may reflect that such arguments naturally invite scrutiny of the motivations behind recent state DOMAs, or that they risk conceding that such laws engage in classification based on sex.

state constitution pertaining to "homosexual . . . orientation" expresses "animus toward the class that it affects").

> By purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation.[102]

Specifically, the argument is eloquent for its sensitivity to the impact of marriage bans on gay and lesbian lives, and revealing for its antiformalism and doctrinal innovation. Justice Cady was clearly correct—no reasonable person could understand these laws as sexual-orientation-neutral—but stood on shaky doctrinal ground. Justice Cady read these laws to *implicitly* classify on the basis of sexual orientation, but could point to no other context in which such implicit classification is identified and condemned; O'Connor's concurrence in *Lawrence* received no other votes,[103] and *Romer* concerned a law which explicitly differentiated sexual orientation from other types of protected status.[104] Instead, *Varnum* focused on the remarkable harms that the law inflicted on gays and lesbians, and particularly on the uniquely identity-based nature of those harms. Judge Cady construed gay identity to effectively forbid opposite-sex marriage, and as a result construed same-sex marriage bans to require gays and lesbians who wish to marry to become, effectively, straight.[105] This is a remarkable argument in constitutional law, for reasons I will explain below, but *Varnum* was not entirely without precedent. Two other state cases from this period applied strikingly similar reasoning.

To support its claim that discriminating against conduct typically associated with a group can trigger heightened scrutiny, *Varnum* cited *Kerrigan* and *Marriage Cases*, which both provide further context for understanding how courts came to read same-sex marriage bans as classifying in their effect, rather than their text.[106] *In re Marriage Cases* asserted that the bans constituted sexual orientation discrimination because the link between sexual orientation and same-sex intimacy is so close that marrying an

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102. *Varnum*, 763 N.W.2d at 885 (internal quotation omitted) (some citations omitted) (also citing Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 n.24 (Conn. 2008); Conaway v. Deane, 932 A.2d 571, 605 (Md. 2007)).

103. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

104. NeJaime, *supra* note 22, at 1215 n.188; Robinson, *supra* note 28 (manuscript at 21-22).

105. *Varnum*, 763 N.W.2d at 885.

106. *Id.*

opposite-sex spouse would make a gay man or lesbian effectively heterosexual:

> A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation. In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation.[107]

Kerrigan, on the other hand, simply collapsed sex and sexual orientation, arguing that, in the context of a sexual or romantic pairing, classification based on sex and sexual orientation are largely indistinguishable:

> We therefore disagree with Justice Zarella's contention that the most that can be said about the state statutory prohibition against same sex marriage is that it impacts gay persons disparately. First, the civil union law, which expressly provides for the union of same sex couples . . . also expressly defines marriage "as the union of one man and one woman." It is readily apparent, therefore, that the statutory scheme at issue purposefully and intentionally distinguishes between same sex and opposite sex couples. . . . In other words, this state's bar against same sex marriage *effectively* precludes gay persons from marrying; to conclude otherwise would be to blink at reality.[108]

In addition to the themes of identity negation already discussed, and the related analytical move of defining sexual orientation in terms of the sorts of conduct in which gay people generally wish to engage, these decisions shared a remarkable pragmatic streak. *Varnum*, *Kerrigan*, and *Marriage Cases* each dismissed distinctions

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107. *In Re* Marriage Cases, 183 P.3d 384, 441 (Cal. 2008); *see also* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993) (describing the difficulty of precisely delineating sexual orientation, in the context of courts' assumptions that gay individuals will definitionally be in violation of sodomy statutes); NeJaime, *supra* note 22, at 1225-29 (referring instead to 'religious exemptions' to same-sex marriage laws that neglect to link the conduct of same-sex marriage to the status-based anti-discrimination interests inherent in same).

108. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 n.24 (Conn. 2008) (internal citations omitted) (citing *In Re Marriage Cases*, 183 P.3d at 384).

between sex and sexual-orientation classification as essentially absurd (notably, none of these decisions acknowledged the fundamental importance of this distinction to the *Baehr* or *Brause* courts).[109] Having thus established that these laws facially classified on the basis of sexual orientation, the cases then analyzed them according to the constitutions of their respective states: the *Varnum* court, for example, subjected Iowa's ban to heightened scrutiny based on the equal protection provisions of the Iowa Constitution.[110]

In more recent litigation—particularly litigation following and interpreting *Windsor*—this line of reasoning re-emerged in a different form. Whereas earlier state courts *argued* that bans on same-sex marriage classified on the basis of sexual orientation, later courts *accepted* that classification as a given. Compare the discussion of classification in the cases cited above with this excerpt from Judge Reinhardt's opinion in *Latta v. Otter*: "'The common vocabulary of family life and belonging that other[s] [] may take for granted' is, as the Idaho plaintiffs put it, denied to them . . . merely because of their sexual orientation."[111] Judge Reinhardt took for granted that Idaho's ban classified on the basis of sexual orientation, even though a concurrence questioned this exact point.[112]

Similarly, the first federal appellate court decision to apply intermediate scrutiny to a same-sex marriage ban, the Second Circuit opinion[113] that was affirmed by the Supreme Court in *Windsor*,[114] devoted substantial argumentative space to explaining

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109. *See supra* notes 41-45 and accompanying text.

110. *Varnum*, 763 N.W.2d at 885-96; *see supra* note 45.

111. Latta v. Otter, 771 F.3d 456, 467 (9th Cir. 2014).

112. *Id.* at 468. *Latta*'s majority opinion does contain a discussion of classification, but it does not consider the sex vs. sexual orientation issue that animated earlier litigation, instead responding to the—somewhat nonsensical—argument raised by the State of Idaho that a law restricting marriage to people of the opposite sex drew a facial classification on the basis of "procreative capacity." *Id.* at 467-69. Remarkably, Judge Reinhardt responds to this argument by noting that "[w]hether facial discrimination exists 'does not depend on why' a policy discriminates, 'but rather on the explicit terms of the discrimination.'" *Id.* at 467-68 (quoting Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)). In the instant case, Judge Reinhardt addresses the facial classification issue raised by Judge Berzon, *id.* at 481 (Berzon, J., concurring) (citing Baker v. State, 744 A. 2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part)), by simply noting that sexual orientation is immutable and that a state should not force its citizens to "abandon" that orientation. *Id.* at 464 n.4 (citation omitted).

113. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

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

why sexual minorities should be treated as a quasi-suspect group[115] and essentially none to explaining why the federal Defense of Marriage Act ("DOMA") classified on the basis of membership in that group. The closest Judge Jacobs came to making this argument openly was in his discussion of the manifest nature of homosexuality: "The class affected by Section 3 of DOMA is composed entirely of persons of the same sex who have married each other. *Such persons constitute a subset of the larger category of homosexuals*; but . . . there is nothing amorphous, capricious, or tentative about their sexual orientation."[116] In the context of an entirely different argument, Judge Jacobs assumed, without argument or citation, the very identity between the sex and sexual orientation of the marrying parties that was a critical issue in *Marriage Cases*, *Kerrigan*, and *Varnum*. The *Windsor I* dissent embraced the same theoretical framework, agreeing that DOMA facially classifies on the basis of sexual orientation but applying rational basis review.[117]

By contrast, a few post-*Windsor* decisions explicitly considered and rejected the sex discrimination argument.[118] *Sevcik v. Sandoval*,[119] which is the only case to find that a same-sex marriage ban was enacted specifically with an anti-gay purpose,[120] actually acknowledged that same-sex marriage bans "'proscribe generally accepted conduct if engaged in by members of' the same gender,"[121] but nevertheless found that they were not motivated by "any intent to maintain any notion of male or female superiority, but rather, at most, of heterosexual superiority or 'heteronormativity' by relegating (mainly) homosexual legal unions to a lesser status."[122] The *Sevcik* court used this anti-gay intent to find that DOMA's impact on gays and lesbians implicated the Equal Protection Clause even in the absence of a classification, but also held that the law's explicit sex-based classification was less salient than its anti-gay discrimination because the ban was not intended to hurt women.[123] *Geiger v.*

115. *Windsor I*, 699 F.3d at 181-85.

116. *Id.* at 184 (emphasis added).

117. *Id.* at 189 (Straub J., dissenting) ("The discrimination in this case does not involve a recognized suspect or quasi-suspect classification.").

118. I provide a brief summary of two such cases below; for a wider ranging treatment, see Goldberg, *supra* note 20, at 2117-18.

119. Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012).

120. *Id.* at 1005.

121. *Id.* at 1004 (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967)).

122. *Sevcik*, 911 F. Supp. 2d at 1005.

123. *Id.* Notably, for the *Sevcik* court the finding that same-sex marriage bans implicated sexual orientation and not sex determined the outcome; the court applied

Kitzhaber[124] employed similar reasoning, stated rather more baldly. *Sevcik* conceded that "the distinction drawn by the State could be characterized as gender-based,"[125] whereas *Geiger* simply asserted that Oregon's "marriage laws discriminate based on sexual orientation, not gender."[126] The *Geiger* court justified its theory with a somewhat ahistorical and extremely adoctrinal claim:

> There is no such invidious gender-based discrimination here. The state's marriage laws clearly were meant to, and indeed accomplished the goal of, preventing same-gender couples from marrying. The targeted group here is neither males nor females, but homosexual males and homosexual females. Therefore, I conclude the state's marriage laws discriminate on the basis of sexual orientation, not gender. *See Sevcik*, 911 F.Supp.2d at 1005 (analyzing a similar Nevada law, the court concluded the law was not directed toward any one gender and did not affect one gender in a way demonstrating any gender-based animus, but was intended to prevent homosexuals from marrying).[127]

There are two clear flaws in this argument. First, the *Geiger* plaintiffs were challenging not only a 2004 amendment to the Oregon Constitution that defined marriage as between a man and a woman, but also Oregon's historical failure to recognize same-sex marriage.[128] It is by no means clear if Oregon's earliest definition of marriage was intended specifically to prevent same-sex couples from marrying, which would seem to be a factual prerequisite for this type of analysis.[129] Second, to hold that an explicit classification—particularly an explicit sex classification—is not "invidious" because it does not target any particular group is incoherent in the face of the doctrines and realities of sex discrimination.[130] As Ruth Bader Ginsburg explained decades before her confirmation to the bench, sex classifications often distinguish between men and women without the aim of explicitly harming either.[131] Writing an animus

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rational basis scrutiny, *id.* at 1006-14, and found that the ban satisfied the rational basis test, *id.* at 1014-19.

124. Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1139-40 (D. Ore. 2014).

125. *Sevcik*, 911 F. Supp. 2d at 1005.

126. *Geiger*, 994 F. Supp. 2d at 1139.

127. *Id.* at 1140.

128. *Id.* at 1134.

129. *See id.*; *infra* notes 267-269 and accompanying text.

130. *See* Leslie, *supra* note 20, at 1109-10.

131. *See* Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 823 (1978).

requirement into the Fourteenth Amendment as a necessary condition for heightened scrutiny would reverse some of the Court's most canonical sex discrimination cases: it is unclear, for example, if *Geiger*'s reasoning would find the sex distinction in *Frontiero*[132] or *Manhart*[133] sufficiently invidious.[134]

For a brief period, judges saw clearly the doctrinal problems posed by the marriage cases. In casting same-sex marriage bans as the sexual orientation classifications that we all understand them to be, these judges made compelling moral arguments about the unique harms these bans inflicted, and those arguments had an explicit logic that could apply outside of the same-sex marriage context. But this moment soon passed, and the classification issue receded from view.[135] Neither Judges Reinhardt nor Jacobs, nor any of the judges who have referred to state same-sex marriage bans as attacks upon one of "the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world,"[136] cited earlier cases to make the point that same-sex marriage bans discriminated against gays and lesbians. They did not refer to the growing consensus that such bans classify on the basis of sexual orientation as dispositive, because they did not see a question with which to dispose.[137] Those judges who did see and reject the earlier sex discrimination argument did so not by expanding the law, as in *Kerrigan*, *Marriage Cases*, and *Varnum*, but by inexplicably narrowing it.

It is no great novelty to claim that the sex-discrimination and sexual-orientation-discrimination theories of marriage equality

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132. Frontiero v. Richardson, 411 U.S. 677 (1973) (finding that a law which presumed dependency for military wives, but not husbands, violated the Equal Protection Clause).

133. L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978) (finding that Los Angeles was forbidden from considering sex in calculating retirement payments, even though the sex classification responded to an undisputed actuarial difference in projected lifespan).

134. This theory has found somewhat more purchase in the context of race, where early racial classifications clearly arose from a desire to harm racial minorities. *See, e.g.*, Brown v. City of Oneonta, 221 F.3d 329, 337-38 (2d Cir. 2003) (finding that police reliance on a suspect description mentioning the suspect's race was facially neutral). Although the suspect description at issue in *Oneonta* clearly referenced the suspect's race, and although the police acting on that description thus considered race in finding suspects, the *Oneonta* court found that city's policy "race-neutral on its face" because it considered other characteristics of the suspect in addition to race. *Id.*

135. *See* Leslie, *supra* note 20, at 1092.

136. Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014).

137. *See* Leslie, *supra* note 20, at 1110.

reflect different ideas about whom the Constitution protects against discrimination. *Baehr* and the other sex-discrimination cases reasoned from the generally accepted notion that the Equal Protection Clause forbids lawmakers from treating men and women differently, while sexual-orientation-based decisions like *Latta* and *Windsor*—and, to a lesser extent, rational-basis decisions like *Goodridge* and *Perry*[138]—claimed that sexual orientation classifications were also forbidden. These theories, however, reflect very different understandings of what discrimination actually is. To say that same-sex marriage bans discriminate on the basis of sex is to define discrimination as distinguishing one group from another on the basis of a particular characteristic, and treating the two groups differently.[139] By contrast, saying that these bans discriminate on the basis of sexual orientation defines discrimination as something more harm-focused and structural; as creating a system that operates, not necessarily explicitly or even consciously, to harm the people in question.[140] The first definition has held sway for decades in constitutional law, and it still does in every context but same-sex marriage.[141]

For gays and lesbians, the broad definition of discrimination adopted in *Latta* and *Windsor I* might seem like solicitude.[142] But for other minorities, these cases appear as a missed opportunity. The next Part of this Article discusses the history of *Feeney*'s discriminatory purpose doctrine and why it poses problems not just for gays and lesbians who wish to marry, but for many other disfavored groups.

II. WHAT'S SO GAY ABOUT SAME-SEX MARRIAGE?: STATUS, CONDUCT, AND *FEENEY*

Decisions treating same-sex marriage bans as straightforward classifications based on sexual orientation are easy to reconcile with our political and social reality. However, they fit less easily with our existing constitutional doctrine. In *Kerrigan*, Judge Zarella argued in dissent that a state ban on same-sex marriage could not be

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138. *See* Carpenter, *supra* note 25, at 184 n.3 (describing lower court decisions reflecting skepticism of antigay laws while nevertheless applying rational basis scrutiny).

139. *See* Case, *supra* note 26, at 1221-22.

140. *See id.* at 1220-21.

141. *Id.*

142. *See* Robinson, *supra* note 28 (manuscript at 50) ("[T]he Court has cultivated a distinct form of analysis for LGBT claims, which subverts certain traditional rules.").

understood as a classification based on sexual orientation because it did not inquire into the sexual orientation of those it affected.[143] Instead, he argued that same-sex marriage bans only disparately impacted gays and lesbians, and thus should be analyzed in the context of the Supreme Court's discriminatory purpose jurisprudence.[144] This argument stands out in our evolving debates over same-sex marriage for two reasons. First, Judge Zarella's reasoning has fallen almost completely by the wayside: only two courts have even considered same-sex marriage bans as raising a disparate impact issue since *Kerrigan*, and one of those is a mere aside in the context of an entirely different argument about the contours of rational basis review.[145] Second, as a factual matter, Judge Zarella was almost certainly correct. Same-sex marriage bans technically place the same restrictions on all parties of the same sex without concern for their sexual orientation,[146] but those restrictions happen to be far more onerous for gays and lesbians. As such, these bans should only trigger equal protection scrutiny if they can be shown to arise from ill will towards the impacted group; in other words, if the facially neutral classification is simply a pretext.[147] This doctrine has enormous implications for whether we consider "gay marriage bans" to discriminate against gay people at all, but it

143. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 515-16 (Conn. 2008) (Zarella, J., dissenting).

144. *Id.* at 521-22 (Zarella, J., dissenting) ("[T]he majority apparently relies on the notion that the disparate impact of the marriage laws on gay persons who wish to enter into marriage creates a classification on the basis of sexual orientation. It is well settled, however, that the constitutional guarantee of equal protection is implicated only when 'a state legislatur[e] . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects [on] an identifiable group.'"). (All alterations except the first in original) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

145. Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) ("If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test."). The other decision to address this issue is *Sevcik v. Sandoval*; *see supra* notes 118-123 and accompanying text.

146. Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); Koppelman, *supra* note 20, at 211.

147. Harris v. McRae, 448 U.S. 297, 323 n.26 (1980) ("The equal protection component of the Fifth Amendment prohibits only purposeful discrimination . . . .") (citing Washington v. Davis, 426 U.S. 229 (1976)); *Feeney*, 442 U.S. at 272 ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

was almost entirely ignored in the biggest civil rights litigation campaign of our century.[148] This Part considers why that might be, what the disparate impact doctrine would mean in gay-rights cases, and what its tacit abandonment in the arena of same-sex marriage could mean for our understanding of the Equal Protection Clause going forward.

A. *How Discriminatory Purpose Works*

For decades, the Supreme Court has held that, unless a law explicitly classifies on the basis of membership in a protected group, it should only be treated as implicating that group if it not only inflicts particular harm on that group, but was in fact designed to inflict that harm. This doctrine, variously referred to as the "discriminatory purpose" or "constitutional disparate impact" doctrine, has been criticized for its cramped view of our anti-discrimination commitments,[149] and can create outcomes as depressing as they are absurd. Courts almost universally refused to follow this doctrine in considering bans on same-sex marriage, but in order to see the potential implications of this refusal we must first understand what exactly the full application of disparate-impact doctrine might require.

It should be immediately obvious that an Equal Protection Clause protecting only against explicit discrimination would be a dead letter. Almost from the moment of the Fourteenth Amendment's passage, state legislatures passed laws to maintain the system of white supremacy threatened by abolition. While many of these laws were quite explicit in classifying citizens by race,[150] others made no reference to race but clearly and intentionally had different effects on black and white citizens. Consider the "grandfather clause" evaluated by the Supreme Court in the 1915 case *Guinn v. United States*:

> No person shall be registered as an elector of this state or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma; but no person who was, on January 1st 1866, or

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148. *See* Robinson, *supra* note 28 (manuscript at 22) (noting this general failure to apply the discriminatory purpose doctrine as evidence that "the rules that apply to race and sex do not necessarily govern sexual orientation").

149. *See* Selmi, *supra* note 18, at 706; Siegel, *supra* note 31, at 15-23.

150. This point is, depressingly, almost too obvious to require citation, but consider, for example, Plessy v. Ferguson, 163 U.S. 537 (1896), which considered the constitutionality of a statute sorting railway accommodations by race.

> at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.[151]

This facially neutral classification (did you have a linear relative who legally voted prior to 1866?) is, in practical terms, clearly racial: given that African-Americans were formally barred from voting in many states prior to the Fifteenth Amendment,[152] these "grandfather clauses" only benefitted descendants of whites,[153] and this is to say nothing of the massive racial disparities that existed in the enforcement of voting restrictions.[154] Any reasonably creative bigot can draw distinctions that harm members of a protected group without specifying that group by name, and in order to be effective, anti-discrimination laws must be able to recognize and address laws based on those distinctions. Under federal statutory law,[155] this problem is addressed through the disparate impact doctrine set forth in *Griggs v. Duke Power Company*: "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[156] This is, essentially, a burden-shifting framework; once a practice is shown to harm members of a protected group at a greater rate than nonmembers, the *Griggs* doctrine places the burden on a defendant to justify that practice.[157]

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151. *Id.* at 357.

152. U.S. CONST. amend. XV § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majorian Difficulty,* 43 HARV. C.R.-C.L. L. REV. 65, 80 (2008).

153. Chin & Wagner, *supra* note 152, at 96-97.

154. *Id.* at 83-97.

155. I refer primarily to the Civil Rights Acts of 1964 and 1991, although the framework has been adopted elsewhere.

156. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

157. *Id.* at 432. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975) (clarifying how an employer can defend a policy with a racially discriminatory impact); Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom-Line Principle,* 31 UCLA L. REV. 305, 353 (1983) (describing the theoretical distinctions between visions of equality that can be supported by disparate impact doctrine, depending on how business necessity is defined and on how evenhandedly courts consider impact on

By contrast, in *Washington v. Davis* the Court applied a far stricter standard in interpreting the Equal Protection Clause. The *Davis* plaintiffs were police officers in Washington, D.C., who sought a promotion and were denied on the basis of their score on a civil service exam and were subjected to other discriminatory procedures.[158] These officers claimed that, because there were clear disparities in test performance between black and white officers, the D.C. Metropolitan Police Department had violated both D.C. civil rights laws and the Equal Protection Clause under a disparate impact theory:[159] the case before the Court considered a summary judgment motion specifically on the plaintiffs' constitutional claims.[160] In resolving those claims, the Court explicitly rejected Title VII's disparate impact framework,[161] reasoning that the Equal Protection Clause was concerned with a law's discriminatory *purpose*, and not with its harmful impact on protected groups.[162]

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dominant and nondominant groups for the purposes of Title VII). I should note that statutory disparate impact is itself a subject of controversy; since *Griggs*, the doctrine was sharply curtailed in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), largely reinstated in the Civil Rights Act of 1991, Pub. L. 102-166, 42 U.S.C. §§ 1981 *et seq.*, and is now under serious threat from some Justices of the Supreme Court who have suggested that it violates the Equal Protection Clause. *See* Ricci v. DeStefano, 557 U.S. 557, 594 (Scalia, J., concurring) ("I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one."); Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (considering whether *Ricci* is itself incompatible with the disparate impact doctrine). Recent decisions in both *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), and *Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, suggest that the Court is not currently prepared to strike disparate impact down. Reva Siegel, *Race Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015) (claiming that the Court's handling of *Fisher* suggests that disparate impact remains constitutional); Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. ___ (forthcoming 2016) (making a similar argument in the context of *Inclusive Communities*).

158. Washington v. Davis, 426 U.S. 229, 232-35 (1976).

159. *Id.* at 233.

160. *Id.* at 236-37.

161. *Id.* at 239 ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.").

162. *Id.* ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is

However, *Davis* left the exact mechanics of this "discriminatory purpose" requirement somewhat unclear: was the Equal Protection Clause implicated only if harming protected groups were an *aim* of a particular statute, or simply if it were an accepted—or even desirable—side effect of that statute's operation?

The Court further clarified this discriminatory purpose requirement in *Feeney*, which considered whether Massachusetts's veterans' preference laws discriminated on the basis of sex.[163] The Massachusetts civil service laws at issue in *Feeney* gave an extremely strong preference to veterans of the armed forces,[164] a community that—largely due to sex-based classifications employed by the military—was overwhelmingly male.[165] Massachusetts, aware of this disparity, nonetheless instituted veterans' preferences in order "to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations."[166] The Court held that, despite the "devastating" impact of these preferences on women's prospects for career advancement within the civil service,[167] the law distinguished "between veterans and nonveterans, not between men and women."[168]

The law at issue in *Feeney* differed from the test used by the *Davis* defendants in two important respects. The clearest difference, which both parties understood to lie at the heart of the litigation and which Justice Stewart discussed at length, was that of a defendant's knowledge versus a defendant's conscious intent. There is no evidence that the *Davis* defendants were even aware that the civil service exam harmed African-American test-takers; because awareness is not a requirement for disparate impact liability under

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unconstitutional *solely* because it has a racially disproportionate impact.").

163. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

164. *Id.* at 261-62 (referring to Massachusetts's veterans' preference law as "among the most generous" in the nation).

165. *Id.* at 270 ("When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female."); *see also* Brief for Appellee, *Feeney*, 442 U.S. 256, No. 78-233, at *12-15 [hereinafter *Feeney* Appellate Brief] (detailing the military's exclusionary policies and how they led to this disparity).

166. *Feeney*, 442 U.S. at 265 (footnote and citations omitted). The *Feeney* plaintiff accepted that the preference statute had not been adopted, at least in the form that applied at the time of litigation, for the purpose of sex-based classification. *Feeney* Appellee Brief, *supra* note 165, at *19.

167. *Feeney*, 442 U.S. at 260 (characterizing the decision of the district court).

168. *Id.* at 275.

Griggs, the *Davis* plaintiffs alleged that the harm was sufficient without making specific claims as to city officials' mental state.[169] *Feeney* considered specifically whether the "discriminatory purpose" requirement in *Davis* could be satisfied by a defendant acting with *awareness* of the law's discriminatory effect, or whether that discriminatory effect needed to be an actual *purpose* of the law. In adopting a purpose requirement, *Feeney*'s holding thus reduced constitutional remedies for disproportionately impactful laws to, effectively, a pretext doctrine. For a law to violate the Equal Protection Clause after *Feeney*, its proponents must have consciously classified on the basis of membership in a protected group—either through a facial classification or through a neutral criterion specifically chosen in order to harm group members.[170]

But there is another, subtler issue in *Feeney*—one that was dismissed by the Court in half a sentence,[171] but that was critical for the same-sex marriage litigation at the heart of this Article. Whereas the test in *Davis* generated racially disparate outcomes for reasons unknown,[172] the *Feeney* preference generated disparate results because of sex-based classifications. The overwhelming disparity in the sex of eligible veterans[173] was no cosmic coincidence; many positions in the armed forces were restricted to men at that time, and total female enlistment was capped at 2%—all but guaranteeing the sharp sex disparity Massachusetts saw in those entitled to make use of its veterans' preference.[174] While classifications based on sex are generally treated with great deference by courts in the military context,[175] they are hardly

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169. *Davis*, 426 U.S. at 235; Griggs v. Duke Power Co., 401 U.S. 424, 424-36 (1971).

170. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 23 (2003) (referring to the theory of discriminatory purpose put forward in *Feeney* as "a particularly narrow way of conceiving the scope of the anticlassification principle . . . ."); Selmi, *supra* note 18, at 760.

171. *Compare Feeney* Appellee Brief, *supra* note 165, at *26-31, *27 (arguing that "[s]ince the Commonwealth's selection criterion extends the de jure discrimination of the military into the area of public employment, it is inherently non-neutral with respect to gender"), *with Feeney*, 442 U.S. at 274 ("The appellee has conceded that [the preference statute] is neutral on its face.").

172. *Davis*, 426 U.S. at 229-56.

173. *Id.* at 270.

174. *See Feeney* Appellee Brief, *supra* note 165, at *12-14.

175. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) ("This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress

neutral.[176] The process of recruiting citizens into the military—for *Feeney* purposes, of determining who would eventually become a veteran—was openly based on sex classification.[177]

This distinction was important to the district court, which held that Massachusetts's veterans' preference was facially discriminatory, unlike the *Davis* exam.[178] The issue was also heavily briefed; both parties treated as a live issue whether or not a statute preferring a group that was predominantly male *because* of conscious sex classification in the military could be fairly said to be sex-neutral.[179] In finding that the preference was, in fact, facially neutral, the *Feeney* Court thus adopted a profoundly narrow view not only of discriminatory purpose,[180] but also of facial neutrality. No matter how closely tied the criterion is to a protected status, a statute is facially neutral unless it expressly inquires into a person's membership in a protected class.

The *Feeney* doctrine, under which a law's operation in practice is effectively irrelevant for equal protection purposes,[181] has posed particular problems for plaintiffs facing laws that disfavor conduct associated with group membership. As long as a law does not classify based on group membership per se, courts generally consider it neutral even if it curtails conduct that is clearly associated with one group in particular.[182] Perhaps the most glaring example of this

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greater deference.").

176. The *Feeney* Court, oddly, acknowledged and then summarily dismissed this fact. *Feeney*, 442 U.S. at 286, 278 ("The enlistment policies of the Armed Services may well have discriminated on the basis of sex. But the history of discrimination against women in the military is not on trial in this case." (citations omitted)). To speak bluntly, it is difficult to see why the Court would need to decide whether the military's previous sex classifications were acceptable in order to determine whether or not a later legislative action based on those classifications was taking sex into account.

177. Robinson, *supra* note 28 (manuscript at 18-19).

178. Feeney v. Com'r. of Mass., 451 F. Supp. 143, 147 n.7 (D. Mass. 1978); *see also id.* at 152 (Campbell, J., concurring) ("Thus while it is concededly a close question whether the Massachusetts veterans' preference is to be regarded as the sort of neutral classification with unintended effects absolved by *Washington v. Davis*, I feel on balance that it is not. Rather the law is more realistically viewed as substantively non-neutral.").

179. *Feeney* Appellee Brief, *supra* note 165, at *12-15; Brief for the Appellants, at *30-31, *Feeney*, 442 U.S. 256, No. 78-233.

180. Strauss, *supra* note 18, at 1002-03.

181. Unless, of course, the impact of a law itself serves to reveal lawmakers' true intent. *See Feeney*, 442 U.S. at 275; Yick Wo v. Hopkins, 118 U.S. 356 (1886); Siegel, *supra* note 18, at 1134.

182. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v.

phenomenon is the Court's treatment of pregnancy. In *Geduldig v. Aiello*,[183] which considered the constitutionality of a California insurance law that denied coverage for any disability "caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter,"[184] the Court applied rational basis scrutiny despite the law's obvious and inevitable impact on women specifically.[185] The Court dismissed Carolyn Aiello's sex-discrimination claim with the summary conclusion that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[186] In other words, a man who became pregnant would be treated no better than a woman who became pregnant; thus, no discrimination. *Geduldig*—and the accompanying decision *General Electric Co. v. Gilbert*, which used similar reasoning to hold that discriminating against pregnant employees did not violate the sex-discrimination provisions of Title VII of the Civil Rights Act of 1964[187]— sparked an enormous outcry, and Congress overruled *Gilbert* by passing the Pregnancy Discrimination Act of 1978, which defined "sex" as including "pregnancy, childbirth, or related medical conditions" for the purposes of Title VII.[188] But *Geduldig*'s constitutional holding still stands. The Court's definition of discrimination ignored the unfairness of asking women to choose between becoming pregnant and remaining financially solvent, and it was so at odds with popular understandings of pregnancy discrimination that Congress was forced to step in. But in the constitutional context, where Congressional override is not an option, *Geduldig* remains.

In *Geduldig*, the Court ignored a straightforward, if implicit, classification. Excluding pregnant workers meant excluding women; while not all women become pregnant, all men don't.[189] However,

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Aiello, 417 U.S. 484, 484-97 (1974).

183. *Geduldig*, 417 U.S. at 484.

184. *Id.* at 489 (citing CAL. UNEMPLOYMENT INS. CODE § 2626) (emphasis omitted).

185. *Geduldig*, 417 U.S. at 496-97.

186. *Id.* (footnote omitted).

187. *Gilbert*, 429 U.S. at 145-46.

188. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)); *see also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions*, 101 YALE L.J. 331, 388 (1991) (providing an account of the forces leading to the passage of the Act).

189. To be clear, the perfect exclusion of men from the class of individuals able to become pregnant has recently become a little less perfect, as some transgender men who have retained female reproductive systems have carried and given birth to

another persistent blind spot in equal protection law is its failure to address the stigmatic or dignitary harms that neutral policies can inflict on disfavored groups. In *Hernandez v. New York*, a defendant challenged his conviction on the grounds that the trial court's decision to exclude Spanish-speaking jurors discriminated against Latinos.[190] Justice Kennedy, speaking for the Court, found that the policy only disproportionately impacted Latino potential jurors,[191] and thus upheld the exclusion as rationally related to the goal of ensuring jurors would not be distracted by the Spanish-language testimony being translated for the court.[192]

Here, the issue was not a hidden classification, as in *Geduldig*; there are more Spanish-speaking non-Latinos than pregnant men. The issue, as Juan Perea has noted, was the troubling message that the exclusion sent.[193] Speaking Spanish should not disqualify someone from performing their civic duty, and given the widely understood connection between Spanish fluency and cultural identity, this exclusion seems to denigrate a historically marginalized group.[194] The prosecutor in *Hernandez*, by setting aside and punishing conduct that is strongly associated with the cultural practices of a particular group, stigmatized and demeaned members of that group. Perhaps the clearest way to see this dignitary harm is to imagine the policy in reverse, as Davis Strauss has suggested: would a prosecutor ever bar English speakers from serving on a jury?[195] The suggestion is absurd. A policy can inflict real dignitary injury without formally classifying on the basis of group membership in that group, but our equal protection jurisprudence struggles to see that injury—unless it involves same-sex marriage.

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children. *See* Guy Trebay, *He's Pregnant. You're Speechless.*, N.Y. TIMES (June 22, 2008), http://www.nytimes.com/2008/06/22/fashion/22pregnant.html (describing transgender man Thomas Beatie's pregnancy and impending childbirth); Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207 (2010). That said, it is still fair to say, at the very least, that the vast majority of pregnant people are women.

190. Hernandez v. New York, 500 U.S. 352, 357-58 (1991).

191. *Id.* at 361-62.

192. *Id.* at 363-64.

193. *See* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail To Protect Latinos*, 117 HARV. L. REV. 1420, 1435-36 (2004).

194. *Id.* at 1436 ("In crediting the prosecutor's discomfort, the *Hernandez* Court suggested that bilingual jurors could not be trusted to perform their duties as jurors and citizens as capably as anyone else."); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 803-06.

195. Strauss, *supra* note 18, at 956-59.

B. *The Uneasy Marriage Between Sex and Sexual Orientation*

This longstanding, hyperformalist interpretation of the discriminatory purpose doctrine has enormous implications for how we talk about same-sex marriage bans. The cases leading up to *Obergefell*, however, mostly discussed these bans as straightforward sexual orientation classifications and ignored the hurdles presented by *Feeney*. Consider again the Ninth Circuit decision, *Latta v. Otter*. The law at issue in *Latta* stated: "Marriage is a personal relation arising out of a contract between a man and a woman . . . ."[196] This law clearly drew a classification among citizens. But it is equally clear that the classification was based on sex.[197] In order to determine what marriage rights were granted to any given individual, Idaho did not inquire as to that individual's sexual orientation—it only asked whether they were a man or a woman. While it is certainly the case that the rights then granted would be vastly more useful for straight people than their gay counterparts, in nearly all other contexts such a difference would only indicate the law's disparate impact, and not any facial classification; facial classification requires that *the law itself* classify citizens on the basis of group membership before it can assign rights, privileges, or penalties.[198]

This difference is perhaps most evident when we consider what classification on the basis of sexual orientation, in the traditional sense, actually entails. Once Judge Reinhardt had established that Idaho's and Nevada's definitions of marriage classified on the basis of sexual orientation,[199] he cited the earlier Ninth Circuit case *SmithKline Beecham Corp. v. Abbott Laboratories*[200] for the proposition that sexual orientation classifications are subject to heightened scrutiny.[201] While some commentators have criticized *Abbott*'s reading of *Windsor* to mandate heightened scrutiny for anti-gay classifications,[202] no one disputes that *Abbott* involved a facial

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196. Latta v. Otter, 771 F.3d 456, 464 n.2 (9th Cir. 2014) (quoting IDAHO CODE § 203(1) (2014)).

197. *Id.* at 480 (Berzon, J., concurring); Goldberg, *supra* note 20, at 2113; *see supra* Part II.A.

198. *See, e.g.*, Alaska C.L. Union v. State, 122 P.3d 781, 788 (Alaska 2005) (footnote omitted) (citation omitted) ("When a 'law by its own terms classifies persons for different treatment,' this is known as facial classification.").

199. *Latta*, 771 F.3d at 468.

200. SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).

201. *Latta*, 771 F.3d at 468 (citing *Abbott Labs*, 740 F.3d at 474).

202. *See, e.g.*, Carpenter, *supra* note 25, at 200-03.

classification, and for very good reason. The *Abbott* plaintiffs alleged that their trial was tainted because an attorney for pharmaceutical manufacturer Smith-Kline Beecham had improperly struck jurors on the basis of sexual orientation.[203] During *voir dire*, Abbott Laboratories' attorney, referred to as Mr. Weinberger, used a peremptory strike to remove one juror who repeatedly mentioned his same-sex partner.[204] In a case involving the sale and pricing of HIV medications, Mr. Weinberger was apparently concerned that gay jurors might be unable to consider the dispute impartially.[205]

This is what classification looks like, at least according to the narrow definition endorsed by *Feeney*. The classifying actor (here, Mr. Weinberger) determines whether or not the classified individual (here, Juror B) belongs in a suspect group, and then modifies their treatment of that individual due to the result of that determination.[206] This determination can be explicitly investigative, as when Mr. Weingartner determined that Juror B was gay as a result of his answers to specific questions;[207] automatic and

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203. *Abbott Labs*, 740 F.3d at 475-76; *see also* Batson v. Kentucky, 476 U.S. 79 (1986) (establishing that a prosecutor striking jurors on the basis of a suspect classification triggered strict scrutiny based on the equal protection rights of the juror in question).

204. *Abbott Labs*, 740 F.3d at 474-75.

205. *Id.* at 474-89. While Abbott Laboratories did offer other neutral reasons for its striking Juror B, the circuit court dismissed those reasons as pretextual. *Id.* at 478 & n.4.

206. *Id.* at 474-89. In *Abbott Labs*, the classification was itself sufficient to trigger the classifier's response: the attorney struck Juror B immediately after he disclosed his homosexuality. *Id.* at 475. However, the classification need not be wholly determinative; as long as the actor determines what class an individual belongs to, and considers that determination in making their decision, the Equal Protection Clause can be implicated; that said, in certain contexts this sort of partial determination has been held constitutionally acceptable. *See* Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the University of Michigan's 'points' system for law school admissions, in which a student's race was an explicit factor in a multivariate test that also considered such factors as grades, LSAT score, and leadership ability, was a classification on the basis of race and thus triggered strict scrutiny); Ortega-Melendres v. Arpaio, 989 F. Supp. 2d 822, 870-83, 899 (D. Ariz. 2013) (finding that Sheriff Joe Arpaio had permitted police under his control to rely on race in the absence of further information about specific potential offenders, and that that reliance constituted a racial classification under the Equal Protection Clause).

207. To be fair, Juror B was not asked his sexual orientation. *See Abbott Labs,* 740 F.3d at 475, 478. However, given the reasoning behind Juror B's exclusion (an increased likelihood that Juror B might resent SmithKline Beecham for their handling of HIV/AIDS medications), it is clear that Mr. Weinberger was only interested in the sex of Juror B's partner insofar as it provided evidence of Juror B's orientation. There is no reason why a partnered gay man would view the issue any

instantaneous, as in the case of an election official in the Jim Crow south deciding what hurdles to place in front of a prospective voter based on his immediate perception of their race;[208] or simply categorical, like the law in *Loving v. Virginia* that assigned marriage rights based on the race of those who wished to marry.[209] Laws restricting marriage to a man and a woman fall in the third category, and marriage equality proponents have made much of these laws' resemblance to the anti-miscegenation statutes that occupy such a dark chapter in American history.[210] But, again, this categorical classification is a classification based on sex. If Virginia required marriage clerks to determine the race of prospective spouses in order to apply its law correctly, Idaho required clerks simply to determine the sex of the spouses.[211] The relevant question was not whether Susan Latta was gay, but simply whether she and Traci Ehlers (her partner) were both women.

Early decisions striking down same-sex marriage bans considered this point. As discussed above, Chief Judge George in *In re Marriage Cases* rejected this reasoning on the grounds that marrying someone of the same sex (or at least wishing to do so) was so intrinsic to sexual orientation that to prevent same-sex marriage was to require gay people, and only gay people, to deny some

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differently than a single one—here, the exclusion was of gay jurors, not of jurors in same-sex partnerships. *Id.* at 478, 486. Many thanks to Doug NeJaime for his help in clarifying this issue.

208. For a depressing—if funny, in a mordant way—example of contemporary awareness of this arbitrary racism, see Albert Bushnell Hart, *The Realities of Negro Suffrage*, 2 PROC. AM. POL. SCI. ASS'N 149, 162 (1905), offering the following joke: "An attempt was recently made to apply [a citizenship test requirement] to a well-educated young negro in Virginia, who, to prove his understanding was asked by the election officers: 'What clauses of the present Virginia constitution are derived from [the] Magna Charta?' To which he promptly replied, 'I don't know, unless it is that no negro shall be allowed to vote in this commonwealth.'"

209. *See* Loving v. Virginia, 388 U.S. 1, 4 (1967) (citing VA. CODE ANN. §§ 20-58, 20-59 (1958)).

210. *See, e.g.*, Oral Argument at 1:02:15, Campaign for Southern Equality v. Bryant, 791 F.3d 625 (No. 14-60837), *available at* www.ca5.uscourts.gov/oralarg recordings/14/14-60837_1-9-2015.mp3 ("Those words, 'Will Mississippi change its mind?', have resonated through these halls before."). *See also* Billy Edward Kluttz, Loving v. Virginia *and Same Sex Marriage: Mapping the Intersections*, 7 CULTURE SOC'Y & PRAXIS 8 (2014) (describing the theoretical ramifications of comparing past discrimination to present discrimination, including analogies between same-sex marriage bans and laws against miscegenation).

211. Latta v. Otter, 771 F.3d 456, 480 (Berzon, J., concurring) (9th Cir. 2014); Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

fundamental part of themselves.[212] But consider how this argument would apply in *Feeney*. Helen Feeney was barred from certain combat positions and excluded from the draft explicitly because of her sex: in order to avoid this classification she would need to not only deny herself of personal or sexual expression, but to actually *pass as a man*. However, as long as the statute did not itself inquire into whether Helen Feeney was a man or a woman before determining how to treat her, it was considered to only disparately impact women. Another approach might treat these laws as so clearly subordinating gays and lesbians as to rise to the level of facial non-neutrality:[213] *Loving* made this point,[214] and many normative claims in favor of marriage equality focus on how same-sex marriage bans humiliate and demean gay citizens.[215] But again, this subordination results from the *operation* of these bans rather than their text. Furthermore, these claims of subordination and humiliation have been markedly absent from other discussions of classification in the disparate impact context. It is easy to see how a prosecutor striking Spanish speakers from juries could send a deeply subordinating message about the fitness of Latinos to participate in our civic institutions;[216] in *Hernandez*, however, the Court ignored this subordination and focused narrowly on the distinction between Spanish fluency and Latino heritage. It is difficult to see how these arguments can apply to gays and lesbians who wish to marry, but not to members of other groups who are punished for conduct that is heavily associated with, and in fact expressive of, their group membership.

Of course, one could argue that sexual orientation and same-sex marriage coincide, as a practical matter, in a way that these other examples do not; not all Latinos speak Spanish, after all.[217] And it is obviously true that the vast majority of couples who wish to enter into same-sex marriages will be composed of homosexual or bisexual partners. But this argument faces the same doctrinal and practical hurdles as those above. In *Geduldig*, the Court held that distinguishing pregnancy from other equivalent disabilities bore no

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212. *In re* Marriage Cases, 183 P.3d 384, 441 (Cal. 2008); *see supra* Part II.C.

213. Hutchinson, *supra* note 27, at 1028-30.

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

215. *See, e.g.*, Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 1036 (2014).

216. Jasmine B. Gonzalez Rose, *Language Disenfranchisement in Juries: A Call for Legal Remediation*, 65 HASTINGS L.J. 811, 829-31 (2014).

217. *See* PEW RESEARCH CTR, 2011 NATIONAL SURVEY OF LATINOS 70-71 (2011), (Sept. 25, 2013), *available at* www.pewhispanic.org/2013/09725/2011-national-survey-of-latinos/.

relationship to sex, even though femaleness is an essentially necessary condition for pregnancy;[218] even if an action would only disadvantage members of a particular group, and even if this fact is known to those taking said action, that coincidence is not itself sufficient to create a facial classification. Furthermore, the correlation in the instant case is nowhere near as perfect.

As a factual matter, is it indisputable that people with primarily or exclusively homosexual desires enter into opposite-sex marriages. While it is difficult to determine exactly how common these marriages may be, researchers estimate that a significant number of Americans are currently in "mixed-orientation marriages."[219] Of course, if these people were entering into opposite-sex marriages specifically due to their legal benefits, such a fact might not be legally problematic; it would be absurd to argue that the dominance of same-race marriage in pre-*Loving* Virginia meant that the law had no effect. If same-sex marriage bans were *themselves* forcing individuals to deny their sexual orientation in order to gain legal protection, that result would be compatible with a finding of facial classification. However, both academic literature and media coverage suggest that these individuals are in fact entering into opposite-sex marriages for a variety of different reasons, such as internalized homophobia,[220] a desire to "pass" as straight,[221] or religious commitments.[222] In particular, some individuals who openly identify as gay nevertheless marry women for religious reasons; these people acknowledge their same-sex attraction, understand it to be a result of their sexual orientation, and nevertheless choose to enter into mixed-orientation marriage with

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218. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

219. Seth Stephens-Davidowitz, *How Many American Men Are Gay?*, N.Y. TIMES (Dec. 8, 2013), http://www.nytimes.com/2013/12/08/opinion/sunday/how-many-american-men-are-gay.html. The Straight Spouse Network, a support organization for individuals whose spouses reveal their homosexuality, estimates that two million LGB individuals have entered into opposite-sex marriages. *Straight Spouses Add Their Voice to National Coming Out Day*, STRAIGHTSPOUSENETWORK.COM (Oct. 10, 2010), http://www.straightspouse.org/straight-spouses-add-their-voice-to-national-coming-out-day/.

220. Daryl J. Higgins, *Gay Men from Heterosexual Marriages: Attitudes, Behaviors, Childhood Experiences, and Reasons for Marriage*, 42 J. HOMOSEXUALITY 15, 31 (2002).

221. *Id.*; John P. Dehlin et al., *Psychological Correlates of Religious Approaches to Same-Sex Attraction: A Mormon Perspective*, 18 J. GAY & LESBIAN MENTAL HEALTH 284, 297 (2014).

222. Peggy Fletcher Stack, *Gay, Mormon, Married*, SALT LAKE TRIB. (Aug. 5, 2006), http://www.sltrib.com/faith/ci_4138478.

knowing spouses as a result of perceived religious commandments to procreate.[223]

This discrepancy is a serious theoretical hurdle to the facial classification theory; a ban on same-sex marriage is not quite the same thing as a ban on gay people marrying. Similarly, these bans prevent heterosexuals of the same sex from marrying in order to express nonsexual commitments or to gain legal benefits.[224] The *Marriage Cases* court addressed this concern definitionally: A primary same-sex relationship is so intrinsic to the idea of a homosexual orientation that a gay person could not make use of California's marriage statute without, effectively, ceasing to be gay.[225] That said, it is difficult to build a legalistic or rigorous definition out of this theory. As Janet Halley has noted, sexual orientation presents specific, and bedeviling, problems of separating individual acts from a legally cognizable shared identity.[226] At the formal level, those whom the law understands to be gay or lesbian are not categorically barred from marrying by a same-sex marriage ban, and certainly not on the basis of any sexual orientation classification.

I should take a moment now to address two objections to this theory; one scholarly, the other practical. First, this analysis treats

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223. *Id.*

224. *See* Katherine Franke, *Longing for* Loving, 76 FORDHAM L. REV 2685, 2700-05 (2008) (discussing the need for a greater understanding of affective relationships besides the sexualized, monogamous variants privileged by our current understanding of marriage).

225. *In re* Marriage Cases, 183 P.3d 757, 441 (Cal. 2008). *See infra* notes 368-373 and accompanying text (discussing normative problems with this definitional approach).

226. Halley, *supra* note 107, at 1747-49 (describing the conceptual difficulties inherent in separating homosexual conduct, here sodomy, from a homosexual identity). Obviously, Halley's analysis predates even a vague idea that laws classifying on the basis of a homosexual identity might raise special problems in the context of the Equal Protection Clause, and her concern is primarily with the *Bowers* Court's assigning a homosexual identity to same-sex sex in order to separate it from the longstanding traditions of nonprocreative sex that might endow it with protection as a fundamental right. That said, the analysis is essentially the same in the instant context, albeit with the political valence reversed—advocates of same-sex marriage who argued that same-sex marriage bans classified on the basis of sexual orientation were trying to link act and identity in order to further gay rights under a clause of the Constitution that is generally held to protect discrete groups who are victims of historical injustice, rather than employing a more universalizing argument against novel intrusions upon settled liberty. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

sexual orientation as an *individual* characteristic, analogous to race or sex. While courts that have found same-sex marriage bans to classify on the basis of sexual orientation have followed that presumption,[227] many scholars have not. In particular, a great deal of scholarly work treating these bans as anti-gay has done so by locating sexual orientation at the level of the couple that wishes to marry, rather than the people who comprise that couple.[228] The distinction may seem theological, but it does effectively solve the problem. If Adam and Eve are a "straight couple," and Adam and Steve a "gay couple," then straight and gay couples are treated differently. In order for a clerk to determine whether a couple may validly marry, determining that couple's sexual orientation is both sufficient and necessary to determine whether the marriage would violate a state's same-sex marriage ban. For courts that insist on viewing same-sex marriage bans as classifying on the basis of sexual orientation, this is an elegant solution, and in terms of logical coherence it is a vast improvement over simply stating that the bans prevent gay people from marrying. But this analysis still raises serious doctrinal questions, and in the end I suspect that it does not map neatly onto the concept of sexual orientation enshrined elsewhere in our anti-discrimination commitments.

To begin, what makes a "gay couple" gay? If we locate sexual orientation at the level of the couple, then determining sexual orientation is exactly the same as determining the parties' sex—if both parties are the same sex, the couple is gay, and if not the couple is straight. Litigants under this theory would be asking for protection for a class of couple that cannot be defined without employing an already-existing quasi-suspect classification.

To argue by analogy, this reasoning is equivalent to analyzing the interracial marriage ban in *Loving* as discriminating against a protected class of "miscegenating couples." It is true that Virginia was more disturbed by the existence of mixed-race couples than by the existence of black people generally—the couple had some special significance in lawmakers' minds, and the same-sex couple may well do the same today.[229] But instead of simply accepting Virginia's characterization, the Court looked specifically to the defining criteria that made this couple suspect, and saw those criteria as arising from unacceptable racial classifications of individuals.[230] Any classification of couples by their sexual orientation begins—and ends—with classifying the sex of the people who have formed the

227. *See, e.g.*, Latta v. Otter, 711 F.3d 456, 467 (9th Cir. 2014).
228. *See supra* note 22.
229. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).
230. *Id.*

couple, and *Loving* shows how that classification can itself violate equal protection without reference to any special characteristics of the couple formed by the individuals who wish to marry.

More importantly, treating sexual orientation as a characteristic inherent in couples, not in people, risks separating the anti-discrimination commitments inherent in marriage equality litigation from those animating other types of LGBT civil rights work. For example, New York has protected against sexual orientation discrimination in employment, education, housing, and the provision of public services since 2001.[231] Those protections inhere in people, not in couples; single lesbians are protected too. Similarly, *Abbott Labs* did not set out to protect the rights of the couple formed by Juror B and his partner; if Juror B were single and had disclosed his homosexuality in another way, that would not have materially affected the case.[232]

Treating sexual orientation as uniquely a feature of couples is a logical solution for marriage and marriage alone; elsewhere, we treat sexual orientation as an individual characteristic, albeit one with relational components and expression. Whether sexual orientation is an individual or relational characteristic is ultimately not a factual question—all identities have individual and relational aspects. But solving the *Feeney* riddle by adopting an entirely relational model of sexual orientation would itself be a remarkable innovation on current doctrinal forms, as well as on the model of sexual orientation that holds elsewhere in American law.

The second objection is somewhat less abstract. The idea that same-sex marriage bans bear no relation to sexual orientation is deeply unsatisfying. The fact that some individuals voluntarily enter into marriages devoid of sexual attraction or desire[233] does not change the modern social meaning of marriage as an institution built on romantic love,[234] and to say that same-sex marriage has nothing to do with homosexuality is to engage in willful denial of the world around us.[235] Frankly, I agree. But *Feeney* and its progeny

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231. S. 720, 224th Ann. Legis. Assemb., Reg. Sess. (N.Y. 2001).

232. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 488 (9th Cir. 2013).

233. Stephens-Davidowitz, *supra* note 219 ("[A closeted gay man] and his wife will go another night without romantic love, without sex. Despite enormous progress, the persistence of intolerance will cause millions of other Americans to do the same.").

234. *See, e.g.*, STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 15-23 (2006).

235. NUSSBAUM, *supra* note 51, at 115.

encourage that very denial in other contexts.[236] What looks obviously absurd in the same-sex marriage context is doctrinally required in other corners of equal protection law, and seeing how it was resolved in the case of marriage offers a way forward for other disadvantaged plaintiffs.

Of course, the Equal Protection Clause can still be implicated in the absence of a facial classification. Laws that have a disparate impact on a suspect group can still trigger heightened or strict scrutiny if they are motivated by a desire to harm that group.[237] In the case of same-sex marriage bans, it would be preposterous to deny that the community of people who wish to marry individuals of the same sex is composed disproportionately of gays and lesbians. This basic fact offers, at least at first, a way around the *Feeney* problem; if a court found that same-sex marriage bans did not classify on the basis of sexual orientation but were nonetheless motivated by homophobia, that court could strike them down under a discriminatory purpose theory.

Many same-sex marriage decisions—most prominently *Windsor*—have referred to the anti-gay "animus" underlying same-sex marriage bans and its tainting effect on the final legislation.[238] Dale Carpenter has argued that these cases in fact represent an ascending anti-animus principle, which finds its legitimacy not in the traditional theory, elaborated most famously by Justice Stone in "Footnote Four"[239] and by John Hart Ely in *Democracy and Distrust*,[240] that the Equal Protection Clause obligates courts to defend specific, uniquely vulnerable groups, but in a more general right granted to all citizens to be free from the arbitrary whims of a

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236. Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 16-20 (2013).

237. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

238. *See, e.g.*, Windsor v. United States, 133 S. Ct. 2675, 2693 (2013) (referring to the Supreme Court's constitutional inquiry as "determining whether a law is motivated by an improper animus or purpose"); Campaign for S. Equality v. Bryant, No. 3:14–CV–818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1140 (D. Ore. 2014).

239. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

240. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 153 (1980) ("[O]ne set of classifications we should treat as suspicious are those that disadvantage groups we know to be the subject of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.").

democratic mob.[241] Carpenter views this principle as resting on two distinct subsidiary conclusions: first, that laws based on popular distaste or bigotry are constitutionally untenable, and second that courts are competent to determine the true motivations of legislative action, which they would have to do in order to determine if the first principle applies.[242]

As an addition to our understanding of the Equal Protection Clause, Professor Carpenter's argument is enormously compelling. The rational basis cases he cites as progenitors of the anti-animus principle[243] are difficult to fit into traditional anti-discrimination paradigms and suggest instead something much more searching and, importantly, much more factual.[244] That spirit of factual skepticism is critical to understanding the Court's invalidation of DOMA in *Windsor*,[245] as this peculiar exchange from the case's oral argument demonstrates:

> MR. CLEMENT: Every State has the traditional definition. Congress knows that's the definition that's embedded in every Federal law. So that's fine. We can defer. Okay. 1996 –
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> JUSTICE KAGAN: Well, is what happened in 1996 -- and I'm going to quote from the House Report here -- is that "Congress decided to reflect an honor of collective moral judgment and to express moral disapproval of homosexuality." Is that what happened in 1996?
>
> MR. CLEMENT: Does the House Report say that? Of course, the House Report says that. And if that's enough to invalidate the statute, then you should invalidate the

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241. Carpenter, *supra* note 25, at 285 ("Our constitutional tradition holds that we're better off in a republic where there are some things a majority can't do to a person, including treat the person maliciously, and where the government knows there will be someone occasionally enforcing the idea that there are some things it cannot do to a person.").

242. *See id.* at 188-89. Carpenter describes these principles as two of the three core conclusions of *Windsor*; his third—that DOMA was based on anti-gay animus—is obviously vital to this understanding of *Windsor*'s holding, but just as obviously not vital to the principle itself. *Id.* at 189-190.

243. In addition to *Windsor*—which he views as the most recent and fullest expression of the anti-animus principle—Carpenter cites three cases that, while nominally applying rational basis review, he believes actually rested on animus grounds. *Id.* at 204-13 (citing Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973)).

244. Carpenter, *supra* note 25, at 246-47.

245. *Id.* at 217-20.

> statute. But that has never been your approach, especially under rational basis or even rational basis-plus, if that is what you are suggesting.[246]

This exchange was noted at the time as a jarring moment in the *Windsor* argument,[247] but it also illuminates how Mr. Clement and Justice Kagan were working within entirely different doctrinal frameworks. Rational basis review is technically hypothetical; any rational reason lawmakers might have had for passing a bill can suffice, regardless of their true intent.[248] We can thus understand Clement's surprise. For the purposes of this particular inquiry, legislative history (and the true intent it reveals) should not be relevant. Justice Kagan, on the other hand, went straight to the true purpose of DOMA, which played an enormous role in the final decision.[249]

Some scholars view this concern with true intention as evidence of the anti-animus principle at work; the colloquy shows how the Court used an animus-based inquiry in place of the rigid framework of tiers that might otherwise govern and bar relief.[250] But this material can just as easily be seen as a response to another rigid,

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246. Transcript of Oral Argument at 74, Windsor v. United States, 133 S. Ct. 2675 (2013) (No. 12-307), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf.

247. *See, e.g.*, Andrew Cohen, *History Won't Be Kind to the Supreme Court on Same-Sex Marriage*, THE ATLANTIC, Mar. 28, 2013, http://www.theatlantic.com/national/archive/2013/03/history-wont-be-kind-to-the-supreme-court-on-same-sex-marriage/274430/; Rosenthal, *supra* note 69; David Weigel, *The Supreme Court Asks Why John Boehner's House Was Defending DOMA Anyway*, SLATE.COM (Mar. 27, 2013), http://www.slate.com/blogs/weigel/2013/03/27/the_supreme_court_asks_why_john_boehner_s_house_was_defending_doma_anyway.html.

248. Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) ("In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally *may* have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.") (internal citations omitted) (emphasis added).

249. *Windsor*, 133 S. Ct. at 2689 ("Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution.").

250. *See, e.g.*, Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 565-67 (2014); Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and Bare Desire To Harm*, 64 CASE W. RES. L. REV. 1045, 1058-61 (2014).

problematic framework in equal protection law; that of classification and discriminatory purpose. The relevant text of DOMA reads:

> 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.[251]

As discussed above, it is difficult to understand the law as a facial classification against sexual minorities,[252] but the *Windsor* opinion is nevertheless deeply concerned with the law's effect upon gays and lesbians, as well as their families.[253] *Windsor* considered a law that did not facially classify on the basis of membership in a particular group, and viewed the law's impact on that group as central to its analysis; if we view *Windsor* through the lens of *Feeney* and its progeny, the true aim of the statute's proponents—their discriminatory purpose—becomes doctrinally central. Furthermore, the judicial competency-cum-skepticism that Carpenter notes in *Windsor* is just as necessary for isolating discriminatory purpose as it is for hidden animus. Cases from *Yick Wo*[254] to *Feeney*[255] presume a role for the judiciary in determining whether the law in question reflects a discriminatory purpose.[256]

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251. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

252. *See supra* Part III.B.

253. *Windsor*, 133 S. Ct. at 2694 ("DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."). Hutchinson, *supra* note 27, at 1032-33.

254. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) ("For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that . . . they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws . . . .").

255. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) ("If the classification itself, *covert or overt*, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination." (emphasis added)).

256. *See* Carpenter, *supra* note 25, at 245 (referring to discriminatory-purpose and anti-animus reasoning as "analogous" in their methodologies); Siegel, *supra* note 18, at 1132-35 (discussing the historical context of the Court's increasing reliance on motive review).

While these cases may show more or less *inclination* to question the government's stated reasoning, they generally presume the *ability* to do so, since it would be absurd to require plaintiffs to show a hidden classification without contradicting the government's denial of the same. Effectively, animus and discriminatory purpose are identical answers to different problems; while animus allows a court to move past difficult questions of a victimized group's place within the *Carolene* framework, discriminatory purpose has historically been required for courts to act in the absence of an explicit classification. We can thus make *Windsor* into something quite simple; the rare discriminatory purpose case that works.[257]

Animus alone cannot solve the *Feeney* riddle, however, since *Windsor* presented a very different fact pattern than any of the other same-sex marriage cases. Edie Windsor was not seeking a positive right to same-sex marriage; her marriage was valid both in Ontario, where it was celebrated, and in New York, where she stood to inherit from her late wife.[258] Under historical norms, the federal government would have recognized her marriage; only DOMA, passed in 1996, stood in the way.[259] Windsor did not ask for a right to be granted that had been not been granted before. All she wanted was for federal marriage law to return to where it stood in 1995.[260]

In such a context, focusing on the animus behind DOMA's passage makes sense. But in the state law context, finding that recent state DOMAs were intended to discriminate against gays and lesbians could justify striking down the DOMAs themselves,[261] but could not justify changing the laws that existed before those DOMAs were passed.

Consider *Baskin*, the Seventh Circuit case. In *Baskin*, Judge Posner briefly discusses the motivations of the Indiana State Legislature when it passed its state DOMA in 1997, largely in

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257. *Windsor*, 133 S. Ct. at 2693 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.").

258. *Id.* at 2683.

259. *Id.*

260. *See id.*

261. William Eskridge has made this point particularly strongly in the context of the debate over same-sex marriage and originalist theories of interpretation. William N. Eskridge, Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1092-93 (2015) (arguing that original understandings of the Equal Protection Clause held it to prevent lawmaking based on "caste regimes," and that same-sex marriage bans are remnants of those regimes as they were constituted in the early twentieth century).

dismissing Indiana's proffered justifications for the ban.[262] But as Posner acknowledged, these bans were "underscoring" a policy of far longer standing; to raise an obvious point, same-sex marriage was not legal in Indiana in 1996.[263] Unlike in *Windsor*, finding that these bans were based on animus could not justify legalizing same-sex marriage; the most it could justify might be forcing these states to recognize out-of-state same-sex marriages, which was not forbidden until the passage of the later laws.[264] Instead, Posner's decision required Indiana and Wisconsin to allow same-sex marriages within their borders.[265] Under a subjective version of the animus theory, this result could only be justified by a factual inquiry into the motivations behind the drafters of Wisconsin's and Indiana's earliest marriage statutes; such an inquiry would face serious evidentiary difficulties,[266] with the results being by no means clear.

To give just one example: while New York, like all states, originally defined marriage as between a man and a woman, an examination of accompanying laws from that period suggests that this arose not from anti-gay animus as much as simple ignorance of the possibility that two people of the same sex might actually seek to get married. In addition to the definition of marriage stated above, New York explicitly disallowed certain types of unions, and made it a felony for those barred by such statutes to seek a marriage license.[267] No such law prohibited individuals of the same sex from seeking a marriage license.

While a close historical inquiry into early nineteenth-century marriage laws is beyond the scope of this Article, it appears that lawmakers comprehended that parties might wish to enter into incestuous or bigamous marriages and sought to disincentivize that behavior through criminal law, while not thinking that two people of the same sex might make a similar request. Lawmakers did believe that two people of the same sex might engage in sodomy and disapproved of the practice,[268] but they seem not to have considered

262. Baskin v. Bogan, 766 F.3d 648, 664-66 (7th Cir. 2014).

263. *Id.* at 664.

264. *Id.*; *see* William Baude, *Interstate Recognition of Same-Sex Marriage After* Windsor, 8 N.Y.U. J.L. & LIBERTY 150, 152 (2013).

265. *Baskin*, 766 F.3d at 672.

266. *See* Nicholas Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 272 n.17 (2013) (discussing the remarkable paucity of state legislative historical material until the very recent past).

267. N.Y. REV. STAT. pt. IV, ch. 1, tit. 5, art. 3, §20 (1829); N.Y. REV. STAT. pt. IV, ch. 1, tit. 5, art. 2, §12 (1829).

268. *See* N.Y. REV. STAT. pt. IV, ch. 1, tit. 1, art.3, §20 (1829); WILLIAM N.

the possibility that two people of the same sex could wish to marry, and their definition of marriage was thus not so much intended to bar them from marrying as reflecting their inability to even imagine such a scenario.[269]

Thus, striking down historical same-sex marriage bans would seem to require a finding that those bans themselves are unjust, rather than just the later DOMAs. Judge Posner, like many other judges who have considered these bans, specifically critiqued them for unjustly setting gays and lesbians apart from the rest of society.[270] Prior to *Obergefell*, judges overwhelmingly understood same-sex marriage bans to wrongfully classify gay people, in effect if not in language, and to merit judicial invalidation as a result.

In the wake of *Windsor*, Susannah Pollvogt noticed this potential weakness in the anti-animus principle, pointing out that, under many definitions of animus, courts would be unable to find animus in same-sex marriage bans without the sort of detailed legislative history that accompanied DOMA.[271] One solution might be an objective theory of animus, visible in its text and operation rather than in its proponents' hearts.[272] There are good arguments for something very much like this, and I would argue that it in fact closely approximates Justice Kennedy's reasoning in *Obergefell*.[273] But we should be clear about the stakes of defining animus this way.

ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003, at 39-72 (2008).

269. *See generally* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 226-27 (3d ed. 2012) (referring to the rise of the "homosexual" as a category to describe individuals, and as an organizing principle of urban subcultures, as occurring at the close of the nineteenth century); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME 1: THE WILL TO POWER; GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940, at 116-27 (1994) (describing homosexual behavior in the early twentieth century, and in particular describing how the concept of homosexuals as a class—against which one could theoretically exhibit animus—arose in concert with early-twentieth-century panics about the possible feminizing effects of white-collar employment).

270. Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014). Even the more fact-based theories of animus, like Akhil Amar's concept of animus as attainder, still require at the very least an *awareness* that the law serves to classify, which is by no means obvious here. *See* Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203, 233 (1996) (referring to "revulsion" towards a group or that group's "untouchability" as triggers for constitutional scrutiny).

271. Pollvogt, *Future*, *supra* note 25, at 220-21.

272. Amar, *supra* note 270, at 204; Pollvogt, *Animus*, *supra* note 25, at 925-26; Pollvogt, *Future*, *supra* note 25, at 209.

273. *See infra* Part IV.

An objective theory of animus bends *Feeney* to its breaking point: if a law's impact alone can trigger a finding of animus, and if that animus violates the Fourteenth Amendment, then basic transitive logic suggests that a law's impact is sufficient to create a constitutional violation and *Feeney* no longer holds.[274]

Same-sex marriage litigation leading up to *Obergefell* had carved out an exception to *Feeney*'s requirement of discriminatory purpose. While this exception predated *Windsor*, it became vastly more important in the litigation following the decision, and it was by no means clear how courts were justifying this departure from equal protection doctrine. Some skeptical commentators might say that these cases were less about orientation than activism—judges who support same-sex marriage will write it into the Constitution by any means necessary,[275] or will interpret doctrines in light of the gay-rights movement's political successes and in particular its marshaling of elite opinion.[276]

But such a theory cannot explain why these judges rejected other, more doctrinally orthodox approaches that would yield the same result. For example, if it had been activism that drove Judge Reinhardt to find that Idaho's same-sex marriage ban classified on the basis of sexual orientation in *Latta*, he could just as easily have based his opinion on the ban's indisputable sex classification. Furthermore, if this were a case of doctrinal fidelity bending to a strong outcome preference, we would expect to see dissents that followed the lead of Judge Zarella in *Kerrigan*—instead, judges on both sides of this issue treated these laws as sexual orientation classifications. Judges did not break with the discriminatory purpose doctrine in order to change the *content* of their decisions, merely their language and reasoning.

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274. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

275. *E.g.*, Girgis, *supra* note 36.

276. This theory is most closely linked to Gerald Rosenberg, who had previously criticized the marriage equality movement's reliance on litigation as risking a severe backlash. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 368 (2d ed. 2008). That said, Rosenberg's theory of courts and social change is perfectly compatible with more recent successes, given that Rosenberg posits courts as most effective when following a pre-existing elite consensus. *Id.* at 73-74. *But see* Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813 (2006) (arguing that marriage equality litigation, and the backlash it sparked, slowed the progress of same-sex marriage); Eskridge, *supra* note 82 (critiquing this view).

Instead, I believe the clearest explanation for this approach lies in *Windsor I*, the Second Circuit decision. In *Windsor I*, Judge Jacobs spent much of his decision arguing for gays and lesbians being treated as a quasi-suspect class under the *Cleburne*[277] framework; homosexuals are a politically powerless subgroup[278] that has historically faced persecution,[279] based on a distinguishing characteristic[280] with no relationship to their ability to contribute to society.[281] Judge Straub responded not by questioning Jacobs's core assumption (that these bans classified on the basis of sexual orientation), but on the meaning of that classification. Straub argued that it was "imprudent" to extend this recognition to gays and lesbians,[282] after explaining why it was necessary to restrict marriage to its prior, heterosexual (in the most technical sense) understanding.[283]

Reading these cases as sexual orientation classifications allowed judges to discuss them in terms of the questions—is homosexuality immutable? Can gays and lesbians contribute equally to American society? Are gays and lesbians a persecuted minority, or do they persecute those who oppose them?—that animated American political and social discourse on the topic of same-sex marriage bans.[284] By contrast, the sex discrimination argument raised questions about the egalitarianism of modern marriage, or how fully an institution can escape from its history of gendered oppression,[285] that judges might have actively wished to avoid. In embracing a theory of sexual orientation classification, judges appear to have sacrificed strict doctrinal fidelity in order to align judicial decision-

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277. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-47 (1985).

278. Windsor v. United States, 699 F.3d 169, 184-85 (2d Cir. 2012).

279. *Id.* at 182.

280. *Id.* at 183-84.

281. *Id.* at 182-83.

282. *Id.* at 211 (Straub, J., dissenting).

283. *Id.* at 205-07 (Straub, J., dissenting).

284. *See, e.g.*, John Blake, *When Christians Become a 'Hated Minority,'* CNN.COM: BELIEF BLOG (May 5, 2013), http://religion.blogs.cnn.com/2013/05/05/when-christians-become-a-hated-minority/; Margaret Talbot, *Is Sexuality Immutable?*, NEW YORKER (Jan. 25, 2010), http://www.newyorker.com/news/news-desk/is-sexuality-immutable; Ana Tintocalis, *California Brings Gay History into the Classroom*, NAT'L PUB. RADIO (July 22, 2011), http://www.npr.org/2011/07/22/138504488/california-brings-gay-history-into-the-classroom ("Gay history is now a requirement in California public schools because of a new state law that says the contributions of gays and lesbians must be included in social studies instruction.").

285. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing the history of legal protections for spousal abuse).

making with the insistent, public social reality that demanded considering these bans in terms of gays and lesbians.

Prior to *Obergefell*, same-sex marriage cases were being discussed in the language of policy and common sense, far more than the language of doctrine. It is only fitting, then, that Justice Kennedy settled the debate with a commonsensical decision written as much for public perusal as legal instruction. But *Obergefell's* soaring prose hides some canny doctrinal moves; rather than ignoring the classification problems at the heart of the same-sex marriage cases, *Obergefell* seems to be developing a new model of anti-discrimination law, with more space for positive rights and anti-subordination concerns. The next Part of this Article argues that reading *Obergefell* in light of *Feeney* both justifies the decision's doctrinal novelties and provides tools for litigation on behalf of other marginalized groups.

III. DIGNITY, EQUALITY, AND *OBERGEFELL*

Same-sex marriage is now the law of the United States; the Supreme Court ruled on June 26, 2015, that state laws forbidding same-sex couples from marrying violated the United States Constitution.[286] Despite broad public acceptance of the holding,[287] reactions to the decision itself have been decidedly mixed; while some praised *Obergefell's* rhetorical bent[288] and obvious nods to dynamic constitutionalism,[289] others criticized its florid prose,[290] traditionalist outlook,[291] and—most importantly for this Article—doctrinal obscurantism.[292]

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286. Obergefell v. Hodges, No. 14-556 (S. Ct. June 26, 2015).

287. McCarthy, *supra* note 16.

288. *See, e.g.*, Michael Dorf, *In Defense of Justice Kennedy's Soaring Rhetoric in Obergefell*, DORF ON LAW (June 27, 2015), http://www.dorfonlaw.org/2015/06/in-defense-of-justice-kennedys-soaring.html; *Jay* Michaelson, *A Manifesto for Marriage Equality*, DAILYBEAST.COM (June 26, 2015), http://www.thedailybeast.com/articles/2015/06/26/supreme-court-on-gay-marriage-it-s-here-and-there-s-no-going-back.html; Richard M. Re, *Rhetoric and Reason in* Obergefell, PRAWFSBLAWG (June 28, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/06/rhetoric-and-reason-in-obergefell.html.

289. Jack Balkin, *Obergefell, Democratic Constitutionalism, and Judicial Review*, BALKINIZATION (June 29, 2015), http://balkin.blogspot.com/2015/06/obergefell-democratic-constitutionalism.html.

290. *See* Jason Mazzone, *The Kennedy Problem*, BALKINIZATION (June 30, 2015), http://balkin.blogspot.com/2015/06/the-kennedy-problem.html.

291. Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. (forthcoming) (manuscript at 24-27); *see also* Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE.COM:

The critics have a point. Much like *Windsor*, Justice Kennedy's last major gay-rights decision, *Obergefell* is far from specific about which doctrine it applies or what scrutiny that doctrine requires.[293] But a close reading of *Obergefell* shows that its doctrinal instability is a measured, and possibly inevitable, response to the instability at the heart of same-sex marriage cases themselves; to laws that hurt gay people, but were written without anti-gay animus[294] and that do not say a word about sexual orientation.

A. *The Puzzle of Fundamental Rights*

Obergefell departs from the cases discussed above in a variety of ways, but its most important departure may be its most basic—*Obergefell* did not present itself as an equal protection case. While Kennedy made a brief, somewhat cryptic mention of the Equal Protection Clause after the meat of his argument,[295] he did not simply find that Ohio's same-sex marriage ban engaged in improper classification and thus denied its gay and lesbian residents of the equal protection of the laws. Instead, he found that the law impermissibly circumscribed the fundamental right to marry and thus violated the principles of substantive due process.[296] *Obergefell* was hardly the first case to analyze same-sex marriage through this lens; *Brause* made a fundamental-rights claim in 1998,[297] and several courts used similar reasoning in the wake of *Windsor*.[298] But *Obergefell* broke sharply from these cases by foregrounding the dignitary injury caused by same-sex marriage bans.

OUTWARD (June 25, 2015), http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html (describing the traditionalist consequences of a decision based on Kennedy's historical preference for dignitary arguments).

292. *See* Brian Beutler, *Anthony Kennedy's Same-Sex Marriage Opinion Was a Logical Disaster*, THE NEW REPUBLIC (July 1, 2015), http://www.newrepublic.com/article/122210/anthony-kennedys-same-sex-marriage-opinion-was-logical-disaster.

293. One widely circulated reaction summarized Kennedy's *Obergefell* decision as "Hark! Love is love, and / love is love is love is love. / It is so ordered." Daniela Lapidous, *The SCOTUS Marriage Decision, in Haiku*, MCSWEENEY'S (June 26, 2015), http://www.mcsweeneys.net/articles/the-scotus-marriage-decision-in-haiku.

294. *See supra* notes 282-284 and accompanying text.

295. Obergefell v. Hodges, No. 14-556, slip op. at 19-23 (S. Ct. June 26, 2015); *see infra* Part IV.B.

296. *Obergefell*, slip op. at 10-11.

297. Brause v. Bureau of Vital Stats., No. 3AN-95-6562 CI, 1998 WL 88743, at *4-5 (Alaska. Super. Ct. Feb. 27, 1998).

298. *E.g.*, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

The basic puzzle at the heart of most fundamental-rights claims is a definitional one: how broad is the right that the plaintiff seeks? A right that is so critical to American life as to merit constitutional protection[299] will often be relevant to a large swath of the polity; similarly, a right that is necessary for social functioning will usually have some historical record. Consider the framing adopted in two earlier gay rights cases, both dealing with bans on consensual sodomy: *Bowers v. Hardwick* found no "fundamental right to engage in homosexual sodomy,"[300] whereas *Lawrence v. Texas* found a universal right to "intimate, consensual conduct" that, of course, happened to include same-sex sex.[301] These definitions are determinative, and there is no clear principle dictating how the definitional inquiry should proceed.[302] But same-sex marriage bans present an additional hurdle; even the broadest framing of the right at issue is difficult to precisely define.

Marriage has been an important part of fundamental-rights case law almost from the doctrine's inception,[303] but states can infringe on the right to marriage in very different ways. On one end of the spectrum is the kind of law struck down in *Zablocki v. Redhail*, which categorically barred specific people (here child-support debtors) from marrying anyone at all.[304] On the other end, for example, are age minimums for parties wishing to enter into a valid marriage.[305] These prohibitions clearly curtail the right to marriage,

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299. *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) ("In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." (footnote omitted)).

300. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

301. Lawrence v. Texas, 539 U.S. 558, 576 (2003).

302. Of course, this is not always the case; one can imagine a new law forbidding historically permitted behavior, a type of law that Justin Driver has recently termed an "upstart." Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 940-43 (2014). In such a case, even a very narrow definition of the practice would reveal a historical tradition. This may be why substantive due process claims have been historically thought of as "backwards looking," protecting traditional freedoms against novel intrusions rather than extending those freedoms in normatively desirable ways. *See* Sunstein, *supra* note 226, at 1170-71.

303. *See* Zablocki v. Redhail, 434 U.S. 374, 384-85 (1978) (describing the importance of marriage rights in the Supreme Court's fundamental-rights case law).

304. *Id.* at 387.

305. *E.g.*, N.Y. DOM. REL. LAW § 15 (2014) (forbidding marriages involving parties under fourteen years of age, requiring parents' written consent and the approval of a judge for marriages involving parties under sixteen years of age, and requiring parents' written consent for marriages involving parties under eighteen

and just as clearly do not survive the strict scrutiny that a robotic application of substantive due process would require. While the state almost certainly has a compelling state interest in preventing child marriage, the array of different age restrictions in different state laws suggests that many states' restrictions are not narrowly tailored to any particular aim.[306] Nevertheless these laws survive; laws that strip people of an absolute "right to marry" face strict scrutiny, but laws that restrict that right, or curtail the "right to marry *the person of one's choice*" are, in practical terms, not viewed as suspect. Therefore, fundamental-rights cases hinge on the same framing issue as those sounding in equal protection: Do bans on same-sex marriage simply restrict the universe of available spouses for all those who wish to marry, or do they categorically forbid any sort of desirable marriage for a specific class of person?

The earlier same-sex marriage cases applying fundamental-rights principles largely sidestepped this problem. For example, the Fourth Circuit case *Bostic v. Schaefer* denied this distinction entirely: "If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed."[307] This reasoning is internally coherent, but if taken literally would imply that any state restriction on the universe of available marriages would create a "list of preferred spouses" and curtail the fundamental right to marriage. Compare this reasoning to the similarly anti-formalist equal protection arguments in *In re Marriage Cases* or *Varnum*. The courts in these two equal protection cases used common sense to argue that gay people were so uniquely restricted by same-sex marriage bans as to be effectively barred from marrying.[308] In order to avoid striking down nearly all restrictions on marriage, *Bostic* must be read as proceeding from the same basic principle. A choice of all spouses over a certain age, or outside of a certain degree of consanguinity, is not hollow, while a choice of all spouses of the gender to which one is not romantically or sexually attracted is.

At the district level, *Kitchen v. Herbert* made a similar pragmatic move in rejecting Utah's claim that all residents were free to marry someone of the opposite sex:

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years of age).

306. *Compare id.*, *with* MISS. CODE ANN. § 93-1-5 (2010) (requiring parental consent for all marriages involving parties under twenty-one years of age, and approval of both the parents and a judge for all marriages involving a male party under the age of seventeen or a female party under the age of fifteen).

307. Bostic v. Schaefer, 760 F.3d 352, 377 (10th Cir. 2014).

308. *See supra* notes 100-110 and accompanying text.

> The State asserts that Amendment 3 does not abridge the Plaintiffs' fundamental right to marry because the Plaintiffs are still at liberty to marry a person of the opposite sex. But this purported liberty is an illusion. The right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex. If marriages were planned and arranged by the State, for example, these marriages would violate a person's right to marry because such arrangements would infringe an individual's rights to privacy, dignity, and intimate association. A person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment.[309]

But elsewhere, the *Kitchen* court acknowledged that the same choices about marriage that are protected by the Fourteenth Amendment can lawfully be subjected to any restriction that is "reasonable."[310] To state the obvious, a reasonableness inquiry is not strict scrutiny. Something about the restriction imposed by same-sex marriage bans is different; the *Bostic* and *Kitchen* courts viewed that restriction as simply more absolute than other marital regulations, and thus treated it as a class-specific ban on marriage, rather than a universal restriction on one's choice of spouse. While *Obergefell* superficially followed those cases, Kennedy's decision is far more explicit about what makes bans on same-sex marriage so odious.

B. *The Dignitary Impact of Disparate Impact*

Obergefell is structured around the fundamental right to marriage, but answers the question presented in *Kitchen* and *Bostic*—what restrictions on marriage can the Constitution accept?—by invoking the Equal Protection Clause. The invocation is brief and its meaning implicit, but the version of equal protection that Kennedy relies upon in *Obergefell* is potentially transformative for anti-discrimination law.

Obergefell follows a loosely bipartite structure. The first part of the decision is given over to a discussion of what "marriage" means in an ontological sense: Kennedy explains that same-sex unions can be usefully defined as marriage because they are the result of an individual's choice to enter into a two-person union that affects both the children who may be raised by that union and the society in which the members of that union reside.[311] Having thus established

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309. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013).

310. *Id.* at 1199 (citing Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

311. Obergefell v. Hodges, No. 14-556, slip op. at 12-19 (S. Ct. June 26, 2015). This part of the decision has been criticized as unduly restrictive, and insulting to

that individuals' rights to enter into legally recognized same-sex unions implicate the right to marriage, Kennedy then breaks from the decisions discussed above—instead of framing same-sex marriage bans as unreasonable[312] or as promising only the illusion of marriage to gay people,[313] Kennedy argues that these laws are themselves discriminatory, invoking the Court's earlier treatment of interracial-marriage bans as a guide.

One of the earliest cases to discuss the fundamental right to marriage was *Loving v. Virginia*, which could have raised similar issues of universality and classification as the same-sex marriage cases: Virginia allowed all of its residents to marry, provided whites did not marry nonwhites.[314] The Supreme Court held that this law deprived Virginians of their fundamental right to marry, specifically because the restriction was based on race and thus offensive to equal protection principles:

> To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.[315]

Obergefell follows this reasoning, citing *Loving*'s gloss on the Equal Protection Clause to explain how Ohio's same-sex marriage ban violated the right to marriage.[316] It should be easy to imagine how this would go. Kennedy could have followed the reasoning of *Baehr* and *Brause*, stating that a person's right to enter into a marriage could be restricted based on her sex.[317] Alternately, Kennedy could have embraced *Windsor I*, *Latta*, or *Varnum* and claimed that a person's right to enter into a marriage cannot be restricted based on her sexual orientation.[318] Instead, Kennedy

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those who fulfill their emotional and affective needs through non-marital structures. *See, e.g.*, Seidman, *supra* note 291 (manuscript at 24-27). Just to be clear, I am not setting out to defend Kennedy's definition of marriage in this Article, and am primarily concerned with the second part of his argument, in which he considers the constitutional propriety of recognizing opposite-sex marriages and not their same-sex equivalents.

312. *See Kitchen*, 961 F. Supp. 2d at 1199-1200.

313. *See* Bostic v. Schaefer, 760 F.3d 352, 377 (10th Cir. 2014).

314. Loving v. Virginia, 388 U.S. 1, 4 (1967).

315. *Id.* at 12.

316. *Obergefell*, slip op. at 19-20.

317. *See supra* Part II.A.

318. *See supra* Part II.B.

focuses on the *impact* of same-sex marriage bans on gays and lesbians, and particularly on the dignitary injury those bans inflict.

Even a cursory reading of Justice Kennedy's equal protection discussion in *Obergefell* shows that he is not engaged in a traditional doctrinal analysis. Kennedy consistently distinguishes between anti-gay laws' actual sex-based classification ("same-sex couples are denied all the benefits afforded to opposite-sex couples")[319] and their clear, sexual-orientation-based impact ("Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality *that resulted from* laws making intimacy in the lives of gays and lesbians a crime against the State.").[320] This distinction is actually a longstanding, and oddly under discussed, feature of Kennedy's sexual orientation jurisprudence. While Kennedy has written nearly every major gay-rights decision of the last quarter century, his decisions are surprisingly light on explicit reference to gays and lesbians. *Lawrence v. Texas*, for example, consistently refers to Texas's ban on same-sex sex as a ban on "homosexual conduct" but only references gay people in terms of the law's harmful effects.[321] *Windsor* consistently refers to DOMA's discrimination against "same-sex couples"[322] but does not refer to sexual orientation at all. Kennedy's sweeping rhetoric belies an exquisite sensitivity to the distinction between classification and impact—in essence, between sex and sexual orientation—that lies at the heart of gay-rights cases. In *Obergefell*, however, Kennedy is far more explicit than ever before on how anti-gay sex classifications can discriminate against sexual minorities for equal protection purposes. For him—and thus, given Kennedy's job, for all of us—the answer is insult.

In *Obergefell*'s entire discussion of equal protection, Justice Kennedy refers to gay and lesbian people exactly twice. Kennedy characterizes *Lawrence* as "dr[awing] upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State 'cannot demean their existence or control their destiny by making their private sexual conduct a crime.'"[323] He then

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319. *Obergefell*, slip op. at 22.

320. *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)) (emphasis added).

321. *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

322. *E.g.*, United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

323. *Obergefell*, slip op. at 22 (citing *Lawrence*, 539 U.S. at 578). Notably, in the original decision this language simply referred to the plaintiffs in the case; Kennedy broadens the reference to refer to gays and lesbians as a class.

states, in reference to same-sex marriage bans, that "[t]he imposition of this disability on gays and lesbians serves to disrespect and subordinate them."[324] Again, there is no explicit classification, and Kennedy does not claim that there is. Instead, he claims that these laws humiliate gays and lesbians as a class, by disfavoring the conduct—same-sex sex and same-sex marriage—that he sees as constituting that class.

Dignity matters to Justice Kennedy,[325] and its deprivation stings. A law can demean a group of people without singling them out by name, and in holding that same-sex marriage bans violate equal protection principles with regards to sexual orientation, Kennedy put forward a remarkably strong expression of anti-subordination principles.[326] The question that remains is how those principles might look if broadly applied, and for that matter whether they will be broadly applied at all. The next Part of this Article considers those questions, and tries to determine whether *Obergefell* marks a real doctrinal shift, or simply a reaction to an emerging social consensus.

IV. WHERE *OBERGEFELL* CAME FROM AND WHERE IT IS GOING: ON RAMIFICATIONS, HISTORY, AND THE RAMIFICATIONS OF HISTORY

Our anti-discrimination doctrines are in a state of remarkable flux.[327] The rise of gay rights heralds a deep shift in our constitutional discourse, and courts' willingness to treat same-sex marriage bans as anti-gay classifications is evidence of that shift. The question is how far our new civil rights revolution goes—or what will be the content of our new equality—and on this question I can offer no more than rank speculation.

While *Obergefell* and some earlier decisions have spent time discussing the roles of dignity, history, or simple rationality in this emerging gay-rights jurisprudence, judges have often been less explicit in their treatment of the classification issue, generating less rhetoric to examine or doctrine to apply. That said, Kennedy's

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324. *Id.*

325. Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 263-68 (2014); Yoshino, *supra* note 215, at 1082-88.

326. A forthcoming reaction to *Obergefell* makes a similar point, reading the decision as resting on a theory of "noncomparative equality" built around dignity and autonomy rights. Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. (forthcoming 2016) (manuscript at 39-40, 45-46).

327. Eyer, *supra* note 250, at 529; Yoshino, *supra* note 17, at 776-86.

reasoning in *Obergefell* has major implications for our understanding of classification if applied universally.

In this Part, I sketch out two theories about what the same-sex marriage cases might mean going forward. Under one reading of the case, *Obergefell* has created a new and important exception to the *Feeney* doctrine, which other groups will be able to use to show how laws that do not explicitly classify against them nevertheless impose constitutionally significant dignitary harms. Under the other, the same-sex marriage cases are largely a response to a single historical moment, recognizing that the emerging consensus against same-sex marriage bans is based on anti-discrimination principles but not necessarily leading to an expansion of those principles themselves.

A. *The Broad Reading: Same-Sex Marriage as a Bulwark for Positive Rights in Equality Law*

As Reva Siegel has noted, our constitutional law is regularly "transformed" in the battles over its application;[328] the equality we offer always changes in the offering.[329] Russell Robinson has described how sexual minorities have benefited from doctrines that are historically unavailable to other disfavored groups,[330] but the theoretical foundations of those rulings could potentially apply far more broadly, and in non-constitutional contexts they already do. This Section considers why sexual orientation protections require a more flexible definition of classification than other types, and what this more flexible definition could mean for skilled litigants and activists.

First, consider the reasons why sexual orientation discrimination has required such a change. As a category, sexual orientation is notoriously difficult to define without reference to sex; there is no one trait that links Brittney Griner,[331] Larry Craig,[332] Edie Windsor, and Jamie Nabozny,[333] short of an internal understanding of sexual

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328. Siegel, *supra* note 285, at 3.

329. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2194-2202 (2002) (describing, at a general level, some of the mechanics by which social movements can alter constitutional understandings).

330. Robinson, *supra* note 28 (manuscript at 50).

331. *Brittney Griner Discusses Being Gay*, ESPN (Apr. 21, 2013), http://espn.go.com/wnba/story/_/id/9185633/brittney-griner-comes-says-just-are.

332. *Senator, Arrested at Airport, Pleads Guilty*, N.Y. TIMES (Aug. 28, 2007), http://www.nytimes.com/2007/08/28/washington/28craig.html.

333. Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).

difference.[334] While it is theoretically possible to define homo- or bisexuality for purposes of legal classification as "the state of being primarily sexually or romantically attracted to the same gender, or to both genders," any law attempting to broadly classify citizens according to that standard would require almost impossible levels of individualized investigation, including (at the most extreme level) some form of sexual arousal test.[335]

At the level of broad classification, this definitional incoherence is a serious problem; a law that wished to institute and then rely on broad sexual orientation classifications would first need to determine how to sort individuals into one or the other specific group. While an individual decision maker might form specific judgments about a person's sexual orientation and then act on those judgments, it is rare to see a law engaging in such large-scale differentiation.

This rule is perhaps most visible in its exceptions; cases involving sexual orientation classification often involve exactly this sort of individuated investigation and judgment. For example, *Abbott Labs* involved an attorney specifically determining a prospective juror's sexual orientation,[336] and even *Romer*'s Amendment 2 merely set aside sexual orientation as a category upon which individual actors, in specific situations, would be empowered to discriminate.[337] Laws that classify on the basis of race or sex assume the existence of broadly perceptible, generally agreed upon differences between people;[338] by contrast, sexual orientation is an

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334. Jay Michaelson, *On Listening to the* Kulturkampf, *or How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1577-78 (2000).

335. For an example of a broad classification on the basis of homosexuality, and the extensive investigation that such classification required, see DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 101-118 (2004).

336. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474-76 (9th Cir. 2013); *see supra* notes 204-206 and accompanying text.

337. Romer v. Evans, 517 U.S. 620, 626-30 (1996).

338. I should clarify that I do not wish to claim that these classifications necessarily reflect an external, pre-existing difference in a way that sexual orientation classifications do not. The primary distinction I make between these classifications is, instead, one of visibility, or of the existence of easily intelligible status markers. Discrimination on the basis of race, or sex, largely relies upon visible characteristics or physical features that are treated as metonyms for the status in question. No such physical feature exists that would permit a discriminator to easily determine a potential victim's sexual orientation; instead, discriminators rely either on self-identification or on forms of conduct that are (stereo)typically correlated with homosexual or bisexual status. Halley, *supra* note 107, at 1729; Michaelson, *supra*

internal condition that is only visible when expressed through some form of non-universal conduct.[339] Therefore, unless a state actor is willing to commit to investigating people's sexual orientation on a large scale, laws penalizing homosexual status will do so by penalizing specific acts. To insist on facial classification would make it effectively impossible to protect against sexual orientation discrimination, and while Russell Robinson casts sexual orientation as *Feeney's* exception,[340] it may be instead a *reductio ad absurdum*.[341]

To briefly return to the discussion of this status/conduct distinction in *In re Marriage Cases*, there the California Supreme Court reasoned that marrying someone of the opposite sex "would require the negation" of a gay person's sexual orientation.[342] This principle had little doctrinal support at the time, but it relies on the same joining of status and conduct—and in particular on the same popular understanding of that joining—that is core to Kennedy's equal protection analysis in *Obergefell*. For Kennedy, the connection between this particular status and conduct is so strong that forbidding the conduct necessarily denigrates the status.

Historically, the "thinnest" reading of the Equal Protection Clause is that it simply creates negative liberties; an individual must not be formally barred from participating in an institution due

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note 334, at 1577-79.

339. This problem has been more thoroughly explored in the private law context, where there is a longer tradition of protection against sexual orientation discrimination both in explicit state employment non-discrimination acts, *see, e.g.*, COLO. REV. STAT. ANN. § 24-34-402(1) (West 2012), and in courts' interpretation of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to forbid employers from discriminating against workers who deviate from perceived gender norms. Notably, employment protections for LGBT workers have led to some remarkable doctrinal innovations, as courts struggle to understand the difference between "pure" anti-gay discrimination based solely on an individual's sexual orientation and discrimination based on gender-deviant behaviors that are often employers' primary signifier of an employee's homosexuality. *See, e.g.*, Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins, *and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (2014); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014).

340. Robinson, *supra* note 28 (manuscript at 20-22). *See also* NeJaime, *supra* note 22, at 1200-05 (arguing that sexual orientation is particularly difficult to understand without breaching the boundary between status and conduct).

341. *See* Kenji Yohsino, *Covering*, 111 YALE L.J. 769, 778 (2002) ("[H]omosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status.").

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

to their membership in a *Carolene* class.[343] But a law does not have to draw such a formal distinction against a class in order to humiliate or demean them. The negative liberties theory of the Equal Protection Clause casts equal protection as, essentially, a right against harmful recognition; a right to not be singled out. But refusing to recognize a group can also be demeaning, when that refusal makes it impossible for that group to engage with the state in a way that allows them to flourish. Therefore, the equality right Kennedy identifies is a positive right to beneficial recognition—the right that allows people to "define and express their identity"[344] and that Justice Scalia savaged in dissent[345]—and to have a formally neutral law altered to avoid identity or dignitary harms.

This principle is novel in constitutional law,[346] but the idea of positive equality has been accepted in our civil rights statutes, and those statutes may offer the clearest idea of how such a right would work in practice. To raise the most obvious example, Title VII has long embraced a theory of disparate impact that does not require discriminatory purpose: minorities have a right under modern civil rights acts to a workplace that respects their needs and abilities, and any employment policy that harms minority workers—even if the harm is unintentional—must be justified as a business necessity.[347] But a clearer example may be the Americans with Disabilities Act ("ADA").[348] The ADA obviously bars intentional discrimination against workers with disabilities,[349] but also grants these workers a positive right to reasonable accommodation—to have a workplace that meets their specific needs.[350]

The reason for this should be clear. Imagine a building with a sign on the door stating "NO PEOPLE IN WHEELCHAIRS PERMITTED ON THE PREMISES." It would be obvious that the policy depicted would constitute discrimination against people with disabilities, based on the owner's intentional exclusion. But imagine that, instead, the building's front door was at the top of a staircase. The structure may not have been designed *in order* to bar people

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343. *See* Strauss, *supra* note 18, at 959-64 (critiquing such a conception, in two different forms).

344. Obergefell v. Hodges, No. 14-556, slip op. at 2 (S. Ct. June 26, 2015).

345. *Id.* at 8 n.22 (Scalia, J., dissenting) ("The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.").

346. *See* Seidman, *supra* note 291 (manuscript at 28-29).

347. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975).

348. 42 U.S.C. §§ 12101 *et seq.* (2012).

349. § 12112(b)(1).

350. § 12112(b)(5).

using wheelchairs from entering; its architect may not have thought of them at all. And it may well be the case that a person in a wheelchair can enter by asking for help from a stranger or by crawling up the stairs.[351] But this clearly violates some notion of equality, and in particular the notion of positive equality embodied by the ADA.[352] Forcing people with disabilities to crawl up stairs demeans them by asking them to submit to bodily humiliation in order to access the same privileges as everybody else, even if that Hobson's choice does not arise from the conscious operation of the law.[353]

Same-sex marriage bans operate in much the same way, and violate the same principle. A law that forces LGB people to forgo romantic attachments in order to access the legal privileges of marriage excludes gays, and gay love, from the broader polity in a constitutionally offensive manner. [354] Importantly, the harm in these non-classifying classifications can arise not only from legislators' conscious attempts to demean gay and lesbian citizens, but also from an ignorance that results in exclusionary laws: unlike *Windsor*, *Obergefell* makes no mention of intent.[355] This theory of same-sex marriage rights may reflect its own new theory of equality, or it may simply be a more articulated version of objective animus—a law that does such specific, identity-based harms cannot withstand constitutional scrutiny, and the language courts use to strike it down matters less than the principle they employ.

One useful case for understanding the limits of this dignitary exception to *Feeney*, and how it might apply outside of the same-sex marriage context, is *Blewett v. United States*.[356] *Blewett* involved a challenge to federal drug laws' disparities in penalties for crack and

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351. *See* Tennessee v. Lane, 541 U.S. 509, 513-14 (2004) (describing an analogous scenario, in the context of a suit over whether the ADA's public-accommodation provisions could be applied against the states); Hellman, *supra* note 326 (manuscript at 40).

352. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 420 (2000) (referring to the ADA as a weapon against "the kind of subordination and second-class citizenship that many scholars have taken to be the appropriate target of civil rights laws.").

353. *See* Chai Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 181-83 (2002).

354. *See* Yoshino, *supra* note 17, at 793-94.

355. *See* ELY, *supra* note 240, at 74 (referring to the message of the Warren Court as "that insofar as political officials has chosen to provide or protect X for some people (generally people like themselves), they had better make sure that everyone was being similarly accommodated or be prepared to explain pretty convincingly why not.").

356. United States v. Blewett, 719 F.3d 482 (6th Cir. 2013).

powder cocaine use; specifically, the Blewetts argued that the 1986 Anti-Drug Abuse Act, which counted one gram of crack cocaine as equivalent to 100 grams of powdered cocaine for sentencing purposes, should not have been applied.[357] *Blewett* presents a clear case where *Feeney* would traditionally apply—while it is clear that the heavy sanctions levied on crack cocaine use disproportionately fall on African-Americans,[358] it is equally clear that the law distinguishes between users of crack and powdered cocaine, not between black and white defendants more generally.[359]

The Sixth Circuit originally interpreted the guidelines as motivated by discriminatory purpose under *Davis* and *Feeney*, for a striking and novel reason: although the laws were not motivated by bigotry at the time of passage,[360] Congress's refusal to repeal the law after learning of its disproportionate impact on African-Americans provided the necessary finding of discriminatory intent.[361] This reasoning could be used to invalidate same-sex marriage bans nationwide as motivated by a discriminatory purpose: After all, while the bans may not have been motivated by anti-gay animus, the state laws that reinstantiated those bans were, and *Blewett*'s logic casts a legislature's decision *not to repeal* a discriminatory law as a new potential site of discrimination. However, *Blewett* was widely criticized[362] and later reversed by an *en banc* panel holding that the Fifth Amendment "forbids only *intentional* discrimination."[363]

While disparities in drug sentencing clearly harm African-Americans, it is difficult to phrase that harm as identity-related or as clearly based on a denial of the sort of minority personhood that *Obergefell* protects. No reasonable judge could view crack cocaine use as integral to African-American identity, or claim that the law stigmatized African Americans for preferring one type of illegal drug over another. That said, the principle at play in same-sex marriage

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357. *Id.* at 484.

358. *Id.* at 487 ("[T]he discriminatory nature of prior crack sentences is no longer a point of legitimate debate.").

359. *Id.* at 488.

360. *Id.* ("When the old 100-to-1 crack cocaine statute was adopted, it presumably did not violate the Equal Protection Clause because there was no intent or design to discriminate on a racial basis. Its adoption was simply a mistake.").

361. *Id.*

362. *See, e.g.*, Orin Kerr, *The Sixth Circuit Really* Blewett, THE VOLOKH CONSPIRACY (May 20, 2013), http://volokh.com/2013/05/20/the-sixth-circuit-really-blewett/ ("I agree that the 100-1 disparity was terrible policy. But the majority's constitutional analysis strikes me as not just wrong but obviously so.").

363. United States v. Blewett, 746 F.3d 647, 658 (6th Cir. 2013) (en banc) (emphasis in original).

cases may be of use to other types of plaintiffs who have been harmed by the facial classification doctrine. One could argue, for example, that laws excluding pregnant women from the workforce (like the one at issue in *Geduldig*) arise from and reinforce subordinating ideas about working mothers. California excluded pregnant people from its insurance policy because pregnancy is inherently unprofessional, or the start of a woman's exit from the workforce.[364] This stereotype is demeaning to women, and a thoughtful litigant could argue that the exclusion reinforced that stereotype and imposed sex-specific dignitary harm.[365]

Hernandez might be a clearer example; excluding Spanish speakers from jury service casts Latinos as uniquely unfit to perform a public duty, even if the classification would permit some Latinos to serve while excluding many others. While Kennedy wrote *Hernandez*, the decision suggests a strong discomfort with the stigmatic effects of excluding Spanish speakers,[366] and Kennedy seems to view the existence of a potentially valid reason for the exclusion—the need for translated testimony—as dispositive, particularly given the deferential standard under which the case was reviewed.[367] Kennedy's dignitary jurisprudence has evolved significantly since *Hernandez*, and a case where the racial aspect of the exclusion were more overt could well generate a different result today.

I should clarify that this robust reading of *Obergefell*, in which courts going forward would recognize dignitary harm as an exception to *Feeney*'s requirement of facial classification or discriminatory purpose, has its own problems. There is a longstanding argument in anti-discrimination scholarship that protecting identity-expressive conduct risks codifying restrictive notions about what it means to belong to a particular protected group.[368] Richard Ford has pointed

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364. *See* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1104-05 (2015).

365. *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120-21 (2d Cir. 2004) (finding that stereotypes about the primacy of motherhood for married women were actionable sex stereotypes under Title VII).

366. Hernandez v. New York, 500 U.S. 352, 363-64 (1991) (noting that many Latinos view Spanish as "their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self").

367. *Id.* at 371-72.

368. *See, e.g.*, Yoshino, *supra* note 17, at 873-74 (describing how, while all minority identities have some performative aspect, some performances are not so constitutive of minority selfhood to merit anti-discrimination protections, and calling for a more individualized analysis).

out that these kinds of protections can violate something very much like an anti-stereotyping principle; any attempt to identify and name the conduct that constitutes a minority identity can easily shade into juridical determination of what race, sex, or sexual orientation "really" mean.[369] For those people who see themselves as belonging to an identity group but do not see that group membership as mediated by the conduct courts identify as constitutive, this type of argument can be troubling and offensive.[370]

The analogy with same-sex marriage is instructive. Many gays and lesbians do not wish to enter into a same-sex marriage, and in fact understand their sexual orientation to be intimately connected with rejecting the sexual, romantic, and familial norms inherent in our marriage regime.[371] To tell these people that a same-sex marriage ban deprives them of their dignity is, perversely, to deny them the dignity of self-determination and self-conception. Such a move arguably denigrates other meaning-making forms of identity performance, by saying that performing identity through these other channels means suffering a form of injury.

Inevitably, determining which conduct prohibitions deprive minority groups of dignity requires first determining what conduct is dignified and what not. For example, "cruising," or using public spaces to solicit sexual partners or perform sexual acts, has a very long history within the gay community and is still done by many gay men today, but it is hard to imagine a court finding that bans on public sexual activity demean gay men or deprive them of dignity.[372] In the end, however, a strong anti-humiliation principle is likely worth this cost; if the alternative is absolute freedom to prohibit conduct, then the wisest balance may simply be to protect conduct

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369. RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 25 (2005).

370. *Id.* (stating that, for a black woman who does not view braided hair as central to her identity, theorists who attack a ban on such hairstyles as a ban on black womanhood "add[] insult to injury by proclaiming that cornrows are *her* cultural essence").

371. *See* Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) ("The creation of new gay publics outside City Hall, on the pages of the *New York Times*, and on the six o'clock news are not exactly the gay publics the drag queens at Stonewall had in mind."); Seidman, *supra* note 291 (manuscript at 26-27).

372. *See* Franke, *supra* note 291 ("Dignity does its work by shifting stigma from one group to another, in this case from same-sex couples to other groups who, by contrast, are not deserving of similar ennoblement. These others include 'less-deserving' groups like unmarried mothers, the sexually 'promiscuous,' or those whose relationships don't fit the respectable form of marriage.").

that is widely viewed as group-identified while accepting that some group members may still choose to live differently.[373]

B. *The Narrow Reading: Same-Sex Marriage as Assimilationist Triumph*

The prior Section of this Article reads *Obergefell* and the other same-sex marriage cases broadly, and somewhat optimistically. However, that is hardly the only way this doctrine could proceed. Others have claimed that same-sex marriage is simply a specific exception, arising from judges' particular solicitude for gay rights.[374] This viewpoint may be right, and this doctrine may apply to gays and lesbians only. But if so, it is worth considering why that might be the case, what is so special about gay and lesbian litigants, and what the unique success of gays and lesbians in fighting the discriminatory purpose doctrine means for our understanding of equal protection. Under this "narrower" reading, courts' approach to same-sex marriage bans rests not on any new emerging theory, but on the success of marriage equality advocates in portraying same-sex marriage in assimilative terms.[375]

In recent years, marriage equality advocates, as well as LGBT rights advocates more generally, have succeeded in making gays and lesbians vastly more palatable to Americans as a whole.[376] This success has accompanied a very specific presentational strategy; the American public has been remarkably receptive to an account of marriage equality that emphasizes similarities between same-sex and opposite-sex couples and thus has portrayed same-sex marriage bans not as improperly subjecting all Americans to harmful sex restrictions, but instead subjecting gays and lesbians—alone—to a

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373. *See* Franke, *supra* note 224, at 2687 ("I hold a kind of "knock yourselves out if that is what you want" view of [same-sex marriage]. Just do not make all the rest of us sign up for that project.").

374. Robinson, *supra* note 28 (manuscript at 50).

375. *See* Franke, *supra* note 371, at 240-46 (describing same-sex relationships as having "normative" implications); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87, 122-23 (2014) (describing how same-sex domestic partners portrayed themselves in ways that emphasized their similarity to opposite-sex married couples).

376. For example, a Gallup poll found that the number of Americans who view gay or lesbian relations as morally acceptable has increased from 40% to 63% since 2001, while the number viewing such relations as morally unacceptable has decreased from 53% to 34% over the same period. *Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Dec. 28, 2015).

total exclusion from marriage.[377] To see this change, consider the 1989 debate between marriage skeptic Paula Ettelbrick and marriage equality advocate Tom Stoddard: Ettelbrick claimed that marriage ran directly counter to the gay and lesbian community's goal of "affirm[ing] . . . gay identity and culture" and would tie gays and lesbians to a harmful relationship model.[378] By contrast, Stoddard argued that allowing same-sex marriage could transform marriage for everybody, making the institution less subordinating and more egalitarian.[379]

The difference between these two theories is vast, and exploring them fully would take far more space than I can afford to give them here; nevertheless, it should be clear that neither argument frames its normative claims about how people should be treated in terms that fit with *Feeney*. It is no secret that anti-discrimination law has been historically poor at affirming minority cultural expression, or at making broad changes to a legal regime based on its harmful effects. By contrast, later movement figures have been much more explicit in framing same-sex marriage bans as simply excluding gays and lesbians from an institution that could accept them without making any other structural change.[380]

Whereas earlier activists like Larry Kramer presented themselves as speaking for a distinct, marginalized group with unique needs that Americans were morally obligated to respect,[381] modern activists like Wolfson or Mary Bonauto have focused instead on gays and lesbians' desire to participate in broader rituals of

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377. A standard account views this shift from a universalizing critique of marriage laws to a more specific equality demand as diachronic, with earlier claims that marriage laws needed to be changed to accommodate uniquely LGBT experiences ceding to a more explicitly assimilationist strategy over the course of the late 1980s and 1990s. *E.g.*, Franke, *supra* note 371, at 244-47. Doug NeJaime's recent work has challenged the most schematic articulation of that framework by showing the normative importance of marriage to gay rights activists fighting for domestic partnership rights in California as far back as the early 1980s. NeJaime, *supra* note 375, at 114-25.

378. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS PUBLIC CEREMONIES 20, 21 (Suzanne Sherman ed., 1992); *see also* Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1535-36 (1993).

379. Thomas B. Stoddard, *Why Gay People Should Seek the Right To Marry*, *in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS PUBLIC CEREMONIES, *supra* note 378, at 13, 19.

380. WOLFSON, *supra* note 74, at 190.

381. *See* Larry Kramer, Op-Ed, *The FDA's Callous Response to AIDS*, N.Y. TIMES, March 23, 1987, at A19.

American communal life, presenting litigants who are heavily involved in their wider non-gay community and depicting same-sex marriage as an expression not of a uniquely gay identity, but of universal impulses towards love and family.[382] This reasoning does not embrace gayness as a differentiating characteristic leading to unique goals, attitudes, behaviors, and needs,[383] but instead as a trait that the law should properly ignore, one that can only obscure the unmarked self with whom the state ought to engage.[384] This version of sexual orientation, whatever its normative desirability, is vastly more consonant with the narrow anti-discrimination commitments underlying the doctrines described above. Judges still largely see discrimination as a matter of two people "similarly situated" in every respect except for the suspect classification, attempting to exercise the same rights and lead the same lives.[385] According to this view of discrimination, the Fourteenth Amendment exists specifically to fight harmful recognition, to prevent bigoted parties from taking note of an individual's suspect status and from considering that status in deciding what treatment that individual deserves.

One example of how activists have fit their discussion of marriage into anti-discrimination norms is Evan Wolfson's famous preference for "marriage equality" over the more precisely defined "same-sex marriage."[386] This may be because phrasing it in such a

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382. *See* Yoshino, *supra* note 17, at 793-94.

383. *See* Katherine Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414-17 (2004); Kramer, *supra* note 381.

384. *See* Robert Post, *Prejudical Appearances: The Logic of American Anti-Discrimination Law*, 88 CALIF. L. REV. 1, 11 (2000). *See also* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask Don't Tell,"* 108 YALE L.J. 485, 502-503 (1998) (noting the conceptual shortcomings of this style of "classification-based" anti-discrimination discourse).

385. *See* Latta v. Otter, 711 F.3d 456, 467 (9th Cir. 2014) ("Plaintiffs are ordinary Idahoans and Nevadans. One teaches deaf children. Another is a warehouse manager. A third is an historian. Most are parents. Like all human beings, their lives are given greater meaning by their intimate, loving, committed relationships with their partners and children."); Yoshino, *supra* note 384, at 502-03. This problem surfaces more frequently, again, in the employment context, where evaluation is more individuated and classification thus more frequently a point of contention. *See, e.g.*, Rogers v. American Airlines, 527 F. Supp. 229, 233 (S.D.N.Y. 1981); Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 428, 435 (2011).

386. *See Marriage 101*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/marriage-101 (discussing their preference for terms like "marriage equality"); Evan Wolfson, *Today Is Freedom To Marry Day: Just Don't Say "Gay Marriage"!*, THE HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/evan-wolfson/today-is-freedom-to-marry_b_86282.html.

way emphasizes the expansion of access to an unchanged institution (gay people can marry) rather than the formal changes such an expansion would require (all people can marry, but now on terms that make marriage attractive to gay people). Alternately, focusing on same-sex marriage bans as categorical exclusion of homosexuals may be the least "risky argument," avoiding the potential fallout of the fundamental rights doctrine or the sex-discrimination argument's troubling implications for people's understanding of their own unions.[387] Alternatively, it may be that this phrasing calls to mind powerful analogies between same-sex marriage bans and earlier laws classifying on the basis of race, while obscuring the bloodless distinctions that *Feeney* would have courts draw. Regardless, this phrasing reflects an important aspect of the same-sex marriage debate, one with serious implications for the classification issues same-sex marriage cases raise.

As it happens, Wolfson's phrasing has worked: Americans have come to see bans on same-sex marriage not only as wrong, but as *anti-gay*. With advocates on one side talking about these bans as wholesale prohibitions on gay people marrying and opponents decrying same-sex marriage as a concession to a powerful minority,[388] it should hardly surprise us that an overwhelming social consensus sees these bans as denying a discrete minority group access to a universal and monolithic institution. When judges see same-sex couples in court, they see them through the lens of a long social movement explaining how gays and lesbians wish to enter into the same kinds of unions, with the same privileges and responsibilities, as do heterosexuals. Of course, it then seems churlish to insist on valorizing formal distinctions—"gay marriage" is marriage between two people of the same sex, "straight marriage" is marriage between two people of different sexes—in the face of this widely shared social reality, particularly when the only figures in the public debate raising this point are doing so in service of claims about reproductive capacity and accidental procreation that are otherwise nearly incoherent.[389] This is especially true given the

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387. Goldberg, *supra* note 20, at 2131-34.

388. *See, e.g.*, *Common Questions: Why Marriage Matters*, FAMILY INST. OF CONN., http://archive.ctfamily.org/questions.html ("The difference between Civil Rights and same-sex marriage is the difference between equal treatment and special rights.").

389. Baskin v. Bogan, 766 F.3d 648, 662 (7th Cir. 2014) ("Go figure."); Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009).

variety of other doctrinal frames that could justify striking down same-sex marriage bans. Why insist on framing same-sex marriage litigation in such a counterintuitive fashion, if it has no impact on the result?

This historical reading of same-sex marriage has animated some of the most pessimistic commentaries on the same-sex marriage cases, and it is easy to see why. When Russell Robinson refers to gay and lesbian litigants as having a "tier of our own" in the equal protection framework,[390] the grim takeaway is that these successes cannot, or at least will not, be replicated. The differences Robinson and I cite arose not because gays and lesbians were any sort of historically privileged overclass; instead, this change reflects an extraordinarily rapid example of what we might call democratic constitutionalism, of social movements culminating in judicial success.[391] These movements can be population-specific, in a way that the principles underlying their goals are not; a society can believe that same-sex marriage bans violate the Fourteenth Amendment and that English-only rules do not, without ever having to clarify their reasoning.

Courts do not, or at least should not, have that option. In the end I am far more optimistic than Robinson; even if the same-sex marriage movement has generated case law at odds with existing doctrine, these cases are themselves a form of doctrine that thoughtful plaintiffs can use to fight the harmful effects of *Feeney*. A useful example of this phenomenon may be *Price Waterhouse v. Hopkins*, which held that obviously sexist behavior—punishing a woman for refusing to wear makeup or a skirt[392]—violated the Civil Rights Act's prohibition against sex discrimination. The point seemed obvious enough, but the underlying principle that such behavior offends is actually quite broad, and intelligent lawyering has made *Price Waterhouse* into a powerful, albeit imperfect,[393]

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390. Robinson, *supra* note 28 (manuscript at 50).

391. The term "democratic constitutionalism" was developed by Robert Post and Reva Siegel. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007). *See also* BALKIN, *supra* note 32, at 284-87 (providing an account of how courts reflect emerging forms of political consensus); Eskridge, *supra* note 329, at 2236-50 (providing a specific historical account of evolving notions of "sexual privacy" as a constitutionally protected right).

392. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

393. Mary Anne Case has noted that *Price Waterhouse* has been interpreted narrowly, and in fact somewhat nonsensically, in the context of gender-specific dress codes. Case, *supra* note 339, at 1354-61.

protection against sexist and homophobic stereotypes in the workplace.[394]

Of course, one key difference is that the *Price Waterhouse* standard has been discussed at some length. One of the first judges to apply *Price Waterhouse*'s theory of stereotyping outside of its original context devoted substantial argumentative space to clarifying just what *Price Waterhouse* forbade, and how harassing and firing effeminate gay men violated its principles.[395]

We can imagine something similar happening with the principle elucidated in *Varnum*, or *In re Marriage Cases*; both decisions clearly lay out a test that non-gay plaintiffs could use to show how bans on group-affiliated conduct functioned as a status-based classification. By contrast, it is hard to isolate the operative feature of the reasoning in *Latta v. Otter* that led Judge Reinhardt to treat Idaho's law as simply forbidding gay people, rather than same-sex couples, from marrying. The bare assertion that same-sex marriage bans "discriminate on the basis of sexual orientation"[396] only helps plaintiffs arguing about whether same-sex marriage bans discriminate on the basis of sexual orientation; the reasoning is too summary to be of broader use.

Obergefell stands between these two poles. Kennedy's reasoning on dignity and class injury is not phrased with the breadth of a Footnote Four; litigants will have to explain what principle underlies his language, and how it applies to their cases. But Kennedy makes very clear that same-sex marriage bans demean gays and lesbians and that that humiliation, *even in the absence of an explicit or intended classification*, violates the Equal Protection Clause. In *Brown v. City of Oneonta*, Judge Walker of the Second Circuit defined the Constitution's equal protection guarantees as extending only to three classes of law: explicit classifications, intentionally discriminatory applications of a neutral statute, or facially neutral laws enacted for discriminatory purposes.[397] If nothing else,

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394. *See, e.g.*, Prowel v. Wise Bus. Forms, 579 F.3d 285, 291-92 (3d Cir. 2009) (finding that harassment of a gender-non-conforming gay male employee constituted actionable sex stereotyping); Terveer v. Billington, 34 F. Supp. 3d 100, 115-16 (D.D.C. 2014) (finding that anti-gay discrimination itself could violate Title VII under a similar theory); Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995 at *6-8, *10-11 (Apr. 20, 2012) (in which the EEOC held that discrimination against transgender people could constitute sex stereotyping); *Complainant v. Foxx*, EEOC decision No. 0120133080, 2015 WL 4397641, at *5-11, *14 (July 15, 2015) (applying the same reasoning to anti-gay discrimination).

395. Centola v. Potter, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002).

396. Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014).

397. Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000).

Obergefell takes equal protection further than that. Even if the precise boundaries of *Obergefell's* anti-humiliation principle remain to be drawn, smart lawyering can make the case into a powerful weapon against the narrowest anti-classification readings of the Equal Protection Clause.

CONCLUSION

Doctrines matter. Judges deciding how to rule on same-sex marriage bans did not have the luxury of being outcome-driven, since deciding that same-sex marriage bans violated the Constitution still required choosing among different doctrinal frames and the different arguments they implied. The fact-based skepticism of a *Baskin* looks very different from the classification-minded formalism of a *Baehr*, or the rights-centered rhetoric of an *Obergefell*, even if all three lead to the same result. The difference comes later: the next time a criminal defendant challenges her conviction because Spanish speakers were excluded from her jury, she may find herself before a sympathetic judge. *Obergefell* has given that judge a new way to interpret equal protection, and supportive precedent with which to work; a ruling that same-sex marriage bans were improper sex classifications or irrational expressions of hatred might offer that judge no help, but could expand protection in other ways and to other litigants.

This is how doctrinal evolution works. Extending "equal protection" to a new group of disfavored Americans does not mean simply expanding the reach of a fixed concept, but works profound changes to the concept itself.[398] Extending equal protection to women did not lead to robotically applying *Brown* with "race" crossed out and replaced with "sex"[399]—it involved a dialogic process about what equality meant for a group that faced vicious stereotypes about their abilities, but that many elites still believed to differ, innately and importantly, from the male norm.[400] The period of the "de facto ERA"

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398. Eyer, *supra* note 250, at 566-67.

399. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317-33 (2012) (discussing the discomfort many felt—and still feel—with placing race and sex on equal footing in anti-discrimination discourse, here in the Civil Rights Act); Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 412-16 (2009) (giving the historical background of the addition of "sex" to the Civil Rights Act).

400. *See* Schultz, *supra* note 364, at 1010-15 (describing these conceptions of difference from a highly critical perspective, and arguing that the recognition of difference inherent in our current thinking about sex discrimination has had

was a period of intense flux for our understandings of equality,[401] and the principle that emerged was not the same one as before.

Same-sex marriage has done something very similar, without anyone quite noticing. African-Americans and women fought against a legal system that employed rigid classifications based on what it assumed to be fixed, immutable status. By contrast, gays and lesbians have struggled with a system that, often with specific intent but sometimes with simple ignorance or unthinking heterosexism, penalizes specific acts heavily associated with homosexuality without explicitly disfavoring the status itself. This simple fact raised a vitally important question for those concerned with equality: does equality mean not facing discrimination solely for who we are, or does it mean protection for what we do, with those we love, with those to whom we wish to join ourselves?[402] By its very nature, fighting for gay rights meant asking these questions more forcefully than others had before. And courts now agree that, in some limited cases, the Constitution protects conduct. What remains to be seen is whether this agreement is a limited exception to longstanding principle made on behalf of a particular group with particular needs, or the birth of a richer, more textured equal protection. All that is left is to wait, and to fight.

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devastating effects on working women). For a scholarly perspective that is more accepting of the idea of innate sex differences and legal recognition of same, see Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. REV. 375, 435-42 (1980), which endorses limited legal recognition of innate sex characteristics (specifically breastfeeding and pregnancy) without analogizing them to sex-neutral temporary disabilities.

401. Siegel, *supra* note 31, at 1326-27, 1329. *See also* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 503-09 (2001) (providing a more general historical account of the effect of social pressure on constitutional doctrine).

402. Lau, *supra* note 22, at 1273; Yoshino, *supra* note 215, at 856-57.