

# Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny

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### Recommended Citation

Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 Cornell L. Rev. 1077 (2014)  
Available at: <http://scholarship.law.cornell.edu/clr/vol99/iss5/2>

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# EMBRACING *LOVING*: TRAIT-SPECIFIC MARRIAGE LAWS AND HEIGHTENED SCRUTINY

Christopher R. Leslie†

*In the wake of the Supreme Court's recent Windsor opinion, the focus of marriage equality litigation has returned to challenging state gender-specific marriage laws that make a couple's right to marry a function of their genders. The outcomes of these future legal challenges will be affected by the level of scrutiny that courts apply. To date, all courts that have applied heightened scrutiny have held same-sex marriage prohibitions to be unconstitutional, while courts applying rational basis review have often upheld such laws.*

*Laws that classify or discriminate based on gender are generally subject to heightened scrutiny. Yet the vast majority of courts have held that gender-specific marriage laws neither classify nor discriminate based on gender because the laws apply to both men and women, and thus are not subject to heightened scrutiny. In Loving v. Virginia, however, the Supreme Court explicitly rejected the parallel argument that if a race-specific marriage law applies equally to all affected races then heightened scrutiny is unnecessary.*

*Courts wishing to avoid heightened scrutiny have attempted to distinguish Loving. For example, courts have concluded that Loving is irrelevant to the level of scrutiny applied in equal protection challenges to gender-specific marriage laws because, while miscegenation laws were implemented to further the theory of white supremacy, gender-specific marriage laws do not have a similar improper discriminatory purpose. In particular, they assert that gender-specific marriage laws are not motivated by a desire to put one gender in a superior position to another gender.*

*This Article explains why these attempts to distinguish Loving are flawed. First, courts misapply the basic equal protection framework when they demand a discriminatory motivation for gender-specific marriage laws as part of determining the appropriate level of scrutiny. Furthermore, even if intent were relevant to that determination, supporters of same-sex marriage bans seek to implement and reinforce a gendered model of marriage in which a woman is presumed to be subordinate to a man. To social conservatives, who are the driving force behind gender-specific marriage laws, same-sex marriage is dangerous precisely because it threatens the gendered model of marriage in which a husband dominates his wife. The Article concludes by noting that following the logic of Loving, same-sex marriage bans necessa-*

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rily classify based on gender and, thus, gender-specific marriage laws should receive heightened scrutiny.

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INTRODUCTION

Gay and lesbian Americans came one step closer to full citizenship with the Supreme Court’s opinion in *Windsor*.<sup>1</sup> The *Windsor* Court invalidated Section 3 of the so-called Defense of Marriage Act (DOMA), which denied federal recognition to valid state marriages between same-sex couples.<sup>2</sup> Yet despite this important victory, most states continue to maintain gender-specific marriage laws, which deny same-sex couples access to marriage.<sup>3</sup> The *Windsor* decision shifts the battleground for marriage equality back to those states.

The outcomes of future legal challenges to state marriage bans will be affected in large measure by the level of scrutiny that courts apply. In the litigation to date, all courts that have applied heightened scrutiny have held same-sex marriage prohibitions to be unconstitutional, while courts applying rational basis review have generally upheld such laws.<sup>4</sup> Laws that discriminate based on gender are sub-

<sup>1</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (concluding that the federal Defense of Marriage Act is invalid because “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”).

<sup>2</sup> *Id.* at 2682.

<sup>3</sup> See *id.* at 2689 (noting that, at time of writing, only twelve states (and the District of Columbia) recognized a right of same-sex couples to marry).

<sup>4</sup> These decisions to uphold gender-specific marriage laws under rational basis review are themselves questionable given the lack of any evidence or credible theory as to

ject to heightened scrutiny. This should have important implications for constitutional challenges to the remaining same-sex marriage bans because gender-specific marriage laws are a form of sex discrimination in that such laws make an individual's legal right to marry one's partner a function of gender. For example, a man can marry a woman, but a woman cannot.

Most courts, however, have held that gender-specific marriage laws neither classify nor discriminate based on sex and thus are not subject to heightened scrutiny.<sup>5</sup> In order to so hold, courts have had to distinguish the Supreme Court's opinion in *Loving v. Virginia*, which invalidated miscegenation laws.<sup>6</sup> Miscegenation laws—which criminalized or voided marriages between a white person and a nonwhite person of the opposite gender—were once the norm in American states.<sup>7</sup> When states maintained miscegenation laws, a majority of Americans considered these laws to be both rational and commonsensical.<sup>8</sup> Nonetheless, the *Loving* Court applied heightened scrutiny and struck down all remaining miscegenation laws.<sup>9</sup>

As civil rights advocates began challenging miscegenation laws as unconstitutional race discrimination, the laws' supporters sought to avoid heightened scrutiny by arguing that legal prohibitions on interracial marriage did not discriminate based on race because the laws applied equally to both white and nonwhite people who wished to marry across legally defined racial boundaries.<sup>10</sup> Overturning almost a century of case law, the Court in *Loving* explicitly rejected the argument that if a race-specific marriage law applies equally to both races then it does not discriminate based on race.<sup>11</sup>

By today's standards, these "equal application" arguments rejected in *Loving* are transparently false. Miscegenation laws are now recognized as one of the hallmarks of race discrimination in American history.<sup>12</sup> And yet, today's opponents of marriage equality are dusting off the same equal application arguments in their defense of

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how denying same-sex couples access to marriage serves any legitimate purpose. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (concluding that "excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest"). That, however, is not the focus of this Article.

<sup>5</sup> See *infra* Part II.B.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CALIF. L. REV. 1233, 1248 (1996).

<sup>8</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 321 (2004) (noting that, in the 1950s, more than 90% of white Americans opposed interracial marriage).

<sup>9</sup> *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

<sup>10</sup> See, e.g., *id.* at 8 (discussing the argument of the State of Virginia for rational basis review).

<sup>11</sup> *Id.* at 10–12 (repudiating *Pace v. Alabama*, 106 U.S. 583 (1883)).

<sup>12</sup> See *infra* Part III.A.

prohibitions on same-sex marriage, including state constitutional amendments and, prior to the *Windsor* opinion, the federal Defense of Marriage Act.<sup>13</sup> Yet, surprisingly, these discredited, recycled arguments have proven successful in court.<sup>14</sup>

The majority of courts to consider the issue have held that gender-specific marriage laws do not discriminate based on gender if they apply equally to men and women.<sup>15</sup> In other words, according to most courts, so long as both men and women are prohibited from entering same-sex marriages, then no sex discrimination has occurred. This is the same equal application theory that the Supreme Court rejected in *Loving*.<sup>16</sup> Consequently, many courts wishing to avoid heightened scrutiny have attempted to distinguish *Loving*.<sup>17</sup> This Article discusses these attempts and exposes their flaws.

This Article demonstrates how those judges who hold that heightened scrutiny is unwarranted because gender-specific marriage laws do not classify based on sex are recycling the precise argument—the equal application theory—that states and judges used from the 1800s to the 1960s to hold that miscegenation laws did not discriminate on the basis of race. Part One lays out the basic law of equal protection. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>18</sup> The Equal Protection Clause limits the ability of the federal and state governments to enact discriminatory laws and “requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”<sup>19</sup> The same legal test that restricts the states through the Fourteenth Amendment limits the federal government through the Due Process Clause of the Fifth Amendment.<sup>20</sup>

Part I reviews equal protection analysis, which is a three-step process. Step One of the analysis requires the court to determine whether the challenged law classifies people according to a particular trait.<sup>21</sup> After the classification is identified in Step One, Step Two requires the court to determine the level of scrutiny associated with that

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<sup>13</sup> See Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 111 (2002).

<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See *Loving*, 388 U.S. at 8.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> U.S. CONST. amend. XIV, § 1.

<sup>19</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

<sup>20</sup> *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 570 (9th Cir. 1990).

<sup>21</sup> See *infra* Part I.

trait.<sup>22</sup> For example, courts apply strict scrutiny to laws that classify people based on race, while applying intermediate scrutiny to gender-based classifications. Strict scrutiny and intermediate scrutiny are forms of heightened scrutiny. If a law is not evaluated with heightened scrutiny, it receives rational basis review, which is extremely deferential. Step Three requires the court to apply the appropriate level of scrutiny. If the challenged law fails that level of scrutiny, then it violates the Equal Protection Clause.<sup>23</sup> Each step in this process is distinct.

Part II presents the basic case for why prohibitions against same-sex marriage discriminate based on sex and thus are subject to heightened scrutiny. Most courts have rejected heightened scrutiny based on sex discrimination by asserting that these laws apply equally to both sexes, because neither a man nor a woman can marry a person of the same gender. This equal application theory is the same argument that states with miscegenation laws, like Virginia, used to claim that their race-specific laws did not discriminate on the basis of race.<sup>24</sup> States argued that white people and black people were treated the same: neither could marry across racial lines. In *Loving*, the Supreme Court explicitly rejected the equal application theory and applied heightened scrutiny.<sup>25</sup>

Part III shows how judges in same-sex marriage cases have sought to distinguish *Loving* in order to avoid applying heightened scrutiny. Judges have made three arguments. First, courts have concluded that *Loving* is irrelevant to the level of scrutiny applied in equal protection challenges to gender-specific marriage laws because miscegenation laws were implemented to further the theory of white supremacy.<sup>26</sup> These judges assert that, whereas miscegenation laws had an improper discriminatory purpose, gender-specific marriage laws do not. Second, these jurists further argue that gender-specific marriage laws do not handicap either men or women as a group. Finally, they assert that gender-specific marriage laws are not motivated by a desire to put one gender in a superior position to another gender in the same manner that race-specific marriage laws were designed to place the white race in a superior position to nonwhite races.

Part III also explains how these attempts to distinguish *Loving* are flawed for three reasons. First, courts misapply the basic equal protec-

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<sup>22</sup> See *infra* Part I.

<sup>23</sup> See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>24</sup> See, e.g., *id.* at 8 (discussing the State of Virginia's contention that, because both white and black people were punished equally under its miscegenation laws, "these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based on race").

<sup>25</sup> *Id.* at 11–12.

<sup>26</sup> See *infra* Part III.A.

tion framework when they demand a discriminatory motivation for gender-specific marriage laws in order to determine whether such laws classify people based on gender. This intent analysis is flawed because when a law classifies on its face—such as a race-specific cohabitation law or a gender-specific marriage statute—intent is irrelevant to the issue of determining the level of scrutiny for that law. The fact that miscegenation laws perpetuate the theory of white supremacy is irrelevant for determining the appropriate level of scrutiny, which is determined by reading the text of the statute and seeing its references to race.<sup>27</sup> In their haste to distinguish *Loving*, courts conflate the first and second steps of equal protection analysis.

Second, courts are wrong to use a group-based analysis to distinguish *Loving*. The right to equal protection of the laws is an individual right, not a group right.<sup>28</sup> In particular, the right to marry recognized by the *Loving* Court is an individual right. In analyzing the equal protection claim, the *Loving* Court states this explicitly. Group-based analysis is irrelevant for determining the appropriate level of scrutiny for evaluating the constitutionality of gender-specific marriage laws.

Third, in performing their group-based analysis and attempting to limit *Loving* to laws perpetuating white supremacy, courts consistently assert that *Loving* should not influence the level of scrutiny applied in litigation over gender-specific marriage laws because there is no evidence that such laws are intended to put one gender in an inferior position to another gender. Historically, however, marriage has been an intrinsically gendered institution and marriage laws in the United States were based on assumptions of female inferiority. Supporters of same-sex marriage bans seek to implement and reinforce a gendered model of marriage in which the woman is presumed to be subordinate to the man. To social conservatives, who are the driving force behind gender-specific marriage laws, same-sex marriage is dangerous in large part because it threatens the gendered model of marriage in which a husband dominates his wife. Thus, courts are wrong to distinguish *Loving* on the basis that gender-specific marriage laws do not subordinate women.

The Article concludes by noting that following the logic of *Loving*, same-sex marriage bans necessarily discriminate based on sex. Instead of trying so hard to distinguish *Loving*, courts should embrace the opinion. For the same reason that race-specific marriage laws discriminate based on race, gender-specific marriage laws discriminate based on gender. Thus, gender-specific marriage laws should receive heightened scrutiny.

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<sup>27</sup> See discussion *infra* Part III.A.

<sup>28</sup> See discussion *infra* Part III.B.

## I

EQUAL PROTECTION ANALYSIS AND THE IMPORTANCE OF  
HEIGHTENED SCRUTINY

Equal protection analysis involves three steps.<sup>29</sup> The first, which this Article will refer to as Step One, requires judges to determine whether the challenged law classifies people based on a particular trait. Step Two requires the court to determine the level of scrutiny associated with that trait. The Supreme Court has delineated three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. Under strict scrutiny, the government has the burden of proving that the challenged law's classifications "are narrowly tailored measures that further compelling governmental interests."<sup>30</sup> Under intermediate scrutiny, "restrictions 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.'"<sup>31</sup> Finally, under rational basis review, "a statutory classification must be rationally related to a legitimate governmental purpose."<sup>32</sup> Rational basis review is very deferential. The government "has no obligation to produce evidence to sustain the rationality of a statutory classification."<sup>33</sup>

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<sup>29</sup> See, e.g., *Loving*, 388 U.S. at 8–11 (applying the three steps by first rejecting the State of Virginia's contention that equal application of the statute voids classification, then determining that a high level of scrutiny is appropriate particularly for criminal statutes containing racial classifications, and finally holding that the statute's racial classification cannot be justified under the appropriate level of scrutiny); *Kan. One-Call Sys., Inc. v. State*, 274 P.3d 625, 635 (Kan. 2012) (listing the three steps in explaining equal protection analysis under the Fourteenth Amendment and the state constitution's Bill of Rights). Some courts treat this as a two-step process by collapsing the last two steps (both determining and applying the appropriate level of scrutiny in a single step). See, e.g., *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995); (analyzing an equal protection claim under a two-step process where the court both determines and applies the appropriate level of scrutiny in the second step); *State v. Poole*, 46 A.3d 1129, 1132–33 (Me. 2012) (determining and applying the appropriate level of scrutiny in the second step). Under either a two-step or a three-step approach to equal protection analysis, the first step of determining classification is separate from—and independent of—the final step of applying the appropriate level of scrutiny. It is this distinction between classification and application that is important for our purposes.

<sup>30</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>31</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)); see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) (noting that under intermediate scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State").

<sup>32</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>33</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993). The Court also stated that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 321 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)) (internal quotation marks omitted)); see also *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds



The level of scrutiny applied is a function of the trait upon which the challenged law classifies people. Legal “[c]lassifications based on race or national origin and classifications affecting fundamental rights” are suspect and receive strict scrutiny.<sup>34</sup> Legal classifications based on gender and illegitimacy are quasi-suspect and are subject to intermediate scrutiny.<sup>35</sup> Both strict scrutiny and intermediate scrutiny are forms of heightened scrutiny.<sup>36</sup> Classifications that are neither suspect nor quasi-suspect receive rational basis review.<sup>37</sup> While some courts have held sexual orientation to be a suspect classification entitled to heightened scrutiny,<sup>38</sup> most state and federal courts have applied rational basis review to laws that discriminate based on sexual orientation.<sup>39</sup>

Determining the appropriate level of scrutiny is more difficult when the challenged law contains no classifications on its face. Courts also apply heightened scrutiny to a facially neutral law if that law has a disparate impact on a group defined by a suspect (or quasi-suspect) classification and the legislature—or relevant decision-maker—intended that discriminatory impact.<sup>40</sup> In this situation, some courts frame the Step One analysis as “whether the challenged state action intentionally discriminates between groups of persons.”<sup>41</sup> Courts,

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along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

<sup>34</sup> *Clark*, 486 U.S. at 461 (citations omitted).

<sup>35</sup> See *City of Cleburne*, 473 U.S. at 441; *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012) (“Intermediate scrutiny applies to classifications based on illegitimacy and gender.”).

<sup>36</sup> *Adusumelli v. Steiner*, 740 F. Supp. 2d 582, 590 n.7 (S.D.N.Y. 2010) (“The two forms of heightened scrutiny are (1) strict scrutiny, under which a law will be upheld only if it is ‘narrowly tailored’ to meet ‘compelling government objectives;’ and (2) intermediate scrutiny, which requires that a law be ‘substantially related’ to ‘important government objectives.’” (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000))).

<sup>37</sup> See *Beach Commc’ns, Inc.*, 508 U.S. at 313.

<sup>38</sup> See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012); (“Here, having analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 430–32 (Conn. 2008) (concluding that sexual orientation should be considered a quasi-suspect classification).

<sup>39</sup> See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (explaining in a parenthetical that *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990), found that “homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes”).

<sup>40</sup> See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (explaining that “when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work”).

<sup>41</sup> *SECSYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012). This reference to “intentional discrimination” does not ask whether the discrimination is itself illegal or even blameworthy. Instead, this inquiry is descriptive, not normative.

however, should only look for evidence of discriminatory intent during Step One if the statute is facially neutral and, thus, additional evidence is necessary to show that the seemingly neutral law, in effect, classifies people and treats them differently based on their classification.<sup>42</sup>

If a law contains a suspect classification in its text, then the court should not consider the motive behind that classification during Step One. For example, the Supreme Court has repeatedly held that “[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.”<sup>43</sup> Even if a racial classification burdens or benefits all races equally, the fact that the government has used a racial classification automatically triggers strict scrutiny.<sup>44</sup> This is because “[w]hen a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of legislative purpose is required.”<sup>45</sup> Accordingly, for the purposes of equal protection claims based on gender discrimination, courts should not look for evidence of discriminatory intent unless the challenged statute is “gender-neutral on its face.”<sup>46</sup>

Step Three of equal protection analysis requires courts to apply the appropriate level of scrutiny—arrived at in Step Two—to determine whether the challenged law survives under the applicable test. As noted, under intermediate scrutiny, “[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest.”<sup>47</sup> If the challenged law fails to satisfy the demands of the

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<sup>42</sup> See *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) (“The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.” (citations omitted)).

<sup>43</sup> *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

<sup>44</sup> *Johnson v. California*, 543 U.S. 499, 506 (2005) (“The [California Department of Corrections (CDC)] claims that its policy should be exempt from our categorical rule because it is ‘neutral’—that is, it ‘neither benefits nor burdens one group or individual more than any other group or individual.’ In other words, strict scrutiny should not apply because all prisoners are ‘equally’ segregated. The CDC’s argument ignores our repeated command that ‘racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.’” (citations omitted)).

<sup>45</sup> *SECSYS*, 666 F.3d at 685.

<sup>46</sup> See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (“When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.”).

<sup>47</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976)).

applicable level of scrutiny, that law is declared unconstitutional. In evaluating equal protection claims based on analogous state constitutional protections, most state courts employ a similar analytical framework.<sup>48</sup> State courts also generally apply heightened scrutiny to laws that classify and discriminate based on gender.<sup>49</sup>

The level of scrutiny applied in challenges to prohibitions against same-sex marriage is largely outcome determinative. Some courts have applied heightened scrutiny because gender-specific marriage laws classify based on sex and have held that the marriage restriction violates Equal Protection.<sup>50</sup> Other courts have applied heightened scrutiny after concluding that sexual orientation is a suspect classification and, consequently, have held that precluding same-sex couples from marrying—or having access to the bundle of rights afforded to married couples—is unconstitutional under either state or federal constitutions.<sup>51</sup> At least three state Supreme Court opinions recogniz-

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<sup>48</sup> See, e.g., *Miller v. Johnson*, 289 P.3d 1098, 1119 (Kan. 2012) (“There are three levels of scrutiny: (1) the rational basis standard to determine whether a statutory classification bears some rational relationship to a valid legislative purpose; (2) a heightened or intermediate scrutiny to determine whether a statutory classification substantially furthers a legitimate legislative purpose; and (3) the strict scrutiny standard to determine whether a statutory classification is necessary to serve some compelling state interest.”). *But see Morrison v. Sadler*, 821 N.E.2d 15, 21 (Ind. Ct. App. 2005) (“Unlike federal equal protection analysis, there is no varying or heightened level of scrutiny based on the nature of the classification or the nature of the right affected by the legislation.”). Some state courts, however, use two levels of scrutiny instead of three. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (“Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to ‘strict scrutiny’ or to a ‘rational basis’ test.” (quoting *Nakano v. Matayoshi*, 706 P.2d 814, 821 (Haw. 1985)) (internal quotation marks omitted)); see also *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 672 (Tex. App. 2010) (“An equal-protection challenge is examined under one of two tests: the strict-scrutiny test or the rational-basis test.”).

<sup>49</sup> See, e.g., *Holdman v. Olim*, 581 P.2d 1164, 1167 (Haw. 1978) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” (alteration in original) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)) (internal quotation marks omitted)).

<sup>50</sup> See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996) (“The sex-based classification in [Hawaii Revised Statutes (HRS)] § 572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.”).

<sup>51</sup> See *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff’d* U.S. v. *Windsor*, 133 S. Ct. 2675 (2013) (“[O]ur conclusion [is] that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect.”); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012) (“Here, having analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny.”); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); (“[W]e hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.”); *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008); (“The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.”); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

ing that the right to marry extends to same-sex couples have applied heightened scrutiny.<sup>52</sup>

In contrast, the vast majority of courts that have declined to apply heightened scrutiny in challenges to gender-specific marriage laws have upheld these laws under rational basis review.<sup>53</sup> Indeed, of the dozens of state and federal opinions upholding prohibitions against same-sex marriage, all applied rational basis review.<sup>54</sup> Several courts rejecting challenges to restrictive marriage laws have explicitly noted that the decisions were driven by the extreme deference that rational basis review requires.<sup>55</sup> These courts emphasized that rational basis review is lax, that “the judiciary does not require a legislature to articulate its reasons for enacting a statute,”<sup>56</sup> that “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature,”<sup>57</sup> and that rational basis review allows courts to uphold anti-gay marriage bans even though the stated justifications for the discriminatory laws are not in sync with their actual operation.<sup>58</sup> Under rational basis review, “the state is not required to show that denying marriage to same-sex couples is necessary to promote the state’s interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage.”<sup>59</sup> These decisions are arguably erroneous given their failure to suggest how denying marriage licenses to same-sex couples in any way

<sup>52</sup> *Varnum*, 763 N.W.2d at 896; *In re Marriage Cases*, 183 P.3d at 453; *Baker*, 744 A.2d at 886.

<sup>53</sup> See *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Conaway v. Deane*, 932 A.2d 571, 605 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 980 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006); *Morrison*, 821 N.E.2d at 27; *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

<sup>54</sup> See, e.g., *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1102 (D. Haw. 2012); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (upholding same-sex marriage ban because no heightened scrutiny applied and rational basis review is very deferential); see also *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 514 (Conn. 2008) (Borden, J., dissenting) (“I also conclude that our marriage statutes survive rational basis review.”).

<sup>55</sup> See, e.g., *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1016 n.6 (D. Nev. 2012) (“The level of scrutiny is controlled by precedent in this case. Because that level of scrutiny is rational basis scrutiny, the Court need not examine the parties’ evidence.”); see also *Morrison*, 821 N.E.2d at 37 (Friedlander, J., concurring in result) (emphasizing that the Indiana court upholding Indiana’s ban on same-sex marriage is not applying heightened scrutiny).

<sup>56</sup> *Jackson*, 884 F. Supp. 2d at 1103.

<sup>57</sup> *Id.* (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

<sup>58</sup> See, e.g., *Morrison*, 821 N.E.2d at 27 (“There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not. This is true, regardless of whether there are some opposite-sex couples that wish to marry but one or both partners are physically incapable of reproducing.”).

<sup>59</sup> *Jackson v. Abercrombie*, 884 F. Supp. 2d at 1106; *id.* at 1117 (“Under rational basis review, the state is not required to show that allowing same-sex couples to marry will discourage, through changing societal norms, opposite-sex couples from marrying. Rather, the standard is whether the legislature could rationally speculate that it might.”).

advances a legitimate state interest.<sup>60</sup> Nevertheless, these opinions illustrate how courts have an easier time upholding prohibitions against same-sex marriage under rational basis review than under heightened scrutiny.

Several judges have conceded that the choice of the level of scrutiny in same-sex marriage cases is often dispositive. In its opinion striking down DOMA as unconstitutional under a standard of review it referred to as “intensified scrutiny,” the First Circuit explicitly acknowledged that the anti-gay law would survive traditional rational basis review.<sup>61</sup> While some courts have used rational basis review to strike down anti-gay marriage restrictions,<sup>62</sup> no court has applied heightened scrutiny and upheld the constitutionality of a gender-specific marriage statute. Judicial decisions on whether same-sex couples are entitled to enter legally recognized marriages thus turn on the level of scrutiny applied.<sup>63</sup>

Proponents of marriage equality have argued that gender-specific marriage laws should be evaluated under heightened scrutiny. First, they have argued that laws prohibiting same-sex couples from marrying should be subject to heightened scrutiny because these laws infringe the fundamental right to marry.<sup>64</sup> Most courts have rejected this argument, reasoning that there is no fundamental right to same-sex marriage.<sup>65</sup> Second, marriage equality advocates have argued that marriage bans should be subject to heightened scrutiny because they discriminate based on sexual orientation and based on

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<sup>60</sup> See *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012), *vacated sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (“Because [California’s] Proposition 8 did not further any of these interests, we conclude that they cannot have been rational bases for this measure, whether or not they are legitimate state interests.”).

<sup>61</sup> *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 9–10 (1st Cir. 2012).

<sup>62</sup> See *Perry*, 671 F.3d at 1094 (invoking the language of “rational basis” and holding of *Romer* to affirm district court’s invalidation of California’s Proposition 8); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (applying rational basis review to strike down Oklahoma’s prohibition on same-sex marriage); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1207–11 (D. Utah 2013) (applying rational basis review to strike down Utah’s prohibition on same-sex marriage); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (invalidating DOMA using rational basis).

<sup>63</sup> See *Holning Lau*, *Formalism: From Racial Integration to Same-Sex Marriage*, 59 *HASTINGS L.J.* 843, 853 (2008) (“Whether a court accepts that same-sex marriage bans amount to sex discrimination will highly influence a case’s outcome. Existing court opinions support this prediction. When judges have accepted that same-sex marriage bans amount to sex discrimination, the bans typically have not survived heightened scrutiny.”).

<sup>64</sup> See, e.g., *Jackson*, 884 F. Supp. 2d at 1094–98; *Conaway v. Deane*, 932 A.2d 571, 603 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 205 (N.J. 2006).

<sup>65</sup> See, e.g., *Jackson*, 884 F. Supp. 2d at 1098; *Conaway*, 932 A.2d at 616; *Lewis*, 908 A.2d at 211. These courts misconstrue the nature of the fundamental right at issue. The proper inquiry is not whether there is a fundamental right to same-sex marriage but whether there is a fundamental right to marriage.

sex.<sup>66</sup> Most courts that have considered the issue have rejected the argument that sexual orientation is a suspect—or quasi-suspect—classification entitled to heightened scrutiny.<sup>67</sup> In contrast, both federal and state jurisdictions hold that gender is a suspect classification.<sup>68</sup> This means that gender-specific marriage laws are subject to heightened scrutiny if judges recognize that prohibitions against same-sex marriage do, in fact, discriminate on the basis of sex. Most courts, however, have concluded that gender-specific marriage laws do not discriminate based on gender.<sup>69</sup> Part Two explains why these courts are mistaken.

## II

### GENDER-SPECIFIC MARRIAGE LAWS AS SEX DISCRIMINATION

State laws prohibiting same-sex marriage have survived most equal protection challenges. The resilience of marriage bans is largely a function of the level of scrutiny applied by the courts in deciding challenges to these bans. Marriage bans have always failed when the court has applied heightened scrutiny but have generally survived when the court applies rational basis review.<sup>70</sup> This Article focuses on the argument that gender-specific marriage laws discriminate based on sex and thus heightened scrutiny is required.

#### A. The Basic Case: Marriage Inequality as Sex Discrimination

Scholars and lawyers have long argued that discrimination based on sexual orientation is a subset of sex discrimination.<sup>71</sup> Many

<sup>66</sup> See, e.g., *Jackson*, 884 F. Supp. 2d at 1100; *Conaway*, 932 A.2d at 602–03.

<sup>67</sup> See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). Cf. *Donaldson v. State*, 292 P.3d 364, 377 (Mont. 2012) (Nelson, J., dissenting) (concluding that sexual orientation is a suspect classification and that Montana’s refusal to extend marriage-like rights to same-sex couples violates Montana’s Equal Protection Clause).

<sup>68</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (“[C]lassifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”); *Conaway*, 932 A.2d. at 673 (noting that under the Maryland constitution, classifications based on gender are suspect).

<sup>69</sup> *Jackson*, 884 F. Supp. 2d at 1098 (“[T]he vast majority of courts considering the issue [have held] that an opposite-sex definition of marriage does not constitute gender discrimination.”).

<sup>70</sup> See *supra* notes 50–60 and accompanying text.

<sup>71</sup> See, e.g., Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83 (2010); Nan D. Hunter, *The Sex Discrimination Argument In Gay Rights Cases*, 9 J.L. & POL’Y 397, 397 (2001); Andrew Koppelman, *Why Discrimination Against Lesbians And Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994) (“[D]iscrimination against lesbians and gay men reinforces the hierarchy of males over females and thus is wrong because it oppresses women.”); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Anti-Miscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 839–40 (2008); Josephine Ross, *Riddle For Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999, 1002 (2002); Mark

anti-gay laws have their roots in gender discrimination and gender stereotyping. For example, gender-specific sodomy laws represented a form of sex discrimination by permitting men to perform cunnilingus but criminalizing that same conduct by women.<sup>72</sup> With respect to gender stereotyping, some courts in employment cases have found that, under some circumstances, hostile actions against a gay employee can violate Title VII's prohibition against discrimination based on sex.<sup>73</sup>

In the case of gender-specific marriage laws, the claim of sex discrimination is straightforward. Step One of equal protection analysis asks whether a challenged law classifies people along a particular trait. By definition, gender-specific marriage laws classify people based on their gender and then restrict the ability to marry based on their partners' respective genders. That is the essence of sex discrimination.<sup>74</sup> This does not answer the ultimate constitutional question because some sex-discriminatory laws do not violate Equal Protection, but these laws must survive heightened scrutiny.<sup>75</sup> In the context of marriage equality for same-sex couples, however, courts have been generally unreceptive to the argument that gender-specific marriage laws

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Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 PEPP. L. REV. 1021, 1033 (2011); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462 (2007); Jeffrey A. Williams, *Re-Orienting the Sex Discrimination Argument for Gay Rights After Lawrence v. Texas*, 14 COLUM. J. GENDER & L. 131, 133 (2005). *But see* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997) (arguing that “[h]omosexuals have low status because they transgress a set of social meanings about gender that define heterosexuality.”); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 474 (2001) (objecting that such an argument is “sociologically, theoretically, and morally flawed”).

<sup>72</sup> Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 151 n.43 (1988); *see also* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 111 (2000) (noting that even facially gender-neutral sodomy laws operated as though they were gender-specific).

<sup>73</sup> *See, e.g.,* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (noting that the Ninth Circuit had previously found that “same-sex gender stereotyping . . . [,] *i.e.*, gender stereotyping of a male gay employee by his male co-workers,” constituted actionable harassment under Title VII and concluding that “[t]he repeated testimony that his co-workers treated [the plaintiff], in a variety of ways, ‘like a woman’ constitutes ample evidence of gender stereotyping”); *see also* Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).

<sup>74</sup> *See* Clark, *supra* note 13, at 140 (“If discrimination against different-race couples is race discrimination, and discrimination against different-religion couples is religious discrimination, and discrimination against different-age couples is age discrimination, . . . then discrimination against same-sex couples must be sex discrimination. The logical extension is irresistible.”).

<sup>75</sup> *See, e.g.,* Rucker v. City of Kettering, 84 F. Supp. 2d 917, 923 (S.D. Ohio 2000) (denying preliminary injunction because city policy of hiring only male jail attendants to guard male prisoners was determined likely to survive heightened scrutiny).

discriminate based on sex and therefore require heightened scrutiny.<sup>76</sup>

The earliest attempts to challenge prohibitions on same-sex marriage as unconstitutional failed miserably. Gay Americans began litigating for the right to marry in the 1970s. In *Baker v. Nelson*,<sup>77</sup> the Minnesota Supreme Court rejected out of hand a male couple's argument that prohibiting them from obtaining a marriage license violated the Fourteenth Amendment.<sup>78</sup> The Supreme Court dismissed their appeal "for want of a substantial federal question."<sup>79</sup> Soon after, a male couple in Washington state sued to obtain a marriage license. In *Singer v. Hara*,<sup>80</sup> the *Singer* court reasoned that the male couple was not being discriminated against based on sex because the two would have been similarly denied a marriage license if they had been a female couple.<sup>81</sup>

Courts thus seemed an unlikely avenue to secure marriage rights until the Hawaii Supreme Court entered the fray in 1993. Same-sex couples in the fiftieth state challenged Hawaii's refusal to recognize same-sex marriage. In *Baehr v. Lewin*,<sup>82</sup> the Hawaii Supreme Court noted that "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that [the state statute not recognizing same-sex marriage] is subject to the 'strict scrutiny' test."<sup>83</sup> The court next held that a same-sex marriage ban necessarily classifies people based on sex and makes rights dependent on an individual's sex. Consequently, the state marriage law "(1) . . . is presumed to be unconstitutional (2) unless . . . the State of Hawaii can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."<sup>84</sup> The Hawaii Supreme Court remanded the case in order to afford the state the opportunity to show that the ban on same-sex marriage could survive strict scrutiny.<sup>85</sup> On remand, the trial court held that refusal to recognize marriages between same-sex

<sup>76</sup> See *infra* note 91.

<sup>77</sup> 191 N.W.2d 185 (Minn. 1971).

<sup>78</sup> *Id.* at 187.

<sup>79</sup> *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

<sup>80</sup> 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>81</sup> *Id.* at 1191 ("In other words, the state suggests that appellants are not entitled to relief under the [Equal Rights Amendment] because they have failed to make a showing that they are somehow being treated differently by the state than they would be if they were females.").

<sup>82</sup> 852 P.2d 44 (Haw. 1993).

<sup>83</sup> *Id.* at 67. The Hawaii Supreme Court did not hold that sexual orientation was a suspect classification. *Id.* at 67 n.33.

<sup>84</sup> *Id.* at 67.

<sup>85</sup> *Id.* at 68 ("On remand, in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by



couples violated the equal protection provision of the Hawaiian Constitution, but the court stayed implementation of its decision until review by the Hawaii Supreme Court.<sup>86</sup> Before that review could occur, the people of Hawaii amended their state constitution to prohibit same-sex marriage while the state legislature created a system of reciprocal benefits through which same-sex couples could acquire many of the rights enjoyed by married heterosexual couples.<sup>87</sup>

The Hawaii Supreme Court's recognition that the state's ban on same-sex marriage was a sex-based classification ignited discussion over same-sex marriage in America. It provided a glimmer of hope for same-sex couples that their country, or at least their state, might recognize their relationships in their lifetimes. Unfortunately, the *Baehr* decision also generated a great deal of backlash against gay couples, most notably the congressional passage of DOMA, which provided, among other things, that the federal government would refuse to recognize valid state marriages between same-sex couples.<sup>88</sup> Dozens of states followed suit, enacting their own mini-DOMAs, often by amending their state constitutions.<sup>89</sup>

The Hawaii decision also encouraged constitutional challenges to same-sex marriage prohibitions. Since the *Baehr* opinion, more same-sex couples have invoked gender-based arguments to challenge the constitutionality of state bans on same-sex marriage.<sup>90</sup> The argument has received a muted reception. Most courts have rejected the argument that same-sex marriage bans discriminate on account of sex and have declined to apply heightened scrutiny on that basis.<sup>91</sup>

Yet even when the sex discrimination argument against same-sex marriage bans does not generate a majority opinion, as it did in the Hawaii Supreme Court, the argument has nevertheless gained trac-

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demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." (citations omitted)).

<sup>86</sup> See *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1075 (D. Haw. 2012).

<sup>87</sup> *Id.* at 1072 ("In 1997, the legislature extended certain rights to same-sex couples through the creation of reciprocal-beneficiary relationships. In 2011, the legislature passed a civil unions law, conferring all of the state legal rights and benefits of marriage (except the title marriage) on same-sex couples who enter into a civil union.").

<sup>88</sup> 1 U.S.C. § 7 (2012).

<sup>89</sup> See *Donaldson v. State*, 292 P.3d 364, 375 (Mont. 2012) (Nelson, J., dissenting) ("In the wake of the Hawaii Supreme Court's decision in *Baehr v. Lewin* . . . , which held that denying same-sex couples the ability to marry must be justified under 'strict scrutiny' principles, measures were proposed and adopted in as many as 30 states, including Montana, purporting to limit marriage to one man and one woman."); *id.* at 373 (Rice, J., concurring) ("To counter this threat to established precedent favoring marriage, citizens of some 31 states acted to either reinstate the law's exclusive definition and treatment of marriage in some manner, or to ensure that courts could not eliminate such exclusive treatment, by amending their state constitutions to explicitly protect marriage.").

<sup>90</sup> See, e.g., *Dean v. District of Columbia*, 653 A.2d 307, 309 (D.C. 1995).

<sup>91</sup> See, e.g., *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (collecting cases); *Jackson*, 884 F. Supp. 2d at 1098-99 (same).

tion among some jurists, both in concurring and dissenting opinions. For example, in *Baker v. State*,<sup>92</sup> the Vermont Supreme Court broke new ground in holding that the state cannot deny same-sex couples the rights and benefits associated with marriage afforded to opposite-sex couples.<sup>93</sup> The opinion led to the creation of civil unions, an institution that afforded same-sex couples the rights and benefits of marriage while denying same-sex couples the use of the word “marriage.”<sup>94</sup> Although the *Baker* majority rejected the argument that Vermont’s prohibition of same-sex marriage constituted sex discrimination,<sup>95</sup> in a partial concurrence and partial dissent, Justice Denise R. Johnson of the Vermont Supreme Court had little trouble concluding that “marriage statutes establish a classification based on sex.”<sup>96</sup> The justice asked readers to

consider the following example. Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.<sup>97</sup>

Justice Johnson’s hypothetical illustrates the point that same-sex marriage bans require the state to inquire into an individual’s gender in order to determine whether that person is entitled to a right that one gender has and the other does not.<sup>98</sup> This is the hallmark of a gender-based classification.<sup>99</sup>

The sex discrimination argument played a minor role when the Massachusetts Supreme Court made legal history by becoming the

<sup>92</sup> 744 A.2d 864 (Vt. 1999).

<sup>93</sup> *Id.* at 886.

<sup>94</sup> See generally DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004) (presenting a historical narrative of the events leading up to the passage of Vermont’s civil unions law and the surrounding debate). Vermont later adopted same-sex marriage through legislative action. See VT. STAT. ANN. tit. 15, § 8 (2010).

<sup>95</sup> See *Baker*, 744 A.2d at 880 n.13.

<sup>96</sup> *Id.* at 905 (Johnson, J., concurring in part and dissenting in part).

<sup>97</sup> *Id.* at 906 (Johnson, J., concurring in part and dissenting in part).

<sup>98</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005) (“The relevant portion of Indiana’s DOMA at issue today states: ‘Only a female may marry a male. Only a male may marry a female.’”).

<sup>99</sup> The Court in *Reed v. Reed*, 404 U.S. 71 (1971), considered an equal protection challenge to an Idaho statute providing that, when two individuals are otherwise equally qualified to serve as the administrator of an estate, the male applicant must be preferred to the female. *Id.* at 73. The Court explained that the Idaho statute “provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.” *Id.* at 75. Similarly, marriage laws provide different treatment based on sex and therefore create a sex-based classification.

first state supreme court to hold that, under that state's constitution, same-sex couples were entitled to marriage—both the bundle of rights and the word itself.<sup>100</sup> In *Goodridge v. Department of Public Health*,<sup>101</sup> the court held that Massachusetts' marriage law unconstitutionally discriminated based on sexual orientation, though not gender.<sup>102</sup> One justice in the *Goodridge* majority, however, would have held that the ban on same-sex marriage also constituted impermissible sex discrimination. Justice John M. Greaney in his concurrence explained:

Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists only of a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry. That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.<sup>103</sup>

Even in those cases where state supreme courts have held that same-sex marriage bans do not violate the state's constitution, the sex discrimination arguments for heightened scrutiny have been powerfully advanced in dissenting opinions. For example, in his dissenting opinion from the Washington Supreme Court's decision to uphold that state's then-prohibition on same-sex marriage,<sup>104</sup> Justice Bobbe J. Bridge argued that the state law violated the state constitution:

[The state law] discriminates on the basis of sex. A woman cannot marry the woman of her choice but a man can marry the woman of his choice. In other words, the only thing preventing plaintiff Heather Andersen from marrying her partner, Leslie Christian, is the fact that Andersen is a woman. Andersen should no more read-

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<sup>100</sup> See generally Christopher R. Leslie, *Heterosexual Words* (unpublished manuscript) (on file with author).

<sup>101</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>102</sup> *Id.* at 968.

<sup>103</sup> *Id.* at 971 (Greaney, J., concurring) (citations omitted).

<sup>104</sup> Following their state supreme court's refusal to recognize marriages between same-sex couples, the voters of Washington state adopted marriage equality in the November 2012 election. See *Gay Marriage Approved by Wash. Voters*, WASH. POST, Nov. 9, 2012, at A12.

ily be prohibited from marrying her partner than she is from voting for president or practicing law.<sup>105</sup>

Similarly, Judge Lynne A. Battaglia of the Maryland Supreme Court dissented from that court's opinion to uphold the then in force state prohibition on same-sex marriage.<sup>106</sup> The judge concluded that the law was a form of sex discrimination because "[o]nly by virtue of a person's sex is he or she prohibited from marrying a person of the same sex."<sup>107</sup>

Recognizing that prohibitions of same-sex marriage represent a form of sex discrimination is important because this would subject state marriage bans to heightened scrutiny in both state and federal courts.<sup>108</sup> The level of scrutiny is potentially dispositive when analyzing the constitutionality of same-sex marriage bans because rational basis review is so deferential that this often leads to the bans being upheld as constitutional due primarily to judicial deference even absent any compelling reason to discriminate against same-sex couples.<sup>109</sup> In her dissent, Judge Battaglia suggested that same-sex marriage bans have endured, in large part, because state courts have applied rational basis review and not heightened scrutiny.<sup>110</sup> Similarly, the chief justice of the Maryland Supreme Court observed that

<sup>105</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 1037 (Wash. 2006) (Bridge, J., dissenting).

<sup>106</sup> As in Washington state, the voters of Maryland subsequently voted to recognize marriages between same-sex couples in the November 2012 election.

<sup>107</sup> *Conaway v. Deane*, 932 A.2d 571, 685 (Md. 2007) (Battaglia, J., dissenting). *See id.* at 686 ("Thus, a man who wishes to marry another man is prevented from choosing his marriage partner purely on the basis of sex; likewise, a woman who wishes to marry another woman is prevented from choosing her marriage partner purely on the basis of sex."). Justice Battaglia found the dissent in the Washington case persuasive. *Id.* at 678–79 ("The Washington same-sex marriage prohibition *did* classify on grounds of sex, because a homosexual was *permitted* to marry a partner of the *opposite* sex, but was prohibited from marrying a partner of the *same* sex.").

<sup>108</sup> *See Baker v. State*, 744 A.2d 864, 907 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) ("Although Vermont has not had occasion to consider the question, most, if not all, courts have held that the denial of rights or benefits on the basis of sex subject the state's action to some level of heightened scrutiny."). The trailblazing opinions of *Baker* and *Goodridge* illustrate that significant gains have been made for marriage equality even without the sex discrimination argument carrying the day. The Vermont Supreme Court recognized that its state constitution required that same-sex couples be afforded the rights and benefits of marriage, albeit without the name. The Massachusetts Supreme Court held that its state constitution precluded the government from excluding same-sex couples from the institution of marriage. This may suggest that the sex discrimination argument is unnecessary to achieve marriage equality. While that was true in Vermont and Massachusetts, the results in other states reveal the importance of the level of scrutiny applied.

<sup>109</sup> *See supra* notes 50–62 and accompanying text.

<sup>110</sup> *See Conaway*, 932 A.2d at 692 (Battaglia, J., dissenting) (arguing, for example, that the state's interest in "promoting marriage between opposite-sex couples because . . . same-sex couples cannot reproduce without extensive, expensive outside intervention . . . has been upheld *only* under rational basis scrutiny" (emphasis added)).

same-sex marriage prohibitions would not survive constitutional analysis if they were subject to heightened scrutiny.<sup>111</sup>

### B. The “Equal Application” of Gender-Specific Marriage Laws

Most courts have rejected the proposition that prohibitions on same-sex marriage constitute a form of sex discrimination and have declined to apply heightened scrutiny on that basis.<sup>112</sup> For over forty years, courts bent on upholding same-sex marriage bans have proclaimed that this form of gender-specific law neither classifies nor discriminates based on sex.<sup>113</sup> Judges have reasoned that such prohibitions do not discriminate on account of sex because the laws apply equally to both men and women, and thus heightened scrutiny is not required on this basis.<sup>114</sup> For example, the Washington Supreme Court held that its state prohibition on same-sex marriage “treats both sexes the same; neither a man nor a woman may marry a person of the same sex.”<sup>115</sup> Similarly, the New York Court of Appeals concluded that “[w]omen and men are treated alike—they are permitted to

<sup>111</sup> See *id.* at 697 (Bell, C.J., dissenting).

<sup>112</sup> See, e.g., *id.* at 586 (“When considering those cases in context, however, and because we believe that Article 46 was not intended by the General Assembly and the Maryland voters who enacted and ratified, respectively, the Maryland [Equal Rights Amendment] in 1972 to reach classifications based on *sexual orientation*, we conclude that Family Law § 2–201 does not draw an impermissible sex-based distinction.” (emphasis in original)); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) (“By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination.”); *Baker*, 744 A.2d at 880 n.13 (“[W]e do not doubt that a statute that discriminated on the basis of sex would bear a heavy burden . . . . Here, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.”).

<sup>113</sup> The argument that prohibitions on same-sex marriage treat men and women equally was also made in defense of the Equal Rights Amendment (ERA) during the 1970s debate over whether to amend the U.S. Constitution to guarantee gender equality. The Supreme Court of Maryland noted,

Speaking directly on the point of the proposed amendment and its effects on marriage between members of the same sex, it was contended by Senator Birch Evans Bayh II (Dem., Indiana) during the Senate debate that “[t]he equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited to women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman-or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man.” 118 Cong. Rec. 9331 (daily ed. 21 March 1972) (statements of Sen. Bayh).

*Conaway*, 932 A.2d at 591. The rhetoric of the ERA era serves as the legal precedent but shows the longevity of the self-contradictory argument that a law that establishes a sexual classification and assigns ability to engage in particular conduct based on gender does not constitute sex discrimination.

<sup>114</sup> See Clark, *supra* note 13, at 120–23.

<sup>115</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 969 (Wash. 2006); see also *Conaway*, 932 A.2d at 598 (“[T]he statute prohibits equally both men and women from the same conduct.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 974 (Mass. 2003) (Spina, J., dissent-

marry people of the opposite sex, but not people of their own sex.”<sup>116</sup> Even the majority in *Baker*, the first state supreme court case to grant substantive marriage-like rights to same-sex couples, posited that same-sex marriage bans “do not discriminate on the basis of sex because they treat similarly situated males the same as similarly situated females.”<sup>117</sup>

In asserting that same-sex marriage bans should not receive heightened scrutiny because they do not discriminate based on sex, courts advance two connected propositions related to classification and benefits. First, judges boldly declare that a gender-specific law

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ing) (arguing that the Massachusetts ban on same-sex marriage “creates no distinction between the sexes, but applies to men and women in precisely the same way”).

<sup>116</sup> *Hernandez*, 855 N.E.2d at 10–11; see also *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1071 (D. Haw. 2012) (“Plaintiffs’ equal protection claim is also subject to rational basis review. Hawaii’s marriage laws do not treat males and females differently as a class; consequently, the laws do not discriminate on the basis of gender.”); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307–08 (M.D. Fla. 2005) (“DOMA does not discriminate on the basis of sex because it treats women and men equally.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 507 (Conn. 2008) (Borden, J., dissenting) (“This statute does not differentiate between the genders because both men and women are equally barred from marrying a person of the same sex. Thus, so long as the civil union statute treats both genders equally in prohibiting both from entering a same sex marriage, it does not run afoul of the constitutional provision barring discrimination on the basis of sex.”); *Baehr v. Lewin*, 852 P.2d 44, 71 (Haw. 1993) (Heen, J., dissenting) (“HRS § 572–1 treats everyone alike and applies equally to both sexes. The effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals, and does not effect an invidious discrimination.”).

<sup>117</sup> *Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part) (criticizing majority opinion on this point); see also *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1286 (N.D. Okla. 2014) (asserting that Oklahoma’s ban on same-sex marriage “does not draw any distinctions between same-sex male couples and same-sex female couples,” though ultimately invalidating ban under rational basis review).

Other courts have employed this same reasoning to deny equal treatment of same-sex couples in situations short of marriage. For example, in *Phillips v. Wis. Personnel Comm’n*, 482 N.W.2d 121 (Wis. Ct. App. 1992), a lesbian couple sued for gender discrimination because the state health plan denied medical coverage to the plaintiff’s partner because the definition of “dependent” was limited to legal spouses or children. *Id.* at 124. The Wisconsin Court of Appeals rejected her claim, reasoning that “dependent insurance coverage is unavailable to unmarried companions of both male and female employees. A statute is only subject to a challenge for gender discrimination under the equal protection clause when it discriminates on its face, or in effect, between males and females.” *Id.* at 129 (emphasis in original) (citations omitted).

Similarly, before the U.S. Supreme Court held sodomy laws to be unconstitutional, the Missouri Supreme Court used the “equal application” argument to reject a sex-based equal protection claim to that state’s sodomy statute:

The State concedes that the statute prohibits men from doing what women may do, namely, engage in sexual activity with men. However, the State argues that it likewise prohibits women from doing something which men can do: engage in sexual activity with women. We believe it applies equally to men and women because it prohibits both classes from engaging in sexual activity with members of their own sex. Thus, there is no denial of equal protection on that basis.

*State v. Walsh*, 713 S.W.2d 508, 510 (Mo. 1986) (en banc).

that renders a couple's legal ability to marry a function of the individuals' genders "does not draw any classifications based on sex."<sup>118</sup> After the Washington appellate court in *Singer* held that gender-restrictive marriage laws did not engage in "sexual classification,"<sup>119</sup> many courts have followed suit. For example, analyzing a challenge to the federal DOMA, a bankruptcy court concluded that "the marriage definition contained in DOMA does not classify according to gender."<sup>120</sup> The court concluded this despite the fact that the law specifically made marriage a function of the gender of the parties.<sup>121</sup> Even the otherwise supportive Vermont Supreme Court wrote, "[t]he difficulty here is that the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex."<sup>122</sup> Similarly, the dissent in Hawaii's *Baehr* decision asserted that the challenged "statute treats everyone alike and applies equally to both sexes."<sup>123</sup>

Second, courts assert that under a regime of gender-specific marriage laws, the provision of benefits is not based on sex. For example, in its 2006 *Andersen* opinion, the Washington Supreme Court reasoned that the state's gender-restrictive marriage law did "not render benefits to just one sex, nor does it restrict or deny rights of one sex."<sup>124</sup> Consequently, judges assert that there

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<sup>118</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 989 (Wash. 2006); *id.* at 988 ("Men and women are treated identically under DOMA; neither may marry a person of the same sex. DOMA therefore does not make any 'classification by sex,' and it does not discriminate on account of sex." (citing *Singer v. Hara*, 522 P.2d 1187, 1194 (Wash. Ct. App. 1974))); *Conaway*, 932 A.2d at 599 ("Because there is no 'discrete class subject to differential treatment,' according to the court's analysis, the prohibition on same-sex marriage did not draw a sex-based classification.").

<sup>119</sup> *Singer*, 522 P.2d at 1192 ("There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one that may be entered into only by two persons who are members of the opposite sex.").

<sup>120</sup> *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004).

<sup>121</sup> 1 U.S.C. § 7 (2012) ("[T]he word 'marriage' means only a legal union between one man and one woman.").

<sup>122</sup> *Baker*, 744 A.2d at 880 n.13.

<sup>123</sup> *Baehr v. Lewin*, 852 P.2d 44, 71 n.3 (Haw. 1993) (Heen, J., dissenting).

<sup>124</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 989 (Wash. 2006); *see also* *Conaway v. Deane*, 932 A.2d 571, 598 (Md. 2007) ("Nor does the statute, facially or in its application, place men and women on an uneven playing field."); *Baehr*, 852 P.2d at 71 (Heen, J., dissenting) ("HRS § 572-1 does not establish a 'suspect' classification based on gender because all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has.").

is no gender discrimination and no need for heightened scrutiny.<sup>125</sup>

Finally, some courts explicitly link these two contentions. For example, the New York Court of Appeals asserted that the state ban on same-sex marriage did “not put men and women in different classes, and give one class a benefit not given to the other.”<sup>126</sup> All of these arguments are versions of “equal application” theory.

### C. *Loving*, Race Discrimination, and “Equal Application” Theory

The argument that gender-specific marriage laws should not receive heightened scrutiny, since they do not discriminate based on gender because they apply equally to men and women, has a facial grammatical simplicity. In decades past, the attraction of such an argument was not lost on supporters of miscegenation laws.<sup>127</sup> The opponents of marriage equality have essentially recycled the “equal application” argument from lawyers who defended state laws that voided interracial marriages and criminalized interracial sexual relations.<sup>128</sup> This section explores how the Supreme Court ultimately rejected the “equal application” argument and applied heightened scrutiny in miscegenation cases.

The Supreme Court first addressed the constitutionality of miscegenation-related laws in the late 1800s. In 1883’s *Pace v. Alabama*,<sup>129</sup> the Justices considered whether an Alabama criminal law that affixed a greater punishment for interracial adultery than same-race adultery violated the Equal Protection Clause of the Fourteenth Amendment. In upholding the Alabama statute, the Supreme Court adopted the

<sup>125</sup> See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 19 (N.Y. 2006) (Graffeo, J., concurring) (“The precedent establishes that gender discrimination occurs when men and women are not treated equally and one gender is benefited or burdened as opposed to the other.”); *id.* at 20 (“[N]either men nor women are disproportionately disadvantaged or burdened by the fact that New York’s Domestic Relations Law allows only opposite-sex couples to marry—both genders are treated precisely the same way. As such, there is no gender classification triggering intermediate scrutiny.”).

<sup>126</sup> *Id.* at 10; *Conaway*, 932 A.2d at 598 (“The limitations on marriage effected by Family Law § 2-201 [the Maryland law that prohibited same-sex marriage] do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class.”).

<sup>127</sup> NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 100 (2000) (“Most often, supporters argued that the federal civil rights legislation would not touch antimiscegenation laws because the laws constrained whites and blacks equally. A black person could not marry a white; but neither could a white marry a black.”) (citing Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 319–23 (1995) (calling this usual justification the doctrine of “symmetrical equality”)).

<sup>128</sup> Hunter, *supra* note 71, at 401–02. See, e.g., *Hernandez*, 855 N.E.2d at 19–20 (Graffeo, J., concurring) (asserting that New York’s Domestic Relations Law burdens both sexes equally).

<sup>129</sup> 106 U.S. 583 (1883).



“racess are treated equally” argument. Justice Stephen Johnson Field opined that the statutory scheme did not impose

any discrimination against either race. [The Alabama criminal code] equally includes the offence when the persons of the two sexes are both white and when they are both black . . . [and] applies the same punishment to both offenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.<sup>130</sup>

The *Pace* opinion was seen as validating all state miscegenation laws.<sup>131</sup> The United States Supreme Court’s position was in line with several state supreme courts that had previously invoked the equal application theory to uphold their miscegenation laws against constitutional attack.<sup>132</sup> As long as state laws against interracial marriage, fornication, and cohabitation applied to, and punished, equally the white and the black participant, *Pace* and its state court counterparts held that these race-specific laws did not discriminate based on race and, thus, did not violate the Equal Protection Clause. While the opinion proved controversial,<sup>133</sup> the Supreme Court waited over 80 years to

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<sup>130</sup> *Id.* at 585.

<sup>131</sup> See, e.g., PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 269 (2009) (“Every southern court that upheld its state miscegenation law—the Supreme Court of Virginia in 1955, the Supreme Court of Louisiana in 1959, and the Supreme Court of Florida in 1963—had cited *Pace* in doing so.” (citing *McLaughlin v. State*, 153 So. 2d 1, 2 (Fla. 1963); *State v. Brown*, 108 So. 2d 233, 234 (La. 1959); *Naim v. Naim*, 87 S.E. 2d 749, 754 (Va. 1955)); Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 49 (1964) (referring to *Pace* as “the only precedent that has been consistently cited by courts in upholding these [miscegenation] statutes”).

<sup>132</sup> See, e.g., *State v. Jackson*, 80 Mo. 175, 177 (1883) (“The act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons.”); *Green v. State*, 58 Ala. 190, 195 (1877) (“[S]urely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only.”); *Lonas v. State*, 50 Tenn. 287, 299 (1871) (“If the males of one race had the right to appropriate the females of the other, while that right was denied to the males of the other race, there might be some foundation for the charge of discrimination.”); *State v. Hairston*, 63 N.C. 439, 440 (1869) (“[T]he intermarriage of whites and blacks is against public policy, and is unlawful. . . . It is no discrimination in favor of one race against the other, but applies equally to both.”).

<sup>133</sup> See John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 How. L.J. 15, 36 (2007) (“*Pace* wreaked much havoc in lower courts.”).

repudiate its holding in *Pace*, and in the meantime, state courts followed this approach to upholding miscegenation statutes.<sup>134</sup>

In 1964, in *McLaughlin v. Florida*,<sup>135</sup> the Supreme Court considered the constitutionality of a Florida statute that punished by imprisonment “[a]ny negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room.”<sup>136</sup> The Florida Supreme Court had upheld the constitutionality of the statute based on the authority of *Pace*.<sup>137</sup> Before the Supreme Court, the State of Florida again argued that because the law applied equally to white people and black people, it did not constitute racial discrimination.<sup>138</sup> The Justices acknowledged the “equal application” theory accepted in *Pace*, observing that the 1883 Court had held that “the Alabama law regulating the conduct of both Negroes and whites satisfied the Equal Protection Clause since it *applied equally* to and among the members of the class . . . . Because each of the Alabama laws *applied equally* to those to whom it was applicable, the different treatment accorded interracial and intraracial couples was irrelevant.”<sup>139</sup> The *McLaughlin* Court also conceded that the Florida law entailed equal application across races to the extent that “all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty.”<sup>140</sup> The Justices, however, looked beyond the facile “equal application” argument and noted that the Florida law “treats the interracial couple made up of a white person and a Negro differently than it does any other couple.”<sup>141</sup> The Justices repudiated the *Pace* opinion, noting that it “represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.”<sup>142</sup> The Supreme Court applied heightened scrutiny—because the Florida statute classified and punished the members of a couple based on their race—and held that the law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>143</sup> Although the State of Flor-

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<sup>134</sup> See, e.g., *Jackson v. City of Denver*, 124 P.2d 240, 241 (Colo. 1942) (“There is here no question of race discrimination. The statute applies to both white and black.”); *In re Paquet’s Estate*, 200 P. 911, 913 (Or. 1921) (“It will be noted that the statute does not discriminate. It applies alike to all persons, either white, negroes, Chinese, Kanaka, or Indians.”).

<sup>135</sup> 379 U.S. 184 (1964).

<sup>136</sup> *Id.* at 184 (quoting section 798.05 of the Florida statutes, F.S.A.).

<sup>137</sup> *Id.* at 187 (citing *Pace v. Alabama*, 106 U.S. 583 (1883)).

<sup>138</sup> *Id.* at 187–88.

<sup>139</sup> *Id.* at 189–90 (emphasis added).

<sup>140</sup> *Id.* at 188.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 191–94.

ida attempted to justify its race-based anti-cohabitation law as ancillary to its miscegenation law, the Supreme Court rejected this argument while declining to “reach[ ] the question of the validity of the State’s prohibition against interracial marriage.”<sup>144</sup>

After it dodged the broader issue in *McLaughlin*, the Court addressed the constitutionality of miscegenation laws three years later in *Loving v. Virginia*.<sup>145</sup> When the State of Virginia convicted Richard and Mildred Loving of violating that state’s miscegenation statute, the couple challenged the law as violating the Equal Protection Clause.<sup>146</sup> The Virginia courts upheld the law as constitutional.<sup>147</sup> In front of the United States Supreme Court, the State of Virginia argued that its miscegenation regime did not discriminate based on race because “its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage.”<sup>148</sup> Writing for a unanimous Court, Chief Justice Earl Warren “reject[ed] the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”<sup>149</sup> The fact that the challenged law made the exercise of rights a function of an individual’s race meant that the law was subject to strict scrutiny, regardless of whether this racial restriction “appl[ied] equally” to all races.<sup>150</sup> The *Loving* Court invoked its earlier opinion in *McLaughlin*, noting that it had “rejected the proposition that . . . the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.”<sup>151</sup> Thus, with respect to Step One of equal protection analysis, the Court rejected the “equal application” theory and concluded that miscegenation laws represented a racial classification and were thus subject to strict scru-

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<sup>144</sup> *Id.* at 195.

<sup>145</sup> 388 U.S. 1, 10 (1967).

<sup>146</sup> *Id.* at 2–4.

<sup>147</sup> *Id.* at 3–4.

<sup>148</sup> *Id.* at 8; *see also* *Conaway v. Deane*, 932 A.2d 571, 601 (Md. 2007) (“In *Loving*, the issue before the Court was the constitutionality of a Virginia statutory scheme prohibiting marriage between non-Caucasians and Caucasians, and providing for criminal penalties for violations. In support of the statute, the State of Virginia argued that, even though reference was made to race in determining who was entitled to marry, it punished equally both participants in the interracial marriage.”).

<sup>149</sup> *Loving*, 388 U.S. at 8.

<sup>150</sup> *Id.* at 8, 11.

<sup>151</sup> *Id.* at 10 (citing *McLaughlin v. State of Florida*, 379 U.S. 184 (1964)).

tiny.<sup>152</sup> The court then proceeded to Step Three and concluded that miscegenation laws failed strict scrutiny.<sup>153</sup>

In short, the *Loving* Court explicitly held that if a law determines what people may do based on a particular trait, then that law classifies people based on that trait. This is consistent with the Court's opinion in *McLaughlin*, which too "stands for the proposition (which should be obvious even without judicial support) that if a statute defines prohibited conduct by reference to a characteristic, then the statute is not neutral with respect to that characteristic."<sup>154</sup>

Not surprisingly, judges who have rejected the "equal application" argument in the Step One analysis—and found gender-specific marriage laws to represent sex-based classifications subject to heightened scrutiny—have invoked *Loving*.<sup>155</sup> For example, the dissent in the Maryland case noted that a gender-specific marriage law "classifies on the basis of sex . . . . Just as in *Loving*, it is the *nature of the classifications themselves* that implicates strict scrutiny."<sup>156</sup> While *Loving* would seem to preclude acceptance of the equal application theory, Part III examines how courts have evaded *Loving's* holding.

<sup>152</sup> *Id.* at 11.

<sup>153</sup> *Id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

<sup>154</sup> Koppelman, *supra* note 72, at 151; see also Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 523 (2001) [hereinafter Koppelman, *Defending the Sex Discrimination Argument*] (citing *McLaughlin* as an example of a racial classification being sufficient to merit heightened scrutiny, regardless of legislative motive or proof of harm).

<sup>155</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) ("Instead, the *Loving* court held that '[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race [where the] statutes proscribe generally accepted conduct if engaged in by members of different races.'" (quoting *Loving*, 388 U.S. at 11)); see also *Conaway v. Deane*, 932 A.2d 571, 685 (Md. 2007) (Battaglia, J., dissenting) ("*Loving* involved the State assertion of an analogous allegedly neutral, generally applicable statute prohibiting miscegenation. . . . The Court applied strict scrutiny to the Virginia statute despite its ostensibly equal application to both races.").

<sup>156</sup> *Conaway*, 932 A.2d at 686 (Battaglia, J., dissenting). Similarly, in challenging Washington state's then-prohibition against same-sex marriage, the plaintiffs relied on that state's equal rights amendment, which provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Wash. Const. art. XXXI, § 1. While the Washington Supreme Court's prevailing plurality and concurrence accepted the "equal application" theory in holding that gender-specific marriage laws did not discriminate based on sex, the dissent noted that "this equal application theory, as applied to the institution of marriage, has already been rejected by the United States Supreme Court in *Loving*." *Andersen v. King Cnty.*, 138 P.3d 963, 1038 (Wash. 2006) (Bridge, J., dissenting).

## III

THE FLAWED EFFORTS TO DISTINGUISH *LOVING*

Because *Loving* repudiated the equal application theory when evaluating Step One of an equal protection claim, judges who are determined to evade heightened scrutiny based on gender have sought to distinguish *Loving*. Indeed, almost every court to reject the sex discrimination argument for heightened scrutiny of gender-specific marriage laws has asserted that *Loving* is “inapt,”<sup>157</sup> “inapposite,”<sup>158</sup> or “not analogous,”<sup>159</sup> such that any “reliance [on *Loving*] is misplaced.”<sup>160</sup> In their attempts to distinguish *Loving*, courts have advanced several related arguments. This Part discusses each of these arguments and explains why they are incorrect.<sup>161</sup>

## A. Discriminatory Intent: Confusing Classification with Analysis

The primary argument that courts use to distinguish *Loving* is that the 1967 opinion is concerned solely with white supremacy and, therefore, is irrelevant to determining whether heightened scrutiny is appropriate because gender-specific marriage laws classify people based on sex. These courts suggest that the only reason that the

<sup>157</sup> *Conaway*, 932 A.2d at 599–600.

<sup>158</sup> *Id.* at 601.

<sup>159</sup> *Andersen*, 138 P.3d at 989.

<sup>160</sup> *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999); *see also In re Marriage Cases*, 183 P.3d 384, 437 (Cal. 2008) (stating that *Loving* is “clearly distinguishable”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 503 n.26 (Conn. 2008) (Borden, J., dissenting) (arguing that the *Loving* case and a case challenging gender-specific marriage laws “are in no way similar”).

<sup>161</sup> Some attempts to distinguish *Loving* are transparently frail. Several courts have held that the holdings of *Loving* are inapplicable to equal protection challenges to gender-specific marriage laws because *Loving* did not involve a same-sex couple. *See, e.g., Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1097 (D. Haw. 2012) (stating that *Loving* “did not involve expanding the traditional definition of marriage as being between a man and a woman” and that “[t]his case presents a different right, the right to marry someone of the same sex”); *see also Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006) (“We add that all of the United States Supreme Court cases cited by plaintiffs, *Loving*, *Turner*, and *Zablocki*, involved heterosexual couples seeking access to the right to marriage and did not implicate directly the primary question to be answered in this case.”). For example, in his dissent in *Baehr*, Hawaiian Supreme Court Justice Heen argued that *Loving* was distinguishable because “the plaintiff in *Loving* was not claiming a right to a same sex marriage.” *Baehr v. Lewin*, 852 P.2d 44, 70 (Haw. 1993) (Heen, J., dissenting). Justice Heen’s reasoning betrays a fundamental misunderstanding of how constitutional law works. Published opinions stand for legal principles that are applied to future litigants in cases involving different fact patterns. The Supreme Court has explicitly cautioned against courts refusing to recognize the rights of gay Americans by declining to apply the holdings of cases not involving gay individuals. *Lawrence v. Texas*, 539 U.S. 558, 566–67 (2003). The *Loving* Court unanimously held that if the marriage law is trait specific, then it classifies people based on that trait and, consequently, heightened scrutiny applies if classification on the basis of that trait is suspect. The fact that Richard and Mildred Loving were of opposite genders is irrelevant to the *Loving* Court’s unqualified rejection of equal application theory. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967).

*Loving* Court rejected the equal application theory was because the challenged statute sought to perpetuate white supremacy.<sup>162</sup> For example, the Vermont Supreme Court held that its gender-specific marriage law did not classify based on gender, distinguishing *Loving* because “the high court [in *Loving*] had little difficulty in looking behind the superficial neutrality of Virginia’s anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy.”<sup>163</sup> Those judges determined to distinguish *Loving* asserted that the miscegenation law in that case was subject to strict scrutiny *because* the law had a discriminatory—anti-black—purpose.<sup>164</sup> To date, the state supreme courts of California, Massachusetts, Vermont, New York, Washington, and Maryland—as well as various lower-level state and federal courts—have distinguished *Loving* in order to hold that gender-specific marriage laws do not receive heightened scrutiny based on sex discrimination because the purpose of miscegenation laws was to perpetuate white supremacy.<sup>165</sup>

Several of these courts gave particular weight to the fact that the Virginia miscegenation statute focused solely on interracial marriages where either the bride or groom was white. These courts highlighted the fact that the *Loving* Court noted in a footnote that “[w]hile Virginia prohibits whites from marrying any nonwhite . . . , Negroes, Orientals, and any other racial class may intermarry without statutory interference.”<sup>166</sup> This suggested an overarching desire by legislators to “protect” the white race without regard to interracial marriage among nonwhite participants.<sup>167</sup> For example, the California Su-

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<sup>162</sup> See *Conaway*, 932 A.2d at 601 (“[T]he Court in *Loving* determined that, although the statute applied on its face equally to all races, the underlying purpose was to sustain White Supremacy and to subordinate African-Americans and other non-Caucasians as a class.”).

<sup>163</sup> *Baker*, 744 A.2d at 880 n.13.

<sup>164</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 992 (Mass. 2003) (Cordy, J., dissenting) (“The statute’s legislative history demonstrated that its purpose was not merely to punish interracial marriage, but to do so for the sole benefit of the white race. . . . Consequently, there was a fit between the class that the law was intended to discriminate against (nonwhite races) and the classification enjoying heightened protection (race).”); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (“[T]he statute there [in *Loving*], prohibiting black and white people from marrying each other, was in substance anti-black legislation.”); *Andersen*, 138 P.3d 963, 989 (Wash. 2006) (“In *Loving* the Court determined that the purpose of the antimiscegenation statute was racial discrimination . . .”).

<sup>165</sup> *In re Marriage Cases*, 183 P.3d at 437; *Goodridge*, 798 N.E.2d at 975; *Hernandez*, 855 N.E.2d at 11; *Baker*, 744 A.2d at 880 n.13; *Andersen*, 138 P.3d at 989; see also *Kerrigan*, 957 A.2d at 503 n.26 (Borden, J., dissenting) (asserting that *Loving* is irrelevant in case challenging gender-specific marriage law because “the court in *Loving* correctly determined that the antimiscegenation statute in question there was clearly aimed at the perpetuation of white supremacy”).

<sup>166</sup> *Conaway*, 932 A.2d at 601 (quoting *Loving*, 388 U.S. at 11 n.11).

<sup>167</sup> See *id.*

preme Court<sup>168</sup> sought to distinguish *Loving* and *Perez*—the California Supreme Court case invalidating that state’s miscegenation statute—“because the antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons.”<sup>169</sup> Both *Loving* and *Perez* mentioned the perceived need to “protect” the white race from intermarriage.<sup>170</sup> Similarly, the Maryland Supreme Court emphasized “‘[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that [these were] . . . measures designed to maintain White Supremacy.’”<sup>171</sup>

Attempts to distinguish *Loving*’s heightened scrutiny holding because miscegenation laws—unlike gender-specific marriage laws—were motivated by a racist desire to perpetuate white supremacy are fatally flawed for three reasons: one legal, one factual, and another practical. First, distinguishing *Loving* because miscegenation laws were motivated by white supremacy confuses Step One and Step Three of equal protection analysis. In Step One, the court asks whether the challenged law classifies people based on a trait (such as race or gender), which will determine the level of scrutiny in Step Two. In Step Three, the court determines whether the challenged law survives the appropriate level of scrutiny. When advocates for marriage equality request heightened scrutiny, they are asking courts to recognize that for the purposes of Step One, gender-specific marriage laws classify based on gender, a suspect classification. When the challenged statute contains the classification in its text, Step One is performed by simply reading the statute.<sup>172</sup> When courts in same-sex marriage cases focus on the improper motivation behind miscegenation laws in order to determine what level of scrutiny applies, judges are confusing the level of scrutiny with the government’s interest in creating the challenged classification, which is part of the Step Three analysis.

In both the *McLaughlin* and *Loving* opinions, a unanimous Supreme Court treated Step One and Step Three as separate inquiries. The *McLaughlin* Court followed the traditional process of equal protection analysis. With respect to Step One, the Justices noted that they

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<sup>168</sup> The California Supreme Court distinguished *Loving* and *Perez* to say that gender-specific marriage laws involve sexual orientation discrimination, not sex discrimination. See *In re Marriage Cases*, 183 P.3d at 437. The court held that the state’s prohibition on same-sex marriage did not constitute sex discrimination but did violate the state equal protection clause by unconstitutionally discriminating based on sexual orientation.

<sup>169</sup> *Id.* The court quoted the language from *Loving* noting that Virginia’s miscegenation statute “prohibit[ed] only interracial marriages involving white persons.” *Id.*

<sup>170</sup> See *Loving*, 388 U.S. at 11; *Perez v. Lippold*, 198 P.2d 17, 23 (Cal. 1948).

<sup>171</sup> *Conaway*, 932 A.2d at 601 (quoting *Loving*, 388 U.S. at 11).

<sup>172</sup> See *id.* at 685 (recognizing the “threshold question of facial neutrality”).

were “deal[ing] . . . with a classification based upon the race of the participants.”<sup>173</sup> After establishing that the Florida statute presented a racial classification, the Supreme Court then proceeded to ask “whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise.”<sup>174</sup> The Court ultimately concluded that the Florida law failed Step Three.<sup>175</sup>

The *Loving* Court also followed the three-step process for analyzing equal protection claims. With respect to Step One, in the first sentence of his opinion for a unanimous court, Chief Justice Warren described Virginia’s statutory scheme as one based on “racial classifications.”<sup>176</sup> In applying Step One, the *Loving* Court did not hold that miscegenation laws constitute racial classification *because* they assume and perpetuate white supremacy.<sup>177</sup> Rather, the Court observed that miscegenation laws constitute racial classification because they classify people and regulate their conduct based on their race.<sup>178</sup> Proceeding to Step Two, although the State of Virginia argued that the Court should apply rational basis review when conducting its equal protection analysis,<sup>179</sup> the Court rejected the State’s plea<sup>180</sup> because “[a]t the

<sup>173</sup> *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964); *see also id.* at 192 (“We deal here with a racial classification embodied in a criminal statute.”).

<sup>174</sup> *Id.* at 192. *See* Koppelman, *Defending the Sex Discrimination Argument*, *supra* note 154, at 523 (“*McLaughlin* did not rely on any claims whatsoever about the motive for the law or about the class that was harmed by the law. It simply noted that there was a racial classification and applied heightened scrutiny. The sex discrimination argument for protecting gays from discrimination requires nothing more.”); *see also* Clark, *supra* note 13, at 120 (“[T]he *McLaughlin* repudiation of the single-standard counterargument should equally repudiate the same counterargument as used to challenge the claim that discrimination against same-sex couples or lesbians and gay men classifies on the basis of sex.”).

<sup>175</sup> *McLaughlin*, 379 U.S. at 196 (“Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.”); *see also id.* at 197–98 (Harlan, J., concurring) (“If, however, the interracial cohabitation statute is considered to rest upon a discrete state interest, existing independently of the antimarriage law, it falls of its own weight.”); *id.* at 198 (Stewart, J., concurring) (“I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person’s skin the test of whether his conduct is a criminal offense.”).

<sup>176</sup> *Loving*, 388 U.S. at 2.

<sup>177</sup> Clark, *supra* note 13, at 150 (“Warren did not reason that racial classifications in general or the classification in *Loving* in particular required strict scrutiny *because* they were invidious or subordinating.”) (emphasis in original).

<sup>178</sup> *See Loving*, 388 U.S. at 11 (“There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.”).

<sup>179</sup> *Id.* at 8.

<sup>180</sup> *Id.* (“[W]e do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.”).



very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny.’”<sup>181</sup>

Only after the *Loving* Court moved on to Step Three of equal protection analysis did the Justices examine the purpose behind Virginia’s miscegenation statute. The Court began its Step Three inquiry into the law’s purpose by noting that if racial classifications “are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”<sup>182</sup> Only in its Step Three application did the *Loving* Court mention white supremacy. In determining that the miscegenation statute did not survive strict scrutiny, Chief Justice Warren concluded, “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”<sup>183</sup> The Court then condemned Virginia’s miscegenation regime “as measures designed to maintain White Supremacy.”<sup>184</sup>

The fact that the *Loving* Court struck down Virginia’s miscegenation laws because they were based on white supremacy had nothing to do with its determination in Step One that miscegenation laws represented a classification based on race and thus heightened scrutiny was required. The Justices applied strict scrutiny because the law included a racial classification (Step One), which required strict scrutiny (Step Two), and then the Court struck down the law for lacking a legitimate purpose (Step Three).<sup>185</sup>

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<sup>181</sup> *Id.* at 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)); *id.* at 9 (“In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”); *see also* Clark, *supra* note 13, at 150–51 (“Warren concluded that racial classifications, as such, required strict scrutiny in order to *determine* whether they were invidious. Mere classification on the basis of race alone triggered strict scrutiny. *McLaughlin v. Florida* was even clearer on this point.”) (emphasis in original).

<sup>182</sup> *Loving*, 388 U.S. at 11.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* That the Court’s discussion of the link between miscegenation laws and white supremacy is part of the Step Three analysis is also clear from the *Loving* Court’s review of the earlier Virginia precedent. In 1955, in *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), the Supreme Court of Appeals of Virginia upheld the constitutionality of miscegenation laws. The Supreme Court in *Loving* reasoned that what the Virginia state court characterized as “legitimate purposes”—namely “‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride’”—were nothing more than “an endorsement of the doctrine of White Supremacy.” *Loving*, 388 U.S. at 7. The *Loving* Court essentially held that the miscegenation statute in *Naim* could not survive Step Three analysis because the racial classification did not further a legitimate state purpose but instead merely perpetuated the racist theory of white supremacy. *See id.* at 7–8.

<sup>185</sup> *See* Widiss, Rosenblatt & NeJaime, *supra* note 71, at 486–87 (noting that these are separate steps).

Yet even for the purposes of Step Three, the intent to perpetuate white supremacy is not necessary for race-specific laws to violate Equal Protection. Attempts to distinguish *Loving* by focusing on the intent behind miscegenation laws must fail because the *Loving* “Court reached its holding independently of the issue of discriminatory intent . . . , ‘find[ing] the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the “integrity” of all races.’”<sup>186</sup> Post-*Loving* racial classifications are analyzed under strict scrutiny regardless of whether the challenged law suggests that one race is superior or inferior to another.<sup>187</sup> In short, *Loving*’s holding that rejects the use of “equal application theory” during Step One of equal protection analysis is completely independent of the Court’s later discussion of white supremacy. Thus, courts in same-sex marriage cases are precluded from using equal application theory to deny heightened scrutiny of gender-specific marriage laws.

Second, courts that distinguish *Loving* by contrasting the underlying purposes of miscegenation laws and gender restrictions in marriage incorrectly assume that gender-specific marriage statutes are facially neutral. Most courts that uphold gender-specific marriage laws look for an improper discriminatory purpose when performing Step One.<sup>188</sup> This approach is unsound because if a law facially contains a trait-based classification that is suspect—be it race, gender, or another suspect classification—discriminatory intent does not matter for Step One.<sup>189</sup> The appropriate level of scrutiny is determined by reference to the trait specified in the classification. In non-marriage cases, courts consistently hold that the purpose of a racial classification does not determine the level of scrutiny.<sup>190</sup> Discriminatory intent is irrelevant when the challenged statute contains the racial classification in its text because all racial classifications receive strict scrutiny,

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<sup>186</sup> *Conaway v. Deane*, 932 A.2d 571, 685 (Md. 2007) (quoting *Loving*, 388 U.S. at 11 n.11).

<sup>187</sup> See, e.g., *Johnson v. California*, 543 U.S. 499, 509 (2005) (racial segregation of prisoners faced strict scrutiny even though there was no implication that the segregation was based on any notion that one race of prisoners was superior to another).

<sup>188</sup> See, e.g., *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) (“The issue turns upon the alleged discriminatory intent behind the challenged laws, which is the *sine qua non* of a claim of unconstitutional discrimination.”).

<sup>189</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”).

<sup>190</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Classifications based on race . . . are given the most exacting scrutiny.” (citing *Loving*, 388 U.S. at 11)); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 21 (Cal. Ct. App. 2001) (“The strict scrutiny standard of review applies regardless of whether a law is claimed to be benign or remedial, regardless of the race of those burdened or benefited by a particular classification, and regardless of whether the law may be said to benefit and burden the races equally.” (citations omitted)).

not just classifications based on race with a purpose to injure one of the enumerated races.<sup>191</sup> The statute in *Loving* received strict scrutiny because it contained a racial classification; that statute failed strict scrutiny because the classification existed for improper purposes.<sup>192</sup> The improper purpose of a law that has a facial racial classification does not trigger strict scrutiny; the facial racial classification itself does. Only if a law is facially neutral with respect to the challenged classification does the court ask during Step One of equal protection analysis whether the law nonetheless serves a discriminatory purpose in order to determine whether heightened scrutiny is appropriate.

By insisting that they must look for an improper discriminatory purpose when performing Step One analysis, courts consistently describe prohibitions against same-sex marriage as “facially gender-neutral statute[s].”<sup>193</sup> This represents an extreme factual mischaracterization of the laws being challenged. A gender-specific marriage statute is *by definition* not gender-neutral. For a statute to be truly gender-neutral, at a minimum, it must not make rights dependent on gender. Yet gender-specific marriage laws, by definition, mention gender as they prohibit men from marrying men, as well as women from marrying women. To call this statutory scheme “facially gender-neutral” strains credulity.

In short, some courts have incorrectly looked for discriminatory intent during the Step One analysis because they have improperly treated gender-specific marriage laws as gender-neutral. But intent is irrelevant during the Step One analysis because gender-specific marriage laws contain a gender-based classification on their face.<sup>194</sup> This automatically triggers heightened scrutiny.

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<sup>191</sup> *City of Richmond*, 488 U.S. at 500; *Clark*, 488 U.S. at 461; *Connerly*, 112 Cal. Rptr. 2d at 21; see also Mark Strasser, *Interpretations of Loving in Lawrence, Baker, and Goodridge: On Equal Protection and the Tiers of Scrutiny*, 13 WIDENER L.J. 859, 870 (2004) (“Express classifications on the basis of race will trigger strict scrutiny even where there is no malicious purpose behind the classification.”).

<sup>192</sup> See *Loving*, 388 U.S. at 11–12 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

<sup>193</sup> See, e.g., *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012) (“Section 572–1 does not treat males and females differently as a class. It is gender-neutral on its face; it prohibits men and women equally from marrying a member of the same-sex.”); *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (describing its gender-specific marriage regime as “a facially gender-neutral statute”); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (describing DOMA as facially gender neutral); see also *Sevcik*, 911 F. Supp. 2d at 1004 (“[O]ne Defendant argues that the State has drawn no distinction at all because the laws at issue are facially neutral with respect to both gender and sexual orientation.”).

<sup>194</sup> *Conaway v. Deane*, 932 A.2d 571, 686 (Md. 2007) (Battaglia, J., dissenting) (“Manifestly, [Maryland’s gender-specific marriage law] classifies on the basis of sex; because it would be necessary to consider the underlying legislative intent only if the same-sex marriage ban did not draw sex-based distinctions, the question of legislative intent is irrelevant. Just as in *Loving*, it is the *nature of the classifications themselves* that implicates strict scrutiny.”).

Third, attempts to construe the *Loving* Court's use of heightened scrutiny as a function solely of the evils of white supremacy would fundamentally undermine the thrust and import of the decision. Some modern judges fail to acknowledge that states often asserted interests in miscegenation laws separate from white supremacy. Southern states, such as North Carolina, claimed to be protecting the racial integrity of all races, not just the white race. In its amicus brief in the *Loving* case, the State of North Carolina argued: "If a state feels like the life of its people is better protected by a policy of racial integrity as to *both races*, or for any other race for that matter, then it has the right to legislate in such field."<sup>195</sup> Several state supreme courts upheld the constitutionality of their miscegenation laws by asserting that the laws did not target black people but instead protected them. For example, the Alabama Supreme Court asserted that "it is for the peace and happiness of the black race, as well as of the white, that such [miscegenation] laws should exist."<sup>196</sup> In upholding its miscegenation law in 1878, the Virginia Supreme Court talked about protecting "both races" and not simply the white race.<sup>197</sup> Assuming for the sake of argument that these states were telling the truth<sup>198</sup>—that they imposed a system of miscegenation laws in order to protect racial integrity of all races—this would not affect the fact that under Step One of equal protection analysis, these miscegenation regimes would be subject to strict scrutiny.<sup>199</sup>

In distinguishing *Loving's* heightened scrutiny holding, many courts in same-sex marriage cases emphasize that Virginia's miscegenation statute applied only to marriages of a white person to a

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<sup>195</sup> Brief of the State of North Carolina as Amicus Curiae at 6, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113925, at \*6 (emphasis added).

<sup>196</sup> *Green v. State*, 58 Ala. 190, 195 (1877); see also *Lonas v. State*, 50 Tenn. 287, 298 (1871) ("It is said, this is discrimination against the negro. Really, those laws were intended to repress the white race, and not the negro . . . . It was not *then* aimed especially against the blacks.").

<sup>197</sup> *Kinney v. Virginia*, 71 Va. 858, 869 (1878) ("The public policy of this state, in preventing the intercommingling of the races by refusing to legitimate marriages between them has been illustrated by its legislature for more than a century. . . . The purity of public morals, the moral and physical development of *both races*, and the highest advancement of our cherished southern civilization . . . all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." (emphasis added)). Advocates of this position could find supporting evidence in the fact that many black Americans opposed interracial marriage. See PASCOE, *supra* note 131, at 183 (evaluating the NAACP's worries "that Blacks might actually support miscegenation laws" and considering that "[y]et this was the prospect that arose in the mid-1920s, when a growing number of African Americans responded to the surging political power of calls for white racial purity by advancing an offsetting program of black racial purity").

<sup>198</sup> I do not believe this to be the case.

<sup>199</sup> Under Step Three of equal protection analysis, North Carolina's miscegenation statute, thus defended, would still necessarily fail to survive strict scrutiny.

nonwhite person.<sup>200</sup> Yet not all miscegenation laws were limited to invalidating only those interracial marriages involving a white participant. For example, the State of North Carolina submitted an amicus brief in *Loving* in order to defend its miscegenation statute that declared void:

All marriages between a white person and a Negro or between a white person and a person of Negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a Negro, or between a Cherokee Indian of Robeson County and a person of Negro descent to the third generation, inclusive. . . .<sup>201</sup>

The argument that *Loving* only found an illegal racial classification because the Virginia law furthered the theory of white supremacy would suggest that the North Carolina law voiding marriages “between a Cherokee Indian . . . and a Negro” would not be subject to heightened scrutiny. Yet despite the fact that some provisions of miscegenation statutes were not motivated by white supremacy, the *Loving* decision invalidated these miscegenation statutes under strict scrutiny as well. Any other reading of *Loving* would be absurd. Indeed, if the motivation of perpetuating white supremacy is the requirement under *Loving*, presumably a modern miscegenation law that barred marriages only between different nonwhite races would not get strict scrutiny. It is hard to believe that any judge would think that this is a proper reading of *Loving*. Yet judges use this misconception of *Loving* when evaluating challenges to gender-specific marriage laws in order to prevent application of heightened scrutiny.

## B. Group Rights Versus Individual Rights

Second, many courts that distinguish *Loving*'s rejection of the equal application theory do so by treating the right to marry as a group right. They assert that *Loving* invalidated miscegenation laws because these statutes infringe the constitutional rights of black Americans *as a group*. Judges then attempt to contrast gender-specific marriage laws as not discriminating against men or women as a group. For example, courts have held *Loving* inapplicable because whereas the miscegenation statute constituted “anti-black legislation,” gender-specific marriage laws are not “designed to subordinate either men to

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<sup>200</sup> See *supra* notes 165–71 and accompanying text.

<sup>201</sup> Brief of the State of North Carolina as Amicus Curiae, *supra* note 195, at 2 (quoting N.C. GEN. STAT. § 51-3 (1965)). North Carolina's criminal component of its miscegenation laws, however, appears limited to “marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive.” N.C. GEN. STAT. § 14-181 (1951) (volume 1B).

women or women to men *as a class*.”<sup>202</sup> Courts assert that this distinguishes *Loving*.<sup>203</sup> These opinions then make the analytical leap that unless a marriage ban’s “purpose is to discriminate against men or women *as a class* . . . [it] does not classify according to gender.”<sup>204</sup> Moreover, those courts that adopt the “equal application theory” to hold that same-sex marriage bans do not classify or discriminate based on sex frequently frame the issue as exclusively about group rights, not individual rights.<sup>205</sup>

This group-based analysis to determine whether a particular classification has taken place for Step One purposes is inappropriate because as a matter of law, the rights at issue are individual rights, not group rights.<sup>206</sup> In miscegenation cases, courts treated the right to marry as an individual right. In holding that Virginia’s miscegenation statute violated the Fourteenth Amendment, the *Loving* Court noted that “[t]he freedom to marry has long been recognized as one of the vital *personal* rights essential to the orderly pursuit of happiness by free

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<sup>202</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (emphasis added); *see, e.g.*, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) (asserting an absence of gender classification because laws prohibiting same-sex marriage “are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived”); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1071 (D. Haw. 2012) (“Plaintiffs’ equal protection claim is also subject to rational basis review. Hawaii’s marriage laws do not treat males and females differently as a class; consequently, the laws do not discriminate on the basis of gender.”); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (“DOMA, however, does not single out men or women as a discrete class for unequal treatment . . . . Women, as members of one class, are not being treated differently from men, as members of a different class. . . . There is no evidence, from the voluminous legislative history or otherwise, that DOMA’s purpose is to discriminate against men or women *as a class*.” (emphasis added)); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 509 (Conn. 2008) (Borden, J., dissenting) (same); *Andersen v. King Cnty.*, 138 P.3d 963, 989 (Wash. 2006) (same).

<sup>203</sup> *Hernandez*, 855 N.E.2d at 10–11 (“Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*.”). Why race-specific marriage laws represent “sham equality” while gender-specific marriage laws do not is left unexplained.

<sup>204</sup> *In re Kandu*, 315 B.R. at 143 (emphasis added); *see also Andersen*, 138 P.3d at 989 (quoting *Hernandez*, 855 N.E.2d at 11.).

<sup>205</sup> *Conaway v. Deane*, 932 A.2d 571, 599 (Md. 2007) (“Appellees counter the ‘equal application theory’ by stating that the proper inquiry in this case is not whether Family Law § 2–201 singles out one sex or the other as a discrete class for disparate treatment. Rather, because constitutional rights are individual rights, the same-sex couples posit that this Court should examine how the legislative enactment affects individually each person seeking to marry.”). Dissenting in the Washington Supreme Court case, Justice Bridge noted “the equal application theory at its core, depends upon the assumption that the ERA was intended to prohibit only broad-based discrimination on the basis of sex without regard for individual impacts.” *Andersen*, 138 P.3d at 1039 (Bridge, J., dissenting).

<sup>206</sup> Even at the group level, the argument is flawed. In the context of miscegenation laws, there was something that whites as a group could do that nonwhites could not: marry other whites. Similarly in the context of gender-specific marriage laws, there is something that men can do that women cannot: marry women.

men.”<sup>207</sup> It further concluded that “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race *resides with the individual* and cannot be infringed by the State.”<sup>208</sup> The Court could not have been clearer that the rights at stake were individual rights, not the rights of a class. Similarly, the California Supreme Court’s decision in *Perez v. Lippold*,<sup>209</sup> the first opinion to strike down a miscegenation law as unconstitutional, held that “[t]he right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals.”<sup>210</sup> Subsequent U.S. Supreme Court opinions in non-miscegenation cases have emphasized that “the right to marry is of fundamental importance for all individuals.”<sup>211</sup>

This judicial focus in the miscegenation cases on individual rights, not group rights, is consistent with equal protection law more broadly. In *Shelley v. Kraemer*,<sup>212</sup> the Court held that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”<sup>213</sup> In the context of racial classifications, the Supreme Court has long held that “[b]ecause the Fourteenth Amendment ‘protect[s] persons, not groups,’ all ‘governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.”<sup>214</sup> Similarly, in non-race equal protec-

<sup>207</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasis added).

<sup>208</sup> *Id.* (emphasis added).

<sup>209</sup> 198 P.2d 17 (Cal. 1948).

<sup>210</sup> *Id.* at 20 (“In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups.”); *see also id.* at 19 (“Since the right to marry is the right to join in marriage with the person of one’s choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry.”).

<sup>211</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

<sup>212</sup> 334 U.S. 1 (1948).

<sup>213</sup> *Id.* at 22; *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (quoting *Shelley*, 334 U.S. at 22) (stating that “[i]t is settled beyond question” that the rights created by the Fourteenth Amendment are personal rights guaranteed to the individual).

<sup>214</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (emphasis in original) (citation omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (internal quotation marks omitted)); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 742–43 (2007) (stating that “the Equal Protection Clause ‘protect[s] *persons*, not *groups*’” (quoting *Adarand*, 515 U.S. at 227)); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (“[O]ur Constitution protects each citizen as an individual, not as a member of a group.”); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 22 (Cal. Ct. App. 2001) (“In applying the strict scrutiny test, it must be remembered that the rights created by the Equal Protection Clause are not group rights; they are personal rights which are guaranteed to the individual.” (citations omitted)).

tion cases, the Court has recognized that equal protection claims vindicate individual rights. For example, in *Eisenstadt v. Baird*,<sup>215</sup> which challenged a state law that allowed married people but not unmarried people to access and use contraceptives, the Court did not hold that the rights of unmarried persons as a group had been infringed; rather, the individuals suffered because “the law impaired the exercise of their *personal* rights.”<sup>216</sup> Finally, and particularly relevant for our purposes, the right to be free from government-sanctioned sex discrimination is also an individual right.<sup>217</sup> Thus, whether it is the right to marry or the right to be free from racial or gender discrimination, equal protection rights belong to individuals.

Although Step One of equal protection analysis focuses on a trait shared by a group of people, the fact that an individual plaintiff belongs to a group specified in Step One does not transform the analysis into one based on group rights.<sup>218</sup> It is true that gender-specific marriage laws prevent an individual woman from marrying her female partner because she is a member of a group (women) who are all forbidden from marrying another woman. But the fact that the discrimination is visited upon an entire group of people does not negate the fact that the individual has suffered a deprivation of rights as an individual. The denial of her individual rights is not mitigated by the fact that people in another corresponding group (i.e., men) are similarly denied their individual right to marry a same-sex partner.

Like the legal battle over miscegenation laws, the current struggle for marriage equality is a battle for individual rights. The discriminatory effect of gender-specific marriage laws is suffered by the individ-

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<sup>215</sup> 405 U.S. 438 (1972).

<sup>216</sup> *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (emphasis added) (discussing *Eisenstadt*).

<sup>217</sup> See *Giffin v. Crane*, 716 A.2d 1029, 1037 (Md. 1998) (“[T]he equality between the sexes demanded by the Maryland Equal Rights Amendment focuses on ‘rights’ of *individuals* ‘under the law.’”) (emphasis added). Similarly, state ERAs

require that the rights of *any person* cannot depend on sex-based classifications, unless the State demonstrates a compelling governmental interest, and then only if the classification is narrowly tailored and precisely limited to achieving that compelling interest. . . . [T]he analysis must focus on the *individual* whose rights are infringed by the sex-based classification, because rights accrue to the *individual*, not to couples, or to some abstract group entity. We [have] emphasized that equal rights between the sexes are personal, not group, rights.

*Conaway v. Deane*, 932 A.2d 571, 682 (Md. 2007) (Battaglia, J., dissenting) (emphasis in original).

<sup>218</sup> The group membership serves a role in establishing heightened scrutiny in that gender is a suspect classification, in part, because women as a group were historically discriminated against. The individual female plaintiff does not have to prove that she as an individual was ever discriminated against in order to secure heightened scrutiny for her claim. Thus, while her membership in a group informs what level of scrutiny the court will apply, she is vindicating her individual rights and the fact that members of another group may be similarly denied their rights does not affect her equal protection claim.



ual whose government denies her the ability to marry her partner.<sup>219</sup> That effect is not lessened by a court's conclusion that despite the discrimination against her personally, women as a class are not being subordinated to men as a class by the gender-based classification of the state's marriage law. Yet when courts attempt to distinguish *Loving* by requiring discrimination against a class, they fail to appreciate that the rights at issue are individual rights, not group rights. Most importantly, the group-rights diversion is irrelevant to the simple fact that because gender-specific marriage laws make the right to marry dependent on gender, heightened scrutiny is required.

### C. The Gendered Model of Marriage

The third argument that courts have employed to distinguish *Loving* is that a facial classification is not a classification for Step One purposes unless the challenged law seeks to make the members of one classified group *inferior* to the members of another classified group. Several courts have asserted that same-sex marriage bans neither assume nor espouse the theory that one gender is inferior to another and, thus, *Loving* is distinguishable.<sup>220</sup> Many courts condemn the failure of marriage equality advocates "to show that gay and lesbian persons are excluded from marriage on account of or in order to perpetuate gender stereotyping."<sup>221</sup> For example, the Vermont Supreme Court noted a lack of evidence to "demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion."<sup>222</sup> Asserting a lack of evidence to

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<sup>219</sup> See *Conaway*, 932 A.2d at 686 (Battaglia, J., dissenting) ("[T]here is sex discrimination at the level of the *individual* who wishes to marry but is precluded from doing so because of the statute.").

<sup>220</sup> See, e.g., *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012) ("There is nothing in the legislative history or elsewhere that suggests that the purpose of [HRS] § 572-1 is to discriminate against men or women as a class."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 509 (Conn. 2008) (Borden, J., dissenting) ("The present case is distinguishable from *Loving* and *McLaughlin*. There has been no showing that the state's civil union statute was passed with the purpose of discriminating based on gender."); *Andersen v. King Cnty.*, 138 P.3d 963, 989-90 (Wash. 2006) ("[T]here is nothing in DOMA that speaks to gender stereotyping within marriage."); see also *Kerrigan*, 957 A.2d at 503 n.26 (Borden, J., dissenting) ("It cannot reasonably be contended that our marriage statutes, which have existed for centuries along with those of every other state, were aimed at perpetuating heterosexual, rather than homosexual, supremacy.").

<sup>221</sup> *Andersen*, 138 P.3d at 989; *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (noting plaintiffs' failure "to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion" and noting "that evidence is not before us").

<sup>222</sup> *Baker*, 744 A.2d at 880 n.13; see also *Conaway*, 932 A.2d at 602 ("Because there is no evidence in the record before us that the Legislature intended with Family Law § 2-201 to differentiate between men and women as classes on the basis of some misconception regarding gender roles in our society, we conclude that the ERA does not mandate that the

prove that gender-specific marriage laws are intended to discriminate against women, courts distinguish *Loving* and hold that *Loving's* rejection of the equal application theory is inapplicable in same-sex marriage cases.<sup>223</sup> These courts then rely on the equal application theory to hold that gender-specific marriage laws do not discriminate based on gender and, therefore, should not be reviewed with heightened scrutiny.<sup>224</sup>

There are fundamental flaws with this effort to distinguish *Loving* for Step One purposes. First, the argument that gender-specific marriage laws do not disadvantage one gender is irrelevant to Step One in equal protection analysis. Step One asks only whether a law classifies based on a specified trait—regardless of whether the classification disadvantages one group in particular.<sup>225</sup> If so, heightened scrutiny is applied. Because gender-specific marriage laws classify people and limit their exercise of rights based on gender, there is no need to ever consider the purposes of the classification in Step One. Heightened scrutiny should attach automatically.

Second, even allowing for the fallacy that intent matters during Step One when analyzing a trait-specific law, gender-specific marriage laws are premised on a vision of marriage that assumes women are inferior to men. Eminent scholars have already made the argument that restricting marriage to opposite-sex couples reinforces gender-based stereotypes that create a hierarchy with men above women.<sup>226</sup>

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State recognize same-sex marriage based on the analogy to *Loving*.”). Some may suggest that opposite-sex marriage predates the explicit desire to exclude same-sex couples from the institution, implying that there is a tenuous link between prohibiting marriage equality and pursuing the goal of female submission. While the male-female model of marriage has existed for centuries, the state constitutional prohibitions on same-sex marriage are all of recent vintage. These prohibitions have been championed by socially conservative legislators and special interest groups. It is these groups that seek to perpetuate a model of marriage in which wives submit to husbands.

<sup>223</sup> *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (upholding the constitutionality of DOMA and stating, “[t]here is no evidence, from the voluminous legislative history or otherwise, that DOMA’s purpose is to discriminate against men or women as a class” and “[a]ccordingly, the marriage definition contained in DOMA does not classify according to gender”).

<sup>224</sup> See, e.g., *id.* (arguing that because DOMA does not “single out men or women as a discrete class for unequal treatment” DOMA does not entitle a claimant to heightened security under the equal application theory).

<sup>225</sup> See *supra* notes 43–46 and accompanying text.

<sup>226</sup> See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES 9, 17 (1991) (“Whatever the impact that legalization of lesbian and gay marriage would have on the lives of lesbians and gay men, it has fascinating potential for denaturalizing the gender structure of marriage law for heterosexual couples.”); Koppelman, *supra* note 72, at 159–60 (“Homosexuality threatens the hierarchy of the sexes because its existence suggests that even in that realm where a person’s sex has been regarded as absolutely determinative, anatomy has less to do with destiny than one might have supposed.”); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218–21, 230–33 (discussing how many condemn homosexuality in

This section of the Article contributes to the current scholarship by showing how the opponents of marriage equality themselves envision and support a model of marriage in which wives are inferior to husbands.

The following discussion proceeds in two stages. First, the one man–one woman model of marriage has historically assumed and perpetuated the subordination of women to men. Second, the primary opponents of same-sex marriage wish to propagate and institutionalize their model of marriage in which a husband, by divine right, exercises authority over his wife. Same-sex marriages undermine their efforts to encourage so-called “traditional marriage” by demonstrating that marriages can be stable, loving, and successful without even the possibility of a woman submitting to a man. Taken together, these points show that the current opposition to the legality of same-sex marriages is part of a futile attempt to turn back the clock and to reconstruct a model of marriage that facilitates women being submissive to men.

In order to understand the current opposition to marriage equality, it is useful to appreciate the gendered history of marriage in America. For most of our nation’s history, marriage was an institution designed to put women in a lesser position to men.<sup>227</sup> And for centuries, marriage law succeeded in doing just that. States maintained coverture laws pursuant to which “[t]he legal existence of a woman was suspended by marriage”<sup>228</sup> as the wife’s “legal and economic identity was subsumed by her husband’s upon marriage.”<sup>229</sup> As Professor

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order to preserve “gender distinctions and traditional family relations premised upon them”); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1785–86 (1988) (“The definitional equation of marriage with heterosexuality forms a self-enclosed system inaccessible to single-gender couples who desire equal protection under the law for their intimate enduring relationships. The summary state denial of homosexual marriage exposes the fundamental right to marry, deemed to inhere in the individual, as an exclusive privilege conditioned upon heterosexual orientation.” (footnotes omitted)); Widiss, Rosenblatt & NeJaime, *supra* note 71, at 484 (“A court faced with a challenge to a restrictive marriage statute could find the statute to be ‘a facially sex-based means of institutionalizing compulsory heterosexuality, an institution of male supremacy, in ways that hurt both sexes on the bases of their sex.’” (footnote omitted)).

<sup>227</sup> COTT, *supra* note 127, at 3 (“Political and legal authorities endorsed and aimed to perpetuate nationally a *particular* marriage model: . . . [including] for the husband to be the family head and economic provider, his wife the dependent partner.”) (emphasis in original).

<sup>228</sup> See *Baker v. State*, 744 A.2d 864, 908 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17 (1982) (“The law created an equation in which one plus one equaled one by erasing the female one.”).

<sup>229</sup> Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010); *id.* at 992 (“The marital bargain in California (along with other states) traditionally required that a woman’s legal and economic identity be subsumed by her husband’s upon marriage under

Sylvia Law has explained, “married women were civilly dead and subject to the control of their husbands.”<sup>230</sup> The wife had no individual right to enter a contract nor could she sue without her husband’s consent.<sup>231</sup> Upon marriage, the wife’s prior personal property that she brought into the marriage, including her money and jewelry, became her husband’s absolute property.<sup>232</sup> Coverture also prescribed that “[a] wife’s obligation to take on the beliefs and the religious identity of her husband was an ordinary aspect of coverture, indistinguishable from her obligation to live where he wished or her obligation to take his settlement as her own.”<sup>233</sup>

Coverture assumed and reinforced “what was then considered a natural division of labor between men and women.”<sup>234</sup> The coverture regime also granted every husband “the right to correct his wife. Since he was legally responsible for her misbehavior, he ought to be able to use moderate ‘domestic chastisement,’ limited to what was necessary for the due government of his family, in the same way that he might correct his children or his apprentices.”<sup>235</sup> At base, coverture required a wife’s subservience to her husband.<sup>236</sup>

Coverture was seen as a cornerstone to American marriage law. Early efforts to transition away from coverture through so-called Mar-

the doctrine of coverture . . .”). See generally COTT, *supra* note 127, at 52–53 (discussing coverture); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 115–22 (2000) (same).

<sup>230</sup> Law, *supra* note 226, at 199.

<sup>231</sup> See *Baker*, 744 A.2d at 908. Furthermore, “if a woman did not hold property for her ‘sole and separate use’ prior to marriage, the husband received a freehold interest in all her property, entitling him to all the rents and profits from the property.” *Id.*; see also COTT, *supra* note 127, at 11–12 (stating that “[c]overture in its strictest sense meant that a wife could not use legal avenues such as suits or contracts, own assets, or execute legal documents without her husband’s collaboration” and that “the husband became the political as well as the legal representative of his wife, disenfranchising her”).

<sup>232</sup> BASCH, *supra* note 228, at 51 (“Such personal property as the household furniture, money, and jewels that the wife brings to marriage belongs to the husband absolutely.”); COTT, *supra* note 127, at 12 (“The legal meaning of coverture pervaded the economic realm as well. Upon marriage a woman’s assets became her husband’s property and so did her labor and future earnings. Because her legal personality was absorbed into his, her economic freedom of action was correspondingly curtailed.”). Women could try to circumvent coverture by creating a trust, but this was often difficult. *Id.* at 72.

<sup>233</sup> HARTOG, *supra* note 229, at 153.

<sup>234</sup> *Perry*, 704 F. Supp. 2d at 959; HARTOG, *supra* note 229, at 165 (“The law of coverture rationalized and justified a structure of power. It existed for husbands as a ruling class, expressed a particular male vision of responsibility and duty and power.”).

<sup>235</sup> HARTOG, *supra* note 229, at 116 (discussing Blackstone); *id.* at 166 (“The role of the law of coverture in constructing a husbandly identity bears some resemblance to the role slave law played in stilling the moral conscience of the American slaveholder. Just as slaveholders needed slave law, so husbands needed coverture.”).

<sup>236</sup> BASCH, *supra* note 228, at 17 (“The doctrine of marital unity not only mandated the wife’s subservience to her husband, but it also held the distinction of obliterating her legal identity.”).

ried Women's Property Laws<sup>237</sup> were greeted with doomsday prophecies by some state legislators who argued that allowing wives to own property would lead to "infidelity in the marriage bed, a high rate of divorce, and increased female criminality."<sup>238</sup> In defense of coverture, one Maryland judge explained why denying wives any legal and economic identity was necessary to keep women submissive:

For let it once be understood that a wife, whenever she may become tired of her husband, or moved by any whim or caprice, may leave him, and take with her the whole property that she ever owned, and enjoy it exclusively, and thus become independent of that superiority and controlling power which the law has always wisely recognized in the husband, what incentive would there be for such a wife ever to reconcile differences with her husband, to act in submission to his wishes, and perform the many onerous duties pertaining to her sphere? Would not every wife, with property enough to sustain herself independently of her husband, when becoming impatient of his restraint and control, however necessarily exercised over her, take the refuge such a law would give her, and abandon her husband and her home?<sup>239</sup>

In other words, coverture was necessary lest a woman have the financial capacity to leave a controlling husband instead of submitting "to his wishes." Many judges resisted the changes in statutory law, for example, by continuing "to interpret wives' housework as owned by their husbands."<sup>240</sup>

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<sup>237</sup> *Baker v. State*, 744 A.2d 864, 908–09 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (discussing Vermont's Rights of Married Women Act, which "grant[ed] married women property and contractual rights independent of their husbands"). See generally BASCH, *supra* note 228, at 16–17 (discussing Married Women's Property Laws).

<sup>238</sup> EVAN WOLFSON, *WHY MARRIAGE MATTERS* 64 (2004) (citation omitted). Nancy Cott has explained that Married Women's Property Laws were motivated in part to protect women's assets from a husband's creditors, as opposed to any desire to treat wives as co-sovereigns in a marriage. COTT, *supra* note 127, at 52–53.

<sup>239</sup> *Schindel v. Schindel*, 12 Md. 294, 308 (1858); see also BASCH, *supra* note 228, at 140 ("William Alcott, one of the most popular manual writers of the day, defined matrimony for women as an act of submission and concession, best symbolized by the wife's assumption of her husband's name. The more cheerful and voluntary the submission, he predicted, the better the marriage." (citing WILLIAM ALCOTT, *THE YOUNG WIFE, OR DUTIES OF WOMAN IN THE MARRIAGE* 29–30 (1837))).

<sup>240</sup> COTT, *supra* note 127, at 54; *id.* at 168–69. Norma Basch has explained:

The judiciary limited the impress of the [Married Women's Property Laws] in three basic ways. First, by declaring sections unconstitutional and void, they narrowed the applicability of the statutes. Second, by relying on equity precedents that required the delineation of the married woman's estate to be clear and unambiguous, they limited the number of estates affected. Third and most important, by professing their faith in the propriety and the desirability of the old common law fiction of marital unity, and by applying that fiction to the countless situations the statutes did not spell out, they eviscerated the spirit and intent of the legislation.

BASCH, *supra* note 228, at 202–03.

Coverture was but one of the legal rules that made wives legally inferior to husbands. In addition to coverture, the common law doctrine of interspousal immunity effectively prevented a wife from suing her husband for any tort he might commit against her.<sup>241</sup> Like coverture, the rule of interspousal immunity assumed and reinforced a subordinate position for women in a marriage.<sup>242</sup> The marital rape exception—common until the 1970s—effectively gave a husband the legal right to rape his wife.<sup>243</sup> Furthermore, wives who failed to be “obedient” faced legal consequences. For example, a woman seeking to leave a bad marriage through divorce “had to show how attentive, obedient, and long-suffering she had been (and of course sexually faithful) while she was being victimized.”<sup>244</sup>

While the legal position of women and wives has improved, the primary opponents to marriage equality continue to support a gendered model of marriage reminiscent of the social theories that animated coverture laws. Anti-gay organizations endorse a model of marriage in which wives are submissive to their husbands.<sup>245</sup> It is reasonable to examine the motivations of these groups because they are the prime movers behind state actions to ban same-sex marriage through constitutional amendments that require gender-specific marriage laws. These social conservative groups have played major roles in drafting same-sex marriage prohibitions, lobbying against marriage equality in state legislatures, and defending gender-specific marriage laws in court.<sup>246</sup> Some of these groups, such as The National Organization for Marriage, exist solely to deny marriage rights to same-sex

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<sup>241</sup> See *Conaway v. Deane*, 932 A.2d 571, 593 n.22 (Md. 2007) (“The common law doctrine of inter-spousal immunity barred a wife from bringing a cause of action, without her husband’s concurrence, in order to recover for losses sustained as a result of either person or property injury.” (discussing *Boblitz v. Boblitz*, 462 A.2d 506, 507 (Md. 1983))); *COTT*, *supra* note 127, at 162.

<sup>242</sup> This doctrine existed well into the modern era. For example, the Maryland Supreme Court did not abrogate the doctrine of interspousal immunity until 1983. *Boblitz*, 462 A.2d at 521.

<sup>243</sup> *COTT*, *supra* note 127, at 211; *HARTOG*, *supra* note 229, at 306–07 (“A man does not commit rape by having sexual intercourse with his lawful wife, even if he does so by force and against her will.”).

<sup>244</sup> *COTT*, *supra* note 127, at 49.

<sup>245</sup> See Wayne Grudem, *Wives Like Sarah, and the Husbands Who Honor Them*, in *RECOVERING BIBLICAL MANHOOD & WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM* 196 (John Piper & Wayne Grudem eds., 1991) (“Submission is an inner quality of gentleness that affirms the leadership of the husband. ‘Be submissive to your husbands’ means that a wife will willingly submit to her husband’s authority and leadership in the marriage . . . . Of course, it is an attitude that goes much deeper than mere obedience, but the idea of willing obedience to a husband’s authority is certainly part of this submission . . . .”); *ANDREAS J. KOSTENBERGER, GOD, MARRIAGE, AND FAMILY: REBUILDING THE BIBLICAL FOUNDATION* 59 (2d ed. 2010) (“[T]here is a sense in which wives are called to submit to their husbands in a way that is *nonreciprocal*.” (citation omitted)).

<sup>246</sup> As government officials stop defending gender-specific marriage laws in court, social conservatives—as amici and intervenors—will play an even larger role in this litigation.

couples.<sup>247</sup> One of the most outspoken opponents of same-sex marriage, and gender equality in general, is Phyllis Schlafly, the founder of the Eagle Forum. The Eagle Forum has provided a major leadership role in propagating prohibitions against same-sex marriage, serving as an amicus defending gender-specific marriage laws in several state and federal cases.<sup>248</sup> Schlafly has argued strenuously that the husband should be in charge because “[i]f marriage is to be a successful institution, it must likewise have an ultimate decision maker, and that is the husband.”<sup>249</sup>

Schlafly is but one of the leading spokespeople who opposes same-sex marriage and supports the wife-submissive model of marriage. Wayne Grudem, Research Professor of Bible and Theology at Phoenix Seminary and the former president of the Council on Biblical Manhood and Womanhood, has worked with many prominent anti-gay organizations in opposing same-sex marriage, including the Family Research Council, Pennsylvania Family Institute, North Carolina Family Policy Council, and the National Organization for Marriage.<sup>250</sup> He has argued that “wives should forsake resistance to their

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<sup>247</sup> See *Our Work*, NAT'L ORG. FOR MARRIAGE, <https://nationformarriage.org/index.php/main/ourwork> (last visited Mar. 18, 2014).

<sup>248</sup> See, e.g., *Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 3 (1st Cir. 2012) (Eagle Forum Education & Legal Defense Fund serving as amicus defending section 3 of DOMA); *Perry v. Brown*, 671 F.3d 1052, 1059 (9th Cir. 2012) (amicus defending California's Proposition 8); *Strauss v. Horton*, 207 P.3d 48, 58 (Cal. 2009) (amicus defending California's Marriage Protection Act); *Morrison v. Sadler*, 821 N.E.2d 15, 18 (Ind. Ct. App. 2005) (Eagle Forum of Indiana serving as amicus defending Indiana's DOMA); Brief Amicus Curiae of Eagle Forum Educ. & Legal Def. Fund, Inc., In Support of Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, No. 12-307 (U.S. Jan. 29, 2013), 2013 WL 355760 (amicus defending section 3 of DOMA and supporting reversal of lower court's decision); Brief Amicus Curiae of Eagle Forum Educ. & Legal Def. Fund, Inc., In Support of Petitioners In Support of Reversal, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 29, 2013), 2013 WL 367055 (amicus defending California's Proposition 8); Amicus Curiae Brief of Eagle Forum Educ. & Legal Def. Fund In Support of Intervener-Appellant In Support of Reversal, *Golinski v. Office Of Pers. Mgmt.*, Nos. 12-15388, 12-15409 (9th Cir. June 11, 2012), 2012 WL 2338874 (amicus defending section 3 of DOMA); Brief for Amicus Curiae Eagle Forum Educ. & Legal Def. Fund In Support of Appellants' Petition For Reconsideration and Rehearing En Banc, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Mar. 5, 2012), 2012 WL 956455 (amicus defending California's Proposition 8).

<sup>249</sup> PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 50 (1977). Schlafly championed the husband's power to make decisions for the family, including his unilateral “right to establish the location of the family home.” *Id.* at 92.

<sup>250</sup> See Press Release, Family Research Council, Family Research Council to Host Webcast Lecture on Global Poverty by Dr. Wayne Grudem (Dec. 3, 2013), available at <http://www.frc.org/newsroom/family-research-council-to-host-webcast-lecture-on-global-poverty-by-dr-wayne-grudem>; Tom Shaheen, *Dr. Wayne Grudem Coming to Pittsburgh*, PA. FAM. INST. (Aug. 10, 2010), <http://pafamily.wordpress.com/2010/08/10/dr-wayne-grudem-coming-to-pittsburgh/>; John Piper, *A Biblical Perspective, The Surpassing Goal: Marriage Lived for the Glory of God*, N.C. FAM. POL'Y COUNCIL, <http://www.ncfpc.org/pdffiles/MarriageAmdtStudyGuide.pdf> (adapted from a book edited by Wayne Grudem); *Politics and the Bible, Part 2*, N.C. FAM. POL'Y COUNCIL (Feb. 10, 2012), <http://www.ncfamily.org/radioshowarchives>

husbands' authority and grow in willing, joyful submission to their husbands' leadership."<sup>251</sup>

Opponents of same-sex marriage believe that the wife-submissive model of marriage is mandated by God and the Bible.<sup>252</sup> For example, Beverly LaHaye, founder of Concerned Women for America, a social conservative organization that actively lobbies against same-sex marriage, argues that "[s]ubmission is God's design for the wife just as the husband is assigned to be the head of the wife."<sup>253</sup> Lynn Wardle is the most prolific law professor who opposes marriage equality and, more broadly, equal rights for gay Americans.<sup>254</sup> In presenting his view of love within marriage, Wardle endorses the Biblical propositions that "wives [should] submit to and respect husbands" and "wives

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2012.html (discussion with Wayne Grudem on the radio show, "Family Policy Matters"). Grudem was an influential signatory on the Manhattan Declaration, authored by Robert George, NOM Board Member. See PhoenixSeminary1, *Dr. Wayne Grudem on "Why Theology is Important,"* YouTube (Nov. 19, 2010), <http://www.youtube.com/embed/WXiLiUjGaWU>; see also MANHATTAN DECLARATION, <http://www.manhattandeclaration.org/#0> (last visited Mar. 18, 2014).

<sup>251</sup> WAYNE GRUDEM, COUNTERING THE CLAIMS OF EVANGELICAL FEMINISM 307 (2006) (citations omitted).

<sup>252</sup> See *id.* at 21 ("God has established this distinct leadership role—male headship—for the husband in marriage."). Wayne Grudem holds out his own marriage and relationship with his wife as a template for all to follow:

But in every decision, whether large or small, and whether we have reached agreement or not, the responsibility to make the decision still rests with me . . . . [T]here is a quiet, subtle acknowledgment that the focus of the decision-making process is the husband, not the wife. And even though there will often be much discussion, and though there should be much mutual respect and consideration of each other, yet ultimately the responsibility to make the decision rests with the husband. And so in our marriage, the responsibility to make the decision rests with me. This is not because I am wiser or a more gifted leader. It is because I am the husband, and God has given me that responsibility.

WAYNE GRUDEM, BIBLICAL FOUNDATIONS FOR MANHOOD AND WOMANHOOD 38 (2002); *id.* at 24 ("A wife is to submit herself graciously to the servant leadership of her husband . . . .").

Wayne Grudem argues against allowing women to be ordained, asserting that it would cause "an erosion of male leadership in the family because the modeling of female leadership in the pastorate will be reflected in a lessening of male leadership in the home." *Women Pastors: Not the "Path to Blessing,"* BELIEFNET, Interview by Laura Sheahen with Wayne Grudem, <http://www.beliefnet.com/Faiths/Christianity/2006/10/Women-Pastors-Not-The-Path-To-Blessing.aspx?p=2>.

<sup>253</sup> BEVERLY LAHAYE, THE NEW SPIRIT-CONTROLLED WOMAN 130 (2005); KOSTENBERGER, *supra* note 245, at 57 ("[S]ince Christ is shown to have supreme authority over all supernatural as well as earthly beings, the husband's headship . . . by analogy is seen as connoting the exercise of authority over his wife as well.").

<sup>254</sup> See, e.g., Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221 (2005) (arguing for the preservation of federalism in family law); Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137 (2004) (arguing for the preservation of federalism in family law by supporting the Federal Marriage Amendment); Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439 (2006) (same).



must be submissive, pure and reverent.”<sup>255</sup> Similarly, the North Carolina Family Policy Council, which successfully lobbied that state’s voters to amend their constitution to forbid same-sex couples from marrying, advocates a Christian marriage in which “both spouses fulfill the roles God intended for them—the man as leader like Christ, the wife as advocate and follower of that leadership.”<sup>256</sup> In short, the most vocal opponents of same-sex marriage believe that the husband has authority over his wife.<sup>257</sup>

In addition to believing that wives should be submissive, opponents of same-sex marriage argue that the division of labor in a marriage should be based on gender. Opponents of gender-neutral marriage laws oppose wives entering the workforce while husbands tend house.<sup>258</sup> Schlafly encourages women to stay out of the labor force and to stay home and have more children.<sup>259</sup> Indeed, according to the traditionalist’s view of marriage, a wife has a responsibility to “present[ ] her husband with children (especially male ones).”<sup>260</sup> During the national debate over the Equal Rights Amendment, Schlafly argued that women already have enough rights, including “the most basic and precious legal right that wives now enjoy: the right to be a full-time homemaker.”<sup>261</sup> More recently, in encouraging women not to enter the work force, she has argued that “servitude to a husband” is more tolerable than “servitude to a boss.”<sup>262</sup>

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<sup>255</sup> Lynn D. Wardle, *All You Need is Love?*, 14 S. CAL. REV. L. & WOMEN’S STUD. 51, 63 n.40 (2004).

<sup>256</sup> Piper, *supra* note 250.

<sup>257</sup> See GRUDEM, *supra* note 251, at 21 (“This idea of male headship in marriage is seen first in the order that men and women were created. . . . Not only was Adam created before his wife; he was also given the responsibility of naming her: . . . the responsibility to name created things is always the person who has authority over those things.”).

<sup>258</sup> See KOSTENBERGER, *supra* note 245, at 63 (“Problems may arise only if the pattern were to be so completely reversed that a given husband is focusing primarily or exclusively on the domestic sphere while the wife is part of the labor force.”).

<sup>259</sup> See PHYLLIS SCHLAFLY, *FEMINIST FANTASIES* 96 (2003) (“It is in the best long-term interests of female workers as well as male workers for public policy to encourage the dependent wife to care for her own children rather than to induce her to enter the labor force. . . . [T]hey have fewer children. . . . The social and economic costs of artificially inducing more millions of wives into the labor market could be tremendous.” (quoting *Changes Needed to Insure the Economic Stability of the Social Security Trust Funds: Hearings Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 97th Cong. 549 (1981) (statement of Phyllis Schlafly, President, Eagle Forum))); SCHLAFLY, *supra*, at 207 (“Society simply has not invented a better way of raising children than the traditional family with a father-breadwinner and a mother-homemaker.”).

<sup>260</sup> KOSTENBERGER, *supra* note 245, at 30.

<sup>261</sup> SCHLAFLY, *supra* note 249, at 79.

<sup>262</sup> SCHLAFLY, *supra* note 259, at 197 (“If you complain about servitude to a husband, servitude to a boss will be more intolerable. Everyone in the world has a boss of some kind. It is easier for most women to achieve a harmonious working relationship with a husband than with a foreman, supervisor, or office manager.”).

Schlafly presents women with a false choice—submission to a boss or submission to a husband. It has apparently not occurred to Schlafly that a woman need not be submissive

Many current proponents of gendered marriage are less shrill than Schlafly and often invoke innocent phraseology, such as describing the virtues of wives “helping” their husbands, as well as husbands and wives “complementing” each other. These words mean different things to their authors and target audiences than they do to judges and others uninitiated in this branch of theology. When social conservatives discuss the different roles that a husband and wife should play in a marriage, they describe the wife as the “helper,”<sup>263</sup> by which they mean the woman “who by virtue of creation serves in a role of lesser authority in the relationship.”<sup>264</sup> The helper—who by definition is the wife—must be subordinate to the husband.<sup>265</sup>

Similarly, opponents of same-sex marriage argue that only opposite-sex marriage should be legally recognized because only the latter can satisfy the criterion of complementarity, which they argue “is an essential and foundational . . . design of marriage.”<sup>266</sup> Complementarity may sound innocuous, but to those religious conservatives who invoke the concept to advocate against same-sex marriage, men and women complement each other because the husband dictates and the wife obeys.<sup>267</sup> Namely, “complementarians believe that men and women are ontologically equal, yet functionally distinct—with men primarily characterized by servant leadership and women primarily characterized by gracious submission.”<sup>268</sup> In short, opponents of same-sex marriage do not view complements as equals; wives are inferior.

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at all. A woman can be her own boss. She can be in a marriage of equals, whether it be to a man or another woman.

<sup>263</sup> Andreas J. Kostenberger, *The Bible's Teaching on Marriage and Family*, FAM. RES. COUNCIL, <http://www.frc.org/brochure/the-bibles-teaching-on-marriage-and-family> (last visited Mar. 18, 2014) (“Mutuality, however, does not mean sameness in role. Scripture is clear that wives are to submit to their husbands and to serve as their ‘suitable helpers,’ while husbands are to bear the ultimate responsibility for the marriage before God.” (citations omitted)).

<sup>264</sup> GRUDEM, *supra* note 251, at 22.

<sup>265</sup> See Raymond C. Ortlund, Jr., *Male-Female Equality and Male Headship*, in RECOVERING BIBLICAL MANHOOD & WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM, *supra* note 245, at 104 (“Subordination is entailed in the very nature of a helping role.”).

<sup>266</sup> KOSTENBERGER, *supra* note 245, at 38. Similarly, Professor Wardle argues that same-sex couples should be prohibited from marrying because they lack the complementary nature of “gender differences [that] is an indispensable purpose of the institution of marriage.” Lynn D. Wardle, *The Boundaries Of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 *BYU J. PUB. L.* 287, 301 (2011).

<sup>267</sup> See Evan Lenow, *The Challenge of Homosexuality for Gender Roles*, 17 *J. FOR BIBLICAL MANHOOD & WOMANHOOD* 28, 32 (2012) (“As complementarians, we believe that husbands have particular roles in marriage, and wives have particular roles in marriage. . . . Wives, on their part, submit themselves to the leadership of their husbands just as the church submits to Christ. She respects her husband and seeks his counsel on spiritual matters. As complementarians, we believe these gender roles were instituted at creation and are reaffirmed after the fall.”).

<sup>268</sup> *Id.* at 29.

Supporters of gendered marriage project their view of the submissive wife on to women generally.<sup>269</sup> Schlafly mocks those who perceive her philosophy as humiliating to women because, she reasons, the woman is being taken care of by her man and thus “the prize is worth the price.”<sup>270</sup> According to the founder of Concerned Women of America, a woman’s worth is a function of her submission to her husband: “As the wife humbles herself and submits to the headship of her husband, she will begin to find her real meaning in that relationship.”<sup>271</sup> America has come a long way since the 1970s, but Schlafly’s thinking—and that of the many she speaks for and to—have not. They continue to argue that a woman can only have a “happy marriage” if she submits to her husband.<sup>272</sup>

Many opponents of marriage equality are sufficiently shrewd to know that they should argue the “heterosexual paradigm reflected in the dual-gender requirement is not based upon the notion that one gender is superior and one inferior.”<sup>273</sup> Their refutations on this point, however, are transparent sleights of hand. Professor Wardle, for example, argues that

there is no evidence that the proposed new same-sex marriage institution would not be dominated by males in short order. Since male homosexuals outnumber female homosexuals by a ratio of at least two to one, it is highly probable that same-sex marriage would be a gay- (male-) dominated institution . . . . Thus, despite the superficial appeal of the gender-discrimination argument based on the *Loving* analogy, upon careful examination there is no substance to the argument.<sup>274</sup>

Professor Wardle misconstrues the gender-discrimination argument. The issue of dominance is not whether more male couples will marry than female couples; rather, the dominance structure sup-

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<sup>269</sup> See SCHLAFLY, *supra* note 259, at 31 (“Except for the unfortunate women who were caught up in the feminist foolishness of the 1970s, most women don’t want to be liberated from home, husband, family, and children.”).

<sup>270</sup> SCHLAFLY, *supra* note 249, at 55 (“She knows how to make him feel like a man—and to remember always that she is a woman. Is this degrading to the wife? Humiliating? Subservient? Or any of the other extravagant liberationist adjectives? How ridiculous! It is just the application of the Golden Rule with a simple male/female variation. Most women think that the prize is worth the price.”).

<sup>271</sup> LAHAYE, *supra* note 253, at 131.

<sup>272</sup> *Id.* at 96 (“[O]nce she gets that message and understands that she cannot be an effective spiritual wife unless she does submit to her husband, she will have a lasting and happy marriage. Only then will she reap the blessings of a life filled with godly submission.”). Furthermore, husbands become frustrated when their wives do not submit. *Id.* at 214 (“The most frustrated men my husband and I deal with are not vocational or educational failures. They are men whose wives do not respect them through submission.”).

<sup>273</sup> Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 *BYU J. PUB. L.* 239, 243 (1998) (citing Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *BYU L. REV.* 1, 87–88).

<sup>274</sup> Wardle, *supra* note 273, at 87.

ported by so-called traditionalists plays out in each individual marriage in which Wardle suggests a wife who wants to be loved should submit to her husband. Finally, Wardle argues that there is no proof that the opposite-gender marriage requirement *causes* gender-stereotyping.<sup>275</sup> That is irrelevant; miscegenation laws did not *cause* the theory of white supremacy. They assumed it. Similarly, gender-specific marriage laws are based on—or supported because of—the assumption of female submission and inferiority.

Opponents of same-sex marriage oppose equality for gay Americans because marriages between same-sex couples upset the gendered model of marriage.<sup>276</sup> Social conservatives oppose same-sex marriage because they believe that each gender must serve a unique gender-based role in a marriage.<sup>277</sup> If a marriage is composed of two women, one of them will have to perform the “male role.” Conversely, in a marriage composed of two men, one of them will have to perform the “female role.” It is this transgression of gender roles that opponents of marriage equality find so distressing. Marriages between same-sex couples offend opponents’ vision of marriage because this means that a man is not exercising authority over a woman.<sup>278</sup>

When courts assert that gender-specific marriage laws are not intended to put one gender in an inferior position to the other gender, they are ignoring both the history of marriage in America and the desire of major players in the anti-gay marriage movement to keep women submissive to men. Supporters of gender-specific marriage laws attempt to spin their vision of marriage as not treating women as inferior but rather exalting women and protecting them. For example, Phyllis Schlafly has argued that women need marriage in order to

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<sup>275</sup> See *id.* at 88.

<sup>276</sup> Of course, not all opponents of same-sex marriage endorse a male-dominant view of marriage, just as not everyone who supported miscegenation laws was a white supremacist. (After all, many nonwhites supported miscegenation laws.) Nevertheless, many of the prime leaders of the marriage-discrimination movement espouse a vision of legal marriage in which wives are inferior to husbands, just as many proponents of miscegenation laws intended to promulgate their (false) viewpoint that nonwhites were inferior to whites.

<sup>277</sup> See William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 172 (2004) (“Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers.”); Widiss, Rosenblatt & NeJaime, *supra* note 71, at 463 (“Conservatives who argue against marriage for same-sex couples explicitly and implicitly invoke sex stereotypes about women’s and men’s roles.”); *id.* at 499 (“[C]onservative advocates often make explicit connections between opposition to marriage by individuals of the same sex and preservation of ‘traditional’ gender-differentiated family roles.”).

<sup>278</sup> Opponents of marriage equality assert that there needs to be one ultimate decision-maker and it needs to be the man. If there is no man, a marriage lacks an ultimate decision-maker. If a marriage is composed of two men, it has one decision-maker too many.

secure the protection of a man.<sup>279</sup> She argues that men should be paid more than women so that husbands can provide for their wives.<sup>280</sup>

Similarly, Professor Wardle argues that same-sex marriage should be illegal because one of the foundational purposes of marriage is “protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers.”<sup>281</sup> Many amicus briefs by conservative groups opposing marriage equality argued that opposite-sex marriage is necessary to protect mothers and vulnerable women.<sup>282</sup> The Family Research Council, perhaps the most vociferous national anti-gay lobbying force, champions opposite-sex marriage as a means for wives to encourage and facilitate their husbands’ employability.<sup>283</sup> Opponents of marriage equality argue that opposite-sex marriage forces men into this provider role. For example, Maggie Gallagher, former chair of the National Organization for Marriage, an anti-gay organization that exists solely to prevent same-sex couples from receiving any legal protections, has argued that opposite-sex marriage is necessary because it creates social expectations, such that:

When a wife urges a husband to look for a job, for example, she does not have to make an extended argument based on personal taste and preferences. Her bargaining position is immensely strengthened because she can fall back on the attitudes and expectations of the wider culture to support her position: Husbands are supposed to have jobs.<sup>284</sup>

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<sup>279</sup> SCHLAFLY, *supra* note 249, at 96 (“[T]here are male and female roles. It is just as hurtful to a man to be deprived of his role as provider and protector as it is to a woman to be deprived of her maternal role. It is just as hurtful to a husband to be deprived of his right to have a wife who is a mother for his children as it is to a wife to be deprived of her right to be a full-time homemaker.”); SCHLAFLY, *FEMINIST FANTASIES*, *supra* note 259, at 89 (“[A] man must carry his share by physical protection and financial support of his children and of the woman who bears his children . . .”).

<sup>280</sup> SCHLAFLY, *supra* note 259, at 99 (“We want a society in which the average man earns more than the average woman so that his earnings can fulfill his provider role in providing a home and support for his wife who is nurturing and mothering their children.”) *Examination On Issues Affecting Women In Our Nation’s Labor Force: Hearing Before the S. Comm. on Labor and Human Res.*, 97th Cong. 398 (1981) (statement of Phyllis Schlafly, President, Eagle Forum)).

<sup>281</sup> Wardle, *supra* note 266, at 299 (internal quotation marks omitted).

<sup>282</sup> Widiss, Rosenblatt & Nejaime, *supra* note 71, at 496–97 (citing to various examples).

<sup>283</sup> Sharon Barrett, *The End of Men, the End of Families*, FAM. RES. COUNCIL BLOG (Oct. 10, 2012), <http://frcblog.com/2012/10/the-end-of-men-the-end-of-families/> (“Marriage, because it demands commitment, makes men more employable. . . . Men are less employable today not because women have squeezed them out of the job market, but because women are not marrying them.”).

<sup>284</sup> LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 22–23 (2000); *see also* Wardle, *supra* note 266, at 300 (“Likewise those who make the greatest sacrifice of personal income-maximization in order to provide nurturing roles within the family (especially wives and

In their view, a marriage in which a man and a woman perform their gender-defined roles protects women. This is the same rationale that nineteenth-century courts used to justify coverture laws.<sup>285</sup>

Laws that are intended to protect women by treating men and women differently are, by definition, not gender neutral and, therefore, subject to heightened scrutiny.<sup>286</sup> Moreover, the Supreme Court has recognized that laws defended as protecting women place women in a position of inferiority to men. For example, the Court has repudiated its earlier decisions upholding laws designed to protect women by limiting their lives to running a household. In 1873, the Supreme Court upheld Illinois' prohibition against allowing women to practice law.<sup>287</sup> Justice Joseph P. Bradley reasoned:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.<sup>288</sup>

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mothers) are best protected by gender-integrated marriage to an opposite-sex partner upon whom expectations of being the family provider are socially reinforced.”).

<sup>285</sup> See *BASCH*, *supra* note 228, at 55–56 (“Furthermore, specific statements by Blackstone consistently sparked editorial outrage. At the end of his discussion of married women’s legal disabilities, for example, Blackstone asserted with equanimity that ‘even the disabilities which the wife lies under are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.’” (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 392 (1765))); *see, e.g.*, *Miller v. Miller*, 1 N.J. Eq. 386, 391 (N.J. Ch. 1831) (“The wife, by marriage, has parted with her property, placed herself under the control of her husband, and looks to him for support.”).

<sup>286</sup> *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (“[I]f the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”) (citation omitted); *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 861 n.12 (9th Cir. 2001) (“Good intentions—including the desire to protect women from harmful work conditions—do not render such gender classifications constitutional.”); *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971) (“Laws which disable women from full participation in the political, business and economic arenas are often characterized as ‘protective’ and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”).

<sup>287</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872).

<sup>288</sup> *Id.* at 141 (Bradley, J., concurring).

A century later, the Supreme Court recognized that such laws seeking to honor women by protecting them from life beyond the domestic sphere are part of “our Nation[’s] . . . long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>289</sup> Yet opponents of same-sex marriage demand that state and federal law impose a model of marriage to facilitate this precise dynamic. Most importantly for our purposes, any arguments suggesting that opposite-sex marriage laws are necessary to protect women go to Step Three of equal protection analysis (i.e., whether a classification is sufficiently justified) and not to Step One (i.e., whether a classification exists). These arguments are, therefore, irrelevant to the issue of whether gender-specific marriage laws should receive heightened scrutiny.

Ultimately, whether gender-specific marriage laws are motivated by a desire to keep women in an inferior position is irrelevant to the issue of determining the appropriate level of scrutiny. Under basic principles of equal protection jurisprudence, the fact that these laws make the legality of conduct a function of gender is sufficient to require heightened scrutiny. The above discussion shows that even adopting the (incorrect) conceit that motive matters for Step One purposes, a strong argument can be made that support for preventing same-sex marriage is driven by a desire to maintain a gendered model of marriage that places women in a position of inferiority. Because the refusal to allow men to marry men and allow women to marry women is based on a worldview that puts women in an inferior position to men, courts are wrong to distinguish *Loving* on the grounds that gender-specific marriage regimes are not premised on one gender being superior to the other.

In short, courts are wrong to assert that *Loving’s* rejection of equal application theory does not apply to same-sex marriage litigation. Courts that distinguish *Loving* on the ground that gender-specific marriage laws do not assume one gender is inferior to another are making two mistakes, one legal and one factual. Legally, the motivation behind a trait-specific law is irrelevant for determining whether that trait is suspect and, thus, whether heightened scrutiny is required. Factually, the major political actors against same-sex marriage are motivated by the desire to implement a model of marriage that makes women inferior to men. Thus, whether or not courts correctly apply the legal framework for equal protection claims, heightened scrutiny applies to gender-specific marriage laws.

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<sup>289</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (footnote omitted).

## CONCLUSION

Prohibitions on same-sex marriage represent a form of sex discrimination. Laws that make the right to marry a function of gender necessarily classify and discriminate based on sex. States have evaded this basic precept of equal protection jurisprudence by arguing that gender-specific marriage laws treat both sexes equally because they forbid both men and women from marrying a partner of the same sex. This is the precise equal application theory that the Supreme Court rejected in *Loving v. Virginia*.<sup>290</sup> *Loving* stands for the simple proposition that if a law is trait-specific and that classification is suspect, then the law is subject to heightened scrutiny when challenged on equal protection grounds.<sup>291</sup>

Instead of following the clear dictate of *Loving*, state courts have consistently distinguished the Supreme Court's opinion by focusing on the discriminatory motive behind Virginia's miscegenation law. In doing so, courts commit three separate mistakes. First, courts are misapplying basic equal protection principles because motive is irrelevant during Step One if the challenged law includes a suspect classification in its text, as gender-specific marriage laws do by definition.<sup>292</sup> Second, courts treat the right to marry as if it were a group right when marriage cases involving opposite-sex couples clearly establish that the rights at stake are individual rights.<sup>293</sup> Third, courts assert that gender-specific marriage laws do not stereotype one gender as inferior to another—as miscegenation laws did with respect to race—despite the fact that opponents of same-sex marriage seek to perpetuate a submissive-wife philosophy of marriage.<sup>294</sup>

*Loving* is not distinguishable with respect to its holding regarding Step One of equal protection analysis. Just as *Loving* held that race-specific marriage laws classify based on race (and are thus subject to heightened scrutiny), gender-specific marriage laws classify based on sex (and are thus subject to heightened scrutiny).<sup>295</sup> Despite the contrary opinions of several state supreme courts, *Loving* precludes the argument that same-sex marriage bans do not discriminate based on sex because they apply equally to men and women.<sup>296</sup> Thus, be-

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<sup>290</sup> 388 U.S. 1, 8 (1966).

<sup>291</sup> *Id.* at 10–11. See Peter Nicolas, *Gay Rights, Equal Protection, and the Classification-Framing Quandary*, 21 GEO. MASON L. REV. 329, 360–64 (2014) (noting reasons why *Loving* cannot be distinguished when determining level of scrutiny for state bans on same-sex marriage).

<sup>292</sup> See *supra* Part III.A.

<sup>293</sup> See *supra* Part III.B.

<sup>294</sup> See *supra* Part III.C.

<sup>295</sup> See *supra* Part II.C.

<sup>296</sup> See *Loving*, 388 U.S. at 8 (equal application of a suspect statute does not preclude application of the Fourteenth Amendment).



cause gender-specific marriage laws make marriage a function of an individual's gender, courts should apply heightened scrutiny when analyzing whether these laws violate the Equal Protection Clause.