MARRIAGE EQUALITY, \textit{UNITED STATES V. WINDSOR}, AND THE CRISIS IN EQUAL PROTECTION JURISPRUDENCE

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I. INTRODUCTION

Equal protection jurisprudence is in crisis. While this crisis has manifested elsewhere,\(^1\) the claim to marriage equality—as addressed both in the lower courts and at the level of the U.S. Supreme Court—provides a particularly comprehensive catalog of the confusion and difficulty in this area of law.

Specifically, lower courts relied on a multitude of equal protection theories in deciding marriage equality challenges prior to the Court’s decision in \textit{United States v. Windsor},\(^2\) and continue to invoke multiple theories in deciding marriage equality cases even after \textit{Windsor}.

Why is this so? One would expect that, once the Supreme Court issues a major decision on a closely analogous, if not identical, issue, the lower courts would begin to consolidate their reasoning.

One reason for this lack of doctrinal consolidation is that \textit{Windsor} did not provide the level of clear guidance lower courts might have hoped for. Specifically, Justice Kennedy, writing for the majority, did not invoke any of the traditional doctrinal structures of equal protection.

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\(^1\) See, e.g., Schuette v. BAMN, 134 S. Ct. 1623, 1634 (2014) (refusing to apply strict judicial scrutiny to state constitutional amendment repealing and prohibiting policies allowing consideration of race in University admissions process); Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (2013) (applying strict judicial scrutiny to policy allowing consideration of race in University admissions process). Reva Siegel in particular has described how the Court’s equal protection jurisprudence has evolved to be more protective of majority interests than of minority interests, essentially turning the mandate of the Equal Protection Clause on its head. Reva B. Siegel, \textit{Foreword: Equality Divided}, 127 HARV. L. REV. 1, 2-3 (2013).

\(^2\) 133 S. Ct. 2675 (2013).
analysis, such as suspect classification analysis,\(^3\) fundamental rights analysis,\(^4\) or the associated mechanism of heightened scrutiny.\(^5\)

Instead of relying on these well-established equal protection doctrines, Justice Kennedy invoked the intriguing but underdeveloped doctrine of unconstitutional animus\(^6\) (and its unacknowledged kin, so-called “heightened rational basis review”).\(^7\) As I have argued elsewhere, it is possible to carefully read the Court’s precedent for a vigorous theory of animus, including a framework for analyzing evidence of animus.\(^8\) But this is not the approach that Justice Kennedy took. Rather, he seized upon one of the weakest and most malleable conceptions of unconstitutional animus: that is, something evidenced when a law enacts “[d]iscrimination of an unusual character.”\(^9\)

There are two fundamental problems with this definition of animus. First, it ignores decades of doctrinal development aimed at providing the Court with standards for distinguishing between permissible and impermissible forms of discrimination. As we know, the Equal Protection Clause does not prohibit discrimination or reliance on classifications of persons per se.\(^10\) Rather, it is concerned only with invidious discrimination—that is, discrimination that is arbitrary or

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3. Suspect classification analysis asks, in essence, whether the group being discriminated against by a particular law possesses certain characteristics (for example, a history of discrimination) such that discrimination against this group is inherently of concern (that is, suspect). In such instances, the Court will apply a more probing form of judicial scrutiny to the challenged law, departing from the Court’s traditional deference to legislative determinations and requiring more substantial justification for the discrimination than in the typical case. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (explaining the rationale for applying more vigorous scrutiny to laws discriminating against certain groups).

4. Under the fundamental rights prong of equal protection analysis, the Court will apply more vigorous scrutiny to laws that discriminate between groups—suspect or not—with respect to a fundamental right. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (subjecting restrictions on access to marriage to strict scrutiny because such restrictions implicate a fundamental right); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (noting that the fact that anti-miscegenation laws were discriminatory with respect to marriage was an independent basis for applying strict scrutiny, separate from the fact that the laws relied on race classifications).

5. Conventional wisdom holds that an equal protection plaintiff will prevail only if the Court decides to apply heightened scrutiny. See Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans, 32 Ind. L. Rev. 357, 373-82 (1999).

6. Windsor, 133 S. Ct. at 2693.

7. Susannah W. Pollvogt, Unconstitutional Animus, 81 FORDHAM L. REV. 887, 899, 929-30 (2012) (citing Farrell, supra note 5, at 373-82) (discussing the “heightened rational basis review” and the proposition that the “rational basis with bite” standard has failed to take sufficient hold in the courts).

8. See Pollvogt, supra note 7, at 899-900, 905-06.

9. Windsor, 133 S. Ct. at 2692 (internal quotation marks omitted).

otherwise unjustified.\textsuperscript{11} Thus, the core purpose of the Court’s equal protection jurisprudence has been to develop mechanisms to distinguish between those discriminations that are invidious and those that are not.\textsuperscript{12} These mechanisms—the doctrines of suspect classification analysis and heightened scrutiny referred to above—are far from perfect.\textsuperscript{13} But they are at least expressed at a level of concreteness and specificity that can be critiqued, leading to further development of the doctrine. The “discrimination of an unusual character” rule, by contrast, is so vague and lacking in substance as to evade structured critique. It is elusive to its enemies, but also to those who might want to rely on it, including advocates and the lower courts. Indeed, lower courts attempting to follow the reasoning of Windsor regarding the doctrine of animus have openly expressed confusion about the analysis Windsor purports to apply.\textsuperscript{14}

The second problem is that the “discrimination of an unusual character” standard repeats a critical mistake that has compromised the Court’s equal protection jurisprudence since its inception. In short, it makes identification of invidious discrimination dependent on common-sense and unarticulated notions of what is and is not “unusual” with respect to discrimination. It incorporates and relies upon contemporary consensus regarding discrimination and the relative entitlement of

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\item[11.] Loving v. Virginia, 388 U.S. 1, 10 (1967) ("[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." (citing McLaughlin v. Florida, 379 U.S. 184, 188 (1964) and the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873))).
\item[12.] See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harvard L. Rev. 4, 78 (1996). Sunstein postulates that employing tiers of scrutiny in equal protection analysis serves two goals: The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work . . . The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor's foot is not a promising basis for antidiscrimination law.
\item[13.] See, e.g., Mario L. Barnes & Erwin Chemerinsky, The Once and Future Equal Protection Doctrine?, 43 Conn. L. Rev. 1059, 1063 & n.13 (2011) (citing numerous scholars in support of the statement that "'[s]cholars have long noted the struggle of courts to resolve how the concept of equality should be defined and measured," while further discussing the text, structure, and history of the Amendment, itself; as drafted); Suzanne B. Goldberg, Equality Without Tiers, 77 S. Cal. L. Rev. 481, 485 (2004) (noting that suspect classification analysis is plagued by "intractable internal contradictions"); see also Louisville Gas & Elec. Co., 277 U.S. at 37 (stating that the Equal Protection Clause "is not susceptible to exact delimitation").
\item[14.] See, e.g., Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1208 (D. Utah 2013) ("While [plaintiffs’ animus argument] appears to follow the Supreme Court’s reasoning in Romer and Windsor, the court is wary of adopting such an approach here in the absence of more explicit guidance.").
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various social groups. In 1896, racial segregation in train cars was likely not seen as “unusual,” similarly, in 1986, criminalizing homosexual sodomy likely did not strike most as “unusual” either. Pinning the recognition of harmful discrimination on such an inherently subjective and consensus-based standard does not serve the larger goal of facilitating equality.

Quite simply, Justice Kennedy’s rule for animus does not force reasoned analysis or the recognition of contemporary prejudices. These are two things that standards in equal protection law must do.

The question then becomes: why did Justice Kennedy avoid the established mechanisms of equal protection jurisprudence in Windsor, instead invoking an unstable concept that could (and did) subject the reasoning of the decision to pointed criticism? As some have suggested, Justice Kennedy’s approach could simply represent a commitment to shoring up his own esoteric equal protection jurisprudence.

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15. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 547 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954) (comparing the Louisiana statute in question to Mississippi state statute segregating train cars in a similar fashion). In upholding the Louisiana train car segregation statute on “separate but equal” grounds, the Plessy Court took a notably backward-looking approach, stating that the state legislature has the prerogative “to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.” Id. at 550-51. Such language all but directly states that segregation was anything but “unusual” at the time and blesses the statute on precisely that basis.

16. See Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003) (citing the “ancient roots” of proscriptions against sodomy to bolster the majority’s opinion). But see Bowers, 478 U.S. at 217 (Stevens, J., dissenting) (drawing attention to the problem of structuring the issue before the court as a fundamental rights analysis when societal norms establishing a legal scheme, such as prohibiting sodomy, may not currently be questioned as unusual).


18. United States v. Windsor, 133 S. Ct. 2675, 2705-07 (2013) (Scalia, J., dissenting) (criticizing the majority’s holding based on an animus analysis and stating that by focusing on animus, the majority failed to address “whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality”).

building on a controversial issue.\textsuperscript{20} It could represent an exercise in judicial restraint—“leaving things undecided.”\textsuperscript{21}

This Idea offers another possibility: that application of traditional equal protection doctrine to the problem of same-sex marriage reveals the deep confusion that currently exists about the meaning of equal protection and whether equal protection doctrines can enforce that meaning in our contemporary, pluralistic society. This confusion was manifest in \textit{Windsor} by its avoidance of traditional doctrines, and is manifest in the lower courts by persistent, varying interpretations of those doctrines.

Sooner or later, one of the myriad of pending state-level marriage equality challenges will arrive at the doorstep of the Supreme Court. When this happens, what role—if any—will traditional equal protection doctrines play? To explore this question, this Idea examines the potential outcomes of applying the traditional equal protection doctrine to the same-sex marriage problem, with a focus on the inconsistencies and confusions this reveals. The Idea concludes that the problem of same-sex marriage has brought to a head the long-existing, latent crisis in equal protection jurisprudence, and points to the need for a new direction in this area of law.

II. TRADITIONAL EQUAL PROTECTION DOCTRINE AND MARRIAGE EQUALITY

Prior to the Court’s decision in \textit{Windsor}, many commentators believed that the only chance a marriage-equality plaintiff would have to prevail would be to persuade the Court to apply some form of heightened scrutiny to her challenge.\textsuperscript{22} Indeed, for decades, heightened judicial scrutiny has been the holy grail of equal protection advocacy. This is because there is a high correlation between a court’s decision to apply heightened scrutiny and a positive outcome for the plaintiff.\textsuperscript{23}

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  \item \textsuperscript{20} See Starger, \textit{supra} note 19.
  \item \textsuperscript{21} \textit{Id.} (attributing Justice Kennedy’s decision to intentional obscurity and stating that one element of obscurity was minimalism, which was described in Cass Sunstein’s article, \textit{Foreword: Leaving Things Undecided, supra note 12}).
  \item \textsuperscript{22} See William N. Eskridge, Jr., \textit{Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?}, \textit{50 Washburn L.J.} 1, 1 (2010) (“[A]dvocates for marriage equality almost invariably seek a reason for judges to apply heightened scrutiny.”).
  \item \textsuperscript{23} See Farrell, \textit{supra} note 5, at 357 (noting the overwhelming lack of success of plaintiffs when the case is reviewed under rational basis review). Over time, the tiers of scrutiny analysis has been criticized as being outcome determinative. Erwin Chemerinsky aptly summarized the sentiment as follows: Although the levels of scrutiny are firmly established in constitutional law and especially in equal protection analysis, there are many who criticize the rigid tiers of review. For
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Conversely, in the absence of heightened scrutiny, plaintiffs rarely prevail. Accordingly, arguments in favor of heightened scrutiny have been a central component in the marriage equality cases. Under the traditional paradigm, equal protection plaintiffs can achieve heightened scrutiny in one of two ways: by demonstrating that the challenged law (1) relies on a suspect or quasi-suspect classification; or (2) burdens a fundamental right. But, attaining heightened scrutiny has in some ways become a pipe dream. The Supreme Court has not recognized a new suspect or quasi-suspect classification since 1977, and has expressed a strong aversion to “discovering” new fundamental rights. Nonetheless, there are a number of strong arguments for applying heightened scrutiny in marriage equality cases. But each of these arguments raises profound questions about the workability of equal protection doctrine.

Example, Justices Thurgood Marshall and John Paul Stevens have argued that there should be a sliding scale of review rather than the three levels of scrutiny. They maintain that the Court should consider such factors as the constitutional and social importance of the interests adversely affected and the invidiousness of the basis on which the classification was drawn. They contend that under the rigid tiers of review the choice of the level of scrutiny is usually decisive and unduly limits the scope of judicial analysis.


24. The notable exception to this trend is the enigmatic set of winning rational basis cases. For a discussion of these rational basis cases through 1996, see Farrell, supra note 5, at 370.


27. Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (noting that laws implicating fundamental rights are subject to strict scrutiny review); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (finding that legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications are reviewed under heightened scrutiny).

28. See Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 757 (2011) (“Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977.”); see also City of Cleburne, 473 U.S. at 445 (rejecting cognitive disability as a quasi-suspect classification).


Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Id.
A. Sexual Orientation, Suspect Classification Analysis, and the Futility of Assessing Political Power

The first route to heightened scrutiny in the marriage equality context would be to conclude that sexual orientation is a suspect or quasi-suspect classification. While the Supreme Court in *Windsor* conspicuously declined to consider this question, several lower courts prior to *Windsor* (including the Second Circuit in *Windsor v. United States*) relied on a suspect classification analysis. Furthermore, some courts ruling on same-sex marriage after *Windsor* have continued to conduct a suspect classification analysis, despite the Supreme Court’s reluctance to do so. Is it possible that the Court will take this approach when it inevitably faces a challenge to a state-level marriage ban?

For the Supreme Court to conclude that marriage bans merit heightened scrutiny under this particular approach, the Court would have to first conclude such laws discriminate on the basis of sexual orientation. The Court could avoid this conclusion because, in fact, bans on same-sex marriage do not directly mention sexual orientation on their face. While it seems obvious that limiting marriage to one man and one woman targets homosexuals, or prescribes an orthodox sexual orientation (heterosexuality), this conclusion nonetheless requires an inferential step beyond what appears on the face of the law.

If the Court nonetheless were to determine that marriage bans discriminate on the basis of sexual orientation, despite the absence of a facial reference to sexual orientation, the Court would next have to analyze sexual orientation against the backdrop of the suspect classification criteria, famously originating in footnote four of

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30. See, e.g., 699 F.3d 169, 181-85 (2d Cir. 2012) (analyzing suspect classification factors and concluding that sexual orientation is a quasi-suspect classification). In an important essay, Katie Eyer observes the way in which lower courts reversed the tide on this issue, reaching beyond what the Supreme Court had yet to decide in declaring that sexual orientation was properly considered a suspect or quasi-suspect classification. Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 199 (2013).


32. See, e.g., *Baker v. State*, 744 A.2d 864, 899 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (observing that the law at issue did not facially discriminate against gays and lesbians).

33. See, e.g., *id.* at 905 (discussing Vermont's then extant definition of marriage as between a man and a woman). Justice Johnson in her concurrence wrote:

Thus, an individual’s right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.

*Id.*
**United States v. Carolene Products Co.** To “qualify” as a suspect classification, the group disfavored under that classification must: (1) be politically powerless; (2) have suffered a history of discrimination; (3) be defined by an immutable trait; and (4) be a discrete and insular minority. The Court has also looked at (5) the extent to which the trait relates to one’s ability to participate in society, such that the trait is presumptively more or less relevant to legitimate legislative goals.

Recently, lower courts, as well as other government actors and academics, have concluded that sexual orientation should be treated as a suspect basis for legislation. Attorney General Eric Holder took this position early in 2011. Similarly, numerous academics have detailed compelling arguments for why sexual orientation should be considered inherently suspicious as a legislative classification.

Still, it is unclear how the trait of sexual orientation would fare under this standard if the Supreme Court were to directly engage the

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34. 304 U.S. 144, 153 n.4 (1938) (observing laws that reflect “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

35. The relationship between suspect classifications (e.g., race) and suspect classes (e.g., originally emancipated slaves, and more generally black Americans and other racial minorities) is confounding because courts consider factors that are at once historical and ahistorical, and factors that are at once deeply substantive and highly formalistic. For an in-depth discussion of this conundrum, see generally Sonu Bedi, Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough, 47 Ga. L. Rev. 301 (2013).

36. City of Cleburne v. Cleborne Living Ctr., Inc., 473 U.S. 432, 438, 464, 473 n.24 (1985). For a discussion of the meaning of the phrase “discrete and insular,” see Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 729 (1985) (“I propose to define a minority as ‘discrete’ when its members are marked out in ways that make it relatively easy for others to identify them.”); see also id. at 726 (describing insularity in part as a type of geographic or social proximity that results in a “dense communications network”).

37. City of Cleburne, 473 U.S. at 440-41. While these criteria are often characterized as mandatory (that is, as an element test), the Court has given greater and lesser emphasis to certain criteria in certain cases (treating the analysis as a factor test). The Court has examined these criteria most strenuously in denying claims to suspect or quasi-suspect status. See Susannah W. Pollvogt, Beyond Suspect Classifications, 16 U. Penn. J. CON. LAW 739, 748, 783 (2014).


issue. There are plausible arguments on both sides of the issue. The best argument that sexual orientation should be recognized as a suspect classification is that it is a trait, like race, that is unrelated to one’s ability to participate in society, and is therefore presumptively irrelevant to law-making. Indeed, the watershed Supreme Court decision Lawrence v. Texas, which held that bare moral disapproval of homosexual conduct or identity was not a valid basis for the public laws, went, and continues to go, a long way toward establishing that regulation of private sexual conduct and sexual identity is beyond the scope of the valid exercise of police power. Specifically, the Lawrence Court held that “[p]ersons in a homosexual relationship may seek autonomy for these purposes [making intimate and personal choices], just as heterosexual persons do,” implying that sexual orientation was not a relevant trait for the legislature to consider in the context of regulating basic liberties.

But this factor—relevance of the trait to valid law-making interests—is but one aspect of the suspect classification analysis. The real sticking point (and the factor that William Eskridge understandably focuses on) is political power. There is possibly no civil rights movement that has been as swift and dynamic as the LGBT rights movement in recent years. It is undeniable that members of the LGBT community have faced—and continue to face—horrible acts of violence and routine discrimination by both private and public actors. But it is also impossible to deny that change is afoot. Suspect classification designations are designed as a stop-gap when the democratic process is otherwise unable to correct the imbalance in the exercise of power.

40. See Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting “two members of this Court have already stated that they ‘cannot conceive of a valid legislative purpose . . . which makes the color of a person’s skin the test of whether his conduct is a criminal offense’”). While there has been quite some debate over whether sexual orientation is “immutable,” the inquiry into a trait’s relevance—which was the focal point of the gender cases—is a slightly different inquiry. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (noting that sex is different than other immutable traits such as intelligence or physical disability because “the sex characteristic frequently bears no relation to ability to perform or contribute to society”).


42. Id. at 582-83 (O’Connor, J., concurring).

43. Id. at 574 (majority opinion).

44. See generally Eskridge, supra note 22.


47. See 33 Marriage Equality–Related 2012 Election Results, MARRIAGE EQUALITY USA (Dec. 10, 2012, 6:40 AM), http://www.marriageequality.org/election-results (showing four states changed their legal stance on marriage equality in the 2012 general election: Maine, Maryland, and Washington voted to approve same-sex marriage, while voters in Minnesota defeated an amendment to the state constitution defining marriage as a union between one man and one woman).
failing to sufficiently protect minority groups. But here, it appears that the democratic process is working, albeit in fits and starts.

Thus, the critical “political powerlessness” factor in suspect classification analysis is inherently problematic as a basis for formulating doctrine because estimations of political power are necessarily subjective, fact intensive, and changing over time.

Further, separate from the question of whether the Court should recognize sexual orientation as a suspect classification is the question of whether the Court would do so, as a matter of realpolitik. Eskridge argues persuasively that the gay rights movement strongly parallels the civil rights and feminist movements before it, and that the historical pattern is for groups to receive protected status not when they are, in fact, politically powerless, but when they have achieved enough political power to be reckoned with. Under this theory, the level of political power achieved by gay men and lesbians at this point in time—power that is incomplete, but not inconsequential—makes sexual orientation the perfect candidate for suspect classification recognition. On the other side of the debate, Kenji Yoshino contends that the Court will not recognize additional suspect classifications, regardless of the merits of the underlying argument, because of the palatable pluralism anxiety manifest in the Court’s contemporary equal protection jurisprudence.

48. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (observing laws that reflect “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”); see also Ackerman, supra note 36, at 715 (interpreting Carolene Products as permitting judicial intervention to correct a defective political process).

49. The marriage equality movement provides a textbook example of discursive, democratic processes at work: advances followed by backlash followed by galvanization of marriage equality advocates. Recently, the tide has turned increasingly toward victory for gay rights advocates. See, e.g., COLO. REV. STAT. § 14-15-107 (2013) (enacting comprehensive civil union benefits in the State of Colorado); cf. Colo. Const. amend. 43 (2006) (defining marriage in the State of Colorado as between one man and one woman); see also Transcript of Oral Argument at 113, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (citing Colorado civil unions law as an example of the democratic process at work).

50. As Justice Powell noted in another context: “The kind of variable sociological and political analysis necessary to produce such rankings [of the relative hardships borne by different social groups] simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.” Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 297 (1978).

51. Eskridge, supra note 22, at 18-19; see also Letter from Eric H. Holder, supra note 38 (“[W]hen the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination.”).)

52. See Yoshino, supra note 28, at 757 (noting that the Supreme Court has not accorded heightened scrutiny to any new group based on suspect classification since 1977, and arguing that “[a]t least with respect to federal equal protection jurisprudence, this canon has closed”).
In other words, recognizing a new suspect classification could start the Court down a slippery slope.

If the Court were to analyze whether sexual orientation is a suspect or quasi-suspect classification, this would expose the suspect classification analysis as based in subjective judgments about the relative power of different social groups, and whether such groups must truly be without political power to gain recognition. Further, such an analysis would potentially re-open the floodgates to claims by a multitude of other social groups.

B. Marriage Bans as Sex Discrimination and the Equal Application Fallacy

The second route to heightened scrutiny would be to conclude that marriage bans rely on sex classifications, mandating the application of heightened scrutiny. Intriguingly, the Court could avoid recognizing a new suspect classification by taking this route, because sex discrimination has long been held to trigger intermediate scrutiny. In terms of rigor, intermediate scrutiny falls short of the gold standard of strict scrutiny, but is nonetheless a form of heightened scrutiny, vastly preferable to deferential rational basis review.

It seems beyond argument that laws prohibiting same-sex marriage rely on—indeed, must invoke—facial sex classifications. States that define marriage as an exclusively heterosexual institution do so by

53. See Craig v. Boren, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); see also United States v. Virginia, 518 U.S. 515, 534 (1996) (requiring an “exceedingly persuasive justification” for sex-based discrimination). While a number of scholars have argued that marriage bans constitute sex discrimination, courts have struggled with framing the issue as such. See, e.g., Mary Ann Case, What Feminists Have to Lose in Same-Sex Marriage Litigation, 57 UCLA L. REV. 1199, 1204 (2010) (discussing same-sex marriage cases historically brought under the sex discrimination theory); Deobrah A. Widiss et al., Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence, 30 HARV. J. L. & GENDER 461, 464-79 (2007) (describing how courts rejecting claims to marriage equality relied on sex role stereotypes). There are, however, several instances where state supreme courts judges have concluded that marriage bans are a form of sex discrimination. See, e.g., Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring); Baker v. State, 744 A.2d 864, 904-05 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

defining marriage as a union between “one man and one woman.”55 By invoking these terms and making access to legal rights dependent upon them, such laws facially discriminate on the basis of sex.56

Further, beyond merely relying on facial gender classifications as a matter of mechanics, marriage bans arguably enact sex discrimination on a substantive level by prescribing orthodox gender roles. This view is reflected in the arguments advanced by proponents of such laws, who frequently rely on the twin claims that: (1) male and female parental roles are necessarily differentiated on the basis of gender; and (2) that this gender differentiation represents the ideal form of parenting.57

And yet courts58 have nonetheless declined to recognize the facial sex classifications at work in these laws, citing the fact that the laws do not disadvantage one sex relative to the other. At the core of this reasoning is an implicit requirement that laws must tangibly disadvantage one group with respect to the other to trigger an equal protection analysis. For example, in Jackson v. Abercrombie,59 a pre-Windsor decision, the federal district court reasoned that Hawaii’s law defining marriage as an exclusively heterosexual institution “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.”60

This reasoning displays a fundamental confusion about the concerns of the Equal Protection Clause, and is in blatant conflict with powerful precedent, most notably the Supreme Court’s decisions in Brown v. Board of Education61 and Loving v. Virginia.62 Brown did not
explicitly deal with the significance of facial classifications, but did so implicitly in refuting the reasoning and outcome of *Plessy v. Ferguson*, the case that infamously solidified the “separate but equal” doctrine in the service of validating racial segregation. The law at issue in *Plessy*, which mandated that train cars be segregated on the basis of race, patently relied on facial race classifications. Indeed, the law could not serve its primary function—racial segregation—without relying on facial race classifications. Nonetheless, the *Plessy* Court concluded that this form of segregation did not implicate the Equal Protection Clause because the train cars, while separate, were still equal in terms of the quality of accommodations. In other words, the *Plessy* Court made differential treatment above and beyond the use of facial classifications the touchstone of equal protection claims.

The Court’s decision in *Brown* refuted both the notion that racially segregated schools could ever be equal, and also the notion that a facial classification was, on its own, insufficient to trigger equal protection scrutiny in the absence of some independent showing of underlying unequal treatment. Rather, the Court will apply the level of equal protection scrutiny triggered by the classification relied upon. As the Court later stated, “[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation.”

*Loving* is even more on point. There, the State of Virginia, in an effort to excuse its anti-miscegenation law from equal protection scrutiny, contended that the Equal Protection Clause’s protections did not apply to the law at all, because the law did not enact race discrimination per se. Race discrimination, according to Virginia, existed only where a law subjected different races to different treatment. Because neither blacks nor whites could intermarry under

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63. 163 U.S. 537 (1896).
64. *Id.* at 552 (Harlan, J., dissenting) (coining the phrase “separate but equal”).
65. *Id.* at 540.
66. *Id.* at 548-49.
67. *Id.* at 551-52.
69. *Id.* at 495 (“Separate educational facilities are inherently unequal.”).
72. The relevant provision stated: “All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.” *Id.* at 4 n.3 (quoting VA. CODE ANN. § 20-57 (1960)). Related provisions imposed criminal penalties for violating this prohibition. *Id.* at 4.
73. *Id.* at 7-8.
74. *Id.* at 8.
the law, and because the criminal penalties imposed on each group were the same, there was no differential treatment of the two classes, therefore no race discrimination, and thus no equal protection claim based on race.\textsuperscript{75}

The \textit{Loving} Court rejected this argument.\textsuperscript{76} Because the anti-miscegenation law relied on facial race classifications, it thereby made legal rights dependent on race, and constituted actionable race discrimination under the Equal Protection Clause to which strict scrutiny would apply.\textsuperscript{77} In other words, facial classifications on the basis of a particular trait trigger the level of equal protection scrutiny asserted with that trait.\textsuperscript{78} Under this logic, because laws prohibiting same-sex marriage necessarily rely on facial sex classifications, they necessarily make legal rights dependent on sex, and constitute actionable sex discrimination to which intermediate scrutiny would apply.

Some courts have rejected the analogy to \textit{Loving}, pointing out that in \textit{Loving}, the racial classifications were motivated by an ideology of white supremacy—that is, an ideology of subordination that is supposedly absent from the same-sex marriage context.\textsuperscript{79} However, the Court’s concern with white supremacy is expressed in a separate portion of the opinion\textsuperscript{80} from the analysis of whether anti-miscegenation laws relied on facial classifications.

The failure of courts to recognize marriage bans as sex discrimination reveals a cabined vision of the Equal Protection Clause’s guarantees. As the Court has recognized (at least at times), the Equal Protection Clause embodies a fundamental suspicion of class-based legislation.\textsuperscript{82} This is true even where classifications are not being used to

\begin{itemize}
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 11. The \textit{Loving} Court treated the laws at issue as a form of race discrimination based on the classifications employed by the law. See id. at 4 (quoting \textsc{Va. Code Ann.} § 20-59 (1960)) (“If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”). Significantly, the Court did not treat it as a case of discrimination against persons inclined to enter interracial relationships. Thus, the facial classification upon which rights were made dependent determined the type of discrimination at issue.
\item \textsuperscript{78} Id. at 9.
\item \textsuperscript{79} See, e.g., Geiger v. Kitzhaber, No. 6:13-cv-01834, 2014 WL 2054264, at *7 (D. Or. May 19, 2014) (distinguishing \textit{Loving} because the laws at issue manifested invidious racial discrimination, not just facial race classifications).
\item \textsuperscript{80} \textit{Loving}, 388 U.S. at 8-11 (rejecting equal application argument, concluding that laws relied on facial race classifications, and applying strict scrutiny as a result).
\item \textsuperscript{81} Id. at 11-12 (concluding that the laws failed strict scrutiny because they had no purpose outside of invidious racial discrimination).
\item \textsuperscript{82} Romer v. Evans, 517 U.S. 620, 635 (2003) (“[C]lass legislation . . . [is] obnoxious to the
directly impose differential treatment as between the classified groups—a point amply supported by both Loving and Brown.\textsuperscript{83} This is because class-based legislation raises concern even where there is, on a superficial level, “equal application” of the laws (as there was in Loving and Brown), because such laws nonetheless tend to cement a certain ordering of social groups, which in turn tends to support formation of an undemocratic caste society.

If the Court were to analyze whether marriage bans are a form of sex discrimination, this would expose the fact that—after decades of relying on the concept—we are still not really certain how facial classifications are identified for equal protection purposes.

C. Marriage Bans, Fundamental Rights Analysis, and the Problem of Tautological Reasoning

The third route to heightened scrutiny would be to find that laws prohibiting same-sex marriage burden the fundamental right to marriage, such that strict scrutiny applies.\textsuperscript{84} Again, it seems beyond argument that such laws implicate the right to marriage. And in fact, the current, post-Windsor trend is for courts to conclude as such.\textsuperscript{85}

But at prior stages in the marriage equality battle, at least some courts found a way around the argument by reframing the fundamental rights inquiry. For example, in Abercrombie, the district court rejected the argument that bans on same-sex marriage implicate the fundamental right to marriage, beginning with the observation that courts are obligated to define asserted fundamental rights with precision.\textsuperscript{86} Applying this rule, the court characterized the asserted right not as the right to “marriage,” but as a right to “same-sex marriage,” something inherently different than traditional, opposite-sex marriage.\textsuperscript{87} In support of this characterization, the court emphasized that marriage has always been understood as the union of one man and one woman, and that the fundamental nature of the marriage right is grounded in its


\textsuperscript{84} See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (quoting Loving, 388 U.S. at 12); Loving, 388 U.S. at 12 (finding anti-miscegenation laws unconstitutional on the alternative basis that they burden a fundamental right).

\textsuperscript{85} Most recently, this approach was taken by the Tenth Circuit Court of Appeals in striking down Utah’s marriage ban. See Kitchen v. Herbert, No. 13-4178, slip op. at 3 (10th Cir. June 25, 2014).


\textsuperscript{87} Id. at 1095-96.
linkage to procreation. Having concluded that same-sex couples could not lay claim to this—the traditional, fundamental right to marry—the court then examined whether history and tradition recognized a fundamental right to same-sex marriage, and unsurprisingly concluded that they did not.

This move is deeply problematic from the perspective of core equal protection values because what it does, in essence, is ask whether members of a disfavored group (in this case, same-sex couples) are entitled to the right to marriage rather than asking whether the marriage right itself is fundamental in nature, as a universal proposition. In other words, asking whether there is a fundamental right to same-sex marriage is really asking whether same-sex couples (or homosexuals) are entitled to the fundamental right to marriage that heterosexual citizens enjoy. This is analogous to asking in the 1960s whether there was a fundamental right to interracial marriage, which was really asking whether interracial couples are entitled to that right. The posing of the question creates its own answer, because of course historically excluded groups will not be perceived as entitled to participation in the rights from which they have historically been excluded. That is to say, the phrasing of the question matters.

This point—that the characterization of the asserted right matters—was made abundantly clear by Lawrence, the case that overturned the Court’s regrettable decision in Bowers v. Hardwick. At issue in Bowers

88. Id. at 1095. Needless to say, many advocates have argued persuasively that marriage is not now, and never has been, primarily a vehicle for regulating procreation. See, e.g., Brief for Family and Child Welfare Law Professors as Amici Curiae Supporting Respondents at 4-16, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (arguing procreation is not the primary focus of marriage). In addition, other courts addressing this argument have found it unpersuasive. See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (“Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse.”); see also Lawrence v. Texas, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting). Justice Scalia wrote:

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution” . . . Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

Id. (alterations in original) (internal citation omitted).

89. Jackson, 884 F. Supp. 2d at 1096-98. By contrast, the district court in Perry v. Schwarzenegger acknowledged that marriage was traditionally a heterosexual institution, but that other aspects of marriage had proven transcendent through the ages—the prescription of differentiated gender roles not being among them. See 704 F. Supp. 2d at 992 (asserting that the persistent, overarching state interest in marriage was to “create[] stable households, which in turn form the basis of a stable, governable populace”).


91. 478 U.S. 186 (1986); see Lawrence, 539 U.S. at 578.
was a state law criminalizing all acts of sodomy. Among its other shortcomings in reasoning, the Bowers Court initially made the mistake of framing the controlling question: “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” This formulation incorporates and emphasizes the marginalized group in the very phrasing of the right. In addition, the Constitution does not confer rights at the level of specificity required to find a right to “sodomy.” By phrasing the question this way, the Bowers Court mocked the seriousness of the claim asserted in the case, and made the answer to the question a foregone conclusion.

This was, of course, recognized by Justice Blackmun in his dissent, and by the majority in Lawrence some seventeen years later. As in Bowers, the issue in Lawrence was a state law criminalizing sodomy. However, the Lawrence Court characterized the right at issue as a universal right to privacy in consensual sexual relations between adults, to which homosexuals and heterosexuals alike were entitled.

Thus, when courts ask whether there is a fundamental right specifically to same-sex marriage, they commit the same logical error as the Court made in Bowers. First, this formulation incorporates a reference to the disfavored/historically excluded group; second, it defines the right too narrowly when it is easily and appropriately categorized within the broader, yet still concrete, established fundamental right to marriage. The vulnerability of the fundamental rights inquiry to tautological manipulation reveals that it is a doctrine not necessarily adept at transcending contemporary prejudices.

If the Court were to analyze whether marriage bans implicate the fundamental right to marriage, it would have to articulate a clearer rule for how the fundamental rights inquiry is properly framed.

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93. Id. at 190 (emphasis added).
94. Id. at 199 (Blackmun, J., dissenting). Justice Blackmun stated: This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, than Stanley v. Georgia was about a fundamental right to watch obscene movies, or Katz v. United States was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”
95. Lawrence, 539 U.S. at 566-67 (stating that the Bowers Court’s narrow framing of the controlling question “disclose[d] the Court’s own failure to appreciate the extent of the liberty at stake”).
96. Id. at 562.
97. Id. at 578 (“The petitioners are entitled to respect for their private lives.”).
III. CONCLUSION

The courts’ analyses of same-sex marriage both before and after Windsor reveal significant problems in equal protection jurisprudence—problems that are not resolved when the Court itself avoids applying traditional equal protection doctrine to cases that seem amenable to it.

But perhaps this avoidance itself is an admission that the traditional doctrinal mechanisms are not as compelling, universal, or transcendent as one might hope. The Court appears to be afraid of its own creation in suspect classification analysis, anxious that recognizing a new group deserving of judicial solicitude will open the floodgates to innumerable claims of suspect status. Perhaps even more disturbing, there is a marked lack of consensus on what constitutes a facial classification, such that it is not clear whether the Court would consider marriage bans a form of sex discrimination. Finally, the Court has yet to model a disciplined approach to framing the fundamental rights inquiry, and as a result we are unsure whether one of the greatest social and legal issues of our time—the question of same-sex marriage—is a question of fundamental rights.

In short, all the usual suspects have been sidelined due to an embarrassing degree of doctrinal sloppiness. This leaves heightened rational basis review and the doctrine of animus as leading candidates for the Court’s ultimate decision on state-level marriage equality.

Despite the fact that the twin doctrines of animus and heightened rational basis review were poorly and incompletely articulated in Windsor, they together represent the most promising option for the future development of equal protection jurisprudence. But that future is in jeopardy. Because the doctrines of unconstitutional animus and heightened rational basis review are unconsolidated (and, indeed, in the case of the latter, unacknowledged by the Court itself), it is not certain that they will evolve to fully meet their robust potential.