COMMENT

HOW CALIFORNIA GOT IT RIGHT: MINING *IN RE MARRIAGE CASES* FOR THE SEEDS OF A VIABLE FEDERAL CHALLENGE TO SAME-SEX MARRIAGE BANS

I. INTRODUCTION

California is at the forefront of a battle over equality. As individuals, couples, and groups challenge statutory and even constitutional bans on same-sex marriage with varying degrees of success across the country, a constitutional ban that has, thus far, withstood state constitutional challenge invalidated and replaced California's statutory ban. However, the plaintiffs in *Perry v. Schwarzenegger*[1] have federalized the issue, asking a United States district court to invalidate California's ban under the Fourteenth Amendment's guarantees of substantive due process and equal protection of the laws.[2] In 2008, the landmark decision *In re Marriage Cases*[3] made California the second United States jurisdiction to judicially recognize the right of same-sex couples to marry.[4] The petitioners' winning argument in that case relied primarily on the *state* equal protection and due process clauses to overturn California's statutory ban on same sex marriage.[5] However, the petitioners'

1. 704 F. Supp. 2d 921 (N.D. Cal. 2010).
2. *Id.* at 927.
3. 183 P.3d 384 (Cal. 2008).
4. *See id.* at 400. In 2003, the Massachusetts Supreme Judicial Court interpreted its state constitution to prohibit the state from denying a marriage license to same-sex couples. Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 948 (Mass. 2003).
5. *See* Opening Brief on the Merits at 11-35, *In re* Marriage Cases, 183 P.3d

reasoning may be applicable to the federal equal protection and due process doctrine as well.

Some have called the legitimacy of laws restricting civil marriage to opposite-sex couples "the civil rights issue of our time,"[6] and courts around the country have begun to strike down laws that deny individuals the right to marry based on sexual orientation.[7] Although courts have generally framed the issue as a question of state constitutional law, *Perry* is the first case to posit the issue directly as a federal question. As this is a question of great national debate and importance, it is likely that the parties will seek U.S. Supreme Court review regardless of the decisions in the district court and the Ninth Circuit Court of Appeals. Indeed, this appears to be the end to which the attorneys on the case aspire.[8] Owing to Proposition 8's typical language,[9] there can be little doubt that a U.S. Supreme Court decision

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384 (Cal. 2008) (No. S147999).

6. Kristin D. Shotwell, Note, *The State Marriage Cases: Implications for Hawaii's Marriage Equality Debate in the Post-*Lawrence *and* Romer *Era*, 31 U. HAW. L. REV. 653, 653 (2009).

7. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); *Goodridge*, 798 N.E.2d at 969-70.

8. Margaret Talbot, *A Risky Proposal: Is it Too Soon to Petition the Supreme Court on Gay Marriage?*, NEW YORKER, January 18, 2010, *available at* http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot?currentPage=all.

9. In response to the California Supreme Court's decision in *In re Marriage Cases*, 52.3% of California voters enacted an initiative constitutional amendment, known as Proposition 8. DEBRA BOWEN, CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008 GENERAL ELECTION 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf. Proposition 8 added the following language to the California Constitution: "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5.

The language of California's Proposition 8 is representative of the language other states have used to write same-sex marriage bans into their own state constitutions. *See, e.g.*, ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); MO. CONST. art. I, § 33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."); OR. CONST. art. XV, § 5a ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

in *Perry* would echo far outside California's borders. Such a decision would determine the constitutional validity of all state and federal laws restricting the institution of civil marriage to opposite-sex couples.

This Comment details that the petitioners' argument in *In re Marriage Cases* can be adapted to work a viable federal challenge to Proposition 8 and similar statutory and constitutional provisions across the nation. Indeed, a compelling case can be made that same-sex marriage bans both (1) abridge same-sex couples' fundamental right to marry without a compelling government justification, thereby depriving them of substantive due process; and (2) impermissibly discriminate on the basis of sex, denying same-sex couples equal protection of the laws. While preparing this Comment for publication, the district court in *Perry* agreed, finding Proposition 8 unconstitutional on both due process[10] and equal protection[11] bases.

This Comment will proceed as follows: Section II will examine the historical background of California's struggle for marriage equality, concentrating especially on the events immediately preceding and giving rise to *Perry*. Section III explores important differences between California's equal protection doctrine and its federal counterpart. Section III argues that classifications based on sexual orientation are reducible to classifications based on sex, and therefore should at least enjoy intermediate scrutiny. Section IV discusses federal due process jurisprudence as it relates to marriage

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10. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010) ("Accordingly, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment."); *id.* at 994-95 ("Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny. . . . As explained in detail in the equal protection analysis, Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by plaintiffs' due process claim.").

11. *Id.* at 997 ("[T]he Equal Protection Clause renders Proposition 8 unconstitutional under any standard of Review."); *id.* at 996-97 ("Having considered the evidence, the relationship between sex and sexual orientation and the fact that Proposition 8 eliminates a right only a gay man or a lesbian would exercise, the court determines that plaintiffs' equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex. . . . Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.").

equality, and identifies how Proposition 8 likely violates federal substantive due process guarantees.

II. BACKGROUND

In 1971, the California legislature amended its marriage statute to use gender-neutral terms.[12] This change, coupled with the repeal of California's criminal consensual sodomy statute in 1976, led some people to conclude that California had recognized same-sex marriage.[13] The legislature quickly re-amended the civil marriage statute to clarify that same-sex marriage remained unlawful in California.[14] California's modern civil marriage statute is Family Code section 300.[15] Section 300, as it existed before the *In re Marriage Cases* decision,[16] provided, in relevant part, that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."[17]

California Family Code section 308 generally binds the State to recognize marriages validly contracted in another state.[18] Because the language of section 308 was unqualified, some California voters

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12. *In re* Marriage Cases, 183 P.3d 384, 408 (Cal. 2008) ("In 1971 . . . the provisions of Civil Code section 4101, subdivision (a), which previously had set the age of consent for marriage for men at 21 years of age and for women at 18 years of age, were modified to provide a uniform age of consent of 18 years of age for both genders. In revising the language of section 4101 to equalize the minimum age for men and women, the 1971 legislation eliminated references to 'male' and 'female,' so that section 4101, subdivision (a), as amended in 1971, stated simply that '[a]ny unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage.'"(citation omitted)).

13. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 56 (1996).

14. *Id.*

15. CAL. FAM. CODE § 300 (West 2004 & Supp. 2010).

16. *In re Marriage Cases* held unconstitutional the words in section 300 "between a man and a woman." *See infra* notes 22-41 and accompanying text.

17. CAL. FAM. CODE § 300 (West 2004).

18. CAL. FAM. CODE § 308 (West 2004) ("A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.").

speculated that California would recognize same-sex marriages performed in other states.[19] When the Hawaii Supreme Court overturned Hawaii's same-sex marriage ban in 1993,[20] many states began enacting laws that denied recognition to same-sex marriages performed in other states.[21] On March 7, 2000, California voters enacted Proposition 22, which added California Family Code section 308.5.[22] Section 308.5 provided that "[o]nly marriage between a man and a woman is valid or recognized in California."[23]

On February 10, 2004, San Francisco Mayor Gavin Newsom directed the County Clerk to begin issuing marriage forms and licenses to individuals without regard to their gender or sexual orientation.[24] Same-sex couples began applying for, and receiving, marriage licenses on February 12, 2004.[25] Opponents of same-sex marriage filed two separate lawsuits to enjoin the issuance of marriage licenses to same-sex couples.[26] Proponents of same-sex marriage filed

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19. *See* DANA S. KRUNKENBERG ET AL., REBUTTAL TO ARGUMENT AGAINST PROPOSITION 22 (2000), *available at* http://primary2000.sos.ca.gov/VoterGuide/Propositions/22norbt.htm.

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

21. *In re* Marriage Cases, 183 P.3d 384, 412 n.20 (Cal. 2008).

22. *Id.* at 409.

23. CAL. FAM. CODE § 308.5 (West 2004).

24. *In re Marriage Cases*, 183 P.3d at 402. Mayor Newsom noted that "California courts have . . . stated that discrimination against gay men and lesbians is invidious . . . [and] have held that gender discrimination is suspect and invidious as well." Letter from Gavin Newsom, Mayor of S.F., to Nancy Alfaro, Cnty. Clerk of S.F. (Feb. 10, 2004), http://news.findlaw.com/cnn/docs/glrts/sfmayor21004ltr.html. Relying on both these California cases and other state supreme court cases that "held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage," and following his "sworn duty to uphold the California Constitution," Mayor Newsom determined that marriage licenses should issue "on a non-discriminatory basis, without regard to gender or sexual orientation." *Id.*

25. *In re Marriage Cases*, 183 P.3d at 402-03 (mentioning that approximately 4,000 marriages were performed before the California Supreme Court enjoined the practice).

26. Proposition 22 Legal Def. and Educ. Fund v. City & Cnty. of S.F., No. CPF-04-503943 (Cal. Super. Ct. S.F. City & Cnty., Aug. 12, 2004) and Thomasson v. Newsom, No. CGC-04-428794 (Cal. Super. Ct. S.F. City & Cnty., Aug. 12, 2004) (subsequently renamed *Campaign for California Families v. Newsom*).

four other suits that challenged the validity of Family Code sections 300 and 308.5.[27] *In re Marriage Cases* was a single, consolidated proceeding comprised of these six cases.[28] On August 12, 2004, the California Supreme Court entered a writ of mandate finding that Mayor Newsom had exceeded his authority under then-existing sections 300 and 308.5.[29] The writ also ordered San Francisco officials to enforce sections 300 and 308.5 "unless and until they are judicially determined to be unconstitutional."[30] As a result, the writ nullified marriage certificates issued to same-sex couples before its entry.[31] The court emphasized, however, that the question of whether sections 300 and 308.5 were constitutionally valid was not before it and expressed no opinion to that question while the matter was pending in the trial court.[32]

On April 13, 2005, the trial court in *In re Marriage Cases* held sections 300 and 308.5 unconstitutional, finding the statutes discriminated on the basis of sex, and thereby violated the state equal protection clause.[33] The California Court of Appeal, First District, Division Three reversed, finding no sex discrimination.[34] The court of appeal also rejected arguments that the statutes impermissibly infringed upon the fundamental right to marry and the right to privacy as recognized in the California Constitution.[35] The California Supreme Court reversed the decision of the court of appeal, holding each section of the Family Code unconstitutional under both the state due process and equal protection clauses.[36] The court recognized sexual orientation as a suspect classification for equal protection purposes, rejecting the petitioners' argument that the marriage statutes discriminated on the basis of sex.[37] The court also found the marriage

27. *See In re* Marriage Cases, 183 P.3d at 402-04.
28. *See id.* at 401 n.6.
29. Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 464 (Cal. 2004).
30. *Id.*
31. *Id.*
32. *Id.*
33. *In re* Marriage Cases, 183 P.3d 384, 404 (Cal. 2008).
34. *Id.*
35. *Id.*
36. *Id.* at 400, 402.
37. *Id.* at 401.

statutes impermissibly restricted the fundamental right to marry under the California Constitution, and enjoined state officials from denying marriage licenses to same-sex couples.[38]

"The backlash against this decision was swift and furious."[39] Voters responded to *In re Marriage Cases* by enacting Proposition 8, an initiative constitutional amendment modeled after Family Code section 308.5.[40] Using language identical to section 308.5, Proposition 8 restored California's same-sex marriage ban.[41] One day after voters enacted Proposition 8, its opponents filed three lawsuits[42]—later consolidated in the California Supreme Court as *Strauss v. Horton*.[43] The opponents sought to invalidate Proposition 8 as an impermissible revision of the California Constitution.[44] However, the California Supreme Court upheld Proposition 8 as a permissible amendment to the state's constitution.[45] Although it is an interesting study in the

38. *Id.* at 400, 453.

39. Shotwell, *supra* note 6, at 671.

40. California's voter initiative process empowers California voters "to propose statutes and amendments to the Constitution and to adopt or reject them." CAL. CONST. art. II, § 8(a). Further, section 8(b) provides:

> An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a[n initiative] statute, and 8 percent in the case of an [initiative] amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

CAL. CONST. art. II, § 8(b).

41. "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. *Cf.* CAL. FAM. CODE § 308.5 (West 2004) ("Only marriage between a man and a woman is valid or recognized in California.").

42. Strauss v. Horton, 207 P.3d 48, 68-69 (Cal. 2009).

43. *Id.* at 69.

44. *Id.* at 60. California's constitution may be modified in two ways: (1) constitutional amendments "propose changes specific and limited in nature"; (2) constitutional revisions, by contrast, make "far reaching change[s] in the fundamental governmental structure or the foundational power of its branches." *Id.* at 88, 101. California voters may amend the state constitution by initiative. CAL. CONST. art. XVIII, § 3. However, revisions must be proposed by constitutional convention or two-thirds of the state legislature, and ratified by the voters. CAL. CONST. art. XVIII, §§ 1-2.

45. *Strauss*, 207 P.3d at 110.

exercise of direct democracy, *Strauss* will have little or no force outside of California due to the unique nature of California's amendment-revision process.[46] Thus, whatever the *Strauss* court may have decided with respect to California's initiative process, it is not relevant to the question addressed by this Comment.

On May 22, 2009, two same-sex couples filed *Perry v. Schwarzenegger* in the U.S. District Court for the Northern District of California.[47] On August 4, 2010, the district court ruled Proposition 8 was unconstitutional under both the due process and equal protection clauses of the Fourteenth Amendment.[48] In contrast to *Strauss*, which dealt with the power of California voters vis-à-vis the California Constitution,[49] *Perry* directly challenges Proposition 8 on federal due process and equal protection grounds.[50] This Comment now turns to the viability of this federal challenge.

III. EQUAL PROTECTION

The Fourteenth Amendment to the United States Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."[51] Courts have read a similar provision, applicable to the federal government, into the Fifth Amendment's Due Process Clause.[52] Equal protection of the laws has proven to be a much more elusive concept than these thirteen simple words would suggest. In fact,

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46. M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality after Proposition 8*, 12 SCHOLAR 1, 6-7 (2009).

47. Complaint, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. May 22, 2009) (No. CV-09-2292).

48. *See supra* notes 10-11 and accompanying text.

49. *See supra* notes 42-45 and accompanying text.

50. Complaint, *supra* note 47, at 8-9.

51. U.S. CONST. amend. XIV, § 1.

52. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973) (recognizing "the equal protection component of the Due Process Clause of the Fifth Amendment"); Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"(citation omitted)).

> [w]hile the language of the . . . Equal Protection Clause[] is plain, the long history of civil rights movements in this country has shown group after group battle for the recognition of their rights and equality. On many occasions, it has been necessary for the Supreme Court to articulate elevated federal protections for a group that would otherwise face discrimination and inequity when subject to the whims of the majority.[53]

Modern equal protection analysis involves two such "elevated" federal protections, and one baseline standard. The most elevated and searching of these protections is strict scrutiny, which courts apply to laws that discriminate based on a suspect classification, such as race, national origin, or alienage.[54] The other elevated protection is intermediate scrutiny, which courts apply to laws drawing "quasi-suspect" classifications, such as gender classifications.[55] Finally, most laws do not draw invidious classifications and courts review such laws only to ensure that a rational connection exists between the ends and the means employed to achieve them.[56] These standards of review are discussed in Section III(A) of this Comment.

The Supreme Court's equal protection doctrine with respect to sexual orientation is quite underdeveloped.[57] The standard of review applied to a challenged classification is frequently outcome-determinative.[58] Thus, whether courts should deem sexual orientation a suspect or quasi-suspect classification for equal protection purposes

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53. Darmer & Chang, *supra* note 46, at 11 (citations omitted).

54. *See infra* notes 60-62 and accompanying text.

55. *See infra* notes 70-72 and accompanying text.

56. *See infra* notes 80-85 and accompanying text.

57. The Court has decided at least one sexual orientation case on equal protection grounds, but in doing so purported to use rational basis review. *See infra* notes 88-92 and accompanying text.

58. *See generally* United States v. Virginia, 518 U.S. 515 (1996). There, the Virginia Military Institute sought to justify a gender classification on the ground that it furthered its interest in ensuring "diversity in educational approaches." *Id.* at 535. The Supreme Court rejected that justification, holding that "Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI." *Id.* at 534. By contrast, under rational basis review, this classification probably would have survived; ensuring diversity in educational approaches is almost certainly a legitimate state interest even if it is not important enough to survive intermediate scrutiny, and a rational legislature could have found that having a single-sex school addresses some part of that interest.

is highly relevant to the constitutionality of measures like Proposition 8. To that end, this Comment will survey the differences between California and federal equal protection law to identify the critical ways in which these two doctrines are the same. This comparison will provide a foundation by which the Petitioners' argument in *In re Marriage Cases* can be successfully adapted to federal equal protection precedent. This section ultimately concludes that classifications based on sexual orientation are reducible to classifications based on gender. Therefore, laws that draw lines based on sexual orientation are quasi-suspect and should be subject to intermediate scrutiny on federal review.

A. Equal Protection in the United States Supreme Court

Federal equal protection jurisprudence recognizes three standards of review: strict scrutiny, intermediate scrutiny, and rational-basis review. These standards were introduced above and will be further developed here.

1. Strict Scrutiny for Suspect Classifications

A suspect class is one "'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[59] To date, courts have recognized only three suspect classifications: race,[60]

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59. Mathews v. Lucas, 427 U.S. 495, 506 n.13 (1976) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). *See also* Plyler v. Doe, 457 U.S. 202, 218 n.14 (1982) ("Several formulations might explain our treatment of certain classifications as 'suspect.' Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (internal citations omitted)).

60. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the

national origin,[61] and alienage.[62] Although immutability of the characteristic by which the class is defined and minority status are also frequently cited as "requirements" for recognition as a suspect classification, it appears that these are subsidiary considerations at best.[63]

Courts strictly scrutinize laws that disadvantage a suspect class to ensure the "classification has been precisely tailored to serve a compelling governmental interest."[64] Even where a compelling state interest exists, the classification must be necessary to achieve that compelling interest.[65] If a less discriminatory alternative classification exists, the classification is neither necessary nor narrowly drawn and must fail strict scrutiny.[66]

Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny.'" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944))); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) ("[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' and subject to the 'most rigid scrutiny.'" (internal citations omitted)).

61. *See, e.g.*, Oyama v. California, 332 U.S. 633, 640 (1948) ("In our view of the case, the State has discriminated against Fred Oyama; the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature."); *id.* at 646 ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943))).

62. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." (citations omitted)).

63. "[T]he United States Supreme Court has granted suspect class status to a group whose distinguishing characteristic is not immutable." Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 427 (Conn. 2008).

64. *Plyler*, 457 U.S. at 217.

65. Ly Tran, *Sick and Tired of the Knox-Keene Act: The Equal Protection Right of Non-Mexican Californians to Enroll in Mexico-Based HMO Plans*, 14 SW. J.L. & TRADE AM. 357, 369 (2008) ("State-imposed classifications based on national origin, like racial classifications, will only be allowed if the state can show that the discrimination is necessary to achieve a compelling government purpose.").

66. *See generally* Kacy Elizabeth Wiggum, *Defining Family in American*

Courts apparently determine whether the interest asserted in defense of a challenged classification is "compelling" on a case-by-case basis. However, the Supreme Court *has* found some interests compelling, including: the prevention of sabotage and espionage in a time of war,[67] diversity in law school admissions,[68] and remedying the effects of the government's own past discrimination.[69]

2. Intermediate Scrutiny for Quasi-Suspect Classifications

"Legislative classifications based on gender also call for a heightened standard of review."[70] However, the United States Supreme Court has also recognized that some gender classifications "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances."[71] Thus, the Supreme Court deems gender classifications "quasi-suspect" and applies an intermediate level of scrutiny to laws drawing gender classifications.[72]

A gender classification will fail unless it is "'substantially related to a legitimate state interest.'"[73] While the interest required need not be compelling, the Supreme Court's equal protection jurisprudence "reveal[s] a strong presumption that gender classifications are

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Prisons, 30 WOMEN'S RTS. L. REP. 357, 404 (2009).

67. *See* Korematsu v. United States, 323 U.S. 214, 216, 218 (1944).

68. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

69. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

70. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

71. Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 469 (1981) (citations omitted). With respect to suspect classifications, by contrast, the Court has noted that "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne Living Ctr.*, 473 U.S. at 440.

72. Illegitimacy is also treated as a quasi-suspect classification in certain circumstances. *See, e.g.*, *Cleburne Living Ctr.*, 473 U.S. at 441. However, this Comment's discussion of intermediate scrutiny focuses on gender as a quasi-suspect class.

73. *Id.* (quoting Mills v. Habluetzel, 456 U.S. 91, 99 (1982)).

invalid."[74] Indeed, the intermediate scrutiny standard is not "toothless."[75]

> [T]he reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[76]

Examples of interests courts have found sufficiently important to support a gender classification include facilitating a relationship between parent and child[77] and remedying the effects of past economic discrimination on women.[78] Even where an important government interest underlies the challenged classification, the classification must bear a "fair and substantial relation[ship]" to the achievement of that interest.[79]

3. Rational Basis Review

Courts review laws that do not draw suspect or quasi-suspect classifications only to ensure a rational connection exists between the classification and a conceivable legitimate state interest.[80] "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the law must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[81] The Supreme

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74. United States v. Virginia, 518 U.S. 515, 532 (1996) (quoting with approval J.E.B. v. Alabama, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring)).

75. Matthews v. Lucas, 427 U.S. 495, 510 (1976).

76. United States v. Virginia, 518 U.S. at 533 (citations omitted).

77. Nguyen v. INS, 533 U.S. 53, 63 (2001).

78. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977).

79. Reed v. Reed, 404 U.S. 71, 76 (1971).

80. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

81. Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-272 (1979), and F.S. Royster Guano Co. v. Va., 253 U.S. 412, 415 (1920)).

Court has "attempted to reconcile [this] principle with . . . reality" through the rational basis test.[82] Under rational basis review, a challenged classification "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[83] Such a classification will be upheld "even if [it] seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous,"[84] because "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process[]."[85] "Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that [the classification] is irrational, they cannot prevail so long as 'it is evident from all the considerations presented . . . and those of which [judicial notice is taken], that the question is at least debatable.'"[86]

Because rational basis review is highly deferential to legislative action, it is normally very difficult to invalidate an enactment under this standard.[87] However, the deference shown to legislatures is not without exceptions, even under rational basis review. For example, where the challenged classification imposes a disadvantage "born of animosity toward the class of persons affected,"[88] the Supreme Court has examined the classification more closely than it would under rational basis review. In the landmark case *Romer v. Evans*, the Court struck down a Colorado constitutional amendment, designated "Amendment 2."[89] The amendment singled out persons according to "homosexual, lesbian or bisexual orientation" and denied them "minority status, quota preferences, protected status or claim of discrimination."[90] The Court explained:

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82. *Romer*, 517 U.S. at 631.

83. *Cleburne Living Ctr.*, 473 U.S. at 440.

84. *Romer*, 517 U.S. at 632.

85. *Cleburne Living Ctr.*, 473 U.S. at 440.

86. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (citations omitted).

87. *See, e.g.*, Darmer & Chang, *supra* note 46, at 12 ("[R]ational basis analysis . . . gives great deference to the state's actions . . . .").

88. *Romer*, 517 U.S. at 634.

89. *Id.*

90. COLO. CONST. art. 2, § 30b (1993).

> "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."
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> . . . [The challenged provision] is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.[91]

It is important to note that *Romer* invalidated Colorado's Amendment 2 despite the State advancing at least one conceivable legitimate state interest in support of its challenged provision.[92] *Romer* would seem to indicate, at a minimum, that classifications resulting from animus toward the disadvantaged class cannot be legitimately or rationally grounded and must fail even rational basis review. The majority opinion in *Lawrence v. Texas*[93] seems to support this inference.[94]

B. Equal Protection in California

California's equal protection jurisprudence has evolved somewhat differently than its federal counterpart. The California Supreme Court

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91. *Romer*, 517 U.S. at 634-35 (citations omitted).

92. *See id.* at 635 ("Colorado . . . cites its interest in conserving resources to fight discrimination against other groups."); *id.* at 636 (Scalia, J., dissenting) (proposing a second legitimate state interest, that the challenged provision is "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws").

93. 539 U.S. 558 (2003).

94. *See id.* at 577-78 ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.' . . . The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."). *See also id.* at 580 (O'Connor, J., concurring) ("We have consistently held, however, that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))). For a discussion of *Lawrence*, which was decided on substantive due process grounds, see *infra* Section IV.A.2.

recognizes only two tiers of scrutiny for purposes of equal protection.[95] "Although in most instances the deferential 'rational basis' standard of review is applicable in determining whether different treatment accorded by a statutory provision violates the state equal protection clause, . . . 'strict scrutiny' . . . is applied when the distinction drawn by a statute rests upon a . . . 'suspect classification.'"[96] The strict scrutiny standard utilized by the California Supreme Court is identical to the federal test.[97]

Under California precedent, laws that classify similarly situated people on the basis of sex or gender are treated as suspect.[98] California appears to recognize limited, if any, situations where valid gender distinctions can be drawn on the basis of "basic biological differences."[99] Addressing gender classifications, the California Supreme Court explained:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.[100]

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95. Shotwell, *supra* note 6, at 672.

96. *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008).

97. *Id.* ("Under the strict scrutiny standard . . . in order to demonstrate the constitutional validity of a challenged statutory classification the state must establish (1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest.").

98. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971) ("We conclude that the sexual classifications are properly treated as suspect.").

99. Nguyen v. INS, 533 U.S. 53, 73 (2001).

100. *Sail'er Inn*, 485 P.2d at 540 (citations omitted).

Thus, California courts treat classifications deemed quasi-suspect by the U.S. Supreme Court as suspect. As a result, intermediate scrutiny and quasi-suspect classifications do not exist under California law.[101]

A law that neither draws a suspect classification nor abridges a fundamental right is subject only to rational basis review.[102] Like its federal counterpart, the California rational basis standard "requires merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose."[103] Although the California rationality test does not appear to have any differences in formulation or general application from the federal standard, courts have not recently applied the California test in cases involving sexual orientation. Rather, California law has long forbidden discrimination based on sexual orientation,[104] and discrimination cases involving sexual orientation tended to be resolved as statutory, rather than constitutional, questions.[105] By contrast, the federal cases have purported to treat sexual orientation classifications under the rational basis standard, even though recent federal cases have invalidated such classifications using language that suggests an unidentified, heightened standard of review may be at work.[106]

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101. *See In re Marriage Cases*, 183 P.3d at 436 n.55 ("Past California decisions . . . have applied the strict scrutiny standard when evaluating discriminatory classifications based on sex, and have not applied an intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classification." (citations omitted)).

102. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 401; Hernandez v. City of Hanford, 159 P.3d 33, 46 (2007).

103. *Id.* at 435 (citations omitted).

104. *See, e.g.*, CAL. GOV'T CODE § 12955 (West 2005) (prohibiting discrimination based on sexual orientation in housing, accommodations, and land use decisions); CAL. CIV. CODE § 51(b) (West 2007) (detailing that all individuals in the state are free and equal regardless of their sexual orientation); CAL. HEALTH & SAFETY CODE § 1365.5 (West 2008 & Supp. 2010) (prohibiting discrimination based on sexual orientation in health care).

105. *See, e.g.*, Dominguez v. Wash. Mut. Bank, 85 Cal. Rptr. 3d 705 (Cal. Ct. App. 2008) (sexual orientation discrimination in employment); Doe v. Cal. Lutheran High Sch. Ass'n, 88 Cal. Rptr. 3d 475 (Cal. Ct. App. 2009) (sexual orientation discrimination in education).

106. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996). For further discussion of *Romer*, see *supra* Section III.A.3. See *infra* Section IV.A.2 for a

Even with the above distinctions, California equal protection doctrine substantially parallels its federal counterpart. Though differences exist, the two lines of authority have enough in common to adapt the petitioners' argument in *In re Marriage Cases* to federal law.

C. In re Marriage Cases and Federal Equal Protection Doctrine

Under California law, domestic partnerships accord virtually identical state benefits to same-sex couples as opposite-sex couples receive in civil marriage.[107] Thus, under state law, one could view the distinction between the two as merely one of name or designation. This does not remove the equal protection problem inherent in the classification, but makes it more susceptible to characterization as merely nominal, rather than a reflection of meaningful legislative classification. However, when considered under federal law, real and tangible government benefits are denied to same-sex couples as a result of enactments like Proposition 8. The California Supreme Court identified some of these: "Social Security, Medicare, federal housing, food stamps, federal military and veterans' programs, federal employment programs, and filing status for federal income tax purposes."[108] Because federal law restricts these and other federal benefits only to marriages "between one man and one woman,"[109] such classifications impose real and serious consequences on same-sex couples. Indeed, on which side of the classification a couple falls will determine whether federal law affords a couple recognition and benefits.[110] This is far from the mere dignitary stigma of having one's relationship accorded a name different from similar relationships.

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discussion of *Lawrence v. Texas*, which the Supreme Court decided on substantive due process grounds, but appeared to apply an unnamed, heightened standard of review similar to that used in *Romer*.

107. *See, e.g.*, CAL. FAM. CODE § 297.5(a) (West 2004 & Supp. 2010).

108. *In re* Marriage Cases, 183 P.3d 384, 417 (Cal. 2008).

109. Defense of Marriage Act, 1 U.S.C. § 7 (2006).

110. Incidentally, not all state benefits available to opposite-sex spouses are available to registered domestic partners in California. *See In re Marriage Cases*, 183 P.3d at 416 n.24. For example, California makes no provision for the contracting of confidential (without being made public) domestic partnerships; however, California allows this procedure with respect to marriages. *Id.*

Although existing authority may well support recognizing sexual orientation as a suspect or quasi-suspect classification in its own right, *In re Marriage Cases* should be adapted to show that laws restricting marriage exclusively to opposite-sex couples are unconstitutional on the basis of existing authority. To that end, a viable equal protection claim can be made on the basis of currently existing gender discrimination jurisprudence.

1. Classifications on the Basis of Sexual Orientation as Gender Discrimination

Independent of any protected status to which it is otherwise entitled, sexual orientation is a gender-based classification subject to intermediate scrutiny. Existing state bans on same-sex marriage and the federal Defense of Marriage Act[111] ("DOMA") all use approximately the same language: marriage shall consist of only one man and one woman. As developed below, this is a facial gender classification that, under federal equal protection jurisprudence, should draw intermediate scrutiny.

Under existing same-sex marriage bans, "[i]f a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor."[112] Although this appears to be a gender-based classification, disadvantaging one who wishes to marry a person of the same gender, some courts disagree. The California court of appeal held the distinction "treat[s] men and women exactly the same, in that neither group is permitted to marry a person of the same gender."[113]

The California Supreme Court took a different approach but arrived at the same result. In rejecting the gender-discrimination approach of the court of appeal, the court found the following:

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111. DOMA purports to permit the denial of full faith and credit to same-sex marriages across state lines. 28 U.S.C. § 1738C (2006). DOMA also provides that the federal definition of marriage shall be "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7 (2006).

112. Opening Brief on the Merits, *supra* note 5, at 25 (internal quotations and citations omitted).

113. *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 706 (Ct. App. 2006).

> [P]ast judicial decisions, in California and elsewhere, virtually uniformly hold that a statute or policy that treats men and women equally but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of *sexual orientation* rather than an instance of *sex discrimination*, and properly should be analyzed on the *former* ground.[114]

Although the California Supreme Court may have discounted the gender discrimination argument because of its decision to recognize sexual orientation as a suspect classification in its own right, the reasoning above is unpersuasive. State supreme court opinions in Massachusetts,[115] Hawaii,[116] and Vermont[117] have urged that such classifications *are* properly characterized as classifications based on gender.

The California courts disagreed that federal and state decisions that invalidated anti-miscegenation statutes[118] were applicable in the context same-sex marriage bans, finding instead that:

> [Such cases] are clearly distinguishable . . . because the antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons. . . . Under these circumstances, there can be no doubt that the reference to race in the statutes at issue in [those cases] unquestionably reflected the kind of racial discrimination that always has been recognized as calling for strict scrutiny under equal protection analysis. . . .
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> . . . [C]ourts have recognized that a statute that treats a couple differently based upon whether the couple consists of persons of

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114. *In re* Marriage Cases, 183 P.3d 384, 437 (Cal. 2008).

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

116. Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993) (plurality opinion).

117. Baker v. State, 744 A.2d 864, 904-05 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

118. Miscegenation refers to "[a] marriage between persons of different races." BLACK'S LAW DICTIONARY 1088 (9th ed. 2009). For a discussion of these cases, see *infra* Sections IV.A and IV.B.

> the same race or of different races generally reflects a policy disapproving of the integration or close relationship of individuals of different races in the setting in question, and as such properly is viewed as embodying an instance of *racial discrimination* with respect to the interracial couple and both of its members.[119]

The California Supreme Court indicates that cases invalidating anti-miscegenation statutes are somehow limited to their facts. However, "[a]lthough *Loving* arose *in the context* of racial discrimination, prior and subsequent decisions of [the U.S. Supreme Court] confirm that the right to marry is of fundamental importance for all individuals."[120] Thus, decisions striking down anti-miscegenation statutes are not the result of specialized rules applicable only in the context of race classifications. Rather, these decisions apply general equal protection principles to a specific set of circumstances. Therefore, the equal protection principles that prompted the U.S. Supreme Court to invalidate race-based restrictions on marriage are equally applicable when those restrictions are gender-based. Just as "a statute that [restricts marriage based on the race of the would-be spouses] generally reflects a policy disapproving of the integration or close relationship of individuals of different races,"[121] a statute that treats a couple differently based upon its composition as either same-sex or opposite-sex generally reflects a policy that disapproves of close relationships between individuals of the same gender. Additionally, "[i]f . . . 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,"[122] and if that interest is not even legitimate, it cannot meet the exceedingly persuasive justification[123] required to support a gender classification.

Finally, "'[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.'"[124] The U.S. Supreme

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119. *In re Marriage Cases*, 183 P.3d at 437.

120. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (emphasis added) (citation omitted).

121. *In re Marriage Cases*, 183 P.3d at 437.

122. Romer v. Evans, 517 U.S. 620, 635 (1996).

123. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

124. *Romer*, 517 U.S. at 633 (quoting Sweatt v. Painter, 339 U.S. 629, 635

Court has repeatedly rejected "the notion that the mere 'equal application' of a statute . . . is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious . . . discrimination[]."[125] Therefore, the California appellate court's finding that California's same-sex marriage ban did not impose a gender-based classification, because it applied equally to men and women, cannot be squared with U.S. Supreme Court precedent.

Such bans "expressly and directly refer to the gender of individuals allowed to participate in the institution of marriage"[126] and thereby draw a facial gender classification. Under the bans, males can marry females, but not males; females can marry males, but not females. "It is the gender of the intended spouse that is the sole determining factor."[127]

Accordingly, laws limiting marriage to opposite-sex couples draw a facial gender classification; therefore, they should be subject to intermediate scrutiny under federal law. It is impossible to identify all possible state interests that one could assert in defense of a same-sex marriage ban. States could assert, for example, that they have an interest in preserving the traditional definition of marriage, fostering procreation, or protecting the welfare of children.

It is doubtful that one could persuasively make such an argument. If one could successfully make such an argument, then the courts hearing the cases striking down anti-miscegenation statutes would have held differently. After all, prior to the decision in *Loving v. Virginia*,[128] many, if not most states, had anti-miscegenation statutes on the books. Therefore, the "traditional" definition of marriage contemplated that marriage would occur only between persons of the same race. If the state had a compelling interest in preserving the

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(1950)).

125. Loving v. Virginia, 388 U.S. 1, 8 (1967). *But see* Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis . . . .").

126. Opening Brief on the Merits, *supra* note 5, at 28.

127. *Id.* at 25.

128. 388 U.S. 1 (1967).

"traditional" definition of marriage, it is difficult to imagine how a statute limiting marriage only to persons of the same race could have been invalidated, even under strict scrutiny. Indeed, such a statute would not just be narrowly drawn, but *perfectly* drawn, to achieve that assumed compelling interest. Therefore, if there is a compelling government interest in preserving the "traditional" definition of marriage, it would easily survive even the most exacting constitutional scrutiny. In sum, it is difficult to argue against a change in the law by asserting "tradition."

Although other state interests, such as the interest in promoting the welfare of children, may be sufficiently important to initially justify gender classification, a ban on same-sex marriage is unlikely to be sufficiently related to fulfillment of that interest and, thus, survive intermediate scrutiny. Because total bans are almost certain to be exceedingly over-inclusive and under-inclusive in their operation, they will fail any kind of heightened scrutiny. Same-sex marriage bans that purport to promote children's welfare are necessarily premised on the argument that a child with parents of opposite genders will fare better than a child with same-sex parents. Putting aside the fact that empirical evidence does not support this proposition,[129] a same-sex marriage ban premised on this kind of argument is, in its very nature, likely to be extremely over-inclusive and under-inclusive in its operation. Thus, it should arguably fail on that basis.

For example, many opposite-sex parents endanger the welfare of their children, but are unaffected by same-sex marriage bans.[130] Hence, such bans are under-inclusive because they do not restrict

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129. *See, e.g.*, MARY PARKE, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING 6 (2003), *available at* http://www.clasp.org/admin/site/publications_states/files/0086.pdf; Marua Dolan, *Children Thrive Equally with Same-Sex, Heterosexual Parents, Psychologist Testifies at Prop. 8 Trial*, L.A. TIMES, Jan. 15, 2010, *available at* http://latimesblogs.latimes.com/lanow/2010/01/children-thrive-equally-with-same-sex-heterosexual-parents-psychologist-testifies-at-prop-8-trial.html.

130. One 2007 study reports that out of approximately 859,000 cases of child maltreatment, 56.5% of the perpetrators were women, 42.4% were men, and a staggering 87.7% of the perpetrators were the biological parents of the abused child. U.S. DEP'T OF HEALTH AND HUMAN SERV., CHILD MALTREATMENT 2007, at 65-66 (2009), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#can.

persons who should be restricted. Conversely, many same-sex parents safeguard the welfare of their children at least as well as opposite-sex parents.[131] Thus, a ban would be over-inclusive because it unnecessarily disadvantages parents who should not be burdened.

The foregoing example is typical of a total ban's application, regardless of what interest proponents use to justify it. Total bans indiscriminately impose a disability upon all who fall within their sphere of operation, without regard to individual characteristics. Indeed, it is exactly this characteristic of total bans that ensures their demise under strict, or even intermediate, scrutiny. Courts are unlikely to accept the high degree of over-inclusiveness and under-inclusiveness inherent in same-sex marriage bans as "substantially related" to the state interests that purport to justify these bans. Thus, total bans are unlikely to survive intermediate scrutiny.

The application of intermediate scrutiny in *United States v. Virginia*[132] is particularly relevant in the context of same-sex marriage. There, the Virginia Military Institute ("VMI") "reserve[ed] exclusively to men the unique educational opportunities" it offered, and completely barred women from enrolling.[133] VMI asserted that its single-sex policy was justified because it "provide[d] important educational benefits" not found in integrated environments and because the program provided "diversity in educational approaches."[134] The Supreme Court found that VMI failed to show an exceedingly persuasive justification for gender classification. The Court "assumed, for the purposes of [its] decision, that most women would not choose VMI's" program, but emphasized that the issue before the Court was "whether the [State] can constitutionally deny [admission] to women who have the will and capacity" to enroll at VMI.[135] Answering in the negative, the Court found that Virginia's justifications relied on overbroad generalizations about "the way women are"[136] and fell "far short of establishing the exceedingly persuasive justification that must be the solid base for any gender-

131. *See, e.g.*, PARKE, *supra* note 129; Dolan, *supra* note 129.
132. 518 U.S. 515 (1996).
133. *Id.* at 519.
134. *Id.* at 535 (citations omitted).
135. *Id.* at 542.
136. *Id.* at 550.

defined classification."[137] Most importantly, the Court explained that "estimates of what is appropriate for *most women* [do not] justify denying opportunity to women whose talent and capacity place them outside the average description."[138] In other words, the Court found that as long as *some* women had both the will and capacity to submit to VMI's adversative method of instruction, Virginia could not constitutionally prohibit them from doing so. [139]

As discussed above, same-sex marriage bans operate to disable persons from marriage who are otherwise qualified to marry, on the basis of the gender of the contracting parties. It is the sex of the intended spouse that solely determines whether two persons may marry.[140] Each of the intended spouses desires to marry the other and would have the capacity to marry but for the operation of a same-sex marriage ban. Thus, the legal posture of two adult, same-sex partners who wish to marry is virtually indistinguishable from that of the women disadvantaged by VMI's policy in *United States v. Virginia*. Same-sex marriage bans impose a constraint on the ability to marry that is justified primarily because the "traditional" definition of marriage[141] estimates what is appropriate for most couples. However, same-sex couples have the will and capacity to marry, notwithstanding a prohibition on their ability to do so, which places them outside the average description. Thus, same-sex partners are in a position identical to the applicants in *United States v. Virginia*: but for a gender-based prohibition on their ability to take advantage of state benefits, both would have the capacity and ability to do so. Unless states can establish an exceedingly persuasive justification for imposing such a disability, supported by sufficiently strong evidence, they cannot use gender classifications to prevent two people who otherwise have the capacity and ability to marry from doing so.

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137. *Id.* at 546 (internal quotations and citations omitted).

138. *Id.* at 550.

139. VMI's adversative method "features '[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of desirable values.' . . . VMI cadets live in Spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills." *Id.* at 522 (quoting United States v. Commonwealth, 766 F. Supp. 1407, 1421 (W.D. Va. 1991).

140. Opening Brief on the Merits, *supra* note 5, at 25.

141. *E.g.*, between a man and a woman.

Absent such an exceedingly persuasive justification, same-sex marriage bans cannot survive intermediate scrutiny under *United States v. Virginia.*

Although one could argue that sexual orientation is a suspect or quasi-suspect classification in and of itself, classifications based on sexual orientation are independently reducible to gender classifications and courts should accord a commensurate level of scrutiny. Indeed, because gender itself is a quasi-suspect classification, it is unlikely that the Supreme Court would accord sexual orientation more protection than gender receives. However, no state interest is likely to justify a total ban on same-sex marriage,[142] and intermediate scrutiny is sufficient to strike down such bans under federal equal protection jurisprudence.

2. Classifications on the Basis of Sexual Orientation as "Animus"

Same-sex marriage bans should be subject to some form of heightened scrutiny. As rational basis review is highly deferential, one would certainly face an uphill battle in attempting to invalidate the

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142. California's Proposition 8, the enactment challenged in *Perry*, is uniquely vulnerable to attack on these grounds. Same-sex marriages performed in California prior to the effective date of Proposition 8 are valid. Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009). Therefore, *Strauss* actually creates three distinct classes for equal protection purposes: (1) unmarried individuals who wish to marry a person of the same sex, but are precluded from doing so by Proposition 8; (2) individuals who married someone of the same sex prior to the effective date of Proposition 8 and whose marriage is therefore recognized by the State of California; and (3) persons who are or seek to be married to someone of the opposite sex.

As discussed above, the equal protection clause requires that the connection between a challenged law and an asserted state interest must be at least rational. A state cannot rationally claim, for example, that banning same-sex marriage serves the state interest of ensuring the welfare of children, or of preserving the traditional definition of marriage, when the state allows same-sex couples to marry. A state that refuses to recognize a relationship generally, but recognizes the same relationship in some instances, cannot then claim that the general refusal is justified on the basis of an interest that would require all instances of the relationship to be prohibited. This is absurd as a matter of common sense. Thus, California's decision to recognize some same-sex marriages precludes the state from asserting any of the state interests mentioned herein, and likely leaves California without any state interest with even a rational connection to Proposition 8.

classification on this standard. However, sufficient evidence may exist to show the actual purpose of the classification was animus toward gay and lesbian individuals. If same-sex marriage proponents could persuade the reviewing court that this animus was indeed the actual purpose, and the proffered "legitimate" state interest was not the actual purpose, then courts could invalidate same-sex marriage bans on rational basis review.

To the extent that legislatures and voters enacted same-sex marriage bans out of fear that same-sex marriage would harm the institution of marriage, it would be quite possible to establish that animus toward gay and lesbian individuals played an impermissible role in the enactment of those measures. If animus motivates the enactment of a same-sex marriage ban, *Romer* indicates that such a ban would be invalidated, even if a legitimate interest exists that would independently justify the ban in the absence of animus.

Finally, to the extent that all conceivable legitimate state interests relate to child-rearing, family stability, and other such goals, sufficient evidence may exist to show that the classification does not rationally relate to furthering that interest. However, as the rational basis standard is quite deferential to legislative action, it is unlikely that such evidence would be so overwhelming as to remove from debate the connection between means and ends. Thus, unless same-sex marriage proponents can show animus, a same-sex marriage ban would be much more likely than not to be upheld on rational basis review.

IV. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."[143] The Fifth Amendment's Due Process Clause, applicable to the federal government, contains similar language.[144] The meaning of the word "liberty" is vague and may connote different meanings to different individuals.[145] Although

143. U.S. CONST. amend. XIV, § 1.

144. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .").

145. *See generally* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926) ("[U]nder the common law, the

earlier cases and scholarly works took a relatively narrow view of the Due Process Clause,[146] courts now interpret its protection of "liberty" to

> denote[] not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[147]

Further, substantive due process is concerned with the principle that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[148] Among all of the liberty interests protected by the Due Process Clause, individuals enjoy "certain fundamental rights [that] must be respected."[149] Although all liberty interests are important, fundamental rights have received special protection from government interference.[150]

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word 'liberty' meant simply 'liberty of the person,' or, in other words, 'the right to have one's person free from physical restraint.'"). *But see* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (holding that "liberty" under the Due Process Clause "means, not only the right of the citizen to be free from the mere physical restraint of his person . . . but . . . to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.").

146. *See, e.g.*, Warren, *supra* note 145.

147. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

148. *Id.* at 399-400.

149. *Id.* at 401.

150. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."). *Cf.* Washington v. Glucksberg, 521 U.S. 702 (1997) (employing rational basis review where no fundamental right was implicated).

An examination of the implied fundamental right to marry is of obvious relevance to this debate. In the following discussion, the federal and California substantive due process doctrines are developed for purposes of comparison.

A. Substantive Due Process in the United States Supreme Court

The United States Supreme Court has long recognized the existence and special place of implied fundamental rights under the United States Constitution. Implied fundamental rights and liberties are those that "are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[151] "The Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"[152] Thus, the Supreme Court applies strict scrutiny to laws infringing on a fundamental liberty interest.[153] By contrast, laws that do not implicate fundamental rights are subject only to rational basis review.[154]

When dealing with a fundamental right, the Supreme Court "require[s]. . . a 'careful description' of the asserted fundamental liberty interest."[155] Framing a fundamental right too narrowly can produce unjust results, and Part 2 will explore this effect in the context of laws regulating homosexual conduct. First, however, this Comment explores the scope and nature of the fundamental right to marry as recognized by the Supreme Court.

1. Marriage as a Fundamental Right

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151. *Glucksberg*, 521 U.S. at 720-21 (citations omitted).

152. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

153. *See supra* Section III.A.1.

154. *See, e.g.*, *Glucksberg*, 521 U.S. 702 (law prohibiting assisted suicide did not implicate a fundamental right and was upheld under rational basis review). As is the case with equal protection, a statute will be upheld on rational basis review "if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

155. *Glucksberg*, 521 U.S. at 721 (citation omitted).

The right to marry is a fundamental liberty interest protected by the Due Process Clause in the United States Constitution. Though the Supreme Court hinted at a fundamental right to marry in many of its early privacy cases,[156] it clearly articulated the right for the first time in *Loving*.[157] There, the Court invalidated Virginia's criminal miscegenation statute on both equal protection and substantive due process theories.[158]

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,"[159] placing it at the heart of the liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[160] Although *Loving* arose in the context of racial discrimination, later Supreme Court decisions have made clear that the right to marry extends to all individuals.[161] And although the state may impose "reasonable regulations that do not significantly interfere with the decision to enter into the marital relationship,"[162] laws that interfere directly and substantially with the right to marry are impermissible unless narrowly tailored to serve a compelling state interest.[163]

The Supreme Court's judgment in *Turner v. Safley*[164] is consistent with this principle.[165] There, state prisoners sought to overturn prison

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156. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

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

158. Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

159. *Loving*, 388 U.S. at 12.

160. *Zablocki*, 434 U.S. at 384 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

161. *Id.*

162. *Id.* at 386 (citing Califano v. Jobst, 434 U.S. 47, 55 n. 12 (1977)).

163. *Id.* at 388.

164. 482 U.S. 78 (1987).

165. The *Turner* Court recognized that *Zablocki* applies even to prison inmates. *Id.* at 95 ("We disagree with petitioners that *Zablocki* does not apply to prison inmates. It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974) (alteration in original))). However, the Court did not apply strict scrutiny. Instead, the Court asked whether the regulation was "'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Id.* at 87 (citations omitted).

regulations that conditioned their right to marry on the warden's approval, and only if "compelling" reasons existed to grant it.[166] While the Court recognized the nature of incarceration meant the State would be able to burden the prisoners' liberty by imposing additional burdens that would not be permissible outside a prison setting,[167] the State could not completely bar the prisoners from marriage.[168] Finding that "important attributes of marriage remain . . . after taking into account the limitations imposed by prison life,"[169] particularly emotional bonding and receipt of government benefits conditioned on

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Finding that this "reasonable relation" test was not satisfied, the Court invalidated the regulation. *Id.* at 99 ("[T]he almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid."). While the Court's application of the "reasonable relation" test seems to conflict with its observation that *Zablocki* applies to prison inmates, the conflict is reconciled by reading the "reasonable relation" test, as applied in *Turner*, as one for determining whether the challenged policy is a "reasonable regulation[] that do[es] not significantly interfere with the decision to enter into the marital relationship," which under *Zablocki* would be permissible. *Zablocki*, 434 U.S. at 386 (citing *Califano*, 434 U.S. at 55 n.12).

The unstated rationale in *Turner*, therefore, is the following: because the challenged regulation was not reasonable, it amounted to a direct and substantial burden on the decision to marry, and was unconstitutional unless it met strict scrutiny. In finding the policy was not reasonably related to any of the interests asserted in its defense, the Court would necessarily have found that strict scrutiny was not satisfied. A regulation that bears no reasonable relation to such interests cannot, *a fortiori*, be necessary to achieve them. This construction of *Turner* reconciles the governing *Zablocki* rule, the unique nature of the prison environment, and the Court's application of the "reasonable relation" test.

166. *Turner*, 482 U.S. at 82.

167. *Id.* at 88 ("As *Pell* acknowledged, the alternative methods of personal communication still available to prisoners would have been 'unimpressive' if offered to justify a restriction on personal communication among members of the general public." (citing Pell v. Procunier, 417 U.S. 817, 825 (1974))); *see also id.* at 95 ("The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life."). For example, prison officials could prevent prisoners from having sex. ESKRIDGE, *supra* note 13, at 129.

168. *Turner*, 482 U.S. at 96.

169. *Id.* at 95.

marriage,[170] the Court held that prisons could not *completely* deny prisoners the right to marry while in prison.[171]

Interestingly, the *Turner* Court upheld the prisoner's right to marry even though, at least for the near future, no procreative activity would result from such a marriage. This important consideration belies a justification commonly asserted in defense of same-sex marriage bans: the fundamental purpose of marriage is to facilitate procreation and child-rearing.[172] Ultimately, procreative intent is not a prerequisite to the issuance of a marriage license.[173] Nonetheless, opponents of same-sex marriage interpose the physical impossibility of procreation as a justification for denying politically unpopular groups access to civil marriage.[174]

Loving's progeny further established that "'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth

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170. *Id.* at 95-96.

171. *Id.* at 99. The Court recognized, however, a very narrow exception to this rule. *Id.* at 96 ("Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context. Our decision in *Butler v. Wilson*, 415 U.S. 953 (1974) . . . is not to the contrary. That case involved a prohibition on marriage only for inmates sentenced to life imprisonment; *and, importantly, denial of the right was part of the punishment for crime.*" (emphasis added)).

A literal reading of this passage would suggest that, in order to deprive an inmate completely of the right to marry, the inmate must be serving a life sentence, and with some kind of determination that he or she would not be permitted to marry. If this reading of *Turner* is correct, this is an extremely narrow exception to the general rule and, as such, would be rarely, if ever, satisfied.

172. *See* ESKRIDGE, *supra* note 13, at 96-98.

173. In California, for example, persons desiring to marry need only have the capacity to legally contract a marriage, consent to the marriage, and solemnize the marriage in a manner approved by the state. CAL. FAM. CODE § 300 (West 2004 & Supp. 2010). Indeed, Eskridge details how little the state seems to care about who is entering into the marriage, and whether or not those individuals can procreate. *See* ESKRIDGE, *supra* note 13, at 96-98.

174. This justification is not an invention of same-sex marriage opponents. The Missouri Supreme Court, for example, found that it is "a well authenticated fact, that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites." State v. Jackson, 80 Mo. 175, 178 (1883).

Amendment.'"[175] It bears repeating that freedom of personal choice with respect to marriage, in addition to the right to marry, is a fundamental liberty interest protected by the Due Process Clause.

2. *Framing Fundamental Rights Questions*

Before a reviewing court can evaluate a substantive due process question on the merits, it must first determine the right at issue. Particularly in the context of laws that abridge fundamental rights, and therefore draw strict scrutiny, a court's definition of the right at issue is usually outcome determinative. Framing an issue too narrowly produces unjust results and creates bad precedent. To illustrate this point, consider and compare the holdings in *Bowers v. Hardwick*[176] and *Lawrence v. Texas*.[177] These cases involved virtually identical facts but reached opposite holdings. Though not dealing specifically with the right to marry, these cases exemplify the consequences of improperly framing a fundamental right and counsel against repeating this error in the context of the right to marry.

In *Bowers,* the State charged Michael Hardwick with violating Georgia's sodomy statute for engaging in sexual conduct with an adult male companion within the privacy of his home.[178] Although he was not charged, Hardwick sought a judicial determination that Georgia's sodomy statute was unconstitutional.[179] The U.S. Supreme Court framed the issue as whether there was a constitutionally-protected fundamental right to engage in homosexual sodomy.[180] With the issue framed in this manner, it is not surprising that the Court answered in the negative.[181] One cannot argue with any degree of seriousness that

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175. Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

176. Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("Against this background, to claim that a right to engage in [consensual homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." (citations omitted)), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

177. *Lawrence*, 539 U.S. at 578.

178. *Bowers*, 478 U.S. at 187-88; *see also* ESKRIDGE, *supra* note 13, at 134.

179. *Bowers*, 478 U.S. at 188.

180. *Id.* at 192.

181. *Id.* at 195-96.

the right to engage in sodomy is one "deeply rooted" in our history and traditions, or "implicit in the concept of ordered liberty."[182] *Bowers* dealt a major setback to same-sex couples seeking marriage on equal terms with opposite-sex couples, for "the criminalization of gay persons' intimate sexual conduct was a barrier to equal protection claims, and was used to justify legalized discrimination against gay persons in many spheres of life."[183]

The facts in *Lawrence* were materially similar to those in *Bowers*. A police officer entered the home of John Geddes Lawrence, whereupon he observed Lawrence and a male companion having sex.[184] Lawrence was arrested, charged with engaging in deviate sexual intercourse, and convicted.[185] The state court of appeal, relying on *Bowers v. Hardwick*, rejected Lawrence's due process and equal protection arguments.[186] Recognizing that the *Bowers* Court did not correctly frame the liberty interest at issue,[187] the Court alternatively framed the issue as whether Lawrence and Garner "were free as adults to engage [in consensual sexual activity] in the exercise of their liberty under the Due Process Clause . . . ."[188] Answering in the affirmative,[189] the Court reaffirmed that "our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . . Persons in a homosexual relationship may seek

182. *See, e.g.*, *id.* at 193-94 (citations omitted) (discussing the history of criminal sodomy statutes in the United States).

183. Shotwell, *supra* note 6, at 658-59 (citation omitted).

184. Lawrence v. Texas, 539 U.S. 558, 562-63 (2003).

185. *Id.* at 563.

186. *Id.*

187. *Id.* at 567 ("The Court began its substantive discussion in *Bowers* as follows: The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." (internal quotations and citations omitted)).

188. *Id.* at 564.

189. *Id.* at 578.

autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right."[190]

Arguably, the most fascinating aspect of the *Lawrence* decision is the near hostility with which the Court viewed the challenged law and its scathing repudiation of *Bowers*.[191] The Court concluded: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[192] The Court went out of its way to articulate its reasons for striking down *Bowers* on due process—not equal protection—grounds. It explained that using the equal protection clause might cause some to question "whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[193] The Court's unusual expression of disdain for the challenged statute and express articulation of its reasons for relying on the Due Process Clause[194] indicate that laws targeting gay and lesbian persons have begun to wear out their welcome. Indeed, "[t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[195]

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190. *Id.* at 574.

191. *See, e.g.*, *id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

192. *Id.*

193. *Id.* at 575.

194. Because laws invalidated under the Due Process Clause have impermissibly infringed upon a liberty interest protected by the Constitution, they cannot be saved by drawing them differently. Laws invalidated under the Equal Protection Clause, by contrast, can become constitutional by drawing them differently. For example, the Court in *Lawrence* indicated it could not save the statute from an equal protection challenge by drawing the statute in such a way as to make it apply equally to homosexual and heterosexual persons. *Lawrence*, 539 U.S. at 578. Thus, the *Lawrence* Court's express articulation of its desire to avoid a saving construction indicates that the Court took issue with the *type* of legislation, rather than the challenged individual statute.

195. *Id.* at 567.

B. Substantive Due Process Analysis in California

Like its federal counterpart, California due process jurisprudence recognizes a fundamental right to marry. The right to marry is recognized in California as one of many fundamental, constitutionally-protected interests; it is protected by the right to privacy expressly enumerated in the California Constitution.[196] Further, California's right to marry jurisprudence is parallel to, and is not meaningfully different from, its federal counterpart.

In *Perez v. Lippold*,[197] a case very similar to *Loving*, the California Supreme Court held the state's miscegenation statute unconstitutional under federal equal protection guarantees.[198] There, the Court recognized a fundamental right to marry[199] and held laws that infringe upon this right "must be based upon more than prejudice and must be free from oppressive discrimination . . . ."[200] Other California authorities make it clear that strict scrutiny applies to laws infringing upon a fundamental right are subject to strict scrutiny to determine if they are necessary to achieve a compelling state interest.[201]

The *Perez* Court elaborated further on the right to marry: "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."[202] Obviously, anti-miscegenation statutes are not the only way to restrict the scope of one's choice of spouse. A law that prohibits marriage between persons of different religions, of the same sex, or who are citizens of different states, would equally restrict the scope of one's choice of spouse. Under

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196. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

197. 198 P.2d 17 (Cal. 1948).

198. *Id.* at 29.

199. *Id.* at 18-19.

200. *Id.* at 19.

201. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 538-42 (Cal. 1971); D'Amico v. Bd. of Med. Exam'rs, 520 P.2d 10, 22 (Cal. 1974).

202. *Perez*, 198 P.2d at 19.

Perez, each of these hypothetical laws would accordingly infringe the right to marry. Indeed, there is nothing that would logically limit the *Perez* Court's holding to race-based restrictions on the right to marry.

Perez explicitly stated that a law prohibiting a particular choice of spouse would "thereby restrict [one's] right to marry" and therefore be subject to strict scrutiny.[203] Thus, *Perez* could not realistically be limited to race-based restrictions on the right to marry. Nonetheless, litigants did not often ask California courts to address substantial restrictions on marriage after *Perez* was decided.[204]

Of course, *In re Marriage Cases* recognized that the right to marry extends to same-sex couples. While Proposition 8 has since overruled this aspect of *In re Marriage Cases*, it is important to note that relying on California precedent quite similar to the due process jurisprudence of the United States Supreme Court, the petitioners' arguments persuaded the California Supreme Court in that case. Declaring Family Code sections 300 and 308.5 unconstitutional, the court was unimpressed by respondents' arguments that: (1) the state never recognized same-sex marriage before and had a legitimate interest in preserving the traditional definition of marriage;[205] and (2) the petitioners were asking the court to create a new substantive right—the right to same-sex marriage—instead of merely defining the boundaries of an existing right.[206] The court rejected these arguments out of hand.[207] Citing the *Bowers* and *Lawrence* decisions[208] and its

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203. *Id.*

204. However, "subsequent California decisions discussing the nature of marriage and the right to marry have recognized repeatedly the linkage between marriage, establishing a home, and raising children in identifying civil marriage as the means available to an individual to establish, with a loved one of his or her choice, an officially recognized *family* relationship." *In re* Marriage Cases, 183 P.3d 384, 422 (Cal. 2008). For two such cases, see De Burgh v. De Burgh, 250 P.2d 598 (Cal. 1952) and Elden v. Sheldon, 758 P.2d 582 (Cal. 1988).

205. *In re* Marriage Cases, 183 P.3d 384, 447 (Cal. 2008).

206. *Id.* at 420-21.

207. The court instead held that "the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual." *In re Marriage Cases*, 183 P.3d at 423. The court continued:

> In light of the fundamental nature of the substantive rights embodied in the right to marry - and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full

own jurisprudence,[209] the California Supreme Court found that the parties were not asking it to create a new right.[210] Instead, the court held that the parties asked the court to decide whether the constitutional right at issue "should be understood in a broader and more neutral fashion so as to focus upon the substance of the interests that the constitutional right is intended to protect."[211] The court's language deserves repeating:

> [T]his court's 1948 decision holding that the California statutory provisions prohibiting interracial marriage were unconstitutional . . . did not characterize the constitutional right that the plaintiffs in that case sought to obtain as "a right to interracial marriage" and did not dismiss the plaintiffs' constitutional challenge on the ground that such marriages never had been permitted in California. Instead, the *Perez* decision focused on the substance of the constitutional right at issue—that is, the importance to an individual of the freedom to join in marriage with the person of one's choice—in determining whether the statute impinged upon the plaintiffs' fundamental constitutional right.[212]

The California Supreme Court was influenced by the U.S. Supreme Court's admitted error in characterizing the right at issue in *Bowers*, and its subsequent correction of the issue's framing in *Lawrence*.[213] By carefully framing the issue before it in terms of "the interests that the constitutional right is intended to protect,"[214] the

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> member of society - the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.

Id. at 427.

208. *Id.* at 421.

209. *Id.* at 420-21.

210. *Id.* at 421 ("[I]n evaluating the constitutional issue before us, we consider it appropriate to direct our focus to the meaning and substance of the constitutional right to marry, and to avoid the potentially misleading implications inherent in analyzing the issue in terms of 'same-sex marriage.'").

211. *Id.* at 421 n.33 (citing the rationale in Lawrence v. Texas, 539 U.S. 558, 565-77 (2003)).

212. *Id.* at 420 (citations omitted).

213. *Id.* at 421.

214. *Id.*

California Supreme Court avoided framing the right too narrowly. Thus, it also avoided creating the kind of unsatisfactory precedent created in *Bowers* and subsequently overruled in *Lawrence.* Accordingly, the California Supreme Court's approach in defining the right at issue provides better guidance in fundamental rights analysis than the U.S. Supreme Court's current practice.[215]

C. In re Marriage Cases *and the Federal Right to Marry*

California and federal substantive due process jurisprudence agree that liberty interests embodied in their respective due process clauses protect the right to marry.[216] The agreement between the two bodies of law does not end there. Federal and state due process cases substantially concur on both the scope and substance of the right to marry.

Interestingly, the U.S. Supreme Court in *Loving* did not view the contested right as the right to interracial marriage, but rather as the unqualified right to marry.[217] The body of federal case law on the right to marry closely parallels that of California as it existed when *In re Marriage Cases* was decided in 2008.[218]

The California Supreme Court also recognizes and protects a fundamental right to marry under the state constitution. California due process jurisprudence holds that "the right to marry is the right to join

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215. The U.S. Supreme Court lacks a test for defining the fundamental right at issue. One position, advocated by Justice Scalia in the opinion of the Court in *Michael H. v. Gerald D.*, would "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). Because only one other Justice joined this part of the opinion, this standard has no precedential value. In contrast, Justice Brennan argued that "the question is not what 'level of generality' should be used," but rather whether the interest at issue "is close enough to the interests that we already have protected to be deemed an aspect of 'liberty' as well." *Id.* at 142 (Brennan, J., dissenting opinion).

216. *See supra* Sections IV.A and IV.B.

217. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . . Under 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.").

218. *See* discussion *supra* Sections IV.A. and IV.B.

in marriage with the person of one's choice . . . ."[219] A statute that restricts the scope of one's choice of spouse thereby restricts his right to marry.[220] Laws abridging that right must "be based upon more than prejudice and must be free from oppressive discrimination,"[221] and courts must subject these laws to strict scrutiny to determine whether they are necessary to achieve a compelling state interest.[222] This rationale is powerful, persuasive, and completely applicable to the right to marry in federal jurisprudence.

The cases cited in this section demonstrate that the right to marry is a fundamental right. However, even where the right is recognized and the problem is merely one of application, courts have been tempted to redefine the right narrowly. By framing the right in *Bowers* as "the right to engage in homosexual sodomy,"[223] the *Bowers* Court lost sight of the forest for the trees. The Court recognized this oversight when it decided *Lawrence*.

Nevertheless, the Court's narrow framing of the right at issue in *Bowers* illustrates the danger of improperly framing the right to marry. Framing the right to marry too narrowly in the context of same-sex couples will have unjust results. Learning from the error in *Bowers*, courts should recognize that the issue in cases challenging the validity of same-sex marriage bans is, in fact, *not* an issue at all; it is settled law. Specifically, these cases do not require recognition of a new substantive right, such as a right to same-sex marriage. Instead, these cases implicate the fundamental right to marry and to be free from direct and substantial government interference in matters of marriage.

In defending their same-sex marriage bans, states have suggested that reviewing courts are asked to recognize a new right—the right to same-sex marriage—and have thereby invited courts to reproduce the error in *Bowers*. However, given *Bowers*' reversal, after only seventeen years, due to improper framing of the right in question, it is unlikely the Supreme Court would accept an invitation to commit the same error again. This is especially true because only seven years have passed since *Lawrence* was decided. Thus, the same right at

219. Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948).
220. *Id.*
221. *Id.*
222. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539-42 (Cal. 1971).
223. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

issue in *In re Marriage Cases*, *Perez*, *Zablocki*, and *Loving*—the right to marry—properly frames the right at issue in *Perry*. To define the right more narrowly would repeat an error the Supreme Court has denounced in unusually strong terms, and would negate Court precedent.

The Supreme Court has repeatedly reaffirmed and protected the fundamental right to marry under the federal Constitution. Although reasonable regulations may be imposed that do not significantly interfere with the decision to enter into the marital relationship, a law that interferes directly and substantially with the right to marry is impermissible unless it is narrowly tailored to serve a compelling state interest.[224] Moreover, the Supreme Court stated that the right to marry is a right held by all individuals.[225] Efforts to deny a marriage license even to prisoners have been unsuccessful,[226] in part because the right to marry is not[227] and may not[228] be conditioned on the spouses' intent to procreate.

Freedom of personal choice in marriage is a fundamental liberty interest protected by the Fourteenth Amendment.[229] One's choice of spouse is usually a matter of personal choice that goes to the heart of one's marriage decision. Restricting or narrowing the scope of that choice does not merely interfere with that choice; in the context of same-sex marriage, such a restriction absolutely *forecloses* the ability of the individual to marry the spouse of his or her choice. Therefore, a law that restricts or narrows the scope of one's choice of spouse

224. Zablocki v. Redhail, 434 U.S. 374, 386-88 (1978).

225. *Id.* at 384.

226. *See* Turner v. Safley, 482 U.S. 78, 99-100 (1987).

227. *See* ESKRIDGE, *supra* note 13, at 96-98; *see also* CAL. FAM. CODE §§ 300-04 (West 2004 & Supp. 2010).

228. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (recognizing fundamental liberty interest in decisions relating to contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing fundamental liberty interest in decisions relating to family relationships); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541-42 (1942) (recognizing fundamental liberty interest in decisions relating to procreation). These cases, taken together, provide strong support for the proposition that individuals have a fundamental right, protected by the Due Process Clause, to decide whether, when, and how to bring a child into the world.

229. Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

interferes directly and substantially with the freedom of personal choice in marriage, and with the right to marry itself.

Accordingly, a state cannot impose such restrictions unless the restrictions meet strict scrutiny; that is, they must be narrowly tailored to serve a compelling state interest. As discussed in the context of equal protection, it is highly unlikely that a same-sex marriage ban could survive intermediate scrutiny, even when considered in connection with the *compelling* state interest of promoting child welfare. A restriction that cannot meet intermediate scrutiny cannot, *a fortiori*, meet strict scrutiny.

Finally, as discussed in the context of equal protection, states impose total bans indiscriminately and without regard to individual characteristics. Therefore, these bans are almost certainly substantially over-inclusive and under-inclusive in their application. A classification that is appreciably over-inclusive or under-inclusive is not narrowly tailored and would fail strict scrutiny.

V. CONCLUSION

Although the California Supreme Court has held that the right to marry includes and applies equally to same-sex couples,[230] given the substantial agreement between California and federal jurisprudence on the matter, this difference appears to result primarily from timing. The U.S. Supreme Court has not yet had the issue squarely presented to it. Enter *Perry*. Destined for Supreme Court review, *Perry* will pose the issue as a federal question. Some commentators suggest that *Perry* is destined to fail.[231] Yet, in light of the remarkable similarity between federal and California equal protection and substantive due process doctrines, and *Perry's* recent success in the district court, such speculation seems pessimistic at best. Though the California Supreme Court's decision in *In re Marriage Cases* is not and could not be

230. Proposition 8, of course, reversed this development in California law.

231. *See, e.g.*, Talbot, *supra* note 8 ("Nan Hunter, a law professor at Georgetown University, is skeptical about [the Perry lawyers'] chances. 'As a purely formal matter, one could argue that [they] are correct,' Hunter said. 'But invalidating roughly forty state laws that define marriage as between a man and a woman is an awfully heavy lift for the Supreme Court, and especially for Justices who take a limited role of the scope for the judiciary.'").

binding on the U.S. Supreme Court, the arguments from that case apply with at least as much force in the federal context.

California equal protection doctrine differs from its federal counterpart in that it recognizes sex classifications as suspect, rather than quasi-suspect. However, notwithstanding that difference, laws limiting civil marriage to opposite-sex couples draw invidious gender classifications and are properly subject to intermediate scrutiny under federal law. Furthermore, fertile soil exists in federal law for recognizing that the right to marry extends on equal terms to both same-sex couples and opposite-sex couples, and in applying strict scrutiny to laws abridging that right. Thus, in light of federal precedent, reasoning parallel to that advanced in *In re Marriage Cases* should yield a federal decision that approximates the decision reached by the California Supreme Court.

California has often been on the cutting edge of civil rights issues and has been the source of many decisions that were ahead of their time. Just as *Perez* anticipated a nationwide trend toward race equality in marriage, *In re Marriage Cases* appears to have anticipated a similar trend with respect to gender. *Perry v. Schwarzenegger* offers the U.S. Supreme Court the opportunity to provide an authoritative pronouncement on the right of same-sex couples to marry; an issue that has troubled the nation for over thirty years.[232] *In re Marriage Cases* provides a vehicle by which a pronouncement can be made on the basis of existing law. With same-sex couples in every state struggling for equal treatment under the law, and a deep split of

232. The Court, however, may well decline to take the opportunity. California Governor Arnold Schwarzenneger and the other defendants in *Perry* have declined to appeal the district court's decision. Erwin Chemerinsky, *Who Has Standing to Appeal Prop. 8 Ruling?*, L.A. TIMES, Aug. 15, 2010, *available at* http://articles.latimes.com/2010/aug/15/opinion/la-oe-chemerinsky-gay-marriage-20100815. While the defendant-intervenors appealed the decision, U.S. Supreme Court precedent is clear that an intervenor has no standing to appeal a judgment when the state defendant chooses not to appeal. *See, e.g.*, Diamond v. Charles, 476 U.S. 54, 68 (1986) ("[One's] status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal."). *But see* Maine v. Taylor, 477 U.S. 131, 136 (1986) (Intervenor state had standing to appeal where the constitutionality of its own statute was challenged, notwithstanding the federal government's decision to abandon its own appeal). Due to the unique circumstances presented in *Perry*, therefore, the district court decision will likely be upheld based on the defendant-intervenors' lack of standing to challenge it.

authority on the issue, the Court should take this opportunity to "say what the law is"[233] and resolve with finality one of the great civil rights issues of our time.

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233. Marbury v. Madison, 5 U.S. 137, 177 (1803).

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