

***DIAZ V. BREWER* AND THE EQUAL PROTECTION CLAUSE:
A ROADMAP FOR THE RETENTION OF SAME-SEX PUBLIC
EMPLOYEE BENEFITS**

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I. INTRODUCTION

At the time of this writing, forty-one states have statutes or constitutional provisions that prevent same-sex couples from marrying under state law by defining marriage as between one man and one woman.¹ The statutes and constitutional provisions were mostly

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¹ States with constitutional provisions defining marriage as between one man and one woman include: Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), California (2008), Colorado (2008), Florida (2008), Georgia (2004), Idaho (2006), Kansas (2005), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (2000), Nevada (2002), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia (2006), and Wisconsin (2006). See ALA. CONST. amend. 774; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263-A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; see also HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2010), available at <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (follow “Statewide Marriage Prohibition Laws”) (last visited Mar. 9, 2012) (providing a visual reference for states and their current legislative statutes regarding same-sex marriage as well as the enactment dates of state constitutional provisions). Several of these states ban all forms of same-sex unions, not only same-sex marriages. See, e.g., TEX. CONST. art. I, § 32 (“Marriage in this state shall consist only of the union of one man and one woman. This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”). In addition to those states listed above, states with a statute restricting marriage to one man and one woman include: Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming. HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2010), available at <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (follow “Statewide Marriage Prohibition Laws”) (last visited Mar. 9, 2012). Note that the legislatures of

passed subsequent to the federal Defense of Marriage Act (“DOMA”),² in which Congress barred federal recognition of same-sex marriage and allowed the states to do so as well, by permitting states not to recognize same-sex marriages validly performed in other states.³ DOMA was passed partly in response to attempts at legalizing same-sex marriage.⁴ Its proponents expressed concern over the potential extension of state and federal marriage-related benefits to same-sex couples.⁵ These benefits run the gamut, but often include employment benefits, such as bereavement leave and sick leave, unemployment compensation, and healthcare insurance for public sector employees, their partners, and dependents.⁶

Washington and Maryland have since passed laws allowing same-sex marriage, but the laws have not yet taken effect. NATIONAL CONFERENCE OF STATE LEGISLATURES, DEFINING MARRIAGE: DEFENSE OF MARRIAGE ACTS AND SAME-SEX MARRIAGE LAWS, *available at* <http://www.ncsl.org/Issues-Research/Human-Services/Same-Sex-Marriage-overview.aspx> (last visited Mar. 9, 2012). California’s gay marriage ban has been found invalid by a federal court of appeals, but the court’s enforcement is pending further appeals. *Id.* See also *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *11 (9th Cir. Feb. 7, 2012) (holding that “Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples”). The information in this footnote is verified as of April 18, 2012.

- 2 See 1 U.S.C. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”); 28 U.S.C. § 1738C (2006) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”). Three states—Wyoming (1957), Maryland (1973), and New Hampshire (1987)—have statutes defining marriage that pre-dated DOMA, although the Maryland legislature has recently passed a same-sex marriage law; see NATIONAL CONFERENCE OF STATE LEGISLATURES, SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS, *available at* <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last visited Mar. 9, 2012). See also Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265–66 (2007) (referring to most state statutes banning same-sex marriage as “mini-DOMAs” because they mimic the effects of the federal Defense of Marriage Act of 1996).
- 3 See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); Mark Strasser, *Life After DOMA*, 17 DUKE J. GENDER L. & POL’Y 399, 399, 402, 412 (2010) (discussing the two provisions of DOMA).
- 4 See Strasser, *supra* note 3, at 401 n.9 (quoting *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. Aug. 17, 2004) (“Congress recognized that the Hawaii Supreme Court appeared to be on the verge of requiring the State of Hawaii to issue marriage licenses to same-sex couples.”)).
- 5 See 142 CONG. REC. 22448 (1996) (statement of Sen. Byrd) (“On a more pragmatic level although no less important, this bill also addresses concerns with respect to the matter of Federal benefits.”).
- 6 See, e.g., Steven N. Hargrove, *Domestic Partnerships Benefits: Redefining Family in the Work Place*, 6 LOY. CONSUMER L. REP. 49, 50 (1994) (“Benefits employers confer upon domestic partners include various combinations of bereavement leave, family sick leave, health in-

In states that contain statutory and constitutional restrictions on same-sex marriage, public-sector employees in same-sex relationships⁷ are usually ineligible for the employment benefits that are traditionally bestowed upon their married, heterosexual counterparts. Nevertheless, several states, cities, and local municipalities have successfully extended public employment benefits⁸ to same-sex couples, despite continued political resistance.⁹ These benefits are typically granted to same-sex and opposite-sex couples who register their domestic partnership with the state, city, or local government, according to some established criteria.¹⁰ Yet legislative acts, public referenda, and judicial decisions in several communities have recently resulted in same-sex public employment benefits being withdrawn.¹¹ In these

surance coverage, subsidized travel and relocation expenses, and employee discounts.”); Sue Nussbaum Averill, Comment, *Desperately Seeking Status: Same-Sex Couples Battle For Employment-Linked Benefits*, 27 AKRON L. REV. 253, 253 n.5 (1993) (“These benefits include but may not be limited to health and dental insurance, life insurance, various types of leave, Social Security, workers’ compensation, unemployment compensation, and pension or retirement plans.”).

- 7 Generally, the terms “same-sex relationship(s)” or “same-sex couple(s)” and “domestic partner(s)” or “domestic partnership(s)” are used interchangeably throughout this Comment, and unless domestic partner(s) or partnership(s) are qualified by “opposite-sex,” they will refer to same-sex domestic partner(s) or partnership(s).
- 8 This Comment uses “public employee benefit(s)” or “public employment benefit(s)” and “state employee benefit(s)” or “state employment benefit(s)” interchangeably, but state employee or employment benefits also refer to benefits provided by local governments and municipalities within each state unless noted otherwise.
- 9 States with domestic partnership laws that incorporate same-sex couples include: California, Colorado, Maine, Maryland, New Jersey, Nevada, Oregon, Washington, Wisconsin, and the District of Columbia; See CAL. FAM. CODE § 297.5 (West 2012); COLO. REV. STAT. § 15-22-101 (LexisNexis 2010); D.C. CODE § 46-401 (LexisNexis 2009); ME. REV. STAT. ANN. tit. 22, § 2710 (2011); MD. CODE REGS. 17.04.13.01 (2010); N.J. STAT. ANN. §§ 26:8A-1, 26:8A-4 (West 2007); NEV. REV. STAT. ANN. §§ 122A.010, 122A.100 (LexisNexis 2009); OR. REV. STAT. ANN. § 106.300 (West 2011); WASH. REV. CODE ANN. §§ 26.60.010, 26.60.030 (West 2009); WIS. STAT. §§ 770.001, 770.05 (2011). For an example of a domestic partnership at the county level, see *Domestic Partner Registry*, WESTCHESTERGOV.COM, http://lgbt.westchestergov.com/index.php?option=com_content&view=article&id=2561&Itemid=4427 (last visited Feb. 17, 2012). For examples of domestic partnership laws in cities, see New York City, N.Y., CHARTER & ADMIN. CODE § 3-240 (West 2010), and S.F., CAL., ADMIN. CODE §§ 62.1, 62.3 (2006).
- 10 See *supra* note 9. (providing several state and municipal statutes as evidence of criteria for and registration of domestic partnerships).
- 11 See, e.g., *Collins v. Brewer (Diaz I)*, 727 F. Supp. 2d 797, 800–01 (D. Ariz. 2010), *aff’d sub nom. Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (evaluating House Bill 2013, passed by the Arizona legislature, and signed into law by Governor Janet Brewer). Although the district court case title for the order granting a preliminary injunction was *Collins, et al. v. Brewer, et al.*, on June 6, 2011, the Ninth Circuit granted plaintiff-appellee’s unopposed motion to dismiss Tracy Collins. The Ninth Circuit’s decision is therefore titled *Diaz, et al. v. Brewer, et al.* For clarity, this Comment will refer to the entire case as *Diaz v. Brewer*, the district court proceedings as *Diaz I*, and the appeals court proceedings

communities, same-sex couples may no longer be eligible to register for public benefits,¹² or same-sex couples who were previously registered may even have their public benefits discontinued.¹³

By drawing on the parallel analytical frameworks that exist within state and federal equal protection jurisprudence, this Comment proposes that arguments premised on state equal protection clauses, which have already found limited success in the expansion of same-sex public employee benefits, should serve as guidance for litigants and courts coping with federal Equal Protection Clause claims that seek to prevent the rescission of such benefits. It is important to note that the act of rescission itself does not directly affect a court's equal protection analysis.¹⁴ However, the withdrawal of public benefits from employees in same-sex relationships, coupled with state statutes or constitutional provisions banning same-sex marriage, helps to resolve one of the traditional dilemmas faced by courts. Such a selective withdrawal helps to clarify the distinction as one between same-sex and opposite-sex couples, as opposed to one between married and unmarried ones—thereby enabling courts to find that the classification was made on the basis of sexual orientation.

Prior legal actions brought by same-sex couples to secure state employment benefits have already demonstrated that arguments premised on state equal protection clauses can be successful in fighting to extend the benefits to same-sex couples. In *Tanner v. Oregon Health Sciences University*, the Oregon Court of Appeals held that the university's denial of health insurance benefits to the unmarried domestic partners of its gay and lesbian employees was a violation of

as *Diaz II*. See also Ana Campoy, *Same-Sex Benefits Ban Roils El Paso*, WALL ST. J., Dec. 8, 2010, at A4 (reporting that the El Paso public referendum stripped employee benefits from everyone other than the employee, his or her legal spouse, and dependent children); Barry Noreen, *She Risks Her Life for Us, but We Deny Care for Her Partner*, COLO. SPRINGS GAZETTE, Sept. 2, 2007, available at <http://www.gazette.com/articles/drapper-26785-benefits-city.html> (reporting on the Colorado Springs City Council's rescission of healthcare benefits for same-sex partners of city employees); Jennifer Medina, *A Town in Westchester Ends Health Benefits for Domestic Partners*, N.Y. TIMES, Jan. 6, 2005, at B1 (reporting that the Eastchester Town Board agreed to no longer offer domestic partner benefits for its employees).

12 See Medina, *supra* note 11 (“[T]he Town Board voted . . . to end a town policy of providing coverage for domestic partners.”).

13 See *Collins (Diaz I)*, 727 F. Supp. 2d at 801 (“[The legislative act] eliminates family coverage for non-spouse domestic partners, whether they are of the same or different sex.”).

14 See *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *38 (9th Cir. Feb. 7, 2012) (finding that Proposition 8's withdrawal from same-sex couples of the existing designation of marriage was not significant in the court's constitutional analysis).

Oregon's equal privileges and immunities clause.¹⁵ Even though the court did not find that the state's anti-discrimination policy was violated, it nevertheless viewed the benefits policy as facially discriminatory since the benefits were "made available on terms that, for gay and lesbian couples, are a legal impossibility."¹⁶

As seen in *Tanner*, the extension of same-sex state employee benefits occurs even in states with explicit prohibitions on same-sex marriage.¹⁷ The case of *Alaska Civil Liberties Union ex rel. Carter v. Alaska* held that the limitation of state employee benefits solely to opposite-sex spouses violated Alaska's equal protection clause.¹⁸ The plaintiffs in *Carter* were same-sex couples challenging the benefits programs, not Alaska's marriage amendment, as discriminatory by denying them benefits that the state affords to similarly situated heterosexual couples.¹⁹ *Carter* rejected the reasoning advanced in several other states that compared lesbians and gay men to unmarried heterosex-

15 *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 448 (Or. Ct. App. 1998) (concluding that "OHSU's denial of insurance benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20, of the Oregon Constitution"). Oregon's equal privileges and immunities clause is generally considered to have the same scope as the federal Equal Protection Clause. See OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens."); *Cooper v. Or. Sch. Activities Ass'n*, 629 P.2d 386, 391 (Or. Ct. App. 1981) (discussing how the scope of Article I, section 20 and that of the federal Equal Protection Clause are generally the same, although Article I, section 20 can be interpreted more broadly if there is a legal basis for doing so).

16 *Tanner*, 971 P.2d at 448.

17 See Eric J. Lobsinger, Comment, *A National Model for Reconciling Equal Protection For Same-Sex Couples With State Marriage Amendments: Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 23 ALASKA L. REV. 117, 119–20 (2006) (discussing the Alaska Supreme Court decision in *Carter* and suggesting that it provides a work-around for states with marriage amendments to retain their amendments while simultaneously securing important rights for same-sex couples). Note that Oregon's constitutional amendment defining marriage between one man and one woman was passed in 2004, subsequent to the decision in *Tanner*, but at the time of *Tanner* there were Oregon statutes that defined marriage as between one man and one woman. Compare HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2010), available at <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (follow "Statewide Marriage Prohibition Laws") (last visited Dec. 4, 2011), with *Tanner*, 971 P.2d at 448 (concluding that "OHSU's denial of insurance benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20, of the Oregon Constitution"), and OR. REV. STAT. §§ 106.010, 106.041 (2007) (defining marriage as between a man and woman and providing for marriage license application procedures).

18 See *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781, 783 (Alaska 2005) (holding that programs offering valuable benefits to state employees' spouses that are not offered to unmarried state employees' domestic partners violate equal protection under the Alaska Constitution).

19 *Id.* at 787 ("They argue not that they have a right to marry each other, but that the benefits programs discriminate against them by denying them benefits that the programs provide to others who, plaintiffs claim, are similarly situated.").

ual couples,²⁰ where courts found that the benefits plans were not discriminatory since they applied equally to both groups.²¹ Even though *Tanner*, *Carter*, and other early cases dealt with attempts to extend employment benefits to same-sex couples, similar arguments have been and should be made for the retention of benefits previously granted by state or local governments.

Moreover, the same arguments are now being brought into federal court, under the federal Equal Protection Clause. A case recently affirmed by the Ninth Circuit, *Diaz v. Brewer*,²² was filed by Lambda Legal on behalf of several same-sex couples who would potentially be deprived of Arizona state employee domestic partner benefits following the signing of Arizona House Bill 2013 into law by Governor Janice K. Brewer on September 4, 2009.²³ The bill, which contained an amendment entitled “Section O,” would eliminate insurance coverage for state employees’ domestic partners and/or their children, regardless of whether the domestic partnership is same-sex or opposite-sex.²⁴ This case appears to present an issue of first impression in federal court, by challenging a state’s rescission of same-sex employee benefits on the grounds that it violates the federal Equal Protection Clause.²⁵

In an important step, the Ninth Circuit Court of Appeals affirmed the district court’s order granting the plaintiffs’ motion for a preliminary injunction to protect the benefits of the same-sex couples.²⁶ The appeals court agreed with the district court and found that Section O “distinguish[es] between homosexual and heterosexual employees, similarly situated,” thus denying homosexual employees the

20 *See* *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *5 (N.H. Super. May 3, 2006) (citing *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); *Ross v. Denver Dept. of Health and Hosps.*, 883 P.2d 516 (Colo. App. 1994); *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593 (Ct. App. 1992); *Phillips v. Wis. Pers. Comm’n*, 482 N.W.2d 121 (Wis. Ct. App. 1992); *Hinman v. Dept. of Pers. Admin.*, 213 Cal. Rptr. 410 (Cal. Ct. App. 1985)) (reviewing cases in which “courts held that lesbians and gay men in committed relationships were similarly situated to unmarried heterosexuals”).

21 *See Bedford*, 2006 WL 1217283, at *6 (noting that *Carter* rejected the reasoning that homosexual couples were similarly situated to unmarried heterosexual couples).

22 656 F.3d 1008 (9th Cir. 2011).

23 *See Collins v. Brewer (Diaz I)*, 727 F. Supp. 2d 797, 799–801 (D. Ariz. 2010) (explaining the posture of the complaint filed and the implications of House Bill 2013). The statute challenged has been codified at ARIZ. REV. STAT. ANN. § 38-651 (1971).

24 *Collins (Diaz I)*, 727 F. Supp. 2d at 801.

25 *Id.*; Complaint at 34, *Collins (Diaz I)*, 727 F. Supp. 2d 797 (D. Ariz. 2010) (No. 2:09-cv-02402-JWS).

26 *Diaz v. Brewer (Diaz II)*, 656 F.3d at 1010.

same benefits for doing equivalent work as heterosexual employees.²⁷ Similar legal issues have subsequently been raised in *Martin v. El Paso*, a case filed in response to a voter referendum passed in El Paso, Texas that stripped domestic partner benefits from the city's public employees.²⁸ As the arc of history bends towards greater equality for gay and lesbian individuals, *Diaz v. Brewer* and *Martin v. El Paso* illustrate the continued importance of the federal Equal Protection Clause as same-sex couples fight to retain equal employment benefits in the public sector.

In Part II, this Comment seeks to understand why litigants have chosen to file early cases over same-sex state employee benefits in state courts asserting (for the most part)²⁹ state equal protection-based claims, as opposed to federal Equal Protection Clause claims in federal court. This section also explores federal equal protection analysis and argues that litigants in federal courts can learn from the experiences of litigants in state courts. In Part III, this Comment briefly discusses the complications that accompany claims based on state anti-discrimination statutes, and suggests that an emphasis on state and federal equal protection claims would be more beneficial to litigants. In Part IV, this Comment reviews the three primary interpretative difficulties that state courts have faced when resolving legal arguments that seek to extend state employment benefits to same-sex couples based upon state equal protection clauses. In Part V, this Comment looks at how these difficulties of judicial interpretation have affected current controversies over the repeal of these benefits in federal court. Finally, Part VI suggests that future cases on this subject will allow for more expansive federal equal protection interpretation, in the same vein as recent state equal protection jurisprudence.

²⁷ *Id.* at 1014.

²⁸ *See* Complaint at 4, *Martin v. El Paso*, No. 2010-4936 (El Paso Cnty. Ct., 34th Jud. Dist. Dec. 15, 2010) (explaining how the ordinance removed health benefits from same-sex partners). The case has since been transferred to federal court. *See infra* note 204. Even more recently, the issues have emerged in *Bassett v. Snyder*, a case filed by the American Civil Liberties Union in Michigan asking the court to strike down a state law barring public employers from providing domestic partner benefits to their employees. *See* Complaint at 2 & 30, *Bassett v. Snyder*, No. 2:12-cv-10038 (E.D. Mich. Feb. 17, 2012), available at <http://www.aclu.org/lgbt-rights/bassett-et-al-v-snyder-complaint> (last visited Feb. 19, 2012).

²⁹ Prior to *Diaz v. Brewer* and *Martin v. El Paso*, *Ross* appears to be the exception, where the plaintiff filed claims in state court under both state and federal equal protection and due process clauses. *Ross v. Denver Dept. of Health and Hosps.*, 883 P.2d 516, 521 (Colo. App. 1994).

II. THE CHOICE: STATE OR FEDERAL EQUAL PROTECTION CLAIMS (OR BOTH)?

Although many states, cities, and local governments have adopted domestic partnerships laws and have expanded state employee benefits to cover same-sex couples and their dependents,³⁰ the majority of jurisdictions across the country fail to provide these benefits. As a result, one available recourse for same-sex couples who seek benefits in these jurisdictions is through judicial action. Claims to extend or prevent the rescission of same-sex public employee benefits can be brought under a state's equal protection clause or under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution³¹ (or both).

Almost all of the earlier state cases seeking to extend public employee benefits to the same-sex domestic partners of the employees on the basis of equal protection relied upon state equal protection clauses, as opposed to the federal Equal Protection Clause.³² Part of the explanation behind litigants' decision to proceed with claims based on state equal protection clauses may be that forty-five of the fifty U.S. states have given their own equal protection clauses "more expansive interpretations than that accorded to [the Equal Protection Clause of] the United States Constitution."³³ This is a result of

³⁰ See *supra* note 9 (providing numerous examples of states that have passed statutes expanding benefits to same-sex couples).

³¹ U.S. CONST. amend. XIV, § 1.

³² See *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781, 784 (Alaska 2005) (alleging violations under the Alaska Constitution); *Hinman v. Dept. of Pers. Admin.*, 213 Cal. Rptr. 410, 411 (Cal. Ct. App. 1985) (considering violations under the California Constitution); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 447 (Mont. 2004) (considering violations under the Montana Constitution); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 437 (Or. Ct. App. 1998) (alleging violations under the Oregon Constitution). In addition, several cases raised claims to extend same-sex public employee benefits on the basis of other grounds, which are mostly outside the limited scope of this Comment. See, e.g., *Hinman*, 213 Cal. Rptr. at 411 (making a claim based on state executive order and state equal protection clause claim); *Ross*, 883 P.2d at 521 (making a claim from state agency's anti-discrimination rule, but coupled with state and federal equal protection and due process constitutional claims); *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 62 (Minn. Ct. App. 2009) (addressing a statutory claim without constitutional claims); *Snetsinger*, 104 P.3d at 448 (making other state constitutional claims in addition to equal protection); *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *4 (N.H. Super. May 3, 2006) (making a statutory claim without constitutional claims). But see a brief discussion of statutory claims based upon anti-discrimination statutes *infra* Part III.

³³ See 1 JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* § 1.7 (2011) (including the states of: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan,

the states' ability "[to] define their internal law more expansively than the federal Constitution is construed."³⁴ Therefore, state court judges have been willing to interpret state constitutional guarantees of equal protection more broadly than the federal Equal Protection Clause to include the rights of same-sex public employees.³⁵ This is the case even when the language of the state equal protection guarantee is similar or identical to the federal Equal Protection Clause.³⁶

This also suggests that the litigants may choose to proceed in state court because they are forum shopping. One commentator has noted that "the make-up of the bench is the most important factor when the legitimacy of domestic partner benefits is raised," given the similarity of the analysis that state courts engage in under their respective state equal protection clauses.³⁷

Despite the decision of litigants to proceed in state court and adjudicate claims brought under state equal protection clauses, this Comment argues that these cases hold significant relevance for litigants in federal court who raise similar claims under the federal Equal Protection Clause. The relevance is grounded in the parallel legal analyses that courts often employ under both state and federal equal protection clauses. While it would be too difficult for this Comment to undertake a comprehensive review of state equal protection jurisprudence, the examples of state equal protection jurisprudence discussed in Part III below largely employ concepts of federal equal protection jurisprudence.

When Congress or a state legislature enacts a statute, the statute usually contains a classification that categorizes people into groups on the basis of some characteristic.³⁸ Federal equal protection guar-

Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

³⁴ *Id.*

³⁵ *Id.*

³⁶ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977) ("Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.").

³⁷ Heidi Eischen, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. TOL. L. REV. 527, 546 (2000).

³⁸ See Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 34 (2010) ("All laws must classify and thereby create classes of people who are treated differently."); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345 (1949) ("To define a class is simply to designate a quality or characteristic or trait or rela-

antees “that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals.”³⁹ Therefore, “[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.”⁴⁰

Some laws will contain a classification that requires the court to determine whether, under the principles of federal equal protection, the law is facially valid.⁴¹ Thus, challenges to laws with facial classifications have two steps: (1) the plaintiffs must show that the law results in members of one group being treated differently from others on the basis of their membership;⁴² and (2) if differential treatment of an identifiable group is shown, then the court must determine whether the treatment is justified under the appropriate level of scrutiny.⁴³ Other statutes do not classify on their face, but instead may be applied in a way that creates a classification.⁴⁴ In such cases, plaintiffs must allege and prove “an unlawful intent to discriminate against the plaintiff for an invalid reason.”⁴⁵ This may require the court to engage in further judicial inquiry into the nature of the classification, its purpose, and its effect.⁴⁶

After identifying the classification, courts then look at the end or purpose of the statute and determine whether the classification is sufficiently related to that end and meets the equal protection guarantee.⁴⁷ The ultimate conclusion of whether the classification satisfies federal equal protection usually hinges upon the degree of judicial scrutiny that the court chooses to exercise over the legislature’s statute.⁴⁸ At least three levels of judicial scrutiny are applied by courts in

tion, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class.”)

39 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.2(a) (4th ed. 2008).

40 Tussman & tenBroek, *supra* note 38, at 346.

41 ROTUNDA & NOWAK, *supra* note 39 at § 18.3(a) (i).

42 *Hamlyn v. Rock Island Cnty. Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1134 (C.D. Ill. 1997) (citing *Jones v. Helms*, 452 U.S. 412, 423–24 (1981)).

43 *Hamlyn*, 986 F. Supp. at 1134 (citing *Plyler v. Doe*, 457 U.S. 202, 217–18 (1982)).

44 ROTUNDA & NOWAK, *supra* note 39, at § 18.3(a) (i).

45 *See Hamlyn*, 986 F. Supp. at 1133 (citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)). The *Hamlyn* court noted that “[t]he goal of requiring intent is to protect the government from liability for mere negligence in the application of otherwise valid laws. Thus, in order to give rise to a constitutional grievance, a departure from the norm must be rooted in design and not derive merely from error or fallible judgment.” *Hamlyn*, 986 F. Supp. at 1133 (citing *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)).

46 ROTUNDA & NOWAK, *supra* note 39, at § 18.3(a) (v).

47 *Id.* at § 18.3(a) (i).

48 *Id.*

equal protection cases, which in turn relate to the type of classification that the legislature employs in its statute.

Classifications in equal protection cases are usually categorized into three groups: (1) race, ethnicity, and alienage; (2) gender and illegitimacy; and (3) all other classifications.⁴⁹ Laws that classify on the basis of race, ethnicity, or alienage⁵⁰ are subject to the court's most stringent equal protection test—known as “strict scrutiny”—whereby the classification must be narrowly tailored to only “compelling” government interests.⁵¹ The application of this test likely means that the law will be overturned.⁵² Laws with gender classifications must further an “important” government interest, and the classification must be “substantially related” to achieving the law's end.⁵³ Lastly, for laws that contain all other classifications, the court applies “rational basis review,” which requires a finding that a classification is “rationally related” to achieving a “legitimate” purpose.⁵⁴

Nonetheless, as mentioned above, some states have interpreted their own constitutions by extending equal protection to cover groups based on other characteristics.⁵⁵ It is important to note that classifications on the basis of sexual orientation receive strict scrutiny in California⁵⁶ and quasi-suspect scrutiny in Connecticut.⁵⁷ But this Comment looks at several examples of state equal protection jurisprudence where sexual orientation is apparently being treated under rational basis review—even though, in reality, the review is more searching.⁵⁸ Finally, after identifying the classification, the law's purpose, and after determining which level of scrutiny will apply, the court is usually able to evaluate the law and determine whether it upholds the guarantee of equal protection.

49 Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011); Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 221 (1998).

50 The use of these traits in legislative classifications has been referred to as “suspect” by the courts. See ROTUNDA & NOWAK, *supra* note 39, at § 18.3(a) (iii).

51 McGreal, *supra* note 49, at 221.

52 *Id.* at 225.

53 *Id.* at 232. The Supreme Court has also held that intermediate scrutiny applies to classifications based on illegitimacy. ROTUNDA & NOWAK, *supra* note 39, at § 18.3(a) (iv).

54 McGreal, *supra* note 49, at 238.

55 See Yoshino, *supra* note 49, at 757 n.73.

56 *Id.* (citing *In re Marriage Cases*, 183 P.3d 384, 441–43, 452 (Cal. 2008)).

57 Yoshino, *supra* note 49, at 757 n.73 (citing *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008)).

58 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

After a brief discussion of state statutory claims in Part III, this Comment will look to state equal protection clause jurisprudence in Alaska, California, Oregon, Montana, and New Hampshire, relating to the expansion of same-sex public employee benefits⁵⁹ in Part IV. Part V below will look at *Diaz v. Brewer* and *Martin v. El Paso* to see how federal courts are dealing with similar doctrinal challenges, and in Part VI, this Comment addresses the future of federal equal protection jurisprudence. As will be demonstrated below, state and federal courts engage in parallel equal protection analyses, such that prior decisions on state equal protection grounds provide strong guidance for litigants in federal court who seek to prevent the repeal of same-sex public employee benefits under the federal Equal Protection Clause.

III. THE PRESENCE OF STATUTORY CLAIMS BASED ON ANTI-DISCRIMINATION STATUTES

One significant difference between the state cases discussed below that has led to varied legal analysis and court outcomes is the presence of anti-discrimination statutes and their respective claims brought by litigants. State anti-discrimination statutes currently protect gays and lesbians in several contexts, including the workplace.⁶⁰ Aside from providing causes of action outside the scope of equal protection, state and federal anti-discrimination statutes usually require parties and the court to apply either a disparate treatment or disparate impact framework to its analysis, and to identify the classification

59 See *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781 (Alaska 2005); *Hinman v. Dept. of Pers. Admin.*, 213 Cal. Rptr. 410, 410 (Cal. Ct. App. 1985); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Bedford v. N.H. Comm. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *1 (N.H. Super. May 3, 2006). See also McGreal, *supra* note 49.

60 See, e.g., CAL. GOV'T. CODE §§ 12926, 12940 (West 2011) (prohibiting discrimination on the basis of sexual orientation and gender identity in public and private employment, housing, and public accommodations); 775 ILL. COMP. STAT. ANN. 5/1-101 (West 2010) (prohibiting discrimination based on sexual orientation in public and private employment, real estate transactions, access to financial credit, and the availability of public accommodations); WIS. STAT. ANN. § 111.31 (West 2002) (prohibiting discrimination on the basis of sexual orientation in public and private employment). Although federal anti-discrimination statutes like Title VII have not been interpreted to protect against discrimination on the basis of sexual orientation, some of these claims nevertheless fall under Title VII jurisprudence in the form of "sex-stereotyping" or discrimination on the basis of sex. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998) (holding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII").

at issue.⁶¹ Claims of discrimination based on disparate treatment exist where an employer “treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic].”⁶² On the other hand, disparate impact claims involve a facially neutral employment practice that burdens one group more than another, without the requirement of an employer’s subjective, discriminatory intent that is required for disparate treatment claims.⁶³ State statutory claims have not had much success in the expansion of same-sex employee benefits. This is in part because they involve complex interactions between the two analytical frameworks,⁶⁴ and

61 Due to the classification requirement and some state courts’ (like Alaska and Oregon) usage of disparate treatment and disparate impact frameworks in equal protection jurisprudence, there can be significant overlap of the legal analysis of equal protection and anti-discrimination claims. *See infra* Part IV.

62 *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (citing *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (describing that proof of discriminatory motive is critical)). Even though proof of intentional discrimination is a required element for disparate treatment analysis under federal anti-discrimination laws like Title VII, not all states require discriminatory intent for disparate treatment analysis of state constitutional violations, nor do federal courts for federal constitutional violations. *See Hamlyn v. Rock Island Cnty. Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1133 (C.D. Ill. 1997) (“[I]ntent does not need to be alleged or proved in a case where a government program, policy or statute is challenged on its face.”); *Tanner*, 971 P.2d at 447 (“As in *Zockert*, OHSU’s intentions in this case are not relevant. What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms.”).

63 *Raytheon*, 540 U.S. at 52–53.

64 Even in the state cases this Comment studies, there is confusion amongst courts and commentators over whether the decisions view the classification at issue as facial or neutral, and thus whether they apply a disparate impact or a disparate treatment framework to the state equal protection clause claims. When discussing the constitutional claim, the *Tanner* court states that “Article I, section 20, does protect against disparate treatment of true classes, those that have identity apart from the challenged law itself.” *Tanner*, 971 P.2d at 445. The court goes on to find that the class, same-sex couples, “clearly is defined in terms of *ad hominem*, personal and social characteristics . . . [and these individuals] are members of a suspect class.” *Id.* at 447. As such, the unintended effect of their action was “to treat a true class of citizens disparately in violation of Article I, section 20.” *Id.* These statements strongly suggest that the court was applying a disparate treatment analysis, as opposed to the disparate impact analysis suggested by some commentators. *See, e.g.*, Eischen, *supra* note 37, at 535–36 (suggesting that the court viewed the policy as facially neutral under statutory and constitutional claims, which would entail disparate impact analysis); Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT’L L. 115, 155 (2010) (stating that the “*Tanner* court clarified that it was using a disparate impact rather than a disparate treatment framework,” but citing to the court’s disposition of the statutory claim as opposed to Oregon’s constitutional provision). Interestingly, the *Carter* decision cites to *Tanner* for its finding that the “denial of employment benefits to unmarried domestic partners of employees had ‘disparate impact’ on homosexuals,” *Carter*, 122 P.3d at 788 n.31, but the court’s ultimate approach seems to reflect the ambiguity inherent in *Tanner*. It appears that the *Carter* court read the *Tanner* decision as having a disparate impact analysis, yet the *Carter* court went on to find that the programs facially discriminate against homosex-

claims of disparate impact, in particular, are very difficult to prove.⁶⁵ Additionally, they may also require a finding that gays and lesbians are a protected or suspect class.⁶⁶

An example of a case based upon a state anti-discrimination statute illustrates the difficulties associated with such claims. In *Monson v. Rochester Athletic Club*, a case involving Minnesota's public accommodations anti-discrimination statute, the court found that the health club's policy of allowing only married couples to participate in a family-membership rate was not facially discriminatory with respect to same-sex couples.⁶⁷ The court held that it was facially neutral, such that "it denies family memberships to unmarried heterosexual couples and unmarried homosexual couples alike."⁶⁸ Since a disparate impact theory was unavailable to the plaintiffs under the public accommodations statute, their claim was ultimately unsuccessful.⁶⁹ How the court defines the classification and the eventual outcome of cases with anti-discrimination claims will vary according to statutory language, judicial precedent,⁷⁰ the make-up of the bench, as well as the analytical framework applied by the court. Due to the challenges that accompany these claims, this Comment emphasizes the importance of state and federal equal protection claims as a means for the retention of same-sex public employee benefits.

uals under a disparate treatment analysis in a manner similar to *Tanner*. Compare *id.* at 788 (concluding that the programs are facially discriminatory), with *Tanner*, 971 P.2d at 447 (holding that even though the defendant had no intention to treat the plaintiffs disparately, it did just that).

⁶⁵ See Linos, *supra* note 64, at 132 ("Plaintiffs in employment discrimination cases fare worse than plaintiffs generally, and plaintiffs making disparate impact claims are particularly likely to lose." (internal citations omitted)).

⁶⁶ See *Tanner*, 971 P.2d at 444 (finding that the plaintiffs are members of a protected class but nevertheless holding that the state did not engage in an unlawful employment practice).

⁶⁷ See *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 64 (Minn. Ct. App. 2009) ("[I]t is only when the policy combines with the marriage statute that a disparate impact occurs.").

⁶⁸ *Id.* (identifying the classification as between married and unmarried couples).

⁶⁹ *Id.* at 67 (finding a disparate impact framework unavailable due to the statutory language which "focuses solely on the public-accommodation provider's conduct in denying the full and fair enjoyment of the accommodation and does not address the effects of the provider's conduct caused by other factors").

⁷⁰ See Linos, *supra* note 64, at 152-55 (arguing that U.S. courts are unlikely to read anti-discrimination statutes broadly in the context of same-sex employee benefit claims due to existing precedent).

IV. THE THREE INTERPRETATIVE DIFFICULTIES OF STATE EQUAL PROTECTION CLAIMS IN THE EXPANSION OF SAME-SEX PUBLIC EMPLOYEE BENEFITS

While several cases challenging the denial of same-sex public employee benefits were ultimately unsuccessful,⁷¹ other cases have been successful based upon their ability to navigate the three main interpretative difficulties of state⁷² equal protection clause claims: (1) the court's identification of a statute's classification; (2) the level of scrutiny that the court applies; and, at least in certain claims, (3) whether a discriminatory intent is present.

A. *The Classification Dilemma*

Beginning in 1985, gay and lesbian litigants confronted state courts with claims that sought to establish their right to employee benefits for their same-sex spouse or dependents. In *Hinman v. Department of Personnel Administration*, the Court of Appeals for the Third District of California held that the denial of the dental care benefits to the partners of state employees did not violate the equal protection clause of the California Constitution.⁷³ The dental care plans in question allowed employees to enroll their spouse or unmarried

71 See, e.g., *Monson*, 759 N.W.2d at 67 (affirming a judgment that a Minnesota health club's policy of allowing only married couples to participate in a family membership rate was facially neutral with respect to same-sex couples and did not violate the state's public accommodations anti-discrimination statute); *Ross v. Denver Dept. of Health and Hosps.*, 883 P.2d 516, 520 (Colo. App. 1994) (holding that the denial of family sick leave benefits for the plaintiff to care for her same-sex partner "treat homosexual employees and similarly situated heterosexual employees differently").

72 Although this section focuses on the state equal protection claims brought in cases to expand same-sex public employee benefits, similar interpretive challenges apply to federal Equal Protection Clause claims and will be discussed in Part V in the context of *Diaz v. Brewer* and *Martin v. El Paso*.

73 *Hinman v. Dept. of Pers. Admin.*, 213 Cal. Rptr. 410, 412 (Cal. Ct. App. 1985). Note that *Hinman* has since been superseded by statute and has been called into doubt by *In re Marriage Cases*, among others. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (determining that the Court of Appeals in California erred in refusing to apply strict scrutiny to classifications based on sexual orientation); *Knight v. Schwarzenegger*, 2004 WL 2011407 (Cal. Super. Sep. 8, 2004) (acknowledging that the validity of *Hinman* had been called into question by subsequent statutes and judicial decisions). However, the discussion of *Hinman* in this Comment, like other early cases, is due to its historical importance as an example of early judicial thought with regard to equal protection analysis.

child,⁷⁴ but at that time California's Civil Code statutorily defined a marriage as between one man and one woman.⁷⁵

The court's equal protection clause analysis began by determining what classification was made by the dental care plans, because "persons similarly situated with respect to the legitimate purposes of a law deserve like treatment."⁷⁶ The court disagreed with the plaintiffs' assertion that homosexual state employees with same-sex partners are similarly situated to heterosexual state employees married to their opposite-sex spouses, instead finding that the dental plans made "a distinction solely on the basis of married and unmarried employees or annuitants, not between heterosexual or homosexual ones."⁷⁷ Subsequent early cases followed a similar analysis to *Hinman*, based primarily on the notion that employee benefit plans limiting employees' beneficiaries to married spouses created a distinction between married and unmarried couples, as opposed to one between heterosexual and homosexual couples.⁷⁸

In *Tanner*, the Oregon Supreme Court considered whether the state's failure to provide employment benefits to same-sex couples violated Oregon's equal privileges and immunities clause or its employment anti-discrimination statute for lesbian and gay employees.⁷⁹ After finding that the statute had not been violated, the *Tanner* court went on to find that the benefits created a classification between heterosexual and homosexual couples, since the latter were unable to marry, and held that the benefits policy violated Oregon's equal privi-

⁷⁴ *Hinman*, 213 Cal. Rptr. at 414.

⁷⁵ See CAL. CIV. CODE § 4100 (West 1985) ("Marriage 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.").

⁷⁶ *Hinman*, 213 Cal. Rptr. at 415. See also *Purdy v. California*, 456 P.2d 645, 653 (Cal. 1969) ("The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.").

⁷⁷ *Hinman*, 213 Cal. Rptr. at 416. See also *Hargrove*, *supra* note 6, at 51 (noting that the *Hinman* court "declined to acknowledge that lesbian and gay couples can have relationships similar to those of married couples").

⁷⁸ See, e.g., *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992) (holding that the benefits policy applies equally to heterosexual and homosexual employees, thus finding that it does not discriminate against the plaintiffs on the basis of sexual orientation); *Ross v. Denver Dept. of Health and Hosps.*, 883 P.2d 516, 520 (Colo. App. 1994) (finding that since "[a]n unmarried heterosexual employee also would not be permitted to take family sick leave benefits to care for his or her unmarried opposite-sex partner . . . the rule does not treat homosexual employees and similarly situated heterosexual employees differently").

⁷⁹ See *supra* text accompanying note 15.

leges and immunities clause.⁸⁰ *Tanner* was the first major case to recognize that benefits provided to spouses of married state employees actually treat homosexual employees differently from heterosexual employees, and to hold the policy unconstitutional.

Decided in the aftermath of *Lawrence v. Texas*,⁸¹ the Montana Supreme Court in *Snetsinger v. Montana University Systems* found that the state university system was violating the equal protection rights of its same-sex employees by denying benefits to their partners.⁸² Unlike the policy at issue in *Tanner*, the benefits policy in *Snetsinger* provided the benefits to unmarried opposite-sex couples, as well.⁸³ As a result, the true classification made by the program was one between unmarried opposite-sex couples and unmarried same-sex couples, which allowed the court to avoid determining whether the policy violated equal protection by classifying the couples based on sex.⁸⁴ Nevertheless, classifications between unmarried opposite-sex couples and unmarried same-sex couples should be viewed as having the same effect as classifications between opposite-sex and same-sex couples more broadly, because they both draw irrational distinctions on the basis of sexual orientation.⁸⁵ As a result of these distinctions, courts, including the court in *Snetsinger*, find that there is no legitimate reason for the government to treat the two groups differently.⁸⁶

Carter was a case that addressed the constitutionality of the denial of benefits to the same-sex partners of gay and lesbian state em-

80 See *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 448 (Or. Ct. App. 1998) (holding that since homosexuals are not able to marry, the benefit program discriminates on the basis of sexual orientation and violates Oregon's constitution). See also *supra* text accompanying note 15.

81 See *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas sodomy law that criminalized private acts of sodomy between consenting, same-sex adults as a violation of the Due Process Clause).

82 See *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (holding that "the University System's policy violates equal protection of the laws under the Montana Constitution by impermissibly treating unmarried same-sex couples differently than unmarried opposite-sex couples").

83 See *id.* at 451 ("Under the policy, the partner of a non-gay employee would qualify for benefits by signing an Affidavit, when the partner of a gay employee would not qualify for the same benefits when signing the same Affidavit.").

84 In cases where benefits programs classify between unmarried opposite-sex and unmarried same-sex couples, the state cannot maintain that such programs are rationalized by their ability to promote marriage. See *id.* ("A policy that allows unmarried opposite-sex couples to sign an Affidavit asserting they are common law married, when they may not be able to legally establish a common law marriage, certainly does not promote marriage, and instead, detracts from it.").

85 *Id.* at 452 ("These two groups, although similarly situated in all respects other than sexual orientation, are not treated equally and fairly.").

86 *Id.*

ployees by state benefits programs. Both *Snetsinger* and *Carter* were of particular importance, since Montana and Alaska are states with constitutional marriage amendments defining marriage as between one man and one woman.⁸⁷ The plaintiffs in *Carter*, the Alaska Civil Liberties Union and nine same-sex couples, alleged “that because they are prohibited from marrying each other by Alaska Constitution article I, section 25, they are ineligible for the employment benefits the defendants provide to married couples, resulting in a denial of the individual plaintiffs’ right to equal protection.”⁸⁸ The plaintiffs did not challenge the marriage amendment, however, but they instead challenged the public employers’ benefits program that denied them the benefits.⁸⁹ The court found that although the marriage amendment precluded same-sex couples from marrying, the amendment itself clearly did not address employment benefits, since doing so could potentially run afoul of the federal Constitution.⁹⁰

After identifying the grounds for the alleged equal protection clause⁹¹ violation, but before the court could implement Alaska’s more stringent equal protection standard,⁹² the court had to resolve two preliminary issues, one of which was to determine the classification established by the benefits program. While the plaintiffs asserted that the government treated same-sex and opposite-sex couples differently, the defendants argued that their programs differentiated on the basis of marital status, or between married and unmarried couples.⁹³ The court agreed with the plaintiffs’ interpretation by finding the proper comparison to be between same-sex and opposite-sex couples, since opposite-sex couples had the opportunity to marry and obtain the benefits, whereas same-sex couples did not.⁹⁴

87 See *supra* text accompanying nn.1 & 17.

88 Alaska Civil Liberties Union *ex rel.* *Carter v. Alaska*, 122 P.3d 781, 784 (Alaska 2005).

89 *Id.* at 784–85 (viewing plaintiff’s complaint as one challenging spousal limitations in the benefits programs).

90 *Id.* at 786, n.20 (citing *Romer v. Evans*, 517 U.S. 620 (1996)) (expressing the concern that an explicit denial of benefits to the same-sex domestic partners of public employees would offend the U.S. Constitution by prohibiting gays and lesbians from seeking a measure designed to protect them under the law).

91 Alaska’s equal protection clause also guarantees equal rights and opportunities to its citizens. See ALASKA CONST. art. I, § 1; *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003) (“We have long recognized that the Alaska Constitution’s equal protection clause affords greater protection to individual rights than the United States Constitution’s Fourteenth Amendment.”).

92 See *Carter*, 122 P.3d at 787 (citing *Malabed*, 70 P.3d at 420–21).

93 *Carter*, 122 P.3d at 788.

94 *Id.*

The second preliminary issue deals with the presence of discriminatory intent, a concern that will be dealt with briefly in Part IV.C.

Following the decision in *Carter*, other state courts continued to split⁹⁵ over the classification made by benefit plans that provide benefits for spouses and dependents of state employees, as well as the appropriate analytical framework for resolving both statutory and constitutional claims. Nevertheless, in cases that have recently addressed the issue, courts in states with marriage statutes and amendments seem to be more likely to find in favor of awarding benefits to the domestic partners of gay and lesbian state employees.⁹⁶

In *Bedford v. New Hampshire Community Technical College System*, the plaintiffs alleged that the state's employment policy unlawfully discriminated against them on the basis of sexual orientation.⁹⁷ The court looked at whether the plaintiffs were part of a protected class who qualified for the benefits, yet were denied despite their qualification, while the benefits were provided to similarly situated persons outside their protected class.⁹⁸ Here, the court found that the lesbian plaintiffs were a protected class, qualified for the benefits as part of their positions, and were denied the benefits while married, heterosexual employees received the benefits.⁹⁹ As such, the court agreed with the plaintiffs' argument that conditioning benefits on marital status discriminated against them on the basis of sexual orientation.¹⁰⁰ By employing the classification framework of *Carter*,¹⁰¹ the court in *Bedford* was able to extend employee benefits to same-sex couples despite New Hampshire's marriage laws forbidding marriages between two men or two women.¹⁰² The significant parallels between the legal analyses of the classification requirement in these cases can and

95 Compare *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283, at *6–7 (N.H. Super. May 3, 2006) (finding that unmarried, heterosexual employees are not similarly situated to unmarried, gay, and lesbian employees for purposes of receiving employee benefits) with *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 64 (Minn. Ct. App. 2009) (rejecting *Carter* and *Bedford* and finding that a family membership policy facially discriminates on the basis of marital status, not sexual orientation).

96 See *Lobsinger*, *supra* note 17, at 135 (arguing that in *Carter* the Alaska Supreme Court was required to treat same-sex couples as their own class and to find that limiting state employee benefits to opposite-sex spouses violated Alaska's Equal Protection Clause because of that state's marriage amendment).

97 *Bedford*, 2006 WL 1217283, at *3.

98 *Id.* at *5.

99 *Id.* at *5, *11.

100 *Id.* at *11.

101 *Id.* at *10–11.

102 *Id.* at *10. See also N.H. REV. STAT. ANN. §§ 457:1, 457:2 (2007) (prohibiting same-sex marriage for men and women).

should provide support for similar arguments to be made in the context of claims based upon the federal Equal Protection Clause.

B. Rational Basis or Heightened Scrutiny?

The next interpretative difficulty that state courts have faced when considering claims to extend same-sex public employee benefits is over what level of judicial scrutiny should apply to these claims. The difficulty is one that has arisen often in state and federal jurisprudence, and has been discussed frequently amongst commentators.¹⁰³ Scholars have also recognized that state constitutional amendments limiting civil marriage to one man and one woman are pushing the debate over which level of scrutiny applies to gays and lesbians into federal courts.¹⁰⁴ This in turn suggests that more cases like *Diaz v. Brewer* and *Martin v. El Paso* are inevitable, so litigants should heed the lessons of state equal protection cases before bringing federal equal protection claims regarding gays and lesbians into federal court.

As discussed earlier, courts often applied some form of rational basis review to cases where the classification at stake does not involve race, ethnicity, alienage, gender, or illegitimacy.¹⁰⁵ This section looks at what scrutiny state courts have previously applied in cases to extend same-sex public employee benefits, and lays the groundwork for the discussion in Part V below over the level of scrutiny that the *Diaz v. Brewer* and *Martin v. El Paso* courts suggest should apply in cases to prevent the benefits' rescission.

In *Hinman*, the court found that the dental care plan challenged by the plaintiffs classified state employees on the basis of whether the employee was married or unmarried.¹⁰⁶ Since the classification was based on marital status, and was thus subject to rational basis review, the court held that the promotion of marriage constituted a legitimate interest, to which the benefits were reasonably related.¹⁰⁷ Due to the lack of a discriminatory classification and the existence of a legitimate state interest, the benefits survived the court's rational basis

103 See, e.g., Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 386 (2010) (summarizing case law and scholarly literature and arguing that lesbians, gays, bisexuals, and transgenders should receive suspect class status).

104 William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 9 (2010).

105 See *supra* Part IV.A

106 *Hinman v. Dept. of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Cal. Ct. App. 1985).

107 *Id.* at 417.

scrutiny and the plaintiffs' state equal protection clause claim was rejected.¹⁰⁸

The Montana Supreme Court in *Snetsinger* identified the classification within state benefit programs as one that distinguished between unmarried same-sex couples and unmarried opposite-sex couples on the basis of sexual orientation.¹⁰⁹ Under Montana equal protection jurisprudence, the three levels of scrutiny and their respective tests are the same as the ones in federal jurisprudence, but the rights they apply to are slightly different: (1) suspect classes and fundamental rights receive strict scrutiny; (2) middle-tier scrutiny applies to rights in Montana's constitution that do not exist in its Bill of Rights; and (3) rational basis scrutiny is appropriate when the other levels do not apply.¹¹⁰ Even though at no point in the opinion does the court name the test that it is applying, it seems clear that the court is applying rational basis review, especially in the absence of a finding of a suspect class or fundamental right, and since the court concludes that there is "no legitimate governmental interest in treating the two groups differently."¹¹¹

In *Carter*, the court applied Alaska's three-step sliding-scale test, which is a judicial invention that recognizes the greater protection afforded by Alaska's equal protection clause, in comparison to the Fourteenth Amendment's Equal Protection Clause.¹¹² For this reason, at least at first glance, it may appear that the portion of *Carter* where the court applies this test is not entirely relevant to federal equal protection jurisprudence. Nonetheless, a closer examination of the court's analysis of the level of scrutiny that it applies to the benefits program reveals that it is almost completely analogous to the level of scrutiny analysis under *Snetsinger* and under the federal Equal Protection Clause.

To determine what level of scrutiny applies, Alaska courts usually begin with the first step of the analysis, which requires the court "to determine what weight to give the individual interests affected by the benefits programs."¹¹³ Even though the plaintiffs contended that the benefits program significantly burdened important personal interests, the court found that this case did not require it to find whether the government action burdened any of the plaintiffs' important interests

108 *Id.* at 419.

109 *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004).

110 *Id.* at 449–50.

111 *Id.* at 452.

112 *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781, 787 (Alaska 2005).

113 *Id.* at 790.

or whether a fundamental right was implicated.¹¹⁴ Instead, the court found that since minimum scrutiny was sufficient to decide the case, it did not need to go any further in its first step analysis.¹¹⁵ The court viewed the employment benefits as an issue affecting only purely economic interests, thus mandating minimum scrutiny, or rational basis review, under Alaska law.¹¹⁶ Under minimum scrutiny, the second step required of Alaska's test only required that the government interests behind the law be "legitimate," and the third step required a "fair and substantial relation"¹¹⁷ between the classification and the purpose of the law.¹¹⁸

Most significantly, the *Carter* court's application of minimum scrutiny to the interests advocated by the government is nearly identical to those presented in *Diaz I*.¹¹⁹ The state presented the court in *Carter* with three legitimate interests, which, as we will see in Part V below, were exactly the same as those that Arizona would later provide to the district court in *Diaz I*: (1) cost control; (2) administrative efficiency; and (3) the promotion of marriage.¹²⁰ The *Carter* court went on to reject each of those rationales, because: (1) the limitation of benefits to heterosexual couples did not advance the state's goal of providing them to the individuals who were "closely connected" to the employee;¹²¹ (2) "the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency";¹²² and (3) "denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage."¹²³

The limited case law regarding same-sex public employee benefits under state equal protection clauses makes it difficult to argue with

114 *Id.*

115 *Id.*

116 *Id.*

117 As the court in *Carter* put it, "Alaska's Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be *substantial*." *Id.* at 791 (emphasis in original). See *infra* note 150.

118 *Id.* at 790.

119 Despite the fact that Alaska's equal protection clause affords greater protection and thus may have lead the court to apply a heightened level of scrutiny, the court in *Collins* similarly recognized that classifications harming politically unpopular groups or personal relationships receive "a more searching form of rational basis review." See *Collins v. Brewer* (*Diaz I*), 727 F. Supp. 2d 797, 804 (D. Ariz. 2010) (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring)).

120 *Collins* (*Diaz I*), 727 F. Supp. at 804–07; *Carter*, 122 P.3d at 790.

121 *Carter*, 122 P.3d at 791.

122 *Id.* at 792.

123 *Id.* at 793.

complete certainty that federal courts would uniformly apply a more searching form of rational basis review on par with the decision in *Carter*. Nevertheless, as the discussion in Part V below will demonstrate, the court in *Diaz I* readily adopted a level of scrutiny that in reality is more demanding than traditional rational basis review.¹²⁴ This suggests that other federal courts would do the same.

C. *The Intent to Discriminate*

The presence of an intent to discriminate can be an element of both state and federal equal protection claims,¹²⁵ and it can be significant in the realm of same-sex state employee benefits. As mentioned in Part II above, plaintiffs are only required to prove an intent to discriminate by the government when the effect of a law creates a classification, as opposed to a law that contains a facial classification.¹²⁶

In *Carter*, the presence (or absence) of a discriminatory intent in the state's benefits programs was the second preliminary issue to be addressed before the court could apply Alaska's three-step sliding-scale test.¹²⁷ The plaintiffs argued that Alaska's equal protection clause did not require a showing of discriminatory intent, while the defendants argued that it did.¹²⁸ Even though it was contested by the parties, the court found the resolution of that question to be unnecessary, since it determined that the benefit programs were facially discriminatory.¹²⁹ By doing so, the court did not need to find intent, since the question of discriminatory intent is satisfied by a showing that the law is discriminatory on its face.¹³⁰ The *Carter* court viewed the benefits programs as classifying gays and lesbians as a different group by the program's own terms.¹³¹ Citing to a federal decision, the

124 See *infra* Part V.

125 See, e.g., *supra* notes 45–46; *infra* notes 127–28.

126 See *supra* Part II.

127 *Carter*, 122 P.3d at 788.

128 *Id.*

129 *Id.*

130 *Hamlyn v. Rock Island Cnty. Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1133 (C.D. Ill. 1997).

131 *Carter*, 122 P.3d at 788 (“When a ‘law by its own terms classifies persons for different treatment’, this is known as a facial classification.” (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.4, at 711 (7th ed. 2004)). Even though it may be suggested that the program’s “own terms” require an explicit reference to gays and lesbians, the group being classified, the *Carter* court did not find that such a reference was necessary and instead viewed the program’s literal effect of denying benefits to gays and lesbians as a sufficient expression of its “own terms.” A more recent edition of Rotunda and Nowak’s Constitutional Law treatise has cited to *Carter*’s interpretation as an example of a facial classification. See ROTUNDA & NOWAK, *supra* note 39, at § 18.4 n.5.

court stated that in these instances “there is no problem of proof and the court can proceed to test the validity of the classification by the appropriate standard.”¹³² As a result, the lack of proof of discriminatory intent did not prevent the plaintiffs from raising an equal protection claim under Alaska’s constitution, and the court proceeded to its three-step sliding-scale test as discussed in Part IV.B above.

Federal courts and at least some state courts do not require proof of discriminatory intent for laws with facial classifications when they are challenged under the doctrine of equal protection.¹³³ So long as courts like the one in *Carter* find that benefit programs facially classify gays and lesbians as a different group, then discriminatory intent will not be a hurdle to plaintiffs bringing state or federal equal protection clause claims—but as will be discussed below, in *Diaz v. Brewer*, courts may still struggle with this issue in the absence of authoritative guidance.

V. FEDERAL EQUAL PROTECTION CLAUSE CLAIMS IN CURRENT LITIGATION TO RETAIN SAME-SEX PUBLIC EMPLOYEE BENEFITS

As discussed in Part IV above, arguments involving state equal protection clauses played a formative role in legal efforts to expand state employee benefits to same-sex couples. Yet now that domestic partnership benefits have been provided in several communities,¹³⁴ a number of economic or political reasons could encourage state legislators and officials to seek their repeal. This Comment has identified at least four different communities where local leaders, state legislators, or the public have sought the removal of same-sex¹³⁵ domestic partnership benefits.¹³⁶ While not all repeal efforts have led to litigation, and not all litigation has been successful, an inquiry into the legal responses to the threat of repeal is a worthy endeavor. This Comment proposes that state equal protection clause cases like *Tan-*

132 *Hamlyn*, 986 F. Supp. at 1133.

133 *See supra* notes 61–64.

134 *See supra* note 9.

135 These actions at minimum seek to remove same-sex domestic partnership benefits, but some (like *Diaz I*) remove the benefits for both same-sex and opposite-sex domestic partners. *Collins v. Brewer (Diaz I)*, 727 F. Supp. 2d 797, 801 (D. Ariz. 2010).

136 *See supra* note 9. The state of Michigan could be considered an additional community, but in that case the plaintiffs sought a judicial declaration that Michigan’s newly approved marriage amendment did not strip same-sex benefits provided by public employers—an outcome which the court had previously refused to oblige. *See National Pride at Work v. Michigan*, 732 N.W.2d 139, 143 (Mich. App. 2007) (ruling that the marriage amendment precluded public employers from extending benefits to domestic partners of the same sex). *See also supra* note 280.

ner, *Snetsinger*, and *Carter* should serve as a model for future cases like *Diaz v. Brewer* and *Martin v. El Paso* that rely on the federal Equal Protection Clause, since they offer the best approach for maintaining state employment benefits for same-sex couples.

A. *Diaz v. Brewer: Protecting Same-Sex Public Employee Benefits Under the Federal Equal Protection Clause*

The state of Arizona, like many others, provides subsidized health care benefits to state employees and their dependents.¹³⁷ Prior to the adoption of Section O, Arizona state regulations defined eligible dependents to include each employee's spouse or domestic partner of the same or opposite sex,¹³⁸ which allowed state employees in same-sex relationships to obtain the same benefits as married heterosexual couples.¹³⁹ Nevertheless, the adoption of Section O changed the definition of dependents to exclude domestic partners of both sexes and only provide coverage for an employee's spouse.¹⁴⁰

The plaintiffs, gay and lesbian state employees with same-sex domestic partners, brought an action against the state and its governor, seeking declaratory and injunctive relief.¹⁴¹ The complaint alleged in part that:

Plaintiffs will suffer . . . harms based on their sexual orientation and their sex in relation to the sex of their committed life partner because the State has enacted legislation that intentionally eliminates family health insurance for lesbian and gay State employees and not heterosexual employees. As a result of the adoption and enforcement of Section O, heterosexual State employees continue to have a way of obtaining family health insurance but the only way lesbian and gay State employees have had to obtain that insurance has been eliminated.¹⁴²

The complaint also alleged that the State violated the plaintiffs' right to equal protection, and specifically their right not to be denied equal protection on the basis of their sexual orientation.¹⁴³ To prevent Section O from taking effect, the plaintiffs filed a motion for a

137 *Collins (Diaz I)*, 727 F. Supp. 2d at 799.

138 Dependents also include the employee's children and the children of their domestic partner. See ARIZ. ADMIN. CODE § R2-5-416(C) (2008).

139 *Collins (Diaz I)*, 727 F. Supp. 2d. at 800.

140 *Id.* at 801. See also *supra* note 138.

141 *Collins (Diaz I)*, 727 F. Supp. 2d at 801.

142 Amended Complaint at 3-4, *Collins (Diaz I)*, 727 F. Supp. 2d. 797 (No. CV9-2402-PHX-JWS).

143 *Id.* at 34.

preliminary injunction that asked the court to enjoin the state from enforcing Section O.¹⁴⁴

In the court's decision granting the preliminary injunction and denying the defendants' motion to dismiss, it stated that the plaintiffs were "highly skilled State employees whose job duties [were] equivalent to the duties of their heterosexual colleagues."¹⁴⁵ The court recognized that the plaintiffs and their partners "enjoyed [] long-term, committed, and financially interdependent relationship[s] and would marry if Arizona law permitted same-sex couples to marry."¹⁴⁶ Lastly, it noted that if Section O went into effect, each of the plaintiff's domestic partners and their qualifying children who were enrolled in the state healthcare plan would lose their benefits.¹⁴⁷

The district court first looked to the plaintiffs' constitutional claim under the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁸ Similar to the analysis in *Tanner* and *Carter*, the *Diaz I* court attempted to identify the classification of groups within Section O.¹⁴⁹ The Fourteenth Amendment requires that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."¹⁵⁰ While the plaintiffs argued that Section O deliberately classified state employees into heterosexual couples and homosexual couples, Arizona contended that Section O was a neutral policy that treated all unmarried employees equally.¹⁵¹

Even though the court found that Section O was not discriminatory on its face, it stated that "as applied Section O 'unquestionably imposes differential treatment on the basis of sexual orientation,' and makes benefits available on terms that are a legal impossibility for gay

¹⁴⁴ *Collins (Diaz I)*, 727 F. Supp. 2d. at 799.

¹⁴⁵ *Id.* at 802. For purposes of motion to dismiss, all of the plaintiff's allegations of material fact are accepted as true and are viewed in the light most favorable to the nonmoving party. *Id.* (citing *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997)).

¹⁴⁶ *Collins (Diaz I)*, 727 F. Supp. at 799.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 803 (identifying a distinction between unmarried heterosexual state employees and unmarried homosexual employees); *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781, 787–88 (Alaska 2005) (identifying the distinction as between same-sex couples and opposite-sex couples, whether married or not); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) (identifying unmarried homosexual couples as a class).

¹⁵⁰ *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Note that the "fair and substantial" language describes the exact same relationship that the Alaska Supreme Court required in *Carter*. See *Carter*, 122 P.3d at 791.

¹⁵¹ *Collins (Diaz I)*, 727 F. Supp. 2d at 803.

and lesbian couples.”¹⁵² The finding that Section O was not facially discriminatory typically means that the court will require proof of intent to discriminate.¹⁵³ Nevertheless, the *Diaz I* court’s citation of Judge Reinhardt’s opinion in *In re Levenson*¹⁵⁴ suggests that it viewed the statute as facially discriminatory under a disparate treatment framework.¹⁵⁵ As Judge Reinhardt recognized, “the differential treatment of opposite-sex and same-sex couples ‘cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation.’”¹⁵⁶ Despite the lack of legal clarity in *Diaz I* on this issue, the court’s ultimate finding that Section O burdens the plaintiffs on the basis of their sexual orientation subjected it to scrutiny under the Equal Protection Clause.¹⁵⁷

Continuing its Equal Protection Clause analysis, the *Diaz I* court next looked to what level of scrutiny should apply to its evaluation of Section O’s constitutionality.¹⁵⁸ The plaintiffs argued that some form of heightened scrutiny should apply, because Section O treated the plaintiffs differently on the basis of their sexual orientation, because gays and lesbians have a history of discrimination and political disadvantage, and because sexual orientation is an immutable characteristic.¹⁵⁹ The court recognized that some form of heightened scrutiny

152 *Id.*

153 *See Hamlyn v. Rock Island Cnty. Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1133 (C.D. Ill. 1997).

154 *In re Levenson* was a case filed in the Ninth Circuit by a federal public defender, who had legally married his same-sex partner under California law but was denied healthcare benefits for his partner as part of his federal employment. Judge Reinhardt heard the case, as designee of the Chair of the Ninth Circuit’s Standing Committee on Federal Public Defenders, and held that the plaintiff’s rights under the employee benefit plan were violated on the basis of sexual orientation, and that the application of DOMA to the plan violated the plaintiff’s right to due process under the U.S. Constitution. *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009).

155 *Collins (Diaz I)*, 727 F. Supp. 2d at 803 (quoting *In re Levenson*, 560 F.3d at 1147).

156 *In re Levenson*, 560 F.3d at 1147 (quoting *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008)).

157 *Collins (Diaz I)*, 727 F. Supp. 2d at 803. The uncertainty over whether the *Diaz I* court viewed the statute as facially discriminatory or facially neutral, and thus applied disparate treatment or disparate impact analysis, is significant to the case, since the requirement of whether plaintiffs must introduce proof of intentional discrimination hinges on that determination. It is especially relevant given that the plaintiffs are bringing a constitutional claim, as opposed to potential statutory claims based on an anti-discrimination statute protecting gays and lesbians from discrimination in the workplace. Here, Arizona does not have a statewide law prohibiting discrimination on the basis of sexual orientation in the workplace. *See* ARIZ. REV. STAT. § 41-1463.

158 *Collins (Diaz I)*, 727 F. Supp. 2d at 804.

159 *Id.*

might apply, but in a manner similar to *Snetsinger*,¹⁶⁰ *Carter*,¹⁶¹ and *In re Levenson*,¹⁶² it punted on the question by finding that the plaintiffs stated “an equal protection claim that is plausible on its face even under the rational basis standard of review.”¹⁶³

The court’s suggestion that heightened scrutiny should apply was particularly noteworthy given its citation of Justice O’Connor’s concurrence in *Lawrence v. Texas*.¹⁶⁴ In *Lawrence*, the Court overruled its prior decision in *Bowers v. Hardwick*,¹⁶⁵ by holding a Texas sodomy statute unconstitutional on the basis of privacy and liberty interests under the Fourteenth Amendment.¹⁶⁶ Although in *Bowers* the Court found gays and lesbians not to be a suspect class warranting heightened scrutiny, *Lawrence* was the first indication that the Court may apply heightened scrutiny to statutes distinguishing on the basis of sexual orientation.¹⁶⁷ Traditionally, federal courts have classified groups as being suspect because: (1) they have historically been stigmatized or discriminated against; (2) they share an immutable character trait; and (3) the trait does not affect their ability to contribute to society.¹⁶⁸ As other commentators have argued, a great deal of evidence exists to support the idea that gays and lesbians should be considered a suspect class for constitutional analysis.¹⁶⁹ To briefly summarize current scholarship on the subject, gays and lesbians should be deemed a suspect class because: (1) they have been a historical target of discrimination on the basis of their sexual orientation; (2) legal jurisprudence “supports the notion that sexual orientation bears no relation to individuals’ ability to participate and

160 See *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (“[W]e need not address the Appellants’ arguments that the policy violates equal protection by classifying them based on sex or that it violates their rights.”).

161 See *Alaska Civil Liberties Union ex rel. Carter v. Alaska*, 122 P.3d 781, 790 (Alaska 2005) (“But because minimum scrutiny is sufficient to resolve this case, we do not need to decide whether the plaintiffs’ interests are ‘important’ or whether a ‘fundamental right’ is affected.”).

162 *In re Levenson*, 560 F.3d at 1149 (finding that “the denial of benefits here cannot survive even rational basis review, the least searching form of constitutional scrutiny,” thus “it is not necessary to determine whether or which form of heightened scrutiny is applicable to this claim”).

163 *Collins*, 727 F. Supp. 2d at 804.

164 *Id.* at 804 n.38 (citing *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring)).

165 See *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), overruled by *Lawrence*, 539 U.S. 558 (2003) (holding that due process is not violated by a state statute that criminalizes sodomy, since homosexual sodomy is not a fundamental right).

166 Powers, *supra* note 103, at 387.

167 *Id.*

168 *Id.* at 388 (citing *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973)).

169 Powers, *supra* note 103, at 387.

contribute to society”; and (3) cases have mostly accepted the notion that sexual orientation is immutable.¹⁷⁰ Neither the Supreme Court, nor any of the cases discussed in this Comment, have undergone this analysis, but *Diaz v. Brewer* and other cases following *Lawrence* suggest a movement towards the identification of gays and lesbians as a suspect class at most, and at minimum, recognition of the more searching scrutiny applied to gays and lesbians even under rational basis review.

Arizona gave five rationales for Section O: (1) the statute “will save the State millions of dollars per year”;¹⁷¹ (2) the statute will be “much easier to administer”;¹⁷² (3) “scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute”;¹⁷³ (4) “this benefit would be most valuable to married persons, who are more likely to have dependent children”;¹⁷⁴ and (5) the new statute “would further the rational, long-standing and well-recognized government interest in favoring marriage.”¹⁷⁵ As mentioned in Part IV.B, four of these rationales—numbered (2) through (5)—are nearly identical to the rationales that the court in *Carter* reviewed and rejected. Similarly, the *Diaz I* court addressed and dismissed each of the rationales in turn.

As for the cost savings rationale, the court looked to *Graham v. Richardson* for the proposition that states may not “attempt to limit [their] expenditures . . . by invidious distinctions between classes of [their] citizens.”¹⁷⁶ The court found the principle to be applicable because “Section O rests on an invidious distinction between heterosexual and homosexual State employees who are similarly situated.”¹⁷⁷ Moreover, as this was an order denying defendant’s motion for dismissal, the court accepted as true facts alleged in the plaintiff’s complaint that the minor additional costs of providing benefits to same-sex couples was offset by not having to provide the benefits through Arizona’s Medicaid program.¹⁷⁸ Regarding the state’s goal of administrative efficiency, the court noted that “the Constitution recognizes higher values than speed and efficiency”—with the prevention of in-

170 *Id.* at 388–89.

171 *Collins v. Brewer (Diaz I)*, 727 F. Supp. 2d 797, 804 (D. Ariz. 2010).

172 *Id.*

173 *Id.* at 804–05.

174 *Id.* at 805.

175 *Id.*

176 *Id.* (quoting *Graham v. Richardson*, 403 U.S. 365, 374 (1971)) (internal quotations omitted).

177 *Collins (Diaz I)*, 727 F. Supp. 2d at 805.

178 *Id.*

vidious classifications being one of them.¹⁷⁹ The court considered the third rationale—that funds are better spent on heterosexual employees—as discriminatory on its face,¹⁸⁰ suggesting that it raised at least the implication of *Romer v. Evans*.¹⁸¹ Lastly, the court found that Section O’s distinction between heterosexual and homosexual employees was not “legitimately, rationally, [or] substantially” related to Arizona’s fourth and fifth rationales, which seek to favor or promote marriage but in reality make the same invidious classification.¹⁸² Since the court was unable to identify any other legitimate state interest that would support Section O, the court denied the defendant’s motion to dismiss, and the plaintiffs were able to meet the four elements for a motion for preliminary injunction, which the court granted.¹⁸³

Soon thereafter, the defendants in *Diaz I* appealed the preliminary injunction to the Ninth Circuit.¹⁸⁴ The defendants’ principal argument was that the district court had incorrectly accepted as true all of the plaintiffs’ allegations in their motion for a preliminary judgment.¹⁸⁵ However, the district court’s opinion dealt with two motions—the defendants’ motion to dismiss, for which the proper standard of review is to accept all of the plaintiffs’ allegations as true, and the plaintiffs’ motion for preliminary injunction, for which the standard is whether the plaintiffs demonstrate a likelihood of success on the merits.¹⁸⁶ The Ninth Circuit found that the district court properly applied each standard to the respective motion.¹⁸⁷

In reviewing the district court’s order, the Ninth Circuit noted the court’s emphasis on the lack of evidence put forth by the State re-

179 *Id.* at 806 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)) (internal quotations omitted).

180 *Collins (Diaz I)*, 727 F. Supp. 2d at 806.

181 *See Romer v. Evans*, 517 U.S. 620, 634 (1996) (finding that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected”).

182 *Collins (Diaz I)*, 727 F. Supp. 2d at 807.

183 *Id.* The court also dismissed the plaintiffs’ argument under the Due Process Clause. *Id.* at 809. Since this Comment advocates for an approach based on Equal Protection Clause claims, discussion of the due process claim is outside its scope, despite the fact that the Supreme Court in practice ignores the formal distinction between equal protection and due process. *See Yoshino, supra* note 49, at 749 (“Too much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees. In practice, the Court does not abide by this distinction.”).

184 *Diaz v. Brewer (Diaz II)*, 656 F.3d 1008, 1012 (9th Cir. 2011).

185 *Id.* at 1012–13.

186 *Id.* at 1013.

187 *Id.*

garding cost savings, which was the State's primary justification for the statute.¹⁸⁸ Moreover, the State did not seriously challenge the district court's finding regarding cost savings on appeal.¹⁸⁹ The appeals court then looked to *United States Department of Agriculture v. Moreno*¹⁹⁰ for the proposition that "when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular."¹⁹¹ Viewing the present circumstances as even "more compelling" than those in *Moreno*, the Ninth Circuit found that the Arizona benefit program's eligibility was restricted in a manner that prevents same-sex couples from retaining eligibility by operation of law.¹⁹² The district court's decision was, in the opinion of the Ninth Circuit, "consistent with long standing equal protection jurisprudence holding that 'some objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests.'"¹⁹³

B. *Martin v. El Paso*

The case of *Martin v. El Paso*,¹⁹⁴ while presenting an array of legal issues, ultimately shaped into a drawn-out legal battle similar to *Diaz v. Brewer*. Religious groups¹⁹⁵ and conservative Christians¹⁹⁶ in El Paso, Texas sought to have a public referendum that would prevent the city from extending domestic partnership benefits to its employees.¹⁹⁷ The professed goal of the groups was to remove the benefits for same-sex partners of city employees, since some of them believed that the program "sends young people the message that the city thinks it is

188 *Id.*

189 *Id.*

190 413 U.S. 528 (1973). In *Moreno*, the Supreme Court held that an amendment defining the term "household" to limit a food stamp program's eligible recipients to related family members was invalid, concluding that the classification was without basis and aimed at an unpopular group. *Id.* at 529–38.

191 *Diaz v. Brewer (Diaz II)*, 656 F.3d at 1013.

192 *Id.* at 1014.

193 *Id.* at 1014–15 (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003)) (O'Connor, J., concurring) (internal quotations omitted).

194 Notice of Removal, *Martin v. El Paso*, No. 3:10-cv-00468-FM (W.D. Tex. Dec. 21, 2010).

195 See Marty Schladen, *Domestic Partners Vote Nears: Group Offers Free Weddings as Initiative Draws Criticism*, EL PASO TIMES, Oct. 10, 2010, available at http://www.elpasotimes.com/news/ci_16300999 (citing El Paso for Jesus as "one of the organizations that oppose taxpayer-funded medical insurance for unmarried partners of city government employees").

196 See Campoy, *supra* note 11 (providing an example of conservative Christians attempting to deny benefits to same-sex couples).

197 See Schladen, *supra* note 195.

permissible to fornicate and be gay.”¹⁹⁸ The ballot initiative stated: “The city of El Paso endorses traditional family values by making health benefits available only to city employees and their legal spouse and dependent children.”¹⁹⁹ Incidentally, when the ballot initiative passed with 55% of the vote, the language of the ballot also had the effect of eliminating benefits for city officials, who are not technically employees of the city, as well as many retirees who were no longer city employees but had been offered benefits upon their retirement.²⁰⁰

As a result, the president of the El Paso Municipal Police Officer’s Association, in addition to a lesbian police officer, her domestic partner, and other plaintiffs, brought suit against the city, alleging claims under the federal Equal Protection Clause, the equal protection and contract clauses of the Texas Constitution, as well as other state law claims.²⁰¹ The plaintiffs alleged that the government interest in passing the ordinance, “endorsing traditional family values,” is not a significant and legitimate public interest.²⁰² Moreover, they argued that the ordinance is unconstitutional since its discrimination “bears no rational relationship to the interest of endorsing traditional family values.”²⁰³

After being transferred to federal court,²⁰⁴ Judge Frank Montalvo of the U.S. District Court of the Western District of Texas ruled that the plaintiffs had not established a violation under the federal Equal Protection Clause.²⁰⁵ The court found that, due to the “unexpected consequences” of direct democracy, the ordinance’s language limits health coverage to city employees, their legal spouses and dependent children, thereby distinguishing between those people and “everyone else.”²⁰⁶ Therefore, since the ordinance did not “affect a discrete group” nor “identify a class which it treats disparately,” a threshold of equal protection analysis was not met.²⁰⁷

198 *Id.*

199 *Id.*

200 Campoy, *supra* note 11.

201 *See* Complaint at 4, Martin v. El Paso, No. 2010-4936 (El Paso County Ct., 34th Jud. Dist. Dec. 15, 2010).

202 *Id.* at 5.

203 *Id.*

204 Notice of Removal, Martin v. El Paso, No. 3:10-cv-00468-FM (W.D. Tex. filed Dec. 21, 2010).

205 Order Denying Plaintiffs’ Second Amended Original Complaint For Declaratory Judgment and to Annul or Invalidate Municipal Ordinance at 18, Martin v. El Paso, No. 3:10-cv-00468-FM (W.D. Tex. May 20, 2011).

206 *Id.* at 17–18.

207 *Id.* at 18.

Despite the absence of a violation, the court went on to advise the parties how it would have ruled had the ordinance targeted domestic partners specifically.²⁰⁸ Such an ordinance would create a discrete group, leading the court to employ rational basis scrutiny. However, even under rational basis scrutiny, the court questioned whether the state's proclaimed interest in "endorsing traditional family values" is a legitimate one, citing to both *Lawrence* and *Moreno*.²⁰⁹ Lastly, the court noted that even if it was a legitimate state interest, it was unclear "how removing health care benefits from domestic partners would rationally relate to that interest," and the court flatly rejected an interest based on budgetary concerns.²¹⁰

Even though the plaintiffs were unsuccessful, the issue remained that the city needed to restore benefits to the elected officials and retirees.²¹¹ Faced with the options of restoring benefits to all and dealing with the wrath of voters, or restoring benefits to all except domestic partners and dealing with the wrath of the courts, the City Council voted 4-4, with the Mayor's vote in favor as tie-breaker, in support of restoring benefits to all individuals affected by the ordinance.²¹² The controversy did not end there, however. Shortly afterwards, the same religious groups who supported the ordinance formed a political action committee, El Pasoans for Traditional Family Values, and have led recall campaigns against the city's mayor and two of the city council members who voted in favor of restoring the benefits.²¹³

Although *Martin v. El Paso* did not ultimately resolve the equal protection violation at issue in *Diaz v. Brewer*, the consequences of the decision are still unfolding and will likely have important ramifications for communities elsewhere that seek to strip same-sex couples of public employee benefits.

208 *Id.*

209 *Id.* at 18–19 (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), and *Moreno v. U.S. Dept. of Agriculture*, 413 U.S. 528, 538 (1973)).

210 Order Denying Plaintiffs' Second Amended Original Complaint For Declaratory Judgment and to Annul or Invalidate Municipal Ordinance at 19–20, *Martin v. El Paso*, No. 3:10-cv-00468-FM (W.D. Tex. May 20, 2011).

211 Adriana M. Chávez, *Judge Upholds Ban on Domestic Partner Benefits*, EL PASO TIMES, May 25, 2011, available at http://www.elpasotimes.com/news/ci_18132235.

212 Marty Schladen, *City Restores Domestic Partner Benefits*, EL PASO TIMES, June 14, 2011, available at http://www.elpasotimes.com/ci_18270403.

213 Marty Schladen, *Mayor Tells Court of Intent to Appeal Recall Ruling*, EL PASO TIMES, Dec. 6, 2011, available at http://www.elpasotimes.com/news/ci_19477399.

VI. AN EXPANSIVE FUTURE FOR FEDERAL EQUAL PROTECTION

Tanner, *Snetsinger*, *Carter*, and all of the other state cases dealing with the expansion of same-sex employee benefits provide important lessons for future plaintiffs who seek to bring similar claims in federal court.²¹⁴ Although outcomes will always be dependent in part on the statutory and constitutional language at issue, judicial precedent, and the particular facts of each case, these cases demonstrate that common equal protection theoretical underpinnings exist across state and federal jurisdictions. As more cases like *Diaz v. Brewer* and *Martin v. El Paso* begin to enter federal court, litigants should take note of the parallel legal analyses that exist under state and federal equal protection jurisprudences in order to maximize their chances at success. Ultimately, this Comment proposes that the experience of states in extending benefits to same-sex state employees should guide federal litigants and the courts in reaching similar outcomes, since cases premised on the Equal Protection Clause provide sound constitutional authority for litigants to refute attempts by state legislators, officials, or even the general public to repeal same-sex benefits for public employees.

A. *Classifications on the Basis of Sexual Orientation*

Despite early cases that identified benefit programs or policies as having classified between married and unmarried couples for the purposes of equal protection analysis, courts are more willing to look past the legal fiction of these policies in order to find a constitutional violation. Cases like *Tanner* and *Carter* hold value outside their state jurisdictions, because of the pragmatic rationales expressed in their decisions. As these cases have articulated, laws or policies that restrict benefits to legal spouses of public employees classify not on marital status but on the basis of sexual orientation, because by their terms gay and lesbian employees can never qualify for benefits in states that deny them the right to marry, whereas unmarried heterosexuals have the option of marrying. The classification becomes even more crystallized in the context of the rescission of domestic partner benefits. The removal of the benefits, while not having direct significance in constitutional analysis, clarifies for the court that the legislation itself is creating two classes—unmarried couples that have the option of

²¹⁴ All of the same lessons from the state cases certainly can and should be used at the state level to further expand same-sex employment benefits in other states that currently do not provide them.

marrying and receiving the benefits, and homosexual, unmarried couples that do not. Even though earlier cases like *Hinman* and *Ross* did not recognize the distinction in the context of the expansion of benefits, *Diaz v. Brewer* and *Martin v. El Paso* provide hope that judges can recognize such classifications within policies that seek their withdrawal.

B. Movement Towards Heightened Scrutiny (or Dignity?)

The decision over whether to apply rational basis or heightened scrutiny to the classifications created by these laws is still an issue of significant debate. The order in *Diaz I* did much to advance the cause of heightened scrutiny, despite its stated decision to ultimately apply rational basis scrutiny to the government's interests. This is largely due to the court's recognition of *In re Levenson*²¹⁵ and Justice O'Connor's concurrence in *Lawrence*²¹⁶ as having precedential value, which itself is a significant step towards the acknowledgement of gays and lesbians as a suspect or protected class.²¹⁷ Prior to the Supreme Court's decision in *Lawrence*, some state and federal courts used the criminalization of homosexual conduct as a rationale for denying suspect classification, and thus heightened scrutiny, to homosexuals.²¹⁸ Nonetheless, as *Diaz v. Brewer*, Justice O'Connor's concurrence in *Lawrence*, and *In re Levenson* suggest, courts are willing to scrutinize more closely the rationales provided by states who seek to remove same-sex employee benefits, even if they do not expressly admit it.

It is outside the scope of this Comment to advocate for one level of scrutiny over another, but these cases emphasize the apparent willingness of some courts, both state and federal, to scrutinize classifications on the basis of sexual orientation in benefit programs under rational basis review and find that there are no legitimate reasons for

215 See *Collins v. Brewer (Diaz I)*, 727 F. Supp. 2d 797, 804 n.34 (D. Ariz. 2010) (citing *In re Levenson*, 587 F.3d 925 (9th Cir. 2009)).

216 See *Collins (Diaz I)*, 727 F. Supp. 2d at 804 n.38 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

217 See Powers, *supra* note 103 (discussing why LGBT individuals are a suspect class and the necessity of applying heightened scrutiny in order to remedy this issue and ensure equal protection).

218 See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (finding that gays are not a suspect class because homosexual conduct is not a fundamental right as decided in *Bowers*); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (reasoning that homosexuals do not constitute a suspect or quasi-suspect class if homosexual conduct can constitutionally be criminalized).

these classifications. This Comment also does not address the courts' apparent movement away from equality claims and towards individual liberty claims, as identified by Professor Kenji Yoshino.²¹⁹ Professor Yoshino describes how this movement has led to the rise of hybrid equality/liberty claims, which he terms "dignity" claims, and believes that "liberty-based" dignity claims will allow the Court to continue upholding equality in our increasingly pluralistic society.²²⁰ Nevertheless, this Comment argues that there is still a place for equal protection jurisprudence and particularly for classifications on the basis of sexual orientation, by subscribing to Professor Eskridge's view that the Equal Protection Clause alone can provide gays and lesbians with constitutional "challenges to an array of interconnected discriminations in state benefits as well as burdens."²²¹ Provided that they are grounded in a strong factual basis, Equal Protection Clause claims that challenge a statute's classification, the rationality of government interests, as well as the relationship between the two, are more likely than ever before to meet success.

VII. CONCLUSION

In conclusion, this Comment has explored the relationship between state equal protection claims in state cases to expand same-sex public employee benefits, and federal Equal Protection Clause claims brought in federal court to prevent their repeal. Despite their differences, these cases demonstrate an emerging trend in state and federal courts towards the recognition of the classifications within benefits programs as discrimination against gay and lesbian employees on the basis of their sexual orientation. Moreover, both state and federal courts have been willing to closely scrutinize the rationales proffered by government entities, despite doing so under the guise of rational basis review.

Litigants in same-sex public benefits cases have a tremendous opportunity to bring the parallel experience of state equal protection jurisprudence to the federal courts, with the possibility of expanding federal equal protection doctrine to include the recognition of public servants who rely upon benefits to take care of their same-sex part-

219 See Yoshino, *supra* note 49, at 748 ("Most notably, the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments.").

220 *Id.* at 749–50.

221 William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000).

ners and dependent children. The opportunity exists despite, or arguably even because of, state constitutional provisions and statutes that define marriage as between one man and one woman. As a critical step in the inevitable progression towards marriage rights for same-sex couples, let us hope this opportunity does not go to waste.

