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SAME-SEX MARRIAGE: A THREAT TO TIERED EQUAL PROTECTION DOCTRINE?

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INTRODUCTION

Recent same-sex marriage cases have generated substantial debate in legal, political, and social circles; few, however, give attention to the effect of these cases on legal doctrine itself. As

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scholars, judges, and justices debate the constitutionality of same-sex marriage prohibitions under the traditional three-tiered equal protection analytical model, the cases themselves should provide substantial impetus to abandon the rigidity of the current methodology in favor of a more flexible approach that produces results consistent with constitutional provisions of equality. Because plaintiffs routinely challenge same-sex marriage prohibitions under equality guarantees contained in state constitutions rather than the federal constitution, state courts employ different equal protection methodologies to assess these claims.[1] While some of these methodologies mirror those employed by federal courts assessing claims brought under the Fourteenth Amendment, some states utilize a contrasting, unitary standard. By analyzing the varying approaches to this singular problem, we can make comparative judgments about the strengths—and weaknesses—of specific equal protection doctrines. Comparing the approaches and results of recent same-sex marriage cases in Washington, New York, Maryland, Vermont, and New Jersey reveals that the traditional tiered analysis contains inherent flaws impeding accomplishment of equal protection's normative goals. In contrast, the cases show that a more flexible and unitary doctrine provides the proper framework for resolving not only same-sex marriage cases, but all federal and state equal protection cases.

Part I of this Article summarizes the Supreme Court's traditional tiered doctrine for assessing federal Fourteenth Amendment Equal Protection claims. Next, the Article discusses various criticisms of tiered equal protection analysis as well as alternative doctrines proposed by Supreme Court Justices and scholars. Part II will analyze recent same-sex marriage cases in Washington, New York, and Maryland. Although involving challenges based on equality guarantees contained in their respective state constitutions, *Hernandez v. Robles*,[2] *Andersen v. King County*,[3] and *Conaway v. Deane*,[4] applied methodologies mirroring federal equal protection doctrine. The discussion of

[1] Because a state constitution's equality guarantee is independent from the Fourteenth Amendment, states are free to adopt their own analytical model to assess these claims rather than follow federal doctrine.

[2] 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

[3] 138 P.3d 963 (Wash. 2006).

[4] 932 A.2d 571 (Md. 2007).

these cases will focus on several flawed aspects of the analyses. Though many of the problems stem from an erroneous application of the federal doctrine, some flaws are inherent in the doctrine itself. While the former set of issues support only a call for clarity from the Supreme Court and more rigorous analysis in applying the doctrine, the latter problems demand re-evaluation of the traditional tiered methodology.

The discussion in Part III focuses on recent same-sex marriage cases in New Jersey[5] and Vermont.[6] In contrast to the prior cases, New Jersey and Vermont use a unitary standard to assess state equal protection claims. This Part will show that while the unitary standard is furthest from federal doctrine in form, New Jersey and Vermont provide—in substance—a closer approximation of the relevant equal protection interests than do states applying a tiered analytical model. Considering the specific issue of same-sex marriage, it becomes evident the traditional doctrine is flawed in its rigidity and that New Jersey's and Vermont's standards—or a similar unitary standard—provide a better resolution of the relative interests. This is because the same-sex marriage cases magnify the contrast between the different doctrines, a contrast that reveals structural flaws transcending this specific issue and compelling modification of federal and state equal protection methodologies to a unitary standard that eschews rigidity for flexibility.[7]

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[5] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[6] Baker v. State, 744 A.2d 864 (Vt. 1999).

[7] There are two notable same-sex marriage cases this Article does not discuss separately from the cases previously mentioned: *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); and *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). In *In re Marriage Cases*, the California Supreme Court analyzed whether same-sex marriage prohibitions violate the California Constitution. 183 P.3d at 447–52. With respect to the plaintiffs' equal protection argument, the California Supreme Court applied a two-tiered approach somewhat analogous to the federal standard and held classifications on the basis of sexual orientation are subject to strict scrutiny. *Id.* at 435–36, 444. The court went on to find denying same-sex couples the benefits of marriage did not survive strict scrutiny. *Id.* at 452. In *Goodridge*, the Supreme Judicial Court of Massachusetts considered whether denying same-sex couples the opportunity to marry violates state equal protection principles. 798 N.E.2d at 948. Applying an approach mirroring the federal methodology, the court held discrimination on the basis of sexual orientation was subject to rational basis review. *Id.* at 960–61. The court then found denying same-sex couples the opportunity to marry did not survive rational basis review. *Id.* at 961, 968. Thus, both California and Massachusetts determined same-sex marriage prohibitions are unconstitutional under a tiered analysis. Although the holdings of these cases support this Article's conclusion that the tiered analyses undertaken in Washington,

In addition to highlighting the problems of tiered doctrine, an analysis of the different models used in New York, Washington, Maryland, New Jersey, and Vermont provides a framework for constructing an equal protection methodology that more appropriately reflects the interests and normative goals of federal and state constitutional provisions of equality. Thus, Part IV proposes a modified version of Justice Stevens' unitary approach to equal protection cases. This standard asks whether an impartial lawmaker could rationally believe the classification serves a legitimate public purpose transcending the harm to the disadvantaged class. In assessing the harm inflicted upon the disadvantaged class, courts should consider the invidiousness of the classification and the importance of the right involved. Relevant to this analysis is the history of discrimination against the group and whether the group lacks political power. Once a court assesses the harm to the disadvantaged group, it should determine whether the public purpose of the discriminatory act transcends that harm. In doing so, courts should consider the importance of the asserted interest and how effectively the discrimination serves that interest. This unitary standard incorporates all relevant equal protection interests while resolving many criticisms leveled against the current tiered doctrine.

I. FEDERAL EQUAL PROTECTION DOCTRINE

A. *Criticisms*

Tiered equal protection analysis originated in the famous footnote four in *United States v. Carolene Products Co.*[8] The

New York, and Maryland were deeply flawed, they do not, in themselves, demonstrate this Article's broader point: Tiered analysis is structurally flawed and inherently apt to produce erroneous results. This is because the cases reach the result this Article advocates even using a methodology it criticizes. However, the cases do not undermine its argument because they show only that tiered analysis is *capable* of producing the correct result if applied by judges willing to overlook, or are not distracted by, its inherent limitations and flaws. Because the goal of any court should be to produce a methodology that mandates accurate results, and constrains judges within the relevant interests, the mere possibility of a correct result under properly-applied tiered analysis does not mitigate the need for a methodology eliminating the structural flaws particularly apt to cause erroneous analysis.

[8] 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.").

Court has discerned that "if a law neither burdens a fundamental right nor targets a suspect class, [it] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[9] Where a law burdens a fundamental right or targets a suspect class, however, "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[10] Thus far, the Supreme Court has applied strict scrutiny to laws that classify on the basis of race,[11] national origin,[12] and alienage.[13]

For quasi-suspect classes like gender or illegitimacy, the Court uses a form of intermediate scrutiny.[14] To withstand constitutional challenge, the government must show that these " 'classification[s] serve[] important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.' "[15] The Supreme Court has identified a number of factors influencing whether a particular group is a suspect or quasi-suspect class: (1) the history of discrimination against the group;[16] (2) the political power of the affected group;[17] (3) whether the trait is immutable;[18] and (4) whether the "characteristic frequently bears no relation to ability to perform or contribute to society."[19]

Since the inception of the doctrine, scholars and justices alike have leveled criticism at various aspects of the tiered methodology. A frequent target of such criticisms is the Court's criteria for determining which classes obtain suspect status.[20] First, the indicia for suspect classifications are internally inconsistent with the doctrine's application.[21] While the indicia

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[9] Romer v. Evans, 517 U.S. 620, 631 (1996).

[10] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[11] *Id.*

[12] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[13] *Id.*

[14] Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

[15] United States v. Virginia, 518 U.S. 515, 533 (1996) (internal quotation marks omitted) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

[16] Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[17] *Id.*

[18] *Id.*

[19] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[20] Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 503–04 (2004).

[21] *Id.* at 504–05.

for suspect classifications focus on the vulnerable group, the appropriate level of scrutiny applies even if the legislation is aimed at helping this group.[22] For example, classifications that burden whites must survive strict scrutiny even though there is no history of discrimination against whites nor have whites ever been politically powerless. Ironically, it is the discrimination whites leveled against minorities and the political power whites deprived from minorities that rewards them with suspect class status. A consequence of this inconsistency is even programs seeking to ameliorate past racial discrimination must satisfy the same test as those seeking to perpetuate such discrimination. This irony invites the criticism that "any methodology that pretends there are no constitutionally relevant differences between a governmental policy that seeks to perpetuate racial subordination and one that seeks to ameliorate it is hopelessly mechanistic and sadly out of touch."[23]

Others argue, however, strict scrutiny—properly applied—should pose no bar to remedial race-based measures.[24] Even so, the primary problem with utilizing the same level of scrutiny is the "danger that the fatal language of 'strict scrutiny' will skew the analysis and place well-crafted benign programs at unnecessary risk."[25] The Court "sends the message to governments that developing a race-conscious effort to ensure equality is a high-risk proposition that stands only a limited chance of surviving legal challenge."[26] Under the current doctrine, the liability of government agencies enacting remedial measures hinges on the ability of reviewing judges to ascertain and implement the subtle, context-specific analysis of *Adarand Constructors* and *Grutter*. Given the risk-averse nature of many government agencies, the unpredictability of strict scrutiny—even if properly applied to remedial measures—often dooms honest legislative attempts to enact legitimate remedial

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[22] Grutter v. Bollinger, 539 U.S. 306, 323–26 (2003) (subjecting affirmative action programs to strict scrutiny).

[23] Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2344 (2006).

[24] Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196 (2002).

[25] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 n.1 (1995) (Stevens, J., dissenting).

[26] Goldberg, *supra* note 20, at 510.

measures.[27] Any doctrine that impedes enactment of legitimate, carefully-drawn remedial measures is inherently flawed and in need of refinement.

Another frequent criticism of the Supreme Court's doctrine is its rigidity.[28] The doctrine's rigidity reveals itself in its all-or-nothing approach. Unless a class meets the criteria for suspect or quasi-suspect status, the Court reviews all classifications under the deferential rational basis standard.[29] Thus, the doctrine recognizes no meaningful difference—at least in form—between classes meeting many of the traits for heightened scrutiny (though not enough to warrant heightened scrutiny) and those that meet none, for both are subject to the same deferential rational basis review.[30] By doing so, the tiered doctrine often makes the preliminary determination of what level of scrutiny to apply outcome-determinative.[31]

An additional example of the doctrine's rigidity is its inability to consider the importance of the right involved in relation to the classification at issue.[32] Unless the government deprives an affected group of a fundamental right, the discriminatory action has to survive only rational basis review. In such a situation, the right's importance becomes immaterial.[33] Thus, the doctrine fails to recognize even amongst those rights that are not fundamental, people place different values on various rights.[34] Depending on which non-fundamental right is at issue and what class is affected, classifications can have varying degrees of injurious purpose and effect.[35] A doctrine that fails to consider the varying and subtle importance of non-fundamental rights is unnecessarily rigid and inherently flawed.

A final criticism of the federal equal protection doctrine is the Court's inconsistent application of rational basis review.

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[27] Siegel, *supra* note 23, at 2350.

[28] Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 173–74 (1984).

[29] Romer v. Evans, 517 U.S. 620, 631 (1996) (describing the circumstances under which courts are to apply the rational basis standard of review).

[30] Shaman, *supra* note 28, at 173–74.

[31] *Id.* at 173.

[32] Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1210–14 (1999).

[33] *Id.* at 1210–11.

[34] *Id.* at 1211–14.

[35] *Id.*

Perhaps in response to the aforementioned criticisms of the doctrine's rigidity, the Court has in many instances of rational basis review deviated from its extremely deferential approach in favor of a more searching judicial inquiry.[36] Troubled by the inconsistency, critics have called for clarity regarding when "weak" and "strong" forms of rational basis review apply.[37] Some favor resolving this inconsistency by adopting a more rigorous rational basis review for certain classifications;[38] in contrast, others use the inconsistency as a reason to disregard the tiered structure entirely.[39]

B. Proposed Alternatives

In light of these criticisms, several scholars and Justices have proposed alternatives—and refinements—to the current tiered doctrine.[40] While there are several competing theories, two in particular warrant attention: Justice Marshall's sliding scale approach and Justice Stevens' modified rational basis test. These two approaches are particularly instructive because they discuss concepts and address problems that re-occur throughout many of the proposed alternatives.

Justice Stevens famously began his tenure on the Court by proclaiming that "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[41] According to Justice Stevens, "the tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather

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[36] *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59–61 (1996). Examples of inconsistent rational basis review include: *Romer v. Evans*, 517 U.S. 620, 631, 635 (1996); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 441–43, 450 (1985); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534–38 (1973). *See* Baker v. State, 744 A.2d 864, 872 n.5 (Vt. 1999).

[37] Goldberg, *supra* note 20, at 514.

[38] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44 (1972); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002).

[39] Goldberg, *supra* note 20, at 514.

[40] *Id.* at 484; Gunther, *supra* note 38, at 7; Kelso, *supra* note 38, at 226; Nice, *supra* note 32, at 1215; Siegel, *supra* note 23, at 2340–42.

[41] Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).

is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[42] Under Justice Stevens' approach, the Court would—in all instances—inquire whether there is a rational basis for the classification at issue.[43]

This is not, however, the deferential rational basis review that exists under traditional tiered analysis. Rather, Justice Stevens believes the term rational "includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[44] For Justice Stevens, the sovereign's duty is to govern impartially, which includes elements of neutrality and legitimacy.[45] This approach also considers whether the class involved has been subject to a history of discrimination and whether a rational member of the disadvantaged class could ever approve of the discriminatory classification.[46]

In contrast, Justice Marshall advocated for a sliding scale approach to equal protection. Through several opinions, Justice Marshall indicated his disagreement with "the Court's rigidified approach to equal protection analysis."[47] He believed the Court's opinions defied categorization into rigid tiers and the Court applied a spectrum of standards depending on the factual circumstances of each case.[48] In his opinion, the level of scrutiny should vary based on the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[49] Justice Marshall's approach focuses on "the character of the classification in question, the relative importance to individuals in the class discriminated against of

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[42] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (alteration omitted) (quoting *Craig*, 429 U.S. at 212 (Stevens, J., concurring)).

[43] *Id.*

[44] *Id.*

[45] *See id.* at 453.

[46] *See id.* at 433–55.

[47] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417, 432 (1974) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

[48] *San Antonio*, 411 U.S. at 98–99 (Marshall, J., dissenting).

[49] *Id.* at 99.

the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[50]

The approaches of Justices Stevens and Marshall both reflect several of the aforementioned criticisms of traditional tiered equal protection doctrine. Both eschew rigidity for flexibility in assessing the relative importance of the interests involved. Because of that flexibility, both approaches recognize the substantive differences between legislation designed to ameliorate past discrimination and those perpetuating such discrimination. Under either approach, the focus of the analysis no longer rests on outcome-determinative conclusions regarding the proper standard of review; instead, the approaches recognize judicial review of classifications should not hinge on such all-or-nothing determinations. Justice Marshall's standard in particular stresses that the importance of an interest varies depending on the group affected and even non-fundamental rights deserve a sliding scale of protection relative to the importnace of the right involved.

These theories contain concepts that are crucial in judging the merits of the different approaches used by New York, Washington, Maryland, New Jersey, and Vermont in recent same-sex marriage cases. The failure or success of a particular analytical model, as judged by its ability to produce results consistent with principles of equality, lies in its ability to incorporate these core concepts. While many arguments have been made that current tiered equal protection doctrine already embodies many of these principles, the cases show that in application, tiered analysis inherently blocks consideration of these crucial factors in a manner that deprives citizens of equal protection. In contrast, the cases make clear it is through only a unitary, flexible standard courts can truly consider the relevant criteria in a uniform manner.

II. SAME-SEX MARRIAGE UNDER TIERED ANALYSIS

A. *Andersen v. King County*

In *Andersen v. King County*,[51] the Washington Supreme Court considered whether Washington's Defense of Marriage Act

[50] *Dandridge*, 397 U.S. at 520–21 (Marshall, J., dissenting).
[51] 138 P.3d 963 (Wash. 2006).

("DOMA") violated the privileges and immunities clause of the Washington State Constitution.[52] In Washington, unless the law is a grant of positive favoritism to a minority class, courts apply "the same constitutional analysis under the state constitution's privileges and immunities clause that is applied under the federal constitution's equal protection clause."[53] Thus, the plurality began its tiered analysis by determining what level of scrutiny to apply.[54]

The plurality opinion first referenced the factors to determine whether classifications based on sexual orientation should be subject to strict scrutiny.[55] The opinion began by noting there "is no dispute that gay and lesbian persons have been discriminated against in the past."[56] The court held, however, that the plaintiffs failed to show sexual orientation was an immutable characteristic.[57] The court determined a showing of immutability was required for suspect class status and that absent such a showing, sexual orientation could not be considered a suspect classification.[58] The plurality also held that homosexuals could not satisfy the politically powerless prong because Washington had recently enacted statutes prohibiting discrimination on the basis of sexual orientation and providing some economic benefits to same-sex couples.[59] Additionally, the court noted that several openly gay candidates were elected to national, state, and local offices in 2004.[60] Because the court believed this was a sign of increasing political power, it concluded

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[52] *Id.* at 968. The Washington Supreme Court also held that the act did not violate the due process clause of the Washington Constitution. As that is not relevant to the equal protection analysis, this Article omits discussion of the court's resolution of that issue.

[53] *Id.* at 969.

[54] *Id.* at 973–74.

[55] *See id.* at 974.

[56] *Id.*

[57] *Id.* The plurality opinion referenced the Ninth Circuit's decision in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), which held that sexual orientation was behavioral and not immutable. Although that conclusion appeared to be in doubt in *Hernandez-Montiel v. Immigration & Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), *overruled in part on other grounds by* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005), the Ninth Circuit has since approvingly referenced *High Tech Gays*' holding that homosexuals are not a suspect class in *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003).

[58] *Andersen*, 138 P.3d at 974.

[59] *Id.*

[60] *Id.*

homosexuals could not satisfy the requirements for suspect class status.[61]

Next, the Washington Supreme Court determined Washington's DOMA did not burden a fundamental right.[62] Phrasing the issue as whether a fundamental right exists to marry a person of the same-sex, the court noted there was not a "tradition or history of same-sex marriage."[63] Because the plaintiffs did not establish that homosexuals are a suspect class or that the fundamental right to marry included same-sex marriage, the court applied rational basis review to the challenged legislation.[64] The opinion began its rational basis review by rejecting the argument that Washington's DOMA was motivated by animus and therefore unconstitutional under *Romer v. Evans*.[65] The court held that while some legislators expressed anti-gay sentiment during the enactment of the legislation, not all legislators were motivated by such sentiment.[66] The opinion concluded *Romer* applies only if the court finds the legislation was "motivated *solely* by animus *and* that it lacked *any* legitimate governmental purpose."[67] Thus, the court held the law did not fail rational basis review even though some legislators were motivated by animus towards gays and lesbians.[68]

The court accepted the state's argument that Washington had a legitimate governmental interest in enacting DOMA to encourage stable relationships that promote procreation.[69] The court reasoned only opposite-sex couples could procreate without

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[61] *Id.* at 974–75.

[62] *Id.* at 979.

[63] *Id.* at 978.

[64] *Id.* at 980.

[65] *Id.* at 980–81. In *Romer v. Evans*, the Supreme Court struck down Colorado's Amendment 2 under rational basis review because "a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." 517 U.S. 620, 634 (1996) (internal quotation marks omitted) (ellipsis omitted).

[66] *Andersen*, 138 P.3d at 981.

[67] *Id.* Under the Washington Supreme Court's reading of *Romer*, animus is immaterial so long as the legislation has a legitimate governmental purpose. This misconstrues the holding of *Romer* and makes animus important only if the law lacks a legitimate rational basis (at which point the act would fail rational basis review already). A more accurate reading of *Romer* is that a law motivated by animus cannot have a legitimate government interest because it offends principles of equality.

[68] *Id.* at 981–82.

[69] *Id.* at 982.

third-party assistance and marriage serves as a mechanism to provide stability for any resulting children.[70] Further, the court held the Washington Legislature could rationally believe it preferable for children to be raised by married opposite-sex parents.[71] The court found it immaterial that the state does not prohibit marriages involving those unwilling or incapable of procreating given the substantial amount of overinclusion and underinclusion rational basis review tolerates.[72] Therefore, the court determined there was a rational basis to believe that providing marriage for opposite-sex couples only served the government's legitimate interest in having children raised in a stable environment by opposite-sex couples. Thus, the court concluded Washington's DOMA did not violate the privileges and immunities clause of the Washington Constitution.

B. Hernandez v. Robles

In *Hernandez v. Robles*,[73] the New York Court of Appeals[74] utilized similar reasoning in assessing the validity of a Domestic Relations Law that did not provide same-sex couples the right to marry. Similar to the Washington Constitution, the New York Constitution's Equal Protection Clause is "no broader in coverage than the Federal provision."[75] First, the court determined there was no fundamental right to same-sex marriage.[76] Next, the court rejected plaintiffs' argument that it should review the marriage laws under strict scrutiny.[77] Although the law draws distinctions based on the sex of the individuals in the relationship relative to each other, the court found the law treated both women and men equally; thus, the law did not warrant heightened scrutiny by engaging in sex-based classifications.[78]

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[70] *Id.* at 983.

[71] *Id.*

[72] *Id.* at 984.

[73] 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

[74] The New York Court of Appeals is the highest state court in New York.

[75] *Id.* at 362, 855 N.E.2d at 9, 821 N.Y.S.2d at 778 (internal quotation marks omitted) (quoting Under 21, Catholic Home Bureau for Dependent Children v. City of N.Y., 65 N.Y.2d 344, 360 n.6, 482 N.E.2d 1, 8, 492 N.Y.S.2d 522, 529 (1985)).

[76] *Id.* at 363, 855 N.E.2d at 10, 821 N.Y.S.2d at 779.

[77] *Id.* at 363–64, 855 N.E.2d at 10, 821 N.Y.S.2d at 779.

[78] *Id.* at 364, 855 N.E.2d at 10–11, 821 N.Y.S.2d at 779–80.

The court agreed, however, that the law draws distinctions based on an individual's sexual orientation, thus necessitating consideration of whether sexual orientation is a suspect classification.[79] The court noted one of the crucial determinations in the analysis was whether the groups affected "have distinguishing characteristics relevant to interests the State has the authority to implement."[80] Without considering whether the other indicia for heightened scrutiny were present, the court determined that because the natural ability for opposite-sex couples to have children is relevant to a governmental interest, rational basis scrutiny applies when analyzing the challenged legislation.[81] Oddly, the court noted that when other interests are affected by classifications based on sexual orientation, it may adopt a more rigorous level of scrutiny.[82]

Repeatedly stressing the deference given to the Legislature under rational basis review, the court concluded New York did have a legitimate government interest in excluding same-sex couples from the rights of marriage.[83] First, the Legislature could rationally believe marriage exists to promote stability amongst people capable of having children by accident or impulse.[84] The court reasoned that because same-sex couples cannot have children by accident, the need for stability in opposite-sex homes is greater. Second, the court found the Legislature could rationally believe it better for a child to grow up with both a mother and a father.[85] Rejecting the numerous studies showing no difference between children raised in opposite-sex homes compared to those raised in single-sex homes, the court determined "[i]n the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and a father in the home."[86] Thus, the court concluded the prohibition of same-sex marriage survived rational basis review and therefore did not violate New York's equal protection clause.

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[79] *Id.* at 364, 855 N.E.2d at 11, 821 N.Y.S.2d at 780.

[80] *Id.* (quoting City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985)).

[81] *Id.* at 364–65, 855 N.E.2d at 11, 821 N.Y.S.2d at 780.

[82] *Id.* at 364, 855 N.E.2d at 11, 821 N.Y.S.2d at 780.

[83] *Id.* at 361, 855 N.E.2d at 9, 821 N.Y.S.2d at 778.

[84] *Id.* at 359, 855 N.E.2d at 7, 821 N.Y.S.2d at 776.

[85] *Id.* at 359–60, 855 N.E.2d at 7, 821 N.Y.S.2d at 776.

[86] *Id.* at 360, 855 N.E.2d at 7–8, 821 N.Y.S.2d at 776–77.

C. *Conaway v. Deane*

In *Conaway v. Deane*,[87] the Maryland Supreme Court used much of the same reasoning when holding that statutes prohibiting same-sex marriage do not violate the equal protection guarantee implicit in the state's constitution.[88] The court noted that the state's equal protection clause applies to the same extent as the Fourteenth Amendment to the United States Constitution.[89] The court first determined what level of scrutiny to apply based on the same criteria identified by the Supreme Court in applying the Fourteenth Amendment.[90] The court began by noting "[h]omosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments."[91] Additionally, the court determined "[g]ay, lesbian, and bisexual persons likewise have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society."[92] Even so, the court focused on recent success in the executive and legislative branches to eliminate discrimination against homosexuals, and it was not "persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to 'extraordinary protection from the majoritarian political process.' "[93] Further, the court determined it could not take judicial notice of homosexuality as an immutable trait.[94] Thus, the Maryland Supreme Court held sexual orientation was not a suspect or quasi-suspect classification. Because the court also held there was no fundamental right to same-sex marriage, it applied rational basis review to the challenged legislation.

Once the Maryland Supreme Court determined rational basis review was appropriate, it proceeded down the same overtly

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[87] 932 A.2d 571 (Md. 2007).

[88] *Id.* at 603 n.33. The Maryland Supreme Court also considered whether the statute draws an impermissible sex-based distinction in violation of the Maryland Equal Rights Amendment, but concluded it did not. *Id.* at 602.

[89] *Id.* at 603 n.33.

[90] *Id.* at 606–07.

[91] *Id.* at 609.

[92] *Id.*

[93] *Id.* at 611 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

[94] *Id.* at 614. The court stated it could not define homosexuality as immutable "[i]n the absence of some generally accepted scientific conclusion identifying homosexuality as an immutable characteristic." *Id.* at 616.

deferential path as Washington and New York. The court first recognized that "safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest."[95] Rejecting the argument that excluding homosexuals from marriage in no way undermines or threatens the ability for heterosexuals to continue to have and raise children, the court held the link between marriage and procreation "reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)."[96] Although acknowledging the merit of the argument that opposite-sex couples will continue to bring children into their families through traditional procreation regardless of the ability for same-sex couples to marry, the court glossed over this flaw "[i]n light of the deference owed to the General Assembly under rational basis review . . . even though it may be under- or over-inclusive, or otherwise create a distinction based on imperfectly drawn criteria."[97] Therefore, the court held statutes prohibiting same-sex marriage do not violate the equality guarantee contained in the Maryland Constitution.

D. The Failure of Tiered Analysis

1. Analytical Flaws

The Washington Supreme Court, New York Court of Appeals, and Maryland Supreme Court engaged in a number of analytical flaws while assessing the constitutional validity of same-sex marriage prohibitions. Admittedly, some result simply from misapplication of Supreme Court precedent. While these may be the product of poor legal analysis in applying the doctrine, they do not themselves indicate the doctrine is inherently flawed. More troubling, however, are the errors resulting from structural defects in the tiered doctrine. Because these cannot be fixed by refinement or clarification, they compel the conclusion that courts should abandon tiered analysis entirely.

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[95] *Id.* at 630.
[96] *Id.* at 630–31.
[97] *Id.* at 634.

To understand the structural errors inherent in traditional tiered doctrine, it is necessary to elaborate on the analytical errors that compelled the courts' holdings. In all three cases applying a tiered methodology, the courts improperly analyzed whether homosexuals deserve treatment as a suspect class. In Washington and Maryland, the courts focused their analysis on the conclusion that homosexuality is not an immutable characteristic. While there are strong arguments homosexuality is immutable,[98] the troubling aspect of the courts' conclusions is they make immutability the sine qua non of heightened scrutiny, which the Supreme Court has never required.

Additionally, the courts in Washington and Maryland determined that homosexuals were not politically powerless merely because those states had recently passed anti-discrimination legislation affording some benefits to homosexuals.[99] Moreover, the Washington Supreme Court was assuaged by the fact that some openly gay candidates were elected to office during the 2004 election.[100] However, the fact that an affected group is protected by some anti-discrimination legislation or has a few national political candidates has never prevented the application of heightened scrutiny. The existence of anti-discrimination laws prohibiting racial and gender discrimination in some contexts, as well as the election of female and minority politicians, never been a bar to the Supreme Court's continued application of heightened scrutiny to acts that discriminate on the basis of gender or race. "Indeed, if a group's *current* political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications."[101] Moreover, such conclusions ignore

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[98] *See* Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 651–53 (2001) (arguing for a concept of immutability not based on whether a trait is defined or ingrained at birth and is unchangeable; rather, that immutability should be understood as encompassing those traits for which change cannot be brought about by a choice to be made by the individual with the characteristic and those traits that can be changed by the individual but with only substantial difficulty or costs).

[99] Andersen v. King County, 138 P.3d 963, 974–75 (Wash. 2006); *Conaway*, 932 A.2d at 611.

[100] *Andersen*, 138 P.3d at 974.

[101] *In re* Marriage Cases, 183 P.3d 384, 443 (Cal. 2008), *reh'g denied*, 2008 Cal. LEXIS 6807, at *1 (Cal. June 4, 2008) .

the fact that these successes—when they exist—are recent, hard-fought, narrowly won, and are often times subsequently reversed through the same political process.[102] Both Washington and Maryland incorrectly concluded that the existence of anti-discrimination legislation and some openly gay political leaders mitigates the strong history of societal prejudice against homosexuals and bars heightened scrutiny; in fact, the Supreme Court has applied heightened review even in the face of such "signs" of political power.

The New York Court of Appeals also engaged in analytical flaws when determining whether classifications based on sexual orientation should be subject to heightened scrutiny. Although recognizing one of the crucial indicia of a suspect class is whether the class affected has characteristics that are often relevant to one's ability to perform or contribute to society, the court incorrectly applied this standard in an individualized manner. The court applied rational basis review because it believed sexual orientation to be relevant in the specific context of marriage.[103] However, the determination of a trait's relevance should not be made solely within the confines of the specific case at hand, but rather in the context of society as a whole.[104] Equally troubling was the court's determination that in other cases, higher judicial scrutiny may apply.[105] In effect, the court held that because there is a rational basis to discriminate with respect to marriage, such discrimination will be reviewed under rational basis scrutiny. This applies heightened scrutiny to sexual orientation discrimination only when those classifications are not relevant to the interest at issue (i.e., those cases that would fail rational basis review already). Moreover, the New York Court of Appeals

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[102] *See* Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 722–23 (2008) ("Indeed, one logically could conclude that the passage of the Defense of Marriage Act (DOMA), defining marriage as between a man and a woman, and the efforts of many states to pass laws limiting marriage to a man and a woman, are the ultimate evidence of just how politically powerless gays are *throughout the country*.").

[103] *See* Hernandez v. Robles, 7 N.Y.3d 338, 364, 855 N.E.2d 1, 10, 821 N.Y.S.2d 770, 779 (2006).

[104] *See* Goldberg, *supra* note 20, at 537.

[105] *See Hernandez*, 7 N.Y.3d at 363, 855 N.E.2d at 10, 821 N.Y.S.2d at 779.

failed even to consider the other indicia the Supreme Court has identified as relevant to such determinations.[106]

2. Doctrinal Flaws

Even if courts are correct in concluding a particular class does not deserve heightened scrutiny, however, the analysis is still flawed because the doctrine's all-or-nothing approach prevents courts from giving value to those indicia the class clearly meets. In all three cases applying a tiered methodology, once the courts determined sexual orientation failed to meet the criteria of a suspect classification, it was immaterial to the remainder of the analyses that homosexuals have endured a long history of invidious discrimination based on a trait frequently not relevant to one's ability to perform in society. Despite such history, classifications based on sexual orientation in Washington, New York, and Maryland must satisfy the same standard of review as classifications directed against groups that have never been discriminated against and possess traits that are often relevant to societal interests. Thus, all three courts disregarded the true injurious effect of sexual orientation discrimination in the name of deference. This is the result of the doctrine's all-or-nothing approach, and a result that argues against such a rigid methodology.

Moreover, the courts incorrectly applied rational basis review to same-sex marriage prohibitions. The cases found that restricting marriage to heterosexual relationships served a legitimate government interest in encouraging procreation and family stability. Although it is certainly true marriage promotes stability for any resulting children, and that this is a legitimate government interest, the exclusion of same-sex couples does not further that interest. When government creates a statutory scheme excluding certain classes, the government must prove

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[106] For various arguments concluding sexual orientation should be a suspect classification under tiered methodology, see Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 7–10 (1994); *In re Marriage Cases*, 183 P.3d at 442–45; *Hernandez*, 7 N.Y.3d at 386–90, 855 N.E.2d at 27–29, 821 N.Y.S.2d at 796–99 (Kaye, C.J., dissenting); Margaret Bichler, Note, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167, 194–200 (2008); and Jeffrey A. Williams, *Re-Orienting the Sex Discrimination Argument for Gay Rights After* Lawrence v. Texas, 14 COLUM. J. GENDER & L. 131, 142–49 (2005).

how the *exclusion* furthers the state interest.[107] By focusing on marriage's ability to encourage stability, and the need for that stability in opposite-sex couples because children can result by accident or impulse, the courts applying tiered analysis did not analyze how denying same-sex couples the same right furthers that interest.[108] In fact, those arguments apply equally to same-sex couples: Same-sex couples have children, and these children have the same interest in growing up in stable homes.[109] While the government does have a legitimate interest in promoting familial stability, same-sex marriage prohibitions cannot survive rational basis review based on this interest because the exclusion of same-sex couples does not further—and in fact hinders—this interest.[110]

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[107] Dissenting in *Hernandez*, Chief Judge Kaye stated:

> Properly analyzed, equal protection requires that it be the legislated *distinction* that furthers a legitimate state interest, not the discriminatory law itself. Were it otherwise, an irrational or invidious exclusion of a particular group would be permitted so long as there was an identifiable group that benefitted from the challenged legislation. In other words, it is not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages. The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State's interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.

Hernandez, 7 N.Y.3d at 391, 855 N.E.2d at 30, 821 N.Y.S.2d at 799 (Kaye, C.J., dissenting) (citations omitted); *see generally* Samuel Marcosson, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense,"* 35 U. LOUISVILLE J. FAM. L. 721, 730 (1997).

[108] Even under an overly-deferential rational basis review, numerous jurists have recognized the state does not further its goal of promoting procreation in marriage by excluding same-sex couples from the opportunity to marry. Conaway v. Deane, 932 A.2d 571, 650 (Md. 2007) (Raker, J., concurring in part and dissenting) (noting the state "cannot rationally claim that its interest in providing a stable environment for procreation and child rearing is then actually furthered by the exclusion of same-sex couples from the equal rights and benefits of marriage"); *Hernandez*, 7 N.Y.3d at 391, 855 N.E.2d at 30, 821 N.Y.S.2d at 799 (Kaye, C.J., dissenting) ("But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest."); Andersen v. King County, 138 P.3d 963, 1017 (Wash. 2006) (Fairhurst, J., dissenting) ("Even if we accept the proffered interests as legitimate, the plurality and the State fail to address or explain the issue this case raises, that is, how those interests are furthered by *denying* same-sex couples the right that heterosexual couples already enjoy.").

[109] Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 991–92 (1991).

[110] *See* Marcosson, *supra* note 107, at 731.

Another interest identified by the New York Court of Appeals and the Washington Supreme Court to justify the exclusion of same-sex couples from the statutory scheme of marriage is the belief that the optimal child-rearing environment includes a home with a father and a mother.[111] However, this interest is insufficient for two reasons. First, there has never been any evidence to demonstrate children raised in same-sex households suffer adverse developmental or psychological effects compared to children raised in "traditional" heterosexual households.[112] Second, the states failed to prove how denying same-sex couples marital benefits furthers this interest.[113] There is no evidence denying same-sex couples marital benefits will increase the number of children raised by opposite-sex parents.[114] Thus, this interest is insufficient to support the state's categorical exclusion of same-sex couples from marriage.[115]

While one could posit the courts' analytical errors are simply the product of poor legal analysis, a closer examination reveals the doctrine itself is inherently flawed in its inability to constrain judicial analysis within relevant equal protection interests. Prescient of results like *Andersen*, *Hernandez*, and *Conaway*, Professor Goldberg has noted that the rational basis standard's "emphasis on deference at times leads courts to skip over the required step of evaluating the link between that permissible goal and the government's action."[116] The tiered doctrine "channels attention away from the particular issues and factual details of cases and toward general questions about the level of scrutiny that should be adopted."[117] Because of this, once rational basis review applies, tiered methodology gives judges the

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[111] *See Hernandez*, 7 N.Y.3d at 359, 855 N.E.2d at 7, 821 N.Y.S.2d at 776; *Andersen*, 138 P.3d at 985.

[112] *See* Marcosson, *supra* note 107, at 731; Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 196 (1995).

[113] *See generally* Marcosson, *supra* note 107, at 731.

[114] *Id.*; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003) ("The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child rearing unit.").

[115] *See* Marcosson, *supra* note 107, at 731.

[116] Goldberg, *supra* note 20, at 490.

[117] Shaman, *supra* note 28, at 174.

freedom to gloss over the relevant interest involved in the name of deference.[118] This constricts the constitutional analysis and removes from consideration "any number of factors, circumstances, and consequences that are relevant."[119] Although inappropriate deference could be considered simply an analytical error, the structural flaw of tiered methodology is in crafting a rational basis review so weak it provides judges the opportunity to ignore the link between the challenged exclusion and the legitimate state interest it supposedly furthers. By stressing deference over substantive analysis, tiered analysis is inherently apt to produce the analytical errors present in *Andersen*, *Hernandez*, and *Conaway*.

Additionally, these errors reveal another inherent flaw in the tiered doctrine: its inability to recognize the spectrum of importance that society places on non-fundamental rights. So long as a right is not fundamental, courts utilize the same standard of review regardless of the right's importance.[120] Thus, a law that affects one's ability to wear a specific color shirt is reviewed under the same level of scrutiny as a law that denies societal recognition of a same-sex couple's commitment and the resulting economic and personal benefits involved. By granting such extreme deference to government regardless of the nature of the right involved, the doctrine avoids a substantive analysis of the true importance of the right at issue in relation to how the deprivation of that right furthers a legitimate state interest.[121]

While deference is appropriate in many situations, courts should recognize that some rights, though not fundamental, are a core expression of one's identity and integral to society's perception of that person, as well as the individual's self-perception. The doctrine's rigidity ignores the reality that a law's injurious effect is dependent on the right involved.[122] As the importance of the right increases, courts need to be more vigilant in examining the link between the discriminatory exclusion and the furtherance of a state interest. For homosexuals, same-sex marriage is not only a battle for societal recognition of their commitment to each other, but an affirmation of their own

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[118] *Id.*

[119] Siegel, *supra* note 23, at 2345.

[120] *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

[121] *See* Nice, *supra* note 32, at 1211.

[122] *Id.*

equality. " '[D]enying the opportunity to marry to homosexuals is the most public affront possible to their public equality.' "[123] By reviewing this harm under the same standard as a government deprivation of any other right, deference obscures the law's true effect as class based legislation violating the principles of equal protection.

The *Hernandez* court magnified this flaw by holding that the Legislature could, "[i]n the absence of conclusive scientific evidence . . . rationally proceed on the commonsense premise that children will do best with a mother and father in the home."[124] The court permitted the state—under the guise of deference—to ignore the majority of scientific evidence proving otherwise to proceed on "intuition and experience" alone.[125] While deference to such unsubstantiated intuition may be appropriate in the vast majority of cases, it is not appropriate when the result deprives homosexuals of the principal means for an individual to achieve societal recognition of his or her commitment to another. A doctrine that assigns importance to rights within only two categories, fundamental or non-fundamental, is overly rigid. In turn, this prevents courts from recognizing the vast and oftentimes subtle differences in the rights at issue and the need for government to respond with an interest equally precise and carefully drawn.

The cases applying tiered methodology illustrate that the doctrine is structurally flawed in its inherent rigidity. As Justice Stevens and Justice Marshall enumerated, the doctrine's all-or-nothing approach replaces substantive analysis with arbitrary line-drawing in a manner that fails to recognize the invidiousness of particular classifications, as well as the importance of various rights, lie across a spectrum and governmental interests should respond appropriately. Without a doctrine that incorporates this flexibility, deference replaces substantive analysis when laws neither burden a fundamental right nor target a suspect class. Because of this, tiered methodology makes the proper level of review outcome-

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[123] Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1933 (1997) (quoting ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 179 (Vintage Books 1996) (1995)).

[124] Hernandez v. Robles, 7 N.Y.3d 338, 360, 855 N.E.2d 1, 8, 821 N.Y.S.2d 770, 777 (2006).

[125] *Id.* at 359–60, 855 N.E.2d at 7–8, 821 N.Y.S.2d at 776–77.

determinative, which in turn tethers the analysis to interests and conclusions unrelated to the principles of constitutional provisions of equality. The failure of such an approach reveals itself when the courts in Washington, New York, and Maryland allow the government to deprive a group that has been subjected to a history of invidious discrimination of a right central to one's identity and societal perception based on "intuition alone" and without sufficiently examining the nexus between the exclusion and the legitimate state interest. While these same-sex marriage cases expose the flaws in tiered methodology, the problems transcend this specific issue and apply to all equal protection cases. In light of the inherent flaws of the tiered doctrine, it is necessary to formulate a new equal protection doctrine that identifies and reflects these core concerns.

III. SAME-SEX MARRIAGE UNDER UNITARY ANALYSIS

A. *Lewis v. Harris*

New Jersey does not follow the federal tiered model in assessing claims brought under the New Jersey Constitution's equal protection guarantee. The differences are evident in *Lewis v. Harris*,[126] where the New Jersey Supreme Court considered whether marriage laws excluding same-sex couples violate the equal protection guarantee of the New Jersey Constitution.[127] The New Jersey Supreme Court asks—in every situation—whether legislation distinguishing between two classes of people bears a substantial relationship to a legitimate governmental purpose.[128] In doing so, the court weighs three factors: (1) "the nature of the right at stake"; (2) "the extent to which the challenged statutory scheme restricts that right"; and (3) "the public need for the statutory restriction."[129] Mirroring Justice Marshall's approach,[130] the court explicitly noted the flexibility of its test and that "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right."[131]

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[126] 908 A.2d 196 (N.J. 2006).
[127] *Id.* at 212.
[128] *Id.*
[129] *Id.*
[130] *See supra* text accompanying notes 47–50.
[131] *Id.* (internal quotations omitted).

The court began its analysis by detailing the numerous statutory steps taken by New Jersey to eradicate discrimination against homosexuals.[132] Unlike the analysis in Washington and Maryland, the existence of such legislation strengthened the plaintiffs' equal protection claim.[133] According to the New Jersey Supreme Court, such extensive anti-discriminatory measures "provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples."[134] The court, considering the extent to which the marriage prohibition restricts the strong interest in equality of treatment, discussed a litany of rights not afforded to same-sex couples because of their inability to marry.[135] Specifically, the court was concerned with the deprivation of rights directed towards the children of same-sex couples relative to the children of opposite-sex married couples.[136]

Finally, the court considered the public need for the restriction.[137] Unlike Washington, New York, and Maryland, New Jersey did not assert that the prohibition was necessary to encourage procreation or to create the optimal living environment for children.[138] Rather, the state relied on the long tradition of opposite-sex marriage and its interest in uniformity with other states' laws.[139] Rejecting both arguments, the court found no rational basis for excluding same-sex couples from the rights of marriage.[140] The court reasoned that to the extent marriage strengthens families and aids children, it does so equally in heterosexual and homosexual relationships.[141] While the court held denying the benefits of marriage to same-sex couples violates the state's equal protection guarantee, it did not require New Jersey to grant those benefits via the traditional marriage statutes.[142] Rather, the court gave New Jersey the option of amending the marriage statutes to permit same-sex

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[132] *Id.* at 213–15.

[133] *Id.* at 215.

[134] *Id.*

[135] *Id.* at 215–17.

[136] *Id.* (focusing on survivors' benefits, tuition assistance, and support obligations as some of benefits of marriage).

[137] *Id.* at 217.

[138] *Id.*

[139] *Id.* at 218.

[140] *Id.* at 218, 220–21.

[141] *Id.* at 218.

[142] *Id.* at 224.

marriage or to create a parallel system granting all of the same rights, though not technically marriage.[143]

B. *Baker v. State*

Similar to the New Jersey Supreme Court, the Supreme Court of Vermont applied a unitary standard in assessing a challenge to same-sex marriage prohibitions under the equal protection guarantee of the Vermont Constitution.[144] Under this unitary analysis, the first step is to "define that 'part of the community' disadvantaged by the law."[145] The court then looks to the government's purpose in drawing the classification and to the nature of the classification "to determine whether it is reasonably necessary to accomplish the State's claimed objectives."[146] The ultimate analysis is whether "the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose."[147] Influencing this determination is the significance of the benefits not provided, whether the exclusion promotes the government's stated goals, and "whether the classification is significantly underinclusive or overinclusive."[148]

Similar to the courts applying a tiered methodology, the Supreme Court of Vermont determined that the government has a legitimate and longstanding interest in promoting a

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[143] *Id.* Although the New Jersey Supreme Court considered civil unions to be "equal" to marriage rights, there are very strong arguments that separate is *not* equal. Matthew K. Yan, Note, *"What's in a Name?": Why the New Jersey Equal Protection Guarantee Requires Full Recognition of Same-Sex Marriage*, 17 B.U. PUB. INT. L.J. 179, 193–97 (2007) (discussing the relevant differences between civil unions and marriage); *see* Robert Schwaneberg, *Gay Couples Find Obstacles on Benefits*, STAR-LEDGER (New Jersey), Apr. 15, 2007, at 21 (discussing insurance companies "refusals to provide couples in civil unions with the same health benefits provided to married couples"). Moreover, there may be an interesting correlation between doctrinal approaches and remedial orders. The Vermont Supreme Court, also applying a unitary methodology, gave the Legislature the option of amending the traditional marriage statutes or creating a parallel scheme of rights. Baker v. State, 744 A.2d 864, 887 (Vt. 1999). It may be the same flexibility in a unitary methodology that gives courts the freedom to strike down traditional marriage laws in the first place that allows them to accept such an incomplete remedy; however, with such a small sampling (two states), it may also be coincidence. Though an interesting and related issue, it exceeds the scope of this Article.

[144] *Baker*, 744 A.2d at 877–78.

[145] *Id.* at 878.

[146] *Id.*

[147] *Id.* at 878–79.

[148] *Id.* at 879.

commitment between couples for the security of their children.[149] Noting the extensive benefits denied to same-sex couples, however, the court held that "[t]he legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."[150] Additionally, the court found recent legislative enactments increasing the rights of homosexuals strengthened the public policy against excluding homosexuals from the benefits of marriage.[151]

With these considerations as a backdrop, the Vermont Supreme Court held the exclusion of same-sex couples from the benefits of marriage did not further the government's stated goal of promoting a commitment between couples for the security of children.[152] The court recognized that "[i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against."[153] Therefore, the court concluded excluding same-sex couples from the benefits of marriage violates the equal protection guarantee of the Vermont Constitution, and it gave Vermont the option of amending the current statutes to permit marriage or to create a parallel system granting same-sex couples all the benefits of marriage.[154]

C. *Success of Unitary Analysis*

The contrast in outcomes between states using a tiered methodology and those using a unitary doctrine begs the question: Were those divergent outcomes simply the result of poor legal analysis or were they the product of more substantive methodological differences? Since the inherent flaws of the tiered doctrine are evident—both in general and as applied to same-sex marriage prohibitions—one must assess whether the

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[149] *Id.* at 881.

[150] *Id.* at 884.

[151] *Id.* at 884–85 ("In light of these express policy choices, the State's arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies are patently without substance.").

[152] *See id.* at 882.

[153] *Id.*

[154] *Id.* at 886–89.

standards employed by New Jersey and Vermont address those flaws in a satisfactory manner that forces courts to conduct the substantive analysis required by constitutional guarantees of equality.

First, New Jersey and Vermont, by using a unitary methodology, were not constrained by arbitrary preliminary questions regarding what level of scrutiny to apply. Whereas New York, Washington, and Maryland found the history of discrimination against homosexuals irrelevant after determining sexual orientation was not a suspect classification, New Jersey and Vermont continuously reflected the principle that classifications on the basis of sexual orientation will merit vigorous judicial review.[155] Appropriately, the existence of anti-discrimination legislation protecting homosexuals strengthened the equal protection claim in New Jersey and Vermont as a reflection of the societal goal of eradicating discrimination and the recognition that sexual orientation is rarely a characteristic relevant to government interests.[156]

This stands in stark contrast to *Andersen* and *Conaway* where the existence of these laws prohibited strict judicial scrutiny, thereby effectively negating the relevance of the history of discrimination directed against homosexuals.[157] In contrast, the unitary methodologies employed by New Jersey and Vermont recognize that recent anti-discrimination legislation reflects this long history of discrimination and is symbolic of society's intolerance of such classifications.[158] Instead of using anti-discrimination statutes as a basis to replace thorough analysis with deference, New Jersey and Vermont recognize them as a reason to doubt the legitimacy of any future sexual orientation classifications.

This ability to conduct a more substantive review flows from the doctrine's flexibility in assessing the character of the group affected and the nature of the right involved. While Washington, New York, and Maryland relegate marriage's importance to trivial status after determining same-sex marriage is not a fundamental right, the unitary standard's flexibility compels a

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[155] *See* Lewis v. Harris, 908 A.2d 196, 215 (N.J. 2006); *Baker*, 744 A.2d at 885.

[156] *Lewis*, 908 A.2d at 215; *Baker*, 744 A.2d at 885.

[157] *See* Andersen v. King County, 138 P.3d 963, 973–75 (Wash. 2006); Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007).

[158] *Lewis*, 908 A.2d at 213–14.

court to conduct a meaningful analysis of the importance of marriage as it relates to the affected class. Applied in New Jersey and Vermont, this allowed the courts to consider the extensive benefits involved in marriage and the effect a lack of marital benefits has on same-sex couples and their children. The doctrine's flexibility allows courts to recognize this reality and thus require a stronger governmental interest than might be applicable in other situations. By requiring a stronger interest, the test mandates a more substantive analysis that compels conclusions consistent with constitutional guarantees of equality, whether federal or state. This stands in stark contrast to the rigidity of the tiered structure, which mandates a level of rational basis review apparently so deferential that legislators can enact discriminatory laws based on unsubstantiated "intuition and experience."

Fortunately, these concerns have not gone completely unnoticed by the Supreme Court. In *Plyler v. Doe*,[159] the Court considered whether a Texas law denying public education to the children of illegal aliens violates the Equal Protection Clause.[160] First, the Court held that education is not a fundamental right.[161] Additionally, the Court concluded illegal aliens are not a suspect class.[162] Under traditional tiered analysis, as the dissent illustrated, the Court should have applied rational basis review and found the law constitutional.[163] However, understanding the inherent rigidity of the tiered doctrine and the inappropriate level of deference accompanying rational basis review, the Court realized that "more is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right."[164]

While the Court concluded education is not a fundamental right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare

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[159] 457 U.S. 202, 205 (1982).

[160] *Id.* at 205.

[161] *Id.* at 221.

[162] *Id.* at 219 n.19.

[163] *Id.* at 244, 248 (Burger, C.J., dissenting) ("Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose.").

[164] *Id.* at 223 (majority opinion).

legislation."[165] Moreover, the Court noted that denying education to this isolated group of children violates one of the central tenets of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[166] In light of these concerns, the Court held the legislation could only be rational if it furthered a substantial goal of the state.[167] By requiring this higher level of scrutiny, the Court was able to recognize that the law accomplished none of the goals set out by the state.[168]

Plyler's significance rests on the Court's recognition of a crucial fact: Strict reliance on tiered doctrine, at least in some cases, impedes full analysis of appropriate equal protection interests. The dissent, chained to the rigidity of tiered doctrine, was incapable of assessing the senselessness of the state law at issue.[169] Because it would have applied overly deferential rational basis review, the dissent—under the guise of deference—would have overlooked the reality that the law served none of the state's articulated goals.[170] In contrast, "[t]he majority opinion in the case was able to reveal this senselessness and therefore strike down the law by adopting an approach similar to the unitary framework."[171] By rejecting the categorical rigidity of tiered methodology, the majority engaged in an in-depth analysis of the interests involved, the classification at issue, and the relationship between the interest and the group affected. This unitary, more flexible standard allowed the Court to engage in a deeper analysis than tiered methodology permits. This case illustrates what recent same-sex marriage cases make apparent: Tiered analysis impedes appropriate consideration of relevant equal protection interests.

The Court's opinion in *Romer v. Evans*[172] further illustrates this point. In *Romer*, the Court considered whether Colorado's Amendment 2, which prohibited any government action designed to protect homosexuals, violated the Fourteenth Amendment.[173]

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[165] *Id.* at 221.
[166] *Id.* at 221–22.
[167] *Id.* at 224.
[168] Shaman, *supra* note 28, at 179–80.
[169] *Id.* at 180.
[170] *Id.* at 179–80.
[171] *Id.* at 180.
[172] 517 U.S. 620 (1996).
[173] *Id.* at 624.

The Court applied rational basis review[174] and held that because the amendment was motivated by animus towards homosexuals, the government did not have a legitimate interest in enacting the amendment.[175] Similar to *Plyler*, the dissent would have relied on the overtly deferential nature of rational basis review to uphold the challenged classification.[176] Though more subtle than *Plyler*, the Court in *Romer* recognized the need to depart from traditional rational basis review to analyze the importance of the right involved and the illegitimate motive behind the classification at issue.[177] Although Amendment 2 did not involve a fundamental right, the Court was concerned that "[t]he resulting disqualification of a class of persons from the right to seek specific protection from the law [was] unprecedented in [the Court's] jurisprudence."[178] Recognizing the "severe consequence" of Amendment 2,[179] the Court deviated from the deference normally accompanying rational basis review.[180] Only through a deeper analysis could the majority recognize what the dissent was incapable of comprehending: that Amendment 2 was the type of class-based legislation antithetical to the Fourteenth Amendment. As both *Plyler* and *Romer* illustrate, rigid adherence to traditional tiered doctrine often impedes judicial analysis of discriminatory classifications.[181]

As the cases in Washington, New York, and Maryland demonstrate, the issue of same-sex marriage reveals the same analytical problems with tiered analysis that concerned the Court in *Plyler* and *Romer*. Similar to education, the right for same-sex couples to marry, even if not fundamental, is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[182] Aside from the numerous

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[174] *Id.* at 631–32. The court did not determine whether homosexuals are a suspect class. Because the Court held that Amendment 2 did not pass rational basis review, the Court found it unnecessary to determine whether a higher level of scrutiny may apply. *See id.* at 631–32, 635.

[175] *Id.* at 632.

[176] *Id.* at 640.

[177] Todd M. Hughes, *Making* Romer *Work*, 33 CAL. W. L. REV. 169, 175 (1997).

[178] *Romer*, 517 U.S. at 633.

[179] *Id.* at 629.

[180] Sunstein, *supra* note 36, at 53.

[181] Professor Sunstein noted after *Romer* that "[t]he hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests." *Id.* at 77.

[182] Plyler v. Doe, 457 U.S. 202, 221 (1982).

tangible benefits available to married couples, the right to marry is inextricably linked with one's conception of human dignity and autonomy.[183] Marriage involves personal confirmation of a couple's commitment to each other while also acting as the means to achieve societal recognition of that commitment. Because of the unique nature of the right, tiered analysis is incapable of assessing a state's deprivation of that right; thus, the courts applying a tiered methodology relied on an inappropriate amount of deference to avoid scrutinizing the legitimate government interest and how the discriminatory exclusion furthers that interest. While the Supreme Court was able to recognize the doctrine's shortcomings in *Plyer* and *Romer* and modify the analysis accordingly, lower courts, including state courts following the federal model, too often ignore or fail to appreciate these variations in favor of rigid classifications and inappropriate deference. Such failures result from more than poor legal analysis, they flow directly from the doctrine itself.

The cases in Washington, New York, and Maryland demonstrate how such an approach leads to conclusions inconsistent with the normative goals of constitutional guarantees of equality. In contrast, it was only through unitary methodologies that New Jersey and Vermont were able to avoid rigid categorization of classifications, interests, and rights to reveal the senselessness of the law at issue. These cases reveal that for same-sex marriage cases, similar to *Plyler*, only a unitary standard can constrain judicial analysis within relevant equal protection interests and force a more penetrating inquiry regarding the nature of the right involved, its relationship to the group deprived of that right, and how the discrimination furthers a governmental interest.[184] These lessons, however, transcend the specific issue of same-sex marriage and demonstrate the need for unitary analysis of all federal and state equal protection claims. The question becomes: How should courts structure a unitary methodology to capture the benefits of a unitary approach and eliminate the flaws of tiered methodology?

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[183] Lewis v. Harris, 908 A.2d 196, 215 (2006).

[184] *See* Shaman, *supra* note 28, at 180–81.

IV. A BETTER WAY

While many scholars, judges, and Justices are in accord with the need to adopt a unitary model, they often disagree when deciding the form of such an analytical model.[185] However, many of the approaches generally focus on balancing two considerations: the governmental interest involved and the harm inflicted by the classification. To combine these interests appropriately, while also integrating the proper amount of deference, federal and state courts should mirror Justice Stevens' approach and ask whether an impartial lawmaker could rationally believe the classification serves a legitimate public purpose that transcends the harm to the members of the disadvantaged class. This Articles argues that this standard incorporates all relevant considerations of equal protection analysis.

The crux of this analysis is on the harm to the disadvantaged class. Determining the harm of the classification requires consideration of two elements: (1) the invidiousness of the classification; and (2) the nature of the right at stake.[186] As the invidiousness of the classification and the importance of the right increase, the governmental interest must proportionally increase for it to transcend the harm of the discriminatory law. While this analytical approach is different in form than the tiered doctrine, the unitary standard still incorporates many of the previously relevant concepts. As the standard focuses on an impartial lawmaker, any classification motivated by animus would fail, because the existence of animus precludes a lawmaker's impartiality. Thus, under the Court's application of the tiered doctrine in *Romer* and the modified version of Justice Stevens' unitary standard proposed here, animus towards politically unpopular groups would doom discriminatory classifications.[187]

Additionally, many of the factors relevant in determining whether a group is a suspect class will still be relevant in

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[185] See Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1032 (2003), for a summary of various unitary approaches under state constitutions. Compare Goldberg, *supra* note 20, with John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191 (1999), for a sampling of the rich literature on this subject, in addition to the approaches of Justice Marshall and Justice Stevens.

[186] Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1154 (1992).

[187] *See* Romer v. Evans, 517 U.S. 620, 634 (1996).

assessing the invidiousness of a classification. Primarily, the invidiousness of a classification depends on the strength of two considerations: a history of discrimination against the group and its lack of political power. The former is particularly important "[b]ecause prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based" and as a result, "a history of unequal treatment requires sensitivity to the prospect that its vestiges endure."[188] Any classification that perpetuates a history of unequal treatment is more likely to inflict harm than classifications that disadvantage groups historically free from such prejudicial treatment.[189]

The second consideration—a group's lack of political power—is relevant because groups lacking political power are more in need of "protection from the majoritarian political process."[190] Theoretically, groups who possess sufficient political power can effectively redress their grievances through the political process. Thus, classifications disadvantaging those groups are more likely to be the product of reasoned consideration. In contrast, classifications that disadvantage politically powerless groups are more apt to result from a blatant disregard of the group excluded, thus violating one of equal protection's normative goals. However, courts should analyze both of these considerations independently. Unlike tiered analysis, this should not be an all-or-nothing approach that a group either meets or does not meet, for the lack of one relevant criterion (e.g., history of discrimination) should not preclude consideration of the other. In contrast to a tiered methodology, these factors would be a flexible barometer for assessing the invidiousness of a particular classification, not a rigid test for which the failure to meet one criteria would negate consideration of others and obviate the need for a governmental interest sufficiently furthered by the discriminatory act.

Notably absent from consideration are two criteria the Court currently uses to gauge whether a group is a suspect class: immutability and whether the group has characteristics often relevant to disparate treatment. Though the Court has

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[188] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (Marshall, J., dissenting).

[189] *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979).

[190] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

historically found immutability relevant,[191] its importance has waned in recent times.[192] Possibly, the Court may have recognized that the "importance accorded to immutability as an indicia of suspectness runs contrary to the Court's own recognition that society, not nature, gives many traits their significance."[193] Thus, many scholars reject immutability as a relevant characteristic;[194] in contrast, Professor Marcosson argues that a properly redefined immutability—one that incorporates immutability as a product of social construction—should remain relevant.[195] However, even a redefined immutability is not a particularly helpful barometer in assessing the harm a discriminatory classification inflicts on a disadvantaged group.[196] Many classifications discriminating with respect to immutable characteristics (e.g., intelligence, age) inflict minimal constitutional harm. Thus, immutability should not be considered in this redefined unitary doctrine.[197]

Additionally, the proposed standard finds no relevance in whether the disadvantaged group has characteristics that are often relevant to valid classifications. While the relevance of the particular characteristic at issue in any one case is significant, there is no reason to skew the analysis because the group has characteristics that may be relevant in *other* contexts. Because "a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not."[198] Because this standard forces a substantive analysis of

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[191] *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[192] Marcosson, *supra* note 98, at 647.

[193] Goldberg, *supra* note 20, at 506.

[194] *Id.*; *see* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598 (1996).

[195] Marcosson, *supra* note 98, at 650.

[196] *See* Sunstein, *supra* note 106, at 9 (noting that immutability is often irrelevant in determining which classifications rest on illegitimate grounds).

[197] Even if a court did find immutability relevant to an equal protection analysis, it should not be applied as a prerequisite, as the courts did in *Andersen* and *Conaway*, for meaningful judicial scrutiny, but rather as one of many factors in determining the invidiousness of a classification.

[198] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part and dissenting in part) ("A sign that says 'men only' looks very different on a bathroom door than a courthouse door."); *cf.* Goldberg,

the interest involved regardless of the classification, there is no reason to utilize presumptions based on a characteristic's relevance in other contexts.

The second judicial consideration in assessing the harm of a discriminatory classification is the nature of the right at stake. This consideration increases with the importance of the right at issue. Instead of arbitrarily categorizing rights as fundamental or non-fundamental, courts should recognize that rights have different degrees of importance. Courts should require the strength of the governmental interest to vary "with 'the constitutional and societal importance of the interest adversely affected.' "[199] More importantly, the importance of the right must be understood with reference to the group affected.[200] As the importance of a right can vary in the abstract sense, so too can its importance vary depending on which group is disadvantaged. This principle "recognizes the interdependence, rather than the separation and isolation, of rights and the classes of right-holders and non-right-holders."[201] Depriving a group of a right can have varying degrees of injurious purpose and effect based solely on which group is affected. As the value of the right increases, both in the abstract and as related to the particular group at issue, the harm of the discriminatory classification increases.

This standard forces courts to begin their equal protection analysis by assessing the harm of the discriminatory classification on the group affected. This requires an assessment of both the invidiousness of the classification and the value of the right at issue. By its structure, this unitary standard responds to many of the criticisms of the tiered doctrine. Namely, by abandoning the rigidity of tiers, the standard recognizes—and allows courts to consider—the differences between legislation that perpetuates discrimination and those aimed at remedying such discrimination. By gauging the invidiousness of the statute based on the disadvantaged group, as opposed to the classification itself, courts can recognize that affirmative action programs inflict less constitutional harm than many other forms

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supra note 20, at 537 ("[S]keptical scrutiny will *not* follow if the trait plausibly can be the basis for differential treatment in a variety of contexts.").

[199] *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)).

[200] Nice, *supra* note 32, at 1223.

[201] *Id.* at 1223–24.

of discrimination. Because these programs by definition disadvantage majority groups, there will be no history of discrimination against the affected group, nor will that group lack political power. Thus, the proposed standard will treat these classifications as inflicting minimal constitutional harm, thereby decreasing the strength of the state interest required. Second, the proposed standard is more capable of assessing situations in which several different classifications, and rights, intersect.[202] In such a situation, the standard would evaluate the harm of each classification and right involved and then require a public interest significant enough to transcend the totality of the harm inflicted on the disadvantaged groups.

After determining the magnitude of the harm, courts should ask whether the law serves a public interest that transcends this harm. In essence, this requires courts to consider two separate yet related points: the strength of the interest and how well the classification serves that interest. Instead of determining whether an interest meets an arbitrary standard (e.g., compelling, substantial, or legitimate), courts must determine whether it outweighs the harm inflicted on the disadvantaged group. Though the inquiry is different, the history of Supreme Court cases under the traditional approach would continue to provide guidance as to the relative merits of particular governmental interests. Moreover, under- and over-inclusion remain relevant under this unitary standard. Because this analysis considers how well the classification serves the relied upon interest, substantial overinclusion and underinclusion impedes the interest from transcending the inflicted harm.

By assessing claims under this standard, courts come closer to analyzing discriminatory classifications in light of the Fourteenth Amendment's normative goals. Further, this standard requires courts to identify the rights and interests

[202] Lundin, *supra* note 185, at 1233. It is unclear exactly how the tiered approach would treat government actions that discriminate on the basis of multiple classifications involving different levels of review. For example, what level of scrutiny would a court use against a statute that discriminates against disabled women? Plausibly, one could argue for rational basis (disability), intermediate scrutiny (gender), or even strict scrutiny because of the synergy of the classifications. *Miller v. Albright*, 523 U.S. 420, 431 (1998), presents a stark example of such a classification.

involved in the classification in a careful and explicit manner.[203] The proposed doctrine forces courts to engage in a more substantive analysis of the relevant considerations in a manner that fosters accurate resolution of the competing interests.

CONCLUSION

By examining the application of different equal protection methodologies in assessing the constitutional validity of same-sex marriage prohibitions, it becomes evident the traditional tiered approach is inherently flawed and needs to be replaced with a unitary standard that eschews an overly rigid approach to categorizing the classes affected and the rights at issue. *Hernandez*, *Andersen*, and *Conaway*, revealed and magnified the flawed rigidity of the tiered doctrine. In contrast, *Lewis* and *Baker* show that by adopting a more flexible approach, courts can more readily recognize the importance of marriage to homosexuals and how that right relates to the history of discrimination against homosexuals. While the same-sex marriage cases demonstrate and magnify the need for a more flexible unitary standard, such a standard should be applied in all equal protection cases, whether brought under federal or state constitutions. In essence, courts should ask whether an impartial lawmaker could rationally believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. In assessing the harm to the disadvantaged class, courts should consider the invidiousness of the classification and the importance of the right involved. Against this, courts should balance the importance of the governmental interest and how effectively the classification serves that interest. This unitary standard abandons the current rigidity of tiered analysis and forces courts to conduct a thorough assessment of all relevant equal protection interests.

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[203] *See* Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 488 (1997).