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Comment

THEORIES OF DISCRIMINATION & GAY MARRIAGE

ADAM FARRA*

INTRODUCTION

America is embroiled in a culture war about gay marriage. This culture war has bled into both the federal legal system and various state legal systems.¹ The result is a national patchwork of gay marriage jurisprudence. A variety of courts addressing the same question have arrived at vastly different decisions and rationales, even though the law they applied is not particularly different.² The question each court has addressed is whether restricting the institution of civil marriage to heterosexual or “opposite-sex” couples violates some equal protection guarantee or equality principle.³ The answers are anything but consistent.⁴

This Comment explores the inconsistency and then attempts to explain it. If multiple states are addressing the same question and applying, generally, the same body of law, then why do the results vary so much from state to state?⁵ Theoretically, if restricting marriage to heterosexual couples violates some basic principle of equal protection, then that legal conclusion should not change much based on jurisdiction. This Comment argues that the answer is embedded within the assumptions and themes guiding each

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1. *See infra* Part III; *see also* Complaint at 3, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 09CV11156 (D. Mass. July 8, 2009) (articulating multiple federal constitutional challenges to the Defense of Marriage Act); Complaint for Declaratory, Injunctive, or Other Relief at 1–2, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. May 22, 2009) (articulating a federal equal protection clause challenge to a California constitutional amendment banning same-sex marriage).

2. *See infra* Part III.A–C.

3. *See infra* text accompanying notes 137, 144, 153–156, 170.

4. *See infra* Part III.A–C.

5. Legal realists provide one potentially obvious answer. It might just depend on who the judge is that is interpreting the law. *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832–33 (2008) (discussing the increasing use of empirical work to assess the general legal realist claim that judge personality drives outcomes).

court's moral understanding of discrimination—or, more plainly, why each court thinks discrimination is wrong to begin with.⁶

Specifically, this Comment looks at a sample of three states—California,⁷ Maryland,⁸ and Iowa.⁹ The highest court of each state adjudicated a state constitutional equal protection challenge to a state law excluding same-sex couples from the institution of civil marriage.¹⁰ Each court formulated a different response to the fairly similar equal protection claims.¹¹ This Comment argues that the courts' differing conceptions of equal protection explain the diversity in results.¹² More specifically, the result in each case largely turned on whether the court subscribed to a “result-based,” “process-based,” or “expressive-based” understanding of discrimination.¹³ California and Maryland subscribed to a result-based understanding of discrimination that led to a denial of marriage rights to same-sex couples.¹⁴ By contrast, Iowa subscribed to a process-based understanding of discrimination and extended marriage rights to same-sex couples.¹⁵ While no court subscribed to an expressive understanding of discrimination, some courts discussed and dismissed the arguments in favor of such a theory.¹⁶

Part I emphasizes the importance of moral theories of discrimination in looking at legal questions, particularly those in relation to equal protection.¹⁷ Part II presents the three theories of discrimination and then discusses a particular scholarly account of each theory.¹⁸ Part III describes the cases and opinions from each state—California, Maryland, and Iowa.¹⁹ Part IV analyzes the legal reasoning of each opinion to determine which theory of discrimination each state adopted.²⁰ The Comment concludes in Part V by describing the implications of this analysis for the gay marriage culture war being fought in the courts.²¹

6. *See infra* Parts II, IV.

7. *See infra* Parts III.A, IV.A.

8. *See infra* Parts III.B, IV.B.

9. *See infra* Parts III.C, IV.C.

10. *See infra* text accompanying notes 137, 144, 153–156, 170.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part IV.

14. *See infra* Part IV.A–B.

15. *See infra* Part IV.C.

16. *See infra* notes 205–208 and accompanying text.

17. *See infra* Part I.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

I. WHAT CAN MORAL THEORIES OF DISCRIMINATION TELL US?

In the broader context of equal protection, the way one answers the question “why is discrimination morally problematic?” shapes the legal conclusion.²² This Part explains why this is true.

Drawing distinctions among groups of people is inevitable and necessary, especially in the context of public policy.²³ Accepting this basic truth, how does one know if a distinction is illegitimate discrimination or smart policymaking?²⁴ A theory of discrimination can help answer that question.²⁵ In an extreme example, say a disease rips through New York and the federal government designs a policy to prevent the disease from spreading. A policy that prevents anyone who (1) has the disease, and (2) lives in New York from leaving the state is probably sufficient to substantially achieve the State’s goal.²⁶ The policy’s classification—diseased people in New York—properly “fits” the Government’s purpose of preventing the disease from spreading.²⁷

The moral dilemma arises in determining how and why the Government draws the distinction.²⁸ Suppose the policy discussed above mandated that everyone except poor African-American women could leave the city (without determining whether they had the disease). The response would likely be outrage, particularly if the distinction were drawn without any clear justification in light of the factual circumstances.²⁹ And if people knew that the disease affected all people equally regardless of gender, race, or class, then the moral outrage would be more defined—one would

22. See DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 4 (2008) (noting that the law itself does not answer whether a particular classification targeting a group of individuals is permissible).

23. *Id.* at 3–4.

24. See *id.* at 4 (noting that statutory and constitutional law do not provide a complete answer to this question because there are “other important issues” that determine whether something ought to be illegal).

25. See, e.g., FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 14–15 (2003) (arguing that generalizations that have “not a shred of evidence” are one way to determine whether a particular trait, like sexual orientation, is completely irrelevant to a favorable characteristic, like courage, and is therefore arbitrary); see also *infra* Part III.

26. See HELLMAN, *supra* note 22, at 115 (characterizing this problem as whether the classificatory trait “fits” the purpose of the law or acts as an appropriate proxy for another trait).

27. See *id.* (noting that rational classifications are ones in which the proxy trait “positively correlate[s] with the target trait” or purpose).

28. *Id.* at 4–5; see also Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2417 (1994) (arguing that discrimination that is statistically accurate and economically efficient may still condemn women or African-Americans to inequality).

29. See Joseph Tussman & Jacobus tenBroek, *Equal Protection of the Laws*, 37 CAL. L. REV. 341, 357–58 (1949) (arguing that the less relevant a classification is to the achievement of its objective, the more it may “offend” the “constitutional safeguard”).

probably ask not only whether the policy is effective, but also whether it is fair to target only this population.³⁰

There are a few different reasons why it would be morally problematic to target only poor African-American women to prevent the disease from spreading.³¹ The classification could be so narrow that it is ineffective and thus fails a basic test of rationality.³² Or it could exacerbate the preexisting social immobility associated with the socioeconomic and racial status of this group of women.³³ Alternatively, the policy could be interpreted as an expression of the Government's lack of interest in caring for the rights of poor African-American women as opposed to, say, wealthier Caucasian men.³⁴ The variety of answers demonstrates the importance of understanding why discrimination is wrong. Moral theories of discrimination attempt to categorize, explain, and clarify the intuitive responses that people may have to a problematic distinction.³⁵

In the broader context of equal protection, the way one answers the question “why is this form of discrimination morally problematic?” shapes the legal debates surrounding the guarantee of equal protection under the law.³⁶ As Justice Holmes noted, “[T]he prevalent *moral and political theories*, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”³⁷

Similarly, moral theories of discrimination clarify the jumbled instinctual responses that people, including judges, experience when they face questionable distinctions made between populations, particularly those

30. *See id.* at 346–47 (characterizing this category of problems—using certain classifications to combat a certain problem—as the “relation of the Trait to the Mischief”). *But see* HELLMAN, *supra* note 22, at 117 (arguing that some rational and accurate classifications can still be morally troubling).

31. *See infra* Part II.

32. This is the problem of under-inclusion. *See* Tussman & tenBroek, *supra* note 29, at 348.

33. *See* Sunstein, *supra* note 28, at 2429 (“[W]e should ask ‘Does the law or practice in question contribute to the maintenance of second-class citizenship, or lower-caste status, for blacks or women?’”).

34. *See, e.g.,* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13 (2000) (“A legal classification violates Equal Protection if the meaning of the law or practice in our society at the time conflicts with the government’s obligation to treat us with equal concern.”).

35. *See* HELLMAN, *supra* note 22, at 4 (arguing that the question of when it is morally problematic to draw distinctions requires a theory that answers the “moral question” of discrimination).

36. *See id.* at 4 (noting that the law itself does not truly provide an answer to the question regarding the permissibility of a particular classification).

37. O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) (emphasis added).

made by governments when formulating social policy.³⁸ These moral instincts inevitably shape the process of legal reasoning.³⁹

Same-sex marriage is a particularly appropriate subject for a discussion of moral theory and discrimination because a court's moral intuitions on the question of discrimination likely shape the way that court views marriage discrimination against same-sex couples.⁴⁰

II. THREE SAMPLES OF MORAL THEORIES OF DISCRIMINATION

This Part provides a brief description of three theories of discrimination—the “result-based,”⁴¹ “process-based,”⁴² and “expressive-based” theories.⁴³ Each theory provides an account of when discrimination is wrong, but each applies a different method in determining when a particular form of discrimination is objectionable, immoral, or invalid.⁴⁴ Before discussing each theory, it is important to acknowledge that all three theories accept that some discrimination is inevitable because policymaking requires drawing distinctions or granting special benefits to particular groups of individuals.⁴⁵

A. *Result-Based Theories of Discrimination*

This Section will begin with a general discussion of result-based theories. Next, it will discuss and attempt to explain a prominent example of result-based theories, distinguish that example from some other prominent theories, and conclude with a discussion of the treatment of sexual orientation discrimination under that particular theory.

If one were to conceptualize discrimination as a timeline, the result-based theorists' focus would be on the end of the timeline, or the effect of

38. If one accepts that moral intuitions play a role in shaping how lawyers and judges respond to legal arguments, then having a comprehensible moral theory can help clarify the reasons why certain legal arguments are deemed particularly persuasive. See R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1420–21 (2006) (“Crucially, an opinion accompanying an intuitionist outcome can itself amount to reasonable evidence that the judge has taken full, careful, empathetic, and detailed account of all of the main interests and concerns of the opposing and other affected parties.”).

39. *Id.* at 1384.

40. See *infra* Part III.

41. See *infra* Part II.A.

42. See *infra* Part II.B.

43. See *infra* Part II.C.

44. See generally ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996) (classifying antidiscrimination theorists into two schools—“process-based theories” and “result-based theories”). But see Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 250 (2003) (arguing that expressivism is a “potentially powerful approach” to resolving equal protection claims).

45. HELLMAN, *supra* note 22, at 29; Tussman & tenBroek, *supra* note 29, at 343.

the discriminating act.⁴⁶ Result-based theorists typically focus on the effect a law may have on a particular social group.⁴⁷ There are, of course, different effects that discrimination can have and different cultural meanings that are tied up with those effects.⁴⁸ For example, discrimination can “generate[] a feeling of inferiority”—a psychological or emotional effect—in a particular group.⁴⁹ It can create a stigmatic effect, where the discriminating act contributes to a corruption of the target’s identity that is related to the target’s race, sex, sexual orientation, or socioeconomic class.⁵⁰

Professor Cass Sunstein’s “anticaste principle” is a prominent example of result-based theories.⁵¹ He argues that legal and social practices that target “morally irrelevant differences” in a way that creates or contributes to “second-class citizenship” should be invalid.⁵² Thus, in his view, a law is objectionable on grounds of equal protection if it contributes to a caste system.⁵³ Castes are the result of systemic (and systematic) inequalities in multiple spheres—for example, poverty, employment, or political power.⁵⁴ If systemic inequality exists in these spheres, then it is likely that the group on the worse side of the differential treatment is the subject of caste-like treatment.⁵⁵ Professor Sunstein identifies African-Americans as one example of a caste.⁵⁶

The problem with systemic differences is that they produce “frequent injuries to self-respect,” or stigma.⁵⁷ The denial of basic respect associated with the stigma is also a component of living under a caste system—it may

46. For example, Professor Sunstein explains that policies that contribute to or exacerbate the effects of second-class citizenship should be invalid under equal protection principles. Sunstein, *supra* note 28, at 2411; *see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (arguing that school segregation has the effect of “generat[ing] a feeling of inferiority” in African-American students).

47. The social group is usually one that has been historically disadvantaged. HELLMAN, *supra* note 22, at 22.

48. *See, e.g.*, KOPPELMAN, *supra* note 44, at 57 (arguing that result-based theorists are focused on the “cultural meaning” of discrimination).

49. *Brown*, 347 U.S. at 494.

50. *See* KOPPELMAN, *supra* note 44, at 68 (discussing how the stigmatized person internalizes his or her deviant status).

51. Sunstein, *supra* note 28, at 2410.

52. *Id.* at 2455.

53. *Id.* at 2429.

54. *Id.* at 2430.

55. *Id.* at 2429.

56. *Id.* at 2444 (noting that empirical evidence can help identify what groups should be considered castes).

57. *Id.* at 2430.

even be evidence of a caste system.⁵⁸ In essence, the argument is that no group should be made into second-class citizens, especially if the distinction used to create that second-class citizenship is a morally irrelevant one like race or sex.⁵⁹

Professor Sunstein's theory, like most result-based theories, is distinct from analyses that focus on the intentions of the individual or body that instituted the discrimination.⁶⁰ While lower castes may be the target of discriminatory policies because of ill intentions, the anticaste principle would place a duty on government to ban legislation that is not at all backed by ill intentions if that policy nonetheless furthers systemic and differential treatment.⁶¹

The anticaste principle is also distinct from the antidiscrimination principle in that a group may not actually be a lower caste even though there may be examples of unfair discrimination directed at them.⁶² According to Professor Sunstein, homosexuals, for example, are not a lower caste because they are not generally worse off than heterosexuals in the traditional spheres of social welfare.⁶³ They are, however, the targets of discrimination and prejudice.⁶⁴

Interestingly, Professor Sunstein has written that same-sex marriage bans contribute to a caste system, but a gendered and sex-based caste, not a sexual orientation-based caste.⁶⁵ His argument, relying on social psychology, is that a ban on state-recognized same-sex relations (like marriage) is an attempt to bolster the "natural difference[s]" between women and men.⁶⁶ Specifically, the "natural difference[s]" are related to the role that men and women have in sexual activity.⁶⁷ The point is to "keep males masculine and females feminine."⁶⁸ In essence, the argument is that the reason why men cannot marry men is because such a union would sanction a sexual relationship where a man would play the role of a

58. *Id.* at 2431–32.

59. *Id.* at 2429.

60. *Id.* at 2441.

61. *Id.* Similarly, the anticaste principle would place a duty on a governmental body to enact measures designed to eliminate the caste system—a duty that goes "well beyond a ban on illegitimately motivated legislation." *Id.*

62. *Id.* at 2443 (noting that Jews and Asian Americans do not count as lower castes).

63. *Id.* at 2443–44.

64. *Id.* at 2444. Professor Sunstein acknowledges that discrimination against homosexuals denigrates them, impacting their self-respect—a critical dimension of the anticaste analysis. *Id.*

65. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 *IND. L.J.* 1, 21–22 (1994).

66. *Id.* at 20–21.

67. *Id.* at 21–22.

68. *Id.* at 21 (quoting Andrew Koppelman, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 *YALE L.J.* 145, 159 n.86 (1988) (citation omitted)).

woman (the penetrated).⁶⁹ For a man to take a passive sexual role violates certain gender roles that are in place to maintain male supremacy—only women, in this system, can play passive sexual roles.⁷⁰ Thus, Sunstein argues that the intolerance of same-sex relations and marriage is the result of caste-like treatment of women, who are subject to sexual inequalities because of patriarchal conceptions of gender roles based on “natural difference[s].”⁷¹

B. Process-Based Theories of Discrimination

This Section will begin with a general discussion of process-based theories, followed by a brief discussion of one example of such theories. Next, this Section will look at a few examples demonstrating the theory and conclude with a discussion of the treatment of sexual orientation discrimination at the theoretical level.

Following the timeline conceptualization of discrimination, process-based theories focus on the beginning of the timeline, or the process leading up to the implementation of the discriminating act.⁷² Unlike the result-based theorists, who accept that there could be a variety of destructive discriminatory effects that justify invalidation of a particular practice,⁷³ process theorists generally agree that a practice is invalid if there is a defect in the decisionmaking process.⁷⁴ The defect is almost universally the incorporation of some “contaminating element,” like bias against a particular group, a desire to harm, animus, or an irrational generalization.⁷⁵

For example, footnote four of *United States v. Carolene Products Co.*⁷⁶ is a fairly clear (though brief) articulation of the concerns of process-based theorists and represents the Supreme Court’s acceptance of process-based theory in the context of the federal Equal Protection Clause.⁷⁷ In the now-famous footnote, the Court states that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”⁷⁸

69. *Id.* at 21–22.

70. *Id.* at 22.

71. *Id.* at 21–22.

72. KOPPELMAN, *supra* note 44, at 55.

73. *See supra* note 48 and accompanying text.

74. KOPPELMAN, *supra* note 44, at 55.

75. *Id.*

76. 304 U.S. 144, 152 n.4 (1938).

77. *Id.*

78. *Id.* at 153 n.4

Essentially, incorporating prejudice into the political process contaminates the process, producing defective results that could harm the very minorities the political process should protect.⁷⁹ Footnote four was the basis for the development of the current federal equal protection doctrine's emphasis on tying the discriminatory impact of a particular act to a discriminatory purpose.⁸⁰

In another manifestation of the process-based analysis, Professors Joseph Tussman and Jacobus tenBroek have argued that a law's classification must be "reasonably related" to the purpose of the law.⁸¹ A law generally has one of two purposes—achieving some public good or eliminating an evil.⁸² Under this framework, a valid law that uses a reasonable classification to eliminate a particular evil would have to include in the classification all persons "similarly situated with respect to the purpose of the law."⁸³

One example of a law that classifies to eliminate an evil would be a law designed to eliminate hereditary criminality.⁸⁴ Assuming that the law tries to eliminate hereditary criminality by sterilizing criminals, Professors Tussman and tenBroek argue that such a classification—all transmitters—would be "reasonable" because it includes everyone who is "similarly situated" with regard to the purpose of the law.⁸⁵ An unreasonable classification in this example would be a classification that is "under-inclusive," like a law that sterilizes only hereditary criminals from Alabama while ignoring all other hereditary criminals.⁸⁶ Another manifestation of unreasonable classification would be an "over-inclusive" one, where the classification targets a group of individuals larger than necessary to achieve its objective.⁸⁷ For example, placing all Americans of Japanese ancestry in internment camps to prevent Japanese spies from leaving the United States is an over-inclusive classification because not all Japanese-Americans are spies.⁸⁸

According to Professors Tussman and tenBroek, the focus on the relationship between the classification and its purpose is designed to smoke

79. *Id.*; see also KOPPELMAN, *supra* note 44, at 17.

80. KOPPELMAN, *supra* note 44, at 15, 17 (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

81. Tussman & tenBroek, *supra* note 29, at 346.

82. *Id.*

83. *Id.*

84. *Id.* at 347. The offspring of criminals, the argument goes, are more likely to commit crimes because of some genetic predisposition. *Id.*

85. *Id.*

86. *Id.* at 348.

87. *Id.* at 351.

88. *Id.*

out illegitimate motivations that could be driving the legislation's classification.⁸⁹ For example, a classification that was "wholly irrelevant" to fulfilling the purpose of the law would be arbitrary.⁹⁰ The motivation of an arbitrary classification is not easily discernible and likely without any rational basis.⁹¹ Therefore, arbitrary classifications are invalid.⁹² To Professors Tussman and tenBroek, such cases are not far removed from cases involving a purely hostile motive, like a law denying a person the right to have a job because of hatred of the person's race.⁹³ In both cases, the classification is not "reasonably related" to any particular purpose—an arbitrary classification that has no relation to the purpose of the law is the same as a law solely driven by pure hostility.⁹⁴ Both are invalid.⁹⁵

Ultimately, under this theory, the prohibition against discriminatory legislation focuses on the motive of the legislator.⁹⁶ If the motive is rooted in "hate, prejudice, vengeance, hostility,"⁹⁷ or arbitrariness,⁹⁸ then the legislation is invalid.⁹⁹

The result for sexual orientation discrimination is fairly clear.¹⁰⁰ The Supreme Court has held that a constitutional amendment designed to prohibit homosexuals from seeking any legislative, executive, or legal protection can be reasonably construed as "born of animosity" and is therefore invalid under the federal Equal Protection Clause.¹⁰¹ More generally, the Court has held that laws that are motivated by a "desire to harm a politically unpopular group" are not actually related to any rational governmental interest and are therefore invalid under equal protection principles.¹⁰² The more complicated problem of same-sex marriage bans will be addressed in more detail below.¹⁰³

89. *Id.* at 358 ("[T]he prohibition against discriminatory legislation is a demand for purity of motive.").

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 358–59, 361.

97. *Id.* at 358.

98. *Id.* at 361 (noting that if there is no "conceivable justification" for discrimination against a particular group, then the statute sanctioning such discrimination should be held invalid).

99. *Id.* at 358–59.

100. See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 93 (1997) (discussing how process-based theory in federal Equal Protection Clause doctrine accommodates measures that have a clear anti-gay purpose).

101. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

102. *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

103. See *infra* Part III.

C. *Expressive-Based Theories of Discrimination*

This Section will begin with a general discussion of expressive-based theories and will discuss a prominent example of such theories. Next, it will distinguish that example from some other theories and conclude with a discussion of the treatment of sexual orientation discrimination.

Expressive-based theories of discrimination carve a sort of middle path between process-based and result-based theories.¹⁰⁴ In the conceptualization of discrimination as a timeline, the focus is on the act at the moment of implementation or the sort of signal that the act sends out.¹⁰⁵ In the context of equal protection, the concern of this theory is whether the “meaning or expressive character” of a practice signals that a particular group of people matters less to the legislator or government.¹⁰⁶

Professor Deborah Hellman, a proponent of an expressive understanding of equal protection, has argued that a distinction is morally problematic when it demeans a group or person affected.¹⁰⁷ She begins with the “bedrock moral principle” that each person has an “equal moral worth.”¹⁰⁸ She extends this assumption to say that the Government cannot express a message of unequal moral worth by giving the impression that one group of people is worth less than another group of people.¹⁰⁹ The worry associated with drawing distinctions among people is that doing so will communicate or send a message that certain individuals are worth less than others.¹¹⁰ Because some differential treatment is inevitable, the important question is whether certain styles of differential treatment rob

104. Hellman, *supra* note 34, at 2.

105. *See id.* at 1–3 (arguing that the heart of equal protection is the “social meaning” of unequal protection, or that unequal treatment signifies that those individuals are of lesser concern to the state).

106. *Id.* at 68; *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000) (“The expressive meaning of a particular act or practice, then, need not be in the agent’s head, the recipient’s head, or even in the heads of the general public. Expressive meanings are socially constructed. These meanings are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community.”).

107. HELLMAN, *supra* note 22, at 7–8 (“Whether a particular distinction does demean is determined by the meaning of drawing such a distinction in that context, in our culture, at this time. In focusing on whether a distinction demeans, this account does not rest on the consequences or the effects of a classification. Rather, some classifications demean—whether or not the person affected *feels* demeaned, stigmatized, or harmed. As such, this account of wrongful discrimination grounds moral impermissibility in the wrong rather than the harm of discrimination.”).

108. *Id.* at 6.

109. Hellman, *supra* note 34, at 10.

110. HELLMAN, *supra* note 22, at 7.

individuals of their equal moral worth.¹¹¹ An act that is demeaning or denigrating denies someone his or her equal moral worth.¹¹²

A demeaning act has a “social dimension” and a “power dimension.”¹¹³ History and culture inform the “social dimension” of the analysis.¹¹⁴ The status of the speaker in relation to those affected by the discrimination informs the “power dimension” of the analysis.¹¹⁵ A governmental act is demeaning if both elements are satisfied.¹¹⁶ An action that distinguishes on the basis of certain characteristics is demeaning if the discriminatory treatment expresses the unequal moral worth of the individuals with those characteristics and if the group or individual adopting the classification “has sufficient power or status such that its actions can put others down.”¹¹⁷

This theory of demeaning discrimination is distinct from the “caste” theory or other result-based theories of discrimination because it shifts the focus of the analysis away from the effect of the discrimination to the expressive character of the discrimination.¹¹⁸ An individual does not have to be a member of a caste to feel demeaned.¹¹⁹ Instead, the act is demeaning if it expresses a person’s unequal moral worth regardless of her social reality or the existence of a caste system.¹²⁰ For example, if there were no disparities in any of the social welfare indices relevant to the determination of caste status, then ordering African-Americans to the back of the bus would probably be valid under the anticaste theory because it would not entrench existing hierarchies based on racial difference.¹²¹ Yet, the act would still be demeaning because it would denigrate African-

111. *Id.* at 29.

112. *Id.*

113. *Id.* at 35.

114. *Id.*

115. *Id.*

116. *Id.* at 42. Some scholars emphasize one part of the test over others. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987) (noting that “evidence regarding the historical and social context” of the governmental act is the key to determining the symbolic meaning of an act).

117. HELLMAN, *supra* note 22, at 42. This is the “power” dimension. *Id.*

118. *Id.* at 27.

119. *Cf.* Hellman, *supra* note 34, at 21 (noting that the expressive character of a practice and a caste-focused analysis can intersect at some point because one must look to the social reality—like existence of a caste system—to determine if the expressive meaning of the practice is somewhat coherent and fits social reality).

120. HELLMAN, *supra* note 22, at 23.

121. *See* Sunstein, *supra* note 28, at 2443–44 (acknowledging that discriminatory acts directed at non-castes—like Jews, Asian-Americans, or homosexuals—would violate some equality principle, but not the anticaste principle, because it focuses on showing the existence of second-class citizenship in social welfare).

Americans, considering their long and complicated history with segregation in public transportation.¹²²

The expressive-based theory is also distinct from process-based theories of discrimination for two more reasons. First, process-based theories evaluate the motivation of the legislator and the “fit” between the classification and the purpose of the law, something unrelated to the expressive-based theory’s central question concerning equal moral worth.¹²³ Second, the expressive-based theory does not give the motivation of the legislator the same amount of weight in determining whether a particular act is demeaning.¹²⁴

The implications of adopting an expressive-based theory for sexual orientation discrimination remain unclear. Part of the lack of clarity is due to the fact that making determinations about what is demeaning is an interpretive exercise and there is some inevitable interpretive gray area about whether something is demeaning.¹²⁵ An analysis of various “aspects of society and culture” may suggest that a particular discriminatory act targeting homosexuals might be demeaning.¹²⁶ Some consider discrimination against homosexuals to be “pervasive” throughout society in a way unlike discrimination against women or African-Americans.¹²⁷

Alternatively, one may adopt the prevalent view that homosexuals are wealthy, overwhelmingly Caucasian, and live in urban areas, and conclude that gay rights issues are a concern of the bourgeoisie.¹²⁸ Thus, an expressivist may not find that any discriminatory act is truly denigrating.¹²⁹ Instead, an expressivist may conclude that discriminatory acts directed at homosexuals may be rightfully designed to prevent homosexuals from claiming “special rights,” or rights that they do not need that would overload the court system.¹³⁰ The implication of adopting expressivism for sexual orientation discrimination is unclear because both interpretive results

122. Cf. HELLMAN, *supra* note 22, at 23, 27 (“Though the status of the group may be relevant . . . , it ought to be relevant in a way that allows us to maintain that a wrong is done to the individual and not just to the group.”).

123. See *id.* at 20 (“[Irrationality] is a reason to get rid of the idiots (to vote them out or whatever) who adopt irrational criteria, but no more.”).

124. *Id.* at 143; Hellman, *supra* note 34, at 59.

125. Hellman, *supra* note 34, at 58 (discussing the anti-gay Colorado constitutional amendment at issue in *Romer*).

126. *Id.* at 59 (discussing *Romer*).

127. KOPPELMAN, *supra* note 44, at 148–49.

128. Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133, 135 (2005).

129. See, e.g., *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“It is also nothing short of preposterous to call ‘politically unpopular’ a group which enjoys enormous influence in American media and politics”).

130. Kendell, *supra* note 128, at 136.

seem possible. The implication for marriage discrimination is likely similarly unclear, and will be discussed in more detail below.¹³¹

III. A SUMMARY OF THE CALIFORNIA, MARYLAND, AND IOWA HIGH STATE COURT OPINIONS

This Part discusses the reasoning of three state courts that have addressed the question of whether same-sex marriage bans are constitutional under equal protection principles. The first Section discusses the Supreme Court of California's case assessing the constitutionality of a state constitutional amendment banning gay marriage.¹³² The second Section discusses the Maryland Court of Appeals's case assessing the constitutionality of a Maryland statute restricting marriage to heterosexual couples.¹³³ The third Section discusses the Supreme Court of Iowa's case assessing the constitutionality of an Iowa statute restricting marriage to heterosexual couples.¹³⁴ Because this Comment analyzes theories of discrimination and equal protection, a discussion of other constitutional theories such as due process is omitted. A discussion of the constitutionality of these same-sex marriage bans under sex and gender discrimination is also omitted.¹³⁵

A. California

In *Strauss v. Horton*,¹³⁶ the Supreme Court of California assessed the legal validity of Proposition 8, a constitutional initiative designed to eliminate the recognition of same-sex marriage.¹³⁷ To assess the validity of a constitutional amendment under the California Constitution, the court had to determine whether Proposition 8 was an appropriate "amendment" or an impermissible "revision."¹³⁸ In California, an amendment can be adopted

131. See *infra* Part IV.

132. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); see *infra* Part III.A.

133. *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007); see *infra* Part III.B.

134. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); see *infra* Part III.C.

135. The question of whether same-sex marriage bans are a form of sex or gender discrimination is not a simple debate to resolve and is outside the scope of this Comment. See, e.g., *Conaway*, 401 Md. at 246, 932 A.2d at 586 (finding that the same-sex marriage ban is not about sex or gender-based discrimination). All three courts agree that same-sex marriage bans classify on the basis of sexual orientation. *Strauss*, 207 P.3d at 102; *Varnum*, 763 N.W.2d at 884; *Conaway*, 401 Md. at 277, 932 A.2d at 605. That agreement makes a clearer foundation for a comparative discussion than does the issue of whether same-sex marriage bans constitute sex or gender discrimination. See, e.g., *id.* at 246, 932 A.2d at 586.

136. 207 P.3d 48.

137. *Id.* at 59. Proposition 8 added a section to the California Constitution designed to overrule a California Supreme Court ruling that extended marriage rights to same-sex couples. *Id.* at 75.

138. *Id.* at 79–80.

through an initiative petition or by a required vote of the Legislature.¹³⁹ By contrast, a revision can be proposed by required vote of the Legislature or by a constitutional convention.¹⁴⁰ A revision cannot be adopted through the initiative procedure.¹⁴¹ The case thus turned on the court's characterization of Proposition 8 as an amendment or a revision.¹⁴²

The court held that Proposition 8 was an amendment and not a revision.¹⁴³ The court reasoned that while Proposition 8 modified the State's constitutional regime governing same-sex couples, the couples still retained "the same broad protections under the state equal protection clause," including status as a suspect class and the corresponding strict scrutiny standard of review.¹⁴⁴ Because the court believed that the heart of the State's guarantee of equal protection still applied to same-sex couples and homosexuals more generally, it was comfortable accepting that the only tangible impact of Proposition 8 was withholding the word "marriage" from same-sex couples.¹⁴⁵ Thus, the court characterized Proposition 8 "as creating a limited exception to the state equal protection clause."¹⁴⁶

The court also rejected the argument that Proposition 8 struck at the "foundational constitutional principle of equal protection" because it subjected the rights of the gay and lesbian minority to the heterosexual majority.¹⁴⁷ The court first noted that an initiative is dubbed a "revision" only when it causes a "fundamental change in the nature of the governmental plan or framework established by the Constitution."¹⁴⁸ Because "fundamental change" is the touchstone of the amendment/revision analysis, the court logically relied on its "limited exception" characterization of Proposition 8 to conclude that Proposition 8 was not "fundamental" enough to constitute a revision of the California Constitution.¹⁴⁹

The court's narrow characterization of the equal protection issue was influenced by its understanding of the right that same-sex couples retained

139. *Id.* at 79.

140. *Id.* at 79–80.

141. *Id.* at 80.

142. *Id.* at 79–80.

143. *Id.* at 78.

144. *Id.*

145. *Id.*

146. *Id.* *But see In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (holding that withholding the designation of "marriage" from same-sex couples violated those couples' right to the equal protection of the laws guaranteed by the California Constitution).

147. *Strauss*, 207 P.3d at 99–100.

148. *Id.* at 100.

149. *Id.* at 99–100.

despite Proposition 8—the right to an officially recognized relationship.¹⁵⁰ This understanding made the court’s equal protection reasoning more persuasive because, in the end, same-sex couples had only lost the word “marriage,” not the rights, benefits, and/or privileges of a state-sanctioned relationship or suspect classification and strict scrutiny.¹⁵¹

B. Maryland

In *Conaway v. Deane*,¹⁵² the Court of Appeals of Maryland upheld a state statutory provision that provided that “[o]nly a marriage between a man and a woman is valid in this State.”¹⁵³ The court held that the statute (1) did not infringe on a “fundamental right to [same-sex] marriage,”¹⁵⁴ (2) did not discriminate on the basis of sex in violation of the Maryland Constitution,¹⁵⁵ and (3) survived rational basis review under Maryland equal protection doctrine.¹⁵⁶

With regard to the equal protection claim based on sexual orientation, the court made two critical holdings. First, it found that sexual orientation is not a suspect or quasi-suspect class.¹⁵⁷ Thus, classifications based on sexual orientation must satisfy only rational basis review, the lowest form of scrutiny.¹⁵⁸ Second, applying rational basis review, it reasoned that the State had a “legitimate governmental interest” in “fostering procreation” that was furthered by the restriction of marriage to same-sex couples.¹⁵⁹

In determining whether homosexuals constitute a suspect class, the court made two analytical moves. First, the court found that homosexuals were not politically powerless enough to qualify as a suspect class because gay rights initiatives on issues like fair housing, employment non-discrimination, education, and public accommodation had a recent history of success in Maryland.¹⁶⁰ Second, after surveying the relevant literature,

150. *Id.* at 61–62.

151. *Id.*; see Erwin Chemerinsky, *Same Sex Marriage: An Essential Step Towards Equality*, 34 SW. U. L. REV. 579, 584 (2005) (noting that by statute, unmarried same-sex couples in California in comparable institutions, like domestic partnerships, retain many—though not all—of the benefits of married heterosexual couples and that a key component of the public relations effort must be to convince people why civil unions still deprive same-sex couples of tangible benefits and create hardship).

152. 401 Md. 219, 932 A.2d 571 (2007).

153. *Id.* at 237 n.1, 932 A.2d at 581 n.1; MD. CODE ANN., FAM. LAW § 2-201 (West 2006).

154. *Conaway*, 401 Md. at 325, 932 A.2d at 635.

155. *Id.*

156. *Id.*

157. *Id.* at 277, 932 A.2d at 606.

158. *Id.* at 315, 932 A.2d at 629.

159. *Id.* at 317, 932 A.2d at 630.

160. *Id.* at 286, 932 A.2d at 611–12.

the court found that sexual orientation is not an immutable trait because there is no “generally accepted scientific conclusion” on the question of immutability.¹⁶¹ Looking at those two factors, the court concluded that homosexuality is not a suspect or quasi-suspect class, and therefore classifications based on sexual orientation require rational basis review.¹⁶²

Applying rational basis review, the court concluded that there was a “sufficient link” between the State’s interest in “fostering a stable environment for procreation” and excluding same-sex couples from the institution of marriage.¹⁶³ The court noted that marriage enjoys such a unique legal status largely due to the fact that procreation occurs within the confines of marriage.¹⁶⁴ The court acknowledged that excluding same-sex couples from the institution of marriage was both an over- and under-inclusive attempt to achieve the State’s goal of promoting procreation.¹⁶⁵ But the court concluded that rational basis review requires deference to the state legislature and does not require “mathematical exactitude” in determining whether the State was achieving its objective.¹⁶⁶

The court also explicitly rejected the proposition that it should fashion a remedy providing same-sex couples with the “various rights and benefits” available to opposite-sex couples in Maryland under a civil union-style system.¹⁶⁷ Somewhat counter-intuitively, the court interpreted the appellees’ arguments about how a marriage-civil union dichotomy would inflict “dignitary harm” on same-sex couples to mean that those couples wanted no part of a civil union system even if they could not have marriage rights.¹⁶⁸

C. Iowa

In *Varnum v. Brien*,¹⁶⁹ the Supreme Court of Iowa unanimously held that a statutory provision excluding same-sex couples from the institution of civil marriage violated the Iowa Constitution’s equal protection provision.¹⁷⁰ The court took several steps in reaching its conclusion. First, the court reasoned that same-sex and heterosexual couples are similarly situated with respect to the Iowa marriage law’s purpose “of providing an

161. *Id.* at 294, 932 A.2d at 616.

162. *Id.*

163. *Id.* at 317–18, 932 A.2d at 630.

164. *Id.*

165. *Id.* at 323, 932 A.2d at 634.

166. *Id.* at 322, 932 A.2d at 633.

167. *Id.* at 324 n.71, 932 A.2d at 634 n.71.

168. *See id.*

169. 763 N.W.2d 862 (Iowa 2009).

170. *Id.* at 906–07.

institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.”¹⁷¹ The court noted that the plaintiffs (same-sex couples) were, like heterosexual couples, in serious romantic relationships and simply desired the “sense of order” that the institution of civil marriage brings to heterosexual relationships.¹⁷²

Second, the court found that the statute classified on the basis of sexual orientation because obtaining access to same-sex marriage is so “closely correlated with being homosexual” that the law clearly targeted gays and lesbians as a class.¹⁷³ According to the court, denying the right of same-sex marriage to heterosexuals was such a useless enterprise that the law was clearly designed to prevent homosexuals from marrying.¹⁷⁴

Third, the court reasoned that intermediate scrutiny had to be applied to laws that classify based on sexual orientation because such classification was likely to be grounded in “prejudice and antipathy” and/or reflect “irrelevant stereotypes.”¹⁷⁵ The court analyzed four factors—the history of invidious discrimination, the ability to contribute to society, the immutability of sexual orientation, and political power as a class—and concluded that gays and lesbians, as a minority group, “continue[] to suffer the enduring effects of centuries of legally sanctioned discrimination,” and therefore laws targeting them required intermediate judicial scrutiny.¹⁷⁶

Fourth, the court concluded that the ban on same-sex marriage failed intermediate scrutiny because the exclusion of same-sex couples from civil marriage did not “substantially further” any of the stated objectives of the law.¹⁷⁷ The court reasoned as follows: (1) there was no causal relation between expanding the institution of civil marriage to include same-sex couples and undermining the “traditional institution” of marriage;¹⁷⁸ (2) excluding same-sex couples from civil marriage was both under- and over-inclusive in promoting the “optimal environment to raise children”;¹⁷⁹ (3)

171. *Id.* at 883 (internal quotation marks omitted) (quoting *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983)).

172. *Id.* at 883–84.

173. *Id.* at 884–85.

174. *Id.* at 885.

175. *Id.* at 886 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985)).

176. *Id.* at 895–96 (quoting *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008)).

177. *Id.* at 904. The stated governmental objectives of the law were “maintaining traditional marriage,” “promotion of optimal environment to raise children,” “promotion of procreation,” “promoting stability in opposite-sex relationships,” and “conservation of resources.” *Id.* at 898–99, 901–02.

178. *Id.* at 898–99.

179. *Id.* at 900. The court reasoned that the ban was under-inclusive because other groups of potential parents like sexual predators or child abusers were not also excluded from the institution of civil marriage. *Id.* The court reasoned that the ban was over-inclusive because not all same-sex

there was no causal relation between excluding gay and lesbian couples from civil marriage and encouraging stability in heterosexual relationships;¹⁸⁰ and (4) excluding same-sex couples from civil marriage was an over- and under-inclusive attempt to conserve state resources.¹⁸¹

IV. ANALYSIS: MORAL THEORIES OF DISCRIMINATION AND THE CALIFORNIA, MARYLAND, AND IOWA OPINIONS

This Part will attempt to determine which moral theory of discrimination each court adopted in assessing the respective equal protection claims brought before it. The Part begins with the California Supreme Court's opinion,¹⁸² moves to the Maryland Court of Appeals's opinion,¹⁸³ and ends with the Iowa Supreme Court's opinion.¹⁸⁴

A. California

The California Supreme Court relied on a result-based analysis of the equal protection issue. There are three components to this analysis. First, the court's focus on the rights that gay couples retained despite the amendment's restrictions strongly suggests that the court adopted a result-based analysis of the equal protection issue.¹⁸⁵ Second, this consequential focus implicitly rejects the concerns of process-based theorists.¹⁸⁶ Third, the court's refusal to engage the dissent's expressive argument suggests a complete disinterest in the expressive character of the law and a rejection of the associated theory of discrimination.¹⁸⁷

First, the court's focus on the protections that same-sex couples retained despite the restriction on the designation of marriage suggests that the court adhered to a result-based theory of discrimination.¹⁸⁸ Specifically, because suspect classification and strict scrutiny still protect same-sex couples, the court seemed more comfortable finding the marriage

couples choose to have children. *Id.* at 900–01. It made little sense to punish couples who did not want children by denying them access to an “optimal” environment for raising children. *Id.*

180. *Id.* at 902.

181. *Id.* at 903–04. The court reasoned that the ban was over-inclusive because same-sex couples would not use more state resources than they previously used as unmarried couples. *Id.* at 903. The court reasoned that the ban was under-inclusive because if the State genuinely wanted to conserve resources, it could have denied civil marriage to a much larger segment of the population—not just the 5800 same-sex couples in Iowa. *Id.* at 903.

182. *See infra* Part IV.A.

183. *See infra* Part IV.B.

184. *See infra* Part IV.C.

185. *See infra* notes 188–191 and accompanying text.

186. *See infra* notes 192–204 and accompanying text.

187. *See infra* notes 205–208 and accompanying text.

188. *See Strauss v. Horton*, 207 P.3d 48, 78 (Cal. 2009).

restriction valid.¹⁸⁹ Similarly, same-sex couples were still guaranteed all the rights associated with marriage under the Due Process Clause—they simply could not have the designation of “marriage.”¹⁹⁰ These observations suggest that the court was applying a cruder version of the anticaste theory—the court essentially reasoned that there was not enough of a disparity in the legal treatment of same-sex and heterosexual relationships to find that withholding the designation “marriage” was objectionable to equal protection principles.¹⁹¹

Second, even the court’s narrow framing of the issue—that all the amendment really did was withhold the word “marriage” from same-sex couples while leaving intact the statutory and constitutional benefits of marriage—suggests that the court was more focused on the effect of withholding the word “marriage” than on the intent in doing so.¹⁹² Similarly, the court refused to engage in an analysis of the voters’ intent or the purpose of the amendment as related to the equal protection argument,¹⁹³ even acknowledging that California had a history of allowing a majority of voters to restrict the constitutional rights of a minority group with a history of past discrimination.¹⁹⁴

There is an argument that the court implicitly applied a sort of “reasonable fit” and intent-based analysis similar to the one proposed by Professors Tussman and tenBroek.¹⁹⁵ The court noted that the stated purpose of the measure was to “restore the traditional definition of marriage,” not to “eliminate the constitutional right of same-sex couples to establish an officially recognized family relationship.”¹⁹⁶ Using this characterization, the court then reasoned that withholding the term “marriage” was a limited exception to the “core set” of rights associated with marriage.¹⁹⁷ The result is a subtle process-based analysis, where the

189. *See id.*

190. *Id.* at 75. *But see* Chemerinsky, *supra* note 151, at 584 (contrasting the Massachusetts legal regime governing same-sex couples before the decision legalizing same-sex marriage with the Californian regime and arguing that civil unions still deprive same-sex couples of tangible benefits and create hardship).

191. *See Strauss*, 207 P.3d at 78 (finding that same-sex couples retain the same “broad protections,” such as equal protection, privacy, and due process, as heterosexual couples); *see also* Sunstein, *supra* note 28, at 2443–44 (noting that homosexuals are not a caste).

192. *Strauss*, 207 P.3d at 77–78 (concluding that same-sex couples are still entitled to the same “respect and dignity” of a couple in a marriage because they “retain the same substantive protections embodied in the state constitutional rights of privacy and due process”).

193. *See id.* at 105 (refusing to read into the amendment process an equal protection element that would prevent a majority of Californians from stripping “one aspect” of a fundamental right of a suspect class).

194. *Id.* at 103.

195. *See* Tussman & tenBroek, *supra* note 29, at 358.

196. *Strauss*, 207 P.3d at 76.

197. *Id.* at 77.

dual purpose of restoring traditional marriage while maintaining core pseudo-marriage rights was squared with the mechanism, withholding the word “marriage” from same-sex couples.¹⁹⁸

This reading does not ultimately support the claim that the California Supreme Court used a process-based analysis. The court acknowledged in a footnote that a more sweeping initiative measure that would have eliminated any government benefits similar to marriage benefits did not gain enough signatures for the ballot.¹⁹⁹ One reading of the court’s assessment is that had the alternative initiative passed, it may have constituted a revision of state equal protection principles.²⁰⁰ Yet, the court’s considerable deference to the democratic process reveals a belief that even if a malicious intent or irrational purpose drove the amendment,²⁰¹ respect for the democratic process should nonetheless take priority.²⁰² More importantly, the court’s primary focus on the benefits that same-sex couples retained is reminiscent of a result-based analysis because it emphasizes the effects of the discriminatory act instead of the rationale behind the act.²⁰³ Intent was important to the court, but only in the sense of what *benefits* the proponents of Proposition 8 *intended* to take away.²⁰⁴

Third, the court seemed unconcerned with the expressive character of withholding the word “marriage” from same-sex couples.²⁰⁵ In his dissent,

198. See Tussman & tenBroek, *supra* note 29, at 346 (arguing that a reasonable classification is one that accurately targets a particular class in order to achieve a statutory purpose); cf. Romer v. Evans, 517 U.S. 620, 634 (1996) (finding constitutionally problematic a sweeping amendment that generally prevented homosexuals from seeking any protection in state or local government in the executive, legislative, or judicial branches).

199. *Strauss*, 207 P.3d at 76 n.8.

200. See *id.* Interestingly, the court compared the two versions of the proposition, using that comparison to suggest that the less expansive proposition, the one that was ultimately adopted, was only designed to “restore the traditional definition of marriage,” and “not to abrogate or eliminate the constitutional right of same-sex couples to establish an officially recognized family relationship.” *Id.*

201. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that prejudice against minorities in the political process may require heightened judicial skepticism); see also KOPPELMAN, *supra* note 44, at 17 (noting that “process” theorists focus on the intended purpose of the law to determine its validity); Tussman & tenBroek, *supra* note 29, at 358–59 (arguing that “the prohibition against discriminatory legislation is a demand for purity of motive”).

202. See *Strauss*, 207 P.3d at 110 (“It is not our role to pass judgment on the wisdom or relative merit of the current provisions of the California Constitution governing the means by which our state Constitution may be altered.”).

203. See *id.* at 77; cf. *Baker v. Vermont*, 744 A.2d 864, 871 (Vt. 2000) (noting that the Vermont Common Benefits Clause doctrine is distinct from federal equal protection jurisprudence because it focuses on “vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective”).

204. See *Strauss*, 207 P.3d at 76 n.8.

205. Even in hypothesizing more extreme cases that may constitute a revision, the court focused on the effects of an amendment that (1) deprives a minority group of an entire protection

Justice Moreno expressly raised the expressive dimension of the amendment, arguing that withholding the word “marriage” from same-sex couples—even ones who have many of the same rights as married couples—“impinges upon [those couples’] fundamental interest in having their family relationship accorded the same *respect and dignity* enjoyed by” heterosexual couples and brands them as “second-class citizens.”²⁰⁶ The court sidestepped this argument, noting that the ultimate power rests with the people who can make determinations about the content of a state constitutional guarantee.²⁰⁷ This move suggests that, for the California court, the expressive signal of state constitutional amendments is largely unquestionable; the voters have total power to decide the content of the amendment during the process of creating the amendment.²⁰⁸ This clear rejection of an expressivist understanding of the discriminatory amendment suggests that the court’s focus was primarily on the tangible or material results of the amendment and, secondarily, on the procedure of creating the amendment. The derived meaning—or the expressive nature of the amendment—is completely absent in this jurisprudence.

B. Maryland

The Maryland Court of Appeals used a hybrid process and result-based analysis of the equal protection issue. There are three components to this analysis. First, the court’s suspect classification analysis strongly focused on the effects of discrimination against homosexuals.²⁰⁹ Second, the court’s focus on the fit between the legislation’s purpose (furthering procreation) and the discriminatory act (excluding same-sex couples from marriage) strongly suggests that the court applied a process-based framework for its equal protection analysis.²¹⁰ Third, the court’s misapplication of the “dignitary harm” argument suggests that the court was uninterested in entertaining an expressive-based analysis of marriage discrimination.²¹¹

or right or (2) strips a group of its right to seek public or private protections in the political or judicial process. *Id.* at 102.

206. *Id.* at 131 (Moreno, J., dissenting) (emphasis added).

207. *Id.* at 114 (majority opinion) (noting that these expressive-style arguments amount to nothing more than “stirring” rhetorical flourishes that ignore the absolute authority of constitutional amendment).

208. *Id.*

209. *See supra* notes 23–35 and accompanying text (discussing how the primary focus of moral theorists of discrimination is determining whether a distinction is illegitimate discrimination or smart policymaking).

210. *Conaway v. Deane*, 401 Md. 219, 317–18, 932 A.2d 571, 635 (2007); *see* Tussman & tenBroek, *supra* note 29, at 346 (arguing that “[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law”).

211. *See supra* notes 167–168 and accompanying text.

Both the process and function of the court's suspect classification analysis seemed to reflect an anticaste or result-based understanding of discrimination and equality. In process, the court's suspect classification analysis largely turned on the fact that homosexuals have statutory protections in several arenas of social welfare, including "public accommodation, employment, housing, and education."²¹² The protections that the court found persuasive were strikingly similar to the factors that Professor Sunstein used to assess caste status.²¹³ And functionally, the court's goal in applying the suspect classification analysis was to build the case against classifying homosexuals as a caste.²¹⁴ For example, the court took judicial notice of the history of prejudice against homosexuals,²¹⁵ yet it concluded that homosexuals are too politically powerful to qualify for the "extraordinary protection" associated with suspect classification.²¹⁶ These findings are confusing because the traditional purpose of the suspect classification analysis is to identify groups who are likely to be the subject of legislation based on illegitimate motivations and considerations.²¹⁷ The court's findings suggest that the court acknowledged that illegitimate motivations might be driving the legislation, but ultimately found that concern was "outweighed" by the fact that homosexuals are politically powerful.²¹⁸ This implied balancing approach strongly suggests that the court was more concerned with the caste-like dimensions of homosexuality than it was with the process-based concerns about motivation or the expressive character of the legislation.²¹⁹ To the court, the Maryland statutory protections for homosexuals were evidence of the success of homosexual activists in eliminating discrimination based on sexual

212. *Conaway*, 401 Md. at 286, 932 A.2d at 611.

213. See Sunstein, *supra* note 28, at 2448–50 (discussing factors, including opportunity in education, income and employment, housing, political representation, and vulnerability to crime); see also *id.* at 2441 (acknowledging that suspect classification and lower caste status "overlap" in function to smoke out illegitimate motivations driving discriminatory legislation).

214. See *Conaway*, 401 Md. at 286, 932 A.2d at 611 (concluding that homosexuals are not "so politically powerless that they are entitled to 'extraordinary protection from the majoritarian political process'").

215. *Id.* at 285, 932 A.2d at 610.

216. *Id.* at 286, 932 A.2d at 611.

217. Sunstein, *supra* note 28, at 2441 ("The notion of suspect classification is based on a fear that illegitimate considerations are likely to lie behind legislation, whereas the anticaste principle is designed to ensure against second-class status for certain social groups.").

218. See *id.* at 2441–42 (arguing that suspect classification and lower caste status are distinct ideas because illegitimate motivations may drive legislation discriminating against groups who do not count as lower castes, such as Asian-Americans or Jews).

219. See *id.* at 2429 (noting that the emphasis of the anticaste analysis is on systemic disadvantage, a type that "operates along standard and predictable lines in multiple and important spheres of life" and hampers democratic participation).

orientation.²²⁰ Thus, homosexuals were “not enough” of a caste to qualify as a suspect class because they had too few disadvantages stacked against them.²²¹ This reasoning is demonstrative of a strongly result-based suspect classification analysis.²²²

The other component of the court’s analysis was its strong focus on the fit between the means of the statute, excluding same-sex couples, and the ends, preserving a procreative environment.²²³ In doing so, the court’s equal protection analysis relied substantially on a process-based theoretical understanding of discrimination.²²⁴ More specifically, the emphasis on the classification’s over- and under-inclusivity can and should be read as a tactic designed to shift the focus away from the external problems associated with sexual orientation discrimination—for example, that it could be demeaning²²⁵—and instead reaffirm the narrowness of the statutory purpose—the promotion of a procreative environment.²²⁶ In focusing on the “fit” between the narrow statutory purpose and the classificatory means, the court relied on the assumption that all classifications, even morally problematic ones, can be used to further some rational purpose.²²⁷ This assumption is a process-based one. In fact, it is

220. *Conaway*, 401 Md. at 286, 932 A.2d at 611–12; *see also* WILLIAM N. ESKRIDGE, JR., *GAYLAW* 143 (1999) (discussing how the shifting legal discourse on same-sex intimacy has also been advantageous for gay people).

221. *See Conaway*, 401 Md. at 286, 932 A.2d at 611–12.

222. *See* Sunstein, *supra* note 28, at 2443–44 (using a similar rationale to explain why homosexuals, Asian Americans, and Jews are not a lower caste, though they may qualify for suspect classification in various jurisdictions or by statute).

223. *See supra* text accompanying notes 163–166; *see also Conaway*, 401 Md. at 322, 932 A.2d at 633 (concluding that “mathematical exactitude” is not needed in assessing the “fit” between the statutory purpose and the classificatory means).

224. *See supra* text accompanying notes 163–166.

225. *See* Posting of Deborah Hellman to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2009/05/deborah-hellman-on-prop-8-decision-peter-westen-equality.html> (May 27, 2009, 2:07 PM) (arguing that marriage discrimination against homosexuals “brands their relationships as inferior”).

226. *See Conaway*, 401 Md. at 317, 932 A.2d at 630 (explaining that because procreation is a fundamental right, the interest in “fostering a stable environment for procreation” is a sufficiently “legitimate” governmental interest); *see also* HELLMAN, *supra* note 22, at 115 (arguing that the focus on classificatory accuracy is a bad model for assessing validity of discrimination because “many morally problematic classifications are fairly accurate”); Tussman & tenBroek, *supra* note 29, at 351 (discussing how a legislator may try to avoid the problem of under-inclusivity by narrowly framing the purpose of the law and tying the reasonability of the classification to that narrow purpose).

227. Professors Tussman and tenBroek found the assertion that some traits “never in fact bear a reasonable relation to any legitimate public purpose” a very difficult assertion to defend. Tussman & tenBroek, *supra* note 29, at 355. They sidestepped the argument by noting that using such traits would likely never pass the reasonable relation test, an assertion ultimately disproved by the court in *Conaway*. *Id.* at 356; *see also Conaway*, 401 Md. at 322, 932 A.2d at 633 (concluding that it is reasonable to bestow marriage only to opposite-sex couples because there is generally at least the “possibility of procreation”).

the foundation for the entire model of process-based theory, which is predicated on the idea that all traits are fair game and simply have to be used in the right way.²²⁸ Here, the court needed to boost the credibility of its finding on the tenuous “procreative interest,”²²⁹ so it strongly relied on a process-based theory of discrimination to give it that credibility.²³⁰

The court’s misapplication of the appellees’ arguments relating to the “dignitary harm” of marriage discrimination suggests that the court was uninterested—or perhaps just unclear—in exploring the expressive character of the discrimination.²³¹ The court interpreted the appellees’ arguments that a system of civil unions would still “perpetuate dignitary harm,” “second-class citizenship,” and send a “stigmatizing message” as statements disavowing civil unions entirely.²³² One reading of the court’s unusual treatment of these arguments is that the court did not see these statements as arguments about the objectively demeaning nature of the act, but rather read them as the subjective beliefs of the same-sex couples and their lawyers.²³³ By treating those arguments as subjective interpretations of the law, the court cut off its ability to engage in an empathic reading of the same-sex couples’ arguments.²³⁴ Professor Hellman suggests that a theory that allows people to make objective arguments about the expressive nature of a particular act opens up the lines of understanding between parties.²³⁵ Although this point is complicated and rooted in epistemic

228. Tussman & tenBroek, *supra* note 29, at 355.

229. See Benjamin G. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2388 (2007) (“A state interest in procreation can provide no basis for denying marriage rights to same-sex couples, because that interest simultaneously proves too much and too little: marriage is no longer linked directly to procreation, and same-sex couples do procreate.”).

230. See Tussman & tenBroek, *supra* note 29, at 351 (arguing that courts can try to avoid the “charge of under-inclusiveness” by simply narrowing the purpose of the law, though it is a largely unpersuasive strategy).

231. See *Conaway*, 401 Md. at 324 n.71, 932 A.2d at 634 n.71 (interpreting the same-sex couples’ arguments about how civil unions are inadequate because they “perpetuate [a] dignitary harm” to mean that the couples did not want civil unions in the event that they failed to get full marriage).

232. *Id.*

233. The subjective reading seems apparent from the way the court presented the arguments—as testimonials—and from the way the appellees made their arguments, discussing the effect of marriage discrimination on their own personal lives. See *id.* (arguing that granting a remedy for civil unions instead of marriage would go against the statements made by plaintiffs); see also HELLMAN, *supra* note 22, at 81 (stating that the test for determining whether an act is demeaning is not grounded in subjectivity or stigma but in an objective assessment).

234. See *infra* notes 235–237 and accompanying text; see also Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1764–65 (1996) (defining “empathy failure” in the context of process-based equal protection theory as “the [oppressed] group’s inability to make its claims sympathetic to potential bargaining partners” or judges).

235. HELLMAN, *supra* note 22, at 81.

concerns, the essential argument is that casting an argument objectively removes the unease associated with passing judgment on personal considerations, and thus encourages people to engage one another and not shy away, as they presumably would, from conflicting subjective interpretations of a particular act.²³⁶ Thus, there is some support for the reading that the court may have disengaged from the debate about “dignitary harm” because it was reluctant to engage the same-sex couples about their subjective beliefs on the expressive character of the restriction.²³⁷ The result is one possible explanation for why the court chose to ignore an expressive account of the restriction of same-sex couples from marriage.

C. Iowa

The Iowa Supreme Court subscribed to a process-based understanding of discrimination. First, the court acknowledged that the function of the suspect classification analysis was to smoke out illegitimate motivations, such as “prejudice and antipathy,” in the formulation of policy.²³⁸ This focus on legislative motivation is a trope of process-based theorists like Professors Tussman and tenBroek.²³⁹ Second, the court’s use of under- and over-inclusivity to dismantle many of the discriminatory law’s justifications was also representative of a means-ends “fit” analysis, another trope of a process-based understanding of discrimination.²⁴⁰

The court’s use of the suspect classification analysis was designed to smoke out potential illegitimate legislative motivations.²⁴¹ The court’s focus on the factors of “history of intentional discrimination” and the

236. *See id.* at 80 (discussing how subjective beliefs in the context of affirmative action generate disagreement, but discussions about how the practice of affirmative action could objectively demean someone would undermine the subjective beliefs about fairness and personal merit). *But see* Godsil, *supra* note 44, at 251 (arguing that an objective standard will lead judges to determine expressive character from their own predominantly Caucasian, upper-middle class, male point of view, undermining the purpose of the theory).

237. *Cf.* *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (arguing that excluding African-Americans from juries is impermissible in part because excluding Caucasians from juries would clearly yield a constitutionally suspect result and further noting that excluding African-Americans from juries is “practically a brand upon them, affixed by the law, an assertion of their inferiority,” and an obstacle to justice).

238. *Varnum v. Brien*, 763 N.W.2d 862, 886–87 (Iowa 2009) (internal quotation marks omitted) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985)).

239. *See* Tussman & tenBroek, *supra* note 29, at 361 (noting that the doctrine is “in essence a demand for purity” of motive); *see also* Sunstein, *supra* note 28, at 2441 (noting that suspect classification generally is about gauging the likelihood that legislation will be based on illegitimate motives).

240. *Varnum*, 763 N.W.2d at 904; *see* Tussman & tenBroek, *supra* note 29, at 357 (arguing that discrimination cannot be an end in itself).

241. *See Varnum*, 763 N.W.2d at 899 (noting that intermediate scrutiny is required “[i]n order to ensure this classification based on sexual orientation is not borne of prejudice and stereotype”).

“relationship of classifying characteristic to a person’s ability to contribute” suggests that the court’s goal was to prevent stereotypes or generalizations from leaking into policy formation.²⁴² The fact that the court emphasized these two factors and not political powerlessness or immutability suggests that the court was more focused on the motivations driving the legislation than on how the discrimination would impact homosexuals as a group or caste relative to other groups.²⁴³ Professor Sunstein’s indicia for determining caste status includes political representation in part because it is accurate in determining *current* caste status; thus, he is unconcerned with historical caste status.²⁴⁴ A group can have a history of discrimination and not *currently* be a caste.²⁴⁵ The difference, then, is focus. If the focus is on whether discrimination strengthens currently existing disparities, as it was in *Conaway* or *Strauss*, then the court will probably look to political powerlessness and immutability (immutability because it helps to clearly delineate one group from another).²⁴⁶ But if the focus is on whether discrimination is a manifestation of long-existing stereotypes, then the court will focus on the “history” and “ability to contribute” prongs (“ability to contribute” because it helps disprove the accuracy of a generalization and bolsters the intentional discrimination claim).²⁴⁷ Thus, the Iowa Supreme Court’s framing of the suspect classification analysis strongly suggests that it relied more on a process-based theory of discrimination than on a result-based or expressive-based theory.

242. *Id.* at 889; see *Cleburne*, 473 U.S. at 473 n.24 (Marshall, J., dissenting) (arguing that history is the best guide to determining if a society is likely to stigmatize individuals); *id.* at 441 (majority opinion) (noting that “relation to ability to perform” is a factor that explains why sex discrimination usually rests on “outmoded notions” of women and men’s abilities).

243. See *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., dissenting) (“The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs.”)

244. See Sunstein, *supra* note 28, at 2448 (discussing data about political representation of African-Americans); see also *id.* at 2443 (noting that the “history of discrimination” factor in the suspect classification analysis is designed to target motive, which is distinct from the anticaste principle’s focus on the creation of disparities).

245. *Id.* at 2444 (discussing Jews and homosexuals as examples).

246. See *id.* at 2442 (discussing how the political powerlessness analysis contains an unarticulated claim about how much political power a particular group *should* have); see also *id.* at 2429 (discussing how “highly visible and irrelevant” differences should not, from a moral perspective, be the source of any systemic disadvantage—an argument parallel to the immutability analysis); Rachel Shapiro, Note, *Conaway v. Deane: To Have and to Hold, From This Day Forward—Maryland’s Unfit Marriage to Federal Equal Protection Analysis*, 68 MD. L. REV. 957, 982–83 (2009) (arguing that political powerlessness and immutability were improperly emphasized in the suspect classification analysis in *Conaway*).

247. See *Cleburne*, 473 U.S. at 473 n.24 (arguing that history is the best guide to determining if a society is likely to stigmatize individuals); *id.* at 441 (majority opinion) (noting that “relation to ability to perform” is a factor that explains why sex discrimination usually rests on “outmoded notions” of women and men’s abilities).

The court's strong emphasis on the "fit" between the classification and the purposes of the law suggests that it embraced a process-based understanding of discrimination.²⁴⁸ For example, the court concluded that excluding same-sex couples from marriage was under-inclusive in promoting an "optimal environment to raise children" because other groups of potential parents who would not provide optimal environments, like sexual predators or child abusers, were not also excluded from the institution of civil marriage.²⁴⁹ The court also reasoned that the ban was over-inclusive because not all same-sex couples choose to have children.²⁵⁰ The court's framework for analyzing inclusivity or "fit" is process-based because it meshes naturally with the court's emphasis on history in the suspect classification analysis,²⁵¹ and classificatory accuracy is a logical focus if there is a history of irrational discrimination.²⁵² For example, a law forbidding gay men from teaching children may be based on long-standing societal views that sexual conduct of gay men is unnatural and perverse because it allows men to assume the sexual role of a woman, and thus such men should simply not be around children in their formative years.²⁵³ A strong focus on the fit between the means, targeting homosexuals, and the end, protecting children from sexual perversion, would best expose and defeat this illegitimate generalization by undermining the rationale for it.²⁵⁴ If, in fact, gay men are not more likely to promote sexual perversion in children than any other class of people, then this classification makes little sense.²⁵⁵

In the context of same-sex marriage, this analysis is evidence that the court's emphasis on "fit" was (1) a manifestation of process-based theory because the purpose of the "fit" analysis was to smoke out illegitimate motivations, and (2) a complement to the court's focus on the history of intentional discrimination against homosexuals, which also focused on revealing illegitimate motivations.

248. See *Varnum v. Brien*, 763 N.W.2d 862, 899–900 (Iowa 2009); see also Tussman & tenBroek, *supra* note 29, at 346 (arguing that a reasonable classification is one that accurately targets a particular class in order to achieve a statutory purpose).

249. *Varnum*, 763 N.W.2d at 900.

250. *Id.* at 900–01.

251. *Id.* at 889–90.

252. HELLMAN, *supra* note 22, at 133.

253. See KOPPELMAN, *supra* note 44, at 159 (noting that people who engage in same-sex sexual activity are stigmatized because they have failed to live up to the expectations of their gender).

254. See SCHAUER, *supra* note 25, at 133 (discussing how irrational generalizations can be exposed through an empirical focus on the relation between the proxy trait and the purpose of the practice).

255. See *id.* (noting that a poor fit between a proxy trait and the purpose of a classification indicates an irrational and invalid classification).

V. CONCLUSION

Although this analysis is not comprehensive, the results indicate a trend. If a court subscribes to a result-based conception of discrimination, then it is likely to find exclusionary marriage laws constitutional under the same principles.²⁵⁶ Alternatively, if a court subscribes to a process-based conception of discrimination, then it is likely to find exclusionary marriage laws unconstitutional under equal protection principles.²⁵⁷ None of the courts discussed in this Comment used an expressive-based theory of discrimination, although Justice Moreno's dissent in *Strauss v. Horton*, probably the closest example to an expressive-based understanding of antidiscrimination, suggests that expressivists would likely invalidate such laws.²⁵⁸

In the gay marriage culture war, gay marriage activists would be well served to note this trend and calibrate their legal arguments accordingly. By conceptualizing discrimination as a check against a flawed policymaking process, gay marriage activists may be able to succeed in persuading future state courts—or perhaps federal courts—of the destructive nature of discrimination based on sexual orientation.

256. See *supra* Part IV.A–B.

257. See *supra* Part IV.C.

258. See *supra* notes 205–208 and accompanying text. *But see* Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 735 (2001) (noting that some practices, like flying a Confederate flag, have very ambiguous social meanings that can pose problems for expressivism in the equal protection context).