University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 9 | Issue 1 Article 11

The Role of Courts vis-à-vis Legislatures in the Same-Sex Marriage Context: Sexual Orientation as a Suspect Classification

Ingrid M. Lofgren

THE ROLE OF COURTS VIS-À-VIS LEGISLATURES IN THE SAME-SEX MARRIAGE CONTEXT: SEXUAL ORIENTATION AS A SUSPECT CLASSIFICATION

INGRID M. LÖFGREN*

I. INTRODUCTION

The proper role of the judiciary vis-à-vis the legislature in recognition of emergent minority rights is central to the heated debate over same-sex marriage in the United States.[1] Courts have repeatedly grappled with the appropriate standard to address legislative acts which discriminate on the basis of sexual orientation, applying varying degrees of equal protection scrutiny.[2] Nevertheless, Fourteenth Amendment equal protection jurisprudence establishes that courts must closely scrutinize government actions that make use of suspect classifications, or characteristics that meet a series of criteria indicating that they are likely the subject of discrimination.[3] In order to guard against impermissible discrimination, government actions that make use of suspect classifications must be "narrowly tailored to further a compelling government interest" to pass constitutional

---

* J.D. Candidate 2010, University of Maryland School of Law. M.S.W. 2009, University of Maryland School of Social Work. B.S. 2005, University of Maryland. The author would like to thank Professor Jana Singer for her encouragement and support.

1. *See e.g.*, Lewis v. Harris, 908 A.2d 196, 220–22 (N.J. 2006) (holding that committed same-sex couples must be afforded the same rights and benefits enjoyed by opposite-sex couples, but stating that

> it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate.);

Peter Hendersen, *California gay marriage battle turns to court role,* REUTERS, Jan. 5, 2009, http://www.reuters.com/article/topNews/idUSTRE5050JB20090106?feedType=RSS&feedName=topNews.

2. *See generally* Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (applying strict scrutiny to invalidate army regulations discriminating on the basis of sexual orientation); Romer v. Evans, 517 U.S. 620 (1996) (finding that a Colorado amendment banning statutory protections on the basis of sexual orientation fails even rational basis review).

3. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (describing suspect classifications as "factors that are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

muster.[4] Accordingly, judicial analysis of sexual orientation is of vital importance in the marriage equality context because it determines the degree of deference courts afford to legislative classifications excluding same-sex couples and their children from the full benefits of civil marriage.

Within a nine month period between September 2007 and May 2008, the highest courts in both Maryland and California confronted whether laws that classify on the basis of sexual orientation warrant heightened equal protection scrutiny in the context of constitutional challenges to statutory bans on same-sex marriage.[5] The Maryland Court of Appeals and the California Supreme Court took dramatically different approaches to framing sexual orientation and lesbian, gay, bisexual, and transgender (LGBT) class status.[6] The courts ultimately reached opposite conclusions regarding the constitutionality of the marriage statutes at issue.[7]

In *Conaway v. Deane and Polyak, et al.*,[8] the Maryland Court of Appeals held that sexual orientation is not a suspect classification.[9] The *Conaway* court reasoned that LGBT persons are not sufficiently politically powerless to necessitate enhanced judicial protection and that sexual orientation is not a conclusively immutable trait.[10] Distinguishably, in *In re Marriage Cases*,[11] the California Supreme Court held that sexual orientation is a suspect classification under the California constitution, reasoning that members of the LGBT community have experienced a history of invidious discrimination due to a characteristic that bears no relation to one's ability to function and contribute to society.[12] As a result of their contrary suspect classification analyses, the *Conaway* court upheld the Maryland same-

4. *See id.*

5. *See generally* Conaway v. Deane & Polyak, 932 A.2d 571 (Md. 2007); In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

6. *See Conaway*, 932 A.2d at 609–16 (emphasizing political powerlessness and immutability); *In re Marriage Cases*, 183 P.3d at 441–42 (emphasizing history of purposeful unequal treatment on the basis of a characteristic that bears no relation to one's ability to function and contribute to society).

7. *See Conaway*, 932 A.2d at (holding that Maryland Family Law Code Section 2-201, defining marriage as the union of one man and one woman, is constitutional); *In re Marriage Cases*, 183 P.3d at 453 (holding that California Family Law Code Sections 300 and 308.5, limiting marriage to the union of one man and one woman, is unconstitutional).

8. 932 A.2d 571 (Md. 2007).

9. *Id.* at 616.

10. *Id.* at 609–616.

11. 183 P.3d 384 (Cal. 2008).

12. *Id.* at 441–42.

sex marriage ban under rational basis review,[13] while the *In re Marriage Cases* court invalidated the California same-sex marriage ban under strict scrutiny.[14]

State and federal courts evaluating the constitutionality of same-sex marriage under the Equal Protection Clause should follow *In re Marriage Cases,* rather than *Conaway,* for several reasons. First, the *Conaway* court erred not only in its analyses of political powerlessness and immutability, but also by affording these factors dispositive weight.[15] The *Conaway* court failed to recognize that, to the extent immutability is determinative, sexual orientation is properly characterized as an immutable trait.[16] In addition, the *Conaway* court employed circular reasoning and misapplied federal equal protection jurisprudence in its political powerlessness inquiry.[17] In contrast, the court in *In re Marriage Cases* properly applied heightened scrutiny on the basis that members of the LGBT community have experienced a history of invidious discrimination due to a characteristic that bears no relation to ability to function and contribute to society.[18] Finally, *In re Marriage Cases* properly establishes that legislative enactments which discriminate on the basis of sexual orientation warrant heightened judicial scrutiny.[19]

Following this Introduction, Part II outlines the specific facts and procedural history of *Conaway v. Deane & Polyak et al.* and *In re Marriage Cases.*[20] Part III presents the relevant legal history and precedent regarding suspect classification analysis in equal protection jurisprudence.[21] Part IV presents the reasoning of the *Conaway* and *In re Marriage Cases* courts.[22] Part V analyzes the disparate characterizations of LGBT class status that the *Conaway* and *In re Marriage Cases* courts employed.[23] This article concludes that judicial recognition of sexual orientation as a suspect classification is consistent with equal protection jurisprudence and is within the proper role of courts in the context of minority rights.[24]

---

13. *Conaway*, 932 A.2d at 635.
14. *In re Marriage Cases*, 183 P.3d at 446–52.
15. *See infra* Part V.A.1.
16. *See infra* Part V.A.2.
17. *See infra* Part V.A.3.
18. *See infra* Part V.A.1.
19. *See infra* Part VI.
20. *See infra* Part II.
21. *See infra* Part III.
22. *See infra* Part IV.
23. *See infra* Part V.
24. *See infra* Part VI.

II. THE CASES

A. Conaway v. Deane & Polyak et al.

The plaintiffs in *Conaway v. Deane & Polyak et al.* included nine same-sex couples who were denied marriage licenses on the basis of Maryland Family Law Code Section 2-201, which provides that "only a marriage between a man and a woman is valid in this state,"[25] and one gay man who wished to preserve his right to apply for a marriage license in the future.[26] The Circuit Court for Baltimore County granted summary judgment in favor of the plaintiffs[27] on the grounds that Section 2-201 discriminates facially on the basis of sex in violation of Article 46 of the Declaration of Rights of Maryland.[28] The circuit court, however, declined to address plaintiff's substantive due process and other equal protection arguments.[29] The Maryland Court of Appeals, the state's highest court, issued a writ of certiorari bypassing the Maryland Court of Special Appeals.[30]

B. In re Marriage Cases

In re Marriage Cases resulted from the consolidated appeal of six claims litigated in the California Superior Court and Court of Appeal[31] in the wake of *Lockyer v. City and County of San Francisco*.[32] In *Lockyer*, the California Supreme Court held that public officials of San Francisco, in both the city and county, had acted unlawfully by issuing marriage licenses to same-sex couples absent a judicial finding that Family Code Sections 300 and 308.5,[33] defining marriage as a union between a man and a woman, are unconstitutional.[34] However, the *Lockyer* court emphasized that the substantive issue of the constitutionality of the California marriage

25. MD. CODE ANN., FAM. LAW § 2-201 (2006).

26. *Conaway*, 932 A.2d at 582.

27. *Id.* at 584.

28. Art. 46, Md. Decl. of Rights (1776) (providing that "equality of rights under the law shall not be abridged or denied because of sex").

29. *Conaway*, 932 A.2d at 585.

30. *Id.* at 584.

31. *In re Marriage Cases*, 183 P. 3d at 397.

32. 95 P.3d 459 (Cal. 2004).

33. CAL. FAM. CODE §§ 300, 308.5 (West 2009).

34. Lockyer v. City & County of San Francisco, 95 P.3d 459 (Cal. 2004); *see also In re Marriage Cases*, 183 P. 3d at 397.

statutes was not before the court in that case.[35] Thus, the California Supreme Court granted further review to address the constitutional validity of the California marriage statutes.[36]

III. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[37] By essentially requiring that "all persons similarly situated should be treated alike,"[38] this constitutional mandate protects citizens against impermissible discrimination on the part of state legislatures.[39] Indeed, the United States Supreme Court has found that the Equal Protection Clause "was intended to work nothing less than abolition of all caste and invidious class-based legislation."[40] As a means to achieve this end, the Court has developed a three-tiered hierarchy of equal protection review to determine whether a governmental purpose is sufficient to justify use of the discriminatory classification in question.[41]

Under this tripartite standard, the type of discrimination at issue dictates whether the legislative purpose must survive strict judicial scrutiny, heightened scrutiny, or deferential rational basis review.[42] For example, classifications that are more likely based in stereotypes and prejudice than legitimate public interests are deemed constitutionally suspect[43] and, thus, must be narrowly tailored to further a compelling government purpose.[44] Although the Supreme

35. *In re Marriage Cases*, 183 P. 3d at 397.

36. *Id.*

37. U.S. CONST. amend. XIV, § 1, cl.2.

38. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

39. Conversely, the Equal Protection Clause places no restrictions on the State's ability to treated dissimilar persons in a dissimilar manner. Thus, not all discriminatory legislative classifications violate the Equal Protection Clause. *See Cleburne*, 473 U.S. at 442 (finding that legislation classifying on the basis of mental retardation need only be rationally related to a legitimate government interest because mentally retarded persons have a reduced ability to cope with and function in the everyday world.); Tigner v. Texas, 310 U.S. 141, 147 (1940) (stating that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same").

40. *Plyler*, 457 U.S. at 213 (1982).

41. Watkins v. United States Army, 875, F.2d 699, 712 (9th Cir. 1989).

42. *Id.*

43. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

44. *Cleburne*, 473 U.S. at 440.

Court has never articulated a bright line diagnostic for identifying suspect classifications, it has emphasized two factors.[45] These factors include whether the burdened class has been subjected to a history of purposeful unequal treatment and whether the characteristic at issue bears any relation to an individual's ability to perform or contribute to society.[46]

A. The Three-Tiered Hierarchy of Equal Protection Scrutiny

Interpreting the Equal Protection Clause[47] in *United States v. Carolene Products*,[48] the United States Supreme Court established the principle that certain forms of governmental discrimination, including those 'directed at discrete and insular minorities,' warrant more critical examination than others.[49] The *Carolene Products* Court implicitly recognized that such groups are particularly vulnerable to impermissible government discrimination because they are too powerless to forge the necessary alliances to protect their interests in our pluralist society.[50] Indeed, the *Carolene Products* Court opined that prejudice against such groups "tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[51] According to the *Carolene Products* rationale, 'discrete and insular minorities' necessitate special judicial protection from the majoritarian political process.[52] To the contrary, when economic and social legislation does not burden a class worthy of enhanced protection by the courts, the judiciary affords broad deference to the more democratic branches of government.[53]

In the years since *Carolene Products*, the Court has developed a three-tiered framework of equal protection review that involves several critical steps.[54] As a threshold inquiry, courts identify the

45. *See infra* Part III.B.

46. *See infra* Part III.B.

47. U.S. CONST. amend. XIV, § 1, cl.2.

48. 304 U.S. 144 (1938).

49. *Id.* at 144 n.4 (asserting that judicial deference to legislative judgments should be highest in the case of purely regulatory economic legislation, whereas statutes "directed at discrete and insular minorities" necessitate a more searching level of scrutiny).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

54. *See* Watkins v. United States Army, 875 F.2d 699, 712 (9th Cir. 1989) (Norris, J., concurring).

classification upon which the legislation discriminates.[55] Next, courts determine the appropriate level of judicial scrutiny by asking whether the classification at issue is constitutionally suspect.[56] The Supreme Court has identified race, alienage, and national origin as "suspect classifications,"[57] or factors that tend to be related to prejudice rather than any justifiable legislative objective.[58] Government acts implicating a suspect classification or explicitly burdening a suspect class are subject to strict judicial scrutiny and must be narrowly tailored to further a compelling government interest.[59] Thus, under strict scrutiny, the government bears a significant burden of proof.

The Supreme Court also recognizes several "quasi-suspect" classifications, or traits that the Court deems relevant to the achievement of a justifiable state interest under some circumstances

---

55. *See id.* For example, laws banning same-sex marriage classify on the basis of sexual orientation because they allow opposite-sex couples to access the benefits of civil marriage while denying this right to similarly situated same-sex couples.

56. *See id.* If the classification at issue has previously been identified as "suspect" by the United States Supreme Court, then the court must automatically subject the government act to strict judicial scrutiny. At the present time, this list includes race, alienage and national origin. If the classification is not included in that list, the court should engage in suspect classification analysis to determine whether the classification warrants heightened judicial protection. Some courts have invalidated legislation on the basis that the classification is not even rationally related to a legitimate government interests, rather than conduct this inquiry.

57. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (subjecting legislation excluding individuals of Japanese ancestry from the west coast of the United States during World War II to the most rigid form of equal protection scrutiny); Graham v. Richardson, 403 U.S. 365 (1971) (applying heightened scrutiny to legislation that made citizenship a requirement for welfare benefits); Oyama v. California, 332 U.S. 633 (1948) (holding that application of the California Alien Land Law to a minor citizen whose Japanese father purchased land in his name discriminated against his right to own property based on the national origin of his father).

58. *Cleburne*, 473 U.S. at 440 (describing suspect classifications as "factors that are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"); *see also Watkins*, 875 F.2d at 712 n.4 (Norris, J., concurring) (finding that "[d]iscriminations that burden some despised or politically powerless groups are so likely to reflect antipathy against those groups that the classifications are inherently suspect and must be strictly scrutinized"); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (opining that

> [s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.).

59. *See e.g.*, *Cleburne*, 473 U.S. at 440 (1985); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

but not others.[60] Courts subject legislation implicating a quasi-suspect classification to intermediate equal protection scrutiny, requiring that it be substantially related to an important government interest to satisfy the requirements of constitutionality.[61] The Court has applied intermediate scrutiny to government acts that discriminate on the basis of gender[62] and legitimacy.[63] As with strict scrutiny, intermediate scrutiny shifts the burden of proof from the party challenging the legislation to the government.[64] By requiring the government to demonstrate that the discriminatory legislation is substantially related to an important government interest, courts are able to identify and invalidate legislative enactments that are based in animus towards a particular group.[65] Such heightened judicial oversight is particularly necessary when discrimination is "unlikely to be timely rectified by legislative means."[66]

All other legislative enactments, including nearly all economic and commercial legislation, are subject to highly deferential rational basis review.[67] Such enactments enjoy a presumption of constitutional

---

60. *See e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding that sex is a suspect classification triggering heightened judicial scrutiny); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that classifications implicating sex or illegitimacy trigger intermediate scrutiny); *Cleburne*, 473 U.S. at 432 (1985) (Marshall, J., concurring, dissenting) (stating that "[h]eightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage because the Court views the trait as relevant under some circumstances but not others").

61. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (finding that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important government objectives and must be substantially related to those objectives").

62. *Id.*

63. *See Clark*, 484 U.S. at 461.

64. *See e.g.*, *Frontiero*, 411 U.S. at 688 (invalidating a statutory scheme that categorized spouses of male uniformed service members, but not spouses of female members, as dependents for the purpose of benefits, on the grounds that the government failed to prove any state interest greater than administrative convenience).

65. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (stating that

> [t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the class are not as worthy or deserving as others. For these reasons . . . these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.)

66. *Id.*

67. *See e.g.*, U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 175, 177 (1980) (quoting Dandridge v. Williams, 397 U.S. 471 (1970)).

validity so long as the classification in the statute is rationally related to a legitimate state interest.[68] Under rational basis scrutiny, a court determines "whether the classifications drawn in a statute are reasonable in light of its purpose."[69] By requiring some rational connection between the classification and the legislative end, courts seeks to ensure that the purpose of the classification is not to burden the disadvantaged groups.[70] This relationship need not be demonstrated with precise certainty, but should not be "so attenuated as to render the distinction arbitrary or irrational."[71] Unlike strict and intermediate scrutiny, rational basis review requires the party challenging the discriminatory state action to bear the burden of proof.[72] Rational basis review is so deferential to legislatures that courts have very rarely invalidated laws under this standard. In the final step of equal protection review, a court weighs the importance of the governmental interest being served and the appropriateness of the government's method of implementation against the resulting infringement of individual rights to determine whether the challenged regulation survives the applicable level of scrutiny.[73] By requiring varying degrees of fit between classification and objective based upon the likelihood of invidious discrimination, a court ensures that a government act comports with the constitutional guarantee of equal protection of the laws.[74]

B. Identifying Suspect and Quasi-Suspect Classifications

Although the Federal Constitution does not explicitly enumerate any suspect classes, the United States Supreme Court has

68. *See* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (reasoning that the rational-basis standard of review inquiry "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid.").

69. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

70. *See U.S. Railroad Retirement Bd.*, 449 U.S. at 181 (Stevens, J. concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

71. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985).

72. *See* Heller v. Doe, 509 U.S. 312, 320 (1992) (stating that "[a] State...has no obligation to produce evidence to sustain the rationality of a statutory classification").

73. *See* Watkins v. United States Army, 875 F.2d 699, 712 (9th Cir. 1989).

74. Romer v. Evans, 517 US 620, 632 (1996) (opining that "the search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority").

extended some form of heightened judicial protection to classifications including race,[75] sex,[76] alienage,[77] national origin,[78] and illegitimacy.[79] Nevertheless, the Court has neither established a bright line diagnostic for distinguishing suspect and non-suspect classes nor provided a clear overarching rationale for why these five classifications, and not others, warrant enhanced judicial skepticism. Although the Court declared that race is a constitutionally suspect classification in the 1944 case, *Korematsu v. United States*,[80] it was not until the early 1970s that the Court began to articulate specific indicia of suspectness, or factors to determine whether a group is worthy of heightened scrutiny.[81]

In 1971, the Supreme Court invoked *Carolene Products* to invalidate a state law denying welfare benefits to noncitizens in *Graham v. Richardson*.[82] The Court held that classifications based on alienage are inherently suspect because "noncitizens are a prime example of a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate."[83] Two years later, Justice Lewis Powell developed this line of reasoning in *San Antonio Independent School District v. Rodriguez*,[84] explaining that a suspect class must be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[85] Later that term, the Court

---

75. *See e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (subjecting legislation excluding individuals of Japanese ancestry from the west coast of the United States to the most rigid form of equal protection scrutiny).

76. *See e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that a government act which discriminate on the basis of gender must be substantially related to an important government objectives).

77. *See e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (applying heightened scrutiny to legislation that made citizenship a requirement for welfare benefits).

78. *See e.g.*, Oyama v. California, 332 U.S. 633 (1948).

79. *See e.g.*, Clark v. Jeter, 486 U.S. 456 (1988).

80. 323 U.S. 214 (1944).

81. In a line of cases beginning in 1971, the Court discussed indicia of suspect classifications. *See Graham*, 403 U.S. at 372 (invoking the *Carolene Products* Court's mention of 'discrete and insular minorities'); San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1, 28 (1973) (explaining that a suspect class must be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (giving importance to whether the classification at issue is determined solely by birth and whether it is related to one's ability to perform or contribute to society).

82. *Graham*, 403 U.S. at 372.

83. *Id.*

84. 411 U.S. 1 (1973).

85. *Id.* at 28.

expanded Justice Powell's analytical framework in *Frontiero v. Richardson,*[86] where it addressed whether sex was "an immutable characteristic determined solely by the accident of birth."[87] The Court declared for the first time that a characteristic's relation to ability to perform or contribute to society was an important indicator of whether government's use of a characteristic should be deemed suspect.[88]

Despite the piecemeal development of equal protection doctrine, the United States Supreme Court has consistently prioritized two indicia of suspectness: (1) whether the group singled out for unequal treatment has been subjected to long-standing and invidious discrimination;[89] and (2) whether the group's distinguishing characteristic bears any relation to the group members' ability to perform or function in society.[90] For instance, in *Massachusetts Board of Retirement v. Murgia,*[91] the Court held that age is not a suspect classification and reasoned that

> [w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[92]

---

86. 411 U.S. 677 (1973).

87. *Id.* at 686.

88. *Id.* (plurality opinion) (finding that "what differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society").

89. *See* United States v. Virginia, 518 U.S. 515, 531–32 (1996); Massachusetts Board of Retirement v. Murgia, 427 US 307, 313 (1976).

90. *See Murgia,* 427 U.S. at 313 (finding that the aged have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442 (1985) (finding that mentally disadvantaged are not a quasi-suspect class because "those who are mentally retarded have a reduced ability to cope with and function in the everyday world"); *Frontiero,* 411 U.S. at 686 (distinguishing sex from nonsuspect statuses on the grounds that it "bears no relation to ability to perform or contribute to society"); Matthews v. Lucas, 427 U.S. 495, 505 (1976) (analogizing illegitimacy to race and national origin on the basis that it "bears no relation to the individual's ability to participate in and contribute to society").

91. 427 U.S. 307 (1976).

92. *Id.* at 313; *see also Matthews,* 427 U.S. at 505 (finding that classifications based on illegitimacy are subject to heightened scrutiny because the characteristic "bears no relation the individual's ability to participate in and contribute to society").

Similarly, in *Cleburne v. Cleburne Living Center*, the Court reasoned that the mentally disadvantaged are not suspect because mental retardation does in fact bear a substantial relationship to the group's ability to participate in and contribute to society.[93] In *Frontiero v. Richardson*, the Court held that sex is a quasi-suspect classification, opining that "what differentiates sex from such non-suspect statuses as intelligence or physical disability. . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[94] The Court once again applied heightened scrutiny in *Matthews v. Lucas*, emphasizing that illegitimacy "bears no relation to the individual's ability to participate in and contribute to society."[95] These cases make it clear that, when determining suspect status, the Court affords considerable weight to whether a group has faced unequal treatment on the basis of a trait that is unrelated to ability to contribute to society.

In contrast, the United States Supreme Court has treated immutability and political powerlessness as potentially relevant but subordinate concerns.[96] In *Graham v. Richardson*, the Court held that alienage is a suspect classification[97] despite the fact that attaining citizenship status would eliminate this characteristic. Instead, the *Graham* court emphasized that aliens are a prime example of the 'discrete and insular minority' that *Carolene* sought to protect.[98] Similarly, in *Clark v. Jeter*, the Court subjected a statute of limitations on actions to establish paternity to heightened scrutiny,[99] even though illegitimacy is a status that ceases to exist in the event that an illegitimate child's parents marry. Contrarily, the Court declined to categorize mental retardation as a suspect classification in *Cleburne v. Cleburne Living Center, Inc.* despite the undisputed immutability of the trait.[100] The *Cleburne* Court emphasized that the defining characteristic was legitimately related to the carrier's ability to contribute to society.[101] As Justice Thurgood Marshall opined in his

93. *Cleburne*, 473 U.S. at 442.

94. *Frontiero*, 411 U.S. at 686, 688.

95. *Matthews*, 427 U.S. at 505–06.

96. *See generally* Graham v. Richardson, 403 U.S. 365 (1971).

97. *Id.* at 376.

98. *Id.* at 372.

99. Clark v. Jeter, 486 U.S. 456, 461-65 (1988).

100. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446–47 (1985).

101. *Id.* at 441. The *Cleburne* Court demonstrated its skepticism of immutability by including the following quote from John Ely:

> Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that

concurring and dissenting opinion in *Cleburne*, "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."[102] Thus, political powerlessness and immutability, while potentially relevant in some cases, are not dispositive indicators of a suspect classification.

C. Sexual Orientation as a Suspect Classification

The level of scrutiny applicable to legislative acts that discriminate based on sexual-orientation remains an open question under federal law, although the United States Supreme Court has come close to confronting this issue on a handful of occasions. The Court addressed the right to engage in private homosexual activity in *Bowers v. Hardwick*,[103] upholding a Georgia law criminalizing sodomy on due process grounds.[104] Since the *Bowers* plaintiffs did not challenge the sodomy law on equal protection grounds, the Court declined to address the level of judicial scrutiny applicable to discrimination based on sexual orientation.[105] Justice Harry Blackmun, in a dissenting opinion with Justice William Brennan, Justice Thurgood Marshall, and Justice John Stevens, criticized the majority for declining to apply the Equal Protection Clause, stating that

> [w]ith respect to the Equal Protection Clause's applicability to § 16-6-2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of

---

> elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980).

102. *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring).

103. 478 U.S. 186 (1986).

104. *Id.* at 196 (holding that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not confer any fundamental right on homosexuals to engage in acts of consensual sodomy, even in the privacy of their own homes).

105. *Id.* at 201 (Blackmun, J., dissenting).

> the statute may raise serious questions of discriminatory enforcement.[106]

However, despite the warning of these four justices that Georgia's anti-sodomy law was likely grounded in prejudice towards homosexuals, the *Bowers* majority emphasized that the Constitution does not confer a fundamental right to engage in consensual homosexual sodomy, even in the privacy of one's own home.[107]

Ten years later in *Romer v. Evans*,[108] the Court struck down a class-based Colorado constitutional amendment that prohibited gay rights ordinances on equal protection grounds.[109] The Court established that neither the public's moral disapproval nor the legislator's dislike could serve as a legitimate justification for the state to disfavor a particular social group.[110] In 2003, the Court explicitly overruled its infamous decision in *Bowers v. Hardwick*, holding in *Lawrence v. Texas*[111] that a Texas law criminalizing homosexual sodomy violated the liberty and privacy guarantees of the constitutional right to due process.[112] In *Lawrence*, the Court once again circumvented the suspect classification inquiry and instead applied rational basis scrutiny to invalidate the law on due process grounds.[113] In her concurring opinion, Justice Sandra Day O'Connor argued that the Court should have found the sodomy law unconstitutional on equal protection grounds because the conduct that the statute targeted was closely correlated with homosexuality, thus discriminating against homosexual persons as a class.[114] Justice O'Connor avoided the suspect class issue by arguing that the sodomy law would have failed even under rational basis review[115] and

---

106. *Id.* ("I disagree with the Court's refusal to consider whether § 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment.").

107. *Id.* at 196.

108. 517 U.S. 620 (1996).

109. *Id.* at 635–36

110. *Id.* at 634–35.

111. 539 U.S. 558 (2003).

112. *Id.* at 578.

113. *Id.*

114. *Id.* at 582–83 (O'Connor, J., concurring).

115. *Id.* at 582 (O'Connor, J., concurring).

> Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

emphasizing that her reasoning does not extend to the same-sex marriage context.[116] Nevertheless, in a lengthy dissent with Justice Clarence Thomas and Justice William Rehnquist, Justice Antonin Scalia scathingly asserted that Justice O'Connor had laid the foundation for constitutional challenges to same-sex marriage bans on the grounds that sexual orientation is a suspect classification.[117] In addition, Justice Scalia accused the majority of effectively decreeing "the end of all morals legislation."[118]

Although the Supreme Court has never squarely confronted whether sexual orientation is a suspect classification, a number of lower courts have done so.[119] In considering whether statutes that discriminate on the basis of sexual orientation are constitutionally suspect, most state and federal appellate courts have found that, unlike race, sex, or national origin, sexual orientation should not be considered a suspect classification for equal protection purposes.[120] However, a number of state appellate judges have concluded that sexual orientation properly should be considered a suspect classification for purposes of analysis under their state equal protection clauses.[121]

IV. THE COURT'S REASONING

A. Conaway v. Deane & Polyak et al.

In *Conaway v. Deane & Polyak et al.*, the Maryland Court of Appeals upheld the constitutionality of Maryland Family Law Code Section 2-201 on the grounds that statutory prohibition of same-sex marriage is rationally related to the state's interest in fostering a stable environment for procreation and child rearing.[122] The *Conaway* court predicated its application of rational basis review, the most deferential

---

Id.

116. *Id.* at 585.

117. *Id.* at 600–02 (Scalia, J., dissenting).

118. *Id.* at 599.

119. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990); Andersen v. King County, 138 P.3d 963, 975 (Wash. 2006).

120. *See e.g., Andersen*, 138 P.3d at 973–76; *Lofton*, 358 F.3d at 818, 818 n.16 (concluding that gays and lesbians are not a suspect class and citing cases from the fourth, fifth, sixth, seventh, ninth, and tenth circuits similarly declining to recognize sexual orientation as a suspect classification).

121. *See* Hernandez v. Robles, 855 N.E.2d 1, 27–29 (N.Y. 2006) (Kaye, C.J. dissenting); Andersen v. King County, 138 P.3d 963, 1029–32 (Wash. 2006) (Bridge, J., concurring).

122. Conaway v. Deane & Polyak, 932 A.2d 571, 629–35 (Md. 2007).

of equal protection standards, on the finding that §2-201 neither abridges the fundamental right to marriage, discriminates on the basis of sex in violation of Article 46 of the Maryland Declaration of Rights nor otherwise implicates a suspect or quasi-suspect class.[123]

The *Conaway* court held that statutes that discriminate on the basis of sexual orientation do not trigger heightened scrutiny under Article 24 of the Maryland Declaration of Rights.[124] The court considered four indicia: (1) the history of purposeful unequal treatment; (2) the relation between classification and ability to function and contribute to society; (3) political powerlessness; and (4) immutability.[125] The *Conaway* court recognized that Maryland case law describes a suspect class as "a category of people who have 'experienced a history of purposeful unequal treatment' or been 'subjected to unique disabilities on the basis of stereotypical characteristics not truly indicative of their abilities," but nevertheless looked to Supreme Court jurisprudence for additional factors.[126]

The *Conaway* court acknowledged that gays and lesbians have undoubtedly experienced a history of purposeful unequal treatment and that sexual orientation is unrelated to the ability to function and contribute to society,[127] but placed decisive emphasis upon the remaining two criteria of suspectness—political powerlessness and immutability.[128] The court cited a laundry list of state anti-discrimination statutes to illustrate that gay and lesbian Marylanders are not sufficiently politically powerless to necessitate enhanced judicial protection from the majoritarian political process.[129] In addition, the *Conaway* court reasoned that there does not appear to be consensus among experts as to the origin of an individual's sexual orientation.[130] The court further explained that "the scientific and sociological evidence currently available to the public" does not conclusively prove that sexual orientation is immutable.[131] As a result,

123. *Id.* at 635.

124. *Id.* at 616.

125. *Id.* at 606–16.

126. *Id.* at 606–7 (reasoning that "Article 24 is construed at least to the same extent as the Fourteenth Amendment").

127. *Id.* at 609 (opining that "[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. Gay, lesbian, and bisexual persons likewise have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society."). *See also id.* at 609–10 for a discussion of historical discrimination against the LGBT community.

128. *Id.* at 611–16.

129. *Id.* at 611–14.

130. *Id.* at 615 n.57.

131. *Id.* at 614.

the *Conaway* court concluded that gays and lesbians did not merit suspect status and ultimately upheld the constitutionality of a Maryland statute denying the benefits of civil marriage to same-sex couples and their children.

B. In re Marriage Cases

Despite the existence of comprehensive domestic partnership legislation in California, the court in *In re Marriage Cases* held that a statutory scheme permitting only opposite-sex couples to enter into a marriage-designated relationship impermissibly denies same-sex couples the equal protection of the laws under Article I Section 7 of the California Constitution.[132] Resolving as a threshold matter that Sections 300 and 308.5 of the California Family Code discriminate on the basis of sexual orientation,[133] the court established that sexual orientation is a suspect classification and that statutes drawing a distinction based on sexual orientation should accordingly be subject to strict scrutiny review.[134]

In analyzing whether sexual orientation is a suspect classification, the court in *In re Marriage Cases* considered whether the defining characteristic: (1) is based upon an immutable trait; (2) bears no relation to an individual's ability to perform or contribute to society; and (3) is "associated with a stigma of inferiority or second class citizenship manifested by the group's history of legal and social disabilities."[135] Affirming the California Court of Appeals' finding that the criteria related to individual's ability to perform in society and history of stigmatization are readily satisfied in cases involving gays and lesbians, the court turned its attention to the more controversial immutability criterion.[136] The court concluded that immutability is not invariably required for a characteristic to be considered a suspect classification for equal protection purposes, reasoning that religion and alienage are suspect classifications under California law despite the

---

132. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

133. *Id.* at 440–41.

134. *Id.* at 441–44 (finding that

> [b]ecause sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies this classification).

135. *Id.* at 442.

136. *Id.*

fact that both conditions are subject to change.[137] In addition, the court emphasized that it is not appropriate to require a person to repudiate or change his or her sexual orientation to avoid discriminatory treatment because a person's sexual orientation is an integral aspect of one's identity.[138]

The *In re Marriage Cases* court also rejected the California Attorney General's alternative argument that a suspect classification is appropriately recognized only for minorities who are unable to use the political process to address their needs.[139] The court found that a group's current political powerlessness is not a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment.[140] Instead, the court declared that

> [t]he most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society.[141]

Consequently, the *In re Marriages* court determined that legislative enactments that discriminate on the basis of sexual orientation should be subjected to heightened judicial scrutiny.

V. ANALYSIS

In *Conaway v. Deane & Polyak, et al.*, the Maryland Court of Appeals erred by treating immutability and political powerlessness as decisive indicia of suspect status rather than supplementary factors.[142] However, to the extent that immutability and political powerlessness are relevant to suspect class analysis, sexual orientation is immutable in the equal protection context, and members of the LGBT community are sufficiently politically powerless to necessitate enhanced judicial

137. *Id.* at 442–43.

138. *Id.* (citing Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000)).

139. *Id.* at 443.

140. *Id.*

141. *Id.*

142. *See infra* Part V.A.1.

protection. Therefore, the *Conaway* court should have reached the conclusion that sexual orientation is a suspect or quasi-suspect classification despite overstating the significance of immutability and political powerlessness. Distinguishably, the California Supreme Court in *In re Marriage Cases* properly recognized that neither immutability nor political powerlessness is a prerequisite of suspect status.[143] The *In re Marriage Cases* court accurately emphasized that gays and lesbians have experienced a history of purposeful unequal treatment due to a characteristic that bears no relation to their ability to contribute to society.[144] Pursuant to this rationale, classifications that implicate sexual orientation are at minimum quasi-suspect, and must be necessary to fulfill an important government interest. Judicial recognition of sexual orientation as a suspect classification is consistent with the appropriate role of courts vis-à-vis legislatures in safeguarding minority rights. For these reasons, courts should follow the *In re Marriage Cases* suspect classification analysis rather than that of *Conaway v. Deane & Polyak, et al.*

A. *Suspect Classification Analysis in the Same-Sex Marriage Context*

Laws denying civil marriage rights to same-sex couples discriminate on the basis of sexual orientation. Thus, judicial recognition of sexual orientation as a suspect classification is extremely significant in the marriage equality context because it would require courts to strictly scrutinize statutory same-sex marriage bans. Strict scrutiny has been described as "strict in theory and fatal and fact" because laws subjected to its heavy burden rarely pass constitutional muster.[145] Thus, it is exceedingly unlikely that courts would uphold the constitutionality of statutory same-sex marriage bans under strict scrutiny.

In deciding the appropriate degree of deference to afford a Maryland law defining marriage as the union of one man and one woman, the Maryland Court of Appeals in *Conaway v. Deane & Polyak, et al.* held that sexual orientation is not a suspect classification.[146] The *Conaway* court reasoned that sexual orientation is not conclusively immutable and that gays and lesbians are not sufficiently politically powerless to merit enhanced judicial

143. *See infra* Part V.A.1.

144. *See infra* Part V.A.1.

145. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

146. 932 A.2d 571, 616 (Md. 2007).

protection.[147] The *Conaway* court's suspect classification analysis is problematic in three ways. First, the *Conaway* court improperly treated immutability and political powerlessness as dispositive rather than persuasive factors.[148] As a result, the court significantly undervalued the history of purposeful and unequal treatment that gays and lesbians have experienced on the basis of a characteristic not indicative of their ability to contribute to society.[149] Second, the *Conaway* court failed to recognize that sexual orientation is effectively immutable in the equal protection context.[150] Third, the *Conaway* court relied upon circular reasoning and misapplied federal equal protection jurisprudence in its analysis of political powerlessness.[151]

1. Immutability and Political Powerlessness are not Dispositive Indicia of Suspectness

The piecemeal development of equal protection doctrine has arguably left the boundaries of constitutionally suspect legislative classifications unclear.[152] Within this tentative area of law, the immutability of a group's distinguishing characteristic is a particularly abstract and controversial indicator of suspectness. The United States Supreme Court has repeatedly omitted immutability from its suspect classification analyses,[153] demonstrating that immutability is a factor, not a requirement, of suspectness.[154] Accordingly, when the Court

147. *Id.* at 609–16.

148. *See infra* Part V.A.1.

149. *See infra* Part V.A.1.

150. *See infra* Part V.A.2.

151. *See infra* Part V.A.3.

152. *See generally,* Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481(2004).

153. *See* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976) (analyzing whether age is a suspect classification without considering immutability); San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1, 28 (1973) (declining to consider immutability when analyzing whether legislation that classifies on the basis of wealth is constitutionally suspect); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440–41 (1985) (omitting immutability from analysis of whether mental retardation is a suspect classification). *See also* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 490–91 (1998) [hereinafter *Assimilationist Bias*] (observing that "the courts have variously cast doubt on immutability by citing academic critiques of it, by interpreting it expansively, by emphasizing that it is a factor rather than a requirement, and by simply omitting it from their formulations of the strict scrutiny test").

154. *See* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507 n.11 (1993-94) (citing Bowen v. Gilliard, 483 U.S. 587, 602–603 (1987); Lyng v. Castillo, 477 U.S. 635, 638 (1986) and stating that "I am unaware of any case in which the Supreme Court has gone beyond this moderated emphasis on immutability").

considered immutability for the first time in *Frontiero v. Richardson*,[155] it indicated that immutability is a factor that *intensifies* the invidiousness of government-imposed burdens that are not sufficiently related to an important state interest.[156]

Legal scholars have exposed a range of problems inherent in immutability analysis. For example, Bruce Ackerman points out that "anonymous and diffuse" groups are often more susceptible to isolation from the majoritarian political process than are *Carolene Products*' "discrete and insular" minorities for the very reason that their defining characteristics are mutable or can be hidden.[157] This reasoning exposes an "assimilationist bias in equal protection jurisprudence," which is evident in the courts' tendency to "withhold heightened scrutiny from groups that can change or conceal their defining trait."[158] The sentiment that gays and lesbians can and should change or conceal their sexual orientation arguably underlies the *Conaway* court's over-emphasis of immutability.

The *Conaway* court failed to subject Maryland's same-sex marriage ban to heightened judicial scrutiny, explaining that "we decline on the record in the present case to recognize sexual orientation as an immutable trait *and therefore* a suspect or quasi-suspect classification" (emphasis added).[159] This explanation clearly indicates that the *Conaway* court improperly afforded decisive weight to immutability. To the contrary, the *In re Marriage Cases* court held that laws discriminating on the basis of sexual orientation are constitutionally suspect, accurately emphasizing that "immutability is

---

155. 411 U.S. 677 (1973).

156. *Id.* at 686–87; *see also* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–09 (1994) (asserting that

> [t]wo features of the Court's subsequent treatment of immutability were accurately foreshadowed in *Frontiero*. First, immutability is not a *requirement*, but a *factor*. Second, that factor is not immutability alone but immutability–*plus*...[T]he *Frontiero* plurality determined that heightened scrutiny was needed in cases involving sex discrimination because "the sex characteristic," *in addition* to being immutable, "frequently bears no relation to ability to perform or contribute to society." *Frontiero* thus expresses a conclusion that, when a characteristic is both immutable *and* unrelated to the legitimate purpose at hand, discrimination based on it *may* suggest unfairness.).

157. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985).

158. *Assimilationist Bias*, *supra* note 153, at 490.

159. Conaway v. Deane & Polyak, et al., 932 A.2d 571, 616 (Md. 2007).

not invariably required for a characteristic to be considered a suspect classification for equal protection purposes."[160]

Federal equal protection jurisprudence indicates that political powerlessness, like immutability, is not a required condition of suspect classifications.[161] The *Rodriguez* Court first introduced the political powerlessness prong of suspect classification doctrine when it established that a suspect class must be

> [S]addled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (emphasis added).[162]

The particular formulation of the *Rodriguez* analytical framework, including the deliberate use of the conjunction "or," indicates that political powerlessness is not unequivocally required, but is rather one of several key considerations. In addition, political powerlessness is not a requirement of suspect classification because its analysis is problematic. As the Supreme Court of Connecticut recently pointed out,

> The Court has accorded little weight to a group's political power because that factor, in contrast to the other criteria, frequently is not discernible by reference to objective standards. Thus, an attempt to quantify a group's political influence often will involve a myriad of complex and interrelated considerations of a kind not readily susceptible to judicial fact-finding.[163]

Like the *Carolene* Court's focus on 'discrete and insular minorities,'[164] the purpose of the 'political powerlessness' and 'history of purposeful unequal treatment' criteria is to identify and protect a subordinated *class* that is particularly unable to protect itself.[165] In contrast, the 'immutability' and 'relationship to ability to function in

160. In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008).

161. *See supra* Part III.

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

163. Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 429 (Conn. 2008).

164. United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938).

165. *See generally* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 206–09 (Harvard University Press 1999) (contrasting *class-based* equal protection analysis with *classification-based* analysis).

society' criteria, which invoke principles of fairness, identify *classifications* that are particularly prone to impermissible discrimination.[166] Considering that the 'political powerlessness' and 'history of discrimination' factors serve an analogous purpose, it seems unnecessary that both conditions must unequivocally be satisfied. Indeed, the very finding that a group has endured a history of oppression suggests that it is likely to be disadvantaged by the majoritarian political system.[167] It follows that, in the context of suspect classification analysis, the political powerlessness inquiry is rendered moot by a clear finding that a group has been subjected to a history of purposeful unequal treatment. Having conceded that gays and lesbians have endured such a history of discrimination,[168] the *Conaway* court should not have treated political powerlessness as dispositive.

2. Sexual Orientation is Immutable in the Equal Protection Context

To the extent that immutability is dispositive of suspectness, sexual orientation should be considered immutable in the equal protection context. Plausible formulations of immutable characteristics include the following: (1) traits that the carrier is physically unable to change or mask; (2) traits that can be changed, but only with great difficulty; and (3) traits that are so central to personal identity that the carrier's ability to change them is irrelevant.[169] Federal Fourteenth Amendment jurisprudence makes it clear that equal protection immutability need not reach the high burden of strict immutability, or absolute insusceptibility to change or concealment.[170] For example, the

166. *Id.*

167. *See* Watkins v. United States Army, 875 F.3d 699, 727 (9th Cir. 1989) (reasoning that "[t]he very fact that homosexuals have historically been underrepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government.").

168. Conaway v. Deane & Polyak, et al., 932 A.2d 571, 609–10 (Md. 2007).

169. Watkins v. United States Army, 837 F.2d 1428, 1446 (9th Cir. 1988).

170. *Id.* (asserting that

> [i]t is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin be changing their customs, their names, or their associations. Lighter skinned blacks can sometimes "pass" for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. At minimum then, the Supreme Court is willing to treat a trait as effectively immutable if

Supreme Court has held that illegitimacy is quasi-suspect although it is an arguably mutable trait, whereas as age and mental disability are not suspect despite their immutability.[171]

The *Conaway* court erred by considering only the strict biological immutability of sexual orientation, rather than applying the nuanced conception of immutability that federal equal protection jurisprudence has generated. Although significant scientific evidence supports a biological basis to homosexuality, it is equally, if not more important, that "sexual orientation, no matter what causes it, acquires social and political meaning through the material and symbolic activities of living people."[172] Accordingly, the *Conaway* court failed to recognize that "sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."[173] As the *In re Marriage Cases* court recognized, characterizing sexual orientation as a mutable trait in the equal protection context is unacceptable because "it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[174]

3. Gays and Lesbians Are Politically Powerless in the Equal Protection Context

The *Conaway* court erred when it cited statutory protections against sexual orientation discrimination in Maryland as evidence that gays and lesbians are not politically powerless, and therefore not a suspect class. Any disadvantaged group with the ability to successfully access political and judicial forums to challenge discrimination would arguably fail the political powerlessness prong under this reasoning. If followed to its logical end, "this inquiry could actually support removal of traits such as race and sex from the list of suspect classifications, contrary to the Court's expressed intent, in light of substantial legislation prohibiting differential treatment based on race

---

changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.).

171. *See e.g.*, Clark v. Jeter, 484 U.S. 456, 461 (1988) (holding that classifications implicating illegitimacy are subject to heightened scrutiny); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that age is not a suspect classification); City of Cleburne v. Cleburne, 473 U.S. 432 (1985) (holding that mental retardation is not a suspect classification).

172. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

173. Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000).

174. *In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008).

and sex."[175] Also recognizing this theoretical inconsistency in political powerlessness analysis, William Eskridge points out that

> [c]ontrary to *Carolene Products*, the Court's practice in equal protection cases rarely protects powerless minorities; instead, the Court tends to protect previously powerless groups once it has become clear that the group is politically mobilized and potentially a partner in the pluralist system.[176]

Several factual considerations also undermine the *Conaway* court's reasoning. First, the Supreme Court identified sex as a quasi-suspect classification in 1973, years after significant legislative protections for women, including the Civil Rights Act of 1964 and the Voting Rights Act, took effect.[177] In addition, although LGBT Marylanders admittedly enjoy some legal protections against discrimination, they are denied myriad rights and benefits simply because they are precluded from civil marriage.[178] In fact, committed same-sex couples in Maryland have been unable to gain equal access to 425 state statutory protections and over 1,000 federal rights, responsibilities, and privileges available to married opposite-sex couples and their children, despite their alleged political influence.[179] Chief Judge Robert Bell of the Maryland Court of Appeals articulated this conundrum in his dissenting opinion in *Conaway*, opining that piecemeal civil advances for gays and lesbians do not indicate that the right to marry is imminent or inevitable for same-sex couples.[180] Indeed, Chief Judge Bell seems to suggest that the impetus for

175. Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 504–05 (2004).

176. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 229 (Harvard University Press 1999).

177. *See* Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973) (characterizing the enactment of laws prohibiting sex discrimination as confirming that a class of individuals had been subjected to widespread discrimination in the past and thus supporting the need for heightened judicial scrutiny of statutory provisions that impose differential treatment on the basis of such a characteristic).

178. Conaway v. Deane & Polyak, et al., 932 A.2d 571, 646 (Md. 2007). (Raker, J., concurring, dissenting) (opining that "despite Maryland's recent statutory, regulatory, and case law that has evolved to equalize some legal protections of heterosexuals and homosexuals, same-sex couples are denied the protection of hundreds of laws simply because they are not yet entitled to the rights and benefits flowing from marriage").

179. U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. 04-4353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

180. Conaway v. Deane & Polyak, et al., 932 A.2d 571, 694 (Md. 2007) (Bell, C.J., dissenting).

incrementally affording these rights to gays and lesbians is to avoid awarding them equal marriage rights.[181]

B. The Appropriate Role of Courts vis-à-vis Legislatures in Recognition of Sexual Orientation as a Suspect Classification

Although the judiciary has a clear obligation to enforce constitutional limitations upon legislative measures under the separation of powers doctrine, the thorny query of when, how much, and why courts should scrutinize discriminatory government acts persists. Not surprisingly, the appropriate role of courts in the recognition and protection of minority rights has been a recurring theme throughout Nineteenth and Twentieth Century constitutional jurisprudence. The view that the court's role is merely to remove barriers to minority participation in the political process is plainly flawed because "the duty of representation that lies at the core of our system requires more than a voice and a vote."[182] In our democratic system, those with the most votes are clearly in the position to prioritize their own interests at the expense of others. While some minority groups may successfully ally themselves with other factions to protect their interests against infringement at the hands of the majority, others are precluded from the benefits of this pluralist political process. Indeed, it was these discrete and insular minorities' that the *Carolene* Court wished to protect.

Judicial activism is arguably best justified when the invidious oppression of vulnerable groups undermines the democratic political process.[183] In this sense, heightened judicial scrutiny of discriminatory government acts is fittingly characterized as curative of democratic processes, rather than countermajoritarian, in that it facilitates the representation of minorities. As the Supreme Court's landmark civil

---

181. *Id.*

182. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (Harvard University Press, 1980) (asserting that

> [s]ome commentators have suggested that the Court's role in protecting minorities should consist only in removing barriers to their participation in the political process. We have seen, however – and the realization is one that threads our constitutional document – that the duty of representation that lies at the core of our system requires more than a voice and a vote. No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise refuse to take their interests into account.).

183. *See* United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (Harvard University Press, 1980).

rights decisions in *Loving v. Virginia*[184] and *Brown v. Board of Education*[185] indicate, the Court should not permit an unconstitutional situation to fester because it enjoys broad public support.[186] Recognizing the application of this principle to civil marriage rights, the Massachusetts Supreme Court eloquently opined that the history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded."[187] It is clear that legislative enactments excluding same-sex couples and their children from the benefits of civil marriage classify on the basis of sexual orientation.[188] Accordingly, if sexual orientation is a constitutionally suspect classification, statutes defining marriage as the union of a man and a woman must be necessary to further a compelling government interest.

VI. CONCLUSION

So long as laws deny same-sex couples and their children the benefits of civil marriage, they will undoubtedly face equal protection challenges. In considering these constitutional disputes, courts should carefully consider their vital role in protecting minority classes against impermissible discrimination by powerful majorities. Applying heightened judicial scrutiny to legislative enactments that discriminate on the basis of sexual orientation is an overdue step towards equal protection of the laws for same-sex couples. Immutability and political powerlessness are supplementary rather than determinative indicia of suspectness and, as such, need not be considered. However, to the extent that courts choose to afford immutability and political powerlessness dispositive weight, both factors indicate that sexual orientation is a suspect classification. The long history of purposeful and unequal treatment that gays and lesbians have suffered on the basis of a characteristic bearing no relation to ability to function in society further confirms that they are a class deserving of special judicial solicitude. Thus, courts should follow the equal protection analysis of *In re Marriage Cases* rather than that of *Conaway v. Deane & Polyak, et al.* by subjecting government acts that discriminate on the basis of sexual orientation to heightened equal protection scrutiny.

---

184. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

185. *See generally* Brown v. Board of Education, 347 U.S. 483 (1954).

186. Goodridge v. Massachusetts Dept. of Public Health, 798 N.E.2d 941, 958 n.16 (Mass. 2003).

187. *Id.* at 966 (quoting United States v. Virginia, 518 U.S. 515, 557 (1996)).