

FEDERAL COURTS, MISDIRECTION, AND THE FUTURE OF SAME-SEX MARRIAGE LITIGATION

*By Mark Strasser**

I. INTRODUCTION

Over the past decade, several federal courts have heard challenges to laws precluding recognition of same-sex marriage. Many, but not all of these cases, involved challenges to section three of the Defense of Marriage Act (DOMA),¹ which defines marriage for federal purposes; although there are three notable cases in the Ninth Circuit challenging state marriage regulations on federal grounds.²

The growing consensus about section three's unconstitutionality was vindicated when the Court struck the section down this past term in *United States v. Windsor*.³ However, the lower court opinions striking down the section have varied greatly in rationale,⁴ and the *Windsor* Court did little to clarify matters.

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

1. 1 U.S.C. § 7 (2013), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

2. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

3. *See Windsor*, 133 S. Ct. at 2675.

4. *See, e.g., Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012) ("We conclude ... that the rationales offered do not provide adequate support for section 3 of DOMA."); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 347 (D. Conn. 2012) ("[H]aving considered the purported rational bases proffered by both BLAG and Congress and concluded that such objectives bear no rational relationship to Section 3 of DOMA as a legislative scheme, the Court finds that no conceivable rational basis exists for the provision. The provision therefore violates the equal protection principles incorporated in the Fifth Amendment to the United States Constitution."); *Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp. 2d 944, 964 (N.D. Cal. 2012) ("The Court finds that § 3 of the DOMA violates the equal protection rights of Plaintiff same-sex spouses, and subparagraph (C) of § 7702B(f) violates the equal protection rights of Plaintiff registered domestic partners."); *Windsor v. U.S.*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012) ("Additionally, as has always been required under the rational basis test, irrespective of the context, the Court must consider whether the government's asserted interests are legitimate. Pursuant to these established principles, and mindful of the Supreme Court's jurisprudential cues, the Court finds that DOMA's section 3 does not pass constitutional muster."); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012) ("The Court has found that DOMA unconstitutionally discriminates against same-sex married couples.").

One noteworthy aspect of some of the lower court opinions involves the ways that these courts have addressed issues and offered analyses that were at best tangentially related to the matter at hand.

The difficulty pointed to here is not that the courts were offering dicta, but that they were sometimes mischaracterizing existing law, perhaps unintentionally, in a way that would likely not be subject to review but nonetheless might provide the foundation for analyses to be offered in other currently anticipated challenges to same-sex marriage bans. At least in part because of mistaken or misleading analyses lurking in the case law, we have seen a convergence with respect to the constitutionality of a particular provision but a broad divergence with respect to how basic analyses should be performed, a potentially dangerous jurisprudential development that must be arrested at the earliest opportunity. Regrettably, the *Windsor* analysis, which discussed both federalism and Fifth Amendment guarantees,⁵ may have only added to the confusion. Unless the Court acts quickly to clarify the law, we are likely to see courts employing increasingly different approaches to relevantly similar issues in constitutional law,⁶ which is a recipe for disaster for the development of the law as a whole and almost guarantees inconsistency and unfairness.

II. MODIFYING THE JURISPRUDENCE WHILE AVOIDING REVIEW

The lower courts' mistaken or misleading analyses in the same-sex marriage cases have been offered in a variety of contexts. Sometimes, courts have addressed issues where the plaintiffs did not even have standing to challenge a contested law. But this meant that misstatements of the law might remain unaddressed, especially if the decisions were not appealed. At other times, the court would either mischaracterize the effects of a law or the jurisprudence in light of which the law should be judged, but would do so by discussing a law or jurisprudence that played little or no role in the challenge before the court. Because mere dicta, these characterizations have tended not to be reviewed. Even where the mistaken view about a particular law is corrected on appeal, the underlying incorrect analyses may continue to lurk in the case law. These unreviewed, mistaken approaches have made their way into other decisions, thereby muddying this and related areas of law even further and undermining the overall coherence of the law.

5. The Court appealed to federalism concerns. *See Windsor*, 133 S. Ct. at 2692 (“DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.”); *see also id.* at 2697 (Roberts, C.J., dissenting) (“[The majority’s] judgment is based on federalism.”); However, the majority also offered other bases upon which to strike down this DOMA section. *See id.* at 2681 (“DOMA violates basic due process and equal protection principles applicable to the Federal Government.”).

6. *Cf. id.* at 2709 (Scalia, J., dissenting) (“[A]n opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.”).

A. Standing

In *Hollingsworth v. Perry*,⁷ the Court held that those challenging a federal district court decision striking down California's Proposition Eight⁸ lacked standing,⁹ thereby illustrating the importance of standing doctrine. Ironically, several lower court decisions addressing same-sex marriage issues should not have reached the merits because the plaintiffs' lacked standing.

1. *Kandu*

One of the first federal courts to discuss the constitutionality of DOMA's section 3 used the occasion to address a number of issues including whether that section violated federal equal protection and due process guarantees. There were a few surprising aspects of the court's analysis, not least of which is that the court should not have reached the merits in the first place, because the plaintiffs did not have standing.

*In re Kandu*¹⁰ involved a same-sex couple, Lee and Anne Kandu, validly married in Canada,¹¹ who sought to file for bankruptcy protection as a married couple.¹² They argued that section three of the Defense of Marriage Act, which barred the recognition of their marriage for federal purposes, was unconstitutional.

That section reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.¹³

The *Kandus* offered several grounds upon which this section of the Act should be struck down, for example, that Congress's attempt to regulate marriage involved use of "a power not granted to Congress in Article I of the U.S. Constitution and, therefore, reserved to the States by the Tenth Amendment."¹⁴ The *Kandu* court recognized that the "federal government's power . . . is expressly limited by the Constitution."¹⁵ However, the court rejected that "DOMA oversteps the boundary between federal and state authority . . . in this instance,"¹⁶ because "the definition of marriage in DOMA

7. 133 S. Ct. 2652 (2013).

8. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Proposition 8 was a California referendum initiative reserving marriage for different-sex couples. See *id.* at 927.

9. *Hollingsworth*, 133 S. Ct. at 2668 ("Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal.").

10. 315 B.R. 123 (Bankr. W.D. Wash. 2004).

11. *Id.* at 130 ("Lee Kandu and Ann C. Kandu (Debtors), two women, who are United States citizens, were married in British Columbia, Canada, on August 11, 2003.").

12. *Id.*

13. 1 U.S.C. § 7 (2013), *invalidated* by *United States v. Windsor*, 133 S. Ct. 2675 (2013).

14. *Kandu*, 315 B.R. at 131.

15. *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

16. *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004).

is not binding on states and, therefore, there is no federal infringement on state sovereignty.”¹⁷ After all, states “retain the power to decide for themselves the proper definition of the term marriage.”¹⁸

The *Kandu* court is correct that Congress was only seeking to define marriage for federal purposes¹⁹ and, at this point, Massachusetts was already permitting same-sex marriages to be celebrated,²⁰ so DOMA was obviously not preventing states from recognizing same-sex unions. If that were the sole point that the *Kandu* court was making, however, one would wonder why the court suggested that DOMA did not “overstep[] the boundary between federal and state authority . . . in this instance.”²¹ DOMA as a general matter does not prevent state legislatures from permitting same-sex couples to marry, and in that sense there would seem to be nothing to differentiate this instance from any other.

The *Kandu* court recognized that DOMA’s focusing on the definition of marriage for federal purposes did not make it immune for constitutional purposes. The court implicitly recognized that “Congress may preempt state family law, in favor of a federal standard, only when specific conditions are met,”²² explaining that in *Hisquierdo v. Hisquierdo*²³ and *United States v. Yazell*²⁴ “the Court considered whether state law was preempted by federal law because there was a direct conflict between the state and federal policy.”²⁵ However, *in this instance*, there was no need to apply the applicable test that is triggered when there is a conflict between state and federal policy in family law because, at that time,²⁶ “Washington State ha[d] adopted its own definition of marriage identical to DOMA, defining marriage for state purposes as the legal union of one man and one woman.”²⁷ There was neither preemption nor even a conflict, “since federal and Washington state standards remain

17. *Id.*

18. *Id.*

19. However, the effects of such a denial are quite significant. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1953 n.295 (2012) (“Denying committed lesbian and gay couples marriage recognition deprives them of more than 1100 federal rights, benefits, and duties.”).

20. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (striking down the state’s same-sex marriage ban).

21. *Kandu*, 315 B.R. at 132 (emphasis added).

22. The court attributed the argument to *Kandu*. However, rather than reject it, the court explained why it was not applicable in this case, implicitly accepting it. *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004).

23. 439 U.S. 572 (1979).

24. 382 U.S. 341 (1966).

25. *Kandu*, 315 B.R. at 132-33.

26. Washington’s public policy has changed since then. See Brian M. Rosenthal, *Making Marriage History: First Same-Sex Marriage Licenses Signed in State 489 Couples Licensed in King County*, SEATTLE TIMES, Dec. 7, 2012, at A1, available at 2012 WLNR 26109001 (“More than 800 gay and lesbian couples across Washington state received marriage licenses Thursday during a long and festive day that same-sex marriage supporters called a major moment in the history of the movement.”).

27. *Kandu*, 315 B.R. at 133.

identical.”²⁸

A separate issue would have been raised if, for example, the Washington same-sex marriage ban violated state constitutional guarantees and, indeed, a Washington district court had so held.²⁹ The *Kandu* court acknowledged the existence of the ruling³⁰ but then ignored it,³¹ presumably because the opinion was stayed pending review by the Washington Supreme Court.³²

Assuming that the marriage was not permitted under local law, it was important to determine whether the state of Washington had a strong public policy against recognizing same-sex marriage at that time.³³ If so, the *Kandus'* marriage would then not have been recognized under *state* law, even if Congress had not passed DOMA, because the general rule is that the federal government will not recognize a marriage if it violates the strong public policy of the couple's domicile.³⁴ But this means that even if the court would have been willing to strike down DOMA, the *Kandus* still would not have been granted the remedy that they sought, namely, having their marriage recognized so that they could jointly file for bankruptcy, which means that they did not even have standing to challenge DOMA.³⁵

Nonetheless, the *Kandu* court addressed whether same-sex marriage bans violate due process and equal protection guarantees. The court began its due process analysis by recognizing that if “there is a fundamental right to same-sex marriage, this Court must apply a ‘strict scrutiny’ analysis that forbids government infringement on a fundamental liberty interest ‘unless the

28. *In re Kandu*, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004).

29. *See Andersen v. King County*, 2004 WL 1738447, at *11 (Wash. Super. 2004), *rev'd*, 138 P.3d 963 (Wash. 2006) (“The denial to the plaintiffs of the right to marry constitutes a denial of substantive due process. The plaintiffs are entitled to have judgment entered declaring that R.C.W. 26.04.010 and 26.04.020(1)(c) are violative of Article 1, § 3 of the Washington Constitution.”).

30. *See Kandu*, 315 B.R. at 133 n.2.

31. *See id.* at 133 (“federal and Washington state standards remain identical, notwithstanding recent developments”).

32. *See Andersen*, 2004 WL 1738447, at *12 (“the matter will now be stayed pending review by the Washington Supreme Court”).

33. *Cf. Andersen v. King County*, 138 P.3d 963, 1005 (Wash. 2006) (suggesting that Washington had a strong public policy against recognizing same-sex marriage).

34. *See id.* (“Where foreign law clearly violates our State's strong public policy, there is an important and well-established exception to the rule for recognizing foreign law. This exception probably requires that Washington courts would not recognize same-sex “marriage” even in the absence of DOMA.”). *See also* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 550 (2010) (“The rare categorical exceptions to the general federal public policy in favor of universal recognition are based on strongly held specific public policy objections regarding who may marry whom, either in the couple's state of domicile, or intended domicile.”).

35. Precisely because the *Kandu* plaintiffs did not challenge the constitutionality of the state law and the state definition of marriage would have governed even had DOMA not existed, the court should simply have dismissed the case for lack of standing. *See Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (holding that a couple did not have standing to challenge DOMA because they did not have a valid marriage under state law).

infringement is narrowly tailored to serve a compelling state interest.”³⁶ However, the court reasoned, if “participation in a same-sex marriage is not a fundamental right, the Court must address the constitutionality of DOMA with a more liberal ‘rational basis’ analysis that requires upholding the legislation if it is rationally related to a legitimate government interest.”³⁷

This way of characterizing the issue is at the very least regrettable. Consider the question whether there is a fundamental right to same-sex marriage. The way that one analyzes whether such a right exists depends upon which test one uses. The *Kandu* court explained that the “Supreme Court has identified the nature of rights that qualify for heightened judicial protection,”³⁸ and then noted that fundamental interests “are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”³⁹ In addition, the court pointed out that such liberties are “objectively, ‘deeply rooted in this Nation’s history and tradition.’”⁴⁰ The difficulty pointed to here is not that the *Kandu* court misquoted the United States Supreme Court, but merely that this test does not seem to be the correct one to use, especially in the marriage context, as the Court’s analysis of the constitutionality of interracial marriage bans illustrates.

Suppose that one wished to determine whether interracial marriage was a fundamental right. The right to marry someone of another race was not deeply rooted in the Nation’s history and tradition. As the Court pointed out in *Loving v. Virginia*, Virginia had prohibited interracial relationships since before the Nation’s founding.⁴¹ Further, over half of the states had laws prohibiting interracial marriage as late as 1950.⁴² Yet, given those statistics, it would be difficult to say that interracial marriage should be thought deeply rooted in history and tradition. But the Court nonetheless held that Virginia’s anti-miscegenation statute not only violated equal protection guarantees,⁴³ but also violated due process guarantees.⁴⁴

36. *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

37. *Id.* (citing *Glucksberg*, 521 U.S. at 728).

38. *Id.*

39. *Id.* at 138-39 (citing *Glucksberg*, 521 U.S. at 721).

40. *Id.* at 139 (citing *Glucksberg*, 521 U.S. at 720-21) (emphasis in original).

41. *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (“Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.”).

42. *See id.* at 6 n.5 (suggesting that at the time of the decision, the following states either still had anti-miscegenation statutes or had only repealed them within the past fifteen years: Maryland, Virginia, Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, West Virginia, Arizona, Colorado, Idaho, Indiana, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. California’s had been struck down by the California Supreme Court in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948)).

43. *See Loving*, 388 U.S. at 11-12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

44. *Id.* at 12 (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”).

The *Loving* Court explained that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁴⁵ But a court adopting the approach recommended by the *Kandu* court would likely have responded, “That may well be so, but the freedom to marry someone of another race has not been so recognized.” So, too, such a court would have said that there is no history and tradition supporting the claim that a noncustodial parent behind on child support has the fundamental right to marry.⁴⁶ It is unsurprising that courts and commentators disagree over whether there is a fundamental right to marry a same-sex partner. However, the way to decide that issue is not to ask whether the Nation has a long history and tradition of recognizing such relationships in particular,⁴⁷ because that test cannot account for some of the marriages that have been found protected by substantive due process.⁴⁸

Assume for purposes here that the right to marry a same-sex partner is not a fundamental right. A separate issue is whether the *Kandu* court is correct that in that event such legislation must be upheld “if it is rationally related to a legitimate government interest.”⁴⁹ The court considered whether *Lawrence v. Texas*⁵⁰ should affect its analysis of the constitutionality of same-sex marriage bans.

The court rightly noted that the *Lawrence* Court had expressly refused to address whether same-sex marriage was constitutionally protected,⁵¹ concluding that the “the Supreme Court did not intend to extend its holding to include same-sex marriage.”⁵² That conclusion is warranted in one sense but not in another. Clearly, the Court was saving that issue for another day and in that sense the Court was not extending its holding to apply to same-sex marriage.⁵³ However, that does not mean that the Court was expressly or impliedly rejecting the claim on the merits.

45. *Id.*

46. *But see Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down on due process grounds a Wisconsin law prohibiting noncustodial parents behind on child support from marrying).

47. *Hernandez v. Robles*, 855 N.E.2d 1, 23 (N.Y. 2006) (Kaye, C.J., dissenting) (“The Court concludes, however, that same-sex marriage is not deeply rooted in tradition, and thus cannot implicate any fundamental liberty. But fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.”).

48. *Id.* at 25 (Kaye, C.J., dissenting) (“To those who appealed to history as a basis for prohibiting interracial marriage, it was simply inconceivable that the right of interracial couples to marry could be deemed ‘fundamental.’”).

49. *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (citing *Washington v. Glucksberg*, 521 U.S. 702 728 (1995)).

50. 539 U.S. 558 (2003).

51. *See Kandu*, 315 B.R. at 139 (citing *Lawrence*, 539 U.S. at 578-79).

52. *Id.*

53. *See Lawrence*, 539 U.S. at 578 (“The present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

Consider *McLaughlin v. Florida*,⁵⁴ in which the Court struck down that state's law punishing interracial fornication and adultery more severely than intra-racial fornication and adultery while expressly refusing to reach "the question of the validity of the State's prohibition against interracial marriage."⁵⁵ A mere three years later, the Court struck down anti-miscegenation laws in *Loving v. Virginia*,⁵⁶ so it was not as if the *McLaughlin* Court was upholding such laws; instead, the Court was choosing not to address them while perhaps serving notice that their constitutionality was in doubt. While it may be that *Lawrence* Court was not issuing a holding one way or the other, Justice Scalia seemed to think that the *Lawrence* Court was serving notice that the constitutionality of same-sex marriage bans was now seriously in doubt.⁵⁷

Suppose that one reads *Lawrence* as simply removing the issue from consideration and implying nothing about the Court's view of the merits. Even so, *Lawrence* is relevant to consider when deciding whether same-sex marriage bans pass constitutional muster for several reasons. First, the *Lawrence* Court struck down the same-sex sodomy prohibition, at least in part, because "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."⁵⁸ But such reasoning suggests the relationship itself has constitutional weight, and that weight would also have to be placed on the constitutional balance if the validity of same-sex marriage bans were at issue.

A basic question about *Lawrence* is surprisingly difficult to answer, namely, what level of scrutiny was employed by the Court? Not only did the Court never expressly state which level of scrutiny was being employed, but the Court seemed to go out of its way to mask the level of scrutiny being used in the analysis.⁵⁹ For example, after citing several cases in the right to privacy jurisprudence,⁶⁰ the Court explained that the "right to liberty under the Due Process Clause gives [those with a same-sex orientation] the full right to engage in their conduct without intervention of the government."⁶¹ If the *Lawrence* Court were simply using rational basis scrutiny, then the obvious response to the Court's analysis would be, "But the privacy cases involved a higher level of scrutiny, so it is simply unclear that they have any relevance

54. 379 U.S. 184 (1964).

55. *Id.* at 195.

56. 388 U.S. 1 (1967).

57. *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

58. *Id.* at 567.

59. *See also* *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

60. *See Lawrence*, 539 U.S. at 564-66.

61. *Id.* at 578.

they have for an analysis involving mere rational basis review.”

The *Lawrence* Court suggested that the “Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁶² Often, when the Court discusses the lack of legitimate interests, the Court is suggesting that the statute at issue fails rational basis scrutiny.⁶³ However, if one pays closer attention to the Court’s actual statement, one sees that the Court was not claiming that the Texas statute served no legitimate purpose at all but, instead, that the state’s interest was not sufficiently important to justify the state intrusion. That leaves open whether the state interest was simply illegitimate or, instead, although legitimate, not sufficiently important to justify the state’s action in light of constitutional guarantees.⁶⁴

In her *Lawrence* concurrence, Justice O’Connor suggested that statutes targeting unpopular minorities should be examined under a more searching rational basis review.⁶⁵ But she was offering an explanation of why the Texas statute violated equal protections guarantees,⁶⁶ and while the Court recognized that equal protection guarantees might also have justified the holding,⁶⁷ the *Lawrence* decision was based on a due process analysis.⁶⁸ It was only Justice Scalia, in dissent, who expressly stated that the Court was striking down the Texas law on rational basis grounds.⁶⁹

The *Kandu* court explained that the “review afforded under this rational basis standard is very deferential to the legislature, and does not permit this Court to interject or substitute its own personal views of DOMA or same-sex marriage.”⁷⁰ But if indeed *Lawrence* involved use of the rational basis test,⁷¹

62. *Id.*

63. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (“We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.”).

64. *Cf. Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).

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

66. *See id.* (O’Connor, J., concurring).

67. *See id.* at 574-75 (noting that the claim that “the Texas statute [was] invalid under the Equal Protection Clause ... [was] a tenable argument”).

68. *Id.* at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

69. *See id.* at 586 (Scalia, J., dissenting) (“Most of the rest of today’s opinion has no relevance to its actual holding—that the Texas statute ‘furthers no legitimate state interest which can justify’ its application to petitioners under rational-basis review.”).

70. *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004).

71. *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (describing the majority’s opinion as “apply[ing] an unheard-of form of rational-basis review that will have far-

then one must wonder why the *Kandu* court did not apply that same more searching rational basis test to the issue before it. Certainly, Justice Scalia believed that *Lawrence* had important implications for the constitutionality of same-sex marriage bans.⁷²

The *Kandu* court's analysis of the equal protection issues was even worse. When rejecting that DOMA classified on the basis of sex, the court reasoned that DOMA "does not single out men or women as a discrete class for unequal treatment."⁷³ While the court was correct that the statute did not single out a particular sex for disfavored treatment, this is simply the wrong test to apply to determine whether heightened scrutiny had been triggered.

The statute at issue in *McLaughlin v. Florida*⁷⁴ did not single out a particular race as a discrete class for unequal treatment when punishing interracial non-marital relations more severely than intra-racial non-marital relations.⁷⁵ But that did not immunize the statute from receiving greater scrutiny, because it "treat[ed] the interracial couple made up of a white person and a Negro differently than . . . any other couple."⁷⁶ Because the statute classified on the basis of race and treated interracial couples differently than intra-racial couples, it triggered close scrutiny.⁷⁷ So too, although a statute banning same-sex marriage may not impose a greater burden on one sex, it may nonetheless classify on the basis of sex, e.g., by treating same-sex couples differently from different-sex couples, and trigger closer scrutiny.

The *Kandu* court's mistake can be traced to its misunderstanding of *Personnel Administrator v. Feeney*,⁷⁸ a case that the court cites.⁷⁹ At issue in *Feeney* was a Massachusetts statute giving employment preferences to veterans. The statute was challenged as a violation of equal protection guarantees because it allegedly discriminated on the basis of sex.⁸⁰ However, the allegedly discriminatory term — "veteran" — is gender-neutral in that it refers to individuals of either sex.⁸¹ The difficulty presented was that although

reaching implications beyond this case").

72. See *id.* at 604-05 (Scalia, J., dissenting).

73. *Kandu*, 315 B.R. at 143.

74. 379 U.S. 184 (1964).

75. *Id.* at 188 ("[A]ll whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty.").

76. *Id.*

77. *Id.* at 196 ("There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.").

78. 442 U.S. 256 (1979).

79. See *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004).

80. See *Feeney*, 442 U.S. at 267 ("The present case . . . challenge[s] the Massachusetts veterans' preference on the simple ground that it discriminates on the basis of sex.").

81. See *id.* at 267-68 ("The first Massachusetts veterans' preference statute defined the term "veterans" in gender-neutral language. . . . Women who have served in official United States military units during wartime, then, have always been entitled to the benefit of the preference.").

the statute helped members of both sexes, men received an extremely disproportionate share of the benefits.⁸²

The *Feeney* Court explained that “[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.”⁸³ Because of the pernicious effects of sex discrimination, “such classifications must bear a close and substantial relationship to important governmental objectives.”⁸⁴ The question at hand, however, was whether the closer scrutiny standard, appropriate for classifications on the basis of sex, had been triggered.

The *Feeney* Court understood that some classifications that are facially gender-neutral are nonetheless designed to impose undeserved burdens on the basis of sex. However, the mere fact that a classification has a disparate impact does not establish that the classification violates equal protection guarantees — “even if a neutral law has a disproportionately adverse effect . . ., it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”⁸⁵ Thus, the *Feeney* Court offered a test to determine whether a classification that did not make use of sex-linked terms would nonetheless trigger heightened scrutiny.

When a statute, gender-neutral on its face, is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.⁸⁶

Where the challenged classification is not itself sex-linked but nonetheless imposes a burden on the basis of sex, the Court will seek to determine whether the imposition of that burden was intentional. If “a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group,”⁸⁷ then the classification will have to meet the more difficult test associated with heightened scrutiny. Basically, the *Feeney* Court understood that some statutes

82. *See id.* at 270 (“When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female.”).

83. *Id.* at 273 (citing *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting)).

84. *Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

85. *Id.* at 272.

86. *Id.* at 274. A separate issue is whether statutes classifying or targeting on the basis of orientation should themselves trigger heightened scrutiny. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012) (“this Court finds that homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny”). *See also Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012) (noting that “the Justice Department filed a revised brief arguing that the equal protection claim should be assessed under a “heightened scrutiny” standard and that DOMA failed under that standard”).

87. *Feeney*, 442 U.S. at 279.

employing gender-neutral language will not only have a disparate impact based upon sex but are intended to do so, and such classifications, *in addition to those employing gender-linked terms*, trigger heightened scrutiny.

The *Kandu* court reasoned “The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law ‘can be traced to a discriminatory purpose.’”⁸⁸ However, that test is only applicable where the classification is *not* gender-based. Indeed, the *Feeney* Court reaffirms the importance of the classification’s not being gender-based in the first prong of the test, requiring the reviewing court to make sure that “the statutory classification is indeed neutral in the sense that it is not gender-based.”⁸⁹ Basically, the *Kandu* opinion misapplies *Feeney* and thereby reshapes equal protection analysis in an opinion that should not have been issued in the first place because the parties did not even have standing. The *Kandu* equal protection analysis was cited with approval in *Wilson v. Ake*,⁹⁰ another case in which standing was problematic.

2. Wilson

At issue in *Wilson* was a challenge to Florida’s same-sex marriage ban⁹¹ and to section two of DOMA, which reads:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁹²

The plaintiffs were two Florida residents, Nancy Wilson and Paula Schoenwether, who were legally married in Massachusetts and who wished to force the state of Florida to recognize their marriage. The *Wilson* court addressed the constitutionality of both the Florida and the federal statutes. The court cited with approval the *Kandu* due process⁹³ and equal protection⁹⁴ analyses, and some of the difficulties inherent in the *Kandu* analysis were also present in the *Wilson* analysis. For example, the court reasoned that “DOMA does not discriminate on the basis of sex because it treats women and men

88. *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (citing *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999)).

89. *Feeney*, 442 U.S. at 274.

90. 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

91. FLA. STAT. § 741.212(1) (1997).

Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state. *Id.*

92. 28 U.S.C. § 1738C (1996).

93. *See Wilson*, 354 F. Supp. 2d at 1305-06.

94. *Id.* at 1307-08.

equally.”⁹⁵ Further, because there was allegedly no fundamental right to same-sex marriage, rational basis review was appropriate, and that review was understood to be “very deferential to the legislature.”⁹⁶

If the *Wilson* court is incorrect and the Florida statute does not pass muster under equal protection or due process guarantees, then the state will have to recognize same-sex marriages whether celebrated in Florida or Massachusetts. Suppose for purposes here, however, that the Florida statute passes muster. A separate issue involves the constitutionality of the federal statute.

The *Wilson* court reasoned that “Congress’ actions in adopting DOMA are exactly what the Framers envisioned when they created the Full Faith and Credit Clause,”⁹⁷ noting that the United States Supreme Court has clearly established that “the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.”⁹⁸ Yet, the court failed to note that its own analysis was undercut rather than supported by the cited full faith and credit jurisprudence.

When explaining that one state does not have to apply another state’s law in violation of its own public policy, the Supreme Court was not offering an interpretation of DOMA but, instead, the requirements of the Full Faith and Credit Clause. Because the Full Faith and Credit Clause does not require one state to substitute another state’s public policy for its own, Florida would not have to recognize its domiciliaries’ marriage in Massachusetts even without DOMA. But that means that the challenge to section two could not be sustained, because plaintiffs did not have standing to challenge the law. Thus, even if section two were struck down, Florida still would not have to recognize the marriage celebrated in Massachusetts because, in this case, Florida would not be forced to substitute the law of another state for its own. But that would mean that the plaintiffs would not be able to secure the relief that they sought even if the *Wilson* court were to have issued a favorable ruling on the merits with respect to the constitutionality of the federal law.

Consider the Lovings’ marriage, which had been validly celebrated in the District of Columbia where interracial marriages were permitted.⁹⁹ Why wasn’t that marriage subject to full faith and credit guarantees? Because the marital parties’ domicile determines whether the parties’ marriage is valid.¹⁰⁰

95. *Id.* (citing *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004)).

96. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (citing *Kandu*, 315 B.R. at 145).

97. *Wilson*, 354 F. Supp. 2d at 1303; *see also* *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 979 (N.D. Cal. 2012) (“In Section 2 of DOMA, Congress, by virtue of the express grant of authority under the second sentence of the Full Faith and Credit Clause, permitted a state to decline to give effect to the laws of other states respecting same-sex marriage.”).

98. *Wilson*, 354 F. Supp. 2d at 1303 (citing *Nevada v. Hall*, 440 U.S. 410, 422 (1979)).

99. *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (“In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws.”).

100. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121, 132 (1934) (“[A] marriage

Basically, marriages are not judgments and do not receive the same kind of faith and credit that judgments receive.¹⁰¹ Because that is so and because Mildred Jeter and Richard Loving were Virginia domiciliaries,¹⁰² the question before the *Loving* Court was not whether Virginia, the domicile, had to recognize a marriage validly celebrated in a different jurisdiction because of full faith and credit guarantees, but whether any state could refuse to recognize interracial marriages without thereby violating federal constitutional guarantees.

The point here is not that DOMA's section two is beyond challenge. Rather, it is merely that the *Wilson* court was in such a hurry to uphold the law that it did not even consider the conditions under which a plaintiff would have standing to challenge the law.

As an initial matter, section two of DOMA has not been authoritatively construed, and it will matter whether the section is merely construed as reaffirming that domiciles have the power not to recognize same-sex marriages celebrated elsewhere or, instead, as doing more. If the former, then the section is not giving states a power that they do not have already, and it is more difficult to construct the circumstances under which plaintiffs will have standing to challenge the section. However, this DOMA section does not seem plausibly construed to be so limited. The section says that *no* state shall be required to recognize a same-sex marriage validly celebrated elsewhere,¹⁰³ which means that the forum state does not have to be the parties' domicile in order to be able to refuse to recognize the marriage.

The United States Supreme Court has never addressed the conditions under which a non-domiciliary state can refuse to recognize the validity of a marriage that is recognized in a sister domiciliary state, so it is unclear whether this DOMA section is affording states any additional power. The Court has noted, however, that society "has an interest . . . in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions,"¹⁰⁴ and that states have a "legitimate concern in the status of persons domiciled there as

is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with" unless the marriage is against the law of the state of domicile of either party.); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971) ("The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage. . . .").

101. Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 2 (2008) ("[T]he Full Faith and Credit Clause imposes a far more rigorous obligation on states to recognize judgments, such as adoption decrees and divorces, than marriages and laws.").

102. *Loving*, 388 U.S. at 2.

103. See 28 U.S.C. § 1738C (1996). No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. *Id.*

104. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

respects the institution of marriage.”¹⁰⁵ It is simply unclear whether these interests are sufficiently important in the constitutional scheme to require non-domiciliary states to recognize marriages valid in sister domiciles. In any event, the power accorded under section 2 is significantly broader than the traditional deference accorded to the domicile at the time of the marriage and, indeed, would seem to undermine the power of the domicile to determine the marital status of its domiciliaries.

In *Ex parte Kinney*, a federal district court suggested that a marriage prohibited by local law would nonetheless have to be recognized if the married couple had been passing through a state rather than becoming domiciled therein.¹⁰⁶ However, this was because refusing to recognize the marriage would violate right to travel rather than full faith and credit guarantees.¹⁰⁷ The United States Supreme Court has already made clear that Congress cannot authorize state abridgement of the right to travel.¹⁰⁸

If a state were to deny recognition to the marriage of a same-sex couple passing through a state, DOMA *might* be subject to challenge based on privileges and immunities guarantees. However, such a same-sex married couple would only have standing to challenge section two of DOMA if that section accorded a power to the state that the state did not have without DOMA.¹⁰⁹ Thus, if states as sovereigns have the power to refuse to recognize any marriage that violates local policy, regardless of where or when that marriage was celebrated, then there would be no standing to challenge section two of DOMA as a violation of right to travel guarantees. *Ex hypothesi*, the section does not give states a power that they do not already have.

Consider a different part of section two, which permits states to refuse to recognize “a right or claim arising from [a same-sex] relationship.”¹¹⁰ If that is interpreted to mean that a state is permitted to refuse to recognize a right arising from a judgment involving a same-sex divorce,¹¹¹ then there is another context in which section two of DOMA might be challenged. Absent DOMA,

105. *Id.*

106. 14 F. Cas. 602, 606 (E.D. Va. 1879) (“That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States, as given by the section of the constitution just quoted, and by the clause of the fourteenth amendment previously considered.”).

107. *Id.*

108. *See Saenz v. Roe*, 526 U.S. 489, 507-08 (1999) (“[W]e have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.”).

109. For a discussion of marriage recognition and the right to travel, *see generally* Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS. J. L. GENDER & SOC’Y 1-34 (2010).

110. 28 U.S.C. § 1738C (1996).

111. *See* Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 122 (2011) (reading DOMA to permit a state to refuse to recognize a same-sex divorce or rights arising therefrom).

a divorce judgment validly issued in one state is subject to full faith and credit guarantees,¹¹² so this section of DOMA clearly does more than merely confirm a power the state already has, and might harm a plaintiff who would otherwise be owed property pursuant to a divorce decree.

A separate question is whether Congress has the power to alter full faith and credit guarantees as a general matter,¹¹³ especially when making use of an express classification on the basis of gender to do so.¹¹⁴ In *In re Levenson*,¹¹⁵ the 9th Circuit explained in the context of examining section three of DOMA that the plaintiff:

was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse's sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and constitutes a violation of the EDR [Employment Dispute Resolution] Plan's prohibition of sex discrimination.¹¹⁶

The same point might be made about section two, namely, that it employs a sex-based classification to determine which divorce judgments will not be subject to the usual faith and credit guarantees. Even if Congress were found to have the power to reduce the faith and credit to be given to divorce judgments as a general matter, that would not establish that Congress is permitted to make use of a classification triggering closer scrutiny when exercising that power.

B. Limiting the Implications of a Decision

Both *Kandu* and *Wilson* addressed some issues that should not have been addressed because the plaintiffs lacked standing to challenge the DOMA sections at issue. Their discussions of the law have later misled courts attempting to address those issues.¹¹⁷ *Perry v. Brown*¹¹⁸ was misleading in a different respect, namely, it purportedly was addressing an issue that had not come up in any other state, perhaps in an attempt to avoid review by the United States Supreme Court,¹¹⁹ but the rationales it employed had ramifications for a

112. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.”).

113. *Id.* (“Whether Congress has the power to create exceptions . . . is a question on which we express no view.”).

114. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (noting that the “Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975)).

115. 587 F.3d 925 (9th Cir. 2009).

116. *Id.* at 929.

117. *See, e.g., infra* notes 185-217 and accompanying text (discussing *Jackson*).

118. 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2675 (2013).

119. *Perry*, 671 F.3d at 1064 (“This unique and strictly limited effect of Proposition 8

number of states.¹²⁰

In *Perry*, the Ninth Circuit addressed the constitutionality of Proposition 8, which was a constitutional amendment adopted by referendum that withdrew from same-sex couples the right to marry.¹²¹ The court noted, “Proposition 8 . . . could not have been enacted to advance California’s interests in childrearing or responsible procreation, for it had no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples.”¹²² Because Proposition 8’s “only effect was to take away that important and legally significant designation, while leaving in place all of its incidents,”¹²³ the court could consider the “unique and strictly limited effect of Proposition 8 . . . [and] address the amendment’s constitutionality on narrow grounds.”¹²⁴ The court implied that it could cabin the effect of its decision, and thus not take sides on “an important and highly controversial question, . . . [which] is currently a matter of great debate in our nation, and an issue over which people of good will may disagree, sometimes strongly.”¹²⁵ However, the court was understating the degree to which its reasoning would be applicable in cases throughout the nation.

Gay or lesbian individuals can adopt children in most if not all states,¹²⁶ so same-sex marriage bans will not, as a general matter, prevent members of the LGBT (lesbian, gay, bisexual, and transgender) community from having or raising children. Further, in those states permitting second-parent adoptions, each member of a same-sex couple can be the legal parent of the same child,¹²⁷ so precluding the adults from marrying in such a state would not affect their parenting rights and obligations. The *Perry* court’s comments about the irrationality of the same-sex marriage ban justification that focuses on parenting would also have import in a variety of other states.

Consider those states where members of the LBGT community can adopt

allows us to address the amendment’s constitutionality on narrow grounds.”).

120. See *infra* notes 117-50 and accompanying text (discussing *Perry*).

121. See *Perry*, 671 F.3d at 1063 (“Proposition 8 had one effect only. It stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right—the right to obtain and use the designation of ‘marriage’ to describe their relationships.”).

122. *Id.*

123. *Id.* at 1064.

124. *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012).

125. *Id.*

126. Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. LAW. 365, 386 (2012) (“Gay singles are also able to adopt in most states.”); Nora Udell, Comment, *A Riddle for Dr. Seuss “Are You My (Adoptive, Biological, Gestational, Genetic, De Facto) Mother (Father, Second Parent, or Stepparent)?” and an Answer for Our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage*, 21 TUL. J.L. & SEXUALITY 147, 150 (2012) (“Lesbian and gay adults may adopt as individuals in all fifty states.”).

127. See Eskridge, *supra* note 19, at 1970 (“Many states have allowed lesbian and gay couples to enter ‘second-parent adoptions,’ whereby the same-sex nonparent partner can adopt the child.”).

singly but cannot adopt jointly.¹²⁸ If same-sex partners in those states cannot marry, then children raised by such parents may suffer some of the opportunity costs resulting from the inability of the parent's partner to establish a legal relationship with the child whom she or he is helping to raise.¹²⁹ But it is not as if preventing the second parent to have a legally recognized relationship will mean that the child will not be raised by that parent; rather, the child will be raised in the same environment,¹³⁰ but will simply suffer the opportunity costs associated with the lack of a legal relationship with one of the adults raising her. The *Perry* court's comments would seem to have relevance here as well.

The *Perry* court noted that the district court had addressed whether depriving same-sex couples of the right to marry violated due process and equal protection guarantees,¹³¹ but explained that there was another basis upon which a challenge could be made. "Proposition 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason."¹³² The court then suggested that because the deprivation argument "applies to the specific history of same-sex marriage in California, it is the narrowest ground for adjudicating the constitutional questions before us, while the first two theories [i.e., due process and equal protection], if correct, would apply on a broader basis."¹³³

Certainly, it is fair to suggest that no other states exactly mirror the California experience where same-sex couples had and then lost the right to marry.¹³⁴ In Hawaii, it seemed very likely that same-sex couples would have

128. See Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2375 n.17 (2007) (suggesting that at the time "only one quarter of states recognize second-parent adoptions, either by explicit legislation or by judicial decisions interpreting general adoption statutes").

129. See *Adoption of Tammy*, 619 N.E.2d 315, 317 (Mass. 1993) (discussing "the emotional security and current practical ramifications which legal recognition of the reality of her parental relationships will provide Tammy"); Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 662 (2012) (discussing "the immense cost of denying children the benefit of having a second parent.").

130. Cf. *Tammy*, 619 N.E.2d at 320 ("Adoption will not result in any tangible change in Tammy's daily life.").

131. See *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012) ("The district court held Proposition 8 unconstitutional for two reasons: first, it deprives same-sex couples of the fundamental right to marry, which is guaranteed by the Due Process Clause . . . and second, it excludes same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to that honored status, in violation of the Equal Protection Clause.") (citing *Perry v. Schwarznegger*, 704 F. Supp. 2d 921, 991–95 & 997–1003 (N.D. Cal. 2010)).

132. *Perry*, 671 F.3d at 1076 (citing *Romer v. Evans*, 517 U.S. 620, 634–35 (1996)).

133. *Id.*

134. For example, Maine voters rejected permitting same-sex couples to marry, but the law permitting the recognition of such unions was never put into effect. See The Associated Press,

the right to marry,¹³⁵ but the state constitution was changed by referendum before the Hawaii Supreme Court was able to affirm that the Hawaii Constitution protected the right of same-sex couples to marry.¹³⁶ In other states where same-sex couples can form civil unions, they did not have the option of entering into marriages and then have that option withdrawn so that they instead could only enter into civil unions.¹³⁷

Nonetheless, some of the *Perry* court's comments have relevance for states recognizing civil unions but not marriages. For example, the *Perry* court "emphasize[d] the extraordinary significance of the official designation of 'marriage,' . . . [which] is singular in connoting 'a harmony in living,' 'a bilateral loyalty,' and 'a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.'"¹³⁸ Nevertheless, if indeed there is a "status and dignity of marriage"¹³⁹ that simply is not afforded by civil unions or domestic partnerships,¹⁴⁰ then a state reserving marriage for different-sex partners and instead creating a new "separate but equal"¹⁴¹ status would have to offer some legitimate reason to make that distinction. The *Perry* court noted that "[w]ithdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the

N.J. State Senate Panel OKs Gay-Marriage Bill, TIMES ARGUS (Montpelier-Barre, Vt.), 12/8/09, 2009 WLNR 26932038 ("[V]oters in Maine overturned a law that was enacted this year to allow same-sex marriages but never took effect."). However, Maine voters have recently approved same-sex marriage. See Charlotte Observer, *Overtorn DOMA, Rule for Same-Sex Marriage Supreme Court Has Opportunity to Be on Right Side of History*, CHARLOTTE OBSERVER (N.C.), 12/10/12, 2012 WLNR 26272165 ("Last month voters in Maine, Maryland and Washington became the first to approve same-sex marriage at the ballot box.").

135. See *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (remanding consideration of the Hawaii same-sex marriage ban for a determination of whether, "it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.") (citing *Nagle v. Bd. of Educ.*, 629 P.2d 109, 111 (Haw. 1981)).

136. See Eskridge, *supra* note 19, at 1938 ("[T]he Hawaii Legislature placed before the voters a constitutional amendment allowing marriage to be restricted to different-sex couples; the voters adopted the amendment, foreclosing marriage equality in that state.").

137. See, e.g., N.J. STAT. ANN. § 37:1-29 (West 2007) ("'Civil union' means the legally recognized union of two eligible individuals of the same sex established pursuant to this act. Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage."); see also NEV. REV. STAT. § 122A.200(a) (2009) ("Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."). However, Nevada law does not require insurance to be provided to a domestic partner. See NEV. REV. STAT. § 122A.210(1) (2009) ("The provisions of this chapter do not require a public or private employer in this State to provide health care benefits to or for the domestic partner of an officer or employee.").

138. *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

139. *Id.* at 1079.

140. *Id.* at 1078 ("[T]here is a significant symbolic disparity between domestic partnership and marriage.").

141. See *Brown v. Board of Education*, 347 U.S. 483, 488 (1954).

right was withdrawn after a week, a year, or a decade.”¹⁴² That is because the “action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is.”¹⁴³ After all, a state legislature that leaves its marriage laws as they have existed for a long time might merely be focusing on other urgent matters and thus might simply not have focused on the issue rather than be attempting to invidiously discriminate against a particular group.¹⁴⁴

Consider the state deciding to create a separate status lacking the “dignity” of marriage rather than permitting same-sex couples to marry. Those legislatures have a more deliberate purpose than might have been indicated by those legislatures having done nothing at all. A separate issue is whether states offend constitutional guarantees by creating a separate status, but it is implausible to attribute to such legislatures a lack of deliberate purpose. By the same token, consider a state law that affirmatively prohibits same-sex couples from marrying. While a separate question is whether states are permitted to pass such laws or amend their constitutions in that way, it simply is not plausible to describe such efforts as lacking deliberate purpose. Insofar as states are attempting to protect marriage from the devaluing or desanctifying effect that would allegedly occur were same-sex couples also permitted to marry,¹⁴⁵ courts will have to determine whether this is indeed a legitimate goal or instead represents animus or an attempt to impose stigma.¹⁴⁶ Such efforts cannot plausibly be described as not purposive.

The *Perry* court explained that “the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*, whether or not it was required to confer that right or benefit in the first place.”¹⁴⁷ The same reasoning would suggest that the Equal Protection Clause would require some legitimate reason for a state to

142. *Perry*, 671 F.3d at 1080.

143. *Id.*

144. *Cf. id.* (discussing a Supreme Court decision striking down a Colorado amendment that “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else.”) (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)). The court then explained, “*Romer* compels that we affirm the judgment of the district court.” *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012); *See also* *Dragovich v. U.S. Dep’t of Treasury*, 2012 WL 1909603, *10 (N.D. Cal. 2012) (“Singling out same-sex spouses for exclusion from the federal definition of marriage amounts to a bare expression of animus on the basis of sexual orientation and, under *Romer*, this rationale does not satisfy rational basis review.”); *but see* *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 1002 (N.D. Cal. 2012) (“Even though animus is clearly present in its legislative history, the Court, having examined that history, the arguments made in its support, and the effects of the law, is persuaded that something short of animus may have motivated DOMA’s passage.”). The court nonetheless struck down the DOMA section. *See Perry*, 671 F.3d at 1081.

145. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 336 (D. Conn. 2012) (“BLAG suggests that DOMA was enacted to . . . counteract the devaluation of marriage resulting from laws permitting homosexuals to marry.”).

146. *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (discussing the stigmatizing effect of Texas’s unconstitutional same-sex sodomy ban).

147. *Perry v. Brown*, 671 F.3d 1052, 1083-84 (9th Cir. 2012).

constitutionalize its refusal to recognize the marriages of one particular group, even if the legislature did not have an affirmative obligation to amend the marriage laws to include that group.

The *Perry* court rejected as “implausible”¹⁴⁸ the claim that “denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman.”¹⁴⁹ However, the court offered no reason to believe that California different-sex couples are special in this regard, which suggests that other states would also be offering an implausible justification if claiming that they were restricting marriage to different-sex couples so that the stability of their marriages could be bolstered.¹⁵⁰

Citing *Loving*, the *Perry* court explained that because “tradition alone is insufficient to justify maintaining a prohibition with a discriminatory effect, . . . it is necessarily insufficient to justify changing the law to revert to a previous state.”¹⁵¹ Here, the court is suggesting that merely because a practice is or was traditional will not itself justify maintaining or returning to that practice. This point has force beyond California—it speaks to any state’s claim that it is somehow permissible to prohibit same-sex couples from marrying as a way of preserving traditional marriage.¹⁵²

There is yet another reason that *Perry* would likely have had implications beyond California’s borders. Consider other states that recognize same-sex marriage.¹⁵³ Suppose that there is a referendum in one of those states designed to reserve marriage for different-sex couples. It might be very difficult to persuasively distinguish between the California experience and what happened in the hypothesized state.

The *Perry* court was allegedly limiting its analysis to a discussion of the California experience in particular,¹⁵⁴ although its justifications make the

148. *Id.* at 1089.

149. *Id.*

150. *Cf. Dragovich v. U.S. Dep’t of Treasury*, 872 F. Supp. 2d 944, 958 (N.D. Cal. 2012) (“There is no reasonable basis to believe that heterosexual couples are more inclined to marry and have children or to enter into a marriage after accidentally conceiving a child, due to this limiting federal definition enacted in 1996.”); *Windsor v. U.S.*, 833 F. Supp. 2d 394, 404 (S.D.N.Y. 2012) (“It does not follow from the exclusion of one group from federal benefits (same-sex married persons) that another group of people (opposite-sex married couples) will be incentivized to take any action, whether that is marriage or procreation”). Here, the *Dragovich* and *Windsor* courts were discussing section 3 of DOMA, but the same point presumably applies to a state’s same-sex marriage ban.

151. *Perry*, 671 F.3d at 1093.

152. *But cf. Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring in the judgment and suggesting that “preserving the traditional institution of marriage” is a legitimate state interest); *see id.* at 601–02 (Scalia, J., dissenting and discussing why O’Connor’s position is not tenable).

153. John Romano, *Tide Turns for Legal Same-Sex Marriages*, TAMPA BAY TIMES, Dec. 16, 2012, at 1B, available at 2012 WLNR 27182627 (“[N]ine states and the District of Columbia now recognize same-sex marriages.”).

154. *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012).

opinion more robust than its own comments about the opinion would suggest. While the Supreme Court vacated that opinion,¹⁵⁵ several of the themes in *Perry* were articulated in *United States v. Windsor*.¹⁵⁶ The Ninth Circuit will likely have other opportunities to address same-sex marriage issues in light of *Windsor's* reasoning — district courts in Hawaii¹⁵⁷ and Nevada¹⁵⁸ have addressed whether those states have violated federal constitutional guarantees by refusing to recognize same-sex marriage.

C. On Striking a Law while Weakening Constitutional Guarantees

When striking Proposition 8 on grounds that were allegedly only applicable to California, the Ninth Circuit offered robust arguments that might have import in challenges to same-sex marriage bans in a number of states. The First Circuit has taken the opposite tack. In *Massachusetts v. United States Department of Health and Human Services*,¹⁵⁹ the First Circuit took a robust position by striking down section three of DOMA, but may have weakened the applicable constitutional protections in the process.

The *Massachusetts* court provided a little background to help explain why DOMA was passed in the first place. The court pointed out that the Hawaii Supreme Court had “held that it might violate the Hawaii constitution to deny marriage licenses to same-sex couples,”¹⁶⁰ and that Congress passed DOMA not long after the Hawaii decision was issued.

Members of Congress had apparently feared that if Hawaii recognized same-sex marriage, then same-sex domiciliaries of other states would go to Hawaii, marry, and then return back to their domiciles demanding that the marriages be recognized.¹⁶¹ The *Massachusetts* court commented that “Section 2, which is not at issue here, absolves states from recognizing same-sex marriages solemnized in other states,”¹⁶² implying that this section, unlike section 3, was merely preserving the power of “individual states [to decide] . . . who can be married to whom.”¹⁶³

The *Massachusetts* court failed to mention the important differences between a state where the couple is living at the time of the marriage — their

155. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

156. See *United States v. Windsor*, 133 S. Ct. 2675, 2693–95 (2013) (discussing how DOMA harms children); see *Perry*, 133 S. Ct. at 2693 (emphasizing the dignity afforded by recognizing same-sex marriages).

157. See *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012).

158. See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

159. 682 F.3d 1 (1st Cir. 2012).

160. *Id.* at 5.

161. See Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 ALB. GOV'T. L. REV. 613, 629 (2012) (“Some in Congress feared that if Hawaii were to recognize such unions, then same-sex couples domiciled in other states would go to Hawaii, marry, and then return to their domiciles demanding that their marriages be recognized.”).

162. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012).

163. *Id.* at 5.

domicile — and a state through which a couple passes on a vacation.¹⁶⁴ Nor did the court mention section two's failure to take account of those differences or even that section two may allow individuals to avoid their court-imposed obligations by fleeing to jurisdictions that refuse to recognize same-sex marriages or rights arising from such relationships.¹⁶⁵ The court instead seemed to think that section two was purely designed to protect the states from Hawaii.¹⁶⁶

The court's discussion of section two was all dicta, because the constitutionality of that section was not before the court.¹⁶⁷ Nonetheless, the court's implying that section two was merely preserving federalism was at best misleading, and may result in a mistaken analysis regarding the constitutionality of section two when and if such a challenge reaches the courts.

The First Circuit directed its attention to the constitutionality of the section before it. First, the court rejected that DOMA was unconstitutional under the most forgiving form of rational basis review, because "Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government."¹⁶⁸ Needless to say, this is a very forgiving standard, because it means that even if Congress's stated goals are undermined by a piece of legislation, the constitutionality of that legislation might nonetheless be upheld as long as Congress might have sincerely but mistakenly believed that its goals would be promoted by the statute at issue.

The First Circuit did not employ this most deferential rational basis review, however, instead examining section three with a less deferential rational basis test. The surprising part of the analysis was in the court's explanation of why that higher scrutiny was required.

First, the court explained that it was unwilling to employ intermediate scrutiny, suggesting that "extending intermediate scrutiny to sexual preference classifications is not a step open to [the court];"¹⁶⁹ after all, *Romer v. Evans*¹⁷⁰

164. See *supra* notes 102-105 and accompanying text (discussing the difference for right to travel purposes).

165. See Mark Strasser, *DOMA's Bankruptcy*, 79 TENN. L. REV. 1, 22 (2011) ("Section two of DOMA undermines this uniform treatment by making one kind of divorce judgment (involving same-sex couples) subject to non-recognition. It permits an individual who does not wish to fulfill the legal obligations imposed by a court of law to avoid those obligations by moving to a state that refuses to enforce divorce judgments involving same-sex partners.").

166. *Massachusetts*, 682 F.3d at 15 ("The fear that Hawaii could impose same-sex marriage on sister states through the Full Faith and Credit Clause...relates solely to section 2 of DOMA, which is not before us.").

167. See *id.* at 5 ("These appeals present constitutional challenges to section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which denies federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to surviving spouses from couples thus married."). See also *id.* at 6 ("Section 2 ... is not at issue here.").

168. *Id.* at 9.

169. *Id.*

170. 517 U.S. 620 (1996).

had “avoided the suspect classification label.”¹⁷¹ But at least two points might be made about that justification. First, the amendment at issue in *Romer* expressly targeted sexual orientation rather than sex.¹⁷² Even if it were true that classifications on the basis of sexual orientation should not trigger intermediate scrutiny, a separate issue is whether the expressly sex-based classification in DOMA should trigger intermediate scrutiny. Second, while *Romer* struck down Colorado’s Amendment Two on rational basis grounds, the Court was much less clear about the level of scrutiny it was employing in its more recent decision involving legislation targeting orientation — *Lawrence v. Texas*.¹⁷³ That decision was almost a study in avoidance with respect to the level of scrutiny being employed.¹⁷⁴

It is not as if the *Massachusetts* court ignored *Lawrence*,¹⁷⁵ although the court failed to discuss whether *Lawrence* cast doubt on whether mere rational basis review was appropriate for orientation discrimination.¹⁷⁶ Instead, the court cited the rational basis with bite cases¹⁷⁷ — *U.S. Department of Agriculture v. Moreno*,¹⁷⁸ *Cleburne v. Cleburne Living Center*,¹⁷⁹ and *Romer v. Evans*¹⁸⁰ — to justify the court’s refusal to “employ rational basis review in its minimalist form.”¹⁸¹

Here, the court is offering one possible understanding of the jurisprudence, namely, that statutes targeting sexual orientation trigger rational basis with bite scrutiny.¹⁸² However, the *Massachusetts* court then noted that

171. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012).

172. *See Romer*, 517 U.S. at 624 (“Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”).

173. 539 U.S. 558 (2003).

174. *See supra* notes 56-61 and accompanying text (discussing the difficulties in discerning the level of scrutiny employed in *Lawrence*).

175. *See Massachusetts*, 682 F.3d at 11.

176. *See supra* note 65 and accompanying text (if the level of scrutiny is not discussed in *Lawrence* due to a due process rather than an equal protection analysis then a different issue is raised; presumably, the level of scrutiny applied to a statute burdening intimate relationships is at least as demanding as the level of scrutiny implicated by a statute burdening intimate relations).

177. *See Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012).

178. 413 U.S. 528 (1973).

179. 473 U.S. 432 (1985).

180. 517 U.S. 620 (1996).

181. *Massachusetts*, 682 F.3d at 10 (The Second Circuit has suggested that statutes targeting on the basis of orientation should be examined under intermediate scrutiny); *see Windsor v. U.S.*, 699 F.3d 169, 185 (2nd Cir. 2012), *aff’d sub nom.* *United States v. Windsor*, 133 S. Ct. 2675 (2013) (“Homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect.”).

182. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more

“a separate element absent in *Moreno*, *City of Cleburne*, and *Romer* — federalism — must be considered.”¹⁸³

Because Massachusetts recognizes same-sex marriage but federal law does not, the First Circuit was forced to confront an issue that the *Kandu* court could avoid, namely, what test should be used when federal law supplants state domestic relations law. In its analysis of the appropriate level of scrutiny, the First Circuit cited *Hisquierdo v. Hisquierdo*,¹⁸⁴ which was one of the cases cited in *Kandu*.¹⁸⁵ The *Hisquierdo* Court explained, “State family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”¹⁸⁶

The test articulated in *Hisquierdo* discussing major damage to clear and substantial federal interests seems much more demanding than even rational basis with bite review, because the interests must be substantial rather than merely legitimate, and the harm to those interests must be considerable, i.e., must do major damage. This means that if a federal statute supplanting state family law does not prevent significant damage to important federal interests, then that statute does not pass muster. This test is triggered when “Congress has ‘positively required by direct enactment’ that state law be pre-empted.”¹⁸⁷

The First Circuit’s analysis suggests that section three of DOMA is constitutionally vulnerable in light of two different lines of cases — the rational basis with bite scrutiny that is triggered by statutes targeting on the basis of orientation and the federal preemption of state family law cases requiring major damage to substantial federal interests. But then, the *Massachusetts* court offered an analysis potentially undercutting both lines of cases: “[O]ur decision discusses equal protection and federalism concerns separately, it concludes that governing precedents under both heads combine—not to create some new category of ‘heightened scrutiny’ for DOMA under a prescribed algorithm, but rather to require a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage.”¹⁸⁸

The difficulty here is in implying that heightened rational basis is triggered because of the *combination* of the equal protection and federalism concerns. That is mistaken because heightened rational basis (or, perhaps, a more demanding level of scrutiny) is triggered on equal protection grounds alone and, further, a level of scrutiny likely more demanding than rational basis with bite scrutiny is triggered by the federal government’s attempt to

searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

183. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012).

184. *See id.* at 12 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)).

185. *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004).

186. *Hisquierdo*, 439 U.S. at 581 (citing *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

187. *Id.* (citing *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

188. *Massachusetts*, 682 F.3d at 8.

displace state family law.

For purposes of the First Circuit holding,¹⁸⁹ it did not matter whether the less deferential rational basis test was triggered by each of the factors cited or, instead, by a combination of those factors. However, that likely would matter in cases challenging either section two of DOMA or a state same-sex marriage ban.

D. Federal Challenges to State Same-Sex Marriage Bans

*Jackson v. Abercrombie*¹⁹⁰ involved a federal challenge to Hawaii's same-sex marriage ban. The district court quickly dispensed with *Perry*, because the Ninth Circuit had "repeatedly asserted that its holding was limited to the unique facts of California's same-sex marriage history."¹⁹¹ Once freed from the *Perry* holding, the *Jackson* court felt unencumbered by the *Perry* reasoning as well,¹⁹² although the court first addressed whether the state's same-sex marriage ban triggered closer scrutiny under due process guarantees.

The *Jackson* court claimed that "in discussing the importance of marriage, the Supreme Court has often linked marriage to procreation," citing *Zablocki v. Redhail*.¹⁹³ Yet, the marriage cases are better understood as recognizing a dual aspect to marriage — it provides a setting in which children can thrive and it provides a setting in which adults can flourish. Consider the case cited by the *Jackson* court — *Zablocki*. Roger Redhail had already had one child out of wedlock¹⁹⁴ and was seeking to marry his pregnant fiancée before she gave birth¹⁹⁵ so that he would not have another child out of wedlock. The Court clearly understood that children are born both within and outside of the context of marriage, "[a]s the facts of this case illustrate."¹⁹⁶

The *Zablocki* Court explained that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships,"¹⁹⁷ suggesting that it did not make "sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the

189. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012) ("Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.").

190. 884 F. Supp. 2d 1065 (D. Haw. 2012).

191. *Id.* at 1071.

192. *See infra* notes 214-17 and accompanying text (discussing some of the respects in which *Jackson* ignored *Perry*).

193. *See Jackson*, 884 F. Supp. 2d at 1095 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

194. *See Zablocki*, 434 U.S. at 377-78 (explaining that Redhail had fathered a child as a minor).

195. *Id.* at 379 ("[A]ppellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time.").

196. *Id.* at 386.

197. *Id.*

foundation of the family in our society.”¹⁹⁸ But gay and lesbian couples, like other couples, have children to raise, so *Zablocki* speaks to why same-sex marriage should, rather than should not, be recognized. So, too, insofar as *Loving* recognized marriage as “fundamental to our very existence and survival,”¹⁹⁹ the Court was recognizing the importance of providing a setting in which children might thrive. Here, too, the decision supports recognizing same-sex marriage, because same-sex couples will also be helped by marriage in their attempts to provide a setting in which their children will thrive, which is essential to society’s continuation.

The Court provides another perspective on why marriage is so important in *Turner v. Safley*,²⁰⁰ where the Court addressed the constitutionality of a Missouri limitation on prison marriages.²⁰¹ The *Turner* Court listed some of the “important attributes of marriage”²⁰² including: (1) marriages “are expressions of emotional support and public commitment;”²⁰³ (2) “the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication;”²⁰⁴ (3) most “marriages are formed in the expectation that they ultimately will be fully consummated;”²⁰⁵ and (4) “marital status often is a precondition to the receipt of government benefits.”²⁰⁶ These constitutionally significant aspects of marriage relate to the adults’ relationship rather than to the adults’ providing a setting in which the children whom they are raising might thrive.

After failing to appreciate the reasons that marriage is important are implicated whether the couple is composed of individuals of the same sex or of different sexes, the *Jackson* court considered the history and traditions test. Citing *Kandu*, the court explained that it “is beyond dispute that the right to same-sex marriage is not “objectively, deeply rooted in this Nation’s history and tradition.”²⁰⁷ The court then considered the *Lawrence* Court’s point that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”²⁰⁸

198. *Id.*

199. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

200. 482 U.S. 78 (1987).

201. *Id.* at 82 (“The challenged marriage regulation, which was promulgated while this litigation was pending, permits an inmate to marry only with the permission of the superintendent of the prison, and provides that such approval should be given only ‘when there are compelling reasons to do so’. App. 47. The term ‘compelling’ is not defined, but prison officials testified at trial that generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason.”).

202. *Id.* at 95.

203. *Id.*

204. *Id.* at 96.

205. *Id.*

206. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

207. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1096 (D. Haw. 2012) (citing *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004)).

208. *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003).

The *Jackson* court failed to understand that *Lawrence* rejects the application of the history and tradition test in the marriage context,²⁰⁹ since *Lawrence* recognized that there had been no history of recognizing interracial marriage and that, nonetheless, such marriages are protected under due process. Rather than address the point that it was using the wrong test, the *Jackson* court shifted ground, reasoning that *Loving* “did not involve expanding the traditional definition of marriage as being between a man and a woman,”²¹⁰ whereas the case before the court “presents a different right, the right to marry someone of the same sex.”²¹¹

The *Jackson* court refused to consider how its recommended approach would have changed the result had it been adopted by the *Loving* Court — that Court presumably would have said that the Lovings sought to expand the traditional definition of marriage as being between a man and a woman of the same race, which is exactly what the *Loving* Court did not say. While it is certainly true that classifying on the basis of sex is different from classifying on the basis of race, the appeal to the traditional definition of marriage is no more convincing in the context of a challenge to a same-sex marriage ban than it was in the context of a challenge to an interracial marriage ban.

The *Jackson* court was no more persuasive in its discussion of the equal protection issues. It suggested that the Hawaii marriage statute “does not treat males and females differently as a class. It is gender-neutral on its face; it prohibits men and women equally from marrying a member of the same-sex.”²¹² This analysis is especially disappointing because the Hawaii Supreme Court had pointed out almost two decades earlier that the state was regulating “access to the status of married persons, on the basis of the applicants’ sex.”²¹³ When making that determination, the Hawaii Supreme Court did not claim that one sex was adversely impacted more than another. Rather, because the ban “on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex,”²¹⁴ the Hawaii Supreme Court held that the statute “establishes a sex-based classification.”²¹⁵ The federal district court nowhere discusses why this facial sex-based classification should somehow be construed as gender-neutral and thus subject to the *Feeney* test.²¹⁶

The *Jackson* court examined the Hawaii statute with rational basis review,

209. See Jack B. Harrison, *The Strange Intersection between Law, Religion, and Government in the Regulation of Marriage*, 6 CHARLESTON L. REV. 547, 553 (Spring 2012) (noting that the history and tradition test cannot account for “interracial marriages, marriages involving indigents, and prison marriages.”).

210. *Jackson*, 884 F. Supp. 2d at 1097.

211. *Id.*

212. *Id.* at 1098 (citing *Kandu*, 315 B.R. at 143; *Pers. Adm’r v. Feeney*, 442 U.S. 256, 274 (1979)).

213. *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993).

214. *Id.* at 64.

215. *Id.*

216. See *supra* notes 80-87 (discussing the *Feeney* test).

citing *Romer* for the proposition that a “court applying rational basis review will uphold a law so long as the legislative classification bears a rational relationship to some legitimate end.”²¹⁷ The court rejected that it should apply a “‘more searching form’ of review,”²¹⁸ at least in part, because the First Circuit had applied an “‘intensified scrutiny’ based on a combination of equal protection and federalism concerns.”²¹⁹ However, *Romer* was one of the cases that itself applied a more searching review.

Some of the justifications that the *Perry* court said could not take seriously were accepted as sufficient by the *Jackson* court. For example, the *Jackson* court believed that “the legislature could rationally conclude that defining marriage as a union between a man and woman provides an inducement for opposite-sex couples to marry, thereby decreasing the percentage of children accidentally conceived outside of a stable, long-term relationship,”²²⁰ i.e., that preventing same-sex couples from marrying would somehow induce different-sex couples to marry. But if *Perry* is any guide, the Ninth Circuit will suggest that Hawaii’s refusal to recognize same-sex marriage will have “no effect . . . on the procreative practices of other couples,”²²¹ i.e., that preventing same-sex couples from marrying will not provide an inducement for different-sex couples to marry before they procreate. So, too, the *Jackson* court believed that the legislature could justify its refusal to permit same-sex couples to marry by appealing to parenting considerations, even though the legislature had “passed a civil unions law, conferring all of the state legal rights and benefits of marriage (except the title marriage) on same-sex couples who enter into a civil union.”²²² Again, if *Perry* is any guide, the Ninth Circuit will point out that the refusal to permit same-sex marriage cannot be justified “to advance [Hawaii’s] interests in childrearing or responsible procreation, for it [would have] no effect on the rights of same-sex couples to raise children.”²²³

The Ninth Circuit may well have the opportunity to correct *Jackson*’s errors on appeal. Nonetheless, the *Jackson* reasoning and analyses are disappointing, because they involve misrepresentations of the prevailing jurisprudence. Further, it may well be that the misleading or mistaken analyses in *Jackson* or other cases will never be addressed, leaving them lurking to be used in other marriage cases in particular or in ways that cannot currently be foreseen.

In *Sevcik v. Sandoval*,²²⁴ the district court of Nevada addressed whether

217. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065,1102 (D. Haw. 2012) (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

218. *Id.* at 1103.

219. *Id.* (citing *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012)).

220. *Id.* at 1072.

221. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

222. *Jackson*, 884 F. Supp. 2d at 1072.

223. *Perry*, 671 F.3d at 1063.

224. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 997 (D. Nev. 2012).

that state's refusal to recognize same-sex marriage violated federal constitutional guarantees. The court's equal protection analysis was surprising. The court understood that "the State of Nevada may be said to have drawn a gender-based distinction, because although the prohibition against same-sex marriage applies equally to men and women, 'the statutes proscribe generally accepted conduct if engaged in by members of' the same gender."²²⁵ Indeed, the district court noted that the "*Loving* Court . . . specifically rejected the argument that a reciprocal disability necessarily prevents heightened scrutiny under the Equal Protection Clause."²²⁶ However, the court concluded that "although the distinction drawn by the State could be characterized as gender-based under the *Loving* reciprocal-disability principle, the Court finds that for the purposes of an equal protection challenge, the distinction is definitely sexual-orientation based."²²⁷ Why? Because the "issue turns upon the alleged discriminatory intent behind the challenged laws, which is the *sine qua non* of a claim of unconstitutional discrimination."²²⁸ But, as the court itself explained, the discriminatory intent test is only triggered when a "facially neutral" government policy is at issue.²²⁹ At issue in the Nevada case was not a facially-neutral statute but an express sex-based classification whose disproportionate impact had not been established.²³⁰ Nonetheless, the court cited *Romer* and concluded that rational basis scrutiny was appropriate,²³¹ and then employed deferential rational basis scrutiny.²³²

The court explained that the "protection of the traditional institution of marriage, which is a conceivable basis for the distinction drawn in this case, is a legitimate state interest,"²³³ and that prohibiting same-sex marriage was rationally related to the promotion of that interest.²³⁴ The district court implied that permitting same-sex couples to wed was an abuse of the institution of marriage,²³⁵ and seemed to take seriously the contention that if same-sex marriage were recognized, "a meaningful percentage of heterosexual persons would cease to value the civil institution as highly as they previously had and hence enter into it less frequently, opting for purely private ceremonies, if any,

225. *Id.* at 1004 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

226. *Id.* (citing *Loving*, 388 U.S. at 8).

227. *Sevcik*, 911 F. Supp. 2d at 1005.

228. *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

229. *See id.* (citing *Lee v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001)).

230. *See Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) ("The laws at issue here are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived.").

231. *See id.* at 1006.

232. *Id.* at 1014 ("Under rational basis review, a court does not judge the perceived wisdom or fairness of a law, nor does it examine the actual rationale for the law when adopted, but asks only whether 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'") (citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)).

233. *Id.*

234. *See id.*

235. *See id.*

whether religious or secular, but in any case without civil sanction, because they no longer wish to be associated with the civil institution as redefined.”²³⁶

Nevada recognizes domestic partnerships,²³⁷ and the *Sevcik* court apparently feared that permitting same-sex couples to marry rather than establish such partnerships might so taint marriage that a meaningful percentage of heterosexual persons would simply refuse to have anything to do with the institution. While empirical evidence does not seem to back up such a claim,²³⁸ it nonetheless would be an amazing development if the marriage rights of one group could be held hostage in this way by another group. In a different context, Justice Alito has criticized policies that might be thought “tantamount to establishing a majoritarian heckler’s veto,”²³⁹ which is exactly what the *Sevcik* court was apparently willing to countenance.

III. CONCLUSION

In several of the marriage cases, courts have offered mistaken or misleading analyses of either particular laws or constitutional approaches. Sometimes, the courts should not have been addressing the merits in the first place, whereas at other times the courts seemed to be offering off-the-cuff comments or analyses that will continue to appear in the case law. While it is not clear whether these mistaken analyses are offered in attempt to follow the jurisprudence or, instead, to change it, it is clear that the Court must correct these mistaken analyses at the first opportunity.

The mistakes pointed to here run the gamut from errors of omission with respect to the effects of particular laws to misapplication of basic concepts within equal protection or due process jurisprudence. The Court must make special efforts to correct some of the latter, because otherwise they are likely to appear in a whole range of cases, putting basic rights at risk and muddying core constitutional doctrines.

The *Windsor* Court struck down DOMA without specifying the tier of scrutiny being employed. The Court did not address whether same-sex marriage bans constitute gender discrimination nor whether the express use of gender-based terms in a statute is itself enough to trigger closer scrutiny. The Court thereby missed an opportunity to clarify some of the issues currently confusing the lower courts, which likely means that key Fourteenth Amendment guarantees will continue to be subject to chaotic treatment both within and across the circuits. The Court will probably have another opportunity to address some of these issues in the not-too-distant future, an opportunity that must not be squandered.

236. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1016 (D. Nev. 2012).

237. *See id.* at 1015.

238. Cf. Editorial, *Uphold Equal Rights in Maine*, BOSTON GLOBE 8, Oct. 25, 2009, available at 2009 WLNR 21156032 (“Supporters of the ballot initiative argue that same-sex marriage erodes heterosexual marriage, but experience has proven them wrong.”).

239. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 3016 n.10 (2010) (Alito, J., dissenting).