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On DOMA, Proposition 8, and the Implications of Their Potential Unconstitutionality for Equal Protection and Substantive Due Process Jurisprudence

Mark Strasser

ABSTRACT

In her article *Marriage This Term: On Liberty and the "New Equal Protection,"* Katie Eyer suggests that this term will likely provide a crucial test to determine whether due process or equal protection guarantees will be the preferred basis on which minorities will be able to protect themselves from majoritarian discrimination. Assuming that the Court reaches a protective result on the merits in either *United States v. Windsor* or *Hollingsworth v. Perry*, however, it seems unlikely that future litigants will know much more than they do now. A robust decision that sexual orientation triggers intermediate scrutiny might be a last hurrah for the recognition of new suspect or quasi-suspect classes or, instead, an invitation for other not-yet-recognized classes to seek to establish that they, too, should be so recognized. What is more likely is that even if the Court strikes down either Proposition 8 or section 3 of the Defense of Marriage Act, the Court will do so on a basis that will provide little or no guidance with respect to which ground is more likely in future to lead to a positive result.

AUTHOR

Mark Strasser is Trustees Professor of Law at Capital University Law School, Columbus, Ohio.

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INTRODUCTION

The U.S. Courts of Appeals for the First and Second Circuits have held that section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, although their analyses are markedly different.[1] In addition, the Ninth Circuit has struck down California's constitutional amendment restricting marriage to different-sex couples.[2] The U.S. Supreme Court has granted certiorari to hear both the Second Circuit case, *United States v. Windsor*,[3] and the Ninth Circuit case, *Hollingsworth v. Perry*,[4] and a decision on the merits in either of these cases will have important implications for lesbian, gay, and bisexual (LGB) families.

In her article *Marriage This Term: On Liberty and the "New Equal Protection,"* Professor Katie Eyer suggests that these cases may test the thesis proposed by some commentators that equal protection guarantees are no longer the best vehicle for providing protection against majoritarian discrimination.[5] But *Windsor* and *Perry* are unlikely to test such a thesis, even assuming that the Court reaches the merits in one or both cases.[6]

Suppose, for example, that the Court adopts the Obama administration's position that orientation discrimination triggers intermediate scrutiny.[7] There would be no way to tell whether the Court's recognition of an additional quasi-suspect classification would signal the beginning of an era of rejuvenated equal protection guarantees for minorities or, instead, a kind of last hurrah.

Those who would instead suggest that we are witnessing an era of expanded due process protections under an umbrella of newly recognized fundamental rights seem no closer to the mark. The Court has been unwilling to expand the list of interests expressly recognized as fundamental,[8] although the Court has been willing

1. *See* Windsor v. United States, 699 F.3d 169 (2d Cir. 2012); Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).
2. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).
3. 133 S. Ct. 786 (2012).
4. *Id.*
5. *See generally* Katie R. Eyer, *Marriage This Term: On Liberty and the "New Equal Protection,"* 60 UCLA L. REV. DISC. 2 (2012).
6. In both certiorari grants, the Court also directed the parties to address standing. *See Perry*, 133 S. Ct. at 786; *Windsor*, 133 S. Ct. at 786.
7. *See, e.g.*, *In re* Balas, 449 B.R. 567, 573–74 (Bankr. C.D. Cal. 2011) (referring to U.S. Attorney General Eric Holder's position advocating "heightened scrutiny of classifications based on sexual orientation").
8. *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting))).

to strike down laws adversely affecting important interests without specifying the level of scrutiny triggered by the interest at issue.[9]

Suppose that the Court were to find that the fundamental right to marry includes the right to marry a same-sex partner. Even so, the Court would likely suggest that it was not thereby expanding the rights qualifying as fundamental but, instead, was merely making clear that the right to marry is not reserved for those wishing to marry someone of a different sex.

In short, this Supreme Court term may have important implications for LGB families. It seems unlikely, however, that the Court will issue any decision that will clarify whether, as a general matter, minority plaintiffs are more likely to succeed by focusing on the class rather than the interest that has been adversely affected by particular legislation.

I. EQUAL PROTECTION V. SUBSTANTIVE DUE PROCESS

Commentators offer differing assessments about which constitutional provisions are more likely to provide protection for minorities. Some suggest that groups challenging laws denying them important interests are more likely to succeed by arguing that their liberty interests have wrongfully been denied under due process guarantees than by asserting that those laws violate equal protection guarantees.[10] Others disagree.[11]

Professor Yoshino has noted that the Court has not recognized a suspect or quasi-suspect class since the 1970s,[12] and he seems quite confident that the Court will not be according that status to many additional classifications.[13] That said, he acknowledges that one or two more groups might be added to the list before the Court firmly closes the door on the recognition of new suspect or quasi-suspect classes,[14] and he expressly notes that sexual orientation might be one of the few

9. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas law criminalizing same-sex sodomy without specifying the level of scrutiny employed. The Court simply wrote, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

10. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

11. *See, e.g.*, Andrew Koppelman, *The Right to Privacy?*, 2002 U. CHI. LEGAL F. 105, 106 ("Privacy, however, is a weak constitutional basis for gay rights claims.").

12. Yoshino, *supra* note 10, at 757 ("[T]he last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977.").

13. *See id.* at 750 ("I am confident in my descriptive claim that the Court has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate.").

14. *Id.* at 761 ("[I]t is certainly possible that the Court may give formal heightened scrutiny to another classification or two . . . .").

classifications that might yet be recognized as triggering closer review.[15] He thus would likely agree with Professor Eyer that the equal protection argument might prove fruitful in one of the cases implicating LGB families.[16] The Court's recognition of one or two more classes whose targeting will trigger closer scrutiny, however, could signal either the dawning of a new era in which equal protection guarantees will be applied to more and more groups, or the end of the equal protection era with the Court refusing to recognize any new classes triggering close scrutiny after the last one or two. It is unlikely that this term will yield any decision or reasoning that will settle this debate.[17]

Express classifications on the basis of sex trigger heightened scrutiny.[18] While heightened scrutiny is less demanding than strict scrutiny,[19] "an 'exceedingly persuasive justification' for the classification"[20] must be offered if such a state classification is to pass constitutional muster.

According to current equal protection jurisprudence, a statute that expressly employs a triggering classification will be subject to closer scrutiny.[21] A statute permitting a man to marry a woman but not a man or one permitting a woman to marry a man but not a woman *expressly* classifies on the basis of sex, just as a stat-

15. *Id.* at 761–62 ("The fact that state courts have given legislation burdening gays strict or 'quasi-suspect' scrutiny under their state constitutions, for instance, may inspire federal courts to do the same." (footnotes omitted)).

16. *See* Eyer, *supra* note 5, at 6 ("In the case of the LGB rights movement, there are strong signs that the movement has finally 'arrived,' rendering it plausible for the first time that the Court may extend full equal protection coverage." (footnote omitted)).

17. Ironically, the most likely development this term with respect to equal protection analysis will be the Court's employing strict scrutiny to strike down state efforts to aid those who have historically been subject to discrimination. *See* Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (granting certiorari to hear a challenge to the University of Texas admissions criteria). The Court seems likely to strike down the University's affirmative action policy. It will probably suggest that close scrutiny is triggered when the state expressly employs a protected classification and that such state action is very difficult to justify in light of existing constitutional guarantees. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." (citing Johnson v. California, 543 U.S. 499, 505–06 (2005))).

18. Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) ("In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex.").

19. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154–55 (1994) (Rehnquist, C.J., dissenting) ("Classifications based on race are inherently suspect, triggering 'strict scrutiny,' while gender-based classifications are judged under a heightened, but less searching, standard of review." (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

20. United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting *Hogan*, 458 U.S. at 724).

21. *See* Miller v. Johnson, 515 U.S. 900, 913 (1995) ("[S]tatutes are subject to strict scrutiny under the Equal Protection Clause . . . when they contain express racial classifications . . . ."); *J.E.B.*, 511 U.S. at 136 (discussing "the heightened scrutiny we afford all gender-based classifications").

ute permitting an individual of one race to marry someone of that race but not of another race expressly classifies on the basis of race.[22]

Although same-sex marriage bans classify on the basis of sex, their purpose is likely to target on the basis of orientation.[23] But just as a state could not immunize the express use of race by claiming that its purpose was to target a different classification such as socioeconomic status, the current jurisprudence does not immunize the use of a protected classification such as sex even if the state's purpose is to target something else. For the Court to use rational basis or even rational basis with bite scrutiny for an express sex-based classification would simply be rejecting the prevailing jurisprudence.

It is sometimes difficult to tell whether the Court is applying or rejecting the prevailing jurisprudence. Consider *Lawrence v. Texas*,[24] in which the Court struck down Texas's same-sex sodomy prohibition on due process grounds. Professor Yoshino describes the Court as "find[ing] that the statute violated the fundamental right of all persons—straight, gay, or otherwise—to control their intimate sexual relations."[25] Supporting Professor Yoshino's strict-scrutiny interpretation, the *Lawrence* Court cited several right-to-privacy cases, including *Griswold*, *Eisenstadt*, *Roe*, and *Carey*,[26] before ultimately concluding that "*Bowers* was not correct when it was decided, and it is not correct today."[27] One would not expect the Court to cite cases triggering strict scrutiny, in which fundamental interests were implicated, to justify striking down a law burdening sexual relations if such a law only triggered rational basis review.

That said, the *Lawrence* Court described Texas's interest in criminalizing same-sex sodomy as "further[ing] no legitimate state interest which can justify its

22. Even the state of Virginia admitted that it was expressly discriminating on the basis of race. It simply said that its express classification affected the races equally and hence was not invidious. *See* Loving v. Virginia, 388 U.S. 1, 8 (1967) ("[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.").

23. *See In re* Marriage Cases, 183 P.3d 384, 441 (Cal. 2008) ("Just as a statute that restricted marriage only to couples of the same sex would discriminate against heterosexual persons on the basis of their heterosexual orientation, the current California statutes realistically must be viewed as discriminating against gay persons on the basis of their homosexual orientation."), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

24. 539 U.S. 558 (2003).

25. Yoshino, *supra* note 10, at 777.

26. *See Lawrence*, 539 U.S. at 564–66 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)).

27. *Id.* at 578 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

intrusion into the personal and private life of the individual."[28] Such a description is compatible with two very different interpretations of what the Court was doing: (1) striking down the Texas law on rational basis grounds[29] by announcing that the state did not have any legitimate interest in criminalizing consensual adult sexual relations,[30] or (2) suggesting that while Texas may have had legitimate interests in regulating nonmarital relations,[31] those interests were not sufficiently strong to justify the burden that the state was thereby placing on privacy interests.[32] The *Lawrence* Court simply did not explain whether the targeted conduct involved a fundamental interest.

Lawrence presents some conundrums for liberty interest analysis. If indeed the right to have consensual sexual relations with a same-sex partner is a fundamental interest, then why would the right to marry a same-sex partner not also be a fundamental interest? The right to marry has been recognized as a fundamental interest since *Loving v. Virginia*,[33] whereas the right to have nonmarital relations was not recognized until almost forty years later.

Suppose that *Lawrence* was decided on rational basis grounds and that the Court was in effect holding that Texas had no legitimate interest in burdening adult, consensual, nonmarital sexual relations more generally or same-sex relations in particular. But if that is so, then it is not at all clear that states have any legitimate interests in precluding same-sex couples from marrying. It is perhaps for this reason that Justice Scalia argued that *Lawrence* sounded the death knell for same-sex marriage bans.[34]

28. *Id.*
29. *See id.* at 594 (Scalia, J., dissenting) ("[T]he Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary.").
30. *See id.* at 578 (majority opinion) ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.").
31. *Cf. Griswold*, 381 U.S. at 498–99 (Goldberg, J., concurring) (discussing the "[s]tate's proper regulation of sexual promiscuity or misconduct").
32. *Cf.* Zablocki v. Redhail, 434 U.S. 374 (1978). While the Wisconsin statute at issue in *Zablocki*, which limited the rights of indigent noncustodial parents to marry, implicated "legitimate and substantial interests," *id.* at 388, the statute nonetheless could not pass muster because it "interfere[d] directly and substantially with the right to marry." *Id.* at 387.
33. 388 U.S. 1 (1967). Indeed, a California district court treated the right to marry a same-sex partner as a fundamental interest triggering strict scrutiny. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010) ("Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny."), *aff'd on other grounds sub nom.*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).
34. *Lawrence*, 539 U.S. at 604–05 (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.").

II. DOMA AND PROPOSITION 8

Recently, the First and Second Circuits struck down DOMA, and the Ninth Circuit struck down a state constitutional amendment reserving marriage for different-sex couples. The Supreme Court has agreed to review the Ninth Circuit and the Second Circuit decisions, and both cases could have important implications for LGB family rights in particular and equal protection jurisprudence more generally.

Both the First Circuit and the Second Circuit held that section 3 of DOMA does not pass constitutional muster. Section 3 reads as follows:

> 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.[35]

In *Massachusetts v. United States Department of Health and Human Services*,[36] the First Circuit analyzed whether this section passed constitutional muster. Unlike some of the other courts that have analyzed the constitutionality of section 3,[37] the First Circuit made clear that it would have upheld the section's constitutionality under the most deferential form of rational basis review.[38] It declined to exercise the deferential rational basis review that might normally be accorded to "ordinary economic legislation,"[39] however, and instead employed "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review."[40] The First Circuit justified its use of closer review by citing both the *Moreno-Cleburne-Romer* line of cases[41] and federalism con-

35. 1 U.S.C. § 7 (2006).
36. 682 F.3d 1 (1st Cir. 2012).
37. *See, e.g.*, Pedersen v. Office of Pers. Mgmt., No. 3:10-CV-1750 (VLB), 2012 WL 3113883, at *35 (D. Conn. July 31, 2012) ("[T]he Court will apply rational basis review. Even under this, the least intrusive level of review, Section 3 of DOMA fails to withstand constitutional scrutiny."); *In re* Balas, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) ("Debtors also have demonstrated that there is no valid governmental basis for DOMA.").
38. *See Massachusetts*, 682 F.3d at 9 ("Under such a rational basis standard, the . . . plaintiffs cannot prevail.").
39. *Id.* at 11.
40. *Id.*
41. *See id.* at 10 (discussing *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996)). In these cases, the Court struck down the applicable law, notwithstanding the Court's allegedly employing the most forgiving level of scrutiny. Some have suggested that in certain cases the Court uses a less forgiving rational basis test. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits such a desire to harm a politically

cerns,[42] and then it found that section 3 of DOMA could not pass muster under this heightened level of rational basis review.[43]

It is unclear whether the First Circuit was suggesting that either the *Moreno-Romer* line of cases or federalism would trigger heightened rational basis review on their own respectively or, instead, that it was only because both considerations were implicated that heightened rational basis review was triggered. A Hawaii district court took the latter approach.

At issue in *Jackson v. Abercrombie*[44] was a challenge to Hawaii's same-sex marriage ban. In rejecting the argument that heightened rational basis was appropriate, the district court explained that "the First Circuit applied an 'intensified scrutiny' based on a combination of equal protection and federalism concerns."[45] Because the Hawaii case did not implicate federalism concerns,[46] the Hawaii court held that deferential rational basis review was appropriate[47] and upheld the ban.[48]

In contrast to the First Circuit, the Second Circuit employed heightened scrutiny in *Windsor v. United States*[49] when reviewing the constitutionality of DOMA's section 3.[50] The *Windsor* court examined the indicia for suspect status: whether the group has "suffered a history of discrimination;"[51] whether "the class characteristic 'frequently bears [a] relation to ability to perform or contribute to society;'"[52] whether the characteristic at issue "is a sufficiently discernible characteristic to define a discrete minority class;"[53] and whether the class has "the strength

unpopular group, we have applied a more searching for of rational basis review to strike down such laws under the Equal Protection Clause.").

42. *See Massachusetts*, 682 F.3d at 12–13 ("Congress' effort to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws does bear on how the justifications are assessed.").
43. *Id.* at 16 ("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.").
44. Civ. No. 11-00734 ACK-KSC, 2012 WL 3255201 (D. Haw. Aug. 8, 2012).
45. *Id.* at *31.
46. *See id.* at *32 ("As an obvious distinction with the First Circuit's decision, this case does not involve the same federalism concerns.").
47. *See id.* at *33 ("[I]f the evidence, viewed in the light most favorable to Plaintiffs, shows that there is any reasonably conceivable rational basis for the policy, [Defendants] are entitled to summary judgment.").
48. *Id.* at *46 ("[B]ecause Hawaii's marriage laws are rationally related to legitimate government interests they do not violate the federal Constitution.").
49. 699 F.3d 169 (2d Cir. 2012).
50. *Id.* at 181 ("[W]e conclude that review of Section 3 of DOMA requires heightened scrutiny.").
51. *Id.* at 182.
52. *Id.* (alteration in original) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41(1985)).
53. *Id.* at 183 (citing Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari)).

to politically protect [itself] from wrongful discrimination."[54] Concluding that orientation was a quasi-suspect classification in light of all these factors,[55] the court examined the DOMA section with heightened scrutiny and found that it could not pass muster.[56]

Certainly, as Professor Eyer suggests, it would be an important result were the Supreme Court to agree that sexual orientation triggers intermediate scrutiny. Not only would the Court likely strike down section 3 of DOMA, but state same-sex marriage bans also seem vulnerable if subjected to intermediate scrutiny. It is doubtful that an "exceedingly persuasive justification"[57] for such a classification could be offered.[58] Yet, Professor Eyer is too optimistic when suggesting that "success—whether based on rational basis or heightened scrutiny—would have equally profound implications for future equality-based claims."[59]

Suppose that the Court were to strike down section 3 of DOMA on rational basis grounds (perhaps citing to the First Circuit rationale) because the federal government does not have a legitimate interest in refusing to recognize those marriages recognized in the states. While such a holding would be important for those married same-sex couples seeking federal benefits, it might have relatively little import either for other cases involving orientation discrimination or for discrimination against other minorities. Indeed, the First Circuit did not seem to believe that striking down section 3 of DOMA would have important implications for the constitutionality of section 2 of DOMA.[60] The court described the latter as the U.S. Congress's attempt to prevent "overreaching,"[61] explaining that the fear that one state "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."[62]

54. *Id.* at 184.
55. *Id.* at 185.
56. *Id.* at 188.
57. United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).
58. *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (employing intermediate scrutiny triggered under state constitutional guarantees and striking down a state same-sex marriage ban).
59. Eyer, *supra* note 5, at 10.
60. Section 2 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.

28 U.S.C. § 1738C (2006).
61. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15 (1st Cir. 2012).
62. *Id.* (citation omitted).

The Supreme Court's decision to hear *Perry* adds an additional level of complexity to the analysis, if only because the Court will have a number of options. The Ninth Circuit held that there was no legitimate reason for the state to withdraw from same-sex couples the right to marry when those couples would nonetheless be afforded all of the benefits of marriage through domestic partnerships. "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[63] But the court was not thereby offering an analysis directly applicable to every state that had set up a separate civil union status because the California experience was unique in a different way. "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."[64] The *Perry* court described *Romer* as controlling[65] and struck down Proposition 8 on rational basis grounds.[66] The Ninth Circuit concluded that "Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status."[67]

While the Ninth Circuit was trying to decide the case before it on "narrow grounds,"[68] the Supreme Court may well believe that the decision will be difficult to cabin for two distinct reasons. First, more and more states are recognizing same-sex relationships.[69] The Court likely recognizes the possibility that some of those states may have popular referenda sometime in the future to take back legislatively accorded rights. The fact that other states may find themselves in a position analogous to California's does not speak to Proposition 8's constitutionality, but it does undercut the *Perry* court's suggestion that the Supreme Court could leave the

63. Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012).
64. *Id.* at 1076 (citing Romer v. Evans, 517 U.S. 620, 634–35 (1996)).
65. *See id.* at 1085.
66. *Id.* at 1096.
67. *Id.* at 1095.
68. *Id.* at 1064.
69. Rachel La Corte, *'Joyous Day' for Same-Sex Couples: Hundreds Marry in Washington as Law Takes Effect*, J. GAZETTE (Fort Wayne, Ind.), Dec. 10, 2012, http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20121210/NEWS03/312109931/1006/NEWS ("Last month, Washington, Maine and Maryland became the first states to pass same-sex marriage by popular vote.").

Ninth Circuit's decision undisturbed while remaining confident that analogous cases would not arise elsewhere.[70]

Second, many of the arguments rejected by the *Perry* court have been offered to justify refusals by other states to recognize same-sex relationships. For example, the *Perry* court described as "implausible" 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."[71] But if the Supreme Court agrees that such an argument simply is not plausible, then that argument cannot be used in other states to justify the refusal to grant marriage rights to same-sex couples. By the same token, the *Perry* court explained that it is not credible to restrict marriage to different-sex couples for the sake of children because members of the LGB community have parenting rights in California.[72] But many states protect the parenting rights of LGB individuals, and if marriage provides a setting in which children can thrive, then the state has an additional reason to recognize same-sex marriage: for the sake of the children those couples might be raising.

Many of the reasons allegedly justifying the constitutionality of Proposition 8 have been used to provide support for other same-sex marriage bans. It would be difficult for the Court to endorse the *Perry* reasoning without at the same time casting doubt on the credibility of those arguments in other contexts as well, although the Court might follow the Ninth Circuit's lead and try to issue a narrow decision without specifying which arguments, while not prevailing in this context, might nonetheless be meritorious in a different context.[73]

By the same token, the Court might employ a narrow approach in affirming *Windsor* that would have little precedential effect for other cases that might come before the Court. Thus, the Court might affirm *Windsor* in striking down section 3 of DOMA without specifying the level of scrutiny employed. Indeed, the Court might muddy the equal protection analysis even further by suggesting that the federal government does not have a legitimate interest in refusing to recognize same-sex marriages valid in the states,[74] thereby leaving open the degree to which the Court's reasoning would have application in other contexts.

70. *Cf. Perry*, 671 F.3d at 1076 ("[T]he specific history of same-sex marriage in California [provides] the narrowest ground for adjudicating the constitutional questions before us . . . .").
71. *Id.* at 1089.
72. *Id.* at 1086.
73. *Cf. id.* at 1096 (suggesting that the opinion merely speaks to what "the People of California" may not do).
74. Some courts would likely interpret such a holding as incorporating some of the federalism discussion contained in the *Massachusetts* opinion. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 11–13 (1st Cir. 2012).

CONCLUSION

The Court will hear at least two cases involving LGB families this term, and the decisions may well have important implications. It is unlikely, however, that these decisions will tell us much about whether minorities will be more likely to be successful in the future by framing their claims in terms of liberty interests rather than equal protection guarantees.

Suppose that the Court finds that same-sex marriage bans trigger intermediate scrutiny. If that is because they expressly classify on the basis of sex, then the Court will not have recognized a new quasi-suspect class but will instead merely have applied the existing jurisprudence. Even if the Court were to recognize orientation as a new classification triggering closer review, that would hardly establish that equal protection guarantees will now be the basis for a wealth of successful claims by a variety of groups.

Suppose that the Court finds that same-sex marriage is a fundamental right. Such a holding would merely suggest that a right already recognized as fundamental is not reserved for different-sex couples. That would hardly provide much justification for the assumption that individuals seeking to vindicate their rights will be able to convince the Court to recognize new liberty interests as triggering close scrutiny.

Certainly, Professor Eyer is correct that there would be important implications if the Court upheld the constitutionality of DOMA and Proposition 8.[75] That would bode poorly for the recognition of orientation as a suspect or quasi-suspect class and for the Court's holding that statutes targeting other classes that have not yet been recognized as suspect or quasi-suspect nonetheless trigger closer scrutiny. By the same token, such holdings would not bode well for expanded liberty interest protections either.

Suppose that that the Court reaches the merits in one or both cases and holds that either DOMA or Proposition 8 is unconstitutional. Even if that occurs, it is not clear that this would be a great step forward with respect to orientation discrimination challenges.[76] The Court might affirm in either *Windsor* or *Perry* by suggesting that the Court did not need to address which level of scrutiny was appropriate because the classification at issue did not survive rational basis

75. Eyer, *supra* note 5, at 9–10 ("A failure on equal protection grounds in the Court would pose an enormous setback for the LGB rights movement . . . .").

76. Professor Eyer is probably overly optimistic about the effects of the Court striking down either Proposition 8 or section 3 of DOMA on rational basis grounds. *See id.* at 10 ("And success—whether based on rational basis or heightened scrutiny—would have equally profound implications for future equality-based claims.").

scrutiny. This would likely not be viewed as a robust endorsement of gay equality[77] but, instead, as preserving the status quo in which some courts would feel free to strike down on rational basis grounds those statutes targeting on the basis of orientation,[78] while other courts would feel equally free to uphold such statutes by reasoning that, in their cases, there was some legitimate basis for the classification.[79]

While we cannot be confident that the Court will address either *Perry* or *Windsor* on the merits or, if it does, how it will decide either case, we can be confident that the Court's decision will likely not be helpful in predicting whether minorities seeking to vindicate rights will be better served by asserting liberty interests rather than equal protection guarantees. Further, if the Court's recent decisions are any guide, those seeking to vindicate LGB rights may not have much more strategic guidance after this term than they do now. In short, while the Court's affirming the unconstitutionality of either Proposition 8 or section 3 of DOMA would be important victories, the implications of such a decision for LGB rights in particular or for minority rights more generally cannot confidently be predicted.

77. *But see id.* at 10 n.37 (arguing that the Court striking down either enactment on rational basis grounds would constitute a robust endorsement of gay equality because it would suggest that orientation discrimination is irrational).

78. *Cf. In re* Levenson, 560 F.3d 1145, 1149 (9th Cir. 2009) ("[T]he denial of benefits here cannot survive even rational basis review, the least searching form of constitutional scrutiny.").

79. *See* Jackson v. Abercrombie, Civ. No. 11-00734 ACK-KSC, 2012 WL 3255201, at *46 (D. Haw. Aug. 8, 2012) ("[B]ecause Hawaii's marriage laws are rationally related to legitimate government interests they do not violate the federal Constitution.").