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ARTICLE
PROBLEMS OF CLASSIFICATION

William C. Duncan[†]

I. INTRODUCTION

When the Massachusetts Supreme Judicial Court ruled that Massachusetts' marriage law was unconstitutional, it offered as a rationale that defining marriage as the union of a man and a woman lacked any rational basis.¹ This court's finding of irrationality allowed the court to avoid the question of whether marriage laws discriminated against a protected category like sex or "sexual orientation."² Given the difficulty of showing that a marriage law that treats men and women precisely the same is a form of sex discrimination or showing that a law that completely ignores the subjective attractions of the parties is sexual orientation discrimination, one can understand the reluctance to attempt to establish either of these propositions, but some courts have nevertheless endeavored to do so.³

Notwithstanding the Massachusetts' court's decision in *Goodridge*, the "marriage is irrational" enterprise has suffered some serious blows since *Goodridge*. The high courts of Maryland, Washington, and New York have all ruled that laws defining marriage as the union of a man and a woman are rationally related to valid state interests.⁴ In the wake of this trend, three

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1. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

2. As will be explained below, the phrase "sexual orientation" as a descriptor of a cognizable category is problematic. It is also a conclusory formulation, suggesting that an individual has a fixed "orientation" that defines that individual.

3. Indeed, even among the courts that have mandated either marriage redefinition or the creation of an equivalent legal status, there has been a significant divergence in justifications offered. While California (*In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008)), Connecticut (*Kerrigan v. Dep't of Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008)), and Iowa (*Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009)) have said marriage is sexual orientation discrimination, Hawaii (*Baehr v. Lewin*, 852 P.2d 44, 51 n.11 (Haw. 1993)) and Massachusetts (*Goodridge*, 798 N.E.2d at 953 n.11) have said it is not. Hawaii, on the other hand, said marriage is a form of sex discrimination, but that idea has been rejected by the high courts of Vermont (*Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999)), Massachusetts (*Goodridge*, 798 N.E.2d at 961), and California (*In re Marriage Cases*, 183 P.3d at 438-40).

4. *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006).

recent court decisions on state definitions of marriage have reverted from the *Goodridge* theory that marriage is irrational to examining marriage laws with heightened scrutiny.⁵ The California Supreme Court held that sexual orientation is a suspect class,⁶ and the Connecticut and Iowa supreme courts have held that it is at least a quasi-suspect class.⁷ Even the ongoing challenge to California's marriage amendment, Proposition 8, relies on a similar theory—that the amendment unfairly targets a constitutionally protected class and so must be invalidated by the judiciary.⁸

The equal protection analysis employed in these decisions and proposed by the *Perry v. Schwarzenegger* plaintiffs challenging Proposition 8, however, does not itself withstand scrutiny for two primary reasons. First, sexual orientation is difficult to establish as a legal classification. Second, sexual orientation, even if adequately defined, would be difficult to comport with the traditional understanding of a protected class. Furthermore, even if this designation were made, it would mar our constitutional system by allowing the government to take sides in factious disputes.

This Article will consider each of these points in turn: the nature of the group, the indicia of suspect class status, and the intention of the Constitution.

II. WHO'S IN, WHO'S OUT

Creating a legal category of sexual orientation would be deeply problematic because it is not clear what individuals would fit in the class. The American Psychological Association (APA) notes that the meaning of sexual orientation can vary significantly.⁹ The APA speaks of orientation in terms of quantifiable factors, such as “behaviors,” but it also relies on subjective factors such as “a person's sense of identity.”¹⁰

In the literature discussing the topic, there seem to be three primary definitions of sexual orientation focusing respectively on sexual behavior,

5. See *In re Marriage Cases*, 183 P.3d at 441-42; *Kerrigan*, 957 A.2d at 475-76; *Varnum*, 763 N.W.2d at 896.

6. *In re Marriage Cases*, 183 P.3d at 441-42.

7. *Kerrigan*, 957 A.2d at 431-32; *Varnum*, 763 N.W.2d at 893.

8. Complaint, *Perry v. Schwarzenegger*, No. CV 09-2292 VRW (N.D. Cal. May 22, 2009), available at http://www.equalrightsfoundation.org/wp-content/uploads/2010/01/2009-05-22_Filed_Complaint.pdf.

9. AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION AND HOMOSEXUALITY 1 (2008), <http://www.apa.org/topics/sexuality/sorientation.pdf>.

10. *Id.*

sexual attraction, or self-identification.¹¹ These factors are, of course, not exclusive, and within each category there are also significant variations. For example, if homosexuality is defined behaviorally (e.g., “men who have sex with men”) does the class of gay men include any man who reports ever having sex with a man? If it does not, would it include those who reported a sexual relationship in the last five years or the last year with a person of the same sex?¹² In short, the question of behavior is a slippery measure of orientation.

If orientation is defined instead by desire or attraction, do we use physical (i.e., sexual) or romantic (i.e., emotional) attraction as the primary criterion?¹³ In addition, attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes.¹⁴ If a man identifies himself as a two or a three on a scale in which one represents “only attracted to men” and seven represents “only attracted to women,” is he gay or straight or something else?¹⁵ Some studies suggest that a large number of women who identify themselves as lesbian, for instance, have had a sexual relationship with at least one man in their lifetimes.¹⁶ This undercuts the idea that sexual orientation can be determined solely on attraction criteria.

A seemingly clearer definition of sexual orientation would rely on self-identification, so that people would be considered part of the class of gays or lesbians only if they adopted that social identity.¹⁷ Of course, neither the State nor any other person would be able to detect or refute the classification because it would be a purely subjective decision. The significance of the problem associated with this type of definition is highlighted by the Iowa Supreme Court’s holding that marriage was a form of sexual orientation discrimination notwithstanding the fact that the state’s marriage law, by not expressly prohibiting gay or lesbian persons from marrying, took no cognizance of the subjective attractions, sexual behavior,

11. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 290 (1994); *see also* Transcript of Proceedings at 2055-56, *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. Jan. 22, 2010), *available at* <http://www.telladf.org/userdocs/PerryTrialTranscript9.pdf> (testimony of Gregory Herek).

12. LAUMANN ET AL., *supra* note 11, at 294-95.

13. *Id.* at 297.

14. *Id.*

15. *Id.* at 293, 297.

16. Allison L. Diamant et al., *Lesbians’ Sexual History with Men*, 159 *ARCH. INTERNAL MED.* 2730 (1999), *available at* <http://archinte.ama-assn.org/cgi/reprint/159/22/2730>.

17. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 9.

or self-identification of prospective spouses.¹⁸ The court found this reality was irrelevant because it believed “civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual.”¹⁹ The court offered no evidence for this assertion, and it seems unlikely it could have, since at the very least, people who are in same-sex marriages sometimes have previously been married to a person of the opposite sex.²⁰ Moreover, people who identify as gay or lesbian may still choose at some point to marry a person of the opposite sex.²¹

Sexual orientation as a category stands in striking contrast to categories like race or sex traditionally subject to heightened scrutiny by the courts.²² The classification of people who are considered to be “gay or lesbian” will shift depending on the various methods a court may choose to adopt in defining the terms, which may or may not be based on the self-identification of the litigants. For example, the number of those who could claim special judicial solicitude due to their sexual orientation could double or triple solely depending on what criteria is used to identify homosexuals.²³ To see how this could play out, consider the State of Iowa where marriage has been redefined.²⁴ By applying the national rates of *self-*

18. *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009). This in contrast to the holdings of the high courts of at least six other states, which held marriage was *not* a form of sexual orientation discrimination. *See* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

19. *Varnum*, 763 N.W.2d at 885.

20. GARY J. GATES, M.V. LEE BADGETT & DEBORAH HO, MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 2 (July 2008) *available at* <http://escholarship.org/uc/item/5tg8147x> (reporting that “more than one in five individuals in same-sex couples who marry or register have previously been married to a different-sex partner”).

21. Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCH. SEXUAL BEHAV. 403, 407 (2003) (reporting that some individuals seek to change their sexual orientation because of a desire to marry a person of the opposite sex).

22. *See Andersen*, 138 P.3d at 976; *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

23. *See LAUMANN ET AL.*, *supra* note 11, at 297.

24. *Varnum*, 763 N.W.2d 862.

identifying homosexuals indicated in a Chicago study²⁵ to the population of Iowa (as of 2008),²⁶ one could calculate that roughly 32,000 men and 16,000 women in Iowa are gay and lesbian, respectively. However, if homosexuality is defined instead by sexual attraction, the numbers would be considerably different: approximately 70,000 men and 51,000 women would be considered gay and lesbian.²⁷ Thus, the number of men and women who could qualify for special legal protection in the state would double for men and triple for women under the latter calculation.²⁸

III. CATEGORY ERRORS

The purpose of holding that marriage laws classify on the basis of sexual orientation is to justify the judiciary in deciding the legal definition of marriage.²⁹ If the courts conclude that a law employs a classification that is suspect or quasi-suspect, they do not have to defer to legislative or popular decisions.³⁰ Instead, they must scrutinize the law more carefully so as to protect groups who could not be adequately protected in the normal political process. Race has been one such example; the clear intent of the Fourteenth Amendment to the U.S. Constitution was to protect racial minorities from unjust discrimination.³¹

The courts have adopted a test for determining when other groups can likewise access heightened judicial involvement in legal controversies

25. LAUMANN ET AL., *supra* note 11, at 293 (reporting that “2.8 percent of the men and 1.4 percent of the women” surveyed in the U.S. “reported some level of homosexuality (or bisexual) identity”).

26. Calculating from the U.S. Census Bureau population data, there are roughly 1,131,729 men and 1,159,220 women over the age of 18. U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS: IOWA (2008), <http://quickfacts.census.gov/qfd/states/19000.html> (last visited Mar. 27, 2010).

27. LAUMANN ET AL., *supra* note 11, at 297 (reporting that 6.2% of men are at least “somewhat attracted” to other men, and that 4.4% of women are attracted to other women).

28. These figures represent the percentage indicated in LAUMANN ET AL., *supra* note 11, as applied to the totals of men and women reported in the Census.

29. This is because the court can lawfully extend its heightened scrutiny to a “protected class” that is discriminated against, rather than giving deference to the legislative definition of marriage.

30. *See* *Hibbs v. HDM Dep’t of Hum. Res.*, 273 F.3d 844, 857-58 (9th Cir. 2001); *see generally* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (discussing heightened scrutiny as applied to racial classifications and refusing to give deference to the legislature); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985) (discussing the varying levels of scrutiny and finding that the mentally retarded do not qualify as a quasi-suspect class).

31. U.S. CONST. amend. XIV, § 1; *see also* *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

affecting them.³² The courts typically look at whether the group has experienced a history of discrimination, whether the group is characterized by an innate and immutable characteristic, and whether the group is politically powerless.³³

Regarding the question of historical discrimination, no one would argue with the fact that gay and lesbian people have often been treated shamefully in the past and continue to be so treated. Unfortunately, it is not uncommon for people to receive poor treatment because of real or perceived differences from others.³⁴ It is a harder question whether a given class has been historically disfavored *by the law*.³⁵ The California, Iowa, and Connecticut supreme courts found that because each state's anti-discrimination law included sexual orientation in its covered classes, these states must have enacted their laws because they were aware of a history of discrimination.³⁶ This is perhaps a simplistic understanding of the significance of these statutes. As the U.S. Supreme Court has noted, "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century."³⁷ This seems to suggest that there has not been widespread legal disability imposed on gay men and lesbians comparable to the disadvantages created by race and gender discrimination including slavery, segregation laws, and denial of voting rights. The most urgently pressed "evidence" of legal discrimination is our inherited understanding of marriage as the union of a man and a woman; yet, it seems facetious to argue that marriage laws were enacted in order to subjugate a class of persons based on sexual orientation. This position is made even more unlikely considering the class only recently came into being. Furthermore, marriage has long served the purpose of

32. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

33. *Id.*

34. See generally John F. Dovidio et al., *Stereotyping, Prejudice, and Discrimination: Another Look*, in *STEREOTYPES AND STEREOTYPING* 276, 276-77 (C. Neil Macrae et al. eds., 1996); Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 J. A.M.A. 2094 (2001), available at <http://jama.ama-assn.org/cgi/reprint/285/16/2094>.

35. *Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) (referring to a "long history of official intolerance of intimate same-sex relationships") (emphasis added).

36. See *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008); *Kerrigan v. Dep't of Pub. Health*, 957 A.2d 407, 447-48 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 889-90 (Iowa 2009).

37. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003); see also Letitia Anne Peplau, *The Development of Sexual Orientation in Women*, 10 ANN. REV. SEX RES. 70, 83 (1999).

promoting a child's bond with both biological parents.³⁸ The question of historical discrimination is thus not as compelling as it might appear.

The second factor that courts will consider concerns the innate and immutable characteristics of the class; however, this factor also presents a problem for sexual orientation. A recent study notes that the effort to establish genetic or hormonal effects on sexual orientation has been "inconclusive at best."³⁹ Thus, "the assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology."⁴⁰ Especially for women, "there is little evidence that biological factors are a major determinant of women's sexual orientation."⁴¹ The authors of a recent article point out that "[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines."⁴² These authors' study of same-sex-attracted individuals used a large, nationally representative sample of teens in school and found that concordance rates for identical twins were only 6.7%, about the same as for fraternal twins (7.2%).⁴³ The authors also point out that other research suggests "substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (58%), and riding a taxi (38%)."⁴⁴ They conclude by finding "no support for genetic influences on same-sex preference net of social structural constraints" and "substantial indirect evidence in support of a socialization model at the individual level."⁴⁵ Maryland's highest court has said:

Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they

38. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 178 (2007). This proposition will be further discussed below. See *infra* text accompanying notes 71-72.

39. Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 AM. J. SOC. 1179, 1180 (2002).

40. RICHARD C. FRIEDMAN & JENNIFER I. DOWNEY, *SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE* 39 (2002).

41. Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation*, 56 J. SOC. ISSUES 329, 332 (2000); see also Rosemary C. Veniegas & Terra D. Conley, *Biological Research on Women's Sexual Orientations: Evaluating the Scientific Evidence*, 56 J. SOC. ISSUES 267, 277 (2000).

42. Bearman & Bruckner, *supra* note 39, at 1184.

43. *Id.* at 1197-98.

44. *Id.* at 1185 n.8.

45. *Id.* at 1199.

may be deemed a suspect class for purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.⁴⁶

Futhermore, there is little serious scientific question that individual identity as straight, gay, or lesbian can and does change. A number of studies suggest that “changes in sexual feelings and orientation over time occur in all possible directions.”⁴⁷ Self-identification seems particularly fluid for lesbians, with research disclosing women who believe their lesbian self-identification is more a personal choice than an innate constraint.⁴⁸ Recent research also suggests that at least a few strongly motivated individuals can voluntarily change their orientation.⁴⁹

This question of innateness and immutability surfaced prominently in the Proposition 8 trial. The plaintiffs’ expert on orientation matters described in his testimony a study he had conducted that reported eighty-eight percent of his gay male subjects said “they had no choice at all, with approximately 7 percent saying they had a small amount of choice” and sixty-eight percent of his lesbian subjects saying they had “no choice at all, and another 15 percent saying a small amount of choice.”⁵⁰ The contrast to race or gender should be obvious where color of skin or a person’s sex from birth offers no choice. The case for innateness and immutability is far from compelling.

46. *Conaway v. Deane*, 932 A.2d 571, 614 (Md. 2007).

47. Joseph P. Stokes et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 43 J. SEX RES. 304, 305 (1997); see also Roy F. Baumeister, *Gender Differences in Erotic Plasticity: The Female Sex Drive As Socially Flexible and Responsive*, 126 PSYCHOL. BULL. 347 (2000); Peplau & Garnets, *supra* note 41.

48. Karen L. Bridges & James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns*, 73 J. COUNS. & DEV. 135 (Nov./Dec. 1994); Claudette M. Charbonneau & Patricia S. Lander, *Redefining Sexuality: Women Becoming Lesbian in Mid-Life*, in LESBIANS AT MID-LIFE 35 (B. Sang et al. eds., 1991); Lisa Diamond, *Development of Sexual Orientation Among Adolescent and Young Adult Women*, 34 DEV. PSYCHOL. 1085 (1998); Lisa Diamond, *Was It a Phase? Young Women’s Relinquishment of Lesbian/Bisexual Identities over a 5-Year Period*, 84 J. PERSONALITY & SOC. PSYCHOL. 352 (2003); Lisa Diamond & Ritch Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. SOC. ISSUES 297 (2000); Sari H. Dworkin, *Treating the Bisexual Client*, 57 J. CLINICAL PSYCHOL. 671 (2001); Susan Rosenbluth, *Is Sexual Orientation a Matter of Choice?*, 21 PSYCHOL. WOMEN Q. 595 (1997).

49. Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCH. SEXUAL BEHAV. 403 (2003).

50. Transcript of Proceedings at 2056, *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. Jan. 22, 2010), available at <http://www.telladf.org/userdocs/PerryTrialTranscript9.pdf>.

Ultimately, the most important factor is the question of political powerlessness. The members of any class, regardless of whether they have an innate characteristic or have been subjected to discriminatory treatment, would need to establish their political powerlessness, or there would exist no logical justification for judicial solicitude on their behalf.⁵¹ However, this factor is the one that is *least* convincingly established by the proponents of heightened scrutiny for sexual orientation.⁵²

It is true that same-sex marriage, like many policy innovations, has not been rapidly adopted in states.⁵³ The political powerlessness analysis, however, must require more than just a showing that a policy favored by a particular group has not been popular.⁵⁴ To make sense, it must require a showing of persistent inability to get any kind of fair hearing due to minority status.⁵⁵ Otherwise, the judicial review of the normal political process would be at best premature and at worst an invalid incursion into the prerogatives of the people and the popular branches.

A summary picture of American law calls into question the assertion of powerlessness. Some states have redefined marriage through legislative action.⁵⁶ Additionally, other “gay rights” efforts have been successful politically, such as the enactment of civil unions or related legal statuses that allow same-sex couples to access the benefits of marriage.⁵⁷ Some states have both constitutional amendments defining marriage as the union of a man and a woman and laws creating alternative legal statuses for same-

51. If indeed, there is any constitutional justification for this judge-created test. As Professor George Carey explains, “aside from the principle of representation that would perforce require a legislative body, Madison at no point in Federalist 10 speaks of constitutional institutions as barriers to factious majorities.” GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION 37 (1989).

52. A more compelling case would be made by a group like the Amish, who typically do not actively participate in political issues, are a distinct minority, and are not well represented among legislators, cultural figures, etc.

53. Only five states have redefined marriage, while thirty have enacted constitutional amendments defining marriage as the union of a man and a woman. See William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL’Y 915 (2009).

54. Why else would the term be “powerlessness,” denoting a persistent condition rather than a one-time experience?

55. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.3d 563, 574 (9th Cir. 1990) (political powerlessness can be rebutted by a showing that a group can gain the attention of the legislature).

56. L.D. 1020, 124th Me. State Leg., 1st Reg. Sess. (Me. 2009); H.R. 436, 2009 Leg., Reg. Sess. (N.H. 2009); S. 115, 2009-2010 Leg., Reg. Sess. (Vt. 2009).

57. CAL. FAM. CODE § 297 (West 2004); N.J. STAT. ANN. § 26:8A-2 (West 2007); OR. REV. STAT. § 99 (2009); H.R. 436, 2009 Leg., Reg. Sess. (N.H. 2009); S. 5688, 2009-2010 Leg., 2009 Reg. Sess. (Wash. 2009).

sex couples.⁵⁸ A number of states now have sexual orientation discrimination laws⁵⁹ or include sexual orientation in hate crimes protection.⁶⁰ Gay rights activists have been able to significantly influence elections,⁶¹ and advocacy organizations are well-funded and influential.⁶² Legal changes favorable to gay and lesbian citizens may not be approved with the rapidity some would desire, but gays and lesbians simply do not experience the level of political powerlessness experienced by groups like African-Americans, who were denied the right to vote and made to endure segregation laws.

In the absence of historical discrimination, immutability, and general political powerlessness, the only evidence offered for extending heightened scrutiny is that the proponents of suspect class status and the class they claim to represent have not obtained a legal redefinition of marriage in every state or inclusion in every state's anti-discrimination laws. If this analysis was adopted in other contexts, any failure to secure a favored result in a political contest would be *de facto* evidence of the existence of a suspect or quasi-suspect class. This would effectively nullify the constitutional lawmaking process, since any group unsuccessful at the ballot box would gain special constitutional status just by virtue of losing.

58. For instance, California (CAL. CONST. art. I, § 7.5; CAL. FAM. CODE § 297 (West 2004)) and Oregon (OR. CONST. art. XV, § 5(a); OR. REV. STAT. § 99 (2009)).

59. See Andrew Harmon & Michelle Garcia, *ENDA Possible by Year's End*, THE ADVOCATE, Aug. 5, 2009, http://www.advocate.com/News/Daily_News/2009/08/04/ENDA_Possible_By_Year_39;s_End/.

60. ARIZ. REV. STAT. ANN. § 41-1750 (2004); CAL. PENAL CODE § 422.75 (West 2010); COLO. REV. STAT. ANN. § 18-9-121 (West 2004); CONN. GEN. STAT. ANN. §§ 53a-181j-181l (2007); DEL. CODE ANN. tit. 11, § 1304 (2007); D.C. CODE § 22-3701 (2009); FLA. STAT. ANN. § 775.085 (West 2010); HAW. REV. STAT. ANN. § 846-51 (LexisNexis 2007); 720 ILL. COMP. STAT. 5/12-7.1 (West 2002); IOWA CODE § 729A.1-2 (2003); KAN. STAT. ANN. § 21-4716(c)(2)(C) (2008); KY. REV. STAT. ANN. § 532.031 (West 2006); LA. REV. STAT. ANN. § 14:107.2 (2004); ME. REV. STAT. ANN. tit. 17-A, § 1151 (2004); MD. CODE ANN., CRIM. LAW § 10-301 (West 2009); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 2002); MINN. STAT. § 363A.03(44) (2004); MO. ANN. STAT. § 557.035 (West 1999); NEB. REV. STAT. ANN. § 28-111 (LexisNexis 2009); NEV. REV. STAT. ANN. § 41.690 (LexisNexis 2006); N.H. REV. STAT. ANN. § 651:6 (2007); N.J. STAT. ANN. § 2C:16-1 (2005); N.M. CODE R. § 31-18B-3 (Weil 2003); N.Y. PENAL LAW §§ 485.00, 485.05 (McKinney 2008); OR. REV. STAT. §§ 166.155, 166.165 (2009); R.I. GEN. LAWS § 12-19-38 (2002); TENN. CODE ANN. § 40-35-114 (2002); TEX. PENAL CODE ANN. § 42.014 (Vernon 2003); VT. STAT. ANN. tit. 13, § 1455 (2009); WASH. REV. CODE ANN. § 9A.36.080 (West 2009); WIS. STAT. ANN. § 939.645 (2005).

61. See Joshua Green, *They Won't Know What Hit Them*, THE ATLANTIC, Mar. 2007, at 76.

62. See, e.g., *How Much Do They Make?*, WASHINGTON BLADE, Mar. 26, 2009.

This, of course, would allow courts to act “like some lumbering bully, to disrupt social norms and practices at its pleasure.”⁶³

IV. FACTIOUS INTERESTS

More promising for evaluating the claims of proponents of heightened scrutiny for sexual orientation than the Supreme Court’s formulae is James Madison’s analysis of faction in *Federalist No. 10*.⁶⁴ For, as helpful as the concept of sexual orientation may be for sociological purposes, it is a distraction in the legal context where matters such as the definition of marriage must be evaluated on the basis of social interests rather than identity politics (the political jostling between different groups claiming preference based on their status). The movement to redefine marriage has more in common with “a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project”⁶⁵ than with the effort to vindicate the Constitution’s promise of equal protection of the laws regardless of race.⁶⁶

James Madison famously describes a faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁶⁷ In his own version of the innateness concept, he notes that the “latent causes of faction are thus sown in the nature of man.”⁶⁸ As Professor George Carey explains, Madison does not argue that all interest groups are factions, but rather that a faction is distinguished by “the oppressive or socially destructive ends which it seeks.”⁶⁹

To continue with the example of same-sex marriage, successful accomplishment of that goal would be adverse “to the permanent and aggregate interests of the community.”⁷⁰ To explain briefly, redefining marriage would undermine the traditional channeling function of

63. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 203 (1986).

64. THE FEDERALIST NO. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001).

65. *Id.* at 48.

66. U.S. CONST. amend. XIV.

67. THE FEDERALIST NO. 10, *supra* note 64, at 43.

68. *Id.*

69. GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 11 (1989).

70. See William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265 (2007); William C. Duncan, *Marriage on Trial*, 12 J. GENDER RACE & JUST. 493 (2009); William C. Duncan, *Portrait of an Institution*, 50 HOW. L.J. 95 (2006).

marriage—its role in encouraging the ideal of a man and a woman committing to each other and to any children their relationship, and their relationship alone, may create.⁷¹ It repudiates the inherited social interest in marriage—ensuring that wherever possible a child will have the opportunity to know and be raised by his or her own mother and father.⁷² Instead, it endorses a set of radical propositions: (1) that marriage is about nothing more than adult desires, (2) that men and women, mothers and fathers, are fungible and neither is necessary to a child's well being, and (3) that the state should be able to co-opt the social institution of marriage for its own purposes.⁷³

Of course, some will benefit from these changes, but many will not. Previous cultural shifts demonstrate the challenge. As Christopher Jencks explains:

Single parenthood began its rapid spread during the 1960s, when elite attitudes toward sex, marriage, divorce, and parenthood were undergoing a dramatic change. This change was obvious in the mass media, in the law, and in the widely publicized activities of celebrities. In the space of a decade we moved from thinking that society ought to discourage extramarital sex, and especially out-of-wedlock births, to thinking that such efforts were an unwarranted infringement on personal liberty. Instead of feeling morally superior to anyone who had a baby without marrying, the young began to feel morally superior to anyone who disapproved of unwed mothers.⁷⁴

Jencks notes that many of these cultural changes “in attitudes almost certainly improved the lives of the educated elite,” but “[f]or less privileged couples, . . . the demise of traditional norms about marriage and divorce posed more serious problems.”⁷⁵ Specifically, “Once the two-parent norm loses its moral sanctity, the selfish considerations that always pulled poor parents apart often become overwhelming.”⁷⁶ Is there any reason to believe that the cultural signals in same-sex marriage (particularly the primacy of

71. See generally William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153 (2004).

72. *Id.*

73. See William C. Duncan, *Does the Family Have a Future?*, 83 N.D. L. REV. 1273 (2007).

74. Christopher Jencks, *Deadly Neighborhoods*, NEW REPUBLIC, June 13, 1998, at 23, 28.

75. *Id.* at 29.

76. *Id.* at 30.

adult interests and the commodification of children) will not be taken seriously and their influence felt by many, including those least equipped to absorb the consequences? In other words, why would we assume that society would not take seriously the messages sent by redefining marriage? James Q. Wilson provides a telling analogy:

Imagine a game of crack-the-whip, in which a line of children, holding hands, starts running in a circle. The first few children have no problem keeping up, but near the end of the line the last few must run so fast that many fall down. Those children who did not begin the turning suffer most from the turn.⁷⁷

The effort to secure heightened scrutiny for sexual orientation classifications is an effort to enlist the judiciary on the side of factious interests. Thus, it is also adverse “to the rights of other citizens.”⁷⁸ If established, the factious aim of same-sex marriage, for instance, would seek to destroy competing interests by destroying liberties⁷⁹ and imposing egalitarianism (ironically, the very way that Madison said the causes of factions themselves could be removed at a prohibitive cost⁸⁰).

Madison also explained in *Federalist No. 10* how a factious interest can be countered. For a minority faction, currently the situation for advocates of same-sex marriage, the majority can “defeat its sinister views . . . by regular vote.”⁸¹ Hence the state marriage amendments and statutes. If the factious interest gains the support of a majority, the extended republic contemplated by our Constitution may counter the faction’s aims.⁸² Herein lies the problem, however. As Professor Carey notes, the government Madison and his colleagues contemplated was “a relatively passive government.”⁸³ Since Madison’s time, “dominant political forces have seen as their main task” securing “greater economic and social equality,” and this “quest for equality in all spheres of social life seemingly knows no bounds short of repealing the laws of nature.”⁸⁴ Consequently, “the government has

77. James Q. Wilson, *Why We Don't Marry*, CITY J., Winter 2002, available at http://city-journal.org/html/12_1_why_we.html.

78. THE FEDERALIST NO. 10, *supra* note 64, at 43.

79. See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas L. Laycock et al. eds., 2008).

80. THE FEDERALIST NO. 10, *supra* note 64, at 43.

81. *Id.* at 45.

82. *Id.* at 48-49.

83. George W. Carey, *The Constitution and Community*, in COMMUNITY AND TRADITION: CONSERVATIVE PERSPECTIVES ON THE AMERICAN EXPERIENCE 63, 79 (George W. Carey & Bruce Frohnen eds., 1998).

84. GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION 48 (1989).

massively intervened in precisely those areas of economic and social life where it is abundantly clear that the opportunities for factious influence abound.”⁸⁵ The centralization of political power at the federal level and in the judicial branch is one of the most significant barriers to the proper working of the faction-defeating characteristics of the extended republic, including the principle of federalism.

Having the definition of marriage “constitutionalized” and made the exclusive province of the federal courts would neutralize the check against minority factions. It would ally the courts with the minority faction. It would also neutralize the checks on majority factions (by removing the question from the representative branches and eviscerating federalism by permanently removing the definition of marriage from the states).

All this and more is at stake in the debate over creating a new legal classification of sexual orientation. It is a question we cannot afford to answer wrongly.

85. *Id.*