THE EQUAL APPLICATION DEFENSE: THE EQUAL APPLICATION DEFENSE

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The Opening and the Close
Of Being, are alike
Or differ, if they do,
As Bloom upon a Stalk.
That from an equal Seed
Unto an equal Bud
Go parallel, perfected
In that they have decayed.¹

I. INTRODUCTION

Once again, the nation finds itself embroiled in a radical redefinition of marriage and, once again, it finds the resurfacing of a reactionary rationalization for social mores and the legal defenses thereof. This is what the equal application defense was—past tense—and this is what the equal application defense is seeking to become again.

Succinctly, the equal application defense maintains that a statute’s reliance on any particular classification system is not constitutionally problematic if the statute applies equally to both (or maybe all²) member classes within the system. Laws prohibiting interracial cohabitation and marriage, since held unconstitutional, were said by their proponents not to be discriminatory because they were applied to whites and blacks alike. Likewise, laws prohibiting same-sex marriage are said not to be discriminatory because they are applied to men and women alike. There is no difference between these arguments, as far as these arguments can comprehend.³

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² See infra text accompanying notes 37–41.

³ A word here about analogy. The more common discussion of these arguments comes in conservative critiques of the so-called “Loving analogy,” which contend that connections be-
This, then, is the equal application defense to the equal application defense. If the defense is to be applied, it must be applied to all alike. If it is to be—as it has, in fact, been—repudiated, it must be repudiated for all the same. If it is valid, laws prohibiting miscegenation are not unconstitutional. If it is invalid, laws prohibiting same-sex marriage are likely unconstitutional: marriage traditionalists must either formulate a different response to claims of sex discrimination or defend the exclusion of same-sex couples under the intermediate standard of scrutiny afforded sex classifications.4

Contemporary proponents of the equal application defense misunderstand the import of facial classification and misapprehend the depths of sexism in American history and society. Worse, the defense either flatly ignores or grossly misreads Supreme Court precedent: it is simply not good law. Part II of this Article details the extension and rejection of the equal application defense in its original context and then examines the revitalization of the equal application defense in sexual contexts. The truth is that McLaughlin v. Florida5 and Loving v. Virginia6 necessarily altered the defense: its initial incarnation stated simply that a law is constitutional so long as it applies equally to the groups involved, whereas its reincarnation urges that equal application demarcates facial neutrality and therefore only a discriminatory purpose will subject the law at issue to constitutional

tween miscegenation and same-sex marriage are tenuous. See David Orgon Coolidge, Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy, 12 BYU J. PUB. L. 201, 201 (1998) ("The use of Loving in our time is preeminently a political use. In the debate over the definition of marriage, Loving is the wedge, the theme piece, the call to arms. One might call Loving 'the race card' of the marriage debate. Advocates are 'playing the Loving card.'"); id. at 204 ("I conclude 'the Loving analogy has been of vital political utility to the advocates of same-sex marriage precisely because it is more about politics than law."); Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. REV. 1, 75-88 (1996) (critiquing the analogy); Lynn D. Wardle, Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 S. TEX. L. REV. 735, 752 (1998) ("[H]omosexual behavior is not comparable to race as a basis for marriage regulations.").

This Article is more about law than politics, most specifically the conclusion in McLaughlin v. Florida, 379 U.S. 184 (1964), and again in Loving that the statutes contained racial classifications. This determination—of a point of law, by precedents of an authoritative court—is not merely an analogy. So it is all well and good to assert social or political differences between the miscegenation and same-sex marriage debates. The problem is the assertion that these differences undermine the claim of discrimination, an assertion quite clearly incorporated into most critiques of the so-called Loving analogy. Coolidge and his colleagues raise intelligible points regarding the political uses of the analogy but the issues of constitutional structure, facial classification, and discriminatory purposes are subjects of precedent, policy, and theory; to term these matters of analogy is, at least, misleading, if not pejorative.

4 See discussion infra note 70.
5 379 U.S. 184 (1964) (involving a statute that prohibited an interracial, unmarried couple from habitating in the same room at night).
scrutiny.\(^7\) Part III then engages three critiques of this revitalized equal application defense. The first, the *strong* defense, maintains very directly that there is no legally articulable reason why the defense would apply any more or less depending on the classification or scrutiny involved. Part III continues to consider first the claim that no facial sex classification is involved in same-sex marriage regulations and then the claim that there is no sexist purpose behind them. The goal is a limited but direct one: between these three critiques, the equal application defense must be understood as no defense at all.\(^8\)

II. AMERICA NEVER WAS AMERICA TO ME: \(^9\) THE BIRTH, DEATH, AND RESURRECTION OF THE EQUAL APPLICATION DEFENSE

The purpose of this Section is merely to examine closely the invocation of the equal application defense in the contexts of miscegenation and same-sex marriage. There are differences between these issues—significant issues regarding class and personal expressiveness—but the invocation of the defense reads nearly the same.

A. Pace Meets the Warren Court

The birth of the equal application defense came in *Pace v. Alabama*,\(^10\) addressing the constitutionality of a state statute that prescribed a more severe penalty for adultery or fornication when committed between "any white person and any negro."\(^11\) These penalties were levied against both offenders, however, and thus the statute purportedly made no distinction between the two classes committing the offense. The Supreme Court clung resolutely to this facet of the statute, asserting the mistake of comparing the basic adultery statute and its interracial analog.\(^12\) Thus sprang forth the defense: "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the

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\(^7\) As I endeavor to show in Part III.B, this distinction stems from an understandable but nonetheless unmistakable error. In short preview, this distinction stems from a misreading of *Loving* and an overlooking of *McLaughlin*.

\(^8\) Again, this conclusion is merely that the sex discrimination argument demands more legal attention than a putative rejection of the existence of sex classifications, facial or otherwise.

\(^9\) LANGSTON HUGHES, *Let America Be America Again*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 189 (Arnold Rampersad ed., 1994) ("Let America be America again. / Let it be the dream it used to be. / Let it be the pioneer on the plain / Seeking a home where he himself is free. / (America never was America to me.).")

\(^10\) 106 U.S. 583 (1882).

\(^11\) *Id.* at 583. In a preview of later anti-miscegenation statutes, Alabama's section 4189 was actually not quite so simple, also attaching the harsher penalty to adultery and fornication between a white and a "descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person . . . ." *Id.*

\(^12\) *Id.* at 584 (opinion of Field, J.).
person of any particular color or race. The punishment of each offending person, whether white or black, is the same.”

It is the second statement, naked, which resounds in the case law on interracial sexual relations; the first is a different staple of the conservative constitutional diet. So pervasive is this argument in miscegenation challenges that it even surfaces in *Frasher v. State*, which addressed a statute that “affixe[d] a penalty upon the white person alone, and none upon the negro.” Others were more direct in their allegiance. In *Green v. State*, for instance, the court declared the law “no more tolerates [interracial marriage] in one of the parties than the other—in a white person than in a negro or mulatto; and each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent.”

This reasoning endured for decades until the Warren Court declared it “a limited view of the Equal Protection Clause.” Even before *McLaughlin* and *Loving* reached the Supreme Court, the façade was crumbling. The Supreme Court of California had rejected an anti-miscegenation statute in the 1948 case of *Perez v. Lippold*. Relying on the importance of marriage, *Perez* distinguished *Pace* as merely an adultery and fornication statute and looked to the growing concern with racial classifications. *Korematsu*’s subjection of such classifications to “the most rigid scrutiny” loomed large, as did *Hirabayashi*. 

13 Id. at 585 (holding there was no violation of equal protection).
14 The relationship between these statements may be clear. Granted, the second is evidence of the first. Yet it would be more difficult to suggest that the first helps prove the second. Where it is repeated, the argument presented by the second is not wedded to the first and thus it is the second proposition alone that bears the brunt of the foregoing analysis. See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gays, Lesbians and Bisexual Identity*, 36 UCLA L. REV. 915, 956–57 (1989) (discussing presumptions about homosexual identity and behavior); Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 384, 387–89 (1994) (discussing the distinction between status and conduct).
15 3 Tex. Ct. App. 263, 276–77 (1877) (reasoning that, because defendants concede an equally applying statute would be constitutional, it follows that the State can regulate interracial marriage in the most effective manner it chooses). *Frasher*, therefore, is not truly an application of the defense. Yet *Frasher* raises a valid query: if it is it valid for the legislature to punish all, what renders a State’s selective benevolence unconstitutional?
16 58 Ala. 190, 192 (1877).
18 198 P.2d 17, 34 (Cal. 1948) (stating that the statute violated the foundations on which the country was built).
19 See id., 198 P.2d at 26 (Traynor, J.) (“We are not required by the facts of this case to discuss the reasoning of *Pace v. Alabama* except to state that adultery and non-marital intercourse are not, like marriage, a basic right, but are offenses subject to various degrees of punishment.”).
20 *Korematsu* v. United States, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).
shi's proclamation that distinctions based on ancestry are "by their very nature odious to a free people."21  Perez rejected the anti-miscegenation law under several theories22 and over an equally insistent dissent by Judge Shenk that found "an unbroken line of judicial support" for anti-miscegenation laws.23 First and foremost in this unbroken line was Pace.

Yet the prescient Perez decision had anticipated the break nearly two decades before McLaughlin reached the U.S. Supreme Court. Perhaps Loving gets more attention than McLaughlin because it addressed marriage instead of the criminalization of "a white person and a Negro who habitually occupy the same room at nighttime."24 Perhaps it is because of Loving's still singular accusation of "White Supremacy"25 or just the incredible caché of a case literally pitting Loving against Virginia. But in any case, it was McLaughlin that denied the authority in Pace,26 McLaughlin that declared Pace "a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court";27 and McLaughlin that urged that "[j]udicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of the class defined by the legislation."28 It was McLaughlin, not Loving, that decided that the question of "invidious discrimination" is "what Pace ignored and what must be faced here."29 In plain, simple language, the Court declared, "[W]e deal here with a classification based upon ... race ..."30

Loving merely followed suit, however resoundingly. Loving perceived “the doctrine of White Supremacy” as undergirding both Vir-

22. Perez was a fascinating mélange of constitutional arguments. It came in the specific context of two Catholics asserting that the prohibition violated their free exercise of religion to participate in the sacrament of marriage. See Perez, 198 P.2d at 18. The court also considered claims under the Fourteenth Amendment’s Due Process Clause, id. at 19, and Equal Protection Clause, id. at 20.
23. Id. at 198 P.2d at 39–41 (Shenk, J., dissenting).
26. See McLaughlin, 379 U.S. at 188 (abrogating Pace).
27. Id.
28. Id. at 191.
29. Id.
30. Id. I note this simple statement because of its significance later. To be clear on the groundwork for that application, this statement cannot be sensibly read as an attribution of a discriminatory purpose within a facially neutral statute. Only once does the McLaughlin Court suggest anything even remotely akin to an investigation of discriminatory purpose, when it declares the issue of invidious discrimination “what Pace ignored and what must be faced here.” Id. The best reading of this is that the McLaughlin Court saw invidious racial discrimination wherever there was a facial classification, not that the statute was facially neutral but exhibited a non-facial discriminatory purpose. Numerous references to racial classification belie this impression, as does McLaughlin’s remarkable revision of Pace as holding, sub silentio, that the Alabama miscegenation law was discriminatory but possessed a legitimate purpose. Id. at 190.
virginia's statute and the Virginia case of Naim v. Naim on which the State had relied. Judge Bazile's infamous remarks about God's racial intentions and the Court's blistering response are only of secondary importance here. More significant in the Court's opinion was its resolute denial of the equal application defense:

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination.... In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

This lengthy passage includes, repeatedly, an essential point. Not once does the Court suggest an examination of a discriminatory purpose because the statute is facially neutral. To the contrary, the Court notes, repeatedly, that the racial classification persists despite its equal application. Loving is a strident rejection of discriminatory purposes, but that vehemence followed an insistent articulation of the racial classifications used on the face of the statute. One might think this much would be unmistakable.

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[51] See VA. CODE ANN. § 20-57 (1960) (voiding interracial marriages); id. § 20-54 (defining interracial marriage).

[52] Compare Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (holding that the Constitution contains no provisions "which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which deny the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship"), with Loving v. Virginia, 388 U.S. 1, 7 (1967) (calling Naim "obviously an endorsement of the doctrine of White Supremacy").

[53] See Loving, 388 U.S. at 3 (quoting the trial judge: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix").

[54] See id. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriage involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

[55] Id. at 8–9.
Then again, one might think the same of the clearest defect in the equal application defense: the failure of the statutes to apply equally to all racial groups. Although a focus on whites and blacks was sensible considering the generally low numbers of other racial minorities, anti-miscegenation statutes often featured exceptions and extensions for such contingents. The statute in Perez forbade whites from marrying "negroes, Mongolians, members of the Malay race or mulattoes." Other statutes distinguished negroes or "those of African descent" from everyone else. Just as relatively low populations helped explain the preoccupation with the white-black paradigm, it was the presence of low but nonetheless appreciable communities that prompted these modifications. These issues were considered precisely because they had some relevance. In Jackson v. City of Denver, Judge Burke's discussion of the race and customs of Mexicans reflected the presence of Mexicans in Colorado in 1942. When the Montana Supreme Court discussed Japanese intermarrying, its attention to the local Japanese community was not a coincidence. Virginia's statutory exception for "persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood" was apparently intended "to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas."

For now, it suffices to recount that the equal application defense in the miscegenation cases was extended to a variety of statutory forms before its rejection in McLaughlin and again in Loving. These statutes did not all define Negroes or people of African descent the same way, yet all were deemed sufficiently equal in application.

57 Perez v. Lippold, 198 P.2d 17, 18 (Cal. 1948) (quoting CAL. CIV. CODE § 60 (1933)).
58 See, e.g., Eggers v. Olson, 231 P. 483, 484 (Okla. 1924) (quoting OKLA. COMP. STAT. § 7499 (1921)).
59 See Jackson, 124 P.2d at 241 (Burke, J.) (discussing a statute that specifically excluded the portion of Colorado acquired from Mexico).
60 See In re Takahashi's Estate, 129 P.2d at 217 (denying a white woman the right to administer her dead husband's estate because he was Japanese and a marriage between a white person and a Japanese person is void in Montana); see also In re Paquet's Estate, 200 P. 911, 913 (Or. 1921) (reviewing an Oregon statute prohibiting marriage between a white person and a "Negro, Chinese, or any person having a one-fourth or more negro, Chinese, or Kanaka blood, or any person having more than one-half Indian blood...."). The simple claim here is that there were Chinese and Kanaka individuals in Oregon to motivate this provision's terms.
61 VA. CODE ANN. § 20–54 (1960) (prohibiting interracial marriage and defining the term "white persons"); see infra Part III.C (discussing the descendants of Rolfe).
B. Sexing It Up: An Enticing Extension of the Equal Application Defense

Before the modern debate about same-sex marriage, the equal application defense was extended to sex in another intriguing application: regulations on cross-sex massage parlors. Motivated by the need to guard against the commission of lewd acts, some states imposed legal restrictions on the procurement of a body massage by a therapist of the opposite sex, often requiring the presence of a licensed physician.

In reviewing these statutes, the courts have been mindful, to an extent, of their equal application betwixt the sexes. In *Ex parte Maki*, a California District Court of Appeal declared a Los Angeles ordinance regulating cross-sex massage permissible.\(^{42}\) *Maki* heeds the equal application of the ordinance to men and women alike.\(^{43}\) These prohibitions are more analogous to interracial adultery, cohabitation, and marriage prohibitions precisely because they are cross-classification.\(^{44}\)

Yet some attention is warranted as to the concerns these courts saw motivating the laws at issue. Careful analysis is limited to an extent by what might be seen as prudishness; there can be only a vague appreciation for what Judge Moore in *Maki* termed, “[t]he inclination of a percentage of mankind to ignore conventionalities, moral codes and inhibitory statutes and to indulge in licentious practices

\(^{42}\) 133 P.2d 64, 69 (Cal. Dist. Ct. App. 1943). The statute at issue reads:

a) It shall be unlawful for any person to administer, for hire or reward, to any person of the opposite sex, any massage, any alcohol rub or similar treatment, any fomentation, any bath, or any electric or magnetic treatment, nor shall any person cause or permit in or about his place of business, or in connection with his business, any agent, employee or servant or any other person under his control or supervision, to administer any such treatment to any person of the opposite sex.

b) This section shall not apply to any treatment administered in good faith in the course of the practice of any healing art by any person licensed to practice any such art or profession under the provisions of the Business and Professions Code of California or of any other law of this state. *Id.* at 66 (citations omitted). Accord *People v. City of Chicago*, 37 N.E.2d 929 (Ill. App. Ct. 1941); *Patterson v. City of Dallas*, 355 S.W.2d 838 (Tex. Civ. App. 1962); see also *Cheek v. Charlotte*, 160 S.E.2d 21, 22 (N.C. 1968) (“In upholding the ordinance in its entirety, the Texas court said that the case of *Ex parte Maki* was so well decided that it was decisive of the appeal. The court encountered no difficulty in finding reasonable grounds for the discrimination in favor of the persons exempted.”). *Cheek* differed from its predecessors in rejecting the statute for its failure to apply to other comparable businesses, without ever rejecting its distinction drawn between the sexes. *Id.*

\(^{43}\) *Maki*, 133 P.2d at 67 (“The ordinance applies alike to both men and women. If petitioner should receive only male patrons and do his own work or employ only masseurs, he would not violate the ordinance. If he should receive only female patrons and employ only masseuses to do his work, there would be no violation.”).

arising from the sex impulse... Is "mankind" an advised term?—Does this concern for licentiousness apply equally as to masseurs and masseuses? Against the background of federal regulation addressing the importation of women for immoral purposes, and not men, and a common law system that specifically designated women's rights as subordinate, and not men's, it cannot be reasonably gainsaid that the purpose behind the law did not apply with equal significance to each sex.

C. Re-Marriaging the Equal Application Defense: The Contemporary Defense

In same-sex marriage cases, gay rights advocates contend that prohibitions on same-sex marriage are a form of sex discrimination. Traditional opponents then reply that there is no sex discrimination because the prohibition applies equally to males and females. Justice Scalia's dissent in Lawrence heralded the defense's return.

In some instances, the equal application defense must be conceded as impassable. Unlike the federal constitutional provisions at issue in miscegenation laws, many same-sex marriage challenges are brought under color of state constitutions which sometimes vary according to their specific constitutional provisions. For instance, Indiana's state equality provision has been interpreted to demand

45 Maki, 133 P.2d at 67.
47 See infra notes 109-111 (discussing coverture and other marital sexual restrictions).
49 See Lawrence v. Texas, 539 U.S. 558, 599-600 (2003) (Scalia, J., dissenting) ("On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.").
equal application.\(^5\) Here, at least, the power of the equal application defense cannot be reasonably resisted.

Yet many other states have fairly typical equality provisions\(^5\) and sometimes specifically “track” their federal analog.\(^5\) Consider the New York case of *Hernandez v. Robles*,\(^5\) in which the concurring opinion in the Appellate Division discussed the defense at great length.\(^5\) The claim of sex discrimination in *Robles* came to the Appellate Division in a precarious posture. Judge Doris Ling-Cohan had determined that the statute impermissibly discriminated on the basis of sexual orientation, without deciding whether it discriminated on the basis of sex.\(^5\) Judge Catterson took issue. First, he asserted the same

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\(^{51}\) Id. at 37 (“First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.” (quoting Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994))). Sadler is elsewhere clear that the Indiana Constitution differs from state counterparts. Id. at 27; see also id. at 36 (Friedlander, J., concurring) (“A number of our sister states either already have considered or are currently considering this question. Many have rendered opinions. Were all state constitutions the same, such cases might be of considerable persuasive value. All state constitutions are not the same, however.”). I excuse also in this category Lewis v. Harris, 875 A.2d 259, 271 (N.J. Super. Ct. App. Div. 2005) (“[O]ur courts employ a balancing test that considers ‘the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.”); id. at 288 (Collester, J., dissenting) (“[O]ur Supreme Court has eschewed the multi-tiered analysis employed by the United States Supreme Court.”); id. (citing Matthews v. City of Atlantic City, 417 A.2d 1011, 1023 (N.J. 1980) (Clifford, J., dissenting), for the description of the federal standards as a “veil of tiers”).

\(^{52}\) See, e.g., MASS. CONST. art. CVI, § 2 (“Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”); N.Y. CONST. art. I, § 11 (“No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”).

\(^{53}\) See, e.g., Empress Adult Video & Bookstore v. City of Tucson, 59 P.3d 814, 828 (Ariz. Ct. App. 2002); Goodridge, 798 N.E.2d at 959 (“The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”); Samuels v. N.Y. State Dept’ of Health, 811 N.Y.S.2d 136, 142 (App. Div. 2006) (“The Court of Appeals has noted that ‘the State constitutional equal protection clause . . . is no broader in coverage than the Federal provision.”’ (quoting Under 21 v. City of New York, 482 N.E.2d 1, 7 n.6 (N.Y. 1985))).

\(^{55}\) See Hernandez v. Robles, 794 N.Y.S.2d 579, 604 (Sup. Ct. 2005), rev’d, 805 N.Y.S.2d 354 (App. Div. 2005) (“This Court, however, need not decide whether the exclusion of same-sex couples from the institution of civil marriage discriminates against each of the persons in those
basic argument presented in *Pace* but adapted to sex classifications. He then, not unlike the dissent in *Perez*, exhaustively recounted agreeing authorities for practically identical propositions. Next, as had Justice Scalia in *Lawrence*, Judge Catterson took to distinguishing *Loving* as having "clearly stigmatized African Americans as inferior to Caucasians" whereas he found "no evidence" of an "intent to discriminate against either men or women." But he deviated from Scalia’s dissent with assertions of his own. For one, he found it "discouraging" to "consider the horror of the Civil War and the majesty of the Emancipation Proclamation in the same breath as same-sex unions." Second, Judge Catterson advanced a "purely logical" failure of the sex discrimination argument: that miscegenation statutes prohibited marriages between individuals of different races whereas same-sex marriage prohibitions prohibit marriages between individuals of the same sex. The concurrence even extended the argument to the sexual orientation discrimination claim, asserting that both homosexuals and heterosexuals are free to marry individuals of the opposite sex. Here, too, Judge Catterson denied a discriminatory purpose or intent.

Ironically, whereas miscegenation fostered no illusions of facial neutrality outside the white-black binary, despite being so often discussed as neutral, marriage makes no reference to sex until actively defined in these terms by the judiciary. Only in Defense of Mar-
riage Act (DOMA) jurisdictions do statutes limit marriage to a man and a woman. In Robles and elsewhere, it is the courts that supply their own definition of marriage and assert that definition in denying same-sex marriages. Yet after this creativity, the equal application defense is much the same, inventing the same conclusion and relying on the same basic constitutional error.

D. A New Day, a Different Defense: Framing the "Fresh Form" of the Equal Application Defense

The argument embraced in Pace is no doubt the formula for those extended in Robles and elsewhere. The equal application defense has adapted but remains essentially the same.

The only salient difference between the classic and contemporary versions of the equal application defense is the secondary analysis of arguable discriminatory purposes pursued in the defense's current form. The original equal application defense ended the constitutional inquiry; the new form only advances the claim past the question of facial classification before considering a discriminatory purpose. Of course, advocates of the equal application defense in same-sex marriage cases invariably cannot locate any such discriminatory purpose.

islative assumption that marriage consists of a union of opposite genders may be found in the consanguinity statutes . . . .

Likewise, in his concurrence in Lewis v. Harris, 875 A.2d 259, 275 (N.J. Super. Ct. App. Div. 2005) (Parillo, J., concurring), Judge Parillo points to “marriage laws under attack, which simply delineate which persons may not marry each other,” and cites the New Jersey Statute, which reads:

A man shall not marry any of his ancestors or descendants, or his sister, or the daughter of his brother or sister, or the sister of his father or mother, whether such collateral kindred be of the whole or half blood. A woman shall not marry any of her ancestors or descendants, or her brother, or the son of her brother or sister, or the brother of her father or mother, whether such collateral kindred be of the whole or half blood. A marriage in violation of any of the foregoing provisions shall be absolutely void.

N.J. STAT. ANN. § 37:1-1 (West 2007) (amended 2007). Yet the plaintiffs in Lewis were not incestuous. The implication is instead, as even Judge Collester concedes, Lewis, 875 A.2d at 279 (Collester, J., dissenting), that the statute enshrines marriage as opposite-sex by its terms, prohibiting men from marrying female relatives and women from marrying male relatives. I take further Judge Collester's recognition that the argument, "circular" as it may in some sense be, "has the advantage of simplicity." Id. at 280; see also infra Part III.B (utilizing definition theory to assert facial classification). But see Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *1, *2 (Wash. Super. Aug. 4, 2004), rev'd, 138 P.3d 963 (Wash. 2006) (“To ‘marry’ means to join together in a close and permanent way. The plaintiffs’ sworn statements reflect that, within each pair, they have already made a close personal commitment to be joined together in a bond that is intended to be permanent. Thus, in a basic or linguistic sense, they are in fact now married.”).


See, e.g., Lawrence v. Texas, 539 U.S. 558, 600 (Scalia, J., dissenting) (“No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies.”).
The common bond between these two equal application arguments is their essential mantra: there is no discrimination. Nor is this insistence ever justified analytically, except by its own repetition. The fact that a law does not “create any disadvantage identified with gender, as both men and women are similarly limited to marrying a person of the opposite sex” does not prove the fact that a law “creates no distinction between the sexes, but applies to men and women in precisely the same way”—these are simply the same facts. There is a reductive quality—a “nuh-uh”-ness—to the equal application defense; its expositors seem to view it as axiomatic that, since the law applies equally, it is not discriminatory. The fresh form of the equal application defense confronts the issue of purpose in the wake of McLaughlin and Loving but both alike share in this essence.

III. LET AMERICA BE AMERICA AGAIN: CRITIQUING THE REFRESHED DEFENSE

This revitalized equal application defense has no place in contemporary Equal Protection jurisprudence. On a superstructural level, Equal Protection doctrine first determines whether any and which classification system constitutes the basis of the statute and then applies a standard for reviewing it. In locating a classification system, the courts look to the face of the statute or non-facial indications of a discriminatory purpose, be they strong empirical indications or the appearance of a statutory objective. A discriminatory purpose does not require a particular subjective state of mind of legislators but only “that an individual or group was treated differently because of” a particular classification system. The courts then de-

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68 See HUGHES, supra note 9 at 191 (“O, let America be America again— / The land that never has been yet— / And yet must be—the land where every man is free. / The land that’s mine—the poor man’s, Indian’s, Negro’s, ME— / Who made America, / Whose sweat and blood, whose faith and pain, / Whose hand at the foundry, whose plow in the rain, / Must bring back our mighty dream again.”).

The Court’s intentional discrimination cases can be divided into two familiar categories: those that involve facially discriminatory classifications and those that are facially neutral. For facially discriminatory practices and policies, the element of intent is inferred from the language, and the Court engages in no additional inquiry to determine whether the statute or policy was discriminatory. . . . More commonly, statutes and policies challenged as discriminatory are facially neutral, and the court must infer intent from the fact of differential treatment. This inference is generally drawn based on the accumulated evidence, which is almost always circumstantial in nature.

Id. at 290. This much is also clear from Supreme Court precedents, particularly Personnel Administrator of Massachusetts v. Feeney.

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
mand demonstration of the importance of the interests articulated in defense of the statute and the statute's relationship to the advancement of those interests. Classifications according to race, national origin, and alienage require a compelling state interest and a closely tailored relationship; classifications according to sex and illegitimacy require an important state interest and a substantial relationship; all other classifications require only a legitimate interest and a reasonable relationship. There is a burden-shifting element that is dependent on the standard of scrutiny, but the courts have also, guided by Supreme Court precedents, shown a willingness to find the plaintiff's burden satisfied under the rational review standard.

This basic superstructure of Equal Protection jurisprudence is invaluable in assessing the equal application defense. The defense is mistaken in its analysis of facial classification and discriminatory pur-

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442 U.S. 256, 274 (1979) (citations omitted). Feeney is also instructive because this exact passage is cited by Judge Cordy in the third and final Goodridge dissent. 798 N.E.2d at 991–92 (Cordy, J., dissenting) (claiming the Feeney court “declin[ed] to characterize veterans' preference as sex discrimination because it applied to both male and female veterans”). The Feeney treatment is clearly more substantial than that, however; consistent with McLaughlin and Loving in its attentiveness to facial classification and purposeful discrimination despite the absence thereof in Feeney. Feeney offers no shelter for the equal application defense.

See Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that race, national origin, and alienage invoke “the most rigid scrutiny.”). Sex discrimination has failed to earn strict scrutiny, however, Frontiero v. Richardson, 411 U.S. 677 (1973), and occupies an intermediate standard, Craig v. Boren, 429 U.S. 190 (1976), alongside illegitimacy, Matthews v. Lucas, 427 U.S. 495 (1976) (Blackmun, J.). Everything else notionally gets rational review, though certain groups such as the disabled, Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), and homosexuals, Romer v. Evans, 517 U.S. 620 (1996), have had their rights vindicated under this relaxed standard (applying rational review and finding discrimination).

See generally Larry Alexander, Sometimes Better Boring and Correct: Romer v. Evans as an Exercise of Ordinary Equal Protection Analysis, 68 U. COLO. L. REV. 335, 344–45 (1997) (“Strict scrutiny on this conception is just a strong judicial presumption that rules with certain characteristics violate the Constitution. Likewise, rational basis review represents a strong judicial presumption in favor of the constitutionality of the rules to which it applies. (Actually, as the Supreme Court has used it, rational basis review is a range of presumptions that extends from an almost conclusive presumption of constitutionality to no presumption in favor of or against constitutionality.) Intermediate scrutiny typically covers a range from some presumption of unconstitutionality to no presumption of either constitutionality or unconstitutionality.”).

See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (holding that a Colorado constitutional amendment prohibiting legislative, executive, and judicial action protecting homosexuals did not bear a rational relationship to a legitimate government purpose); Cleburne, 473 U.S. at 485 (applying rational review and holding a city ordinance invalid); see also Alexander, supra note 71 (discussing judicial application of rational review in equal protection case analysis); R. Randall Kelso, Standards of Review Under The Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice, 4 U. PA. J. CONST. L. 225, 227–37 (2002) (discussing Supreme Court cases striking down legislation through application of rational review).
pose. Additionally, the sequence of equal protection analysis coun-
sels for applying the equal application defense universally or not at
all. This "strong" critique of the equal application defense precedes
the arguments concerning facial classification and discriminatory
purpose but any of them are sufficient to defeat the defense.

A. The Strong Equal Application Defense to the Equal Application Defense

This important difference recounted above does not disturb the
ultimate formal equation of these versions. The issue(s) surveyed are
the existence of facial classifications and, in the latter version, the ex-
istence of a discriminatory purpose. These are the determinants for
the constitutional standard of scrutiny for reviewing the statute at
hand. They are therefore not determined by it. There is simply no
reason why the defense should be generally good for some scruti-
nized classifications and generally not for others. To apply this
equally, there is simply no reason why the defense should be repudi-
ated by the United States Supreme Court for some classifications but
revitalized for others by courts below.

B. Facial Classification in an Anti-Affirmative Action Era

Beyond this strong attack, there are weaker claims still forceful
enough to defeat the defense. The enduring assertion of the equal
application defense is that equal application erases the burden of a
facial classification. This argument was legally wrong the day
McLaughlin was decided. It is even less sensible in contemporary
constitutional jurisprudence, however, where it appears that even
statutory classifications that accord benefits or preferences are un-
constitutional.

The basic error of the modern form of the equal application de-
fense is that it distorts McLaughlin and Loving on the issue of facial
classification. While it is indubitable that a discriminatory purpose
will doom a facially neutral law, McLaughlin and Loving alike re-
jected the assertion that the laws were facially neutral simply because
they applied equally. The existence of a facial classification is such an
elementary issue that no law confines it: facial classifications admit-

73 See supra note 70 (reviewing tiered scrutiny).
75 See Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) ("And while this consent of the supervi-
sors is withheld from them and from two hundred . . . Chinese subjects, eighty others, not Chi-
nese subjects, are permitted to carry on the same business under similar conditions. . . . No rea-
son for it is shown, and the conclusion cannot be resisted, that no reason for it exists except
hostility to the race and nationality to which the petitioners belong, and which in the eye of the
law is not justified.").
But if it is a contest between unprovable assertions, it does rather matter that one contestant is obligated to adhere to the other's opinion. It is difficult to reconcile the defense's view of these cases with their actual language.

In a sense, this is to say that facial classification alone is sufficient to warrant whatever scrutiny attaches to the classification system. This is the more consistent reading of these precedents and is on even firmer constitutional ground in the wake of the Burger and Rehnquist Courts' affirmative action jurisprudence. Whereas the Court had suggested an intermediate standard of scrutiny for benign discrimination,76 the Michigan Cases have clarified the extension of strict scrutiny to such laws.77 This extension is significant, depending perhaps on one's impression of "ox-goring."78 It may be that strict scrutiny is appropriate because of a harm associated with a traditionally empowered group,79 because of the illusory or paternal benefit offered the marginalized group,80 or perhaps both.81 It is difficult to

75 See Winkfield F. Twyman, Jr., Justice Scalia and Facial Discrimination: Some Notes on Legal Reasoning, 18 VA. TAX REV. 103, 114 (1998) ("Because the Court is operating without textual guidance or clear original meaning, every definitional issue necessarily involves a judgment call by the Court.").

76 See Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359-62 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (applying intermediate scrutiny); see also Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J.). Fullilove does not hinge on an issue of scrutiny per se but does lend effect to the determinations of Congress, rejecting "the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion." Id. at 482. Fullilove thus shares in the lax jurisprudential attitude towards benign discrimination that occupied the closing stanzas of the Burger Court.

77 See Gratz, 539 U.S. at 270-76 (2003) (invalidating an undergraduate admissions policy that relied on racial classifications through application of strict-scrutiny equal protection analysis); Grutter v. Bollinger, 539 U.S. 306 (2003) (explaining that all racial classifications imposed by government should be analyzed under strict scrutiny) [hereinafter, collectively, "the Michigan Cases"].

78 "Ox-goring" has caught on as constitutional terminology for the issue. See Bakke, 438 U.S. at 295 n.35 ("[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored." (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975))).

79 Adarand Constructors v. Pena, 515 U.S. 200, 241 n.6 (1995) (Thomas, J., concurring) ("It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others."). But see Bakke, 438 U.S. at 375 (Brennan, J., concurring in the judgment in part and dissenting in part) ("Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color.").

80 See Bakke, 438 U.S. at 360 (Brennan, J., concurring in the judgment in part and dissenting in part) ("[W]e nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear . . . . State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce
do one without the other: preferring one often translates into harming another. Yet it would be difficult to divorce the jurisprudence from a rejection of preference. Some opinions have spoken specifically about the hazards of constitutional preferences. Moreover, the suggestion of intermediate scrutiny for supposedly "benign" instances of discrimination must generate some presumption that the lens of preference was a considered aspect of these decisions.

the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."). But see id. at 376 ("Once admitted, these student must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged . . . Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.").

See Grutter, 539 U.S. at 349–51 (Thomas, J., concurring in part and dissenting in part) (arguing that the policy in question amounted to both discrimination of an empowered racial group and an unnecessary paternal aid to the aided racial group); id. at 371 ("Putting aside what I take to be the Court's implicit rejection of Adarand's holding that beneficial and burdensome racial classifications are equally invalid, I must contest the notion that the Law School's discrimination benefits those admitted as a result of it."); Adarand, 515 U.S. at 241 (Thomas, J., concurring) ("So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.").

See Bakke, 438 U.S. at 298 (Powell, J.) ("[T]here are serious problems of justice connected with the idea of preference itself"); id. at 307 ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

It was, after all, racial preferences in admissions processes at issue in the Michigan Cases. See Gratz v. Bollinger, 539 U.S. 244, 249 (2003) (Rehnquist, C.J.); id. at 266, n.16 (framing the challenge as attacking "any use of race"); id. at 269–72 (recounting jurisprudence); id. at 281 (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.").

The dissents in Gratz are sharply critical of the majority on the issue of standing, focusing closely on the framing of the controversy as "any use of race." See id. at 287–88 (Stevens, J., dissenting) (noting Grutter's counsel's oral argument representation that, "[w]e are not suggesting an absolute rule forbidding any use of race under any circumstances. What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest."); id. at 291–93 (Souter, J., dissenting) (criticizing the Court's standing theory). These dissenters do not dispute, however, that the issue is race-consciousness. See id. at 295 (describing the admissions policy at issue as a "race-conscious admissions scheme"); id. at 298 (Ginsburg, J., dissenting) ("[T]he Court once again maintains that the same standard of review controls judicial inspection of all official race classifications."); id. at 302 ("The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection."). Accord Grutter, 539 U.S. at 326 (O'Connor, J.) ("Because the Fourteenth Amendment 'protects persons, not groups,' all 'governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." (quoting
There is certainly a strong suggestion that preferential classifications are just as constitutionally problematic as their harmful counterparts. So it must be asked: if facial classifications that harm are unconstitutional and facial classifications that benefit are unconstitutional, why are facial classifications that apply equally uniquely constitutional? The simple answer: they are not. Consider lastly the purposes evinced for the cross-sex massage prohibitions in Maki. If facial classification adduces an inference of a loosely defined discriminatory intent, would not the facial neutrality of a statute yield to differential purposes?

This critique should also dispense with the "purely logical" flaw in the analogy found by Judge Catterson in Hernandez v. Robles. The Court's jurisprudence suggests an equivalence between penalizing one group and preferring another, yet this translation stymies the logic of the asserted flaw. If both penalties and preferences are unconstitutional, and preferring difference is as presumptively unconstitutional as penalizing similarity, then it follows that penalizing similarity is unconstitutional too.

Like the strong form of the equal application defense to the equal application defense, this much is sufficient to return the defense to constitutional retirement. If this is true, the question is not whether a law without a facial classification could still possess a discriminatory purpose, but only whether any such finding of purpose is even necessary after a law is found to possess a facial classification. So much has never been held by the Court, seems contrary to the affirmative action jurisprudence, and seems patently needless as a matter of judicial discretion.

Adarand, 515 U.S. at 227)); id. ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting Adarand, 515 U.S. at 227)); id. at 348 (Scalia, J., dissenting) (framing the issue as preference).

85 805 N.Y.S.2d 354, 370–71 (App. Div. 2005) (Catterson, J., concurring) ("The Loving analogy is inapt on purely logical grounds. The statutes struck down in Loving (as well as those in Perez) prohibited marriages between members of different races, not between members of the same race. The equivalent, in the area of sex, of an anti-miscegenation statute would not be a statute prohibiting same-sex marriages, but one prohibiting opposite-sex marriages, an absurdity which no State has ever contemplated.").

86 This is a cautious assertion. The rather explicit holding of the Michigan Cases is that diversity may serve as a compelling interest. In this sense, "preferring difference" has been vindicated. Yet, a point certainly worth stressing is that in this instance there nonetheless was a presumption of unconstitutionality salvaged only through the application of strict scrutiny.

Hernandez, 805 N.Y.S.2d at 371 (Catterson, J., concurring) (recognizing "a fundamental precept of constitutional law that '[a] racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race.'" (quoting Lawrence v. Texas, 559 U.S. 538, 600 (2003))).

88 See supra notes 77–84.

89 With all reverence for the courts, judicial discretion is not and should not be unbounded. Rigorous nomination and election processes are likely to eliminate forcefully biased judges. Even the most non-discriminatory judge should recognize, however, the clear danger involved in permitting judges to excuse facial classifications based simply on a discretionary determina-
C. The Red Rolfses and a Radical Feminist Critique of Marriage

The second prong of the contemporary equal application defense is that a discriminatory purpose is likewise absent. Even doubting the strong defense and resisting the existence of facial classifications, the claim of a discriminatory sexist purpose behind same-sex marriage prohibitions cannot reasonably be casually dismissed. Whatever one might think of their own marital or intimate bond, however uncomfortable personal relationships might make this consideration, it is undeniable that marriage and heterosexual intercourse have both historically instantiated male social dominance. Here, Virginia’s antimiscegenation statutory exceptions are quite instructive.

Individuals who were one-sixteenth or less Native American fared differently under Virginia’s statute than other racial minorities. In terms of permissible marital partners, this segment of the population technically fared better than any other racial group under the statute’s terms. Yet it could not plausibly be maintained that this exception marked the adoption of a racial hierarchy with this particular group at its peak. To the contrary, exceptions such as Virginia’s bespeak an assimilationist ideology that is drastically different than, but consistently racist with, the segregationist vision that dominated the statute’s application in the black-white binary. The exception for “Red Rolfses” demonstrates that race was a sufficiently malleable value to justify the segregation and subordination of blacks for their labor and the compelled socialization of Natives for their land. Race is ubiquitous in American history and its influence long preceded the creation of the United States.

Yet the same should be said about the import of sex. It also operates throughout society, differently in different contexts: masculinity and femininity, gender at home and in the workplace, in matters

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90 See supra Part II.C (discussing same-sex marriage).
91 There is no provision in the Virginia statute defining these white/Native American ancestors as white, for the purposes of the statute or otherwise. The provision simply states these individuals may marry whites. It therefore appears that these individuals, uniquely, could marry both white and non-white people alike.
92 This phrase refers to a term used to describe the descendents of Pocahontas and John Rolfe. See Powhatan Ranape Nation, The Pocahontas Myth, http://www.powhatan.org/pocc.html (defining the term and suggesting that Pocahontas’s marriage to Rolfe was less than consensual).
93 This is a callous comparison, not intended to be exhaustive. Yet if it is clear that the civilization of Native Americans was central to the justification for acquiring their land and equally clear that the degradation of Negroses was central to the justification for exploiting their labor, it hardly seems unfair to credit the difference between land and labor motives for the assimilationist and segregationist demands placed on the groups.
of religion—and in race, as well. The fact that the interaction was between a white man and a Native American woman can partly be attributed to the gendering of roles in the two cultures; the former kept women in domestic and private capacities while the latter allowed Pocahontas to serve as an active diplomat and liaison. But the legacy of Pocahontas and the apparent nobility credited in the Virginia statute, cannot simply be attributed to the important public functions of the Powhatan princess. The transmission of Western culture to native people through sex featured men as the active ingredient in both processes. The reaction of colonial explorers to a Southwestern native ritual where women danced violently and lewdly on "the corpses of enemies" is just one vivid example of how offensive

should not separate gender and sex); Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 188-96 (1988) (discussing homosexuality's departure from traditional gender norms and postulating that negative legal attitudes toward homosexuality are attempts to preserve traditional views of masculinity and femininity).


97 This intersection has been most ably explored by Professors Kimberle Crenshaw and Angela Harris. See generally Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990).


[50 Tenn. 287, 300 (1871).]
an inversion of sexual activity and passivity was to the cultural sensibilities of the Westerners. 100

Sex instantiated power in a different but appreciable way within the white-black binary before and after the abolition of slavery. Disputes persist as to the prevalence of breeding techniques per se, but the use of the black woman's reproductive capability to perpetuate the slave trade is undeniable, particularly after the importation of slaves was prohibited. 101 There is too much historical support indicating the prevalence of sexual relations between white male slaveowners and their black female slaves to be ignored or dismissed as anecdotal or rare, and, considering that the rape of a slave was generally not a criminal offense, there is every reason to scrutinize these relationships. 102 These problems suggest the tremendous burden placed on black women during slavery. More generally, they vividly depict how sex, marriage, and reproductivity can be used to reify power. When a black peon recounts his wife's liaisons with one of the white owners, her staying in a separate, nicer house with her children from the owner, the sale of his own son with her and an owner's eventual decision to simply tell him to "git," the illustration of power through sex and reproductivity is clear. 103 When a slaveowner's black mistress raised "her" children in separate and more comfortable quarters, one cannot ignore the dominance that permitted those comforts.

The terrors of rape and lynching remained common tactics in the racial and sexual regulation of the freed slaves throughout segregation. 104 Reconstruction brought new perils as well, however. In Kill-

100 WILLIAM K. POWERS, WAR DANCE: PLAINS INDIAN MUSICAL PERFORMANCE (1990). See MACKINNON, supra note 99, at 89 (opining that "[w]hat is not considered to be a hierarchy is women and men—men on top and women on the bottom"). Of course, Gayle Rubin's classic Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267-319 (Carole S. Vance ed., 1984), also recognizes these attributes.

101 See U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); see also DOROTHY ROBERTS, KILLING THE BLACK BODY 22-55 (1997) (discussing reproduction in the slave trade); id. at 27-28 (noting historical debate about the prevalence of breeding techniques).

102 See ROBERTS, supra note 101 at 29-33 (illustrating the sexual tortures endured by female slaves).

103 See Ida B. Wells Barnett, The Lift Story of a Negro Peon, Obtained from an Interview with a Georgia Negro, reprinted in BLACK WOMEN IN WHITE AMERICA 150-55 (1972) (discussing the historical role of black women as sex objects).

104 Lynching and rape were often complementary tools of oppression. Family members decrying the sexual violation of black women were met with the lynching party, and lynching parties frequently violated black women while looking for their family members. See Barnett, supra note 103, at 202 ("With the Southern white man, any mesalliance existing between a white woman and a colored man is a sufficient foundation for the charge of rape.... In numerous instances where colored men have been lynched on the charge of rape, it was positively known at the time of lynching, and indisputably proven after the victim's death, that the relationship
ing the Black Body, Dorothy Roberts powerfully argues that modern reproductive policy, particularly as evinced by political debates surrounding welfare recipients, cannot be divorced from America’s racist heritage. En route, she notes how eugenic theory lent justification to the racist ideology of slavery and resulted in the augmenting of anti-miscegenation laws. In these issues, Roberts finds the assertion of both racial and sexual power. Her thrust in Killing the Black Body is the racialization of reproductive policy, whereas the thrust of this work is the sexualization of racial and colonial policy. In Pocahontas, children are taught the story of a Powhatan princess who is taken, racially and sexually, by white civilization—and taught to laud it.

Relations of power between white men and Native American and black women are particular illustrations of relations of power between men and women generally. Indeed, the rape of women is an enduring tool of political power, intraracially, interracially and internationally alike. It may be, as some feminist commentators have claimed, that heterosexual sex is power. It suffices to say simply that sex so often in America’s cultural tradition has been power and sustained between the man and the woman was voluntary and clandestine, and that in no court of law could even the charge of assault have been successfully maintained.

See Roberts, supra note 101, at 203–08 (illuminating the racist roots of welfare policy).


See MACKINNON supra note 99, at 6 ("All the ways in which women are suppressed and subjected—restricted, intruded on, violated, objectified—are recognized as what sex is for women and as the meaning and content of femininity. If this is done, sexuality itself is no longer unimplicated in women’s second-class status. Sexual violence can no longer be categorized away as violence not sex."); id. at 50 ("[F]eminism is a theory of how the erotization of dominance and submission creates gender, creates woman and man in the social form in which we know them. Thus the sex difference and the dominance-submission dynamic define each other."); id. at 85 ("What I see to be the danger of [unifying issues of violence against women], what makes it potentially cooptive, is formulating it—and it is formulated this way—these are issues of violence, not sex: rape is a crime of violence, not sexuality; sexual harassment is an abuse of power, not sexuality; pornography is violence against women, it is not erotic."); id. at 86–87 ("What we are saying is that sexuality in exactly these normal forms often does violate us. So long as we say that those things are abuses of violence, not sex, we fail to criticize what has been made of sex, what has been done to us through sex, because we leave the line between rape and intercourse, sexual harassment and sex roles, pornography and eroticism, right where it is.").
that sex *often remains* power today. Traditional marriage, with dower\(^{108}\) and coverture\(^{109}\) and the legal inexistence of marital rape,\(^{110}\) can hardly be immunized from this equation of sex and power. Social mores have developed but there should be no mistake: even today, "[t]his is being done to real women now."\(^{111}\)

If sex and marriage have often been and may often remain the instantiation of power, the insistence on opposite-sex marriage alone clearly implicates sex discrimination. In America’s cultural tradition, legal history, and in many American households today (and thus to many American eyes and ears), the term "wife" implies an inferior and subordinate status.\(^{112}\) To reserve that status for only women, and as women’s only status, is to discriminate against them. “Gender here is a matter of dominance, not difference.”\(^{113}\)

The rejoinder to this radical vision of marriage and sex relations generally is that such relations preserve natural and/or social har-

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\(^{109}\) See, e.g., Janet Calvo, *A Decade of Spouse-Based Immigration Laws*: *Coverture’s Diminishment but Not Its Demise*, 56 N. Ill. U. L. Rev. 154, 154–55 (2003) (illustrating that the basic concepts of coverture have been retained in spouse-related immigration laws); Emily Field Van Tessel, *Re-binder the Sticks*: *A Comment on Is Coverture Dead?*, 82 Geo. L.J. 2291, 2293 (1994) (recharacterizing Joan Williams’s theory as requiring the use of “dependency” in its alimony analysis); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 Geo. L.J. 2227, 2229 (1994) (identifying problems with the alimony framework that views the husband’s claims as rooted in entitlement, whereas the woman’s claims are linked to mere discretionary allotments).

\(^{110}\) See State v. Smith, 426 A.2d 38, 39 (N.J. 1981) (providing an example where the criminal code was reformed to exclude the defense of marriage when charged with rape); Matthew Hale, *Historia Placitorum Coronae*: *The History of the Pleas of the Crown* 629 (1800) ("[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."). Smith, 426 A.2d at 41 (resisting the exemption, tracing the theory to Hale "in a bare, extra-judicial declaration made some 300 years ago."); see also MackinNON, supra note 99, at 26 ("The reality is that not only married women, but also women men know or live with, can be raped at will. Men know this. Rape is not illegal, it is regulated. When a man assaults his wife, it is still seen as a domestic squabble, as permissible; when she fights back, it is a crime."); id. at 59 ("Men define women as sexual beings; feminism comprehends that femininity ‘is’ sexual. Men see rape as intercourse; feminists say much intercourse ‘is’ rape."); Jill Elaine Hasday, *Contest and Consent*: *A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373, 1375 (2000) (showing that some form of the common law exemption still exists in a majority of states); Note, *To Have and to Hold*: *The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255, 1255 (1986) (discussing the continued use of the marital rape exemption to subordinate women). *But see Smith*, 425 A.2d at 45 (explaining that the rule that a husband cannot be guilty of rape upon his wife has been adopted by its sister-states and considering a due process question of whether the husband had notice that his conduct was criminal).

\(^{111}\) *MackinNON*, supra note 99, at 199.

\(^{112}\) See id. at 23 ("[W]omen’s place is not only different but inferior, . . . not chosen but enforced."). Thus MackinNON’s suggestion that same-sex marriage "might do something amazing to the entire institution of marriage" by recognizing "the unity of two ‘persons’ between whom no superiority or inferiority could be presumed on the basis of gender." Id. at 27.

\(^{113}\) See id. at 51 (observing that men and women are equally different, yet unequally powerful).
mony. Though often coupled with the wondrous common benefits accrued under this gendered arrangement, I take the sharper edge of this argument to be the depths lodged by it in constitutional doctrine. Law has not embraced radical feminism and maintains that some sex differentiations are appropriate. Yet a reminder to those traditionalists who are also formalists: in such instances the Court has not simply conceded a discriminatory purpose and then summarily excused it. Rather, the Court has subjected those laws to its intermediate scrutiny and upheld them only upon a showing of some substantial relationship to a significant interest. In other words, this is a much better rejoinder to a radical feminist theory of sex relations than it is a defense of the equal application defense. Like its treatment of facial classification, the defense’s understanding of discriminatory purpose is lacking.

D. The Critique of Conflicting Critiques

It should go without saying that the doctrinal conservative critique and the theoretical feminist critique represent widely divergent perspectives that more often conflict than coincide. One might be able to safely guess that few conservatives are likely to be so critical of the history of marriage as a social institution and equally few feminists are likely to be formalistic in their perspectives on affirmative action.

This chasm, though great, does not disturb or mitigate the critical focus on the equal application defense. Facial and purposeful discrimination are alternative triggers for the standards of scrutiny drawn for various classifications. Either of these arguments, or the strong defense, on its own, is sufficient to defeat the equal application defense and trigger the requisite scrutiny. The critiques addressing the equal application defense’s conclusions regarding the absences of facial classification and discriminatory purpose do conflict, but that alone is no response to these critiques of the equal application defense.

IV. CONCLUSION

No doubt this Paper will be promptly recycled by those tempted to view it as just another same-sex marriage article. Yet this Article has repeatedly stopped short of simply concluding that bans on same-sex marriage are unconstitutional. Traditionalist defenders are welcome to reformulate their defenses in the language of intermediate scrutiny if they want to avoid the constitutional prohibition on sex discrimination. After all, to paraphrase Justice O’Connor discussing the

114 See supra note 70 (presenting the Court’s intermediate scrutiny).
115 See id. (discussing the elements required for a stringent review by the Court).
purpose of strict scrutiny and race, the very purpose of intermediate scrutiny is to "smoke out" illegitimate uses of sex as a classification by assuring that the legislative body is pursuing a goal important enough to warrant use of a quasi-suspect tool.\textsuperscript{116} When addressing such an inveterate institution with "such profound social significance"\textsuperscript{117} as marriage, this burden of reformulation should not be too much for traditionalists to bear. If not, not; so be it. But, in any event, arguments against same-sex marriage must actually comport with constitutional doctrine surrounding discrimination and equality. In this most modest legal obligation, the equal application defense simply fails.

\textsuperscript{116} See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J.) ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); id. at 494-95 (querying how to determine whether a classification is remedial without scrutinizing the classification).

\textsuperscript{117} Lewis v. Harris, 875 A.2d 259, 275 (N.J. Super. Ct. App. Div. 2005) (Parillo, J., concurring) (writing separately to underscore the importance of maintaining a distinction between the judiciary and the legislature for such significant social issues). See id. at 276 (resisting the "distillation of marriage down to its pure 'close personal relationship'" because "the marital form traditionally has embraced so much more, including: the fundamental facets of [traditional] conjugal life: the fact of sexual difference; the enormous tide of heterosexual desire in human life, the massive significance of male female bonding in human life; the procreativity of heterosexual bonding, the unique social ecology of heterosexual parenting which bonds children to their biological parents, and the rich genealogical nature of heterosexual ties" (alteration in original)). One might easily surmise from this exegesis that Judge Parillo would find this embrace of substantial, if not compelling, importance. See also Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (calling marriage "of basic importance in our society").