STATE CONSTITUTIONAL LAW — CALIFORNIA SUPREME COURT DECLARES PROHIBITION OF SAME-SEX MARRIAGES UNCONSTITUTIONAL. — *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

In November 2003, the Massachusetts Supreme Judicial Court issued its much-anticipated ruling in *Goodridge v. Department of Public Health*,[1] making Massachusetts the first state in the nation to legalize same-sex marriages. For four years, Massachusetts stood alone. Then, last May, in *In re Marriage Cases* (*Marriage Cases III*),[2] the California Supreme Court followed Massachusetts's lead, becoming the second state in the nation to legalize same-sex marriages. *Marriage Cases* was, in many respects, a landmark and groundbreaking decision. It invalidated California's ban on same-sex marriage[3] as a violation of the state's equal protection doctrine and declared sexual orientation to be a suspect class alongside race and gender. Within months, the Connecticut Supreme Court followed suit, citing heavily to *Marriage Cases* in striking down Connecticut's own marriage restrictions.[4] With Iowa waiting in the wings and New York and New Jersey not far behind, *Marriage Cases* seemed to mark the beginning of a sea change in the legalization of same-sex marriage.[5] Such sentiments, however, quickly fizzled. The decision in *Marriage Cases* was met with millions of dollars of contributions to the campaign for Proposition 8,[6] a California ballot initiative specifically designed to overturn the decision in *Marriage Cases* and reinstate statutory bans on same-sex marriage.[7] With the passage of Proposition 8, the substantive holding of *Marriage Cases*, namely the constitutionality of same-sex marriages in Califor-

---

[1] 798 N.E.2d 941 (Mass. 2003). Some blame the Massachusetts decision for causing a conservative backlash, leading to state ballot initiatives banning gay marriage and to Democratic losses in the 2004 congressional and presidential elections. *See, e.g.*, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 459–73 (2005). *But see* Daniel A. Smith, Matthew DeSantis & Jason Kassel, *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 ST. & LOC. GOV'T REV. 78, 79 (2006) (questioning whether anti–gay marriage initiatives resulted in higher Republican turnout).

[2] 183 P.3d 384 (Cal. 2008).

[3] CAL. FAM. CODE § 308.5 (West 2004).

[4] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 418–20 (Conn. 2008).

[5] *See* William Henderson, *The Other 48*, THE ADVOCATE, July 1, 2008, at 42; *see also* Varnum v. Brien, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007) (invalidating Iowa ban on same-sex marriage), *argued*, No. 07-1499 (Iowa Dec. 9, 2008); Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (finding the denial of benefits and privileges normally granted to opposite-sex couples to be a violation of state equal protection).

[6] *See* Mark Barna, *Focus Gives Big to Initiative*, GAZETTE (Colorado Springs, Colo.), Sept. 13, 2008, at 1, 4 (noting that Focus on the Family made its largest donation, a sum of $250,000, roughly one month after the court's ruling); Dan Morain & Jessica Garrison, *Prop. 8 Backers Outraise Rivals*, L.A. TIMES, Sept. 23, 2008, at B1.

[7] Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

nia, is no longer good law. Nonetheless, the court's decision to grant suspect class protections sets an important precedent for future sexual orientation claims and highlights the court's changing understandings of immutability and suspect classifications.

In February 2004, the mayor of San Francisco directed city clerks to begin issuing marriage licenses to same-sex couples, in direct defiance of state statutes prohibiting same-sex marriages.[8] Not surprisingly, the California Supreme Court ruled in *Lockyer v. City and County of San Francisco*[9] that such orders were unlawful, rendering the 4000 same-sex marriages performed null and void.[10] However, the court left the question of the marriage statutes' constitutionality undecided, signaling that the issue was far from settled.[11]

Indeed, several petitions were soon filed in California Superior Courts, challenging the constitutionality of California's marriage statutes[12] and asking for an affirmative declaration that all California statutory provisions limiting marriage to unions between a man and a woman violate the equal protection and privacy provisions of the California Constitution.[13] Judge Kramer of the Superior Court for San Francisco agreed with the plaintiffs, holding that differential treatment of same-sex couples was a violation of the state's equal protection clause[14] under both the rational basis and strict scrutiny tests.[15]

The State of California appealed and in a divided opinion the California Court of Appeal reversed.[16] Judge McGuiness wrote the major-

---

[8] *Marriage Cases III*, 183 P.3d at 402.

[9] 95 P.3d 459 (Cal. 2004).

[10] *Id.* at 464; *see also* Howard Mintz & Thaai Walker, *Gay Vows Nullified; Legal Fight Not Over*, MERCURY NEWS (San Jose, Cal.), Aug. 13, 2004, at 1A.

[11] *Lockyer*, 95 P.3d at 464 ("Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.").

[12] CAL. FAM. CODE § 300 (West 2004) (defining marriage as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary"); *id.* § 308.5 ("Only marriage between a man and a woman is valid or recognized in California.").

[13] *See, e.g.*, Complaint, City and County of San Francisco v. State, No. CGC-04-429539 (Cal. Super. Ct. Mar. 11, 2004). San Francisco's petition was consolidated with five others for judicial efficiency and convenience on appeal. *In re* Coordination Proceeding, Special Title, Marriage Cases (*Marriage Cases I*), No. 4365, 2005 WL 583129, at *1 (Cal. Super. Ct. Mar. 14, 2005).

[14] *Marriage Cases I*, 2005 WL 583129, at *5 ("The idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal."). Judge Kramer did not rule on the privacy claim. *See id.* at *12.

[15] *Id.* at *8, *12.

[16] *In re* Marriage Cases (*Marriage Cases II*), 49 Cal. Rptr. 3d 675 (Ct. App. 2006). Judge Parrilli concurred, noting that the many issues raised in such an "uncomfortable intersection of law, culture, and religion" may be "better suited to legislative consideration and public debate." *Id.* at 727, 730 (Parrilli, J., concurring). Judge Kline, dissenting in part, would have upheld the lower court's decision as he found no rational basis for the ban on same-sex marriage. *Id.* at 733 (Kline, J., concurring in part and dissenting in part).

ity opinion, defining the right to marriage in traditional opposite-sex terms and concluding that the court had no authority to alter such a definition.[17] He also found that sex-based marriage restrictions did not violate fundamental due process,[18] that classifications based on sexual orientation did not merit strict scrutiny review,[19] and that the state had a valid and legitimate interest in preserving the traditional meaning of marriage, thus satisfying rational basis review.[20] In addition, the opinion cautioned against judicial activism, noting that "[t]he time may come when California chooses to expand the definition of marriage to encompass same-sex unions. That change must come from democratic processes, however, not by judicial fiat."[21]

The California Supreme Court, in a 4–3 decision, reversed and remanded.[22] Chief Justice George, writing for the majority, ruled that the California marriage statutes were unconstitutional on three separate and individually dispositive grounds: the fundamental right to marriage, the equal protection clause, and the due process right to privacy. Beginning with the fundamental right to marriage, the court emphasized that it was not *redefining* marriage, but merely affirming each California citizen's *individual* constitutional right to marry the person of his or her choice, regardless of whether that person was of the opposite or same sex.[23] Moving to equal protection, the court rejected the gender-discrimination analogy to interracial marriage[24] but went on to declare classifications based on sexual orientation to be "suspect" along the same lines as classifications based on race and gender.[25] Noting that a trait's immutability was not necessary for categorization as a suspect classification, the court adopted strict scrutiny

---

[17] *Id.* at 701, 705 (majority opinion).

[18] *Id.* at 699–700 (qualifying the right to marriage as a traditional union between a man and a woman).

[19] The court held that the state's marriage statutes did not give rise to disparate treatment based on gender. *Id.* at 707.

[20] *See id.* at 717–26. The court also declined to apply strict scrutiny based on privacy rights, explaining that though what *happens* in the bedroom is protected, what such a relationship is legally *called* is not. "The laws do not proscribe any form of intimate conduct between same-sex partners. . . . What the marriage statutes prohibit, however, is the state's recognition of same-sex relationships as 'marriage.'" *Id.* at 717.

[21] *Id.* at 686.

[22] *Marriage Cases III*, 183 P.3d 384. Chief Justice George's majority opinion was joined by Justices Kennard, Werdegar, and Moreno.

[23] *See id.* at 448.

[24] *Id.* at 436–37. Though not discussed in the court's opinion, scholars have made more straightforward gender-based equal protection claims based on the idea that the "traditional" definition of marriage perpetuates marriage as a male-dominated union and furthers female subordination. *See, e.g.*, William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1510 (1993); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

[25] *Marriage Cases III*, 183 P.3d at 442–43.

due to the long history of widespread arbitrary and invidious hostility toward homosexuals.[26] Finally, the court struck down the statutes as violations of the fundamental right to privacy, pointing out that a separate classification of domestic partner or domestic union may force an individual to involuntarily and unnecessarily disclose his or her sexual orientation.[27]

Justice Kennard concurred in the judgment, writing separately to explain the decision's compatibility with *Lockyer*.[28] Justice Baxter, joined by Justice Chin, criticized the majority for overstepping its judicial authority[29] and for wrongly extending heightened scrutiny.[30] Justice Baxter further warned that the decision could lead to the legalization of polygamy or incest.[31] Justice Corrigan also wrote in dissent, arguing that fundamental changes in the definition of marriage were best left to the "legislative sphere."[32]

With the passage of Proposition 8, the court's decision is unlikely to stand as a strong precedent for the constitutionality of same-sex marriage.[33] However, the court's decision does trigger important questions

---

[26] *Id.*

[27] The court observed that every time an individual in a same-sex relationship encountered a form asking for marital status and spousal information, he or she could be effectively forced to disclose their sexual orientation. *See id.* at 446.

[28] *Id.* at 453 (Kennard, J., concurring).

[29] *Id.* at 457 (Baxter, J., concurring in part and dissenting in part) ("[A] bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves."). The majority opinion, however, stressed that the will of the people, even if in opposition to the court's holding and based on longstanding historical understandings, should have no effect on the court's interpretation of the Constitution. *Id.* at 449–51 (majority opinion) (citing Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." (internal quotation marks omitted)); Mulkey v. Reitman, 413 P.2d 825 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967) (prohibiting racial discrimination in housing despite the overwhelming popular support for and long history of race-based housing restrictions).

[30] *Marriage Cases III*, 183 P.3d at 467 (Baxter, J., concurring in part and dissenting in part) ("[G]ays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded.").

[31] *Id.* at 463. Indeed, the majority's explanation of why the decision would not lead to legalized polygamy and incest and its references to sound family environments seemed remarkably similar to historical arguments against same-sex marriage. *Compare id.* at 434 n.52 (majority opinion), *with Marriage Cases II*, 49 Cal. Rptr. 3d 675, 720 (Ct. App. 2006).

[32] *Marriage Cases III*, 183 P.3d at 471 (Corrigan, J., concurring in part and dissenting in part) ("If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.").

[33] It should be noted that before Proposition 8's passage, the Connecticut Supreme Court cited to *Marriage Cases III* in its decision to grant heightened scrutiny to sexual orientation and echoed the California court's rationale that immutability was not a necessary characteristic for suspect classification. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 417, 429 n.20 (Conn. 2008). In addition, it is possible that the *Marriage Cases III* decision will still have an effect on California gay rights beyond the right to marriage. As Professor Kenji Yoshino notes, "gays can now challenge any state policy that discriminates on the basis of sexual orientation." Kenji Yoshino,

about the requirements for suspect classification and the resulting eligibility of sexual orientation for heightened scrutiny. Though many have argued against the requirement of immutability for equal protection, courts have continued to refer to immutability as a necessary prerequisite to suspect classification. Similarly, though many have acknowledged the historical and social inequities faced by the gay community, few courts have actually included sexual orientation within their list of suspect traits given heightened scrutiny. The California Supreme Court's decision thus stands as a notable opinion in highlighting the changing criteria for suspect classification and the inclusion of sexual orientation as a protected trait.

Though California courts have routinely granted relief for discrimination based on sexual orientation under both the state's civil code and its domestic partnership laws,[34] the courts had successfully avoided ruling on sexual orientation's eligibility for heightened scrutiny as a suspect classification under state equal protection.[35] The closest precedent dates back to 1979, when a group of plaintiffs sued the Pacific Telephone and Telegraph Company, arguing that the company's employment discrimination against homosexuals constituted a violation of equal protection and thus deserved heightened scrutiny.[36] Though the California Supreme Court agreed that state equal protection laws against arbitrary discrimination were applicable to homosexuals, it stopped short of granting the suspect classification protections given to traits like race and gender.[37] Since then, California's state courts have remained mostly silent.[38]

In their general equal protection jurisprudence, California's state courts have traditionally held that characteristics granted heightened scrutiny as suspect classifications must: (1) carry a historical stigma of inferiority and second-class citizenship, (2) bear no effect on one's abil-

---

*Magisterial Conviction: Why the California Supreme Court Did More Than Legalize Gay Marriage*, SLATE, May 15, 2008, http://www.slate.com/id/2191530/.

[34] *See, e.g.*, Curran v. Mount Diablo Council of the Boy Scouts, 952 P.2d 218, 238 (Cal. 1998) (noting state statutory protections against sexual orientation discrimination in business establishments); People v. Garcia, 92 Cal. Rptr. 2d 339 (Ct. App. 2000) (protecting against jury exclusion).

[35] As the California Court of Appeal noted in *Marriage Cases II*, no precedent exists in California's Supreme Court, Courts of Appeal, or trial courts on the acknowledgment of sexual orientation as a suspect classification. *See Marriage Cases II*, 49 Cal. Rptr. 3d at 714.

[36] Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979).

[37] *See id.* at 613 ("Plaintiffs . . . cite no authority in support of the proposition that . . . a benefit to one or a number of historically aggrieved groups is unconstitutional if the same benefit is not afforded to all historically aggrieved groups.").

[38] It is worth noting that the Ninth Circuit has visited the issue and two of its judges affirmed the immutability of sexual orientation. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("For practical and constitutional purposes, then, homosexuality is an immutable characteristic. . . . Preventing such unfair discrimination is what the equal protection clause is all about.").

ity to perform or contribute to society, and (3) be immutable.[39] Under that test, the Court of Appeal acknowledged sexual orientation's satisfaction of the first two requirements, but refused to grant suspect classification based on the inconclusive proof of immutability.[40] Interestingly, *Marriage Cases* did not attempt to challenge the position that sexual orientation is a mutable trait; instead, the court recognized sexual orientation as a suspect classification by casting aside the immutability requirement as unnecessary.[41]

The California Supreme Court's decision to discard immutability was by no means a novel legal approach. For example, ten years ago, the Oregon Court of Appeals came to a similar conclusion in a domestic partner benefits case, stating that "the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice."[42] Similar arguments have appeared in numerous academic articles, questioning both the positive requirement of immutability for suspect classification and the normative value of such a requirement.[43] Though the California Supreme Court's decision may not be a legal breakthrough, it suggests that longstanding objections to reliance on immutability in equal protection law may be having an effect.

However, though the court declared that immutability was not required for a characteristic to be considered a suspect classification, its ensuing discussion suggested that the underlying concept of immuta-

---

[39] *Marriage Cases III*, 183 P.3d at 442 (citing Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971)).

[40] *Marriage Cases II*, 49 Cal. Rptr. 3d at 713. California has traditionally interpreted the third prong of immutability to require that traits be "grounded in the accident of birth," *see, e.g.*, *Sail'er Inn*, 485 P.2d at 540; Hicks v. Superior Court, 43 Cal. Rptr. 2d 269, 274 (Ct. App. 1995), implicitly ruling out traits that are acquired after birth and traits that change over time.

[41] *Marriage Cases III*, 183 P.3d at 442 ("[I]mmutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes."). The California Supreme Court explained that regardless of the trait's immutability, it was "not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." *Id.*

[42] Tanner v. Or. Health Sci. Univ., 971 P.2d 435, 446 (Or. Ct. App. 1998).

[43] *See, e.g.*, Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (reviewing three scientific theories supporting the immutability of sexual orientation and contending that legal arguments based upon immutability may actually be divisive and harmful to gay rights equal protection claims); *see also* Marc R. Shapiro, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409, 443–44 (2003) (suggesting that courts should discard the immutability concept if immutability is defined narrowly as a physical inability to change); Edward Stein, *Born That Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* (Cardozo Legal Studies Research Paper No. 223, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538 (making the case that there are serious issues in using scientific arguments, especially those focusing on immutability, for gay-rights advocacy).

bility may still be relevant. The court pointed to the previous inclusion of religion and nationality as protected traits notwithstanding their questionably immutable nature,[44] but went on to defend sexual orientation as an inherently integral trait. Indeed, the court's reference to the fundamental and "deeply personal"[45] nature of one's sexual orientation fits perfectly into what Professor Kenji Yoshino has termed "personhood immutability."[46] It may be more accurate, then, to say that the court was discarding California's traditional definition of immutability as a focus on absolute corporeal traits, or what others have labeled "strict immutability."[47] Indeed, with the availability of sex-change operations and the increasing numbers of religious conversions, nationality changes, and multiracial individuals, it is hard to see how a court could still adhere to a truly strict definition of absolute immutability.[48] If even the most traditionally protected traits of race and gender are unable to pass muster, the requirement loses all practical significance. Instead, while the underlying idea of immutability may still be useful, it would be more sensibly interpreted as a measurement of how *easily* a trait could be changed.[49]

Yet, even as the court discards its absolute view of immutability, another question of interpretation within its definition of suspect classifications may be waiting in the wings. The court closed its discussion of suspect classifications by emphasizing the need to look for historical as opposed to present-day discrimination,[50] partially in response

---

[44] *See Marriage Cases III*, 183 P.3d at 442 (citing Owens v. City of Signal Hill, 201 Cal. Rptr. 70 (Ct. App. 1984) (citing religion and alienage as examples of suspect classes); Raffaelli v. Comm. of Bar Examiners, 496 P.2d 1264 (Cal. 1972) (making no mention of immutability in holding lack of citizenship as a suspect classification)).

[45] *Id.* at 443 (quoting Egan v. Canada, [1995] 2 S.C.R. 513, 528 (Can.)).

[46] Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 494 (1998) (splitting immutability into three categories based on the physical inability to change).

[47] *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

[48] California's laws protecting immutable characteristics also support a shift away from absolute immutability. *See* CAL. CIV. CODE § 51 (West 2007); City of San Francisco v. Garnett, 82 Cal. Rptr. 2d 924, 928 n.6 (Ct. App. 1999) (levels of wealth); Hicks v. Superior Court, 43 Cal. Rptr. 2d 269, 274 (Ct. App. 1995) (age discrimination); Marshall v. McMahon, 22 Cal. Rptr. 2d 220, 226 (Ct. App. 1993) (physical disabilities). In applying the statutory protections, California courts have taken the liberty to extend protections for physical appearance, family size, and sexual orientation. *See* Scripps Clinic v. Superior Court, 134 Cal. Rptr. 2d 101, 110 (Ct. App. 2003).

[49] It is important to note that "easily" could also be interpreted in many ways; though some would focus on the physical ease of change, others would argue that immutability should include all traits that are central to a person's identity where change would be offensive, even if physically easy to alter. *See* Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991) ("Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self.").

[50] *Marriage Cases III*, 183 P.3d at 443 ("Thus, 'courts must look closely at classifications based on that characteristic lest *outdated* social stereotypes result in invidious laws or practices.'" (quoting Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971)) (emphasis added)).

to the argument that though the gay community may have been weak and vulnerable in the past, present-day circumstances suggest that gay individuals are quite powerful and able to protect themselves.[51] While suspect classifications may have originally been intended to protect weak groups unable to challenge majoritarian injustices, they have since been employed by historically strong groups as well, most notably as race-based affirmative action claims brought by white students[52] and gender-based equal opportunity claims brought by male nursing students.[53] If heightened scrutiny is strictly understood as a remedy for categories of traits that were subjects of historical discrimination, such as race, gender, or religion, regardless of the specific population that was the weak and stigmatized group, such as blacks, women, or Muslims, such claims would be allowed. If, however, as the California Supreme Court seemed to suggest, heightened scrutiny is only meant to protect those who were historically wronged, such claims should be rejected. A problem could arise with the definition of historical, a term that could be as narrowly defined as decades or centuries ago or as broadly interpreted as last year. To prove the existence of discrimination at any point before today may be too inclusive, but to move to the other extreme of only allowing claims based on discriminations of generations past may be equally unjust. It would seem that the California Supreme Court may need to continue refining its suspect classification criteria.

Immediately after its printing, *Marriage Cases* was heralded by same-sex marriage activists as the long-awaited decree of reason and justice that would spark similar advancements nationwide, and decried by its opponents as the dangerous work of liberal judicial activism that must be overturned lest it ruin California families and the sanctity of marriage. With the enactment of Proposition 8, both sides may discard the decision as politically spent and therefore no longer meaningful. The legacy of the case, however, lies beyond its political functions. The decision sets a bold precedent in its extension of heightened scrutiny to sexual orientation and, in so doing, highlights the need for significant changes in the understanding of immutability and suspect classifications. While it is true that the decision in *Marriage Cases* may not go down in history books as the case that forever changed same-sex marriage rights, its relevance and significance as an equal protection precedent should not be overlooked.

---

[51] *Id.* ("Indeed, if a group's current political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications.").

[52] *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[53] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).