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Similarly Situated

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SIMILARLY SITUATED

*Giovanna Shay**

Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.¹

The same is true of turkeys but not of chickens, even though “a bred chicken and a bred turkey are similarly situated. Each has feathers and two legs.”²

[A]ll of the lots . . . are similarly situated with respect to the asphalt pavement.³

INTRODUCTION

In recent marriage equality litigation, opponents of same-sex marriage have argued that gay and straight couples are not “similarly situated” with respect to the purposes of the marriage statutes.⁴ Courts in Iowa,⁵ Connecticut,⁶ and California⁷ have rejected these arguments (although the California

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¹ *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).

² *United States v. Skelly Oil Co.*, 394 U.S. 678, 688 (1969) (Douglas, J., dissenting) (quoting LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 174 (1961)).

³ *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 345 (1901).

⁴ *In re Marriage Cases*, 183 P.3d 384, 435 n.54 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (West, Westlaw through 2010), *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 423-24 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009); *see also* Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943, 964 (2009) (noting that marriage equality opponents in California and Iowa had “tried to argue, again unsuccessfully, that the [same sex couple] plaintiffs are not similarly situated to opposite-sex couples so as to necessitate further equal protection analysis because the plaintiffs cannot ‘procreate naturally’” (alteration in original) (quoting *Varnum*, 763 N.W.2d at 882)).

⁵ *Varnum*, 763 N.W.2d at 883-84.

⁶ *Kerrigan*, 957 A.2d at 424.

⁷ *In re Marriage Cases*, 183 P.3d at 435 n.54.

result was overturned by Proposition 8,⁸ which itself was invalidated by a district court as this Article was being written⁹). The Iowa and California courts also questioned the structure of the “similarly situated” analysis asserted by the opponents.¹⁰ Marriage equality opponents in those states pressed a “threshold”-type similarly situated analysis.¹¹ Under this scheme, if the two groups are not similarly situated, there is no need to proceed to the merits of equal protection review.¹² Judges in Iowa and California noted that this asserted formulation permits an end-run around full equal protection analysis,¹³ which properly focuses on the “fit” between the legislative classification and the purpose of the statute.¹⁴

This Article asks, “what is the meaning of the phrase ‘similarly situated’?”¹⁵ At first blush, the question appears simple, but it has far-reaching implications. As Professors Joseph Tussman and Jacobus tenBroek asked in a foundational 1949 article setting out today’s prevailing understanding of equal protection,¹⁶ “The question is . . . what does that ambiguous and crucial phrase ‘similarly situated’ mean?”¹⁷ More than sixty

⁸ CAL. CONST. art. I, § 7.5 (West, Westlaw through 2010) (codifying Proposition 8, passed Nov. 4, 2008), *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *see also* Jennifer L. Levi, *Marriage Equality for Same-Sex Couples: Where We Are and Where We Are Going*, 22 J. AM. ACAD. MATRIMONIAL LAW. 55, 69 (2009) (discussing the marriage equality landscape).

⁹ *Perry*, 704 F. Supp. 2d at 1003. On appeal, the Ninth Circuit certified a question to the Supreme Court of California to determine whether the proponents of Proposition 8 have standing to defend the initiative’s constitutionality. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

¹⁰ *In re Marriage Cases*, 183 P.3d at 435 n.54; *Varnum*, 763 N.W.2d at 884 n.9.

¹¹ *In re Marriage Cases*, 183 P.3d at 435 n.54; *Varnum*, 763 N.W.2d at 882.

¹² *In re Marriage Cases*, 183 P.3d at 435 n.54; *Varnum*, 763 N.W.2d at 882.

¹³ *In re Marriage Cases*, 183 P.3d at 435 n.54; *Varnum*, 763 N.W.2d at 883-84.

¹⁴ *See* William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 57 (2009) [hereinafter Araiza, *Constitutional Rules*] (identifying a “concern with ‘fit’ analysis in traditional equal protection doctrine”); William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493, 505 (2007) [hereinafter Araiza, *Irrationality and Animus*] (noting the importance of “fit” in equal protection analysis); *see also* William R. Engles, *The “Substantial Relation” Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 152 (1985) (“The test thus requires a certain ‘fit’ between the classification at issue and the goal that the legislature seeks to achieve through that classification.”).

¹⁵ This Article includes within its survey the phrase “similarly circumstanced” and other phrases that are variations on “similarly situated.”

¹⁶ *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 358 (1999) (describing Tussman and tenBroek’s article as “influential”); Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315, 343 (1998) (describing Tussman and tenBroek’s article as “articulat[ing] . . . the [now] standard conception of the [Equal Protection] Clause”).

¹⁷ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345 (1949). More recently, Professor Martha Minow has formulated the question as “What differences . . . should matter, and for what purposes?” MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 374 (1990).

years later, their question remains vital, surfacing prominently, but not exclusively, in marriage equality litigation.¹⁸

Although the phrase “similarly situated” is a familiar component of equal protection case law, it has not received much scholarly attention.¹⁹ Constitutional law scholars have focused more on other aspects of the doctrine.²⁰ To the author’s knowledge, this Article is the first to examine the phrase “similarly situated.”

The words “similarly situated” appeared in equal protection doctrine long before the advent of the modern, “tiered” form of equal protection analysis, which employs varying levels of scrutiny based on the protected class.²¹ Of course, the words “similarly situated” are not a part of the Fourteenth Amendment to the U.S. Constitution.²² The concept of being “similarly situated” developed in doctrinal contexts other than equal protection, including cases involving property, and then entered the U.S. Supreme Court’s equal protection jurisprudence in 1884 in a case involving a San Francisco ordinance targeting laundries run by Chinese immigrants,²³ a precursor to *Yick Wo v. Hopkins*.²⁴

After gaining currency in equal protection case law, the phrase “similarly situated” migrated beyond Fourteenth Amendment litigation into other

¹⁸ See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 386 (D. Mass. 2010); *In re Marriage Cases*, 183 P.3d at 435 n.54; *Varnum*, 763 N.W.2d at 882-84, 884 n.9.

¹⁹ While the “similarly situated” requirement itself has not received extensive scholarly attention, commentators have criticized its application in certain contexts, including cases on behalf of women prisoners, discussed *infra* notes 95-111. *But see* Engles, *supra* note 14, at 154-56 (describing the distinction between the “similarly situated” test and the “gender neutral” test in the Court’s early gender discrimination cases (internal quotation marks omitted)).

²⁰ Although it is impossible to catalogue all scholarship on the Equal Protection Clause, this Article mentions some works examining complementary aspects of equal protection analysis. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 (2004) (explaining the history of the “tiered” structure of review and proposing a single standard); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972) (identifying a trend toward intermediate scrutiny); Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 16 (2009) (questioning whether a trait must be “immutable” to qualify for heightened protection as a suspect class); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 213-19 (1991) (describing the history of standards of scrutiny); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 750, 754 (2011) (advocating a “liberty-based dignity claim” as a remedy for “[t]he [e]xhaustion of [t]raditional [g]roup-[b]ased [e]qual [p]rotection”).

²¹ See Goldberg, *supra* note 20, at 485 (“The Court did not articulate detailed indicia for discerning which classifications [are suspect and which quasi-suspect] until the early 1970s . . .”); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 301-02 (1997) (noting that the Court developed “rigid multi-tiered standard of review” in the mid-twentieth century).

²² U.S. CONST. amend. XIV, § 1.

²³ *Barbier v. Connolly*, 113 U.S. 27, 32 (1885); see also David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 234-36 (1999).

²⁴ 118 U.S. 356 (1886).

doctrinal contexts.²⁵ As of the writing of this Article, more than 1,000 U.S. Supreme Court opinions and orders mentioned the phrase.²⁶ In addition to equal protection analysis, the phrase “similarly situated” appears in cases involving tax law,²⁷ the Clean Water Act,²⁸ the commerce clause,²⁹ shareholder actions,³⁰ class action certification,³¹ social security,³² employment

²⁵ See Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 361-62 (2001) (discussing the use of the Equal Protection Clause and the Due Process Clause in the criminal context); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (describing the phenomenon of “constitutional borrowing” (emphasis omitted)).

²⁶ Based on a search of the Westlaw Supreme Court database for the phrase (“similarly w/5 situated”) as of February 12, 2011. If the search is expanded to include (“similarly w/5 circumstanced”), the number of cases retrieved jumps even higher.

²⁷ *E.g.*, *United States v. IBM*, 517 U.S. 843, 847-48 (1996) (“The true construction of [the Export Clause] is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.” (quoting *Cornell v. Coyne*, 192 U.S. 418, 427 (1904)) (internal quotation marks omitted)); *Jersey Shore State Bank v. United States*, 479 U.S. 442, 447 (1987) (stating that “employers and lenders are similarly situated under the Code”); *Thor Power Tool Co. v. Comm’r*, 439 U.S. 522, 544 (1979) (“Variances . . . are questionable in a tax system designed to ensure as far as possible that similarly situated taxpayers pay the same tax.”); *Comm’r v. Lincoln Sav. & Loan Ass’n*, 403 U.S. 345, 354 (1971) (referring to “similarly situated insured savings and loan associations”).

²⁸ *E.g.*, *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring) (asking whether wetlands, “alone or in combination with similarly situated lands,” affect the integrity of navigable waterways); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 203 (2000) (Scalia, J., dissenting) (citing a case in which the plaintiff sought an injunction “on behalf of herself, her child, and all others similarly situated”).

²⁹ *E.g.*, *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”); see also *Gonzales v. Raich*, 545 U.S. 1, 18 (2005); *United States v. Lopez*, 514 U.S. 549, 556 (1995).

³⁰ *E.g.*, *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 526 n.3 (1984) (“The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” (quoting FED. R. CIV. P. 23.1) (internal quotation marks omitted)); *Snyder v. Harris*, 394 U.S. 332, 333 (1969); *Hoffman v. Blaski*, 363 U.S. 335, 338 (1960); *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 534 (1941) (using the phrase “all other shareholders similarly situated”); *Phillips-Jones Corp. v. Parmley*, 302 U.S. 233, 236 (1937) (using the phrase “as between all stockholders similarly situated the burden of paying the debts shall be borne ratably”); *Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 648 (1896) (“The suit was brought for the benefit of the plaintiff and all stockholders similarly situated.”); *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 430 (1895), *superseded by statute as recognized in Penn Mut. Indem. Co. v. Comm’r*, 277 F.2d 16 (3d Cir. 1960) (using the phrase “on behalf of himself and all other stockholders of the defendant company similarly situated”); *Cent. R.R. Co. of N.J. v. Mills*, 113 U.S. 249, 256 (1885) (using the phrase “in behalf of themselves and other stockholders similarly situated”).

³¹ *E.g.*, *Allen v. Wright*, 468 U.S. 737, 779 (1984) (Brennan, J., dissenting); *Harris v. McRae*, 448 U.S. 297, 320 (1981) (identifying a plaintiff as “the indigent pregnant women who sued on behalf of other women similarly situated”); *Richardson v. Ramirez*, 418 U.S. 24, 26-27 (1974) (stating that the

discrimination,³³ standing,³⁴ antitrust,³⁵ and bills of attainder.³⁶ It appears in numerous criminal law contexts,³⁷ including sentencing,³⁸ selective prosecution claims,³⁹ capital punishment,⁴⁰ Eighth Amendment proportionality

plaintiffs brought a claim “on behalf of themselves and others similarly situated”); *Roe v. Wade*, 410 U.S. 113, 121 (1973) (noting that plaintiffs “purported to sue on behalf of themselves and all other couples similarly situated” (internal quotation marks omitted)).

³² *E.g.*, *Heckler v. Campbell*, 461 U.S. 458, 461 (1983) (noting that “vocational experts frequently were criticized for their inconsistent treatment of similarly situated claimants”).

³³ *E.g.*, *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 912 (1989) (noting that “a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time”), *superseded by statute as recognized in Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Florida v. Long*, 487 U.S. 223, 227 (1988) (“The normal retirement benefit is therefore equal for similarly situated male and female employees.”); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (“*McDonnell Douglas* teaches that it is the plaintiff’s task to demonstrate that similarly situated employees were not treated equally.”). *See generally* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 729, 735 (2011) (criticizing the use of comparators in employment discrimination law as simplistic and outmoded and arguing that “the demand for similarly situated, better-treated others underinclusively misses important forms of discrimination”); Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 832 (2002) (arguing that courts have “misused this ‘similarly situated’ concept” by “requir[ing] the plaintiff to prove, as part of her prima facie case, that she was treated differently than similarly situated employees who were not members of the protected group” when in fact Supreme Court doctrine permits “plaintiffs to demonstrate a prima facie case in a variety of ways” and by “defin[ing] ‘similarly situated’ in an unjustifiably narrow fashion”).

³⁴ *E.g.*, *City of L.A. v. Lyons*, 461 U.S. 95, 98 (1983) (citing allegations “that Lyons and others similarly situated are threatened with irreparable injury”).

³⁵ *E.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 484 n.21 (1982) (“McCready and the banker and the distributor are in many respects similarly situated.”).

³⁶ *E.g.*, *United States v. Brown*, 381 U.S. 437, 449 n.23 (1965) (“The vice of [bills of] attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.”).

³⁷ *See, e.g.*, *Howe*, *supra* note 25, at 363 (arguing that the “criminal clauses” should be analyzed, not under equality theory, but as “discrete protections of personal liberty”).

³⁸ *E.g.*, *United States v. Booker*, 543 U.S. 220, 297 (2005) (Stevens, J., dissenting) (noting the failure of judges “to sentence similarly situated defendants in a consistent, reasonable manner” (quoting 130 CONG. REC. 976 (1984) (statement of Sen. Paul Laxalt))); *Blakely v. Washington*, 542 U.S. 296, 332 (2004) (Breyer, J., dissenting) (describing systems that resulted in disparate “punishment of similarly situated defendants”); *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (noting “the great variation among sentences imposed by different judges upon similarly situated offenders”); *Moore v. Missouri*, 159 U.S. 673, 678 (1895) (stating that “a different punishment for the same offence may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated”).

³⁹ *E.g.*, *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (holding that respondents failed to demonstrate “that the Government declined to prosecute similarly situated suspects”); *see also* *Hartman v. Moore*, 547 U.S. 250, 264 n.10 (2006); *United States v. Bass*, 536 U.S. 862, 863-64 (2002); *Wayte v. United States*, 470 U.S. 598, 605 (1985); *Wooley v. Maynard*, 430 U.S. 705, 712 n.9 (1977); *Beck v. Washington*, 369 U.S. 541, 567-68 (1962) (Black, J., dissenting).

⁴⁰ *E.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987) (refusing to find a constitutional violation following a demonstration “that other defendants who may be similarly situated did not receive the death penalty”); *Dobbert v. Florida*, 432 U.S. 282, 301 (1977) (“[P]etitioner is simply not similarly

review,⁴¹ retroactivity analysis,⁴² ex post facto claims,⁴³ and peremptory challenges,⁴⁴ among others.⁴⁵ The widespread use of the phrase no doubt reflects the influence of the longstanding precept in Western thought that “likes” should be treated “alike.”⁴⁶

Although frequently invoked in the equal protection context, the “similarly situated” concept is not uniformly employed in the case law. Many important equal protection opinions contain no substantive “similarly situated” analysis,⁴⁷ including *United States v. Virginia*⁴⁸ and *Romer v. Evans*.⁴⁹ Although the recent district court decision striking down Proposition 8 essentially conducts an extensive “similarly situated” analysis as part of its equal protection review, it does not contain the exact phrase “similar-

situated to those whose sentences were commuted.”); *Gregg v. Georgia*, 423 U.S. 153, 198 (1976) (“[T]he Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.”).

⁴¹ *E.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2050 (2010) (Thomas, J., dissenting) (“[T]he Court cannot point to a national consensus in favor of its rule without assuming a consensus [that] . . . [j]uveniles are always less culpable than similarly-situated adults.”).

⁴² *E.g.*, *Teague v. Lane*, 489 U.S. 288, 300 (1989) (“[E]venhanded justice requires that it be applied retroactively to all who are similarly situated.”); *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (“[S]elective application of new rules violates the principle of treating similarly situated defendants the same.”); *see also Powell v. Nevada*, 511 U.S. 79, 84 (1994); *Zant v. Moore*, 489 U.S. 836, 837 (1989) (Blackmun, J., dissenting) (per curiam); *Lego v. Illinois*, 488 U.S. 902, 904 (1988) (Marshall, J., dissenting from denial of cert.); *Shea v. Louisiana*, 470 U.S. 51, 56 (1985); *United States v. Johnson*, 457 U.S. 537, 555 (1982); *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977); *Jenkins v. Delaware*, 395 U.S. 213, 216 (1969); *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

⁴³ *E.g.*, *Miller v. Florida*, 482 U.S. 423, 431 (1987) (“[T]he revised guidelines law clearly disadvantages petitioner and similarly situated defendants.”); *see also Carr v. United States*, 130 S. Ct. 2229, 2233 (2010) (noting that ex post facto challenge to the Sex Offender Notification Registration Act was “consolidated . . . with that of a similarly situated defendant”); *Lynce v. Mathis*, 519 U.S. 433, 443 (1997); *Weaver v. Graham*, 450 U.S. 24, 33 (1981).

⁴⁴ *E.g.*, *Hayes v. Missouri*, 120 U.S. 68; 72 (1887); *see also Miller-El v. Cockrell*, 537 U.S. 322, 362-63 (2003) (Thomas, J., dissenting). *Compare Miller-El v. Dretke*, 545 U.S. 231, 247 (2005) (“[W]hen we look for nonblack jurors similarly situated to [the juror who was struck], we find strong similarities as well as some differences. But the differences seem far from significant” (footnote omitted)), *with id.* at 291 (Thomas, J., dissenting) (“‘Similarly situated’ does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them.”).

⁴⁵ *E.g.*, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2991 (2010) (“CLS was similarly situated: It hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled.”).

⁴⁶ *Compare Goldberg*, *supra* note 33 (discussing Aristotelian roots of theories of equality and their role in contemporary discrimination doctrine), *with Maureen B. Cavanaugh, Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 418-21 (1994) (contrasting “arithmetic” and “geometric” notions of equality in Greek philosophy).

⁴⁷ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 375 (2003) (Thomas, J., concurring in part and dissenting in part); *Craig v. Boren*, 429 U.S. 190, 192 n.2 (1976).

⁴⁸ 518 U.S. 515 (1996).

⁴⁹ 517 U.S. 620 (1996).

ly situated,” concluding instead that same-sex and opposite-sex couples are “situated identically.”⁵⁰ Other opinions recite oft-repeated language, such as “Equal Protection . . . requires States to treat similarly situated persons alike,”⁵¹ which is sometimes followed up with “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,”⁵² but contain little discussion of the phrase.

In their influential 1949 article, one of the few to address the meaning of “similarly situated,” Tussman and tenBroek explained that “[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.”⁵³ “Similarly situated” could not mean merely that everyone in the class possessed the “classifying trait,” they wrote, because that would produce the tautological result that a law complies with equal protection if it “applies equally to all to whom it applies.”⁵⁴ If that were true, “a law applying to red-haired makers of margarine” would not violate equal protection.⁵⁵

The aim of this Article is to explore the history and meaning of the “similarly situated” requirement. Its thesis is that “similarly situated” analysis is not a preliminary hurdle that litigants must clear to proceed to equal protection review, but rather a statement of longstanding equal protection principles that appeared in the case law long before the development of a multi-tiered system of scrutiny.⁵⁶ Courts and litigators are sometimes uncertain about how to reconcile the older “similarly situated” requirement with a tiered approach to equal protection.⁵⁷ As a result, some view “similarly situated” as a threshold analysis that must be met in order to qualify for equal protection review.⁵⁸ It is true that equal protection plaintiffs in cases that do not involve express categorizations, such as selective prosecution claims, must first demonstrate that other “similarly situated” individuals

⁵⁰ Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) (concluding that “[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law” and citing extensive findings of fact to support that assertion).

⁵¹ Women Prisoners v. District of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996).

⁵² Tigner v. Texas, 310 U.S. 141, 147 (1940); *see also* Women Prisoners, 93 F.3d at 924 (stating the same).

⁵³ Tussman & tenBroek, *supra* note 17, at 346.

⁵⁴ *Id.* at 345. Another way of framing this type of analytic mistake—or manipulation—is as an error in the choice of comparator. Lidge, *supra* note 33, at 831-33; *cf.* Kenneth W. Simons, *Over and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 468 (1989) (“Equal protection plaintiffs, to be most persuasive, will try to identify a comparison class . . . that is as similar as possible to [the class] of which they are members.”).

⁵⁵ Tussman & tenBroek, *supra* note 17.

⁵⁶ Goldberg, *supra* note 20, at 485, 528-29.

⁵⁷ *See infra* notes 298-305 and accompanying text.

⁵⁸ *See infra* notes 112-20 and accompanying text.

were treated differently.⁵⁹ However, properly understood, “similarly situated” is *not* a threshold hurdle to equal protection analysis on the merits in cases involving facial classifications.

In cases regarding express categories, no matter the level of equal protection scrutiny applied, the focus of the “similarly situated” analysis is substantially the same as the key inquiry of equal protection review: Does the legislative classification bear a close enough relationship to the purpose of the statute?⁶⁰ While courts and litigants may disagree about whether individuals really are “similarly situated” with respect to a statutory purpose, the analysis, properly understood, is another way of describing the substantive equal protection inquiry.⁶¹

This Article does not take a position on whether the tiered framework should be abandoned.⁶² Rather, it seeks to contextualize the phrase “similarly situated.” It explains how “similarly situated” has its origins in the older understanding of the Equal Protection Clause as a bar on “class legislation” or legislation intended to disadvantage a class of citizens,⁶³ how it is properly understood as a restatement of the “fit” analysis⁶⁴ most closely associated with “rational basis with bite”⁶⁵ and intermediate scrutiny,⁶⁶ and

⁵⁹ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“To establish a discriminatory effect in a race case [alleging selective prosecution], the claimant must show that similarly situated individuals of a different race were not prosecuted.”).

⁶⁰ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); see also 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.2(a), at 300 (4th ed. 2008) (“Usually one must look to the end or purpose of the legislation in order to determine whether persons are similarly situated in terms of that governmental system.”); Araiza, *Constitutional Rules*, *supra* note 14; Araiza, *Irrationality and Animus*, *supra* note 14, at 502-05; Goldberg, *supra* note 20, at 516 (describing the relationship between classification and statutory aim as “the underlying purpose of equal protection review”); Tussman & tenBroek, *supra* note 17.

⁶¹ See *infra* notes 298-305 and accompanying text.

⁶² Cf. Goldberg *supra* note 20, at 484, 494-518 (explaining the history of the “tiered” structure of review and proposing a single standard).

⁶³ See *infra* notes 173-75, 181-184 and accompanying text; see also *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution . . . neither knows nor tolerates classes among citizens.”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Goldberg, *supra* note 20, at 528 (arguing that the “first principle” of equal protection has always been “preventing enforcement of class legislation”); Saunders, *supra* note 21, at 331.

⁶⁴ See Araiza, *Constitutional Rules*, *supra* note 14; Araiza, *Irrationality and Animus*, *supra* note 14, at 502-05.

⁶⁵ See Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2774 (2005); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 *IND. L.J.* 779, 779-80 (1987).

⁶⁶ See Goldberg, *supra* note 20, at 540 (“[T]he core concerns of rational basis and heightened review overlap in certain important respects, including their shared commitment to assessing the relationship between potential justifications for a classification and the classification itself.”).

how it could play a role in a unified approach to equal protection analysis if the tiers become less salient.⁶⁷

This Article proceeds in three parts. Part I introduces the problem by looking at an area of litigation in which the threshold “similarly situated” requirement has been hotly contested—marriage equality.⁶⁸ Part II traces the origins of the phrase in equal protection doctrine. Part III draws on this historical description to discuss the proper application of “similarly situated” in modern equal protection analysis.

In a properly conducted equal protection analysis, the identification of statutory purpose becomes the major contest.⁶⁹ This is demonstrated vividly in the marriage equality cases, in which divisions regarding the definition of the social institution play out in the doctrinal analysis.

I. THE TROUBLE: A “THRESHOLD” SIMILARLY SITUATED REQUIREMENT

This Article is prompted by a problem. Some litigants and judges have unmoored “similarly situated” from its origins and grafted it onto the tiered equal protection approach as an antecedent requirement to “fit” analysis. In cases in state courts in Iowa,⁷⁰ Connecticut,⁷¹ and California,⁷² opponents of marriage equality argued that because same-sex couples were not similarly situated to heterosexual couples, further equal protection analysis was unnecessary.⁷³ In each of these three jurisdictions, that argument was properly rejected,⁷⁴ although it was accepted by some dissenters.⁷⁵ The Iowa

⁶⁷ *Id.* at 549-50.

⁶⁸ Some commentators have noted that the marriage equality movement’s heavy reliance on arguments that gay couples are “the same” as their straight counterparts places “similarly situated” analysis front-and-center. See Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. (forthcoming 2011) (manuscript at 12) (on file with the George Mason Law Review) (describing similarity politics in marriage equality litigation). Professor Courtney Cahill draws on Professor Marc Spindelman’s description of “like-straight” claims to argue that “like-straight reasoning simply reflects the formal equality principle . . . [that] similarly situated individuals, and like cases, must be treated alike.” *Id.* (manuscript at 13).

⁶⁹ Simons, *supra* note 54, at 460.

⁷⁰ See *Varnum v. Brien*, 763 N.W.2d 862, 884 n.9 (Iowa 2009).

⁷¹ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 423-24 (Conn. 2008).

⁷² *In re Marriage Cases*, 183 P.3d 384, 435 n.54 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (West, Westlaw through 2010), *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

⁷³ See Cahill, *supra* note 4. Although many of these same themes regarding the purpose of marriage were litigated in the 2003 Massachusetts marriage equality victory, *Goodridge v. Department of Public Health*, the claims were not analyzed under the rubric of “similarly situated.” See *id.* at 953.

⁷⁴ *In re Marriage Cases*, 183 P.3d at 435 n.54; *Kerrigan*, 957 A.2d at 423-24; *Varnum*, 763 N.W.2d at 884 n.9. Of course, in other states, equal protection arguments for marriage equality have been rejected. See Levi, *supra* note 8, at 56 & n.4 (describing defeats for proponents of marriage equality in Maryland, New Jersey, New York, Oregon, and Washington). However, this Article focuses

and California courts went beyond determining that same-sex and opposite-sex couples were “similarly situated,” further questioning the formulation of a threshold “similarly situated” analysis.⁷⁶

Because all three of these cases involved state constitutional claims, there were important differences in the constitutional analyses, most notably the level of scrutiny applied to classifications based on sexual orientation.⁷⁷ Nonetheless, all three courts’ equal protection analyses were informed by federal equal protection concepts and precedent,⁷⁸ and as Part II demonstrates, the phrase “similarly situated” has a long history in federal equal protection case law.

The Iowa Supreme Court in *Varnum v. Brien*⁷⁹ discussed the role of a “similarly situated” analysis at some length.⁸⁰ The *Varnum* court described the “similarly situated” requirement as “a narrow threshold test.”⁸¹ It explained that it had “utilized this test in the past” and that “if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause.”⁸²

Nonetheless, the Iowa court refused to merely focus on asserted differences between the two groups, but continued on to emphasize the “fit” analysis at this initial step. “[T]o truly ensure equality before the law,” it

on the opinions in which marriage equality opponents offered threshold-type “similarly situated” arguments like those presented in the women prisoners’ cases.

⁷⁵ *In re Marriage Cases*, 183 P.3d at 464 (Baxter, J., concurring and dissenting) (“A statute does not violate equal protection when it recognizes real distinctions that are pertinent to the law’s legitimate aims.”); *id.* at 470 (Corrigan, J., concurring and dissenting); *Kerrigan*, 957 A.2d at 519 (Zarrella, J., dissenting) (“[A] couple that is incapable of engaging in the type of sexual conduct that can result in children is not similarly situated to a couple that is capable of engaging in such conduct with respect to legislation that is intended to privilege and regulate that conduct.”).

⁷⁶ *In re Marriage Cases*, 183 P.3d at 435 n.54; *Varnum*, 763 N.W.2d at 884 n.9.

⁷⁷ *In re Marriage Cases*, 183 P.3d at 401 (treating sexual orientation as a suspect classification); *Kerrigan*, 957 A.2d at 412 (concluding that gay persons constitute a quasi-suspect class); *Varnum*, 763 N.W.2d at 896 (employing intermediate scrutiny); *cf.* Suzanne B. Goldberg, Sarah Hinger & Keren Zwick, *Equality Opportunity: Marriage Litigation and Iowa’s Equal Protection Law*, 12 J. GENDER RACE & JUST. 107, 109 (2008) (introducing an amicus brief filed in *Varnum* advocating an independent analysis of Iowa’s equal protection guarantee).

⁷⁸ *See In re Marriage Cases*, 183 P.3d at 420 (discussing federal precedent in construing the California Constitution); *Kerrigan*, 957 A.2d at 420 (“[A]lthough we may follow the analytical approach taken by courts construing the federal constitution, our use of that approach for purposes of the state constitution will not necessarily lead to the same result as that arrived at under the federal constitution.”); *Varnum*, 763 N.W.2d at 878 n.6 (“[W]e view the federal and state equal protection clauses as ‘identical in scope, import, and purpose.’ . . . Here again, we find federal precedent instructive in interpreting the Iowa Constitution, but we refuse to follow it blindly.” (quoting *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999))).

⁷⁹ 763 N.W.2d 862 (Iowa 2009).

⁸⁰ *Id.* at 884 n.9.

⁸¹ *Id.* at 882.

⁸² *Id.*

wrote, “the equal protection guarantee requires that laws treat all those who are similarly situated *with respect to the purposes of the law* alike.”⁸³ “The purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes,” it explained.⁸⁴

Even more relevant here, the *Varnum* court questioned the “usefulness” of deploying a “similarly situated” test as a threshold requirement and “express[ed] caution in the future use of the threshold analysis.”⁸⁵ While it had applied the “similarly situated” requirement as a threshold test, the Iowa court explained that it had also “directly or indirectly infused that analysis with principles traditionally applied in the complete equal protection analysis.”⁸⁶

This approach was “almost inevitable,” it wrote, if the test was “to have any real value as an analytical tool to resolve equal protection claims.”⁸⁷ Because the *Varnum* plaintiffs had satisfied the “similarly situated” threshold standard, the Iowa court reserved for future cases the question of whether “similarly situated” analysis should be conducted as a preliminary requirement of equal protection.⁸⁸

After calling into question the threshold nature of the test, the Iowa court then conducted the “similarly situated” analysis.⁸⁹ Citing Tussman and tenBroek’s article, the court stated that whether two groups are “similarly situated” cannot be defined solely by the trait identified by the legislature in drafting the statute.⁹⁰ The Iowa court concluded that the plaintiffs were “similarly situated” to straight couples because they “[we]re in committed and loving relationships, many raising families, just like heterosexual couples.”⁹¹ This meant that the plaintiffs were “similarly situated in every important respect, but for their sexual orientation,” for the purpose of Iowa marriage laws, “which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways.”⁹²

The *Varnum* court concluded its “similarly situated” analysis by noting that the classifying trait alone (i.e., sexual orientation) could not justify the legislative distinction if plaintiffs were otherwise similarly situated.⁹³ It wrote that the conception of the “similarly situated” requirement pressed by

⁸³ *Id.* at 883.

⁸⁴ *Id.*

⁸⁵ *Varnum*, 763 N.W.2d at 884 n.9.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 882-84.

⁹⁰ *Id.* at 882-83 (citing Tussman & tenBroek, *supra* note 17, at 344-47).

⁹¹ *Varnum*, 763 N.W.2d at 883.

⁹² *Id.* at 883-84.

⁹³ *Id.* at 882-84.

the County was “circular” and would result in “all distinctions . . . evad[ing] equal protection review.”⁹⁴

It is not surprising that the threshold variant of “similarly situated” appeared in Iowa. This formulation of the requirement first gained visibility in the Eighth Circuit in a 1994 opinion rejecting a women prisoners’ equal protection challenge to educational and vocational prison programs.⁹⁵ The Eighth Circuit concluded that women prisoners were not “similarly situated” to prisoners in male institutions in the same state system.⁹⁶ In making this determination, it identified several factors: the number of prisoners of each sex, their security level, the types of crimes they were convicted of committing, the lengths of their sentences, and “special characteristics” of the prisoners.⁹⁷ The “special characteristics” of women prisoners identified by the court included that many had been physically or sexually abused, were single-parent primary caretakers, and were convicted of nonviolent crimes.⁹⁸ Because the Eighth Circuit concluded that female prisoners were not “similarly situated” to male inmates, it rejected the plaintiffs’ equal protection claims without proceeding to the merits.⁹⁹

The Eighth Circuit “threshold” variant of similarly situated analysis was adopted in a series of women prisoners’ equal protection cases,¹⁰⁰ including another Eighth Circuit decision out of Iowa.¹⁰¹ The D.C. Circuit also relied on this same reasoning two years later in *Women Prisoners v. District of Columbia*.¹⁰² In a spirited dissent, Judge Judith Rogers criticized the majority’s “similarly situated” analysis for reasons similar to those advanced here.¹⁰³ Judge Rogers argued that a court cannot determine whether individuals in two groups are “similarly situated” without analyzing “the purpose for which the government is acting.”¹⁰⁴ Instead of

⁹⁴ *Id.* at 884.

⁹⁵ *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994).

⁹⁶ *Id.*

⁹⁷ *Id.* at 731-32.

⁹⁸ *Id.*

⁹⁹ *Id.* at 731.

Absent a threshold showing that [the plaintiff] is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim. Thus, before we may reach the merits of their equal protection claim, we must determine if the plaintiffs and [male Nebraska] inmates are similarly situated.

Id. (citation omitted); *see also* *Women Prisoners v. District of Columbia*, 93 F.3d 910, 925 (D.C. Cir. 1996) (“The threshold inquiry in evaluating an equal protection claim is, therefore, ‘to determine whether a person is similarly situated to those persons who allegedly received favorable treatment.’” (quoting *United States v. Whiton*, 48 F.2d 356, 358 (8th Cir. 1995))).

¹⁰⁰ *See* *Roubideaux v. N.D. Dep’t. of Corr. & Rehab.*, 570 F.3d 966, 971, 974 (8th Cir. 2009); *Keevan v. Smith*, 100 F.3d 644, 647-49 (8th Cir. 1996); *Pargo v. Elliott*, 69 F.3d 280, 281 (8th Cir. 1995) (per curiam).

¹⁰¹ *See* *Pargo*, 69 F.3d at 280.

¹⁰² 93 F.3d 910 (D.C. Cir. 1996).

¹⁰³ *Id.* at 954-55 (Rogers, J., dissenting).

¹⁰⁴ *Id.* at 954.

focusing on the relationship between the classification and the purpose of the government action, Judge Rogers explained, the majority “fixate[d]” on “irrelevancies” like the size of the two facilities.¹⁰⁵ She wrote that the court should first “[d]etermin[e] the purpose of government action before embarking on a similarly-situated analysis.”¹⁰⁶

The reasoning of the women prisoners’ majority opinions has been criticized,¹⁰⁷ with commentators arguing that the analysis is “circular,”¹⁰⁸ that it “perpetuate[s] the gender-based stereotypes that the women prisoners were challenging,”¹⁰⁹ and that it undercuts equal protection review.¹¹⁰ Some of this commentary was cited by the Iowa Supreme Court in questioning the formulation of the threshold “similarly situated” requirement.¹¹¹

Nonetheless, the “threshold” variant of “similarly situated” has gained some currency following the women prisoners cases, mostly in state courts concentrated in a few jurisdictions,¹¹² including most notably Iowa,¹¹³ Ne-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 954-55.

¹⁰⁷ See Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women’s Prisons*, 5 TEMP. POL. & CIV. RTS. L. REV. 1, 22-24 (1995); Angie Baker, Note, *Leapfrogging over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal Facilities for Males and Females in Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), 76 NEB. L. REV. 371, 397-98 (1997); Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of “Similarly Situated”*, 51 N.Y.L. SCH. L. REV. 595, 602-08 (2006); Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 283-86 (2000). Inmates in women’s prisons did win some early equal protection victories. See, e.g., *Canterino v. Wilson*, 546 F. Supp. 174, 206, 213 (W.D. Ky. 1982) (concluding that disparities between men’s and women’s prisons in Kentucky violated equal protection), *aff’d*, 875 F.2d 862 (6th Cir. 1989); *Glover v. Johnson*, 478 F. Supp. 1075, 1083 (E.D. Mich. 1979) (noting the same in Michigan institutions).

¹⁰⁸ Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 275 (2003).

¹⁰⁹ Carroll-Ferrary, *supra* note 107, at 603.

¹¹⁰ Baker, *supra* note 107, at 386; Carroll-Ferrary, *supra* note 107, at 610-11.

¹¹¹ *Varnum v. Brien*, 763 N.W.2d 862, 884 n.9 (Iowa 2009) (citing Laddy, *supra* note 107, at 22-23; Baker, *supra* note 107, at 385).

¹¹² “Similarly situated” is referred to as a “threshold” test in some lower federal court opinions, but usually in cases alleging disparate treatment under a facially neutral law, in which the plaintiff must demonstrate that some discrimination is taking place. See, e.g., *Habhab v. Horn*, 536 F.3d 963, 967 (8th Cir. 2008) (stating that plaintiffs needed to demonstrate that state police had treated them “less favorably than similarly-situated . . . companies”); *United States v. Jones*, 287 F.3d 325, 333 (5th Cir. 2002) (holding that a defendant alleging selective prosecution had failed to make the threshold statistical “showing that he was singled out for prosecution” and “that others similarly situated were not”); *Fales v. Garst*, 235 F.3d 1122, 1123 (8th Cir. 2001) (per curiam) (“[T]he plaintiffs failed to offer specific evidence of incidents in which they were treated differently than others who were similarly situated.”); *Domina v. Van Pelt*, 235 F.3d 1091, 1099 (8th Cir. 2000) (“The threshold inquiry in an equal protection case is whether the plaintiff is similarly situated to others who allegedly received preferential treatment.”); *Arnold v. City of Columbia*, 197 F.3d 1217, 1220 (8th Cir. 1999) (“[A]ppellants were required, as a threshold matter, to demonstrate that they were treated differently from others *similarly situated* to them.”). See generally ROTUNDA & NOWAK, *supra* note 60, at 297-99 (“[A] law may have no imper-

braska,¹¹⁴ Kansas,¹¹⁵ Colorado,¹¹⁶ California,¹¹⁷ and Illinois.¹¹⁸ *Varnum* cites other Iowa cases describing “similarly situated” as the first step of equal protection analysis, which must be satisfied to proceed with the merits analysis.¹¹⁹ Indeed, some of the Iowa cases describe “similarly situated” as a threshold requirement even in cases requiring only rational basis review.¹²⁰

The argument for a “threshold” type of similarly situated analysis also has surfaced in marriage equality litigation in California and Connecticut.

missible classification by its own terms but it may be applied in such a way as to create a classification.”).

¹¹³ See *infra* notes 119-20.

¹¹⁴ See, e.g., *Benitez v. Rasmussen*, 626 N.W.2d 209, 219 (Neb. 2001) (“Absent this threshold showing, one lacks a viable equal protection claim.”); *Gramercy Hill Enters. v. State*, 587 N.W.2d 378, 383 (Neb. 1998) (“It is fundamental that ‘the initial inquiry in an equal protection analysis focuses on whether one has demonstrated that one was treated differently than others similarly situated. Absent this threshold showing, one lacks a viable equal protection claim.’” (quoting *State v. Atkins*, 549 N.W.2d 159, 163 (Neb. 1996))).

¹¹⁵ See, e.g., *In re Weisgerber*, 169 P.3d 321, 328 (Kan. 2007) (“[A] threshold requirement for stating an equal protection claim is to demonstrate that the challenged statutory enactment treats ‘arguably indistinguishable’ classes of people differently.” (quoting *Ross v. Moffitt*, 417 U.S. 600, 609 (1974))).

¹¹⁶ See, e.g., *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 400 (Colo. App. 2009) (“The threshold question in any equal protection challenge is whether the legislation results in dissimilar treatment of similarly situated individuals.”); *Walgreen Co. v. Charnes*, 911 P.2d 667, 668-69 (Colo. App. 1996) (“The threshold question in any equal protection challenge, therefore, is whether the legislation results in dissimilar treatment of similarly situated individuals.”).

¹¹⁷ See, e.g., *Cooley v. Superior Court*, 57 P.3d 654, 669 (Cal. 2002).

“The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” *Id.* (citations omitted) (quoting *In re Eric J.*, 601 P.2d 549, 552 (Cal. 1979)); see also *People v. Buffington*, 88 Cal. Rptr. 2d 696, 701 (Ct. App. 1999) (stating that an equal protection claim requires a finding that persons are similarly situated under the challenged law).

¹¹⁸ See, e.g., *People v. Whitfield*, 888 N.E.2d 1166, 172 (Ill. 2007) (“[W]e cannot go so far as to apply the rational basis test in this case because defendant cannot meet the threshold requirement for an equal protection claim—demonstrating that he and the group he compares himself to are similarly situated.”).

¹¹⁹ *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (citing *Timberland Partners XXI, LLP v. Iowa Dep’t of Revenue*, 757 N.W.2d 172, 176-77 (Iowa 2008); *In re Det. of Hennings*, 744 N.W.2d 333, 338-40 (Iowa 2008); *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002)).

¹²⁰ In *Grovijohn*, for example, the Iowa Court wrote:

The first step of an equal protection claim is to identify the classes of similarly situated plaintiffs singled out for differential treatment. . . . Because *Grovijohn* has not satisfied the first step of an equal protection analysis, we do not address whether the [statute at issue] has a rational relationship to a legitimate government interest.

643 N.W.2d at 204; see also *Timberland Partners*, 757 N.W.2d at 175 (“The first step of an equal protection [analysis] is to identify the classes of similarly situated persons singled out for differential treatment.” (quoting *Ames Rental Prop. Ass’n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007)) (alteration in original) (internal quotation marks omitted)); *In re Hennings*, 744 N.W.2d at 339 (“If the two groups are not similarly situated, we need not scrutinize the legislature’s differing treatment of them.”).

In California, opponents of marriage equality in *In re Marriage Cases*¹²¹ pressed a “threshold” similarly situated argument “that same-sex couples and opposite sex couples are not ‘similarly situated’ with regard to the challenged statute’s legitimate purpose.”¹²² Although two dissenters accepted this threshold formulation, the majority rejected it, explaining that it “in reality would insulate the challenged marriage statute from *any* meaningful equal protection review” by “assertedly obviating any need for this court even to consider which standard of review applies to plaintiffs’ equal protection claim.”¹²³ The *In re Marriage Cases* majority concluded that same-sex and opposite-sex couples were in fact “similarly situated,” explaining that “[b]oth groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship.”¹²⁴

In *Kerrigan v. Commissioner of Public Health*,¹²⁵ Connecticut opponents of marriage equality also advocated a form of “similarly situated” analysis that could sidestep full equal protection review.¹²⁶ They “assert[ed] that the plaintiffs [were] not similarly situated to opposite sex couples” and that this fact “thereby obviat[ed] the need for [the] court to engage in an equal protection analysis.”¹²⁷ Unlike the Iowa and California courts, the Connecticut court did not question the threshold nature of a “similarly situated” inquiry.¹²⁸ Like in Iowa, some prior Connecticut case law referred to the “similarly situated” requirement as a “threshold” requirement of an equal protection challenge.¹²⁹ The Connecticut majority explained that a statute violates equal protection if “either on its face or in practice, [it]

¹²¹ 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (West, Westlaw through 2010), *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

¹²² *Id.* at 435 n.54; *see* Proposition 22 Legal Defense and Education Fund Answer to Petitioners’ Opening Briefs on the Substantive Issues at 49, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (“Petitioners cannot meet the threshold for an equal protection challenge. Accordingly, this Court should not even consider what standard of review would be appropriate for the alleged equal protection claims.”).

¹²³ *In re Marriage Cases*, 183 P.3d at 435 n.54.

¹²⁴ *Id.*

¹²⁵ 957 A.2d 407 (Conn. 2008).

¹²⁶ *Id.* at 423-24; Brief of Defendant-Appellees with Appendix at 19, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716) (“[I]n any equal protection challenge, the plaintiffs must show, as a threshold matter, that the statute at issue treats similarly situated people differently.”).

¹²⁷ *Kerrigan*, 957 A.2d at 423-34.

¹²⁸ *Id.* at 424.

¹²⁹ *See* *Ramos v. Town of Vernon*, 761 A.2d 705, 722 (Conn. 2000), *rev’d on other grounds*, 353 F.3d 171 (2d Cir. 2003); *State v. Angel C.*, 715 A.2d 652, 670 (Conn. 1998) (“[T]he defendants must show, as a threshold matter, that [the statute] either on its face or as applied, treats similarly situated individuals differently.”).

treat[s] persons standing in the same relation to it differently.”¹³⁰ “[Accordingly],” the majority continued, “the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated.”¹³¹

Although accepting the “threshold” or “initial” nature of the inquiry, the Connecticut majority nonetheless focused on “fit,” reiterating that the question is “not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged.”¹³² The majority ultimately concluded that same-sex and opposite-sex couples were “similarly situated” for the reasons articulated by the California court in *In re Marriage Cases*.¹³³

The “similarly situated” analysis in the marriage equality opinions exposes different conceptions of marriage.¹³⁴ Marriage equality opponents defined the purpose of the marriage statutes narrowly as regulating “natural” reproduction.¹³⁵ A Connecticut dissenter, Justice Peter Zarella, concurred with this assessment.¹³⁶ “[B]ecause the long-standing, fundamental purpose of our marriage laws is to privilege and regulate procreative conduct,” he wrote, “those laws do not classify on the basis of sexual orientation and . . . persons who wish to enter into a same sex marriage are not

¹³⁰ *Kerrigan*, 957 A.2d at 421 (quoting *Stuart v. Comm’r of Corr.*, 834 A.2d 52, 56 (Conn. 2003)) (internal quotation marks omitted).

¹³¹ *Id.* at 421-22 (alterations in original) (quoting *Stuart*, 834 A.2d at 56) (internal quotation marks omitted).

¹³² *Id.* at 422 (quoting *Stuart*, 834 A.2d at 56).

¹³³ *Id.* at 424.

¹³⁴ *Cf.* MINOW, *supra* note 17, at 108 (noting that “similarly situated” analysis “retains a general presumption that differences reside in the different person rather than in relation to norms embedded in the prevailing institutions”). The Massachusetts Supreme Judicial Court’s opinion in *Goodridge v. Department of Public Health*, although not turning on “similarly situated” analysis, also focused on the construction of marriage as an institution and the purpose of the marriage statutes. 798 N.E.2d 941, 961 (Mass. 2003) (“The judge in the Superior Court [held] that ‘the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.’ This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family.”); *see also* Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1377 (2010) (urging adoption of an “equal access” litigation theory for marriage equality, emphasizing the concept of marriage as a government-supported institution).

¹³⁵ *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009); *see* Final Brief of Defendant-Appellant at 24, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499) (“Plaintiffs are not similarly situated to opposite sex couples. That is a matter of common knowledge. Plaintiffs, as couples, are not capable of procreating naturally and are not similarly situated to opposite sex couples who can naturally procreate.”).

¹³⁶ *Kerrigan*, 957 A.2d at 516-17 (Zarella, J., dissenting). Justice David Borden also dissented, but wrote, “I also agree with the majority that the plaintiffs are similarly situated with respect to opposite sex couples regarding the right to marry.” *Id.* at 483 n.6 (Borden, J., dissenting).

similarly situated to persons who wish to enter into a traditional marriage.”¹³⁷

A dissenting Justice of the California Supreme Court went even further. Acknowledging that the question “is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged,’” Justice Carol Corrigan responded by wholly identifying the statutory purpose with the traditional conception of marriage.¹³⁸ “The legitimate purpose of the statutes defining marriage is to preserve the traditional understanding of the institution,”¹³⁹ she wrote.¹⁴⁰ One of her colleagues concurred: “Same-sex and opposite-sex couples cannot be similarly situated for that limited purpose.”¹⁴¹

By contrast, by rejecting limited definitions of the social institution at issue, the majorities in the marriage equality cases were able to move away from a cramped “similarly situated” analysis¹⁴² and to focus on commonalities among the litigants.¹⁴³

¹³⁷ *Id.* at 516 (Zarella, J., dissenting).

¹³⁸ *In re Marriage Cases*, 183 P.3d 384, 470 (Cal. 2008) (Corrigan, J., concurring and dissenting) (quoting *Cooley v. Superior Court*, 57 P.3d 654, 669 (Cal. 2002)), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (West, Westlaw through 2010), *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

¹³⁹ *Id.*

¹⁴⁰ Deborah Hellman makes a distinction between “proxy” and “non-proxy” discrimination. Hellman, *supra* note 16, at 316-17.

¹⁴¹ *In re Marriage Cases*, 183 P.3d at 464 (Baxter, J., concurring and dissenting).

¹⁴² *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009). The *In re Marriage Cases* court reached a similar conclusion:

Both groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine “whether distinctions between the two groups justify the unequal treatment.”

183 P.3d at 435 n.54 (quoting *People v. Hofsheier*, 129 P.3d 29, 37 (Cal. 2006)). This was the same analytical move employed by Justice Ginsburg in *United States v. Virginia*, although that opinion did not use a “similarly situated” vocabulary. *See* 518 U.S. 515, 545 (1996). Quoting from VMI’s mission statement regarding its goal of producing “citizen-soldiers,” Justice Ginsburg stated, “Surely that goal is great enough to accommodate women.” *Id.* (internal quotation marks omitted); *cf.* Cahill, *supra* note 4 (noting that marriage equality opponents in California and Iowa had “tried to argue, again unsuccessfully, that the [same-sex couple] plaintiffs are not similarly situated to opposite-sex couples so as to necessitate further equal protection analysis because the plaintiffs cannot ‘procreate naturally.’” (alteration in original) (quoting *Varnum*, 763 N.W.2d at 882)).

¹⁴³ *Cf.* MINOW, *supra* note 17, at 379 (arguing that “emphasiz[ing] the basic connectedness between people and the injuries that result from social isolation and exclusion” would be “an opening wedge for an alternative to traditional legal treatments of difference”).

II. “SIMILARLY SITUATED” IN EQUAL PROTECTION DOCTRINE

This Part describes the origins of the phrase “similarly situated” and demonstrates that the U.S. Supreme Court has not historically viewed it as a separate, threshold requirement, but rather as one and the same as the equal protection merits inquiry. The phrase “similarly situated” appeared in equal protection doctrine long before the current tiered analysis. Originally imported from other doctrinal contexts, “similarly situated” has figured in equal protection challenges since the latter half of the nineteenth century.¹⁴⁴ In the mid- to late-twentieth century civil rights era, “similarly situated” played a particularly salient role in the early gender and legitimacy cases, presaging the advent of an intermediate level of scrutiny¹⁴⁵ and assisting courts in separating stereotyped differences from legitimate bases of distinction.¹⁴⁶ Throughout all this time, it has never been viewed by the U.S. Supreme Court as a threshold hurdle to obtaining equal protection review on the merits.

A. *The Early Cases*

Before entering the equal protection lexicon—even before the passage of the Fourteenth Amendment—the phrase “similarly situated” was used to refer to property. The earliest cases involved the capture of ships in the War of 1812.¹⁴⁷ Other early cases centered on authority over land,¹⁴⁸ including land grants in New Orleans in 1836¹⁴⁹ and in California during the Mexican-American War.¹⁵⁰ In other early cases, the phrase described the location of

¹⁴⁴ See *infra* notes 147-81 and accompanying text.

¹⁴⁵ See Gunther, *supra* note 20, at 32-33.

¹⁴⁶ Cf. Engles, *supra* note 14, at 174 (“[T]he similarly-situated test . . . provides one means of uncovering illicit motive.”).

¹⁴⁷ See, e.g., *The Adventure*, 12 U.S. (8 Cranch) 221, 228 (1814) (“[A]s this property was found within the United States at the declaration of war, it must stand on the same footing with other British property similarly situated.”).

¹⁴⁸ See, e.g., *Conrad v. Waples*, 96 U.S. 279, 290 (1877); *Moore v. Am. Transp. Co.*, 65 U.S. (24 How.) 1, 39 (1860) (“[C]ommerce upon these lakes, and all others similarly situated, is not within the regulation of Congress.”); see also *United States v. Reynes*, 50 U.S. (9 How.) 127, 144 (1850) (“The character of this hypothesis requires particular examination, as upon its correctness or its fallacy must depend the fate of this claim, and of every other similarly situated.”); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 515 (1839).

¹⁴⁹ See, e.g., *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 731 (1836) (“That both the kings of France and Spain could exercise a certain jurisdiction over this common, and other places similarly situated, has been stated . . .”).

¹⁵⁰ See, e.g., *United States v. Cambuston*, 61 U.S. (20 How.) 59, 64 (1857) (“The grant purporting to have been made by Pico, so near the time when the Government of the Territory had passed from his hands . . . it, and all others similarly situated, should be inquired into and scrutinized with great care . . .”).

land,¹⁵¹ particularly in relationship to water.¹⁵² The phrase was used in *Dred Scott v. Sandford*,¹⁵³ in a section discussing whether Congress possessed authority to pass legislation banning slavery in certain territories.¹⁵⁴

In the Civil War period, “similarly situated” appeared in cases involving the Captured and Abandoned Property Act and the Non-Intercourse Act, sometimes referring to the difficult circumstances in which people found themselves in wartime.¹⁵⁵ In an 1869 case, it referred to the situation of a Southern debtor.¹⁵⁶ In another case, litigants described the circumstances of agents assertedly authorized by Union Army officials to run a blockade.¹⁵⁷

In the late-nineteenth century, the Court began to employ “similarly situated” in reference to the application of a facially neutral statute to all engaging in a particular activity.¹⁵⁸ An 1883 case rejecting a claim that a ferry license fee constituted an unlawful restraint on the right to contract explained:

¹⁵¹ See, e.g., *Meehan v. Forsyth*, 65 U.S. (24 How.) 175, 178 (1860) (noting that another case “involved a controversy for a lot in the city of Peoria, similarly situated as that which forms the subject of this suit” (citing *Bryan v. Forsyth*, 60 U.S. (19 How.) 334 (1856))).

¹⁵² See, e.g., *Illinois ex rel. Dunne v. Econ. Light & Power Co.*, 234 U.S. 497, 515 (1914) (discussing “other lands similarly situated with reference to the river”); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 163 (1896); *Hall v. DeCuir*, 95 U.S. 485, 515 (1887) (Clifford, J., concurring) (“Hundreds of such creeks . . . are similarly situated.”); *Withers v. Buckley*, 61 U.S. (20 How.) 84, 87 (1857) (“[T]he flow of the waters of the Homochitto removes the deposits of mud occasioned by the overflow of the Mississippi, and thus keeps open the outlet of Old river, to the great advantage of the complainant, and of others similarly situated on Old river.”); *Surgett v. Lapice*, 49 U.S. (8 How.) 48, 66 (1850) (describing the construction of embankments on the Mississippi River, explaining that “individual proprietors were relied on to do that which, in other countries at all similarly situated, was a great national work”); *Smith v. Turner*, 48 U.S. (7 How.) 283, 398 (1849) (“Hundreds of creeks within the flow of the tide were similarly situated.”).

¹⁵³ 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

¹⁵⁴ *Id.* at 434 (“The example of Virginia was soon afterwards followed by other States, and, at the time of the adoption of the Constitution, all of the States, similarly situated, had ceded their unappropriated lands, except North Carolina and Georgia.”).

¹⁵⁵ See, e.g., *United States v. Grossmayer*, 76 U.S. (9 Wall.) 72, 74 (1869); *The Sea Lion*, 72 U.S. (5 Wall.) 630, 637 (1866).

¹⁵⁶ *Grossmayer*, 76 U.S. (9 Wall.) at 74 (“It was natural that Grossmayer should desire to be paid, and creditable to Einstein to wish to discharge his obligation to him, but the same thing can be said of very many persons who were similarly situated during the war . . .”).

¹⁵⁷ *The Sea Lion*, 72 U.S. (5 Wall.) at 637 (stating that the agents who “[e]mbarked in a transaction such as this” and “persons similarly situated” were “compelled . . . to pick their way in fear and silence, walking, as it were, at every step, over burning ploughshares” (internal quotation marks omitted)).

¹⁵⁸ William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1087 (1999) (“The framers of the clause and the early Supreme Court decisions focused equal protection attention on laws that subjected a class of citizens to special disabilities unjustified by natural differences.”); see also *Saunders*, *supra* note 21, at 333.

The ordinance of the city of East St. Louis makes no discrimination in favor of any other ferry similarly situated which it is authorized to regulate, tax, and license. The same license fee is exacted of all keepers of ferries within the corporate limits as are imposed upon the plaintiff in error.¹⁵⁹

B. *Barbier v. Connolly: Emergence in Equal Protection*

The first use of the phrase “similarly situated” in U.S. Supreme Court equal protection jurisprudence was in 1884 in *Barbier v. Connolly*.¹⁶⁰ *Barbier* dealt with an ordinance passed by the board of supervisors of the city and county of San Francisco regulating public laundries.¹⁶¹ The ordinance in *Barbier* was one of a series of facially neutral laws designed to discriminate against Chinese laundrymen; at the time, more than three-quarters of California laundrymen were Chinese, and animus against them was running high.¹⁶² The famous *Yick Wo v. Hopkins* decision was a subsequent case in this series.¹⁶³

Under the ordinance at issue in *Barbier*, public laundries were to obtain a certificate from the city health officer and another from the fire wardens, they were to stop washing and ironing clothes between 10:00 p.m. and 6:00 a.m., and forbid any person with an infectious disease from remaining on the premises.¹⁶⁴ The petitioner in *Barbier* was convicted of washing and ironing clothes during the off-hours and was sentenced to the county jail for five days.¹⁶⁵

Mr. Barbier brought a writ of habeas corpus, claiming that the ordinance violated the Fourteenth Amendment.¹⁶⁶ Specifically, he argued that the ordinance discriminated between a “class of laborers engaged in the laundry business” and those engaged in other businesses and “that it discriminated between laborers beyond the designated limits and those within them.”¹⁶⁷

The lower court dismissed the writ, and the Supreme Court affirmed, concluding that there was no “invidious discrimination.”¹⁶⁸ The challenged

¹⁵⁹ *Wiggins Ferry Co. v. E. St. Louis*, 107 U.S. 365 (1883) (challenging a ferry licensing fee imposed by the City of St. Louis on the grounds that it supposedly impaired the right of contract).

¹⁶⁰ 113 U.S. 27 (1885).

¹⁶¹ *Id.* at 27.

¹⁶² Bernstein, *supra* note 23, at 228-29.

¹⁶³ Bernstein, *supra* note 23, at 244. *But see* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, U. ILL. L. REV. 1359, 1363 (2008) (arguing that *Yick Wo* is really based in due process, not equal protection, and is not so much a victory for antidiscrimination principles as a routine application of treaty law).

¹⁶⁴ *Barbier*, 113 U.S. at 27-28.

¹⁶⁵ *Id.* at 28-29. In fact, Professor David Bernstein’s article reveals that *Barbier* was a test case set up to demonstrate the law’s constitutionality by the lawyers for the City of San Francisco, but that fact apparently did not come to light in the Supreme Court. Bernstein, *supra* note 23, at 234-35.

¹⁶⁶ *Barbier*, 113 U.S. at 29.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 29-30, 32.

legislation did not discriminate, the Court explained, but applied to “[a]ll persons engaged in the same business.”¹⁶⁹ The Equal Protection Clause does not prohibit regulation imposed “alike upon all persons and property under the same circumstances and conditions,” the Court explained,¹⁷⁰ but rather forbids “[c]lass legislation, discriminating against some and favoring others.”¹⁷¹ In its next sentence, the Court introduced the phrase “similarly situated” into equal protection analysis: “[L]egislation which, in carrying out a public purpose, is limited in its application, *if within the sphere of its operation it affects alike all persons similarly situated*, is not within the amendment.”¹⁷²

Some commentators argue that *Barbier*’s statement that “[c]lass legislation . . . is prohibited, but [not] legislation which . . . affects alike all persons similarly situated”¹⁷³ reflected the understanding of the drafters of the Equal Protection Clause that it was “designed to prevent the states from singling out certain classes of people for special benefits or burdens without sufficient justification.”¹⁷⁴ This conception of equal protection, they assert, was rooted in nineteenth-century state constitutional doctrines that forbade “partial” or “special laws,” imposing benefits or burdens on a class of persons without an adequate “public purpose.”¹⁷⁵

Certainly, despite its emphasis on facial neutrality, *Barbier* is a case that is deeply enmeshed in racist and anti-immigrant sentiment,¹⁷⁶ emphasizing that the statute at issue was facially neutral was certainly not a race-neutral act.¹⁷⁷ However, the phrase “similarly situated” is employed to

¹⁶⁹ *Id.* at 30-31.

¹⁷⁰ *Id.* at 32.

¹⁷¹ *Id.*

¹⁷² *Barbier*, 113 U.S. at 32 (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ Saunders, *supra* note 21, at 333.

¹⁷⁵ *Id.* at 247-48 (internal quotation marks omitted); see also HOWARD GILMAN, THE CONSTITUTION BESIEGED 7 (1993) (stating that “nineteenth-century courts were on guard against not all regulations of the economy but only a particular kind of government interference in market relations—what the justices considered ‘class’ or ‘partial’ legislation; that is, laws that (from their point of view) promoted only the narrow interests of particular groups or classes rather than the general welfare.”); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 13, 15 (2003) (explaining that “[o]pposition to class legislation had deep roots in pre-Civil War American thought and, after the Civil War, quickly became an interpretive focal point of the Fourteenth Amendment,” although arguing that “[c]lass [l]egislation [a]nalysis [d]id [n]ot [p]lay an [i]nfluential [r]ole in the *Lochner* [e]ra”); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 429-30, 434 (2004) (“Perhaps the most complete body of early ‘equal protection’ law in state courts dealt with ‘partial’ or special laws. State courts repeatedly invalidated laws that singled out a particular class or person as the recipient of special rights or the carrier of extra burdens.” (footnote omitted)).

¹⁷⁶ See Bernstein, *supra* note 23, at 231.

¹⁷⁷ See *id.* at 231-33.

express that equal protection concerns itself with distinctions between classes of persons.¹⁷⁸

In the famous follow-on case to *Barbier*, *Yick Wo v. Hopkins*, which established the viability of equal protection challenges based on discriminatory enforcement, the Court repeated its use of the phrase “similarly situated,” citing *Barbier*.¹⁷⁹ Contrasting the situation in *Yick Wo* with the statute in *Barbier*, the Court explained that “[t]he ordinance drawn in question in the present case . . . does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform.”¹⁸⁰

C. *The Lochner Era: Increasing Focus on “Fit”*

Through the late-nineteenth century and into the *Lochner* era, the phrase “similarly situated” appeared in cases involving equal protection challenges to statutes. During this period, courts first cited the phrase as part of *Barbier*’s statement that equal protection forbade “class legislation” and then increasingly mentioned “similarly situated” in connection with the “fit” between the legislative classification and statutory purpose. Whether judges deferred to legislatures or adopted a more searching attitude towards social and economic regulation, they uniformly treated “similarly situated” as part of the merits phase of equal protection review, not as a threshold inquiry.

The *Barbier* “similarly situated” formulation, emphasizing the bar on “class legislation,” was cited numerous times during the *Lochner* era.¹⁸¹

¹⁷⁸ See *id.* at 211 (“These laws almost never discriminated against the Chinese explicitly. Nevertheless, such laws were passed in order to shut down Chinese laundries.”). Bernstein argues the “revisionist” view of the *Lochner* era—that is, that courts “relied on two long-standing American intellectual traditions . . . the tradition that valued ‘natural rights’ and ‘free labor,’ and the tradition that ‘opposed class legislation.’” *Id.* at 282-83 (footnote omitted).

¹⁷⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 367-68 (1886) (citing *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885)).

¹⁸⁰ *Id.* at 368.

¹⁸¹ Professor Stephen Siegel has argued that *Lochner*-era courts’ reliance on equal protection to invalidate state protective legislation has been under-estimated. See Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 131-32 (2005) (arguing that “[d]espite the conventional wisdom” that *Lochner*-era courts relied on due process to invalidate state protective legislation, “the number of equal protection invalidations is surprisingly large,” numbering forty-six invalidations on equal protection grounds between 1897 and 1937, “approximately one-fifth of the total number of decisions in which the *Lochner*-era Court voided governmental action on Fourteenth Amendment grounds”); see also Bernstein, *supra* note 23, at 214 (arguing the “revisionist” view of the *Lochner* era, which focuses on “negative effects of facially neutral regulatory legislation on racial minorities”). But see Bernstein, *supra* note 175, at 28 (arguing that “[c]lass [l]egislation [a]nalysis [d]id [n]ot [p]lay an [i]nfluential [r]ole in the *Lochner* [e]ra” and that “[w]hen the *Lochner* Court did

In invalidating a Kansas statute regulating stockyards, the Court in *Cotting v. Kansas City Stock Yards Co.*¹⁸² nonetheless recognized that “exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are . . . similarly situated.”¹⁸³ In 1921, the Court invalidated an Arizona statute protecting picketers, reasoning that it violated equal protection and due process, and quoted *Barbier*.¹⁸⁴

Lochner-era dissenters also appealed to formulations of “similarly situated” language in defending the regulatory power of the state.¹⁸⁵ They too integrated “similarly situated” in their equal protection analysis, focusing increasingly on the relationship between the classification and the statute’s purpose.¹⁸⁶ Justice Brandeis, dissenting in *Quaker City Cab Co. v.*

invalidate regulatory legislation, it consistently relied on liberty of contract arguments under the Due Process Clause rather than on class legislation arguments under the Equal Protection Clause”).

¹⁸² 183 U.S. 79 (1901).

¹⁸³ *Id.* at 111-12.

¹⁸⁴ *Truax v. Corrigan*, 257 U.S. 312, 333-34 (1921).

¹⁸⁵ *See, e.g., Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 42 n.1 (1928) (Brandeis, J., dissenting).

¹⁸⁶ Not all *Lochner*-era cases employing the phrase “similarly situated” invalidated statutes on equal protection grounds. *See, e.g., Mountain Timber Co. v. Washington*, 243 U.S. 219, 228, 239, 246 (1917) (upholding a Washington statute requiring logging companies to contribute to a state fund and explaining that “[c]lass legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.” (internal quotation marks omitted)); *Hadachek v. Sebastian*, 239 U.S. 394, 404, 413 (1915) (denying relief in a 1915 habeas case challenging a conviction under a Los Angeles city ordinance restricting brick making to certain parts of the city, reasoning that “[i]t may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be”); *Watson v. Maryland*, 218 U.S. 173, 174-75, 179-80 (1910) (rejecting an equal protection challenge to a statute criminalizing practicing medicine without a license, stating that “[t]he selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive and apply equally to all persons similarly situated”); *Williams v. Arkansas*, 217 U.S. 79, 86, 90 (1910) (affirming an Arkansas conviction for “drumming” up customers for a boarding house on a railway depot, explaining that “[i]t is settled that legislation which ‘in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment’” (quoting *Barbier v. Connolly*, 113 U.S. 27, 32 (1885))); *Muller v. Oregon*, 208 U.S. 412, 418, 423 (1908) (upholding a statute limiting the hours that women could work in a laundry and, in so doing, rejecting the defendant’s claim that the statute was impermissible class legislation that “d[id] not apply equally to all persons similarly situated”); *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552, 557, 559, 563 (1905) (affirming a conviction under a New York statute that criminalized selling milk without a license, the Court quoted the New York Appellate Division opinion that “if this section of the sanitary code vested in [the board] arbitrary power to license one dealer . . . and refuse a license to another similarly situated, undoubtedly it would be invalid” (quoting *New York ex rel. Lieberman v. Van De Carr*, 80 N.Y.S. 1108 (App. Div. 1903))). Some opinions still used “similarly situated” to refer to a geographic location. In other opinions, it referred to a person’s circumstances or a geographic location. The Court rejected a challenge to a New Mexico statute forbidding railways to accept cattle hides for shipment outside of the territory without proof of inspection. *See*

Pennsylvania,¹⁸⁷ defended a statute imposing taxes on a transportation company and explained that “we have declared that the classification must rest upon a difference which is real . . . so that all actually situated similarly will be treated alike Subject to this limitation of reasonableness, the equality clause has left unimpaired . . . the State’s power to classify for purposes of taxation.”¹⁸⁸

Some of the *Lochner*-era opinions contained language that would later be important in civil rights victories.¹⁸⁹ These opinions used the “similarly situated” concept in a more rigorous form of rational basis review,¹⁹⁰ striking down economic and public welfare legislation. The Court’s 1920 decision in *F.S. Royster Guano Co. v. Virginia*¹⁹¹ elaborated on the “similarly situated” requirement, using language that would be cited later by the Supreme Court in anti-discrimination cases.¹⁹² At issue in *Royster* was an income tax that exempted businesses that were incorporated in Virginia, but did all of their business outside of the commonwealth.¹⁹³ Equal protection does not forbid state legislatures from classifying, the Court explained, “[b]ut the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”¹⁹⁴ The Court concluded that the exemption in *Royster*

New Mexico *ex rel. E.J. McLean & Co. v. Denver & Rio Grande R.R. Co.*, 203 U.S. 38, 54-55 (1906) (“In the Territory of New Mexico, and other parts of the country similarly situated, it is highly essential to protect large numbers of people against criminal aggression upon this class of property.”).

¹⁸⁷ 277 U.S. 389 (1928), *abrogated by* *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

¹⁸⁸ *Id.* at 406 (Brandeis, J., dissenting).

¹⁸⁹ *Cf.* Bernstein, *supra* note 175, at 13, 31-32, 49 (describing an “expansion of *Lochnerian* due process jurisprudence to civil liberties” in the 1920s, although emphasizing that this legacy was grounded in due process, not equal protection); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 273 (2005) (arguing that post-Civil War African-American advocates shared “the same set of concerns that produced the new judicial doctrines of the *Lochner* era: that states would rely on the police power . . . in ways that overstepped constitutional bounds”); Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609, 609-10 (2011) (arguing that a “modified *Lochnerian* analysis, based on the presumption that people should be allowed the liberty to order their own affairs,” might “advance gay rights”).

¹⁹⁰ *See* Schlam, *supra* note 175 at 439 (describing how the Court in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), “articulated a modified, more demanding version of the ‘rational basis’ standard of review”); *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 361 (2006) (“Tracing back to Gilded Age Commerce Clause adjudication, and frequently used in *Lochner*-era police power cases, the ‘narrow tailoring’ doctrine gave meaningful protection to constitutional norms well before the development of either modern bifurcated review or strict scrutiny.”).

¹⁹¹ 253 U.S. 412 (1920).

¹⁹² *See, e.g., Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (citing *Royster* in a gender discrimination case).

¹⁹³ *Royster*, 253 U.S. at 414.

¹⁹⁴ *Id.* at 415.

violated equal protection because “the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation.”¹⁹⁵

In 1927, Justice Holmes elaborated on “similarly situated” in his reviled opinion in *Buck v. Bell*,¹⁹⁶ upholding a statute authorizing sterilization of the “feeble-minded”¹⁹⁷ and deriding the Equal Protection Clause as “the usual last resort of constitutional arguments.”¹⁹⁸ Although more deferential to the legislature than *Royster*, Holmes’s opinion also focused on the relationship between classification and legislative policy. He wrote that “the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.”¹⁹⁹ Language from *Buck* was later cited in *Skinner v. Oklahoma ex rel. Williamson*,²⁰⁰ but in that case, the Court reached a different conclusion by invalidating Oklahoma’s Habitual Criminal Sterilization Act and concluding that “[m]arriage and procreation” were, in fact, “one of the basic civil rights of man.”²⁰¹

Although the 1940 case *Tigner v. Texas*²⁰² did not use the phrase “similarly situated,” its analysis later figured in interpretations of the phrase, particularly in cases rejecting gender discrimination claims.²⁰³ Although exemplifying a more deferential statement of rational basis review, *Tigner* again articulated a “fit” inquiry in which the concept “similarly situated” is part of an integrated analysis.²⁰⁴ In *Tigner*, the Court rejected an equal protection challenge to a price-fixing statute, which the plaintiff claimed violated equal protection by differentiating between agriculture and industry.²⁰⁵ “The equality at which the ‘equal protection’ clause aims is not a disembodied equality,” the Court explained.²⁰⁶ It continued:

The Fourteenth Amendment enjoins “the equal protection of the laws,” and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the

¹⁹⁵ *Id.* at 416-17.

¹⁹⁶ 274 U.S. 200 (1927).

¹⁹⁷ Siegel, *supra* note 181, at 116; *see also id.* at 106 (describing *Buck v. Bell* as Justice Holmes’s “most despised opinion”).

¹⁹⁸ *Bell*, 274 U.S. at 208.

¹⁹⁹ *Id.*

²⁰⁰ 316 U.S. 535 (1942).

²⁰¹ *Id.* at 541.

²⁰² 310 U.S. 141 (1940).

²⁰³ *See, e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981).

²⁰⁴ *Tigner*, 310 U.S. at 147.

²⁰⁵ *Id.* at 144, 149.

²⁰⁶ *Id.* at 147.

use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.²⁰⁷

D. “Similarly Situated” and the Advent of Intermediate Scrutiny

The phrase “similarly situated” figures prominently in relatively few race discrimination cases of the mid-twentieth century civil rights era.²⁰⁸ Beginning in the 1970s, however, a growing number of equal protection opinions, particularly in gender discrimination cases, employed the phrase “similarly situated.”²⁰⁹

1. The Gender Discrimination Cases

Numerous cases used the phrase “similarly situated” in concluding that the legislative classification was based on outmoded gender stereotypes.²¹⁰

²⁰⁷ *Id.*

²⁰⁸ The phrase “similarly situated” appeared in a series of equal protection challenges to legislative reapportionment beginning with *Baker v. Carr*, 369 U.S. 186, 193-94 (1962). See *Roman v. Sincok*, 377 U.S. 695, 697-98 (1964); *Davis v. Mann*, 377 U.S. 678, 680 (1964); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 659 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 635-36 (1964); *Reynolds v. Sims*, 377 U.S. 533, 537, 540 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 3-4 (1964); see also *Allen v. Wright*, 468 U.S. 737, 779-80 (1984) (using “similarly situated” in the description of the class); *Gilmore v. City of Montgomery*, 417 U.S. 556, 559 (1974) (describing how “plaintiffs, or any other Negroes similarly situated, [were forced] to submit to enforced segregation solely because of race or color in their use of any public parks”). As discussed further, *infra*, “similarly situated” played an important role in alienage cases, including *Plyler v. Doe*, 457 U.S. 202, 216 (1982). See *infra* notes 256-58 and accompanying text; cf. *Oyama v. California*, 332 U.S. 633, 687 (1948) (Jackson, J., dissenting) (“Every grantee similarly situated is saddled by the identical burden imposed on Fred Oyama whether he is the son of a Japanese, the son of an American citizen or the son of an eligible alien.”).

²⁰⁹ See, e.g., *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 611 (1979) (White, J., dissenting) (“Such an arbitrary assignment of burdens among classes that are similarly situated with respect to the proffered objectives is the type of invidious choice forbidden by the Equal Protection Clause.”); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 176-77 (1979) (noting “the incongruous result that a new party or an independent candidate needs substantially more signatures to gain access to the ballot than a similarly situated party or candidate for statewide office”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53 (1978) (stating that plaintiffs filed suit “on behalf of themselves and others similarly situated”); *Poelker v. Doe*, 432 U.S. 519, 522 (1977) (per curiam) (stating that plaintiff alleged “it was constitutionally impermissible that indigent women be ‘subjected to State coercion to bear children which they do not wish to bear [while] no other women similarly situated are so coerced.’” (alteration in original) (quoting *Doe v. Poelker*, 515 F.2d 541, 545 (8th Cir. 1975)) (internal quotation marks omitted)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 88 (1973) (Marshall, J., dissenting). But see Engles, *supra* note 14, at 154 (arguing that some of the Court’s then-recent gender cases went beyond the “similarly situated” test by focusing on the relationship between classification and statutory purpose and in fact required “a good reason for *not* treating men and women *identically*”).

²¹⁰ See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982) (noting that “[a] similarly situated female would not have been required to choose between forgoing credit and bearing

Many of these opinions were issued during the period in which the Court was feeling its way toward an intermediate level of scrutiny for gender discrimination claims.²¹¹ In these cases, the Court used “similarly situated” to emphasize the importance of scrutinizing legislative classifications based on gender to determine if they reflected a difference that should be accorded the force of law.

For example, the Court cited *Royster* in *Stanton v. Stanton*²¹² in striking down a Utah child support statute that provided different ages of majority for male and female children, affecting how long they would receive child support.²¹³ The *Stanton* court quoted *Royster*’s statement that “[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²¹⁴ Although the State of Utah asserted that sons would be more likely than daughters to require extended support for higher education, the Court wrote that there was “nothing rational in the distinction”²¹⁵ and that the “criteria [of gender was] wholly unrelated to the objective of that statute.”²¹⁶

In striking down an Idaho statute giving a preference to males in the appointment of administrators of estates in *Reed v. Reed*,²¹⁷ the Court cited *Barbier* and *Royster* and wrote:

th[e] inconvenience” of travelling to another city to attend a nursing program); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 149 (1980) (invalidating a statute providing gender-based disparity in survivor’s benefits and saying “[i]t was this discrimination against the male survivor as compared with a similarly situated female that . . . result[ed] in a denial of equal protection”); *Orr v. Orr*, 440 U.S. 268, 270-71 (1979) (invalidating an Alabama alimony statute under which men, but not women, could be ordered to pay, stating that “Mr. Orr made no claim that he was entitled to an award of alimony from Mrs. Orr, but only that he should not be required to pay alimony if similarly situated wives could not be ordered to pay”); *cf. Zablocki v. Redhail*, 434 U.S. 374, 395 (1978) (Stewart, J., concurring) (“[T]he effect of the Court’s decision in this case is not to require Wisconsin to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons.”).

²¹¹ Goldberg, *supra* note 20, at 485 n.17 (“Some have argued that the Court had actually been applying a form of heightened review since *Reed v. Reed*, 404 U.S. 71 (1971).”); Gunther, *supra* note 20, at 32-34; *see also* Farrell, *supra* note 16, at 358-70 (describing Professor Gunther’s article identifying the emerging form of heightened scrutiny).

²¹² 421 U.S. 7 (1975).

²¹³ *Id.* at 8, 17.

²¹⁴ *Id.* at 14 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (internal quotation marks omitted).

²¹⁵ *Id.*

²¹⁶ *Id.* (internal quotation marks omitted); *see also id.* at 14-15 (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).

²¹⁷ 404 U.S. 71 (1971).

The objective of [the statute] clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective.²¹⁸

In *Eisenstadt v. Baird*,²¹⁹ the Court invalidated Massachusetts statutes prohibiting the sale of contraceptives to unmarried persons and explained that “by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the statutes] violate the Equal Protection Clause.”²²⁰ Concluding that a statute violated equal protection if it treated the spouses of male and female service members differently for the purpose of benefits, the Court in *Frontiero v. Richardson*²²¹ explained that “any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands ‘dissimilar treatment for men and women who are . . . similarly situated.’”²²² In *Califano v. Goldfarb*,²²³ it concluded that a provision of the Social Security Act providing survivors’ benefits to widows but not widowers “disadvantages women contributors to the social security system as compared to similarly situated men.”²²⁴

2. “Different in Fact”: Childbearing and the Draft

The “similarly situated” language figured prominently, often with different results, in equal protection cases involving pregnancy, childbearing, and the draft.²²⁵ Although in these cases the Court sometimes described

²¹⁸ *Id.* at 77; *see also* Kahn v. Shevin, 416 U.S. 351, 358 (1974) (Brennan, J., dissenting) (citing *Reed*, 404 U.S. 71).

²¹⁹ 405 U.S. 438 (1972).

²²⁰ *Id.* at 454-55.

²²¹ 411 U.S. 677 (1973).

²²² *Id.* at 688, 690 (alteration in original).

²²³ 430 U.S. 199 (1977).

²²⁴ *Id.* at 201-02, 208. Likewise, in *Weinberger v. Wiesenfeld*, the Court used the phrase “similarly situated” in invalidating a provision of the Social Security Act that provided benefits to wives of deceased fathers, but not to widowers. 420 U.S. 636, 645 (1975). It explained that the decedent, who had worked as a teacher and died in childbirth, “not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings.” *Id.* at 639, 645.

²²⁵ *See* Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship”*: A Case Study of Sex-Segregated Public Education, 101 MICH. L. REV. 755, 761 (2002) (noting that the Supreme Court has often struck down legal classifications based on sex stereotypes, “with the exceptions generally tending to cluster around sex-specific rules that the Court understands to be inseparably tied to the gestational capacity that all women (presumptively) possess”); *cf.* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 473 (2010) (pointing out that sexual orientation classifications are more frequently upheld under rational basis review in cases involving the military and child-rearing).

men and women as not “similarly situated” because of differences it deemed salient, the Court employed “similarly situated” analysis as part of its equal protection review, not as a threshold analysis.

In *Michael M. v. Superior Court*,²²⁶ the Court upheld a statutory rape law imposing criminal penalties on men but not women.²²⁷ Quoting *Tigner* for the proposition that the Equal Protection Clause does not require “things which are different in fact . . . to be treated in law as though they were the same,” Justice Rehnquist wrote, “the sexes are not similarly situated in certain circumstances.”²²⁸ The *Michael M.* majority concluded that it was reasonable for the legislature to impose a criminal penalty only on men.²²⁹ The legislative aim was to deter pregnancies outside of marriage, the Court reasoned, and young women already bore the brunt of the harm of teen pregnancy.²³⁰

“Similarly situated” analysis appeared again with mixed results in cases regarding children born outside of marriage.²³¹ In *Caban v. Mohammed*,²³² the Court struck down a New York law requiring the consent of unwed mothers (but not unwed fathers) to the adoption of their children, concluding that men and women were similarly situated with respect to the legislative purpose.²³³ Citing *Reed* and *Royster*, it explained that a statute “must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²³⁴ In *Caban*, the father had participated in raising the children over a period of years, and the Court concluded that there was no “profound difference between the affection and concern of mothers and fathers for their children” under these circumstances.²³⁵

That same year, however, in *Parham v. Hughes*,²³⁶ the Court upheld a Georgia statute that permitted the mothers of children born outside of marriage to sue for wrongful death of their child, while the fathers of extramarital children could only sue if they had “legitimated” their child.²³⁷ “The fact is that mothers and fathers of illegitimate children are not similar-

²²⁶ 450 U.S. 464 (1981).

²²⁷ *Id.* at 466-67.

²²⁸ *Id.* at 469 (alteration in original) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)).

²²⁹ *Id.* at 472-73.

²³⁰ *Id.*

²³¹ *See, e.g.*, *Mathews v. Lucas*, 427 U.S. 495, 503 (1976) (“The [Social Security] Secretary does not disagree that the Lucas children and others similarly circumstanced are treated differently, as a class . . .”).

²³² 441 U.S. 380 (1979).

²³³ *Id.* at 391-92.

²³⁴ *Id.* at 391 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) (internal quotation marks omitted).

²³⁵ *Id.* at 382-83, 392.

²³⁶ 441 U.S. 347 (1979).

²³⁷ *Id.* at 348-49, 359.

ly situated,” the Court explained.²³⁸ “Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown.”²³⁹ Four years after *Parham, Lehr v. Robertson*²⁴⁰ presented a case where the father had never established a relationship with his child, and the Court concluded that equal protection was not violated by a statute that permitted the adoption to proceed without giving him notice.²⁴¹ In this case, the Court reasoned, mothers and fathers were not “in fact similarly situated with regard to their relationship with the child.”²⁴²

The Court again focused on men’s and women’s purportedly different relationship to childbearing in more recent cases involving requirements for foreign-born children born outside of marriage to claim U.S. citizenship.²⁴³ The Court upheld more onerous requirements for the children of U.S. citizen fathers than for children of U.S. citizen mothers.²⁴⁴ Citing *Royster and Cleburne*, Justice Kennedy, writing for the Court in *Tuan Anh Nguyen v. INS*,²⁴⁵ said that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.”²⁴⁶

The other major area in which the Court has concluded that women and men sometimes are not “similarly situated” is military service.²⁴⁷ In *Schlesinger v. Ballard*,²⁴⁸ the Court upheld a statute providing that male naval officers would face mandatory discharge if they were passed over for promotion twice, while female officers had 13 years before facing mandatory discharge.²⁴⁹ The Court reasoned that “the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service.”²⁵⁰ Specifically, the Court explained,

²³⁸ *Id.* at 355.

²³⁹ *Id.*

²⁴⁰ 463 U.S. 248 (1983).

²⁴¹ *Id.* at 267-68.

²⁴² *Id.* at 267.

²⁴³ *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998).

²⁴⁴ *Tuan Anh Nguyen*, 533 U.S. at 63.

²⁴⁵ 533 U.S. 53 (2001).

²⁴⁶ *Id.* at 63.

²⁴⁷ *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 878 n.20 (1984) (Marshall, J., dissenting) (“I would protest the extension of this gender classification into the area of federal education assistance, an area in which gender is irrelevant and any classification based on gender is constitutionally objectionable. Men and women are similarly situated for purposes of the allocation of education funds.”); *Johnson v. Robison*, 415 U.S. 361, 385-86 (1974) (upholding the exclusion of conscientious objectors from financial aid for veterans); *see also Engles, supra* note 14, at 173 (noting “the Court’s highly deferential attitude toward congressional decisions in the military area”).

²⁴⁸ 419 U.S. 498 (1975).

²⁴⁹ *Id.* at 502-04, 508-10.

²⁵⁰ *Id.* at 508.

women had less opportunity for promotion, since there were restrictions on their participation in combat and sea duty.²⁵¹

In 1981, the Court rejected a due process challenge to the draft, again reasoning that men and women were not “similarly situated.”²⁵² “Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft,” wrote Justice Rehnquist in his opinion for the Court.²⁵³ “The Constitution requires that Congress treat similarly situated persons similarly,” he continued, “not that it engage in gestures of superficial equality.”²⁵⁴

E. “*All Persons Similarly Situated Should Be Treated Alike*”

The phrase “similarly situated” continued to appear in the Court’s opinions when it began to use a tiered approach to equal protection analysis.²⁵⁵ However, instead of employing “similarly situated” as an antecedent requirement to the tiered review, the Court used it to restate the core principles of the Fourteenth Amendment inquiry.

In *Plyler v. Doe*,²⁵⁶ which concluded that denying undocumented children a public school education did not pass rational basis review, Justice Brennan, writing for the Court, said that “[t]he Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’”²⁵⁷ “But so too, ‘[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.’”²⁵⁸

Perhaps the most-cited language regarding “similarly situated” analysis in current equal protection jurisprudence is from the Court’s 1985 decision in *City of Cleburne v. Cleburne Living Center*,²⁵⁹ in which it declined to consider “mental retardation” a quasi-suspect class, but nonetheless struck down a statute requiring a “special use” permit for a group home.²⁶⁰ The Court, in an opinion by Justice White, described the three

²⁵¹ *Id.*

²⁵² *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981).

²⁵³ *Id.*

²⁵⁴ *Id.* at 79.

²⁵⁵ *Cf.* *Goldberg*, *supra* note 20, at 485 & n.16 (stating that the Supreme Court started articulating “detailed indicia for discerning which classifications should fill” the set of tiers in equal protection analysis in the early 1970s and citing cases that use the phrase “similarly situated” (citing *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))).

²⁵⁶ 457 U.S. 202 (1982).

²⁵⁷ *Id.* at 216 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²⁵⁸ *Id.* (alteration in original) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

²⁵⁹ 473 U.S. 432 (1985).

²⁶⁰ *Id.* at 446-48.

levels of review in modern equal protection analysis.²⁶¹ However, citing *Plyler*, the *Cleburne* Court also used “similarly situated” in describing the overarching concerns of equal protection, writing that the Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.”²⁶² Although not particularly substantive, this oft-cited statement makes clear that “similarly situated” is a restatement of the central aims of equal protection.

F. *Summing Up Lessons of the Historical Survey*

In the early equal protection cases like *Barbier*, the “similarly situated” requirement meant that the legislation passed muster if it was non-discriminatory and neutral (as opposed to invidious “class legislation”) and applied to all “similarly situated” with respect to the law.²⁶³ For example, in passing on the facially neutral restriction of laundry hours, the *Barbier* court explained that legislation does not violate the Fourteenth Amendment if “within the sphere of its operation it affects alike all persons similarly situated.”²⁶⁴

As equal protection doctrine evolved, it focused increasingly on the “fit” between classification and legislative purpose.²⁶⁵ In the 1920 Virginia tax case *Royster*,²⁶⁶ the Court emphasized the need for this “fit,” using the language of the similarly situated requirement: “the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²⁶⁷ Watershed cases like *Cleburne* and *Plyler* also emphasize that “fit” is the overarching purpose of equal protection analysis,²⁶⁸ again employing “similarly situated.”²⁶⁹ In *Cleburne*, the Court wrote that the “command[.]” of the

²⁶¹ *Id.* at 439-42.

²⁶² *Id.* at 439.

²⁶³ See *supra* notes 173-75 and accompanying text.

²⁶⁴ *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).

²⁶⁵ *Tussman & tenBroek*, *supra* note 17, at 345-46 (describing the fit between the “classifying trait” and the legislative purpose (internal quotation marks omitted)); see also Araiza, *Constitutional Rules*, *supra* note 14 (describing a “concern with ‘fit’ analysis in traditional equal protection doctrine”).

²⁶⁶ *Goldberg*, *supra* note 20, at 515 n.126 (citing *Royster* as an example of “strong” rational basis review (internal quotation marks omitted)).

²⁶⁷ *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); see also *Goldberg*, *supra* note 20, at 515.

²⁶⁸ See Araiza, *Constitutional Rules*, *supra* note 14 (observing that the Supreme Court’s analysis in *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), “reflect[ed] a concern with ‘fit’ analysis in traditional equal protection doctrine”).

²⁶⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“The Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’” (quoting *Royster*, 253 U.S. at 415)).

Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.”²⁷⁰

“Similarly situated” analysis appears in four of the twelve rational basis cases in which the U.S. Supreme Court invalidated a legislative classification between 1973 and 2010²⁷¹—*Allegheny Pittsburgh Coal Co. v. County Commission*,²⁷² *Cleburne, Williams v. Vermont*,²⁷³ and *Plyler*. It also figures in the “class-of-one” equal protection cases.²⁷⁴

This “similarly situated” language appears not only in rational basis cases, but also figures prominently in the early gender discrimination cases, such as *Reed* and *Eisenstadt*.²⁷⁵ In the early gender cases, the Court is concerned with which differences are deemed “real”—mostly related to child-bearing and combat service—and which are either outmoded stereotypes or generalizations that may be statistically true at the moment, but should not be reified.²⁷⁶ “Similarly situated” figures so prominently in these cases

²⁷⁰ *Cleburne*, 473 U.S. at 439 (citing *Plyler*, 457 U.S. at 216).

²⁷¹ See *Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336, 346 (1989); *Cleburne*, 473 U.S. at 439; *Williams v. Vermont*, 472 U.S. 14, 23 (1985); *Plyler*, 457 U.S. at 216. Goldberg’s 2004 article collected the cases in which the Court invalidated a statutory classification under rational basis review, taking 1973—the year of Gunther’s article—as the starting point. See Goldberg, *supra* note 20, at 512-13, 513 n.120. The review contained in this Article has not identified any subsequent “rational basis with bite” invalidations at the Supreme Court level. See also Farrell, *supra* note 16 (concluding that there are “effectively . . . two sets of rationality cases, one deferential and one heightened, operating as if in parallel universes with no connection between them”).

²⁷² 488 U.S. 336 (1989).

²⁷³ 472 U.S. 14 (1985).

²⁷⁴ See, e.g., *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); see also Araiza, *Constitutional Rules*, *supra* note 14, at 56-57; Araiza, *Irrationality and Animus*, *supra* note 14, at 503. Compare *Willowbrook*, 528 U.S. at 564 (“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”), with *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 604-05 (2008) (concluding that there is no viable “class of one” equal protection claim in public employment).

²⁷⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972); *Reed v. Reed*, 404 U.S. 71, 77 (1971).

²⁷⁶ See *United States v. Virginia*, 518 U.S. 515, 550 (1996) (describing Supreme Court equal protection jurisprudence as rejecting “generalizations about ‘the way women are’”). Compare *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (concluding that there is no real difference between widows and widowers), *Orr v. Orr*, 440 U.S. 268, 281-82 (1979) (finding that there is no difference between “needy” men and women for the receipt of alimony payments), *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (determining that there is no real difference between widows and widowers in the receipt of social welfare), *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652-53 (1975) (indicating that awarding dependent benefits does not implicate problems “special” only to women), *Frontiero v. Richardson*, 411 U.S. 677, 690-91, 691 n.25 (1973) (holding that there is no real difference between men and women armed forces members for the purpose of awarding various benefits), *Eisenstadt*, 405 U.S. at 453 (indicating that there is no difference between married and unmarried persons in the distribution of contraceptives), and *Reed*, 404 U.S. at 76-77 (concluding that there is no difference in the abilities of men and women to administer an estate of a person who dies intestate), with *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (finding that there is a difference between men and women in the birth process), and

because it presages appearance of intermediate scrutiny.²⁷⁷ In those cases, the Court was trying to use the “similarly situated” analysis to filter real differences from stereotypes.²⁷⁸

It is not surprising that “similarly situated” is pivotal in cases involving either rational basis or intermediate scrutiny. Under the current tiered structure, these levels of scrutiny are particularly concerned with the link between the legislative line-drawing and statutory purpose,²⁷⁹ and with sorting legitimate from illegitimate bases of classification.²⁸⁰

By contrast, the phrase “similarly situated” did not figure as prominently in race cases that were reviewed under strict scrutiny.²⁸¹ The phrase appeared only in passing in *Brown v. Board of Education*²⁸² and did not appear in *Loving v. Virginia*²⁸³ or in *Washington v. Davis*.²⁸⁴ More recently, there is no mention of the words “similarly situated” in *Johnson v. California*,²⁸⁵ which concluded that the California Department of Correction’s policy of temporary racial segregation upon admission was subject to strict scrutiny.²⁸⁶ There is no substantive “similarly situated” analysis in the Court’s 2003 higher education affirmative action cases, *Grutter v. Bollinger*²⁸⁷ and *Gratz v. Bollinger*,²⁸⁸ nor in the recent school desegregation case *Parents Involved in Community Schools v. Seattle School District No. 1*.²⁸⁹ The phrase “similarly situated” appears less in race cases because the Court is less willing to entertain the claim that racial line-drawing is legitimate, no matter the asserted justification.²⁹⁰ The absence of “similarly

Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (determining that men and women are not similarly situated with respect to the risks associated with sexual intercourse).

²⁷⁷ See Goldberg, *supra* note 20, at 513 n.120; Gunther, *supra* note 20, at 32-33; see also Stanton v. Stanton, 421 U.S. 7, 17 (1975) (“We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—[the Utah age of majority statute applied in the child support context] does not survive an equal protection attack.”).

²⁷⁸ Cf. Gunther, *supra* note 20, at 32-33.

²⁷⁹ Goldberg, *supra* note 20, at 540 (stating that “the core concerns of rational basis and heightened review overlap in certain important respects”).

²⁸⁰ See Engles, *supra* note 14, at 154, 174-75.

²⁸¹ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.10, 495 (1954) (using the phrase only in a footnote and in the penultimate paragraph of the opinion).

²⁸² 347 U.S. 483 (1954).

²⁸³ 388 U.S. 1 (1967).

²⁸⁴ 426 U.S. 229 (1976).

²⁸⁵ 543 U.S. 499 (2005).

²⁸⁶ *Id.* at 509.

²⁸⁷ 539 U.S. 306 (2003).

²⁸⁸ 539 U.S. 244 (2003).

²⁸⁹ 551 U.S. 701 (2007).

²⁹⁰ See Engles, *supra* note 14, at 175 n. 152 (noting that the “presumption of validity [is] removed where classification is based on race); Goldberg, *supra* note 20, at 509 (“[It] is possible that this rigid and categorical review flows not just from the suspect classification analysis itself, but also from the majority’s belief in the perniciousness of any racial classification.”).

situated” talk is one more indicator of Professor Gerald Gunther’s famous observation that strict scrutiny is “‘strict’ in theory and fatal in fact.”²⁹¹

As discussed in Part I, in some lower court cases, “similarly situated” is used today as a threshold requirement, which must be satisfied in order to merit full equal protection review.²⁹² The court first determines whether the parties are “similarly situated” before proceeding to the “fit” analysis, applying the appropriate level of scrutiny under the tiered framework.²⁹³

However, properly understood, “similarly situated” analysis is relational. Its focus is not merely pointing out any difference between the two classes, but rather evaluating the relationship between the classification and the statutory purpose.²⁹⁴ As Justice Kennedy explained in *Romer*, without using a “similarly situated” vocabulary, “[t]he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.”²⁹⁵

III. THE SOLUTION: AN INTEGRATED “SIMILARLY SITUATED” ANALYSIS

As demonstrated in Part II, “similarly situated” emerges from the older conception of equal protection as a bar on “class legislation,”²⁹⁶ a concern that remains a focus of equal protection analysis, no matter the level of scrutiny.²⁹⁷ This Part further develops the argument that “similarly situated” is properly understood as one and the same as the substantive equal protection review, and not as a threshold inquiry.

Under the Court’s current tiered scheme, when properly understood and applied, “similarly situated” is another way of stating the fundamental values of the Equal Protection Clause.²⁹⁸ It is largely a restatement of

²⁹¹ Gunther, *supra* note 20, at 8; *see* Schlam, *supra* note 175, at 446 (“If the Court categorized the case as appropriate for strict scrutiny, the government almost always lost; if the traditional test was to be used, the government almost never lost.”).

²⁹² *See supra* notes 70-143 and accompanying text.

²⁹³ *See infra* notes 298-305 and accompanying text.

²⁹⁴ ROTUNDA & NOWAK, *supra* note 60; Tussman & tenBroek, *supra* note 17.

²⁹⁵ *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see also* Goldberg, *supra* note 20, at 516 (quoting this language from *Romer* as a statement of the “underlying purpose of equal protection review”).

²⁹⁶ *See supra* notes 160-80 and accompanying text. Thanks to Bill Araiza, Howard Wasserman, and others with whom I workshopped this paper at Brooklyn Law School for helping to clarify my thinking in this Section.

²⁹⁷ Goldberg, *supra* note 20, at 528.

²⁹⁸ This Article is *not* suggesting that the equal protection analysis itself is empty, *contra* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982), but rather that “similarly situated” is another way of expressing the principles embodied in the current “tiered” review. *Cf.* Araiza, *supra* note 225, at 508 (“[T]he Equal Protection Clause, and the comprehensive equality principle that it has been taken to mean, is known for its vacuity and indeterminacy.”).

“rational basis with bite”²⁹⁹ and of intermediate scrutiny. Of course, these two levels of scrutiny specify different degrees of “fit” that are required.³⁰⁰ At both levels of review, however, “similarly situated” analysis is somewhat redundant of the “fit” inquiry³⁰¹—for rational basis, whether the line that is drawn is reasonably related to a legitimate government interest,³⁰² and for intermediate scrutiny, whether it is substantially related to an important government interest.³⁰³ “Similarly situated” analysis underlies both of these inquiries and, as a formal matter, can be collapsed into each of them.³⁰⁴ To borrow a phrase from the Iowa Supreme Court in *Varnum*, “similarly situated” analysis should be “infused with principles traditionally applied in the complete equal protection analysis.”³⁰⁵

This Part provides examples of the proper application of “similarly situated.” It examines two Supreme Court cases that have conducted an integrated “similarly situated” analysis and an opinion from a recent district court case analyzing a challenge to the Federal Defense of Marriage Act (“DOMA”). It then applies these lessons to a case out of Iowa cited by the *Varnum* court, *Grovijohn v. Virjon, Inc.*,³⁰⁶ to illustrate how an integrated “similarly situated” analysis might make a difference.

A. Williams v. Vermont

A good example of a proper application of “similarly situated” appears in *Williams v. Vermont*, a 1985 case that challenged a Vermont “use” tax imposed on cars registered by owners who purchased them out-of-state before becoming Vermont residents.³⁰⁷ The Court, in an opinion by Justice White, first identified the purpose of the Vermont Motor Vehicle Purchase and Use Tax—to “improve and maintain” the roads.³⁰⁸ It then considered whether the classification drawn—whether the taxpayer was a Vermont resident at the time she purchased a vehicle and paid a sales tax in another

²⁹⁹ Smith, *supra* note 65, at 2770 (internal quotation marks omitted); Pettinga, *supra* note 65, at 780.

³⁰⁰ “Similarly situated” analysis is not wholly redundant of the tiered approach because the level of scrutiny applied instructs courts about “how likely it is that improper motives are behind the statute.” Engles, *supra* note 14, at 174 (describing the difference between levels of scrutiny as “[h]ow ‘tight’ a fit is required” between classification and statutory purpose).

³⁰¹ See Araiza, *Constitutional Rules*, *supra* note 14; Araiza, *Irrationality and Animus*, *supra* note 14, at 503, 505.

³⁰² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

³⁰³ *Id.* at 440-41; see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (explaining intermediate scrutiny in the context of a gender classification case).

³⁰⁴ See *supra* notes 298-303 and accompanying text.

³⁰⁵ *Varnum v. Brien*, 763 N.W.2d 862, 884 n.9 (Iowa 2009).

³⁰⁶ 643 N.W.2d 200 (Iowa 2002).

³⁰⁷ *Williams v. Vermont*, 472 U.S. 14, 15-16 (1985).

³⁰⁸ *Id.* at 18 (quoting VT. STAT. ANN. tit. 32, § 8901 (1981)) (internal quotation marks omitted).

state—bore a rational relationship to the statutory purpose.³⁰⁹ The Court analyzed whether the two classes of Vermont residents were “similarly situated” with respect to the legislative aim.³¹⁰ Apart from the classifying trait (i.e., whether they were residents of Vermont at the time they purchased their vehicle out-of-state), both groups were “similarly situated for all relevant purposes.”³¹¹ Individuals in both groups were currently Vermont residents, used a car in Vermont, and possessed “an equal obligation to pay for the maintenance and improvement of Vermont’s roads.”³¹² Thus, the Court concluded that “[t]he purposes of the statute would be identically served, and with an identical burden, by taxing each” and that “[t]he distinction between them bears no relation to the statutory purpose.”³¹³

The “similarly situated” analysis in *Williams* is fully integrated into the rational basis review and focused on “fit.”³¹⁴ It is “infused . . . with principles traditionally applied in the complete equal protection analysis.”³¹⁵

B. Tuan Anh Nguyen v. Immigration and Naturalization Service

Of course, the fact that the analysis is integrated does not dictate any particular result.³¹⁶ As we saw in the marriage equality cases in Part I, the parties will continue to contest whether the legislative classification bears a close enough relationship to the statutory purpose (and indeed, the statutory purpose itself).³¹⁷

A second example of an integrated equal protection analysis by the U.S. Supreme Court yielded different results in the majority and dissent, although both groups of Justices incorporated the “similarly situated” concept into their merits analysis rather than applying it as a separate, threshold test. In *Tuan Anh Nguyen v. INS*, in which the Court considered an equal protection challenge to a statute mandating more burdensome requirements to establish citizenship for the children of unmarried U.S.

³⁰⁹ *Id.* at 23-24.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Williams*, 472 U.S. at 24.

³¹⁴ See Araiza, *Constitutional Rules*, *supra* note 14 (identifying a “concern with ‘fit’ analysis in traditional equal protection doctrine”); Araiza, *Irrationality and Animus*, *supra* note 14, at 503, 505 (noting the importance of “fit” in equal protection analysis).

³¹⁵ *Varnum v. Brien*, 763 N.W.2d 862, 884 n.9 (Iowa 2009).

³¹⁶ Goldberg, *supra* note 20, at 564 (“[T]he test cannot provide sure answers to how courts will resolve the often fierce debate regarding whether a trait bears a sufficiently plausible relationship to a regulatory context to justify the differential treatment at issue.”).

³¹⁷ See Simons, *supra* note 54, at 460 (“In order to conduct means-end analysis, a court must identify the relevant legislative end which the means must ‘fit.’”).

citizen fathers than for the children of unmarried U.S. citizen mothers,³¹⁸ the Court split 5-4 with the majority upholding the constitutionality of the gender-based distinction.³¹⁹

Most significantly, both the majority and the dissent in *Tuan Anh Nguyen* performed integrated “similarly situated” analyses, utilizing the concept in the merits review.³²⁰ Although the two opinions reached different results, they both focused on the asserted purposes of the statute and their relationship to the gender-based classification.³²¹ Neither contemplated that the “similarly situated” requirement was a “threshold” test.

In his opinion for the *Tuan Anh Nguyen* majority, Justice Kennedy wrote that the primary asserted purpose of the statute was “assuring that a biological parent-child relationship exists” and that because fathers “need not be present at the birth,” “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.”³²² In dissent, Justice O’Connor took issue with whether this was, in fact, a Congressional aim.³²³ She went on to criticize the “fit” between the “asserted end” of the statute and the gender-based classification, asserting that “sex-neutral alternatives” were available.³²⁴

In response to another of the government’s proffered justifications—that the statutory classification was intended to ensure a “real” relationship between parent and child—Justice O’Connor argued that while mothers and fathers may not be “similarly situated” with respect to the biological circumstances of birth, they are “similarly situated with respect to the ‘opportunity’ for a relationship” with the child because a father may choose to be present at a child’s birth.³²⁵

In addition to illustrating this Article’s primary argument that “similarly situated” analysis is a part of the “fit” question and not just an initial hurdle, the opposing opinions in *Tuan Anh Nguyen* also demonstrate once again how “similarly situated” can be a frame for debating which

³¹⁸ *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001) (“The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”). While a U.S. citizen mother can transmit citizenship at birth, an unmarried U.S. citizen father must take additional steps: legitimate the child, make a declaration of paternity, or obtain a court order of paternity. *Id.* at 62.

³¹⁹ *Id.* at 56, 73.

³²⁰ Compare *id.* at 63 (“Fathers and mothers are not similarly situated with regard to the proof of biological parenthood.”), with *id.* at 86 (O’Connor, J., dissenting) (“[T]he statute on its face accords different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though those two individuals are similarly situated with respect to the ‘opportunity’ for a relationship.”).

³²¹ See *id.* at 63 (majority opinion); *id.* at 80, 85-86 (O’Connor, J., dissenting).

³²² *Id.* at 62-63 (majority opinion).

³²³ *Id.* at 79 (O’Connor, J., dissenting).

³²⁴ *Tuan Anh Nguyen*, 533 U.S. at 86 (O’Connor, J., dissenting).

³²⁵ *Id.*

differences are “real” or unalterable, and which are socially constructed and thus potentially subject to stereotype.³²⁶ It can also reveal notions about the institution at issue, this time parenthood.³²⁷ The *Tuan Anh Nguyen* majority focused on the biological mechanics of a typical birth, in which the mother is in labor and the father may or may not attend.³²⁸ By contrast, the dissenters focused on the “opportunity for a relationship” beginning at birth that a parent of either gender could establish by choice.³²⁹ Justice O’Connor criticized the majority’s reasoning as a stereotype,³³⁰ while Justice Kennedy, writing for the majority, countered that “[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial.”³³¹

The *Tuan Anh Nguyen* opinions illustrate that the line of scrimmage in an integrated “similarly situated” analysis shifts from focusing on differences between two groups to debating the statutory aims and the “fit” between the legislative classification and these asserted goals.³³² As *Nguyen* illustrates, real conflicts and differences of opinion continue to play out in the doctrinal analysis. Nonetheless, performing a proper “similarly situated” analysis, linked to the “fit” with the statutory purpose, is more meaningful than merely pointing out some differences between the groups at the outset.³³³

³²⁶ Cf. MINOW, *supra* note 17, at 107-08, 375 (identifying one legal approach to differences that assumes “differences as inherent to the ‘different’ person rather than a function of comparisons”); Simons, *supra* note 54, at 462 (“Professor Minow has argued . . . against several traditional assumptions about ‘differences’ in equal protection doctrine . . . for example, that differences are intrinsic rather than socially constructed . . .”).

³²⁷ See MINOW, *supra* note 17, at 107-08, 375. For contrasting descriptions of parenthood in the *Tuan Anh Nguyen* opinion, see *supra* note 320.

³²⁸ *Tuan Anh Nguyen*, 533 U.S. at 63, 73.

³²⁹ *Id.* at 86-87 (O’Connor, J., dissenting).

³³⁰ *Id.* at 87.

³³¹ *Id.* at 73 (majority opinion).

³³² Cf. Simons, *supra* note 54, at 460 (“In order to conduct means-ends analysis, a court must identify the relevant legislative end which the means must ‘fit.’”). Compare *Tuan Anh Nguyen*, 533 U.S. at 63 (“The requirement of [the statute] represents a reasonable conclusion by the legislature that the satisfaction of one of several alternatives will suffice to establish the blood link between father and child required as a predicate to the child’s acquisition of citizenship.”), with *id.* at 86 (O’Connor, J., dissenting) (“[A]vailable sex-neutral alternatives would at least replicate, and could easily exceed, whatever fit there is between [the statute’s] discriminatory means and the majority’s asserted end.”).

³³³ Cf. *Women Prisoners v. District of Columbia*, 93 F.3d 910, 954-55 (Rogers, J., dissenting) (“Determining the purpose of government action before embarking on a similarly-situated analysis is inherent in the individual nature of equal protection rights.”).

C. Gill v. Office of Personnel Management

More recently, the district court opinion in *Gill v. Office of Personnel Management*,³³⁴ invalidating DOMA, also performed an appropriate “similarly situated” analysis informed by principles of equal protection.³³⁵ Quoting the “similarly situated” language of *Cleburne* and *Plyler*, the district court began by recognizing that equal protection is “essentially a direction [to the government] that all persons similarly situated should be treated alike.”³³⁶ It then proceeded to conduct a rational basis review informed by these values (i.e., “not a toothless one”).³³⁷ The court focused on the relationship between the classification and the purpose of the statute.³³⁸ “[A] challenged law can only survive this constitutional inquiry if it is ‘narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s],’” it explained.³³⁹ Tying the “rational basis with bite” review back into the “similarly situated” requirement, the court wrote that “a law must fail rational basis review where the ‘purported justifications . . . [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects.’”³⁴⁰

The court then applied these integrated principles to review the asserted justifications for the federal government’s restriction of the definition of “marriage” to “a legal union between one man and one woman as husband and wife.”³⁴¹ It rejected the proffered purposes of “encouraging responsible procreation and child-bearing” and “defending and nurturing the institution of traditional heterosexual marriage,” saying that “to the extent that this was the goal, Congress has achieved it ‘only by punishing same-sex couples.’”³⁴² Similarly, the district court rejected the asserted goals of “defending traditional notions of morality” and “preserv[ing] . . . scarce government resources,” reasoning that neither private morality nor “negative attitudes or fear” were an appropriate basis for such a classification.³⁴³

³³⁴ 699 F. Supp. 2d 374 (D. Mass. 2010).

³³⁵ *Id.* at 386, 397.

³³⁶ *Id.* at 386 (alteration in original) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)) (internal quotation marks omitted).

³³⁷ *Id.* at 387 (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)) (internal quotation marks omitted).

³³⁸ *Id.* at 387-88.

³³⁹ *Id.* at 387 (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

³⁴⁰ *Gill*, 699 F. Supp. 2d at 388 (alterations in original) (quoting *Bd. of Trs. v. Garrett*, 531 U.S. 356, 366 n.4 (2001)).

³⁴¹ *Id.* at 377 (internal quotation marks omitted).

³⁴² *Id.* at 388-89 (quoting *In re Levenson*, 560 F.3d 1145, 1150 (9th Cir. Jud. Council 2009)).

³⁴³ *Id.* at 389-90 (quoting *City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 448 (1985)) (internal quotation marks omitted).

The *Gill* court wrote that “it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled” and that it could not see any way in which this difference was relevant.³⁴⁴ It concluded by again tying its “rational basis with bite” analysis to the language of the “similarly situated” requirement: “[W]here, as here, ‘there is no reason to believe that the disadvantaged class is different, in *relevant* respects’ from a similarly situated class, this court may conclude that it is *only* irrational prejudice that motivates the challenged classification.”³⁴⁵ Thus, in the *Gill* court’s opinion, “similarly situated” is an integrated part of the court’s equal protection analysis.³⁴⁶

D. *An Illustration: Grovijohn v. Virjon, Inc.*

What difference would it make to switch from a “threshold” to an “integrated” approach to similarly situated analysis? An Iowa Supreme Court decision cited in *Varnum*, which employed a threshold analysis, provides an example. Ricky Grovijohn was injured in a car accident in which the driver had been drinking.³⁴⁷ He filed suit under Iowa’s dramshop statute against the bar that served alcohol to the intoxicated driver.³⁴⁸ The bar successfully raised an affirmative defense that Grovijohn had failed to comply with a statutory requirement that dramshop plaintiffs provide notice of intent to sue to the dramshop within six months of the accident.³⁴⁹ Grovijohn challenged this notice requirement on equal protection grounds.³⁵⁰ The Iowa Supreme Court rejected his challenge, reasoning that because dramshop plaintiffs were not “similarly situated” to other potential tort plaintiffs, no equal protection challenge was viable.³⁵¹ In fact, the Iowa Court reasoned that because dramshop plaintiffs were not similarly situated to other plaintiffs, it need “not address whether the dramshop statute has a rational relationship to a legitimate government interest.”³⁵²

³⁴⁴ *Id.* at 396.

³⁴⁵ *Id.* at 396-97 (Birch, J., concurring) (second emphasis added) (quoting *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 377 F.3d 1275, 1280 (11th Cir. 2004)).

³⁴⁶ The district court opinion in the California case challenging Proposition 8, *Perry v. Schwarzenegger*, does not contain the verbatim phrase “similarly situated.” See 704 F. Supp. 2d 921 (N.D. Cal. 2010). Nonetheless, the court essentially performed the same equal protection analysis, applying a rational basis standard of review and concluding that opposite-sex and same-sex couples were “situated identically . . . in terms of their ability to perform the rights and obligations of marriage under California law.” *Id.* at 993. Functionally, the analysis was the same as in *Gill*, driving home the point that a properly conducted “similarly situated” analysis does much the same work as “rational basis with bite.”

³⁴⁷ See *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 201 (Iowa 2002).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 202.

³⁵¹ See *id.* at 204.

³⁵² *Id.*

Applying an integrated equal protection analysis, the result in *Grovijohn* might well be the same. However, the reasoning would differ in critical ways. The Court would not be able to evade the question of whether the statutory classification drawn bears a rational relationship to the legislative purpose. Rather, the Court would have to consider whether dramshop plaintiffs and other civil plaintiffs are similarly situated *with respect to the statutory purpose*.³⁵³ One possible aim of the notice provision, although not stated in *Grovijohn*, is presumably to give bar proprietors notice that they should preserve records and testimony regarding an accident of which they may not otherwise be aware.³⁵⁴ The statutory classification drawn here might well pass muster under rational basis review on the merits.

Although possibly producing the same outcome in *Grovijohn*, an integrated analysis would avoid logical errors. For example, in its threshold “similarly situated” analysis, the Iowa Court wrote that “[i]t is significant all dramshop plaintiffs, as a unique class, are treated alike amongst themselves . . . [and] are subject to the same requirements of the dramshop statute.”³⁵⁵ This is precisely the type of tautological reasoning that Tussman and tenBroek warned against in their seminal article on equal protection.³⁵⁶

CONCLUSION

In an area of the law that is so culturally charged, many factors other than doctrine can affect the outcome of cases.³⁵⁷ Nonetheless, there is value in clearing away superfluous hurdles and distractions.³⁵⁸

³⁵³ See ROTUNDA & NOWAK, *supra* note 60.

³⁵⁴ See *Rohlf v. Klemenhausen, LLC*, 227 P.3d 42, 46 (Mont. 2009) (noting that the Montana Legislature added a notice provision to its Dram Shop Act because it is difficult for a potential defendant to gather and preserve evidence if that defendant is not aware of the incident giving rise to the suit).

³⁵⁵ *Grovijohn*, 643 N.W.2d at 204.

³⁵⁶ Tussman & tenBroek, *supra* note 17 (warning against concluding that a statutory classification passes muster if it “applies equally to all to whom it applies”).

³⁵⁷ See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179-80 (1996) (discussing how courts may continue to reinforce “status regimes” of race and gender despite changes in formal legal doctrine); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-31 (1997) (arguing that the “discriminatory purpose” doctrine “continues to authorize forms of state action that contribute to the racial and gender stratification of American society”); cf. *Johnson v. Phelan*, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, J., dissenting) (stating that constitutional interpretation is “a Rorschach test” in which “[w]hat the judge sees . . . is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources of moral judgment”).

³⁵⁸ See Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 93, 100 (2009) (calling for courts to “[d]ecalify doctrine” in the area of equal protection). See generally Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 888 (2010) (discussing doctrines that

In a properly conducted, integrated equal protection analysis, the front lines of litigation will move—that is, from whether groups or persons are “similarly situated” in relation to one another³⁵⁹ to the definition of the statutory purpose,³⁶⁰ and more fundamentally, of the social institution itself.³⁶¹ These inquiries can raise big questions, which may touch on deeply held beliefs.³⁶² However, debate on this ground, although still hotly contested, is more authentic.³⁶³

Having emerged from the early understanding of equal protection as a prohibition on “class legislation,”³⁶⁴ “similarly situated” analysis could figure in a unified, single-tier approach to equal protection.³⁶⁵ Some commentators have urged the Court to discard the tiered review,³⁶⁶ or have at least questioned its legitimacy.³⁶⁷ It is beyond the scope of this Article to express an opinion about the validity of the tiered approach to equal protection analysis. This Article seeks only to demonstrate that “similarly

erect threshold and procedural barriers to the enforcement of constitutional rights and arguing that “[w]ithout the ability to enforce constitutional rights in the courts, it will be impossible for us to realize some of our most fundamental constitutional and political values”).

³⁵⁹ MINOW, *supra* note 17, at 108 (noting that “similarly situated” analysis “retains a general presumption that differences reside in the different person rather than in relation to norms embedded in the prevailing institutions”).

³⁶⁰ *Cf.* Simons, *supra* note 54, at 460-61 (describing the problems that result from the court attempting to identify the relevant legislative purpose).

³⁶¹ *See* MINOW, *supra* note 17, at 375 (“We have seen the assumptions about difference deeply entrenched in our social institutions, and in the legal rules that govern them.”); *see also* Simons, *supra* note 54, at 461-62 (summarizing Martha Minow’s criticisms of “traditional assumptions about ‘differences’ in equal protection,” including “that differences are intrinsic rather than socially constructed; that an objective rather than subjective perspective exists; that the judged person’s perspective is irrelevant or has already been considered; and that the status quo is natural and neutral”).

³⁶² *See* MINOW, *supra* note 17, at 108; Goldberg, *supra* note 20, at 564.

³⁶³ MINOW, *supra* note 17, at 375; Goldberg, *supra* note 20, at 564.

³⁶⁴ *See supra* notes 170-72.

³⁶⁵ Goldberg, *supra* note 20, at 527-28.

³⁶⁶ Professor Suzanne Goldberg has argued that the tiered approach was merely an “unwitting training vehicle” or a “transitional analytic tool” that supported post-Lochner, mid-twentieth-century courts in analyzing “identity-based discrimination by government” and ferreting out “impermissible stereotyping or bias.” *Id.* at 582. She has proposed a three-step, single-tier approach to equal protection, in which the second step is “whether the justification offered for the line drawing has a specific relationship to the classification’s context.” *Id.* at 533. “Similarly situated” analysis, properly understood, is equivalent to the second step of this proposed unified standard. *See* Balkin & Siegel, *supra* note 358, at 100 (writing that “[c]ourts must give up their preoccupation with formal classification” in equal protection doctrine); *cf.* Araiza, *supra* note 225, at 488 (describing the equal protection doctrine and the tiered approach as an “almost *ad hoc* body of case law”).

³⁶⁷ *See* Araiza, *supra* note 225, at 502 (“[T]he *Carolene*-based structure of tiered scrutiny is generally understood as the Court’s attempt to create a judicially workable approach to constitutional review in the face of the questionable legitimacy of such review in the service of unenumerated, or in this case vague rights.”).

situated” is a statement of equal protection meaning that appeared in the doctrine long before our current formulation of the tiered structure.³⁶⁸

In sum, “similarly situated” analysis is *not* a preliminary showing required to proceed to equal protection review. It is a restatement of the most central concern of equal protection—the relationship between the legislative line-drawing and the purpose of the statute.³⁶⁹ Although currently somewhat redundant of the tiered review, “similarly situated” is properly understood as being “infused with principles traditionally applied in the complete equal protection analysis.”³⁷⁰

“Similarly situated” should not be used as an end-run around equal protection review.³⁷¹ When litigants attempt to circumvent the full rigor of equal protection analysis by asserting that two groups of persons are not “similarly situated,” it is a gambit.

The uses and misuses of “similarly situated” illustrate how doctrinal constructs can become reified.³⁷² This Article has advocated an integrated analysis that emphasizes equal protection over formalism.³⁷³

³⁶⁸ See Goldberg, *supra* note 20, at 485; *supra* notes 263-80 and accompanying text.

³⁶⁹ Tussman & tenBroek, *supra* note 17, at 344; see also Araiza, *Constitutional Rules*, *supra* note 14, at 56-57; Araiza, *Irrationality and Animus*, *supra* note 14, at 505-06; Engles, *supra* note 14, at 173-74; Goldberg, *supra* note 20, at 515-16.

³⁷⁰ *Varnum v. Brien*, 763 N.W.2d 862, 884 n.9 (Iowa 2009).

³⁷¹ See *In re Marriage Cases*, 183 P.3d 384, 435 n.54 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (West, Westlaw through 2010), *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Varnum*, 763 N.W.2d at 884 n.9; *Baker*, *supra* note 107, at 386; *Carroll-Ferrary*, *supra* note 107, at 610-11.

³⁷² Cf. Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 8 (2004) (explaining that “judge-created constitutional doctrine is not identical to judge-interpreted constitutional meaning”); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655 (2005) (building on Berman’s “decision rules” framework and noting that “[t]here is room for disagreement about the status of particular doctrinal formulations—whether they are constitutional operative propositions or decision rules”); Yoshino, *supra* note 20, at 750 (“We need to look past doctrinal categories to see that the rights secured within those categories are often hybrid rights.”).

³⁷³ Cf. Goldberg, *supra* note 20, at 491 (arguing that a three-step, single-tier approach to equal protection may aid in “revitalizing meaningful equal protection review at the highest and lowest levels”).