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A Rational Basis Review That Warrants Strict Scrutiny: The First Circuit's Equal Protection Analysis in *Massachusetts v. U.S. Department of Health and Human Services*

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A RATIONAL BASIS REVIEW THAT WARRANTS STRICT SCRUTINY: THE FIRST CIRCUIT'S EQUAL PROTECTION ANALYSIS IN *MASSACHUSETTS v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES*

Abstract: On May 31, 2012, the U.S. Court of Appeals for the First Circuit in *Massachusetts v. U.S. Department of Health & Human Services* held Section 3 of the Defense of Marriage Act unconstitutional. In doing so, the court declined to extend heightened scrutiny to sexual preference classifications and instead relied on a more searching form of rational basis review. This Comment argues that the First Circuit's equal protection analysis is flawed because it purports to apply Supreme Court precedent, but fails to do so faithfully. It also argues that the court could have reached the same result and more effectively insulated its holding from attack by designating sexual orientation a suspect or quasi-suspect classification.

Introduction

In 1993, in *Baehr v. Lewin*, the Supreme Court of Hawaii sustained the first equal protection challenge to a traditional marriage statute in the United States.[1] Congress viewed the *Baehr* ruling as an assault against traditional heterosexual marriage laws.[2] To combat this perceived threat, Congress passed the Defense of Marriage Act ("DOMA"), which President Bill Clinton signed into law in 1996.[3] DOMA contains only two operative paragraphs, and is therefore among the shortest major enactments in recent history.[4] In pertinent part, Section 3 of DOMA provides:

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[1] *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Courtney Joslin & Shannon Minter, Lesbian, Gay, Bisexual and Transgender Family Law 514, 517 (2012); Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, BNA Pension & Benefits Daily, May 8, 2009, at 1, 1–2. A "traditional marriage statute" refers to a law that prohibits same-sex marriage. *See* Rebecca Schatschneider, Comment, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 Temp. Pol. & Civ. Rts. L. Rev. 285, 286 (2004).

[2] *See* H.R. Rep. No. 104-664, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908.

[3] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)); *see* Eickman, *supra* note 1, at 1–2.

[4] *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 6 (1st Cir. 2012).

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[5]

In 2012, the U.S. Court of Appeals for the First Circuit in *Massachusetts v. U.S. Department of Health & Human Services* held Section 3 unconstitutional.[6] The court relied on a nuanced equal protection review that deviated from the traditional tiered analyses applied by other courts.[7] The First Circuit applied neither a heightened scrutiny standard, nor the traditional rational basis standard.[8] Instead, the court utilized a more searching form of rational basis review—namely, rational basis with "bite"—and invalidated Section 3 only after carefully evaluating Congress's purported justifications.[9]

Part I of this Comment introduces the fundamentals of equal protection review, describes how federal courts have treated Section 3, and provides the procedural background to *Massachusetts*.[10] Part II examines the standard of review employed by the First Circuit in *Massachusetts* and explores the court's decision to utilize this unconventional analysis.[11] Finally, Part III discusses potential vulnerabilities in the First Circuit's reasoning and posits that the court could have more effective-

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[5] Defense of Marriage Act § 3, 1 U.S.C. § 7. Commentators have noted that whether an individual will receive benefits from over 1000 federal statutory provisions turns on marital status. *E.g.*, Virginia F. Coleman, *Same-Sex Marriage*, *in* Sophisticated Estate Planning Techniques 467, 501 (2009); Eickman, *supra* note 1, at 2. Accordingly, more than 100,000 same-sex couples located in states that permit same-sex marriage are affected by DOMA. *Massachusetts*, 682 F.3d at 6.

[6] *See Massachusetts*, 682 F.3d at 14–15.

[7] *Compare id.* at 10–11, 14–15 (applying the more searching form of the rational basis standard), *with* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 333 (D. Conn. 2012) (holding that heightened scrutiny is appropriate, but resolving the case under the rational basis standard), Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012) (applying a heightened scrutiny standard), Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011) (applying the rational basis standard), Wilson v. Ake, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (applying the rational basis standard), *In re* Balas, 449 B.R. 567, 575 (Bankr. C.D. Cal. 2011) (applying a heightened scrutiny standard), *and In re* Kandu, 315 B.R. 123, 144 (Bankr. W.D. Wash. 2004) (applying the rational basis standard).

[8] *See Massachusetts*, 682 F.3d at 10–11, 14–15.

[9] *See id.*

[10] *See infra* notes 13–45 and accompanying text.

[11] *See infra* notes 46–62 and accompanying text.

ly protected the rights of homosexuals by holding that sexual orientation is a suspect or quasi-suspect classification.[12]

I. Prior Treatment of DOMA in Federal Courts

A. *The Competing Equal Protection Standards Applied to DOMA*

The constitutional status of DOMA, and the equal protection standard with which to weigh its merits, has sparked stark disagreement among the federal courts.[13] At issue is whether sexual orientation qualifies as a suspect or quasi-suspect classification for the purposes of equal protection review.[14] Such designations are reserved for specific historically disadvantaged groups and will trigger a heightened standard of review.[15]

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[12] *See infra* notes 63–95 and accompanying text.

[13] *See supra* note 7 (collecting cases). The modern, tiered approach to equal protection analysis originates from a famous footnote in *United States v. Carolene Products Co.*, where the Supreme Court observed that certain constitutional claims require more exacting judicial scrutiny, particularly those that stem from discrimination against a "discrete and insular minority." 304 U.S. 144, 152 n.4 (1938); *see* Erwin Chemerinsky, Constitutional Law: Principles and Policies 552 (4th ed. 2011); J.M. Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275, 283–84 (1989) (observing that Footnote Four recognized the Court's role in protecting the rights of groups that are shut out of the political process). This analysis has evolved into a three-tiered framework for equal protection review. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985); Chemerinsky, *supra*, at 552–54, 687–88; Mark Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 Pepp. L. Rev. 1021, 1023 (2011). "Suspect classes" —such as race and national origin—are subject to a heightened review known as "strict scrutiny," under which statutes are rarely upheld. *See Massachusetts*, 682 F.3d at 8–9; Chemerinsky, *supra*, at 554; Strasser, *supra*, at 1023–25. Classifications that are "quasi-suspect" —such as gender and illegitimacy—are subject to "intermediate scrutiny," which is also considered a heightened form of review. *See* Chemerinsky, *supra*, at 553, 797; Strasser, *supra*, at 1023–25. The remaining class is a catch-all category for anything that does not fall into either of the first two and is subject to the "rational basis" standard—a highly deferential form of review. *See Massachusetts*, 682 F.3d at 9; Chemerinsky, *supra*, at 688; Strasser, *supra*, at 1023. Although somewhat less stringent than strict scrutiny, intermediate scrutiny is still far more demanding than rational basis review. *See Massachusetts*, 682 F.3d at 9; Chemerinsky, *supra*, at 553–54, 686–87; Strasser, *supra*, at 1023–25.

[14] *Compare Wilson*, 354 F. Supp. 2d at 1308–09 (finding that sexual orientation does not warrant heightened scrutiny), *and In re Kandu*, 315 B.R. at 144–46 (same), *with Pedersen*, 881 F. Supp. 2d at 333 (finding that sexual orientation warrants heightened scrutiny), *Golinski*, 824 F. Supp. 2d at 989 (same), *and In re Balas*, 449 B.R. at 575 (same).

[15] *See* Chemerinsky, *supra* note 13, at 797 (describing the types of classes subject to intermediate or strict scrutiny review); Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 Law & Contemp. Probs. 109, 118, 120 (2009) (indicating that suspect designations protect the chronically disadvantaged).

The U.S. Supreme Court has established a variety of indicia to determine whether a classification is suspect or quasi-suspect.[16] Generally, (1) the classification associated with the group must be an immutable characteristic,[17] (2) the group must have suffered a history of invidious discrimination,[18] (3) the group must be politically powerless,[19] and (4) the distinguishing characteristics that define the group must bear no relation to its members' ability to perform or contribute to society.[20] Importantly, no single factor is dispositive in determining whether a certain class triggers heightened scrutiny.[21] Instead, the courts weigh each factor in making their determinations.[22] In practice, however,

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[16] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–32 (1996); Lyng v. Castillo, 477 U.S. 635, 638 (1986); *Cleburne*, 473 U.S. at 442–47; Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion); *see also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 426 (Conn. 2008) (succinctly synthesizing the general indicia required by the U.S. Supreme Court). The Supreme Court has established this set of criteria to constrain the number of classes that trigger heightened scrutiny review. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev. 135, 171–72 (2011); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 Yale L.J. 485, 562 (1998). Nevertheless, commentators argue that the Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), indicates that the Court may be amenable to applying heightened scrutiny to sexual orientation classifications. *See* Courtney A. Powers, *Finding LGBTs A Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 Duke J. Gender L. & Pol'y 385, 387–88 (2010); Jeremy B. Smith, Note, *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, 2770 (2005). In *Lawrence*, the Supreme Court invalidated a Texas statute that criminalized homosexual sodomy because it violated homosexuals' right to liberty under the Due Process Clause of the Fourteenth Amendment. *See* 539 U.S. at 578–79. Importantly, by overruling the 1986 Supreme Court case *Bowers v. Hardwick*, 487 U.S. 186 (1986), this ruling effectively undermined the foundation that many courts relied on to deny sexual orientation suspect or quasi-suspect status. *See* Powers, *supra*, at 387–88.

[17] *See Frontiero*, 411 U.S. at 686 (plurality opinion); *see also Kerrigan*, 957 A.2d at 426; Powers, *supra* note 16, at 387–88; Smith, *supra* note 16, at 2770.

[18] *See Cleburne*, 473 U.S. 432, 441 (1985); *see also Kerrigan*, 957 A.2d at 426; Powers, *supra* note 16, at 387–88; Smith, *supra* note 16, at 2770.

[19] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *see also Kerrigan*, 957 A.2d at 426; Powers, *supra* note 16, at 387–88; Smith, *supra* note 16, at 2770.

[20] *See Cleburne*, 473 U.S. at 441–44; Mathews v. Lucas, 427 U.S. 495, 505 (1976); *see also Kerrigan*, 957 A.2d at 426; Powers, *supra* note 16, at 387–88; Smith, *supra* note 16, at 2770.

[21] Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 Wm. & Mary J. Women & L. 323, 372 (2000); *see Golinski*, 824 F. Supp. 2d at 983.

[22] Velte, *supra* note 21, at 372; *see Golinski*, 824 F. Supp. 2d at 983. One court has noted, "[t]he presence of any of the factors is a signal that the particular classification is 'more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,' thus requiring heightened scrutiny." *Golinski*, 824 F. Supp. 2d at 983 (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

courts tend to place particular emphasis on whether the characteristic bears on a person's ability to contribute to society and the presence of a history of discrimination, while relying on political powerlessness and the immutability of the characteristic as supporting factors.[23]

Initially, courts tended to deny sexual orientation suspect or quasi-suspect status and to uphold the constitutionality of Section 3.[24] In 2005, in *Wilson v. Ake*, the U.S. District Court for the Middle District of Florida held that Section 3 of DOMA did not violate the Equal Protection Clause; that the applicable standard of review was "rational basis," rather than heightened scrutiny; and that the government's purported interests easily satisfied such a deferential standard.[25] Similarly, in 2004, the U.S. Bankruptcy Court for the Western District of Washington in *In re Kandu* upheld the constitutionality of DOMA applying the same logic.[26]

More recent cases, however, have cast doubt on DOMA.[27] In 2011, in *Dragovich v. U.S. Department of the Treasury*, the U.S. District Court for the Northern District of California applied rational basis review and

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[23] Smith, *supra* note 16, at 2775; *see Kerrigan*, 957 A.2d at 426. For example, the Supreme Court has held that resident aliens are deserving of heightened scrutiny review—despite the mutability of alienage. *See* Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977); *see also Kerrigan*, 957 A.2d at 427 n.20 (observing that the Supreme Court has often left any reference to "immutability" out of its analysis entirely). In addition, the Supreme Court has held that racial classifications merit heightened scrutiny irrespective of political power. *See* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984); *see also Kerrigan*, 957 A.2d at 428 n.21 (indicating that in all cases where a class suffered from a history of discrimination, and was characterized by a distinguishing feature unrelated to their ability to perform in society, the Supreme Court did not give any weight to political power—or powerlessness).

[24] *See* Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923, 927 n.21 (2010).

[25] *See* 354 F. Supp. 2d at 1308–09. Under the traditional rational basis review, classifications will survive as long as they bear a rational relationship to *some* legitimate governmental purpose. Heller v. Doe, 509 U.S. 312, 320 (1993); *see* CHEMERINSKY, *supra* note 13, at 696. In the case of a suspect class—and strict scrutiny review—for a classification to survive, it is not enough that a justification be rational or even important. *See* CHEMERINSKY, *supra* note 13, at 711. Instead, the discrimination at issue must be *necessary* to promote a compelling state interest. CHEMERINSKY, *supra* note 13, at 554; *see* Anna C. Tavis, Note, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627, 1657 (2010). To qualify as "necessary," the government must show that the law in question is the least restrictive or discriminatory method available for achieving the compelling interest. CHEMERINSKY, *supra* note 13, at 554. This has led some to refer to the standard as "strict in theory and fatal in fact." *Id.* In the case of a quasi-suspect class—and intermediate scrutiny review—a distinction must be supported by an exceedingly persuasive justification. *See Virginia*, 518 U.S. at 532–33 (articulating the standard for gender-based classifications); CHEMERINSKY, *supra* note 13, at 553.

[26] *See* 315 B.R. at 144–46 (finding that DOMA should be analyzed under rational basis review and that DOMA satisfied this standard).

[27] *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 1002 (holding Section 3 unconstitutional); *Dragovich*, 764 F. Supp. 2d at 1190 (same); *In re Balas*, 449 B.R. at 579 (same).

held that Section 3 deprived same-sex couples of equal protection under the law.[28] Unlike previous courts that had accepted such justifications, the court in *Dragovich* rejected that DOMA was rationally related to the goals of promoting procreation, encouraging heterosexual marriage, preserving governmental resources, and expressing moral disapproval.[29] Some courts have gone further and held that DOMA triggers heightened scrutiny.[30] In 2012, in *Golinski v. U.S. Office of Personnel Management*, the U.S. District Court for the Northern District of California invalidated Section 3 of DOMA after applying such a standard.[31]

Finally, in 2012, the U.S. Court of Appeals for the Second Circuit in *Windsor v. United States* was the first federal appeals court to strike down Section 3 while applying heightened scrutiny review.[32] The plaintiff, Edith Windsor, was the surviving spouse of a same-sex marriage who sought the benefit of the unlimited spousal deduction for federal estate taxes denied her by Section 3.[33] The Second Circuit held that the denial of Windsor's spousal benefits violated the Equal Protection Clause.[34] In reaching its decision, the court applied intermediate scrutiny and devoted significant space to explaining why homosexuals constitute a quasi-suspect class.[35]

B. *Factual and Procedural History*

In 2009, two cases challenging the constitutionality of DOMA were filed in the U.S. District Court for the District of Massachusetts: *Gill v. Office of Personnel Management* and *Massachusetts v. U.S. Department of*

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[28] 764 F. Supp. 2d at 1189–90.

[29] *Compare id.* at 1190 (finding that DOMA was not rationally related to these justifications), *with Wilson*, 354 F. Supp. 2d at 1308–09 (finding that DOMA was rationally related to the governmental interest of encouraging relationships that are optimal for procreation and for raising of children by their biological parents), *and In re Kandu*, 315 B.R. at 145–46 (same).

[30] *See Pedersen*, 881 F. Supp. 2d at 333; *Golinski*, 824 F. Supp. 2d at 989; *In re Balas*, 449 B.R. at 575.

[31] *See* 824 F. Supp. 2d at 1002. Additionally, both the U.S. Bankruptcy Court for the Central District of California in 2011 in *In re Balas* and the U.S. District Court of Connecticut in 2012 in *Pedersen v. Office of Personnel Management* held that DOMA triggered heightened scrutiny. *See Pedersen*, 881 F. Supp. 2d at 333; *In re Balas*, 449 B.R. at 575. These courts, however, went on to opine that DOMA does not even survive rational basis review. *Pedersen*, 881 F. Supp. 2d at 333; *In re Balas*, 449 B.R. at 579.

[32] *See* Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-307).

[33] *Windsor*, 699 F.3d at 175. This benefit was worth $363,053. *Id.* at 176; *see* 26 U.S.C. § 2056(a) (2006).

[34] *Windsor*, 699 F.3d at 188.

[35] *See id.* at 181–85, 188.

Health & Human Services.[36] In both cases, the judges held that Section 3 of DOMA was unconstitutional.[37] Despite this holding, the court in *Gill* did not address the plaintiffs' arguments that DOMA should be subjected to strict scrutiny.[38] Instead, the court found that DOMA failed to pass constitutional muster even under the highly deferential rational basis standard.[39]

On appeal, the two district court cases were consolidated.[40] Despite defending the constitutionality of DOMA at the district court level, the U.S. Department of Justice ("DOJ") announced in February 2011 that it would abandon its defense of DOMA.[41] Instead, the DOJ filed a revised brief in which it conceded that although DOMA could survive rational basis review under the Equal Protection Clause, it nevertheless warranted heightened scrutiny, which it failed.[42] The DOJ stressed that the Supreme Court had yet to rule on the proper equal protection standard with which to adjudicate classifications based on sexual orientation.[43] Nevertheless, the DOJ illustrated that the Supreme Court had instead provided a clear set of guidelines by which to identify classes that are deserving of heightened scrutiny—the indicia of suspectness—which homosexuals readily satisfy.[44] Furthermore, the DOJ underscored that courts holding otherwise failed adequately to consider the matter,

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[36] *See* Complaint at 5, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 3:10-cv-01750-VLB); Complaint at 1, Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT).

[37] *See Gill*, 699 F. Supp. 2d at 387; *Massachusetts*, 698 F. Supp. 2d at 249, 253. *Gill v. Office of Personnel Management* was an equal protection challenge brought by seven same-sex couples who were legally married in Massachusetts and three surviving spouses of same-sex relationships. *See Massachusetts*, 682 F.3d at 6. Its companion case, *Massachusetts v. U.S. Department of Health & Human Services*, was brought by the Commonwealth. *Id.* at 7. In contrast to *Gill*, the Commonwealth's case was premised on federalism concerns. *See Massachusetts*, 698 F. Supp. 2d at 235–36. Specifically, the Commonwealth argued that Section 3 of DOMA violated the Tenth Amendment by infringing on a traditional area of state sovereignty, and violated the Spending Clause by requiring the Commonwealth to discriminate against its citizens to receive federal funding. *Id.* at 235–36, 249.

[38] *See* 699 F. Supp. 2d at 387.

[39] *Id.*

[40] *Massachusetts*, 682 F.3d at 1.

[41] Statement of Eric Holder, Attorney Gen., U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

[42] Superseding Brief for the U.S. Dep't of Health and Human Servs. at 45–46 & n.20, *Massachusetts*, 682 F.3d 1 (Nos. 10-2204, 10-2207, 10-2214).

[43] *Id.* at 26 & n.9.

[44] *Id.* at 28.

relied on outdated Supreme Court jurisprudence, or simply applied flawed logic.[45]

II. The First Circuit's Equal Protection Review

In 2012, the First Circuit in *Massachusetts* held Section 3 of DOMA unconstitutional under the Equal Protection Clause.[46] In reaching its decision, the First Circuit relied on a more searching form of rational basis review, an equal protection standard never before applied to DOMA.[47] The court's analysis was informed by a series of Supreme Court cases that have applied this rarely administered, more searching review.[48] Under this analysis, purported justifications for the disparate treatment of politically unpopular minorities are more carefully evaluated.[49] Invoking this more cautious analysis, the First Circuit concluded that none of DOMA's purported justifications adequately supported Section 3.[50]

The standard used by the First Circuit in *Massachusetts* is distinct from the traditional rational basis and heightened scrutiny standards.[51] The purpose of this more searching rational basis review is to invalidate

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[45] *Id.* at 27–28 & n.11.

[46] Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15 (1st Cir. 2012).

[47] *See id.* at 10–11, 14–15.

[48] *See* Koppelman, *supra* note 24, at 928–29 & n.29; Strasser, *supra* note 13, at 1029–30.

[49] *See* Koppelman, *supra* note 24, at 928–29 & n.29; Strasser, *supra* note 13, at 1029–30. The First Circuit relied on three Supreme Court cases to support this proposition. *See Massachusetts*, 682 F.3d at 10–11. In 1973, in *U.S. Department of Agriculture v. Moreno*, the Court held that distinguishing between households of related persons and those of unrelated persons for the purposes of a food stamp program was not rationally related to the purported purpose of stimulating the agricultural economy. *See* 413 U.S. 528, 534 (1973). The First Circuit observed that central to the holding in *Moreno* was a "bare congressional desire to harm a politically unpopular group." *Massachusetts*, 682 F.3d at 10; *see Moreno*, 413 U.S. at 534. In 1985, in *City of Cleburne v. Cleburne Living Center*, the Court rejected the proffered justifications for denying a special permit to a group home for mentally disabled persons because discriminating against the mentally disabled was not rationally related to an ordinance aimed at avoiding excessive population density. *See* 473 U.S. 432, 450 (1985). The First Circuit noted that the discrimination in *Cleburne* was driven by unsubstantiated negative attitudes and irrational discrimination. *Massachusetts*, 682 F.3d at 10; *see Cleburne*, 473 U.S. at 450. Finally, in *Romer v. Evans*, in 1996, the Court held that a state's constitutional prohibition of any state action designed to protect homosexuals from discrimination was so broad and unprecedented that it could not be rationally related to the purported goal of respecting citizens' freedom of association. *See* 517 U.S. 620, 635 (1996). Again, the First Circuit observed that the constitutional provision in *Romer* was a mere "status-based enactment." *Massachusetts*, 682 F.3d at 10; *see Romer*, 517 U.S. at 634–35.

[50] *See Massachusetts*, 682 F.3d at 15.

[51] *See id.* at 10.

legislation characterized by pretextual or impermissible justifications.[52] Nevertheless, although it is less deferential than traditional rational basis review, the more searching form utilized by the First Circuit does not require the government to provide a more substantial or compelling justification.[53] Thus, the only difference between the more searching rational basis review and traditional rational basis review is that the former involves a more thorough evaluation of the purported justifications themselves.[54] Under both standards, as long as there is *any* rational basis for the law, it is upheld.[55] In contrast, courts employ a much more stringent standard under a heightened scrutiny.[56]

In relying on this alternative standard, the First Circuit declined to apply a more rigorous standard of review.[57] According to the court, evaluating DOMA under a heightened scrutiny standard was not a viable option.[58] First, the court stated that in the absence of supervening authority, new panels are bound by the decisions of old panels.[59] As a result, the court concluded that it was bound by a 2008 case, *Cook v. Gates*, in which a First Circuit panel declined to recognize sexual preference as a suspect classification.[60] Second, the First Circuit expressed that treating sexual orientation as a suspect class would inappropriately imply an overruling of the Supreme Court's 1972 summary dismissal of *Baker v. Nelson*, a case in which the Court was asked to rule on the claim that a state's refusal to recognize same-sex marriage violated federal equal protection principles.[61] The First Circuit reasoned that it lacked power to take such action and expressed doubt that the Supreme Court

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[52] *See id.*

[53] *See* 3 William W. Bassett et al., Religious Organizations and the Law 14-31, 14-33 (2012).

[54] *See Massachusetts*, 682 F.3d at 9 (describing that the more searching review yields a more careful examination of purported justifications); Bassett, *supra* note 53, at 14-33 (indicating that the more searching review nevertheless has the same requirements as rational basis review). It is specifically when justifications have served as a pretext for animus that the Supreme Court has utilized the rational basis with bite standard to invalidate legislation. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 901–16 (2012) (illustrating that the laws in *Moreno*, *Cleburne*, and *Romer* were invalidated because of perceived animus).

[55] *See* Bassett, *supra* note 53, at 14-33; Koppelman, *supra* note 24, at 939.

[56] *See* Strasser, *supra* note 13, at 1023.

[57] *Massachusetts*, 682 F.3d at 9.

[58] *See id.*

[59] United States v. Holloway, 499 F.3d 114, 118 (1st Cir. 2007).

[60] *Massachusetts*, 682 F.3d at 9; *see* Cook v. Gates, 528 F.3d 42, 61–62 (1st Cir. 2008).

[61] *Massachusetts*, 682 F.3d at 8–9; *see* Baker v. Nelson, 409 U.S. 810 (1972). The Supreme Court summarily dismissed the claim for want of a substantial federal question. *Baker*, 409 U.S. 810.

would overrule *Baker*, given the missed opportunity to do so in 1996 in *Romer v. Evans*.[62]

III. The Path Not Taken: Applying Heightened Scrutiny Review to Sexual Orientation Classifications

The First Circuit reached the correct result by holding Section 3 of DOMA unconstitutional, but relied on flawed reasoning.[63] This Part begins by arguing that sexual orientation is a suspect or quasi-suspect classification.[64] This Part then argues that the First Circuit was not barred from making this judgment, despite its assertions to the contrary.[65] Finally, this Part explains how the First Circuit's reasoning makes the decision vulnerable to attack.[66]

The First Circuit should have held that sexual orientation is a suspect or quasi-suspect class.[67] Homosexuals, as a group, satisfy the variety of indicia identified by the Supreme Court as indicative of whether a class warrants heightened scrutiny.[68] First, it is overwhelmingly accepted within the scientific community that sexual orientation is not a characteristic consciously subject to change.[69] Second, homosexuals have

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[62] *Massachusetts*, 682 F.3d at 9; *see supra* note 49 (discussing *Romer*). The Court in *Romer* held that the Colorado constitutional amendment at issue did not survive even rational basis review, but declined to address whether sexual orientation classifications trigger heightened scrutiny review. Strasser, *supra* note 13, at 1028–29.

[63] *See infra* notes 64–95 and accompanying text.

[64] *See infra* notes 67–75 and accompanying text.

[65] *See infra* notes 76–85 and accompanying text.

[66] *See infra* notes 86–95 and accompanying text.

[67] *See* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 985, 989 (N.D. Cal. 2012) (holding that homosexuals as a group satisfy the requisite suspect class indicia), *reh'g en banc denied*, 680 F.3d 1104 (9th Cir. 2012); Chemerinsky, *supra* note 13, at 807 (observing that sexual orientation classifications bear many similar characteristics to classifications that traditionally receive heightened scrutiny). The courts have not provided meaningful guidance for distinguishing between the propriety of a "suspect" or "quasi-suspect" label. Powers, *supra* note 16, at 387 n.16; *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 430 (Conn. 2008). *See generally Golinski*, 824 F. Supp. 2d 968 (failing to articulate distinguishing features between the labels). In fact, courts apply precisely the same totality test to establish either designation. Powers, *supra* note 16, at 387 n.16; *see Kerrigan*, 957 A.2d at 430; Velte, *supra* note 21, at 372. Accordingly, this Comment does not distinguish between the designations of "suspect" or "quasi-suspect" classes.

[68] *See Golinski*, 824 F. Supp. 2d at 985, 989; *see also supra* notes 16–23 and accompanying text (providing an overview of the indicia for suspect or quasi-suspect classifications).

[69] *See* Just the Facts Coal., Just the Facts about Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel 6 (2008), http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf ("The American Academy of Pediatrics, the American Counseling Association, the American Psychiatric Association, the American Psychological Association, the American School Counselor Association, the National Association of School Psychologists, and the National Association of Social Workers, together

been—and continue to be—subjected to deliberate and malicious discrimination based solely on their sexual orientation.[70] Third, the lingering result of this pervasive historical bigotry is that homosexuals lack the political power to rectify discrimination by resorting to the democratic process.[71] Although some political gains have been achieved by the homosexual community, they are few and far between.[72] Thirty-seven states have banned same-sex marriage through the legislative process, including constitutional amendments, whereas only a relatively small number have been successful in passing legislation that legalizes it.[73] Fourth, courts have acknowledged that, unlike age or mental disability—both of which have been denied suspect status—homosexuality is utterly unrelated to a person's ability to contribute to society.[74] In contrast, the defining characteristics of age and mental disability—diminished physical and mental capacity—are directly related to a person's ability to cope and function in society.[75]

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representing more than 480,000 mental health professionals, have all taken the position that homosexuality is not a mental disorder and thus is not something that needs to or can be 'cured.'"). *But see* High Tech Gays v. Def. Indus. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (arguing that homosexuality is a mutable behavior).

[70] *Kerrigan*, 957 A.2d at 434. The American Psychiatric Association ("APA") has argued that homosexuals are among the most stigmatized of all minority groups. *Id.* at 432. According to the APA, homosexual-related hate crimes, heckling, and humiliation remain rampant throughout the nation. *See id.* at 432–33. This stigmatism is felt in both school and professional settings, where many gay and lesbian persons fear the repercussions of identifying as a homosexual. *See id.* at 433.

[71] *See id.* at 444. The test for political powerlessness does not require a literal lack of political power. *Id.* (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)). For example, both women and African-Americans continue to be regarded as quasi-suspect and suspect, respectively, despite the fact that they wield significant political power. *See id.*; Smith, *supra* note 16, at 2776–77. Instead, the test is satisfied if there is a risk that the group cannot readily mollify discrimination through the democratic process due to a marked, widespread, and persistent discrimination previously suffered by the group of people. *Kerrigan*, 957 A.2d at 444 (citing *Cleburne*, 473 U.S. at 440).

[72] *See Golinski*, 824 F. Supp. 2d at 988 ("While President Obama nominated four openly-gay judges, there are literally hundreds of federal judges nationwide."); *Kerrigan*, 957 A.2d at 447 ("No openly gay person ever has been appointed to a United States Cabinet position or to any federal appeals court."); Andersen v. King Cnty., 138 P.3d 963, 1032 (Wash. 2006) (Bridge, J., concurring in dissent) ("Nationwide, 511,000 people hold office at the local, state, and national level. Of those, a mere 305 are openly gay.").

[73] Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NCSL, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated Nov. 2012) (providing an overview of state same-sex marriage laws); *see Golinski*, 824 F. Supp. 2d at 988.

[74] *See, e.g.*, Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 318–19 (D. Conn. 2012); *Golinski*, 824 F. Supp. 2d at 986; *In re* Balas, 449 B.R. 567, 577 (Bankr. C.D. Cal. 2011); *Kerrigan*, 957 A.2d at 435.

[75] *See Cleburne*, 473 U.S. at 441–42; *Kerrigan*, 957 A.2d at 435.

Additionally, despite its assertions to the contrary, the First Circuit was not barred from designating sexual orientation a suspect or quasi-suspect class.[76] The First Circuit has held that in order for a prior Circuit decision to constitute binding precedent on a particular issue, the specific issue must have been argued, heard, and decided.[77] Significantly, in 2008 in *Cook v. Gates*, the First Circuit was not presented with any evidence or argument on the record regarding the potential for sexual orientation to fall within a suspect category.[78] Consequently, the court's opinion did not analyze the relevant factors for such a consideration.[79] Instead, the court merely accepted, at face value, that the Supreme Court did not itself mandate that homosexuals constitute a suspect class.[80]

Similarly, the Supreme Court's summary dismissal of *Baker v. Nelson* in 1972 did not bar the First Circuit from finding sexual orientation to be a suspect or quasi-suspect class.[81] The Supreme Court has held that summary dispositions are limited in precedential value and should be narrowly interpreted.[82] A summary disposition has value with regard solely to the issues that were necessarily decided by the action.[83] Furthermore, a summary disposition is not dispositive for any other issue, however related.[84] Given the limited value of summary dispositions and the fact that *Baker* solely considered the constitutionality of state legislation, *Baker* is not dispositive of an equal protection challenge to federal legislation.[85]

Finally, the First Circuit's reliance on the more searching rational basis standard exposed the decision to two main vulnerabilities.[86] A comparison of *Massachusetts* with the flagship cases applying the more

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[76] *See In re* Kandu, 315 B.R. 123, 137–38 (Bankr. W.D. Wash. 2004) (holding that *Baker v. Nelson* was not binding on an evaluation of DOMA under the Equal Protection Clause); Brief for Plaintiff-Appellee Commonwealth of Massachusetts at 53–54, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (No. 10-2204) (arguing that the First Circuit was not prohibited from holding sexual orientation to be a suspect or quasi-suspect class by its 2008 decision in *Cook v. Gates*).

[77] Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993).

[78] *See* Brief for Plaintiff-Appellee, *supra* note 76, at 54.

[79] *See Cook v. Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008) (failing to analyze these factors).

[80] *See id.*

[81] *See In re Kandu*, 315 B.R. at 136–38.

[82] *See id.* at 138; *see also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979) ("A summary disposition affirms only the judgment of the court below . . . and no more may be read into our action than was essential to sustain that judgment.").

[83] *See In re Kandu*, 315 B.R. at 136 (citing *Illinois State Bd. of Elections*, 440 U.S. at 182).

[84] *See id.*

[85] *See id.* at 137–38; Brief for Plaintiff-Appellee, *supra* note 76, at 33–34.

[86] *See infra* notes 87–95 and accompanying text.

searching rational basis standard illustrates the weaknesses inherent in the First Circuit's use of this standard.[87] First, in the Supreme Court cases *U.S. Department of Agriculture v. Moreno* in 1973, *City of Cleburne v. Cleburne Living Center* in 1985, and *Romer v. Evans* in 1996, the more searching rational basis review revealed classifications solely driven by animosity toward a politically unpopular group.[88] In contrast, although the First Circuit purportedly held DOMA unconstitutional under the very same analysis, the court deliberately declined to find a similar animus behind this legislation.[89] Second, it was critical to the Supreme Court's holdings in these cases that the purported justifications for the challenged laws were not rationally related to their purposes.[90] In contrast, DOMA differs in that one could feasibly establish such a rationally related justification.[91] For example, in her concurrence to *Lawrence v. Texas* in 2003, Justice Sandra Day O'Connor articulated that protecting the long-standing tradition of marriage is a legitimate goal, distinct from a mere animus toward homosexuals.[92] Justice O'Connor argued that a classification based on sexual orientation could survive rational basis review, and its more searching counterpart, if supported by such a justification.[93] Therefore, the First Circuit's failure to recognize the animus

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[87] *Compare Romer*, 517 U.S. at 634 (identifying a patent animus behind the purported justifications), *Cleburne*, 473 U.S. at 450 (same), *and* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (same), *with Massachusetts*, 682 F.3d at 16 (declining to find a similar animus). Indeed, as one scholar has noted, unlike the state constitutional amendment in *Romer*, DOMA may have a rationally related state interest. *See* Koppelman, *supra* note 24, at 939.

[88] *See Massachusetts*, 682 F.3d at 10 (reviewing Supreme Court precedent); Koppelman, *supra* note 24, at 928–29.

[89] *Massachusetts*, 682 F.3d at 16. The First Circuit indicated that the many legislators supporting DOMA had a variety of motivations. *Id.* The court reasoned that although a number of comments made by individuals revealed an animus toward homosexuals, the motives of this minority could not be imputed to the vast majority who voted for the statute. *Id.*

[90] *See id.* at 10 (illustrating the refuted justifications in these cases).

[91] *See* BASSETT ET AL., *supra* note 53, at 14-34; Koppelman, *supra* note 24, at 939.

[92] *See* 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

[93] *See id.* In contrast, the interest of protecting marital traditions would fail under both intermediate scrutiny and the more stringent strict scrutiny review. *See In re* Marriage Cases, 183 P.3d 384, 451 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Kerrigan*, 957 A.2d at 478; Goodwin v. Dep't of Pub. Health, 798 N.E.2d 941, 972–73 & n.5 (Mass. 2003) (Greaney, J., concurring). Intermediate review requires that a justification be "exceedingly persuasive." *See, e.g.*, United States v. Virginia, 518 U.S. 515, 545–46 (1996); *Kerrigan*, 957 A.2d at 478. It is not enough that classification simply advance a legitimate state interest; instead, the interest must also be distinct from the classification itself. *See Virginia*, 518 U.S. at 545–46; *Kerrigan*, 957 A.2d at 478 (citing *Romer*, 517 U.S. at 635). The interest of protecting marital traditions fails this test because the tradition of excluding same-sex persons from marriage is essentially the same as the classification engendered by DOMA. *See Virginia*, 518

underlying DOMA and its reliance on the premise that DOMA has no rationally related justifications are two critical flaws in its application of the more searching rational basis review.[94] By extending a heightened scrutiny standard to sexual orientation classifications, the First Circuit could have better insulated its ruling from attack, and thus more effectively protected the rights of homosexuals.[95]

Conclusion

The First Circuit in *Massachusetts* relied on a more searching form of rational basis review to hold Section 3 of DOMA unconstitutional. Although the First Circuit reached the correct result, a comparison with Supreme Court jurisprudence illustrates that the First Circuit's equal protection analysis featured a number of flaws that make it vulnerable to attack. Thus, the First Circuit should have held that sexual orientation is a suspect or quasi-suspect class. Had the First Circuit done so, it could have reached the same result and more effectively insulated its holding from attack.

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U.S. at 545–46; *Kerrigan*, 957 A.2d at 478 (citing *Romer*, 517 U.S. at 635); *Goodwin*, 798 N.E.2d at 972–73 & n.5 (Greaney, J., concurring). In other words, this justification would be inadequate because it simply repeats—and does not explain—the classification. *See Virginia*, 518 U.S. at 545–46; *Kerrigan*, 957 A.2d at 478 (citing *Romer*, 517 U.S. at 635); *Goodwin*, 798 N.E.2d at 972–73 & n.5 (Greaney, J., concurring).

[94] *See supra* note 86–93 and accompanying text.

[95] *See* Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012) (holding that DOMA does not survive heightened scrutiny review), *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-307); *Golinski*, 824 F. Supp. 2d at 995 (same); *In re Balas*, 449 B.R. at 579 (same).