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Marriage Equality: Why Laws Restricting Same-Sex Couples' Rights Should be Subject to Heightened Scrutiny under Equal Protection Challenges.

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CHALLENGES.

I. INTRODUCTION.

Imagine not being able to marry the person you love, or being in a state that refuses to recognize your valid marriage. What if you were denied marriage or marital benefits because of your sexual orientation – because you were straight, bisexual, lesbian, or gay?

This thesis discusses why laws that restrict marital rights and recognition, on the basis of the couple’s sexual orientation, should be subject to a heightened or intermediate level of judicial scrutiny under Equal Protection challenges.¹ This thesis addresses, analyzes, and suggests why sexual orientation – within the context of same-sex couples – should be considered a quasi-suspect class,² rather than a non-suspect class, so that laws negatively impacting couples based on their sexual orientation are subjected to a fairer and more reasonable level of judicial scrutiny.³

Although this thesis explains why laws restricting couples’ rights, on the basis of the couples’ sexual orientation, should be subject to heightened judicial scrutiny, this article specifically focuses on same-sex couples. That is because same-sex couples have less legal protection than opposite-sex couples. For example, as of December, 2013, an opposite-sex couple can get married anywhere while a same-sex couple can get married in 16 states.⁴

Furthermore, although sexual orientation can arguably qualify as a suspect class, this article focuses on why sexual orientation is a quasi-suspect class.⁵ This is because no appellate court, other than Hawai’i, Montana,⁷ and California,⁸ has held that laws impacting same-sex couples should be subject to strict scrutiny under Equal Protection challenges. Hence, there is
insufficient precedent to adequately support this contention, particularly in federal jurisprudence. However, such lack of precedential authority does not preclude the possibility that same-sex marriages should be subject to strict scrutiny review. For example, as precedent shows, marriage is a fundamental right. Therefore, one could argue that laws prohibiting same-sex marriages should be subject to strict scrutiny review because it denies same-sex couples the fundamental right to marry. However, this is not the focus of this article particularly because of the recent Supreme Court decision in Windsor. Although same-sex couples may lawfully marry and now obtain federal benefits in any state that legally recognizes their marriage, a state that does not recognize same-sex marriage may still refuse to deny state benefits to those legally married. Thus, this article discusses why same-sex marriages should qualify as a quasi-suspect class, thereby subjecting laws that restrict same-sex marriages or marital benefits to a heightened scrutiny level of judicial review for Equal Protection purposes.

Section II of this thesis provides a background on same-sex marriage rights and the levels of review under the Equal Protection Clause. Subsection A discusses the recent progressive history of major cases and laws impacting same-sex marriage rights. Subsection B discusses the levels of judicial review under the Equal Protection Clause and why they are important in Equal Protection challenges with regards to challenging laws that impact a class. Lastly, Subsection C discusses why laws restricting same-sex couples’ rights are less likely to survive under a heightened level of review than a rational basis review under Equal Protection challenges. Section III analyzes and explains why sexual orientation is a quasi-suspect class under Equal Protection principles. Subsection A analyzes and explains why the level of judicial scrutiny applicable to laws impacting sexual orientation is still not clearly answered. Subsection B analyzes and explains why sexual orientation satisfies all factors constituting a quasi-suspect
class. Finally, Section IV concludes this thesis by saying that sexual orientation correctly qualifies as a quasi-suspect class, and thus laws restricting same-sex couple’s rights to marriage and marital benefits should be subject to a heightened review under Equal Protection challenges.

II. BACKGROUND OF SAME-SEX MARRIAGE RIGHTS AND THE LEVELS OF REVIEW UNDER THE EQUAL PROTECTION CLAUSE.

A. RECENT HISTORY OF MAJOR LAWS IMPACTING SAME-SEX MARRIAGE RIGHTS.

Significant laws governing same-sex couples’ marriage rights primarily originate from case law and the Defense of Marriage Act (DOMA). Major cases influencing same-sex marriage rights include Baker v. Nelson, Baehr v. Lewin, and U.S. v. Windsor. Major statutes defining these rights include Section 2 and 3 of DOMA. These cases and statutes are considered major here because they had a significant and relatively nation-wide impact on same-sex couples seeking marriage rights. 13

Baker v. Nelson, 1971, involved the first gay couple, Richard Baker and James McConnell, to challenge the denial of a marriage license to them in Minnesota. 14 The State denied their marriage license on the basis of their same-sex sexual orientation. 15 The Minnesota Supreme Court affirmed, holding that marriages were restricted to opposite-sex couples. 16 The court reasoned that marriage revolves around the union of woman and man because of their unique ability to procreate and raise children in a family. 17 The court did not analyze whether sexual orientation was a quasi-suspect or suspect class. Furthermore, the Supreme Court dismissed the appeal for “want of substantial federal question,” 18 finding that the U.S. Constitution was not violated by the Minnesota Supreme Court’s decision to deny the marriage license. 19 The decision in Baker re-emphasized the lack of legal rights same-sex couples had when challenging laws that restrict their right to marriage. 20
Baehr v. Lewin, 1993, involved Ninia Baehr and Genora Dancel, as well as other same-sex couples, challenging the denial of marriage licenses in Hawai’i. The Hawai’i Supreme Court held that the State Constitution did not provide a fundamental right for same-sex couples to marry. The court did not address whether sexual orientation was a quasi-suspect or suspect class. However, the court held that because the state law restricting marriage to same-sex couples involved sex classifications (a suspect class in Hawai’i), the law was presumed unconstitutional under the Equal Protection Clause unless it survived a strict level of judicial review. Following the decision in Baehr, Hawai’i amended its state law to “have the power to reserve marriage to opposite-sex couples."

In response to the possibility that same-sex couples could gain the right to marry in Hawai’i and potentially elsewhere, Congress passed DOMA and President Clinton signed it into law in 1996. DOMA contains two Sections: Section 3, codified in 1 U.S.C. § 7, which defines the word “marriage” for all federal purposes as “only a legal union between one man and one woman;” and Section 2, codified in 28 U.S.C. § 1738C, which states “[n]o State ... shall be required to ... [respect] a relationship between persons of the same sex that is treated as marriage under the laws of such other State.” In other words, Section 3 of DOMA defined marriage as between one man and one woman so that the federal government could refuse to provide federal benefits to married couples that involved one man and one man, or one woman and one woman. Section 2 of DOMA made it legal for states to refuse recognition of validly married same-sex couples. The impact of DOMA was significant in that it not only deprived same-sex couples of marital recognition in a majority of states, but that it also stripped away at least 1,138 federal benefits to such couples, including social security, veterans, taxation, military, immigration, employment benefits, and much more.
In 2013, the Supreme Court in *U.S. v. Windsor* held that Section 3 of DOMA, defining marriage as between one man and one woman, was unconstitutional as it violated the Equal Protection Clause. The case involved a lesbian widow, Edith Windsor, who had been in an intimate relationship with her married partner, Thea Spyer, for over forty years. Although New York recognized Windsor and Spyer’s valid marriage from Canada, the federal government did not because they were not an opposite-sex couple under Section 3 of DOMA (defining “marriage” as between one man and one woman). Thus, when Spyer died, the federal government demanded Windsor pay over $363,000 in estate taxes. Windsor paid the estate taxes and sued the United States in the District Court of New York.

Windsor sought a refund of her estate taxes and a declaration that Section 3 of DOMA violated the Equal Protection Clause. The District Court held that Section 3 of DOMA violated the Equal Protection class. However, it chose not to address whether sexual orientation was a suspect or quasi-suspect class because it found DOMA unconstitutional even under a *rational* basis review, which is the lowest level of judicial scrutiny. On appeal, the Second Circuit Court affirmed. But in contrast, it held that Section 3 of DOMA violated the Equal Protection Clause under a *heightened* or intermediate level of review. Accordingly, the Second Circuit determined sexual orientation to be a quasi-suspect class after analyzing factors constituting a quasi-suspect class. Thus, because sexual orientation was deemed to be quasi-suspect class, it subjected Section 3 of DOMA to heightened review. Although the Supreme Court in *Windsor* affirmed the Second Circuit’s judgment, it did not specifically address the level of scrutiny applicable to sexual orientation in the context of same-sex couples.

Now, although same-sex married couples are entitled to over 1,138 federal benefits in states that recognize their marriage, their married status does not need to be legally recognized in
states that chose not to.\(^{39}\) Hence, this thesis explains why laws restricting same-sex couples’ rights should be subject to a heightened level of review, instead of a lesser level of review, under Equal Protection challenges. The following subsection explains the levels of review under Equal Protection challenges, and why the level of review matters with regards to the likelihood of challenged laws surviving when restricting same-sex couples’ rights.

B. THE DIFFERENT LEVELS OF SCRUTINY UNDER EQUAL PROTECTION CHALLENGES.

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution states that “[n]o State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\(^{40}\) In other words, the Equal Protection Clause requires “that all persons similarly situated should be treated alike” under the laws.\(^{41}\)

There are three levels of judicial scrutiny in Equal Protection challenges: (1) strict scrutiny, which courts use to determine whether the government has a “compelling state interest” in the law’s existence;\(^{42}\) (2) heightened or intermediate scrutiny, which courts use to determine whether the law’s objectives are “substantially related to an important state interest;”\(^{43}\) and (3) rational basis review, which courts use to determine whether the law has “a rational relationship between the ... treatment and some legitimate governmental purpose.”\(^{44}\) The following subsections discuss in greater detail the significant differences between each level of review with regards to the likelihood of a challenged law (e.g., a state law prohibiting marriage equality to same-sex couples) surviving.

1. STRICT SCRUTINY.

Courts will analyze Equal Protection challenges under strict judicial scrutiny if a law’s classification impinges on a fundamental right or puts a suspect class at a disadvantage.\(^{45}\)
Fundamental rights are those rights guaranteed by the Constitution and determined by the Supreme Court, and include the freedom of speech, the right to marry, the right to procreate, and the right to privacy. Suspect classes include persons who: (1) have been “subjected to such a history of purposeful unequal treatment;” (2) are “saddled with such disabilities;” or (3) are “relegated to such a position of political powerlessness as to command extraordinary” legal protection. For example, race, national origin, and alienage are considered suspect classes. Hence, laws impacting race, national origin, or alienage are subject to strict judicial scrutiny.

For a law to withstand strict scrutiny, the law must promote a *compelling state interest* (e.g., national security) and “that there are no less restrictive” methods to accomplishing this interest. The government has a heavy burden of proof to justify that the law’s differential treatment of persons is “both constitutionally permissible and substantial, and that its use of classification is necessary ... to the accomplishment of its purpose.” Courts reviewing challenged laws under strict scrutiny must apply the “most rigid scrutiny.” Thus, most laws fail under strict scrutiny.

For example, under strict scrutiny, the Supreme Court has struck down a Florida statute making it a crime for a black man to occupy the same room with another white woman, or a white man to occupy the same room with another black woman at night. The court determined race to be “constitutionally suspect” because of the Fourteenth Amendment’s purpose in preventing racial discrimination. Hence, because race was considered a suspect class, the Court applied the “most rigid scrutiny” to the race-based law. The Court held that the law – based on the prevention of “adultery” and “lewd cohabitation” between persons of different races
– lacked substantial goals, particularly because persons of different races were no more likely than persons of the same race to be in the same room at night together.64

In another example, under strict scrutiny, the Supreme Court has struck down a Connecticut law excluding resident aliens from admission to the bar.65 The Court determined alienage to be a suspect class because “[a]liens are a prime example of a discrete and insular minority.”66 Hence, because alienage was considered a suspect class, the Court required the state to show that the alienage-based law “is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose.”67 The Court held that the law – based on the class’s ability to contribute or perform in their roles and responsibilities as lawyers – lacked sufficient justification for the law’s existence.68 The Court reasoned that resident aliens can contribute and perform as lawyers because like U.S. citizens, they help the economy, pay taxes, serve in the military, and perform and contribute in other ways similar to U.S. citizens.69

Thus, laws impinging on a fundamental right or impacting a suspect class are subject to a strict and difficult level of scrutiny. Although sexual orientation could arguably constitute a suspect class, and although marriage for same-sex couples could arguably constitute a fundamental right (thereby subjecting laws that impact same-sex couples to strict scrutiny), precedential authority is lacking to support such qualifications (see Section I above). Instead, sexual orientation is more likely to qualify as a quasi-suspect class, thereby subjecting laws that restrict same-sex couples’ rights to a heightened level of review. The following subsection describes this heightened level of review.
2. HEIGHTENED SCRUTINY.

Courts will analyze Equal Protection challenges under heightened or intermediate judicial scrutiny if the challenged law applies to a quasi-suspect class. Quasi-suspect classes include gender and illegitimacy. The Supreme Court uses four factors to determine whether a class is quasi-suspect. It includes whether the class: (1) was subject to a history of discrimination; (2) possesses characteristics that do not “frequently [bear] relation to ability to perform or contribute to society;” (3) “[exhibits] obvious, immutable, or distinguishing characteristics that define them as a discrete group;” and (4) is “a minority or [is] politically powerless.” Immutability and political powerlessness are not necessarily required factors, but they may be considered in analyzing whether a class is quasi-suspect.

The analysis under heightened scrutiny tests whether the law’s objectives are “substantially related to an important state interest.” In other words, courts using heightened scrutiny must determine whether there is an important (not just “legitimate”) governmental interest for the law’s use, and that the means for the law are “substantially related to the achievement of those [governmental interests].” More so, the government must have an “exceedingly persuasive justification” to show that the challenged law has “important governmental objectives” and is “substantially related to the achievement of those objectives.” Thus, under heightened scrutiny, a challenged law fails unless it is sufficiently related to an important governmental goal.

For example, under heightened review, the Supreme Court has struck down a sex-based statute that held that spouses of male uniformed members were dependents, but that “spouses of female [uniformed members] are not dependents unless they are in fact dependent for over one-half of their support.” The Court found sex to be at least a quasi-suspect class because: (1)
women were historically discriminated;\textsuperscript{83} (2) they lacked political power;\textsuperscript{84} (3) because they have an immutable characteristic determined “by the accident of birth;”\textsuperscript{85} and (4) because sex bears “no relation to ability to perform or contribute to society.”\textsuperscript{86} Therefore, under a heightened scrutiny,\textsuperscript{87} the Court found the sex-based law – granting male uniformed members more money than female uniformed members to their spouses – was not substantially related to the government’s interest in conserving financial resources.\textsuperscript{88} The Court reasoned that the law was based more on “mere convenience” than conserving finances, and the law’s granting more money to male than female uniformed members’ spouses did nothing to actually conserve any money (compared to if male uniformed members were granted the same amount of spousal support as female members).\textsuperscript{89}

In another example, under heightened review, the Supreme Court has upheld a statute requiring that, in order for an illegitimate child to inherit his or her father’s estate, he or she would have to show that his or her father intended to pass his estate to him or her.\textsuperscript{90} The Court determined that, although laws impacting illegitimate children were not subject to strict scrutiny, the law needed to at least be “substantially related to [a] permissible state interest.”\textsuperscript{91} The Court found that the illegitimacy-based law was substantially related to the state’s permissible interest in preventing fraud, and that the state had no other means to preventing the fraud.\textsuperscript{92}

Thus, laws impacting a quasi-suspect class are subject to a heightened level of scrutiny. Sexual orientation is likely to fall under this category of review compared to the lesser level of a rational basis review (see Section III below for an analysis). Accordingly, if sexual orientation were correctly classified as a quasi-suspect class, then laws restricting same-sex couples’ rights would survive only if they were substantially related to an important governmental interest. In contrast to challenged laws that are subjected to a heightened or strict level of review, laws
subjected to a rational basis review are more likely to survive. The following subsection describes this rational basis review.

3. RATIONAL BASIS SCRUTINY.

Laws that do not affect a suspect class, quasi-suspect class, or fundamental right are subject to rational basis scrutiny. Age, mental disability, veterans, and close relatives are non-suspect classes, thus subjecting laws that impact them to only a rational basis review.

A law analyzed under rational basis review is not subjected to such high scrutiny as that under strict or heightened review. In fact, rational basis review subjects the challenged law only to the “minimum level of judicial scrutiny.” The challenged law is presumed to be valid, and the review “is not a license for courts to judge the wisdom, fairness, or logic” of the law. Nonetheless, for a law to withstand a rational basis review, it must be shown that there is a reason for it treating a class differently than other similarly-situated classes. Further, there must be “a rational relationship between the disparity of treatment and some legitimate governmental purpose.” However, the challenged law must be upheld if there is any conceivable reason for its existence, and courts reviewing the challenged law must accept the law’s generalizations “even where there is an imperfect fit between means and ends.” In other words, even if another law could better suit at fitting the means to its ends, the challenged law would still prevail. Therefore, laws that do not impact a suspect class or fundamental right will be upheld unless they do not rationally relate to a legitimate state interest. Thus, parties “rarely succeed” when challenging laws under rational basis review.

For example, under a rational basis review, the Supreme Court has upheld a Massachusetts’ law requiring police officers to retire at the age of 50. The Court determined age to be a non-suspect class because it related to the class’s ability to perform or contribute in
society as they got older. The Court held that the retirement law was based on Massachusetts’ legitimate interest in “protect[ing] the public by assuring physical preparedness of its uniformed police,” and that the retirement law was rationally related to such legitimate interest.

In another example, under rational basis review, the Supreme Court has upheld a zoning ordinance discriminating against the mentally disabled in regards to their application for a group home. The Court determined that mental retardation was a non-suspect class because mental retardation related to the ability to perform or contribute to society. Thus, because the city’s ordinance affected a non-suspect class, the Court subjected the law to a rational basis review. Under this review, the court reasoned that the city had a legitimate interest in “the safety and fears of residents in adjoining neighborhood, and the number of people to be housed at home.”

The Supreme Court has applied a “more searching form of rational basis review,” or a rational basis “with bite,” to laws appearing to “harm a politically unpopular group.” Accordingly, the Court has struck down laws impacting lesbians and gay men under a rational basis “with bite” when such laws exhibit “anything but animus” towards the class. These include laws criminalizing same-sex conduct and an amendment refusing any “legislative, executive, or judicial” protection to gays and lesbians. Although the Court failed to describe the test for a rational basis “with bite,” it at least acknowledged that laws impacting lesbians and gay men were subject to a more searching review than a rational basis. The following subsection explains why advocates for marriage equality should argue that sexual orientation is a quasi-suspect class instead of a non-suspect class, so that laws impacting same-sex couples are subject to a review “more searching” than rational basis: a heightened level of review.
C. LAWS RESTRICTING SAME-SEX COUPLES’ RIGHTS ARE LESS LIKELY TO SURVIVE IF SEXUAL ORIENTATION IS DEEMED A QUASI-SUSPECT THAN NON-SUSPECT CLASS.

Advocates for marriage equality would have a higher likelihood of prevailing on Equal Protection claims, specifically against laws restricting same-sex couples’ rights to marriage or marital benefits, if sexual orientation was deemed a quasi-suspect class. This is because a court will review laws under greater scrutiny (hence making it more difficult for laws to prevail) when a quasi-suspect class is involved (compared to when a non-suspect class is involved, such as age). The following subsection illustrates the difficulty of a law surviving if sexual orientation was deemed a quasi-suspect class instead of a non-suspect class.

1. EXAMPLE OF WHY A LAW RESTRICTING SAME-SEX COUPLES’ RIGHTS IS LESS LIKELY TO SURVIVE IF SEXUAL ORIENTATION IS DEEMED A QUASI-SUSPECT CLASS.

The Second Circuit court in *Windsor* subjected Section 3 of DOMA to a heightened review because it found sexual orientation constituted a quasi-suspect class (see Subsection B below for a detailed analysis of why sexual orientation is quasi-suspect). In its arguments, BLAG (Bipartisan Legal Advisory Group) contended that DOMA serves the important governmental objective of: (1) conserving a “‘uniform definition’ of marriage;” (2) conserving government resources; (3) protecting the traditional notion of marriage; and (4) promoting procreation. Thus, under a heightened review, the court had to decide whether conserving these federal interests and promoting procreation were important governmental goals, and whether the means used by DOMA were substantially related to achieving those goals.

In regards to BLAG’s first argument – keeping a uniform definition of marriage in order to conserve federal interests – the court found that having a uniform definition of marriage was not an important governmental interest to justify DOMA. The court explained that
historically, marriage has been left up to the states and not the federal government. The court further reasoned that DOMA causes inconsistencies in marriage uniformity amongst the states’ laws (“[b]ecause DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, ... divorce, ...”).

In regards to BLAG’s second argument – protecting government resources through DOMA – the court found that DOMA was not substantially related to such governmental objective. The court reasoned that “[t]he saving of welfare costs cannot justify an otherwise invidious classification.” BLAG has argued that DOMA never prevented federal benefits to same-sex couples because DOMA was enacted before states recognized same-sex marriage. However, the court found that DOMA did indeed withdraw federal benefits from same-sex married couples in States that now do recognize same-sex marriage. The court concluded that DOMA was not substantially related to conserving resources because the over 1,000 federal benefits denied to same-sex married couples also covered many non-fiscal government benefits, such as bankruptcy.

In regards to BLAG’s third argument – keeping a traditional definition of marriage through DOMA – the court found that keeping a traditional notion of marriage was not substantially related to an important governmental objective. In adopting the Supreme Court’s decision in Lawrence, the court reasoned that the tradition of viewing a class as immoral is insufficient to justify “an important government interest.” The court further noted that “[e]ven if preserving tradition were in itself an important goal, DOMA is not a means to achieve it” because the determination of marriage rights is a decision for the states. In other words, the uniform preservation of a traditional marriage is not an important governmental interest because the idea of marriage has historically been left up to the states.
Lastly, in regards to BLAG’s fourth argument, BLAG has argued that DOMA was substantially related to promoting procreation, an important governmental interest. BLAG explained that: (1) “only opposite-sex couples can procreate naturally;” (2) “DOMA [encourages] biological parenting;” and (3) “DOMA facilitates [the] optimal parenting arrangement of [having] a mother and a father.”

Although the court acknowledged that promoting procreation can be an important governmental goal, it found that DOMA was not substantially related to the achievement of that goal. The court reasoned that DOMA does not increase incentives for opposite-sex married couples to procreate by taking rights away from same-sex couples. Thus, the court found all of BLAG’s arguments for Section 3 of DOMA’s justification to fail under a heightened scrutiny review.

Advocates for marriage equality would have a higher chance of prevailing on Equal Protection claims if they argue that sexual orientation is a quasi-suspect class so that laws restricting same-sex couples’ rights would be subject to a heightened review. Accordingly, laws restricting same-sex couples rights under a heightened review are less likely to survive compared to laws challenged under a rational basis review. The following subsection illustrates the likelihood of a challenged law surviving if sexual orientation was deemed a non-suspect class (compared to if sexual orientation was deemed a quasi-suspect class, as illustrated above).

2. **EXAMPLE OF WHY A LAW RESTRICTING SAME-SEX COUPLES’ RIGHTS IS MORE LIKELY TO SURVIVE IF SEXUAL ORIENTATION IS DEEMED A NON-SUSPECT CLASS.**

In *Sevcik v. Sandoval*, the District Court of Nevada subjected the state’s law – prohibiting marriage to same-sex couples – to a rational basis review because the court found sexual orientation to be a non-suspect class. In analyzing Nevada’s marriage law under a rational
basis review, the court noted that “other reasons exist to promote the institution of marriage beyond mere moral disapproval” of same-sex couples.\(^\text{138}\) It found that keeping a traditional notion of marriage was a *legitimate* state interest *rationally related* to promoting procreation and a family structure.\(^\text{139}\) The court further found that such interests were separate from that of moral disapproval of same-sex relations.\(^\text{140}\)

The court explained that unlike same-sex couples, only an opposite-sex couple can procreate, and the “perpetuation of the human race depends upon traditional procreation between man and woman.”\(^\text{141}\) Additionally, it explained that only a small amount of couples adopt and/or conceive through artificial means, particularly because it is “a social backstop for when traditional biological families fail.”\(^\text{142}\)

The court further reasoned that allowing same-sex couples to marry “might result in undermining the societal understanding of the link between marriage, procreation, and family structure.”\(^\text{143}\) The court explained that allowing same-sex couples to marry might cause opposite-sex couples to “cease the value [of marriage] as highly as they previously had and thus enter into it less frequently.”\(^\text{144}\) For example, opposite-sex couples may want to disassociate themselves from an institution of marriage that allows same-sex couples to get married, which might result in an “increased percentage of out-of-wedlock children, single-parent families, [and] difficulties in property disputes after [marital] dissolution.” Hence, under a rational basis review, the court found that preserving a traditional notion of marriage was rationally related to the important governmental interest in preserving procreation and a traditional family structure.\(^\text{145}\)

*Sevcik* illustrates how laws restricting same-sex couples’ rights are more likely to survive when challenged under a rational basis review compared to under a heightened review. The
following section analyzes and explains why sexual orientation is a quasi-suspect class, so that laws restricting same-sex couples’ marriage rights are subjected to a heightened judicial review.

III. WHY SEXUAL ORIENTATION IS A QUASI-SUSPECT CLASS.

A. THE LEVEL OF SCRUTINY FOR LAWS RESTRICTING SAME-SEX COUPLES’ RIGHTS IS STILL UNANSWERED.

The level of judicial scrutiny that should apply to laws restricting same-sex couples’ rights is still unanswered. Accordingly, the Supreme Court has yet to address whether sexual orientation is a suspect, quasi-suspect, or non-suspect class under Equal Protection principles. Although the Supreme Court in Romer v. Evans and Lawrence v. Texas analyzed the constitutionality of certain laws under a “more searching” form of rational basis review, they failed to analyze whether sexual orientation was a suspect or quasi-suspect class for purposes of subjecting those laws to a heightened or strict level of review. As the Second Circuit in Windsor pointed out, Romer and Lawrence are neither necessarily controlling because they did not expressly state the level of review as applied to same-sex couples.

Before Romer and Lawrence, sexual orientation was considered a non-suspect class from the 1986 Supreme Court decision in Bowers v. Hardwick. Bowers involved a challenge to Georgia’s sodomy statute criminalizing certain consensual and private sexual conduct between same-sex individuals. The Supreme Court held that, because “homosexual sodomy” was not a fundamental right, gays and lesbians were not considered a suspect class for purposes of subjecting laws that impact them to a strict judicial review under the Equal Protection Clause. Thus, under a rational basis review, the law criminalizing “homosexual conduct” survived because it was found to be rationally related to notions of morality (a legitimate state interest).

Following Bowers, in 1996, the Supreme Court in Romer held that Colorado’s Constitutional Amendment banning legal protection for lesbians and gays against discrimination
violated the Equal Protection Clause. Although the Court analyzed Colorado’s law under rational basis review, it did not analyze or rule on whether sexual orientation was suspect, quasi-suspect, or non-suspect class. One reason could be because the trial court held that homosexuality failed to meet the element of political powerlessness necessary to constitute a suspect class. The respondents challenging Colorado’s Constitutional Amendment decided not to appeal the trial court’s decision. Another reason could be because Bowers held that there was no fundamental right to “homosexual sodomy,” that there would be no precedential support in arguing sexual orientation is a quasi-suspect or suspect class.

Following Romer, in 2003, the Supreme Court in Lawrence held that a Texas statute criminalizing certain consensual and private sexual conduct between same-sex individuals was unconstitutional because it violated the Due Process Clause. The Court overruled Bowers, and adopted Justice Stevens’ dissenting opinion in Bowers:

First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice .... Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.

The Court in Lawrence analyzed the constitutionality of the Texas statute under a rational basis review, and ruled such statute did not serve a legitimate state interest. However, the Court failed to explain why it used rational basis review instead of heightened review. Indeed, the Court made no analysis or mention of sexual orientation constituting a quasi-suspect or suspect class. One explanation could be that because the challenged Texas statute failed under a rational basis review (the minimum level of review), a heightened view was unnecessary. Thus, Romer and Lawrence failed to establish whether sexual orientation was a suspect or quasi-suspect class.
Other circuit courts classifying sexual orientation as a non-suspect class did so because they relied on *Bowers* (a since overruled case),\(^{166}\) because they relied on cases that relied on *Bowers*,\(^ {167}\) or because they avoided an analysis of whether sexual orientation was a suspect or quasi-suspect class.\(^ {168}\)

For example, in 1990, the Ninth Circuit Court in *High Tech Gays* (a case that many subsequent courts relied on in deciding that sexual orientation was not a suspect or quasi-suspect class) ruled that gays and lesbians were a non-suspect class.\(^ {169}\) The court based its ruling on *Bowers*, which was subsequently overruled in 2003 by *Lawrence* (see above).\(^ {170}\) *High Tech Gays’* reasoning for why gays and lesbians did not constitute a quasi or quasi-suspect class – because “homosexual conduct” could be criminalized, according to *Bowers* – has since been squarely rejected by the Supreme Court in *Lawrence*.\(^ {171}\) Hence, *High Tech Gays’* holding that lesbians and gays are not suspect or quasi-suspect is greatly undermined.\(^ {172}\)

Thus, because *Lawrence* overruled *Bowers*, and because many cases holding sexual orientation as a non-suspect class relied on *Bowers*, the question as to which class sexual orientation fits into – suspect, quasi-suspect, or non-suspect – is still unanswered.\(^ {173}\) Therefore, advocates for marriage equality should argue sexual orientation correctly falls under a quasi-suspect class because sexual orientation satisfies all factors constituting a quasi-suspect class. The following subsection analyzes and explains why sexual orientation satisfies all factors constituting a quasi-suspect class.

**B. SEXUAL ORIENTATION SATISFIES ALL FACTORS CONSTITUTING A QUASI-SUSPECT CLASS.**

Although the Supreme Court decision in *Windsor* affirmed the Second Circuit Court’s holding that Section 3 of DOMA violated the Constitution, the Court did not affirm the Circuit Court’s reasoning for why sexual orientation qualifies as a quasi-suspect class. Instead, the
Supreme Court held that Section 3 of DOMA violated Due Process and Equal Protection principles because the law sought to deprive same-sex couples the liberties and freedom that New York sought to protect. Nonetheless, the Second Circuit provided a thorough analysis of whether sexual orientation is quasi-suspect. Such analysis may furthermore provide a framework for stronger future challenges to laws restricting same-sex marriage or marital benefits.

1. **GAY MEN AND LESBIANS WERE HISTORICALLY DISCRIMINATED.**

   This factor examines whether lesbians and gay men have “suffered a history of purposeful unequal treatment because of their sexual orientation.” The Second Circuit Court in *Windsor* decided that lesbians and gay men have historically been the subject of “persecution and discrimination.” The court explained that the most significant indication of such historical discrimination is illustrated by the fact that homosexuality had been a crime. For example, before the Supreme Court’s decision in *Lawrence*, homosexual conduct could be lawfully criminalized. Thus, the fact that homosexuality had been a crime illustrates the history of discrimination gay men and lesbians have faced.

   BLAG has argued that discrimination against lesbians and gays is different from discrimination based on race or gender because “homosexuals as a class have never been politically disenfranchised.” However, this argument ignores the fact that not all quasi-suspect classes have been politically disenfranchised. For example, illegitimacy, a quasi-suspect class, has never been politically disenfranchised (e.g., illegitimate children were never prevented from voting); yet, the Supreme Court has applied intermediate scrutiny to laws impacting the class.

   BLAG has also argued that lesbians and gays never “suffered discrimination for longer than history has been recorded.” BLAG explains that discrimination against lesbians and gay
men is “‘unique and relatively short-lived,’” noting that discrimination against homosexuality was rooted in early American laws, starting with “the earliest English settlers’ understanding of the religious and secular traditions that prohibited sodomy.”183 BLAG also noted that it was not until the early twentieth century that the government “began to classify and discriminate against ... citizens on the basis of their status or identity as homosexuals.”184 This included: (1) labeling homosexuality as a mental disorder; (2) laws “barring all gay and lesbian noncitizens from entering the United States;” (3) laws barring lesbians and gays from government jobs, (4) laws barring lesbians and gays from “child custody and visitation rights;” (5) laws barring lesbians and gay men “the ability to associate freely;” and (6) “legislative efforts including local initiatives to repeal laws that protect homosexuals from discrimination.”185

However, the fact that discrimination against the homosexual identity as a distinct class was not recorded until the early twentieth century is not conclusive that there was an absence of discrimination against such identity before that time.186 In other words, BLAG’s argument that gay men and lesbians did not suffer “discrimination for longer than history has been recorded”187 does not preclude the fact that gays and lesbians “have suffered a long history of discrimination.”188 The lack of historical recognition of homosexuality as a distinct class could be explained by gays and lesbians having concealed their identity in the “closet” to avoid discrimination.189 Furthermore, the Second Circuit in Windsor determined that the length of discrimination is irrelevant, concluding that “[n]inety years of discrimination is entirely sufficient to document a history of discrimination.”190 Hence, purposeful discrimination based on sexual orientation has undoubtedly occurred in history.191 The history of purposeful discrimination against gays and lesbians is also “widely acknowledged in American
The following subsection analyzes the second factor constituting a quasi-suspect class as applied to same-sex couples.

2. **SEXUAL ORIENTATION DOES NOT RELATE TO ABILITY TO PERFORM OR CONTRIBUTE TO SOCIETY.**

This factor examines whether sexual orientation “as a characteristic frequently bears [a] relation to perform or contribute to society.”\(^{193}\) When the law classifies a group that bears no relation with ability to contribute or perform in society, then the Supreme Court generally classifies that group as suspect or quasi-suspect.\(^{194}\)

In same-sex marriage cases, no state court has yet found sexual orientation to interfere with one’s ability to contribute or perform in society.\(^{195}\) Furthermore, the District Court in *Pedersen v. Office of Pers. Mgmt.* explained that the “‘recent repeal of ‘Don’t Ask Don’t Tell’” illustrates gay men’s and lesbians’ ability to perform and contribute to society, particularly in the military.”\(^{196}\) *Pedersen* additionally illustrated the “long-held consensus of the psychological and medical community...‘that homosexuality per se implies no impairment in judgment, stability, reliability or general or social capabilities.’”\(^{197}\)

Furthermore, the Second Circuit in *Windsor* found that unlike mental retardation or age (“which undeniably impacts an individual’s capacity and ability to contribute to society”\(^{198}\)), being gay or lesbian does not impair one’s ability to contribute to society.\(^{199}\) Instead, the court found sexual orientation to be more similar to “‘sex, race, or illegitimacy, [where gays and lesbians] have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.’”\(^{200}\) More so, the negative consequences that gays and lesbians experience from discrimination have “nothing to do with aptitude or performance.”\(^{201}\)

BLAG has argued that sexual orientation inhibits one’s ability to engage in “family roles in procreation and the raising of children.”\(^{202}\) However, BLAG failed to cite any authority to
support its argument. The Second Circuit in *Windsor* noted that the Supreme Court in *Frontiero v. Richardson* held that sex characteristics do not impair one’s ability to perform or contribute to society. Accordingly, the Second Circuit implies that because sex characteristics involve the ability to procreate, and because *Frontiero* held that sex characteristics do not relate to ability to perform or contribute to society, one’s ability to procreate on the basis of his or her sex thus does not relate to ability to perform or contribute to society. Lastly, the ability to procreate “has never been a precondition to marriage.” In fact, opposite-sex couples who adopt, conceive children through artificial methods, or cannot conceive children have never been denied marriage or marital benefits. Thus, sexual orientation does not relate to ability to perform or contribute to society, and the majority of cases addressing this factor conclude so. The following subsection analyzes the third factor constituting a quasi-suspect class as applied to same-sex couples.

3. **SEXUAL ORIENTATION EXHIBITS NON-OBVIOUS DISTINGUISHING CHARACTERISTICS.**

This factor examines whether lesbians and gay men have “obvious, immutable, or distinguishing characteristics” that define them as a discrete group. Additionally, classes do not need to “carry an obvious badge” (such as the characteristics of race) to have distinguishing characteristics.

BLAG has argued that sexual orientation is not immutable because it is a malleable and changeable characteristic. For example, bisexual-identified individuals may choose to enter into opposite-sex or same-sex relations. Furthermore, BLAG presented research showing that a small percentage of gays and lesbians can change their sexual orientation. However, the Second Circuit in *Windsor* noted that this factor considers “whether there are obvious, immutable, or distinguishing characteristics that define ... a discrete group.” Hence, a class
does not need to have purely immutable characteristics to satisfy this factor so long as the class
has *distinguishing* characteristics that would define them as a discrete class.

The Second Circuit, in providing an example of a non-obvious but distinguishing
characteristic that would satisfy this factor, discussed “alienage, illegitimacy, and national
origin” as being suspect or quasi-suspect classes “even though these characteristics do not
declare themselves, and often may be disclosed or suppressed as a matter of preference.”\(^\text{215}\) The
court stated that what suffices as a “non-obvious distinguishing characteristic” is when the
“characteristic of the class calls down discrimination when it is manifest.”\(^\text{216}\) The court further
explained that, for same-sex couples, their class is distinguishable when they apply for a
marriage license, or when a spouse applies for benefits, because their sexual orientation becomes
clear and discrete from opposite-sex couples who apply for the same benefits.\(^\text{217}\) The court noted
that similar to illegitimacy (a quasi-suspect class), an individual born out of wedlock is not
necessarily distinguishable in the public, but his or her class becomes distinguishable when he or
she “applies for Social Security benefits on the death of a parent.”\(^\text{218}\) Like illegitimacy, sexual
orientation has “non-obvious distinguishing characteristics.”\(^\text{219}\) More so, these characteristics are
more distinguishing in the context of same-sex marriages because their status as gay or lesbian
becomes “visible to the law.”\(^\text{220}\)

BLAG has argued that laws impacting people based on their sexual orientation “would be
more ‘amorphous’ than discrete.”\(^\text{221}\) In other words, the category of sexual orientation in itself
(e.g., comprising of bisexuality, heterosexuality, homosexuality, and other forms of sexual
orientation) may exceed the amount of individuals who are visibly discrete.\(^\text{222}\) However, a class
having amorphous qualities does not preclude it from being a discrete group.\(^\text{223}\) For example, the
Second Circuit in *Windsor* noted that BLAG failed to consider the amorphous qualities involved
in illegitimacy or national origin (which are also quasi-suspect and suspect classes). For instance, an illegitimate child can be legitimized by his or her father. Thus, sexual orientation as a class satisfies this “obvious, immutable, or distinguishing characteristic” factor by exhibiting “non-obvious distinguishing characteristics.” The following subsection analyzes the last factor constituting a quasi-suspect class as applied to same-sex couples.

4. **GAY MEN AND LESBIANS ARE A POLITICALLY POWERLESS MINORITY.**

This factor examines whether gay men and lesbians as a class are politically powerless or a minority. The Supreme Court has never elaborated on the meaning of “political powerlessness” for this factor. However, a complete lack of political power is not required to satisfy this factor. In other words, “current [and complete] political powerlessness is not a prerequisite” to satisfying this factor. For example, “women were not politically powerless in an absolute sense when they were first accorded heightened [review] in the early 1970s.”

BLAG has argued that gays and lesbians cannot be politically powerless because of the recent achievements made in equality. It is true that lesbians and gays have achieved some political equality. However, gains in equality may actually be a sign that the class is in need of equality. Additionally, the Second Circuit in *Windsor* made clear that this factor does not ask whether the class in question has made substantial gains in achieving equality. Instead, this factor asks whether the class has the ability “to politically protect themselves from wrongful discrimination.”

For example, in 1973, the Supreme Court in *Frontiero* found sex to be a quasi-suspect class despite the fact that women were not a small and completely powerless minority. Women had already achieved some political success at this time, including the implementation of Title VII which banned discrimination based on sex in employment. Nonetheless, the Court
acknowledged that women were still a politically powerless group, illustrated by the subtle
discrimination against them in employment and education, and by their lack of representation in
the political sphere. For example, no woman served in the Supreme Court by 1973, and to this
date, no woman has served as U.S. president.

Here, it is unlikely that lesbians and gay men have any more political power than women
did in 1973 when the Supreme Court held that laws impacting sex required heightened
scrutiny. Similar to women, lesbians and gay men have made some gains in obtaining
political equality, but they nonetheless continue to experience disparate negative treatment under
many laws. For example, although the Court considered women to be quasi-suspect class
despite the implementation of Title VII, the Court has yet to consider sexual orientation as quasi-
suspect despite a lack of protection under Title VII.

Furthermore, lesbians and gays do not have adequate political power to protect
themselves from discrimination when manifested. For example, as of 2013, lesbians and gay
men cannot obtain political protection from discrimination in employment and housing in 29
states, in 20 states that do not address hate crimes based on sexual orientation, in 8 states
that do not allow same-sex couples to adopt, in 34 states that do not have laws prohibiting
bullying or harassment based on a student’s sexual orientation in schools, and in 37 states that
do not have laws prohibiting discrimination based on a student’s sexual orientation in schools.
More so, “little has been done to remove barriers to civil marriage.” Indeed, even months
after the Supreme Court in Windsor overturned Section 3 of DOMA, 33 states continue to have
statutes or constitutional amendments banning marriage and marital rights to same-sex
couples. Thus, despite some achievements in equality, gays and lesbians as a class remain a
“politically powerless minority” still unable to achieve full equality.
Hence, sexual orientation – in the context of same-sex couples – satisfies all four factors constituting a class as quasi-suspect for purposes of Equal Protection principles. The following section concludes this thesis by saying that because sexual orientation correctly qualifies as a quasi-suspect class, courts should subject laws restricting same-sex couple’s rights to a heightened level of review under Equal Protection challenges.

IV. CONCLUSION.

The question as to which class – suspect, quasi-suspect, or non-suspect – sexual orientation fits into is still unanswered. Therefore, advocates for marriage equality should argue why sexual orientation is a quasi-suspect class, so that laws restricting same-sex couples’ rights are subjected to a heightened level of judicial scrutiny. Accordingly, sexual orientation satisfies all factors that constitute a class as quasi-suspect: (1) lesbians and gays have been subjected to a long history of intentional discrimination that still continues today;\(^{251}\) (2) sexual orientation does not relate to ability to perform or contribute to society;\(^{252}\) (3) gays and lesbians have non-obvious distinguishable characteristics that define them as a discrete group;\(^{253}\) and (4) lesbians and gays are a politically powerless minority.\(^ {254}\) Hence, because same-sex couples correctly qualify as a quasi-suspect class, laws impacting them based on their sexual orientation should be subjected to a heightened level of judicial scrutiny.

Thus, advocates for same-sex marriage would have more success by arguing that sexual orientation – within the context of same-sex couples – constitutes a quasi-suspect class under Equal Protection challenges. Laws that restrict couples’ rights because of the couples’ sexual orientation will be less likely to survive if sexual orientation is deemed a quasi-suspect instead of a non-suspect class. “If we learned anything as an evolving species, it is that no government, no religion, no institution, and no political party can long oppress the inviolable dignity and spirit of
human beings in their fight for fairness in the courts, access to justice, and equal protection of the laws.”

1 The terms “level of scrutiny” also refer to “scrutiny,” “judicial scrutiny,” “judicial review,” and “level of review.”
2 Please see Section II, Subsection B below, for a detailed explanation of what a suspect, quasi-suspect, and non-suspect class is, and why it matters under Equal Protection challenges.
3 Although this article discusses why sexual orientation should be a quasi-suspect class, this article nonetheless acknowledges that sexual orientation could also be argued as a suspect class.
5 See, e.g., Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (“While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment is not sufficient to require our most exacting scrutiny.”) (internal quotation omitted), aff’d, 133 S. Ct. 2675 (2013).
6 Baehr v. Lewin, 852 P.2d 44, 46-48 (Haw. 1993) (because same-sex couples involve sex characteristics, a suspect class in Hawai’i, the state law restricting marriages to opposite-sex couples would need to prevail under strict judicial review).
7 Donaldson v. State, 292 P.3d 364, 401 (Mont. 2012) (in analyzing the factors that constitute a class as suspect or quasi-suspect, the court concluded that “…sexual orientation is a suspect class and that treating same-sex couples differently than different-sex couples is thus subject to strict scrutiny review.”).
8 See, e.g., In Re Marriage Cases, 76 Cal. Rptr. 3d 683, 702-03 (2008) (concluding that sexual orientation is subject to strict scrutiny because it is a characteristic that is “—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment.”) (superseded on other grounds by Constitutional Amendment in Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)).
9 Loving v. Virginia, 388 U.S. 1, 10-12 (1967).
10 See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010) (“Because plaintiffs[, same-sex couples,] seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny.”).
12 28 U.S.C.A. § 1738C.
13 This thesis also acknowledges the significant impact of state constitutional amendments and state statutes restricting same-sex couples’ rights. However, this section focuses more on federal statutes because it affects same-sex couples nation-wide (thus impacting a greater number of same-sex couples).
15 Baker, 191 N.W.2d at 186.
16 Id.
17 Id. at 186-87.
18 Baker, 409 U.S. at 810.
19 See, e.g., Baehr, 852 P.2d at 61.
20 Id. at 61 (“the Baker court arrived at the same conclusion as we have with respect to [the Hawai’i state constitution precluding] same-sex marriages.”).
21 Id. at 46-47.
22 Id. at 67.
23 Id.
24 Haw. Const. Art 1, § 23; see, e.g., Windsor, 699 F.3d at 191 n.1.
27 28 U.S.C.A. § 1738C.
29 Windsor, 133 S. Ct. at 2680.
31 Id.
33 Id.
34 Id. at 407.
35 Id. at 401-402.
36 Windsor, 699 F.3d at 176.
37 Please see Section II, Subsection B below, for a detailed explanation on what constitutes a suspect, quasi-suspect, and non-suspect class.
38 Windsor, 699 F.3d at 185.
40 U.S. Const. Amend XIV, § 1; the Equal Protection Clause is also part of the “Due Process Clause of the Fifth Amendment” under the Constitution; see United States v. Sperry Corp., 493 U.S. 52, 65 (1989) (addressing “the equal protection component of the Due Process Clause” with regards to the constitutionality of a statute).
41 City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985); see, e.g., Holmes v. California Army Nat. Guard, 124 F.3d 1126, 1132 (9th Cir. 1997).
44 Heller v. Doe by Doe, 509 U.S. 312, 320 (1993); Clark, 486 U.S. at 461.
46 Regan, 461 U.S. at 547; Sturgell v. Creasy, 640 F.2d 843, 852 (6th Cir. 1981).
47 Turner v. Safley, 482 U.S. 78, 95-99 (1987) (finding the right to marry is a fundamental right, even for convicted felons); Zablocki v. Redtail, 434 U.S. 374, 388 (1978) (holding a statute preventing an individual from marrying because he owed child support was unconstitutional because it violated the fundamental right to marry).
50 Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (analyzing factors that constitute a class as suspect); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (analyzing factors that constitute a class as suspect).
51 Loving, 388 U.S. at 11.
52 Toyosaburo Korematsu v. United States., 323 U.S. 214, 216 (1944) (finding national security to be a compelling state interest in upholding a law requiring Japanese-Americans to be in designated camps during World War II).
54 Cleburne, 473 U.S. at 440 (discussing classes subject to strict scrutiny under Equal Protection challenges and the test required for laws to withstand scrutiny).
55 Toyosaburo Korematsu, 323 U.S. at 216-23.
56 Cleburne, 437 U.S. at 440; see, e.g., Grutter, 539 U.S. at 326.
57 Qub v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993).
60 See, e.g., Cleburne, 437 U.S. at 440.
61 McLaughlin, 379 U.S. at 184.
62 Id. at 192.
63 Id. at 191 (internal quotation omitted).
members” than to female members burden onto the Government’s assumption that wives are more dependent on their spouses for support than husbands. The Court also placed the burden onto the Government to show that it is “cheaper to grant increased benefits with respect to all male members” than to female members to establish the law’s purpose.

64 Id. at 193.
66 Id. at 721 (internal quotation omitted) (the Court, however, failed to discuss what qualifies as a “discrete” and “insular” minority).
67 Id. at 721-22 (internal quotation omitted).
68 Id. at 722-24.
69 Id.
70 Cleburne, 473 U.S. at 440 (noting that laws impacting gender and illegitimacy, both quasi-suspect classes, require heightened judicial review).
72 See Windsor, 699 F.3d at 181.
73 Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987) (noting that close relatives are not a “suspect or quasi-suspect class” because as a class they have not been subjected to history of discrimination; they “do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.”); see, e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986) (in determining whether a class requires heightened scrutiny, the Court considers whether the class has been historically discriminated); see, e.g., Windsor, 699 F.3d at 181; see, e.g., Varnum v. Brien, 763 N.W.2d 862, 886-88 (Iowa 2009) (collecting cases).
74 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (finding what differentiates sex from non-suspect classes is that sex “frequently bears no relation to ability to perform or contribute to society.”); see, e.g., Cleburne, 473 U.S. at 440-41.
75 Lyng, 477 U.S. at 638 (finding that close relatives as a class are not suspect or quasi-suspect because they do not have “obvious, immutable, or distinguishing characteristics that define them as a separate group.”); Frontiero, 411 U.S. at 686 (the Court finding sex as an “immutable characteristic” to be a factor in constituting the class as quasi-suspect).
76 Lyng, 477 U.S. at 638 (finding close relatives are not a suspect or quasi-suspect class because “they are not a minority or politically powerless.”).
77 Cleburne, 473 U.S. at 472 n.10, n.24 (Marshall, J., concurring in part and dissenting in part) (“The ‘political powerlessness’ of a group may be relevant ... but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.”) (internal quotation omitted); see, e.g., Miss. University for Women, 458 U.S. at 723 (holding the fact that a policy negatively discriminates males instead of females does not reduce the level of scrutiny for gender).
78 Clark, 486 U.S. at 461 (1988) (discussing application of heightened review on a law proscribing a six-year statute of limitations on illegitimate children’s paternity suits) (emphasis added); Ball, 254 F.3d at 823.
79 Miss. University for Women, 458 U.S. at 724 (internal quotation omitted).
81 See, e.g., Clark, 486 U.S. at 461; see, e.g., Windsor, 699 F.3d at 185.
82 See, e.g., Frontiero, 411 U.S. at 677, 690-91.
83 Id. at 683 (finding women as a class were subject to a history of discrimination because of the “paternalistic attitude ... so firmly rooted in our national conscious ... that a distinguished Member of this Court was able to proclaim “Man is, or should be, women’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).
84 Id. at 685-86 (finding that although woman have made achievements in equality, they “still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and... in the political arena.”).
85 Id. at 686.
86 Id. (finding that, as a class, women do not relate to mental or physical disabilities).
87 Id. at 682.
88 Id. at 688-89.
89 Id. (noting that the sex-based law was based more on “administrative convenience” because of the Government’s assumption that wives are more dependent on their spouses for support than husbands. The Court also placed the burden onto the Government to show that it is “cheaper to grant increased benefits with respect to all male members” than to female members to establish the law’s purpose).
90 *Lalli*, 439 U.S. at 272-73 (the Court, however, did not provide a thorough analysis of why illegitimate children as a class qualify as quasi-suspect).
91 *Id.* at 265.
92 *Id.* at 278 (Stewart, J., concurring).
93 *Heller*, 509 U.S. at 319 (discussing the analysis for a rational basis review in an Equal Protection case); see, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983).
94 *Murgia*, 427 U.S. at 313 (analyzing whether age, as a class, is subject to strict judicial scrutiny); see, e.g., *Lerner v. Corbett*, F. Supp. 2d, 2-3 (M.D. Pa. 2013) (agreeing with the Supreme Court that laws impacting people based on age are subject to a rational basis review).
95 *Cleburne*, 473 U.S. at 442.
96 *Sturgell*, 640 F.2d at 852 (finding veterans are not entitled to greater scrutiny than a rational basis review because veterans are not “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”) (*internal quotation omitted*).
97 *Bowen*, 483 U.S. at 602-03.
98 *Cleburne*, 473 U.S. at 437; *Clark*, 486 U.S. at 461 (finding that rational basis review is the minimum level of scrutiny).
102 *Id.* at 320 (emphasis added).
103 *Id.* at 320-321.
106 *Id.* at 315.
107 *Id.* (“Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively diminished with age.”).
109 *Id.* at 442 (“It is undeniable, and it is not argued otherwise here, that those who are mentally disabled have a reduced ability to cope with and function in the everyday world.”).
110 *Id.* at 437 (*internal quotation omitted*).
112 *Romer*, 517 U.S. at 632.
114 *Romer*, 517 U.S. at 620, 632-33.
116 *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring); *Romer*, 517 U.S. at 632. Although the Supreme Court has applied a more searching form of rational basis review to laws impacting gays and lesbians, it did not hold that rational basis was the review as to be applied to gays and lesbians. Furthermore, the Court did not hold that gays and lesbians were a non-suspect class.
117 See, e.g., *Heller*, 509 U.S. at 320 (applying rational basis scrutiny); see, e.g., *Miss. University for Women*, 458 U.S. at 724 (applying heightened scrutiny).
118 *Windsor*, 699 F.3d at 185.
119 *Id.* at 185-88.
120 *Id.*
121 *Id.* at 186.
122 *Id.* at 185-86.
123 *Id.* at 187.
124 *Id.* at 186 (*quoting Graham*, 403 U.S. at 375).
125 *Id.* at 187.
126 Id.
127 Id.
128 Id., citing Lawrence, 539 U.S. at 577-78.
129 Id. (internal quotation omitted).
130 Id. (internal quotation omitted).
131 Id. (however, the court did not explain why promoting procreation could be an important government interest).
132 Id.
133 Id.
134 Id. ("Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.").
135 See, e.g., Kerrigan, 957 A.2d at 482-83 (although the court found Connecticut’s anti-gay marriage law to violate the State Constitution, Borden, J., dissenting, found that such laws would survive under a rational basis review).
136 Windsor, 699 F.3d at 189 (Straub, J., dissenting) (noting that DOMA survives a rational basis review); but see Windsor, 833 F. Supp. 2d at 402-06 (noting that DOMA does not survive a rational basis review).
137 Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1005-14 (D. Nev. 2012) (the court, however, failed to analyze whether sexual orientation satisfied factors constituting a quasi-suspect or suspect class. It instead reasoned that the Supreme Court never “explicitly stated” that sexual orientation was a quasi-suspect or suspect class. The court instead adopted High Tech Gays’ conclusion that sexual orientation was a non-suspect class, despite the fact that High Tech Gays’ conclusion was based on an overruled decision in Bowers); see High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1998).
138 Sevcik, 911 F. Supp. 2d at 1015.
139 Id.
140 at 1017.
141 Id. at 1015.
142 Id.
143 Id. at 1016.
144 Id. at 1015-16.
145 Id. at 1017.
147 Windsor, 699 F.3d at 180-81; see, e.g., Pedersen, 881 F. Supp. 2d at 311-12; see, e.g., Golinski, 824 F. Supp. 2d at 985 ("The Supreme Court and the Ninth Circuit have yet to issue binding rulings as to whether classifications based on sexual orientation are suspect [or quasi-suspect].").
148 Lawrence, 539 U.S. at 580 (O’Connor, J., concurring); Romer, 517 U.S. at 632.
149 Pedersen, 881 F. Supp. 2d at 311; Kerrigan, 957 A.2d at 468-69 (rejecting the argument that Romer established sexual orientation was not a suspect or quasi-suspect class “[b]ecause the court indicated that the Colorado constitutional amendment could not withstand even rational basis review, the lowest level of judicial scrutiny, the court had no reason to decide whether heightened review was appropriate.").
150 Windsor, 699 F.3d at 180-81.
152 Id. at 190-94.
153 Id. at 196.
154 Romer, 517 U.S. at 633-34.
156 Id.; see, e.g., Pedersen, 881 F. Supp. 2d at 311.
157 See Romer, 517 U.S. at 641 (Scalia, J., dissenting).
158 Lawrence, 539 U.S. at 564.
159 Bowers, 478 U.S. at 186.
160 Lawrence, 539 U.S. at 577-78.
161 Id. at 585.
162 Golinski, 824 F. Supp. 2d at 985 (finding that Lawrence did not address the level of review for lesbians and gays).
See, e.g., *Pedersen*, 881 F. Supp. 2d at 311 (noting “the word ‘suspect’ does not appear once in the Supreme Court’s decision in *Lawrence*.”).

See, e.g., *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (the court did not analyze whether DOMA, as applied to same-sex couples, should be subject to stricter scrutiny because the law failed even under the minimal rational basis review. “This court need not address these arguments [for why DOMA, as applied to same-sex couples, should be subject to strict scrutiny] ... because DOMA fails to pass constitutional muster even under highly deferential rational basis test.”).

*See, e.g., Witt v. Dept. of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (concluding “*Lawrence* applied something more than traditional rational basis review. This leaves open the question whether the court applied strict scrutiny, intermediate scrutiny, or another heightened level of scrutiny.”).

*High Tech Gays*, 895 F.2d at 571 (relying on an overruled decision in *Bowers*); *Richenberg v. Perry*, 97 F.3d 256, 260–61 n.5 (8th Cir.1996) (relying on *Bowers*), cert. denied, 522 U.S. 807 (1997); *Thomasson*, 80 F.3d at 928 (in not analyzing whether sexual orientation is a suspect or quasi-suspect class, the court reasoned that because there is no fundamental right to engage in same-sex sexual conduct, they are not suspect); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 266-68 (6th Cir. 1995) (also relying on *Bowers*’ overruled holding), cert. granted, judgment vacated on other grounds, 518 U.S. 1001 (1996); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (finding *Bowers* dispositive of the issue that homosexuality is not a suspect or quasi-suspect class) cert. denied, 494 U.S. 1003 (1990); *Ben–Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) (finding that “[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.”).

*Holmes*, 124 F.3d at 1132 (the court declined to analyze whether sexual orientation is a suspect or quasi-suspect class. The court based its decision on *High Tech Gays*’ holding which relied on an overruled decision in *Bowers*); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997) (the court also declined to analyze whether sexual orientation is a suspect or quasi-suspect class. The court based its decision on *High Tech Gays*’ holding which relied on an overruled decision in *Bowers*).

*See Díaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011) (“We do not need to decide whether heightened scrutiny might be required.”). However, the court provided no explanation for failing to analyze whether sexual orientation was a suspect or quasi-suspect class); *see Dragovich v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d. 1178, 1189 (N.D. Cal. 2011) (finding it unnecessary to determine whether sexual orientation was suspect or quasi-suspect “[b]ecause the Court finds that Plaintiffs state a claim under the rational basis standard, the question of whether Plaintiffs are members of a protected class need not be resolved here.”); *see In Re Levinson*, 587 F.3d 925, 931 (9th Cir. 2009) (finding that although heightened scrutiny review may apply, it was not necessary to apply such standard because DOMA could not “survive even rational basis review, the least searching form of constitutional scrutiny.”). The court thus found it unnecessary to “determine whether or which form of heightened scrutiny is applicable to this claim.”; *see Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (declining to analyze whether sexual orientation is suspect or quasi-suspect because the “Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes.”); *see Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir.2004) (declining to analyze whether sexual orientation is a suspect or quasi-suspect class because the Supreme Court nor the Fifth Circuit has never recognized it could qualify); *see U.S. Dept. of Health and Human Servs.*, 682 F.3d at 9 (refusing to “[extend] intermediate scrutiny to sexual preference classifications [because it] is not a step open to us.”); *see Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (declining to analyze whether sexual orientation is a suspect or quasi-suspect class because other “sister circuits ... declined to treat homosexuals as a suspect class.”); *Nat’l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (declining to analyze whether sexual orientation is suspect or quasi-suspect, reasoning that because “only four members of the Supreme Court [in *Frontiero*] have viewed gender as a suspect classification.”).

*High Tech Gays*, 895 F.2d at 74-81 (holding that there was a rational basis for the Department of Defense using a policy to use expanded background investigations for lesbian and gay applicants for “secret and top secret security clearances” because of the Department’s interest in protecting national secrets).

*Lawrence*, 539 U.S. at 578 (overruling *Bowers*, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”).

*Id.* (holding that private consensual sexual conduct between same-sex individuals is constitutionally protected).

*See, e.g., Golinski*, 824 F. Supp. 2d at 985 (“The Court finds that the outdated holding in *High Tech Gays* subjecting gay men and lesbians to rational basis review, is no longer a binding precedent.”).
See, e.g., Windsor, 699 F.3d at 180-81; see, e.g., Witt, 527 F.3d at 817; Pedersen, 881 F. Supp. 2d at 310-13 (in determining the merit of cases finding that lesbians and gays do not constitute suspect or quasi-suspect class, the court concludes the “precedential import of such authority is unpersuasive” because many of those cases relied on Bowers or relied on cases based on Bowers); Golinski, 824 F. Supp. 2d at 985 (“... no federal appellate court has meaningfully examined the appropriate level of scrutiny to apply to gay men and lesbians. Thus, the “[q]uestion of what level of scrutiny applies to classifications based on sexual orientation is still open.”); Id. at 983 (“When the premise for a case’s holding has been weakened, the precedential import of the case is subject to question. District courts are not governed by earlier appellate precedent that has been ‘undercut by higher authority to such an extent that it has been effectively overruled by such higher authority.’”) (citing Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003)).

Windsor, 133 S. Ct. at 2693 (New York provided marriage equality to same-sex couples, but DOMA sought to take away those same rights the state sought to protect).

See also, Kerrigan, 957 A.2d at 431-75 (2008) (providing an extensive analysis in determining whether sexual orientation is a suspect or quasi-suspect class).

See, e.g., Varnum, 763 N.W.2d at 889 (discussing factors constituting a class as quasi-suspect).

See, e.g., Windsor, 699 F.3d at 181-82 (“It is easy to conclude that homosexuals have suffered a history of discrimination.”)

Id. at 182.

Id. at 180.

Pedersen, 881 F. Supp. 2d at 315-16 (referring to an expert affidavit by George Chauncey, Ph.D, that discusses the historical discrimination of gay men and lesbians).

Id. (citing George Chauncey, Ph.D); Id. at 316 (noting the “federal government’s long-standing practicing of deeming [lesbians and gays] unfit for government employment.”) (citing “Employment of Homosexuals and Other Sex Perverts in Government, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280 81st Congress (Dec. 15, 1960)”).

Id. at 316 (discussing the government’s discrimination against gay men and lesbians as a distinct class in the twentieth century).

Id. at 316-17.

Windsor, 699 F.3d at 182.

See Pedersen, 881 F. Supp. 2d at 316.

Id.

Id. (internal quotation omitted).

See, e.g., Varnum, 763 N.W.2d at 889 (“The Country does not, and could not in good faith, dispute the historical reality that gays and lesbians as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation.”).

Pedersen, 881 F. Supp. 2d at 317 (“Many courts have concluded that homosexuals have suffered a long and significant history of purposeful discrimination.”) (collecting cases).

Cleburne, 473 U.S. at 440–41; Windsor, 699 F.3d at 182; see, e.g., Varnum, 763 N.W.2d at 890.

Pedersen, 881 F. Supp. 2d at 319; see, e.g., Frontiero, 411 U.S. at 686 (“What differentiates sex from such non-suspect statuses as intelligence or physical disability ... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

Varnum, 763 N.W.2d at 890 (collecting cases); Id. at 890 n.18 (concluding that a same-sex partner’s inability to contribute to society by procreating through sexual intercourse is not dispositive of whether sexual orientation is related to ability to contribute to society. Accordingly, the “ability to contribute to society is a general one.”).

Pedersen, 881 F. Supp. 2d at 318 (also discussing how Defense Secretary Leon Panetta “recently highlighted these [military] contributions and thanked gay and lesbian service members, [LGBT] civilians, and their families for their dedicated service to our country.”) (internal quotation omitted).

Id. (quoting the American Psychiatric Association’s (1973) reasoning why homosexuality was removed the Diagnostic and Statistical Manual of Mental Disorders) (emphasis added).
Windsor, 699 F.3d at 182-83 (concluding that being lesbian or gay bears no relation to ability to perform or contribute to society); Varnum, 763 N.W.2d at 893 (collecting cases). Pedersen, 881 F. Supp. 2d at 319 (collecting cases); see, e.g., Perry, 704 F. Supp. 2d at 1002 (“...by every available metric, opposite-sex couples are not better than their same-sex counterparts, instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal.”); see, e.g., Golinski, 824 F. Supp. 2d at 986.

Lyng, 477 U.S. at 638 (describing a factor constituting a class as quasi-suspect); see Windsor, 699 F.3d at 183-84.

Mathews v. Lucas, 427 U.S. 495, 506 (1976); see, e.g., Windsor, 699 F.3d at 183.

Windsor, 699 F.3d at 183.

Pedersen, 881 F. Supp. 2d at 322 (BLAG indicates that approximately over “12% of self-identified gay men and nearly one out of three lesbians reported they experienced some or much choice about their sexual orientation.”).

Windsor, 699 F.3d at 183, citing Bowen, 483 U.S. at 602-03 (emphasis added).

Id. at 184; see, e.g., Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977) (finding that resident aliens constitute a suspect class, despite their ability to conceal their status as a resident alien).

Windsor, 699 F.3d at 184 (For example, BLAG’s counsel even acknowledged the married same-sex couples who were denied benefits under Section 3 of DOMA as possessing “nothing amorphous, capricious, or tentative about their sexual orientation.” The court explained that such couples, including Windsor and her partner, Spyer, were a class “most visible to the law, and they are foremost in mind when reviewing DOMA’s constitutionality.”).

Id. at 184.

Id. at 183-84.

Id. at 182.

Id. at 184.

Id.

Id.

Pedersen, 881 F. Supp. 2d at 4 (finding that complete lack of power is not required to satisfy the factor of political powerlessness, comparing the political power that gays and lesbians currently have to the political power women had in the 1970s when they were deemed as requiring heightened judicial protection); see Frontiero, 411 U.S. at 688.
248 D.C. have laws prohibiting discrimination based on sexual orientation in schools).

A http://www.hrc.org/files/assets/resources/school_non

247 or prohibiting discrimination or bullying based on a student's sexual orientation in school).

246 As of August 2, 2013, 16 states have laws

http://www.hrc.org/files/assets/resources/school_anti

245 based on sexual orientation. As of June 19, 2013, 20 states do not have laws addressing hate crimes based on sexual


244 See e.g., Kiley v. American Soc. for Prevention of Cruelty to Animals, 296 F.App’x107, 109 (2d Cir. 2008) (finding that Title VII “... does not recognize homosexuals as a protected class.”).

243 Windsor, 699 F.3d at 185 (concluding that gays and lesbians “are not in a position to adequately protect themselves from discriminatory wishes of the majoritarian public.”).

242 Id.

241 Id.


238 Varnum, 763 N.W.2d at 894.

237 Frontiero, 411 U.S. at 686 n.17.

236 411 U.S. at 685; Windsor, 699 F.3d at 184.

235 411 U.S. at 686 n.17.

234 See Frontiero, 411 U.S. at 685.

233 Kerrigan, 957 A.2d at 450.

232 Pedersen, 881 F. Supp. 2d at 452 (finding that gays and lesbians “have no greater political power – in fact, they undoubtedly have a good deal less such influence – than women did in 1973, when the United States Supreme Court, in Frontiero, held that women are entitled to heightened judicial protection.”).

231 Lawrence, 539 U.S. 578-79 (overturning a Texas statute criminalizing private, consensual sexual conduct between members of the same sex).

230 Pedersen, 881 F. Supp. 2d at 452 (finding that gays and lesbians “have no greater political power – in fact, they undoubtedly have a good deal less such influence – than women did in 1973, when the United States Supreme Court, in Frontiero, held that women are entitled to heightened judicial protection.”).

250 Windsor, 699 F.3d at 184 (concluding that lesbians and gays as a class are political minority).

251 See, e.g., Kerrigan, 957 A.2d at 432 (“Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society.”).

252 Id. (“The characteristic that defines the members of this group – attraction to person of the same sex – bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”).

253 Windsor, 699 F.3d at 183-84; see, e.g., Kerrigan, 957 A.2d at 438-39 (“... gay persons, because they are characterized by a central, defining trait of personhood, which may be altered if at all only at the expense of significant damage to the individual’s sense of self... are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic.”) (internal quotation omitted).

254 See, e.g., Kerrigan, 957 A.2d at 432.

255 Donaldson, 367 Mont. at 376-77.