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The Profound and Intimate Power of the *Obergefell* Decision: Equal Dignity as a Suspect Class

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 Special thanks to my wife for her patience while I completed this law review and for her patience waiting for the Supreme Court to recognize our equal dignity in marriage.

I. INTRODUCTION

The *Obergefell*[1] decision should be celebrated for its role in recognizing the equal dignity of gay Americans and properly regarded as one of the most influential cases within the American legal system. President Obama praised the Supreme Court of the United States for its same-sex marriage ruling, saying it arrived "like a thunderbolt."[2] After the decision came out, one news commentator proclaimed that "this was a historic moment" and the decision "is probably right up there with Brown v. Board of Education."[3] Many gay people personally affected by the decision experienced the shared sentiment that it was really the first time that they felt themselves to be true Americans.

By holding that the state bans against same-sex marriage violated constitutional principles of due process and equal protection, the United States Supreme Court's opinion both caught up with growing trends within the social, political, and legal landscape and also added significant momentum to the gay civil rights struggles that are still being waged. After centuries of extraordinary discrimination, oppression, and violence, the ability now to participate in a cherished institution is nothing less

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
2. Bill Chapel, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR THE TWO-WAY (June 26, 2015), http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages.
3. *Id.*

than the long awaited affirmation of the basic humanity of gay Americans. The profound and intimate power of *Obergefell* should be respected not only because the decision was a strong move toward relieving gay Americans and their families from the material costs, insecurity, and stigma of second class citizenship, but because *Obergefell* advances principles of liberty, equality, and personal autonomy for all Americans. This article provides an overview of the constitutional analysis, focuses attention upon the Court's discussion of the four factors of the suspect class doctrine, and also celebrates *Obergefell*'s role in changing the American legal and cultural landscape.

There are many sophisticated nuances that underlie the Court's discussion of same-sex marriage. The *Obergefell* decision uses the phrase "gays and lesbians" to refer to the class of individuals that avail themselves of same-sex marriage. For the sake of simplicity and efficiency, I often will use the phrase gays and lesbians or the inclusive term "gay" in this article to refer to lesbians as well as other groups of people who were historically excluded from marriage and discriminated against for gender nonconformity. I will also sometimes use the term "homosexual" as this term was frequently used in older cases and laws that are relevant to the discussion. *Obergefell* relies upon the term "sex" quite often. Sex as a biological categorization can be distinguished from gender, which "includes the socially constructed roles, behaviors and attributes that society considers appropriate for men and women."[4] In order to maintain consistency with the *Obergefell* decision, which frequently uses the phrase "same-sex couples," I will use the same naming conventions as that of the decision.

II. OVERVIEW OF THE *OBERGEFELL* DECISION

In *Obergefell*, fourteen same-sex couples and two men whose same-sex partners are deceased ("same-sex couples") challenged the Kentucky, Michigan, Ohio, and Tennessee (herein "States") laws defining marriage as a union between one woman and one man.[5] The same-sex couples initially won the right to marry in each of the district courts in which they filed suit but the States seeking to ban gay marriage appealed the district court wins for same-sex couples.[6] During the appeals process, the United States Court of Appeals for the Sixth Circuit consolidated the cases and

4. Jeff Brodin, *New Role for Title VII: Sexual Orientation and Gender Identity*, ARIZONA ATTORNEY 34 (Dec. 2014).

5. *Obergefell*, 135 S. Ct. at 2593.

6. *Id.*

reversed the favorable gay marriage judgments of each of the district courts.[7]

The same-sex couples then requested certiorari review from the United States Supreme Court, which was granted.[8] The Court had previously denied certiorari review of the marriage equality rulings by the United States Court of Appeals for the Fourth, Seventh, and Tenth Circuits and denied requests by Alabama and Florida to stay marriage equality decisions while the United States Court of Appeals for the Eleventh Circuit was addressing the appeals of the two states.[9] The Court gave some indication that it was leaning toward marriage equality and might have a majority of Justices on board to support a pro-marriage ruling. By denying review of marriage equality rulings and denying requests to stay marriage equality rulings, the Court seemed to indicate that it was allowing precedential momentum to build throughout the country in favor of gay marriage. When the Court granted certiorari to review the ruling of the Sixth Circuit upholding marriage bans, some observers of the Court were cautiously optimistic that it might decide for marriage equality but ultimately nothing was known for certain.[10] Once review was granted, more amicus curiae briefs were filed during the briefing process than any other Supreme Court case in history.[11] Amici included churches, businesses, scholars, professional organizations, and a whole host of other interested parties that felt that the questions before the Court were worthy of advocacy.[12] After hearing oral argument, the Supreme Court issued the long awaited decision on June 26, 2015. In a concisely worded 5-4 opinion, the Supreme Court held that the Fourteenth Amendment to the United States Constitution requires a State to license a marriage between two people of the same-sex and requires a state to recognize a same-sex marriage licensed and performed in a State where same-sex marriage is legal.[13]

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7. *Id.*

8. *Id.*

9. Lily Hiott-Millis, *SCOTUS Denies Review of Marriage Cases, Bringing the Freedom to Marry to 5 States*, FREEDOM TO MARRY (Oct. 6, 2014) http://www.freedomtomarry.org/blog/entry/supreme-court-denies-review-of-marriage-cases-bringing-marriage-equality-to.

10. Ohio Outlook Mag., *Ohio Law Professors Predict a Ruling for Marriage Equality* (June 4, 2015), http://outlookcolumbus.com/2015/06/ohio-law-professors-predict-a-ruling-for-marriage-equality/.

11. Nina Totenberg, *Record Number of Amicus Briefs Filed in Same-Sex Marriage Case*, NPR IT'S ALL POLITICS (Apr. 28, 2015), http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases.

12. *Id.*

13. Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015).

A. Integrated Constitutional Analysis

Obergefell grants same-sex couples the right to marry by articulating an integrated constitutional theory that recognizes the interdependency between principles of equality, liberty, association, religion, expression, and intimacy.[14] Instead of mechanically applying the Due Process and the Equal Protection Clauses as if they existed in isolation from each other and from other constitutional amendments, *Obergefell* recognizes that gay people have a right to marry based upon interconnected rights that derive from a variety of constitutional provisions.[15] In fact, one notable proclamation from the decision is that "the Due Process Clause and the Equal Protection Clause are connected in a profound way."[16] The language of the opinion sheds new light on constitutional interpretation and can be used to advance the civil rights of gays beyond the context of marriage.

The four dissenters[17] criticize the majority for *Obergefell*'s lack of doctrinal purity and adherence to Fourteenth Amendment principles. Although these dissents are of interest to some, they do not carry the force of precedent. In the opinion, the Court rebuts the notion that it is applying a theoretically weak constitutional analysis to justify a personal and political decision about gay marriage.[18] To the Court, it makes practical and doctrinal sense to apply a holistic, inclusive, or integrated constitutional interpretation theory in the particular context of marriage. For one thing, marriage is just that big. As the Court notes, the institution fulfills basic human needs and is cherished by individuals and widely revered in social, religious, and political spheres.[19] Marriage has endured in some form or the other across centuries, cultures, religions, and belief systems.[20] Laws that implicate marriage necessarily implicate a host of profound and intimate rights. Furthermore, the Constitution and its amendments are specifically designed to balance democratic principles with the protection of the inherent dignity of the person.[21]

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14. *Obergefell*, 135 S. Ct. 2584.
15. *Id.*
16. *Id.* at 2602-03.
17. *Id.* at 2611-43.
18. *Id.* at 2618 (Roberts, J., dissenting) ("But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for 'judicial self-restraint.'").
19. *Id.* at 2594-95.
20. *Id.*
21. *Id.* at 2605-06 ("The idea of the Constitution was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.") (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

Democratic laws that burden one individual right also predictably burden other individual rights as all these rights emanate from the same source and are based upon the principle that there are certain realms and activities where the individual should be free from government intrusion.[22]

In other words, it is common sense that the right to marry is fundamental under substantive due process and equal protection analysis of the Fourteenth Amendment because the decision to marry implicates rights to privacy or intimacy under the Ninth Amendment, implicates First Amendment notions of freedom of religion, expression, and intimate association, implicates due process liberties related to childrearing, procreation, and education, and because marriage has historically been accorded significant social and political reverence.[23] The marriage bans both impair a fundamental right and demean a historically stigmatized class of people.[24]

B. The Form and Substance of the Obergefell Decision

The *Obergefell* decision is organized into five broad sections. The first section of the opinion simply relates the procedural history of the case.[25] In the second section, the Court identifies the "transcendent importance of marriage" and chronicles the history of discrimination against gay people as well as the political and legal struggles that gay people have had to endure.[26] Within this section, the Court recounts the personal stories of three of the fourteen same-sex couples involved in the litigation. It details the struggles of James Obergefell, who sought merely to be put on the death certificate as a spouse after his husband died following a painful battle with ALS, April DeBoer and Jayne Rowse, a married couple seeking the protection of marriage for the several special needs children they are raising together, and Thomas Kostura and Army Reserve Sergeant First Class Ijpe DeKoe, a married couple who were brought to Tennessee by Ijpe DeKoe's military service.[27]

The heart of the constitutional analysis is laid out in the third section of the opinion. Here, the Supreme Court discusses the interconnected nature of various constitutional provisions, with particular

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22. *Id.* at 2602-03 ("The Due Process Clause and the Equal Protection Clause are connected in a profound way.").

23. *Id.* at 2597-2602 (focusing on the identification of marriage as a fundamental right under substantive due process).

24. *Id.* at 2602-07 (focusing on the denial of equal protection).

25. *Id.* at 2593.

26. *Id.* at 2593-97.

27. *Id.* at 2594-95.

emphasis on due process and equal protection, and describes how Supreme Court precedent supports the right of gay people to marry.[28] The Court also draws a direct comparison between the historic sex and race-based inequality that once defined marriage and the challenged sexual orientation-based inequality.[29] It notes that until the *Loving v. Virginia* Court declared bans against interracial marriages invalid, the "unequal treatment of interracial couples" was common practice in certain states.[30] It also details the extensive body of laws that used to treat "women as unequal to men in marriage,"[31] including the doctrine of coverture that required state governments to view a married straight couple as a "single, male-dominated legal entity."[32] This particular section also contains a short one paragraph rebuttal to the arguments of the Sixth Circuit states that marriage should be limited to heterosexual couples because the institution promotes what has been termed responsible procreation amongst these couples.[33] The Supreme Court counters the so-called responsible procreation argument by saying that childbearing is only one potential aspect of marriage and that the "ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State."[34]

The fourth section addresses the argument made by the States that the Court should "wait and see" and defer to the democratic processes within the States rather than rule in favor of gay marriage.[35] In justifying its decision, the Court reflects upon the fundamental nature of the rights implicated by the marriage bans, the extensive legislative, scholarly, social, and legal attention that has already been given to gay marriage, and the need to resolve the disagreement between the Sixth Circuit, which denied marriage equality, and the rest of the other Circuit Courts that affirmed marriage equality.[36] The Court also asserts that it has a "duty" to rule in favor of the same-sex couples because of the deep connection between law and cultural perceptions of law. It notes that "were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most

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28. *Id.* at 2597-2605.

29. *Id.* at 2603 ("In *Loving*, the Court invalidated a prohibition on interracial marriage" and "invidious sex-based classifications . . . remained through the mid-20th century.").

30. *Id.* at 2603.

31. *Id.* at 2604.

32. *Id.* at 2595.

33. *Id.* at 2601.

34. *Id.*

35. *Id.* at 2597-2605.

36. *Id.* at 2605 ("Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.").

basic compact."[37] The fourth section dismisses many of the States' arguments that gay marriage will harm heterosexual marriage and highlights the immediate, substantial, and continuing harm imposed upon gay people by being denied the right to marry.[38] The Supreme Court concludes this section with a paragraph reassuring religious organizations that both oppose and support gay marriage that although state law cannot be used to express the moral disapproval[39] of homosexuality, the decision does not impact their ability to teach the principles and religious doctrines that they find compelling.[40]

Finally, the fifth section reiterates the hardship imposed by denying marriage to gay couples. It acknowledges that "no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."[41] In a stirring conclusion to the decision, the Court notes that gay couples "ask for equal dignity in the eyes of the law" and the "Constitution grants them that right."[42] Appendix A to the *Obergefell* decision provides an exhaustive list of state and federal decisions addressing same-sex marriage and Appendix B details the state legislation and judicial decisions legalizing same-sex marriage.[43] The Court notes that with the exception of the Sixth Circuit Court of Appeals decision under review as well as one case from the United States Court of Appeals for the Eighth Circuit, the Circuit Courts have uniformly held that state marriage bans excluding gays from marriage violate the Constitution.[44] The Court also remarks that the "substantial body of law" written by the lower courts on same-sex marriage bans "helps to explain and formulate the underlying principles" the Supreme Court considered in reaching its decision.[45]

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37. *Id.* at 2606.

38. *Id.* ("Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude than an opposite-sex couple would choose not to marry simply because same-sex couples may do so.").

39. For a robust discussion of law as a vehicle of moral disapproval against gays and lesbians prior to the *Obergefell* decision, please review Linda McClain, *From* Romer v. Evans *to* United States v. Windsor*: Law as a Vehicle of Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 394 (2013).

40. *Obergefell*, 135 S. Ct. at 2607 ("[R]eligions . . . may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.").

41. *Id.* at 2608.

42. *Id.*

43. *Id.* at 2608-11.

44. *Id.* at 2597 (referring to Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006), which ruled that gay couples should be excluded from marriage).

45. *Id.*

C. Gays and Lesbians Have a Fundamental Right To Marry and Are Entitled to Equal Protection Under the Law

One of the primary conclusions that *Obergefell* reached was that the States' marriage bans violate the fundamental right to marry under the Due Process Clause. The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property without due process of law."[46] The Court analyzed four principles which demonstrate that marriage is fundamental under the Due Process and Equal Protection Clauses and that "apply with equal force to same-sex couples."[47]

The first principle supporting a fundamental right to marriage equality is that "personal choice regarding marriage is inherent in the concept of individual autonomy."[48] Intimate decisions concerning contraception, procreation, marriage, and child rearing have historically been protected as individual rights that cannot be infringed upon by the government.[49] Furthermore, decisions regarding family life and marriage have specifically been identified as extensions of the right to privacy.[50]

The second principle that supports the fundamental right to marry is that marriage "supports a two-person union unlike any other in its importance to the committed individuals."[51] The Court notes that *Lawrence v. Texas*, which overturned same-sex sodomy laws, and *Turner v. Safley*, which held that prisoners could not be barred from marriage, both recognized the right to enjoy "intimate association."[52] In addition to the right to intimate association, individuals should be able to "define themselves by their commitment to each other" in marriage.[53]

The third reason for protecting the fundamental right to marry is that it "safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education."[54] As the Court remarks, the "right to marry, establish a home, and bring up children is a central part of the liberty protected in the Due Process Clause."[55] Laws restricting marriage to heterosexual couples harm the rights parents

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46. U.S. CONST. amend. XIV, § 1.
47. *Obergefell*, 135 S. Ct. at 2599.
48. *Id.*
49. *Id.*
50. *Id.* (citing Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("[I]t would be contradictory 'to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society'.").
51. *Id.*
52. *Id.* at 2600 (referencing Turner v. Safley, 482 U.S. 78 (1987); Lawrence v. Texas, 539 U.S. 558 (2003)).
53. *Id.* (quoting United States v. Windsor, No. 12-307, slip op. at 22-23 (2013)).
54. *Id.*
55. *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

possess in their raising children according to their choosing.[56] Laws restricting marriage to heterosexuals also unduly harm the children of gay couples. The Court states that marriage "affords the permanency and stability important to children's best interests."[57]

The fourth reason marriage choice represents a fundamental substantive right is that marriage is "a keystone of our social order."[58] As the Court observes, marriage resides "at the center of so many facets of the legal and social order."[59] Excluding same-sex couples from this bedrock institution "demeans gays and lesbians," "has the effect of teaching that gays and lesbians are unequal," and consigns gays and lesbians "to an instability many opposite-sex couples would deem intolerable in their own lives."[60]

Consistent with the integrative constitutional approach the Court used to identify marriage as a fundamental right, the Court observes that the "Due Process Clause and the Equal Protection Clause are connected in a profound way," that there is "synergy between the two protections," and that due process and equal protection are "instructive to the meaning and reach of the other."[61] Although the two clauses of the Fourteenth Amendment are distinct in some senses, the constitutional analysis applied to both clauses is noticeably similar. In fact, "substantive due process challenges, just as equal protection ones, require a court to determine whether the challenged policy or statute creates a suspect class or affects a fundamental right."[62] In *Plyler v. Doe*, the Court observed that under equal protection review "we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right.'"[63] The Supreme Court refers to both the fundamental rights strand of equal protection review as well as the discriminatory classification strand of equal protection review, which focuses on suspect classes in the *Obergefell* opinion. By means of example, the Court proclaims that "the marriage laws enforced by respondents are in essence unequal; same-sex couples are denied all the benefits afforded opposite-sex couples *and* are barred from exercising a fundamental right."[64]

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56. *Id.*
57. *Id.*
58. *Id.* at 2601.
59. *Id.*
60. *Id.* at 2601-02.
61. *Id.* at 2590, 2603.
62. 16B AM. JUR. 2D *Constitutional Law* § 966 (2015).
63. 457 U.S. 202, 216-17 (1982).
64. *Obergefell*, 135 S. Ct. at 2590 (emphasis added).

The *Obergefell* decision did not use the magic words of "suspect class" but it expends a considerable amount of language and space describing gays and lesbians in terms of the four factors of the Suspect Class Doctrine. Section III.B. of this law review will elaborate on the Court's discussion of gays and lesbians under the factors the Suspect Class Doctrine, including the history of discrimination against gays and lesbians, the irrelevance of being gay or lesbian to the ability to perform or contribute to society, the obvious, immutable, and distinguishing characteristics of gays and lesbians, and the political powerlessness of gays and lesbians. Consistent with the discriminatory classification strand of equal protection analysis, the Court also compares the discriminatory classification involved in same-sex marriage bans to the discriminatory classifications involved in gender biased coverture laws and interracial marriage bans.

The *Obergefell* opinion did not use the magic words of "heightened scrutiny," but it is clear from the language and disposition of the case that the Supreme Court gave same-sex couples exactly the ruling and the underlying reasoning they asked for in their briefs. Whatever *Obergefell* lacked in the explicit naming conventions that some commentators may prefer, it more than made up for in substance and practical application. In line with the heightened scrutiny standard, *Obergefell* noted that the Sixth Circuit states did not meet their burden to prove the validity of the marriage bans and "have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe."[65] *Obergefell* applied heightened scrutiny review in practice by allocating the burden to the States seeking to uphold the marriage bans, identifying marriage as a fundamental right, and discussing the four elements of the Suspect Class Doctrine under equal protection analysis.

D. The Implications of Obergefell on Legislation Justified By Moral Disapproval, Respect for Tradition, and Equal Application

In addition to the significant cultural and legal revolution that gay marriage represents and the integrated constitutional analysis that *Obergefell* applied, there are several strong and recurring themes in the opinion that should be brought to light. The protected intimacy involved in individual rights is highlighted in the opinion as is the "profound commitment" of marriage.[66] The inherent intimacy of personal decisions

65. *Id.* at 2607.
66. *Id.* at 2594.

related to sex, expression of sexual orientation, child rearing, and family relations is repeatedly discussed in the opinion.[67]

Obergefell relies upon the word "intimate" or some derivative of it on a number of occasions referring to "intimate association," "same-sex intimacy," "intimate bond," "intimate choices," and the like.[68] The repeated use of this particular phraseology signals the Court's strong rejection of the States' imposition of their version of morality upon the intimate spheres of private and personal life, particularly when the "best interests" of children are involved, "the rights of two consenting adults" are involved, and when the activities "pose no risk of harm to themselves or third parties."[69]

The Court also seems to signal that constitutional interpretation should learn from the mistakes of the past, particularly the legislation of morality that reflects a singular, albeit popular, view of proper moral behavior. "Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[70] The Court heavily relied upon *Loving*, which overturned bans on interracial marriage on both equal protection and due process grounds.[71] It also relied on a number of cases where legal classifications in marriage imposed "sex-based inequality" upon marriage and denied women "equal dignity" under the law.[72] The Court's reliance on these cases is understandable given the striking similarity between the arguments that motivated and justified race, sex, and sexual orientation-based marriage laws. The Court's reliance on these cases also suggests some of the arguments used to perpetuate class discrimination no longer hold any water in a legal context.

Both interracial and gay marriage bans, as well as laws that treated women as inferior to men in marriage, were strongly defended on the bases of respect for tradition as well as religious and moral disapproval of certain people acting outside of their perceived and socially defined roles. In *Obergefell*, the Court referenced a 1971 Georgia law that stated that "the husband is the head of the family and the wife is subject to him; her civil existence is merged in the husband."[73] This law and similar coverture laws, which have now been overturned, reflected commonly

67. *Id.* at 2597-2602.
68. *Id.* at 2588, 2590, 2596, 2598, 2600, 2606.
69. *Id.* at 2600, 2607.
70. *Id.* at 2603.
71. Loving v. Virginia, 388 U.S. 1 (1967).
72. *Obergefell*, 135 S. Ct. at 2595, 2603-04.
73. *Id.* at 2603.

accepted Biblical commands expressed in the New Testament that "the husband is the head of the wife," "wives should submit to their husbands in everything," and wives should "submit to their husbands as to the Lord."[74] In similar fashion, the trial judge in *Loving* made the now infamous religious proclamation against interracial marriage:

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[75]

Like interracial marriage bans and coverture laws, morality and respect for tradition were offered by the States, as reasons to preserve the state same-sex marriage exclusions. For example, Ohio argued that heterosexual marriage was the traditional and only definition of marriage and that this institution should not be changed by judicial decision.[76] It also asserted "this Court should not isolate many ordinary Americans . . . by forever branding their deepest beliefs as irrational prejudice."[77] Michigan gave a dire warning in its opening brief that ruling in favor of same-sex couples would perpetuate a "social and moral divide" and send a message to many Americans that "their own cherished beliefs are hateful and contrary to constitutional values."[78] *Obergefell* did not find tradition and morality arguments persuasive.

The decision assured "religions, and those who adhered to religious doctrines" that they may continue to advocate that "same-sex marriage should not be condoned" but that they could not use the democratic process to institutionalize their version of morality.[79] Morality and tradition did not give the authority to the States to "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."[80] It also cautioned that even when "sincere, personal opposition becomes enacted law and public policy" that law is still unconstitutional if "the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[81] With specific respect to the tradition argument,

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74. *Ephesians* 5:22-24 (New International Version).
75. *Loving*, 388 U.S. at 3.
76. Brief for Respondent Ohio, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).
77. Brief for Respondent Ohio at 35, *Obergefell*, 135 S. Ct. 2584 (2015) (No. 14-556).
78. Brief for Respondent Michigan at 16, *Obergefell*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).
79. *Obergefell*, 135 S. Ct. at 2607.
80. *Id.*
81. *Id.* at 2602.

the Court also elaborated that "if rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[82] *Obergefell* indicates that laws that discriminate against a class cannot be justified by the bare moral disapproval of a faction of the population, or respect for the tradition of the dominant culture alone.

In addition to morality and tradition arguments, equal application arguments were raised in defense of both interracial and same-sex marriage bans. Virginia argued in *Loving* that the interracial marriage ban was compatible with equal protection because there was a theoretical "equal application" of the ban upon all races. The *Loving* Court, however, firmly rejected this argument. It held that the mere "fact of equal application does not immunize the statute from the very heavy burden of justification" and that it is clear that the ban was designed to promote the improper objective of "White Supremacy" and so-called integrity of the white race.[83] Despite its failure in the context of race, the States in *Obergefell* used a virtually identical "equal application" argument to justify same-sex marriage bans. Irrespective of the obvious fact that gays and lesbians are the class most likely to enter into same-sex marriage, Ohio claimed that its gay marriage ban was constitutional because it "applies to all individuals no matter their orientation."[84] Kentucky added to this sentiment by asserting that its same-sex marriage ban was "facially neutral" and that "men and women, whether heterosexual or homosexual, are free to marry persons of the opposite sex under Kentucky law, and men and women, whether heterosexual or homosexual, cannot marry persons of the same sex under Kentucky law."[85] The *Obergefell* Court rejected these equal application arguments suggesting that they lacked credibility because the "immutable nature" of gays and lesbians "dictates that same-sex marriage is their only real path to this profound commitment."[86] The marriage bans were "in essence unequal" because "same-sex couples are denied all the benefits afforded to opposite-sex couples."[87]

The comparison of same-sex marriage bans to interracial marriage bans and the disabilities that coverture and similar laws once heaped

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82. *Id.*

83. *Id.* at 6, 9, 11.

84. Brief for Respondent Ohio at 45, *Obergefell* 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).

85. Brief for Respondent Kentucky at 26, *Obergefell*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).

86. *Obergefell*, 135 S. Ct. at 2594.

87. *Id.* at 2604.

upon women in marriage is compelling from a legal maneuvering standpoint as well as from a broader social and cultural perspective. Racism certainly still exists but interracial unions have lost much of the stigma and novelty that used to accompany them. Similarly, the notion that women should be submissive to their husbands is still obeyed by certain religious sects of Americans but it has lost much of the unquestioning legal and social acceptance it had in the past. Comparisons of sexual orientation discrimination to racial and sex discrimination indicate that at least five members of the Supreme Court believe sexual orientation discrimination to be on par with the outdated racism and sexism of the past. The comparisons, in addition to other language in the opinion, also strengthen the recognition of gays and lesbians as a suspect class. It is indeed a brave new world for gay Americans.

III. GAY PEOPLE REPRESENT A SUSPECT CLASS UNDER EQUAL PROTECTION ANALYSIS AND LEGISLATION IMPLICATING GAY PEOPLE MUST BE REVIEWED UNDER HEIGHTENED SCRUTINY

While the Supreme Court's equal marriage ruling profoundly affirms the dignity of gays and lesbians, the equal protection analysis justifying the ruling should also be celebrated as a victory. The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[88] Essentially, it directs state governments to "treat all similarly situated persons alike."[89] It has also been incorporated to apply to the federal government through the Due Process Clause of the Fifth Amendment.[90] As legislation by its very nature involves classifications, courts distinguish between the types of legislative classifications that are presumed to be more invidious and those that are presumed to be more benign. Under equal protection analysis, "if a law neither burdens a fundamental right nor targets a suspect class," courts "will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[91] *Obergefell* characterizes the right to marry as a fundamental right and also describes gays and lesbians as the suspect class targeted by the same-sex marriage bans.

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88. U.S. CONST. amend. XIV, § 1.

89. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

90. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213-18 (1995), which applied Fourteenth Amendment strict scrutiny analysis to actions taken by the federal government through the Fifth Amendment.

91. Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller v. Doe, 509 U.S. 312, 319-20 (1993)).

The standard of constitutional review is critical because it stacks the cards either in favor of those opposing legislation or in favor of the governmental entity supporting the legislation. In general, gay rights advocates favor heightened scrutiny review for sexual orientation classifications in legislation, while those seeking to punish or exclude gay people favor rational basis review. Laws relating to age, disability, or economic distinction are without question subject to rational basis review and come with a presumption of constitutionality.[92] Rational basis review is the standard most deferential to legislative policy choices. The Ohio same-sex couples argued that the "judicial presumption that comes with rational basis review" is an "assertion of their inferiority" and that it tells society "that laws infringing on their personhood should be viewed with no more skepticism than laws regulating packaged milk."[93] In order for a law to be upheld under rational basis review, it must only be "rationally related" to a "legitimate government interest."[94]

In contrast to rational basis review, there are essentially two types of heightened constitutional scrutiny referred to as strict scrutiny and intermediate scrutiny. In order to survive heightened scrutiny, the government must describe "actual stated purposes" for the law rather than offer hypothetical justifications or ad hoc rationalizations.[95] Intermediate scrutiny is applied by courts when a law burdens a quasi-suspect class and strict scrutiny is applied when a law burdens a suspect class. Quasi-suspect classifications include gender and illegitimacy.[96] Gender, for example, is presumed by the courts to be an invalid classification unless there is an "exceedingly persuasive" showing that the law is constitutional or unless there is a showing that the law is "substantially related" to an "important government objective."[97] Legal classifications based on race and national origin are inherently suspect and subject to strict scrutiny because "some classifications are more likely than others to reflect deep-seated prejudice" and, "legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that

92. *Cleburne Living Ctr.*, 473 U.S. at 440 (mental disability); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1878) (age); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (economic transactions).

93. Brief for Petitioners Ohio Same-Sex Couples at 39-40, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).

94. *Cleburne Living Ctr.*, 473 U.S. at 440.

95. United States v. Virginia, 518 U.S. 515, 535-36 (1996).

96. *Virginia*, 518 U.S. 515 (1996) (gender); Matthews v. Lucas, 427 U.S. 495 (1976) (illegitimacy).

97. *Virginia*, 518 U.S. at 531 ("exceedingly persuasive"); Clark v. Jeter, 486 U.S. 456, 461 (1988) ("substantially related").

Fourteenth Amendment was designed to abolish."[98] When strict scrutiny is applied, the government bears the burden of proving that the classification is "narrowly tailored" to further a "compelling state interest."[99]

In order to determine whether a particular class is subjected to heightened scrutiny as either a suspect or quasi-suspect class, courts apply what is known as the Suspect Class Doctrine. The four factors that courts generally consider when examining the suspect status of a group are a history of discrimination, bearing or ability to contribute to society, immutability or distinguishing characteristics, and lack of political power.[100]

One of the most practical and symbolic accomplishments of *Obergefell* is that it suggests that heightened scrutiny review that applies to protected classes like sex and race should also apply to sexual orientation under the Equal Protection Clause of the Fourteenth Amendment. The fact that the Supreme Court used suspect class language associated with heightened scrutiny gives direction to lower courts that laws that single out gays and lesbians for unequal treatment are presumptively invalid and that governments seeking to discriminate against gay people bear the significant burden of proving that these suspect laws are constitutional. Heightened scrutiny communicates to the broader community as well as the entire judicial and political system that gays deserve equal dignity under the law. *Obergefell* recognizes that gay people have experienced a history of discrimination, gay people can and do participate in society, gay people are a discrete and identifiable group, and gay people have suffered political powerlessness. The *Obergefell* decision stacks the deck in favor of gay people when they are faced with discrimination, provides greater leverage for civil rights advocates in the future, and helps pave the way toward a more meaningful equality for gay and lesbian Americans beyond the context of marriage.

A. The Long Journey to Resolving the Proper Level of Constitutional Review and the Suspect Class Status of Gay Americans

In order to fully appreciate the contours of the equal protection arguments in *Obergefell* and why the discussion of factors under the Suspect Class Doctrine is so revolutionary, it is important to understand

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98. Plyer v. Doe, 457 U.S. 202, 217 n. 14 (1982); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("most rigid scrutiny" applies to race).

99. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215-17, 227 (1995) ("narrowly tailored").

100. Bowen v. Gilliard, 483 U.S. 587, 602 (1987); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

the history of gay rights litigation before the Supreme Court. The Supreme Court "first gave detailed consideration to the legal status of homosexuals" in the 1986 case, *Bowers v. Hardwick*.[101] In *Bowers*, the Supreme Court held that a Georgia statute criminalizing both heterosexual and homosexual sodomy was constitutional under rational basis review.[102] Despite the broad application of the law, the Supreme Court focused only on homosexual sex and determined that the sodomy statute was rationally related to the legitimate governmental purpose of expressing moral disapproval of homosexual sodomy.[103] It determined that the Due Process Clause of the Fourteenth Amendment did not confer a fundamental right upon adult homosexuals to engage in consensual acts of sodomy in the privacy of their homes because homosexual sexual conduct was not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."[104]

Gay rights were next addressed in the 1996 case of *Romer v. Evans*.[105] In *Romer*, the Court held that a Colorado law was unconstitutional because it reflected an "animus" toward homosexuals as a class.[106] Amendment 2 rescinded and prohibited state or local laws from protecting gays against discrimination in employment, housing, public accommodations, and various other arenas.[107] Despite the fact that Colorado voters had passed Amendment 2 by statewide referendum, the Supreme Court reasoned that Amendment 2 failed the "most deferential of standards" because it embodied a "bare . . . desire to harm" the "politically unpopular" class of homosexuals and did not have a "relationship to a legitimate state interest."[108] Amendment 2 failed even the minimal and deferential constitutional test but the Court also embedded language in the opinion that suggested a higher level of scrutiny should apply to sexual orientation. The Court noted that "laws singling out a certain class of citizens for disfavored status or general hardships are rare" and "discriminations of an unusual character especially suggest *careful consideration* to determine whether they are obnoxious to the constitutional provision."[109]

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101. *Obergefell*, 135 S. Ct. at 2596.
102. Bowers v. Hardwick, 478 U.S. 186 (1986).
103. *Id.* at 196.
104. *Id.* at 191-92.
105. Romer v. Evans, 517 U.S. 620 (1996).
106. *Id.* at 632.
107. *Id.* at 629.
108. *Id.* at 632-35.
109. *Id.* at 633 (emphasis added).

Gay civil rights gained additional momentum from the 2003 *Lawrence v. Texas* decision.[110] In *Lawrence*, two adult males who had engaged in private and consensual sex were prosecuted under a Texas law that criminalized "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)" but did not criminalize identical behavior by heterosexual couples.[111] Although *Romer* significantly eroded the *Bowers* decision, it did not overrule it. *Lawrence* explicitly overruled *Bowers*, noting it "[was] not correct when it was decided."[112] Contrary to the reasoning in *Bowers*, *Lawrence* held that history informed but did not dictate the result of the substantive due process inquiry.[113] In other words, the fact that political majorities within states had traditionally viewed homosexual sodomy as immoral "was not a sufficient reason for upholding a law prohibiting the practice."[114] "Although *Lawrence* elaborated its holding under the Due Process Clause," the Court referenced various constitutional theories similar to the integrated constitutional analysis of *Obergefell*.[115] The decision echoed equal protection principles because it "sought to remedy the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State."[116] It also implicated privacy concerns by stating that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[117] While a notable victory with compelling language suggestive of higher constitutional review, *Lawrence* also did not explicitly spell out whether sexual orientation was deserving of heightened scrutiny under the various legal theories discussed in the case.

Just a few terms ago, the Supreme Court overturned the Defense of Marriage Act (DOMA) in *United States v. Windsor* because "it violate[d] basic due process and equal protection principles" guaranteed by the Fifth Amendment.[118] The Court held that the "moral disapproval of homosexuality" and the protection and promotion of "traditional (especially Judeo-Christian) morality," which motivated the enactment of DOMA, was not sufficient enough to exclude legally married same-sex

110. Lawrence v. Texas, 539 U.S. 558 (2003).
111. *Id.* at 563.
112. *Id.* at 578.
113. *Id.* at 577.
114. *Id.*
115. Obergefell v. Hodges, 135 S. Ct 2584, 2604 (2015).
116. *Id.* at 2604.
117. *Lawrence*, 539 U.S. at 562.
118. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

couples from more than a thousand federal marriage benefits.[119] The decision clearly kept the dial tuned to a heightened scrutiny standard by noting the "demonstrated purpose" of DOMA raised serious constitutional questions.[120] The opinion also stated that in contrast to a deferential rational basis review courts must use "careful consideration" in determining "whether a law is motivated by an improper animus or purpose."[121] While incorporating language strongly indicative of heightened scrutiny, the Court also made ambivalent comments implying that the level of review needed more clarification. *Windsor* remarked that the arguments that heightened scrutiny should apply to gay people as a suspect class, which were advanced by the Attorney General, the President, Edie Windsor, and the United States Court of Appeals for the Second Circuit, were "still being debated and considered in the courts" and "based on a constitutional theory not yet established in judicial decisions."[122]

The *Obergefell* ruling applied the heightened scrutiny rationale favored by couples opposing same-sex marriage bans rather than the rational basis rationale favored by the States defending the bans. In their briefs, same-sex couples specifically asked the Supreme Court to "clarify for the courts below that official discrimination based on sexual orientation requires heightened scrutiny."[123] They also argued that "this Court should make explicit what is already implicit in its holdings: that government discrimination based on sexual orientation is not entitled to the presumption of constitutionality."[124] Clarification on the equal protection standard applicable to sexual orientation has long been sought because although the gay community gained Supreme Court wins in *Romer*, *Lawrence*, and *Windsor* prior to *Obergefell*, these wins did not definitively refer to gay Americans in terms of a suspect class or quasi-suspect class subject to heightened review.[125]

As is true of any litigation, explicit pronouncements are desirable but not always needed. Strong language and supportive phrasing in the *Romer*, *Lawrence*, and *Windsor* decisions gave advocates ample footing

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119. *Id.* at 2693.
120. *Id.*
121. *Id.* at 2692-93.
122. *Id.* at 2683, 2689.
123. Brief for Petitioners Tennessee Same-Sex Couples at 40, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).
124. Brief for Petitioners Ohio Same-Sex Couples at 38, *Obergefell*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).
125. Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558; United States v. Windsor, 133 S. Ct. 2675 (2013).

to make the case that heightened scrutiny should apply to sexual orientation. Advocates used this footing to move many lower state and federal courts toward recognizing marriages between same-sex couples and striking down various other forms of anti-gay discrimination, either on the basis of strict scrutiny, heightened scrutiny, rational basis, or some standard in between heightened scrutiny or rational basis. In *SmithKline Beecham Corp. v. Abbott Laboratories*, for example, the Ninth Circuit used *Lawrence* and *Windsor* to conclude that lawyers cannot exclude potential jurors on the basis of sexual orientation and that a "heightened scrutiny standard was to be applied to all government actions that discriminate on the basis of sexual orientation."[126]

Despite giving advocates footing to argue for heightened scrutiny, it is not fully clear why the Supreme Court did not explicitly recognize gays as a protected class until *Obergefell*, especially given the fact that *Romer*, *Lawrence*, *Windsor*, and *Obergefell* were all penned by Justice Kennedy. In reflecting on this, certain commentators have characterized *Romer*, *Lawrence*, and *Windsor* as minimalist decisions, in which the Court was willing to grant rulings that incrementally advanced gay rights to the extent the "country is . . . willing to go along."[127] In all three cases, the Supreme Court decided to rule in favor of gay rights but was careful to use implicit and subdued language that would not be deemed overtly threatening to those opposed to gay rights, cause political backlash, or open the Court up to widespread criticism of judicial activism.

A distinct minority of lower courts departed from a more careful and rigorous scrutiny of the laws pertaining to gays and applied only a very weak form of rational basis.[128] These cases were often used by those seeking to discriminate against gays as relevant precedent. Same-sex couples specifically argued that it was inappropriate for the Court to use the rational basis test in *Obergefell* because the application of this test to sexual orientation was "based largely on pre-*Lawrence* circuit precedent that relied expressly on the now-overruled holding of *Bowers v. Hardwick*, 478 U.S. 186 (1986), that states constitutionally may criminalize same-sex sexual intimacy."[129]

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126. SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014); Jeff Brodin, *New Role for Title VII: Sexual Orientation and Gender Identity*, ARIZONA ATTORNEY (Dec. 2014).

127. William N. Eskridge, *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025-26 (2004).

128. *See generally* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).

129. Brief for Petitioners Tennessee Same-Sex Couples at 44, *Obergefell* 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).

In reaching its decision that gay people are a suspect class entitled to heightened scrutiny review, the *Obergefell* Court scolded lower courts and those in opposition to gay rights for taking a pinched and disingenuous view of its gay rights jurisprudence and for clinging to *Bowers* and other outdated pre-*Lawrence* precedent. The *Obergefell* opinion proclaims "while [*Lawrence*] confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there."[130] The Court notes "outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[131] Gay people are not outlaws entitled to only rational basis review.

Although there is extensive language in *Obergefell* that recognizes gays and lesbians as a suspect class under Equal Protection, at least one federal district court in Iowa continues to adhere to the pinched interpretation of the Supreme Court's gay rights cases.[132] It recently stated that the *Obergefell* decision "passed on the opportunity to decide whether sexual orientation amounted to a suspect class for equal protection purposes" and that "sexual orientation does not constitute a 'suspect or quasi-suspect class' entitled to heightened equal protection scrutiny."[133] The district court's statements with respect to the *Obergefell* decision and the suspect class status of gays and lesbians are unsupported and do not represent precedential authority. In the case, the Plaintiff's assertion that he was discriminated against for being homosexual was dismissed for failing to state a plausible claim because he failed to allege that he actually received disparate treatment as a result of his homosexuality.[134] The district court's speculative language with respect to *Obergefell* and the suspect class status of gays and lesbians was not substantiated and was not necessary to the actual ruling in the case.

B. Obergefell's *Discussion of the Four Factors of the Suspect Class Doctrine*

The four factors that the *Obergefell* Court discussed and that courts generally consider when examining the suspect status of a group are a history of discrimination, bearing or ability to contribute to society, obvious, immutable, or distinguishing characteristics, and lack of

130. *Obergefell*, 135 S.Ct. at 2600.
131. *Id.*
132. Willet v. Iowa, 2015 U.S. Dist. LEXIS 163973 (N.D. Iowa 2015).
133. *Id.* at 12-13.
134. *Id.* at 11-15.

political power.[135] Although immutability and lack of political power are relevant to the inquiry of whether a group represents a suspect class, these factors are not as dispositive and do not have as much relative weight as the factors examining whether there has been a history of discrimination against a class or whether the class characteristics prompting the discrimination bears a relation to the ability to perform or contribute to society.[136]

In *Obergefell*, the Court applied the heightened scrutiny standard favored by those opposing same-sex marriage bans instead of rational basis, which was favored by the States defending the bans. The Supreme Court had in the three major LGBT rights cases since *Bowers* (*Romer*, *Lawrence* which expressly overturned *Bowers*, and *Windsor*) given advocates footing to argue for heightened scrutiny even though the opinions never specifically called for its use. Despite this, as discussed in the section above, a distinct minority of lower courts departed from a more careful and rigorous scrutiny of the laws pertaining to gays, instead applying only a very weak form of rational basis review. The division between the states on the issue of same-sex marriage, which reflected the underlying division among lower courts on the proper level of equal protection review, compelled the Court to discuss the four factors of the Suspect Class Doctrine.

1. Factor 1: *Obergefell* Recognizes that Gay Americans Have Experienced a History of Discrimination

Throughout history, homosexuals have been regarded by law and by society as criminals, sexual predators, pedophiles, unfit parents, deserving targets of violent hate crimes, disposable and compromised employees, crazies, pariahs, and the living embodiment of all that is bad.[137] In fact, the Seventh Circuit Court of Appeals explicitly stated in its decision to overturn marriage bans that "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world."[138] The *Obergefell* decision echoes this sentiment by deliberately chronicling the history of gay discrimination.

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135. Bowen v. Gilliard, 483 U.S. 567, 602 (1987); Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

136. Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977) (stating that immutability does not apply to resident aliens); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (finding that religious identity and alienage are changeable but still constitute suspect classes); Miller v. Albright, 523 U.S. 420, 431 (1988) (declaring that illegitimacy may be mutable).

137. WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY (2014).

138. Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014).

It observes that the growing recognition of the "humanity and integrity of homosexual persons" has been a hard fought battle spanning many generations of Americans.[139] Given the national legacy of shunning and dehumanizing gays, the fact that the Supreme Court characterizes Jim Obergefell's relation to his husband as "love" is both affirming and exceptional.[140] As recounted by the decision, "same-sex intimacy was condemned as immoral" and was criminalized in various states for many years.[141] In fact, the Supreme Court blessed state laws criminalizing same-sex intimacy as constitutional until relatively recently when the Supreme Court overturned the *Bowers* precedent in 2003 with its decision in *Lawrence*.[142] The Court recognized that by upholding sodomy laws in *Bowers* it had "denied gays and lesbians a fundamental right and caused them pain and humiliation."[143]

In addition to the moral and legal condemnation heaped upon gays, *Obergefell* notes that "homosexuality was treated as a mental illness" and "many persons did not deem homosexuals to have a dignity in their own distinct identity."[144] Individuals with same-sex attraction were in fact routinely prescribed shock therapy, punishing methods of aversion therapy, and lobotomies as medical and psychological treatments designed to supposedly cure them of same-sex attraction.[145] The pariah status of homosexuals in virtually every segment of society caused many gay people an extreme amount of shame and self-loathing. Gay people were painfully forced to "change" their sexual orientation or in more accurate parlance were painfully forced to "hide" their orientation by becoming closeted to themselves, as well as to friends, family, churches, and co-workers. *Obergefell* gives a nod to the stigmatizing and segregating effect of the closet by remarking that "a truthful declaration by same-sex couples of what was in their hearts had to remain unspoken."[146]

The *Obergefell* Court further elaborated upon the long history of discrimination by stating that "gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights

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139. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).
140. *Id.* at 2594, 2608.
141. *Id.* at 2588.
142. Lawrence v. Texas, 539 U.S. 558 (2003).
143. *Obergefell*, 135 S. Ct. at 2606.
144. *Id.* at 2588, 2596.
145. FRANK, *supra* note 137.
146. *Obergefell*, 135 S. Ct. at 2596.

to association."[147] Times have gotten better due in large part to the bravery of gay people coming out and fighting discriminatory laws but discrimination against gay people is still pervasive and ongoing. The Kentucky same-sex couples pointed out in their Opening Brief "[t]here is still no express federal ban on sexual orientation discrimination in employment, housing, education, or credit" and many states still lack laws that would protect gay people from discrimination in employment, housing, education, credit, public accommodations, or other areas relevant to the lives of so many gay Americans.[148] States are also increasingly passing legislation that sanctions the discrimination against gay people in public accommodations and many states still allow professionals to engage in treatments that seek to "cure" gay people of their gayness.

Discrimination within the context of marriage illustrates the history of discrimination against the class of gays and lesbians. The "long history of disapproval" of gay relationships and the fact that gay couples were legally locked out of a "central institution of our Nation's history" for so long served as evidence to the majority of the Court that there has been a history of discrimination against gay people.[149] As the *Obergefell* opinion describes, gay couples are "denied the constellation of benefits that the States have linked to marriage" and this denial causes "more than just material burdens."[150] "Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."[151] Given the checkerboard pattern of law across the nation and the related hospital visitation rights that accompany marriage, the Supreme Court recognized that gay couples are likely to suffer a "severe hardship" if one of the spouses needs to be hospitalized while on "an ordinary drive into a neighboring State to visit family or friends."[152]

Gay people also have a history of discrimination against them in their family units, which has undermined their ability to safeguard and care for their children. *Obergefell* took notice that children of gay couples, "through no fault of their own," suffer "significant material costs," "stigma," "harm and humiliation," and "a more difficult and uncertain family life" due to their parents inability to marry.[153] Based

147. *Id.* at 2596.

148. Brief for Petitioners Kentucky Same-Sex Couples at 36, *Obergefell*, 125 S. Ct. 2584 (Nos. 14-556, 14-562, and 14-574).

149. *Obergefell*, 135 S. Ct. at 2602, 2604.

150. *Id.* at 2590, 2601.

151. *Id.* at 2601.

152. *Id.* at 2607.

153. *Id.* at 2600-01.

solely on the perceived good intentions and mighty principles of the States' same-sex marriage bans, an entire class of people who just want to be left alone in their own sincere personal, family, and religious beliefs were discriminated against. The children of this class also experienced the collateral damage of this discrimination.

The types of de jure and de facto discrimination borne by gay people throughout history are legion. The *Obergefell* decision did not provide an exhaustive list of the discrimination gay people have suffered throughout history or continue to face because to do so likely would have entailed a much longer opinion. However, the *Obergefell* opinion fully addresses the first prong of the Suspect Class Doctrine. A detailed discussion of the history of discrimination was not required for the Court to determine that there was a fundamental right to choice in marriage under substantive due process or equal protection. The history of discrimination laid out by the Court was an effort to demonstrate that the marriage bans violated the equal protection rights of gays and lesbians as a legally protected class.

2. Factor 2: *Obergefell* Recognizes That Sexual Orientation Is Not Relevant to the Ability To Perform or Contribute to Society

The second inquiry of the Suspect Class Doctrine is whether the classification of sexual orientation "frequently bears no relation to ability to perform or contribute to society."[154] This prong, which is sometimes known as the "irrelevance" prong, as well as the "history of discrimination" prong are the most heavily weighted in the Suspect Class Doctrine.[155] As *Obergefell* notes when describing the history of anti-gay discrimination, gay sexual orientation was historically regarded as something that by definition impaired an individual's ability to participate in and contribute to society. Contrary to abusive and outdated stereotypes of homosexuals as immoral, sexually deviant, and mentally disturbed, there is no valid evidence demonstrating that being gay or lesbian negatively impacts a person's ability to participate in or contribute to society. With respect to this inquiry, the briefs supporting same-sex couples often quote the American Psychiatric Association's conclusion that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational abilities."[156]

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154. Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

155. Windsor v. United States, 699 F.3d 169, 181 (2nd Cir. 2012) (holding that "immutability and lack of political power are not strictly necessary factors to identify a suspect class").

156. Brief for the United States as Amicus Curiae Supporting Petitioners at 18, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, and 14-574).

History is full of the contributions of gay people in all fields of endeavor, even when they did not fully disclose their sexual orientation because of discriminatory laws and overwhelming prejudice. In *Obergefell*, the Court specifically applauded the contribution of Army Reserve Sergeant First Class Ijpe DeKoe saying "he served this Nation" in Afghanistan.[157] In another passage, the opinion refers to DeKoe as having "served this Nation to preserve the freedom the Constitution protects."[158] *Obergefell* also makes special acknowledgement of the contributions of the married couple of April DeBoer and Jayne Rowse.[159] The opinion recognized that both women work as nurses and have taken in a number of abandoned, special needs children.[160]

The Court determined that the characteristic of being attracted to one's own gender does not impair the ability to contribute to the family unit. Although the States argued that the marriage bans promoted a legitimate government interest in only allowing heterosexual marriages because the presence of both genders is necessary for optimal child rearing, the Supreme Court summarily rejected this argument. The opinion notes that "as all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."[161] It also stated the fact that "most States have allowed gays and lesbians to adopt" is "powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[162]

Obergefell makes an explicit determination that being gay has no bearing on the ability to live in a loving, committed relationship, serve as a stable and nurturing parent, engage in a noble profession, help other individuals that are vulnerable in the community, or generally contribute to society. As one commenter observed, that there "could even be a matter of debate" on the bearing of gayness on a person's ability to contribute to society "is a sad testament to the widespread discrimination still faced by gays and lesbians."[163] Indeed, *Obergefell*'s discussion of the irrelevance prong is historically important as it signals a shift in the legal status of gays. Not only does the Court's discussion address an inquiry of

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157. *Obergefell*, 135 S. Ct. at 2606.
158. *Id.* at 2595.
159. *Id.*
160. *Id.*
161. *Id.* at 2600.
162. *Id.* at 2606.
163. Roberta Kaplan & Julie Fink, *The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation*, 2012 CARDOZO L. REV. DE NOVA 203, 212 (2012).

the Suspect Class Doctrine, it serves as a testament to the equal dignity, humanity, and integrity of gay people.

3. Factor 3: *Obergefell* Recognizes that Gay Americans Have Obvious, Immutable, or Distinguishing Characteristics that Define Them as a Discrete Group

With regard to what is commonly known as the immutability factor, the *Obergefell* majority recognized that sexual orientation is an immutable characteristic indicative of protected class status. The immutability of sexual orientation was specifically mentioned twice and referenced by implication on numerous occasions throughout the opinion. However, the Court did not find it necessary to delve into all the sophisticated nuances of this factor or how the factor was litigated in previous gay rights decisions. Immutability is not necessarily a dispositive factor under the Suspect Class Doctrine but, like the relevance of gayness on the ability to contribute to society, it has proved to be a very controversial prong.

The full scope of judicial inquiry under the immutability factor is actually quite broad. This factor looks not just to the immutability of class characteristics but also to whether a class "exhibit[s] obvious, immutable, *or* distinguishing characteristics that define them as a discrete group."[164] Although immutability is just one consideration under the broad analysis of this factor, it should also be noted that immutable characteristics have been strictly conceived of as characteristics that are not capable of change, or in other words an "accident of birth," and more flexibly conceived of as characteristics "so fundamental to one's identity that a person should not be required to abandon them."[165] *Obergefell* tactfully recognizes that sexual orientation can be an inherent characteristic while also recognizing that sexual orientation is a fundamental aspect of chosen identity as well. The Supreme Court states very early in the opinion that sexual orientation is immutable. It provides:

> Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.[166]

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164. Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

165. Latta v. Otter, 771 F.3d 456, 464-65 (9th Cir. 2014); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 986-87 (2012).

166. *Obergefell*, 135 S. Ct. at 2594.

The sentiment in this passage recognizes that gay sexual orientation is fixed and incapable of change under the firmer understanding of the immutability factor and that marriage to a person of the same sex represents the only real and authentic way for a gay person to be married. The passage also provides compelling recognition that banning gay conduct in marrying someone of the same sex is tantamount to actually banning gay identity. In other words, banning predictable gay conduct in seeking long-term companionship with someone of the same sex and formal recognition of that relationship in effect represents a ban on the expression of immutable gay identity.

In a reference to the Brief for American Psychological Association et al. as Amicus Curiae, the Supreme Court also says that "[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable."[167] This particular passage speaks to the firm understanding of sexual orientation as immutable. It also references the history of discrimination by the medical, psychiatric, and psychological professions in treating homosexuals as unnatural and diseased.

Language choices within the opinion also indicate that the Court views sexual orientation to be immutable as a reflection of inherent nature as well as a reflection of intimate personal choice usually based upon inherent nature. The opinion speaks about the right of gays and lesbians "to define and express their identity" and discusses how the Constitution protects "intimate choices that define personal identity and beliefs" from government infringement.[168] In one passage, *Obergefell* provides that "same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."[169] The Court also highlighted an excerpt from *Lawrence* which strongly alluded to the immutability of sexual orientation. According to the opinion, *Lawrence* protected the rights of gays and lesbians as a class by holding that the state "cannot demean their existence or control their destiny by making their private sexual conduct a crime."[170]

Finally, the Court's acknowledgement of the immutable nature of sexual orientation is also strongly demonstrated by the frequent comparison between the bans on same-sex marriages and the "prohibition on interracial marriage" that was struck down in the famous

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167. *Id.* at 2596.
168. *Id.* at 2597, 2621.
169. *Id.* at 2602.
170. *Id.* at 2604 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

Loving case, as well as "invidious sex-based classifications in marriage" that were struck down in various cases.[171] Comparing sexual orientation to race and sex, which have been regarded as immutable characteristics at least for purposes of identifying a suspect class, also demonstrates that the Court entertained the immutability inquiry and found the factor to have been satisfied. Due to *Obergefell*, gay people no longer bear the burden of justifying their fundamental existence and are significantly but not completely relieved of second class status in America.

a. The Comparative Immutability of Sexual Orientation, Gender, and Race

Although a complete and robust discussion about the nature of race and gender in equal protection cases is beyond the scope of this Article, it is important to compare the suspect classes of race and gender to the now suspect class of sexual orientation in order to fully appreciate how the Court's recognition of immutability in *Obergefell* is profound and legally important. While the immutability of sexual orientation has been the subject of significant social, religious, and legal debate and numerous expert witnesses have been called in gay rights cases like *Romer* and *Windsor* to testify on this very issue, the presumed and fixed immutability of race and sex has often gone unquestioned in equal protection cases.

The disparity in legal history and legal analysis regarding the immutability of sexual orientation versus the immutability of race and sex is notable and somewhat ironic given that concepts of race and sex are actually quite subjective and unstable. Race, as a legal concept, has been a historically contingent and somewhat crude classification defined by those in the majority in order to preserve the second class status of minorities and protect a highly reductive and ill-conceived notion of racial integrity.[172] This reality, in addition to the natural and attendant complexities of race and culture, may be why courts have started to stray away from immutability as a heavily weighted and dispositive factor in identifying suspect classes.

One of the best examples of the historical contradictions and subjectivity of race immutability is actually demonstrated in the *Loving* case, which overturned interracial marriage bans and is frequently referenced by the Court in the *Obergefell* decision. In *Loving*, Mildred Loving was prosecuted for marrying a "white" man that was outside her

171. *Obergefell*, 135 S. Ct. 2584.
172. Loving v. Virginia, 388 U.S. 1 (1967).

race.[173] Mildred Loving's understanding of herself as both Indian[174] and colored was in direct opposition to the statute that categorically defined her race as only colored. Under Virginia antimiscegenation laws that "arose as an incident to slavery," colored people were defined as those "in whom there is ascertainable any Negro blood."[175] The State's definition of colored as a fixed racial category essentially extinguished Mildred Loving's legitimate identification of herself as mixed race Indian. In the time of *Loving*, state officials drafted overly simplistic certificates of racial heritage that allegedly verified a person's race presumably based at least partially upon racial stereotyping.[176] Racial certificates were then used to define who a person could or could not marry.[177] Traditionally, a singular and narrow racial classification was imposed even if the person was mixed race and even if the official classification dismissed the individual's own understanding of his or her family and cultural history.

In recent times "the United States government has essentially abandoned the practice of imposing racial identity on Americans, instead relying largely on voluntary self-identification to keep track of racial data."[178] While modern day tribal governments within the United States still use blood quantum (i.e., percentages of Indian blood) or proof of lineal descent from a tribal member for tribal enrollment, these presumed requirements of racial integrity only go so far as to serve as a proxy for tribal political affiliation.[179] Current tribal enrollment standards that depend upon blood quantum, irrespective of some misunderstanding, do not officially define race and are certainly not without criticism as being a relic of the federal government's assimilation policies that sought to eliminate native peoples.[180] Race is simply no longer a state imposed and fixed characteristic to the extent it ever authentically was.

Self-identification as well as third-party recognition of race has replaced government assignments of race, but race is still far from being categorically immutable. While it is certainly true that a person cannot change their ancestors, and that changing certain physical and genetic characteristics that indicate race is extremely difficult, peoples'

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173. *Id.* at 2-3.

174. THE LOVING STORY (Augusta Films 2011).

175. *Loving*, 388 U.S. at 5-6.

176. *Id.* at 6-7.

177. *Id.*

178. Anthony R. Enriquez, Student Author, *Assuming Responsibility for Who You Are: The Right to Choose "Immutable" Identity Characteristics*, 88 N.Y.U.L. REV. 373, 382 (2013).

179. Andrea Appleton, *Blood Quantum: A Complicated System that Determines Tribal Membership Threatens the Future of American Indians*, HIGH COUNTRY NEWS (Jan. 12, 2009), http://www.hcn.org/issues/41.1/blood-quantum.

180. *Id.*

relationship or understanding of their racial composition can change over time and is highly dependent on how they are questioned about their racial identity. Census data frequently shows that the racial self-identification of many Americans changes over time and self-identification can be even more complicated in the case of those with mixed race backgrounds.[181] Similarly, third-party identification of race is highly unreliable and subject to influence by the third party's own understanding of race as well as their underlying motives, biases, and sophistication. A person's racial perceptions of themselves and others can literally change based upon where they are, what they are doing, and who they are with.

Similarly, gender is not strictly immutable if the immutability factor is only rigidly understood as an accident of birth or a characteristic that cannot be changed.[182] For example, intersex persons that are born with mixed female and male genetic and biological markers are routinely operated upon when young and forced to identify and present themselves as a singular gender that does not correspond with their inherent biology or their understanding of their own identity.[183] Historically, society has imposed a gender on intersex people in contradiction to their fundamental nature. In a separate context, many transgender people also intuitively understand their gender as different from their physical sex from an early age and believe they are transgender by incident of birth. They later present themselves as the gender that does not correspond with their sex. Transgender people often transform their physical bodies with hormones and surgeries to make their physical sex correspond to the gender that they identify with, as opposed to a gender that they were assigned by society. In fact, "[a]majority of states allow transgender people to change their legal names, as well as the sex on their birth certificates."[184] The presumption that gender is fixed and permanently incapable of change is not easily supported although it can practically be stated that transgender and intersex identities are still immutable because

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181. D'Vera Cohn, *Millions of Americans Changed Their Racial or Ethnic Identity from One Census to the Next*, PEW RESEARCH CENTER (May 5, 2014), http://www.pewresearch.org/fact-tank/2014/05/05/millions-of-americans-changed-their-racial-or-ethnic-identity-from-one-census-to-the-next/.

182. For a thorough discussion of race and gender mutability, please review Enriquez, *supra* note 178, at 384-86.

183. GERALD CALLAHAN, BETWEEN XX AND XY: INTERSEXUALITY AND THE MYTH OF TWO SEXES, 115-25 (2009).

184. Enriquez, *supra* note 165 at 385.

they are inherent, fundamental to identity, and cannot or should not be required to change.[185]

Despite the unacknowledged and problematic nature of firm immutability in the race and gender suspect classifications, the immutability factor has long been used to exclude gays from suspect classification prior to *Obergefell*. In the 1990 *High Tech Gays v. Defense Industry Security Clearance Office* case, for instance, the court stated that "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage."[186] Similarly, in the 1989 *Woodward v. United States* case, the court claimed that "members of recognized suspect or quasi-suspect classes, e.g. blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."[187]

b. The Litigated History of Homosexuals as Either a Class Defined by Sexual Acts or a Class Defined by Distinguishing Characteristics

The argument that gays are a conduct-based class defined by sexual acts rather than a status-based class defined by distinguishing and immutable characteristics also has a storied history in cases before the Supreme Court. The *Bowers* Court applied rational basis to uphold a Georgia statute that prohibited both straight and gay sodomy. The Supreme Court, however, reframed the constitutional issue presented in the case to instead focus only on the sexual conduct of homosexuals criminally prosecuted under the sodomy statute. *Bowers* held that the Fourteenth Amendment did not confer "a fundamental right to homosexuals to engage in . . . sodomy" because "[p]roscriptions against that conduct have ancient roots."[188]

In stark contrast to *Bowers*, the Court in *Romer* identified gays and lesbians as a discrete group with distinguishing characteristics rather than merely criminals that engaged in the conduct of homosexual sodomy. Although the *Romer* Court never officially declared gay people to be a suspect class under equal protection analysis, it clearly treated gay people as a status-based class defined by sexual orientation rather than a conduct-based class in which sodomy defined the class of homosexuals.

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185. Golinski v. U.S. Office of Pers. Mgmt., 842 F. Supp. 2d 968, 986 (N.D. Cal. 2012); Enriquez, *supra* note 165 at 386 n. 58.

186. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

187. Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

188. Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

The *Romer* Court noted that Amendment 2 prohibits all antidiscrimination measures "designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians."[189] It specifically disregarded arguments by supporters of Amendment 2 that "unlike race, national origin, or sex, homosexuality is not an immutable characteristic, because what defines the class of homosexuals is conduct."[190] According to the decision, Amendment 2 violated equal protection because it was a "status-based enactment" that reflected an "animus toward the class" of gays and lesbians and was designed to "harm a politically unpopular group."[191] Dissenters in *Romer* that still adhered to the conduct-based *Bowers* reasoning remarked that "if it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed desire to engage in the conduct."[192]

Lawrence was primarily decided on due process and privacy grounds but it "also sought to remedy the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State."[193] Like *Romer*, *Lawrence* did not explicitly find gays to be a suspect class but did refer to homosexuals as a status-based class based on sexual orientation. It noted that "sexuality finds overt expression in intimate conduct with another person."[194]

Consistent with the attitude of *Romer* and *Lawrence*, the *Windsor* Court noted that the Federal Government in DOMA imposed restrictions and disabilities upon the state defined class of gay and lesbian couples. The parties in the case specifically debated the immutability of sexual orientation, with the DOMA supporters favoring a conduct-based classification of homosexuals to which only rational basis review would apply.[195] In response to these arguments, the American Psychological Association (APA) and Human Rights Campaign (HRC) briefs asserted that "sodomy does not define the suspect class of homosexuals," "homosexual identity is immutable," and is "not solely based on behavior in which an individual chooses to engage."[196] In a somewhat bizarre ends justify the means strategic move, the Bipartisan Legal Advisory Group

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189. Romer v. Evans, 517 U.S. 620, 624 (1996).

190. McClain, *supra* note 38 at 394 (referring to ACLJ Brief). The McClain article provides great detail on the conduct-based versus status-based arguments in the *Windsor* and *Romer* cases.

191. *Romer*, 517 U.S. at 632, 634-35.

192. *Id.* at 642 (Scalia, J., dissenting).

193. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

194. *Id.* at 2600.

195. McClain, *supra* note 38 at 432.

196. *Id.* at 400.

(BLAG), as a supporter of so-called traditional marriage, Christian sensibilities, and default heterosexuality, argued in favor of something that actually resembles the sexual fluidity theories promoted by some academics in order to disprove the immutability factor. Edie Windsor, the plaintiff in the case, spent forty-four years in a committed, romantic relationship with her wife and regards herself a lesbian.[197] However, BLAG used the fact that she had once been briefly married to a man during the repressive social environment following World War II to assert that "sexual orientation is a fluid characteristic capable of changing over a person's lifetime."[198] While still making the conservative argument that same-sex unions were morally inferior and had diminished ability to procreate and raise families, "BLAG argued that immutability did not apply because sexual orientation is 'not necessarily fixed,' but 'may change over time, range along a continuum, and overlap.'"[199] In the end and despite passionate debate on the immutability of gay sexual orientation, *Windsor* stuck to its definition of gays and lesbians as a status-based class.

The immutability of gay sexual orientation has long been the unique preoccupation of significant religious, political, scientific, psychological, medical, and legal debate, but the tide is changing. In addition to court decisions upholding conversion therapy bans, juries have found ex-gay conversion therapy groups to be in violation of state statutes protecting consumers from fraudulent and unconscionable business practices.[200] Notably, the Third Circuit Court of Appeals upheld a New Jersey statute prohibiting licensed counselors from engaging in sexual orientation change efforts ("SOCE"), also known as conversion or reparative therapy, with clients under the age of 18.[201] New Jersey's minor conversion therapy ban survived against First Amendment challenges because it advances New Jersey's "'substantial' interest in protecting minors from ineffective or harmful professional services."[202] The legislative record warns of serious psychological and health risks accompanying conversion therapy, including "depression, anxiety, self-destructive

197. Roberta Kaplan, *"It's All About Edie, Stupid": Lessons from Litigating* United States v. Windsor, 29 COLUM. J. GENDER & L. 85, 88-91 (2015).

198. *Id.* at 89, n.15, n.17.

199. *Id.* at 425.

200. Mark Joseph Stern, *Consumer Fraud Lawsuit Forces Ex-Gay Conversion Therapy Group to Pay Victims and Disband*, SLATE (Dec. 21, 2015), http://www.slate.com/blogs/outward/2015/12/21/settlement_reached_in_consumer_fraud_ex_gay_conversion_therapy_case.html

201. King v. Governor, 767 F.3d 216 (3rd Cir. 2014).

202. *Id.* at 235.

behavior, and suicidality."[203] Relevant to the discussion on gay immutability, the Court observed that "it is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition."[204]

The Ninth Circuit Court of Appeals upheld a similar California statute banning licensed mental health providers from providing sexual orientation conversion therapy to minors based upon an overwhelming legislative record that this type of so-called therapy is "harmful and ineffective."[205] The conversion ban, determined to be constitutional, applied to conversion "techniques such as inducing vomiting or paralysis, administering electric shocks, and performing castrations" as well as "techniques carried out solely through words."[206]

The *Obergefell* decision sends a strong message that the legal debate on the immutability of sexual orientation is now settled. *Obergefell*'s language not only fulfills a requirement of the Suspect Class Doctrine, it is culturally revolutionary. Even though there are obvious elements of choice in the expression of any sexual orientation, the dominant narrative and related experience of gay people is that same-sex attraction is inherent, natural, and immutable in the sense of being an accident of birth or something that is not subject to change. As the United States so eloquently phrased it in its amicus curiae brief in Obergefell, "[t]he choice lesbian and gay people face is whether to live their lives openly and honestly."[207]

Given the religious and social condemnation of homosexuality as an immoral tendency to be shunned and condemned, given the medical and psychological condemnation of homosexuality as a psychopathic condition or mental illness to be cured, and given the law's long endorsement and promotion of discrimination against gays, the Supreme Court's explicit recognition of immutability is a long overdue acknowledgement of the dignity that gay people possess in their fundamental identity as well as their intimate choices.[208]

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203. *Id.* at 238.
204. *Id.* at 239.
205. Pickup v. Brown, 740 F.3d 1208, 1232 (9th Cir. 2014).
206. *Id.* at 1235.
207. Brief for the United States as Amicus Curiae Supporting Petitioners at 19, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, and 14-574).
208. *See generally* Brief of Amici Curiae Survivors of Sexual Orientation Change Therapies in Support of Petitioners, *Obergefell* 135 S. Ct. 2584 (Nos. 14-556, 14-562, and 14-574).

4. Factor 4: *Obergefell* Recognized the Political Powerlessness of Gay Americans

The *Obergefell* opinion states that "the idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts'."[209] History is clear that gays were and continue to be a powerless minority that needs judicial protection from the "vicissitudes of political controversy," majorities, and state officials.[210] The legislative and judicial victories achieved by gay people, largely aimed at dismantling oppressive and focused discrimination, do not represent "spoils of war won by a politically powerful class."[211] "Instead, they are merely kernels of dignity accomplished by decades of political struggle."[212]

Political powerlessness is still considered a relevant factor under the Suspect Class Doctrine although it is assigned diminished weight compared to the first two factors. When discussing the fundamental right to marry, *Obergefell* commented that "it is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process."[213] Courts have implicitly downplayed the role of the political powerlessness factor by applying equal protection to men and whites as distinct classes protected from discrimination despite the fact that men and whites exercise considerable political power and are not the typical classes impacted by systematic legal discrimination.[214] Other courts have also undermined the importance of the factor by explicitly stating that "immutability and minority status or political powerlessness are subsidiary"[215] to the history of discrimination factor and the relevance to social contribution factor. Significant scholarly work also critiques the political powerlessness factor because it has often been applied by courts in a narrow or inconsistent manner.[216]

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209. *Obergefell*, 135 S. Ct. at 2605-06.

210. *Id.*

211. Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1032 (2014).

212. *Id.*

213. *Obergefell*, 135 S. Ct. at 2606.

214. Craig v. Boren, 429 U.S. 190 (1976) (holding that male plaintiffs can be victims of invidious gender-based discrimination); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (suggesting equal protection means the same things for all races).

215. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 427, 481 (Conn. 2008); Varnum v. Brien, 763 N.W. 2d 862, 894 (Iowa 2009).

216. Hutchinson, *supra* note 211.

Contrary to the nuanced considerations that define true political power, the Supreme Court found in *Cleburne v. Cleburne Living Center* that heightened scrutiny partly did not apply to the mentally disabled because they had not demonstrated that they had "no ability to attract the attention of the lawmakers."[217] If the language within *Cleburne* is taken literally, as advocated by some courts and the States supporting the marriage bans, "it would disqualify all of the existing suspect and quasi-suspect classes as candidates for judicial solicitude."[218] Even the most severely and historically disadvantaged suspect classes were at some point capable of attracting legislative attention.

Gay people were and are portrayed as a sinister elite, pulling marionette strings behind the scenes of Hollywood and Washington, hell-bent on the destruction of good and normal society. The theme of the threatening gay urban elite was reflected in several now notorious court rulings that denied gay people equal protection of the law.[219] Consistent with the stereotype of the politically powerful homosexuals, Justice Scalia famously remarked in his dissent from *Romer v. Evans* that the Colorado constitutional amendment prohibiting measures to remedy gay discrimination was simply "the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it."[220]

The *Obergefell* Court specifically observes that DOMA's ban on recognition of valid same-sex marriages and state bans on both the licensing and recognition of same-sex marriage were part of a nationwide political backlash against relatively small strides made by two states in favor of gay rights.[221] Gay people were politically powerless against this nationwide backlash. In the 1993 *Baehr v. Lewin* case, the Hawaii Supreme Court held that the state law excluding gay couples from marriage constituted a classification based upon sex that violated the Hawaiian Constitution under strict scrutiny review.[222] Later in 2003, the Supreme Judicial Court of Massachusetts held that same-sex couples were entitled to marry based upon the state Constitution.[223] The

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217. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985).

218. Hutchinson, *supra* note 211 at 995.

219. Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989); Dean v. Dist. of Columbia, 653 A.2d 307, 350 (D.C. 1995); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990).

220. Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

221. Obergefell v. Hodges, 135 S. Ct. 2584, 2596-97 (2015).

222. *Id.*

223. *Id.*

Obergefell Court acknowledges that some states gradually began granting gays the right to marry in line with these two state court decisions but also acknowledges that there was still substantial cultural and political opposition. *Obergefell* explains that even though the Hawaii "decision did not mandate that same-sex marriage be allowed, some states were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners."[224] The *Obergefell* majority also observes that,"[s]o too in 1996, Congress passed the Defense of Marriage Act, 110 Stat. 2419, defining marriage for all federal-law purposes as 'only a legal union between one man and one woman as husband and wife.'"[225]

Gay people were politically powerless against the implementation of DOMA, the main purpose of which the Supreme Court previously noted was "to impose inequality" and to burden the lives of gay couples so their "unions will be treated as second-class marriages."[226] The impact of DOMA was extreme, especially considering the minimal level of political gain that gay people actually achieved in Hawaii. Although justified by reactionary paranoia, DOMA was passed by a bi-partisan Congress and signed into law by Democratic President Clinton.[227] It should be pointed out in order to further illustrate the political powerlessness of gays that Clinton had made campaign promises to the gay community to overturn the then-existing ban on homosexuals in the military, but he eventually caved to overwhelming political opposition to gay rights and signed both DOMA and Don't Ask Don't Tell into law during his term in office.[228] Gay people were only relieved of the political burdens of DOMA through the judicial relief afforded by the *Windsor* decision.

Similarly, gay people were politically powerless against state bans of same-sex marriage that were either passed by legislatures or approved by a political majority of voters through the referendum process. But for *Obergefell* judicially overturning the Sixth Circuit same-sex marriage bans, and but for the state and federal judicial decisions overturning same-sex marriage bans that are listed in Appendix A to the *Obergefell* decision, gay people would still be the political losers on same-sex marriage in many states.

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224. *Id.*
225. *Id.*
226. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).
227. McClain, *supra* note 38 at 412-13.
228. GARY MUCCIARONI, SAME SEX, DIFFERENT POLITICS, 174-204 (2008).

The political powerlessness of gay people was also exemplified by the *Bowers*, *Romer*, and *Lawrence* cases, which the *Obergefell* opinion draws attention to. In providing a history of the legal status of gay people, *Obergefell* explains that in *Romer*, "the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation."[229] Like DOMA and the state same-sex marriage bans, the Colorado constitutional amendment was passed to undermine small political gains achieved by the gay community in passing limited antidiscrimination measures in three cities.[230] The constitutional amendment was passed by a considerable margin of voters due to fear that gay people would gain protected suspect class status like women and racial minorities and largely based upon a campaign that perpetuated horrific stereotypes of gays.[231]

Discussions regarding the history of discrimination and the political powerlessness of the class of gays and lesbians sometimes overlap in *Obergefell*. Although the Sixth Circuit states argued that gay people did not need protection because they captured public support and political power, *Obergefell* recognizes that gays are discriminated against in nearly every sector of society and law. The decision is replete with references to the second class social status of gay Americans. As noted by the Court, same-sex intimacy was frequently criminalized by state legislatures.[232] Certain state legislatures voluntarily abandoned sodomy laws applying to gay couples on their own initiative. However, these actions were primarily due to the adoption of the Model Penal Code, which recommended that these laws were too difficult to enforce rather than in response to a political movement seeking equality for gay people.[233] *Obergefell* states that the *Bowers* Court may have upheld politically sanctioned discrimination through sodomy laws "as a cautious endorsement of the democratic process."[234] In fact, it took the Supreme Court case of *Lawrence* in 2003 to actually declare criminal punishment of same-sex intimacy unconstitutional.[235] For most of America's past, gay

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229. *Obergefell*, 135 S. Ct. at 2596.

230. Romer v. Evans, 517 U.S. 620, 623 (1996).

231. McClain, *supra* note 38 at 397-98 (discussing Amendment 2 campaign, which claimed "gays are sex-crazed, disease-ridden perverts out to destroy the traditional family" and "are 12 times as likely as heterosexuals to molest children" and "most gays urinate or defecate on their partner").

232. *Obergefell*, 135 S. Ct. at 2596, 2601.

233. MUCCIARONI, *supra* note 228.

234. *Obergefell*, 135 S. Ct. at 2605.

235. *Id.*

people were not politically powerful enough to gain legal protection for their most natural and intimate acts. Expressing something as basic to a gay person's identity as sexual intimacy was viewed by state legislatures as depraved and criminal.

Political power has been elusive for gay people as a class because it is exceedingly hard to organize a political movement when dominant society either completely denies your existence or characterizes you as a disease ridden, mentally unstable sinner, or criminal. Overwhelming discrimination and the criminal and employment consequences associated with being identified as gay forced people to deny their sexual orientation to family and coworkers, or even themselves. Furthermore, *Obergefell* recognized that the criminality of homosexuality also meant that gay people were "targeted by police" and "burdened in their rights to associate."[236] The imposed stigma of homosexuality made it very hard to be a visible homosexual. Visibility and the ability to associate and organize with others of your class is essential to gaining political power.

The Supreme Court's discussions of the political struggles of and historical discrimination against gay people are profoundly important because they advance sexual orientation as a suspect class and also because they represent a clear break from legally entrenched stereotypes. Gay people are politically powerless because they represent a minority of the population. As discussed by *Obergefell*, the political process has repeatedly encouraged discrimination against gays in employment, civic service, adoption, and marriage. Physical abuse has been tolerated by governmental actors and actively pursued by other governmental actors, such as the police. Gays were abused by the medical and psychological establishment and were routinely denied health care. The view of gays and lesbians as enemies of American democracy and the routine purging of gays and lesbians from positions of influence also harmed their political potency. All this discrimination negatively impacted the social standing, quality of life, health, income, and political power of gay people, particularly when combined with the multiplying factors of sexism, racism, and classism. *Obergefell* rejects the outdated and quite frankly ridiculous stereotype of gay people as a nefarious political elite composed exclusively of rich, white, male, urban dwellers.

IV. CONCLUSION

Obergefell is a momentous Supreme Court decision that will likely influence this generation and many generations to come. By recognizing

236. *Id.* at 2696.

the right of gay Americans to enter into the central institution of this nation's legal and social life, *Obergefell* recognizes the humanity of a people once criminalized and in many instances still treated as outcasts. The decision relieves present and future gay and lesbian couples, as well as their children and families, from the material burdens, instability, and shame imposed by second class status. Although the ruling rests upon the Fourteenth Amendment's Due Process and Equal Protection Clauses, the Court also announces a theory of constitutional interpretation deeply rooted in the interconnected nature of all rights and freedoms. The language and reasoning of *Obergefell* can be used to ensure greater freedom for gay Americans and all Americans in the exercise of personal conscience and belief, liberty, equality, and intimate conduct. Most importantly, *Obergefell* safeguards the individual from the tyranny of democratic majorities and government intrusion, which is exactly what civil liberties and civil rights are designed to do.

The profound and intimate power of the *Obergefell* decision is seen not just in its protection of individual rights but also in its protection of collective rights. After many years of contentious litigation, *Obergefell* finally recognizes gay people as a suspect class through the discussion of the factors of the Suspect Class Doctrine. *Obergefell* details the history of persecution, exclusion, and political powerlessness that predominated the shared experience of gay people. The decision also recognizes that gay people are a distinct and identifiable class of people and that gay sexual orientation is immutable and fundamental to identity. Furthermore, the Court determined that being gay does not impair the ability of gays to serve their country, to make valid choices, to be married, or to create loving, committed families. At last, gay Americans are entitled to equal dignity under the law.

I wish I could share
All the love that's in my heart
Remove all the bars
That keep us apart
I wish you could know
What it means to be me
Then you'd see and agree
That every man should be free[237]

237. Nina Simone, *I Wish I Knew How It Would Feel To Be Free*, on THE VERY BEST OF NINA SIMONE 1967-1971 SUGAR IN MY BOWL (SONY Music 1998).