

12-2335-cv(L)
Windsor v. United States

1
2 **UNITED STATES COURT OF APPEALS**

3
4 **FOR THE SECOND CIRCUIT**

5
6 August Term, 2012

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9 (Argued: September 27, 2012 Decided: October 18, 2012)

10 Docket No. 12-2335-cv(L); 12-2435(Con)

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15 EDITH SCHLAIN WINDSOR, IN HER OFFICIAL CAPACITY AS EXECUTOR
16 OF THE ESTATE OF THEA CLARA SPYER,

17
18 Plaintiff-Appellee,

19
20 - v.-

21
22 UNITED STATES OF AMERICA,

23
24 Defendant-Appellant,

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26 and

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28 BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE
29 OF REPRESENTATIVES,

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31 Intervenor-Defendant-Appellant.

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35 Before: JACOBS, Chief Judge, STRAUB and DRONEY,
36 Circuit Judges.

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38 Intervenor Bipartisan Legal Advisory Group of the
39 United States House of Representatives appeals from an order
40 of the United States District Court for the Southern
41 District of New York granting summary judgment in favor of

1 the surviving spouse of a same-sex couple who was denied the
2 benefit of the spousal deduction under federal tax law. The
3 United States, the defendant, is a nominal appellant. For
4 the following reasons, we conclude that Section 3 of the
5 Defense of Marriage Act violates equal protection and is
6 therefore unconstitutional.

7 Judge STRAUB dissents in part and concurs in part in a
8 separate opinion.

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1 DENNIS JACOBS, Chief Judge:

2 Plaintiff Edith Windsor sued as surviving spouse of a
3 same-sex couple that was married in Canada in 2007 and was
4 resident in New York at the time of her spouse's death in
5 2009. Windsor was denied the benefit of the spousal
6 deduction for federal estate taxes under 26 U.S.C. § 2056(A)
7 solely because Section 3 of the Defense of Marriage Act
8 ("DOMA"), 1 U.S.C. § 7, defines the words "marriage" and
9 "spouse" in federal law in a way that bars the Internal
10 Revenue Service from recognizing Windsor as a spouse or the
11 couple as married. The text of § 3 is as follows:

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

19 1 U.S.C. § 7. At issue is Windsor's claim for a refund in
20 the amount of \$363,053, which turns on the constitutionality
21 of that section of federal law.

22 For the reasons that follow we hold that:

23 **I.** Windsor has standing in this action because we
24 predict that New York, which did not permit same-sex
25 marriage to be licensed until 2011, would nevertheless have

1 recognized Windsor and Thea Clara Spyer as married at the
2 time of Spyer's death in 2009, so that Windsor was a
3 surviving spouse under New York law.

4 **II.** Windsor's suit is not foreclosed by Baker v.
5 Nelson, 409 U.S. 810 (1971), which held that the use of the
6 traditional definition of marriage for a state's own
7 regulation of marriage status did not violate equal
8 protection.

9 **III.** Section 3 of DOMA is subject to intermediate
10 scrutiny under the factors enumerated in City of Cleburn v.
11 Cleburn Living Center, 473 U.S. 431 (1985), and other cases.

12 **IV.** The statute does not withstand that review.

13 * * *

14 On June 6, 2012, the United States District Court for
15 the Southern District of New York (Jones, J.) granted
16 summary judgment in favor of Windsor in a thorough opinion.
17 Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y.
18 2012). The court ruled that Section 3 of DOMA violated the
19 equal protection because there was no rational basis to
20 support it. Id. at 406. "We review a district court's
21 grant of summary judgment de novo, construing the record in
22 the light most favorable to the nonmoving party." Church of

1 American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197,
2 203 (2d Cir. 2004).

3 A preliminary issue concerning alignment of the parties
4 on appeal has been presented by motion. The United States,
5 initially named as the sole defendant, conducted its defense
6 of the statute in the district court up to a point. On
7 February 23, 2011, three months after suit was filed, the
8 Department of Justice declined to defend the Act thereafter,
9 and members of Congress took steps to support it. The
10 Bipartisan Legal Advisory Group of the United States House
11 of Representatives ("BLAG") retained counsel and since then
12 has taken the laboring oar in defense of the statute. The
13 United States remained active as a party, switching sides to
14 advocate that the statute be ruled unconstitutional.

15 Following the district court's decision, BLAG filed a
16 notice of appeal, as did the United States in its role as
17 nominal defendant. BLAG moved this Court at the outset to
18 strike the notice of appeal filed by the United States and
19 to realign the appellate parties to reflect that the United
20 States prevailed in the result it advocated in the district
21 court. The motion is denied. Notwithstanding the
22 withdrawal of its advocacy, the United States continues to

1 enforce Section 3 of DOMA, which is indeed why Windsor does
2 not have her money. The constitutionality of the statute
3 will have a considerable impact on many operations of the
4 United States. See INS v. Chadha, 462 U.S. 919, 931 (1983)
5 (“When an agency of the United States is a party to a case
6 in which the Act of Congress it administers is held
7 unconstitutional, it is an aggrieved party for purposes of
8 taking an appeal The agency’s status as an aggrieved
9 party . . . is not altered by the fact that the Executive
10 may agree with the holding that the statute in question is
11 unconstitutional.”).

12
13 **DISCUSSION**

14 **I**

15 For the purpose of federal estate taxes, the law of the
16 state of domicile ordinarily determines whether two persons
17 were married at the time of death. Eccles v. Comm’r, 19
18 T.C. 1049, 1051, 1053-54 (1953); Rev. Rul. 58-66, 1958-1
19 C.B. 60 (“The marital status of individuals as determined
20 under state law is recognized in the administration of the
21 Federal income tax laws.”). At the time of Spyer’s death in
22 2009, New York did not yet license same-sex marriage itself.

1 A separate question--decisive for standing in this case--is
2 whether in 2009 New York recognized same-sex marriages
3 entered into in other jurisdictions. That question was
4 presented to the New York Court of Appeals in Godfrey v.
5 Spano, 13 N.Y.3d 358 (2009). However, the court was able to
6 resolve that case on other grounds, finding "it unnecessary
7 to reach defendants' argument that New York's common-law
8 marriage recognition rule is a proper basis for the
9 challenged recognition of out-of-state same-sex marriages."
10 Id. at 377.

11 When we are faced with a question of New York law that
12 is decisive but unsettled, we may "predict" what the state's
13 law is, consulting any rulings of its intermediate appellate
14 courts and trial courts, or we may certify the question to
15 the New York Court of Appeals. See State Farm Mut. Auto.
16 Ins. Co. v. Madella, 372 F.3d 500, 505 (2d Cir. 2004). BLAG
17 urges that we certify this question, observing that this is
18 an option that we have and that the district court did not.
19 We decline to certify.

20 First, the Court of Appeals has signaled its
21 disinclination to decide this very question. When it
22 elected to decide Godfrey on an alternative sufficient

1 ground, the Court of Appeals expressed a preference and
2 expectation that the issue would be decided by the New York
3 legislature: "[w]e . . . hope that the Legislature will
4 address this controversy." Godfrey, 13 N.Y.3d at 377. We
5 hesitate to serve up to the Court of Appeals a question that
6 it is reluctant to answer for a prudential reason.

7 Second, rulings of New York's intermediate appellate
8 courts are useful and unanimous on this issue. It is a
9 "well-established principle that the ruling of an
10 intermediate appellate state court is a datum for
11 ascertaining state law which is not to be disregarded by a
12 federal court unless it is convinced by other persuasive
13 data that the highest court of the state would decide
14 otherwise." Statharos v. New York City Taxi and Limousine
15 Comm'n, 198 F.3d 317, 321 (2d Cir. 1999) (internal quotation
16 marks and ellipsis omitted). Three of New York's four
17 appellate divisions have concluded that New York recognized
18 foreign same-sex marriages before the state passed its
19 marriage statute in 2011. See In re Estate of Ranftle, 81
20 A.D.3d 566 (1st Dep't 2011) (Windsor's home Department,
21 recognizing a 2008 Canadian marriage); Lewis v. N.Y. State
22 Dep't of Civil Serv., 872 N.Y.S.2d 578 (3rd Dep't 2009),

1 aff'd on other grounds sub nom. Godfrey, 13 N.Y.3d 358;
2 Martinez v. Cnty. of Monroe, 850 N.Y.S.2d 740 (4th Dep't
3 2008). Two of these cases, Lewis and Martinez, were decided
4 before Spyer died on February 5, 2009. Given the consistent
5 view of these decisions, we see no need to seek guidance
6 here. Because Windsor's marriage would have been recognized
7 under New York law at the time of Spyer's death, she has
8 standing.

10 II

11 In Baker v. Nelson, an appeal from a Minnesota Supreme
12 Court decision finding no right to same-sex marriage, the
13 Supreme Court issued a summary dismissal "for want of a
14 substantial federal question." 409 U.S. 810 (1971). The
15 Minnesota Supreme Court had held that "[t]he equal
16 protection clause of the Fourteenth Amendment, like the due
17 process clause, is not offended by the state's
18 classification of persons authorized to marry." Baker v.
19 Nelson, 291 Minn. 310, 313 (Minn. 1971). According to BLAG,
20 Baker compels the inference that Congress may prohibit same-
21 sex marriage in the same way under federal law without
22 offending the Equal Protection Clause. We disagree.

1 "The Supreme Court has long recognized that the
2 precedential value of a summary dismissal is limited to 'the
3 precise issues presented and necessarily decided by' the
4 dismissal." Alexander v. Cahill, 598 F.3d 79, 89 n.7 (2d
5 Cir. 2010) (quoting Mandell v. Bradley, 432 U.S. 173, 176
6 (1977)). The question whether the federal government may
7 constitutionally define marriage as it does in Section 3 of
8 DOMA is sufficiently distinct from the question in Baker:
9 whether same-sex marriage may be constitutionally restricted
10 by the *states*. After all, Windsor and Spyer were actually
11 married in this case, at least in the eye of New York, where
12 they lived. Other courts have likewise concluded that Baker
13 does not control equal protection review of DOMA for these
14 reasons.¹

¹ See Massachusetts v. U.S. Dep't of HHS, 682 F.3d 1, 8 (1st Cir. 2012) (finding that Baker permitted equal protection review so long as arguments did not "rest on a constitutional right to same-sex marriage"); Windsor, 833 F. Supp. 2d at 399-400 ("The case before the Court does not present the same issue as that presented in Baker. . . . Accordingly, after comparing the issues in Baker and those in the instant case, the Court does not believe that Baker 'necessarily decided' the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause."); Pedersen v. Office of Pers. Mmgmt., No. 3:10-cv-1750, 2012 WL 3113883, at *11 (D. Conn. July 31, 2012) ("DOMA impacts federal benefits and obligations, but does not prohibit a state from authorizing or forbidding same-sex marriage, as was the case in Baker."); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982 n.5

1 Even if Baker might have had resonance for Windsor's
2 case in 1971, it does not today. "[I]nferior federal
3 courts had best adhere to the view that if the Court has
4 branded a question as unsubstantial, it remains so *except*
5 *when doctrinal developments indicate otherwise.*" Hicks v.
6 Miranda, 422 U.S. 332, 344 (1975) (quoting Port Auth.
7 Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d
8 259, 263 n.3 (2d Cir. 1967) (Friendly, J.)) (emphasis
9 added). In the forty years after Baker, there have been
10 manifold changes to the Supreme Court's equal protection
11 jurisprudence.

12 When Baker was decided in 1971, "intermediate scrutiny"
13 was not yet in the Court's vernacular. See Craig v. Boren,
14 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting)
15 (coining "intermediate level scrutiny"). Classifications

(N.D. Cal. 2012) ("The failure of the federal government to recognize Ms. Golinski's marriage and to provide benefits does not alter the fact that she is married under state law."); Dragovich v. U.S. Dept. of Treasury, No. 4:10-cv-01564-CW, 2012 WL 1909603, at *6-7 (N.D. Cal. May 24, 2012); Smelt v. Cnty of Orange, 374 F. Supp. 2d. 861, 872-74 (C.D. Cal. 2005), vacated in part on other grounds, 447 F.3d 673 (9th Cir. 2006); In re Kandu, 315 B.R. 123, 135-38 (Bankr. W.D. Wash. 2004); see also Perry v. Brown, 671 F.3d 1052, 1082 n. 14 (9th Cir. 2012) (finding that Baker did not preempt consideration of Proposition 8 case, because "the question of the constitutionality of a state's ban on same-sex marriage" was not before the court) (emphasis added).

1 based on illegitimacy and sex were not yet deemed quasi-
2 suspect. See Lalli v. Lalli, 439 U.S. 259, 264-65, 275
3 (1982) (applying intermediate scrutiny to a classification
4 based on illegitimacy, and describing how heightened
5 scrutiny had been used for such classifications starting in
6 1976); Frontiero v. Richardson, 411 U.S. 677, 682 (1973)
7 (plurality opinion) (identifying sex as a suspect class);
8 Boren, 429 U.S. at 197-98 (applying intermediate scrutiny to
9 a classification based on sex); United States v. Virginia,
10 518 U.S. 515, 575 (1996) (Scalia, J., dissenting)
11 (summarizing that sex-based classifications were analyzed
12 with rational basis review before the 1970's).² The Court
13 had not yet ruled that "a classification of [homosexuals]
14 undertaken for its own sake" actually lacked a rational
15 basis. Romer v. Evans, 517 U.S. 620, 635 (1996). And, in
16 1971, the government could lawfully "demean [homosexuals']
17 existence or control their destiny by making their private
18 sexual conduct a crime." Lawrence v. Texas, 539 U.S. 558,
19 574, 578 (2003) (noting that there was a "tenable" equal

² While other classifications have been deemed quasi-suspect or suspect over the years, the decisions to add sex and illegitimacy are especially helpful in analyzing whether the classification made in DOMA merits intermediate scrutiny.

1 protection argument against such laws, but choosing instead
2 to overturn Bowers v. Hardwick, 478 U.S. 186 (1986)). These
3 doctrinal changes constitute another reason why Baker does
4 not foreclose our disposition of this case.

5 The First Circuit has suggested in dicta that
6 recognition of a new suspect classification in this context
7 would "imply[] an overruling of Baker." See Massachusetts,
8 682 F.3d at 9. We disagree for two reasons that the First
9 Circuit did not discuss. First, when it comes to marriage,
10 legitimate regulatory interests of a state differ from those
11 of the federal government. Regulation of marriage is "an
12 area that has long been regarded as a virtually exclusive
13 province of the States." Sosna v. Iowa, 419 U.S. 393, 404
14 (1975). It has for very long been settled that "[t]he
15 State . . . has [the] absolute right to prescribe the
16 conditions upon which the marriage relation between its own
17 citizens shall be created, and the causes for which it may
18 be dissolved." Pennoyer v. Neff, 95 U.S. 714, 734-35
19 (1878), overruled on other grounds by Shaffer v. Heitner,
20 433 U.S. 186 (1977). Therefore, our heightened scrutiny
21 analysis of DOMA's marital classification under federal law
22 is distinct from the analysis necessary to determine whether
23 the marital classification of a state would survive such
24 scrutiny.

1 Second, the Supreme Court's decision to apply rational
2 basis review in Romer does not imply to us a refusal to
3 recognize homosexuals as a quasi-suspect class. See
4 Massachusetts, 682 F.3d at 9. The litigants in Romer had
5 abandoned their quasi-suspect argument after the trial court
6 decision. See Romer, 517 U.S. at 640 n.1 (Scalia, J.,
7 dissenting). We are satisfied, for these reasons, that
8 Baker has no bearing on this case.

9
10 **III**

11 "In deciding an equal protection challenge to a statute
12 that classifies persons for the purpose of receiving
13 [federal] benefits, we are required, so long as the
14 classifications are not suspect or quasi-suspect and do not
15 infringe fundamental constitutional rights, to uphold the
16 legislation if it bears a rational relationship to a
17 legitimate governmental objective." Thomas v. Sullivan, 922
18 F.2d 132, 136 (2d Cir. 1990). Of course, "'a
19 bare . . . desire to harm a politically unpopular group
20 cannot constitute a *legitimate* government interest.'" Romer
21 v. Evans, 517 U.S. 620, 634-35 (1996) (quoting Dep't. of
22 Agric. v. Moreno, 413 U.S. 528, 534 (1973)). So while
23 rational basis review is indulgent and respectful, it is not

1 meant to be "toothless." Schweiker v. Wilson, 450 U.S. 221,
2 234 (1981) (quoting Mathews v. Lucas, 427 U.S. 495, 510
3 (1976)).

4 The district court ruled that DOMA violated the Equal
5 Protection Clause for want of a rational basis. Windsor,
6 833 F. Supp. 2d at 406. But the existence of a rational
7 basis for Section 3 of DOMA is closely argued. BLAG and its
8 amici proffer several justifications that alone or in tandem
9 are said to constitute sufficient reason for the enactment.
10 Among these reasons are protection of the fisc, uniform
11 administration of federal law notwithstanding recognition of
12 same-sex marriage in some states but not others, the
13 protection of traditional marriage generally, and the
14 encouragement of "responsible" procreation.

15 Windsor and her amici vigorously argue that DOMA is not
16 rationally related to any of these goals. Rational basis
17 review places the burden of persuasion on the party
18 challenging a law, who must disprove "'every conceivable
19 basis which might support it.'" Heller v. Doe, 509 U.S.
20 312, 320 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts
21 Co., 410 U.S. 356, 364 (1973)). So a party urging the
22 absence of any rational basis takes up a heavy load. That
23 would seem to be true in this case--the law was passed by

1 overwhelming bipartisan majorities in both houses of
2 Congress; it has varying impact on more than a thousand
3 federal laws; and the definition of marriage it affirms has
4 been long-supported and encouraged.

5 On the other hand, several courts have read the Supreme
6 Court's recent cases in this area to suggest that rational
7 basis review should be more demanding when there are
8 "historic patterns of disadvantage suffered by the group
9 adversely affected by the statute." See Massachusetts, 682
10 F.3d at 10-11; Able v. U.S., 155 F.3d 628, 634 (2d Cir.
11 1998); United States v. Then, 56 F.3d 464, 468 (2d Cir.
12 1995) (Calabresi, J., concurring). Proceeding along those
13 lines, the district court in this case and the First Circuit
14 in Massachusetts both adopted more exacting rational basis
15 review for DOMA. See Massachusetts, 682 F.3d at 11
16 (describing its "more careful assessment"); Windsor, 833 F.
17 Supp. 2d at 402 (noting that "rational basis analysis can
18 vary by context"). At argument, counsel for BLAG wittily
19 characterized this form of analysis as "rational basis plus
20 or intermediate scrutiny minus." Oral Arg. Tr. 16:10-12.

21 The Supreme Court has not expressly sanctioned such
22 modulation in the level of rational basis review; discussion
23 pro and con has largely been confined to concurring and

1 dissenting opinions.³ We think it is safe to say that there
2 is some doctrinal instability in this area.

3 Fortunately, no permutation of rational basis review is
4 needed if heightened scrutiny is available, as it is in this
5 case. We therefore decline to join issue with the dissent,
6 which explains why Section 3 of DOMA may withstand rational
7 basis review.

³ Compare Lawrence, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") and U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 188 (1980) (Brennan, J., dissenting) ("In other cases, however, the courts must probe more deeply.") with City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 459-60 (1985) (Marshall, J., concurring in part and dissenting in part) ("The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate [B]y failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.") and Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting) ("[T]he Court has rejected, albeit *sub silentio*, its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation."). But see U.S. R.R. Ret. Bd., 449 U.S. at 176 n.10 ("The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.").

1 Instead, we conclude that review of Section 3 of DOMA
2 requires heightened scrutiny. The Supreme Court uses
3 certain factors to decide whether a new classification
4 qualifies as a quasi-suspect class. They include: A)
5 whether the class has been historically "subjected to
6 discrimination," Bowen v. Gilliard, 483 U.S. 587, 602
7 (1987); B) whether the class has a defining characteristic
8 that "frequently bears [a] relation to ability to perform or
9 contribute to society," Cleburne, 473 U.S. at 440-41; C)
10 whether the class exhibits "obvious, immutable, or
11 distinguishing characteristics that define them as a
12 discrete group;" Bowen, 483 U.S. at 602; and D) whether the
13 class is "a minority or politically powerless." Id.
14 Immutability and lack of political power are not strictly
15 necessary factors to identify a suspect class. See
16 Cleburne, 473 U.S. at 442 n.10 ("'[T]here's not much left of
17 the immutability theory, is there?'") (quoting J. Ely,
18 *Democracy and Distrust* 150 (1980)); Cleburne, 473 U.S. at
19 472 n.24 (Marshall, J., concurring in part and dissenting in
20 part) ("The 'political powerlessness' of a group may be
21 relevant, but that factor is neither necessary, as the
22 gender cases demonstrate, nor sufficient, as the example of
23 minors illustrates."); Nyquist v. Mauclet, 432 U.S. 1, 9

1 n.11 (1977) (rejecting the argument that alienage did not
2 deserve strict scrutiny because it was not immutable); see
3 also Pedersen, 2012 WL 3113883, at *13; Golinski, 824 F.
4 Supp. 2d at 983; Kerrigan v. Comm'r of Pub. Health, 289
5 Conn. 135, 167-68 (2008). Nevertheless, immutability and
6 political power are indicative, and we consider them here.
7 In this case, all four factors justify heightened scrutiny:
8 A) homosexuals as a group have historically endured
9 persecution and discrimination; B) homosexuality has no
10 relation to aptitude or ability to contribute to society; C)
11 homosexuals are a discernible group with non-obvious
12 distinguishing characteristics, especially in the subset of
13 those who enter same-sex marriages; and D) the class remains
14 a politically weakened minority.

15 **A) History of Discrimination**

16 It is easy to conclude that homosexuals have suffered a
17 history of discrimination. Windsor and several amici labor
18 to establish and document this history, but we think it is
19 not much in debate. Perhaps the most telling proof of
20 animus and discrimination against homosexuals in this
21 country is that, for many years and in many states,
22 homosexual conduct was criminal. These laws had the
23 imprimatur of the Supreme Court. See Bowers, 478 U.S. at

1 196; see also Lawrence, 539 U.S. at 578 (noting that such
2 laws "demean[ed homosexuals'] existence [and] control[led]
3 their destiny").

4 BLAG argues that discrimination against homosexuals
5 differs from that against racial minorities and women
6 because "homosexuals as a class have never been politically
7 disenfranchised." True, but the difference is not decisive.
8 Citizens born out of wedlock have never been inhibited in
9 voting; yet the Supreme Court has applied intermediate
10 scrutiny in cases of illegitimacy. See generally Lalli v.
11 Lalli, 439 U.S. 259 (1982). Second, BLAG argues that,
12 unlike protected classes, homosexuals have not "suffered
13 discrimination for longer than history has been recorded."
14 But whether such discrimination existed in Babylon is
15 neither here nor there. BLAG concedes that homosexuals have
16 endured discrimination in this country since at least the
17 1920s. Ninety years of discrimination is entirely
18 sufficient to document a "history of discrimination." See
19 Pedersen, 2012 WL 3113883 at *21 (summarizing that "the
20 majority of cases which have meaningfully considered the
21 question [have] likewise held that homosexuals as a class
22 have experienced a long history of discrimination").

23 **B) Relation to Ability**

1 Also easy to decide in this case is whether the class
2 characteristic "frequently bears [a] relation to ability to
3 perform or contribute to society." Cleburne, 473 U.S. at
4 440-41; see Frontiero, 411 U.S. at 686 ("[W]hat
5 differentiates sex from such non-suspect statuses as
6 intelligence or physical disability, and aligns it with the
7 recognized suspect criteria, is that the sex characteristic
8 frequently bears no relation to ability to perform or
9 contribute to society."). In Cleburne, the Supreme Court
10 ruled that heightened scrutiny was inappropriate because
11 "those who are mentally retarded have a reduced ability to
12 cope with and function in the everyday world." 473 U.S. at
13 442. The Court employed similar reasoning with respect to
14 age classifications, finding that heightened scrutiny was
15 not appropriate for mandatory retirement laws because
16 "physical ability generally declines with age" and such
17 requirements reasonably "serve[d] to remove
18 from . . . service those whose fitness for uniformed work
19 presumptively has diminished with age." Murgia, 427 U.S. at
20 316.

21 There is no such impairment here. There are some
22 distinguishing characteristics, such as age or mental
23 handicap, that may arguably inhibit an individual's ability

1 to contribute to society, at least in some respect. But
2 homosexuality is not one of them. The aversion homosexuals
3 experience has nothing to do with aptitude or performance.

4 We do not understand BLAG to argue otherwise. Rather,
5 BLAG suggests that the proper consideration is whether "the
6 classification turns on 'distinguishing characteristics
7 relevant to interests the State has the authority to
8 implement,'" quoting Cleburne, 473 U.S. at 441. Thus, BLAG
9 urges that same-sex couples have a diminished ability to
10 discharge family roles in procreation and the raising of
11 children. BLAG cites no precedential application of that
12 standard to support its interpretation, and it is
13 inconsistent with actual cases. See, e.g., Frontiero, 411
14 U.S. at 686 (distinguishing that sex, unlike intelligence,
15 has no bearing on one's general ability to contribute to
16 society). In any event, the abilities or inabilities cited
17 by BLAG bear upon whether the law withstands scrutiny (the
18 second step of analysis) rather than upon the level of
19 scrutiny to apply. Cf. Clark v. Jeter, 486 U.S. 456, 461
20 (1988) (defining the test for intermediate scrutiny as
21 whether a classification is "substantially related to an
22 important government interest").

1 **C) Distinguishing Characteristic**

2 We conclude that homosexuality is a sufficiently
3 discernible characteristic to define a discrete minority
4 class. See Rowland v. Mad River Local School Dist.,
5 Montgomery County, Ohio, 470 U.S. 1009, 1014 (1985)
6 (Brennan, J., dissenting from denial of certiorari)
7 (“[H]omosexuals constitute a significant and insular
8 minority of this country’s population.”).

9 This consideration is often couched in terms of
10 “immutability.” BLAG and its amici argue that sexual
11 orientation is not necessarily fixed, suggesting that it may
12 change over time, range along a continuum, and overlap (for
13 bisexuals). But the test is broader: whether there are
14 “obvious, immutable, or distinguishing characteristics that
15 define . . . a discrete group.” See Bowen, 483 U.S. at 602
16 (emphasis added). No “obvious badge” is necessary. See
17 Mathews v. Lucas, 427 U.S. 495, 506 (1976). Classifications
18 based on alienage, illegitimacy, and national origin are all
19 subject to heightened scrutiny, Cleburne, 473 U.S. at 440-
20 41, even though these characteristics do not declare
21 themselves, and often may be disclosed or suppressed as a

1 matter of preference.⁴ What seems to matter is whether the
2 characteristic of the class calls down discrimination when
3 it is manifest.

4 Thus a person of illegitimate birth may keep that
5 status private, and ensure that no outward sign discloses
6 the status in social settings or in the workplace, or on the
7 subway. But when such a person applies for Social Security
8 benefits on the death of a parent (for example), the
9 illegitimate status becomes manifest. The characteristic is
10 necessarily revealed in order to exercise a legal right.
11 Similarly, sexual preference is necessarily disclosed when

⁴ Alienage and illegitimacy are actually subject to change. See Pedersen, 2012 WL 3113883 at *23 ("The Supreme Court has held that resident aliens constitute a suspect class despite the ability to opt out of the class voluntarily. Additionally, one's status as illegitimate may be subject to change and is therefore not a strictly immutable characteristic.") (internal citation omitted); see also Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. . . . At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

1 two persons of the same sex apply for a marriage license (as
2 they are legally permitted to do in New York), or when a
3 surviving spouse of a same-sex marriage seeks the benefit of
4 the spousal deduction (as Windsor does here).

5 BLAG argues that a classification based on sexual
6 orientation would be more "amorphous" than discrete. It may
7 be that the category exceeds the number of persons whose
8 sexual orientation is *outwardly* "obvious, immutable, or
9 distinguishing," and who thereby predictably undergo
10 discrimination. But that is surely also true of
11 illegitimacy and national origin. Again, what matters here
12 is whether the characteristic invites discrimination when it
13 is manifest.

14 The class affected by Section 3 of DOMA is composed
15 entirely of persons of the same sex who have married each
16 other. Such persons constitute a subset of the larger
17 category of homosexuals; but as counsel for BLAG conceded at
18 argument, there is nothing amorphous, capricious, or
19 tentative about their sexual orientation. Oral Arg. Tr.
20 12:11-14. Married same-sex couples like Windsor and Spyer
21 are the population most visible to the law, and they are
22 foremost in mind when reviewing DOMA's constitutionality.

23

1 We therefore conclude that sexual orientation is a
2 sufficiently distinguishing characteristic to identify the
3 discrete minority class of homosexuals.

4 **D) Political Power**

5 Finally, we consider whether homosexuals are a
6 politically powerless minority. See Bowen, 483 U.S. at 602.
7 Without political power, minorities may be unable to protect
8 themselves from discrimination at the hands of the
9 majoritarian political process. We conclude that
10 homosexuals are still significantly encumbered in this
11 respect.

12 The question is not whether homosexuals have achieved
13 political successes over the years; they clearly have. The
14 question is whether they have the strength to politically
15 protect themselves from wrongful discrimination. When the
16 Supreme Court ruled that sex-based classifications were
17 subject to heightened scrutiny in 1973, the Court
18 acknowledged that women had already achieved major political
19 victories. See Frontiero, 411 U.S. at 685. The Nineteenth
20 Amendment had been ratified in 1920, and Title VII had
21 already outlawed sex-based employment. See 78 Stat. 253.
22 The Court was persuaded nevertheless that women still lacked
23 adequate political power, in part because they were "vastly

1 underrepresented in this Nation's decisionmaking councils,"
2 including the presidency, the Supreme Court, and the
3 legislature. Frontiero, 411 U.S. at 686 n.17.

4 There are parallels between the status of women at the
5 time of Frontiero and homosexuals today: their position "has
6 improved markedly in recent decades," but they still "face
7 pervasive, although at times more subtle,
8 discrimination . . . in the political arena." Frontiero,
9 411 U.S. at 685-86. It is difficult to say whether
10 homosexuals are "under-represented" in positions of power
11 and authority without knowing their number relative to the
12 heterosexual population. But it is safe to say that the
13 seemingly small number of acknowledged homosexuals so
14 situated is attributable either to a hostility that excludes
15 them or to a hostility that keeps their sexual preference
16 private--which, for our purposes, amounts to much the same
17 thing. Moreover, the same considerations can be expected to
18 suppress some degree of political activity by inhibiting the
19 kind of open association that advances political agendas.
20 See Rowland, 470 U.S. at 1014 (Brennan, J., dissenting from
21 denial of certiorari) ("Because of the immediate and severe
22 opprobrium often manifested against homosexuals once so
23 identified publicly, members of this group are particularly

1 powerless to pursue their rights openly in the political
2 arena.").

3 In sum, homosexuals are not in a position to adequately
4 protect themselves from the discriminatory wishes of the
5 majoritarian public.

6 * * *

7 Analysis of these four factors supports our conclusion
8 that homosexuals compose a class that is subject to
9 heightened scrutiny. We further conclude that the class is
10 quasi-suspect (rather than suspect) based on the weight of
11 the factors and on analogy to the classifications recognized
12 as suspect and quasi-suspect. While homosexuals have been
13 the target of significant and long-standing discrimination
14 in public and private spheres, this mistreatment "is not
15 sufficient to require 'our most exacting scrutiny.'" Trimble v. Gordon, 430 U.S. 762, 767 (1977) (quoting Mathews
16 v. Lucas, 427 U.S. 495, 506 (1976)).

17
18 The next step is to determine whether DOMA survives
19 intermediate scrutiny review.

20

21

IV

22

23

To withstand intermediate scrutiny, a classification
must be "substantially related to an important government

1 interest." Clark v. Jeter, 486 U.S. 456, 461 (1988).
2 "Substantially related" means that the explanation must be
3 "'exceedingly persuasive.'" United States v. Virginia, 518
4 U.S. 515, 533 (1996) (quoting Mississippi Univ. for Women v.
5 Hogan, 458 U.S. 718, 724 (1982)). "The justification must
6 be genuine, not hypothesized or invented post hoc in
7 response to litigation." Id.

8 BLAG advances two primary arguments for why Congress
9 enacted DOMA. First, it cites "unique federal interests,"
10 which include maintaining a consistent federal definition of
11 marriage, protecting the fisc, and avoiding "the unknown
12 consequences of a novel redefinition of a foundational
13 social institution." Second, BLAG argues that Congress
14 enacted the statute to encourage "responsible procreation."
15 At argument, BLAG's counsel all but conceded that these
16 reasons for enacting DOMA may not withstand intermediate
17 scrutiny. Oral Arg. Tr. 16:24-17:6.

18 **A) Maintaining a "Uniform Definition" of Marriage**

19 Statements in the Congressional Record express an
20 intent to enforce uniform eligibility for federal marital
21 benefits by insuring that same-sex couples receive--or

1 lose--the same federal benefits across all states.⁵

2 However, the emphasis on uniformity is suspicious because
3 Congress and the Supreme Court have historically deferred to
4 state domestic relations laws, irrespective of their
5 variations.

6 To the extent that there has ever been "uniform" or
7 "consistent" rule in federal law concerning marriage, it is
8 that marriage is "a virtually exclusive province of the
9 States." Sosna, 419 U.S. at 404. As the Supreme Court has
10 emphasized, "the states, at the time of the adoption of the
11 Constitution, possessed *full power* over the subject of
12 marriage and divorce. . . . [T]he Constitution delegated *no*
13 *authority* to the Government of the United States on the
14 subject of marriage and divorce." Haddock v. Haddock, 201
15 U.S. 562, 575 (1906) (emphasis added), overruled on other
16 grounds by Williams v. State of North Carolina, 317 U.S. 287
17 (1942). DOMA was therefore an unprecedented intrusion "into
18 an area of traditional state regulation." Massachusetts,
19 682 F.3d at 13. This is a reason to look upon Section 3 of

⁵ For example, certain legislators were concerned that it would be administratively difficult to deal with benefit changes as same-sex couples moved between states with different policies on same-sex marriage. See, e.g., 150 Cong. Rec. 15318 (2004) (Sen. Inhofe).

1 DOMA with a cold eye. "The absence of precedent . . . is
2 itself instructive; '[d]iscriminations of an unusual
3 character especially suggest careful consideration to
4 determine whether they are obnoxious to the constitutional
5 provision.'" Romer v. Evans, 517 U.S. 620, 633 (1996)
6 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32,
7 37-38 (1928)).

8 Moreover, DOMA's sweep arguably creates more discord
9 and anomaly than uniformity, as many amici observe. Because
10 DOMA defined only a single aspect of domestic relations law,
11 it left standing all other inconsistencies in the laws of
12 the states, such as minimum age, consanguinity, divorce, and
13 paternity. See Br. of Amici Curiae Family Law Professors
14 Supporting Petitioner at 12-13 (noting that "the federal
15 government has always accepted the states' different ways of
16 defining parental status" and offering numerous examples of
17 critical differences in state parental policies).

18 The uniformity rationale is further undermined by
19 inefficiencies that it creates. As a district court in this
20 Circuit found, it was simpler--and more consistent--for the
21 federal government to ask whether a couple was married under
22 the law of the state of domicile, rather than adding "an
23 additional criterion, requiring the federal government to

1 identify and exclude all same-sex marital unions from
2 federal recognition." Pedersen, 2012 WL 3113883 at *48; see
3 Golinski, 824 F. Supp. 2d at 1001-02 ("The passage of DOMA
4 actually undermined administrative consistency by requiring
5 that the federal government, for the first time, discern
6 which state definitions of marriage are entitled to federal
7 recognition and which are not.").

8 Because DOMA is an unprecedented breach of longstanding
9 deference to federalism that singles out same-sex marriage
10 as the only inconsistency (among many) in state law that
11 requires a federal rule to achieve uniformity, the
12 rationale premised on uniformity is not an exceedingly
13 persuasive justification for DOMA.

14 **B) Protecting the Fisc**

15 Another professed goal of Congress is to save
16 government resources by limiting the beneficiaries of
17 government marital benefits. H.R. Rep. No. 104-664, at 18
18 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2922. Fiscal
19 prudence is undoubtedly an important government interest.
20 Windsor and certain amici contest whether the measure will
21 achieve a net benefit to the Treasury; but in matters of the
22 federal budget, Congress has the prerogative to err (if
23 error it is), and cannot be expected to prophesy the future

1 accurately. But the Supreme Court has held that “[t]he
2 saving of welfare costs cannot justify an otherwise
3 invidious classification.” Graham v. Richardson, 403 U.S.
4 365, 375 (1971) (quotation marks omitted). As the district
5 court observed, “excluding any arbitrarily chosen group of
6 individuals from a government program conserves government
7 resources.” Windsor, 833 F. Supp. 2d at 406 (quotation
8 marks).

9 Citing Bowen v. Owens, 476 U.S. 340, 348 (1986), BLAG
10 draws the distinction that DOMA did not *withdraw* benefits
11 from same-sex spouses; since DOMA was enacted before same-
12 sex marriage was permitted in any state, DOMA operated to
13 prevent the *extension* of benefits to people who never
14 enjoyed them. However, Bowen was decided on rational basis
15 grounds and did not involve an invidious classification.
16 Id. at 349-50. Moreover, DOMA is properly considered a
17 benefit withdrawal in the sense that it functionally
18 eliminated longstanding federal recognition of all marriages
19 that are properly ratified under state law--and the federal
20 benefits (and detriments) that come with that recognition.

21 Furthermore, DOMA is so broad, touching more than a
22 thousand federal laws, that it is not substantially related
23 to fiscal matters. As amicus Citizens for Responsibility

1 and Ethics in Washington demonstrates, DOMA impairs a number
2 of federal laws (involving bankruptcy and conflict-of-
3 interest) that have nothing to do with the public fisc. See
4 Br. of Amicus Curiae Citizens for Responsibility and Ethics
5 in Washington at 5-11, 18-23. DOMA transcends a legislative
6 intent to conserve public resources.

7 For these reasons, DOMA is not substantially related to
8 the important government interest of protecting the fisc.

9 **C) Preserving a Traditional Understanding of Marriage**

10 Congress undertook to justify DOMA as a measure for
11 preserving traditional marriage as an institution. 150
12 Cong. Rec. 14951. But “[a]ncient lineage of a legal concept
13 does not give [a law] immunity from attack for lacking a
14 rational basis.” Heller, 509 U.S. at 326. A fortiori,
15 tradition is hard to justify as meeting the more demanding
16 test of having a substantial relation to an important
17 government interest. Similar appeals to tradition were made
18 and rejected in litigation concerning anti-sodomy laws. See
19 Lawrence, 539 U.S. at 577-78 (“[T]he fact that the
20 governing majority in a State has traditionally viewed a
21 particular practice as immoral is not a sufficient reason
22 for upholding a law prohibiting the practice; *neither*
23 *history nor tradition* could save a law prohibiting

1 miscegenation from constitutional attack.'") (quoting
2 Bowers, 478 U.S. at 216 (Stevens, J., dissenting)) (emphasis
3 added).

4 Even if preserving tradition were in itself an
5 important goal, DOMA is not a means to achieve it. As the
6 district court found: "because the decision of whether
7 same-sex couples can marry is left to the states, DOMA does
8 not, strictly speaking, 'preserve' the institution of
9 marriage as one between a man and a woman." Windsor, 833 F.
10 Supp. at 403.

11 Preservation of a traditional understanding of marriage
12 therefore is not an exceedingly persuasive justification for
13 DOMA.

14 **D) Encouraging Responsible Procreation**

15 Finally, BLAG presents three related reasons why DOMA
16 advances the goals of "responsible childrearing": DOMA
17 subsidizes procreation because only opposite-sex couples can
18 procreate "naturally"; DOMA subsidizes biological parenting
19 (for more or less the same reason); and DOMA facilitates the
20 optimal parenting arrangement of a mother and a father. We
21 agree that promotion of procreation can be an important
22 government objective. But we do not see how DOMA is
23 substantially related to it.

1 All three proffered rationales have the same defect:
2 they are cast as incentives for heterosexual couples,
3 incentives that DOMA does not affect in any way. DOMA does
4 not provide any incremental reason for opposite-sex couples
5 to engage in "responsible procreation."⁶ Incentives for
6 opposite-sex couples to marry and procreate (or not) were
7 the same after DOMA was enacted as they were before.⁷ Other
8 courts have likewise been unable to find even a *rational*
9 connection between DOMA and encouragement of responsible
10 procreation and child-rearing. See Massachusetts, 682 F.3d
11 at 14-15 (underscoring the "lack of any demonstrated
12 connection between DOMA's treatment of same-sex couples and
13 its asserted goal of strengthening the bonds and benefits to
14 society of heterosexual marriage") (citations omitted);
15 Windsor, 833 F. Supp. at 404-05; Pedersen, 2012 WL 3113883,
16 at *40-43.

⁶ "[T]he argument that withdrawing the designation of 'marriage' from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships lacks any such footing in reality." Perry v. Brown, 671 F.3d 1052, 1089 (9th Cir. 2012).

⁷ To the extent that BLAG is suggesting that Congress' laws might actually *influence* sexual orientation, there is no evidence to support that claim (and it strikes us as far-fetched).

