RECENT CASES

EQUAL PROTECTION — SEXUAL ORIENTATION — FIRST CIRCUIT INVALIDATES STATUTE THAT DEFINES MARRIAGE AS LEGAL UNION BETWEEN ONE MAN AND ONE WOMAN. — *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012).

Since 2004, when Massachusetts became the first state to legalize same-sex marriage,[1] over one hundred thousand same-sex couples have married in the United States.[2] The federal government does not recognize these marriages, however, due to section 3 of the Defense of Marriage Act[3] (DOMA), which defines "marriage" for federal purposes as "a legal union between one man and one woman as husband and wife."[4] Recently, in *Massachusetts v. United States Department of Health & Human Services*,[5] the First Circuit held that section 3 violates the equal protection principles of the Fifth Amendment.[6] Notably, the court did not base its holding on the "rigid categorical rubrics" of rational basis or intermediate scrutiny, but instead applied what it called "intensified scrutiny" to DOMA's justifications.[7] The First Circuit explained that such scrutiny — consistent with a preexisting form of review called rational basis with a "bite"[8] — is more contextually sensitive than the "abstract categorizations" of typical equal protection analysis, as it takes a broad view of a law's harms rather than focusing on the fit between the law and an appropriate purpose.[9] Though the First Circuit did not clarify whether it conceived of its scrutiny as a complement to or replacement for traditional scrutiny, courts would do well to interpret its analysis as a welcome alternative to the rigid three-tiered equal protection inquiry.

In 1993, the Supreme Court of Hawaii held that a state statute banning same-sex marriage was "presumed to be unconstitutional."[10] Calling the decision the "greatest breakthrough" in "[t]he legal assault

---

[1] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16.

[2] Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), *available at* http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html.

[3] 1 U.S.C. § 7 (2006).

[4] *Id.*

[5] 682 F.3d 1 (1st Cir. 2012).

[6] *Id.* at 15.

[7] *Id.* at 10.

[8] Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

[9] *See Massachusetts*, 682 F.3d at 10–11.

[10] Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

against traditional heterosexual marriage laws,"[11] Congress responded three years later by passing DOMA, section 3 of which specifies:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife . . . .[12]

Since DOMA was passed, ten states and the District of Columbia have legalized same-sex marriage.[13] In 2009, seven same-sex married couples and three survivors of same-sex spouses from one of those states, Massachusetts, brought claims against federal agencies that applied DOMA to withhold benefits available to similarly situated heterosexual couples.[14] Massachusetts filed a companion suit, arguing that DOMA violated the Tenth Amendment, "by intruding on areas of exclusive state authority," and the Spending Clause, "by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds."[15]

The federal district court in Massachusetts agreed with the plaintiffs in both cases, holding that DOMA violated the Fifth Amendment's equal protection principles, the Tenth Amendment, and the Spending Clause.[16] Scrutinizing DOMA under rational basis review, Judge Tauro found that section 3 was not rationally related to any legitimate state interest, nor could Congress's post hoc justifications save the statute.[17] Denying benefits to married same-sex couples, he reasoned, did not "encourag[e] responsible procreation."[18] Nor, after *Lawrence v. Texas*[19] and *Romer v. Evans*,[20] could Congress sustain DOMA by refer-

---

11 H.R. REP. NO. 104-664, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908.

12 1 U.S.C. § 7 (2006).

13 Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, REUTERS (Nov. 7, 2012), http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107. California briefly recognized same-sex marriages in 2008. Jesse McKinley, *Top Court in California Will Review Proposition 8*, N.Y. TIMES, Nov. 20, 2008, at A20.

14 Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010). The plaintiffs sought access to various federal health benefits programs, Social Security retirement and survivorship benefits, and the ability to file federal income taxes jointly with their spouses. *Id.* at 379–83.

15 Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 236 (D. Mass. 2010). The Department of Veterans Affairs threatened to recapture grant funding for a cemetery if Massachusetts accepted a burial application from a gay civilian eligible due to his marriage. *See id.* at 240–41. The Department of Health and Human Services required Massachusetts to pay a tax on Medicare benefits for the same-sex spouses of state employees and refused to reimburse the state for providing Medicaid coverage to individuals eligible due to their same-sex marriages. *Id.* at 241–44.

16 *Id.* at 236; *see also Gill*, 699 F. Supp. 2d at 379–83. Judge Tauro did find against one of the plaintiffs due to his lack of standing. *Id.* at 385.

17 *See Gill*, 699 F. Supp. 2d at 379–89.

18 *Id.* at 389.

19 539 U.S. 558 (2003).

20 517 U.S. 620 (1996).

ence to "traditional notions of morality."[21] Although DOMA conserved "scarce government resources," this rationale could "hardly justify the classification used in allocating" the resources.[22] DOMA also did not preserve the status quo, but defined marriage at the federal level for the first time.[23] Finally, DOMA decidedly did not increase uniformity, as it differentiated among couples based on sex.[24] Accordingly, DOMA unconstitutionally discriminated, and since it "impose[d] an unconstitutional condition on [Massachusetts's] receipt of federal funding," it violated the Tenth Amendment and Spending Clause as well.[25]

The First Circuit affirmed.[26] Writing for a unanimous panel, Judge Boudin[27] held that DOMA violated the equal protection principles of the Fifth Amendment.[28] But he disagreed with the district court's conclusion that DOMA could not survive "minimalist" rational basis review,[29] as "Congress could rationally have believed that DOMA would reduce costs."[30] Judge Boudin also noted that "extending intermediate scrutiny to sexual preference classifications is not a step open to us" in light of Supreme Court and First Circuit precedent.[31] Judge Boudin further held that DOMA did not violate the Tenth Amendment or Spending Clause, as it lacked the "two vices of commandeering or direct command."[32]

Yet the First Circuit did not consider these findings "the end of the matter," citing three decisions in which the Supreme Court did not rely on suspect classifications or "rigid categorical rubrics" but nevertheless "intensified scrutiny of purported justifications where minorities [we]re subject to discrepant treatment."[33] Judge Boudin explained that the

---

[21] *Gill*, 699 F. Supp. 2d at 389.

[22] *Id.* at 390 (quoting Plyler v. Doe, 457 U.S. 202, 227 (1982)).

[23] *Id.* at 393.

[24] *Id.* at 394.

[25] Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 248–49 (D. Mass. 2010).

[26] *Massachusetts*, 682 F.3d at 17. Notably, in 2011, the Department of Justice amended its brief to argue that DOMA was unconstitutional under intermediate scrutiny, and the House of Representatives' Bipartisan Legal Advisory Group intervened to defend section 3. *Id.* at 7; *see also Developments in the Law — Presidential Authority*, 125 HARV. L. REV. 2057, 2113–14 (2012).

[27] Chief Judge Lynch and Judge Torruella joined Judge Boudin's opinion.

[28] *See Massachusetts*, 682 F.3d at 15. The First Circuit also affirmed the district court's finding that one of the plaintiffs lacked standing. *Id.* at 16–17.

[29] *Id.* at 10

[30] *Id.* at 9.

[31] *Id.* The First Circuit considered itself bound by *Baker v. Nelson*, 409 U.S. 810 (1972), which summarily dismissed a challenge to Minnesota's same-sex marriage ban. *But see* United States v. Windsor, Nos. 12-2335-cv(L), 12-2435(Con), 2012 WL 4937310, at *3–5 (2d Cir. Oct. 18, 2012) (finding that *Baker* had no precedential value for a *federal* marriage law).

[32] *Massachusetts*, 682 F.3d at 12.

[33] *Id.* The decisions were *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

Court overturned statutes in these cases after stressing "the historic patterns of disadvantage suffered by the group adversely affected."[34] In light of the "substantial" burdens DOMA placed on gays and lesbians — who "have long been the subject of discrimination" — Judge Boudin reasoned that the Court "would scrutinize with care the purported bases for" DOMA.[35] Federalism concerns "uniquely reinforced" this need for intensified scrutiny, as "DOMA intrudes broadly into an area of traditional state regulation."[36]

Applying this standard, the court criticized the justifications offered in support of DOMA for reasons similar to those provided by the district court.[37] Significantly, however, Judge Boudin did not limit his analysis to the fit between the statute and legitimate purposes. Rather, the court emphasized that federalism concerns diminished "the deference ordinarily accorded" Congress, and that the substantial, disparate impact DOMA imposed on minority interests required weighty justifications for the law.[38] In this context, "the rationales offered for DOMA" were not legitimate enough to "provide adequate support."[39]

Although the First Circuit did not label the standard of scrutiny it applied, the court correctly noted that it was departing from conventional equal protection analysis.[40] In most equal protection cases, courts apply one of three standards of scrutiny — rational basis, intermediate scrutiny, or strict scrutiny — to analyze the *fit* between a law and its purpose. The applicable level of scrutiny is determined by rigid, enumerated categories. This analysis differs from a proportionality approach to equal protection cases that would directly *balance* the purposes served by a law against the burdens the law imposes on a particular group. It is possible to read the First Circuit's analysis as applying an unusual form of the fit test consistent with what commentators have called rational basis with bite,[41] albeit with an additional focus on federalism. Yet courts would do well to consider both *Massachusetts* and the "bite" jurisprudence as contextually sensitive forms of balancing not subject to the rigidity of the traditional trichotomy.

---

[34] *Massachusetts*, 682 F.3d at 11.

[35] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 571 (2003)).

[36] *Id.* at 13.

[37] *See id.* at 13–17. *Compare, e.g.*, *id.* at 14 (holding, under intensified scrutiny, that preserving scarce resources could not justify DOMA), *with* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 390 (D. Mass. 2010) (same, under rational basis review).

[38] *Massachusetts*, 682 F.3d at 12; *see id.* at 11–13 (reasoning that the Supreme Court has "scrutinized with special care federal statutes intruding on matters customarily within state control," so Congress's effort to influence a state's marriage laws "does bear on how the justifications are assessed," *id.* at 13).

[39] *Id.* at 15.

[40] *See id.* at 10–11.

[41] *E.g.*, Gunther, *supra* note 8, at 12.

The first principle of equal protection is that the Constitution does not tolerate "invidious[]" or "arbitrary" discrimination.[42] Yet determining whether a classificatory scheme is invidious is inherently subjective.[43] Traditional scrutiny accounts for this problem with "a roundabout variant of motivation analysis" that evaluates three components of a classification: the harm to plaintiffs, the strength of the government's purpose, and the fit between the purpose and the law.[44] With most laws, courts "will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[45] But "[s]ome classifications" — those involving suspect classes such as race or fundamental rights such as voting — "are more likely than others to reflect deep-seated prejudice rather than legislative rationality."[46] In these cases, courts presume harm by applying intermediate or strict scrutiny, which "'flush[] out' unconstitutional motivation" by demanding a more substantial governmental purpose and "an essentially perfect fit" between that purpose and the classification at issue.[47]

Because these tests' characterization of harm is so narrow, however — limited to simple ex ante findings that a particular class or right is involved — what began as presumptions have in practice become prescriptions for the outcome of a given case. Strict scrutiny is "fatal" to most laws, while rational basis applies "minimal scrutiny in theory and virtually none in fact."[48] Yet courts have little discretion in choosing which "rigid categorical rubric" to apply. Regardless of how harmful a classification is, if it fails to implicate a particular class or right, it is upheld, and if it trips either trigger, it is invalidated. Although the First Circuit recognized exceptions to this trend, citing three cases in which the Supreme Court used rational basis to strike down laws discriminating against the poor, the mentally disabled, and gays and lesbians,[49] the Court has never articulated when this bite applies.[50]

The First Circuit noted that the Supreme Court has applied rational basis with bite after stressing "the historic patterns of disadvantage suffered by the group adversely affected by the statute."[51] The court reasoned that such a finding of disadvantage might trigger intensified

---

[42] *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911).

[43] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57, 763 (2011) ("[O]ne person's prejudice is another's principle . . . ." *Id.* at 763.).

[44] JOHN HART ELY, DEMOCRACY AND DISTRUST 146 (1980).

[45] Romer v. Evans, 517 U.S. 620, 631 (1996).

[46] Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

[47] ELY, *supra* note 44, at 146.

[48] Gunther, *supra* note 8, at 8.

[49] *Massachusetts*, 682 F.3d at 10; *see* cases cited *supra* note 33.

[50] *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370, 415 (1999).

[51] *Massachusetts*, 682 F.3d at 11.

scrutiny calling for a "careful assessment of the [law's] justifications."[52] This standard might be a fourth rubric consistent with the trichotomy, invoked by a new trigger besides suspect classes and fundamental rights.[53] Yet the standard also highlights the value of broader assessments of equal protection harm beyond the restrictive presumptions, allowing courts to directly weigh the burdens imposed by a classification against its objectives.

Reorienting equal protection analysis from a mechanical application of "rigid categorical rubrics" to a flexible proportionality test is not a new idea. Beginning in the 1970s, Justices Stevens and Marshall noted, while the Court was ostensibly determining whether a class was suspect or a right was fundamental, that the Court was really applying a sliding scale that weighed a statute's harms against the interests it served.[54] The scale depended "on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification [was] drawn."[55] The Justices implored the Court to drop the trichotomy, accept that there is only "one Equal Protection Clause,"[56] and ask only whether the "justification put forward by the State is sufficient to make an otherwise offensive classification acceptable."[57] This form of tierless equal protection analysis — a proportionality test — would give courts discretion to weigh "the public interest pursued by the state as well as the individual interests of the right-holder."[58]

The Supreme Court has never explicitly adopted this idea. Although intermediate scrutiny, for example, assesses broader types of harm than strict scrutiny, it too is only accessible to predetermined "quasi-suspect" classes and rights — a list that has not expanded since 1977.[59] Yet courts have, since then, employed proportionality elements in the bite context.[60] In *Romer v. Evans* for instance, the Supreme

---

[52] *Id.*

[53] *Cf.* James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2304–11 (2006) (suggesting that there might be up to six tiers of scrutiny).

[54] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

[55] *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting).

[56] *Craig*, 429 U.S. at 211 (Stevens, J., concurring).

[57] *Id.* at 213; *see id.* at 211–13.

[58] Vlad Perju, *Proportionality and Freedom — An Essay on Method in Constitutional Law*, 1 J. GLOBAL CONSTITUTIONALISM (forthcoming 2012) (manuscript at 6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033281; *see also* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 154 (1972).

[59] Yoshino, *supra* note 43, at 757 & n.73.

[60] *See* Cook v. Gates, 528 F.3d 42, 52 (1st Cir. 2008) ("[W]e are persuaded that *Lawrence* [*v. Texas*, 539 U.S. 558 (2003)] . . . applied a balancing of constitutional interests that defies either the

Court struck down a law for inflicting "immediate, continuing, and real injuries that *outrun and belie* any legitimate justifications that may be claimed for it," even with no fundamental rights at stake.[61]

The *Massachusetts* approach is consistent with this proportionality test. Had the court applied traditional analysis, it would likely have upheld DOMA after finding that it tenuously fit a legitimate purpose and did not implicate a suspect class or fundamental right.[62] Instead, the court broadly assessed the "major detriments"[63] DOMA imposed on a historically disadvantaged group and the problems of a Congress intruding "into an area of traditional state regulation" by attempting to influence "a state's decision as to how to shape its own marriage laws."[64] Thus, rather than *presume* no harm based on predefined rubrics, the court contextually evaluated DOMA's implications to hold that DOMA's harms *outweighed* the objectives the law served.

Courts might consider expanding the direct balancing evident in this analysis across the gamut of equal protection cases. Members of the Supreme Court have already invoked "proportionality" review in the First Amendment[65] and some Fourteenth Amendment contexts,[66] and courts from Europe to Canada "have adopted proportionality as their method of choice in constitutional cases and beyond."[67] The main advantage of traditional scrutiny is that it helps to banish the specter of judicial lawmaking.[68] By limiting courts' discretion in presuming harm to enumerated classes and rights, the trichotomy prevents courts from engaging in *Lochner*-style invalidations of regulations.[69] Moreover, the trichotomy is predictable; it would take years of

---

strict scrutiny or rational basis label."); Fleming, *supra* note 53, at 2311 (concluding that Justices Stevens and Marshall "were right after all").

61 Romer v. Evans, 517 U.S. 620, 635 (1996) (emphasis added); *see also, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (concluding that encouraging investment is not "legitimate under the Equal Protection Clause *to justify* the imposition of the discriminatory tax at issue here" (emphasis added)); Plyler v. Doe, 457 U.S. 202, 224 (1982) ("[W]e may appropriately take into account [the law's] costs to the Nation and to the innocent children who are its victims. *In light of these countervailing costs*, the discrimination contained in [the law] can hardly be considered rational . . . ." (emphasis added)).

62 *See Massachusetts*, 682 F.3d at 8–10.

63 *Id.* at 11.

64 *Id.* at 12–13.

65 *See* United States v. Alvarez, 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring in the judgment) ("[T]his Court has often found it appropriate to . . . determine whether [a] statute works speech-related harm that is out of proportion to its justifications.").

66 Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 567 (2003).

67 Perju, *supra* note 58 (manuscript at 2); *see also* Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE. J. COMP. & INT'L L. 291 (2012).

68 *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 & n.212 (1987).

69 *See* ELY, *supra* note 44, at 146.

precedential decisions before a proportionality approach could stably guide lower courts regarding which harms outweigh which interests. Yet a proportionality test offers three advantages over the present tiers. First, to the extent courts *already* implicitly balance state interests and individual rights, "the balancing takes place inside a black box."[70] It would be preferable for courts to weigh competing policies "outright without diversionary discussions regarding a statute's rationality."[71] Second, by incorporating constitutional harm directly into a less rigid form of equal protection analysis, courts could distinguish between beneficial and harmful types of classifications. Rather than categorically compelling school systems to "stop assigning students on a racial basis,"[72] for example, courts could weigh a government's interests in affirmative action programs directly against the harms and benefits to individuals, distinguishing between a figurative "'No Trespassing' sign" and "welcome mat."[73] Finally, a proportionality test is tierless, avoiding the irony of assessing the strength of a plaintiff's equal protection claim based on his or her membership in a particular class.[74] This point is salient in the context of gay rights, where courts have confronted discriminatory laws knowing that the Supreme Court may not apply heightened scrutiny to such cases.[75]

Massachusetts's departure from the "rigid categorical rubrics" reveals a central problem with the scrutiny trichotomy: even a substantial governmental interest in a classification can be outweighed by the harm it causes a nonsuspect class. Yet the trichotomy, as presently conceived, does not adequately capture this nuance, in part because it leaves little room for a court to flexibly assess the actual burdens a law imposes on targeted groups. Regardless of whether the *Massachusetts* court intended for its analysis to present a proportionality test, the court explicitly held that the government's interest in discriminating against same-sex spouses was inadequate to support the harm the discrimination caused. Such a direct holding points to a more contextual approach to equal protection analysis that other courts would do well to adopt.

---

[70] Aleinikoff, *supra* note 68, at 976; *see also* Schlink, *supra* note 67, at 298 ("Proportionality analysis would not be something alien to American constitutional jurisprudence and scholarship . . . ."); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 476–77 (1997) (arguing that "the Court actually engages in covert balancing").

[71] Note, *supra* note 58, at 154.

[72] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[73] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

[74] *See* Yoshino, *supra* note 43, at 763 (predicting the "Court will find . . . choosing among groups to be increasingly distasteful as the nation becomes ever more conscious of its diversity").

[75] *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1063–64 (9th Cir. 2012) (invalidating same-sex marriage ban under rational basis); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 1002–03 (N.D. Cal. 2012) (invalidating DOMA under intermediate scrutiny and rational basis review).