Rationalizing away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians

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I. INTRODUCTION

In November of 2000, Nebraska joined a growing number of states that have banned same sex marriage by passing a constitutional amendment prohibiting the recognition of same sex marriage, civil unions, and domestic partnerships. Unlike legislation and amendments in other states which either simply define marriage as a union between a man and a woman or refuse to recognize same sex marriage, the amendment to the Nebraska constitution is a broad prohibition on the recognition of any partnership rights for same sex couples. The United States Supreme Court has yet to establish whether or not gays and lesbians should be treated as a suspect or quasi-suspect class under equal protection analysis. However, it is clear that as more state bans on gay marriage and civil unions are challenged, the Supreme Court may soon be forced to declare its stance on this issue.

As evidenced by the decisions of lower courts, the final decision on this issue may center on the question of whether gays and lesbians constitute a politically powerless group. If, like some lower courts, the Supreme Court elects to measure the political power of gays and lesbians in a different manner than it has historically measured the political power of women and racial minorities, the Supreme Court will continue to apply rational basis review to legislation classifying by sexual orientation, rather than applying the heightened or strict scrutiny standards it has used with regard to gender and race, respectively.

II. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The courts have applied varying levels of scrutiny when deciding whether legislation violates the Equal Protection Clause. When a law classifies on the basis of race, alienage, or national origin, or discriminates with respect to a fundamen-
In analyzing laws which classify by gender, the courts apply heightened scrutiny. All other laws challenged under equal protection are analyzed under rational basis review, which is the most lenient of the three standards.

Although the United States Supreme Court had previously been reluctant to hold that all laws which classified by race were inherently suspect, by the mid-1960s, it became clear that racial classifications would be subject to the “most rigid scrutiny.” In McLaughlin v. Florida, the Court held that a law which made it a crime for unmarried interracial couples to cohabitate violated equal protection. Because the law classified on the basis of race, the Court looked to “the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.” Based on this central purpose, the Court established that racial classifications are “constitutionally suspect.”

In the 1967 case of Loving v. Virginia, the Court held that laws prohibiting interracial marriage were also invalid under the Equal Protection Clause. The Court further established that in order for any racial classification to be upheld, the classification must be “necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.” In the case of a law prohibiting interracial marriage, the Court stated that such a law

5. Id. at 440 (“Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.”).
6. Id. In order for a law to survive under strict scrutiny, the law must be narrowly tailored to serve a “compelling state interest.” Id.
7. Id. To withstand heightened scrutiny, such laws “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Craig v. Boren, 429 U.S. 190, 197 (1976).
8. Cleburne, 473 U.S. at 440. Under rational basis review, legislation must “classify the persons it affects in a manner rationally related to legitimate governmental objectives” in order to be sustained. Schweiker v. Wilson, 450 U.S. 221, 230 (1981); see also Cleburne, 473 U.S. at 440.
11. Id. at 184-86.
12. Id. at 191-92.
13. Id. at 192 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)); Gerstmann, supra note 9, at 35 (“[W]hen a group is designated as a suspect class all laws regarding that group are, by definition, suspect.”).
14. 388 U.S. 1, 2 (1967).
15. Id. at 11.
had "no legitimate overriding purpose independent of invidious racial discrimination."\(^{16}\)

Later, the Court began to apply strict scrutiny to laws which classified by alienage or national origin. The court found that laws based on these factors were "deemed to reflect prejudice and antipathy" in that the factors they were based on are "seldom relevant to the achievement of any legitimate state interest."\(^{17}\) The Court has reasoned that strict scrutiny must be used because the discrimination that is furthered by laws which classify by race, alienage, or national origin "is unlikely to be soon rectified by legislative means."\(^{18}\) This is because some minority groups lack the political power to "effectively use the legislative process to protect their rights."\(^{19}\)

Initially, the Court held that classifications based on gender were subject to strict scrutiny,\(^ {20}\) but it soon settled on a heightened standard of review,\(^ {21}\) which is "not so exacting as strict scrutiny."\(^ {22}\) Therefore, laws which treated the sexes differently became subject to heightened scrutiny because such laws "very likely reflect outmoded notions of the relative capabilities of men and women."\(^ {23}\) In \textit{Craig v. Boren}, the Court dealt with an Oklahoma statute which prohibited the sale of beer to males under the age of 21 and to females under the age of 18.\(^ {24}\) The Court noted that in order for classifications based on gender to withstand heightened scrutiny, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."\(^ {25}\) Although the Court agreed that the law’s purpose of promoting traffic safety was an important governmental objective,\(^ {26}\) the Court held that the statistical evidence regarding the drunk-driving rates of males and females was not substantial enough to justify treating the genders differently under the statute.\(^ {27}\)

In \textit{Mathews v. Lucas}, the Court gave its reasons for applying heightened rather than strict scrutiny to laws that classify based on illegitimacy.\(^ {28}\) The Court observed that the status of illegitimacy bears some similarity to race or national origin in that it is "a characteristic determined by causes not within the control of the . . . individual, and it bears no relation to the individual’s

\begin{itemize}
  \item \textit{Id.}\(^ {16}\)
  \item City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).\(^ {17}\)
  \item \textit{Id.}\(^ {18}\)
  \item GERSTMANN, \textit{supra} note 9, at 21.\(^ {19}\)
  \item See Frontiero v. Richardson, 411 U.S. 677, 688 (1973).\(^ {20}\)
  \item \textit{Cleburne}, 473 U.S. at 440.\(^ {21}\)
  \item GERSTMANN, \textit{supra} note 9, at 21.\(^ {22}\)
  \item \textit{Cleburne}, 473 U.S. at 441.\(^ {23}\)
  \item 429 U.S, 190, 191-92 (1976).\(^ {24}\)
  \item \textit{Id.} at 197.\(^ {25}\)
  \item \textit{Id.} at 199-200.\(^ {26}\)
  \item \textit{Id.} at 201-02.\(^ {27}\)
  \item 427 U.S. 495 (1976).\(^ {28}\)
\end{itemize}
ability to participate in and contribute to society.”

However, the Court declined to apply strict scrutiny, finding that discrimination against illegitimate individuals “has never approached the severity or pervasiveness” associated with discrimination towards racial minorities. Therefore, the Court has chosen to apply a somewhat heightened form of scrutiny to laws which classify based on illegitimacy. This standard requires that such laws will be invalid unless the Court finds them to be “substantially related to a legitimate state interest.” Because laws classifying on the basis of gender and illegitimacy are subject to a standard of review that is less rigorous than strict scrutiny, but more so than the general rational basis rule, gender and illegitimacy are known as “quasi-suspect classifications.”

When the Court designates a group as a suspect class, every law dealing with that group becomes suspect and will be presumed unconstitutional under strict scrutiny. Therefore, the Supreme Court has been reluctant to designate new suspect classes because such a designation would “throw all laws disadvantaging that group into question, thus affecting important issues far beyond the scope of whatever issue is being litigated.” Since its last designation of alienage as a suspect classification in 1971 and its designation of gender and illegitimacy as quasi-suspect classifications in 1977, the Court has refused to declare that any new groups are suspect or quasi-suspect classifications, including the elderly, the mentally disabled, and the poor.

Courts in general have been reluctant to extend to gays and lesbians the same strict or heightened scrutiny standards afforded to the groups which the Supreme Court has designated as suspect or quasi-suspect classifications. In the 1990 case of High Tech Gays v. Defense Industrial Security Clearance Office, the Ninth Circuit held that homosexuals were not a suspect or quasi-suspect class that was entitled to strict or heightened scrutiny under the Equal

29. Id. at 505.
30. Id. at 506.
32. GERSTMANN, supra note 9, at 21.
33. Id. at 35.
34. Id. at 59.
35. Id. at 24.
36. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (holding that even if a statute imposes a penalty based on the classification of age, “it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny”).
39. GERSTMANN, supra note 9, at 23.
Protection Clause. 40 The plaintiffs, a class consisting of all gay persons who had applied for secret or top secret clearance, 41 challenged a policy of the Department of Defense which required homosexuals to undergo expanded investigations when applying for secret or top secret clearances and challenged the Department's policy and practice of refusing to grant security clearances to "known or suspected gay applicants." 42 At the trial level, the District Court for the Northern District of California ruled that homosexuals were a quasi-suspect class entitled to heightened scrutiny, but that the clearance regulations must be reviewed under strict scrutiny "because they impinge upon the right of lesbians and gay men to engage in any homosexual activity ... and thus impinge upon their exercise of a fundamental right." 43 Furthermore, the district court found that even if homosexuals were only entitled to rational basis scrutiny, there was no rational basis that justified treating homosexual applicants differently than heterosexual applicants. 44

The Ninth Circuit overturned the district court decision. It reasoned that in order for any group to qualify as a suspect or quasi-suspect class, the group must suffer from a history of discrimination, exhibit "obvious, immutable, or distinguishing characteristics," and be "a minority or politically powerless," or show instead that the law which classifies the group "burdens a fundamental right." 45 The court referred to a previous Supreme Court decision which held that homosexual activity is not a fundamental right because the right to privacy "inheres only in family relationships, marriage and procreation, and does not extend to all private sexual conduct." 46

After disposing of the fundamental rights issue, the Ninth Circuit analyzed whether homosexuals could meet the three prerequisites of a suspect or quasi-suspect classification. 47 The Court concluded that homosexuals had suffered from a history of discrimination. 48 However, the court went on to distinguish homosexuals from the classifications under race, gender, and alienage, finding that homosexuality is a behavioral trait and not an immuta-

40. 895 F.2d 563, 571 (9th Cir. 1990).
41. Id. at 566 n.1. "The clearance process begins when the defense contractor forwards an individual's name to the [Department of Defense] for Secret or Top Secret clearance." Id. at 565-66. The applicant then undergoes several background checks. Id. at 566.
42. Id. at 565.
44. Id. (citing High Tech Gays, 668 F. Supp. at 1373).
45. Id. at 573 (citing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987)).
46. Id. at 571 (citing Bowers v. Hardwick, 478 U.S. 186, 194-96 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 563 (2003) (holding that a Texas statute which made it a crime for two persons of the same sex to engage in "deviate sexual intercourse" was unconstitutional)).
47. Id. at 573-74.
48. Id. at 573.
ble characteristic.\textsuperscript{49}  Furthermore, the Court found that homosexuals did not lack political power in light of the various forms of anti-discrimination legislation which had been passed in several states.\textsuperscript{50}  Thus, the Ninth Circuit determined that “homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny.”\textsuperscript{51}  

While a limited number of district courts have held that gays and lesbians are a suspect class, all of these decisions, similar to the ruling in \textit{High Tech Gays}, have been reversed or vacated on appeal.\textsuperscript{52}  In \textit{Jantz v. Muci}, Vernon Jantz brought suit against Cleofas Muci, a school principal, after the principal had refused to employ Jantz as a teacher.\textsuperscript{53}  Jantz alleged that the principal based his decision on his belief that Jantz had “homosexual tendencies,” and therefore, the principal’s actions violated the Equal Protection Clause.\textsuperscript{54}  In its decision, the District Court of Kansas addressed the Ninth Circuit’s argument from \textit{High Tech Gays} that homosexuality is not an immutable characteristic, noting that the Ninth Circuit made this decision without citing any scientific or medical authority.\textsuperscript{55}  

The District Court of Kansas concluded that in addition to the scientific evidence that sexual orientation is not easily changed, “absolute immutability simply is not a prerequisite for suspect classification.”\textsuperscript{56}  The Court reasoned that “[a]liens may obtain citizenship, gender may be altered by surgery, lighter-skinned blacks may pass as white.”\textsuperscript{57}  However, the court observed that such alteration or concealment, including changing or hiding one’s sexual orientation, could only be achieved “at the expense of significant damage to the individual’s sense of self,” and therefore, such a defining characteristic as sexual orientation fulfills the requirement of immutability.\textsuperscript{58}  

The district court also addressed the Ninth Circuit’s argument that anti-discrimination legislation in several states proves that homosexuals are not lacking political power.\textsuperscript{59}  The district court noted that the Ninth Circuit “mistakenly assume[d] that scattered, piecemeal successes in local legislation are proof of political power.”\textsuperscript{60}  If such a limited amount of legislative protection would prevent homosexuals from being politically powerless, the district court reasoned that surely the larger amount of legislation protecting blacks, women, and aliens should also prevent these groups from receiving the poten-

\textsuperscript{49}  Id.
\textsuperscript{50}  Id. at 574.
\textsuperscript{51}  Id.
\textsuperscript{52}  See \textit{Gerstmann}, supra note 9, at 60.
\textsuperscript{54}  Id.
\textsuperscript{55}  Id. at 1547.
\textsuperscript{56}  Id. at 1548.
\textsuperscript{57}  Id.
\textsuperscript{58}  Id.
\textsuperscript{59}  Id. at 1549.
\textsuperscript{60}  Id. at 1550.
tial benefits of heightened scrutiny. However, classifications regarding those groups are still reviewed under strict or heightened scrutiny, and therefore, if those groups continue to lack political power, the court stated that homosexuals are also politically powerless under the existing standards.

Ultimately, the district court held that under the guidelines established by the Supreme Court, “discrimination based on sexual orientation is inherently suspect.” The Tenth Circuit subsequently reversed the decision of the district court on the grounds of immunity without specifically ruling on the issue of homosexuals as a quasi-suspect classification, but noted that in Rich v. Secretary of the Army, the court had found that status-based classifications were not inherently suspect. Intimating what it would decide if faced with the issue, the Court stated that it “would not be entitled as a three-judge panel to overrule circuit precedent.”

Because the courts have consistently refused to designate gays and lesbians as a suspect or quasi-suspect class, laws which classify based on sexual orientation have been reviewed under rational basis scrutiny. Therefore, laws which classify by sexual orientation will only be struck down if there is no rational basis justifying different treatment of heterosexuals and homosexuals. For example, in Romer v. Evans, the Supreme Court struck down a law that could not withstand even this lower level of scrutiny under the Equal Protection Clause. In that case, several Colorado municipalities had passed ordinances which banned discrimination based on sexual orientation in a variety of contexts. The state of Colorado then passed a constitutional amendment (“Amendment 2”) which precluded “all legislative, executive, or judicial action at any level of state or local government” which was designed to protect people based on their sexual orientation. The Colorado Supreme Court held that Amendment 2 infringed upon the right of gays and lesbians to

61. Id.
62. Id.
63. Id. at 1550-51.
64. Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992) (holding that the principal was entitled to qualified immunity, which “shields government officials from the burdens of lawsuits stemming from the exercise of discretionary authority” when the plaintiff cannot show that the defendant’s conduct “violated clearly established law of which a reasonable person would have been aware” at the time. Id. at 627-28.
65. Id. at 630 (citing Rich v. Sec’y of the Army, 735 F.2d 1220, 1229 (1984)).
66. Id. (citing U.S. v. Spedalieri, 910 F.2d 707, 710 n.3 (10th Cir. 1990)).
67. GERSTMANN, supra note 9, at 23.
69. 517 U.S. 620, 632 (1996) (“Amendment 2 fails, indeed defies, even this conventional inquiry”).
70. Id. at 620. These ordinances banned discrimination in contexts such as housing, employment, education, public accommodations, and health and welfare services.
71. Id.
participate in the political process, and therefore, the Amendment was subject to strict scrutiny under the Equal Protection Clause.\textsuperscript{72} While the United States Supreme Court affirmed the state supreme court's judgment, it reached its conclusion under the rational basis standard, rather than under strict scrutiny.\textsuperscript{73}

The Supreme Court reasoned that a law which made a "general announcement that gays and lesbians shall not have any particular protections from the law" raised the inference that the law was "born of animosity toward the class of persons affected."\textsuperscript{74} The State of Colorado argued that the rationale behind Amendment 2 was to respect the liberties of landlords or employers who may have objections to homosexuality.\textsuperscript{75} The Court observed that because the "sheer breadth [of Amendment 2] is so discontinuous with the reasons offered for it,"\textsuperscript{76} Amendment 2 only served "to make [homosexuals] unequal to everyone else," and therefore, it lacked a rational relationship to legitimate state interests.\textsuperscript{77}

Because the Court reviewed the law under rational basis scrutiny, the ruling decided only the issue of whether a rational basis existed for treating homosexuals differently under Amendment 2.\textsuperscript{78} If the Court had held that gays and lesbians were a suspect or quasi-suspect class, such a holding would have made all laws which classify based on sexual orientation immediately suspect.\textsuperscript{79} Although the Supreme Court's finding that Amendment 2 could not survive rational basis review allowed the Court to avoid the question of whether homosexuals constitute a suspect class, the Court may soon be faced with such a decision in the context of laws that place bans on gay marriage.

III. RECENT DEVELOPMENTS

\textit{A. Citizens for Equal Protection v. Bruning}\textsuperscript{80}

In November of 2000, Nebraska voters passed a constitutional amendment which provided:

\textbf{\textsuperscript{72} See} Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993) (finding that "the Equal Protection Clause . . . protects the fundamental right to participate equally in the political process," and any amendment "which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny").

\textbf{\textsuperscript{73} Romer}, 517 U.S. at 632.

\textbf{\textsuperscript{74} Id.} at 634-35.

\textbf{\textsuperscript{75} Id.} at 635.

\textbf{\textsuperscript{76} Id.} at 632.

\textbf{\textsuperscript{77} Id.} at 635.

\textbf{\textsuperscript{78} GERSTMANN, supra} note 9, at 117.

\textbf{\textsuperscript{79} See id.} at 37.

\textbf{\textsuperscript{80} 455 F.3d} 859 (8th Cir. 2006).
Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska. 81

Citizens for Equal Protection and two other public interest groups filed an action against the Governor and Attorney General of Nebraska, seeking an order which declared that the amendment violated the Equal Protection Clause. 82 The plaintiffs did not ask the District Court of Nebraska to decide whether or not gays and lesbians had a right to marry or enter same sex civil unions. Instead, they sought "a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection." 83 The plaintiffs' argument rested on the fact that the ban took the form of a constitutional amendment, which can only get the legislators' attention if the amendment is repealed. 84 Thus, the plaintiffs argued that the amendment restricted the political power of gays and lesbians by making it impossible for state and local government officials to address certain issues that are of concern to gays and lesbians. 85

The District Court of Nebraska noted that although all fifty states have laws dealing with same sex unions, "no state ha[d] amended its Constitution with language as broad as Nebraska." 86 The State argued that the purpose of the amendment was to "preserve marriage as the union between a man and a woman, to promote procreation and family life, and to ensure that Nebraskans are not forced to recognize same sex marriages from other jurisdictions." 87 However, the court found that the scope of the amendment served to "impose a broad disability on a single group," and therefore, the amendment was indistinguishable from the amendment at issue in Romer v. Evans. 88 The court further reasoned that the language of the amendment went far beyond defining marriage, and instead was designed to prevent one class of citizens from having the political power to advocate for access to benefits retained by other

81. Id. at 863 (quoting NEB. CONST. art. I, § 29).
82. Id.
83. Id. at 865 (quoting Citizens for Equal Prot. v. Bruning., 368 F. Supp. 2d 980, 985 n.1 (D. Neb. 2005)).
84. See id. at 865 n.2.
85. Id. at 865. The plaintiffs assert that they seek to have the ability to advocate the passage of legislation that "would make domestic partners responsible for each others' living expenses; allow a partner hospital visitation; provide for a partner to make decisions regarding health care, organ donations, and funeral arrangements; permit bereavement leave; permit private employer benefits; allow survivorship, intestacy and elective share; and permit same-sex couples to adopt children." Citizens for Equal Prot., 368 F. Supp. 2d at 999-1000.
86. Citizens for Equal Prot., 368 F. Supp. 2d at 1000 n. 16.
87. Id. at 1000.
88. Id. at 1002; see supra notes 69-79 and accompanying text.
citizens. Although the court did not declare that gays and lesbians constitute a suspect or quasi-suspect class, it did hold that because the State’s purpose behind the amendment lacked a connection to the broad scope of the amendment, section 29 did not have a rational relationship to any legitimate state interest.

On appeal, the Eighth Circuit Court of Appeals noted that although the district court “purported to apply conventional, ‘rational-basis’ equal protection analysis,” it had actually applied strict scrutiny based on its finding that section 29 denied gays and lesbians the fundamental right to access the political process. Observing that the Supreme Court had applied rational basis review in *Romer*, and that the Supreme Court had never designated sexual orientation as a suspect classification, the Eighth Circuit initially held that the plaintiffs were therefore entitled to rational basis review, rather than strict scrutiny.

Then, the court examined the State’s argument that laws defining marriage as the union of a man and a woman and the resulting extension of benefits to married couples were rationally related to the State’s interest in encouraging procreation within marriage. The court found that this argument was based on the “traditional notion that two committed heterosexuals are the optimal partnership for raising children.” Ultimately, because the State’s argument was also based on a “‘responsible procreation’ theory” which justified inducing heterosexual couples to marry because they can produce children by accident, unlike same sex couples who cannot, the court found that it could not conclude “that the State’s justification ‘lacks a rational relationship to legitimate state interests.’”

### B. Similar Amendments in Other States

Several states have passed similar constitutional amendments that ban the recognition of same sex marriages, civil unions, and/or domestic partnerships. These amendments range from broad prohibitions “of any partnership rights for same-sex couples” to prohibitions which “focus more narrowly on comprehensive rights,” instead of prohibiting any and all possible partnership rights.

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89. *Citizens for Equal Prot.*, 368 F. Supp. 2d at 1002.
90. *Id.*
92. *Id.* at 866-67.
93. *Id.* at 867.
94. *Id.*
95. *Id.* at 867-68 (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).
For example, an amendment to the Kentucky Constitution states that Kentucky will only recognize as valid a marriage between one man and one woman, and that "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."  A similar amendment in Arkansas states that "[l]egal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized . . . ."  Michigan's amendment defines marriage or a similar union as "the union of one man and one woman."  Amendments such as these are considered to be more narrowly tailored in that citizens may still be able to establish domestic partnerships because the benefits of such a partnership do not "approximate the extensive combination of rights associated with marriage."

North Dakota's constitutional amendment, on the other hand, defines marriage as a legal union between a man and a woman, and states that "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."  Other examples of similar state constitutional amendments include Georgia's amendment, which states that "[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage;", Kansas's amendment, which states that "[n]o relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage"; Louisiana's amendment, which states that its constitution and state laws shall not be construed "to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman"; Oklahoma's amendment, which states that its constitution and state laws shall not be construed "to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups"; and Texas's amendment, which prohibits the creation or recognition of "any legal status identical or similar to marriage."

These amendments, much like the Nebraska amendment in Bruning, are examples of broad prohibitions that prevent the establishment of same sex marriage, civil unions and domestic partnerships.  However, both the broad and narrowly tailored constitutional amendments are more restrictive than

97. KY. CONST. § 233(A).
98. ARK. CONST. amend. 83, § 2.
100. Howenstine, supra note 96, at 443.
102. See Howenstine, supra note 96, at 425 n.57.
103. GA. CONST. art. I, § 4, P I(b).
104. KAN. CONST. art. XV, § 16(b).
105. LA. CONST. art. XII, § 15.
106. OKLA. CONST. art. II, § 35.
107. TEX. CONST. art. I, § 32(b).
108. Howenstine, supra note 96, at 425.
statutes because they prevent state legislatures from establishing any laws that would provide rights which are traditionally afforded to spouses to same sex partners.  

IV. DISCUSSION

A. Gays and Lesbians as a Suspect or Quasi-suspect Classification

Although the Supreme Court successfully avoided the issue of whether gays and lesbians constitute a suspect class in Romer, its decision nonetheless provides guidance on how the Supreme Court would employ a rational basis inquiry when reviewing a law or amendment prohibiting recognition of same sex marriages, civil unions, or domestic partnerships. Additionally, decisions from lower courts which declare homosexuals to be a suspect or quasi-suspect class provide several bases upon which the Supreme Court might decide that legislation classifying homosexuals is entitled to strict or heightened scrutiny.  

Based on its decision in Romer, the Supreme Court could employ rational basis review and find that amendments such as the one at issue in Bruning so broadly prohibit homosexuals' rights that they fail the rational basis test. Furthermore, if the Court assessed the political power of all groups in the same manner when determining whether a group constitutes a suspect or quasi-suspect classification, it would be much more likely that the Court would find laws classifying on the basis of sexual orientation to be subject to heightened or strict scrutiny.

While the Eighth Circuit disposed of the argument that homosexuals constitute a suspect classification by simply stating that "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes," some district courts have provided considerably more in-depth analyses which led to markedly different results. In High Tech Gays, for example, the District Court for the Northern District of California did not rely upon the Supreme Court's silence on the issue of whether homosexuals constituted a suspect class, but instead based its analysis on the framework provided by the Supreme Court's decision in Cleburne. Relying the Supreme Court's precedent, the district court reached a different result than the Eighth Circuit, and held that "Cleburne mandates that classifications based on sexual orientation be scrutinized under a heightened standard of review analogous to the standard of review afforded classifications based on gender."
Because the Supreme Court’s analysis in *Cleburne* provided factors which established the Court’s basis for finding that gender was a quasi-suspect classification, these factors may provide a basis for finding homosexuals to be a quasi-suspect classification as well. As noted in the district court’s analysis in *High Tech Gays*, the Supreme Court found that heightened scrutiny should be applied to gender classifications because gender classifications often reflected “‘outmoded notions of the relative capabilities of men and women,’” and that “‘the sex characteristic frequently bears no relation to ability to perform or contribute to society.’” The district court applied these principles when analyzing the requirement that a group must suffer from a history of discrimination in order to qualify as a suspect or quasi-suspect class, noting that homosexuals “have been the object of some of the deepest prejudice and hatred in American society.” Based on the history of discrimination that homosexuals have faced, the district court observed that stereotypes and negative attitudes toward homosexuals “represent outmoded notions about homosexuality, analogous to the ‘outmoded notions’ of the relative capabilities of the sexes that require heightened scrutiny of classifications based on gender.”

Although many courts have been unwilling to declare that homosexuals constitute a suspect or quasi-suspect class, courts have generally agreed that homosexuals have suffered a history of discrimination and therefore, homosexuals, as a group, exhibit the first attribute required in order for a group to be declared a suspect or quasi-suspect class. When the Ninth Circuit overturned the district court’s finding that homosexuals constituted a quasi-suspect class, it noted that it agreed that homosexuals had suffered from a history of discrimination. However, it also found that legislatures across the country were currently addressing the discrimination suffered by homosexuals, and the passage of anti-discrimination laws prevented homosexuals from constituting a politically powerless group, which is one of the attributes a group must have in order to warrant strict or heightened scrutiny.

Under equal protection analysis, it is unclear whether a standard exists for courts to measure a specific group’s political power. When the Colorado trial court found that Amendment 2 violated the Equal Protection Clause in *Evans v. Romer*, Judge Jeffrey Bayless held a trial to determine whether homosexuals constituted a suspect class and determined that homosexuals did

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114. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985)).
115. *Id.*
116. *Id.*
117. GERSTMANN, *supra* note 9, at 66 (“In fact, no court has ever denied suspect-class status to gays and lesbians on the ground that they have not suffered a history of discrimination.”).
119. *Id.* at 574.
not meet the criteria necessary for a group to constitute a suspect class. In finding that homosexuals could not be considered politically powerless, Judge Bayless based this conclusion on the fact that 46 percent of Colorado voters voted against Amendment 2. At the time, the homosexual population was estimated to be four percent, which caused Judge Bayless to reason that "[i]f 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness." However, this conclusion does not take into account the fact that Amendment 2 had enough support to be enacted, and that one of the Amendment’s practical effects was to prevent homosexuals from seeking protection through the passage of anti-discrimination laws.

Furthermore, Judge Bayless and the Ninth Circuit failed to address the parallels between homosexuals and already established suspect or quasi-suspect classes, such as racial minorities and women. If racial minorities and women are deemed to lack political power and therefore, are characterized as suspect or quasi-suspect classes, “then logically gays and lesbians must be, at a minimum, more politically powerful than these groups” in order for courts to find that homosexuals are too politically powerful to constitute a suspect or quasi-suspect class. However, many laws, including amendments to the U.S. Constitution, have been enacted with the intention of protecting racial minorities and women from discrimination. Therefore, if the “scattered, piecemeal” passage of local anti-discrimination legislation and the ability of gays and lesbians to rally enough support to almost defeat the passage of Amendment 2 is deemed by courts to constitute too much political power, it is clear that under this standard, courts would have to declare that racial minorities now also have too much political power to be considered suspect or quasi-suspect classifications.

When the Supreme Court addressed the political power of women, it measured women’s political power in terms of the impact discrimination has had on limiting the number of women who hold seats in the House of Representatives and the number of women who have been appointed as Supreme Court Justices. The Court also noted that there has never been a female President. This measure of political power is substantially different than the standard by which the political power of homosexuals has been measured. This blatant discrepancy may serve to prevent the possibility of lessening the protection ordinarily given to women and racial minorities under heightened and strict scrutiny. If courts measured the political power of racial minorities

120. GERSTMANN, supra note 9, at 60; See Evans v. Romer, No. 92 CV 7223, 1993 WL 518586 (D. Colo. 1993).
121. Romer, 1993 WL 518586 at *12.
122. Id.
123. GERSTMANN, supra note 9, at 81.
125. GERSTMANN, supra note 9, at 82 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1972)).
and women by their ability to gather support for legislation aimed at preventing discrimination towards them, the success these groups have had in obtaining support or the passage of such legislation "would deeply undermine the validity of subjecting racial and gender discrimination to strict scrutiny" or heightened scrutiny. 126 If courts began to measure the political power of homosexuals in the same manner that courts have measured the political power of women, women would emerge as the more politically powerful of the two groups, thus lessening the justification for subjecting gender classifications to heightened scrutiny.

In the context of what is frequently referred to as "reverse discrimination," courts have even gone as far as applying strict or heightened scrutiny to laws that discriminate against whites and males. 127 The Supreme Court has also held that males may not be discriminated against in situations involving jury selection and admission to universities. 128 If the standard used to measure the political power of homosexuals had been used in these situations, it is likely that whites and males would have been unsuccessful in persuading the Supreme Court to apply strict or heightened scrutiny to laws discriminating against them.

In order for courts to have the ability to continue applying strict or heightened scrutiny to racial minorities and women, plus to whites and males in some circumstances, it seems that the simplest solution would be to apply the same standard when measuring the political power of any group seeking the enhanced protections afforded to a suspect or quasi-suspect class under strict or heightened scrutiny. The application of a different standard for homosexuals serves not only to deprive homosexuals of designation as a suspect or quasi-suspect class, but also endangers the status of racial minorities and women as suspect and quasi-suspect classes. If courts began to base their measurement of homosexuals' political power on a history of discrimination, as the courts have done in the cases of women and racial minorities, it would be difficult to deny that homosexuals are sufficiently politically powerless to constitute a suspect or quasi-suspect class. Thus, the development of a different standard for measuring the political powerlessness of homosexuals demonstrates the reluctance of courts to find that homosexuals are a suspect or quasi-suspect class.

Additionally, based on the Supreme Court's unwillingness to add groups to the short list of classifications which warrant strict or heightened scrutiny, the Court is likely to continue to both deny homosexuals status as a suspect or quasi-suspect classification and to examine laws classifying based on sexual orientation under the rational basis test. Alternatively, the Court may find

126. Id.
certain laws, like the constitutional amendment at issue in Bruning, so broad in their prohibition of partnership rights that they do not even pass the rational basis test. In that case, the Court would again, as it did in Romer, avoid having to answer the question of whether homosexuals constitute a suspect or quasi-suspect classification.

B. Rational Basis Review of Bans on Gay Marriage

As the district court and the Eighth Circuit decisions in Bruning demonstrate, the application of rational basis review by different courts can result in substantially different reasoning and results.\textsuperscript{129} Although the district court "purported to apply conventional, 'rational-basis' equal protection analysis," it appeared to the Eighth Circuit that the district court had really employed a strict scrutiny analysis.\textsuperscript{130} The Eighth Circuit then applied what it believed to be a true rational basis review, which was "highly deferential . . . to the electorate that directly adopted § 29 by the initiative process."\textsuperscript{131} Under this minimal form of scrutiny, the Eighth Circuit found that the State’s interest in giving the rights and benefits of marriage only to heterosexual couples in order to encourage procreation "to take place within the socially recognized unit that is best situation for raising children," provided a rational basis for section 29.\textsuperscript{132}

Additionally, the Eighth Circuit rejected the district court’s argument that section 29 was indistinguishable from Amendment 2 in Romer.\textsuperscript{133} The court found that unlike Amendment 2, the amendment at issue in Bruning limited the rights afforded to homosexuals only within the context of marriage and its legal equivalents, and therefore, it was not so broad as to be based only on the legislature’s animus towards same sex couples.\textsuperscript{134} However, the Eighth Circuit mistakenly assumed that just because section 29 does not concern multiple facets such as orientation, conduct, practices, and relationships, that it cannot be considered overly broad.\textsuperscript{135} In the context of the subject that it does restrict, section 29 is much broader than a statute or amendment that simply defines marriage as a union between a man and a woman. Not only does it deprive homosexuals of any rights stemming from any form of same sex partnership, but it also prevents them from being able to persuade the legislature to afford homosexuals any partnership rights in the future. In light of the amendment, the legislature is prohibited from passing

\textsuperscript{129} See 368 F. Supp. 2d 980 (D. Neb. 2005); 455 F.3d 859 (8th Cir. 2006).
\textsuperscript{130} 455 F.3d at 865-66.
\textsuperscript{131} \textit{Id.} at 867.
\textsuperscript{132} \textit{Id.} at 867-68.
\textsuperscript{133} \textit{Id.} at 868.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
any laws which would provide homosexuals with any rights that would resemble those given to a spouse.

Although the Supreme Court would likely find that state constitutional amendments and statutes which define marriage as a union between a man and a woman are rationally related to a state’s interest in protecting the traditional marriage and family structure, it is possible that under the same analysis it employed in Romer, the Court may strike down broad laws like the amendment at issue in Bruning. Because the traditional definition of marriage is already protected by the amendment’s language, the prohibition of all partnership rights is therefore unnecessary. Thus, the broad effect of section 29 in denying any and all partnership rights to same sex couples seems to be motivated by a desire to make homosexuals unequal in the context of partnership rights, and as the Supreme Court held in Romer, such a law cannot survive even under the minimal review of the rational basis test.

V. CONCLUSION

As states continue to enact legislation and amendments which ban the recognition of same sex marriage, civil unions, and domestic partnerships, the Supreme Court will continually be pressured to declare whether or not gays and lesbians constitute a suspect or quasi-suspect classification for purposes of equal protection analysis. If the Supreme Court follows the lead of several circuits which have held that gays and lesbians do not qualify as a politically powerless group, laws which classify based on sexual orientation will continue to be subject only to the lenient standard of rational basis review. However, based on the Supreme Court’s decision regarding the amendment at issue in Romer, broad constitutional amendments which prohibit the recognition of any partnership rights for gays and lesbians may be invalid even under rational basis review. Alternatively, if the Court chooses to apply its equal protection analysis evenhandedly by measuring the political power of homosexuals in the same manner it has measured the political power of other groups, the Court may find that laws classifying based on sexual orientation are subject to heightened or strict scrutiny.

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136. Howenstine, supra note 96, at 440.