A Constitutional Right to Same-Sex Marriage in the United States

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Abstract

The fight for same-sex marriage in the United States is a contemporary topic of law and politics. The Supreme Court will issue a decision on the matter by June 2013. Same-sex marriage, as a state's jurisdiction, has three routes the Supreme Court can choose: strict scrutiny with the Due Process Clause of the Fourteenth Amendment, strict scrutiny with the Equal Protection Clause of the Fourteenth Amendment, or rational basis with Susan Rush's ill motives exception. The statutes against same-sex marriage do not survive any level of scrutiny established by the Supreme Court. Therefore, same-sex marriage is constitutional.

Table of Contents

Table of Figures

Introduction

Marriage is so intertwined with humanity that it has become a part of everyday life in every culture. A record of marriage exists in history from civilizations dating back to ancient Egypt (Tyldesley, 1994, 20). Children are raised surrounded by marriage and many are taught to marry for life. Marriage is inherent in culture, especially American and Western culture, and it is difficult to imagine this widely accepted institution inexistent in a society.

Yet, what is a current definition of marriage? Some argue it is a right bestowed from God, consecrated in a church and only serves religious purposes.[1] However, this definition is no longer the entire definition. The term 'marriage' now contains 'civil marriage' through its inclusion in numerous governmental laws and statutes.[2] Marriage is an act recognized by law and enjoyed by a majority of people, religious or not. It has become an idea of companionship with another person; as argued by John Corvino:

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[1] "The judges have chosen to insult millions…from many religions and has perverted justice. God alone has the right to define marriage" (Hall, 2004, A21).

[2] "'And because civil marriage licenses are obtained from the government, ending sex discrimination in legal or 'civil' marriage won't compel any change in our nation's churches, synagogues, mosques, and temples.'…In a related but somewhat different vein…'religious institutions, under the direction of their individual leaders and religious teachings, preach what they believe is best for those people who share the same faith ... Government should not be a weapon used to impose religious rules or parochial interpretations on others,'" (Dane, 2009, n4).

> "[Marriage] involves the couple's commitment to each other and to society that they are each other's main line of defense in the world, for life. It is an exclusive commitment, not in the sense a spouse doesn't care for other people (children, friends, parents), but in the sense that only one person can be your Number One Person. Here is the "special someone" that you will have and hold, for better or for worse, for richer or for poorer, in sickness and in health, until death do you part. Here is the one that you will come home to at night, wake up with in the morning, and share life's joys, sorrows, and challenges with. Here is the one that you will be most intimate with physically, emotionally, socially, sexually—elements that are difficult to tease apart in practice, because they are mutually reinforcing. Nothing creates, signals, and sustains this kind of relationship the way marriage does" (Corvino, 2012, 15).

However, marriage is not a privilege granted to every person, but an act that has historically and currently only been permitted with certain limits.[3] For most of American history, certain States[4] only allowed marriage between a white man and a white woman, or a black man and a black woman. These anti-miscegenation standards were shattered with the case of *Loving v. Virginia,* (*Loving v. Virginia*, 388 U.S. 1 (1967)) where the United States' Supreme Court ruled a state could not define a marriage based on race. Today, the debate with marriage is its denial to homosexual couples. The Federal Government and a majority of the States' governments have deemed this type of marriage impermissible.

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[3] "During the 11th Century, marriage was about securing an economic or political advantage. The wishes of the married couple - much less their consent - were of little importance. The bride, particularly, was assumed to bow to her father's wishes and the marriage arrangements made on her behalf" (Everitt, 2012). In 1753 "The act required couples to get married in a church or chapel by a minister, otherwise the union was void. Couples also had to issue a formal marriage announcement, called banns, or obtain a licence." (Everitt, 2012). Another example is the States denying interracial marriage in the United States until the U.S. Supreme Court case of *Loving v. Virginia,* (*Loving v. Virginia*, 388 U.S. 1 (1967)).

[4] These States included Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Caroline, Oklahoma, South Caroline, Tennessee, Texas, Virginia, and West Virginia until their anti-miscegenation laws were overturned by *Loving v. Virginia*, 388 U.S. 1 (1967), ("American anti-miscegenation").

This paper will argue that the denial of marriage to same-sex couples is unconstitutional, beginning with a history of the gay rights movement in America and steps taken to reach the fight for same-sex marriage. Next, the present legal status of same-sex marriage is analyzed, providing a closer examination of certain States' laws that deny same-sex marriage, the federal statute of the Defense of Marriage Act (DOMA) ("Defense of Marriage," 1996), and the current cases awaiting to be heard from the Supreme Court concerning same-sex marriage.

The paper then presents the mixed decisions created by the Supreme Court concerning the gay rights movement. The cases reviewed include *Baker v. Nelson (Baker v. Nelson*, 409 U.S. 810 (1972)*), Bowers v. Hardwick (Bowers v. Hardwick*, 478 U.S. 186 (1986)*), Romer v. Evans (Romer v. Evans*, 517 U.S. 620 (1996)*),* and *Lawrence v. Texas (Lawrence v. Texas*, 539 U.S. 558 (2003)*).* Although not all of the cases discussed concern same-sex marriage, each offers important insight into the changing attitudes towards gay rights in the last fifty years.

The paper then addresses same-sex marriage's constitutionality. The thesis first describes what scrutiny is and defines the varying levels. Next, it argues two routes to a strict scrutiny review by the Supreme Court; the first establishes the right to same-sex marriage as a fundamental right protected by "life, *liberty*, and property" of the Due Process Clause of the Fourteenth Amendment.[5] The established fundamental right of marriage is tested as same-sex marriage under the Supreme Court's decision in *Washington v. Glucksberg* (*Washington v. Glucksberg*, 521 U.S. 702

[5] "nor shall any State deprive any person of life, liberty, or property, without due process of law;" (U.S. Const. amend. XIV, § 2)

(1997)). Problems with Due Process are addressed. If strict scrutiny through Due Process fails, gays are established as a suspect class under the Equal Protection Clause of the Fourteenth Amendment. Problems with the Equal Protection Clause are addressed. After explaining the requirement of strict scrutiny, the thesis presents and overcomes arguments from the States as to why their anti-gay marriage statutes are necessary. If the level of strict scrutiny under both Equal Protection and Due Process is not obtained, the statutes against same-sex marriage are examined under the rational basis test, to which the laws would not survive using Susan Rush's ill motives exception (Rush, 2008, 704).

Marriage is a term not found in the U. S. Constitution. Nothing in the Bill of Rights says who can and cannot be married, nor is there a constitutional amendment that ordains marriage as a right to all, or reserved to a few. Yet, to have a state or a government deny a class of people this right enjoyed by the majority of the population is inherently discriminatory. The paper concludes that marriage, as a right, is fundamental and should be enjoyed by heterosexuals and homosexuals alike, protected by the United States' Constitution.

History of Same-Sex Marriage

Same-sex marriage is a topic that is relatively contemporary in today's society and has, in the last twenty years, become a widespread matter of protest and support (Altman, 2008).[6] The gay rights movement first became widely publicized in the United States in 1969 with the Stonewall Riots (The Leadership Conference, 2009), in which openly gay citizens revolted against New York City police for several days for the right to be openly gay in public. The riots are considered a catalytic event spurring the gay rights movement (*Hollingsworth v. Perry*, 2012, 12). Since 1969, same-sex marriage has grown exponentially in support by homosexuals and heterosexuals. However, the movement has concurrently grown in protest as well.

Same-sex marriage has seen a huge shift in perceptions, political and societal, throughout the last decade. In 1996, an estimated 68% of Americans were against same-sex marriage, the same year the Defense of Marriage Act was enacted (Stark, 2012). Today, perceptions have shifted. A poll taken in 2012 reports that only 48% of Americans are against same-sex marriage (Stark, 2012). Recent polls taken in 2013 show a majority, average of 53%, supporting the legalization of the act ("Same-sex marriage, gay," 2013). Both President Barack Obama and Vice President Joe Biden have made statements supporting same-sex marriage earlier in 2012.[7] In the November 2012 ballot vote, Maryland, Maine, and Washington were added to

[6] Sources cited without page numbers are HTML documents found online with no page numbers provided.

[7] "'At a certain point, I've just concluded that for me personally it is important for me to go ahead and affirm that I think same-sex couples should be able to get married,' Mr. Obama said" (Calmes, 2012).

the States that allow same-sex marriage.[8] Furthermore, in the November 2012 election, the first openly gay United States Senator, Tammy Baldwin, was elected into office from the state of Wisconsin (Grinberg, 2012). While the political and legal perspectives towards same-sex marriage and gay rights have shifted from rejection to acceptance, full equality for homosexuals to marry has yet to occur.

Although the United States faces same-sex marriage conflicts, there are other countries around the world that have both resolved and addressed the debated legal right. Canada, the United States' closest relative in regards to geography and political make-up, has had same-sex marriage legalized by most of its courts, including its highest court, since the early 2000's (Smith, 2005, 225). While legal in other countries such as Argentina, the Netherlands, Spain, South Africa, Portugal, Iceland, Belgium and Sweden (Alpert, 2012), it still remains a crime, sometimes punishable by death, in many countries in Africa, including Libya, Sudan, Egypt, Somalia, and Uganda (Alpert, 2012). Many countries have homophobic laws against the right of same-sex marriage, including most of Australia and the majority of the States in the United States (Alpert, 2012). While the countries that promote same-sex marriage remain a minority, it proves to be an issue that demands much attention from legislatures worldwide. However, same-sex marriage gains increasingly more support and acceptance each year (Pew Research Center for the People and the Press, 2012).

[8] *As of May 2013, Minnesota and Delaware have joined this group.*

Yet, in the United States the definition of marriage is decided by the States.[9] Each state is allowed to write their own laws based on the population's ideas and beliefs towards same-sex marriage. Recently, the number of States that allow same-sex marriage has increased by three since the 2012 ballot vote, with the addition of Maine, Maryland, and Washington to the prior list of Vermont, New Hampshire, Massachusetts, Connecticut, New York, Washington D.C., and Iowa ("States that allow," 2012). However, in the majority of the United States, same-sex marriage remains illegal. Even in federal law, The Defense of Marriage Act or DOMA, written in 1996, declared that States not permitting same-sex marriage do not have to recognize a same-sex marriage from States that allow it, and that marriage is only between a man and a woman ("Defense of Marriage," 1996).

Currently, same-sex marriage is a legal, political, and cultural dilemma. It is an issue that each political party takes a stance during elections and is normally very divisive between the Democratic and Republican parties. The Democratic Party has supported the movement, while the Republican Party takes a firm stance against it, arguing that a marriage can only be between a man and a woman (McLaughlin, 2013). The question has been addressed in past elections and will most likely continue to be addressed until the Supreme Court issues a ruling in the cases of *Hollingsworth v. Perry* (*Hollingsworth v. Perry* 558 U. S. ___ (2013)) and *United States v. Windsor* (*United States v. Windsor* 558 U. S. ___ (2013)).

[9] The right to regulate marriage is given to the States by the 10th Amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Hollingsworth v. Perry addresses same-sex marriage at the state level, which concerns the issue of Proposition 8 in California's 2008 election. Opponents of same-sex marriage placed on the ballot a voter initiative that overturned the previous precedent the California Supreme Court had established in legalizing same-sex marriage (Yoshino, 2012, 527). The initiative stated, "Only marriage between a man and a woman is valid or recognized in California" *(Perry I,* 704 F. Supp. 2d, pg. 927) and was voted into law on November 4, 2008 with 52 percent of the vote (Yoshino, 2012, 527). However, homosexuals who had been married in California before the proposition were allowably recognized as validly married (Yoshino, 2012, 527). The *Perry* case has exhausted all levels of the lower courts, with the most recent decision (2012) of the Ninth Circuit Court of Appeals that overturned the initiative (*Perry v. Brown,* 2012). In early 2013, the Supreme Court issued a writ of certiorari, or a grant from the Court to hear the case, and arguments were made before the Court on March 26, 2013 ("Hollingsworth v. perry," 2013). The Court is expected to announce a decision before the end of June 2013.

However, until the Supreme Court issues a decision on the matter, the legality of same-sex marriage will continue to be regulated and decided by the States and their respective constitutions.

Present American Legal Status of Same-Sex Marriage

Today, most American States' governments remain opposed to same-sex marriage.[10] The majority of the opposing States refuse to recognize the marriages administered by States that have legalized the institution. Kansas argued in its 2005 Proposed Amendment 1, "(a) Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void. (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage" ("National briefing," 2005). Virginia in its 2006 Amendment stated:

> "That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage" ("An amendment on," 2006), ("Gay marriage amendment," 2006).

As is seen in the Virginia amendment, some States do not allow for any substitution to same-sex marriage, such as domestic partnerships or civil unions. Of the fifty States, twenty-eight States have some form of legislation or amendment that bans same-sex marriage ("States that allow," 2012). These States include Texas, Pennsylvania, Ohio, Michigan, Idaho, and Florida.

A minority of States, although not permitting same-sex marriage, will recognize civil unions or domestic partnerships. These States will grant homosexual

[10] *See picture on page 53*

couples benefits of marriage while not fully recognizing the relationship as marriage. Nevada is one of these States. The Secretary of State of Nevada must recognize the domestic partnership, and domestic partnerships must receive the same rights as married couples; NRS 122A states:

> "Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses" ("Chapter 122a").

Of the fifty States, there are nine States which permit civil unions. These States are California, Hawaii, Illinois, Colorado, Wisconsin, Oregon, Rhode Island, New Jersey and Delaware, ("States that allow," 2012).

However, nine States and the District of Columbia have made same-sex marriage legal. These States are Maine, Maryland, Vermont, New Hampshire, Massachusetts, Connecticut, New York, Iowa, and Washington, ("States that allow," 2012).[11] Massachusetts was the first state to permit same-sex marriage, by judicial action in the case of *Goodridge v. Department of Public Health*, (*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)). The case was brought by GLAD, Gay and Lesbian Advocates and Defenders, for a number of same-sex couples who were denied marriage licenses in the state. The court ruled in favor of GLAD's fight for same-sex marriage, which reversed the state statute:

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[11] *See page 10*

> "The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples" (*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), 1).

After *Goodridge* was decided, other States followed Massachusetts, arguing that a denial of same-sex marriage is a denial of equality. As *Goodridge* states, "Our obligation is to define the liberty of all, not to mandate our own moral code" (*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), 1). Maryland, Maine, and Washington are the most recent additions to the States that allow same-sex marriage, with the issue being approved by voters during the 2012 ballot, ("States that allow," 2012).

Although the laws of same-sex marriage have been predominantly regulated by the States, a Federal law exists that prohibits the act as well. The Defense of Marriage Act, or DOMA passed in 1996 and has three sections. The first section simply titles the legislation "the Defense of Marriage Act," while the second section states:

> "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship,'' ("Defense of Marriage," 1996).

This section attempts to suspend the Constitution's Full Faith and Credit Clause[12] because the Clause may have helped spread same-sex marriages. The Full Faith and Credit Clause's main purpose is to uphold and recognize something that occurred in one state in any other state, such as a marriage or a divorce.[13] For example, if a heterosexual couple was married in one state, such as Nevada, they would have to be considered married in any other state to which they may move. The same rule applies to divorce; if the same couple divorced in Nevada, and the wife moved to California, she would still be considered divorced in California. This Section of DOMA was created with the idea that if a state decided to legalize same-sex marriage, the marriage would not have to be recognized by every other state to which a homosexual couple might move.[14] Congress enacted this Section in order to prevent same-sex marriage spreading by a domino effect. The effect would hypothetically have occurred if one state, such as Hawaii, legalized same-sex marriage while the rest of the States kept the act as illegal.[15] Same-sex couples from the mainland U.S. could fly to Hawaii, be married legally, and then fly back to their state of residence. Through the Full Faith and Credit Clause, the other States must

[12] "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Article IV, Section 1

[13] *Williams v. North Carolina*, 317 U.S. 287 (1942) The case set the precedent that the federal government and court decides divorce and marriage statuses in between state lines.

[14] "Section 2, entitled 'Powers Reserved to the States,' provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex" ("The defense of," 1996, 2)

[15] The Hawaii scenario is a very real scenario that occurred with the Hawaiian Supreme Court Case of *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993). Congress stated in the Background and Need for Legislation of DOMA "The prospect of permitting homosexual couples to ''marry'' in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States. More specifically, if Hawaii (or some other State) recognizes same-sex ''marriages,'' other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions, ("The defense of," 1996, 2).

recognize the legal Hawaiian marriage and, with the assumption that a majority of same-sex couples would do travel to Hawaii to marry, same-sex marriage would eventually have to be recognized by the rest of the United States. This domino effect by the Full Faith and Credit Clause is what Congress sought to prevent with DOMA.

The third section of DOMA states,"…the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife" ("Defense of Marriage," 1996). This section was created to show that the federal government does not support same-sex marriage and believes that marriage must be heterosexual.[16] Many cases were brought against this section of DOMA, among them *Windsor v. United States* (*Windsor v. United States* 833 F. Supp. 2d 394 (S.D.N.Y. 2012)). In *Windsor,* two women were legally married in the state of New York. The women were together for over forty years until one of the spouses passed away. Because DOMA forbids the Federal Government to recognize their marriage as valid, the surviving spouse had to pay a federal inheritance tax on her late spouse's property, a tax that widowed heterosexual spouses do not have to incur. As Michael D. Steinberger argues:

> "While the estate tax laws generally allow married heterosexuals to transfer unlimited assets to their spouses at death without incurring estate tax liability, Americans in same-sex relationships are limited in their ability to transfer assets tax-free to their same-sex partner upon death" (Steinberger, 2009, Executive Summary).[17]

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[16] "And Section 3 defines the terms 'marriage' and 'spouse,' for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex" ("The defense of," 1996, 2).

[17] The chart below exemplifies the extra amount in estate taxes surviving spouses of same-sex couples are required to pay by year in comparison to surviving spouses in heterosexual couples.

The case was tried in a New York federal court, which ruled in favor of the surviving spouse. The court argued that section 3 of DOMA is unconstitutional. After moving to the 2nd Circuit Court of Appeals, the New York decision was upheld on October 18, 2012 and received a writ of certiorari from the Supreme Court with arguments presented to the Court the week of March 25, 2013. The case should decide the federal matter of same-sex marriage and the constitutionality of DOMA by June 2013.

Because there are two separate questions of constitutionality dealing with same-sex marriage in the United States, state versus federal, this paper will only make an argument for same-sex marriage at the state level. These questions and issues lie beyond the more basic question of marriage availability to homosexuals at the Federal level.

(Steinberger, 2009, Executive Summary). The table is broken down by year and the bottom row shows the total difference in amount of taxes same-sex spouses incur compared to heterosexual spouses.

	2009	2010	2011
Same-Sex Descendents Affected	73	76	550
Average Additional Tax per Estate	$3.3 million	$0.2 million	$1.1 million

Prior Precedent

Despite being a recent topic of public controversy, the precedent with same-sex marriage in the United States Supreme Court begins in the early 1970s and continues to the early 2000s. These cases include *Baker v. Nelson* (*Baker v. Nelson*, 409 U.S. 810 (1972)), *Bowers v. Hardwick* (*Bowers v. Hardwick*, 478 U.S. 186 (1986)), *Romer v. Evans* (*Romer v. Evans*, 517 U.S. 620 (1996)), and *Lawrence v. Texas* (*Lawrence v. Texas*, 539 U.S. 558 (2003)). While the cases do not directly deal with the issue of same-sex marriage, each case offers an important precedent and historical understanding of the progression of the movement.

Baker v. Nelson (1972)

Baker is one of the first cases dealing with same-sex marriage to appear in the U. S. court system. After the Stonewall Riots in 1969, the gay rights movement gained much ground in the States. The movement became prominent enough to bring its first civil rights case to the Minnesota Supreme Court, a civil rights case concerning a homosexual couple's ability to marry. In 1971, Richard Baker and James McConnell went to their local County District Courthouse in the state of Minnesota to apply for a marriage license. The clerk Gerald Nelson denied Baker and McConnell the license arguing that there was no statute permitting the two to be legally married. The lower trial court agreed with Nelson, stating that there was nothing requiring Nelson to issue the marriage license to Baker and McConnell and specifically instructed that there should not be a marriage license issued. The court of appeals affirmed, and the United States Supreme Court did not grant a writ of

certiorari "for want of a substantial federal question" (*Hollingsworth v. Perry* 558 U. S. ___ (2013), 12).

Baker argued that, although there was no law permitting he and his partner to be married, there was also no law denying it. The Minnesota Supreme Court argued:

> "[The Minnesota statute] which governs 'marriage,' employs that term as one of common usage, meaning the state of union between persons of the opposite sex. It is unrealistic to think that the original drafts-men of our marriage statutes, which date from territorial days, would have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as 'husband and wife' and 'bride and groom,'" (*Baker v. Nelson*, 409 U.S. 810 (1972), 311).

Baker countered that the statute is unconstitutional because:

> "The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the States by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment" (*Baker v. Nelson,* 409 U.S. 810 (1972), 311).

Using the sterilization case of *Skinner v. Oklahoma* (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and the book of Genesis as evidence, the Minnesota Supreme Court argued that marriage and procreation are necessarily intertwined. The Court argued that to allow marriage between a man and a man, or a woman and a woman would defy the laws of nature in regards to procreation and would not progress the true purpose of marriage, to create children.[18] In regards to

[18] "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. *Skinner v. Oklahoma ex reI. Williamson*, 316 U. S. 535 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act

the Fourteenth Amendment claims, the Court contends that there is no invidious or irrational discrimination requiring the invocation of the Equal Protection Clause.[19] By presenting the argument from the anti-miscegenation historical precedent[20] that did not allow a black and white person to marry, the Minnesota Court responded, "But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (*Baker v. Nelson,* 409 U.S. 810 (1972), 315). The United States Supreme Court chose not to issue the writ of certiorari to *Baker* and did not create an opinion concerning gay rights until over ten years later.

Bowers v. Hardwick (1986)

The *Bowers* case, although not directly concerning same-sex marriage, deals with the issue of sodomy and the progression, or perhaps regression, of gay rights. In 1982, Hardwick was caught participating in homosexual acts, sodomy, in the confines of his home and was charged with breaking a Georgia state statute illegalizing any form of sodomy. The Supreme Court cited the statute as:

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on equal protection grounds, stated in part: 'Marriage and procreation are fundamental to the very existence and survival of the race.' This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend" (*Baker v. Nelson*, 1972, 312).

[19] "The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination" (*Baker v. Nelson*, 1972, 313).

[20] The precedent of States not allowing interracial marriage was overturned in the U.S. Supreme Court case of *Loving v. Virginia* 388 U.S. 1 (1967).

> "Georgia Code Ann. § 16-6-2 (1984) provides, in pertinent part, as follows:
> '(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .'
> '(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .'" (*Bowers v. Hardwick,* 478 U.S. 186 (1986), 196).

The district court ruled in favor of Georgia, but the Eleventh Circuit Court of Appeals overturned. The Court ruled,

> "Relying on our decisions in *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Stanley v. Georgia,* 394 U.S. 557 (1969); and *Roe v. Wade,* 410 U.S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment" (*Bowers v. Hardwick,* 478 U.S. 186 (1986), 189).

However, the Supreme Court reversed, finding that the Circuit Court of Appeals had erred. The Court stated, "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy, and hence invalidates the laws of the many States that still make such conduct illegal, and have done so for a very long time" (*Bowers v. Hardwick,* 478 U.S. 186 (1986), 190). Hardwick attempted to argue that the right to practice in homosexual sex should be a fundamental right conferred by the Constitution, which the Court denied:

> "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution" (*Bowers v. Hardwick,* 478 U.S. 186 (1986), 194).

The Court established that a fundamental right cannot easily be created or protected by the Fourteenth Amendment, and the right to homosexual sodomy is not considered one of these rights. However, the right for the state to create and uphold anti-sodomy laws in the United States was considered constitutional based on history and tradition; "against this background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious" (*Bowers v. Hardwick,* 478 U.S. 186 (1986), 194).

With the decision in the *Bowers* case, the homosexual population thought their movement was pushed back; they were denied marriage and denied the ability to practice homosexual sex in States that ruled the act illegal. It was not until ten years after *Bowers* that the gay rights movement began to make progress once again.

Romer v. Evans (1996)

The *Romer* case was the first case in which gay rights were legally advanced by the U.S. Supreme Court and protected by the Constitution. The Court concluded that a state's citizens could not vote a discriminatory referendum into law.

In 1992, the state of Colorado enacted a voter wide referendum titled "Amendment 2." The Amendment read as follows:

> "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing" (*Romer v. Evans*, 517 U.S. 620 (1996), 1623).

After the Amendment was voted into Colorado's state constitution, many homosexual citizens, including some who were government workers,[21] brought suit against the state and Governor Romer. The citizens argued that the Amendment is discriminatory and unconstitutional.[22] The case reached the State Supreme Court, which argued the Amendment was discriminatory and should be held by strict scrutiny[23] under the Fourteenth Amendment of the United States Constitution. The Amendment "infringed the fundamental right of gays and lesbians to participate in the political process" (*Romer v. Evans,* 517 U.S. 620 (1996), Syllabus).

When the Supreme Court passed judgment on the matter, the justices issued

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[21] "Among the plaintiffs (respondents here) were homosexual persons, some of them government employees" (*Romer v. Evans,* 517 U.S. 620 (1996), 1624).

[22] "They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation" (*Romer v. Evans,* 517 U.S. 620 (1996), 1624).

[23] Strict scrutiny is the highest level of scrutiny based on a three-tiered system. The Court uses certain levels of scrutiny in deciding whether a statute is being inherently invidious to a class of people or if a fundamental right is infringed. The level of scrutiny provided reflects the amount of interest the government must provide as to why it is enforced. The lowest tier of scrutiny is rational basis, the next tier is heightened scrutiny, and the highest tier is strict. *See page 33, et esq. for a more in-depth discussion of scrutiny.*

guidelines as to what falls under the Fourteenth Amendment Equal Protection Clause. The Court stated:

> "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons…We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end" (*Romer v. Evans*, 517 U.S. 620 (1996), 1627).

After establishing this guideline, the Court concluded that Colorado's Amendment 2 failed to even uphold the most basic of requirements under the Equal Protection Clause, and that the Amendment was unconstitutional. Justice Kennedy, in the majority opinion, argued:

> "First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests" (*Romer v. Evans,* 517 U.S. 620 (1996), 1627).

The ruling was the first issued by the United States Supreme Court that protected homosexuals and recognized them as a separate class subject to discrimination. The case also established that a state's voters cannot enact legislation or amendments that discriminate and render unequal treatment against a certain class.[24] As Justice Kennedy concludes his opinion, "A State cannot so deem a class of persons a

[24] *Edwards v. People of State of California*, 314 U.S. 160 (1941) The United States Supreme Court ruled that a California statute prohibiting non-resident indigent people from residing in the state of California was unconstitutional conflicting with the goals of the Constitution (the Fourteenth Amendment Due Process Clause) and the fundamental right to travel.

stranger to its laws" (*Romer v. Evans,* 517 U.S. 620 (1996), 1629).

Romer is likely to influence the opinion of the case of *Hollingsworth v. Perry* argued before the Supreme Court on March 26, 2013. Similar to *Romer,* the *Hollingsworth* case that concerns California was a voter-enacted law called Proposition 8 that denied homosexuals the right to marry. The resemblance between *Romer* and *Hollingsworth* is seen in both cases concern voter-enacted laws that deny rights to a class of people, specifically gays. *Romer* did not deal with the matter of marriage, but will still be influential to the Constitutional question at hand.

Lawrence v. Texas (2003)

The *Lawrence* case is significant because it is one of the most recent Supreme Court decisions that concerns gay rights. *Lawrence* is best known for overturning the *Bowers* decision. *Lawrence,* following in the footsteps of *Romer* advanced the ideals of the gay rights movement and acknowledged the unconstitutionality of anti-sodomy state statutes enforced against homosexuals.

In the state of Texas, police officers were dispatched one night to a residence based on a call reporting a weapons disturbance. When entering the home of John Lawrence, they found him participating in activities with Tyron Garner prohibited by the state's anti-sodomy laws. The two men were arrested, held in jail overnight, charged and convicted. The state statute criminalizing the acts stated that a person is considered an offender if he participates in "deviate sexual intercourse with another individual of the same sex" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 2). "Deviate sexual intercourse" is then defined as:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 2).

The Texas district court and court of appeals both upheld the Texas statute based on the precedent of *Bowers*. The Supreme Court granted certiorari and established three questions to address within the case. The first was whether the Texas statute was discriminatory under the Equal Protection Clause because the law only criminalized sexual intimacy by same-sex couples and not heterosexuals. The second question was whether adult consensual sex within the confines of the home violated the protected liberty and privacy guaranteed through the Due Process Clause of the Fourteenth Amendment. The final question asked whether the *Bowers* precedent should be overruled.

Justice Kennedy, the majority opinion's author argued that *Bowers* is no longer a binding precedent and that, although seemingly valid at the time of the decision, the decision no longer holds merit. The Court concluded that anti-sodomy laws, such as Texas's, previously protected by *Bowers* are in fact discriminatory and should no longer be constitutional. Justice Kennedy stated:

> "[The anti-sodomy laws] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 6).

He continues to argue, "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual

persons to discrimination both in the public and in the private spheres" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 14) and concluded the opinion with "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 17).

In constructing the argument as to why *Bowers* is no longer valid, Justice Kennedy discussed why these anti-sodomy statutes are unconstitutional under the Due Process Clause. He argues that the rights of gays have progressed and the group has been decided as a class of people.[25] The level of scrutiny has not been established as how to address the class and, in Justice O'Connor's concurring opinion, she sought to make it clear that the *Lawrence* decision in no way legalizes or makes permissible gay marriage.[26] However, by utilizing *Romers* as precedent, the *Lawrence* case made history for gay rights advocates and has continued to progress the movement to the question of gay marriage.

With the precedents of *Baker, Bowers, Romer,* and *Lawrence,* there has been established a history of gay rights cases and development in the United States. The older cases of *Baker* and *Bowers* have presented the antiquated and historical

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[25] "We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 14). In recognizing gays as a class of people, the Court establishes a precedent of future protection of the class under the Equal Protection Clause of the Fourteenth Amendment.

[26] "That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group" (*Lawrence v. Texas*, 539 U.S. 558 (2003), 7).

perspectives of homosexuals and gays within the country, and the more current cases of *Romers* and *Lawrence* have shown how much perspective has shifted in the last twenty years. Concurrently, with *Lawrence* overturning *Bowers,* it is likely that the precedent of *Baker* too will be overturned.

Same-Sex Marriage as Guaranteed by the Constitution

America's legal system stems from the 224 year old Constitution. However, in considering the Constitution as a "living" document, it must be open to changing interpretations with the changing times.[27] Presently, one of the major issues concerning the Constitution is the problem of marriage, specifically same-sex marriage.

Marriage is an institution that is never explicitly mentioned in the Constitution.[28] There is no amendment that defines marriage nor is there an Article that addresses it. The Declaration of Independence does state that there are certain "unalienable rights"[29] of which many believe the framers used to include marriage; however, the Declaration of Independence is not law. Yet, marriage is a deep-rooted idealism that is inherent in this country. Furthermore, marriage is no longer merely a religious ceremony practiced for religious benefit, or simply an act.

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[27] "We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not…I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights" (Marshall, T., 1987, 4).

[28] Some argue that marriage is included in the 9th Amendment stating, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." However, the 9th Amendment is only argued to protect the privacy in a marriage. Justice Goldberg states, "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment, and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment…" (*Griswold v. Connecticut,* 381 U.S. 479 (1965), 491) However, although the word marriage is not physically printed in the Constitution and its amendments, marriage has been determined a fundamental right as protected through the Fourteenth Amendment's Due Process Clause by the Supreme Court.

[29] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." (U.S. Declaration of Independence, Paragraph 2 (1776)).

Marriage provides a multitude of benefits, both monetarily, with taxes and insurance, and socially. Marriage is an institution that religions, Christians,[30] Muslims,[31] Buddhists,[32] Hindus,[33] and atheists of varying ages participate in, or strive to one day participate.

There are multiple routes to constitutional protection on behalf of marriage for gays, some more plausible than others. There is the denial of the fundamental right of marriage under the Due Process Clause of the Fourteenth Amendment and protection of gays as a class by the Equal Protection Clause of the Fourteenth Amendment. Each route triggers strict scrutiny. It is debatable as to whether both ways can be used simultaneously; most Supreme Court cases that have an intersection of Equal Protection and Due Process usually choose one route or the other.[34] The main line of demarcation is seen as such:

> "If a law denies the right to everyone, then due process would be the best grounds for analysis; but if a law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection or the violation of the right can be objected to under due process" (Chemerinsky, 2006, 793-94).

This thesis argues that both routes protect same-sex marriage, depending on

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[30] "For this cause a man shall leave his father and mother, and shall cleave to his wife; and the two shall become one flesh" (31 Eph. 5: New International Version).

[31] "And of His signs is this: He created for you mates from yourself that you might find rest in them, and He ordained between you love and mercy. Lo, therein indeed are portents for folk who reflect."(Quran 30:21)

[32] "The Buddhist views on marriage are very liberal: in Buddhism, marriage is regarded entirely as personal and individual concern, and not as a religious duty" (Sri Dhammananda Maha Thera, 2002, 322)

[33] "The Hindu marriage is a carefully crafted, a beautifully sculpted institution and, like many concepts in the Hindu tradition, it is soaked in the acute and careful understanding of human nature" (Usgaonkar, 2005).

[34] This can be seen in the case of *Lawrence v. Texas* where the majority opinion determined the case to infringe substantive due process, but a concurring opinion written by Justice O'Connor argued for Equal Protection violations.

which course the Court takes. However the case cannot be decided simultaneously with the Due Process Clause and the Equal Protection Clause, or else the logic will commit what Susan Rush calls the "Collapsible Error." She argues:

> "Courts commit the Collapsible Error when they conflate the equal protection question ('Are gays a suspect class?') into the due process question ('Is there an underlying fundamental right?') by defining the underlying right by the group targeted by the law-gay marriage-and then limiting the analysis to substantive due process ('Is there a fundamental right to gay marriage?')" (Rush, 2008, 685).

Rush contends that combining the Equal Protection question in the Due Process question is an argument that falls on itself. She argues, "the right cannot be defined in a way that subsumes the equal protection issue into the substantive due process analysis. Stated alternatively, the right cannot be defined by the class of persons adversely affected by the underlying law" (Rush, 2008, 732).

Yet, the Court has a history of committing this error, as seen in *Bowers v. Hardwick*. *Bowers* made the decision that *homosexual* sodomy was not protected by the Constitution, while not addressing the constitutionality of *heterosexual* sodomy; "Committing the Collapsible Error was the primary methodological mistake of the *Bowers* Court, which held that there is no fundamental right to engage in *homosexual* (class of persons) sodomy (underlying right)" (Rush, 2008, 732). The Court based the *Bowers* decision on Due Process claims, yet in identifying the type of sodomy as homosexual, the Court inherently committed an Equal Protection violation against homosexuals. Rush argues:

> "If a state or court cannot justify the law without committing the Collapsible Error, then it must be unconstitutional. Moreover, if the *only way* to justify a law is by relying on the Collapsible Error, then it seems clear the law is ill-motivated; it is targeted at a particular group and the right is defined by the group. This is true even if the law only implicitly targets the disfavored group by defining the right to include only the favorable group-'heterosexual marriage,'" (Rush, 2008, 736).

In considering the statutes against same-sex marriage as unconstitutional, the Court must assign a level of scrutiny. Both cases of infringing a fundamental right under Due Process and denying a fundamental right to a class of people under the Equal Protection Clause trigger strict scrutiny, the highest of the three-tiered system.

A. Levels of Scrutiny

The Supreme Court has created a process to determine the level of scrutiny a statute will receive. The process includes the three tiers of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. Schaff defines the three levels of scrutiny as follows:

> "(i) Rational-basis review is the minimal standard, since it requires the state to have only a *legitimate* interest in pursuing some goal and the statute in question to be designed broadly to achieve that goal… (ii) Heightened scrutiny is an intermediary standard that requires the state to have an '*important* interest,' and that the means for achieving it are 'substantially related.' (iii) The most difficult standard for the state to meet is required by the strict-scrutiny test. This requires the state to show that it has a *compelling* interest that the statute pursues by the narrowest means possible" (Schaff, 2004, 139).

Under strict scrutiny, the Court is most likely to presume a law invalid and the government must prove the interest behind the statute. After the Court determines which level of scrutiny is utilized, the government must prove the

correlating level of interest (legitimate interest for rational basis, important interest for heightened scrutiny, and a compelling interest for strict scrutiny) and the State's reason behind the statute.

To determine the level of scrutiny, the Court must first analyze the constitutional question at hand and determine whether a fundamental right has been infringed or a classification of people could be considered suspect. If either of these prongs is met with same-sex marriage, strict scrutiny must be used.

However, if neither suspect classification nor an infringed fundamental right is identified, the Court resorts to rational basis. The test is defined as:

> "The level of judicial review for determining the constitutionality of a federal or state statute that does not implicate either a fundamental right or a suspect classification under the Due Process Clause and the Equal Protection Clause of the Constitution. When a court concludes that there is no fundamental liberty interest or suspect classification at stake, the law is presumed to be Constitutional unless it fails the rational basis test. Under the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. The challenger of the constitutionality of the statute has the burden of proving that there is no conceivable legitimate purpose or that the law is not rationally related to it" ("Rational basis test," 2010).

In the situation of same-sex marriage, if the Court decides that homosexuality is not a suspect class, nor do homosexuals have a fundamental right to marry, the rational basis test is used. The test determines whether there was a "legitimate state interest" in the enforcement of anti-gay marriage laws. The methodology is as such: if the Court establishes a suspect class (gays), then strict scrutiny is used against the anti-marriage statutes. If the Court does not establish a suspect class, but recognizes a fundamental right has been infringed (marriage), strict scrutiny is

used as well. However, if the Court believes that there is neither a suspect class nor an infringed fundamental right, rational basis is used (Rush, 2008, 744). A statute under rational basis almost always survives, yet statutes have failed in the past (*Romer v. Evans,* 517 U.S. 620 (1996)). Yet, even under the less examined rational basis test, laws against same-sex marriage are still invalid.

This thesis will argue that strict scrutiny, whether through Due Process or Equal Protection, is the desired outcome for same-sex marriage. However, there are reasons why the Court would choose not to apply strict scrutiny in either situation. In that situation, the thesis will prove that the statutes against same-sex marriage cannot survive rational basis as well, using the *Frontiero* case and Susan Rush's "ill motivates exception" (Rush, 2008, 704).

B. Due Process Clause of the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law" (U.S. Const. amend. XIV, § 2). Many of the country's fundamental rights have been created under the Due Process Clause of the Fourteenth Amendment. A fundamental right is where "The Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met" (Chemerinsky, 2006, 792). Most of the rights are not mentioned in the Constitution and many come from natural law or "are supported by a deeply embedded moral consensus that exists in society" (Chemerinsky, 2006, 794-96). Further, many of the rights

deemed fundamental are protected by the term "liberty" in the Due Process Clause. Susan Rush states, "The growing judicial acknowledgment that some rights, ultimately termed 'fundamental rights,' are more important than others understandably demanded that the Court use a procedural methodology to give greater judicial scrutiny when evaluating the constitutionality of laws that burdened those especially important rights" (Rush, 2008, 695). This "greater judicial scrutiny" was found in Footnote Four of *United States v. Carolene Products Co*. (304 U.S. 144, (1938)) which called for "more searching judicial inquiry" in cases dealing with minorities, as can be seen with the suspect class argument or an "infringement of a fundamental right" (Chemerinsky, 2006, 795). Further, "Justice Stone's insights in Footnote Four in *United States v. Carolene Products* in 1938 expressed this need for heightened scrutiny when laws infringe on certain rights" (Rush, 2008, 695). Ira Lupu defines fundamental rights to "include all the claims of individual rights, drawn from sources outside of the first eight amendments, that the Supreme Court has elevated to preferred status (that is, rights which the government may infringe only when it demonstrates extraordinary justification)" (Lupu, 1979, 983).

An example of a "liberty" case is found in *Skinner v. Oklahoma* (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, (1942)), where "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race — the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment" (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, (1942), 536). *Skinner* was a case where

that questioned an Oklahoma statute decreeing that criminals, after a certain amount of offenses, could be sterilized (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, (1942)). The Court ruled that, under Due Process's "liberty" Oklahoma was infringing on the fundamental right to procreation, "which the Court noted is 'one of the basic civil rights of man,'" (Rush, 2008, 696).

Another example can be seen in *Lawrence v. Texas.* Susan Rush argues, "it is clear that the [*Lawrence*] Court placed the interest at stake within the sphere of 'liberty' protected by the Due Process Clause… The Court held that 'liberty' protects the 'right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,'" (Rush, 2008, 703). In most cases, establishing a fundamental right requires substantial Due Process.

The Due Process Clause contains two types of due process: substantive due process and procedural due process. Procedural due process is brought to court when a mistake is made in the process of a case; examples include a lack of notification of rights, an issue with jury instructions, or a negligent lawyer not fully performing his duties (*Procedural due process*, 2012). Substantive due process is a problem with the actual topic at hand. In the right to privacy cases, substantive due process is defined as "certain substantive individual rights against the States" that are guaranteed by the Due Process Clause, (Gertsmann, 2004). With this form of due process, the Supreme Court has discretion to decide which rights can be adapted under the Fundamental Rights theory:

> "where the Court adopts whatever substantive rights it thinks are so basic, natural and fundamental that they must be protected even without reliance on any particular provision of the Constitution…the Court is said to root these guarantees directly in the word "Liberty" in the Fourteenth Amendment's Due Process Clause" ("Substantive due process," 2012).

In utilizing substantive due process, the Court has to decide whether the issue of same-sex marriage constitutes as a violation of a fundamental right or as a lesser liberty interest.

Cases considered under substantive due process have a specific Supreme Court two-prong test that defines what can be considered a fundamental right. The test is found in *Washington v. Glucksberg* (*Washington v. Glucksberg*, 521 U.S. 702 (1997)). *Washington v. Glucksberg* addresses the question of whether physician assisted suicide and the right to take a person's own life is a fundamental right. The U.S. Supreme Court held that, "Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide does not violate the Due Process Clause" (*Washington v. Glucksberg*, 521 U.S. 702 (1997), Syllabus). In deciding whether there is a right to suicide, the Court specified a fundamental rights test. Chief Justice Rehnquist stated in the majority opinion:

> "Our established method of substantive-due-process analysis has two primary features: First we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'…Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest" (*Washington v. Glucksberg* , 521 U.S. 702 (1997), 720).

The Court concluded that there is no right to suicide.

The "*Glucksberg* Test,"[35] as it has come to be known, is now considered with a question of fundamental rights[36] protected by the Due Process Clause. The first prong of the test deals with whether the questioned right is embedded in the "Nation's history and tradition" (*Washington v. Glucksberg* , 521 U.S. 702 (1997), 721) and the second prong determines whether the right is "implicit in the concept of ordered liberty" (*Washington v. Glucksberg* , 521 U.S. 702 (1997), 721).

However, ever since its precedent, the *Glucksberg* test seems to better determine what are not fundamental rights than what are. As Mark Strasser argues, "Such a result might be thought unsurprising---if fundamental rights cannot be abridged unless very important state interests would otherwise be at risk, the recognition of many such rights would hamstring legislatures in their attempts to regulate everyday affairs" (Strasser, 2011, 119). Yet, the main issue with the *Glucksberg* test is that "many of the rights currently recognized as falling within the right to privacy [a fundamental right] could neither be described as deeply rooted in this nation's history and tradition nor as implicit in the concept of ordered liberty" (Strasser, 2011, 119). One such example is the right to contraception as protected by the fundamental right to privacy;[37] contraception was considered illegal for many

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[35] The original test was constructed in the case of *Palko v. Connecticut*, 302 U.S. 319 (1937). However, today, the *Glucksberg* (1997) test is most commonly referred to when dealing with questions of fundamental rights.

[36] There have been multiple rights established as fundamental. These include the right to vote (*Kramer v. Union Free School District* No. 15, 395 U.S. 621 (1969)), the right to privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), and the right to travel (*United States v. Wheeler,* 254 U.S. 281 (1920)) (*Shapiro v. Thompson*, 394 U.S. 618 (1969)).

[37] The fundamental right to privacy protects the right to contraception. Furthermore, the right to contraception is not a right to have contraception, but a right to have a protected, private conversation with a doctor about procuring contraception, and the doctor's right to prescribe such contraception.

years and eventually became fundamental and legal under the right to privacy in *Griswold v. Connecticut*, (*Griswold v. Connecticut*, 381 U.S. 479 (1965)). Another example is the right to abortion, which was criminalized for centuries until protected by privacy in the case of *Roe v. Wade*, (*Roe v. Wade*, 410 U.S. 113 (1973)). However, both contraception and abortion can still be regulated by the State. In Mark Strasser's article *Same-Sex Marriage and the Right to Privacy,* he argues that the *Glucksberg* decision is not lenient enough with current fundamental rights problems and that the *Glucksberg* test should not be considered in the decision of same-sex marriage (Strasser, 2011, 121). However, although the test has strict guidelines that must be met, there is arguably enough evidence for the test to be passed. This thesis will attempt to pass the *Glucksberg* test with same-sex marriage.

The first prong of the test considers how much the right has been present in this "Nation's history and tradition" (*Washington v. Glucksberg,* 521 U.S. 702 (1997)). This prong is the most debated prong (Strasser, 2011, 120). An example of the debate is seen with the rights to contraception and abortion, both protected by the right to privacy, but neither is inherent in the nation's history or tradition.[38] However, it is debatable what extent of history should be considered:

> "The use of tradition as the sole criterion for fundamental right status is problematic because it virtually guarantees that the right in question will be denied constitutional protection, regardless of how strong the individual's or government's interests may be. The reason for this is that the tradition approach makes the existence of rights asserted today solely dependent on the beliefs of past generations"

[38] The fundamental right to privacy includes the right to an abortion (*Roe v. Wade*, 410 U.S. 113 (1973)) in that the conversation between a patient and her doctor is protected by privacy, but the state can place certain restrictions on whether an abortion is illegal, and, if legal, at what time of the pregnancy an abortion can occur.

(Miller, 2006, 473).

However, the Supreme Court has decided that the nation's entire history does not need to be considered in every case. As stated in *Lawrence v. Texas*, "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" (*Lawrence v. Texas,* 539 U.S. 558 (2003), 11). In the past forty years, the gay rights movement has made tremendous progress. With the Stonewall riots and the progression of Supreme Court cases from *Baker v. Nelson,* and *Bowers v. Hardwick,* towards *Romer v. Evans* and *Lawrence v. Texas* the rights of gays have become recognized and accepted. Furthermore, the precedent set by *Lawrence v. Texas* made clear that the analysis of the Nation's history and tradition does not require the entire Nation's history. Justice Kennedy argued, "In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives" (*Lawrence v. Texas*, 539 U.S. 558 (2003), 11).

Marriage has been established as a fundamental right without the *Glucksberg* test. For the last half-century, there have been multiple Supreme Court cases that establish marriage as a fundamental right. The first and probably most important case is *Loving v. Virginia* (*Loving v. Virginia*, 388 U.S. 1 (1967)). In 1967, over a hundred years after the end of the civil war and the Emancipation Proclamation, many States still enforced anti-miscegenation laws, or laws that prohibited interracial marriage between a white person and a black person. The Lovings, an

interracial couple, were married in Washington D.C. and moved back to their Virginian hometown, a state where ant-miscegenation laws were enforced. Suit was brought against them for not following the law, and the case eventually reached the Supreme Court. In *Loving v. Virginia*, the Supreme Court ruled that anti-miscegenation laws were unconstitutional based on the Due Process Clause of the Fourteenth Amendment. The decision of *Loving v. Virginia,* (*Loving v. Virginia*, 388 U.S. 1 (1967)) States that marriage is in fact a fundamental right under the Fourteenth Amendment Due Process Clause. Chief Justice Warren's majority opinion argues "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men…Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (*Loving v. Virginia*, 388 U.S. 1 (1967), 12).

The other main case concerning the fundamental right to marriage is *Zablocki v. Redhail* (434 US 374, (1978)). Susan Rush considers *Zablocki* "as *the* case that *really* held that marriage is a fundamental right" (Rush, 2008, 725). The case is about a Wisconsin statute "which provides that members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry" (*Zablocki v. Redhail*, 434 US 374, (1978), 375). The Court directly ruled that marriage is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment; "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state

interests and is closely tailored to effectuate only those interests" (*Zablocki v. Redhail*, 434 US 374, (1978), 388). Rush argues, "The *Zablocki* Court, citing to *Loving,* emphasized that marriage is a fundamental right under the Fourteenth Amendment. Accordingly, the Court 'critically' scrutinized the law and held it unconstitutional" (Rush, 2008, 726).

Other cases such as *Grisworld v. Connecticut, Santosky v. Kramer,* and *Planned Parenthood v. Casey* cite marriage as a fundamental right. In *Griswold v. Connecticut* (*Griswold v. Connecticut*, 381 U.S. 479 (1965)) the Court argues:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions" (*Griswold v. Connecticut*, 381 U.S. 479 (1965), 486).

In *Santosky v. Kramer* (*John Santosky v. Bernhardt S. Kramer*, 455 U.S. 745 (1982)) the Court says, "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment" (*Santosky v. Kramer,* 455 U.S. 745 (1982), 753). In the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)), Justice Blackmun argued:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the

> State" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), 851).

These cases agree that marriage is a fundamental right supported by the country's history and tradition far surpassing the past fifty years. Marriage is undoubtedly protected.

Yet, because same-sex marriage has only been legalized in the last decade, there are conflicting precedents on same-sex marriage. There is, however, precedent in the past fifty years in support for same-sex relationships. For example, in Justice Steven's dissenting opinion in *Bowers v. Hardwick*:

> "[He] concluded that (1) the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of "liberty" protected by due process" (*Lawrence v. Texas*, 539 U.S. 558 (2003), 2).

In *Lawrence v. Texas,* Justice Kennedy states, "These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives" (*Lawrence v. Texas*, 539 U.S. 558 (2003), 11). Consequently, all the decisions of *Baker, Bowers, Romer,* and *Lawrence* help to demonstrate the history, tradition, and progressive acceptance of homosexuals, and the rights afforded to them in the last 50 years. The Court made a drastic shift in not recognizing gay rights in both *Baker* and *Bowers*, to realizing the apparent discrimination in *Romer* and correcting their error from *Bowers* in *Lawrence.* Therefore, with the established history and tradition of marriage in the United States there is, under the *Lawrence* precedent, substantial evidence to satisfy the

first prong of *Glucksberg*'s test for same-sex marriage.

The second prong establishes that the right is "implicit in the concept of ordered liberty" (*Washington v. Glucksberg* , 521 U.S. 702 (1997), 721). "Implicit in the concept of ordered liberty" (*Washington v. Glucksberg* , 521 U.S. 702 (1997), 721) is defined by Justice O'Connor in *Reno v. Flores* (*Reno v. Flores*, 507 U.S. 292 (1993)) as "whether a governmental decision implicating a squarely protected liberty interest comports with substantive and procedural due process" (*Reno v. Flores*, 507 U.S. 292 (1993), 318). In the case of *Cleveland Board of Education v. LaFleur* (*Cleveland Board of Education v. LaFleur*, 414 US 632 (1974)), Justice Stewart argues that marriage is a protected liberty under the Fourteenth Amendment's "nor shall any State deprive any person of life, *liberty*, or property, without due process of law" (U.S. Const. amend. XIV, § 2). The Justice states, "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (*Cleveland Board of Education v. LaFleur,* 414 US 632 (1974), 639). The opinion helps to show how marriage, and personal choice inherent in marriage, is a liberty protected by the Due Process Clause.

By establishing marriage as a fundamental right and the ideas encompassing homosexuality and same-sex relationships' progress through the last fifty years, it can be argued that same-sex marriage could pass the stringent *Glucksberg* test. Same-sex marriage passes the first prong with the history and tradition of marriage found in the United States and Supreme Court cases of *Lawrence, Loving, Zablocki,*

Griswold, Santosky, and *Casey.* The *Lawrence* opinion is used to define 'history' limited to the last fifty years as acceptable. The second prong is met by recognizing marriage as implicit to liberty under the Due Process Clause of the Fourteenth Amendment. The establishment of marriage as a fundamental right is granted protection under the Due Process Clause, and therefore would receive strict scrutiny.

A problem with same-sex marriage through Due Process is that marriage, as recognized by the Court as fundamental, has always been heterosexual. The Court may not consider homosexual marriage as inclusive under the historically recognized fundamental right to marry. In this scenario, the Court may not use strict scrutiny under Due Process.

Therefore, if the case is not granted strict scrutiny under the Due Process Clause, but can receive the scrutiny under the Equal Protection Clause, the Court should use the Equal Protection Clause in order to avoid Susan Rush's "Collapsible Error." Rush states:

> "the targeted group also has an equal protection right to have a court apply due process analysis. Otherwise, the group's members lose an opportunity to have a higher level of review apply, which would be the case if the right were already established as fundamental or would be placed in that category if the Court considered the question [of suspect classification]" (Rush, 2008, 733).

If the denial of marriage to gays is not considered a violation of a fundamental right, the anti-same-sex marriage laws could still be determined unconstitutional by establishing gays as a suspect class under the Equal Protection Clause.

C. Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause found in the Fourteenth Amendment states "nor deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. amend. XIV, § 3). The Equal Protection Clause has historically been used to provide equivalent treatment to every person under law and to ensure that people are not discriminated. One of the first constitutional uses of the Clause can be seen in *Strauder v. West Virginia* (*Strauder v. West Virginia* 100 U.S. 303 (1879)):

> "In *Strauder,* the Court struck down a state law that prohibited black men from serving on juries in criminal trials. Significantly, the decision challenged the reality of a white society that condoned racial discrimination and preferred that the races live separately, a preference the Court would constitutionalize less than twenty years later in *Plessy v. Ferguson.* Separation of the races was quite rational to white society at the time. Thus, *Strauder* is a remarkable judicial stand against racism at a time when rational basis review was the only articulated methodology" (Rush, 2008, 694).

However, the idea of creating 'suspect classes' took much longer to create. Justice Stone alluded to the need for protection of minorities in Footnote Four of *United States v. Carolene Products Co*., 304 U.S. 144, (1938). He argues:

> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.... Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (*United States v. Carolene Products Co*., 304 U.S. 144, (1938), 152).

Justice Stone argues that, in general, courts should believe that laws are constitutional, except in cases requiring a "more searching judicial inquiry." Examples of these cases are when "it is a law that interferes with individual rights, or a law that restricts the ability of the political process to repeal undesirable legislation, or a law that discriminates against a 'discrete and insular minority,'" (Chemerinsky, 2006, 540). The 'discrete and insular minority' is the first suggestion of a creation of suspect classes, or a class of people discriminated against in such a way to require a stronger scrutiny by the Court. As Susan Rush states, "Footnote Four generally is recognized as the source of the Rule; that is, that heightened scrutiny should apply in cases where a law infringes on a fundamental right *or* burdens a suspect class" (Rush, 2008, 695).

The first case that applies heightened scrutiny to a suspect class is *Korematsu v. United States* (*Korematsu v. United States*, 323 U.S. 214 (1944)). Petitioner Korematsu "was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area,' contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area" (*Korematsu v. United States,* 323 U.S. 214 (1944), 216). Essentially, Korematsu was ordered by statute to go to a Japanese internment camp during World War II and refused. He was convicted and appealed to the Supreme Court. The Court held "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.... [C]ourts must subject them to the most rigid scrutiny"

(*Korematsu v. United States,* 323 U.S. 214, (1944) 216). *Korematsu* was a case dealing with questions of both Equal Protection and Due Process: Equal Protection because the case affected those of Japanese ancestry, a suspect classification, and Due Process through infringing the right to liberty of living where a person desires. However, the Court was required to issue the majority opinion on Equal Protection grounds "because the only reason for denying members of the group of their liberty was their Japanese ancestry" (Rush, 2008, 697). This case helped establish the idea "that in cases where due process and equal protection intersect, courts apply heightened review if *either* a fundamental right *or* a suspect class is involved. Outside of such cases, courts generally require that legislation merely pass rational basis review" (Rush, 2008, 697).

The levels of scrutiny became clearer in *Kramer v. Union Free School District* (*Kamer v. Union Free School District No. 15*, 395 US 621 (1969)). The case concerned voting laws in a New York district where the district required that a person could not vote in elections unless "they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools." Chief Justice Warren defines strict scrutiny in regards to the right to vote as "…if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest" (*Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), 627). He continues to argue for a heightened form of scrutiny by stating:

> "Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable. The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality" (*Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), 627-28).

By arguing a need for a closer scrutiny, Chief Justice Warren and the *Kramer* Court helped create the three-tiered system used today.

Strict scrutiny is applied to a number of cases dealing with suspect classifications, such as race (*Korematsu v. United States*, 323 U.S. 214 (1944)), religion, alienage (*Graham v. Richardson,* 403 U.S. 365, (1971)), and national origin (*Oyama v. State of California*, 332 U.S. 633 (1948)). Another class is gender, which is not given the full protection of strict scrutiny, but receives some form of heightened, intermediary scrutiny (*Frontiero v. Richardson*, 411 U.S. 677 (1973)). If a suspect class is targeted, then strict scrutiny is triggered even if no fundamental right is violated (Rush, 2008, 699). However, in cases where there is both an infringed fundamental right (Due Process Clause) and a suspect class targeted (Equal Protection Clause), it is up to the Court to decide which route to take. The major problem in the case of same-sex marriage is that the Supreme Court has not established gays as a suspect class. This paper argues that gays are a suspect class and require strict scrutiny in heterosexual marriage statutes.

The Supreme Court first established a suspect classification test for strict scrutiny with *Korematsu v. United States* (*Korematsu v. United States*, 323 U.S. 214 (1944)). *Korematsu* established three criteria:

> "(i) the class of individuals must be the target of *purposeful* discrimination; (ii) the discrimination must violate an established constitutionally protected right; and (iii) a set of features to determine whether (ii) applies must identify the relevant features of the specific class in question. For example, a defining feature of the class must be 'immutable' in some sense, that is, individuals discriminated against because of the characteristic must not be able to change it" (Schaff, 2004, 137).

The test was utilized and updated in 1973 with the Supreme Court case of *Frontiero v. Richardson* (411 U.S. 677 (1973)). *Frontiero*:

> "concerns the right of a female member of the uniformed service to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and medical and dental benefits…on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support…A servicewoman, on the other hand, may not claim her husband as a 'dependent' under these programs unless he is in fact dependent upon her for over one-half of his support. Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen" (*Frontiero v. Richardson,* 411 U.S. 677 (1973), 678).

The Court answered the question by identifying gender as a quasi-suspect class, or a class protected by the intermediary heightened scrutiny. The opinion expounded the *Korematsu* test, creating the *Frontiero* test. The *Frontiero* test has four elements:

> "(1) Has the group suffered a history of purposeful discrimination? (2) Is the class the object of such deep-seated prejudice that it is often subjected to disabilities based on inaccurate stereotypes that do not truly reflect the members' abilities? (3) Is the class defined by the presence of an immutable trait that is beyond a class member's control and yet bears no relation to the individual's ability to contribute to society? (4) Is the group a politically powerless minority?" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)).

For the establishment of the class of LGBT citizens, the *Frontiero* test will be utilized and each prong will be appropriately addressed.

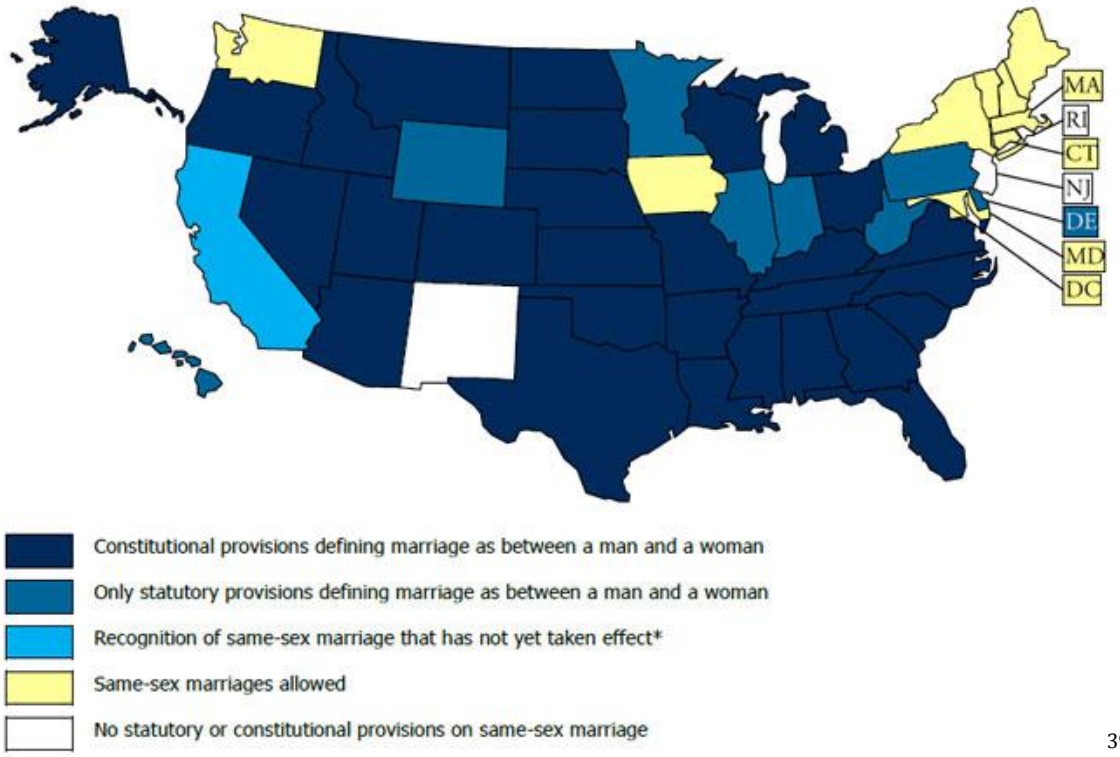
1. *Has the group suffered a history of purposeful discrimination?*

It is no secret that gay people have undergone blatant discrimination throughout history. As stated in the case *Kerrigan v. Commissioner of Public Health*, (*Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, (2008)):

> "gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation. For centuries, the prevailing attitude toward gay persons has been 'one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment,'" (*Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, (2008), 432).

The discrimination became legally apparent in the United States with the previously mentioned Supreme Court cases of *Baker v. Nelson* in 1972 and *Bowers v. Hardwick* in 1986. The cases showed how the class of gays was considered unnatural and a type of people not afforded the same rights as every other American person. Next, was the case of *Romer v. Evans* in 1996 of which the state of Colorado created an amendment affording no special rights to the gay community. Although the Supreme Court eventually ruled the state amendment unconstitutional, the desire and purpose of the Coloradans passing this amendment was clearly discriminatory.

Currently, many State and Federal laws target gays. Today, the majority of States have some form of statute or constitutional amendment forbidding same-sex marriage. The map below better portrays the number of States against same-sex marriage:



[39]

California is given the light blue color because the state is waiting for judgment on its status of same-sex marriage from the Supreme Court with *Hollingsworth v. Perry*.

Although the gay rights movement has profoundly increased the amount of awareness for LGBT rights and has decreased discrimination in the last few years, discrimination is still present in everyday life. Kari Balog argues:

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[39] "Defining marriage" 2013

> "While homosexuals have made major legal breakthroughs in the last ten years, they continue to suffer from discrimination. Discrimination against homosexuals ranges from schools refusing to punish gay bashing, and States refusing homosexual couples the right to marry or adopt children." (Balog, 2005, 2).

Justice Kennedy argues in *Board of Trustees of Univ. of Ala. v. Garrett* (531 US 356):

> "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves" (*Board of Trustees of Univ. of Ala. v. Garrett*, 531 US 356 (2001), 374-75).

Until these discriminations are addressed and ratified, prejudices will continue to be rampant and ensue.

2. *Is the class the object of such deep-seated prejudice that it is often subjected to disabilities based on inaccurate stereotypes that do not truly reflect the members' abilities?*

Prejudice and stereotype are two terms that inherently go hand-in-hand. Stereotypes are considered a necessity for a prejudice of a class of people to grow and thrive within a society. A Connecticut Supreme Court defined stereotype as "a standardized mental picture ... that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment" (*Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, (2008), 460). Because of the growth of the gay rights movement over the past fifty years, stereotypes of LGBT people have flourished and have created a 'deep-seated' prejudice against the class's favor. Various prejudices and stereotypes exist against homosexuals with the common goal of denying this class of people such inherently fundamental rights, such as the ability to marry the person one loves.

An example of a prejudicial gay stereotype is described by Hanna:

> "laws restricting the right to marry to 'one man, one woman' reflect and reinforce a thickly gendered conception of sex roles and what it means to be a 'husband' or a 'wife.' The enforcement of these roles has deprived women and gay men of equal social status, and it has 'impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes.' It has defined not only men's and women's roles as spouses but also their roles as citizens, workers, parents, and children" (Hanna, 2010, 1695).[40]

Another example of stereotypes that the LGBT community are subjected to can be seen in the opinion of Judge Walker in the California Proposition 8 case of *Perry v. Schwarzenegger* (*Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 991-92 (N.D. Cal. 2010)). Judge Walker ruled that Proposition 8 was inherently invidious and violated the Due Process Clause and Equal Protection Clauses of the Constitution. He argued:

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[40] The Federal Government has enacted its own prejudiced provisions against homosexuals. Examples of national discrimination are seen with DOMA and DADT. First, and most pertinently, is DOMA or the Defense of Marriage Act. As discussed in an earlier chapter, DOMA federally restricts marriage as an act between a man and a woman, and nationally suspends the Full Faith and Credit Clause (Article IV, Section 1, U.S. Constitution) in order to completely restrict marriage. The Act is inherently discriminatory because heterosexual couples that marry in one state are recognized in all other States as married. DOMA has been in effect since 1996, over fifteen years.

Another federal act that was discriminatory and has just recently been overturned is "Don't Ask, Don't Tell" (DADT). The history behind DADT dates back to the 1950s when President Harry S. Truman signed into effect the Uniform Code of Military Justice, creating rules of discharge for any homosexual service member, ("Timeline," 2010). Continuing on to 1982, President Ronald Reagan stated, "homosexuality is incompatible with military service," continuing the discharging of proclaimed homosexuals, bisexuals, and people who participate in homosexual acts, ("Timeline," 2010). Then, in 1993 the 'compromise' of "Don't Ask, Don't Tell" came from President Clinton's administration where it was declared that gay men and women were permitted to serve but were to keep secret their sexuality; they were not to be asked of their sexuality nor to share it. It was not until December 18, 2010 when Senate passed the vote to repeal the legislation and allow gay men and women freely to serve in the United States military, of which President Obama signed into law, ("Timeline," 2010). DADT and the history of the anti-gay military help to show how the country has, especially in the last sixty years, been predominantly discriminatory against gays.

> "that gays and lesbians experienced discrimination based on unfounded stereotypes and prejudices, while finding as an evidentiary matter that Proposition 8 increased costs and decreased wealth for same-sex couples in terms of tax and health insurance burdens, while singling out lesbians and gays for unfavorable treatment by suggesting that they were incapable of forming long-term relationships and were not good parents" (Bamforth, 2011, 242).

Justice Walker notes the stereotype the supporters of Proposition 8 and opponents of same-sex marriage have is:

> "the campaign in favor of Proposition 8 had relied on fears that children exposed to the concept of same-sex marriage might somehow 'become' gay or lesbian, entailing inaccurate insinuations about the possibility of 'conversion' from heterosexuality and implicit fears that parents should dread having a non-heterosexual child, propositions which again reduced to stereotypes concerning the 'inferiority' of same-sex relationships." (Bamforth, 2011, 245).

In Judge Walker's conclusion of the case, he states that:

> "as a matter of law that what remained of the case for Proposition 8 was the notion that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate" (Bamforth, 2011, 244).

The prejudices and stereotypes held against gays are apparent and seemingly irrational. Yet, they are prejudices still upheld and fought for against homosexuals in court cases to this day. These prejudices and stereotypes are devastatingly invidious and will most probably not be upheld under Constitutional scrutiny.

3. *Is the class defined by the presence of an immutable trait that is beyond a class member's control and yet bears no relation to the*

individual's ability to contribute to society?

The set of features required by the Court to determine a suspect class must be immutable or "a trait that is 'determined solely by the accident of birth' and is 'not capable of or susceptible to change.' This definition of immutability does not include 'ethnic or sociocultural' characteristics 'such as citizenship or alienage' or 'poverty,'" (Balog, 2005, 554). Some previously determined immutable traits include race and gender:

> "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system,'" (*Frontiero v. Richardson*, 411 U.S. 677 (1973), 686).

The question of immutability in the case of same-sex marriage is whether being 'gay' is an immutable trait that cannot be changed or altered. However, the Supreme Court has ruled that immutability does not imply biology, that instead the Court recognizes an immutable trait as "immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity" (Schaff, 2004, 138). Furthermore, as stated in *Frontiero* in addressing the immutability of gender, "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society" (*Frontiero v. Richardson,* 411 U.S. 677 (1973), 686). The same applies in the case of homosexuality because a person's private sexuality will not negatively harm the way the person functions in his/her career, social relations,

ability to abide by laws, or add to society. As stated in the Connecticut Supreme Court case of *Kerrigan v. Commissioner of Public Health*, "The characteristic that defines the members of this group--attraction to persons of the same sex--bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens" (*Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, (2008), 426).

When it comes to homosexuality, there are conclusions drawn as to whether being gay is a choice or inherently immutable. As Kari Balog argues:

> "While members of the American Psychiatric Association are unable to agree on one cause for sexual orientation, they do agree that 'human beings can not choose to be either gay or straight . . . Sexual orientation [is not] a conscious choice that can be voluntarily changed.' The antiquated belief that homosexuality is an illness which can be spread has generally diminished and doctors and scientists widely agree that homosexual orientation can not be spread. This drastic change in thought shows a general acceptance of homosexuality as a trait which is at least mostly predetermined and completely beyond the control of the affected person. The early determination of sexual orientation and its inability to change, shows that sexual orientation is as immutable as race or gender. Thus, homosexuals should be classified as a suspect classification for equal protection purposes" (Balog, 2005, 562).

Balog analyzes only one aspect here, the psychological aspect, but continues on in her argument to present evidence from biology and genetics that homosexuality is not a choice and has increasingly proven scientifically to be immutable.

4. Is the group a politically powerless minority?

The question of the political powerlessness of gays seems to be the most challenging prong to meet. Although gays have had a history of political powerlessness, such as exposed in *Romer v. Evans,* the amount of support for the

movement has grown enormously over the last decade. In Justice Scalia's dissent of *Romer v. Evans* he argues, "it is also nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics" (*Romer v. Evans*, 517 U.S. 620 (1996), 652).

In response to Justice Scalia's opinion, Susan Rush argues "Significantly, the struggle for equal protection is not about political *popularity;* it is about political *power*" (Rush, 2008, 713). She contends:

> "It bears emphasizing that how much a group is feared or hated generally is related to how much or how little political power they have. But political power is different from political popularity. Political power is about gaining equal citizenship on an enduring basis. Sometimes people, perhaps as a matter of principle, use their political power to support even very politically unpopular groups that are the target of prejudice or hostility… Progress toward equality for politically powerless groups necessarily relies on the goodwill, understanding, and ultimately the integrity of the politically powerful. Sometimes this will manifest itself in the ordinary democratic process (majority wins)… Other times it must manifest itself in decisions by politically powerful figures-like judges-who are called upon in the democratic process to protect 'constitutional values in our scheme of government even more fundamental than perfected pluralism-most notably, those that bar prejudice against 'discrete and insular minorities,'" (Rush, 2008, 713).

Rush believes the argument that gays are politically powerful "allows the forest to get lost among the trees" (Rush, 2008, 722). She continues her argument by citing the legislative discrimination that gays have endured:

> "Indeed, one logically could conclude that passage of the Defense of Marriage Act (DOMA), defining marriage as between a man and a woman, and the efforts of many States to pass laws limiting marriage to a man and a woman, are the ultimate evidence of just how politically powerless gays are *throughout the country*" (Rush, 2008, 722-23).

Further, Rush concludes, "The widespread political movements across the country to limit marriage to a man and a woman belie any suggestion that gays are a politically powerful group" (Rush, 2008, 742).

The conclusion that gays are not politically powerless because of the amount of public support the movement has is intrinsically weak; as Rush exemplifies, if the group were politically powerful, the anti-same-sex marriage laws would not be in place.

Furthermore, Kenji Yoshino (Yoshino, 2010) argues that the LGBT community can meet the requirements of the prong based on previous Supreme Court precedent. His first argument states, "In the 1973 case of *Frontiero v. Richardson*, a plurality of the Court observed that women could be deemed politically powerless despite their numerosity because they were 'vastly underrepresented' in the 'Nation's decisionmaking councils,'" (Yoshino, 2010, 1542). However, Yoshino argues that this is a vague standard as many other classes, such as people with disabilities, which have received substantial media and legislative attention, have failed to meet this prong (Yoshino, 2010, 1542).

Yoshino in substitution argues for a formula of factors to determine political powerlessness. He wants these factors to be:

> "(1) the group's income and wealth; (2) its health and longevity; (3) its freedom from public and private violence; (4) its ability to exercise its political rights; (5) its education level; (6) its social position; and (7) the acceptability of prejudice against the group" (Yoshino, 2010, 1543).[41]

[41] He has constructed this list of requirements based on:

Based on the previous prongs on the Frontiero test alone, the LGBT class has already met numbers 3, 6, and 7, in relation to the amount of discrimination, prejudice, and stereotypes waged against homosexuals over the years. Yoshino argues the rest of the factors are capable of being met:

> "Despite the myth of gay affluence, gays face significant wage discrimination. With respect to health and longevity, studies show that the suicide rate for gay youth is as high as seven times that of their straight peers. According to the Federal Bureau of Investigation, recent years have generally seen a rise in reported hate crimes against individuals on the basis of sexual orientation" (Yoshino, 2010, 1543).

Yet, although Yoshino's argument is promising, there is a chance the Court will not adopt such standards in determining that political powerlessness of a class.

However, advocates of the movement argue that the prong can still be met. Cheryl Hanna argues:

> "courts, both state and federal, have had a long history of grappling with questions of sex classifications and gender stereotyping. Even though the issues of marriage equality or workplace rights for gay men and lesbians may be recent, courts are not without precedent in routinely striking down classifications that reinforce gender stereotypes" (Hanna, 2010, 1696).

"constitutional scholar Cass Sunstein's analysis. Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2430 (1994) (listing 'poverty, education, political power, employment, susceptibility to violence and crime, [and] distribution of labor within the family' as potential markers of social welfare). Moral philosopher Martha C. Nussbaum has subsequently propounded a useful list of 'human capabilities' in the context of thinking about women. See Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 78-80 (2000). Nussbaum contends that there are ten human capabilities, which include (1) longevity; (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species (the capacity to relate to animals, plants, and the world of nature); (9) play; (10) control over one's environment (including political and material control)" (Yoshino, 2010, 1543, footnote 49).

Hanna's point is that it is only a recent trend of courts actually taking LGBT civil rights cases and that the history of cases that were heard were predominantly ruled in favor of heterosexual views and stereotypes. This type of judicial misrepresentation could convey the political powerlessness the LGBT movement has historically encountered. Furthermore, Kari Balog argues:

> "It is true, of course, that gay persons recently have made significant advances in obtaining equal treatment under the law. Nonetheless, we conclude that, as a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling them out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping" (Balog, 2005, 547).

Balog contends that just because the gay rights movement has recently grown in political strength, the amount of political power now may still be relatively powerless in regards to a ruling that could continue the discrimination and prejudice that homosexuals have incurred.

Overall, although the prong of political powerlessness brings the case of scrutiny for same-sex marriage into a region of ambiguity, the arguments presented for political powerlessness meet the requirements.

By satisfying the four criteria of the *Frontiero* Test, the conclusion can be drawn that gays should be considered a suspect class. However, the intrinsic problem with bringing the same-sex marriage argument under Equal Protection is that, although gays arguably meet each prong of the test, they have yet to be specifically or historically classified as a suspect class, which is no easy task. If the Court rules in favor of same-sex marriage under Equal Protection, the Court has the

opportunity to consider gays a suspect class. However, the Court has not created a new suspect class or quasi-suspect class since 1976 (Rush, 2008, 739). Further, the Court had an opportunity in *Bowers* to create the suspect class of gays but refused to "ask the equal protection question: are gays a suspect class?" (Rush, 2008, 703). The Court in *Lawrence* had the opportunity as well, but chose to address their question through Due Process; "the Court chose to define the right without reference to the group targeted by the law and thereby avoided committing the Collapsible Error. This is important because the *Lawrence* Court avoided building an inequality into the analysis ab initio" (Rush, 2008, 734).

However, Justice O'Connor, in her concurring opinion, argued for Equal Protection, but did not address the question of suspect classification for gays:

> "Consider that even as Justice O'Connor exposed the animosity behind the statute in *Lawrence,* she hinted that discrimination based on sexual orientation might be rational for the purpose of protecting the traditional institution of marriage. Her use of the word 'rational' implies that she would not consider sexual orientation a suspect classification" (Rush, 2008, 737).

This proves to be the main problem with the Equal Protection argument; if the Court does not consider gays a suspect classification based on sexual orientation, the argument for same-sex marriage may not receive strict scrutiny.

Ideally, gays will be considered a suspect class under the Equal Protection Clause because the "law denies a right to some, while allowing it to others" (Chemerinsky, 2006, 794), and the statutes against gay marriage will be considered discriminatory.

If either the Due Process or Equal Protection route is used to reach strict

scrutiny, then the States that have such discriminatory laws must provide a compelling state interest as to why these laws are enforced.

D. The States' Compelling Interests

Both routes of Equal Protection and Due Process trigger strict scrutiny, regardless of which route is chosen. Therefore, inherent in the application of strict scrutiny, the States in opposition must provide a "compelling state interest" (Schaff, 2004, 139) as to why the laws and constitutional amendments created should restrict same-sex marriage and no longer be presumed invalid.

Many States argue that it is in their interest to deny same-sex marriage. Indiana argues for the interest of reproduction. The State contends that same-sex marriage is unconstitutional in its case of *Morrison v. Sadler* where the court argues, "there is a key difference between same-sex and different-sex couples, namely, the ease of procreation" (*Morrison v. Sadler* 821 N.E.2d 15 (Ind. App. 2005), 23). Indiana's argument is for the traditional family in that the State wants couples that can continue to procreate, an act that is impossible for same-sex couples. Another State that argues for the interest of procreation is Arizona. In the Arizona appellate case of *Standhardt v. Superior Court* (*Standhardt v. Superior Court,* 77 P.3d 451(Ariz. Ct. App. 2003), 458) the court states, "Implicit in *Loving* and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and one woman." This opinion upholds the idea that the main purpose of marriage is procreation, the opinion that a majority of States use as their interest.

However, many of these arguments cannot be upheld as compelling or much less reasonable. As Strasser states, "the procreation aspect of marriage is a reason to recognize rather than refuse to recognize same-sex marriage, " (Strasser, 2011, 129). For example, many same-sex couples are adopting children who were given up by their heterosexual parents. These gay couples are still able to have families. However, families and adoptions are not enough for States with the mentality of Indiana and Arizona. While denying marriage to same-sex couples with the argument of procreation, Arizona allows the elderly, pass childbearing years, to marry. In addition, Arizona allows first cousins to marry as long as the cousins can prove they are unable to bear children, (Strasser, 2011, 130). If Arizona's argument were to be valid, marriage would have to be denied to the elderly and first cousins, which would continue to breach the fundamental right to marry.[42] As Strasser argues, "The [Standhardt] court seemed to accept that the mere *possibility* that different-sex couples might have children was reason to permit them to marry, but that the *actuality* of same-sex couples having children to raise was not enough to justify their having the opportunity to marry" (Strasser, 2011, 130).

Furthermore, Susan Rush argues that in denying same-sex marriage, the States are committing a fallacy. She states, "The state cannot meet strict scrutiny by relying on a tautological rationale that defines the right by the group" (Rush, 2008, 735). She explains this in more detail:

[42] Except in the case of marriage between first cousins, which some States do not permit.

> "For example, the state cannot argue that an anti-sodomy law is necessary to limit a fundamental right (sodomy) to certain people (heterosexuals) because the right, although ostensibly neutrally defined (sodomy), *by definition* includes only the people (heterosexuals) who fall within the definition of the right (heterosexual sodomy)" (Rush, 2008, 735).

This example is in regards to the issues of the *Bowers* case, but can also be applied to same-sex marriage. In using her language, a state cannot argue the necessity of limiting a fundamental right (marriage) to certain people (heterosexuals) because the right, although neutrally defined (marriage), *by definition* includes only the people (heterosexuals) who fall within the definition of the right (heterosexual marriage). She concludes the argument with "Preserving the 'traditional institution of marriage' cannot justify limiting marriage to heterosexuals because the 'traditional institution of marriage' is tautologically defined *by* heterosexuality" (Rush, 2008, 738).

An alternative argument is that the restriction of marriage between a man and a woman is protected by the States' police powers of morality.[43] The police powers are those powers granted to the States by the 10th Amendment. Opponents contend that it is immoral to have a marriage between two men or two women and argue that it is in the States' rights to regulate marriage under its police powers:

> "[The] argument religious groups often put forth in defense of the continuing prohibition on same-sex marriage centers on the state's police powers. The police powers are typically classified as the right of

[43] "Ever since Chief Justice John Marshall coined the term in *Brown v. Maryland* in 1827**,** the police power has been a pivot of American constitutional thinking. As recently as 1991 the Supreme Court spoke in *Barnes v. Glen Theatre* of '[t] he traditional police power of the States' as one which 'we have upheld [as] a basis for legislation;' this plurality opinion of the Court defined it as 'the authority to provide for the public health, safety, and morals,'" (Legarre, 2007, 745).

> the state to regulate activity that can influence the safety, security, or public welfare of the community. Those who oppose same-sex marriage claim that it is indeed an issue of morality, which falls under the category of public welfare, and therefore is within the realm of the state to interfere" (Baker, 2010, 193).

The argument for morality is seen in the *Lawrence* case. Texas argued that its statute against homosexual sodomy was valid "by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality" (*Lawrence v. Texas,* 539 US 558 (2003), 582). Justice O'Connor states in her concurring opinion that *Bowers* argues, "moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient" (*Lawrence v. Texas*, 539 US 558 (2003), 582). Rush argues, "The [*Lawrence*] Court held that morality could not be a legitimate reason for the law, and there was no other legitimate reason, either" (Rush, 2008, 704).

Therefore, the States' compelling interest against strict scrutiny, whether procreation, to protect the institution of marriage, or morality under the States' police powers, is not valid. Procreation is overruled by allowing the elderly to marry; the argument for the institution of marriage is tautologically defeated; and the argument for morality cannot be upheld when the statute is against a group of people.

E. Rational Basis

Yet these arguments for strict scrutiny may not be adopted. Rush argues that there are two exceptions to the requirement of strict scrutiny (Rush, 2008, 745). These exceptions do not require the statute to meet strict scrutiny because they fail rational basis review. The first is the 'ill motives' exception where a law is considered ill-motivated based on some form of animus or discrimination driven by a society's biased views. Rush defines this as "Prejudice and hostility by government officials are illegitimate motives, but there is a difference between a judicial finding that a law lacks a legitimate interest and a judicial finding that a law is ill-motivated" (Rush, 2008, 691). The second exception, the 'logical' exception is "when a court finds a law cannot pass rational basis review, logically, it is unnecessary for the court to evaluate the law under a higher level of review even though one theoretically applies or might apply" (Rush, 2008, 690). If strict scrutiny is not assigned through the Due Process Clause or the Equal Protection Clause, statutes against gay marriage would still be considered unconstitutional. The unconstitutionality is determined with rational basis through the ill motives exception.

Susan Rush explains her ill motives exception to be any law or statute created with a prejudice. She defines prejudice as, "a 'preconceived opinion that is not based on reason or actual experience.' Today, perhaps a synonym for 'prejudice' might be 'stereotype,' which means 'a widely held but fixed and oversimplified image or idea of a particular type of person,'" (Rush, 2008, 704). She continues to

argue, "Increasingly, the Court rejects stereotyping as a legitimate basis for discriminating" (Rush, 2008, 704).

Through meeting the requirements of the *Frontiero* test in the chapter on Equal Protection, the discrimination and stereotyping against gays is addressed and the prejudices are apparent.[44] They have been stereotyped as unable to parent, discriminated against at state and national levels, and overall deemed unfit for the institution of marriage. As the DOMA report states, "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing" because "At its core, it is hard to detach marriage from what may be called the 'natural teleology of the body': namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child" ("Defense of Marriage," 1996, 13).

The idea of an ill-motivated law not able to pass rational basis stems from the years of enforcement of racist laws. However, prejudice holds a stricter definition because "Racial prejudice resembled more the concept of 'hostility,' which means 'unfriendliness or opposition,'" (Rush, 2008, 705). Rush argues, "It would be inaccurate and an injustice to describe racial hostility as merely a matter of prejudice" (Rush, 2008, 705). Through various court cases dealing with race,[45] the Court came to the conclusion that "the notion that prejudice, particularly racial hostility, is illegitimate came in to being under the only articulate standard of review

[44] *See page 48*
[45] *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Yick Wo v. Hopkins,* 118 US 356 (1886).

that existed: rational basis" (Rush, 2008, 705). The ill motives exception eventually broadened to include more than racist statutes, but any statute that is truly ill motivated (Rush, 2008, 707).

Therefore, the problem arises with the term 'hostility.' There have already been great changes in public perceptions with the adoption of same-sex marriage. Polls have shifted drastically from the majority of the population condemning same-sex marriage to condoning it.[46] Therefore, if there is decreasing hostility towards the group, can a statute continue to be ill-motivated? As Justice Kennedy and Justice O'Connor argue in *Board of Trustees of the University of Alabama v. Garrett*, (531 U.S. 356 (2001)):

> "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves…There can be little doubt, then, that persons…are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will" (Rush, 2008, 716).

Justice Kennedy is arguing that hostility towards a group is not a necessary condition for prejudice, or an ill motive, to be established. He "acknowledges that some people harbor no ill will toward particular groups; they just do not care about them, or they feel insecure around them" (Rush, 2008, 717). Furthermore, "even though anti-discrimination laws occasionally respond favorably to a group, the group nevertheless can continue to be the target of discrimination" (Rush, 2008,

[46] *See page 6*

717). Although public opinion has taken a turn for the better concerning gays and same-sex marriage, the animus is still present and the ill motives behind the anti-marriage statutes are apparent. The only way to defeat the ill motives exception is "if another legitimate justification supports the law." As addressed in *States' Compelling Interests*,[47] there is no legitimate justification that would sufficiently support the anti-marriage statutes.

Therefore, if the Court chooses not to take a strict route of scrutiny and rely on rational basis, statutes against same-sex marriage would continue to be considered unconstitutional because of the ill motivations behind the laws. These statutes would not be able to pass the lowest tier of rational basis and would be deemed invalid.

[47] *See page 61*

Conclusion

Same-sex marriage has made tremendous progress in the United States since the 1960's. LGBT awareness has grown exponentially and the number of supporters for gay rights, both homosexual and heterosexual, is substantial. The growth of the movement spurs the intrinsic desire for equal rights for gays. The most contentious right fought for today is same-sex marriage. Same-sex marriage has advanced from a denial in a Minnesota Supreme Court in 1972 (*Baker v. Nelson,* 409 U.S. 810 (1972)) to two cases heard before the Supreme Court on March 26 and March 27 of 2013.

The main precedents referenced in this thesis are *Baker v. Nelson, Bowers v. Hardwick, Romer v. Evans,* and *Lawrence v. Texas.* These precedents show the changing attitudes towards gays and useful in understanding in order to create an argument for same-sex marriage.

The regulation of marriage is decided by the States. Today, the majority of States have a form of law or amendment banning same-sex marriage. The argument presented in this thesis is that the denial of the right of marriage to same-sex couples is unconstitutional.

The statutes against same-sex marriage could arguably be invalidated under the least restrictive rational basis test of the three levels of scrutiny. The statutes meet both of Susan Rush's exceptions to heightened scrutiny, ill-motivated and logical, and there is precedent of these statutes not surviving rational basis with the

Goodridge case. However, this paper argued for the most restrictive form of scrutiny, strict, in order to provide the most protection to gays and same-sex marriage in the future.

Preventing same-sex couples to marry is an infringement of a fundamental right under the Due Process Clause of the Fourteenth Amendment and a violation of a suspect classification of people (gays) under the Equal Protection Clause of the Fourteenth Amendment. Both of these situations triggers strict scrutiny, the highest tiered level of analysis used by the Supreme Court. However, the case for same-sex marriage cannot be brought on both Due Process *and* Equal Protection grounds, it must be either-or. The right to same-sex marriage could reach the desired strict scrutiny by exemplifying the infringement of a fundamental right under the Due Process Clause of the Fourteenth Amendment. The right to marry is considered fundamental by the Supreme Court in cases such as *Loving* and *Zablocki*. Moreover, the right to same-sex marriage could pass the fundamental right test established in *Glucksberg.* However, if the Court does not recognize the infringement of marriage under Due Process, a suspect class of gays can be created under the Equal Protection Clause. Yet, this proves to be easier said than done considering a suspect classification has not been identified since 1976 (Rush, 2008, 739). The thesis presents the argument that gays satisfy the criteria of suspect classification defined by *Frontiero*, but the Court may still disagree.

By triggering strict scrutiny through either Due Process or Equal Protection, the States would have to argue why their statutes are necessary. There are three

arguments presented and defeated. The first is that the state has an interest in procreation of its citizens; gay people cannot procreate so there is no reason to allow them to marry. This is overturned by States permitting the elderly, who can no longer procreate, marry. The second argument is that the state is trying to protect the institution of marriage by maintaining its heterosexuality. Susan Rush defeats this by calling the argument "tautological" or self-defeating. The final interest the state proclaims to have is protecting morality through the 10th Amendment's police powers. This argument will most likely be beat by the Supreme Court based on precedent of not allowing the interest of morality to overturn the rights of a class of citizens.

However, the Supreme Court may not grant strict scrutiny with either Due Process or Equal Protection and may rely on the less stringent test of rational basis. Even if rational basis is the route taken, the statutes against same-sex marriage will not uphold because of Susan Rush's ill motives exception (Rush, 2008, 704). She argues that if a statute is created with an ill motivation with no legitimate purpose, the law will not uphold the least strict test of rational basis because of the background of discrimination.

The thesis argues that statutes against same-sex marriage are undeniably unconstitutional. They are unconstitutional under the strictest level of Supreme Court scrutiny, and continue to be unconstitutional under the least strict level of scrutiny. Either level of scrutiny the Court chooses to use should grant the outcome of legal same-sex marriage.

Marriage is more than a religious union or a symbol of love. It "promotes mutual lifelong caregiving in a way that no other institution does, a task that is important for gay and straight citizens alike" (Corvino, 2012, 20). In acknowledging this fact, gay couples should be permitted to marry in the United States and have their marriages recognized by every single state. Denying marriage to same-sex couples is inherently unconstitutional per the Due Process and Equal Protection Clauses of the Fourteenth Amendment and should be eliminated from the laws of this equality-founded land.

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