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Homosexuals, Equal Protection, and the Guarantee of Fundamental Rights in the New Decade: An Optimist's Quasi-Suspect View of Recent Events and Their Impact on Heightened Scrutiny For Sexual Orientation-Based Discrimination

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Cover Page Footnote

28-1

**HOMOSEXUALS, EQUAL PROTECTION, AND THE
GUARANTEE OF FUNDAMENTAL RIGHTS IN THE NEW
DECADE: AN OPTIMIST’S *QUASI-SUSPECT* VIEW OF
RECENT EVENTS AND THEIR IMPACT ON HEIGHTENED
SCRUTINY FOR SEXUAL ORIENTATION-BASED
DISCRIMINATION**

*by John Nicodemo**

I. INTRODUCTION

The Defense of Marriage Act (DOMA),¹ “as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.”² “[C]lassifications based on sexual orientation warrant heightened scrutiny”³ “DOMA is unconstitutional.”⁴ These statements nei-

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¹ 1 U.S.C. § 7 (2006). The Defense of Marriage Act consists of merely one sentence, stating:

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

Id. The act effectively prohibits any same-sex marriage from being recognized for federal purposes, and serves to allow states not to recognize same-sex marriages performed in other states. See DOMA WATCH, <http://www.domawatch.org/index.php> (last visited March 18, 2011).

² Memorandum from Att’y Gen. Eric H. Holder, Jr. to Speaker of the House of Rep. John A. Boehner 1 (Feb. 23, 2011) (on file with author).

³ *Id.* at 2.

⁴ *Id.*

ther reflect the mantras of a civil rights group nor echo the sound bites of a run-of-the-mill LGBT⁵ march on Washington. These sentences appear in an eloquently written letter by Attorney General Eric Holder to the Honorable John Boehner, the current Speaker of the House of Representatives.⁶ The aforementioned correspondence, dated February 23, 2011, reflects the Obama Administration's decision to cease defending DOMA—a legislative act that the Administration finds unconstitutionally discriminatory.⁷ The decision arose because the Administration currently faces the task of defending DOMA against new lawsuits in federal circuits without binding precedent on whether rational basis review⁸ should be applied to sexual orientation-based discrimination.⁹

The Obama Administration's position on raising the standard of review from rational basis to heightened scrutiny for sexual orientation-based discrimination resonated as an optimistic sign for the

⁵ "LGBT" is a socio-cultural categorical label that stands for "Lesbian, Gay, Bi-sexual and Transgender." See LGBT HELPLINE, <http://www.lgbt.ie/information.aspx?contentid=84> (last visited Nov. 15, 2011). Throughout this article, references to "discrimination based on sexual orientation" or "discrimination against gays" apply to discrimination directed toward all members of the LGBT community.

⁶ Memorandum from Att'y Gen. Eric Holder, *supra* note 2, at 1-2; see also Elspeth Reeve, *John Boehner Becomes Speaker of the House*, THE ATLANTIC WIRE, (Jan. 5, 2011), <http://www.theatlanticwire.com/politics/2011/01/john-boehner-becomes-speaker-of-the-house/21632/> (stating that the Honorable John Boehner became Speaker of the House on January 5, 2011).

⁷ See Memorandum from Att'y Gen. Eric H. Holder, *supra* note 2, at 1 ("After careful consideration . . . the President of the United States has made the determination that . . . [DOMA] as applied to same-sex couples who are legally married under state law, violates the equal protection component under the Fifth Amendment.").

⁸ See BLACK'S LAW DICTIONARY (9th ed. 2009) (defining the "rational basis test" as "[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective. Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis").

⁹ See, e.g., Complaint at 1, 9, *Windsor v. United States*, 2010 WL 5647015 (S.D.N.Y. Nov. 9, 2010) (No. 1:10-CV-08435) (asserting that DOMA should be unconstitutional as applied to estate tax in New York); Complaint at 1-2, *Pedersen v. Office of Personnel Mgmt.*, 2010 WL 4483820 (D. Conn. Nov. 9, 2010) (No. 3:10-CV-1750) (asserting that DOMA should be unconstitutional as applied to the FEHB federal program, ERISA benefits, Social Security lump-sum death benefits, the FMLA federal program, and the New Hampshire Retirement System pension plan); see also *Romer v. Evans*, 517 U.S. 620, 623, 631 (1996) ("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.*") (emphasis added).

gay community.¹⁰ Although President Barack Obama's decision in no way binds the Supreme Court to follow its directive,¹¹ one cannot imagine that neither the Court nor Congress, whether these branches of government ultimately agree with the President's position, would wholly ignore his persuasive findings. Gay rights groups may choose to rest their well-founded optimism on an extraordinarily progressive position from one of the three co-equal branches of the government.

Eric Holder's letter, a monumental landmark in the struggle for rights within the LGBT community, proved to be one of many positive guideposts for the LGBT community in the years 2010 and 2011. Following *Witt v. United States Department of the Air Force*¹² and *Log Cabin Republicans v. United States*,¹³ two widely publicized Ninth Circuit challenges to the facially discriminatory military policy known as "Don't Ask, Don't Tell,"¹⁴ Congress, near the end of 2010, repealed "Don't Ask, Don't Tell."¹⁵ Soon after, *Perry v. Schwarzenegger*,¹⁶ another Ninth Circuit case, challenged the constitutionality of California's Proposition 8,¹⁷ a highly controversial ballot initiative that rendered same-sex marriage illegal.¹⁸ Although the *Perry* court,

¹⁰ See Dan Froomkin, *Gay Rights Advocates Celebrate Obama's DOMA Turnaround*, HUFFINGTON POST (Feb. 23, 2011, 5:35 PM), http://www.huffingtonpost.com/2011/02/23/doma-unconstitutional-gay-rights-groups-celebrate_n_827355.html ("Gay rights groups celebrated President Obama's decision . . . to no longer defend the constitutionality of the 1996 Defense of Marriage Act, which bans federal recognition of same-sex marriages.").

¹¹ See U.S. CONST. art. I, § 1 (vesting in Congress all legislative powers); see also U.S. CONST. art. III, § 2, cl. 2, (binding the Court's jurisdiction "under such Regulations as the Congress shall make.").

¹² 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

¹³ 716 F. Supp. 2d 884 (C.D. Cal. 2010).

¹⁴ 10 U.S.C. § 654 (2006) (repealed 2010); The "Don't Ask, Don't Tell" Act provided:

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if . . . (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect . . . (3) That the member has married or attempted to marry a person known to be of the same biological sex.

Id. at § 654 (b)(1)-(3).

¹⁵ See Carl Hulse, *Senate Repeals Ban of Openly Gay Military Personnel*, N.Y. TIMES, (Dec. 18, 2010), available at http://www.nytimes.com/2010/12/19/us/politics/19cong.html?pagewanted=1&_r=1 ("The Senate on Saturday [December 18, 2010] struck down the ban on gay men and lesbians openly serving in the military . . .").

¹⁶ 704 F. Supp. 2d 921 (N.D. Cal. 2010).

¹⁷ CAL. CONST. art. I, § 7.5, *invalidated by Perry*, 704 F. Supp. 2d at 1003.

¹⁸ *Id.* (plainly stating that, "[o]nly marriage between a man and a woman is valid or recognized in California."); see also *Perry*, 704 F. Supp. 2d at 927 ("Plaintiffs allege that

in holding that Proposition 8 violated the Constitution, clearly stated that “the evidence presented at trial shows that gays and lesbians are the type of minority *strict scrutiny was designed to protect*,”¹⁹ its decision rested on rational basis review.²⁰ Perhaps by clearly pronouncing that sexual orientation-based discrimination deserves a heightened standard of review, the court in *Perry* judicially nudged the Obama Administration.

The question then becomes: “Is any level of optimism among the LGBT community warranted?” The answer is a prudent and qualified “yes.” Since the inception of the modern gay rights movement in the late 1960’s,²¹ members of the LGBT community have struggled for acceptance in the American mainstream. During the past several decades, as strides have been made to secure basic civil rights for all Americans, the efforts of gay rights activists have been unavoidably impeded by vehement opposition.²² This opposition has generally been fueled by either moral or religious attitudes, and has most often surfaced to further political goals.²³ Unlike other classes of citizens who encountered and defeated discriminatory adversity throughout the latter half of the twentieth century, constitutional recognition of the LGBT community as a protected class often seems unattainable. When homosexuals make strides in the cause to achieve basic rights, legislatures seem to counter by enacting policies that present obstacles to realizing those strides.²⁴

Proposition 8 deprives them of due process and of equal protection of the laws contrary to the Fourteenth Amendment and that its enforcement by state officials violates 42 U.S.C. § 1983.”)

¹⁹ *Perry*, 704 F. Supp. 2d at 997 (emphasis added).

²⁰ *See id.* (“[T]he Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review.”).

²¹ *See* Andrew Matzner, *Stonewall Riots*, GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER CULTURE, http://www.glbtq.com/social-sciences/stonewall_riots.html; http://www.glbtq.com/social-sciences/stonewall_riots,2.html (last visited Mar. 9, 2011) (providing an overview of the beginning of the gay rights movement). On June 27, 1969, entertainer Judy Garland died. *Id.* The next day, June 28, 1969, is understood to mark the beginning of the modern gay rights movement. *Id.* In the early morning hours of June 28, the police made one of their periodic raids of the Stonewall Inn, a gay bar in the Greenwich Village of New York City filled with a crowd presumably mourning the loss of gay icon Garland, and caused an eruption of fury. *Id.* This raid and subsequent riot became known as the “Stonewall Rebellion.” *Id.*

²² *See* RACHEL KRANZ & TIM CUSICK, *GAY RIGHTS*, 51-55 (Facts on File, Inc., rev. ed. 2005) (providing an overview of the “anti-gay rights movement” that has been perpetuated by religious and political factions since the inception of the gay rights movement).

²³ *See id.*

²⁴ *See, e.g.*, 10 U.S.C. § 654 (2006) (repealed 2010) (requiring that a member of the armed

Fourteenth Amendment scholars and enthusiasts have witnessed a series of events in the years 2010 and 2011 that somehow indicate a potential for a change in the status of the LGBT community in Equal Protection issues.²⁵ Federal courts currently analyze constitutional challenges for sexual orientation discrimination using a rational basis standard of review.²⁶ A question arises as to whether the current socio-political climate precipitates a change. Does the possibility, or moreover, the probability, exist that the Supreme Court may raise the level of scrutiny afforded to sexual orientation based discrimination claims within a few years? Can it occur sooner? Will the Court succumb to social pressure and social norms and provide legal constitutional protections to a visible and economically viable group of American citizens? Moreover, will the LGBT community ever be afforded constitutional protections as a suspect or quasi-suspect class²⁷ for matters involving equal protection and guarantees of fundamental rights?

This paper will examine the current state of constitutional protections accorded to the LGBT community. Section II will analyze the factors determined by the Supreme Court to distinguish and

forces be discharged for engaging or attempting to engage in homosexual acts, stating his homosexuality, or marrying a person of the same sex); 1 U.S.C. § 7 (2006) (mandating that marriage only applies to heterosexuals).

²⁵ See, e.g., *Log Cabin Republicans*, 716 F. Supp. 2d at 927 (holding that 10 U.S.C. § 654 violates the Equal Protection Clause because it serves no valid governmental interest); *Witt*, 739 F. Supp. 2d at 1316 (holding that 10 U.S.C.A. § 654 violates an Air Force nurse's due process rights); *Perry*, 704 F. Supp. 2d at 927 (holding that California's Proposition 8 violates the Equal Protection Clause); see also Hulse, *supra* note 15 (stating that the Senate's repeal of 10 U.S.C. § 654 appeases the inferior treatment of homosexuals in the military); Memorandum from Att'y Gen. Holder, *supra* note 2, at 2 (stating that the Defense of Marriage Act violates the Equal Protection Clause).

²⁶ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 942 (3d ed. 2009) (discussing *Romer v. Evans*, 517 U.S. 620, noting that although it was the first time the Supreme Court struck down a discriminatory law against gays, the Court used only rational basis review to do so, not heightened scrutiny). "The rational basis test is the minimum level of scrutiny that all government actions . . . must meet . . . [requiring] that a law meets the rational basis review if it is rationally related to a legitimate government purpose." *Id.* at 723. "There is a strong presumption in favor of laws that are challenged under the rational basis test." *Id.* at 724.

²⁷ See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("To be a 'suspect' or 'quasi-suspect' class homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right." (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03, (1987))); see also *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.").

identify classifications of citizens deserving heightened levels of scrutiny for constitutional equal protection challenges and apply those factors to the LGBT community as a class. Recent and current federal court rulings, legislative actions (and inactions), socio-political mores, and general statistics and facts regarding the LGBT community will reveal that sexual orientation, as a classification for equal protection, clearly warrants some level of heightened scrutiny. Section III provides a critical view regarding legislative and judicial refusal to accept same-sex marriage as a fundamental right guaranteed under Due Process. Section IV focuses on recent Supreme Court decisions involving public and private sexual orientation-based discrimination, and compares those cases with decisions involving race and gender discrimination by private associations. The analysis will reveal that, although the Court refused to allow either race or gender discrimination, the Court has either permitted sexual orientation discrimination or ignored the issue altogether. Section V will discuss the ways in which changing social mores regarding social classes of Americans has led to judicial and legislative attention for the protection of such classes. The question remains whether history regarding the link between social change and constitutional protections will prevail for the LGBT community. After having considered and weighed all the factors regarding the possibility (and probability) of constitutional protections for the LGBT community, the outcome of this paper promises to be less foreboding and more optimistic—that is, *cautiously optimistic*.

II. CLASSIFICATIONS FOR EQUAL PROTECTION: SUSPECT, QUASI-SUSPECT, GAY—DESCENDING LEVELS OF EQUALITY

Currently, federal courts analyze constitutional challenges based on sexual orientation discrimination using a rational basis standard of review.²⁸ Presently, sexual orientation as a class of citizens fails to warrant either a suspect or a quasi-suspect classification for matters of discrimination.²⁹ Therefore, constitutional challenges to

²⁸ See *Romer*, 517 U.S. at 631-32 (noting that alleged sexual orientation discrimination is to be analyzed using a rational basis review).

²⁹ See CHEMERINSKY, *supra* note 26, at 936 (noting that although sexual orientation discrimination has similarities to other forms of discrimination which warrant heightened scrutiny).

governmental actions designed to discriminate against the LGBT community require the government to show that the challenged action was reasonably related to a legitimate governmental interest.³⁰ Under the rational basis standard of review, federal courts give great deference to the legislatures, and thus challenges to alleged discriminatory governmental action, when this standard is employed, usually fail.³¹

The federal courts determine the level of review to constitutional challenges depending on whether the class challenging the governmental action warrants heightened scrutiny.³² The Supreme Court recognizes these suspect or quasi-suspect classes based on specific characteristics of the class.³³ Logically, federal courts are highly suspicious of legislative actions that serve to either prevent a member of a suspect class from realizing a fundamental right or deprive a member of a suspect class from the equal protections of the law.³⁴ Classifications based on race, national origin, and alienage warrant strict scrutiny, for which governmental actions against these classes require the legislature to meet a “rigid” and strict standard of review.³⁵ This strict scrutiny standard requires the legislature to meet an onerous burden of proving that the challenged legislation is either necessary or narrowly tailored to meet a compelling governmental interest.³⁶ Classifications based on gender warrant mid-level scrutiny, for which the legislature must demonstrate an “exceedingly persua-

tiny, such alleged discrimination requires only rational basis review).

³⁰ *Id.* at 723 (discussing the requirements to satisfy the rational basis test).

³¹ *Id.* at 724.

³² *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying strict scrutiny to discrimination based on national origin, specifically Japanese internment during World War II).

³³ *See* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-43 (1985), (discussing some of the factors the Supreme Court used to make determinations as to which groups are labeled as “suspect” or “quasi-suspect” classes).

³⁴ *See* *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”).

³⁵ *Korematsu*, 323 U.S. at 216; *Cleburne Living Ctr.*, 473 U.S. at 440.

³⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a state, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

sive justification” for an important governmental interest.³⁷

The Court has determined several factors based on the characteristics of a classification of citizens to evaluate whether the group necessitates status as a suspect class, and thereby establish the level of scrutiny applied for constitutional challenges to governmental actions. Therefore, in order for the LGBT community to warrant a heightened level of scrutiny, it naturally must conform to the standards set forth by the Court as applied to race, national origin, non-citizenry, and gender.

To be a suspect or quasi-suspect class, “homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.”³⁸

A suspect classification characteristic is:

[A]n immutable characteristic determined solely by the accident of birth . . . [that] frequently bears no relation to ability to perform or contribute to society . . . [and should not be subject to the] imposition of special disabilities upon the members of a particular [class] because [it] . . . would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”³⁹

A. Sexual Orientation and a History of Discrimination

History reveals that classifications based on race, national origin, and gender clearly warrant the heightened scrutiny afforded them in matters of discrimination and fundamental rights.⁴⁰ A history

³⁷ *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”).

³⁸ *High Tech Gays*, 895 F.2d at 573.

³⁹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

⁴⁰ *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984) (stating that a Minnesota statute that served to eliminate gender discrimination demonstrates that the legis-

of discrimination suffered by groups based on such classifications represents an important factor in determining whether to use either strict or heightened scrutiny for equal protection challenges. However, one cannot discount the staggering history of discrimination endured by the LGBT community, a pattern that continues to this day without sufficient constitutional protection.

The LGBT community currently faces a pressing need for legal recognition from the courts. Americans need not identify as LGBT to fully understand the struggle. Statistics indicate that official recognition of sexual orientation as a protected class falls short from a national perspective.⁴¹ Only twenty-five states protect sexual orientation in employment discrimination practices for both public and private employers, while five states prohibit discrimination in public workplaces only.⁴² Thirty-seven states currently prohibit same-sex marriage or civil unions⁴³ by defining marriage as a union between one man and one woman, while only six states (and the District of Columbia) have enacted legislation specifically allowing same-sex marriage.⁴⁴ Legislative and judicial action, and inaction, perpetuate the intolerance that members of the LGBT community encounter each day. Equal protection under the law continues to appear an unattainable goal.

Stigmatization, as experienced by those within the LGBT

lature recognized the importance of removing barriers to economic and societal equality); *see also* John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 349 (1995) (underscoring and highlighting the shifting positions of the Supreme Court in relation to matters of racial discrimination); Juan F. Perea, *Ethnicity and Prejudice: Re-evaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 806-07 (1994) ("In the United States, often we have not treated strangers as we have treated our native born."); DO SOMETHING, <http://www.dosomething.org/tipsandtools/background-racial-discrimination> (last visited Sept. 30, 2011) (summarizing discriminatory practices against various racial and ethnic minority groups in the United States).

⁴¹ *Your Rights Against Sexual Orientation Discrimination in the Workplace*, FINDLAW.COM, <http://employment.findlaw.com/employment/employment-employee-discrimination-harassment/employment-employee-gay-lesbian-discrimination/> (last visited October 3, 2011).

⁴² *Id.*

⁴³ *See* Tom Head, *Civil Unions*, ABOUT.COM, http://www.civilliberty.about.com/od/gendersexuality/g/civil_unions.htm ("Civil unions are legal contracts between partners that are recognized by a state or government as conferring all or some of the rights conferred by marriage, but without the implicit historical and religious meaning associated with the word 'marriage.'") (last visited October 3, 2011).

⁴⁴ *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, NATIONAL CONFERENCE OF STATE LEGISLATURES (last visited Nov. 27, 2011), <http://www.ncsl.org/default.aspx?tabid=16430> (listing the current legislation, or lack thereof, in each state).

community, often leads to unfortunate social consequences.⁴⁵ For example, violence against gays is on the rise, with more reported incidents each year.⁴⁶ Because of intolerance of their sexual orientations, several young people committed suicide in the year 2010 alone.⁴⁷ An atmosphere of anti-gay rhetoric continues to permeate the platforms of political candidates who put forth gay rights as a wedge issue to seek votes from like-minded constituents.⁴⁸ Protections not only against discrimination, but also for physical and emotional safety, warrant obvious and immediate attention from the legislatures and the courts.

B. Sexual Orientation—Immutable?

The word “immutable” simply means unchangeable.⁴⁹ Immutability within a class of citizens constitutes a major factor in determining whether a class is either suspect or quasi-suspect; as the Supreme Court has stated, a person should not suffer discrimination “determined solely by the accident of birth.”⁵⁰

In 1990, twenty years before the groundbreaking cases of 2010, the Ninth Circuit Court of Appeals heard a case challenging the constitutionality of allegedly unfair employment screenings of homosexuals in *High Tech Gays v. Defense Industrial Security Clearance Office*.⁵¹ Here, the Petitioners claimed that the United States De-

⁴⁵ See Ramon Johnson, *Hate Crimes Motivated by Sexual Orientation Bias*, ABOUT.COM: GAY LIFE, <http://www.gaylife.about.com/od/hatecrimes/a/statistics.htm> (stating that the Federal Bureau of Investigations, under the Hate Crimes Statistics Act, reported that hate crimes based on sexual orientation bias increased from 1,415 reported cases in 2006 to 1,617 reported cases in 2008) (last visited October 3, 2011).

⁴⁶ See *id.*

⁴⁷ See *Raymond Chase Commits Suicide, Fifth Gay Teen to Take Life in Three Weeks*, HUFFINGTONPOST.COM, (Oct. 1, 2010 1:11 PM), http://www.huffingtonpost.com/2010/10/01/raymond-chase-suicide_n_746989.html (“Many consider this - - the fifth suicide by a young gay person in the past few weeks - - as a national call to action.”).

⁴⁸ See Amy Beth Arkawy, *Political Anti-gay Rhetoric Fuels Anti-gay Violence*, NEWS JUNKIE POST, (Oct 11, 2010 2:28 PM), <http://www.newsjunkiepost.com/2010/10/11/political-anti-gay-rhetoric-fuels-anti-gay-violence/> (“[P]oliticians are openly denouncing the ‘gay lifestyle’ and campaigning on keeping gay teachers out of schools.”).

⁴⁹ *Immutable Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/immutable> (last visited October 3, 2011).

⁵⁰ *Frontiero*, 411 U.S. at 686.

⁵¹ 895 F.2d 563, 565 (9th Cir. 1990).

partment of Defense violated their Fifth and Fourteenth Amendment rights of equal protection.⁵² The district court, after its analysis of the equal protection challenge, found for the plaintiffs holding that “gay people are a ‘quasi-suspect class’ entitled to heightened scrutiny.”⁵³ The Ninth Circuit disagreed, and stated that

It is apparent that while the Supreme Court has identified that legislative classifications based on race, alienage, or national origin are subject to strict scrutiny and that classifications based upon gender or illegitimacy call for a heightened standard, the Court has never held homosexuality to a heightened standard of review.⁵⁴

Although the Ninth Circuit found that “homosexuals [had] suffered a history of discrimination,” it stated that, “we do not believe that they meet the other criteria. Homosexuality is *not an immutable characteristic*; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage.”⁵⁵

Twenty years after *High Tech Gays*, the Ninth Circuit produced *Perry v. Schwarzenegger*, a groundbreaking case for both its outcome and its dicta regarding the characteristic of homosexuality. When deciding the issue of whether evidence showed California had an interest in “differentiating between same-sex and opposite-sex unions,” the court explicitly stated that, “[s]exual orientation is commonly discussed as a characteristic of the individual. Sexual orientation is *fundamental to a person’s identity* and is a distinguishing characteristic that defines gays and lesbians as a discrete group.”⁵⁶ Most notable is the following assertion that the court adopted: “*Individuals do not generally choose their sexual orientation*. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change

⁵² *Id.* at 565, 569.

⁵³ *Id.* at 565 (quoting *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987)).

⁵⁴ *Id.* at 573.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Perry*, 704 F. Supp. 2d at 963-64 (emphasis added) (citing evidence proffered by Gregory Herek, a professor of psychology at U.C. Davis). Herek, a psychologist, specializing in social psychology (“the intersection of psychology and sociology” that “focuses on human behavior within a social context . . .”), whose “dissertation focused on heterosexuals’ attitudes toward lesbians and gay men . . . [,] teaches a course on sexual orientation and prejudice.” *Id.* at 943.

his or her sexual orientation.”⁵⁷

In *Perry*, the court explicitly adopted a social psychologist’s statement regarding the characteristics of gays and lesbians.⁵⁸ In addition to dispelling the long-held prejudicial beliefs regarding the moral inferiority of gays and lesbians to non-gays, the court boldly pronounced that homosexuality is, in all likelihood, immutable.⁵⁹ In other words, homosexuals are *born that way*. This statement is logically paralleled by the findings of two independent studies determining that prejudice of homosexuals is born from outdated and erroneous misconceptions.⁶⁰ The court’s opinion furthers the need for other jurisdictions to understand that, like race and gender, sexual orientation deserves constitutional protection from discrimination.

C. Homosexuals and Political Power?

Traditionally, in determining political powerlessness in relation to suspectness, the Supreme Court has held that a class must be “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁶¹ Additionally, the Court has alluded to the fact that political powerlessness results from a class having “no ability to attract the attention of the lawmakers,”⁶² thereby meriting judicial suspicion regarding legislative actions.

Even though Congress, at the end of 2010, repealed “Don’t Ask, Don’t Tell,” DOMA still stands as an obstacle to same-sex mar-

⁵⁷ *Id.* at 966 (emphasis added). “Herek has conducted research in which he has found that the vast majority of lesbians and gay men, and most bisexuals as well, when asked how much choice they have about their sexual orientation say that they have ‘no choice’ or ‘very little choice’ about it.” *Id.*

⁵⁸ See *Perry*, 704 F. Supp. 2d at 965 (concluding in part from David Herek’s extensive study).

⁵⁹ *Id.* at 966.

⁶⁰ Historian George Chauncey warned that ancient stereotypes depicting gays as criminals based on the criminalization of homosexual conduct in the twentieth century fostered discrimination. *Id.* at 937. Political scientist Gary Segura testified that discrimination against gays was manifested in laws and policies, and the negative stereotypes served to limit the political rights of the LGBT community. *Id.* “It’s very difficult to engage in the give-and-[take] of the legislative process when [people] think you are an inherently bad person. That’s just not the basis for compromise and negotiation in the political process.” *Id.*

⁶¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁶² *Cleburne Living Ctr.*, 473 U.S. at 445.

riage in the United States. Federal, state, and local legislatures seem less than hard-pressed to enact legislation that would serve to protect the LGBT community both in the workplace and in public.⁶³ State legislatures overwhelmingly refuse to entertain the possibility of same-sex marriage or civil unions.⁶⁴ Moreover, politicians regularly spew anti-gay rhetoric during election campaigns to garner votes from those who find homosexuality morally reprehensible.⁶⁵ The current state invariably proves that the LGBT community remains politically powerless.

D. Does Homosexuality Bear any Relation to Ability?

“[W]hat differentiates sex from such non-suspect 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.”⁶⁶ This factor contributes to determining whether a class is suspect or quasi-suspect. In contrast, the Court has alternatively held that characteristics such as intelligence and physical disabilities constitute non-suspect statuses.⁶⁷

The feature that distinguishes members of the LGBT community from the community at large pertains to sexual orientation, a characteristic having no bearing on a person’s ability. Nor does sexual orientation determine the overall moral character of an individual or an individual’s ability to lead a productive life. According to President Obama, “ ‘it is time to recognize that sacrifice, valor, and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.’ ”⁶⁸

⁶³ See *supra* notes 41 and 45 (underscoring the lack of uniform statewide workplace protections throughout the United States as well as the pressing need for general protections against bias crimes).

⁶⁴ See *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 44 (stating that “[o]ver half the states have passed legislation defining marriage between a man and a woman in their state constitutions”).

⁶⁵ See Arkawy, *supra* note 48 (stating that politicians will attack gays in order to win the family values voters).

⁶⁶ *Frontiero*, 411 U.S. at 686.

⁶⁷ See *id.* at 686-87 (differentiating non-suspect classes from the suspect class of gender, especially pertaining to women).

⁶⁸ NPR Staff and Wires, *Senate Votes to Repeal ‘Don’t Ask, Don’t Tell,’* NPR, (Dec. 18, 2010), <http://www.npr.org/2010/12/18/132164172/-dont-ask-dont-tell-clears-vital-hurdle>.

E. Do these Factors Raise Sexual Orientation to the Level of ‘Suspect Class’ Status?

An analysis of the factors pertaining to the characteristics of the LGBT community as a class clearly indicates that equal protection challenges to governmental legislation require some form of heightened scrutiny. As Judge Vaughn Walker clearly explained in *Perry*, “gays and lesbians are the type of minority strict scrutiny was designed to protect.”⁶⁹

The question of whether the Court will ever address the issue of raising the level of scrutiny for matters of equal protection naturally follows. As recently as the 2009-2010 Term, the Court granted certiorari to *Christian Legal Society v. Martinez*,⁷⁰ a case dealing with sexual orientation-based discrimination.⁷¹ Gay rights advocates looked to the *Martinez* decision with particular anticipation; speculation persisted that the Court’s granting certiorari pointed to decidedly political motivations.⁷² However, the issue of equal protection never surfaced in the Court’s opinion.⁷³

Similarly, in 2003, the Court explicitly avoided an opportuni-

⁶⁹ *Perry*, 704 F. Supp. 2d at 997.

⁷⁰ 130 S. Ct. 2971 (2010).

⁷¹ *Id.* at 2978. In *Martinez*, the Christian Legal Society, a faith-based registered student organization with local law school chapters throughout the country, sought to prevent students whose religious and moral beliefs differed from those prescribed by the student organization. *Id.* at 2980. In 2004, Society’s chapter at the University of California—Hastings School of Law adopted a Statement of Faith, which required each member to abide by specific Christian-based tenets; non-Christians and those that engaged in “unrepentant homosexual conduct” failed to meet the newly established guidelines. *Id.* The Christian Legal Society directly claimed that the constitution allowed discrimination based on sexual orientation by asserting a First Amendment right to free speech, free association, and the freedom to exercise their religion. *Id.* at 2981. Although the Court necessarily addressed the issue of First Amendment free association and applied its analysis to *Martinez*, Justice Ginsberg, in her majority opinion, failed to speak directly to the issues of equal protection and discrimination against gays, which was the basis for the case. See *Martinez*, 130 S. Ct. at 2985-86 (“[Finding an alternative way] to conclude that [the] limited-public-forum precedents supply the appropriate framework for assessing both CLS’s speech and association rights.”).

⁷² See Nan Hunter, *Will the Supreme Court Grant Cert in Christian Legal Society Case?*, HUNTER OF JUSTICE (Nov. 13, 2009, 10:33 AM), http://hunterforjustice.typepad.com/hunter_of_justice/christian-legal-society-litigation/page/2/ (“Clearly, *someone* on the Court is interested in granting cert: the case has been on the Court’s conference calendar five times (counting today), but still no decision on cert has been announced.”).

⁷³ See *Martinez*, 130 S. Ct. at 2985-86.

ty to address the rights of homosexuals as a protected class against discrimination in *Lawrence v. Texas*,⁷⁴ a case regarding the constitutionality of sodomy laws.⁷⁵ In the majority opinion, Justice Kennedy made clear that the *Lawrence* decision would give no guidance regarding the government's view of the Petitioner's homosexual lifestyle.⁷⁶ As such, *Martinez*, several years following *Lawrence*, presented a novel opportunity for the Court to address the missing "guidance" from the *Lawrence* decision. However, this "guidance" never came.

Considering that sexual orientation as a class, similar to race and national origin, clearly qualifies for heightened status, the Court logically should espouse a compelling reason for what seems to be its avoidance of the issue. Neither political motivations nor moral reprobation constitute a compelling or important reason for the Court's avoidance. Anti-majoritarian Article III judges receive Presidential appointments and Senate confirmations; they are constitutionally spared the political process.⁷⁷ Therefore, unlike legislators that continually seek re-election, federal judges (including Supreme Court Justices) enjoy the freedom to interpret federal and constitutional law absent pressure from constituents seeking to inject moral persuasion into the government.

Public moral disapproval of homosexuality on behalf of the Justices would controvert the Court's 1996 decision in *Romer v. Evans*.⁷⁸ In *Romer*, the Court invalidated a Colorado statute that facially prohibited protections to any members of the LGBT community.⁷⁹ Applying rational basis analysis to the legislative action, the Court expressly held that Colorado's proffered interest in enacting the statute—protecting "the liberties of landlords and employers who have personal or religious objections to homosexuality"—failed to

⁷⁴ 539 U.S. 558 (2003).

⁷⁵ *Id.* at 563 (Petitioners were arrested for violating a Texas statute that provided, "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

⁷⁶ *Id.* at 578 ("[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual person's seek to enter.").

⁷⁷ U.S. CONST. art II, § 2, cl. 2 ("[The President] shall have power, by and with the Advice and Consent of the Senate . . . to appoint . . . Judges of the Supreme Court . . .").

⁷⁸ 517 U.S. 620 (1996).

⁷⁹ *Id.* at 635-36. The state of Colorado adopted an Amendment to its Constitution that served to eliminate all anti-discriminatory protections to the class of people known as "homosexual, lesbian, or bisexual . . ." *Id.* at 624. Under the Amendment, sexual-orientation based discrimination could not be prohibited by any local governments within the state. *Id.*

rise to the level of a *legitimate* interest.⁸⁰ “ ‘[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.’ ”⁸¹ Therefore, if the Court refused to allow a state to oppress a “*morally unpopular*” group, then the idea that our Supreme Court would deny protective status to a group based on personal moral views seems hypocritical, repugnant, and ironically, *immoral*.

III. THE RIGHT TO MARRY; JUST HOW FUNDAMENTAL IS IT?

Few current socio-political issues spur the level of controversy that marriage equality evokes.⁸² Since the outcome of *Goodridge v. Department of Public Health*,⁸³ the groundbreaking case that legalized same-sex marriage in Massachusetts, several additional states have allowed same-sex marriage while many states have effectively banned it.⁸⁴ Public debate over the issue seemingly never ceases, with human rights activists advocating for marriage equality while conservative groups echo the unavoidable language of DOMA that defines marriage as a union between “one man and one woman.” Naturally the question arises as to the core of the controversy: Why does the LGBT community seek marriage equality? Does the answer reflect a longing within the community for *equality*? Does the desire for equal protection arise from the myriad of legal protections that marriage affords or the simple desire to engage in an institution

⁸⁰ *Id.* at 633, 635.

⁸¹ *Romer*, 517 U.S. at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

⁸² See e.g., Tom Curry, *A Guide to the Marriage Furor*, MSNBC.COM, (July 14, 2004, 1:54 PM), http://www.msnbc.msn.com/id/4473785/ns/us_news-same-sex_marriage/ (“The status of marriage has become a major issue in this year’s presidential and congressional races.”); Joe Messerli, *Should Same Sex Marriage Be Legalized*, BALANCED POLITICS.ORG, http://www.balancedpolitics.org/same_sex_marriages.htm (last updated Mar. 24, 2009) (“Many areas of the country such as San Francisco have performed marriage ceremonies in defiance of the law. Lost in all the legal battles and political maneuvering is the basic question ‘[s]hould we allow gay couples to legally marry?’ ”); Tim Ruten, *Both Sides in the Same Sex Marriage Controversy Need to Cool Down*, LATIMES.COM, (Nov. 15, 2008), <http://www.latimes.com/news/opinion/la-oe-ruten15-2008nov15,0,5322261.column> (discussing Proposition 8 and the passionate, and sometimes counter-productive, divide it caused in California).

⁸³ 798 N.E.2d 941 (Mass. 2003).

⁸⁴ See *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 44.

deemed to be fundamental? Perhaps the answer encompasses all of the above.

The right to marry has been deemed a fundamental right constitutionally protected by the Due Process Clause.⁸⁵ “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.”⁸⁶ “Marriage is one of ‘the basic civil rights of man’ ”⁸⁷ Similar to discrimination against “discrete and insular” minorities, government action designed to infringe upon a fundamental right generally must meet heightened scrutiny to pass constitutional muster—that is, the governmental action must be narrowly tailored to meet a compelling purpose.⁸⁸ Therefore, because the Court interpreted marriage to be a fundamental right and fundamental constitutional rights presumably apply to all citizens, this logical assumption leads to the conclusion that marriage rights extend to gays.

However, fundamental rights are not absolute. The Court has stated that, “reasonable regulations that do not significantly interfere with decisions to enter into a marital relationship may legitimately be imposed.”⁸⁹ Additionally, the lower court in *Goodridge* provided the classic reasons that state governments proffer to justify denying same-sex couples the right to marry.⁹⁰ The Massachusetts high court,

⁸⁵ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”). In *Loving*, an interracial couple sought to avoid criminal prosecution based on a Virginia statute that criminalized interracial marriage. *Id.* at 2-3. The Court, in striking down the statute as violating the Lovings’ Due Process rights, stated, “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” *Id.* at 12.

⁸⁶ *Id.*

⁸⁷ *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

⁸⁸ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“Prejudice against . . . discrete and insular minorities . . . [require] a correspondingly more searching judicial inquiry.”); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (stating that fundamental liberties protected by the Due Process Clause, including the right to marry, cannot be infringed upon unless the government action is “‘narrowly tailored to serve a compelling state interest.’ ” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

⁸⁹ *Zablocki*, 434 U.S. at 386.

⁹⁰ In *Goodridge*, fourteen Massachusetts citizens filed suit after they sought marriage licenses to marry their same-sex partners and were summarily denied by the Department of Public Health. 798 N.E.2d at 949-50. The Supreme Judicial Court of Massachusetts recounted the findings of the Superior Court judge, who relied upon classic examples of governmental reasoning used in denying same-sex marriage:

in applying rational basis review,⁹¹ examined the three rationales offered by the state to defend denying marriage rights to the same-sex couples—“(1) providing a ‘favorable setting for procreation’; (2) ensuring the optimal setting for child rearing, which the Department of Public Health defined as ‘a two-parent family with one parent of each sex’; and (3) preserving scarce State and private financial resources”⁹²—and invalidated each one.⁹³ The court then grappled with

[T]he marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee “the fundamental right to marry a person of the same sex.” He concluded that prohibiting same-sex marriage rationally furthers the Legislature’s legitimate interest in safeguarding the “primary purpose” of marriage, “procreation.” The Legislature may rationally limit marriage to opposite-sex couples, he concluded, because those couples are “theoretically . . . capable of procreation,” they do not rely on “inherently more cumbersome” non-coital means of reproduction, and they are more likely than same-sex couples to have children, or more children.

Id. at 951. The Supreme Judicial Court of Massachusetts granted certiorari on appeal. *Id.*

⁹¹ *Id.* at 960 (“Under both the equality and liberty guarantees, regulatory authority must, at very least, serve ‘a legitimate purpose in a rational way’; a statute must ‘bear a reasonable relation to a permissible legislative objective.’” (quoting *Rushworth v. Registrar of Motor Vehicles*, 596 N.E.2d 340, 344 (Mass. 1992))).

⁹² *Goodridge*, 798 N.E.2d at 961.

⁹³ The Massachusetts high court vehemently disagreed with the lower court in equating marriage with procreation by firmly stating that:

If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as the “source of a fundamental right to marry” overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

Id. at 962 (quoting *Goodridge*, 798 N.E.2d at 987 (Cordy, J., dissenting)) (internal citations omitted). As to the state’s second rationale, the court held that:

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth’s proffered goal of protecting the “optimal” child rearing unit. Moreover, the department readily concede[d] that people in same-sex couples may be “excellent” parents.

Id. at 963. As for the third rationale, the court held:

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department’s conclusory generalization—that same-sex couples are less financially dependent on each

the notion that same-sex marriage would somehow “trivialize or destroy the institution of marriage as it has historically been fashioned[.]” by brilliantly stating that, “the plaintiffs seek only to be married, not to undermine the institution of civil marriage.”⁹⁴

Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.⁹⁵

In 2009, six years after *Goodridge*, a group of plaintiffs from California filed suit in a federal district court in California challenging the constitutionality of a voter-enacted ban on same-sex marriage (“Proposition 8”) in *Perry v. Schwarzenegger*.⁹⁶ In November 2000, California voters adopted the California Defense of Marriage Act, amending the state’s Family Code to read, “Only marriage between a man and a woman is valid or recognized in California.”⁹⁷ In February 2004, San Francisco began “issu[ing] marriage licenses to same-sex couples[.];” and one month later, the California Supreme Court issued an injunction preventing the mayor of San Francisco from con-

other than opposite-sex couples-ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

Id. at 964.

⁹⁴ *Id.* at 965 (footnotes omitted).

⁹⁵ *Goodridge*, 798 N.E.2d at 965.

⁹⁶ 704 F. Supp. 2d at 927-28.

⁹⁷ *Id.* at 927.

tinuing the practice.⁹⁸

Subsequently, the city of San Francisco initiated legal action in superior court, challenging the constitutionality of the California Defense of Marriage Act.⁹⁹ In May 2008, the Supreme Court of California invalidated the Act, holding that it violated the equal protection guarantee of the California Constitution.¹⁰⁰ As a result, approximately eighteen thousand same-sex couples were granted marriage licenses from June until November of 2008, when Proposition 8 took effect.¹⁰¹ Federal court litigation then ensued with *Perry*.

Initially, when proponents of Proposition 8 campaigned for its passage prior to the November 2008 statewide election, the message to advance the Proposition echoed a tone of moral superiority.¹⁰² However, because the proponents of the Act realized that only secular purposes legally justify constitutional scrutiny, the defendants in *Perry* eliminated the language referring to the moral superiority of opposite-sex couples employed during the election campaign.¹⁰³ Nevertheless, the proponents' evidence consisted mainly of an expert who testified that, "marriage is either a socially approved sexual rela-

⁹⁸ *Id.* at 928.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Perry*, 704 F. Supp. 2d at 928.

¹⁰² *See id.* at 930 ("The advertisements conveyed to voters that same-sex relationships are inferior to opposite-sex relationships and dangerous to children."). During the campaign, the key premises of Proposition 8 contained the following messages:

1. Denial of marriage to same-sex couples preserves marriage;
2. Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;
3. Denial of marriage to same-sex couples protects children;
4. The ideal child-rearing environment requires one male parent and one female parent;
5. Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple's marriage is superior to a same-sex couple's marriage; and
6. Same-sex couples' marriages redefine opposite-sex couples' marriages.

Id.

¹⁰³ *Id.* at 931. The argument for the defense at trial asserted that the Act:

1. Maintains California's definition of marriage as excluding same-sex couples;
2. Affirms the will of California citizens to exclude same-sex couples from marriage;
3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and
4. Promotes "statistically optimal" child-rearing households; that is, households in which children are raised by a man and a woman married to each other.

Id.

tionship between a man and a woman for the purpose of bearing and raising children who are biologically related to both spouses or a private relationship between two consenting adults.”¹⁰⁴

The court presented the parties the task of “identify[ing] a difference between heterosexuals and homosexuals that the government might fairly need to take into account when crafting legislation.”¹⁰⁵ The proponents of Proposition 8 only offered evidence that opposite-sex couples can procreate whereas same-sex couples cannot, but offered no basis for the government’s considering fertility while drafting legislation.¹⁰⁶ Judge Walker stated that, “No evidence at trial illuminated distinctions among lesbians, gay men and heterosexuals amounting to ‘real and undeniable differences’ that the government might need to take into account in legislating.”¹⁰⁷

Goodridge and *Perry* both provided crystal clear examples of the usual ad hoc “legitimate interests” that states advance to thwart same-sex marriage, as well as insightful examinations of the failure of those proffered interests in both state and federal challenges.¹⁰⁸ Perhaps these two cases suggest that courts, in examining challenges to same-sex marriage, may no longer rely upon traditional interests to prevent same sex couples from marrying. In any event, *Goodridge* and *Perry* proved that, even in the absence of determining whether same-sex marriage is a fundamental right provided by the Constitution, rational basis analysis does not portend ultimate defeat for marriage equality.

¹⁰⁴ *Perry*, 704 F. Supp. 2d at 933. David Blankenhorn provided the socio-political expert testimony for the proponents and, ultimately, the court found Blankenhorn’s testimony to be unreliable and held that California has an interest in defining marriage as a union between one man and one woman. *Id.* at 934.

¹⁰⁵ *Id.* at 997.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *Goodridge*, 798 N.E.2d at 961 (listing the three rationales the legislature used for prohibiting same-sex marriage); *Perry*, 704 F. Supp. 2d at 998-1002 (enumerating and discussing the rationales set forth in enacting Proposition 8). The *Perry* court listed the following rationales for Proposition 8:

Proponents put forth several rationales for Proposition 8 . . . : (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.

Perry, 704 F. Supp. 2d at 998.

However, even though the Constitution guarantees the fundamental right to marry and both federal and state courts have summarily dismissed reasons for preventing same-sex marriage as illegitimate in *Perry* and *Goodridge*, the question arises as to whether same-sex marriage, as distinguished from “traditional” marriage, warrants constitutional protection. The federally authorized stumbling block known as DOMA presents an unavoidable problem. Considering that DOMA textually defines marriage as “a legal union between one man and one woman as husband and wife,”¹⁰⁹ the question arises as to whether same-sex marriage, distinguished from marriage in general, constitutes a fundamental right at all. Although same-sex marriage proponents may turn to American history for a myriad of examples showing that the definition of marriage has undergone several cultural changes,¹¹⁰ has Congress’ definitive definition of marriage in DOMA effectively determined the traditional meaning of the institution?

Coupled with this dilemma for proponents of marriage equality lies the history and tradition of the Supreme Court in elucidating the history and tradition of our nation. The Court has construed fundamental liberties to be those that are deeply rooted in the “ ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there) as to be ranked as fundamental.’ ”¹¹¹ Members of the Court have further suggested that there is a “limitation on the concept of liberty[,]” and “this limitation [is found] in ‘tradition.’ ”¹¹²

Further, the Court has firmly stated that “[it is] refer[ring] to the most specific level at which a relevant tradition protecting, or denying protection to, [an] asserted right can be identified.”¹¹³ Specific traditions supersede general traditions.¹¹⁴ In other words, because

¹⁰⁹ 1 U.S.C. § 7 (2006).

¹¹⁰ See *Goodridge*, 798 N.E.2d at 966-67 (reviewing the history of the constructs of marriage throughout the last century and a half and determining that the definition of marriage has survived many changes, including the abolition of anti-miscegenation laws, the end of treating wives as property, and the enactment of no-fault divorce).

¹¹¹ *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (quoting *Snyder v. Com. of Mass.*, 291 U.S. 97, 105 (1934) (alterations in original)).

¹¹² *Michael H. v. Gerald D.*, 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (criticizing the plurality’s use of historical tradition relating to fundamental rights, namely, in this case, the right of a natural father to parent his child).

¹¹³ *Id.* at 127, n.6.

¹¹⁴ See *id.* (reasoning that the rights of “a natural father of a child adulterously conceived” are not protected by any societal tradition that offers rights to these types of fathers).

traditional marriage *specifically* dictates a union between two people of opposite sexes, same-sex marriage may be effectively precluded.

The Court, however, cannot erase its holdings that, at times, contradict its former messages. Traditions evolve, standards erode, and societies adapt to new sets of rules. The eloquent messages of *Goodridge* and *Perry* dismissing traditional concepts of marriage somehow echo the dicta of the Court from four decades ago:

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.¹¹⁵

The Court seemed to indicate that marriage as a fundamental right cannot and should not be overcome by societal standards that reflect personal morality. A noble purpose that has been interpreted as a fundamental right lacks both nobility *and* purpose if society can arbitrarily pick and choose its recipients. As the states begin to recognize marriage equality for its citizens, the logical progression dictates that marriage equality will become the norm. It seems, on its face, cruel and hypocritical to deny members of American society, those who dictate society's mores, a right as fundamental as the right to marry.

IV. DISTINGUISHING SEXUAL ORIENTATION DISCRIMINATION FROM RACE AND GENDER DISCRIMINATION: *CHRISTIAN LEGAL SOCIETY V. MARTINEZ* AND THE SUPREME COURT'S SILENCE

Throughout the latter half of the twentieth century, groups and organizations have sought to exclude others on the basis of a First Amendment right of freedom of expressive association.¹¹⁶ Several times throughout the period, the Supreme Court has struck down

¹¹⁵ *Griswold*, 381 U.S. at 486 (emphasis added).

¹¹⁶ *See, e.g.*, Bd. of Dir. of Rotary Club Int'l v. Rotary Club of Duarte, 481 U.S. 537, 539-41 (1987) (regarding the issue of revoking a rotary club's charter because of the inclusion of women into the club); *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (regarding the issue of exclusion from a private club based on gender); *Runyon v. McCrary*, 427 U.S. 160, 163 (1976) (regarding the issue of exclusion from a private school based on race).

claims of freedom of expressive association, asserting that the First Amendment could not be used as a cloak for blatant discrimination.¹¹⁷ Three landmark Supreme Court decisions exemplify the Court's unwillingness to allow constitutionally sanctioned discrimination: *Runyon v. McCrary*, *Roberts v. United States Jaycees*, and *Board of Directors of Rotary International v. Rotary Club of Duarte*. *Runyon* involved an attempt to exclude based on race;¹¹⁸ *Roberts* and *Duarte* challenged attempts at gender discrimination.¹¹⁹ In each of these cases, the Respondents justified their actions based on a First Amendment right of Free Expressive Association; in essence, they argued that inclusion of racial minorities and women would somehow alter their associations' viewpoints and messages.¹²⁰ In the 2010 case of *Christian Legal Society v. Martinez*, a faith-based Christian organization at the University of California—Hastings College of the Law sought to exclude homosexuals for similar purposes.¹²¹ In *Runyon*, *Roberts*, and *Duarte*, the Court focused on issues of anti-discrimination to defeat the First Amendment arguments of the Respondents; no such analysis was forthcoming in *Martinez*.¹²²

¹¹⁷ See, e.g., *Duarte*, 481 U.S. at 549 (stating that the Act in question may “slight[ly] infringe [up]on Rotary members’ right of expressive association, [and] that infringement [will be] justified because it serves the State’s compelling interest in eliminating discrimination against women.”); *Roberts*, 468 U.S. at 623, 628 (stating that “potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.”); *Runyon*, 427 U.S. at 176 (“[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment [but] it has never been accorded affirmative constitutional protections” (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))).

¹¹⁸ *Runyon*, 427 U.S. at 163 (questioning whether federal law, specifically 42 U.S.C. § 1981, proscribes the non-admission of otherwise qualified students into private schools on the basis of their race). The law specifically provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2006).

¹¹⁹ *Roberts*, 468 U.S. at 612 (“This case requires us to address a conflict between a State’s efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization.”); *Duarte*, 481 U.S. at 539 (discussing whether a California statute is in contravention of the First Amendment when it requires that a private rotary club admit females).

¹²⁰ See discussion *infra* part IV A (discussing *Runyon*, *Roberts*, and *Duarte*).

¹²¹ 130 S. Ct. at 2979-80, 2884.

¹²² *Id.* at 2985-86. Compare *Runyon*, 427 U.S. at 176 (holding in 1976 that enforcement

A. The First Amendment Right of Free Association

The First Amendment guarantees specific freedoms with the language: “Congress shall make no law abridging . . . the freedom of speech”¹²³ The concept of a First Amendment right to free expressive association, on American soil, grew out of Supreme Court interpretations regarding the extension of free speech to include the freedom to express oneself through group participation. Throughout the last half-century, the Supreme Court has both visited and broadened the scope of the issue of the Constitutional right to association.¹²⁴ Through the Court’s interpretation, freedom of association for the “advancement of beliefs and ideas,” although not expressly written into the First Amendment, fundamentally protects the right to belong.¹²⁵

In 1976, the *Runyon* decision represented an instance in which a private group sought to exclude another group by asserting its First Amendment right of freedom of association.¹²⁶ Here, a private school in Virginia denied admission to a minority student, claiming that its students’ parents enjoyed their constitutionally granted right to advocate their “belief that racial segregation is desirable.”¹²⁷ The Court

of civil rights statutes do not violate the free association rights of groups wishing to exclude) and *Roberts*, 468 U.S. at 628 (holding in 1984 that a state’s Human Rights Act forbidding an organization to engage in sexual discrimination did not affect the free association rights of the organization), with *Martinez*, 130 S. Ct. at 2985 (stating that, “restrictions [on associational freedom] are permitted only if they serve ‘compelling state interests’ that are ‘unrelated to the suppression of ideas’” (quoting *Roberts*, 468 U.S. at 623)).

¹²³ U.S. CONST. amend. I.

¹²⁴ The Court avers that practices protected by the First Amendment further include “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts*, 468 U.S. at 622. There is no specific rule that determines what types of association are afforded constitutional protections. *Duarte*, 481 U.S. at 545. Nevertheless, Supreme Court jurisprudence has opined that the right to free association does not only exist in familial relationships, but can also be found in those relationships where there are “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” *Id.* (quoting *Roberts*, 468 U.S. at 619-20).

¹²⁵ CHARLES E. RICE, FREEDOM OF ASSOCIATION 176-77 (1962) (detailing the many facets of the right of expressive association interpreted under the First Amendment).

¹²⁶ See *Runyon*, 427 U.S. at 173.

¹²⁷ *Id.* at 176.

wholly rejected the parents' assertions that the school at issue was private, and that the First Amendment protected private discrimination, declaring that discrimination received no affirmative constitutional protections.¹²⁸ Further, the Court held that racial integration would, in no way, alter the educational environment.¹²⁹

In *Roberts v. United States Jaycees*, the Supreme Court again visited the right of association, and furthered its limitations regarding a private organization and the organization's attempt to discriminate.¹³⁰ In *Roberts*, a national private civic organization (Jaycees) sought to discourage local chapters from accepting female members by imposing severe sanctions for admitting them.¹³¹ Similar to the private school in *Runyon*, the Jaycees claimed that admitting women into an organization designed to encourage the social furtherance of men violated its right of free association.¹³² The Court disagreed; holding that, as the "right to associate for expressive purposes is not . . . absolute[.]" a state's legitimate interest may limit the right.¹³³ As a result, the Court stated that, even if the free association rights of the Jaycees are "incidental[ly] abridge[ed]," the minor infringement is outweighed by the state's greater purpose to prevent discrimination.¹³⁴

Three years subsequent to *Roberts*, the issue of exclusion by means of free association resurfaced in *Duarte*. Here, the directors of an exclusively male organization, the Rotary Club, challenged a California statute that required the club to admit women, claiming the statute violated its First Amendment rights.¹³⁵ The Court, in finding against the Rotary Club, stated that, similar to *Roberts*, even if the California statute abridged the associational rights of the Rotary members, the "State's [more] compelling interest in eliminating discrimination against women[]" justified the Court's decision.¹³⁶

Interestingly, both *Runyon* and *Roberts* demonstrated the Court's unwillingness to expand the right of free association, or free

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See Roberts*, 468 U.S. at 628-29.

¹³¹ *Id.* at 614.

¹³² *See id.* at 615.

¹³³ *Id.* at 623.

¹³⁴ *Id.* at 628.

¹³⁵ *Id.* at 541 (referring to the California Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982)).

¹³⁶ *Id.* at 549.

expressive association, to allow groups to exclude. In his impassioned opinion in *Roberts*, Justice Brennan drew a solid parallel of the “stigmatizing injury” that naturally accompanies both racial discrimination and gender-based discrimination.¹³⁷ The Court repeatedly refused to allow permissive exclusion to flow from a First Amendment right to free association, perhaps leading to a conclusion that the Court would generally reject state-sanctioned discrimination, both publicly and privately.

B. *Boy Scouts of America v. Dale* proved to be the exception

The 2000 case of *Boy Scouts of America v. Dale*¹³⁸ ushered in the new millennium with an unfavorable decision regarding the treatment of sexual-orientation based discrimination. Similar to its predecessors *Runyon*, *Roberts*, and *Duarte*, *Dale* involved a challenge to overcome a First Amendment claim of a right to exclude.¹³⁹ However, the Respondent in *Dale* was a homosexual, and his challenge proved unsuccessful.¹⁴⁰

In *Dale*, a New Jersey based Boy Scouts of America scoutmaster, James Dale, admitted his homosexuality while in college.¹⁴¹ Dale’s revelation presented problems for the Boy Scout organization in that Boy Scouts of America deemed homosexual conduct immoral.¹⁴² Dale’s membership was subsequently revoked based on the fact that the Boy Scouts “specifically forbid membership to homosex-

¹³⁷ *Id.* at 625 (“[The] stigmatizing injury, and denial of equal opportunities that accompanies [the many manifestations of racial discrimination], is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”).

¹³⁸ 530 U.S. 640 (2000).

¹³⁹ *Id.* at 644.

¹⁴⁰ *Id.* at 644-45, 661.

¹⁴¹ *Id.* at 644-45.

¹⁴² *Id.* at 644. In 1978, the Boy Scouts’ Executive Committee offered its position on “homosexuality and Scouting.” *Dale*, 530 U.S. at 651. When posed with the question as to whether an openly gay person may be a Scout leader, the organization replied, “No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate” *Id.* at 651-52.

uals.”¹⁴³ Dale brought suit against the organization, and the New Jersey Superior Court’s Chancery Division held for the Boy Scouts (“the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group . . .”).¹⁴⁴

The Boy Scouts predicated its argument on the holding of *Duarte*, claiming that the Boy Scouts enjoyed a constitutional right “to enter into and maintain . . . intimate or private relationships . . . [and] to associate for the purpose of engaging in protected speech.”¹⁴⁵ The Appellate Division reversed, and the New Jersey Supreme Court affirmed, holding that the evidence regarding the group’s large size and organizational practices renders the Boy Scouts’ assertions of “intimate association” and “personal or private . . . constitutional protection” unwarranted.¹⁴⁶

The Supreme Court granted certiorari, and in a five to four decision, reversed the New Jersey Supreme Court.¹⁴⁷ The Court focused on the Boy Scouts claim of freedom of expressive association, citing the earlier decisions of both *Roberts* and *Duarte*, reaffirming that the attempts at exclusion in both these cases could not overcome the states’ legitimate interests to prevent gender-based discrimination.¹⁴⁸ Neither the male members of the Jaycees nor the male mem-

¹⁴³ *Id.* at 645. When Dale acknowledged his homosexuality during his freshman year at Rutgers University in New Jersey, he joined and eventually became the co-president of the Lesbian/Gay Alliance, and, in July 1990, when a local newspaper covered a story about his advocacy for gay youth, the Boy Scouts, in a letter, revoked his membership. *Id.* at 644-45.

¹⁴⁴ *Id.* at 645. The lower court held that New Jersey’s public accommodation statute was inapplicable to a private organization. *Dale*, 530 U.S. at 645. N.J. STAT. ANN. § 10:5-5 reads:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

Id. at 661-62 (quoting N.J. STAT. ANN. § 10:5-4 (West 2011)).

¹⁴⁵ *Dale*, 530 U.S. at 646 (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1219 (N.J. 1999) (alteration in original)).

¹⁴⁶ *Id.* at 646. The New Jersey Supreme Court, in addition to finding that the Boy Scouts’ organization was deemed too large to warrant intimate associational rights, “concluded that it was ‘not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral.’” *Id.* at 647 (quoting *Dale*, 734 A.2d at 1223-24) (alteration in original).

¹⁴⁷ *Dale*, 530 U.S. at 661.

¹⁴⁸ *See id.* at 655, 657-59 (explaining the Court’s view that each organization in *Roberts*

bers of the Rotary Club International demonstrated that the inclusion of women would interfere with the expression of their ideas.¹⁴⁹ Here, the Court expressed that, “[t]he state interests embodied in New Jersey’s public accommodations law do not justify such a *severe intrusion* on the Boy Scouts’ rights to freedom of expressive association.”¹⁵⁰

The Court relied on the premises that the Boy Scouts possess a right to freely associate, and that the inclusion of a homosexual would somehow interfere with that right. However, by applying the First Amendment principles employed in both *Roberts* and *Duarte*, the Court arrived at the *Dale* decision through questionable analysis. In both *Roberts* and *Duarte*, the men’s clubs at issue expressly avowed that each club existed for the furtherance of the ideals of young *men*.¹⁵¹ The holdings in both cases arose from the Court’s finding that a legitimate state’s interest to eliminate gender discrimination overcame the right to exclude under the First Amendment, and the Court expressed that the inclusion of women in intended all-male clubs would *not* serve to alter the clubs’ ideas.¹⁵² Yet, it seemed intuitively logical that the inclusion of an unintended group (women) into these men’s clubs would arguably *somehow* alter the ideas and viewpoints of the clubs; the Jaycees and the Rotary Club members expressly intended to provide clubs for the furtherance of men only. Whether it appeared fair to the female gender in no way altered the logic of the Respondents’ arguments.

In *Dale*, the Court, in an about face from the “anti-discriminatory” reasoning in *Roberts* and *Duarte*, held that James Dale’s homosexuality would somehow alter the viewpoints of the Boy Scouts.¹⁵³ Yet, the Court failed to reasonably demonstrate the ways in which Dale’s homosexuality would have circumvented the

and *Duarte* lacked a meritorious claim in which a First Amendment right to Freedom of Association could be found).

¹⁴⁹ *Id.* at 657-59.

¹⁵⁰ *Id.* at 659 (emphasis added).

¹⁵¹ See *Duarte*, 481 U.S. at 541 (“Membership in Rotary Clubs is open only to men.”); *Roberts*, 468 U.S. at 612-13 (“The objective of the Jaycees, as set out in its bylaws, is to pursue ‘such educational and charitable purposes as will promote and foster the growth and development of young men’s civic organizations in the United States . . .’” (quoting Brief for Appellee at 2, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)).

¹⁵² *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628-29.

¹⁵³ *Dale*, 530 U.S. at 661 (“[P]ublic or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.”).

Scouts' viewpoint.¹⁵⁴ In both *Roberts* and *Duarte*, the Court relied on the states' important interests to eradicate gender discrimination, even though the men's organizations at issue were private.¹⁵⁵ In *Dale*, the New Jersey Supreme Court held that elimination of discrimination in general (including discrimination against homosexuals) constituted a legitimate state interest, even though the Boy Scouts of America is private.¹⁵⁶ Logic would have indicated that an important state interest serves to supersede attempted discriminatory exclusion. Yet, the Supreme Court of the United States held otherwise.¹⁵⁷

The dissent seemed to follow in a more progressive direction, stating that the public had become more accepting of homosexuality in recent years.¹⁵⁸ Furthermore, the decision in *Dale* came down a mere thirty years after the unofficial recognition of the gay rights movement.¹⁵⁹ However, the majority seemed unfazed by the dissent's assertion of socio-political norms, perhaps painting a foreboding picture for future decisions. *Dale* essentially defied the Court's historical tendency to adapt the Constitution to the socio-political climate of the day.¹⁶⁰ *Dale's* unfavorable decision for the gay rights

¹⁵⁴ Essentially, the Court claimed only that Dale's inclusion would impair the Boy Scout's right to exercise its position on homosexuality, but offered no concrete rationale concerning specifically how Dale would have impaired the Scout's organization. See *id.* at 653. The Court stated:

As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation."

Id.

¹⁵⁵ See *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628 (stating that regulations prohibiting gender discrimination, which are narrow in scope and unrelated to the repression of ideas, may place limitations on the right of association to serve a legitimate state interest).

¹⁵⁶ *Dale*, 530 U.S. at 647.

¹⁵⁷ *Id.* at 654-55.

¹⁵⁸ *Id.* at 699-700 (Stevens, J., dissenting).

¹⁵⁹ See Matzner, *supra* note 21.

¹⁶⁰ See Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship between the Davis Intent Requirement and the Crack Laws*, 50 How. L. J. 345, 354 (2007) (referring to the timeline of events that preceded *Washington v. Davis*, 426 U.S. 229 (1976), a case which challenged the racially discriminatory effects of the Washington, D.C. Police Department's hiring exam). Tyson wrote:

[A] major social upheaval forever alters the balance of racial power and

movement perhaps indicated that the LGBT community remained far from equal in the eyes of the Supreme Court.

C. *Christian Legal Society v. Martinez*: The 2010 Term's Missed Opportunity?

The Supreme Court's opportunity to overcome its discriminatory ruling in *Dale* arrived during the 2010 Term with *Christian Legal Society v. Martinez*, a case fraught with intensely divisive issues surrounding First Amendment rights, morality, and discrimination.¹⁶¹ The Christian Legal Society, a faith-based registered student organization with local law school chapters throughout the country, sought to prevent membership to students whose religious and moral beliefs differed from those proscribed by the student organization.¹⁶² The

the status of Blacks; organized mass action influences legislation and social developments that solidify a new social order; a backlash develops that quickly adapts its modus-operandi to the new racial discourse and conventional wisdom; political and legal contests reflecting the tension between the new social order and the backlash increase in number and intensity; the Supreme Court intervenes to settle the tension

Id.; William N. Eskridge, Jr., *Channeling: Identity-based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419 (2001) (discussing the modern meaning of the Equal Protection Clause especially as a result of modern social movements); Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 15-18 (2001) (discussing the historical basis and the inherent struggle surrounding the passage of the Act); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1323-24 (2006) (discussing positive changes in the law due to women's rights movement).

¹⁶¹ *See id.* at 2980 (“On October 22, 2004, CLS filed suit against various Hastings officers and administrators under 42 U.S.C. § 1983. Its complaint alleged that Hastings’ refusal to grant the organization RSO status violated CLS’s First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The suit sought injunctive and declaratory relief.”).

¹⁶² *Id.* The Hastings chapter of the Christian Legal Society adopted a “Statement of Faith,” a tenet by which each member vowed to abide, which read as follows:

Trusting in Jesus Christ as my Savior, I believe in: One God, eternally existent in three persons, Father, Son, and Holy Spirit; God the Father Almighty, Maker of heaven and earth; The Deity of our Lord, Jesus Christ, God’s only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return; The presence and power of the Holy Spirit in the work of regeneration; The Bible as the inspired Word of God.

Respondent in this case, the University of California-Hastings College of the Law, adopted a strict nondiscrimination policy for registered student organizations, and interpreted it as a viewpoint-neutral “all-comers” policy.¹⁶³ In essence, Hastings, a public university, required that, for a student organization to gain registered status, the organization must not limit membership on the basis of any class protected against discrimination by California statute. The “all-comers” model was a practice not uncommon among other American law schools.¹⁶⁴ The Christian Legal Society’s attempted exclusion of one of those protected classes—sexual orientation—became the catalyst for this Supreme Court case.

The Christian Legal Society’s challenge to the law school’s policy presented a novel situation for Hastings because no registered student organization had ever sought an exemption from its directives regarding the nondiscrimination policy.¹⁶⁵ Consequently, Hastings, refusing to accept the student organization’s argument that the school violated its First Amendment free association rights, declined to grant the Christian Legal Society its request, and denied the student organization the many financial benefits attached to other organizations that obeyed the policy.¹⁶⁶ Hence, Christian Legal Society commenced a lawsuit seeking both injunctive and declaratory relief.¹⁶⁷ The District Court ruled in favor of the law school, the Ninth Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari on appeal.¹⁶⁸

Martinez, although argued and eventually settled from a First Amendment perspective, examining the right to expressive associa-

Id. The Christian Legal Society expressly sought to exclude those whose religious beliefs differed from Christianity, and those who engaged in “unrepentant homosexual conduct.” *Id.* (internal citations omitted).

¹⁶³ *Martinez*, 130 S. Ct. at 2979-80. The policy states: “[G]roups must ‘allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.’” *Id.* at 2979 (alteration in original). In order to assert the policy’s viewpoint-neutrality, Hastings clarified that the non-discrimination policy “does not foreclose neutral and generally applicable requirements unrelated to status or belief.” *Id.* at 2980, n.2 (internal quotation marks omitted).

¹⁶⁴ *See id.* at 2979-80 (pointing to several other law school nondiscrimination policies, specifically citing the policies adopted at both Georgetown and Hofstra).

¹⁶⁵ *Id.* at 2980 (internal quotation marks omitted).

¹⁶⁶ *See Martinez*, 130 S. Ct. at 2980-81 (explaining that, although Hastings allowed the Christian Legal Society to use both its facilities for meetings and its bulletin boards for announcements, the law school denied the Society official registered student organizational status, essentially suspending funding for the organization).

¹⁶⁷ *Id.* at 2981.

¹⁶⁸ *Id.* at 2981-82.

tion, represented the much broader issue of sexual orientation-based discrimination.¹⁶⁹ The Hastings Chapter of the Christian Legal Society sought exemption from the Hastings nondiscrimination policy as a result of the Society's amendment of its by-laws.¹⁷⁰ In 2004, the Society adopted a "Statement of Faith," which required each member to abide by specific Christian-based tenets; non-Christians and those engaged in "unrepentant homosexual conduct" failed to meet the newly established guidelines.¹⁷¹ Therefore, in addition to seeking sanctioned discrimination based on religious beliefs, the Society's expectations encompassed a broader reach; it wished to specifically target homosexuals as those whose behavior authorized discrimination.

The Supreme Court, in previous decisions involving the delicate balance of the right to free association and the inherent right to discriminate, clearly acknowledged that a legitimate state interest to enforce nondiscrimination policies outweighs the right of free expressive association.¹⁷² In other words, the question arose whether equal protection challenges under the Fifth and Fourteenth Amendments supersede the First Amendment right of free association. In *Martinez*, the Court clearly avoided the issue of sexual orientation-based discrimination, even though it remained the central issue of the basis for the Christian Legal Society's claim of free association rights under the First Amendment. In his concurring opinion in *Martinez*, Justice Stevens briefly referred to intolerance of homosexuals in a way that approached a comparison to intolerance against Jews, blacks, and women.¹⁷³ Although the possibility surfaced from Stevens' comments to construe a similarity between discrimination of the several

¹⁶⁹ See Nan Hunter, *Supreme Court Rejects Preferential Treatment for Religious Organizations*, HUNTER OF JUSTICE (June 29, 2010, 7:06 AM), http://hunterforjustice.typepad.com/hunter_of_justice/christian-legal-society-litigation/ (stating that the Christian Legal Society hoped that the Supreme Court would extend the ruling of *Boy Scouts v. Dale*, which held that the Boy Scouts could not be forced to obey state anti-discrimination laws that violated the group's anti-gay beliefs).

¹⁷⁰ *Martinez*, 130 S. Ct. at 2980.

¹⁷¹ *Id.* at 2980.

¹⁷² Compare *Runyon*, 427 U.S. at 176 (holding that enforcement of civil rights statutes does not violate the free association rights of groups wishing to exclude), and *Roberts*, 468 U.S. at 628 (holding that a state's Human Rights Act forbidding an organization to engage in sexual discrimination did not affect the free association rights of the organization), with *Martinez*, 130 S. Ct. at 2985 (stating that, "restrictions [on associational freedom] are permitted only if they serve 'compelling state interests' that are 'unrelated to the suppression of ideas'") (quoting *Roberts*, 468 U.S. at 623).

¹⁷³ *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring).

groups, the actual allusion never materialized in his concurrence; Stevens' analogy to other minority groups served only to distinguish condonation of intolerance from government financial support of the furtherance of intolerance.¹⁷⁴ In other words, although the constitution provides for free speech and free expression, even when the messages tend to further intolerance, the government need not provide financial support to the groups that support messages of intolerance.

Martinez stands out as a regressive step in a year for which the LGBT community witnessed unprecedented progressive gains.¹⁷⁵ Unfortunately, *Martinez* represented a missed opportunity for the Court to address the issue of discrimination, even though the case was argued on First Amendment principles. Interestingly, even though the respondents in *Runyon*, *Roberts*, and *Duarte* argued that the right of free expressive association justified their exclusionary behaviors, the Court explicitly held in each of the cases that the petitioners' Equal Protection rights outweighed the respondents' rights to expressive association.¹⁷⁶ The Court's reasoning failed to apply to *Dale*, but in *Martinez*, it never surfaced.

V. SOCIAL PRESSURE, SOCIAL CHANGE, CONSTITUTIONAL PROTECTION?

In addition to clearly indicating that specific traditions can dictate judicial decision-making,¹⁷⁷ the Supreme Court, alluded that its decisions *reflect* rather than *dictate* the views of society.¹⁷⁸ The

¹⁷⁴ See *id.* (stating that a free society must already tolerate groups that discriminate against Jews, blacks, and gays, but it should not have to subsidize them).

¹⁷⁵ See *Log Cabin Republicans*, 716 F. Supp. 2d at 888 (holding that "Don't Ask, Don't Tell" constitutionally violates the rights of the Log Cabin Republicans); *Witt*, 739 F. Supp. 2d at 1316 (holding that "Don't Ask, Don't Tell" did not further a government interest as applied to Major Witt, and therefore violated her substantive due process rights); *Perry*, 704 F. Supp. 2d at 991 (holding that Proposition 8 violates the fundamental right to marry); Att'y Gen. Holder, *supra* note 2, at 1 (stating that the President has made the determination that the Defense of Marriage Act violates equal protection); Hulse, *supra* note 15 (announcing the Senate's repeal of "Don't Ask, Don't Tell").

¹⁷⁶ *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 623; *Runyon*, 427 U.S. at 176.

¹⁷⁷ See *Michael H.*, 491 U.S. at 127-28, n.6 (stating that the Court was guided by relevant tradition); *Griswold*, 381 U.S. at 493 (stating that judges must look to tradition when deciding whether a right is fundamental).

¹⁷⁸ See *Michael H.*, 491 U.S. at 127, n.6 ("Because such general traditions provide such

Court's willingness to adapt to societal changes logically follows a necessity on the part of the Court to address issues that arise based on the progression of society. Ours is a fluid and ever-changing culture that naturally requires an adaptive constitutional focus, rendering those with non-originalist views of the Constitution particularly satisfied.¹⁷⁹

It has not been uncommon for major societal changes to eventually result in Court decisions that reflect the change, especially regarding racial discrimination in the United States during the latter half of the twentieth century.¹⁸⁰ The decades of the seventies and the eighties ushered in the beginnings of the resurgence of the Women's Rights Movement.¹⁸¹ As society progressed, women began to demand equality outside the home that had previously been enjoyed by their male counterparts.¹⁸² While the struggle for women's rights grabbed headlines, the Court followed with decisions that served to affirmatively support those rights, especially for protections against gender discrimination.¹⁸³

imprecise guidance, they permit judges to dictate rather than discern the society's views.").

¹⁷⁹ Non-originalists believe that the Constitution should evolve through interpretation, not only by amendment, claiming their view "is essential so that the Constitution does not remain virtually static, so that it can evolve to meet the needs of a society that is advancing technologically and morally." CHEMERINSKY, *supra* note 26, at 12.

¹⁸⁰ See Tyson, *supra* note 170, at 354 (discussing how social upheaval has led to Supreme Court intervention).

¹⁸¹ See *The Women's Movement*, COUNTRY STUDIES, <http://countrystudies.us/united-states/history-131.htm> (last visited Mar. 24, 2010) ("During the 1950s and 1960s, increasing numbers of married women entered the labor force The women's movement of the 1960s and 1970s drew inspiration from the civil rights movement. It was made up mainly of members of the middle class, and thus partook of the spirit of rebellion that affected large segments of middle-class youth in the 1960s. Another factor linked to the emergence of the movement was the sexual revolution of the 1960s, which in turn was sparked by the development and marketing of the birth-control pill.").

¹⁸² See *Women's Strike for Equality*, ABOUT.COM (Sept. 27, 2011, 8:20 P.M.) http://womenshistory.about.com/od/feminism/a/strike_for_equality.htm ("Fifty years after women were granted the right to vote in the United States, feminists were again taking a political message to their government and demanding equality and more political power. The Equal Rights Amendment was being discussed in Congress, and the protesting women warned politicians to pay attention or risk losing their seats in the next election.").

¹⁸³ See, e.g., *Duarte*, 481 U.S. at 549 (holding that Equal protection against gender discrimination outweighs a private association's right to First Amendment protections); *Roberts*, 468 U.S. at 628 (holding that Equal protection against gender discrimination outweighs a private association's right to First Amendment protections); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (holding that alimony orders are gender-neutral); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (concluding that, "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth

On the night of June 27, 1969, outside a small bar in New York's West Greenwich Village called Stonewall, a group of brave men decided that they deserved equality as citizens.¹⁸⁴ From their defiant stance against the police (assigned to arrest them simply because they were gay), arose what has arguably become the social movement of our time.¹⁸⁵ Juxtaposed with the facts regarding anti-gay violence,¹⁸⁶ the prevalence of anti-gay rhetoric,¹⁸⁷ and the unwillingness of state legislatures to protect members of the LGBT community,¹⁸⁸ concurrent reports reveal American society's positive acceptance of the LGBT community.¹⁸⁹ Additionally, many American allies from around the globe have granted equal protections to their LGBT citizens.¹⁹⁰

The courts, the legislatures (including Congress), and Presi-

Amendment insofar as they require a female member to prove the dependency of her husband").

¹⁸⁴ Matzner, *supra* note 21.

¹⁸⁵ See Will Hun, *The Larger Meaning of the Gay Rights Movement*, OHIO.COM (Dec. 18, 2010) http://www.ohioverticals.com/blogs/akron_law_cafe/2010/12/the-larger-meaning-of-the-gay-rights-movement/ ("The gay rights movement is the product of nearly every important philosophical, social, legal, and intellectual movement of modern times: pragmatic consequentialism, legal realism, the principle of equality, the elimination of gender roles, sexual freedom, the free market, economic efficiency, and social Darwinism."); Minh T. Nguyen, *Civil Rights—The History of Gay Rights*, ENDERMINH.COM (1999), <http://www.enderminh.com/minh/civilrights.aspx> ("With the rise of gay rights activists, gay-rights opponents appeared, and the issue about homosexuals' rights turned into a controversial, legal battle, which today is still fought with neither party entirely winning.").

¹⁸⁶ See Johnson, *supra* note 45 (reporting 1,617 sexual-orientation based hate crimes in 2008, as opposed to 1,171 in 2005); *Raymond Chase Commits Suicide*, *supra* note 47 (reporting the suicide of a young gay man).

¹⁸⁷ See Arkawy, *supra* note 48 (discussing recent anti-gay rhetoric, such as politicians denouncing homosexual lifestyles).

¹⁸⁸ See Head, *supra* note 43 (discussing how some states allow civil unions between same-sex partners, but that these unions lack the deeper meaning associated with a marriage); *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 44 (discussing the six states that allow gay marriage, as well as the states that offer legal alternatives).

¹⁸⁹ See Paolo Ramos, *Social Support of Gays Ahead of Politics*, FIUSM.COM (Mar. 22, 2011), <http://fiusm.com/2011/03/22/social-support-of-gays-ahead-of-politics/> (stating that the increasing social acceptance of gays is not being mirrored in the political sphere); Linda Carroll, *Gay Families More Accepted than Single Moms*, MSNBC.COM (Mar. 15, 2011 8:59 A.M.), http://www.msnbc.msn.com/id/42078511/ns/health-kids_and_parenting/ (reporting that Americans are becoming accustomed to and accepting of gay families); Frank Newport, *American Attitudes Toward Homosexuality Continue to become More Tolerant*, GLAPN.ORG (June 4, 2001), <http://www.glapn.org/sodomylaws/usa/usnews32.htm> (revealing statistics regarding the positive attitudes toward gays as of 2001).

¹⁹⁰ See Sheri Stritof & Bob Stritof, *Same-Sex Marriage FAQ—Gender Neutral Marriage Laws*, ABOUT.COM (revealing that, as of 2011, nine other countries, beginning with the Netherlands in 2001, currently allow same-sex marriage).

dent Obama have clearly indicated progressive attitudes and have taken positive action for members of the LGBT community in the years 2010 and 2011.¹⁹¹ The movement to secure basic civil rights continues much stronger in the wake of the recent victories. The natural progression indicates that the Supreme Court, the final arbiters in the granting of constitutional protections, may soon take action.

VI. QUASI-SUSPECT OR QUASI-OPTIMISTIC: LOOKING AHEAD

Where does the LGBT community stand? Are we perched with our backs to the past and our heads pointed affirmatively toward the future? Have the strides of the past two years somehow overcome the setbacks? Perhaps a look at the recent past will provide adequate assurances that, in the future, the LGBT community will prevail as equals. Relatively speaking, the LGBT community has recently witnessed significant events that have served to fuel a cautious optimism that the Supreme Court will soon address the issue of equal protection.

Perhaps I tend to be a foolish optimist that sees a glass half full. Perhaps I incorrectly misinterpreted the machinations of a well-intentioned Presidential Administration, and I expect entirely too much from a politically motivated Congress and a stagnant Supreme Court. However, I look to the future with promise for the members of the LGBT community. There were undoubtedly periods in our recent history when members of the African-American community and those who emigrated from other nations optimistically gazed into a future that promised equality for them. I envision a day in the not too distant future when constitutional scholars and practitioners opine about whether the federal courts correctly applied the newly enunciated heightened standard of review for sexual orientation-based discrimination, as opposed to whether a heightened standard should be

¹⁹¹ See *Log Cabin Republicans*, 716 F. Supp. 2d at 888 (holding that “Don’t Ask, Don’t Tell” constitutionally violates the rights of the Log Cabin Republicans); *Witt*, 739 F. Supp. 2d at 1316 (holding that “Don’t Ask, Don’t Tell” did not further a government interest as applied to Major Witt, and therefore violated her substantive due process rights); *Perry*, 704 F. Supp. 2d at 991 (holding that Proposition 8 violates the fundamental right to marry); Att’y Gen. Holder, *supra* note 2, at 1 (stating that the President has made the determination that the Defense of Marriage Act violates equal protection); Hulse, *supra* note 15 (announcing the Senate’s repeal of “Don’t Ask, Don’t Tell”).

applied at all. I fervently await a time in which LGBT citizens enjoy the fundamental rights and equal protections guaranteed by the Constitution. I predict that, if the current climate outlined in this paper continues to move in a progressive direction, the time is within reach. Our nation has developed into one that bestows specific fundamental rights upon its deserving citizens by limiting governmental interference with those rights. No upstanding citizen should be denied access to *fundamental* rights as well as *equal protections* under the Constitution. That is my wish. *That is my America.*¹⁹²

¹⁹² The disposition of the current appeal in *Perry v. Schwarzenegger* is as follows: oral arguments for the appeal in the Ninth Circuit Court of Appeals began December 6, 2010. Dante Atkins, *The Return of Perry v. Schwarzenegger: The Appeal*, DAILY KOS (Dec. 6, 2010, 4:25 P.M.). On January 4, 2011, the court denied intervention on the part of defendant-intervenors, claiming they had no Article III standing in the case. *Perry v. Schwarzenegger*, Nos. 10-16752 & 10-16696—Update on the Ninth Circuit Proposition 8 Case, RECORD ON APPEAL (Jan. 5, 2011, 9:17 A.M.) <http://www.recordonappeal.com/record-on-appeal/2011/01/perry-v-schwarzenegger-nos-10-16752-10-16696-update-on-ninth-circuit-proposition-8-case.html>). The Ninth Circuit Court of Appeals needed to clarify the following question regarding another defendant-intervenor, ProjectMarriage.com – Yes On 8, A Project of California Renewal, as official proponents of Proposition 8:

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011); *see also*, David Dayen, *9th Circuit Asks CA Supreme Court to Rule in Standing on Prop 8 Case*, FIRE DOG LAKE NEWS DESK (October 12, 2011 10:13 A.M.), <http://news.firedoglake.com/2011/01/04/9th-circuit-asks-ca-supreme-court-to-rule-on-standing-in-prop-8-case/>.

On November 17, 2011, the California Supreme Court answered in the affirmative:

In a post[-]election challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.

Perry v. Brown, No. S189476, 2011 WL 5578873 at *3 (Cal. 2011). As of January 1, 2012, the Ninth Circuit Court of Appeals has asked each party to submit briefs regarding the constitutionality of Proposition 8; no decision has been reached. *See* http://hunterforjustice.typepad.com/files/prop8_media_announce.pdf.