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Same Sex Relationships and the Right to Intimate Association: Developing an Alternative Constitutional Framework in Support of Gay Rights

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Abstract

Over the past five years, a multitude of cases that have made their ways through the U.S. judicial system dealing with the question of how to adjudicate laws discriminating against individuals based on their sexual orientation. The common theme among them is a reliance on the 14th Amendment's Equal Protection Clause, which states that no State may "deny to any person within its jurisdiction the equal protection of the laws." While discrimination of individuals on their sexual orientation would appear to violate it, the way that the courts have interpreted the Equal Protection Clause has posed many problems in achieving both a clear legal doctrine and a wider expansion of gay rights. Given these issues, this thesis seeks to remedy the constitutional quandary of how the courts should interpret laws discriminating against sexual orientation by finding an alternative constitutional justification for overturning said discrimination. The theory that I advance focuses instead on the well-established right to intimate association, which derives from analysis of the First Amendment rights to free speech and assembly and the 14th Amendment right to substantive due process. This right states that the government cannot, without a compelling and narrowly tailored purpose, infringe upon the right of individuals to form and cultivate meaningful intimate relationships. My goal in writing this thesis is to articulate a theory that can provide a clear model for how courts should interpret sexual orientation discrimination in future cases.

Introduction

The nature of social movements really is rather fickle. It was only about 30 years ago that those active in the gay rights movement were trying to change generally held views about the source of homosexuality. In response to a public and Supreme Court that believed that homosexuality was not an orientation, but merely a choice one made to advance their own sexual desires. When framed in this way, it is easier to have contempt and less understanding about those who take part in this conduct. Gay rights activists saw these perceptions as the fundamental barriers to gaining widespread equality. It was more difficult to gain far-reaching support for people that were seen to be making conscious, constant immoral decisions regarding their sexual conduct. Alternatively, if it could be proven that all of those who engaged in gay sexual conduct are all acting upon a common identity that dictates their sexual preference outside of their control, then activists could shift the optics of gay sexual conduct to persecution of a minority group unable to change the motivations for their actions. Such was the goal of those in the gay rights movements, who sought to change the perceptions of homosexuality by showing that all gays are not acting in rebellion to norms. They are merely realizing a fundamental element of their identity. This fundamental element happens to be shared by many others like individuals. Discrimination upon this group then becomes shifted from targeting persons' immoral choices to targeting people's fixed identity that beyond their choosing.

It was this perspective that dictated the way that advocates argued for gay rights through the courts, relying on Equal Protection justification. In order for gays to earn the safeguards of the Equal Protection Clause, they would have to prove that homosexuality was an immutable characteristic that individuals possess that has led to discrimination they have no opportunity to

remedy or change.[1] This required the gay rights movement to argue for one overarching definition of sexuality for the Court in order to receive judicial protection. This was seen as not only preferable, but necessary, in order to change the widely-held perceptions that reduced sexuality to one's sexual conduct.

The fickleness of social movements is apparent through a look into how gay rights are understood today, and how that understanding differs from 30 years ago. Nowadays, there is much less of a concern with demonstrating how all gays are unified. Rather, there is actually a concerted effort to show how sexuality and gender identity is very fluid, and can't be defined through one umbrella concept of sexual orientation, because those perceptions can differ depending on the individual's perspective. This change effectively highlights the issue that I seek to explore in this thesis: that as a constitutional doctrine, Equal Protection is rather problematic and not the silver bullet gay rights advocates originally saw it to be in terms of gaining judicial recognition and protection for gays. In order to have their rights recognized through an Equal Protection doctrine, the Court must define homosexuality through one, narrow understanding. This would go against much of the changing shifts in discourse around sexuality, and potentially misrepresent an entire minority group. Another result of an Equal Protection decision relying on one understanding of homosexuality that could eventually become obsolete renders the impact of the Court's rights analysis weakened.

This is only one facet of the problems that exist in Equal Protection jurisprudence. An appeal to the Equal Protection Clause has other issues, such as difficulty in applying clear precedents that are easy for lower courts to follow. Given these two issues, along with others that

[1] There are many other factors that are necessary to establishing if a group earns heightened protections under the Equal Protection Clause that I will go into great depth in explaining throughout this thesis. In a very basic sense, the Supreme Court requires that groups prove that they are discriminated on qualities outside of their control, and that the individuals are unified as a distinct minority group.

I will develop throughout this thesis, I believe that the most proper constitutional theory to understand and frame gay rights is not through Equal Protection. The burdens placed on the minority group, combined with the ambiguities inherent to the precedents, signal a need to find an alternative approach to gaining equal rights. My alternative is an appeal to the right to intimate association, which is found in the 14th Amendment's Due Process Clause. Stating that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law," the right to intimate association was found to be essential to the liberty exercised by all humans in their lives. The right to intimate association protects individuals and the relationships that they form that are of an intimate nature, such as romance, friendship, or family. Being in an intimate association allows for individuals to fulfill basic psychological desires, such as the need to be social, the need for love, and the need for stimulation, be it mental, intellectual or physical. These, along with other benefits I will discuss in greater depth later on, make up the basis as to why intimate associations are essential to liberty and therefore are strongly protected by the Court.

The right to intimate association can be rather clearly applied to same-sex relationships, and the individuals who are either in such a relationship or desire to be in one. Same-sex relationships can provide many benefits to the individual of other protected intimate associations, such as opposite-sex romantic relationships. This right also does not require gays to give one broad definition of human sexuality, and instead only seeks to recognize whether there are meaningful relationships existing between individuals. If there are meaningful relationships existing between individuals of the same sex that can be considered intimate associations, then it does not matter why those individuals have found their bond. All that matters is that they have a

meaningful relationship that allows them to exercise the liberty endowed by the Due Process Clause.

To shed doubt that gay rights advocates should pursue Equal Protection arguments in order to achieve gay rights, I have taken a bifurcated approach to proving this. Chapters One-Three cast doubt about Equal Protection precedents as a viable constitutional approach. More specifically, Chapter One explains the history of Equal Protection jurisprudence, including the first interpretations of the Clause and the way that courts now interpret claims made under the clause. Employing a system called tiered scrutiny, the courts rely upon a number of factors in order to determine which minority groups are entitled to the protection of the clause, and how strong those protections should be.

I then critique the use of tiered scrutiny over the course of Chapter Two. Many of the factors that the Court relies upon are difficult to understand and measure, misrepresentative of many different minority groups, or allow for judicial arbitrariness and subjectivity. When dealing with law and the rights of individuals to cultivate their own identity and relationships, the Court should not allow itself to be vulnerable to charges of arbitrariness. Chapter Three then applies the factors used in Equal Protection litigation to gays, highlighting the inherent problems of the tiered scrutiny used by the Court to weigh the claims of groups petitioning for equal protection.

The reason that I differentiate Chapters Two and Three is to show the depth of the issues with Equal Protection jurisprudence. It is not just that the law is unfavorable to gays. Rather, the law is problematic regardless of the group petitioning for recognition of their rights. The problems are further elucidated when specifically applied to gays. Analysis about how broken the law is just heightens the need to find an alternative approach to substantiate gay rights. Finding an alternative approach is in the interests of both gay rights activists and the Court, as

they can find a clearer, more easily-applied and understandable theory to recognize for the onslaught of gay rights cases that will continue to flood the dockets of Courts across the country.

Chapter Four articulates the case law for my original contribution, that gays should be protected under the right to intimate association. While there have been fewer cases argued over the right to intimate association, the case law still provides a basis strong enough to have a clear understanding of the scope of the law and how it could be applied to those in same-sex relationships. Chapter Five encompasses the bulk of my original contribution, in which I argue that same-sex relationships should be considered intimate associations, based on the benefits derived from being in such relationships and the fit that these relationships have within the precedent. I then weigh the arguments for finding gay relationships as intimate association against views opposed to this recognition, and demonstrate that the arguments against recognition of same-sex relationships are not as strong as those in favor of recognition. I then discuss why this approach was not pursued by gay rights activists in past cases, which I believe was not due to any inadequacy in the legal justification. As litigation was only one facet of the wider movement seeking equal treatment under the law for gays, the constitutional approaches needed to align with the platform of the movement on the whole, and any constitutional theory could not undermine the national message. That national message was that gays are a distinguishable minority unified by their shared, fixed orientation that defined their identity. An argument focusing on the relationship and the benefits of the relationship distracted from the identity of the individual.

In conclusion, I consider the merits and flaws of Equal Protection and Due Process right to intimate association arguments when applied to gays, and conclude that the net benefits of the right to intimate association outweigh the net benefits of Equal Protection argument. An

argument appealing to the right to intimate association both reflects the interests of the Court and of gay rights activists in a more complete way. Given the Court's preference for consistency and objectivity, this theory provides that in a much more substantial way than does Equal Protection. For gay rights activists, the shifts in discourse on how to understand sexuality can still exist without interference by the Court, as the Court would offer no definition or clarification on the nature of identity because it is not relevant to find protection for the rights of those in same-sex relationships under the right to intimate association.

Chapter 1 – The History and Development of the Equal Protection Clause

Over the past 40 years, a multitude of cases have been filed, argued, and decided at the state and federal level in the United States concerning a range of discriminatory practices against gay citizens, including but not limited to employment discrimination, criminalization, speech and press protections, parental custody and adoption rights, and access to state-sanction marriage. While these cases have targeted different forms of discrimination and have had myriad different results, one of the primary commonalities among all of them is the basic guidelines of the parameters that each side has argued within and each judge has decided on. Those arguments fall within the judicial construct of tiered scrutiny, which is a system used by the courts to weigh Equal Protection rights claims for individuals who are discriminated on based on some characteristic of their personhood against government laws passed that have a discriminatory effect. (Holder 2011)[2] With regard to cases involving the marginalization of gay individuals, an approach appealing to the levels of scrutiny is not the best jurisprudential doctrine to establish for a plethora of reasons.

This chapter describes how the doctrine of tiers of scrutiny developed, the judicial intent that motivated their creation, and how they have become the backbone of equal protection jurisprudence today. It evaluates how different identity categories, e.g., race, sex, sexual orientation, fit within this jurisprudential architecture, identifying the various qualifications of identity that the Supreme Court has held must be met if the highest level of judicial scrutiny is to

[2] While tiered scrutiny is most commonly associated with racial and gender discrimination, as I will get into more depth later on, this is not the limit of all arguments put forth in trying to have other persons granted equal protection. Some examples include alienage, education level, poverty, illegitimacy, medical practitioners, even lawyers. Many of these groups have gained traction in the courts for their minority, while others have not seen even the slightest affirmation by the courts in being granted protected status as a minority in need of judicial intervention to ensure equal protection. The main point is that the tiers of scrutiny have been applied by many different parties in many different cases, all with the intent on showing how a certain minority fits the framework established.

be applied to laws that classify on the basis of identify. Finally, this chapter explains the distinct factors that the Court has carved out and is intended to be applied when making determinations on whether to award heightened scrutiny[3] to new minority groups.

The Tiered System Introduced

In 1868, following the Civil War and marking the beginning of the reconstruction era, Congress passed the 14th Amendment. Of particular note for this thesis is the amendment's Equal Protection Clause, which says that, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment) The original intention of the amendment was to extend political and economic equality to black citizens who had been enslaved and to provide a conscious dedication towards righting the wrongs provoked by slavery. (*Strauder v. West Virginia,* 1879)[4]

While the initial intent of the Equal Protection Clause was to be used to limit discriminatory legislation upon black citizens, the courts did not embrace the full scope and potential of the clause until much later. It wasn't until the 20th Century when the Supreme Court interpreted the 14th Amendment as providing a check against discriminatory majoritarian views that disenfranchised blacks. (Sunstein 1994, 12) While the first cases judged under the Equal Protections Clause were based on racial classifications, the scope of the clause soon grew to

[3] Throughout this thesis, I will refer to 'heightened scrutiny' frequently. As will become clear of the course of this chapter, there are three different levels of scrutiny, called strict scrutiny, intermediate scrutiny, and rational basis review. While many interchange intermediate scrutiny with heightened scrutiny, for the purposes of this thesis I will not be doing so. When I refer to heightened scrutiny, I mean both strict scrutiny and intermediate scrutiny. For example, if a group is petitioning for heightened scrutiny, then I am saying that they are trying to become recognized under either strict of intermediate scrutiny. The analysis about the tiers of scrutiny will become further elucidated throughout this thesis. What is important to take away at this point is the broader definition that I use for heightened scrutiny.

[4] Throughout this thesis, there will be many references to different courts and court decisions. So it is clear, when Court is capitalized, then I am referring specifically to the United States Supreme Court. If it is in the singular and lowercase (court) or in the plural (courts), then I am referring to the institution of the justice system and the legal decision makers on the whole. As an example, my stating "the courts have applied *x* law in *y* way, I am referencing the entire system, while if I stated "the Court has applied *x* in *y* way", then I am referencing the Supreme Court.

include other groups experiencing discriminated that deserved judicial protection of their right to equality.

Today, in order to determine how to weigh Equal Protection claims made by complainants, the Court employs a system to weigh the competing interests in Equal Protection Cases, which has come to be called "tiered scrutiny". In theory,[5] tiered scrutiny is intended to give courts a standardized weighing mechanism to decide whose claim is most compelling: minority groups seeking equal protection or the government. This judicial doctrine is intended to articulate the extent of protections afforded to those who claim their right to equal treatment has been violated, and provide clarity for lower courts on how to weigh those competing interests.

The fundamental premise of tiered scrutiny is that there are different levels. What this means is that the court weighs the interests of each side in a specific way depending on the level of scrutiny applied in the case. The reason that the different levels are necessary is because the Court has determined that different minority groups need their rights protected more ardently than others. In order to determine what minorities are protected by what standard, the Court employs a number of different factors that are intended to provide guidance in applying the correct amount of judicial protection to the specific minority. The three different levels are called strict scrutiny, intermediate scrutiny, and rational basis review.

Strict scrutiny requires that in order for the government to facially infringe on an individual's right, they must provide a *compelling* purpose that is *narrowly tailored* and one that is *necessary* to achieve that purpose. (*Loving v. Virginia,* 1967)[6] This is the highest tier of scrutiny, meaning that it is the greatest form of protection the court offers individuals that are

[5] I say "in theory" because it is my position that there are many flaws to employing the doctrine of tiered scrutiny to Equal Protection claims. Those issues will be discussed later in this chapter.

[6] The precedent was further established in *Palmore v. Sidoti* (1984) and *Regents of the University of California v. Bakke* (1978), among other cases

deemed worthy of receiving protection by the Court. While commonly linked with 14th Amendment analysis, strict scrutiny is used for more than just Equal Protection cases. Some examples include 1st Amendment claims, such as the right to free speech, and 14th Amendment Due Process Claims, such as the right to vote, (*Dunn v. Blumstein,* 1972) right to interstate travel, (*Shapiro v. Thompson*, 1969) or right to privacy. (*Griswold v. Connecticut*, 1965)[7][8] Within Equal Protection cases, the Court has determined that individuals cannot be discriminated on the basis of their race, religion, and national origin. (Wilkinson 1975, 979) Groups that are protected under strict scrutiny are called suspect classes. So, if an individual is discriminated against on the basis of race, the government has discriminated against a suspect class.[9]

The second tier the Court articulated is intermediate scrutiny. Intermediate scrutiny states that laws will be upheld that appear to discriminate against individuals protected by this standard if they are *substantially* related to an *important* government purpose. (*Craig v. Boren,* 1976) What this means is that the burden of importance in instituting and enforcing a discriminatory law is lower. (Strauss 2011, 137) The reason for this is that the Court has determined that the group being discriminated against does not deserve the same level of protection as individuals protected under strict scrutiny due to a number of reasons, which I will articulate throughout the course of this chapter. Members who are protected under this class are considered to be quasi-suspect, meaning that they are entitled to some protection, but not all that are afforded to individuals protected by the higher standard of strict scrutiny. Those protected under

[7] The precedent was further established in *Eisenstadt v. Baird* (1972) and *Lawrence v. Texas* (2003), among other cases.

[8] Fundamental rights, as defined by the Court, are rights that are essential to upholding the liberty of each individual. They are not specifically written in the constitution, but are rights that the Court has found to be essential to actualizing the liberty guaranteed in the 14th Amendment's Due Process Clause, which states that " nor shall any State deprive any person of life, liberty, or property, without due process of law". (14th Amendment).

[9] How this determination is made will be addressed later on in this chapter. It is this determination where the doctrine of the tiers of scrutiny is most rife with problems, thereby leading me to search for other constitutionally grounded principles.

intermediate scrutiny are currently limited to gender (*Craig)* and illegitimacy. (*Jimenez v. Weinberger,* 1974) It is this standard that some courts have determined is the proper standard to adjudicate laws discriminating gays[10], although there is far from a conclusive determination affirming this principle. (*Kerrigan v. Commissioner of Public Health,* 2008; *Windsor v. U.S.,* 2012)

The final tier the Court relies upon is rational basis review. This standard is the most deferential to legislative bodies, in that the burden of importance for passing discriminatory laws is very low and allows lawmakers much more leeway in accomplishing legislative action. Because this standard is more deferential to the government, as opposed to the individual claiming discrimination, the burden is shifted to the party making a rights violation. The individual filing suit must be able to prove that the law passed is not *rationally related* to any *legitimate* government purpose. (*Williamson v. Lee Optical of Oklahoma,* 1955) In other words, all the government must establish is that there is some rational purpose for passing a law. If they can demonstrate that they do have a purpose that achieves a legitimate government aim, then the law ought to be upheld under this standard. Any persons that are claiming a form of discrimination on the basis of some characteristic the Court has not determined to be a suspect or quasi-suspect class has their claim adjudicated under this standard.(Wilkinson 1975, 951) Some notable examples of minority groups that have been denied suspect or quasi-suspect class status

[10] Throughout this thesis, I will be referring to gay, lesbian, and bisexual citizens as 'gay' simply for ease of readership. I am not claiming that protections would be extended only to gay men, but those who would identify with having same sex attraction and that this attraction is a part of their identity. I am purposefully not including transgendered individuals in my theory. This is not done out of any animus, but rather it is out of constitutional necessity. It is my contention that those that identify as transgendered face different issues and should be considered differently by the Court based on those different experiences. I would even contend that those who are transgendered are being discriminated on their gender identity, which is a settled area of law, in that gender classifications have already been formally protected by the Court. Gays, on the other hand, cannot claim that they have been protected. As such, it is for logical purposes that I separate the different identities that are commonly linked in social movements under the LGBT umbrella.

are the poor, the mentally handicapped and felons. (Strauss 2011, 141) The reasoning for doing so is varied, as the criteria for fulfilling suspect of quasi suspect class status is rather subjective. However, the Court ultimately determined that these groups did not merit the application of any form of heightened scrutiny, establishing a definitive precedence regarding the fate of these groups.[11]

Among legal scholars and court watchers, there are commonly held beliefs about how judges adjudicate equal protection claims under these tiers. Preeminent legal scholar Gerald Gunther famously stated that strict scrutiny was "strict in theory, fatal in application." What he meant by this was that the burden established by strict scrutiny was so high that it was almost impossible for the Court to find the government justification for a law that discriminates against a suspect class constitutional. While later studies have shown that the burden is not insurmountable for the government,[12] it is clear that the majority of laws adjudicated under the standard of strict scrutiny are struck down.

On the complete opposite end of the spectrum, the perception is that the government has a very low burden to prove the legitimacy of the law passed. For groups claiming an equal protection violation, it is very difficult to prove that the government acted wrongly in discriminating against a group protected only by this standard, as all that is required is that the government demonstrates that they have some rational purpose for instituting that law. The

[11] While the Court has made it very clear that such examples, among many others, do not deserve a form of heightened scrutiny, and have substantiated such claims through some form of precedent, the way that the Court chose to weigh the different aspects that qualify a group for heightened scrutiny was highly subjective. It is this aspect that I take great issue with, as it is the Court's burden to resolve ambiguity in the law, both for the purpose of making the law clear for the general public and for providing an understanding for how legislatures can and cannot act. When the doctrines in place provide for more ambiguity and less clarity, then that is where I see a need to fill a void in the Court's jurisprudential decision making.

[12] In actuality, through empirical study, laws are upheld about 30% of the time when adjudicated under the theory of strict scrutiny. (Winkler 2006). The perception comes from high profile race-based cases, which are frequently struck down due to the Court's wariness of justifying discrimination (*Loving*)

rational purpose either must be independent of discriminatory intentions or it must fulfill a government objective. (Strauss 2011, Page 137) The example of education demonstrates just how low the burden upon the government is under rational basis review. Currently, the majority of funding for public schools is based on local property taxes. Even though this could be seen as discriminatory towards those in poorer areas, the Court stated that doing so made the pragmatics of education funding more efficient. (*San Antonio Independent School District v. Rodriguez*, 1973) By showing a purpose that was rational, the claim of discrimination does not continue to stand, even if the group's claim appeared more compelling. What is key is the existence of a rational basis on the part of the government, not a countervailing purpose.

Unlike rational basis review or strict scrutiny, intermediate scrutiny is less defined in its perceived outcomes. Because it seeks to strike a balance between the rigid burdens of the other two standards, its results are less conclusive in terms of preference for the individual or the government. Without demonstrated preference for one party in cases involving intermediate scrutiny, there appears to be more subjectivity among judges in which side is more successful. (Strauss 2011, 137)

History of Equal Protection Claims

While the Equal Protection clause was enacted in 1868, the notion that groups of individuals were entitled to a specific form of higher protection by the courts was first conceived as late as the 1930s.[13] Rather, the initial decisions made by the Court were much less sweeping in

[13] There is some literature that the ground work for the tiers of scrutiny began in FDR's pre-New Deal Court. Some political scientists, most notably George Mason University Law Professor David Bernstein, have argued that the conservative courts of the 1910s and 1920s were much more amendable to exploring and instituting some policy that required the government to provide some formal justification that proved that some law was especially worthy of being upheld if it were to infringe on individual rights. David Bernstein, *The Conservative Origins of Strict Scrutiny.* While there is some credence to this belief that there were considerations for a system of heightened scrutiny, no

the protections extended. In the famed 1873 *Slaughterhouse Cases* the Court adjudicated a claim made under the 14th Amendment for the first time. In answering a question about the powers of individual states to regulate economic enterprises, they held that the amendment's Privileges or Immunities Clause, which stated that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States", (14th Amendment) was restricted to claims that involved United States citizenship, and did not hold any authority over state action. This had the initial effect of limiting the scope of cases covered under the 14th Amendment, as rights claims could initially only be brought against the federal government, and infringements of rights at the hands of the states or other private individuals were not recognized under the 14th Amendment. (*Slaughterhouse Cases*, 1872) This interpretation appeared to limit the protections that were intended to assist newly-freed slaves in their integration to American society. (Amar 2002, 26)

Because of the novelty of the 14th Amendment in American Constitutionalism at the time of the Slaughterhouse Cases, the Court sought to provide some clarity as to how the Amendment ought to be read in its entirety. As such, they provided a definition of the Equal Protection Clause to read that, "the existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." (*Slaughterhouse)* The intention of the Court at that time was to restrict the scope of Equal Protection to the political and economic rights of newly freed blacks. While this scope was eventually widened through further

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metric was devised to assess these claims. The first clear instance that demonstrated precedent of a tiered scrutiny system was in Carolene.

cases,[14] the importance of race being the first factor to receive heightened protection had many great impacts for the direction of the law. By having race protected first, all other Equal Protection claims in the future could be measured against the harms faced by blacks, as the Court would try to develop a clear line of precedence.

By relying on such a narrow interpretation, the Privileges or Immunities Clause was effectively rendered obsolete. While the *Slaughterhouse Cases* could have interpreted to substantially limited the scope of the 14th Amendment, the Court began to find protections through other provisions within the Amendment, namely the Due Process and Equal Protection Clauses. It was through these clauses that reinvigorated the 14th Amendment by expanding its scope that led to the system of tiered scrutiny in use today. In 1880, the Court decided in *Strauder v. West Virginia* that individuals could not be excluded from serving on a jury on the basis of race. (*Strauder v. West Virginia,* 1879)[15] In making this determination, the Court relied upon the Equal Protection Clause, stating that, "the 14th Amendment… denied to any state the power to withhold from them the equal protection of the laws." (*Strauder*) Even though it did not formally recognize it as such, the Court relied upon a balancing mechanism between the protection of equal rights and deference to government legislation. At its core, the tiers of scrutiny are intended to clearly delineate how to balance individual rights against government objectives. *Strauder* was the first case to do so when deciding on the grounds of Equal Protection.

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[14]Cases highlighting this expansion include the expansion of social equality recognition under the 14th Amendment in *Brown v. Board of Education* (1972), and the creation of intermediate scrutiny for gender classifications in *Craig v. Boren* (1976), among other examples.

[15] The case was brought by an African-American defendant who claimed that he was not given the opportunity to a fair trial because of a law that stated blacks could not serve on juries, which deprived him of his right to a jury of his peers.

While cases such as *Strauder* served as foundation for what would become the tiers of scrutiny, the idea that specific minorities would need extra judicial protection was not introduced until the 1930s. Unlike *Strauder*, this notion was first formally introduced in a case that had no specific relevance to Equal Protection of minority rights. Rather, this idea was first broached in *United States v. Carolene Products,* a case about the powers of government to regulate interstate commerce. (Siegal 2006, 356) Carolene Products Co. had begun to replace milk fat with a skimmed milk combined with some other fat intended to replicate the milk fat, as the milk fat could be sold at a higher profit for use in other dairy products. Called filled milk, it was proven to cause adverse health effects. In response to the proliferation of the sale of filled milk, the federal government passed legislation banning the shipping of filled milk across state borders. (*U.S. v. Carolene Products Co.* 1938) The government claimed it was within its powers to regulate interstate commerce, and as the filled milk was being shipped and sold in states outside of its production location, the federal government was acting within its enumerated powers. Fearing a great loss in profits, Carolene Products sued, claiming infringement of the Commerce Clause and the Fifth Amendment's Due Process Clause.[16] Writing for an 8-1 majority siding with the government, Associate Justice Harlan Stone held that the government was operating within the bounds of their powers in regulating interstate commerce. More importantly, he determined that Congress had demonstrated a rational basis for passing this law, and subsequently outweighing any Due Process claim by the proponent, stating that the law sought to protect public health, as filled milk was substantially proven to pose significant health risks. (*Carolene*)

[16] The Due Process Clause of the 14th Amendment states that "nor shall any state deprive any person of life, liberty, or property, without due process of law." Found in Article 1, Section 8, Clause 3, the Commerce Clause states that "[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

What makes this seemingly mundane case so important is one footnote that Justice Stone added that has since been unofficially anointed as the most influential footnote in the history of American constitutional law. (Powell 1982, 1088) In discussing why rational basis review was utilized in finding that there was no due process violation, Stone included a passage stating how this standard cannot necessarily be applied for all due process and equal protection claims. In this famed footnote, Stone claimed there are groups of individuals who may require greater judicial protections of their rights than rational basis review accorded. Specifically, Footnote Four of the majority opinion states that:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (*Carolene*)

This footnote does two very important things. First, it delineates that economic legislation should be adjudicated under rational basis review. Second, and more importantly for the purpose of this thesis, it claims that not all legislation impacting different individuals can be judged in the same way, which "may call for a correspondingly more searching judicial inquiry," meaning a greater protection of minority rights. In stating that minorities needed extra judicial protection, Stone broached questions outside the scope of the case by introducing an outside approach to a separate issue.

Of particular importance is the intention of the way the footnote would be applied by future courts. It is unclear which groups would be protected by this greater form of scrutiny being proposed. The language of the passage suggests that the definitions of groups needing protection put forth were merely suggestions of areas of law that needed to be further scrutinized through future cases. Claims that the Court "may call for a… more searching judicial inquiry" and that they do not need to "consider now whether legislation which restricts those political processes… is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" do not appear to be establishing a clear precedent as to how minority Equal Protection suits ought to be decided. (*Carolene*) Rather, they are merely suggesting that there is a deficiency in an important area of law that should be explored further. (Strauss 2011, 144) Louis Lusky, Justice Stone's clerk who was the original author of the quote, confirms this as such. He claims that the purpose of the footnote was merely to highlight salient examples of discrimination that would demonstrate the difference between social rights of minorities and economic legislation affecting corporations. The specific wording chosen was not carefully crafted with the intention of becoming the bedrock of equal protection law. He even goes to say that discrete and insular are not even commonly defined in the way that they are used

in the footnote, further highlighting the intention to merely suggest an idea for the Court to consider in the future, not a binding precedent made in that opinion.(Lusky 1982, 1105)

What is important to remember about footnote four is which minorities were being treated unequally and how they were being marginalized. The group most discriminated against, African Americans, had their rights greatly infringed upon by local, state, and federal legislative means. (Ackerman 1985, 717) This was also during a time when the U.S. saw a mass influx in European immigrants, which led to a rise in anti-immigrant sentiments. Such sentiments were codified into law that targeted the country's new immigrant population, highlighting a need for greater protection of immigrant rights. Given the prominence of those particular minority groups and the rampant discrimination upon them by the majority, it is easy to understand how the philosophy advocated for by Justice Stone was directed at protection for these groups. (Ackerman 1985, 741) The fundamental problem, however, is that this was a philosophy written as a commentary on the state of society at the time of writing. It was not drafted to establish a clear precedent of how courts should interpret future discriminatory laws against other minority groups, such as gender, sexual orientation, or disability.

Even though footnote four of the Carolene Products decision was not intended to become the jurisprudential bedrock for Equal Protection law, such was the outcome. The examples provided by Justice Stone (individuals of religious, nation of origin, or racial minorities) all became suspect classes and adjudicated under the doctrine of strict scrutiny. In deciding if members of these groups should be considered a suspect classification, the Court relied on the factors articulated in footnote four. Great reliance in determining suspect class status was placed upon the language of footnote four, in weighing "whether prejudice against discrete and insular minorities may be a special condition… to a more searching judicial inquiry." This definition has

become fundamental to equal protection litigation. It is this definition, however, that has created both additional ambiguity of the law and misrepresentation of different minority groups. (Ackerman 1985, 717-718)

Following the enumeration of footnote four into the Court's line of precedents, there was not a great rush of underrepresented groups seeking judicial protection to provide redress for the wrongs committed against them in society. Rather, Carolene was initially only sighted sparingly. The most notable citation of the footnote, prior to the Warren and Burger Courts of the 1960s-70s, was in Korematsu v. United States, in which the Court was presented the question as to whether Japanese internment during World War II was allowed under the Equal Protection Clause. While the Court found that the internment of all Japanese citizens constitutional on the grounds that the Executive was correctly exercising his constitutionally enumerated war powers, Associate Justice Hugo Black used the standard of strict scrutiny to weigh whether members of the Japanese race had been unjustly discriminated against, (*Korematsu v. U.S.*, 1944) marking the first time the standard had been used in practice. (Robinson and Robinson 2005, 30) In his decision, Black claimed that the president's goal of internment was compelling and was as narrowly tailored as possible, which are the requirements for upholding a law that infringes a suspect class's right to equality. It has subsequently been debated at length whether this was actually compelling or narrowly tailored. Regardless, the lasting impact was the reliance on strict scrutiny for discrimination of racial classification.

Korematsu also had the effect of protecting all citizens from discrimination based on their race. It formalized that the protections were not only extended to blacks, which contradicted the belief that the 14th Amendment was only to be applied to blacks, as the Amendment was passed

in response to the ending of enslavement of African Americans. Justice Black articulated this distinction by saying that:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. (*Korematsu*)

What is important about this distinction (that racial classifications were protected, not just African Americans) was that all individuals were protected from discrimination on the basis of their race. Thus, it is a specific quality that all individuals possess that can't be discriminated, as opposed to one specific group (blacks). This created the precedent that a fundamental element of one's personhood and identity could not be discriminated against. This particular distinction opened the door for other groups to petition that a fundamental element of their personhood that similarly bore little to no relation to their contributions to society was also discriminated against.

Over the next 30 years, the tiers of scrutiny became further entrenched into the understanding of Equal Protection adjudication. Through cases such as McLaughlin v. Florida (1964)[17], Loving v. Virginia (1967)[18], and Bakke v. Regents of University of California (1978)[19], the Court continued to reaffirm that racial classifications were examine through the lens of strict scrutiny. The Court also began to expand the scope of the Equal Protection Clause by hearing many cases of sex discrimination, primarily led by then-attorney and current Supreme Court

[17] Held that Florida's ban of interracial cohabitation was unconstitutional on the basis that discriminated against individuals based on their racial classification.
[18] Followed McLaughlin's precedent in finding that Virginia's ban on interracial marriage was unconstitutional on the basis that discriminated against individuals based on their racial classification.
[19] Held that affirmative action in college admissions was constitutional, yet quota systems stating exactly how many minorities could be admitted was unconstitutional

justice Ruth Bader Ginsberg. Through a series of cases, Ginsberg advanced a race-sex analogy that sought to demonstrate the parallels between race and gender. It was Ginsberg's belief that race and gender were similar both in the way they contributed to one's conception of their identity and in how the government has discriminated against this trait. Developing the analogy, Ginsberg presumed, would force the Court to find gender classifications as protected in the same way as racial classifications. (*Hoyt v. Florida,* 1961; *Reed v. Reed,* 1971; *Taylor v. Louisiana,* 1975)

Ginsberg achieved a minor victory in Frontiero v. Richardson, which weighed the constitutionality of a provision that did not give equal military benefits for husbands of enlisted women as it did for wives of enlisted men. (*Frontiero v. Richardson,* 1973) The Court decided that the provision was unconstitutional under the Equal Protection Clause. However, no binding majority opinion was written, as the justices finding the statute unconstitutional could not agree upon a rationale. The majority was divided over whether or not to apply strict scrutiny to gender classifications, which prevented a clear majority around one rationale to apply and establish a precedent around. (*Frontiero*) Arguing for awarding suspect class status for gender classifications, Justice William Brennan attempted to clarify the necessary factors that would trigger the application of strict scrutiny. Any group that has experienced a history of discrimination or have had their political power marginalized on account of the trait being discriminated against were relevant factors in the decision to award heightened scrutiny. Additionally, the Court takes into account whether the trait being discriminated against does not rationally relate to their contributions to society, and if the trait is biologically determined. (*Frontiero*) It was Brennan's view, shared by three other justices, that gender classifications fulfilled these prongs, yet he could not generate a majority of the Court to endorse this

viewpoint. Absent a majority, the question about which tier to apply to gender classification was left unanswered.

As the ultimate determination of what tier gender classifications fell under remained in flux after *Frontiero*, the Court revisited the issue in later cases, most notably in *Craig v. Boren*. Deciding whether a law that restricted the sale of beer to men over 21 but to women over 18 discriminated against men, the Court officially established the new tier now known as intermediate scrutiny, which found a middle ground between the strength of strict scrutiny and the leniency of rational basis review. (*Craig*) Finding that gender was immutable and not relevant to one's ability to contribute to society, the Court determined that there should be some extra protection. However, even though women had historically faced prejudice, the discrimination faced by women was not as great as the discrimination of those marginalized on the basis of their race. Additionally, the intent of discrimination against women was not to oppress, but to protect them, which was based on a social construct that women were more fragile than men. Even though the protection of women was offensive and still led to marginalization that required some judicial intervention, the intentions behind gender discrimination were not as malicious as the intentions of lawmakers discriminating against blacks.

Since *Craig v. Boren*, the only other group to receive some form of heightened scrutiny was illegitimate children, meaning individuals who were born out of wedlock. (*Mathews v. Lucas,* 1976; *Trimble v. Gordon,* 1977) Other minority groups, such as the mentally retarded (*City of Cleburne v. Cleburne Living Center,* 1985) and the elderly (*Gregory v. Ashcroft,* 1991; *Kimel v. Florida Board of Regents,* 2000), have petitioned the Court to hear their claims of deserved heightened scrutiny to no avail. The question of sexual orientation and where it fits

within this jurisprudential model is the latest, and most highly publicized, group to petition for heightened scrutiny. However, even though the Court has had the opportunity numerous times to render an opinion that would definitively formalize the tier to be applied to gays, they have not taken those opportunities, and the law remains in the ambiguous limbo that we see today.

Explaining the Factors Used in Equal Protection Cases

There are many different factors that the Court refers to in order for a group to receive heightened class status.[20] They must be considered a discrete and insular minority, meaning the quality being discriminated against must be visually apparent and such minority must be insular within itself. The Court has placed an emphasis on protecting those who are discriminated against based on a trait that is immutable, meaning the individual does not decide if they are possessed with the characteristic, such as one's race. (*Frontiero*) The group must have faced an amount of prejudice inflicted by others in society, primarily the majority. (*Carolene*) This prejudice takes form in two different ways: historical discrimination faced by the group (*Loving*) and the political powerlessness of the minority group that would impact the ability the group has to affect change through legislative avenues. (*Frontiero*) The trait that is discriminated against must not be relevant to the individual's ability to actualize within society, be it politically, economically, or socially. (*Craig*) For example, an individual's race does not affect their ability to perform their job, and as such the legislature should not codify law that discriminates against traits that have no rational relation to the individual's contribution to society. The final factor that the Court has considered is the intent of the lawmakers in passing discriminatory laws, and

[20] When I say "factors", I mean different elements that would support an application of a tier of scrutiny upon a distinct group petitioning for heightened class status. Such elements all are relevant reasons that would signal that such protection is necessary. Throughout this note, I will continue to refer to the different reasons primarily as factors or elements, and will use them interchangeably.

whether or not such intent is necessary for finding laws to be discriminatory and thereby in violation of the 14th amendment. (Ely 1980, 151)

The way in which the factors have been applied has been far from clear. This lack of clarity has created many issues for the Court and produced contradictory decisions. In short, the Court has stated that these different factors *can* be employed in order to determine if a group is entitled to suspect or quasi-suspect class status. They are to be used as guidelines for the Court when presented with a new group. While they are fairly well delineated and must be considered, not all must be consulted and weighed equally. It is within the judge's discretion as to how strongly each factor ought to be employed in awarding heightened protection to new groups. (*Bakke*) It is this subjectivity in how judges weigh the factors, combined with the perniciousness of the factors to be considered, that contribute to the fundamental problems with Equal Protection precedents. It is due to these issues that I advocate for a break from such strong reliance on this doctrine, which is the basis of the subsequent chapter.

Chapter 2 – Vulnerabilities of Equal Protection Jurisprudence

Throughout the 20th century, the Court frequently relied upon the Equal Protection Clause to extend the protection of rights to many different classifications, most prominently race and gender. To establish the protections in place today, the Court substantiated its newly formed tiers of scrutiny though the use of different factors to be used exclusively for Equal Protection analysis. While the intentions of the Court were good, the reliance on factors is, by nature, problematic because in order to grant rights to different classifications, judges must apply the different standards that are vulnerable to charges of subjectivity. Over the course of this chapter, I will explain each of the different factors that use in order to determine whether or not a group is entitled to heightened scrutiny, as well as the reasons behind recognizing each factor as necessary for Equal Protection jurisprudence. I will also highlight the many issues that exist in each factor. This chapter will show how the Court's methodology for Equal Protection cases is rather flawed. In the next chapter, I will explain how the flaws inherent to this line of precedents affect the claims made by gay rights groups in their petitions for heightened scrutiny.

The Factors in Deciding Suspect Class Status

Since Justice Stone's seminal footnote in Carolene Products, the Court has continued to refine how they decide which minority groups deserve suspect class and quasi-suspect class status, and which groups deserve no extra judicial protection at all. The factor suggested in *Carolene* of protecting discrete and insular minorities has stood with surprising strength. An element of prejudice against the discrete and insular minority must also be present in order to receive heightened class status. Through later cases, the Court determined that if the characteristic being discriminated against had no rational relation to their ability to function in

society, then it suggested a need for protection. They also placed an increased importance on the immutability of the characteristic that was being discriminated against.

Classifying a Minority

In determining who is entitled to suspect classification, the Court determined that groups that consist of a minority of the populace need extra judicial supervision to protect their rights. This idea was first broached in *Carolene*, presumably due to widespread vitriol and marginalization of blacks. As is clear by looking at census data, black citizens consisted of a notable subset of the population, yet clearly made up a minority subset of the population.[21] The reason as to why the Court determined there was a need to protect groups of minority status was fairly simple. Blacks consisted of a substantial portion of the population, yet were greatly outnumbered by their white counterparts, whose power allowed them to infringe the rights and opportunities of blacks. So, if a substantial portion of the population was greatly affected by the majority, and the marginalized group could not create the political change they desired because of their lack of numbers, then it is the role of the judicial authorities to try to foster opportunity that does not occur through typical political avenues. (Ackerman 1985, 722) The argument boiled down to the fact that minorities were notably present groups in society, yet they were not powerful enough to affect change without judicial protection of discrimination.

There are two main problems with considering whether or not a discriminated group consists of a minority in society. First, the Court weighs the importance of protecting a minority group's rights in part based on the size of the minority group's population. The issue with this is

[21] In 1938, citizens identifying as black made up about 10% of the population. This number has gradually increased, albeit not that substantially, as today only 12.5% of the United States' population is black. (*Statistical Abstract of the United States: 2003)*

that the Court never directly says how big the minority should be within society, yet it clearly has an effect in their decision making. The minority group must be a substantial portion of the populace. (Ackerman 1985, 720) For instance, blacks consisted of approximately 11 percent of the population during the 1960s, when the levels of scrutiny were first being formulated and applied to equal protection cases. (Statistical Abstract of the United States: 2003) More than one in ten of all citizens were experiencing great political and social marginalization. However, blacks were not a large enough population that they could have a real impact upon normal legislative processes to combat discriminatory policies. The Court prefers to not involve itself in deciding constitutional issues when the people can exercise their will and have laws passed that achieve the same end.[22] But when a large portion of the population has those avenues blocked to them because of discrimination, then it justifies Court intervention.

The issue is that this analysis is premised upon the size of the minority. If blacks had comprised 35-40 percent of the population, but still were discriminated against in the same way, would they be less entitled to protection?[23] They would in theory have more agency to change the laws, because they comprised a larger voting bloc. At best, this logic appears odd for the Court to pursue, considering how the Court tends to view individual rights. The Court is extending rights to individuals based on the size of the group they are a part of. This represents a clear break from the common way of extending rights to individuals, which are allocated based

[22] The purposes for this run deep. As the only unelected branch of the government, the Court does not like to act contrary to the widely held social sentiments of society. That is not to say they won't decide cases that have a large impact upon the country (*Brown v. Board of Education, Roe v. Wade* to name a couple), but if avenues on certain issues can be taken that involve bodies that were elected by the people, and better reflect the will of the people, then the Court prefers to allow those to be taken given that similar ends would be achieved.

[23] I understand the expected objection to this. If they had comprised that much of the population, then they would have been able to better change laws that were discriminatory. However, this point is not just rooted in this example. As I will discuss in greater length, women comprised a majority, yet were still discriminated against.

on the simple fact that one is a citizen of the country.[24] It begs the question: is an individual more entitled to judicial protection of their basic individual rights because of the size of the population that that individual identifies with? This principle would seem to make individual rights premised on the existence of other like individuals, instead of on the basis of the upholding the interest of protecting each citizen from majoritarian discrimination. (Ely 1980, 165)

When looking at how minorities are viewed by the Court, we must also recognize the other side to the size argument: that if a group is too small, they are not as entitled to judicial protection. (Ackerman 1985, 720) The Court is much less likely to come to the defense of individuals who consist of a very small portion of the electorate. For the sake of argument, let's look at a time in which a minority group was marginalized prior to the application of Equal Protection safeguards. If American Indians, who represent a much smaller subset of the population than blacks do, were the first minority group to claim that their right to Equal Protection was bring infringed due to discriminatory laws, it is likely that the Court would have less concern for their plight because of their size and lack of potential to impact the political system through other avenues. (Ackerman 1985, 720) American Indians are such a small percentage of the population that they have little impact on wielding political influence. Because they are not like blacks, who are a larger voice that is being suppressed, the Court would be less likely to grant Equal Protection.

This only further illustrates how the Court's duty of weighing the protection of individual rights versus governmental interests is premised on a fact that is out of the control of the individual or the government, yet wields a great amount of influence in deciding the scope of

[24] You can look to almost any other example of a rights claim. While one person has been affected, the right is extended to all.

rights**.** The rights of the individual are only to be protected if that individual was arbitrarily born into a group that is large enough to have a realistic expectation of political influence if they had not been discriminated against, yet is not too large that they wouldn't need judicial protection. This will prove to be especially problematic for the adjudication of cases involving gay rights, which I will discuss further in Chapter Three, because it is unclear exactly how what percentage of the country is gay. Overall, however, the notion of what constitutes a minority, and how individuals are protected based on how many people are also of that group, poses many problems of judicial arbitrariness.

Understanding Discreteness

Another aspect of footnote four of *Carolene* that has become a foundation of Equal Protection precedence is the reliance on the discreteness and insularity of the minority. Currently, there is no set definition of what constitutes discreteness and insularity. (Hoffman 2003, 1235) While some scholars have argued that these concepts ought to be defined together (Strauss 2011, 149), there is a large contingency who see them as being distinct factors, (Ackerman 19985, 721) with the most notable individual seeing them in this way being Louis Lusky, the clerk for Justice Stone who wrote the first draft of footnote four in *Carolene*.(Lusky 1982, 1105) Given that we know the drafter of the footnote intended for these two qualities to be considered separately, I am choosing to proceed by analyzing them as distinct, and that the Court takes each into account separately when deciding what level of scrutiny to apply to different groups.

Since *Carolene*, the Courts have lacked a clear definition as to what discreteness actually is.[25] One clear definition that has been provided and cited many times is provided by Bruce Ackerman in his piece *Beyond Carolene Products.* He states that a minority is discrete "when its members are marked out in ways that make it relatively easy for others to identify them." (Ackerman 1985, 730) This definition is important because it attempts to provide a clear way of trying to understand how this factor has been understood, and does an effective job in doing so. Discreteness was originally used as a factor in awarding heightened class status to groups because this was prevalent in discrimination in 1938. Blacks were being discriminated solely on the basis of a discrete characteristic. It was this public characteristic that was easily identifiable that created bigotry and subsequent legislation enacting this bigotry into law. (Wilkinson 1975, 981)

For many different politically disadvantaged groups, it was important to recognize how the discreteness of a characteristic led to discrimination. The public nature of race and gender was the basis for legislative marginalization. In this respect, the trait's discreteness was directly correlated with the purpose for discrimination.(Ackerman, 730) However, the reliance on discreteness as a standard for granting suspect classification, or even quasi-suspect classification, creates a premium on demonstrating a quality that may not apply to all citizens who have been discriminated against. By focusing so intently on discreteness, the Court has overlooked the possibility of prejudice on the basis of an anonymous trait. (Ackerman 1985, 729) Traits not visually apparent are considered to be not as worthy of protection as traits that are publicly displayed. The best example is sexual orientation. As I will discuss in more detail in Chapter

[25] This is one of the primary reasons why it has been so difficult to distinguish whether or not discreteness and insularity are inextricably linked definitionally or not. The only sources that we can rely upon are the interpretations different courts have taken of this written precedent, and the understanding of the writer. This ambiguity is yet another element that shows the shoddiness of the tiered scrutiny doctrine.

Three, sexual orientation is not public to others in the way that gender or race is. To illustrate this point, if you were to see a child being born, you would know both the gender and the race of the child.[26] However, you would not be able to determine the orientation of that child just by appearances.

Anonymity is important to recognize because people possessing these traits should not be less entitled to judicial protection simply because the fact about themselves that is discriminated against happens to not be visually apparent. There are many examples of individuals being discriminated due to non-discrete traits, such as sexual orientation or mental illness. Persons possessing anonymous traits that are discriminated against can easily hide that aspect of who they are. (Ackerman 1985, 729) This has the effect of both misrepresenting how many people possess that trait, which as discussed earlier is an important consideration in the Court's determination of who to extend protection to. Gays, for example, can hide their orientation from the public, which skews the total population of homosexual citizens. When persons choose to hide a trait about themselves that can be discriminated against, this choice also demonstrates the depth of that discrimination, as individuals are made so afraid that their rights and privileges will be taken away due to prejudicial laws that they hide that aspect of themselves. This has the effect of making it even more difficult for regular political avenues to be taken to extend rights for groups possessing anonymous characteristics, because those who could be active in gaining rights for themselves are afraid to publicly affirm that they are a part of a group subject to animus.

[26] I recognize that there are some abnormalities that affect this from being a fool-proof test. Things like being born intersex or albinism would cloud the clarity of the gender or race. However, these extreme examples don't nullify the point that characteristics like race and gender are, for the vast majority of individuals, easily discernible upon appearance.

Understanding Insularity

Insularity refers to the bonds of persons among a discriminated group and the strength of those bonds. A group is insular if its members are unified together through many different political and social bonds, such as political affiliation, church membership, and residential communities. (Ackerman 1985, 726) The Court determined that insularity of a group was something to be protected due to the rampant segregation that bred insularity among those who were disenfranchised. The thought was that it was the discrimination that caused the insularity. (*Carolene*, 1938) Given the realities that resulted from this insularity, it made it that much harder to break from the bonds and communities that were imposed upon minority groups. This is apparent through all three examples of discriminated groups provided in footnote four. Immigrants tended to live among fellow immigrants from the same nation of origin, racial communities were highly segregated, and members of minority religions tended to exist within the same social sphere.

The issues with insularity are similar to those arising from discreteness. Insularity may have been a product of the inequality imposed upon restricted groups. However, like discreteness, insularity is not an aspect that applies to all groups who have found themselves discriminated against. The counter to insularity, diffuseness, is an aspect of discriminated groups that can impede the group from gaining political influence to advocate for equal treatment. Members of diffuse groups, such as women, do not experience the benefits of insularity, including ease of political organization, common shared experiences, and unified social bonds. (Wilkinson 1975, 982) They consequently have a more difficult time in creating these bonds, and thereby have a more difficult time in creating lasting political change. By this logic, it seems that

the Court protects individuals who are more likely to be able to use the political channels that the Court is seeking to open up through extra judicial protection, while overlooking the groups that do not have the natural advantages of insularity. (Ackerman 1985, 726-28)

Prejudice as a Metric

An individual who is a discrete and insular minority is not automatically entitled to strict scrutiny or intermediate scrutiny. If that were the case, then bald CEOs would be a protected class, as they would fulfill all of the necessary components of being a discrete and insular minority. Essential to finding a group to be worthy of heightened scrutiny is the existence of prejudice against members of a group. Among all protected groups under the Equal Protection Clause, all have faced some form of societal prejudice.[27] This realization is reflected in footnote four of *Carolene*, and has been consistently cited as a necessary factor in order to grant suspect or quasi-suspect class status. (Ackerman 1985, 731) However, even though there is consistency about the importance of societal prejudice, the way in which to measure such prejudice has been a source of great ambiguity. (Strauss 2011, 150) The Court has analyzed prejudice in two different ways: analysis of historical discrimination against the group, and analysis of the political power the group currently wields to combat discrimination. (*Frontiero,* 1973)

There are many different ways the Court could interpret historical discrimination. The Court could look to past legislation that intentionally or unintentionally yet disproportionately discriminated against a minority. The Court could look to the social stigmas against certain groups, and how those stigmas prevented individuals of the affected group from being able to

[27] Adarand Constructors Inc v. Pena (racial minorities); Frontiero v. Richardson (women); Graham v. Richardson (aliens); Jimenez v. Weinberger (illegitimacy of birth);

actualize many of the rights and privileges that have been afforded to those who have not been discriminated against. (Wilkinson 1975, 981) As such, it is the duty of the Court to recognize the de facto discrimination and provide redress for this historical marginalization. Historical discrimination could also be seen through inadequate governmental representation. For instance, women consisted of a large subset of the population.[28] However, the cultural expectations for women did not allow them the same opportunities in government as it did men.[29] When a group of individual cannot gain political representation for themselves due to widespread societal bigotry, judiciary intervention is consequently necessary.

Current political participation, or the lack thereof due to prejudice, is the other way in which Courts have interpreted the effects of prejudice and their role in determining judicial class status in equal protection cases.[30] Legal theorist Marcy Strauss has effectively condensed the approaches judges have taken to understanding political strength and the factors that restrict the exercise of political will. She writes that the four factors are the group's ability to vote, the numbers of individual of that minority, the existence of favorable legislative enactments that might demonstrate political power, and whether members of the group have achieved positions of power and authority. (Strauss 2011, 154) Each one of these different modes of analysis have been used at various points throughout the Court's jurisprudential history, with some being more

[28] Depending on the year, women actually were a majority, and men were the minority.

[29] Justice Brennan emphasized this point through many gender discrimination cases, when he was advocating for suspect class status for women. He claimed that even though women were actually the majority, they had such little representation to show for their demographical presence. He cited the fact that, up until the 1970s, no women had been elected president (which remains true today), no woman had sat on the Supreme Court, no woman had served in the Senate, and only 14 women had been elected to the House of Representatives.

[30] By judicial class status, I mean how the group is classified with regard to the tier of scrutiny that their claims are adjudicated under. For example, race would have a judicial class status of suspect class, while gender would be considered quasi-suspect class status. Another term for this is heightened class status.

relevant to today's debate than others.[31] Strauss highlights the issues of trying to measure political power, because the different elements of political power can all be manipulated to fit the intended decision of a judge. For example, a judge can point to a few select examples of women in power, and claim that women therefore have political capital and do not need judicial protection. This does not mean that women are properly represented or that this instance correlates to the existence of meaningful political power. It merely means that there is great power in the hands of the judge, and there is no clear way that a judge should act when presented with these questions.

Like the many other aspects of Equal Protection precedence, the analysis about prejudice is not without error. The problem with measuring prejudice is that there is a real lack of consistency among courts in analyzing prejudice. Without a proper metric to measure prejudice, there is no direction for lower courts as to how they should understand the history of prejudice and how that relates to the opportunities for members of that group today. (Bhagwat 1997, 307) One primary example of this schism in how to best weigh the two different elements of prejudice comes from the Connecticut Supreme Court's decision legalizing gay marriage, *Kerrigan v. Commissioner of Public Health*. Writing for the majority, Justice Richard Palmer emphasized the history of political and social discrimination against gays that has greatly contributed to the stigma that sees them as second-class citizens. However, for the dissent, Justice David Borden claimed that judicial intervention on behalf of gays and lesbians was not necessary, as they were a politically powerful group who, at that time, had the capital and the influence to take advantage

[31] The point that I believe is of less concern is the right to vote, as everyone in society has the right to vote, with the exception of some individuals who are restricted given a greater government interest in restricting their ability to vote (most notably children, felons, and illegal aliens). With regard to the sheer size of the group, I have adequately addressed both the importance the courts place on the size of the group, as well as the problems associated with this emphasis. To do so again in this section would be simply redundant.

of other political avenues. Instead of focusing on how gays had been historically marginalized, he analyzed the rise of influence that gays were continuing to gain at a rapid rate. As such, he believed that the political system was not marginalizing these groups, but rather was adapting to their increasing political capital, which lessens the need for judicial intervention. (*Kerrigan*, 2008)

Kerrigan provides a great example for when two judges can each follow the same precedents yet come to drastically different results. Both recognized the prejudice leveled against gays. They each placed greater weight on differing elements of this principle, leading to the opposing viewpoints. What this shows is how there is no way to clearly incorporate these separate ideals into one cogent understanding of prejudice that can be applied in future cases. The result is less opportunity for judicial objectivity, and it allows judges the opening to justify decisions with their own self-selecting history.

This leads us to another important question about prejudice: How would we ideally measure past prejudice? Can it even be done at all? (Wilkinson 1975, 981) These are both valid criticisms, ones that may we may never be able to answer. The primary issue is that the levels of scrutiny are trying to fit different groups with different histories and forms of marginalization under one model of interpretation. What this does is makes the actual prejudice even harder to understand, because it is not being interpreted for its own sake. (Ackerman 1985, 737)

Having recognized that there is no objective way to measure history, and seeking to minimalize their own subjectivity, judges have tried to find clearer ways to understand prejudice of new groups petitioning for equal protection by looking to the groups that the tiers were based around. For strict scrutiny, that would be race, while for intermediate scrutiny, the archetype is gender. Judges and legal advocates have tried to understand the history of these two groups that

led to those courts deciding which standard to implement, and then analogize others groups to these two archetypes. For strict scrutiny, judges have tried to understand the history of different groups based on a comparison to the history of discrimination on the basis of race. (*Graham v. Richardson*, 1971) When looking at the history of blacks in the U.S., they were enslaved on the basis of race, and restricted to living and interacting only with members of their own race. While being greatly under represented and marginalized, women never experienced the level of hardship that blacks did. Additionally, the intent to oppress women was not nearly as vitriolic as the intent to restrict the autonomy and basic political rights of blacks. The comparison of respective past discrimination was a basis for establishing intermediate scrutiny for gender discrimination, because the history of discrimination women faced was not equal to the discrimination of blacks. (*Craig v. Boren*, 1976) The process of comparison became an unwritten precedent, in that later courts have used this strategy of analogy to understand other group's place with equal protection precedent.

The issues of analogizing are exactly the same as trying to measure prejudice without any sort of metric. It allows judges to subjectivity determine the nature of a group's history of discrimination, due to their being no proper way to understand the history of discrimination. The only difference is that subjective comparisons are drawn between groups, instead of just subjective assessments being made about the marginalization of the group for their own sake. What this does is cloud the understanding of prejudice for individual groups because they are being understood only by comparison to another groups' hardships. (Ackerman 1985, 744) This has the effect of misrepresentation and a lack of clarity. For example, women were restricted from voting for over 100 years, they had much less ability to effect political change, and were expected to remain subservient to men in intellectual, physical, social, and economic ways. It

would be very hard to claim that women have not been marginalized when compared to the opportunities extended to men. Now, assume for the sake of argument that there never was any racial discrimination and subsequent issues stemming from this discrimination. Would women then have a stronger claim to greater protection, because they would appear to be the group most greatly oppressed? The rights of women, and the judicial protection of those rights, were dependent on greater rights atrocities inflicted upon a completely independent group, instead of being interpreted for their own sake.

There is general agreement that blacks have been one of the groups experiencing the greatest form of prejudice.[32] But let's look at another hypothetical, one that would call this line of thought into question. Let's say our country, at one point, had a nationwide policy, greatly supported by the vast majority of people, stating that any child born with red hair should be instantly executed. They have no right to life whatsoever. Now, if this were to have happened, we would probably see the plight of blacks as less severe than that of redheads, who never even got to experience the pleasures of life at all. Does this then mean that blacks, based on their history of discrimination, would have less of a need for judicial protection? I contend that it should have no bearing, because when looking at the prejudice simply for blacks, there was a need for judicial oversight in protection of basic rights that had been stripped. However, in the approach that some courts have taken in trying to understand history of prejudice, blacks would presumably receive a lesser form of scrutiny than redheads because their history of

[32] I refrain from saying definitively that they have experienced the greatest form of prejudice because I would be falling into the exact trap that I criticize the courts for falling into. I cannot say that the courts are misrepresenting and misunderstanding history by making these subjective classifications while then making one myself. There are valid arguments to be made that other groups have suffered greater rights infringements, such as Native Americans. I am not making a value judgment one way or another. That being said, I don't believe that I am going too far out on a limb to recognize the atrocities committed against blacks on the basis of their race was *one* of the strongest forms of prejudice.

discrimination was less severe, even if they did not deserve protection of a lower tier. This highlights the fundamental issue with drawing parallels that shouldn't be drawn. It does not allow for understanding prejudice in its own right, and only seeks to compare that prejudice to the animus faced by other groups in different times and social contexts.

Relevance of Trait in Discrimination

Another factor in determining the level of scrutiny for groups is whether or not the trait being discriminated against is related to the individual's ability to participate and contribute in society. It is the test of the relevancy of the characteristic being discriminated against. For example, education opportunities could not be restricted to whites only, because one's race was not relevant to whether that individual should or should not receive an education. If the trait does not reflect the person's abilities or capabilities, then it could be considered irrelevant, and thereby not a justified reason by the government to impose a law with this discriminatory impact. (Goldberg 2004, 481) The Court has used this logic to reject age as a suspect or quasi-suspect class, as they claim that legislative actions that facially restrict the opportunities of some based on their age are not discriminatory because the trait bears a direct relation to a government interest, most notably that of workplace productivity. (*Kimel v. Board of Regents,* 2000) However, there is no relevant reason for capping the number of female workers, as one's gender does not have a rational relationship with the ability to work productively.

Similarly to many of the other factors, relevancy suffers from the same ambiguity that does not provide clear precedents. Firstly, how can relevancy really be determined? This question again gets left up to the interpretation of the judges. Secondly, and perhaps more importantly, does the trait have to be highly irrelevant to a government purpose for a group to

accrue judicial protection?(Aukerman 2005, 37) Many have argued that the poor deserve heightened protection of some sort, instead of having their cases of discrimination only adjudicated under rational basis review. There are many different factors that contribute to this line of thinking, with the chief among them being that poor individuals are at a greater disadvantage for many different opportunities compared to their wealthier counterparts.[33] However, the fact that persons are poorer can be directly related to their marginalization and not being afforded equal protection. (Strauss 2011, 167) The best example of such was in the case *San Antonio Independent School District v. Rodriguez,* when the Supreme Court determined that education could be funded by local property taxes, even though persons living in poorer neighborhoods were guaranteed to have schooling of much lesser quality. Because schooling is funded through property taxes, poorer citizens have less valuable pieces of property and therefore pay less in property taxes, which then results in less money going into the school system. With less money in the school system, the quality suffers greatly compared to districts with higher property values. In this case, the fact that the individuals affected were poor was directly relevant to the case at hand. (*Rodriguez,* 1973) Their economic status directly led to worse education and the harms that are associated with this worse education. Does that mean, because a lack of wealth was the cause of the problem and the cause of the discrimination, that we should not recognize it?

This example of the poor elucidates the need to call into question whether or not this is a constitutionally responsible principle to uphold as one of the bedrock of equal protection cases. Individuals can be discriminated against for things within their control, and which have

[33] Examples of such include ability to influence the political process through campaign donations, restrictions on the right to vote through tougher voter ID laws and shorter voting hours, poorer education, lack of social mobility, lower quality of property ownership, among many other issues.

relevance to government measures. That does not mean that they do not deserve heightened protection in any form.

Immutability

The concept of immutability is one that has slowly developed to become arguably the single greatest consideration in the court's determination of who receives suspect classification. It is this concept that has been the primary justification for heightened classification for race and gender, while it was one of the reasons that prevented social class or age from gaining similar recognition. It is also a very large point of contention, both among scholars and the courts, as to whether one's sexual orientation fulfills these factors.

In *Frontiero v. Richardson*, the landmark case that first introduced the idea of some form of heightened scrutiny for women, Justice Brennan attempted to try to clarify the factors of equal protection cases, including immutability. In doing so, he claimed that immutability was a trait that one was born with and was biologically determined. (*Frontiero,* 1973) Over time, this definition has shifted a bit, and there is some dispute about the true definition of immutability. Some courts have claimed that immutability is simply a characteristic about oneself that is essential to their existence and trying to change it would provide for so much strife and difficulty that it cannot be reasonably expected that they would change of alter its existence. (*Watkins v. United States Army*, 1989) [34] Others continue to rely upon the *Frontiero* precedent that immutability is biologically determined.

[34] This line of argumentation was advanced for two reasons. First, it provided justification for providing suspect or quasi suspect class status for gays, as it was proving difficult to prove orientation was linked to biological processes. The second reason was that even immutable characteristics determined by biology could still be altered through advances in medical capabilities, such as gender reassignment or racial transformation surgery (in which one undergoes treatment to change their skin tone). Additionally it is important to be clear that this definition has been

When looking at either of these two definitions, they both rely on a quality that can't be changed, regardless of the why this quality exists in individuals. If somebody possesses some trait that cannot be changed, and the government discriminates against this trait, then the government has passed law that an individual has no method of recourse in which to remedy the situation. (Strauss 2011, 163) Restrictions placed upon blacks in public places like restaurants or bathrooms, for example, were commonplace. Because one cannot change their race, blacks had no opportunity to earn the privileges of whites. By recognizing the immutability of a characteristic, the Court is acknowledging the limitations upon people, and that the government should recognize that these limitations exist. They should therefore protect the autonomy of such people when they are restricted from doing so based on some immutable characteristic, because they cannot provide the change that would be necessary for the full realization of privileges afforded to the majority. (*Frontiero*, 1973)

There are two main objections to the use of immutability in determining suspect class status. First, the premise of immutability confuses the effects of discrimination by placing a premium on an individual being discriminated for the rest of their life, instead of simply accepting the existence of discrimination for the point that they are at in their life. Hypothetically, let's say one's gender switched every ten years, but men still held an inherent and historical privilege that women did not experience.[35] Would women not be entitled to heightened protection, because their gender was not immutable? The discrimination would still

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used by certain courts, such as the deciders in *Watkins*. However, there is far from any conclusive agreement to use this new definition of immutability, as many courts continue to place a premium upon a trait being biologically determined.

[35] I understand that if everyone experienced life as both genders, there would presumably be much more equality, both procedurally and substantively. However, for the sake of argument, maintaining social constructs around gender while manipulating immutability seeks to highlight the issue with immutability as a concept.

exist for that individual, and at that point in time, they would not be able to exist equally to men. However, the fact that they do not remain that gender would then determine that women should not be entitled to benefits at that time, because they have the potential to not be subjected to that harm in the future.

Now, apply this logic to a more tangible example: the poor. The Court has stated that those in poverty are not members of a suspect class because they have the ability to progress and develop greater wealth and experience class mobility. Because they have that ability, the Court has said they are less entitled to heightened protection, because other protected minorities do not have the ability to ever change the basis of why they are being discriminated against. However, this overlooks the discrimination in the present that poor individuals experience. In the case of education funding, the families negatively affected may in the future be prosperous enough to move to a district where they can receive better schooling. However, in that moment they do not have that opportunity. By placing a premium on immutability, what the Court is saying is that the potential to change an aspect of oneself in the future is a greater consideration than the very real and tangible forms of discrimination that poor individuals experience at that very time.

Another example that illustrates the problem with immutability is age discrimination. Obviously, people who are old have not always been old. Rather, they grew up and developed as people with qualities and capabilities that have evolved since they were of a younger age. Along with this self-development, the individual becomes subjected to new feelings animus directed towards them, due to the public's treatment of the elderly. That individual had never had to experience this form of prejudice before, but with their advanced age comes this new form of discrimination. Does the fact that they were young once mean that they do not experience discrimination? Or is the discrimination of these individuals less than that of other individuals

discriminated against due to an immutable characteristic simply because they weren't born with it?

The second issue with immutability as a factor is the strength that it possesses when weighed against other factors. All other protected classifications rely on the fact that the group receiving suspect classification had some history of discrimination or was currently being discriminated against. Even if the courts have not conceptualized how to measure prejudice effectively, the mere existence of some form of prejudice has always been a primary factor in whether or not to grant suspect or quasi suspect classification to a distinct group. However, through the rise in importance of immutability, the courts have decided that laws discriminating against anyone on the basis of race, gender, religion, or any other protected class are subject to the level of scrutiny determined by the Court. (Strauss 2011, 170) What this means is that whites are entitled to strict scrutiny to protect their interests, even though they have suffered none of the harms that were used to justify greater judicial protection for blacks in the first place. The immutability of race has overshadowed all of the other reasons for the tiers of scrutiny. The same goes for gender, where men are given quasi-suspect classification. (*Craig,* 1976) The effect is that it clouds the history of the precedents established. The reasons for establishing tiers of scrutiny were the existence of a trait combined with other factors that led to marginalization, such as prejudice experienced. By extending the same level of protection to the majorities who were the oppressors, the factor of immutability becomes the only factor and the other factors that were originally used to create the tiered system are rendered moot.

By this logic, all of the other factors in determining suspectness, with the possible exception of relevancy, are either lessen in their importance or simply unnecessary. Therefore, under this interpretation and reliance on immutability, anybody with any immutable

characteristic would be entitled to judicial protection, even for things as trivial as eye color or amount of freckles. The easiness of looking at whether or not a trait is immutable has superseded the other considerations that the Court must take to the point that the original purposes of judicial supervision over rights claims are completely misappropriated.

Weighing all of the Different Factors

Among all of the different factors used by courts in equal protection cases, there is one common problem that affects the application of each of these factors. Each of these factors, in their own right, require a great amount of weighing of the different considerations on the part of the judge. The judge must weigh whether a group has been made politically powerless, or if they have been marginalized through social spheres, and how to weigh the importance of those different aspects. She must weigh how relevant the trait of the individual is to their ability to function in society, or how relevant that trait is to the government purpose aimed to be fulfilled in the legislation passed. Within each of these factors, there are many considerations that could be interpreted very differently depending on the judge.

Now, take that analysis about weighing different aspects of singular factors, and expand it to consider all in conjunction with, or competing against, one another. There are so many factors that are necessary to review and analyze under the tiered scrutiny doctrine. As such, there are so many different ways in which judges can interpret and weigh the importance of the different factors. Coupled with the many different factors that judges must weigh is the lack of precedent or guidance that would convey how to value the different factors. Individual judges are then left to both determine how to properly define each of these factors, and then judge the merit of each of them in comparison to the others.

At this point, it may seem as if I am merely articulating the duties of judges, and am criticizing the ways in which jurisprudential models and precedents are established. However, the potential harms amplify the caution that should be taken within this line of constitutional development. In no other area of law are there so many factors that judges must both individually measure and simultaneously weigh against each other in the way that has been enumerated for these cases. The reason we have not seen such multifaceted judicial doctrines is because it prevents clarity for how judges ought follow and apply the law. This consideration has not been properly met, and serves to provide the opposite harms that result from a lack of such clarity.

Relying on so many subjective factors gives judges a license to make decisions based on personal feelings while giving the illusion of grounding that decision in the precedents. The system in place has so many different elements that can be taken into account, that it frequently goes unnoticed when judges don't consciously take into account every factor that previous courts have deemed necessary. The purpose of strongly following precedent is to provide a check upon judges from being able to "legislate from the bench" by effectively making policy decisions from their position on the court. However, when the precedent to follow is so extensive and as muddled as it is within this area of law, it does precisely the opposite of what it intends to do. (Ackerman 1985, 744) By having so many different factors all supported by precedent, then almost any justification can be drawn for any decision. A prime example involves laws of gender discrimination. There have been many cases in which various judges have all come to completely different outcomes, with some finding gender discrimination worthy of strict scrutiny, (*Frontiero,* 1973 others determining that it deserves the lesser form of intermediate scrutiny (which it is currently adjudicated under), (*Craig,* 1976) and some even saying that women should not receive any heightened protection at all. (*Geduldig v. Aiello* dissent, 1974)

That is not to say that any of these judges are categorically wrong; actually, it shows quite the opposite. This example shows how each judge can come to sound decisions based on the available precedent, yet seriously diverge from their colleagues.

Furthermore, the weighing of the different elements of equal protection raises issues of a new tension of constitutional principles. There are questions as to whether the Court should be extending rights to some individuals and not others, which is what judicial protection of minorities effectively does, or if the Court should be concerned with rights that can be applied to all citizens. The specific precedents enumerated create a tension between these principles. When looking at the role of historical discrimination or political powerlessness, the Court seems to prefer identity based rights analysis, focusing on the specific groups within society. However, through the application of immutability, the Court extends Equal Protection considerations for classifications on the whole, as opposed to specific groups, meaning that all are protected from discrimination on the basis of their race or gender. This signals that the rights being extended are extended to all. This schism in the direction in which the Court directs their rights analysis highlights the lack of clarity and depth of understanding that those operating within the judicial system genuinely have over the animal that has grown out of the haphazard assortment of cases decided. It is due to unresolved issues such as these that I seek to move away from this line of penumbra, rather than continue to prop up an ineffective understanding of the law simply because others in the past have done so as well.[36]

[36] I recognize that this may come across as if I am seeking to just disregard all precedents the Court has developed simply because I do not care for the way they have handled them. That cannot be further from the truth. As will be developed throughout this paper, I am advocating for the search of other constitutional principles to see if there are any other potential constitutional violations of homosexual discrimination. Presumably, these other avenues would not have nearly as many issues with the penumbral line as does Equal Protection cases possess. I am not seeking to change law. Rather I am seeking to find an avenue that provides the most clarity and ease of understanding, which is not possible through the 14th Amendment given the way the law had been developed.

My purpose in showing the issues of tiered scrutiny is not to propose an entirely different alternative. At this point, I am trying to show how the system of tiered scrutiny is a precedent that is inefficient and problematic, regardless of the group petitioning the Court seeking equal protection. In the next chapter, I will analyze the different ways in which gays specifically have tried to use the tiered approach to gain greater judicial protection, and by extension equal rights. I will discuss further how the tiered system does not adequately represent gay citizens. Through this analysis, I will show how the tiered system does not provide guidance for a clear jurisprudential model to clarify the ambiguity about how gays should be protected in the face of a discriminatory law. However, in order to show how the tiered system is flawed for gays specifically, thus laying the necessary groundwork to introduce a new way to adjudicate such laws, it is imperative to show that the entire line of precedence is flawed and should not be pursued at all. Otherwise, it makes my arguments vulnerable to the claim that I am merely seeking to gain the greatest amount of rights for gay citizens, instead of trying to provide the clearest jurisprudential doctrine for judges to easily follow in future cases regarding laws with a discriminatory impact upon gays. To effectively counter any potential claim that I am merely forging my own unsubstantiated path, I must, and have, clearly articulate the reasons for breaking from a precedent that has become strongly rooted but is not so fundamentally essential to the decision making processes that it cannot ever be abandoned.

Chapter 3 - Equal Protection Law Applied to Sexual Orientation

As I demonstrated throughout the course of the previous chapter, the precedents that have been developed to elucidate the purpose and protections of the Equal Protection Clause of the 14th Amendment have proven problematic. Even with the great multiplicity of issues that have arisen, the strength of the precedents continues to grow, even if it does so haphazardly. It is my contention that the entire structure of the interpretation of the 14th Amendment is problematic. These issues are especially apparent when trying to answer the question of which tier of scrutiny should be applied to sexual orientation classifications. In the previous chapter, I sought to demonstrate the extent to which this model is problematic. Throughout this chapter, I intend to focus my analysis by looking at sexual orientation within this error-filled model, and highlight how any tier applied to gays would be misrepresentative of sexual orientation and the way society views this trait.

I will explain in detail the cases that the Supreme Court has decided involving the rights of those identifying as gay. While the questions posed to the Court differed depending on the circumstances of the cases, there was a common theme that ran throughout each of these cases. Even though there was a clear need, the Court consistently ducked the question of which level of scrutiny to apply to sexual orientation classification. The Court has given unclear precedents in a haphazard manner without much direction in how to decide future cases, leaving in its wake a plethora of lower court decisions, in which all can be seen as constitutionally legitimate yet are highly contradictory. Additionally, I will explain how sexual orientation poses new dilemmas for the Court, in that the hardships faced by gays in America do not align with the set of precedents that are necessary to grant heightened scrutiny.

Sexual Orientation and the Supreme Court

As the tiers of scrutiny became more firmly entrenched in the law, different groups were formally given different class statuses. Along with many other overlooked minorities, interest groups seeking gay rights pursued claims asserting that their right to Equal Protection had been violated do to their sexual orientation in ways similar to that of blacks or women, two groups who had earned classifications of higher protection (suspect class status for race, quasi-suspect class status for gender). The first case pursued by gay rights activists seeking heightened scrutiny was *Bowers v. Hardwick*, decided in 1986, in which a Georgia resident, Michael Hardwick, was arrested on the charge of sodomy, due to the police witnessing Hardwick and another male engaging in consensual oral sex.[37] With the aid of notable interest groups, such as the American Civil Liberties Union (ACLU) and the Lambda Legal Defense and Education Fund, (Anderson 2006, 37) Hardwick claimed that Georgia's anti-sodomy law discriminated against him on the basis of his sexual orientation, because the law was written so that any homosexual sodomy would be prosecutable. Any sexual conduct borne out of the identity of one's sexual orientation was discriminating against the underlying identity, which would be a violation of the 14th Amendment, so Hardwick claimed. It was this identity that was similar to one's race or one's gender, as it does not rationally relate to one's ability to contribute to society.

However, in a 5-4 decision, the Court determined that it was the conduct that was at issue in this case, not the underlying identity of the individuals engaged in the criminalized conduct. What is especially notable about the majority opinion was how the ultimate constitutional question at issue was whether or not there is a fundamental right allowing individuals to engage

[37] Sodomy is defined as sexual conduct that does not serve to procreate. This means that individuals are not allowed to conduct oral or anal sex under laws banning sodomy.

in sodomy.[38] Writing for the majority, Justice Byron White stated that the "Federal Constitution does not confer fundamental right upon homosexuals to engage in sodomy." (*Bowers v. Hardwick* 1996) Never in the majority opinion are the Equal Protection claims asserted by Hardwick given any consideration, demonstrating a clear lack of awareness or care for the argument that gays possess an identity which has the effect of causing certain conduct. What Hardwick sought was recognition of that identity and a heightened level of judicial protection that came with it. With a higher level of protection, gay rights activists wanted for the Court to weigh whether the government's purpose of protecting morality by criminalizing sodomy was either compelling (the standard for strict scrutiny) (*Adarand Constructors, Inc. v. Pena*, 1995) or important (the standard for intermediate scrutiny) (*Craig*), instead of whether or not it was rational (the standard for rational basis review) (*Williamson*). While he never said so explicitly, White's opinion had strong implications that Georgia was *rationally* exercising its police power in maintaining common standards of decency by enforcing this law. The rational exercise of this enumerated power fulfilled a prima facie rational purpose, thereby justifying the constitutional legitimacy of the law. (Sunstein 1994, 9)

In response to the Court's holding in *Bowers*, gay rights activists began pursuing an approach to satisfy a prong that they saw as being the key to triggering some form of heightened scrutiny: proof of immutability of sexual orientation. (Halley 1994, 511) 14 years earlier, Justice Brennan had claimed in *Frontiero* that immutable traits ought to be protected under a higher

[38] The relevance of pursuing an answer as to whether or not there was a fundamental right resides within the 14th Amendment's Due Process Clause and the precedents stemming from this text. The Due Process Clause states that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Among other purposes, the Due Process Clause protects the substantive due process rights of citizens through protection of unenumerated rights that are essential to functioning within and contributing to the democratic republic. The definition of liberty has been interpreted to be viewed as a rational continuum of freedom through which every facet of human behavior is safeguarded from arbitrary impositions and purposeless restraints. (*Griswold v. Connecticut).* It is through these grounds that the Court justifies its substantive due process holdings.

standard because they are not chosen under one's own volition, yet have been the basis of the individual's marginalization in society. (*Frontiero*) In trying to follow this precedent, gay rights activists figured that the missing lynchpin that would guarantee heightened scrutiny was proof that sexual orientation was biologically determined. Known as the search for the "gay gene", activists sought out to demonstrate the biological source of sexual orientation, with varying degrees of success.(Halley 1994, 507,512) While some studies prove substantial differences between gays and straights,(Balog 2005, 563) the research was far from conclusive in definitively proving that orientation was immutable.(Halley 1994, 514)[39]

The Bowers decision may have provided an initially unfavorable decision for gay rights advocates. After *Bowers*, gay rights advocates were certainly hampered in their quest to gain greater protection under the Equal Protection clause. However, this setback did not mean that the legal movement was dead. It only meant new cases, combined with new legal strategies (such as proving immutability), were needed to show different forms of discrimination that needed to be argued in a court of law. Many cases were argued involving gay rights, both at the federal level (*Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 1997)[40] as well as at the state level. (*Baehr v. Lewin,* 1993) However, the Supreme Court didn't take up the issue of sexual orientation discrimination again until 1996, when they granted certiorari[41] to hear *Romer*

[39] I will discuss the search for and the importance of immutability later on within this chapter. In short, there are two primary issues with the search for immutability. Firstly, there is no conclusive scientific evidence determining that orientation is biologically immutable. Secondly, assuming for the sake of argument that orientation is immutable, the established precedents provide a lack of clarity that would allow for heightened scrutiny to be automatically applied if the trait were immutable. There must be other considerations taken into account in order to find for the application of a heightened tier that work in tandem with immutability of a trait, as opposed to immutability simply being a trump card that outweighs all other considerations needed to find for a higher tier of scrutiny

[40] Other federal courts that have decided cases on gay rights include the decisions *U.S. Department of Agriculture v. Moreno* (1973) and *Watkins v. U.S. Army* (1989)

[41] The definition of granting certiorari means that the Court has agreed to hear and render a decision on a case. Cases petition decisions made by lower Courts, yet the Supreme Court does not have to grant certiorari. (In fact, the vast

v. Evans. Unlike *Bowers,* which specifically dealt with sexual conduct, the discrimination present in *Romer* dealt specifically with the identity of sexual orientation. Throughout the early-mid 1990s, various municipalities across the State of Colorado passed city ordinances that protected gays under existing employment discrimination protections. All employment protections extended to racial, gender, and age classifications were now extended to sexual orientation. In response to this proliferation of equal right expansion, the citizens of Colorado passed a statewide referendum known as "Amendment 2" to be added to the State Constitution, which prevented any legislative, executive, or judicial action at any level of state or local government that was designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." (*Romer*) Affirmed with 53% of the vote, the ban overturned any local ordinance seeking to protect gays from employment discrimination. (R*omer*)

While the facts differed greatly between *Romer* and *Bowers*, the ultimate question facing the Supreme Court appeared to be fairly similar, as they both forced the Court to consider the rights of homosexuals. However, the point at which they differed was in the way gays were being targeted by their respective state governments. In *Bowers*, the Court could avoid the question of whether being gay was an identity that one possessed and was fundamental to their existence, which would raise larger questions about the discrimination they faced. In *Romer*, the Court had no such avenue to avoid that quandary. There was no question of upholding public morals, which was the foundation of the *Bowers* decision. (*Bowers*) Amendment 2 specifically targeted those who identify as gay, and discriminated on this basis for an area of civic life that

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majority of cases are not granted certiorari.) Hereinafter, any references to the term 'cert' simply mean certiorari, as it is a common shortening in the legal profession.

was not related to the way in which they actualized their sexual orientation. While *Bowers* certainly affected the lives of gay citizens, *Romer* was the first case heard by the Supreme Court that required a real analysis about whether sexual orientation was an element of one's identity. This question about the understandings of orientation naturally led to analysis about whether discrimination on this identity was discrimination against a form of personhood, as opposed to regulation of conduct, which was the ultimate issue in *Bowers*.

In reviewing the decision of the Colorado State Supreme Court, which found that Amendment 2 was unconstitutional and that gays should be protected under strict scrutiny,[42] (*Romer*) the majority opinion, written by Associate Justice Anthony Kennedy, came to the same result but adopted a different rationale. Rather than determined that gays are protected by a higher form of scrutiny, Kennedy found Amendment 2 unconstitutional under rational basis review. Writing about a basic reading of the Equal Protection Clause, Kennedy stated that "if 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." (*Romer*) Having made the determination that animus against a group of persons cannot be considered a legitimate government interest, he determined that the State of Colorado did not possess a rational motivation that achieved a legitimate state objective. Given a lack of a legitimate purpose, the Court was given no reason to uphold the Amendment. (*Romer*)[43]

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[42] *Romer v. Evans*; stating that "the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process."

[43] The primary justification for the Amendment provided by the state was that it sought to maintain equality among all citizens by not creating special privileges for certain individuals that were not extended to all. The provision protecting gays, according to the state, served to give special protections that their straight counterparts would not have access to. Therefore, the Amendment was passed to ensure that equality for all individuals, regardless of their sexual orientation. The majority did not endorse this analysis, claiming that Amendment Two allowed for discrimination to occur against gays (as gays would be exponentially more likely to be discriminated against on the

Seven years later, the Court heard another homosexual sodomy case very similar to what they heard in 1986 in *Bowers* when they granted cert in the case *Lawrence v. Texas.* After a night of socializing, Michael Lawrence and Tyron Garner decided to spend the night together, during which they engaged in consensual sexual activity, including oral and anal sex. Having received a false notification alleging violence at Lawrence's residence, the police arrived to find Lawrence and Garner engaged in said consensual sexual activity. They were both arrested under the "homosexual conduct" provision of the Texas anti-sodomy law. In response to their arrests, they filed suit claiming their 14th Amendment rights had been violated, namely their Due Process Right to liberty and their right to Equal Protection. (*Lawrence*) The case, both in the facts and the legal questions being asked, was almost parallel to *Bowers v. Hardwick*. The only real difference between the cases was that the Texas law was written to target gays, (*Lawrence*) while the Georgia law was disproportionately enforced against gays, even though it criminalized all sodomy, regardless of the genders of the participants. (*Bowers*)

In a 6-3 opinion, Justice Kennedy again wrote for the majority, finding that Texas's law criminalizing sodomy violated Lawrence's privacy rights, enumerated under the liberty provision of the Due Process Clause. Claiming that privacy had a well-established history as a fundamental right,[44] Kennedy wrote that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." (*Lawrence*) What the decision did not do was establish a clear understanding about the way in which to adjudicate sexual orientation under the tiers of scrutiny. Instead of making that determination, Justice Kennedy affirmed that

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basis of their sexual orientation), as opposed to ensuring equality for all citizens and not allowing for preferences of certain citizens over others.

[44] Cases such as *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Roe v. Wade* (1973), and *Pierce v. Society of Sisters* (1925), among others, have entrenched the right to privacy in the history of the Court's decisions.

the holding in *Romer* was correct, but did not apply in this case.[45] The questions posed to the Court by Lawrence did not require a decision on Equal Protection grounds. Rather, the decision could be made through another avenue, that of Due Process. Because all the Court needs is one justification in order to come to some legitimate rationale, Kennedy decided that the fundamental issue facing the Court was whether Lawrence's privacy rights had been violated. This decision to focus on privacy rendered questions about the tier to be applied to gays and equal protection purposes moot. (*Lawrence*)

This past June, the Supreme Court heard and decided the famed marriage cases of the last term, *U.S. v. Windsor* and *Hollingsworth v. Perry*.[46] In *U.S. v. Windsor*, female New York resident Edie Windsor sued the federal government claiming discrimination on the basis of her sexual orientation. Windsor had been married to Thea Spyer, another female New York resident, and their marriage had been recognized as valid by the State of New York. (*U.S. v. Windsor*, 2013) The Defense of Marriage Act (DOMA), which stated that "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," prevented equal recognition of their marriage. (H.R. 3396, 1006) Even though the states were entitled to create their own definitions of what constituted marriage, DOMA prevented any federal recognition of the states' definitions and instead relied upon its own definition of marriage. (H.R. 3396, 1006) As such, lawfully wed same-sex couples did not receive many of the same financial benefits as their

[45] The circumstances of *Romer* that made the Equal Protection determination needed was due to the identity of orientation needing protecting, as opposed to the conduct, which was at issue in *Lawrence*

[46] While both cases had far reaching impacts, only *U.S. v. Windsor* is relevant to my research in this note. *Hollingsworth v. Perry* reestablished gay marriage in California. However, it did so on standing grounds, meaning that petitioners defending the law did not have standing to bring the suit because they had not been directly harmed. While the ramifications going forward as to how standing is determined for laws passed by ballot initiative, it is an area in which I am not concerned for the purposes of this thesis.

straight counterparts. It was on this basis that Windsor filed suit, as she claimed she was forced to pay estate taxes on her deceased wife's estate that she would not have had to pay had she been widowed by a husband instead of by a wife.

On the last day of the Court's session, the Court announced it had found in favor of Windsor, rendering section 3 of DOMA (the section creating a federal definition of marriage) unconstitutional on Equal Protection grounds. Once again, the Court refused to clearly establish the level of scrutiny applied, and did not definitively state what tier other courts are bound to when adjudicating cases with similar constitutional questions. All the Court did was reaffirm the principle established in *Romer*, stating that "the Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." (*Windsor*) Furthermore, they reiterated the principle that animus directed towards a certain group cannot be the basis for justifying a law's legitimacy. Like in *Romer*, the Court found the motivations of the legislature who passed DOMA to be borne out of animus and not some other interest in achieving a legitimate state aim.

Again, similar to the criticisms of the *Romer* and *Lawrence* decisions, what is most notable about *Windsor* is what was not addressed. It is not clear what standard lower courts should follow going forward. This is especially problematic when considering that the lower court, the Second Circuit Court of Appeals came to the same ultimate result, yet it found that gays were entitled to intermediate scrutiny. (*Windsor v. U.S.,* 2012) The District Court decision also came to the same ultimate result, but did so under rational basis review. (*Windsor v. U.S. Dis.,* 2012)[47] Typically, when lower courts have split decisions or rationales, the Supreme Court

[47] The three levels of judicial review are the District Court, The Court of Appeals, and the Supreme Court. Unless granted special circumstances, all federal cases go through these three different Courts, assuming they are granted cert.

seeks to resolve the paradox that was created in the opposing decisions. Instead of seeking to clarify exactly what standard was to be applied, the Court stated that rational basis review *could* be applied. It did not say that it *had* to be applied. What is clear is that the Court did not claim the Second Circuit was wrong in finding gays to be entitled to intermediate scrutiny. All that was stated was that the law would be found unconstitutional under rational basis review. Without an explicit rejection of the Second Circuit's rationale, it is unclear if gays residing within the Second Circuit's jurisdiction are entitled to intermediate scrutiny while all other gays across the country are still only protected by rational basis review, or if the Second Circuit was wrong in their analysis. All that was said was that this case required rational basis review, not that gays were entitled to rational basis review.

The problem with this is that until the Supreme Court decides to establish a standard, it creates a precedent for lower courts to come to their own determinations without any recourse,. This means that the federal government, through the judicial system, treats citizens with exactly the same characteristics as fundamentally different based on their location of residence.[48] This is problematic because the purpose of the federal court system is to make areas of law clearer for the other branches of government and the general public. By allowing different federal courts to make different determinations regarding the status of gays, instead of clearly laying out how those lower courts should proceed, individuals are consistently left in a state of flux without clear understanding of the law. This is especially problematic for Equal Protection precedence, as this

[48] This is especially problematic for the federal government, as the federal government is one entity that is advantaging and disadvantaging some citizens over others based purely on where they happen to live. While it would appear that this is the exact same problem with maintaining states' rights, there are larger interests in protecting the rights of different states to act autonomously (greater forms of representation, ease of extending and protecting rights due to a smaller scope of persons to represent, etc) that ultimately outweighs the need for equal application of law to all citizens. The federal government, on the other hand, does not have a countervailing purpose to allow for disparate treatment of citizens based on location of residence.

area of law is already so reliant on judges' subjectivity, as was discussed in chapter two. With so many factors in determining level of scrutiny under the judge's discretion, unequal application of the law only serves to complicate the issue further, doing the exact opposite of what should be occurring.

The *Windsor* decision left open the question about what tier should be applied for discrimination of gays. However, even if one were to interpret that rational basis review must be adhered to, it is also not clear whether or not rational basis review has been followed in the way that it has been traditionally understood, or if Romer's definition of rational basis review, which is considerably different than traditional rational basis review ought to be applied. In theory and practice, rational basis review has been highly deferential to the government. All that is needed is for the government to prove that in order to be "valid under equal protection clause, a law must bear a rational relationship to a legitimate governmental purpose." (*Cleburne*) What this has meant is that all the government must do is prove that they have a rational purpose to achieve a legitimate interest. As long as it does that, then any equal protection claim cannot outweigh the government purpose. (Sunstein 1993, 4) However, with Kennedy stating that animus cannot be the justification for any law, he is implying that a higher tier is in effect. Such can be rightfully implied because animus for a group can have a rational purpose that achieves a legitimate government end.(Smith 2005, 2806) When looking at the example of DOMA, animus against gays was the motivator for the passage of the law. Yet the government could say that the law raised tax revenues because fewer individuals receive tax breaks. Raising capital would appear to be a legitimate interest of the government. (*Windsor*) Furthermore, if traditional rational basis review is not to be followed and the Romer decision is to be followed, does that mean that the analysis borne out of that decision holds precedent for future groups making equal protection

claims? Are the old tiers and factors to determine tiers being rendered obsolete? Or has a new tier been introduced similar to the way the Court introduced intermediate scrutiny to protect gender? The complete lack of clarity about the direction the Court intends to pursue is glaring, and continues to go unfixed. This has the effect of creating a strange hybridization of the different tiers without delineating why certain elements of each tier are present in the rationalization of the decision. Without this clarity, the precedent can be interpreted and applied in so many different ways, resulting in decisions that are wholly contradictory. Even with contradictory decisions, each can be seen as legitimate when understood within the context to the guidance that the Court has provided.

These lower courts have understandably lacked a sense of direction on how to proceed in cases calling upon similar questions. This claim about the lack of clarity is not one only rooted in academia. It has already begun to happen to lower courts. Some courts have patterned their decisions within the new form of rational basis review created specifically for gays (*Kansas v. Limon*, 2005), claiming that there existed a level of animus directed at gays that violated the 14th Amendment. However, other courts read the decisions as holding gays to rational basis review in the way it was previously understood, merely looking for a rational purpose to achieve a legitimate government end. (*Schroeder v. Hamilton School District*, 2002) Without the Supreme Court clarifying exactly how to interpret, lower courts have no definitive precedent to follow. (Smith 2005, 2807)

In these conflicting forms of rational basis review, the issue of what becomes a rational purpose for achieving a legitimate state interest becomes highly murky, to say the least. (Ludwig 2006, 519) For many judges, there are rational purposes for upholding laws with a discriminatory impact against gays. More specifically, the consistent line of analysis defending forms of

discrimination against gays is that the state is exercising its police power that allows it to uphold public morals of decency. (Massey 2005, 961)[49] It was this argument of protecting morality that was used to justify restrictions on pornography, even though those restrictions constituted a First Amendment violation on the right to free speech. Traditionally, the Court has protected the individual's First Amendment rights much more fervently than they have for individuals who are members of classes protected only by rational basis review for their equal protection claims. Even with a greater awareness for protecting the right of the individual, protecting morality is still seen as a legitimate government interest for First Amendment. If the Court is willing to find morality to be a compelling enough point to restrict a basic right of individuals that has been accorded very strong protection, then it is very reasonable to believe that upholding standards of morality that discriminate against groups viewed under rational basis review would be allowed.

This point is not just a logical conclusion drawn through academic research. It was the accepted justification in deciding Bowers, as Justice White claimed that the "presumed belief of majority of Georgia electorate that homosexual sodomy is immoral and unacceptable provided rational basis for Georgia's sodomy statute." (*Bowers*) For many courts, protecting historical norms that have been proven to allow for stability are justifiable reasons for upholding bans against gay citizens, as there is no pattern demonstrating that society will remain stable in the way in which it has when the only recognized relationships are of the heterosexual nature. (Ludwig 2006, 534) The strength of the argument for protecting the morality of society varies

[49] Police power is a privilege extended to the states through the 10th Amendment that allows them to enforce laws for the betterment of the health, safety, morality, and general welfare of the citizens of that state. The Court has used this provision to justify a state's decision to pass laws restricting certain actions that would harm the morality of the community. The most notable example of the Court recognizing its police powers is through the Court's analysis of the state's restrictions upon pornography, in which they weighed the autonomy states should have in protecting the morals of the community in comparison to the rights of the individual to freely dispense a form of speech. (*Roth v. U.S* (1957); *Miller v. California* (1973))

greatly among courts. It is presumed that Kennedy and the Supreme Court's majority did not endorse this view of morality. (Ludwig 2006, 518) However, there are many courts that have claimed that the protection of heteronormativity as a moral one is so strong, it would be reason enough to uphold laws discriminating against gays even if gays were protected under intermediate scrutiny. (*Lofton v. Secretary of Dept. of Children and Family Services,* 2008)

Problems within Precedents for Equal Protection

One of the primary reasons that the Court has been unwilling to assign a tier of scrutiny to gays that are necessary to fulfill are highly problematic because gays do not fit many of the qualifications previously implemented into the precedence, making it difficult to justify heightened scrutiny when they are analyzed within the context of the precedents. Gays have also experienced different forms of hardship than other minority groups that is not reflected in the current model used for Equal Protection analysis. Much of this can be attributed to the nature of sexual orientation. Due to the differences between sexual orientation and traits such as race or gender, the understanding of the identity as well as the discrimination stemming from that identity marginalizes gays in different ways than it marginalized women or blacks, for example. Given these differences, the current factors are not established to represent these differences, even if those differences have produced additional harms not experienced by other classifications afforded a higher tier. In this section, I will articulate both where gays do not meet established criteria, and how the law's established criteria does not reflect the nature of being gay and the hardships experienced by gays. The culmination of this will be to demonstrate that the way the Equal Protection Clause has been understood and applied does not properly equip the Court to render a sound decision on how to understand discrimination of sexual orientation.

The Nature of Orientation

Since Justice Stone articulated in *Carolene Products* that in order to receive suspect class status, a minority must be both discrete and insular, the Court has continued to adhere to these qualifications. This is in spite of the fact that being discrete and insular does not provide any clear causation for discrimination, or even a correlation of a pattern of discrimination.[50] When attempting to understand gays under this definition, two main problems arise. First, it is incredibly difficult to determine whether gays are to be considered discrete and insular. Second, the issue arises that being discrete and insular provides benefits that the opposite qualifications, anonymity and diffuseness, do not. If this is true, then being discrete and insular is actually a benefit, and not an impediment, to equality.

When examining the discreteness of homosexuality, there have been a multitude of different interpretations regarding how gays should be understood in this context. Some courts have claimed that gays are discrete. (*Nabozny v. Podlesny*, 1996) Consequently, there have been many to say that because orientation is not visibly apparent, the trait should be considered anonymous. It is not something that is easily discernible simply by looking at a person in the way race or gender are easily discernible. (Ackerman 1985, 729) This debate elucidates the issue with discreteness: how is it both measured and applied? In *Nabozny v. Podlesny*, which posed the question whether a school's lack of protection of a student who was bullied on the basis of his sexual orientation was permissible, the Seventh Circuit Court of Appeals said that being gay is clearly identifiable. This is demonstrated through discrimination passed in retaliation to the

[50] I recognize that being discrete and insular can be the basis for discrimination, as it most certainly was for blacks, as the basis of the discrimination was an obvious characteristic (skin tone) and the discrimination created segregated communities that made it difficult to affect real change because of a lack of interaction with their oppressors. (Balog, 556) However, simply because these characteristics were the basis of discrimination against blacks does not mean they establish a clear model for all discriminated groups and the characteristics that caused the discrimination.

visibility of gay citizens, and that the student (Nabozny) was discriminated against because his orientation was identifiable. (*Nabozny)* While this analysis may be applicable for understanding some discrimination against some individuals, it does not properly cover all who identify as some orientation that faces discrimination. If Nabozny had chosen to hide his sexual orientation and stayed within the metaphorical closet, would he no longer be seen as identifiable, and therefore not entitled to protection?

The case of Nabozny v. Podlesny provides a perfect example of how orientation cannot be considered discrete for all individuals. The discreteness of orientation relies on two basic formulations that would demonstrate open expression of sexuality. One could publicly recognize their sexual orientation and disseminate that information among their social and professional communities, or one could demonstrate qualities that are commonly associated with being gay, such as having a particular sense of fashion or possessing an inflection in one's voice.[51] In these instances, being gay can be seen as discrete, and the discreteness of these instances can indeed lead to discrimination.

The issue here is not that gays *can be* discrete. It is that not all gays *are* discrete. Many gays either hide their orientation from the rest of society or do not act in a way that would allow for others to assume that they are gay. (Yoshino 1998, 509) Among gay persons, when the individual recognizes this about themselves varies greatly depending on the person, with some

[51] Through this point, I want to make it clear that I am not saying the reliance on stereotypes is legitimate, accurate, or acceptable. The point I am trying to illustrate, however, is that when individuals in society make assumptions or claims that an individual is gay without direct confirmation from that person or a trusted source who definitively confirms this to be true, such stereotypes are used to provide the justification to the belief that someone would identify as gay. It is these stereotypes that are discrete, and in some instances can be used to discriminate against others. I do not mean to say that any individual who dresses in a certain manner or has a particular vocal inflection is gay, nor am I saying that those who do not dress in a way would be stereotypically categorized as gay are automatically straight. However, in some instances, these discrete understandings of being gay, regardless of their accuracy, are present in society and used for discrimination shows that there can be an element of discreteness. The fact that these stereotypes do not apply to everyone proves the issue with relying on discreteness altogether, as I will discussed further throughout the body of this chapter.

claiming they have known they were gay from early elementary school to others not recognizing that aspect of themselves until the end of their life. Now, among this population, not all will make their sexuality public upon recognition, with many waiting many years to publicize that aspect of themselves, and some not ever publicly affirming their true sexual orientation. The nature of sexual orientation allows individuals to be anonymous and not live openly and therefore make them unable to become discrete. (Yoshino 1996, 1778)

The reasons for staying anonymous and not publicly acknowledging one's sexuality are not particularly difficult to understand. Because of widespread vitriol and codified laws discriminating against gays, many do not want to experience potential professional, economic, or social marginalization and hardship. (Sunstein 1994, 8) So, instead of putting oneself in positions to be subjected to that form of bigotry, they choose to stay anonymous. This does not mean that that individual is not being subjected to discrimination. It only means that the society that is enforcing said discrimination doesn't know its exact targets. However, just because the oppressive majority cannot pinpoint the exact individuals they are discriminating against does not mean that the individuals subjected to that discrimination, even if they are subjected to it privately, are not harmed by the discrimination. (Ackerman 1985, 729) Equal Protection is still not extended to those individuals. The only difference between gays and members of discrete classifications is that every individual of a discrete class being discriminated against can be identified. This skews what it means to be marginalized, because the basis is not the marginalization itself, but the ability for the majority to be able to identify every member of the minority that they are discriminating against. The fact that the majority can't locate all who are being marginalized does not take away from the existence of that marginalization. The precedents established, however, do not allow for this consideration to be taken into account

given the current established precedents and reliance on these precedents that place a premium on discreteness.

The second way in which an individual can be discrete is by possessing and displaying characteristics that many would attribute to homosexuality. The problem with doing so and relying on stereotypes to determine discreteness is that they are wholly misrepresentative. Not all individuals who identify as gay possess qualities that would allow them to be pinpointed as gay. By relying on discreteness, activists have sought to fit orientation within this paradigm. The question that arises is *should* this form of discreteness be recognized. And if it is, then would gays who do not embody the stereotypes traditionally associated with that form of sexuality, and thereby remain facially anonymous, not be considered worthy of heightened scrutiny? The reliance on discreteness, and lack of recognition of the ways anonymity can be applied, demonstrates how the law does not provide clear ways to interpret how to understand gays.

The other issue with discreteness is that there are benefits conferred to minorities that are discrete that may not necessarily be afforded to those who can be anonymous. In being discrete, all individuals as part of that group can easily mobilize together to achieve political and social change, as it is easier to know who to mobilize. (Ackerman 1985, 735) However, with gays having the ability to remain anonymous, it affects others who do seek to make their orientation public and want equal rights for themselves regardless of their orientation.(Yoshino 1996, 1778) In many ways, it is even more harmful that in order for gays to build coalitions to gain political change through legislative channels, all individuals must be forthcoming with that information about themselves. This is a premise that we have seen simply does not happen, as the metaphorical closet still holds many gays inside its confines to this day.(Yoshino 1996, 729) Absent this coalition building and consistently effective change to law, the need to recognize the

anonymity associated with being gay is absolutely necessary, yet the precedents not only do not recognize it, but they place a premium on the opposite quality. What can be taken from this dichotomy is that the precedents are rife with error and signal that something is fundamentally wrong.

When looking at the other quality of minorities that the Court has placed importance upon, insularity, there are similar issues arising with this concept to that of discreteness. Having insularity can allow for benefits that the antithesis, diffuseness, does not allow for. (Ackerman 1985, 732) This applies aptly for gays. Gay citizens are not born into insular, self-determined communities in the way that racial communities naturally form. Individual nuclear families can and do have both gay and straight members. Gay persons can be born anywhere across the country into any home, regardless of the political affiliations or attitudes towards gay persons of the parents. (Halley 1986, 936) As such, there is not a natural gay community that exists that all who identify as such can become a part of without consciously seeking it out. The time and effort required for gays to mobilize is much more difficult than members of a similar race, because gays are much more spread out, which only adds to the issue of anonymity. This would lead to the natural conclusion that diffuseness actually acts as an obstacle to attaining political power, instead of a trait that can spur influence. However, the precedents are clearly aligned to not recognize diffuseness and instead search for the presence of insularity, which can hold many benefits in terms of political mobilization, as a factor in granting heightened scrutiny.

The thinking that insularity actually confers some benefits and should not be a qualification in finding for heightened scrutiny has been considered by Courts, most notably by Justice Antonin Scalia in his *Romer* dissent. While far from a conclusive understanding, Scalia claimed that gays were insular, he then stated that as such they had the ability to demonstrate

their political power, as they could mobilize and use collective resources to affect political change. (*Romer*) By being insular, Scalia claims that gays have strong political power and therefore do not need judicial protection, because of their insularity and the benefits conferred by this trait of the group. Scalia's interpretation serves to highlight the problems with the application of tiers of scrutiny to new groups deserving judicial protection. Through Scalia's interpretation, gays are to be seen as insular. That factor would appear to positively affect analysis about whether they should be awarded heightened protection. The other option the Court could take would be to find that or the Court could now say that being insular now allows for benefits that do not actually provide a need for judicial protection. (*Romer*) The problem with these options, assuming for the moment that gays are indeed insular, is that the Court either makes a claim that many would interpret as being untrue, (Halley 1994, 509) or the Court would be changing the standards for equal protection simply based on convenience and ease of adjudication for the particular case in front of them. If the Court can now claim that certain factors should not become a part of equal protection analysis, then it gives license to disregard other precedents and undermines the consistency that the court values so much.

Measuring Discrimination Against Gays

The one constant among Equal Protection precedence is that the Court has always recognized some form of prejudice directed towards groups that are ultimately given heightened protection. The basis of this reasoning is simple: the Court seeks to protect groups if it has been demonstrated that their rights cannot be insured absent the judicial branch's involvement. (Constitutionals Status 1980, 1301) However, that is the extent of the shared commonality among all equal protection cases. As explained in more detail in Chapter Two, the way that the

Court measures prejudice leveled against a group is manifested in two forms: historical discrimination and political powerlessness of the group.

Before understanding how to reconcile these two different forms of prejudice, it is important to recognize the faults of each of these different factors when applied to gays. The nature of anonymity undertaken by many gay citizens contributes to the difficulty in trying to assess the extent of historical discrimination that gays faced. (Yoshino 1996, 1798) Historically, there was not much specific codified legislation that targeted gays until the 1990s, when local, state, and federal legislatures passed many anti-gay laws.(Constitutional Status 1980, 1307) However, the absence of discriminatory legislation does not necessarily mean that gays weren't being discriminated against. Exercising a sexuality that ran counter to the heteronormative norms was not necessarily criminalized or made illegal, but the social pressures to live within those heteronormative bounds kept gays in the closet (Ackerman 1985, 731). The fear of ostracization, professionally and personally, motivated many gays to keep silent about their true sexual orientation. Because of the strong social pressures and widely accepted forms of animus against gays, there was no need for the legislature to pass laws to ensure the marginalization of gays, because society effectively did so on its own. (Ludwig 2006, 515)

The issue with trying to measure past discrimination is that there are so few objective methods to measure it. (Ludwig 2006, 552) One of the best and most relied upon methods is through analysis of the proliferation of legislation that prevented gays from accessing rights and privileges to the same degree as their straight counterparts. So, if the Court were to primarily look at discriminatory legislation, then there would be a case to be made that gays have been subjected to a number of different prejudices enforced by all levels of government, ranging from local municipalities to the U.S. Congress. However, what is important to recognize is what

prompted said legislation to be enacted in the first place. The anti-gay majority that had existed for so long was finally being challenged consistently and effectively by gay rights activists, who were finding more success through both legislative[52] and judicial (*Baehr v. Lewin*, 1993) means to advance their causes. As a response to the threat that gays would be successful in gaining greater recognition and dismantling of the discrimination they faced, anti-gay forces sought to codify many of the long standing traditions of heteronormativity. As such, the 1990s saw a large spike in bills passed that had the intent of discriminating against gays, ranging from lack of extension of tax benefits for gay couples to marriage restrictions. Gays were subjected to great anti-gay animus in the form of legislative marginalization. The paradox created by the legislative developments of the 1990s was, and continues to be, troubling for the Court. (Rush 2008, 714) Quite simply, the Court could recognize the legislation as discriminatory and use it as evidence that historical discrimination occurred, thus justifying a primary factor in finding for some form of heightened scrutiny for gays. Looking more closely at that legislation highlights the fact that the great influx of discriminatory laws passed were in response to greater political influence and mobilization around the platform of expansion of rights for gays. (Rush 2008, 712) So, if the Court were to use this legislation as justification, then it would effectively be claiming that only when gays began to grow and gain more political power are they now more entitled to protection. This is problematic for two reasons. First, it established the precedents that groups are only entitled to protection when they begin to become politically powerful, but not so powerful that they can be successful through typical political avenues. By this logic, gays would have had to overcome the discrimination on their own to a small extent before they were entitled to

[52] Some examples include the ordinances passed in Colorado cities Denver and Boulder ensuring equal protection of gays, and the wide expansion of employment protections in states such as Massachusetts, California, and New York.

judicial protection. This is highly problematic, because the purpose of judicial intervention and protection is to ensure that those *most* marginalized are given fair opportunities to exercise their enumerated rights, be it political, social, economic, or any other right. (Siegal 2006, 402) Under the precedents established, the most marginalized would not be the ones most protected. It is simply the ones with the most codified legislation specifically targeting them, which does not directly correlate to the historical discrimination faced by the group in the way the Court would have it.

The second reason that recognizing prejudice through legislation that was only passed in response to greater mobilization around gay rights is that it contradicts the other prong of measuring prejudice levied against gays: political powerlessness. As this time period saw a rise in political power for gays, this would signal a need for less judicial intervention, not more of it. This demonstrates one of the issues with relying on political powerlessness as a factor in determining when and how to apply heightened scrutiny. In order to satisfy the prong of historical discrimination, one must undermine the evidence for demonstrating the political powerlessness of the group. This chasm shows the discontinuity in applying the two standards in accordance with each other, as they only undermine the opposite and thereby give way to inaccurate and misleading conclusions.

Outside of the apparent schism between the two prongs demonstrating prejudice, there are other fundamental issues with measuring political powerlessness when applied to gays and the history of gay rights. As is common with almost all social movements, as groups mobilize in greater numbers and find new ways to convey their message, the natural effect is that new

conversations are had and opinions are changed. This can act both positively and negatively.[53] Regardless of whether the attitudes changed are beneficial or harmful to a movement, the simple existence of attitudinal shifts demonstrates the lack of constancy in support for positions, and thereby demonstrates a lack of consistency in the political power behind certain platforms.

Given that there are natural shifts in attitude regarding different political positions and that these attitudinal shifts strongly correlate to political capital, the Court must face a large paradox that needs to be resolved. Remember that once the Court determines a level of scrutiny, that tier is effectively binding for all future cases. The paradox is that the Court is applying a long-lasting precedent based on a factor that has been proven to change so frequently. What then happens is that it would seem arbitrary when the Court decides to award suspect or quasi-suspect class status because that determination was based on an ever-changing factor. One could convincingly argue that it would have made the most sense to award heightened scrutiny in the 90s, when there was a proliferation of anti-gay legislation passed, and the political might of gays was weaker. (Ludwig 2006, 518) However, gays have seen many legislative victories over the past decade or so, rapidly seeing the expansion of marriage equality in states across the country, among many other victories.[54] Therefore, it would appear as if gays now need this protection less than they did 20 years ago. With the Court using this as a factor, it gives them the license to never give a determination of the need for heightened scrutiny, because they can always call

[53] Examples where increased awareness and conversation that have led to positive impacts for the group seeking to highlight those conversations include blacks, women, and even gays. On the other hand, greater religious consciousness has had the effect of putting religious teachings, especially evangelical Christianity, in an increasingly negative light. Regardless of what the shifting attitudes are , the fact that these attitudes do shift and do gain and lose support proves a lack of constancy in political powerlessness, which is premised upon the support one has for their desired political outcomes.

[54] 16 states now recognize full marriage equality for same sex couples, with Hawaii and Illinois both being ratified within the past month. The military's "Don't Ask, Don't Tell" provision preventing gays from serving openly in any branch of the United States military was repealed. The Employment Non-Discrimination Act was also recently brought to the House floor after six years of not being proposed.

upon the argument of the lack of need for judicial intervention due to the changing political climate around these issues. This is problematic because it makes the entire system of tiered scrutiny completely arbitrary, in the sense that it is up to the Court when they decide that judicial intervention must become binding and ignore the developments of political movements, or that political movements outweigh the need for judicial decision-making.[55] When specifically applied to gays, the court has been unwilling to recognize the need for judicial protection and has made claims that gays are politically powerful and can impact legislation without extra protection. (*Windsor*) This is inconsistent with how the Court has understood political powerlessness in the past, especially when compared to women. The natural conclusion is that the Court is allowed the opportunity to make political decisions about identity politics and justifying them in legal precedence.

Another difficulty of measuring the political power of gays is due to the way gays have formed communities. As is rather obvious, there are areas of the country that are both more accepting of gays and have seen a larger concentration of gay citizens, be it families or singles. (Ludwig 2006, 554) For instance, areas such as San Francisco, Northwestern states (Oregon, Washington), and New England cities, to name a few, have demonstrated much higher levels of acceptance for gays,[56] and that has been reflected both in the number of gays who live in those areas and the legislative protections extended to gays. However, not all areas are like San

[55] The Court has proven that they are prone to this exact form of arbitrariness regarding when they do and do not apply heightened scrutiny. In the early 1970s, the National Organization for Women began a campaign to pass what they called the Equal Rights Amendment which would ensure "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." (Equal Rights Amendment Text) After receiving the requisite number of votes in both the House and Senate, the amendment later failed when being voted on by the individual state legislatures. However, what is important here is that women demonstrated that they had great political power, going so far as to be on the brink of passing an amendment to the Constitution ensuring their equal rights. Even so, they still were recognized as deserving intermediate scrutiny, even though they had demonstrated that they wielded a great deal of political capital, and were thereby not powerless. (Brown 1971)

[56] San Francisco's estimated gay population is at 15.4%, Seattle's gay population is at 12.9%, while Boston's is at 12.3%. The national percentage of self-identifying gay citizens is about 3.4% of the nation's electorate. (Gates 2006)

Francisco or Seattle. There are many areas of the country that are much more hostile towards homosexuality, and as a result, there are far fewer (openly) gay citizens residing in these areas. (Yoshino 1996, 1804) Due to a lack of gay acceptance and gay population in those communities, gays who do live there are much less likely to have political capital and influence to access typical legislative channels to prevent discrimination than do gays who live in more progressive areas. (Ackerman 1985, 730) This begs the question as to which situation should the Court look to when deciding political powerlessness. Does it recognize those who are the worse off and have the least political power, or does it recognize that in many areas gays live almost equally to their straight counterparts and have great influence in their regions? The disparate amounts of power in different areas of the country presents a large quandary for the Court in terms of understanding how to measure the political power of the group as a whole. Such a factor creates different circumstances and different burdens in protecting people who possess the same trait that is being discriminated against, and only differ due to the location of residence.

The Question of Immutability

Unlike many of the factors used in Equal Protection jurisprudence, immutability was not introduced in footnote four of *Carolene* as an element in finding suspect class status. Rather, the first time it was formally introduced was in *Frontiero*, in which Justice William Brennan wrote that the factor was necessary for finding suspect class status, as an individual was being punished by their government based on a characteristic that was a part of their identity but they had no control over. (*Frontiero*) The definition was further clarified in Regents of the University of California v. Bakke, in which the Court stated that immutability is one which "its possessors are powerless to escape or set aside." (*Bakke*)

Given the Court's position on immutability, gays have tried extensively to find orientation to be immutable, to varying degrees of success. Many researchers have found strong correlations affirming the belief that one's orientation is outside of the individual's control, coming to many determinations that orientation is immutable, grounded in biology, psychology, and genetics.[57] However, even with much data that would suggest that orientation is determined by some outside influence independent of the choice of an individual, the data is not conclusive. There is no consensus among the scientific community that *definitively* states that orientation is immutable. (Halley 1994, 516) Without this consensus, courts have been unwilling to root their decisions in a determination that orientation is immutable, thus allowing them to find that gays are entitled to strict scrutiny. The Court does not want to establish precedents that bind their action for the future on a rationale that could become obsolete due to continued scientific research. (Constitutional Status 1985, 1302) When looking at the scientific studies regarding immutability of orientation, they continue to proliferate and new theories are tested and contributed to the literature constantly. (Halley 1994, 537) Even though many contribute to the literature suggesting orientation is immutable, none have been proven with the certainty that an alternative viewpoint contesting that view would look unprofessional or incorrect. Absent this certainty, the Court is put into the position of having to be the arbiter over an area of study that they do not specialize in and subsequently make a determination that would be binding, even though that decision could be proven wrong through future studies. (Balog 2005, 548) If the

[57] Kari Balog, in her piece, "Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How It Is Met", argues from a perspective that science has proven sexual orientation is indeed immutable, due to the wide array of studies confirming links to the biology, psychology, and genetics of an individual that are outside of their own control. The strength of these studies, combined with their multiplicity all leading to the same conclusion (that orientation is immutable), Balog then argues from the perspective that others must prove that orientation is not immutable. This perspective, while strong in argument, has not gained much traction, either through academia (Halley 1994; Yoshino 1996) or thorough the Courts (*High Tech Gays*, 1990; *Steffan v. Aspin*, 1993)

Court were to find orientation immutable, and further studies come out proving otherwise, then the legitimacy of the Court can reasonably be called into question, as the previous decisions made would be wrong and there would be the perception that the Court is acting outside its bounds of authority.

Additionally, immutability is not the proverbial smoking gun of the tiered scrutiny jurisprudence that gay rights activists want it to be. (Sunstein 1994, 9) Many courts have been unwilling to rely on the immutability of a trait so strongly that it automatically triggers strict scrutiny or even intermediate scrutiny (*High Tech Gays v. Defense Indus. Sec. Clearance Office,* 1990; *Baehr*) The argument commonly relied upon is that many traits are immutable, such as male-patterned baldness, that are not protected classes. The immutability of a trait must align with the other factors. (Sunstein 1994, 9) While this seems reasonable, it calls into question the legitimacy of Brennan's proclamation of the factors used for heightened scrutiny. It also reintroduces the same unanswered question of how to weigh the different factors against each other.

Finally, the issue with immutability is that many who do not endorse this view about orientation on the whole. There are many who believe that orientation is mutable in the sense that it is fluid and does not hold to one fixed construction throughout the entirety of one's life. It may not be consciously switched by the individual, but it naturally changes throughout one's life, in a way that does not occur with race or gender. As such, the government should not enforce legislation that enforces the strict binary of hetero- and homosexuality when individuals naturally do not fit within this construct. (Halley 1994, 517)

Even if one were to endorse this belief about the mutability of gays, it does not mean that it would automatically disqualify gays from deserving heightened scrutiny. The Hawaii Supreme

Court, in *Baehr v. Lewin*, stated that the lack of scientific evidence did not prevent them from finding gays to be entitled to strict scrutiny. Furthermore, the Courts have demonstrated that certain choices are also protected by strict scrutiny, with the most salient example being religion. (Rush 2008, 740) There is no argument to be made that one's religious affiliation is immutable, yet the fact that it is chosen by the person has been seen as a value worth protecting. (*Sherbert v. Verner*, 1963; *Wisconsin v. Yoder*, 1972) In extending this logic to gays, since orientation is a fundamental aspect of one's self-identity in a way similar to that of religion, the choice of one's orientation should be protected in a similar way, thereby lessening the need for scientifically proving the immutability of sexuality.

Comparing to Past Precedents

As is clear, the way in which to measure many of these factors is highly subjective. As such, the Court has tried to draw parallels between groups that are petitioning to be granted some form of heightened scrutiny to those that have already become enumerated within the tiers. Once race was formally established as being protected by strict scrutiny, gender was subsequently compared to those precedents and the determination of intermediate scrutiny was based in part on the similarities and differences that one's gender had upon their ability to actualize their rights as one's race had. (*Reed*)

The problem with comparing different groups to one another is the system in which it is done. Because race was the first group to receive suspect class classification, the factors that were to be used in Equal Protection cases were tailored to fit with the nature and hardships citizens faced due to their race. Thus, it is easy to see how factors such as insularity and discreteness would be relied upon by the Court in order to come to a determination of the need for judicial protection, as blacks were clearly discrete and were segregated by law, thereby

making them insular and removed from political influence. (Siegal 2006, 405) Once strict scrutiny under the Equal Protection Clause was formalized and other groups began to petition for similar protections, courts relied upon analogies to the groups that had been formally recognized as deserving suspect status. (*Rowland v. Mad River Local School District, Montgomery County, Ohio,* 1985) The reasoning behind this was simple. If a group experienced similar treatment and the element of their personhood being discriminated against was similar to that of race, then it would logically apply that that group would deserve suspect class status. The problem with relying on past precedent and analogizing groups to race is that the Court is relying on disanalogous parallels that are made to a group simply because it had the luxury of being the first to receive heightened protection by way of the Equal Protection Clause. (Schacter 1994) That is not to say that race shouldn't be considered a suspect classification. However, what I am saying is that by forcing parallels of groups to that of race, it minimalizes the individuality of the problems and conceptions of other identities that have been discriminated against and mandates comparison to a group who happened to be selected first.

To further illustrate these harms, let's pretend for the sake of argument that gays had received suspect class status first. Presumably, diffuseness would be recognized, as gays can be born into any family and cannot be segregated in nearly the same ways as blacks could be. If diffuseness was then a standard for finding suspect class status, then blacks would not be able to fulfill that standard. Does that mean that there should be less protection afforded to them? Presumably not. This example seeks to illustrate the fact that race was merely the first classification to receive protection, not the most important one that all others should measure up against.

The issue with comparing to race or gender extends greatly when looking at how to measure prejudice. When looking at historical discrimination, the Courts have commonly looked to the fact that blacks were subjected to slavery and had all of their basic rights infringed upon, be it political, social, economic, and even moral rights. Because of the proclivity to compare groups to one another, past discrimination of groups is measured against blacks. This was one of the reasons that women received intermediate scrutiny, because the marginalization they faced was not a as great, and the intentions behind that marginalization were not as vitriolic. (*Craig*) When looking at the history of gays, they had never been subjected to something as devastating as slavery. The issue that arises here is that because the discrimination faced by gays was not as dehumanizing as the groups already protected, the history of the discrimination becomes clouded and lessened and understood for what it wasn't, as opposed to what it was and how it affected citizens. (Ludwig 2006, 551)

Furthermore, there are areas of discrimination faced by gays that were not experienced by blacks, such as the need to hide a fundamental aspect of one's identity for the entirety of one's life due to the fear of complete ostracization by one's family or community. The intention of segregation and anti-gay laws also differed greatly. Segregation was meant to do just that: segregate the races from interaction amongst each other. Anti-gay legislation was not meant to segregate but rather suppress. Gays were denied any recognition of their identity, and even saw that identity criminalized. (Sunstein 1994, 17) These are examples of discrimination not experienced by blacks. Does it make it less worthy of recognition?

Overall, the histories of different groups are just that: different. By using a system that tries to standardize and compare unique, multifaceted histories, it misunderstands the effects that the discrimination had upon individuals, and the need for protection from said discrimination. By

requiring such formal factors that have so much subjectivity without any form of objectivism, the most logical way to achieve said objectivism under the current model is to compare different groups with different histories and struggles. However, doing so only creates less proper classification and conceptualization of the different groups applying for heightened judicial protection.

Chapter 4 – The Right to Intimate Association

Throughout my thesis up until this point, I have critically analyzed the direction that the Court was taking in extending gay rights across the country. The road to equality through 14th Amendment jurisprudence is treacherous, to say the least. Sweeping characterizations and drawing false analogies are the hallmarks of Equal Protection analysis, and require much of the discriminated group to prove that they deserve their right to be protected, which as I have explained I find highly problematic.

In the remaining chapters, I will lay out the judicial history for an alternative constitutional approach for understanding gay rights. The right to intimate association, found as an essential form of liberty enumerated under the Due Process Clause under the 14th Amendment, provides an approach that can both offer the Court much greater clarity of gay rights and represent the people in ways equal protection analysis is not capable of doing. The fundamental difference between the two approaches is the way that the Court analyzes who the right applies to. The Equal Protection Clause requires a minority to prove why their class of people deserves the right to equal protection on the basis of a multitude of haphazard factors. The right to intimate association does not separate citizens into distinct categories. Rather, the right is applied to all, and is weighed and adjudicated for its own sake, instead of being awarded because the individual petitioning for recognition of the right based on dividing, personal characteristics about oneself (as Equal Protection requires). My proposed theory is that those in same-sex relationships are exercising their right to intimate association, yet are infringed from being able to properly actualizing this right due to government and private restrictions upon these relationships. In this chapter, I will explain the purpose of the right to intimate association, as well as detail the method and the rulings that the Court has relied upon to sustain this right. This

serves as foundation for my original contribution, that gay rights should be adjudicated under this constitutional theory instead of through Equal Protection.

While the Supreme Court did not formally recognize it until 1984, the idea of the right to intimate association has long predated the Court's analysis on the right. Alexis de Tocqueville, in his seminal work *Democracy in America* written in 1835, claimed that "Americans of all ages, all stations in life, and all types of dispositions are forever forming associations…of a thousand different types – religious, moral, serious, futile, very general and very limited, immensely large and very minute." (de Tocqueville 1835, 485) Many other political philosophers have echoed the same belief, writing that intimate association is as central to an individual's liberty as the freedom of speech, because the relationships one creates with others are so fundamental to living meaningful lives.[58] Outside of its constitutional justification, the right to intimate association is valuable for its own sake. In order to better understand its place as a well-established right by the Courts, we must understand its intrinsic value.

One of the most influential legal scholars of the past half-century, Kenneth Karst, has written extensively on the existence of a right to intimate association. In his 1980 piece *The Freedom of Intimate Association*, Karst gives his interpretation of the structure and purpose of an intimate association which seems to adequately reflect both the sentiment and the importance of the relationship. Drawing upon studies of prominent psychologists and sociologists,[59] he defines intimate associations as close, familiar personal relationship with another person or persons. A prime example Karst cites is the associations formed through marriage or family.(Karst 1980,

[58] This includes, but is not limited to, Reena Raggi (Independent Right to Freedom of Association, 1977), David Fellman (The Constitutional Right to Association, 1963), and Charles Rice (Freedom of Association, 1962).

[59] Karst reviews prominent sociologists Emile Durkheim and Max Weber for understandings on the definition of intimate associations, and he notes the studies of some of the most well-known psychologists and biologists, such as B.F. Skinner (Science and Human Behavior), E.O. Wilson (On Human Nature), and Harry Harlow (The Nature of Love)

629) The association is more than the sum of its members, meaning that the relationship between the individuals provides unique benefits for those in the relationship that they would not otherwise exercise. (*Smith v. Organization of Foster Families*, 1977)

As social beings, Karst claims we all seek out and cherish such relationships in a multitude of different ways and intensities. Given that an individual is not a hermit completely closed off from human interaction, all individuals share in the company of others in intimate settings. (Karst 1980, 631) Intimate associations range from close friendships to marriages to sexual encounters to exclusive social groups, such as a fraternity. The pervasiveness of intimate associations, combined with their importance, form what de Tocqueville claims is a right that is as inalienable as individual liberty.(de Tocqueville 1831, 487)

The value of intimate associations comes from the benefits that the existence of the relationship confers. Such relationships give the opportunity to enjoy the company of others, whether that be in conversation, in romance, or in pure sexual desire. Intimate associations fulfill the basic human need to feel loved and cherished, and to allow such individuals the opportunity to demonstrate their own capacity to love and care for another individual in a substantial, unique way. (Karst 1980, 632) It is through intimate associations that persons can develop their own intellect, emotional intelligence, or self-worth, and can aid others in developing in similar ways.(Karst 1980, 633)

The importance of the intimate association is further demonstrated through the close link it has with the freedom of choice and autonomy. In order to cultivate such intimate associations, and by extension confer the benefits, we must choose to trust another individual in such a deep way to allow ourselves to develop those bonds and realize those benefits. Individuals exercise a great deal of choosing who they trust to develop a deep connection with, which makes that bond

that much more meaningful. (Linder 1984, 1901) The discretion we can exert in choosing our intimate associations allows for the cultivation of our own unique identity and our own unique life course. (Karst 1980, 635) The power of the intimate association would be compromised if the individual was forced to coexist and share the experiences of intimate associations without the option of choosing who they are sharing those experiences with. Thus it show the importance of the choice in whom to trust and form these bonds with. In this sense, the autonomy exercised by individual persons reflects the liberty inherent in the formation and cultivation of intimate associations.(Linder 1984, 1901)

History of Intimate Associations Under the Due Process Clause

The Supreme Court first formally recognized the right to intimate association in *Roberts v. United States Jaycees* in 1984, claiming the right was embedded in the precedents of the First and 14th Amendment. However, there were many cases leading up to Roberts that shaped the rationale later adopted by the Court in the seminal case. By many scholars' accounts, the ideals of the right to intimate association were first broached in *Griswold v. Connecticut*, which found a Connecticut statute barring married couples from accessing contraception unconstitutional. (Schwartzchild 2013, 97) The Court found Connecticut's ban unconstitutional in two ways. The first, which has traditionally been seen as the binding precedent and the most scrutinized aspect of the decision, was the finding of an implicit right to privacy through the penumbra of specific guarantees of the Bill of Rights. (*Griswold*, 1965) In order to support this belief, Justice William Douglas wrote that the First, Third, Fourth, Fifth, and Ninth Amendments all guaranteed specific zones of privacy. The common theme of these Amendments demonstrate an underlying right to privacy. With this new recognition to the right to privacy, the Court found the decisions made in

marriage regarding procreative choices to be protected by the protected sphere of privacy. (*Griswold,* 1965)

The Court also found Connecticut's contraceptives ban unconstitutional on 14th Amendment Due Process grounds. The Due Process Clause of the 14th Amendment says that "no State [shall] deprive any person of life, liberty, or property, without due process of law." Especially notable about the Due Process Clause is the right to exercise one's liberty, which the Court has interpreted mean that any rights fundamental to the liberty of individuals through all spheres of life. (*Griswold,* 1965) Under the liberty provision of the Due Process Clause, the Court established what is now known as Substantive Due Process. Any rights that may be found under Substantive Due Process are not found in the first eight Amendments, yet are determined to be fundamental to an individual's existence and livelihood. In *Griswold,* the liberty being recognized was the right to privacy in the comfort of one's marriage. (*Griswold,* 1965)

In determining that privacy within marriage was a liberty that should be protected under Substantive Due Process, the Court elaborated on the purposes and benefits of marriage. Through this analysis do we begin to see the right to intimate association begin to develop. Justice Douglas stated that the decisions made within the bonds of marriage must warrant a high level of protection, as marriage "is intimate to the degree of being sacred. It is an association that promotes a way of life; [that is] a harmony of living." (*Griswold,* 1965) *Griswold* also affirmed the autonomy that is necessary in forming meaningful relationships, which lends credence to the perceived importance of developing marital and romantic bonds. Constitutionally, the decisions made in marriage are protected under the right to privacy, which is found through Substantive Due Process. It was this refocusing upon the liberty component of the Due Process Clause that laid the groundwork for the Court's decision to come in *Roberts.*

While the idea that certain unenumerated rights could be fundamental and recognized under the Due Process Clause was a novel one broached in *Griswold*, the importance of marriage was an ideal that was already well-established. The majority opinion for *Loving v. Virginia*, which found all bans on interracial marriage unconstitutional, also articulated the importance of marriage in our society, saying that "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." (*Loving*, 1967)Although the Court did not claim that the right to marriage was its own protected right, its existence and importance to individuals was a central part of the ruling, and formed the argumentative foundation for future cases to formalize the right to marriage, and later the right to intimate association.

In 1976, the Court held in *Zablocki v. Redhail* that any restrictions upon an individual's right to marry were subjected to strict scrutiny.[60] The freedom to marry, the Court stated, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Zablocki*, 1976) Furthermore, the *Zablocki* decision reaffirmed the principle established in *Maynard v. Hill*, decided in 1888, which stated that marriage is "the most important relation in life" and is the "foundation of the family and of society, without which there would be neither civilization nor progress." (*Maynard v. Hill*, 1986) *Zablocki* relied upon the well-established precedent of the importance of marriage to find the right to marriage to be a protected element of liberty enumerated under the Due Process Clause. This finding ultimately became the bedrock of the *Roberts* decision. (Linder 1984, 1899) However, the Court also found that the more recent *Griswold* decision substantiated the finding that marriage was a fundamental

[60] Later in this chapter I will address how the tiers of scrutiny are used in determining the right to intimate association and the weight of that right against government interest. While it may come across that I am vehemently anti-tiered scrutiny, I must clarify that I believe the essence of the tiers has intrinsic merit. The way in which they are applied to 14th Amendment jurisprudence is the primary issue I take with the system of tiered scrutiny.

right to liberty. Because many of the decisions made in marriage are private and recognized as such, some of the most fundamental elements of marriage are already protected. This established reason to find the entire institution of marriage valuable in itself and therefore worthy of judicial protection as an essential form of liberty.

The next year, in 1977, the Court returned to the question to clarify the importance of marital and family relationships and these relationships' place under the 14th Amendment. In *Moore v. City of East Cleveland*, the Court was faced with the question as to whether a city ordinance that limited occupancy of a dwelling unit to members of a single immediate family was a violation of the liberty established in the Due Process Clause. Challenging the law was East Cleveland resident Inez Moore, who had established residence with her son, his son (her grandson), and another grandson whose parents were absent from the child's life. While the Court noted the city's justification for the ordinances (overcrowding and traffic prevention, lessening the financial burden upon the public school system), they found that the intrusion upon family living relationships was a greater concern, thereby finding East Cleveland's ordinance unconstitutional. Recognizing much of the same precedent used to decide *Zablocki*, the Court held that the freedom of choice in marriage and family arrangements was one of the liberties protected by Substantive Due Process.(*Moore v. City of East Cleveland,* 1977) Due Process of liberty, the Court said, was intended to recognize and respect the liberty of the individual, and balance that respect against the demands of organized society. (*Poe v. Ullman,* 1961) This protection of liberty mustn't be determined on arbitrary lines, but rather from careful respect for the teachings of history and recognition of the basic values that underlie our society. (*Griswold,* 1965) As such, the restriction of decisions so central to the foundation of familial life met the standard of impeding on the liberty of individuals in their most personal relationships. (*Moore,*

1977) The process of child-rearing is fundamental to the purpose of cultivating a family, and it is neither the Court's nor the City of East Cleveland's place to determine the way in which that is done. (*Moore,* 1977)

There are two notable standards established by the Moore decision. First, the Court's use of the Due Process Clause represented a noticeable shift towards recognizing the intrinsic benefits of meaningful personal relationships between individuals, instead of relying on the privacy necessary in cultivating these relationship. While this may appear to be a minute distinction, a clearer understanding about the importance of these relationship purely in their own right demonstrated their importance and their need to be protected in a much stronger way. Recognizing the relationship's importance for their own sake is preferred over trying to faultily fit them under a privacy jurisprudence, especially because the right to privacy does not apply to all substantial restrictions upon marriage or family.[61] This distinction made it clear that these intensely personal relationships are valued and protected for their own value as a form of liberty of all individuals.

Moore also helped shape what became the right to intimate association through its recognition of personal relationships afforded through extended families. While not monolithic in its approach, (*Meyer v. Nebraska,* 1923)[62] the Court had previously focused its liberty

[61] The questions posed by *Moore* show how privacy does not necessarily cover all infringements on the liberty in forming meaningful relationships with other in the confines of family and marriage. The case dealt with whether the City of East Cleveland could restrict cohabitation to nuclear families. The decision on how and who to live with may be personal. However, the actual cohabitation is not a private existence. It is known through census reports and establishment of one's home mailing address, both of which are public records. As such, it can be convincingly argued that there is no privacy restriction, but there is a liberty restriction upon the right to live with the family as one so defines. The Court rightly made this distinction between privacy and liberty in such relationships and established a clear precedent for the future that marriage and familial relationships were valued in and of themselves, not just as a form of privacy that is protected.

[62] Other examples of cases that recognized some rights of the family include *Pierce v. Society of Sisters*, and *Yoder v. Wisconsin*

protections of such associations on the bonds and benefits afforded by marriage. (*Loving*, 1967)[63] The recognition of the importance of relationships outside the confines of marriage expanded the Court's view on intimate associations. It was not that marriage is uniquely capable of providing a form of liberty that needed protection, but rather that marriage gave a strong example of this liberty. This difference, and the Court's recognition of this difference, demonstrated a proclivity and openness towards accepting close, personal relationships as forms of liberty, with less regard for the form that these associations take. The concern was on the benefits these relationships conferred to individuals.

While highly notable, the aforementioned cases are not the only ones that laid the groundwork for the Court's decision to recognize the right to intimate association in *Roberts.* There are several more cases that found intrinsic value in the existence of intimate associations.[64] What is significant is how the foundation for the right to intimate association was so prevalently applied to a whole range of cases dealing with distinctly separate constitutional issues. The importance of this unestablished right was central to the Court's holdings granting contraceptive rights to all, (*Eisenstadt v. Baird*, 1972) the right to sit-in to challenge racial segregation, (*Bell v. Maryland*, 1964) and the right to have parental access and guidance to one's child born out of wedlock. (*Stanley v. Illinois*, 1972) These cases were also varied in the constitutional questions they posed, challenging and clarifying the understanding of the First, Fourth, Fifth, Ninth, and 14th Amendments. The main takeaway from the diversity in cases that employed the rhetorical and argumentative force of arguing for the right to intimate association is that the right has been

[63] See also *Griswold*, *Zablocki*, and *Ullman*,

[64] Some additional examples include *Eisenstadt v. Baird*, which gave unmarried couples access to contraception; *Doe v. Bolton*, which extended abortion rights to married couples; *Bell v. Maryland*, which found sit-ins to protest racial segregation to be constitutional under the First Amendment; and *NAACP v. Alabama*, which found that the NAACP was not required to publicized its list of membership.

central to the facilitation of many other rights. (Linder 1984, 1887) Its importance is evidenced through the many cases decided on other issues that used the importance of intimate association as reason to uphold other rights. This shows that the intimate association has its own intrinsic value that needed formal recognition.

Formal Recognition: The Court Defines the Right to Intimate Association

As the purpose of intimate associations became more elucidated over the course of the 20th century, both in the courts and in academia[65], the Court formally recognized and articulated the right to intimate association in the groundbreaking case *Roberts v. United States Jaycees.* The case challenged whether the United States Jaycees[66] had the right to exclude women from its membership. A national civic organization, the Jaycees' expressed purpose, according to its bylaws, is to promote and foster the growth of Americanism and civic interest and provide its members with an avenue for intelligent participation in the affairs of their community, state, and nation, and to cultivate friendships with others sharing similar ideals. (*Roberts*) Additionally, the Jaycees restricted their memberships to only men, and justified this discrimination as necessary to achieve the purposes of the organization. However, the Minneapolis/St. Paul chapter began allowing women into the Jaycees, thus violating the national ban on female participation. As a result, the chapter had its charter revoked by the national office, prompting the litigation that eventually led up to the Supreme Court's decision. The question faced by the Court was whether the associational rights of the Jaycees outweighed the state of Minnesota's interest in upholding its Human Rights Act, which states that no place of public accommodation can discriminate on

[65] See Karst (1980), David Richards (Constitutional Legitimacy and Constitutional Privacy, 1986) , Rice (1962), Fellman (1963)

[66] Throughout the course of the chapter, the United States Jaycees may be referred to as such, or as "U.S. Jaycees", or simply "Jaycees"

the basis of, among other characteristics, gender. (*Roberts,* 1984)[67] Writing for a 6-3 majority, Justice William Brennan held that the United States Jaycees were not permitted to restrict women from membership, employing a newly-devised metric to better weigh the competing interests of associations and the state that made the precedent so fundamental in future cases.

In their briefs to the Court, the Jaycees contended that restricting membership to only men was protected under their First Amendment rights to speech and association as articulated in *NAACP v. Alabama,* which had stated that the right to association was a facilitative right that was essential to allowing individuals the ability to actualize their First Amendment rights to the freedoms of speech and assembly.(*NAACP v. Alabama,* 1958) While the precedent of *NAACP v. Alabama* would appear to be sufficient for coming to a conclusion about whether the associational rights of the Jaycees merited their exclusion of women, the Court took the opportunity to explain exactly which associations were protected.

Instead of accepting a broad right to association to reflect all human interactions, the Court clarified the scope of associational rights by diving the right into two distinct types: intimate and expressive association. The fundamental difference between the two is the value that each type has for individuals. Brennan defined expressive associations by saying that the Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (*Roberts,* 1984) Finding that the right to expressive association was necessary to recognize its facilitative nature in exercising the enumerated rights to speech and assembly, the Court determined that the right to

[67] It is a point of contention as to whether or not the Jaycees are considered a private or public organization, and as such, whether that requires them to abide by the Minnesota Human Rights Act, or whether they have greater latitude in determining the associational purposes endowed to private groups.

expressive association was inherent to the First Amendment. The Court then stated that given the state's compelling purpose in protecting against gender discrimination, the organization must show why the restriction upon women is a central purpose to the association's existence. (*Roberts,* 1984) This metric was utilized in order to determine whether or not the discrimination is central to the group's existence. If a group exists to exercise their First Amendment rights to hate other individuals on the basis of some characteristic, then the government is not within its powers in suppressing that voice and association because this would effectively amount to censorship. However, if a group's purpose can be blind to personal characteristics and still exist without fundamental harm to the association, then the discrimination against individual based on some arbitrary characteristic is not justified. In the case of the Jaycees, the purposes of promoting civic engagement for citizens ages 18-35 was not mutually exclusive to men. As such, the discrimination was an unjustified exclusion that was irrelevant to the actual purposes of the organization, which then made the state's interests outweigh the association's purpose in upholding a restriction of women.

The second, and more important, form of association the Court delineated in Roberts was the right to intimate association. Unlike expressive association, which finds its constitutional roots in the First Amendment, the Court found this form of associational right as essential to personal liberty covered by Substantive Due Process of the 14th Amendment. (*Roberts,* 1984) The Court recognized that there are elements of the two types of association that may coincide. However, they decided to separate the two forms for two purposes: to better understand the role of the United States Jaycees as either an intimate or expressive association, and to establish a clear, binding precedent articulating the importance of two separate rights that are essential to upholding existing enumerated rights. The intention of the Bill of Rights was to protect

individual liberty from the power of the government. (Rakove 1985) The Court determined that the intimate associations individuals form help foster and sustain that liberty by providing, among other benefits, emotional enrichment, a clearer understanding of one's own identity, and diversity of ideals and thought.

Brennan then goes on to provide an archetype of the ideal intimate relationship: the family. Stating that it is these relationships that exemplify the benefits conferred through this form of association, Brennan cites the intimate nature of the family and the many fundamental decisions made through these associations as proof of the need for judicial recognition of this form of liberty. (*Roberts,* 1984) Families, according to Brennan, "involve deep attachment and commitments to the necessarily few individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life." The importance of these relationships manifest themselves in both theoretical ways (the cultivation of ideas and identity) and in practical decision-making processes exclusive to the family (the decision to have children(*Skinner v. Oklahoma* 1942*; Carey v. Population Services International,* 1977), raising of children (*Smith v. Organization of Foster Families,* 1977), and cohabitation with relatives (*Moore,* 1977), among other decisions linked to family relationships).

In order to determine whether or not a relationship between persons is considered to be an intimate association, the Court must consider only the factors of size, selectivity, purpose, policies, and congeniality, and any other relevant characteristics as determined by the court presiding in future cases regarding questions on the scope of this right.. The purpose of having such factors is to better understand what genuinely is to be considered an intimate association. Again, the Court references the family to illustrate these factors. The family is distinguished by relative smallness, a high degree of selectivity, and seclusion from others in critical decision

making. (*Roberts*, 1984) While these qualifications could appear to be arbitrary, they actually highlight the inherent value in recognizing intimate associations. The selectivity, or choice, in who one forms these relationships with is an element of the liberty endowed by the 14th Amendment. This choice is essential to cultivating meaningful associations, as the ability to trust and grow is dependent on the willingness to open up to another individual.(Karst 1980, 633)

The size of the relationship also indicates its intimacy**.** Pragmatically speaking, the benefits that are fulfilled through intimate associations (personal growth, sharing of ideals, child rearing[68]) would be increasingly difficult to realize as the size of the intimate associations grew. For instance, it would be difficult to claim that the relationships between all employees in a corporation would be classified as intimate associations, as the bonds between the individuals within one company would most likely not be considered intimate due to lack of choice in who one's coworkers are along with a lack of opportunity for all within a company to come together as one intimate association. However, a deep friendship or relationship fostered by way of shared employment could be considered an intimate association.

As determined in earlier cases, any rights found to be essential to liberty are placed under strict scrutiny, in that the government must have a compelling purpose and it must be the least restrictive means to accomplishing that aim in order to infringe upon the right. (*Griswold*, 1965)[69] The right to intimate association is rooted in the liberty component of substantive due process, meaning that any infringements on this right must be weighed under the scale of strict scrutiny.[70]

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[68] In the case of marriage or family, which the court has already is the archetype for protected intimate associations.
[69] This precedent was reaffirmed in *Zablocki* (1976), *Memorial Hospital v. Maricopa County* (1974), and *Carey v. Population Services International* (1977)
[70] It is here that there could be potentially some confusion about what I am advocating for. In chapters Two and Three, I provided a detailed critique of the way in which Equal Protection precedence has been established. In short,

Additionally, what is notable about the *Roberts* decision is the emphasis placed on the importance of this right for its own sake. There is little analysis that the right to intimate association only is endowed to a select few, or endowed to those who cultivate specific types of intimate associations. All Brennan does in this opinion is establish that there is a right to intimate association found as essential to exercising the liberty, and illustrate the basic structure of the form that these associations could take. There is no mention of appealing to historical norms or traditionally-protected relationships. This is notable, as future courts begin to try to redefine the right to reflect appeals to historical norms and traditions as necessary to guaranteeing this form of liberty to individuals.

Questioning the Scope of the Roberts Decision

In the 30 years since *Roberts* was decided and the right to intimate association was formally recognized as protected through Substantive Due Process under the 14th Amendment, the Court has not been faced with many cases forcing them to further clarify or limit the understanding of the right. One tension that has arisen, however, is whether intimate associations are only protected if they are a relationship this is rooted in the traditions, culture, and morals of

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the way in which the tiers of scrutiny are employed is highly problematic. This analysis could lead many to believe that I am against the use of the tiers of scrutiny in weighing rights claims. However, the problem I have with Equal Protection jurisprudence is not that the tiers of scrutiny are used. It is the way that they are used for the Amendment. Individuals' equal rights claims are adjudicated based on the characteristics of one's identity, thereby separating everyone into categorized groups and weighing whether certain groups are deserving of equal rights or if they are not. This separation is perpetuated by attributing an assigned tier to different minority groups (e.g. strict scrutiny for race, intermediate scrutiny for gender). In this system, the tiers are not the problem. The way the tiers are used is the problem. When looking at the ways the tiers operate for their own sake, they provide a weighing mechanism that clearly establish the burden upon the government in order to justify why a right can be infringed. This shows the importance of the right and compares it to the importance of the government's purpose. The primary difference between the tiers of scrutiny for Substantive Due Process claims and Equal Protection claims is that the right is being endowed to everyone, not a select few based on capricious characterizations. As such, there is much less subjectivity and arbitrariness as to who gets enhanced judicial protection, as everyone is ensured the exact same protection of the right, given that rights are endowed to all unless there is some extenuating circumstance (e.g. imprisonment).

the nation and its history. This question was broached in *FW/PBS, Inc. v. City of Dallas* in 1989, only five years after *Roberts* was decided. In a case that was primarily focused upon whether the First Amendment allows the distribution of pornography, the Court weighed whether an individual's right to intimate association was being violated by disallowing hotel to rent rooms at hourly rates, which are typically purchased for brief sexual activity. In a comprehensive bill aimed at protecting the morals of the community, the City of Dallas barred hotels from offering rooms for ten hours or less, claiming that such rates promote non-procreative sexual conduct and prostitution. The petitioners claimed that this provision of the bill infringed on the right to intimate association, asserting that the right to engage in sexual activity with a partner of one's choosing fit under the model of an intimate association laid out in *Roberts.* (*FW/PBS,* 1989)

Unfortunately for the petitioners, the Court did not agree with their stated position. While the Court reiterated the need for recognition of the right to intimate association as an essential form of liberty, they claimed that the sexual relationship between individuals consummated in hotel rooms are not a protected form of intimate association. (*FW/PBS,* 1989) Such sexual conduct is not the sort of relationship that has traditionally conferred the benefits of intimate association that allowed the right to be recognized in the first place. The *FW/PBS* decision created a schism in how intimate association should be understood. Does the right encompass non-traditional relationships, as suggested in *Roberts*, or is it limited only to associations commonly rooted and viewed as essential to the cultural and moral fabrics of our society? (Marcus 2006, 287)

This question was highlighted again in *Bowers v. Hardwick*, in which the Court upheld bans on sodomy committed by individuals of the same gender. While the Court was not as explicit in recognizing the importance of the right to intimate association as they would be in

FW/PBS, they decline to recognize the relationships of those partaking in same-sex sexual conduct as constitutionally protected, finding that there is no element of gay sex that is essential to the liberty of the 14th Amendment. (*Bowers*, 1986) The majority justified this view by saying that homosexual sodomy has no root in the traditions or commonly accepted beliefs of the country. Given that there was no lasting expectation that individuals should have the right to engage in these actions, there could then be no claim that such conduct is essential to liberty, because it had never been widely considered essential prior to the previous few decades. If it is not rooted in history, then it is not an everlasting principle that simply hadn't gotten judicial recognition. (*Bowers*, 1986)

The dissent in *Bowers* lamented the Court's holding, finding that they had not grappled in any way with the right to intimate association, only concerning themselves with the question of if there is a fundamental right to sodomy. The dissent, written by Justice Harry Blackmun, reaffirmed *Roberts* in saying that the right to intimate association is indeed essential to liberty, and it is not the state's role to determine what forms those associations may take. (*Bowers*, 1986) Even when appealing to history, Blackmun claimed that protection of these associations fits within the national ethos that the majority claims they are rooting their decision in. He held that the liberty of individuals to form their own relationships has always been valued by our country, and that the autonomy to choose is one of the bases of our nation's existence. Furthermore, he says that the fact that these relationships are non-traditional is actually reason that they should be protected, not restricted. (*Bowers,* 1986) Non-traditional relationships, such as romantic relationships between individuals of the same sex, foster diversity throughout society. Diversity

of views, demographics, and identities, are protected through the Bill of Rights and is celebrated as one of the unique qualities of American culture.[71]

Only 17 years later, the Court explicitly overturned *Bowers* in *Lawrence v. Texas,* finding that the choice of individuals to partake in sodomy was protection under the right to privacy that is intrinsic to the liberty protected under Substantive Due Process. (*Lawrence,* 2003) Less notably, Lawrence also clarifies the question of whether only traditional relationships were protected intimate associations. The ruling signaled a willingness of the Court to defer to the right to autonomy of individuals to choose their own relationships, as opposed to allowing the government to define which relationships were permissible based on commonly-held tradition. (*Lawrence,* 2003) The Court takes two approaches to repudiate the *FW/PBS* standard. They state that there is no one clear way to understanding history and tradition, and that the state should not be defining the relationships people can and cannot have. In trying to homosexual sodomy, the state argued that individuals partaking in sodomy were acting against widely accepted morals. The Court rejects this claim, however, saying that history is being distorted to fit the views of the petitioner, not the other way around. When analyzing the enacted laws during the late 18th century, when the United States gained its independence, there were no laws distinctly targeting gays. Rather, it targeted all sodomy between any adults, regardless of the genders of the participants.[72] The beginning of anti-gay legislation and law enforcement began in the mid 20th century, which would certainly not be representative of a commonly held belief rooted in our nation's ethos. This example illustrates the majority's point that in determining whether a right is

[71] Among others, the First Amendment clearly seeks to promote differing views and lifestyles to allow for all to cultivate their own chosen identity and prevent a monolithic conglomeration understanding of culture.

[72] There are some who argue that homosexual sodomy would not have been conscribed into law because it was seen as so abhorrent that it was obvious that it would not need to be codified. However, to the point in which such extrapolations are continuously drawn to support theses on the morals of the country, it only shows the difficulty in relying on historical morals and traditions as an objective measure of whether rights should be protected.

fundamental to all individuals, the history is simply not conducive or extensive enough to justify whether a right can or cannot be proscribed.

The Court frequently seeks to distance itself from relying on historical ethos arguments in rights analysis. But even if the history was clear enough to definitively dictate whether a form of relationship is morally rooted in the country's ethics, the government does not even necessarily have the right to restrict non-traditional relationships. The majority claims that the government does not have such a strong interest in defining the deeply personal relationships of private, consenting citizens. The interests of the Court are "to define the liberty of all, not to mandate our own moral code." Given that the sexual relationships of consenting individuals are a private matter, and therefore protected by the substantive due process right to privacy, the obligation of the Court is to determine how that right can be best protected, so long as there is no countervailing right that would allow for restriction of the original right. With the only opposing interest in *Lawrence* an appeal to tradition, which the majority was skeptical of, the opinions of each individual justice were of no concern in deciding whether non-traditional intimate associations should be protected found that their opinions of the private relationships were of no concern.

What is key to recognize about the *Lawrence* decision is the how they found non-procreative sexual relations to exist as a right under Substantive Due Process**.** They did not say that the government's ban was infringing on the liberty central to intimate associations. Rather, they found that the law violated privacy rights in choosing and actualizing sexual desires with another individual. (*Lawrence,* 2003) Considering not all sexual actions are allowed, namely that individuals are not allowed to have sex or any like conduct in public, the private setting in which

many choose to have these relations reduces the interests of the government because of the interests in protecting privacy rights.

Although the Court did not explicitly call upon *Roberts* to decide *Lawrence*, the past intersectionality of the privacy and intimate association arguments, along with their shared constitutional justification of Substantive Due Process, provide a common argumentative basis. The justification for the Court's decision in *Lawrence* may not specifically call upon the right to intimate association, yet much of the same precedents can be applied as support for both an argument for right to intimate association and right to privacy. Much of *Roberts* was based off of the privacy determinations made in *Poe*, *Griswold*, and *Roe*, among other cases, and many cases justified by privacy after *Roberts* were decided upon analysis given by the Court in *Roberts*.[73] The exact same approach to understanding *Roberts* can be applied to the understanding of intimate associations implicit in the *Lawrence* decision.

Other Instances of Right to Intimate Association After Roberts

Outside of the questions about the role of morality and tradition in granting intimate associational rights protection, the Court has been faced with other quandaries regarding the scope of the right to intimate association. While the Supreme Court has not decided many cases since *Roberts* that directly clarify the definition of the right, that does not mean lower courts have not been posed with shaping the right in certain ways. Since *Roberts*, many have claimed that their association be protected under Substantive Due Process as an intimate one, with varying degrees of success. There has also been dispute as to whether all restrictions of intimate association are adjudicated under strict scrutiny, or if there are some infringements on

[73] Examples *include Planned Parenthood v. Casey* (1992), *Washington v. Glucksberg* (1997), *Cruzan by Cruzan v. Director, Missouri Dept. of Health* (1990)

relationships that could be interpreted as intimate associations that are not entitled to strict scrutiny. (*Akers v. McGinnis*, 2003)

In the *Roberts* majority opinion, Justice Brennan suggested that there could be a sliding scale in determining both the level of intimacy in a relationship and the importance that relationship has for an individual. (*Roberts,* 2003) While the courts have not adopted a clear sliding scale, they have continued to use the example of the romantic and family relationship as the archetypical intimate association. (*Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 1987) In conjunction with this, courts have also relied on the parameters established by Brennan in the *Roberts* opinion of size, selectivity, and purpose, to best understand the essence of an intimate association.

Utilizing these factors, different courts have characterized other relationships as intimate associations essential to liberty. There have been many cases that protect the relationships of the family that extend outside the bounds of the immediate nuclear unit. (*Parham v. J.R.*, 1979) The bonds of foster children with their foster parents are considered to be intimate associations, even though the children are not legally considered to be permanent dependants or members of the parents' family.(*Smith v. Organization of Foster Families,* 1977) The relationship between an aunt and her niece was protected as an intimate association. (*Prince v. Massachusetts,* 1944) The right to divorce one's partner is also protected as a decision under the liberty needed to create intimate associations. (*Boddie v. Connecticut,* 1971) The realm of intimate association goes so far to even include protection from prosecution of marital rape, as the bind shared between those

married outweighs the government interest in prosecuting sexual assault. (Dworkin 1988, 165-67)[74]

Outside of the family, the Court has also recognized other forms of intimate association. The bonds of close friendship have been continuously protected, as they confer many of the same benefits about cultivating one's identity, exercising one's autonomy in choosing relationships, and trusting another individual in profound ways similar to the bonds of family.(*Corrigan v. City of Newaygo,*1995) Fraternities and sororities are also considered to be intimate associations, as they function in relative seclusion and maintain a level of exclusivity that allows bonds to be fostered that have inherent meaning to the individual in a similar way that other protected intimate associations do. (*Chi Iota of Alpha Epsilon Pi Fraternity v. City University of New York* , 2007) Prisoners, even though they have forfeited many of their rights by committing crimes, have their right to be visited by family members protected under the right to intimate association. (*Overton v. Bazzetta*, 2003) To be clear, I am not necessarily endorsing that all of these associations be considered intimate and essential to the liberty of Substantive Due Process. My point in illustrating the different types of associations is to show how the Courts have applied this line of precedence to a wide range of relationships, which can then be used to show how same sex relationships can also be covered.

The tier of scrutiny applied to intimate associations has also been in a minor state of flux. The courts have ruled that not all relationships that could be construed as intimate are worthy of the protection of strict scrutiny. In *Akers v. McGinnis*, the Sixth Circuit held that relationships

[74] While this is a highly controversial notion, and one that many persons would find morally reprehensive and many Courts would seek to repudiate, my choice to include this form of protected intimate association is to show the breadth of relationships and privileges within those relationships that the Court protects. In Chapter Five, I will compare the government interests in preventing the actualization of gay relationships to the government interests in not being able to prosecute rape, given this example, to elucidate the breadth of what is considered an intimate association.

that are intrinsically intimate, such as marriage, are not always protected by strict scrutiny. In this case, the court was asked if a policy of the Michigan Department of Corrections that barred employees from any non work-related conduct with the prisoners being held in the corrections facility infringed upon the employees' or prisoners' right to intimate association. The plaintiffs claimed their rights to privacy and intimate association were being violated. However the court was not compelled by their claims.(*Akers*, 2003) The reasoning behind this decision is highly noteworthy. First, the court reaffirmed that intimate associations are a form of liberty protected under the 14th Amendment. Yet they also stated that not all intimate associations are protected by strict scrutiny, and that the impact upon the right must pose a substantial harm or potential harm to a large number of people in order to trigger strict scrutiny protection. In this case, the right to intimate association only applied to employees of the prison and the prisoners. The Sixth Circuit found that the restrictions upon these individuals' right to intimate association was not so fundamentally restrictive that it required such strong protection, because the relationships between employees and prisoners were not so important, and this policy did not restrict anyone outside of the prison. The restriction also only limited the individuals affected in a marginal way, as there were many other people in both employees and prisoners lives' to form intimate associations with. Strict scrutiny was reserved for cases in which a large subset of the population is affected by some restriction. This case did not apply to that necessary large subset. As such, the Court determined that rational basis review was appropriate for adjudicating this case. Under this metric, the state was found to have a rational basis for preventing non work-related contact between corrections facility employees and prisoners.

While the *Akers* rationale may appear flawed, it has been upheld by other Courts, and remains a rather strong precedent in adjudicating intimate association claims. The Sixth Circuit

found in *Anderson v. City of Lavergne* that police officers of different ranks were not allowed to be in a relationship while both were employed at the same precinct. They were given the option of one being transferred to another precinct within the district. (*Anderson,* 2004)The court stated that this imposition did not amount to a categorical infringement upon their 14th Amendment rights, and was therefore adjudicated under rational basis review and the ban on inter-office relationships was upheld. Cases that dealt with issues of intimate association infringement of small magnitude were decided similarly, thus proving the strength of the *Akers* standard. (*Vaughn v. Lawrenceburg Power System,* 2001)

Finally, I would be remiss if I did not discuss two of the biggest right to association cases regarding gays in the past twenty years. In 2000 and 1995, respectively, the Court decided in *Boy Scouts of America v. Dale* and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* that expressive associations were allowed to ban participation and inclusion of gays if their central purpose was based around disapproval of gays. The Court found in both cases that the government could not force associations protected by the First Amendment to include individuals that went against the fundamental beliefs of the associations, as that would effectively be censorship. (*Dale,* 2000; *Hurley,* 1995) Stating that as long as the central purpose of the association was disapproval of gays, such exclusion was allowed. However, if the discrimination was secondary and not fundamental to the speech being advocated for through the association, then the bans would not be permitted. In both of these cases, the Court held that the central purposes of the expressive association in question did indeed seek to discriminate against gays, thereby permitting continued discrimination. (*Dale,* 2000; *Hurley,* 1995)

While these were seen as large blows for gay rights, they actually served to strengthen associational rights and limit government involvement in associational formation. Although

these cases dealt at expressive associations instead of intimate association, the notion that the association's right to define its own membership outweighs the government's interests in dictating that membership has positive implications for intimate association, as the logic could be applied to the formation of intimate associations. With the strengthening of associational rights, the limits upon the government are also subsequently strengthened, thus making it more difficult for the government to infringe upon the right to association.

Chapter Five – The Rights of Those in Same-Sex Relationships

In the previous chapter, I discussed the history and development of the right to intimate association, found under substantive due process of the 14th Amendment. It is this right within the 14th Amendment that I believe best represents the most sound and reasonable constitutional claims for those who are restricted based on their choice to form same-sex relationships. It is this line of precedent that most properly reflects the constitutional claim that restrictions upon those who engage in same-sex relationships are unconstitutional. As an alternative to Equal Protection, I believe that the relationships between two individuals of the same gender ought to be considered an intimate association under the 14th Amendment. The right to intimate association does not characterize people by any labels or imposed identities. It instead recognizes the nature of certain relationships between people and weighs whether those relationships are worthy of protection. Given the precedence and the purposes for protecting intimate associations, it is my belief that same-sex romantic relationships should be considered intimate associations protected under the Due Process Clause. This then establishes the right to engage in these relationships as a fundamental right, entitling individuals to the protections that come along as such.

Before explaining the unconstitutionality of restrictions upon those engaging in same-sex relationships, it is important to properly identify to whom this right extends. Over the past half-century, with particular emphasis on the past 10 years, there has been a large groundswell in support for gay rights on the whole.[75] One of the goals of gay rights activists has been to try to

[75] Gallup has tracked the public opinion on gay rights over the last 30 years. With regard to whether or not homosexual sexual conduct should be legal, 64% of respondents in 2013 believe it should be, compared to only 31% who believe it should be illegal. This represents a 21-point increase since 1977, when support for legalization of homosexual conduct was only at 43%, and fell to its low of 32% in 1986, the year the Court decided that Georgia's ban on sodomy was constitutional in *Bowers v. Hardwick*. With regard to same-sex marriage, only 27% of respondents believed same-sex marriage should be recognized in 1996, compared to 68% who believed there should be no formal recognition for gay couples. Those numbers look dramatically different now, as a majority of citizens

achieve equality and proper recognition of same-sex relationships by the government and by society.[76] The means to achieve these goals have ranged from challenging discriminatory laws through the court system , to political influence, to spreading a unified message through media. As a movement, those in support of gay rights have mobilized and changed mass public opinion in unprecedented ways.[77]

Central to the discourse around gay rights has been the debate about the source and manifestation of homosexuality in individuals. One of the most common questions has been the source of homosexuality and whether it is immutable or chosen by the individual. Additionally, there a large amounts of conversation about whether one's orientation is fixed, or if it is fluid and ever-changing over the course of a person's life.[78] Many believe that homosexuality is immutable and as such should be reflected in the Court's understanding of sexual orientation, (Balog 2005, 548) while others claim that because there is no conclusive scientific evidence that proves immutability, along with individuals who claim that their sexual preference is fluid, the Court should not recognize this factor. Along with this debate is the role of one's orientation in forming their personal sense of identity. For many, one's sexual orientation can be a defining

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believe same-sex couples should have their relationship recognized (54%), compared to only 43% in opposition. (Gallop 2014). This trend in greater support is more obvious over the past ten years, as support for marriage equality was only at 33% of citizens, a 21-point differential. (Pew Research 2014)

[76] One method to determine the goals of the gay rights movement is to look to the mission statements of prominent gay rights organizations. The Human Rights Campaign, which is the largest LGBT rights organization in the country, states that their mission is to "end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all." (HRC, 2013) GLAAD (formerly the Gay and Lesbian Alliance Against Discrimination) holds their purpose to "promote understanding, increase acceptance, and advance equality." (GLAAD, 2014) Because of their influence and large representation of LGBT persons, they serve as a strong basis to understanding the goals of the gay rights movement on the whole.

[77] In addition to the commentary in footnote 1, the percentage of respondents who responded with no opinion has steadily and consistently decreased, signifying the wider education of more people on gay issues. Even if some of those individuals who would have said no opinion later stood in opposition to gay rights, the fact that more have an opinion signals that there is a greater public consciousness of gay issues, which is essential to either attract new supporters or change the views of those opposed. (Gallop, 2014)

[78] This is argued through academia and national media. See Halley (1994), Balog (2005), Ambrosino (2014), and Michelson (2014)

quality in shaping their identity of themselves. (Nurius 1983, 128) As we've seen the Court articulate, one's identity and the cultivation of this identity is an essential aspect of what makes us human. (*Lawrence v. Texas*, 2003) For others, however, orientation is simply a stated fact about oneself that was outside of their control, similar to that of their race or gender. As such, this does not define that individual any more than the aspects of oneself that are consciously chosen by that individual, such as their interests or profession. (Nurius 1983, 124)

These conversations among the gay community and throughout society on the whole are greatly beneficial to the gay rights movement. They have an impact both in greater awareness and acceptance of sexualities outside of heterosexuality. For the right to intimate association, however, these distinctions and understandings about sexuality are irrelevant. Under the approach that I advocate for, it is not relevant whether an individual chooses to identifies as gay, or whether or not one's sexuality is immutable. It also does not matter if an individual's sexuality may change 20 years from now. All that is relevant is if a same-sex relationships exists at some point in time, and whether or not these same-sex relationships should be protected under the right to intimate association. If that relationship is not recognized simply due to the genders of the individuals. This constitutional theory is not meant to protect just those who identify as gay. Rather, the right to intimate association is a right that is extended to all, and all ought have the opportunity to actualize this right.

This clarification is important because it contrasts the Equal Protection argument. There are many rights that are not intended for all to use and call upon. However, what is important is that all have the opportunity and ability to have their rights protected, even if one is not actively employing in their daily lives. The potential for infringement signals the need to recognize all rights for all individuals. One prime example of rights extended to all that may not apply to all is

the free exercise of religion. In *Sherbert v. Verner*, the Court said that the State could not withhold unemployment benefits because of an individual's unwillingness to work on Saturdays because of her beliefs as a member of the Seventh Day Adventist Church, the religion of her choosing. (*Sherbert v. Verner*, 1942) While a very small subsection of the population practices as Seventh Day Adventists, the right to free exercise of religion is extended to all, regardless of religion. An individual's practice of religion may not be infringed in one moment, but there is the potential for it to be infringed in the future. This principle is further elucidated through the understanding of identity and religion. One cannot be discriminated on the basis of their religion, even if they do not actively practice. This example parallels the right to intimate association in protecting same-sex relationships. Not all citizens will partake in these relationships. However, the right is extended to all, regardless of the way that one self-identifies.

Given that this right applies to all, it is important to understand how this right will be extended. What I will do over the course of this chapter, is argue that same-sex relationships fit the parameters of an intimate association established by the Court. The purposes and composition, among other features, of same-sex relationships align with the necessary qualifications the Court has previously articulated. Over the course of this chapter, I will articulate how same-sex relationships fit within the Court's precedents, and how the application of the right to intimate association when applied to individuals in same-sex relationships withstands any countervailing challenges.

Same-sex Relationships as Intimate Association Essential to Liberty

As I explained in Chapter Four, the right to intimate association is valued for many reasons. It is through intimate associations that we enjoy the company of others, fulfill a necessary psychological need to interact with others, (Karst 1980, 627) grow through

conversation, experience romantic and sexual intimacy, and develop our own emotional intelligence in more profound ways, among many other benefits. (Rice 1962) The association is valued for more than just its individual members. The actual relationship is valued, because the benefits would not be conferred if it were not for the existence of that relationship. Intimate associations are also valued for the autonomy inherent to their formation. In order to enter an intimate association, one must consciously choose to develop bonds with another individual or group of individuals. An individual's choice to trust and develop a relationship with a person of their choosing is that much more powerful than any relationship forced on an individual, as the value of intimate associations comes from the choice to enter into one with another person, or group of people. (Karst 1980, 630)

Before I explain how such relationships fit into this established framework, it is important to understand the nature of same-sex relationships. In short, same-sex romantic relationships function in highly similar ways to opposite sex relationships. Those in same-sex relationships make life commitments to each other (and marry if their state of residence has recognized their union), they raise children together, reside together, share financial commitments, and make important life decisions as a unit. However, not all same-sex relationships require such a deep commitment. Same-sex relations can be purely of a sexual nature, resulting in satisfying sexual desires with another individual similar to that of opposite-sex relationships of like form. Overall, the manifestation of same-sex relationships does not differ fundamentally from the more well-known and culturally accepted opposite sex relationships.[79]

[79] I recognize that there is a large debate over whether same-sex relationships are actually similar to opposite sex relationships, with many who seek out same-sex relationships wanting to distance their associations from the puritanical rigidity of opposite sex relations. Many argue that aspects of lifelong commitment, such as monogamy, are inherently unhealthy and unreasonable to expect out of individuals. (Ghaziani 2011) As such, many see same-sex relationships as an opportunity to show different forms of love and commitment outside of society's

Inherent to the practical manifestations of the relationship are the intrinsic goods that are essential to that relationship. At the foundation of these associations are the qualities that apply to all intimate associations. Relationships between individuals of the same-sex in a romantic way allow for those a part of the relationship to establish a deep connection with another individual, and build a unique level of trust with that person. They allow for a greater realization of one's own identity, through deeper conversation and the resulting self-worth that comes from feeling loved and reciprocating that same love. Same-sex relationships are even more likely to allow one to develop their sense of self-identity and feel confident about that identity more than any other relationship, due to the historical and current societal animus directed at individuals partaking in such relationships. (Porche and Purvin 2008, 147) To love and trust an individual of the same gender in the face of widespread contempt, and to do so publicly, creates a sense of self that is more resilient, because the barriers to overcome in order to have that relationship are comparatively so much higher.

Furthermore, it is clear that entering into a same-sex relationships takes a strong will of choice and autonomy, which the Court has said is paramount to the existence of intimate associations. If somebody seeks out romantic relationships, and chooses to find those connections with somebody of the same-sex, they are exercising the liberty of choice that is essential to forming any intimate association. The choice about which gender one prefers may be biologically driven, or may be decided by the individual under their own exercise of their autonomy. Under this constitutional theory, this distinction is irrelevant and unnecessary. As

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expectations. (Michelson 2014) While this may be true, it does not take away from the fact that for many, their same-sex relationships are similar to many depictions of opposite sex relationships. The comparison is used to illustrate the nature of same-sex relationships, to give a clearer understanding about the dynamics and intimacy of the association.

long as an individual is exercising some choice in forming their intimate associations at the time of their conception, then the motivation for why they chose the individual they did is irrelevant in the eyes of the law.

In *Roberts,* the Court stated that in order to find a relationship between persons to be an intimate association, they must look to the size, purpose, selectivity, and congeniality of the relationship. (*Roberts*) As I've explained, the purposes of same-sex relationships clearly aligns with the objective that the Court has established. With regard to the selectivity, the choice that is exercised demonstrates the exclusivity and uniqueness of the relationship. That that choice is made in the face of societal vitriol only strengthens the resolve of the individual in making that choice. The congeniality is inherent to the choice being made. If both individual consent into the relationship, then they would be doing so in a congenial manner, as it is a relationship pursued and desired by both parties. Same-sex relationships also clearly fit within the constructs of the final factor: size. Relationships between two persons of different genders have always been recognized by the government. There is no difference between opposite-sex relationship and same-sex relationships in size, as the only fundamental difference between these couples is the genders of the individuals in the relationships.

In addition to the provisions established in *Roberts*, Brennan found that intimate associations exist on a spectrum, with some being more important and essential to liberty than others. The archetype of the most important association to protect is that of the family. (*Roberts*) This includes both the romantic relationship between two individuals and the familial relationships between parents, children, siblings and other relationships formed within the family structure. Relying on this archetype, Brennan claims that both the family and romantic

relationship allow "individuals [to] draw much of their emotional enrichment from close ties with others." The prevalence and meaningfulness of families and their benefits prove their importance to both the individual and society. (*Roberts*) Under this claim, the families that are created by two individuals of the same-sex confer all of the same benefits as families with opposite gendered parents and mates. Individuals in same-sex unions create the lasting ties between individuals in ways opposite sex couples do. They raise children. They experience life together in similar ways. The families and marital relationships of individuals of the same-sex are not fundamentally different in any way other than in the genders of those in the relationship, which is important because the genders should not be relevant if the purposes of the relationship align with the Court's precedents.

The claim that individuals in same-sex relationships should have their association protected due to the parallels to the Court-established archetype is even more substantiated when comparing it to other protected intimate associations. In keeping in line with Brennan's belief that there is a continuum of different forms of intimate association and variance as to their importance, (*Roberts*) the Court has found there are many types of intimate associations that range in their form and purpose. In *Moore v. City of East Cleveland*, the Court ruled that an extended family constituted an intimate association. (*Moore*) The Court has consistently stated that close friendships constitute an intimate association. (*Corrigan v. City of Newaygo,* 1995) Even fraternities and sororities, due to their selectivity, private nature, and positive effects that they have upon their members, are protected under this right under the 14th. (*Chi Iota Colony at Alpha Epsilon Pi Fraternity v. City University of New York*) When taking Brennan's analysis about how there is a hierarchy of protection of different forms of intimate association, what must be done is a comparison between same-sex romantic relationships and other protected forms.

Keeping in mind that the family is the archetype for protection, the association between two consenting same-sex adults in a romantic relationship would quite clearly be considered closer to the ideal than that of a close friendship or fraternity. By comparing these different forms of association, we can see how the associations formed by those in same-sex relationships would be considered more meaningful and therefore more worthy of protection given the Court's method of understanding intimate associations. With lesser forms of intimate association being afforded the full protections of substantive due process, the logical conclusion is that gay relationships[80] would then have to be afforded all of the same protections afforded to all intimate associations.

The Court has also emphasized that the recognition and protection of intimate associations should not be based on who the individuals are in the association. What is important is whether the association fulfills the Roberts requirements, which do not specify who the individuals can and cannot be in any way. (*Doe v. Doe,* 1973) In *Moore*, the Court specifically said that arbitrariness in deciding what constitutes an intimate association for an individual cannot be endorsed. It is not the Court's role to determine what relationships have meaning in a person's life. (*Moore*) As long as that relationship fulfills the requirements established in *Roberts*, then it ought to be recognized as an intimate association. The Court, in writing this, was referring to the existence of familial relationships and how they take many forms. They stated that the nuclear family is not the only form of family that should be protected. Rather, the extended family can serve the exact same purposes and have the same impact upon one's life as the immediate family does, (*Johnson v. City of Cincinnati,* 2002) and it is arbitrary and

[80] When I say "gay relationships", I want to be clear about its definition. While I understand that it could be interpreted in this way, I do not mean that it is a relationships predicated upon the identities of the individuals. Rather, I am using the term interchangeably with "same-sex relationship", meaning any romantic relationship between individuals of the same-sex. I employ this terminology merely to avoid constant repetition of "same-sex relationship".

unjustified for the Court to say that the nuclear family is the only form of familial relations that confer the intrinsic benefits of intimate association. (*Moore*) In applying this logic to gay relationships, it is arbitrary to say that only those in opposite gender relationships are cultivating intimate associations that are essential to one's liberty, but those in same gender relationships do not. This is the exact form of arbitrariness that the court is seeking to avoid, yet absent any recognition of same-sex couples as intimate associations, the Court is directly endorsing this subjectivity.

The Court articulated an additional purpose in avoiding arbitrariness when determining what should to be considered an intimate association under the 14th Amendment. In writing about how the family cannot be understood to just mean the nuclear family consisting of two parents and their legal children, the Court stated that this understanding of a family cannot be considered the "normal" or desired form of family because it does not reflect the diversity of society. Rather, it is an imposition of white, suburban ideals. (*Moore*) The Court does not want to take away from the associations formed in these relationships, but these norms should not be dictated as preferred by the Court, or the only family relations worthy of judicial protection. By holding the nuclear family dynamic as the preferred family structure, the Court would then be protecting a style of living that is reflective of only a small subset of a population that has been privileged above many others. The Court has the duty to recognize that meaningful family structure come in all different forms, and only recognizing the form of family that those with privilege have constructed does not reflect the duties of the Court, which is to adequately dispense rights to all, regardless of their place in society. (*Johnson*)

This logic correlates to gay relationships. It is not the Court's place to uphold certain forms of relationships simply because they are strongly rooted in society due to the power those

with privilege wield. Opposite sex relationships are strongly rooted in our society's history, and they have shaped much of our country's cultural attitudes about the formations of romantic relationships. However, given the *Moore* precedent, the Court is not concerned with merely upholding associations created by those with privilege. It is concerned with determining what is essential to liberty, and how the Court can best preserve what they deem to be essential to liberty. Denying same-sex relationships as a form of intimate association would be accepting the norms established by the majority, instead of searching for the mere existence of intimate associations and the benefits they confer. The Court has made it clear that the form of the relationship is not relevant, and that they should not only concern themselves with the forms of association merely because some associations have been normalized by populations of privilege. The source or tradition of association is irrelevant; the purposes, benefits, and links to liberty are what matter. And in the case of same-sex relationships, they clearly align as intimate associations, and the source of these relationships is not relevant to their existence and need for protection.

How to Adjudicate Such Cases

Having established that the relationships between members of the same gender should be considered intimate associations, it is imperative to understand what that means in terms of how cases involving infringement upon this right should be treated by the Court. Because this is a right found under substantive due process under the 14th Amendment, it would be designated a fundamental right. (*Roe v. Wade,* 1973; *Griswold*) As a fundamental right, it is protected by strict scrutiny, which in review means that in order to infringe on the right, the government must have a compelling reason to infringe and the means of achieving the compelling purpose must be narrowly tailored. (*Korematsu*) As explained in earlier chapters, this is the highest standard,

meaning it is the greatest form of protection of an individual right. The perceptions of strict scrutiny is that it is overwhelmingly protective of the individual's rights. The protections would be unprecedented for individuals in same-sex relationships , and would change the entire legal understanding of same-sex relationships in society.

Even though it has been well-established that rights found essential to liberty under the Due Process Clause are to be adjudicated under strict scrutiny, the Court has sometimes found that there are situations in which the right to intimate association can be infringed in a minor way. (*Zablocki*) This belief was broached in *Roberts,* when Justice Brennan wrote that if not all of the qualities are met to prove that some relationship is an intimate association, then lesser burdens can be imposed on the government in order to restrict the right. For situations when the right is not restricted in a fundamental way, the Court has determined that rational basis review ought to be applied. (*Roberts*) Articulated in *Akers v. McGinnis*, infringements upon the right to intimate association are only weighed under strict scrutiny if they affect a substantial portion of the population. Situations in which select individuals are being restricted, but the rules restricting them do not apply to a large subset of the populace, then rational basis review should be employed. (*Akers*)

It is my contention that if a right is fundamental to liberty, then the scope of the restriction upon the number affected should not be relevant. If there is an infringement to individual liberty, then the Court should recognize that infringement upon an individual for its own sake and the effect on that individual in that courtroom instead of weighing if it applies to a great number of people. However, given the *Akers* standard, the Court has and continues to make differentiations between restrictions upon intimate associations. Even with this standard in place, any restrictions upon relationships between individuals of the same sex should still be

adjudicated under strict scrutiny and could not be lowered to the more deferential tier of rational basis review. By not recognizing relationships between individuals of the same sex, it limits the possibility of developing meaningful romantic and family relationships by half of the available population, as they are limited to finding those connections with only members of the opposite sex. For those who identify as gay or lesbian, and prefer to find these relationships exclusively with persons of the same sex, this serves as a restriction that cannot be avoided, as they would not seek relationships with members of the opposite gender. As such, it is clear that even with the *Akers* standard in place, limitations on same-sex relationships constitute a substantial infringement on a large subset of the population.

The only way that a restriction on a gay relationship would be lowered to rational basis review is if the same restriction was placed on a straight relationship. Why is this? Because the *Akers* standard is blind to who the individuals are in an intimate association, and only recognizes the sum of its parts. The examples of allowed restrictions include preventing workplace disruption or maintaining productivity. (*Vaughn v. Lawrenceburg Power System*, 2001) Neither of these justifications, or many others, are exclusive to one type of couple. They instead are reflective of the effect that the existence of a relationship can have upon a workplace or other relevant setting. As such, rational basis review is used for instances in which it would be more productive for the workplace environment to transfer one employee to another department or branch within a company to maintain professionalism instead of having both members of a couple working together, as was the case in *Anderson v. City of Lavergne*. But if the harm being imposed on a relationship singled out those only in same-sex relationships, then they would unjustifiably be prioritizing the genders of the individuals in one relationship over another. When the relationships between opposite and same-sex couples act in highly similar ways, yet one type

is allowed while another is not, that should trigger strict scrutiny, because the marginalization of one's choices is more profound, due to their being limited based on their partner's gender.

Weighing Same-sex Couples' Right to Intimate Association against Competing Compelling Purposes

In advancing this alternative theory substantiating the constitutional rights of those in same-sex relationships, there are two prongs that must each be analytically satisfied. First, those in same-sex relationships must be proven to form intimate associations. As I have discussed at length throughout this chapter, gay relationships clearly fall within the Court's precedents as an intimate association that is deserving of strict scrutiny. The second prong relies on the first prong, that same-sex relationships are considered intimate associations. In order to determine whether same-sex relationships ought to be protected under strict scrutiny, the right must be weighed against competing governmental purposes, as is the case with all rights analysis. Simply establishing same-sex relationships as an intimate association under substantive due process does not guarantee judicial protection of the relationship. All it does is establish how the Court should understand same-sex relationships. In order to formally receive protection, it must be weighed against competing values, and determined whether or not the right is deemed more or less important than the given government purpose.

Because gay relationships have not been recognized as intimate associations, the courts have not had the opportunity to say whether the government purposes for restricting this right are compelling enough to outweigh the interests in protecting the liberty of the 14th Amendment. Even so, the arguments against gay rights employed in the more traditional Equal Protection cases apply to this constitutional approach. Primarily, the arguments against same-sex relationships are rooted in arguments about the national ethos, morals, and protection of

traditional values. Although the Court has taken into account the role of morals and national tradition in its decisions, these arguments are insufficient when weighed under strict scrutiny. They are not nearly compelling enough to outweigh a fundamental aspect of liberty such as the right to intimate association.

The argument that gay relationships should not be recognized and protected as an intimate association has been argued by claiming that such relationships are not deeply rooted in society. (*Doe v. Doe*, 1973) These relationships do not adequately reflect the long standing traditions of our country and have not been essential to persons throughout the country's history. Opposite sex marriage and its recognition has been the bedrock of organization of society at the micro level. (*Loving*) Persons interact with the world through their families, and it is these relationships that have established the nature of our society. What is key is that these families have taken the form of opposite sex relationships. While I, and many others, have claimed that this is an arbitrary distinction, there are many who argue that it is this familial relationships that is fundamental. The exact form of the family is relevant, because it is this form that is enduring and continued to be seen as the model of stability in society. (Devlin 1965, 64)

Because opposite gender relationships are deeply rooted in the ethics and norms of our society, and have proven to be beneficial to cultivating a rights-enhancing, democratic state, then it is argued that this should be protection of opposite-sex unions. By looking at the practicality of the relationships, and that this practicality has been shown to be valued and beneficial, it then provides an additional basis that the right is both necessary for individuals and important for the government to protect for society on the whole. When analyzing same-sex relationships, there is no history that they can serve the same purposes for society in similar ways to opposite sex

relationships. Many contend that same-sex relationships simply cannot be as meaningful as straight relationships.[81] The more salient argument, however, is that even if the relationships between same-sex individuals are just as meaningful as opposite sex relationships, there is no proof that they would benefit society in the same way as the relationships that have been proven to be fundamental to our nation. (Devlin 1965, 61-62) Without this assurance, the government then has a compelling claim at prioritizing relationships that are known to be positive for the functioning of the state on a macro level.

The reliance on traditional norms is expounded in *FW/PBS*, in which Justice O'Connor claims that intimate associations must be recognized as part of the country's traditions in order to be considered a fundamental right. Her argument was that if our country has been so successful and individuals have been able to thrive for so long without recognition of this right, then is it actually fundamental? If a right is so fundamental to liberty, then it would have been recognized and become part of the national ethos, because any right that is so important wouldn't be so grossly overlooked.(*FW/PBS*) It is on these grounds that marriage between opposite sex couples was recognized as a fundamental right. (*Zablocki*) It is an institution that had endured since our country's inception, and one that the majority of individuals seek out. (*Loving*) Because we as a nation have always sought out to fill this need in our lives, the right can then be claimed to be fundamental. But when applying that to gay relationships, there has been no such push or desire to actualize these relationships in public settings. As such, the right cannot be thought of as fundamental, because it wasn't necessary for such a long period of time.

[81] Some of those who argue against recognition for gay relationships include Debra DeLaet (2008), Gay Marriage as a Religious Right, Manuel Lopez (2005), and Sherif Girgis (2012)

While this argument can be persuasive, there are many responses that mitigate the impact of this rationale. First, appealing to national ethos and tradition is inherently an arbitrary process. (Richards 1986, 957) Slavery was a fundamental part of the country's economy, culture, and way of life for the first 70 years of the United States' existence. Does that justify the practice, because it is deeply rooted? What if we only look at any blatant racial discrimination, which was explicitly codified into law for almost 200 years? (Millett 1963, 35-37) While these may seem like extreme, straw man examples, they highlight the fact that under an appeal to tradition, truly morally reprehensible practices could be justified as legitimate simply because they have been important in society in the past. Argumentatively, the reliance on traditions of rights, instead of analyzing a right for its own sake, is an is-ought fallacy. Because society has promoted and endured with certain practices does not inherently justify them, and it does not preclude other practices from being necessary as well. The simple existence of opposite sex relationships and their success does not mean that there are no other relationships that can serve the same purpose. This argument can only be used to reiterate the importance of opposite-sex relationships, which I am not trying to take anything away from. The true role of opposite-sex relationships in my argument is to show how they confer benefits very similar to same sex relationships. This then lends credence to the argument that their similarities in structure and conferred benefits should lead to similarities in judicial protection.

Additionally, the argument that because there is no proven track record of the beneficial nature of gay relationships to society, there is no reason to recognize the right, is flawed in other ways. The argument goes that it has not been proven that society would be detrimented by recognizing same-sex relationships in equal ways to opposite sex relationships. While many contend that states that have full recognition of same-sex relationships have had no issues in

integrating same-sex couples and families into modern society, we cannot say with complete, unflinching confidence that these relationships will ultimately have no effect or prove beneficial to the democratic state, politically or culturally. (*Baker v. Nelson*, 1971)

Through my view, allowing gay relationships would actually provide its own intrinsic, unique benefits for society. A greater understanding and acceptance of diversity allow individuals to feel more comfortable and confident in all facets of their life, because they know they would not be ridiculed or harmed because of aspects so fundamental to their life. While I can reason and convince others that greater acceptance of different forms of romantic relationships would be beneficial to society, I cannot prove with definitiveness. The lack of definitiveness exists for speculation about whether recognition of gay relationships would be positive or negative for society, because they have not been recognized in order to know with any certainty one way or the other. To the point where we do not know one way or another what the general impact of widespread recognition of these relationships are, however, we cannot rely on any sort of determination that would presuppose their impact. Because no determination can be made about the impact of gay relationships the Court should then remove any thoughts on the impact of gay relationships upon society, and merely look at the relationship for its own sake and whether the rights of those individuals should be valued. By removing speculation about the impacts of same-sex relationships, the argument about why we should uphold only traditional values and practices over protecting individual rights is severely weakened. With its weakening, this purpose becomes far from compelling, and is therefore unable to sustain a ban on same-sex relationship recognition.

As is clear, the reliance on tradition is fraught with issues in allocating and recognizing rights essential to liberty. However, for the sake of argument, let's assume that we must rely on

the traditions of the nation in order to justify any claims of liberty under the Due Process Clause. This leads us back to the initial problem with relying on tradition: that it is inherently arbitrary which ideals are worthy of protection. (Schwartzchild 2013, 120) Just as opponents make frequent claim that only opposite gender relationships are rooted in our nation's history and culture, those in favor of same-sex relationships can consequently say that recognizing their intimate association does align with national traditions. Part of our national ethos is valuing choice, and how that choice allows individuals to construct meaningful lives. As a country, we value the individuality of persons and the autonomy that they have the potential of exercising. Additionally, we value the exercise of that choice in the relationships that we form, as evidenced by the enumerated rights to assembly (*Thomas v. Collins*, 1945)[82], right to free exercise of religion (which is typically done in communal settings), (*Sherbert*)[83] right to protection from quartering of soldiers (recognizing the sanctity of the home and the relationships that make up the unit),and right to protection of one's persons and papers, (*Weeks v. U.S.*, 1914)[84] among others. The Bill of Rights, and subsequent amendments, highlight a general motivation in valuing the individual capabilities and autonomies that all persons can exercise if given the opportunity. The original purpose of the Bill of Rights was to ensure that the individual citizen's autonomy was protected in some fundamental ways.(Rakove 1985)

It is this tradition of protecting the basic essences of being a human being in a democratic state that has been central to the formation of our government. These feelings of protecting individuality have persisted throughout our country's history to the present day, as evidenced by

[82] Other cases affirming the freedom of assembly include *Edwards v. South Carolina* (1963), and *De Jonge v. State of Oregon* (1937)
[83] Other cases affirming the free exercise of religion include *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993)
[84] Other cases affirming the protection from search and seizure include *Boyd v. U.S.* (1886) and *Schermber v. California* (1966)

the intense focus upon libertarianism in our political debates today. When looking at our nation's traditions from this perspective, recognition of same-sex relationships would definitely fit into an ethos of individual rights and self-actualization. The argument of appealing to tradition could be applied as support, not opposition to the recognition of gay relationships. In comparing support and opposition to same-sex relationship recognition when viewed through a framework of comparison to national traditions, it can be convincingly argued that the text and basic ideologies are aligned with recognition. The Bill of Rights alludes or specifically mentions the rights to choice and association, whereas it makes no mention whatsoever about the genders of a romantic couple.

The metric used to evaluate whether the government can infringe upon a fundamental right requires a compelling purpose to outweigh the rights infringement. It does not require an equal balancing between government objectives and rights protection. In order to serve as justification for infringing upon the right to intimate association, the argument of upholding traditional values must be so strong that it outweighs the interests of protecting the liberty endowed in the 14th Amendment. First, it is not clear that we have selected the right value to uphold, which undermines any argument that protecting one definition of a relationship is more valuable than protecting a fundamental right. Second, even if it was clear that the definition of proper relationships was the primary value to protect over all others, that still does not explain why it is so compelling, and narrowly-tailored, to restrict all individuals from actualizing relationships between themselves and individuals of the same gender and gaining proper recognition of that relationship. It has not been shown that there is a tangible, significant harm in recognizing same-sex relationships, which is necessary if the government purpose is to be recognized and upheld. (Karst 1985, 649) As such, opponents must be able to show both why the

value of opposite sex relationships so important, and how that value would be harmed in a significant way if same-sex relationships were to be recognized. The argument of protecting traditional values cannot do either of these two things, thereby showing its limitations and inadequacies as a justification for restricting this structure of the right to intimate association.

Another argument employed by those against same-sex relationships is similar in form to upholding traditional values. Many against gay relationships appeal to arguments about upholding common morality. One of the most influential scholars in the field of legal philosophy, Lord Patrick Devlin, articulates the nature of how law is determined. As a legal precedent, he claims that the law is based on moral law, and that the root of codified laws is reflective of moral underpinnings. (Devlin 1965, 61-62) When discussing the morality of protecting strictly opposite sex relationships, the most common association discussed is marriage. Devlin claims that marriage should be protected as an institution of one man and one woman, because it both reflects the moral fabric of society and is a proven institution in society that cultivates progress and stability. (Devlin 1965, 62-63) This logic can be applied to all opposite sex relationships. Any form of limitation on recognition of relationships based on the genders, can be attributed to the moral underpinnings.

The flaws with appealing to morality run deep. The entire argument is a monumental is-ought fallacy**.** The arguments to appeal to morality is made by stating that the law reflects morals, and because the law has only reflected the legitimacy of opposite sex relationships, they therefore can continue to recognize only these relationships**.** This argument assumes either assumes that morals do not change, or it accepts that the only morals that are relevant are those determined during the foundation of our country. It does not reflect the shifting understanding of what is right and what is good. This is a common view of originalists, most notably Associate

Supreme Court Justice Antonin Scalia. Some originalists believe that the Court should interpret the Constitution based on the cultural and social understandings of rights during the time that the Constitution was written and ratified in 1787. In that time, same-sex relationships were not allowed or written into the constitution as a protected right. (Scalia 1988) If it was actually important to guarantee the right to have same sex relations and expect government recognition, then the right would have been incorporated into the Constitution or the Bill of Rights. Since they were not, then we cannot subsequently find a right to exist in the constitution when the right was not clearly explicated by the drafters.

The ultimate problem with appealing to morality is that there is no true understanding about the origination of the morals that are supposedly essential to uphold. There is nothing to reflect the sentiment that opposite sex relationships are philosophically more justified for recognition than same-sex relationships. The most salient arguments for many against same-sex relationships come instead from religious teachings.[85] Sonu Bedi, one of the leading scholars on this matter, claims if we were to look to morals to justify bans on same-sex couples, the only moral justification is rooted in religious teachings. Therefore, they are what he calls a "shadow establishment of religion." (Bedi 2013, 218) Upholding values rooted strictly or primarily in one theology, as bans on same-sex relationships do, the Court would violate the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion."[86] It would be irresponsible for the Court to rely on a justification to restrict one's rights that is unconstitutional in itself. The logical conclusion is that the reliance on

[85] In reviewing the arguments by those opposed to same-sex marriage, one of the most prominent is that a belief in gay rights goes against their religious convictions. (TFP 2014; Hawkins, 2012, National Organization for Marriage, 2014). Additionally, when asked of citizens who are opposed to same-sex marriage, the most common reason for opposition was that it conflicts with their religious beliefs (47%) (Gallup 2014)

[86] The Establishment Clause has been interpreted to include all government bodies and agencies, not just acts of Congress. The Establishment Clause states that the government cannot endorse any organized religion in any way.

morality is wrought with far too much error to be used to infringe upon the fundamental right to intimate association.

If the morality preferring opposite sex relationships is not rooted in religious text, then it must be found through secular reasoning in the will of the people. Such is claimed emphatically by Devlin. (Devlin 1965, 47) It is my primary contention that morality, even if believed by the vast majority of people, is not able to substantiate a ban on a fundamental right to humanity without some other interest to substantiate that ban.[87] However, even if we are to accept Devlin's framework that the government's understanding of morality should be based on the will of the people, it isn't clear that the moral proclivities of persons in the United States today would actually support restriction on same-sex couples. In actuality, more than half of the country's population supports marriage equality for same-sex couples. (Gallup 2014) Additionally, gay marriage is the issue in which there is the greatest resistance in extending protections to individuals in same-sex relationships. Employment protection and recognition of civil unions, among other issues, show much greater widespread support for protection of same-sex couples.[88]

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[87] This belief is also well substantiated in academia. In a series of writings, Devlin and the father of legal positivism, H.L.A. Hart, each articulated their views on the role of morality in the common law, and how the morality of the people could be determined or enforced. Hart responds to Devlin, who claims that the laws should reflect the will of the people, and if the will of the people includes a clear consensus around some moral conviction, then the law should reflect that. Hart counters by saying that morality can only be used as justification to restrict an individual's rights if the supposed immoral "act harm[s] anyone independently of its repercussions on the shared morality of the society? And does this act affect the shared morality and thereby weaken society?" (Hart 1963) Hart reviews laws predicated on upholding morals with a more critical eye, finding that if immoral actions were to be allowed in spite of the common morality of the general public, there must be some clear, demonstrative harm that results. Absent any harm, the morals do not outweigh the right of the individual being infringed. I, along with many others (Kenneth Karst, David Richards, Hanna Schwartzchild), find myself aligned with this viewpoint.

[88] 72% of all citizens believe gays should receive employment protection, meaning that they cannot be fired based on their sexual orientation. 67% of respondents believe that gay couples should receive equal rights as straight coupes in the form of a civil union, compared to only 28% in opposition. Of note is that these polls were worded recognizing one's orientation as more fixed and a fundamental part of their identity. This differs from my legal belief, that the relationship is all that is relevant, not the conception of identity. However, even though there is a difference in approaches, it does not negate that the general public does not hold the strong moral beliefs against same-sex relationships that would be used as justification to restrict the rights of those in same-sex relationships. (Gallup 2014)

So, if we were to rely on the will of the people (which as I've stated is problematic in its own right), we would still come to the conclusion that same-sex relationships should be recognized. This metric lends clear support for recognition of this right as a 14th Amendment form of liberty. It does not serve in any reasonable way as a government justification to limit the rights of citizens.

Additionally, the arguments appealing to morals are vulnerable to the same criticism as those about protecting national tradition. It is arbitrary which long-held morals are valued. While there are many who consider the restriction of same-sex unions as a moral duty, this is not the only moral obligation that can be conferred for this issue. For many, protection of diversity and the cultivation of that diversity is important, so as not to homogenize society into one limiting identity. (Marcus 2006, 282) This diversity allows for a greater freedom of expression and the ability to develop one's identity on an individual level. It also encourages a wider discourse of ideas and perspectives. (*Bowers*) Another moral consideration could be the prevention of government intervention into individual decision making. As a moral consideration, the individual's self interest in determining their own life path is essential to the construct of their character and the pursuit of happiness.

Both of these moral claims, along with many others, are highly important in the minds of many. To the point that these moral beliefs have real traction and can reasonably function as government interests, then there is no reason that the moral that restricts the rights of same-sex couples should be prioritized over all other valid moral considerations. Again, if it cannot be determined which moral conclusion the government has a clear duty to uphold, then how can it be claimed that one of these moral stances is so important to outweighs fundamental rights? The simple conclusion is that it cannot.

The final argument against recognition and protection of same-sex relationships is that those in gay relationships can't procreate. Those opposed claim that one of the primary purposes of marriage is to provide an optimal relationship for child-rearing, and incentivizing the most healthy relationship for procreating. Given that procreation can only be done between and biological men and women, it is argued that the government should protect the optimal relationships that promotes healthy procreation patterns. It is obvious that two individuals of the same-sex cannot procreate on their own. (Lopez 2005) Given this, the argument is that by having equal recognition between opposite sex and same-sex couples, the government would be conflating an ideal form and a lesser form of romantic relationships under the umbrella of one definition, even though there is one form of the relationships that is preferred, because of an opposite sex couples' ability to procreate. It does not mean that those in gay relationships should have no rights. But given that they are not capable of procreating, and conferring all of the benefits that come with being able to procreate, the legal recognition should not allow these relationships to be seen as completely equal. (Girgis, Gordon, and Anderson, 2012)

This argument is deeply flawed for a multitude of reasons. First, it conflates romantic relationships and procreation to a point in which they are inextricably linked to each other, which is categorically false. While many in opposite sex relationships do choose to marry and have children as married partners, that does not mean that the practice of procreation is inherent to marriage of opposite sex relationships. Individuals frequently procreate outside the confines of marriage, yet are not restricted in any way for doing so. Also, those in opposite sex relationships that do not procreate are not prevented from having their relationship recognized. The fact that such relationships and procreation are linked in some way does not mean they are mutually exclusive to each other. Because individuals in same-sex relationships cannot beget a child on

their own, their relationships are to be seen as less valid because of this incapacity. However, if this logic were to be applied to all, then any couple who was infertile, medically unable, or elderly would not have their relationship recognized as well, because they are just as incapable of procreating as same-sex couples.

Furthermore, this argument is even less compelling when used as justification against the right to intimate association instead of Equal Protection. As explained earlier, the right to intimate association is one that is focused upon the benefits that intimate social relationships between individuals have upon those involved. Among many other benefits, they allow one to grow, development of virtues such as trust and love, and exploration of different ideas through social relationships. All of these benefits, along with many others, are for the purpose of recognizing the liberty essential to personhood. These rights are not awarded because of some utilitarian societal benefit. Because these rights are solely focused on the individual, the societal harm must be so great so as to outweigh the individual right. However, there is no harm demonstrated in recognizing same-sex relationships that relates to procreation. Greater recognition of same-sex relationships does not mean there will cease to be opposite sex relationships in which individuals choose to beget children. Consequently, there is no compelling purpose regarding protecting procreation that allows the individual right to be limited. If we began to see a sharp population decline due to a much higher percentage of individuals in non-procreative relationships, then there may be a compelling government purpose in protecting the interests of society. Absent this decline or any sign of the size of the population being threatened in essential ways, there is no purpose that outweighs the individual right on this basis.

Expanding the Scope of the Right to Intimate Association

Up until this point, I have focused upon the rights of individuals who are in same-sex relationships. This could lead to the conclusion that the right to intimate association only would extend to those who have found that intimate association, and would only cover restriction that affect the existence of same-sex relationships. However, this would misinterpret the purpose of the right. At its basis, the right to intimate association, as with all rights found under the liberty provision under the Due Process Clause of the 14th Amendment, is one endowed to the individual. It is not solely attributed to the existence of a romantic, same-sex couple, but rather to the individuals within that relationship. All should have the right to pursue whatever relationships that they desire, provided that those relationships don't create a net harm that would form a basis for government intervention. The focus has been on the actual relationship because the reasons for protecting this individual right are found through the formation of the association. The restrictions against individuals who seek to exercise this right have also been argued much more strongly against the actual relationship, instead of the beliefs that underlie the relationship. The opposition against same-sex relationships has focused their arguments on the relationship itself, instead of focusing on the rights of the individuals in the relationship.

As I have stated numerous times, the purpose of the right to intimate association is one that all should be able to access. Given this premise, the fact that one is actually in a relationship that would be characterized as an intimate association is irrelevant. If one expresses a desire to enter into a same-sex relationship, then they cannot be restricted from doing so, unless the government could show a compelling purpose for restricting this desire. The reason for doing is one cannot be punished merely for having a desire to exercise a constitutionally protected right. It would be completely illogical for the Court to protect individuals in a constitutionally

protected relationship, but then allow for restriction of individuals based on their want to employ that exact right.

This analysis also extends to the right to not form intimate associations, and to not be discriminated on this basis. If an individual seeks to never form any romantic relationships in her life and chooses to remain single, she has the right to choose whether or not she actualizes her fundamental rights. The choice that is so important in forming intimate associations still exists in the right to not form such relationships. One is consciously exercising their autonomy to not commit to a relationship with another individual. (Karst 1985, 634) They cannot then be penalized for acting on their ability of choice in not pursuing the relationship. Abortion serves as a compelling example to highlight this point. The majority of women will never have an abortion, yet they all still have the right to choose to receive one or not. Such is the same with intimate associations.

The idea of protecting one's right to not act upon a constitutional right is not simply drawn from logic. We see examples of the Court recognizing that an individual's choice to not actualize a right is still protected. The Second Amendment allows the individual the right to bear arms, yet it is not required that she must do so. (*District of Columbia v. Heller,* 2008) The choice of whether or not one wants to act upon their enumerated right by owning a firearm is essential to the right's existence. The individual cannot subsequently be harmed in a significant way because of their decision on whether or not they choose to actualize the right. As long as the right is premised on the choice of the individual, then that individual can't be punished for choosing whether or not they want to exercise that right.

Additionally, this right would protect those who are discriminated on the basis of appearance of homosexuality. Even if one does not make it public what their preferred gender is

when forming intimate associations, such individuals can still be discriminated for how they would appear to actualize this right. Therefore, one cannot discriminate against another individual due to their appeared sexual preference, because the discriminator is still making an unconstitutional value judgment upon someone else's protected right to intimate association. This is further substantiated when remembering the choice that is so important to developing intimate associations. If one can choose their intimate partners, and another person can stereotype another individual about who they would associate with, and consequently harm them in some way, then the choice of the individual is being marginalized, because their choice (or perceived choice) is the reason for their discrimination.

Throughout this chapter, I have explained in great detail why the arguments allowing for the discrimination of those in same-sex relationships do not justify infringing the right to intimate association. While the arguments seeking to restrict the right to intimate association are lacking in substance, it does not mean that there are no instances in which this right can be restricted. The limits of the protections associated to the right to intimate association when applied to individuals in same-sex couples are reached when weighed against the right to free speech and right to expressive association. The Court has repeatedly reiterated the importance of the right to free speech and freedom of belief, and that the government cannot censor individuals' right to expressed their own beliefs. With regard to free speech, one limit upon the right to intimate association is that other individuals are constitutionally protected in their ability to transmit speech in opposition to same sex couples. As the first Court stated in *Abrams v. United States*, it is not the Court's nor the government's role to decide what can be characterized as acceptable speech or thought. That right and duty is proscribed to the people. (*Abrams v.*

United States, 1919)[89] If one does promote socially unacceptable views, then it is up to the people to mobilize and actualizes their own right to free speech in order to drown out those unpopular views. (Linder 1984, 1902) This is applicable to opposition to gay relationships. Realistically, we can reasonably claim that there will be persons who would not accept same-sex relationships as legitimate, and would advocate against their recognition and protection, as almost half of the country's electorate still opposes recognition of gay marriage. (Gallup 2014) The right to express discriminatory views is protected, so long as it does not directly infringe another individual's right to intimate association.

The other limitation on the bounds of the right to intimate association when applied to same-sex couples is the right to expressive association. As explained in Chapter Four, the right to expressive association is rooted in the First Amendment as a facilitative right to freedom of speech and freedom of assembly. (*Board of Directors of Rotary Intern. v. Rotary Club of Duarte,* 1987) The right allows individuals to congregate together and impart their collective views as an organized body, merely forming an additional way in which an individual can actualize their right to free speech. (Thoum 2002, 646) Because it is an extension of free speech, the rights of expressive associations allow for a level of what would appear to be discriminatory practices. The Court has stated that if the central purpose of an expressive association's purpose is intended to promote a viewpoint against the rights of some other group, then that association is allowed to exclude members of the targeted group from joining the organization. This principle was clearly explicated in the case *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, in which the Maryland District Court stated that the KKK is not required to admit blacks into the

[89] Other reiterations of this right include *U.S. v. Rumely* (1953), *Lamont v. Postmaster General* (1965), *N.Y. Times v. Sullivan* (1964), and *Citizens United v. Federal Election Commission* (2010)

organization, and was allowing the group to restrict the rights to Equal Protection.[90] (*Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont* , 1988)The reason was that the KKK's expressed purpose is the devaluation of rights for African-Americans. If the government were to force the KKK to admit blacks, the group would be forced to compromise their beliefs, and thereby forced to suppress the right to free speech they were trying to actualize. (*Invisible Empire*)

The same logic has been applied to individuals desiring same-sex relationships in the monumental case *Boy Scouts of America v. Dale*, in which the Court stated that because the Boy Scouts are a private expressive association intended on instilling values in the younger generations of males, they can decide what values they hold central to their concept of morality. With this liberty, the Boy Scouts have held that homosexuality and same-sex relationships are not moral and should not be pursued of one wants to live a value-laden life. (*Boy Scouts of America v. Dale*, 2000) There have been many who have disputed that the views opposing homosexuality are the central purpose of the Boy Scouts. Organization such as HRC claim that the Boy Scouts are instead intended to promote values such as community-building and teamwork. (Windy City Times, 2000) However, the Court has affirmed that when a group claims that the fundamental reason for their existence does have discriminatory views, and there is proof that the group's practices reflect those views, then they are allowed by way of the First Amendment to discriminate against a group. This right would supersede the right to intimate association and the protection of this right. (*Hurley*)

To be clear, the right to expressive association does not cover any group who makes a claim that they stand in opposition to some group of people, and therefore are allowed to limit

[90] *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*

the rights of those individuals. *Roberts v. U.S. Jaycees* and *Rotary Club International v. Duarte* prove that an association cannot claim that their fundamental purpose is premised upon the exclusion of some group of people and instantly receive protection. The Court said that the both the Jaycees and the Rotary Club, which both excluded women, were not founded to express views on male superiority. Rather, they were create for the purposes of networking and civic engagement, which are not exclusive to men. As such, women could not be prevented from joining the group. This line of precedents illustrates that restrictions and harms placed upon individuals who seek to actualize their fundamental rights cannot be arbitrary. In order to discriminate, such views must be central to actualizing the right to free speech. Otherwise, the rights of the marginalized group of people hold more importance. (*Roberts; Rotary Club*)

This dynamic also explains the rights of businesses or other private actors. A business or employment opportunity could not be restricted to only those who pursue opposite sex relationships, because the central purpose of the business is not to impart views of opposite sex relationship superiority. Their central purpose is to provide a service or good and generate a profit. Most institutions or associations that would seek to restrict those in gay relationships do not have an expressed purpose of restricting such individuals. (*Roberts*) Because of this, these institutions are not constitutionally permitted to discriminate. The distinction between the central purposes of different associations establish the brightline as to when individuals in same-sex relationships can be discriminated against and when they cannot, and further clarifies the scope of these protections.

To clarify, the examples referenced were of institutions exercising their right to expressive association to discriminate against other individuals in same-sex relationships. In the courts, these cases weighed the rights to expressive association against a minority's right to

Equal Protection, not their right to intimate association. Even though Equal Protection was at issue in those cases, the logic still applies to the right to intimate association. The target of discrimination does not need to be a group of people seeking equal rights and recognition of their rights to Equal Protection. As long as an expressive association is seeking to restrict the rights of some individuals, then the right that is being infringed is irrelevant. So groups that want to infringe upon an individual's right to intimate association must show that it is their central purpose to restrict such individuals in order to prevent them from joining their association. As long as that is proven, then the targeted group does not need to be targeted on the basis of preventing equal protection, just on the basis of preventing some individual from being able to access some established right. On the other hand, associations whose central purpose is not premised upon discrimination against individuals in gay relationships cannot harm such individuals through restriction or marginalization.

Strategic Avoidance: Why the Right to Intimate Association was not Pursued by Gay Rights Activists

Throughout this thesis, I have explained at great length why pursuing a right to intimate association would be preferable to protect gays than an Equal Protection justification. However, if this right was is so preferred compared to Equal Protection, and was a part of the case law during the time of many of the preeminent gay rights cases[91], then it begs the question as to why it was not pursued by gay rights activists seeking equality through the courts. The answer is not that the legal analysis of gays' right to intimate association was not compelling, because these

[91] *Roberts v. Jaycees* was decided in 1984. The first case that the Supreme Court heard and decided with a formal written opinion was *Bowers v. Hardwick* in 1986. The only case regarding gay rights that came before the Supreme Court prior to *Roberts* was *Baker v. Nelson* in 1971, in which the Court decided via summary judgment that gays did not have the right to marry.

arguments were strongly considered and argued in *Bowers v. Hardwick.* (Schraub 2010, 1448) The answer lies in the political considerations for the gay rights movement, and were the basis of the case's dissent. Activists had to consider a legal strategy that could both had a chance at being effective in court and would also cast gays in a favorable light politically. Throughout the 1980s, the concept of homosexuality as an identity was in its infancy, and did not have the support of a substantial portion of the population in the way that the belief has nowadays.[92] Much of the country saw gays as individuals who chose to partake in alternative forms of sexual conduct, and not as individuals who held an identity that deviated from the concept of heterosexuality. (Pew Research 2013) It was the goal of activists to try to change the perceptions of the wider population that being gay should not be reduced simply to the sexual conduct between two individuals. These strategies sought to better reflect the way many felt about their sexual orientation: that it was a defining characteristic that shape their life and understanding of themselves. It was not simply an explanation for the sexual conduct that went on behind closed doors.

The goal of shifting the public's understanding of gay rights was to humanize gay citizens. It was to show that homosexuality did not only result in perceived deviation from common sexual norms, but rather were born possessing a differing identity and still were good, moral people who simply were sexually attracted to other individuals of the same-sex. (Brookey 2002) There was a focus upon the individual and their identity, and not the sexual pair, which was a common view for the time. (Pew Research) The intention of humanizing gays was to lead to greater social acceptance of gays within all interactions and institutions one comes in contact

[92] While I was unable to find any data from the 1970s-80s, the general opinions of the U.S. populace about whether or not homosexuality was a choice have shifted dramatically since the mid 1990s. Today, 65% of individuals believe one's sexual orientation is not within the individual's control. In 1994, the same poll was given, with only 49% of individuals believing that homosexuality was not a choice. (Pew Research)

with throughout their life. (Anderson 2006, 104) It also served to distance gays from the demeaning reduction of one's identity to their sexual conduct.

It was not just the general public that needed to shift its understanding of being gay from a choice of sexual conduct to an understanding of an individual's identity. The courts also considered gays to be defined by the sexual acts and choices as opposed to understanding their homosexual status. No case greater exemplifies this view than *Bowers*, which found Georgia's bans on homosexual sodomy constitutional due to the lack of a fundamental right to engage in non-procreative sexual conduct. (*Bowers,*1986) In that case, the majority only saw gays as products of their sexual choices as opposed to their status, and as such claimed that there was no protection of those choices. Justice Powell referred to Georgia's ban as "uncommonly silly", yet found that the State of Georgia's restriction of sexual conduct was allowed because there was no constitutional right to engage in homosexual sodomy. (*Bowers*, 1986) Especially notable was how the Court refused to determine whether sodomy was a form of privacy or intimate association. They merely stated that there was no right to engage in sodomy, without any regard for whether this conduct could be considered a protected form of liberty under Substantive Due Process.

In terms of public opinion, The *Bowers* decision was highly detrimental to gay rights advocates, as it reaffirmed the common perceptions of homosexuality. The case was a well calculated effort by Lambda Legal try to push gay rights into the national political consciousness and advance awareness and discourse by way of a monumental legal victory. (Murdoch and Price, 2001) However, the Court's opinion finding the state's ban on homosexual sodomy constitutional not only established a negative precedent. It also served to legitimize the view that gays could be characterized by their conduct as opposed to their identity. Gay rights activists

accurately predicted that this case would draw great attention across the nation. However, the loss galvanized the opposition and served to highlight the deficiencies in the movement, thus leading for a call to refocus on how to best win equal rights. (Anderson 2006, 94)

Legally, *Bowers* posed great problems to those within the gay rights movement, as it legitimized the notion that those who partake in homosexual sodomy were criminals. With this title, it made discrimination against such individuals much more palatable. (Anderson 2006, 93) There were many cases decided in the following years that relied on Bowers' analysis on the nature of gay citizens as criminals choosing to partake in criminal behavior. This was the justification that allowed the FBI to reject an otherwise qualified applicant who identified as lesbian (*Padula v. Webster*, 1987), maintain a ban on gays from serving in the Navy (*Woodward v. U.S.*, 1989), and prevent anyone identifying as gay or straight from adopting children.(*Appeal in Pima County Juvenile Action B-10489,* 1986) By focusing on the identity component of sexual orientation, activists could distance themselves from decisions like these that focused exclusively on the conduct of individuals without recognizing the underlying, legitimate identity that determined the motivating sexual conduct. The argument for equal protection would provide a constitutional doctrine that could highlight this new conception of homosexuality as an identity could unify the movement under one coherent message. The right to intimate association, on the other hand, relied on analysis that was too close to the negative precedents established and reinforced the conduct aspect of same-sex relationships too strongly. (Anderson 2006, 120)

After *Bowers*, gay rights activists sought to affirm the ideal that being gay was both not a choice and was more than one's choice of sexual conduct. This led to the concerted effort to discover the "gay gene" to affirm that homosexuality was immutable and was not determined simply through the choice of the actor. (Brookey 2002, 156) With regard to litigation strategy,

this approach to humanize and normalize gay identity needed to be substantiated through legal means. The best constitutional approach to achieving gay rights while fitting the new image that activists so desired to portray was that of Equal Protection. If being gay was a mark of immutability and was a central factor in one's formation of their identity, then it could be covered under the 14th Amendment's Equal Protection Clause based on the Court's prior rulings. This strategy both aligned with the wider movement while being constitutionally permissible.(Anderson 2006, 114)

The right to intimate association, on the other hand, too closely reflected the argument that gays could be defined by their sexual conduct, which was the argument that advocates so actively sought to fight against. The focus of the movement was to move away from the actual relationship between individuals of the same sex, and instead characterize such individuals as minorities possessing a new form of identity. (Thomas 1992, 1452-53) The right to intimate association was too directly affiliated to the unacceptable conception of sexuality as merely a product of sexual conduct. While it may not have been the best legal strategy, pushing equal protection better aligned with the wider considerations of the movement that needed to be considered**.**

The shift in rebranding the gay population proved effective through further litigation. The Court recognized both in *Romer v. Evans* and *Lawrence v. Texas* that gays should be considered as a group of people bound together by a common identity, instead of as individuals choosing to engage in alternative sexual conduct. (*Romer; Lawrence*) In each case, the Court claimed that the state cannot justify any discrimination on gays with no rational purpose other than demonstrated animus against individuals of the group. This is significant because of were being seen by the Court as a group whose identity needed protecting, which is essential to earning the protections

associated with the Equal Protection Clause.[93] While neither of these cases granted gays the protections of a higher tier of scrutiny under the Equal Protection Clause, which was one of the expressed goals for the movement, they did legitimize the shift away from being characterized as sexual deviants, and highlighted the coalition of gays as a distinct minority group.

Since the 1990s, the debate over gay rights has become more central within the political sphere. It also has attracted much more support, as I explained earlier. This support has led to victories through legislative means,[94] ballot referendums,[95] and Supreme Court victories,[96] most notably in *U.S. v. Windsor*. As the movement has progressed and support for gay rights is much more prevalent across all demographics, there is less need to align litigation strategy with the platform of the social movement. There is a broad enough base of support for gay rights that the strategy is now less important than the outcome of cases. As such, with less need to align with the overall movement, then it makes it even more prudent to employ the right to intimate association as the preferred constitutional theory. While the Supreme Court is supposed to interpret the law and the constitution without concern for political leanings, and decisions should not be more acceptable at certain times than others, the reality is that the public opinion surrounding high-profile issues greatly influences both the way these cases are argued by the parties involved and the way these cases are decided by the courts.

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[93] The only uses of the Equal Protection clause that have been applied to give higher protection has been to individuals who identify as part of some group

[94] Some legislative victories include the repeal of the military's "Don't Ask, Don't Tell" policy, which banned gays from openly serving in the military (2010), the recognition of orientation as a basis for pursuing hate crime charges (2009), and state legislation that legalized gay marriage, including Rhode Island, Delaware, Minnesota, New Hampshire, New York, and Hawaii

[95] Citizens of Minnesota struck down a 2012 ballot initiative to amend the state constitution to restrict marriage to only unions between a man and a woman. The states of Maine, Maryland, and Washington all voted in affirmation of the legalization of gay marriage.

[96] The most notable court victories were last year's *U.S. v. Windsor* and *Hollngsworth v. Perry*. However, there have been many cases within the past couple of years that challenge bans on gay marriage, whether they be in state courts (*Garden State Equality v. Dow, Kerrigan v. Commissioner of Public Health,* among others) or lower federal courts (*Bradacs v. Haley, Kitchen v. Herbert, Love v. Beshear,* among others)

The growth in support signals the readiness to choose a legal theory that is legally most compelling. As I have explained, an argument supporting gay rights through recognition of all individual's right to form intimate associations much better reflects both the individual and their choices, and allows for greater consistency and clarity of law. My goal with this thesis has been to determine the most convincing legal theory that serves the purposes of constitutional processes in the most honest form. Pursuing a theory predicated on the Equal Protection Clause muddles the clarity of law, thus undermining the desire for consistency and clarity. An argument through right to intimate association establishes a clearer precedent that coincide with past rulings is a more coherent fashion while dictating a clear doctrine to be applied in future cases. These purposes were not of great concern to the gay rights movement during the 1980s and 1990s, which goes to explain the emphasis placed on the political optics of the legal theory advanced. These earlier decisions by those active in the gay rights movement to pursue Equal Protection was not because advocating for the recognition of gay relationships as intimate associations was inadequate.

Furthermore, the nature of the gay rights movement has adapted greatly from the late 20th century to today. While much attention and focus was placed upon mobilizing all gay individuals together in order to show that they all shared a collective identity, the understanding of identity has grown and become much more diverse. There is simply a much greater consciousness around the many different identities that one could subscribe to, instead of the simple binary of gay or straight**.** The prominence of bisexuality has increased, along with the belief that sexuality can be fluid and ever-changing, even if the source of our sexuality is out of our control. There is a much greater awareness about the difficulties and limiting natures of gender binaries that restrict men and women to societal expectations based on their biological gender. Identities such as being

transgendered[97] highlight the diversity in the way that individuals self-identify by helping to deconstruct norms around the expectations of persons to conform their social identity to the body they were born into.

The many different identities that people possess, along with the greater social consciousness about the plethora of different identities and the importance of these different identities, better coincide with a constitutional theory based around the right to intimate association, instead of Equal Protection. Assume for the moment that both constitutional philosophies led to the same results in terms of spreading equal rights for all individuals in or desiring same-sex relationships. If the ends are the same, then we would look at the means used that represent the people. When analyzing how the people are represented, the right to intimate association better captures the nature of identities and the fluidity and individuality inherent to them. With Equal Protection, the burden is on the minority group to clearly define many different dimensions of their identity, such as immutability, discreteness, and the historical discrimination against them. However, this is incredibly limiting, because it forces a group of people to be defined under one monolithic conception of sexual orientation. This goes against common understanding of sexuality, especially when considering the intersectionality of gender and sexual orientation issues and identities. The diversity of individuals, their identities, and their relationships cannot be defined by one uniform definition. It would not properly represent the people that the Court would be trying to establish equal right for. Rather, it leads to the potential of codifying mass mischaracterizations of large swaths of people. This could have the effect of

[97] While a true comprehensive understanding of what it means to be transgendered would require much greater analysis than just this footnote, one good definition is provided by the Lesbian, Gay, Bisexual, and Transgender Community Center of New York, which states that transgendered "at its most basic level, is a word that applies to someone who doesn't fit within society's standards of how a woman or a man is supposed to look or act." For example, one who identifies as female, yet is born as a biological man, may identify as a transgendered female. (The Center, 2014)

rendering a decision whose precedence could be seen as obsolete and a relic of a past time in the coming years, which had an unclear and narrow-minded understanding of identity.

The right to intimate association, however, does not place any burden on individuals to define themselves in any way. Instead, it simply seeks to determine whether there are meaningful relationships between individuals that are not being protected in a way that preserves their liberty enumerated to them by the 14th Amendment. To the point that there are meaningful relationships between individuals of the same gender, it does not matter how those individuals identify themselves. All that matters is that these relationships exist. This is preferable because the Court does not have to characterize a diverse group of people through one overarching definition. Rather, the decision of how one sees themselves is properly left up to the individual, instead of to the government. When recognizing the tides and movements of the public independent of the development of the law, the opportunity to avoid sweeping characterizations of people who are keen on highlighting the subtle difference and embracing the diversity that comes from these subtle difference better represents the exact people the Court would be awarding rights to.

Conclusion

In search of a legal rationale to uphold gay right, the Equal Protection Clause of the 14th Amendment is not the only way to protect and attain these rights. The right to intimate association has the potential to provide the desired equality sought through litigation. The purpose of extending the right to intimate association is not to suggest that an Equal Protection claim is unable to provide the desired outcomes for those within the gay rights movement. When considering the interests of the judicial system in conjunction with the aims of those within the gay rights movement, the right to intimate association as a justification for a greater expansion of gay rights better reflects the desires and needs of all of the different relevant interests.

When analyzing how judges are told to interpret laws affecting gay citizens, the right to intimate association provides greater clarity for judges than does an argument of Equal Protection. Effective precedents should be clear in the rationale that they rely upon, and should consequently be easily applicable to later cases that deal with similar issues. The nature of the right to intimate association better lends itself to this purpose than do the precedents for Equal Protection.

Determinations about which groups receive protection under the Equal Protection Clause are rather subjective. There are many factors that the Court is to take into account when deciding if a group is entitled to heightened judicial scrutiny for their right to Equal Protection. (Ackerman 1985, 726) They include whether or not a group is discrete or insular (*Carolene*), whether the group has experience prejudice in the form of historical discrimination of the political powerlessness of the group, whether or not trait being discriminated against is immutable, and whether the trait bears relation to the government purpose in discriminating. (*Frontiero*)

Each of these different factors poses real problems of subjectivity and lack of clear application and interpretation. They also do not necessarily represent all minority groups who may have a claim to deserve Equal Protection, yet cannot fit within the confines established. Discreteness of a trait, or the ability to clearly recognize a characteristic of an individual, may have been the basis for discrimination against blacks and women, but not all groups petitioning for Equal Protection have traits that are visually apparent. (Ackerman 1986, 729) Such does not mean that the claim of their discrimination and need for Equal Protection are invalid. It just means that they cannot fulfill the established, necessary factors. Insularity suffers from the same problem, as it is not a trait that is necessarily essential to demonstrating the need to award a certain group heightened status.

Measuring prejudice is especially difficult, as there is no clear and objective way to understand past discrimination or to measure a group's political power. Without a clear metric for understanding prejudice against a group, it allows for judges to be selective in what evidence they use, and does not provide any check upon judges to reflect the entirety of past discrimination or political power. Furthermore, measuring historical discrimination of a group and the political power that group now wields both reflect the prejudice faced by the petitioning group, but still asks separate questions. There is no apparent method to weigh the historical discrimination against the current political power of a group in a cohesive fashion that would establish a clear understanding of a prejudice felt by a group. (Strauss 2011, 154)

Immutability and relevance of trait to discrimination each pose their own issues as factors in Equal Protection litigation. The intention of immutability is to reflect that an individual should not be discriminated on the basis of a characteristic they have no ability to change. (Halley 1994, 514) However, the way in which that has manifested is that the quality must either be

biologically determined or unable to be changed over the course of a person's life. This is problematic because it only validates discrimination against an individual if the basis of the discrimination is against a quality that will never be changed in the future. It does not recognize that discrimination of a trait is bad for its own sake, regardless of how long the discriminated person will possess that trait. Relevance of the trait in discrimination is problematic because a policy could be directly attacking a quality about an individual and the purpose for doing so is because of that quality. (Strauss 2011, 165)

Each of these different qualities is flawed in their own right and difficult to determine or apply. When courts then have to take all of these factors that are difficult to interpret and combine them together in order to form a determination about whether a class deserves heightened status, there is no guarantee of any real precision or consistency in applying the law. With so many different factors to consider, and no understanding of which to prioritize, it places a high burden upon judges to adequately weigh the different factors against each other properly. Yet without any metric for how to do so, the result is that almost any justification can be determined for petitioning groups depending on the relative importance each judge places on each factor.

The problems of the Equal Protection jurisprudence are elucidated when applying the factors in coming to an understanding of how to interpret sexuality. There are problems with each of these factors, in that they either do not reflect the hardships experienced by gays or they are difficult to measure. Gays would not fulfill either of the first two factors necessary to find for heightened class status: discreteness or insularity. (Ackerman 1985, 729) Yet, even though gays may be anonymous and diffuse (the opposites of discreteness and insularity), these attributes can be seen as harming gays more than being discrete or insular would have. (Wilkinson 1975, 980)

Because individuals do not have to be public with their sexuality, they can choose to remain anonymous. This fear is harmful to the individual and is directly caused because of societal discrimination. It is questionable as to whether or not one's sexuality is immutable, with many arguing passionately on both sides of the debate. However, the question remains as to whether or not it is relevant that sexuality is immutable. To the point that one is discriminated based on their identity and chosen understanding of their sexuality, then it should not matter if their orientation will remain fixed in the future or was determined at birth. (Strauss 2011, 163) If the discrimination exists, then there should be recognition of such and steps should be taken to remedy that discrimination.

The issues of measuring historical discrimination and political powerlessness are also highly problematic when applied to gays. There is no clear way to measure the historical discrimination faced by gays. One could look to the legislative history that served to discriminate against gays. Yet, they would find most anti-gay laws were ratified in the 20th century. Does that mean that gays were not discriminated against prior to the passage of these laws? (Hoffman 2003, 1255) Or does it mean that marginalization of gays was so commonplace that there was no need to codify that discrimination, because it was simply implied? The questions are left unanswered and are again within the purview of any presiding judge faced with Equal Protection claims. (Wilkinson 1975, 981) Measuring the political powerlessness of gays is especially troubling, because gays have different amounts of political influence in different areas of the country. In the northeast and pacific northwest, for instance, gays experience a great deal of support and wield significant political capital. However, in less tolerant regions such as the south, there is much less acceptance of homosexuality, which translates to more prevalent discrimination and less political power for gays in those regions. With such disparity in political

capital throughout the country, the question then becomes how the court should take into account these disparities, to which there is no clear answer.

Overall, the way that the Equal Protection precedents are established prevents a clear understanding of what tier gays should be adjudicated under. The factors could be interpreted to justify a decision under any of the levels of scrutiny. These issues prompt the need for a better judicial philosophy that can be easily decided and establishes a clear precedent. The right to intimate association can provide that alternative for gay rights. While there are many benefits that are exclusive to the right to intimate association, the approach is not without some flaws. Just like there is a level of subjectivity in Equal Protection precedents, the right to intimate association is not immune from some subjectivity as well. In review, the Court decided in *Roberts* that the right to intimate association was found as essential to the liberty endowed in the 14th Amendment's Due Process Clause. (*Roberts*) Within that precedent, the Court stated that there were four primary factors that made up an intimate association that future Courts could use to determine whether certain relationship should be considered intimate associations. The four relevant factors in determining whether a relationship is an intimate association are purpose, size, selectivity, and congeniality. The purpose of the association must align with the intended reasons for recognizing the right in the first place. The size of the association must be small enough or conducive to allowing individuals to have the opportunity to develop bonds with another individual or individuals. Recognizing selectivity as a factor acknowledges the autonomy of an individual to form their own intimate associations, and reinforces the notion that the most meaningful relationships are those that are chosen by the individual. Congeniality is closely related to selectivity, as intimate relationships are chosen on the basis that individuals gain real

benefits from being a part of them, and inherent to gaining these benefits is that there is a sense of congeniality among those in the relationship. (*Roberts*)

The reliance on these factors could be vulnerable to the same criticism as Equal Protection: that judges are basing their decisions on whether to consider a relationship as an intimate association on the same subjectivity that proves perilous for Equal Protection. Judges can still preference certain factors over others in determining whether a relationship should be protected under Substantive Due Process as a fundamental right. (Roling 2012, 908) Also, there is the question as to whether a relationship must be aligned with national tradition in order to be worthy of protection. The precedents appear to lean towards recognizing all relationships regardless of their historical prevalence or significance, yet without a clear dictation making this explicitly clear, judges in future cases could reasonably choose to only protect associations that clearly are reflected in the nation's tradition. This is both an area of ambiguity in the law and gives the opportunity for same sex relationships to not be recognized as a protected form of intimate association, which would mean that those in same-sex relationships would receive no extra judicial protection.

While there is an element of subjectivity that does exist for adjudication of the right to intimate association similarly to that of Equal Protection, the level of subjectivity is comparatively less than it is for Equal Protection precedents. The burdens placed of judges through the right to intimate association are much more manageable, with fewer factors. All of these factors are also more clearly defined for the right to intimate association. The size of a relationship, or the simple fact that the individuals chose to enter the association, can be easily understood, especially when compared to determining how the Equal Protection precedents are to be understood.

The difference in the level of subjectivity and lack of clarity between the two theories can be attributed to what is ultimately attempting to be achieved through each theory. In order for gays to earn suspect or quasi-suspect class status, the entire minority must be defined in a way sufficient for the Court. Having to define an entire group of people and then use that definition to understand whether or not those people deserve extra judicial protection of their rights is an incredibly difficult task and lends itself to great amounts of subjectivity on the parts of judges. Defining a group of people in a comprehensive way that both reflects their individuality as a people but also fits within past precedents that were determined through analysis of other groups is incredibly difficult. Defining the nature of a relationship, as is needed when understanding the scope of the right to intimate association, is much simpler due to the nature of understanding a relationship between two people. All that is necessary to find is whether or not that relationship allows individuals to fulfill the liberty endowed by the 14th Amendment, and whether the structure of the relationship is conducive to achieving that liberty. The Court does not have to classify a group with a definition that will endure through generations, as is necessary in Equal Protection. The target of the judge's interpretation is easier to comprehend and characterized in the right to intimate association, which lends itself to greater clarity in the how decisions should be interpreted and applied by future courts.

Another similarity between the way cases are adjudicated under the Equal Protection Clause and the Due Process Clause's right to intimate association is that both rely on the use of analogies to best understand the case before the Court. As an attempt to create objectivity within Equal Protection cases, the Court began analogizing any group petitioning to protected minority groups. (*Craig v. Boren*, 1976) The two that petitioning groups are most commonly compared to are blacks and women, as those are the two groups that were used to establish strict scrutiny and

intermediate scrutiny. The right to intimate association uses the family and marriage as the archetypical forms of association that other relationships must demonstrate and mimic the form and the purposes of these relationships. (*Roberts*)

While this could appear to cause similar problems between the two theories, this would overlook what is actually necessary in order to draw these comparisons between the archetype and the entity the Court is asked to adjudicate. The process of comparing a group of people to another is both incredibly difficult and allows for misrepresentation of two different groups. How must the Court weigh the history of discrimination of gays against blacks, when the hardships that members of each of these groups experienced were distinctly and independently difficult for individuals? Further, some of the factors employed by the Court are based on requiring the Court to compare different groups in a false way. Discreteness and insularity may have been reasons that blacks were disenfranchised, but they do not apply to gays, yet in petitioning for heightened scrutiny, gays must try to fit themselves into a confine that is misrepresentative of the nature of sexuality and of the hardships experienced by members of the group. (Ackerman 1985, 729)

The necessary comparisons to be drawn in the right to intimate association cases is not as difficult to make for courts as it is in Equal Protection cases. At their root, all intimate associations should confer roughly the same benefits, including but not limited to aiding the development of one's emotional faculties, experiencing the feeling of love and reciprocating that feeling, and improving one's outlook on elements of the world that can be stimulated through close relationships with other individuals. (Karst 1980, 629-32) Familial or marital relationships are used as the comparison because they illustrate a relationship where all of these benefits are clearly derived. Measuring the benefits of a relationship and comparing them to the benefits

derived from familial associations requires less extrapolation and sweeping generalizations because there is less depth to the analogy.

Another difference between these two views is whom these rights apply to. The Equal Protection Clause is only extended when a group of individuals are deemed worthy of the protection. The right to intimate association does not require individuals to label themselves in any way, and the rights are extended to all regardless of the way one identifies. This is important because one does not need to prove themselves worthy of gaining judicial protection of their rights. Furthermore, the right to intimate association is one that is provided to all without any reservations or complications. If same-sex relationships were to be recognized as intimate associations, then anyone would be granted the right to enter such relationships. The vast majority of the individuals may choose to not actualize this right, but it is still available to all.

Not only is this right available to all, while Equal Protection requires proof of deservedness of judicial protection, it better reflects the nature of sexual orientation and the power of the individual to choose their own identity. The right to intimate association does not require those who enter into same-sex relationships to clarify for the Court how they perceive their own identity. This is especially important because of the increasing awareness of the differences in the identities that people hold so central to their personhood. Some feel their orientation is fixed in themselves, while others believe their sexuality is more fluid. Some believe that there is fluidity in gender and gender identity, and that they should not be defined by their biological anatomy they were born with. Because they do not want to subscribe to beliefs about how they should act based on their bodily capabilities, they do not define themselves as one fixed gender or orientation. The differences in these identities may appear minute, yet one's conception of their own identity plays a substantial role in their understanding of their worldview

and their own place within that worldview. The right to intimate association allows individuals to continue to explore and determine their identity for themselves. The law simply allows individuals to pursue the relationships of their choosing without unnecessary government intervention.

Equal Protection analysis does not allow for individuals to self-determine their identity while also extending legal protections for gay individuals. Gays only attain judicial protection by classifying themselves in one way. This is not necessarily reflective of how individuals see themselves, and also limits the autonomy of individuals to cultivate their own identity and not feel restricted. If the Court prioritizes on conception of gay identity over all others, then it continues the practice of favoring certain identities over others. Even if there are more protections extended, the hierarchy of who deserves rights still is perpetuated, which is one of the aspects of discrimination that gay rights advocates are concerned with eliminating.

The right to intimate association can remedy many of the issues that have arisen throughout gay rights litigation focusing on Equal Protection. That is not to say the theory is not without its faults. A reexamination and strengthening of the right to intimate association opens the door to challenge other restrictions that may also impede upon the right to intimate association, such as polyamory**.** While I cannot comment in too much depth about other independent issues that could arise, the other cases that could be argued under the right to intimate association may have legitimacy in their own right. If a romantic relationship of three individuals confers all of the same benefits as a two-person relationship, then the questions remains if the government should be dictating that only two-person relationships should be recognized. (Bedi 2013, 212)

This example, along with many other instances of non-protected associations (incest, bestiality, among others), is vulnerable to the issue of consent, and whether or not those in the relationship are genuinely consenting to become a part of those relationships. If they are not, then there is basis to not recognize the relationship, as the congeniality factor would not be fulfilled. There may be other reasons that would justify government bans or lack of recognition that could be developed through a more clear focus upon those issues. Additionally, while other groups could feel emboldened by the advancement of gay rights under the right to intimate association, the right has existed for 30 years, and there have been no prominent challenges using the available case law. Recognition of same-sex relationships does not mean that there is more justification to recognize these other forms of association.

The right to intimate association is vulnerable to the criticism that the protections for those not in same-sex relationships but desire them may not be as strong as possible. I've dedicated much focus upon the rights of those in same-sex relationships, and then explained how one who desires to such relationships can't be restricted from wanting to actualize one of their fundamental rights. There is the potential that lower courts could divide on whether or not the right to intimate association is solely restricted to those in same-sex relationships. If so, then the impact of the right is significantly reduced, as any individual who seeks same-sex relationships would not be protected and would be vulnerable to the injustices that this constitutional theory seeks to prevent.

Even with these potential weaknesses, they do not negate the innate positive benefits that this constitutional theory possesses, especially when compared to Equal Protection. Individuals do not have to be defined through one, overarching definition of sexuality through a right to intimate association, as required by the Equal Protection. The rationale to come to a decision is

much clearer and easy for lower courts to follow, which is important because of the inevitable challenges to discriminatory laws upon same-sex couples that will continue to arise through lower courts. Overall, the right to intimate association is preferable for both the courts and for the citizenry on the whole. In the late 19th century, the country was not necessarily ready for a right to intimate association argument as justification for striking down discriminatory laws prevalent across the nation**.** (Anderson 2006, 129) We have developed our understanding of gay issues and identities significantly since that time. Our preferred legal doctrines should follow this trend, and develop and grow in the most effective way possible for all actors affected. The right to intimate association is the vehicle that allows this development to happen.

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