AMERICA'S PROLONGED BATTLE FOR GAY RIGHTS:

WHO WILL CREATE SOCIAL CHANGE?

By

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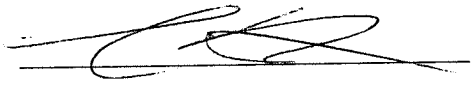

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ABSTRACT

When a man or a woman swears that they will take their partner in sickness and in health, for better or for worse, and till death do they part, does it really matter who is looking back at them? Common law delineates that marriage is between one man and one woman; and until the last decade, this was the prevailing definition of marriage. Yet as the gay rights movement gained support, the conventional definition of marriage has transformed. But the gay rights movement is not just about securing the right to marry; it is an attempt to produce social change through the United States court system.

As the gay rights movement attempts to create social change through the two gay marriage cases, will the justices declare a historic ruling on gay marriage? Yet, regardless of their decision in June 2013, the Supreme Court's decision will not affect the momentum of the gay rights movement. Through analyzing the history of the gay rights movement, the legal arguments at stake, and reviewing past influential state and Supreme Court cases, it is evident that the prevailing gay rights movement will achieve its goals regardless of winning or losing litigation at the Supreme Court.

The wedding bells have rung, the white doves have taken flight, and the 'I dos' have been sworn. Finally, the moment of truth has arrived as the clergyman famously recites, "By the power vested in me by the state of…I now pronounce you…" Though traditional and customary, the means of becoming married have come under great discussion within the last two decades. When a man or a woman swears that they will take their partner in sickness and in health, for better or for worse, and till death do they part, does it really matter who is looking back at them? Common law delineates that marriage is between one man and one woman; and until the last decade, this was the prevailing definition of marriage. Yet as the gay rights movement gained popularity in the early 1990s, the conventional definition of marriage, and the beliefs surrounding who can marry have transformed. No longer does the majority of Americans believe that marriage is solely between one man and one woman; on the contrary, 53% of Americans now support legalizing gay marriage to allow same-sex couples to wed (Stark, 2013). As society's opinions have dramatically altered, more and more individuals are coming out as publicly being gay; in fact, 57% of Americans say that they have a family member or close friend that has come out as gay or lesbian (Stark, 2013). Clearly, with more individuals publicly open about their sexual orientation, the American public's opinion on legalizing gay marriage has severely changed. But the gay rights movement is not just about securing the right to marry, nor is it solely about fighting to obtain equal rights or only about gaining respect for the LGBT community. The gay rights movement is an attempt to produce social change through the United States court system.

Founded upon ideas of liberty, justice and freedom, the Founding Fathers enshrined the inalienable rights of the people, and the legal limits of the government in the U.S. Constitution. Scarred by a history of abusive power and tyranny of the majority, the Founding Fathers ensured

that *this* document—unlike any other document ever created—would prevail into the future and protect the rights of minorities. But over two-hundred years later, has the U.S. really protected the rights of the minorities? After overcoming our prehistoric racial and gender prejudices of the 1900s, has the U.S. now achieved equal rights? In carefully constructing the Constitution, the Founding Fathers guaranteed that the U.S.' court system would uphold the rights of every man and woman, and strike down the laws that attempted to infringe upon those rights. A forum for debate and policy-questioning, and an avenue for social change, the U.S court system is supposed to disregard public opinion and politicians, and simply interpret the Constitution. Yet throughout their history, it seems as if the courts have failed to step up, take charge, and create social change. Constrained by fear of public disapproval and political backlash from Congress, the courts have rarely initiated social change through their decisions. Now as the gay rights movement attempts to challenge the Courts with both *Hollingsworth v. Perry* and *United States v. Windsor* being heard by the Supreme Court in spring 2013, will the justices finally make a stand? Equipped with the power of a far-reaching decision, the Supreme Court can once and for all declare that prohibiting same-sex marriage violates the Constitution. On the other hand, the Supreme Court can prolong the debate by deferring to the states on issues of marriage. Yet, regardless of their decision in June 2013—beneficial or not—I hypothesize that the justices' opinion will not affect the momentum or the growing support of the gay rights movement. Through analyzing the history of the gay rights movement, the legal arguments at stake, and reviewing past influential state and Supreme Court cases, it is evident that the prevailing gay rights movement will achieve its goals regardless of winning or losing litigation at the Supreme Court.

Theories of Social Change

As social change is a slow and difficult process, it will be no easy feat for the Supreme Court justices to alter the opinions of society, transform the beliefs of political leaders, and change the laws of the land. In the past century though, more and more social movements have relied upon the U.S. court system to provide them relief. As Rimmerman and Wilcox comment, "the courts are the place to go for the redress of grievances. When elected officials and public opinion are lined up against us, the courts can be relied upon to protect minorities from the tyranny of the majority…through the mechanism of civil rights litigation the courts can be the engine of progressive social change" (53). However, how true does Rimmerman and Wilcox's statement hold? Can the courts consistently be relied upon to declare what is right and is what is wrong? Moreover, will their ruling be implemented and create the change that they seek?

One main theory of social change is the optimistic premise that the courts can create social change through their judicial decisions. Discussed by Gerald Rosenberg, the "Dynamic Court" view contends that activist courts are "powerful, vigorous, and potent proponents of change" (2). Moreover, the Dynamic Court view holds that the courts protect our country's minorities and defend our liberty "in the face of opposition from the democratically elected braches" of government (2). By highlighting the historic decisions of *Roe v. Wade* and *Brown v. Board of Education*, the Dynamic Court view clearly demonstrates that even in times of mass public opposition, the justices can still declare legislation as unconstitutional. In addition to creating social change through their rulings, the Dynamic Court view also exemplifies that the courts can bring about change by attracting attention to an issue. Rosenberg considers that "…by bringing an issue to light courts may put pressure on others to act, sparking change" (107). Thus, under the Dynamic Court view, the courts can either make a prominent decision, or if the courts

are wary to declare a potentially controversial decision, they can still create social change by hearing the case, and bringing national media attention to the issue.

As well as the Dynamic Court view, Stuart Scheingold's theory concerning the "Myth of Rights" additionally reinforces the claim that the courts can bring about social change. Scheingold's "myth of rights rests on a faith in the political efficacy and ethical sufficiency of law" (17). He contends that individuals' belief in the sacredness of the Constitution and the righteousness of our justice system allows courts to make influential decisions that create change. Moreover, Scheingold asserts that it is our inherent belief in the myth of rights that endows the Supreme Court with the power to be influential. He maintains that the Court "need not rely on coercion to enforce their decisions;" just as long as "our judges follow the path of the law—evidencing a serious concern with precedent, a firm commitment to the Constitution, and a subtle appreciation of our enduring values—can they expect to have political influence" (35). Lastly, Scheingold adds that not only can the courts create change through the myth of rights, they also have "an opportunity, perhaps an obligation, to draw 'progressive' decisions from the competing analogies presented by the counsel" (32). Hence, not only do Courts have the ability to create change, Scheingold avers that the courts *should* create social change. Similar to the Dynamic Court theory, Scheingold's theory undoubtedly attests that courts have the power to create social change. Whether it is through a historic decision, bringing attention to an issue, or simply appealing to the Myth of Rights, both theories evidence that the Supreme Court is most definitely able to produce social change when it declares its June 2013 ruling on the two gay marriages.

Contrasting with the Dynamic Court view and the Myth of Rights is the other main theory that the courts do *not* create social change. Rosenberg's predominant theory emphasizes

that the courts are too constrained, and thus, cannot create social change. In his "Constrained Court" view, he describes the courts as "weak, ineffective, and powerless" compared to the other two branches of government (Rosenberg, 3). Rosenberg explains that as a result of the courts "lack of power over either the 'sword or the purse' their ability to produce political and social change is limited" (3). Despite being unelected justices in the highest court of the land—and not having to fear reelection—the justices are powerless in the sense that they cannot force anyone to implement their decisions. Moreover, Rosenberg highlights that the "courts will generally not be effective producers of significant social reform for three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation" (10). He first elucidates that limited constitutional rights constrain the court because the justices cannot be *too activist on the court.* As their job is to interpret the literal words of the Constitution, they cannot extend or create too many rights because the rights are so limited already. Next, Rosenberg explains that the lack of judicial independence from the other two branches constrains the courts. Although they are unelected, Congress can still pass legislation that hinders the Court's independence. Lastly, of course, the courts have no powers of implementation. So although they may issue a historic ruling, they will need the assistance of Congress or the Executive Branch to enforce their decision. Consequently, Rosenberg holds in his Constrained Court view, that for these three reasons alone, the courts are unlikely to create social change through their decisions.

Finally, Rimmerman and Wilcox support Rosenberg's Constrained Court view after analyzing the court's history. In their analysis, they found that "the Supreme Court follows rather than leads. The Court does not boldly chart new directions. It does not venture on to new ground. Rather, it tends to consolidate change that has already occurred" (Rimmerman and Wilcox, 44).

Rimmerman and Wilcox reinforce their assertion by highlighting two of the most famous Supreme Court cases: *Roe v. Wade* and *Brown v. Board of Education*. Although these two cases are commonly used in supporting the claim that the courts *do* create change, Rimmerman and Wilcox contest that these two cases actually demonstrate the court *following* the trends of public opinion. In both *Roe* and *Brown*, they exemplify how public opinion had already been transforming and were becoming more supportive of allowing abortions and in ending racial segregation. Hence, the court did not pave the way for the rest of the civil rights movement, or help in establishing abortion under the right to privacy. Instead, Rimmerman and Wilcox note that in those two court cases, which were thought to have created change, they actually created "powerful reactionary movements" (53). They illustrate that after *Brown* came the battle to integrate schools, and after *Roe* came the conservative and religious movement to overturn it. So in actuality, Rimmerman and Wilcox demonstrate that the Supreme Court did not create change; rather, they simply followed the public opinion trends, and initiated the powerful opposition groups that formed after the decisions were made.

From the Dynamic Court view, to the Myth of Rights, and to the Constrained Court view, there are clearly many theories on whether or not the Supreme Court creates social change. As the gay rights movement garners more support, it is evident that public opinion is on the Supreme Court's side in the gay marriage cases. With more than 50% of American supporting the legalization of same-sex marriage, how will the justices rule? Will they follow the trend of the American public, and rule in the gay rights proponents favor? Or will they be constrained by the political pressure of the religious opposition groups. Regardless of the decision of the Court, the gay rights movement will be successful in obtaining their goals in the near future. Support for gay marriage is only increasing; thus, if the Supreme Court is to remain a legitimate, pragmatic

avenue for constitutional liberties, then they will have to realize the significance and power of the gay rights movement. Everyone else is 'coming on board'—and it is their turn now.

The History of the Gay Rights Movement

Considered to be one of the most expeditious social movements that the U.S. has ever witnessed, the gay rights movement is quickly overcoming its opponents and garnering more support with each passing year. Battling for equal rights for the LGBT community, and an end to the 'second-class' citizen stigma, the gay rights movement has achieved numerous victories within the past 60 years. Undoubtedly, "the history of the gay and lesbian movement, since its beginnings in the 1950s, has been one of change so rapid and extraordinary that it can justifiably be described as progress" (Rimmerman and Wilcox, 45). After conquering blatant discrimination and transcending over the setbacks throughout its history, the gay rights movement is now finally having its voice heard by the Supreme Court.

Fighting alongside many other civil rights movements, the history of the gay rights movement commenced in the early 1950s with the founding of the first national gay rights organization. Founded in November 1950, gay rights activist Harry Hay founded the Mattachine Society to alter society's views on homosexuality and to "cultivate the notion of an 'ethical homosexual culture'" (PBS). To his dismay, the society was met with immense opposition as state anti-sodomy laws became popular and were being passed all over the U.S. Opposition towards the gay rights movement only worsened as the American Psychiatric Association (APA) listed homosexuality as a disease in its first publication of the "Diagnostic and Statistical Manual of Mental Disorders" in 1952. As a result of the APA's publication, over the next few years, more than 4,300 homosexual men and woman were discharged from the military, and around 500 were fired from their government jobs, in what was known as the "lavender scare" (PBS).

Since the APA had classified homosexuality as a mental illness, government agencies feared that homosexual individuals were a "security risk" since they apparently had a mental illness (PBS). Then in 1953, President Dwight D. Eisenhower solidified the government's fear by signing an executive order in 1953 that banned all homosexuals from working in the federal government (PBS). Unmistakably, the 1950s were marked by confusion and fear revolving homosexuality. As hardly any information concerning homosexuality was available to the public, individuals immediately begun concocting their own theories and creating the long-standing opposition movement to gay rights.

Contrary to the bitter start of the gay rights movement in the 1950s, the 1960s marked an era of self-assertion and individuals coming out all over the U.S. In 1962, Illinois commenced the new era by becoming the first state to repeal its anti-sodomy laws and decriminalize homosexuality (PBS). As the rest of the states started to follow suit into the 1970s, homosexual men and women began to bring attention to their cause by engaging in protests and even starting riots. Yet as the old saying goes, no media attention is bad media attention as long as it sheds light upon the issue.

In the 1970s, the gay rights movement made more strides in the battle to achieve equal rights when in 1970 the first ever U.S. gay pride parade took place through Central Park in New York (PBS). As more media attention was given to the gay rights movement with the start of their yearly parade, they were delivered another victory in 1973 as the APA removed homosexuality from the list of mental illnesses from its diagnostic and statistical manual. Closing up the 1970s, the gay rights movement was once again handed a victory; yet, this time from the Civil Service Commission dropping the exclusion of gays from federal employment (Rimmerman and Wilcox, 47). With homosexuals starting to be treated just as everybody else in

the workforce, and gay public events getting more media publicity, it is easy to distinguish how the gay rights movement was able to become so successful later on.

As the 1970s were a period for great strides in the gay rights movement, the 1980s became a decade of uncertainty and a transformation of the focus of the gay rights movement. The 1980s are most notably known for the AIDS epidemic that hit the U.S. As more young, homosexual men and women were contracting the deadly HIV virus, the public soon came to equalize HIV and AIDS as the 'homosexual disease.' New, and not understood at the time, government agencies and even political leaders stayed silent for many years about AIDS, as no one knew how to deal with the deadly epidemic. Yet because of the AIDS epidemic, the focus of the gay rights movement began to switch to family rights. "Next of kin" issues were widespread in hospitals as young and middle-aged men were dying from AIDS and wished to be with their loved ones during their last moments (Rimmerman and Wilcox, 48). One of the more famous next of kin issues during the 1980s was the Sharon Kowalski case. In 1983, Sharon was in a car accident that left her hardly able to communicate. Instead of awarding guardianship to her partner, Karen Thompson, the courts awarded Sharon's father guardianship who denied Karen access to see her partner (Rimmerman and Wilcox, 49). In the end, it took eight grueling years of court battles before Karen was awarded guardianship over Sharon. As Sharon's case became a rallying point for the gay rights movement, Evangelical Christian groups began their opposition movement and started rallying together to oppose any new gay rights victories. Protecting the traditional family unit of a father, a mother, and a child, the religious opposition launched their never-ending movement in hopes of thwarting the gay rights movement's momentum.

Although the 1980s were a busy era for the gay rights movement, the 1990s transformed the entire gay rights debate and launched the movement to where they are today. Starting in

1993, the U.S. military became directly involved in the gay rights debate as the Department of Defense issued the "Don't Ask, Don't Tell" legislation. This directive prohibited the military branches from excluding applicants based on sexual orientation; however, it still forbid military members from "engaging in homosexual acts or making a statement that he or she is homosexual" (PBS). So although the military took two steps forward in ending the exclusion of homosexuals, it simultaneously took a step back as it extended its policies against openly gay members. Around the same time as Don't Ask, Don't Tell, the state of Hawaii became immersed in the gay rights debate as well. In *Baehr v. Lewin*, the Hawaii Supreme Court ruled that the state could no longer deny marriage licenses to same-sex couples. Although the decision was overturned, to be discussed in a later section, the *Baehr* case launched the states into the contentious gay rights debate. Following Hawaii's lead, in 1996 the Vermont court system heard its own gay marriage case in *Baker v. Vermont*. Yet, unlike Hawaii, the Vermont Supreme Court found that civil unions satisfy the requirements and bestow same-sex couples the same rights as married couples. Naturally, Vermont initiated the discussion of civil unions and started the trend for other states to follow.

Since the states were now involved in the debate, it comes to no surprise that the federal government got involved as well. In 1996, Representative Bob Barr (R-Georgia) and Senator Don Nickles (R-Oklahoma) created the Defense of Marriage Act (DOMA) which defined marriage as "only a legal union between one man and one woman as husband and wife," and acknowledged the right of each state to refuse recognition of out-of-state-same-sex marriages despite the Full Faith and Credit Clause of the Constitution (Rosenberg, 365). To the disappointment of gay rights proponents, then President Bill Clinton—a supposed gay rights supporter—signed DOMA into law later that year. DOMA was evidently an enormous setback

for the gay rights movement as it denies same-sex couples numerous federal benefits that come with marriage (Rosenberg, 365). Clearly, the 1990s were filled with both victories and losses for the gay rights movement. As each victory was declared, it appeared as if there was some setback that would undermine the gay rights movement's success.

After Hawaii and Vermont became involved in the 1990s, several other states became engrossed in the gay marriage debate as well. In 2003, Massachusetts went down as the first U.S. state to legalize same-sex marriage after its Supreme Court found in *Goodridge v. Department of Public Health* that denying marriage licenses to same-sex couples was unconstitutional and that civil unions would *not* remedy the violation. After crossing the threshold and becoming the first state to legalize gay marriage, several states followed Vermont's lead. In 2005, Connecticut legalized same-sex marriage with New Jersey following in 2006 and New Hampshire in 2007. Yet despite the major progress that was being made for the gay rights movement, there were numerous states that went in the other direction to oppose gay rights. 'Protecting marriage' initiatives became highly popular in the early 2000s with states amending their constitutions to prohibit same-sex marriage, and recognizing other states' same-sex marriages. By 2006, 27 states had prohibited same-sex marriage by amending their constitutions, and 45 states had adopted measures to prevent the recognition of same-sex marriages (Rosenberg, 363-364). In addition to numerous states opposing the legalization of same-sex marriage, members of the federal government were doing their part as well to hinder the movement of the gay rights movement. In 2003, Representative Marilyn Musgrave (R-Colorado) introduced H.J. Resolution 56, a resolution to amend the U.S Constitution to define marriage as between a man and a woman. Senator Wayne Allard (R-Colorado) similarly introduced S.J Resolution 26 to amend the U.S. Constitution as well. Both Musgrave and Allard had hoped to put a stop to the 'liberal

states' new gay marriage laws by creating a new constitutional amendment stating that "marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups" (Rosenberg, 364-365). However, in 2004 the bill came short of garnering enough votes in the House and Senate and was subsequently killed before it could even go to the states for ratification. Despite not garnering enough votes, the Defense of Marriage Amendment clearly illustrates the political atmosphere during the early 2000s when the gay rights movement was making innumerable strides towards achieving equal rights. Yet similar to the 1990s, it appeared that every step forward yielded a step back as the political and religious opposition groups fought against the progress of the gay rights movement.

After the gay rights movement overcame the hurdles that were presented in the early 2000s, they have been able to expeditiously transform public opinion concerning gay marriage. Additionally, the gay rights movement has seen immense progress in recent years with garnering political support. During the 2012 Presidential election, the Democratic National Committee included support for same-sex marriage on the Democratic platform for the first time in U.S. history. As former Governor Mitt Romney challenged President Barack Obama for the 2012 Presidency, Obama became the first U.S. President to publicly support same-sex marriage. Although the LGBT vote was not the deciding factor in the 2012 Presidential election, they are most definitely becoming a factor in political races now. Both Democrats and Republicans realize that it is impossible to run solely on an anti-gay platform anymore. Consequently, many Republican members of Congress have recently endorsed same-sex marriage and equal rights for all LGBT individuals. Unmistakably, this is a huge achievement for the gay rights movement.

With public support at over 50%, a President that endorses same-sex marriage, and now bipartisan political support, the gay rights movement can expect to see the distribution of more equal rights for the LGBT community in the future. The journey may have been rough to get to this point; yet nevertheless, the gay rights movement has witnessed extraordinary and rapid change within the last sixty years, and will continue to produce change until equal rights are achieved.

The Legal Arguments of Same-Sex Marriage

Despite the simplicity of the words, 'I do,' the institution of marriage has become a vicious battleground as religious groups combat equal rights advocates on determining the definition of marriage. Contrary to widespread presumption, the definition of marriage is nowhere to be found in the U.S. Constitution. Similar to numerous other social issues, the Founding Fathers relinquished the definition and process of marriage to the states to decide. Consequently, it is to no surprise that disputes concerning the definition of marriage would arise when same-sex couples began to apply in different states for marriage licenses.

As issues involving civil or equal rights reach the Supreme Court, it is imperative that the justices employ appropriate tests to determine if laws violate the Constitution or not. There are three main tests that the Supreme Court utilizes when discrimination is a factor in a case. The first test that the Court can employ is the rational basis test. In this test, the state simply has to demonstrate that the law is plausible in achieving its goals; as a result, this is the easiest test for a state to pass, and usually results in the state winning the case. Currently, the rational basis test is the test that is used to evaluate sexual orientation-based discrimination claims. The second test that the Supreme Court can employ is the intermediate scrutiny test. This test involves states demonstrating an important government interest and explaining how the legislation is

substantially related to that interest. Slightly more difficult for states to pass, intermediate scrutiny is the current test that is used for gender-based discrimination claims. The last test is strict scrutiny, and is the most difficult test for a state to pass. In this test, the state must have a compelling interest for the creation of the law, it must be narrowly tailored, it must advance the interest of the state, and it must be the least restrictive way possible to achieve the state's goals. Currently, racial-discrimination claims are reviewed using strict scrutiny because they are a suspect classification. Evidently, it is extremely arduous for a state to win a case when the Supreme Court uses the strict scrutiny test; yet, it is vital that some fundamental rights be protected by this heightened test.

Gay rights proponents contest that the justices should apply the strict scrutiny test instead of the rational basis test when evaluating the two gay marriage cases at the Supreme Court. Despite precedent compelling the justices to employ the rational basis test, gay rights advocates hold that strict scrutiny is justified in these cases because of two main reasons. First, they argue that marriage is a basic, fundamental right that is bestowed upon all individuals. Secondly, strict scrutiny should be used because homosexuals are a suspect classification. As a result of the historical discrimination and persecution, and the fact that homosexuals are a discernible minority group, gay rights proponents contend that strict scrutiny should replace the rational basis test when analyzing sexual-orientation discrimination appeals.

Before the gay rights movement gained popularity, almost all of the states retained the traditional definition of marriage as between one man and one woman. As a result of the Founders leaving the federal government out of the marriage debate, a majority of the states had enacted anti-sodomy laws, or laws prohibiting homosexuality. However, as the gay rights movement began gaining momentum, many of those laws were overturned by court decisions

yielding small victories for gay rights advocates. Yet as the gay rights movement took one step forward, they were forced to take two steps back as same-sex marriage litigation in the late 1990s and early 2000s alarmed state legislatures to exercise their states' rights and amend their constitutions to include their own definition of marriage. Accordingly, gay marriage opponents now commonly apply a federalism argument in defending the rights of states to define marriage as their legislatures and constituents please.

Additionally, with the definition of marriage absent in the Constitution, multitudinous arguments employ the Bible to define marriage. Although the Christian Bible does not explicitly state a definition of what marriage should be, there are copious references that delineate marriage as between one man and one woman. Opponents of gay marriage frequently quote Genesis 2:22-24 as evidence that the Bible defines marriage as between one man and one woman as it states, "Then the Lord God made a woman from the rib he had taken out of the man, and he brought her to the man. The man said, "This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man." For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh" ("New American Standard Bible"). Despite the First Amendment of the Constitution declaring that there would be a separation between Church and State, appeals to religious beliefs have endured as compelling arguments in preserving the traditional nature of marriage through the gay rights movement.

As opponents of gay marriage contest that the definition of marriage should remain the traditional 'one man and one woman' meaning, gay rights advocates contend that the controversy of gay marriage encompass the constitutional right to privacy and the Equal Protection Clause of the Fourteenth Amendment. Although the right to privacy is not an explicit right stated in the Constitution, the Supreme Court ruled in *Griswold v. Connecticut* that the combination of the

First, Third, Fourth, Fifth, and Ninth Amendments create a peripheral right to privacy (Epstein and Walker, 404). Moreover, the Court affirmed in *Griswold* that the right to privacy was a fundamental right to which laws would be subject to strict scrutiny. As a result of the Court's majority opinion, proponents of gay marriage assert that the right to privacy entails marital relationships; thus, gay marriage is constitutionally protected by the fundamental right to privacy and all state laws regulating or prohibiting gay marriage are subject to strict scrutiny.

In addition to applying the right to privacy, gay marriage advocates argue that the denial of same-sex marriage licenses violate the Equal Protection Clause of the Fourteenth Amendment. A frequent focal point of numerous cases, the Equal Protection Clause of the Fourteenth Amendment states that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (The United States Constitution). Without a doubt, the language "state" and "equal" are crucial terms in the clause that allow constitutional appeals to arise. How similar must things be in order to be considered equal? In *Brown vs. Board of Education*, Chief Justice Earl Warren proclaimed that the precedent of "separate but equal" could never be equal under the laws of the Constitution. In this historic case, the Supreme Court announced that although processes may seem equal, and tangible parts may appear equal—the sense of inferiority and social stigma of 'separate but equal' violates the equal protection of the laws guaranteed by the Fourteenth Amendment (Epstein and Walker, 622-623). As the justices struck down separate but equal laws regarding racial segregation in 1954, proponents of gay marriage now argue that the current 'separate but equal civil union' laws that still prohibit same-sex marriage are unconstitutional as they violate the Equal Protection Clause as well. Similar to

the arguments made in *Brown*, gay marriage advocates highlight that prohibiting marriage licenses to same-sex couples creates second-class citizens, and introduces an additional social stigma that homosexual couples are inferior to heterosexual couples since they cannot legally be married. Despite states creating civil union laws that bestow the same benefits to same-sex couples as heterosexual couples, gay marriage proponents contest that the simple denial of marriage licenses violates the Fourteenth Amendment's guarantee of equal protection under the laws.

As the Supreme Court undertakes the issue of gay marriage in March 2013, it is still too soon to tell what test the Court will utilize in evaluating gay marriage, what definition of marriage the justices will take, or what laws [if any] they will consider as violating the Constitution. With numerous constitutional issues at hand as the Court takes upon the unfamiliar question of gay marriage, their decision could take the entire nation by surprise.

Prominent State Court Cases

As the gay marriage movement waits anxiously for the Supreme Court's decision on the two gay marriage cases, it is clearly evident that there are numerous legal issues to be decided when the Supreme Court considers the cases. Along with the fundamental right to privacy and the right to marriage, the justices must evaluate whether or not the laws violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Even more difficult, the Supreme Court must affirm which standard to use when evaluating sexual orientation discrimination appeals. As each of these factors affect the overall decision, it is essential to review prior gay marriage court cases to understand how the gay marriage movement arrived at where it is today. Over the course of its history, the gay marriage movement has witnessed success and failure in three prominent state court cases: *Baehr v. Lewin* in 1993, *Baker v.*

Vermont in 1999, and *Goodridge v. Department of Public Health* in 2003. After first assessing these state court cases, it will be easier to predict how the justices will rule in relevant Supreme Court cases, and how they will rule in the two gay marriage cases in June 2013.

In 1993, the gay marriage movement experienced its first legal success despite society's unfamiliarity and lack of support for gay marriage. In *Baehr v. Lewin*, the respondents, Nina Baehr and Genora Dancel, applied for a marriage license in Hawaii but were denied because they were of the same sex (Rosenberg, 343). The couple then sued John Lewin, the director of the Department of Health and administrator of the state marriage law for denying them their marriage license (Rosenberg, 343). After a Hawaii state court dismissed the claim, the couple appealed to the Hawaii Supreme Court where the Court was faced with the question of whether or not Hawaii's refusal to issue a same-sex marriage license violates the Equal Protection Clause.

After reviewing the issues of the case, the Hawaii Supreme Court found that Lewin's denial of the marriage license to the respondents violated the guarantee of equal protection under the laws of Hawaii's Constitution. In coming to their decision, the justices acknowledged that they do "not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice" (*Baehr v. Lewin*). Consequently, the Justices held that a state may deny a couple the right to marry—but only for compelling reasons. To decide which standard of scrutiny they should apply, the Hawaii Supreme Court reviewed prior U.S. Supreme Court cases and deduced that strict scrutiny should be applied in this case due to homosexuals being a suspect classification (*Baehr v. Lewin*). After applying strict scrutiny, the justices then held that Lewin does not possess a persuasive compelling interest to deny same-sex couples the right to marry. Lastly, the Hawaii Supreme Court recognized that "the equal protection clauses of the

United States and Hawaii Constitutions are not mirror images of one another;" thus, the Justices must evaluate whether or not the denial of the marriage license violates the Hawaii Constitution rather than the U.S. Constitution (*Baehr v. Lewin*). In Article I, section 5 of the Hawaii Constitution, it states that "no person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry;" therefore, the Hawaii Constitution clearly "prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex" (*Baehr v. Lewin*). After employing the strict scrutiny standard and analyzing the denial based on the Hawaii State Constitution, the Hawaii Supreme Court easily found that same-sex couples have the legal right to be married.

Despite winning a momentous state court case in *Baehr v. Lewin*, the gay rights movement was countered with a massive opposition movement from religious groups, family forums, and traditional marriage groups from all over the U.S. As opponents of gay marriage vowed to stop and overturn the Hawaii decision, many scholars believe that *Baehr* marked "the beginning of a civil rights revolution for gays in American society" (Rosenberg, 343). Following the *Baehr* victory, same-sex marriage actually did not become legal in Hawaii. In 1994, the Hawaiian legislature passed legislation that limited marriage to heterosexual couples. In addition, opponents rallied against the State Supreme Court in proposing an amendment to the Hawaii Constitution "that would reserve the issue of same-sex marriage for legislative determination," which would allow the legislature to prohibit same-sex marriage licenses (Rosenberg, 343). In 1998—just five years after the *Baehr* decision—Hawaiian voters overwhelmingly ratified the amendment to the Hawaiian Constitution overruling the progress of the *Baehr* decision. Yet the new amendment was not a complete loss to gay rights proponents. In order to ensure that the new

amendment made it onto the ballot for voters, the sponsors of the amendment offered a "reciprocal beneficiaries" law that would guarantee some government and private benefits to same-sex couples in Hawaii (Rosenberg, 344). Thus, although gay rights advocates suffered a defeat in the aftermath of *Baehr*; in the end, they were successful in obtaining some equal rights for same-sex couples in Hawaii.

Launching the U.S.' court system into the gay marriage movement, *Baehr v. Lewin* motivated both proponents and opponents of gay marriage to rally together for what they believe in. Unfortunately for gay rights proponents, "same-sex marriage lacked much public or elite support" in the early 1990s, which allowed opponents to easily apply pressure and overturn the decision (Rosenberg, 344). Without local or national support to implement the ruling, the Hawaii Supreme Court perfectly exemplifies Rosenberg's Constrained Court Theory discussed earlier. Constrained by the opposition's pressure, the Hawaii Supreme Court could not produce social change, despite declaring a landmark ruling in *Baehr*. Yet as more states begin to witness same-sex marriage appeals, and as the gay rights movement begins to alter their legal strategies, the U.S.' court system starts to change their own strategies paving the way for possible social change in the future.

Just six years after Hawaii launched the states into the decisive debate of gay marriage, Vermont was delivered with almost the very same question in 1999 with *Baker v. Vermont*. In this historic court case, three same-sex couples—some who were in a committed relationship for numerous years and even had children—applied for marriage licenses in different towns in Vermont. After all of the couples were denied licenses, the couples brought suit contending that the denial of marriage licenses violated the Vermont Constitution. After trial courts dismissed the claim, the couples appealed to the Vermont Supreme Court leaving them to answer the pivotal

question of whether or not the state can exclude same-sex couples from the benefits that are provided to married couples under the Vermont Constitution.

Although a contentious decision, the Vermont Supreme Court found that the state's refusal to issue marriage licenses to same-sex couples violated the Common Benefits Clause of the Vermont Constitution as it denied those couples the benefits of civil marriage. In reaching their decision, the Vermont justices reasoned that "the legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority" (*Baker v. Vermont*). As the Vermont Supreme Court could not find a persuasive and legitimate state interest for denying the marriage benefits, they consequently ruled that the state could no longer deny same-sex couples those benefits. Although this may have seem like a victory to gay rights proponents, the Vermont justices quickly assured the public that this decision was not an automatic legalization of gay marriage. While recognizing that the legalization of same-sex marriage could remedy the situation, the Vermont justices held that it is not the *only* remedy to the problem. Among suggesting a "domestic partnership" or "registered partnership" that will provide equal benefits to same-sex couples, the Court demonstrated that there are numerous legislative avenues that can be pursued to remedy the constitutional violation (*Baker v. Vermont*). As a result of the many available options, the justices held that, "the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion" (*Baker v. Vermont*). By allocating the Vermont legislature a window of time to correct the situation, the Court hoped to witness the legalization of same-sex marriage or an alternative marital status that would extend "all or most of the obligations provided by the law to married partners" (*Baker v. Vermont*). Without a doubt, the

Vermont Supreme Court was not obligating the legislature to issue same-sex marriages, they simply held that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law…the State could do so through a marriage license is obvious. But it is not required to do so" (*Baker v. Vermont*). As a result, the constrained Vermont court—cautious in overstepping its boundaries and issuing a liberal ruling—merely gave their opinion in taking the first step towards allowing same-sex marriage in the future.

In the aftermath of the *Baker* decision, the Vermont legislature held multiple hearings to decide how to handle giving equal benefits to same-sex couples. After continuous hearings and getting opinions from the public, the legislature passed a bill in April 2000 that granted same-sex couples the right to form civil unions (Rosenberg, 345). In addition to issuing the same benefits as married couples, civil unions required same-sex couples "to register with a town and have their unions solemnized by a member of the clergy or a justice of the peace;" whereas couples who wanted to "dissolve their civil unions were required to petition the Family Court, just as divorcing heterosexual couples are required" (Rosenberg, 345). With the creation of civil unions, the Vermont legislature was able to satisfy the demands of the court, while still maintaining the traditional nature of marriage between one man and one woman.

Unlike the massive political backlash seen in *Baehr v. Lewin*, there was no large-scale opposition movement after *Baker v. Vermont*. In fact, public-opinion data showed that Vermont citizens were evenly divided over the creation of civil unions (Rosenberg, 346). Certainly, there were opponents of civil unions aiming to repeal the law; yet, Vermont did not experience the same political force that was used in Hawaii to overturn *Baehr*. That leaves us to the question then; are civil unions the simple answer to solving the gay marriage debate? If civil unions carry

all of the same rights and responsibilities as marriage, and can be accepted by the public without major opposition, should we simply adopt those instead? Yet at the same time, civil unions are not *exactly* the same. Because of civil unions, same-sex couples possess a separate legal status from heterosexual couples. Moreover, civil unions hold a different symbolic status as same-sex couples "are not, and cannot be, married" (Rosenberg, 346). In a way, civil unions are the "separate but [almost] equal" status to marriage (Rosenberg, 346). Was the Vermont Supreme Court just apprehensive to boldly order same-sex marriage licenses to be issued? Or will it take our legal system a *Plessy*-similar and *Brown*-similar case in order to achieve gay marriage? Though the modest civil union decision in *Baker* resulted in social change, it was still not the historic case needed to propel the gay rights movement in achieving equal rights for same-sex marriage.

After Hawaii's *Baehr* decision generated mass political opposition to same-sex marriage, and Vermont's *Baker* decision that permitted a separate, but not-so equal way of recognition, it would appear as if the U.S.' legal system was heading down a path that would never allow same-sex marriage to occur. Yet in 2003, the Massachusetts court system shocked the entire country with its historic and monumental ruling in *Goodridge v. Department of Public Health*. In this case, seven same-sex couples applied for marriage licenses in Massachusetts and were all denied. Consequently, they brought suit in Suffolk Superior Court in Boston to challenge Massachusetts' ban on same-sex marriage (Rosenberg, 347). After losing the case the next year, the couples appealed to the Massachusetts Supreme Judicial Court where the Court was faced with the issue of whether or not the State's prohibition on same-sex marriage violates the Massachusetts State Constitution.

In a surprising, divisive four to three decision, the Massachusetts Supreme Judicial Court found that in the case of *Goodridge v. Department of Public Health*, the State's prohibition on same-sex marriage violated the state constitution. Because of the significance that this case could have, the justices carefully reviewed each fact of the case before coming to their decision. First, the Court reflected on the U.S' history with same-sex marriage and the relevant court cases that emerged from it. After reviewing both *Perez v. Sharp* and *Loving v. Virginia*, the Court held that clearly "the right to marry means little if it does not include the right to marry the person of one's choice" (*Goodridge v. Department of Public Health*, 327-328). Moreover, the justices found that "whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family…are among the most basic of every individual's liberty and due process rights" (*Goodridge v. Department of Public Health*, 329). Consequently, it is essential that the Court evaluate legislative laws to ensure that guaranteed liberties are not violated. The justices acknowledged that regulating liberties requires, "at very least, to serve a legitimate purpose in a rational way," and that "any law failing to satisfy the basic standards of rationality is void" (*Goodridge v. Department of Public Health*, 330). Thus, in assessing the prohibition on same-sex marriage, the Massachusetts Supreme Judicial Court employed the rational basis standard after finding that there was "no fundamental right or suspect class at issue" to justify using strict scrutiny (*Goodridge v. Department of Public Health*, 331). Despite the rational basis standard being the easiest standard for a state to overcome, the Court found all three of the state's justifications for the law to be unpersuasive and irrelevant. As a result, a majority of the Court's justices ruled in favor of the plaintiffs and declared the ban on same-sex marriage to be unconstitutional and void.

Even though declaring the ban on same-sex marriage was a significant moment in the gay rights movement, it was not the most momentous aspect of *Goodridge*. After invalidating the law, the Massachusetts Supreme Judicial Court then announced that Vermont-style civil unions would not remedy the violation, and could not be implemented in place of same-sex marriage. The justices were firm in that the State Constitution mandated equal treatment in rights, benefits and terminology for heterosexual and same-sex couples. Chief Justice Margaret Marshall infamously stated in her majority opinion that in the case of *Goodridge*:

> Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit. (337)

At last, the gay rights movement witnessed the courts bringing about social change. On May 17, 2004, the first same-sex marriages legally took place in Massachusetts (Rosenberg, 348). Naturally, there were copious amounts of opposition movements launched in order to stop same-sex marriages from being performed. After a public declaration of disapproval from the Massachusetts Governor, the President, and multiple attempts to pass a state amendment to the constitution prohibiting same-sex marriages, the opposition movement still failed to overturn the *Goodridge* decision.

Now that Massachusetts has boldly gone where no state has gone before, they have set the stage for the rest of the states to follow suit. Although numerous states have already amended their constitutions to prohibit same-sex marriage, there has been ample progress in other states

granting civil unions or same-sex marriage. Today, six states allow civil unions and nine states have made same-sex marriage legal (Stark, 2013). Yet despite the swift progress that has been made in the past two decades, there is much more to be accomplished for the gay rights movement. As the federal government does not recognize legal same-sex marriages, homosexual couples are still considered second-class citizens under the law. Clearly, there is a need for the federal court system to get involved; and as the two gay marriage cases arrive at the Supreme Court, now is their time to finally make a stand on the constitutionality of same-sex marriage.

Influential Supreme Court Cases

As the contentious gay marriage debate enters the Supreme Court for the first time in spring 2013, there are numerous theories and speculations already concerning how the justices will rule on the two cases. As a result of the magnitude that their decision could have, it is valuable to analyze past cases in order to better predict how the justices will interpret the gay marriage cases. Throughout the history of the Supreme Court, there have been three main cases that embody similar civil and equal rights appeals as the current gay marriage cases: *Loving vs. Virginia (1966), Bowers vs. Hardwick (1985),* and *Lawrence vs. Texas (2002).* With each of these cases incorporating either the Equal Protection Clause or the right to privacy—the two issues that the Supreme Court is examining now—they will each provide a forecast of how the justices will rule in June 2013.

In *Loving v. Virginia*, the Supreme Court focused on whether individuals had the constitutional right to marry. In this 1966 case, Mildred Jeter, an African American woman, and Richard Loving, a white man, were both residents of Virginia, but, were married in the District of Columbia. After getting married, the Lovings returned to Virginia; yet, were then charged with violating Virginia's anti-miscegenation law that banned interracial marriages. After the

couple was found guilty and sentenced to one year in prison, the judge suspended the sentence if the Lovings left Virginia and did not return for twenty-five years (Epstein and Walker, 639). In a salient sentencing, the Virginia judge remarked that the "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents…the fact that he separated the races shows that he did not intend for the races to mix" (Epstein and Walker, 639). As a result of this prejudiced judge's ruling, the Supreme Court was left to answer the question of if Virginia's anti-miscegenation law violated the Equal Protection Clause of the Fourteenth Amendment.

In reviewing *Loving v. Virginia*, the justices came to a unanimous decision that the Virginia law indeed violated the Equal Protection Clause of the Fourteenth Amendment. In coming to their conclusion, Chief Justice Earl Warren acknowledged that states possess police powers that allow them to regulate marriage; however, those powers are not unlimited. He then held that "marriage is one of the basic civil rights of man, fundamental to our very existence and survival;" consequently, "to deny this fundamental freedom…is surely to deprive all the State's citizens of liberty without due process of law" (Epstein and Walker, 641). Additionally, the Court found that despite the law rendering an equal punishment for both whites and blacks, the law nevertheless violates the Equal Protection Clause. The justices all agreed that Virginia had no legitimate purpose in creating the law besides "invidious racial discrimination" (Epstein and Walker, 641). As a result, the justices held that racial classifications need to be subject to strict scrutiny as individuals' fundamental rights are at risk for violation. Thus, the state of Virginia would have to demonstrate a compelling interest for the law, and the law must be the least restrictive means possible. Since Virginia did not have a compelling interest for the law, the judges easily found this law to be in violation of the Fourteenth Amendment.

Evidently, the *Loving* decision impacts the current gay marriage debate that the Supreme Court will be undertaking in 2013. Chief Justice Earl Warren's comment that "marriage is one of the basic civil rights of man" is a tremendous argument for gay rights advocates (Epstein and Walker, 641). Gay rights proponents contest that surely if individuals have the constitutional right to marry someone regardless of their race, they should be able to marry someone regardless of their sexual orientation. Although the *Loving* decision reinforces the arguments of gay rights advocates, the Supreme Court could look at the Chief Justice Earl Warren's comments regarding which standard to use when making classifications instead. Racial classifications are subject to strict scrutiny because of the U.S.'s odious history with racial discrimination. Because the gay rights movement is so new and fast paced, the U.S. does not have such an execrable history as gay marriage; consequently, the Supreme Court may not evaluate the cases with strict scrutiny as they did in the *Loving* case. If this happens, the justices may use the rational basis test instead which would most likely allow states to continue regulating gay marriage. Unquestionably, it is impossible to know precisely how the Supreme Court will rule in June 2013; yet, it is certain that the justices will review precedent in coming to their decisions.

As the *Loving v. Virginia* decision propels the arguments of the current gay rights movement, the Supreme Court's decision in *Bowers v. Hardwick* hinders their momentum. In 1985, a Georgia police officer observed the respondent, Michael Hardwick, engaged in consensual homosexual sodomy with another male in Hardwick's home (*Bowers v. Hardwick*). Consequently, Hardwick was charged for violating a Georgia statute that criminalizes sodomy. As the case reached the Supreme Court, the justices were faced with the issue of whether or not the Constitution "confers a fundamental right upon homosexuals to engage in consensual

sodomy" (*Bowers v. Hardwick).* If indeed the Constitution bestowed that right, it would thereby invalidate numerous state laws that considered sodomy illegal.

Differing from *Loving*, the justices were split in a five to four decision in *Bowers v. Hardwick.* After hearing the case, Justice White, writing for the majority opinion, first declared that there is no constitutional right for homosexuals to engage in sodomy in their homes. Justice White held that because there is "no connection between family, marriage, or procreation, on the one hand, and homosexual activity" the respondent could not relate a constitutional right to marriage, to a constitutional right to sodomy (*Bowers v. Hardwick*). Moreover, he found that the U.S.'s long history in prohibiting acts of sodomy solidify the Court's decision in allowing states to restrict sodomy. In addition to sodomy not being a fundamental right, Justice White stated that the right to privacy that was discussed in *Griswold v. Connecticut* does not extend to acts of sodomy because "illegal conduct is not always immunized whenever it occurs in the home" (*Bowers v. Hardwick*). In coming to their decision, the Court used the rational basis test to examine the constitutionality of the law. The majority justices found that since Georgia has a reasonable basis for the law, it is constitutional. Lastly, Justice White and the majority opinion commented that the Court is not "inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause" because it makes the Court vulnerable in becoming illegitimate with "judge-made constitutional law[s]" (*Bowers v. Hardwick*). Evidently in this case, the majority justices were wary of overstepping their boundaries by extending too many constitutional rights.

A contentious issue, there were many concurring and dissenting opinions in *Bowers*. Chief Justice Warren Burger concurred that there has never been a constitutional right to engage in acts of sodomy. After describing democratic history and religious morals, he agreed with the

majority opinion about the outcome of *Bowers*. Additionally, Chief Justice Burger remarked that this is a legislative issue and he finds no issue with states enacting these types of legislations. Also agreeing with the majority opinion, Justice Powell concurred that there is no fundamental right to sodomy in the Due Process Clause. However, Justice Powell mentions that there could be an Eighth Amendment issue if Hardwick received a long prison sentence after his trial. Disagreeing with the majority opinion, Justice Blackmun angrily dissented that this case is not about a fundamental right to engage in acts of sodomy, rather, this case is about the fundamental right that every individual has: "to be left alone" (*Bowers v. Hardwick*). Contrary to the majority opinion, Justice Blackmun passionately dissents that the fundamental right to privacy found in *Griswold* completely applies to Hardwick since he was in his own home. He does not think that Georgia had a justifiable reason for this law, and that majority opinion only declared the law constitutional because of the homosexual nature of the law. Justice Stevens additionally dissents against the majority opinion in the case as well. After reviewing several prior cases in his dissenting opinion, Justice Stevens came to the conclusion that precedent clearly illustrates that states may not prohibit sodomy because—as famously stated in *Griswold*—it is within the "sacred precincts of marital bedrooms" (*Bowers v. Hardwick*). More importantly, Justice Stevens contends that, "the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions" (*Bowers v. Hardwick*). Clearly, Justice Stevens believes that every individual—regardless of race, sex, or sexual orientation—has the fundamental right bestowed upon by the Constitution to his or her own relationships.

Without a doubt, *Bowers v. Hardwick* was a controversial case that left the Court severely divided. Now as the future of the gay rights movement is in the hands of the Supreme

Court, it will be interesting to see how the justices bring *Bowers* back into the debate. Although the majority opinion is mainly referencing sodomy, Justice's White statements concerning which standard to use when evaluating sexual orientation laws is extremely relevant. In examining the Georgia law, the Court only used the rational basis test since they found that sexual orientation is not a suspect class nor has a bad history of discrimination in the U.S. Evidently, the standard that the current Supreme Court decides to use with the gay marriage cases will immensely impact the outcome of the cases. With the rational basis test allocating more leeway to the states, the U.S. could see the continuance of gay marriage regulations. On the other hand, the Court could use strict scrutiny which almost always strikes down state laws; and in this case, the U.S. could see a massive victory for the gay rights movement. In addition to the standard used in *Bowers,* the dissenting opinion is also relevant to today's gay marriage debate. Justice Blackmun and Justice Stevens undeniably state in their dissenting opinions that individuals have the fundamental right to privacy; more so, Justice Stevens clearly contested that the right to privacy allows individuals to have their own relationships. Whether or not the current justices include same-sex marriage as an individual's own relationships is still unknown though, and will greatly impact the decision that will be delivered in June 2013.

As the *Loving* decision rendered a victory for gay rights advocates, and the *Bowers* decision administered a setback, it seemed as if the Supreme Court was able to finally find a middle ground when they heard the arguments of *Lawrence v. Texas* in 2002. In this historic case, Houston police officers were responding to a reported weapons disturbance at an apartment complex and observed the respondents, John Lawrence and Tryon Garner engaged in a sexual act inside of Lawrence's apartment (Epstein and Walker, 437). Both of the men were arrested and convicted of violating a Texas statute that forbids two persons of the same sex to engage in

acts of sodomy. Important to note, unlike *Bowers v. Hardwick*, the Texas anti-sodomy law only applied to members of the same sex. Because the law only applied to homosexuals and not heterosexuals, the respondents appealed to the Supreme Court leading the justices to answer the questions of whether or not the Texas statute violates the Equal Protection Clause of the Fourteenth Amendment, and/or violates the fundamental right to privacy.

In a surprising six to three decision, the Court found that the Texas statute does not violate the Equal Protection Clause of the Fourteenth Amendment, but that it does violate the right to privacy. In a majority opinion written by Justice Kennedy, the Court held that the right to privacy for married couples, which was established in *Griswold v. Connecticut*, extends to all individuals in sexual relationships. Justice Kennedy recognized that the "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government" (Epstein and Walker, 439). Moreover, he found that this case is simply about a private choice between consenting adults; therefore, all sexual conduct falls into the right to privacy. The majority opinion additionally declared that the precedent of *Bowers* will be overturned, as the Court misunderstood the right to privacy then, and did not acknowledge that there was an expectation of privacy in sexual matters. Yet although the statute violated the right to privacy found in the Due Process Clause, Justice Kennedy highlighted that the law did *not* violate the Equal Protection Clause of the Fourteenth Amendment. In his reasoning, the Texas statute did not violate the Equal Protection Clause because it was too narrow. Nevertheless, Justice Kennedy and the majority opinion found the law to be in violation of the Due Process Clause compelling them to invalidate the statute. Furthermore, the Justices concluded that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" (Epstein and Walker, 440). Appropriately, the Supreme Court

deemed that no compelling state interest coupled with the violation of the Due Process Clause permits them to overturn the precedent of *Bowers v. Hardwick* and to declare the anti-sodomy Texas statute unconstitutional.

Similar to *Bowers v. Hardwick*, the *Texas v. Lawrence* decision possessed many concurring and dissenting opinions from other justices. Justice O'Connor agreed with the outcome of the majority decision, but disagreed with the reasoning in her concurring opinion. She deduced that the Texas statute was unconstitutional because it violated the Equal Protection Clause rather than the Due Process Clause of the Fourteenth Amendment. Justice O'Connor reasoned that the law is unconstitutional because it bans homosexual sodomy but not heterosexual sodomy. Moreover she found that "a law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review" (Epstein and Walker, 441). In addition to the statute being biased against homosexual orientation, Justice O'Connor concluded that Texas' rationale for the law "is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause" (Epstein and Walker, 441). Subsequently, Justice O'Connor finds no reason to uphold the statute and adduces that it is unconstitutional under violation of the Equal Protection Clause.

Contrary to Justice O'Connor and the majority opinion, Justice Scalia disagrees with the overall decision of the case in his dissenting opinion. Justice Scalia first addressed that the Court has been extremely hypocritical in delivering its decision in *Lawrence*. Justice Scalia reminds the Court that they were apprehensive and wary to overturn *Roe v. Wade* with *Casey* because of fear that it would delegitimize the Court's rulings. However, in this case, the Court is more than willing to overturn *Bowers v. Hardwick.* As a result, Justice Scalia finds the majority justices to

be hypocritical in their decisions. In addition, Justice Scalia dissents that the Court—along with the current legal profession—has "signed on to the so-called homosexual agenda" in becoming anti anti-gay; and because of this new agenda, valid laws are being considered unconstitutional (Epstein and Walker, 443). Justice Scalia finds that "what Texas has chosen to do is well within the range of traditional democratic action" (Epstein and Walker, 443). In other words, it is permissible for a state to be anti-gay as it is simply a state judgment and within their powers to do so. Confounded by the majority's opinion, Justice Scalia concludes his opinion by leading off to what is now possible for the Court. Since the Court did not find Texas's rationale as a compelling interest, Justice Scalia wonders "what justification could there be for denying the benefits of marriage to homosexual couples" in the future (Epstein and Walker, 443). Clearly, Justice Scalia foresees the Court taking up the issue of same-sex marriage in the future and employing the same rationale that was used in *Lawrence.*

Lastly, Justice Thomas writes a brief dissenting opinion to the majority justices. Although he believes that the Texas statute is unconstitutional and should be repealed, he does not believe that the Court can do so. He quickly reminds the justices that there is no general right to privacy in the Constitution; therefore, there is nothing the Court can do to repeal the law.

Evidently, *Texas v. Lawrence* can have a huge impact as the current Supreme Court justices analyze the two gay marriage cases. The Court can both stick with precedent and rule that there is no Equal Protection Clause violation, or the Court can agree with Justice O'Connor's concurring opinion that there was a violation of the Equal Protection Clause. More importantly, though, is how Justice Scalia's final dissenting opinion remarks will play into the current debate. According to Justice Scalia's opinion—if the Court stuck to their same reasoning in *Lawrence*—there may be no valid state justifications for denying same-sex marriage licenses.

In *Lawrence*, the Court did not find a compelling state interest to justify the Due Process Clause violation; the question is now whether the Court necessitates a compelling state interest to regulate same-sex marriage.

From *Loving v. Virginia*, where the Supreme Court found a fundamental right to marry an individual of a different race; to *Bowers v. Hardwick*, where the Court found that the constitutional right to marry did not extend to a right to engage in sodomy; and now to *Lawrence v. Texas*, where the justices found anti-sodomy laws to be in violation of the Due Process Clause, the U.S. has witnessed the Supreme Court go back and forth with the issue of equal rights for homosexuals and the right to marry. Now as the issue of gay marriage arrives at the Supreme Court, how will the justices rule in June 2013? Will they need to see a simple rational basis from the states in order to regulate same-sex marriage? Or will they require a compelling interest? After analyzing the past three relevant court cases, the Supreme Court could easily rule in both directions for gay marriage. The justices could find that only denying marriage to homosexuals violates the Equal Protection Clause, or they could find that states have a legitimate interest in regulating marriage and have the constitutional right to do so under their police powers. Yet regardless of their ruling, the underlying question remains: how will their decision impact the current gay rights movement?

The Supreme Court Decision Awaits

As the gay rights movement gathers more Presidential attention, media coverage, and societal support, it appears as if the movement is gaining ground and is closer to witnessing social change. Yet, in December 2012, the Supreme Court startled both proponents and opponents of gay marriage as the Court declared that they would take on the issue of gay marriage in the spring of 2013. Would this be the moment that everything came down to? Would

the Supreme Court hand down a decision that would curtail the gay rights movement, or would they lead the nation in upholding equal rights for homosexuals and be responsible for creating social change?

In tackling the gay marriage debate, the Supreme Court will be evaluating two pivotal pieces of legislation: the U.S. Congress' Defense of Marriage Act (DOMA) in *United States v. Windsor*, and California's Proposition 8 in *Hollingsworth v. Perry*. In *United States v. Windsor*, the respondent, Edith Windsor, was married to Thea Clara Spyer in Toronto, Canada in 2007; under New York state law their same-sex marriage was recognized. After Spyer passed away in 2009; however, the federal government would not recognize that Windsor was the sole executor of Spyer's estate because DOMA prohibited the U.S. government from recognizing same-sex marriages. As a result, Windsor had to pay a substantial federal estate tax that would have otherwise been exempt if their marriage was recognized by the federal government (Shapiro, 2012). Consequently, Windsor filed suit in 2010 that DOMA violated her Fifth Amendment guarantee to equal protection under the law. The case took a surprising twist in 2011 when the Executive Branch and the U.S. Attorney General declared that they would not defend the constitutionality of DOMA in court, leading the Bipartisan Legal Advisory Group of the House of Representatives to intervene and defend DOMA. Nonetheless, the district court ruled that DOMA was unconstitutional because it violated the Fifth Amendment, and the Second Circuit Court of Appeals later affirmed that ruling.

In reviewing *United States v. Windsor,* the Supreme Court will initially have to look at issues related to standing and jurisdiction. First, they must determine whether or not they even have jurisdiction to review the case since the Executive Branch had agreed with the lower court's prior ruling that DOMA was unconstitutional. Second, they must decide whether the Bipartisan

Legal Advisory Group of the House of Representatives has standing to defend DOMA in the absence of the Executive Branch. In addition to ruling on standing and jurisdiction issues, the Supreme Court will have to take a side on gay marriage. Considered the most important issue of the case, the justices will have to evaluate whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the law for homosexuals who are legally married under state law. If the Supreme Court finds that Section 3 of DOMA violates the Fifth Amendment, the ruling would immensely aid the gay rights movement, and could result in the U.S. federal government officially recognizing all same-sex marriages.

Analyzing the arguments in *United States v. Windsor*, Windsor is arguing that the Supreme Court needs to apply the heightened strict scrutiny test because the law is discriminating against sexual orientation. They argue that heightened scrutiny is justified in this case because of four essential factors: First, "homosexuals as a group have historically endured persecution and discrimination." Second, "homosexuality has no relation to aptitude or ability to contribute to society." Third, "homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages." Fourth, "the class remains a politically weakened minority" ("*United States v. Windsor*" 29-30). As a result of these four reasons, Windsor argues that the highest level of scrutiny should be applied in this case to clearly demonstrate how DOMA violates the Equal Protection Clause of the Fifth Amendment.

Arguing for the constitutionality of DOMA, the Bipartisan Legal Advisory Group commences their argument with the two primary reasons for why Congress enacted DOMA. First, they elucidate that Congress has ""unique federal interests," which include maintaining a consistent federal definition of marriage, protecting the fisc, and avoiding the "unknown

consequences of a novel redefinition of a foundational social institution”” (*United States v. Windsor,* 38). Second, they argue that Congress constructed DOMA to encourage “responsible procreation” among individuals (*United States v. Windsor,* 38). In addition to explaining the reasons for creating DOMA, the Bipartisan Legal Advisory Group have four major arguments as to why the federal government has a legitimate, compelling interest in regulating gay marriage; which in turn, allows DOMA to be constitutional. First, they argue that the federal government is attempting to maintain a “uniform definition of marriage” between one man and one woman across all fifty states (*United States v. Windsor,* 38). Second, they argue that Congress is trying to “protect the fisc” and save government resources “by limiting the beneficiaries of government marital benefits” (*United States v. Windsor,* 40). Third, the Bipartisan Legal Advisory Group is arguing that Congress has an interest in “preserving a traditional understanding of marriage” as one man and one woman (*United States v. Windsor,* 42). Lastly, the group is arguing that DOMA encourages “responsible procreation” among individuals (*United States v. Windsor,* 43). From these key factors, the Bipartisan Legal Advisory Board contends that the federal government has a real interest in regulating gay marriage; and thus, DOMA is constitutional.

After evaluating the main arguments for both Windsor and the United States, I predict that the Supreme Court will declare DOMA unconstitutional as it violates the Equal Protection Clause of the Fifth Amendment. Windsor presented several reasons why the discrimination present in this case deserves heightened scrutiny. Moreover, there are numerous holes in the main arguments for why the federal government has an interest in regulating gay marriage. The Bipartisan Legal Advisory Group’s first argument that the federal government needs to maintain a uniform definition of marriage can be nullified because of the *Haddock v. Haddock* case in 1906 where the Supreme Court ruled that “the states, at the time of the adoption of the

Constitution, possessed full power over the subject of marriage and divorce…[The] Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce" (*United States v. Windsor*, 43). This 1906 case set the precedent that the states had the power to regulate marriage—*not* the federal government. The group's second argument that they need to protect the fisc is evidently an important government interest. However, the Supreme Court ruled in *Graham v. Richardson* in 1971 that even in times of great economic woe, saving money is not a justification for an "invidious classification" of a minority group (*United States v. Windsor*, 39). The Bipartisan Legal Advisory Group's third argument concerning preserving the traditional understanding of marriage is additionally flawed, because as history demonstrates, we cannot use "tradition" as an argument because times change, and our culture evolves. For example, if the United States kept with tradition, slavery would still be constitutional. Clearly, keeping with tradition is not a valid argument. The group's last main argument that the federal government is trying to encourage responsible procreation is considered by some as the most absurd argument. Of course, opposite-sex couples are able to procreate naturally unlike same-sex couples; however, DOMA did not create any new incentives for heterosexual couples to procreate responsibly. Moreover, the CDC researched and found that almost one third of all babies born in the United States are out of wedlock now; highlighting the fact that heterosexual couples may not already be practicing responsible procreation (Center for Disease Control). After evaluating each argument on both sides of *United States v. Windsor*, it appears that gay marriage proponents may achieve success in striking down the federal government's DOMA; yet, as the U.S. has witnessed before, the Supreme Court could always rule in the other direction and take everyone by surprise.

As one case embraces the gay marriage debate at the national level, the other case undertakes the debate at the state level. The other pivotal case that the Supreme Court will be dealing with in the gay marriage debate is *Hollingsworth v. Perry* in which the justices will be looking at this contentious issue that began in California. In *Hollingsworth v. Perry*, the respondents are a gay and lesbian couple who are suing the California state legislators—responsible for the creation of Proposition 8—for violating their Fourteenth Amendment right to equal protection. Since Proposition 8 amended the California State Constitution so that marriage is only between one man and one woman, the respondents claim that they do not possess the same equal rights as heterosexual couples to wed. Similar to *United States v. Windsor*, California's Governor and Attorney General surprisingly announced that they would not defend Proposition 8 in court, which led to other state officials intervening and defending the bill in their absence. Yet despite different officials defending the legality of Proposition 8, the district court ruled that Proposition 8 violated the Constitution, and the Ninth Circuit Court of Appeals later affirmed the ruling.

In *Hollingsworth v. Perry*, the Court will first have to decide whether the new petitioners have standing to defend Proposition 8 in absence of the original California state legislators. After ruling if the petitioners have standing or not to bring the case, the Supreme Court will have to then decide the paramount question of if the Equal Protection Clause of the Fourteenth Amendment prohibits California from defining marriage as the union of one man and one woman (Oyez Project, 2013). If so, then Proposition 8 would be unconstitutional and could potentially affect the constitutionality of numerous other state marriage laws that prohibit same-sex couples to wed.

In reviewing the arguments of *Hollingsworth v. Perry*, both the petitioners and defenders utilize similar arguments to *United States v. Windsor*. The petitioners in this case argue that Proposition 8 has one main effect: to strip same-sex couples of their right that they previously possessed from the state of California "to obtain and use the designation of 'marriage' to describe their relationships" (*Hollingsworth v. Perry*, 16a). In addition, they argue that California does not have a compelling governmental interest in prohibiting same-sex couples to marry. They reason that since Proposition 8 does not include nor have an "effect on the rights of same-sex couples to raise children or on the procreative practices of other couples," the state of California does not have a compelling interest to prohibit same-sex marriage (*Hollingsworth v. Perry*, 31). Moreover, given that Proposition 8 does not "have any effect on religious freedom on or parents' rights to control their children's education" the State's interest in enacting Proposition 8 was not to safeguard these liberties either (*Hollingsworth v. Perry*, 31). As a result of the lack of these components, the petitioners argue that Proposition 8 is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment, and the State does not have a compelling governmental interest evident in the proposition to justify the prohibition of marriage.

On the other side of the debate are state legislators arguing that Proposition 8 is constitutional because the state exemplifies a compelling interest. California state legislators' main argument in *Hollingsworth v. Perry* stems from their reasoning that "the traditional definition of marriage furthers society's vital interest in responsible procreation and childrearing," which furnishes them with a compelling state interest (*Hollingsworth v. Perry*, 27-28). They argue that human history clearly demonstrates that there is a "biological reality" that only heterosexual couples can produce children; as a result, marriage is "social institution with a

biological foundation" (*Hollingsworth v. Perry*, 27). Because of this biological foundation, they argue that the principal purpose of marriage in any society is to regulate the sexual relationships between men and women so that their ability to procreate in relationships will benefit society. Furthermore, they argue that the institution of marriage will increase the likelihood of children being born and raised into stable and lasting "family units" that consist of both the mother and father that conceived the child (*Hollingsworth v. Perry*, 27-28). Therefore, they contend that any benefits that derive from marriage are related to the government's interest in "steering procreation into marriage" (*Hollingsworth v. Perry*, 28). Following this reasoning, the state legislators contest that Proposition 8 was crafted out of this compelling state interest making the legislation constitutional.

Although the California state legislators attempt to illustrate how the state possesses a compelling interest to justify the prohibition by discussing the traditional nature of marriage and procreation, their argument is flawed in similar ways to *United States v. Windsor*. As a result, I hypothesize that the Supreme Court will reject their argument and declare Proposition 8 unconstitutional. Once again, it is amiss to state that society must stick to tradition, because as a society we are constantly growing and evolving; consequently, traditions and values concerning in marriage will evolve as well. As stated previously, the CDC announced that one third of all babies born in the United States are born out of wedlock (Center for Disease Control). On top of that startling statistic, in 2009 the CDC also found that roughly 53% of all marriages end in divorce (Center for Disease Control). Evidently, the tradition and goal of linking marriage and responsible procreation have changed as heterosexual couples are not defining marriage as their right to responsibly procreate. In addition to society evolving and not sticking to traditions, the California state legislators' argument is also flawed because same-sex couples cannot

biologically procreate; thus, there is no "threat of irresponsible procreation" by them (*Hollingsworth v. Perry*, 31). On the other hand, heterosexual couples can practice sexual behavior outside their marriage which would present a threat of irresponsible procreation (*Hollingsworth v. Perry*, 31). Consequently, Proposition 8 should be considered unconstitutional as the California state legislators' argument does not demonstrate how same-sex couples would threaten the traditionalism of marriage, and thus, lacks a compelling governmental interest for Proposition 8 to be constitutional.

Of course, it is easy to analyze both *United States v. Windsor* and *Hollingsworth v. Perry*, critique the arguments, and make a prediction of how the Supreme Court will rule. Yet, the Supreme Court has often ruled contrary to public opinion and has surprised many with its decisions. With oral arguments beginning in late March 2013 and a decision not expected until June 2013, the outcome of these two cases could still go either way. The gay rights movement could see an important victory in the fight to obtain equal rights, or they could be delivered a massive hurdle to overcome in the future. Moreover, the Supreme Court can completely dismiss the issue by ruling that the petitioners do not have standing to sue. In this outcome, the Supreme Court would subject the case to go down to additional lower court review which could result in several more months of legal battle. Evidently, there are numerous outcomes that can greatly affect the drive of the gay rights movement. Not only are bystanders wondering what the decision will be in June; yet, they are wondering if the Supreme Court's decision will—if at all—affect the momentum of the gay rights movement in the years to come.

Although both outcomes are completely possible, it really does not matter *how* the Supreme Court rules in June 2013. Of course, a ruling striking down the same-sex marriage prohibitions would be the most beneficial outcome for the gay rights movement; however, even

if the Court rules in the other direction, their decision will not affect the momentum or the popularity of the gay rights movement. As more of the American public becomes more accepting of same-sex marriage, it is simply a matter of time before the Supreme Court realizes that they must jump on the bandwagon and rule in favor of same-sex marriage. As stated previously, Rimmerman and Wilcox emphasize that although the Supreme Court does not create social change with bold rulings, they will eventually follow public opinion. Therefore, if the Supreme Court does not rule in favor of the gay rights movement or dismisses the case, in time, they will ultimately declare a favorable ruling on gay marriage as they tend "to consolidate change that has already occurred" (Rimmerman and Wilcox, 44). The majority of the American public is supportive of gay marriage, the current Obama Administration endorses gay marriage, and now conservative members of Congress are becoming supportive of gay marriage. Needless to say, it is only a matter of time before the Supreme Court justices support gay rights as well.

In addition to the Supreme Court eventually following public opinion, the gay rights movement will witness social change regardless of the Court's decision because of its fast-paced momentum and rapid progress. Within the last 60 years, the gay rights movement has overcome the belief that homosexuality is a disease, to understanding the AIDS epidemic, to prohibiting anti-sodomy laws, to granting civil unions, and is now seeing the legalization of same-sex marriage in several states. Considered one of the most expeditious social movements in U.S. history, the gay rights movement has experienced numerous victories in its goal of achieving equal rights for the LGBT community. Undoubtedly, the gay rights movement will succeed in achieving equal rights and same-sex marriage across all fifty states in the near future.

The Gay Rights Movement: Our Generation's Civil Rights Movement?

Commencing its journey in 1993 as a simple state court case in Hawaii, the gay rights legal movement has certainly come a long way in just 20 years. With the legalization of same-sex marriage in nine states and six states allowing civil unions now, it is clear that gay rights proponents have won many victories (Stark, 2013). But at the same time, the movement has also been dealt numerous blows with thirty-eight states banning same-sex marriage through legislation or constitutional amendments (Stark, 2013). As a result of the many successes and losses dealt to the gay rights movement, there have been countless comparisons of it to the 1960s civil rights movement. Both movements encompass influential public leaders, include paramount pieces of legislation that were initiated by the Presidency, and have clear, identifiable legal strategies for obtaining their goal. Additionally, both movements recognized that litigation could "lead to building a movement, generating public support for new rights claims, and [provide] leverage to supplement other political tactics" (Rosenberg, 356). Court case after court case, the civil rights movement witnessed the outlawing of the exclusion of black voters from primaries, to the separate but equal doctrine, and to the inclusion of black students in law school. Evidently, *Brown vs. The Board of Education* "was the last step in a carefully planned legal strategy that had moved forward one step at a time" (Rimmerman and Wilcox, 55). Parallel to the civil rights movement, the gay rights movement has used litigation to achieve their mission as well. From the prohibition of anti-sodomy laws, to the separate and almost equal civil unions, to Massachusetts legalizing same-sex marriage, the gay rights movement has experienced many of the same legal victories and defeats as the civil rights movement had.

Despite the many similarities between the civil rights movement and the gay rights movement, there are obvious differences that prevent the two from being accurately compared to one another. The most obvious of course, is the history of persecution. Although members of the

LGBT community have been harassed, assaulted, bullied in schools, and discriminated against—and are even still today—it is not to the extent of what African Americans had endured before the civil rights movement. While all of those actions are hateful and atrocious hardships to bear, they do not compare to slavery, the lynching, or hangings that African Americans had endured in trying to obtain equal rights. In addition to the history of persecution, the pace of social change between the two movements is dramatically disparate. African Americans had been rebelling against slavery and battling for equal rights since the 1800s, yet it was not until after the 1960s when the Voting Rights Act and the Civil Rights Act were passed that the U.S. witnessed social change. On the other hand, the gay rights movement is still fairly recent. Gay rights proponents began gathering attention in the 1950s for equal rights; and as early as the 1970s, the movement already began to see victories in changing legislative policies. From there, the gay rights movement has captured immense attention, and continues to gain more and more support each year. In just seventeen years, public opinion polls have shown opposition to gay marriage fall from 68% in 1996, to 47% in March 2013 (Stark, 2013). Unmistakably, society has grown accustomed to the gay rights movement and becomes more supportive of it with each passing year.

In addition to public opinion rapidly changing, the use of new online social media sites has greatly impacted the gay rights movement. Online outlets such as Facebook, Twitter, Instagram, and YouTube allow the gay rights movement to reach vast amounts of people, convey their message to younger users, and connect them with their cause. Whether or not the use of social media sites has solely caused this rapid change in public opinion is another debate; yet, there is no doubt that they have contributed to the growing gay rights movement and in changing public opinion. As a result of having a disparate history of persecution in the U.S., and an

inconsistent time frame, it is unreasonable to compare the gay rights movement with the 1960s civil rights movement. Despite having similar legal strategies, the differing outcomes and the immense differences in the pace of social change prevent a fair comparison of the two social movements. As the civil rights movement took over a century to achieve equal rights, the fate of the gay rights movement is still unknown as it waits on the Supreme Court's decision.

Conclusion

Fueled by a passion for equal rights, a drive for egalitarianism, and a dedication to justice, the gay rights movement is now one of the most rapidly changing social movements in America. After leaping over the hurdles presented by the religious opposition movement, and overcoming the political attempts to overturn monumental judicial decisions since the 1950s, the gay rights movement is now waiting—motionless—for the Supreme Court to make its move. As the fate of DOMA in *United States v. Windsor*, and Proposition 8 in *Hollingsworth v. Perry* lie in the justices' hands, it is clear from the evidence that the Supreme Court can rule in either direction. Will they follow the path that was taken by the civil rights movement, and deliver a *Plessy*-like decision, keeping the separate but not-so equal civil unions? Or will they announce a *Brown* decision and declare once and for all that denying same-sex marriage licenses violates the Constitution? Or even, will the Supreme Court dismiss the issue and not even take a stand on gay marriage right now? With a majority of the public supporting gay marriage, and a supportive Executive Branch waiting in the background, the Supreme Court has a chance to create immense social change with their decision in June 2013. Exemplifying Rosenberg's Dynamic Court View, the Supreme Court can demonstrate that they possess power, and are not constrained by the other branches of government by declaring a historic decision in June.

Yet hypothetically, if the Supreme Court evades the question and does not take a stand on gay marriage, will it really matter? After reviewing the divergent theories on social change, recapitulating the history of the gay rights movement, and analyzing the past and current court cases, it is clear that the Supreme Court's decision will *not* affect the momentum and the magnitude of the gay rights movement. Public opinion polls have proven that America is more accepting of homosexuality and same-sex marriage than ever before. Moreover, if public opinion continues to follow the same trend, more and more Americans will support same-sex marriage. Additionally, the Obama Administration has set the precedent in the Executive Office to endorse gay marriage. Lastly, the increasing support from the Republican Party evidences that political candidates can no longer run on an anti-gay platform anymore. The LGBT community is an integral part of the U.S., and must be taken into consideration by all political candidates in order to be successful. Although numerous states had already enacted legislation or passed a constitutional amendment prohibiting same-sex marriage, with the changing attitudes of society, it is with no doubt that those prohibitions will be repealed in the years to come. Thus, if the Supreme Court dodges the issue at hand or administers an unfavorable ruling in June, it will not hinder the gay rights movement. Their ruling may become another hurdle or another obstacle to overcome—but that is it. If asked whether they would continue to fight into the future until equal rights were achieved for the LGBT community—the gay rights movement would swear, "I do."

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