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IRRECONCILABLE DIFFERENCES? A CONSTITUTIONAL ANALYSIS AS TO WHY THE UNITED STATES SHOULD FOLLOW CANADA'S LEAD AND ALLOW SAME-SEX MARRIAGE

INTRODUCTION

In June 2003, the Ontario Court of Appeals handed down the landmark decision of *Halpern v. Toronto*, which sanctioned same-sex marriage.¹ A mere two months after the decision, nearly 600 same-sex couples had applied for marriage licenses in Toronto's city hall.² More than one hundred of these couples were U.S. citizens, who had traveled to Canada to legally marry.³ Not only did the *Halpern* court rule that the Canadian federal law limiting marriage to heterosexual couples violated the 1982 Charter of Rights and Freedoms, part of the Canadian Constitution,⁴ but the court also changed Canada's legal definition of marriage to encompass same-sex unions.⁵ Prior to Canada's allowance of same-sex marriage it had been

1. *Halpern v. Toronto*, [2003] 65 O.R.3d 161.

2. Clifford Krauss, *Now Free to Marry, Canada's Gays Say, 'Do I?'*, N.Y. TIMES, Aug. 31, 2003, at A1.

3. *Id.* Canada has no residency or citizenship requirement for marriage; therefore, U.S. citizens can obtain a marriage license and legally marry their same-sex or opposite-sex partner. Deborah Gutierrez, *Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications it Will Have on the United States*, 10 NEW ENG. J. INT'L & COMP. L. 175, 208 (2004). Five weeks after *Halpern*, 15% of the 362 same-sex marriage licenses issued in Canada were issued to U.S. couples. Jay Weiser, *The Next Normal Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 50 (2004).

4. CAN CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). Jeffery Hodgson & Randall Palmer, *Toronto Issues Gay Marriage License After Ruling*, REUTERS, June 10, 2003, available at <http://www.reuters.com/printerFriendlyPopup.jhtml?type=topNews&storyID=2907895>.

5. *Halpern*, 65 O.R.3d at 196-97.

legal in the Netherlands since April 2001, in Switzerland since September 2002, and in Belgium since early 2003.⁶

In stark contrast to the recent developments in Canada and Western Europe, the United States lags far behind in recognizing the right of homosexuals to marry.⁷ The reason why the U.S. couples had to cross the border to marry is that only one of the fifty states permits same-sex couples to legally marry.⁸ While Senators in the United States are working to amend the Constitution to say that marriage can only be between one man

6. *Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003); Weiser, *supra* note 3, at 50.

7. Steve Sanders, *U.S. Lags on Gay Rights; Supreme Court Can Help*, CHI. TRIB., June 22, 2003, at C3.

8. See generally *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the prohibition on same-sex marriage violated Massachusetts' constitution). See also *Massachusetts Court Rules Ban on Gay Marriage Unconstitutional*, available at <http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling/>.

Six months after gay and lesbian couples began legally marrying in Massachusetts, opponents of same-sex marriage swept Election Day, with voters in eleven states approving constitutional amendments codifying marriage as an exclusively heterosexual institution. The amendments won in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah and even Oregon – the one state where gay rights activists had hoped to prevail. The amendments passed with a 3-to-1 margin in Kentucky, Georgia and Arkansas, 3-to-2 in Ohio and 6-to-1 in Mississippi. Bans passed by narrower margins in Oregon, about 57%, and Michigan, about 59%.

Kavan Peterson, *50-State Rundown On Gay Marriage Laws*, Nov. 3, 2004, available at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=false>.

Since Massachusetts began allowing gay and lesbian couples to wed last May, 13 states have approved constitutional bans on same-sex marriage. This number includes Missouri, which approved such a measure in August. The amendments in Mississippi, Montana and Oregon refer only to marriage, specifying that it should be limited to unions of one man and one woman. The measures in Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma and Utah call for a ban on civil unions or other partnership benefits as well. ... Since the Massachusetts ruling, more than 35 states have introduced legislation aimed at preserving the traditional definition of marriage as a union between a man and a woman.

Id.

and one woman,⁹ the Canadian courts are ruling that the same declaration in their country is unconstitutional.¹⁰ Furthermore, in 1996, the U.S. federal government enacted the Defense Of Marriage Act (DOMA),¹¹ which established that no state has an obligation to recognize a same-sex union performed in another state.¹² DOMA also codified the federal definition of marriage as the union of one man and one woman.¹³ In addition to the

9. Helen Dewar & Alan Cooperman, *Gay Marriage Ban Headed for Senate Defeat; GOP May Salvage Rural Voters' Goodwill Out of Failure to Amend Constitution*, WASH. POST, July 14, 2004, at A2.

10. Janice Tibbetts, *MPS Want Quick Vote on Same-Sex Marriage*, THE OTTAWA CITIZEN, Sept. 10, 2003, available at <http://canada.com/national/story.asp?id=887A9FC7-D85D-4BC0-A8D2-E199736A900D>. Courts in three provinces – Toronto, British Columbia, and Quebec – have said that the federal ban on same-sex marriage is unconstitutional and currently Toronto and British Columbia permit same-sex marriages. All other provinces are waiting for federal legislation to pass before allowing same-sex unions. *Id.*

11. 28 U.S.C.A. § 1738(C) (2005), which provides that

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

Id.

The federal government's DOMA is not an outright ban on same-sex marriage, but it does allow the federal and state governments to refuse to recognize same-sex unions. Maria Hinojosa, *Massachusetts Court to Rule on Same-Sex Marriages*, Jan. 13, 2004, available at <http://www.cnn.com/2003/LAW/07/14/same.sex.marriages/>.

12. 28 U.S.C.A. § 1738(C).

13. 1 U.S.C.S. § 7 (2005), which provides that:

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

Id.

See also Elizabeth Kristen, *Recent Developments: The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 113 (1999).

With the enactment of DOMA, Congress for the first time limited States' obligation to give full faith and credit to 'public acts, records and judicial proceedings' of other states. Some commentators have argued that DOMA is unconstitutional since it exceeds Congress's

federal DOMA, thirty-nine states have enacted “junior DOMAs”, which essentially provide for the same rules as their federal counterpart.¹⁴

While the Canadian government did not pass a specific marriage law establishing the rights of gay and lesbian couples to marry, the court, of its own accord, determined that prohibiting same-sex unions was in violation of the Canadian Constitution.¹⁵ If changes regarding same-sex marriage are to be made in the United States, they will likely follow a similar path, as it seems probable that any changes, if and when they come, will come through the courts, rather than through the legislature.

This Note seeks to establish that the U.S. Supreme Court should raise the level of judicial review afforded to sexual orientation for purposes of the Equal Protection Clause.¹⁶ Once the Court makes this change, it should reach the same conclusion as the Ontario Court of Appeals did in *Halpern* because Canada’s mode of constitutional analysis is similar to U.S. analysis of equal protection under an intermediate level of scrutiny. Although *Halpern* is analogous to the U.S. judicial review standard of intermediate scrutiny, the *Halpern* court’s analysis of the arguments given by the Attorney General would yield the same result under a rational review standard.

In Part I, this Note examines Canadian case law leading up to *Halpern* with an emphasis on how judicial opinion regarding homosexuality and equality has evolved since the Charter’s inception. Part II focuses on the reasoning used by the Ontario Court of Appeals in declaring that prohibiting same-sex mar-

powers and violates equal protection. The constitutionality of DOMA cannot be challenged, however, until a same-sex couple’s marriage, valid in one state, is denied recognition in another.

Id.

14. DOMA Watch, available at <http://www.domawatch.org/index.html> (last visited Jan. 23, 2005). The eleven states that do not have junior DOMA’s are the following: Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, and Wyoming. Peterson, *supra* note 8. But it should be noted that in New Hampshire and Wyoming there is a state law that bans same-sex marriage and pre-dates DOMA laws; and in Wisconsin there has been a state Supreme Court ruling stating that only heterosexual marriages are legal. *Id.*

15. See generally *Halpern*, 65 O.R.3d 161 (holding that the prohibition on same-sex marriage violated the Canadian Charter of Rights and Freedoms).

16. U.S. Const. amend. XIV § 1.

riages violated the Canadian Charter of Rights and Freedoms and promoted principles “that are not justified in a free and democratic society” and how the court was able to reach its conclusion.¹⁷ Part III examines how the U.S. Supreme Court interprets the Equal Protection Clause of the Constitution, with a particular focus on case law regarding sexual orientation. Part IV discusses how the analysis used by the Canadian courts compares to that used by U.S. courts, and why U.S. courts should apply heightened scrutiny to laws that discriminate on the basis of sexual orientation, as the Canadian courts do. Part V shows that the Canadian court’s analysis is also applicable to the rational review test, so that under the rational review test the U.S. courts should determine that a ban on same-sex marriage is unconstitutional. Finally, Part VI shows that regardless of what standard of review the U.S. Supreme Court uses, it will be able to reach the same conclusion as *Halpern*.

Traditionally, the U.S. Supreme Court has not looked to the decisions of other countries in interpreting the U.S. Constitution, and this Note does not propose that it do so.¹⁸ Instead, this Note proposes that if the U.S. Supreme Court affords sexual orientation the heightened level of scrutiny that it deserves, the court must draw the same conclusions as the *Halpern* court because the constitutional analysis is analogous.

17. See generally *Halpern*, 65 O.R.3d 161 (holding that the prohibition on same-sex marriage violated the Canadian Charter of Rights and Freedoms).

18. Cody Moon, *Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?* 12 WASH. U. J. L. & POL’Y 229, 240 (2003).

However, evidence of the U.S. Supreme Court looking to foreign courts can be found in *Lawrence v. Texas* where the court stated,

[T]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has not followed *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the government interest in circumscribing personal choice is somehow more legitimate or urgent.

Lawrence v. Texas, 539 U.S. 558, 577 (2003).

I. HISTORY OF LEGAL DEVELOPMENTS LEADING TO *HALPERN*

The court's decision in *Halpern* was monumental, but it was only able to reach its conclusion by looking back to prior decisions regarding sexual orientation and the Charter of Rights and Freedoms. The Charter, which was adopted in 1982, is the Canadian Bill of Rights and it forms part of the Constitution of Canada.¹⁹ The purpose of the Charter is to ensure that the government respects the individual rights and freedoms of Canadian citizens.²⁰ Challenges to laws regarding the rights and freedoms of homosexuals are often analyzed under Section 15(1) and Section 1 of the Charter.²¹ Section 15(1) states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."²² Section 1 states that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."²³ If a law is challenged as being discriminatory under Section 15(1) of the Charter, the court must first determine whether the law actually is discriminating against a particular individual or group of people.²⁴ If the law is found to be discriminatory the court then turns to Section 1 and determines whether the discrimination imposed by the law can be justified by a legitimate state interest.²⁵

Challenges regarding gay rights based on Section 15(1) and Section 1 of Charter of Rights and Freedoms began shortly after

19. Gutierrez, *supra* note 3, at 180 (The *Charter* applies to all federal and provisional levels of government and guarantees a set of civil liberties and fundamental rights that are protected from the actions of Parliament, provincial legislatures, government agencies and officials.).

20. *Id.*

21. *See, e.g., Halpern*, 65 O.R.3d 161.

22. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15.

23. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §1.

24. *Halpern*, 65 O.R.3d at 179.

25. *Id.* at 190–91. See Part II for a more thorough discussion of Section 15(1) and Section 1 of the Charter.

the Charter's inception in 1982.²⁶ Some of the earliest Charter cases involving same-sex discrimination were heard by appellate courts. The first case worthy of note is *Andrews v. Ontario (Minister of Health)* for its use of a biological argument in supporting discrimination against homosexuals.²⁷ In *Andrews*, the court ruled that the Ontario Health Insurance Program did not violate Section 15(1) of the Charter by excluding same-sex couples and their children from the program.²⁸ The court did not find a violation because it determined that, since heterosexual couples could marry, procreate, and raise children and same-sex couples could not, there are biological differences between the two groups.²⁹ This "difference" allowed the court to determine that same-sex couples were not entitled to formal equality with heterosexual couples.³⁰ The approach of heteronormativity articulated in *Andrews* reverberated in subsequent cases.³¹

One such case is *Layland v. Ontario*.³² In reaching its decision that same-sex couples were not legally entitled to marry, the court relied on the common law definition of marriage and what the court determined was the principle purpose of mar-

26. Brenda Cossman, *Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms*, 40 OSGOODE HALL L.J. 223, 225 (2002). Prior to the inception of the Charter another significant victory in the battle for equality for gays and lesbians occurred in 1969 when Parliament decriminalized sodomy. R. Douglas Elliot, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. REV. 591, 620 (2004). "This particular revision to the Federal Criminal Code, applied across the nation and was justified on the grounds that the State had no business in the 'bedrooms of the nations' and 'what's done in private between adults.'" Jane Adolphe, *The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations*. 18 BYU J. PUB. L. 479, 487 (2004).

In contrast, the United States did not decriminalize sodomy until 2003 in *Lawrence v. Texas*, in which the Court had to overturn a 1986 case which upheld the criminalization of sodomy. See generally *Bowers v. Hardwick*, 478 U.S. 1039 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

27. See generally *Andrews v. Ontario (Minister of Health)*, [1988] 64 O.R.2d 258 (holding that the Ontario Health Insurance Program did not violate Section 15(1) of the Charter by excluding same-sex couples and their children from the program).

28. *Id.*

29. *Id.* at 21.

30. *Id.* at 38.

31. Cossman, *supra* note 26, at 225.

32. See generally *Layland v. Ontario*, [1993] 104 D.L.R. 214 (holding that same-sex couples were not legally entitled to marry).

riage – procreation.³³ Procreation, the court wrote, cannot be achieved in same-sex unions “because of the biological limitations of such a union.”³⁴ Although the court found that discrimination on the basis of sexual orientation violated Section 15(1) of the Charter, given that discrimination on the basis of sexual orientation was analogous to discrimination against any of the classes specifically referenced in Section 15(1) of the Charter, it did not find any discrimination in the prohibition against same-sex unions.³⁵

It was however, Justice Greer’s dissent in *Layland* that, a decade later, the majority in *Halpern* would echo. Greer believed that it was not sufficient to simply look at the pre-Charter cases to determine the definition of marriage.³⁶ Instead, the concept needed to be placed “in the larger social context of our modern-day society and its mores and expectations.”³⁷ He went on to say that “choice” is a benefit of the law and a fundamental right which applies to marriage.³⁸ Under Section 15(1), the right to choose is protected.³⁹ Section 15(1) is also designed to protect those who are disadvantaged in society, and traditionally homosexuals have been subjected to discrimination.⁴⁰ In addition to finding a violation under Section 15(1),

33. *Id.* at 219–23. The court determined that the petitioners tried to use Section 15 of the Charter to alter the common law definition of marriage and the Charter does not serve that function. *Id.* at 223. Furthermore, the definition does not constitute a violation of Section 15. *Id.* A homosexual person is entitled to marry; he or she can marry someone of the opposite sex. *Id.*

34. *Id.* at 223. The court did note that although not every heterosexual marriage produces children, the institution of marriage is intended by the state, religions, and society to encourage procreation. *Id.*

35. *Id.*

36. *Id.* at 228 (Greer, J., dissenting).

37. *Id.*

38. *Id.*

39. *Id.* at 229.

40. *Id.*

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes and violence directed at them specifically because of their sexual orientation. ... They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation. ... The stigmati-

Greer concluded that the law could not be saved by Section 1, because the government was not able to prove that the discrimination imposed by the law was justified.⁴¹

The first Charter case to reach the Supreme Court of Canada involving the issue of sexual orientation and equality was *Egan v. Canada (A.G.)*.⁴² In *Egan*, a homosexual couple challenged the definition of “spouse” as it appeared in the Old Age Security Act, claiming that the definition violated Section 15(1) of the Charter.⁴³ The court unanimously held that even though sexual orientation was not explicitly listed in Section 15(1) of the Charter, it was analogous to those classes that are enumerated in

zation of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexual persons to conceal their orientation. This imposes its own associated costs in the workplace, the community and in private life.

Halpern, 65 O.R.3d at 184 (quoting *Egan v. Canada*, [1995] 2 S.C.R. 513, 600-02).

41. *Layland*, 104 D.L.R. at 233 (Greer, J., dissenting). Justice Greer stated that while it is in the interest of the state to protect family relationships, this interest should apply equally to both same-sex and heterosexual unions. *Id.* It is discriminatory to say that the state only needs to preserve heterosexual families, and a rule with a discriminatory purpose is not justified under Section 1. *Id.*

42. *See generally Egan*, 2 S.C.R. 513 (holding that the Old Age Security Act was constitutional because although declining benefits based on sexual orientation was discriminatory under Section 15(1) of the Charter, the government established sufficient reasons for why the law was justified under Section 1). The first case to reach the Supreme Court of Canada involving gay equality rights was *Mossop v. Canada*, in which a gay man was denied the right by his employer to receive bereavement leave when his partner's father died. *Mossop v. Canada (A.G.)*, [1993] 1 S.C.R. 554 *construed in* *Cossman*, *supra* note 26, at 226–27. The petitioner, however, did not challenge on Charter grounds. *Id.* Instead, the petitioner claimed he was being discriminated against under the Human Rights Act on the basis of family status and not sexual orientation. *Id.* The Supreme Court dismissed the case stating that the denial was based on sexual orientation and not family status. *Id.* Since the petitioner did not raise any constitutional challenges there was no basis for his claim. *Id.*

43. *Egan*, 2 S.C.R. at 527. “Spouse” is defined in 19(1) of the Old Age Security Act, R.S.C. 1985, which states that “spouse, in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for a least one year, if the two persons have publicly represented themselves as husband and wife. ...” *Id.* This definition extends to common law relationships. *Id.* The appellants claim that the definition is a violation of Section 15 of the Charter in that it discriminates on the basis of sexual orientation. *Id.* at 527–28.

this section and, therefore, discrimination based on sexual orientation was prohibited.⁴⁴ Then, in reaching the conclusion that Section 1 permits the discrimination, the court determined that it was sound public policy for Parliament to favor and provide support for heterosexual married couples.⁴⁵ Marriage, the court said, is “deeply rooted in our fundamental values and traditions, values and traditions that could not have been lost on the framers of the Charter.”⁴⁶

The *Egan* court then turned to the biological argument, that marriage is by nature heterosexual and grounded in the biological and social realities that only heterosexual couples can procreate.⁴⁷ Due to the important position marriage holds in society and the unique needs of the union, the court held that Parliament is permitted to afford it special support and, therefore, the discrimination based on sexual orientation was found to be reasonable under Section 1.⁴⁸

Just five years after *Egan*, the Supreme Court ruled in *Vriend v. Alberta* that the denial of formal equality to homosexuals was a violation of Section 15(1) and could not qualify as an exception under Section 1.⁴⁹ In *Vriend*, a science laboratory coordinator was fired from his job at a Christian college because he was gay.⁵⁰ While *Vriend* was not about same-sex marriage, it was a sign of the future: no longer would discrimination on the basis of sexual orientation survive a Charter challenge.⁵¹

In the next case to reach the Supreme Court, *M. v. H.*, the court declared the term “spouse,” as it appeared in the Family Law Act (FLA),⁵² a violation of the Charter.⁵³ The court held

44. *Id.* at 528.

45. *Id.* at 536–37.

46. *Id.* at 535.

47. *Id.* at 536.

48. *Id.* See also Cossman, *supra* note 26, at 229.

49. See generally *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (holding that a law cannot deny formal equality to homosexuals).

50. *Id.*

51. Cossman, *supra* note 26, at 232.

52. Family Law Act, R.S.O., ch. F.3, § 29 (1990) (Can.) (The Family Law Act provides a means for a person to petition the court to receive support from a spouse, or a man or woman with whom a person lived with in an opposite-sex conjugal relationship.).

that the definition encompassed only opposite-sex couples and, as such, was a violation of Section 15(1) because it discriminated entirely on the basis of sexual orientation.⁵⁴ In reaching this conclusion, the court determined that the denial of the potential benefit gained from spousal support may create an economic burden that would contribute to the “general vulnerability by individuals in same-sex relationships.”⁵⁵ The court held that when analyzing a benefit under Section 15(1), it must look beyond whether a party is conferred a benefit and examine whether he or she is denied access to a process that can give an economic or non-economic benefit.⁵⁶ Moreover, there is a societal significance to receiving benefits under the FLA. By excluding same-sex couples, the legislature was essentially stating that these relationships are less worthy of recognition and protection and are not able to create the intimate relationships that derive from economic interdependence.⁵⁷

Under the Section 1 analysis, the court determined that the government did not meet its burden, which is to prove that the discrimination imposed by the law is justified.⁵⁸ To meet this burden, the legislature has to provide the court with evidence to support its claim and justification.⁵⁹ The court concluded that

53. See generally *M. v. H.*, [1999] 2 S.C.R. 3 (holding that the definition of spouse at it appeared in the Family Law Act was a violation of Section 15(1) because it discriminated on the basis of sexual orientation).

54. *Id.* at 57.

55. *Id.* at 61.

56. *Id.* at 60.

57. *Id.* at 62.

58. *Id.* at 63.

59. *Id.*

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution. ... This court has often stressed the importance of deference to the policy choices of the legislature in the context of determining whether the legislature has discharged its burden of proof under Section 1 of the Charter. ... Deference is not a kind of threshold inquiry under Section 1. As a general matter, the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make. The simple or general claim that the infringement of a right is justified under Section 1 is not such a decision. The notion of judicial deference to legislative choices should

the exclusion of same-sex couples was not rationally related to the government's objective under the FLA.⁶⁰ The court noted that the objective of the FLA was to alleviate the financial burden on a spouse when a relationship dissolved and that the objective would actually be *enhanced* if it included same-sex couples under the FLA.⁶¹

It should be noted that the court specifically announced that it was not making any statement regarding same-sex marriage or on any related issues.⁶² Because the FLA applied to both married and unmarried opposite-sex couples, the court was only able to determine whether the FLA discriminated against same-sex couples who were cohabitating in ways equivalent to cohabitating opposite-sex couples.⁶³

Although the court did not make any determination with regard to same-sex marriage, it did recognize that same-sex relationships are legitimate and entitled to legal protection.⁶⁴ Furthermore, the aftermath of the decision had other far reaching consequences. The Ontario government amended sixty-seven statutes that included the term "spouse" to include same-sex partners in *An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H.*⁶⁵ However, the Ontario government made these changes reluctantly. Prime Minister Mike Harris stated "[t]his legislation is not part of our...agenda. We are introducing this bill because of the Supreme Court of Canada's decision."⁶⁶ Moreover, the legislature responded in a way the Supreme Court had not intended.⁶⁷ Instead of creating a gender-neutral definition of the word

not...be used to completely immunize certain kinds of legislative decisions from Charter scrutiny.

Id. at 59–60.

60. *Id.* at 69.

61. *Id.* at 73.

62. *Id.* at 58.

63. *Id.* The court determined that same-sex couples are capable of forming conjugal relationships, even though they cannot "hold themselves out" as husband and wife. *Id.* at 51.

64. *See generally M. v. H.*, 2 S.C.R. 3 construed in *Cossman*, *supra* note 26, at 235.

65. *Id.*

66. Jason Murphy, *Dialogic Responses to M. v. H.: From Compliance to Defiance*, 59 U.T. FAC. L. REV. 299, 305 (2001).

67. *Id.*

“spouse,” the government established a new category of relationship by calling it “same-sex partner,” thereby creating a separate but equal approach.⁶⁸

The federal government responded to *M. v. H.* by approving a motion stating that “it is necessary to state that marriage is and should remain the union of one man and one woman to the exclusion of all others,” and that Parliament “will take all necessary steps within its jurisdiction to preserve this definition of marriage in Canada.”⁶⁹ Although this motion was only symbolic as it had no legal force, its symbolism was important because it reflected the federal government’s opposition to same-sex marriages.⁷⁰

By the time *M. v. H.* was decided, it appeared that the Supreme Court of Canada had moved away from the biological argument used to deny equality based on sexual orientation, and towards recognizing equality for same-sex couples. However, it is equally as clear that the elected government had not.

The specific amendment to s. 29 of the *FLA* in that act inserted the following definition alongside that of “spouse”: ‘same-sex partner’ means either of two persons of the same sex who have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Id. at n. 27.

⁶⁸*Id.* at 306.

This separate but equal approach clashed dramatically with the position held by same-sex rights activists that the order in *M. v. H.* required legislatures to include both opposite-sex and same-sex couples within a single definition of spouse. To do otherwise, they argued, went against the very spirit of the decision by affixing separate labels on the basis of sexual orientation.

Id.

69. Cossman, *supra* note 26, at 237. The federal government created the *Modernization of Benefits and Obligations Act*. Murphy, *supra* note 66, at 305.

70. Cossman, *supra* note 26, at 237. While other provinces responded to the Supreme Court’s decision, only the responses of Ontario and the Federal Government bear directly on this note. The U.S. federal government announced its views on marriage with DOMA and, like Canada’s government after *M. v. H.*, the United States is against same-sex unions. *Anti Gay Marriage Act Clears Congress*, CNN, Sept. 10, 1996, available at <http://www.cnn.com/US/9609/10/gay.marriage/>. Unlike Canada however, DOMA is not symbolic, but federal law. 28 U.S.C.A § 1738(C).

II. *HALPERN V. TORONTO*⁷¹

In Canada, as well as other jurisdictions around the world, same-sex marriage has been the subject of legal, political, and moral debate.⁷² In increments, the Supreme Court of Canada has extended certain benefits and rights to gays and lesbians. It was, therefore, only a matter of time before a challenge to the

71. As of this publication, *Halpern* has not been appealed and the federal government announced that it would not appeal the decision. Elliot, *supra* note 26, at 613–14. Instead, on July 16, 2003, the legislature referred a draft Bill entitled *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* (“*Proposed Act*”) to the Canadian Supreme Court for an advisory opinion. Reference re Same-Sex Marriage, 2004 Can. Sup. Ct. LEXIS 76 *16. The Court was to determine the validity of the act. *Id.* The relevant sections are as follows: Section 1: Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others; Section 2: Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs. *Id.* (construing *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* (“*Proposed Act*”).

Three questions were presented to the Canadian Supreme Court to determine the validity of the act. The three questions were as follows:

1. Is the annexed *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* within the exclusive legislative authority of the Parliament of Canada?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious official from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs.

Id. at *17

In answering these questions, the Supreme Court determined that Section 1 of the *Proposed Act* is within the exclusive legislative competence of Parliament, while Section 2 is not. *Id.* Furthermore, the new definition of marriage is constitutional, and religious officials cannot be compelled to perform marriages contrary to their religious beliefs. *Id.*

After the decision by the court, the Bill will then be submitted to Parliament for a vote. Elliot, *supra* note 26, at 613–14. However, the legal definition of marriage has already been changed. *Id.*

72. Mark D. Walters, *Incorporating Common Law Into the Constitution of Canada: EGALÉ v. Canada and the Status of Marriage*, 41 OSGOODE HALL L.J. 75, 78 (2003).

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refusal to allow same-sex marriages appeared before the Canadian courts.⁷³

A. *Facts of Halpern v. Toronto*

The lawsuit began over three years ago when seven same-sex couples (Couples) applied for civil marriage licenses from the Clerk of the City of Toronto.⁷⁴ Instead of denying the licenses, the clerk stated that she would hold them in abeyance while waiting for directions from the courts.⁷⁵ The Couples decided not to wait on the clerk and, instead, commenced their own application.⁷⁶ On August 22, 2000, the Couples' application was transferred to the Divisional Court.⁷⁷

At about the same time that the Couples began their application, the Metropolitan Community Church of Toronto (MCCT) decided it would marry homosexual couples in religious ceremonies.⁷⁸ The reason for this decision was MCCT's learning that under the application of the laws of Ontario, the ancient Christian tradition of publishing the banns⁷⁹ of marriage was a lawful alternative to a marriage license issued by municipal authorities.⁸⁰ Two same-sex couples decided to marry at MCCT

73. In addition to *Halpern*, there were two other Canadian courts that sanctioned same-sex marriages. *Halpern*, 65 O.R.3d at 173. In Quebec, in *Hendricks v. Quebec (Attorney General)* the court "declared invalid the prohibition against same-sex marriages caused by the intersection of two federal statutes and the *Civil Code of Quebec* on the basis that it contravened Section 15 (1) of the Charter and could not be saved under Section 1." *Id.* (quoting *Hendricks v. Quebec*, [2002] R.J.Q. 2506). The declaration was stayed for two years to allow the legislature to respond. *Id.*

In British Columbia, in *EGALE Canada Inc. v. Canada (Attorney General)*, the Court of Appeals "declared the common law definition of marriage unconstitutional, substituted the words 'two persons' for 'one man and one woman' and suspended the declaration of unconstitutionality until July 12, 2004, the expiration of the two-year suspension ordered by the Divisional Court in this case." *Halpern*, 65 O.R.3d at 173 (quoting *EGALE v. Canada*, [2003] B.C.J. 994).

74. *Halpern*, 65 O.R.3d at 169.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. CATHOLIC ENCYCLOPEDIA, available at <http://www.newadvent.org/cathen/02255a.htm> (last visited Feb. 7, 2005). Banns of marriage is the ecclesiastical announcement of the names of persons contemplating marriage. *Id.*

80. *Halpern*, 65 O.R.3d at 169.

in a religious ceremony, and thereafter, Reverend Brent Hawkes published their banns during services.⁸¹ Reverend Hawkes then married the couples, registered the marriages in the Church register, issued the couples marriage certificates, and submitted the required documents to the Office of the Registrar General.⁸² The Registrar refused to accept the documents, stating that the federal prohibition on same-sex marriages prevented him from registering the marriages.⁸³ In response to the registrar's assertion, MCCT brought an application to the Divisional Court.⁸⁴

On July 12, 2002, for the first time in Canadian history, a court found that the common-law rule barring same-sex marriage was unconstitutional.⁸⁵ The Divisional Court found that the law was unconstitutional because it violated Section 15(1) of the Canadian Charter of Rights and Freedoms and was not saved by Section 1 of the Charter.⁸⁶ Although the decision regarding constitutionality was unanimous, the court was divided as to the appropriate remedy.⁸⁷ The court, therefore, decided to suspend the remedy for twenty-four months to allow "Parlia-

81. *Id.* at 170.

82. *Id.*

83. *Id.*

84. *Id.* By an order dated January 25, 2001, the applications of The Couples' and MCCT were consolidated. *Id.* On November 5-9, 2001, a three-member panel, Justice LaForme, Justice Blair and Justice Smith, of the Ontario Divisional Court heard the case. *Halpern*, 65 O.R.3d at 170 (citing *Halpern v. Toronto*, [2002] 60 O.R.3d 321).

85. Kathryn Chapman, Comment, *Chronique De Jurisprudence: Halpern v. Toronto*, 19 CAN. J. FAM. L. 423, 425 (2002).

86. *Halpern*, 65 O.R.3d at 170.

87. *Halpern*, 65 O.R.3d at 170-71.

Smith A.C.J.S.C. was of the view that Parliament should legislate the appropriate remedy and that it should be given two years to do so, failing which the parties could return to the court to seek an appropriate remedy. LaForme J. favoured immediate amendment, by the court, of the common law definition of marriage by substituting the words "two persons" for "one man and one woman." Blair R.S.J. adopted a middle position; he would have allowed Parliament two years to amend the common law rule, failing which the reformulation remedy proposed by LaForme J. would be automatically triggered. It is Blair R.S.J.'s position that is reflected in the formal judgment of the court.

Id.

ment to respond to the Charter violation by engaging in debate with respect to the social, religious, and other values related to marriage.⁸⁸ Before Parliament responded, however, the Attorney General of Canada appealed⁸⁹ and the Couples and MCCT cross appealed.⁹⁰

B. Decision in Halpern v. Toronto

The question on appeal was whether Canada's definition of marriage, which excludes same-sex couples from marrying, violates Section 2(a)⁹¹ or Section 15(1) of the Canadian Charter of Rights and Freedoms in a way that cannot be permitted in a free and democratic society under Section 1 of the Charter.⁹² The court put forth a detailed analysis, which ultimately led to its decision that denying same-sex couples the right to marry violated the Charter.⁹³

The court began by establishing that the definition of marriage is found at common law.⁹⁴ The definition was first espoused in *Hyde v. Hyde and Woodmansee* by Lord Penzance, in which he stated, "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."⁹⁵ The court determined that the common law definition

88. Chapman, *supra* note 85, at 425.

89. *Halpern*, 65 O.R.3d at 171 (appealed on the equality issue).

90. *Id.* The couples cross-appealed on the question of remedy alone. *Id.* They sought "a declaration of unconstitutionality and a reformulation of the definition of marriage, both to take place immediately, and related personal remedies in the nature of mandamus." *Id.* MCCT cross-appealed on the question of remedy. *Id.* In addition, it cross-appealed that the current definition of marriage infringes its §§ 2(a) and §15(1) rights as a religious institution. *Id.*

91. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §§2(a). Section 2(a) of the Charter of Rights and Freedoms states, "Everyone has the following fundamental freedoms (a) freedom of conscience and religion." *Id.* The court determined that there was no violation of Section 2(a). *Halpern*, 65 O.R.3d at 171.

92. *Halpern*, 65 O.R.3d at 171.

93. *See generally Halpern*, 65 O.R.3d 161 (holding that the prohibition against same-sex marriage violated the Charter of Rights and Freedoms).

94. *Id.* at 173.

95. *Hyde v. Hyde and Woodmansee* L.R. 1 P&D. 130, 133 (1866). *This has been the definition of marriage in Canada for all of the nation's 136 years. *Halpern*, 65 O.R.3d at 166.

of marriage violated the Couples' equality rights on the basis of sexual orientation under Section 15(1) and that this violation could not be justified under Section 1.⁹⁶

In addition to the common law definition, the court noted that the word "marriage" appears in the Constitution Act, raising the question of whether a constitutional amendment was needed to change Canada's definition of marriage.⁹⁷ The court decided that an amendment was not needed because "marriage" did not have a constitutionally-fixed meaning, but was, instead, a flexible term that could change as Canadian society changed.⁹⁸ The court did not want to "freeze" the definition of marriage as to how it was defined in 1867 because that would be contrary to Canada's progressive constitutional interpretation.⁹⁹ The constitution, the court noted, "must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."¹⁰⁰ Since the term "marriage" was flexible there was no need for constitutional amendment procedures.¹⁰¹ Because a constitutional amendment was not needed, both the courts and Parliament were free to alter the law without resorting to the intricacies and difficulties of the amendment process. After determining that an amendment was not needed, the court went on to discuss whether prohibiting same-sex marriage violated the Charter.

96. *Id.* at 196. The court ultimately determined that the common law definition did not infringe freedom of religion rights under §§ 2(a) of the Charter. *Id.*

97. *Halpern*, 65 O.R.3d at 174 (construing CAN. CONST. (Constitution Act, 1867) §§ 91(26), 92(12)).

The Association for Marriage and Family in Ontario takes the position that the word 'marriage as used in the Constitution Act, 1867 is a constitutionally entrenched term that refers to the legal definition of marriage that existed at Confederation'... that being the 'union of one man and one woman.' As such the definition can only be amended by formal constitutional amendment procedures.

Id.

98. *Halpern*, 65 O.R.3d at 176.

99. *Halpern*, 65 O.R.3d at 175. The court also noted that "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." *Id.* at 175 (quoting *Edwards v. A.G. Canada* [1930] A.C. 124, 136).

100. *Halpern*, 65 O.R.3d at 175.

101. *Id.* at 176.

1. Section 15(1) of the Charter

As stated above, Section 15(1) provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”¹⁰² Not every distinction created by the legislature, however, is discriminatory.¹⁰³ A Section 15(1) violation is found only when the law in question conflicts with the purpose of Section 15(1).¹⁰⁴ The purpose of Section 15(1) is

to prevent the violation of essential human dignity and freedom through the imposition of disadvantaging, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁰⁵

To determine whether a conflict exists under Section 15(1), the Supreme Court in *Law v. Canada* created a three-stage inquiry:

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?
2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit for the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a

102. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15(1).

103. *M. v. H.*, 2 S.C.R. at 59.

104. *Halpern*, 65 O.R.3d at 179.

105. *Id.* (quoting *Law v. Canada* [1999] 1 S.C.R. 497, 529).

human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?¹⁰⁶

Stage 1:

In Stage 1, the court must determine whether the law: a) draws a formal distinction between the claimant and others on the basis of one or more personal characteristics; or b) fails to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.¹⁰⁷ Here, the claimant must decide the relevant group to compare himself or herself to for the purpose of determining if the claimants are receiving differential treatment.¹⁰⁸ In *Halpern*, the couples determined that the relevant group was opposite-sex couples, since only opposite-sex couples have the legal right to marry.¹⁰⁹ The Attorney General argued that, due to the enactment of the Modernization of Benefits and Obligations Act,¹¹⁰ which gave same-sex couples substantive equal benefits and protection of the federal law, same-sex couples do not receive differential treatment.¹¹¹ The court disagreed with the Attorney General's argument and found that, even with the Modernization of Benefits and Obligations Act, same-sex couples were, in fact, receiving differential

106. *Law*, 1 S.C.R. at 548–49. The claimant has the burden of establishing each of these factors on a balance of probabilities. *Halpern*, 65 O.R.3d at 179.

107. *Halpern*, 65 O.R.3d at 179.

108. *Halpern*, 65 O.R.3d at 180.

109. *Id.*

110. Modernization of Benefits and Obligations Act, S.C., ch. 12, §1.(1) (2000) (Can.).

111. *Halpern*, 65 O.R.3d at 180. The government argued that the institution of marriage does not allow a distinction between opposite-sex and same-sex couples: "The word marriage is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm." *Id.* Additionally, the government argued that marriage is not a common law concept, but instead is a historical and worldwide institution that predates the Canadian legal framework. *Id.* Moreover, the definition of marriage is not the source of the differential treatment, the source is the legislation that gives the authority to provide government benefits and obligations. *Id.* Since the Modernization of Benefits and Obligations Act was enacted, same-sex couples receive substantive equal benefits from the government and protection of the federal law. *Id.*

treatment.¹¹² This determination was founded on the fact that legislatures give various rights and obligations based on the institution of marriage, such as licensing and registration, so that the marriage can be recognized by law.¹¹³ Same-sex couples are denied access to these rights and obligations, and this denial constitutes differential treatment.¹¹⁴ Moreover, the common law definition of marriage creates a distinction between opposite and same-sex couples on the basis of their sexual orientation. Since a distinction between same-sex and opposite-sex couples was found, the first stage of the Section 15(1) inquiry was satisfied.¹¹⁵

Stage 2:

In determining Stage two of the inquiry the court looked to the Canadian Supreme Court's decision in *Egan v. Canada*.¹¹⁶ Recognizing that although there are specific grounds enumerated in Section 15(1) such as race and religion, the *Egan* court determined that sexual orientation was analogous to those already listed in the Charter.¹¹⁷ In *Egan*, the Supreme Court first recognized sexual orientation as an analogous ground deserving of protection when it stated that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."¹¹⁸ Since the Supreme Court had previously determined that sexual orientation was an analogous ground, Stage two was met.¹¹⁹

112. *Halpern*, 65 O.R.3d at 180–81.

113. *Id.* at 181.

114. *Id.* ("Once the state does provide a benefit it is obliged to do so in a non-discriminatory manner. ...In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons.")

115. *Id.*

116. *Halpern*, 65 O.R.3d at 182. *See generally Egan*, 2 S.C.R. 513 (holding that sexual orientation is analogous to the specific grounds already listed in Section 15(1) of the Charter).

117. *Egan*, 2 S.C.R. at 528.

118. *Id.*

119. *Halpern*, 65 O.R.3d at 183.

Stage 3:

For the third stage of the inquiry, the court focused on substantive equality, not formal equality, with the emphasis on human dignity.¹²⁰ Here, the court was required to consider the individual's or group's traits, history, and circumstances to evaluate whether a reasonable person in similar circumstances would find that the law in question differentiates the couples in a way that demeans their dignity.¹²¹ The court also examined the purpose and effect of the law.¹²² A law that has a discriminatory purpose cannot survive Section 15(1) scrutiny. However, in order to successfully challenge the law, the claimant does not have to show a discriminatory purpose; a discriminatory effect will suffice.¹²³

To determine if a law has a discriminatory purpose or effect, the court examines four factors.¹²⁴ These four factors are 1) pre-existing disadvantage, stereotyping or vulnerability of the claimants; 2) correspondence between the grounds and the

120. *Id.*

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon the personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

Id. (quoting *Law*, 1 S.C.R. at 530).

121. *Halpern*, 65 O.R.3d at 183.

122. *Id.* at 183.

123. *Id.* (“[A]ny demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society...will suffice to establish an infringement of Section 15(1).”).

124. *Id.*

claimant's actual needs, capacities or circumstances; 3) ameliorative purpose or effects on more disadvantaged individuals or groups in society; and 4) nature of the interest affected.¹²⁵ All four factors do not have to be met for the court to determine that a law is discriminatory.¹²⁶

While not dispositive, the first factor is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory."¹²⁷ The court stated that homosexual persons have been disadvantaged throughout Canada's history.¹²⁸ However, the court also noted that a particular legislation may not be discriminatory if the distinction created by the law respects the group's or individual's liberty interest in making fundamental decisions regarding their lives.¹²⁹

One of the essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life. ...Limitations imposed by this court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.¹³⁰

The court held that the common law definition, requiring marriage to be between two people of the opposite sex denies people in same-sex relationships a fundamental choice, whether or not to marry their partner.¹³¹

The second factor is the "correspondence, or lack thereof, between the grounds on which the claim is based and the actual

125. *Id.* at 183–90.

126. *Id.* at 183 ("The list of factors is not closed and not all of the factors will be relevant in every case.")

127. *Id.* at 183–84 (quoting *Law*, 1 S.C.R. at 534).

128. *Id.* at 184.

Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of partner....Studies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

Id.

129. *Id.*

130. *Id.*

131. *Id.*

needs, capacities, or circumstances of the claimant or others with similar traits.”¹³² Legislation that accommodates the actual needs, capacities, and circumstances of the claimants is less likely to demean dignity.¹³³ Here, the government argued that marriage relates to the needs, capacities, and circumstances of opposite-sex couples.¹³⁴ The court rejected this argument because the question to be determined is whether the law takes into account the needs, capacities, or circumstances of *same-sex*, not opposite-sex couples.¹³⁵ The purpose and effect of the law in question must be viewed from the perspective of the claimant, and here, the court determined that from the perspective of same-sex couples, the law did not meet their needs, capacities, or circumstances.¹³⁶

The reason the law did not meet same-sex couple’s needs, capacities, or circumstances was because the law prevented them from receiving the benefits of marriage. The court determined that the recognized purposes of marriage include companionship, societal recognition, economic benefits, blending of two families, and intimacy.¹³⁷ In addition to the denial of these benefits, prohibiting same-sex couples from marrying would perpetuate the view that same-sex couples are not capable of having the same type of relationship as opposite-sex couples and that their relationships are not deserving of the same respect and recognition afforded to opposite-sex couples.¹³⁸

Moreover, the court determined that the government’s argument here is more suited for a Section 1 and not a Section 15(1) analysis because the Section 15(1) analysis at this stage re-

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 186. (“[T]he fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the § 15(1) guarantee.”).

136. *Id.* at 187.

137. *Id.*

138. *Id.* The government also argued that marriage as an institution is for the capacities, needs and circumstances of heterosexual couples: “The concept of marriage – across time, societies and legal cultures – is that of an institution to facilitate, shelter and nurture the unique relationship of a man and a woman who, together, have the possibility to bear children from their relationship and shelter them within it.” *Id.* at 185–86.

quires the court to “define the scope of the individual’s right to equality, not to balance that right against societal values and interests or other Charter rights.”¹³⁹ Any balancing is done under Section 1.

The third factor is whether the law has “an ameliorative purpose or effect upon a more disadvantaged person or group in society.”¹⁴⁰ It was clear to the court that throughout Canada’s history opposite-sex couples were more advantaged than same-sex couples.¹⁴¹ In effect the court took judicial notice of the existence of this advantage, which allowed the court to determine that the third factor was met.¹⁴²

The fourth factor is the “nature of the interest affected by the law.”¹⁴³ The court stated that “[T]he more severe and localized the effect of the law on the affected group, the greater the likelihood that the law is discriminatory.”¹⁴⁴ The Attorney General

139. *Id.* at 186.

140. *Halpern*, 65 O.R.3d at 187. In *Law*, the court stated that “under-inclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination.” *Id.* (quoting *Law*, 1 S.C.R. at 539).

141. *Id.* at 188.

142. *Id.* at 187–88. The government proposed that because heterosexual couples raise most of societies’ children, supporting these unions does not further a historic advantage but, instead, ameliorates historic economic disadvantage that opposite-sex couples are faced with when raising children. *Id.* at 187.

143. *Id.* at 188.

144. *Id.* For an example of how the courts determine this inquiry, *Halpern* cited *Law*. *Id.* In *Law*, the court stated that the Charter protects more than economic rights:

Although a search for economic prejudice may be a convenient means to begin a Section 15 inquiry, a conscientious inquiry must not stop here. The discriminatory caliber of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group? It stands to reason that a group’s interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like.

Halpern, 65 O.R.3d at 188 (quoting *Law*, 1 S.C.R. at 540).

pointed to the Modernization of Benefits and Obligations Act to preclude a finding of discrimination.¹⁴⁵ The court, however, found that the Act did not give the same benefits and obligations to same-sex couples¹⁴⁶ and, moreover, even under the Act, same-sex couples were excluded from the actual act of participating in a legal marriage, an important and vital social institution.¹⁴⁷ The court held that Section 15 guarantees more than equal access to economic benefits; it also guarantees equal access to fundamental social institutions, such as marriage.¹⁴⁸

Once the court determined that the common law definition of marriage violated Section 15(1) of the Charter, the court then examined whether the violation could be justified under Section 1 of the Charter.¹⁴⁹

2. Section 1 Analysis

Section 1 states that “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁵⁰ If a law violates Section 15(1) of the Charter, it can be upheld if it is justified under Section 1.¹⁵¹ The party who wants the law up-

145. *Id.*

146. *Id.* at 189. (In numerous cases, benefits and obligations under the Modernization of Benefits and Obligations Act are only given to same-sex couples after they have lived together for a certain period of time, whereas opposite-sex couples got them immediately.)

147. *Id.* (The court must consider whether the affected group has been excluded from “fundamental societal institutions.”)

148. *Id.* at 190.

149. *Id.*

150. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §1.

151. *Halpern*, 65 O.R.3d at 190. Section 1 analysis requires a balancing of an individual’s right against the state’s interest, however a Section 15(1) analysis does not have this requirement. CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §1, *construed in Lavoie v. Canada*, [2002] 1 S.C.R. 769, 809–10. Section 15(1), requires the courts to “define the scope of the individual right to equality.” *Id.* Under Section 15(1), a claimant must provide a rational foundation for the experience of discrimination and demonstrate that a similarly situated rational person would share that experience; however, Section 1 requires the government to justify that discrimination, not to explain it or deny its existence. *Id.*

held must establish the justification for the law and has the burden of proving that:

1. the objective of the law is pressing and substantial; and
2. the means chosen to achieve the objective are reasonably and demonstrably justifiable in a free and democratic society.

This requires:

- (A) The rights violation to be rationally connected to the objective of the law;
- (B) The impugned law to minimally impair the Charter guarantee; and
- (C) Proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgment of the right.¹⁵²

At this stage, the burden was on the government to demonstrate a justification for the breach of human dignity caused by the law.¹⁵³ To meet its burden, the government could show the practical, moral, economic, or social aspects of the law by demonstrating a need to protect other rights in the Charter, or by establishing that what the law purports to do outweighs its negative impact on human dignity.¹⁵⁴

When the law in question is challenged as being under-inclusive, as it is here, the objective of the entire law must be examined along with the objective of the exclusion.¹⁵⁵ Here, the Attorney General argued that throughout history marriage has always been between a man and a woman, and the purpose of marriage is for uniting the opposite sexes, promoting companionship, and encouraging procreation.¹⁵⁶ While the court agreed

152. *Halpern*, 65 O.R.3d at 191 (quoting *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138–39). The *Oakes* court was the first court to formulate the test for determining whether a law is a reasonable limit on a Charter right or freedom in a free and democratic society. *Halpern*, 65 O.R.3d at 191. This became known as the Oakes test. *Id.* The first stage of the Oakes test involves two steps: first the objectives of the impugned law must be determined, and secondly, the objective of the impugned law must be evaluated to see if the objective is capable of justifying limitations on Charter rights. *Halpern*, 65 O.R.3d at 191 (interpreting *R. v. Oakes*, 1 S.C.R. at 138–39).

153. *Id.*

154. *Id.* at 186.

155. *Id.* at 191.

156. *Id.* at 191–92.

that this has historically been the accepted notion of marriage, the question before the court was whether perpetuating this concept is a valid objective and whether the Attorney General had given valid arguments for the court to support and perpetuate this definition of marriage.¹⁵⁷ The court determined it was not a valid objective and disagreed with all three rationales put forth by the Attorney General.¹⁵⁸

First, the court noted that merely stating that marriage is heterosexual because it always has been that way is not an objective that can justify infringing upon a Charter value.¹⁵⁹ The court then went on to dismiss the other arguments provided by the Attorney General. The first purpose given by the Attorney General stated that marriage unites the opposite sexes.¹⁶⁰ The court held that this purpose values one form of relationship over another and suggests that same-sex relationships are not as legitimate as opposite-sex relationships.¹⁶¹ A purpose that demeans the dignity of same-sex couples cannot be pressing and substantial, since it is contrary to the values of a free and democratic society.¹⁶² Second, the encouragement of procreation will not be impeded by allowing same-sex couples to marry and heterosexual couples will not stop procreating if same-sex couples are entitled to marry.¹⁶³ Moreover, heterosexual couples and same-sex couples can adopt and heterosexual couples can choose to not have children.¹⁶⁴ Last, the third argument was dismissed because encouraging companionship only between opposite-sex couples perpetuates the notion that same-sex couples are not equally capable of forming loving relationships.¹⁶⁵

While the court's conclusion under the first stage of the analysis was sufficient to determine that the Attorney General did not meet his burden, the court went on to consider the remainder of the test.¹⁶⁶ Under the rational connection test, the

157. *Id.* at 192.

158. *Id.* at 193.

159. *Id.* at 192.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 192–93.

165. *Id.* at 193.

166. *Id.*

party seeking to uphold the law must show that the violation of rights is rationally related to the objective.¹⁶⁷ Here, the government would have to show that the exclusion of same-sex couples from marriage is required to encourage procreation, childrearing, and companionship.¹⁶⁸ The court held that the rational connection test was not met because the “exclusion of same-sex couples from marriage is not necessary for the promotion of procreation, childrearing, and companionship.”¹⁶⁹ The court found that the law was both under and over-inclusive.¹⁷⁰ It was over-inclusive because the ability to naturally conceive children and willingness to raise children are not prerequisites for opposite-sex marriage.¹⁷¹ The law was under-inclusive because it excluded same-sex couples who have and raise children.¹⁷² The court determined that even if it had concluded that the Attorney General’s objectives were pressing and substantial, these objectives were not rationally connected to the opposite-sex requirement for marriage.¹⁷³

As for minimal impairment,¹⁷⁴ because same-sex couples were completely excluded from the institution of marriage, it was clear that there was significantly more impairment than “minimal.”¹⁷⁵ Furthermore, the court stated that any alterna-

167. *Id.* at 194.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Minimal impairment relates to the second prong of the Oakes test. *See supra* Part II.B.2.

175. *Id.* at 196. The Attorney General submitted that the means chosen by Parliament to achieve its objectives impairs the rights of gays and lesbians as minimally as possible:

Although same-sex relationships are not granted legal recognition, gay men and lesbians have the right to choose their partners and to celebrate their relationships through commitment ceremonies. Additionally, same-sex couples have achieved virtually all of the federal benefits that flow from marriage with the passing of the Modernization of Benefits and Obligations Act.

Id. at 195.

The court, however, did not accept this assertion, and stated it did not believe that same-sex couples have achieved equal access to government bene-

tive to the legal institution of marriage was not an adequate substitute.¹⁷⁶

Under the Section 1 analysis, the court determined that the Attorney General's objectives for the prohibition against same-sex marriage did not justify the exclusion of same-sex couples from the institution of marriage.¹⁷⁷

3. Remedy

To remedy the situation, the court replaced the common law definition of marriage with a new definition of its own creation: "The voluntary union for life of two persons to the exclusion of all others."¹⁷⁸ The court also determined that this definition was to have immediate effect, that the Clerk of the City of Toronto was to issue marriage licenses to same-sex couples, and that the Registrar General of the Province of Ontario was to accept the marriage certificates of same-sex couples.¹⁷⁹

III. THE EQUAL PROTECTION CLAUSE IN THE UNITED STATES

Canada is not the only nation to grapple with same-sex marriage, nor are its courts the only courts to establish under which standard of constitutionality a law prohibiting same-sex couples to marry should be scrutinized. The U.S. court system has also been called upon to address issues of gay rights, although its highest court has not yet addressed the issue of same-sex marriage. Looking at how the U.S. courts interpret the Equal Protection Clause and how the Supreme Court of the United States has applied the clause to laws which discriminate on the basis of homosexuality will help to understand how the Court will rule on the issue of same-sex marriage if, or when, it appears before it.

fits and that marriage should not be viewed purely in economic terms. *Id.* at 194–95.

176. *Id.* at 195 ("Same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts.").

177. *Id.* at 196.

178. *Id.* at 197.

179. *Id.* at 199.

A. Origins and Background

Justice Harlan, in his dissent in *Plessy v. Ferguson*, stated “[i]n view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens.... The Equal Protection Clause neither knows nor tolerates classes among citizens.”¹⁸⁰ The basis for equal protection is found in the Fourteenth Amendment to the U.S. Constitution.¹⁸¹ It states that no state shall “deny to any person within its jurisdiction the equal protection of the law.”¹⁸² The interpretation of the amendment has been left mainly to the Supreme Court.¹⁸³ The Equal Protection Clause comes into play whenever the government treats two groups differently.

When determining whether a particular statute is a violation of equal protection rights, a U.S. court must first decide the appropriate standard of review.¹⁸⁴ To do this, the court must ascertain the basis for the claim of discrimination, such as race, gender, or sexual orientation.¹⁸⁵ These and other categories of discrimination have been divided into three levels of review; strict scrutiny, intermediate scrutiny, and rational basis.¹⁸⁶

180. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). Harlan went on to say that “[T]he thin disguise of equal accommodation will not mislead anyone, nor atone for the wrong this day.” *Id.* at 562.

181. U.S. CONST. amend. XIV §1.

182. *Id.*

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Id.

183. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW, 601–04 (2002). “More than a century after the adoption of the fourteenth amendment, the question of the inherent content of equal protection continues to be a subject of intense debate.” *Id.* at 601.

184. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT’L & COMP. LAW. 141, 159 (2001).

185. *Id.*

186. *Id.*

Strict scrutiny, the highest standard of review, is applied to classes of discrimination that the court deems “suspect classes.”¹⁸⁷ This includes claims of unequal treatment based on race, alienage, or national origin.¹⁸⁸ If a law is subjected to this level of review, it will be declared unconstitutional unless the state can provide a “compelling state interest”¹⁸⁹ and that the discriminatory means employed substantially relate to the achievement of the state interest.¹⁹⁰ Under this analysis, most statutes will be struck down.¹⁹¹ This is because the state must show the law is “necessary to the accomplishment of some permissible state objective, independent of the discrimination....,”¹⁹² which places an exceptionally high burden on the state.

At the middle level, which encompasses “quasi-suspect classes” such as gender and illegitimacy, the court will apply heightened, or intermediate scrutiny.¹⁹³ This level requires the state to show that “the legislative use of the classification ‘reflects a reasoned judgment consistent with the ideal of equal protection that furthers a substantial interest of the state.’”¹⁹⁴ Under intermediate scrutiny, the party seeking to defend the law must show an “exceedingly persuasive justification” for the law.¹⁹⁵ The Court in *United States v. Virginia* stated that the state must show “at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹⁹⁶ The Court went on to state that “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation.”¹⁹⁷

187. *Id.*

188. *Id.*

189. *See e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

190. *See e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

191. Maxwell, *supra* note 184, at 159.

192. *See, e.g.*, *Loving*, 388 U.S. at 11.

193. SULLIVAN & GUNTHER, *supra* note 183, at 647.

194. Maxwell, *supra* note 184, at 159–60.

195. *See e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (This case concerned a gender based law.).

196. *United States v. Virginia*, 518 U.S. at 533 (quoting *Wengler v. Drug-gists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

197. *Id.* at 533.

Classification based on gender receives heightened review because these classifications “very likely reflect outmoded notions of the relative capabilities of men and women.”¹⁹⁸ Moreover, classifications based on illegitimacy receive intermediate scrutiny because “illegitimacy is beyond the individual’s control and bears no relation to the individual’s ability to participate in and contribute to society.”¹⁹⁹

The lowest level of review, the “rational basis” test, is used when there is no suspect classification involved.²⁰⁰ The Supreme Court has determined that age,²⁰¹ poverty,²⁰² mental retardation,²⁰³ and sexual orientation²⁰⁴ are not suspect classes. Under rational review it is the petitioner who has the burden of demonstrating that the discrimination is not “rationally related to a legitimate government interest.”²⁰⁵ Typically, statutes which come under the rational basis test are found to be constitu-

198. *City of Cleburne*, 473 U.S. at 441. See also Josiah N. Drew, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace* 16 *BYU J.PUB. L.* 287, 301 (2002).

199. *City of Cleburne*, 473 U.S. at 441 (quoting *Matthew v. Lucas*, 427 U.S. 495, 505 (1976)). See also Drew, *supra* note 198, at 287.

200. *City of Cleburne*, 473 U.S. at 441 (quoting *Matthew v. Lucas*, 427 U.S. 495, 505 (1976)). See also Drew, *supra* note 198, at 287.

201. See generally *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that laws that discriminate on the basis of age should only receive rational basis review).

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Id. at 313.

202. See generally *James v. Valtierra*, 402 U.S. 137 (1971) (holding that laws that discriminate on the basis of wealth should only receive rational basis review). See also *Harris v. McRae*, 448 U.S. 297, 323 (1980) (stating that this Court has held repeatedly that poverty, standing alone, is not a suspect classification).

203. See generally *City of Cleburne*, 473 U.S. at 441–43 (holding that laws that discriminate on the basis of mental retardation should only receive rational basis review).

204. See generally *Romer v. Evans*, 517 U.S. 620 (1996) (holding that laws that discriminate on the basis of sexual orientation should only receive rational basis review).

205. *Id.*

tional, since all the court requires to uphold the law is a legitimate government reason for the discrimination, a very low burden for the state.²⁰⁶

To determine whether a suspect class or quasi-suspect class is involved, the court uses a three-part analysis.²⁰⁷ The origin of this three-part test comes from often cited Footnote 4 of the *United States v. Carolene Products*.²⁰⁸ First, the court looks to see if the class has a history of discrimination.²⁰⁹ Second, the court determines the immutability of the class characteristic.²¹⁰ Finally, the court examines whether the class is politically powerless enough to command extraordinary protection from the majoritarian political process.²¹¹

B. Equal Protection Cases and Their Application to Sexual Orientation

The two most notable Supreme Court cases addressing sexual orientation and equal protection are *Romer v. Evans* and *Lawrence v. Texas*.²¹² In *Romer*, the Colorado legislature enacted a law that denied homosexuals any express statutory protections.²¹³ The law prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect the named class."²¹⁴ The named class was homosexual persons.²¹⁵ By applying the rational basis test the Court deter-

206. *Id.*

207. *High Tech Gays v. Defense Indus. Sec. Clearing Office*, 895 F.2d 563, 573 (9th Cir. 1990). *See also* Timothy Verhoff, Comment, *Class Struggles: A Century After the Ku Klux Klan Act and Still Seeking Protection for the Disabled*, 1999 WIS. L. REV. 153, 168 (1999).

208. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

209. *Drew*, *supra* note 198, at 303.

210. *Id.*

211. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). *See also* Verhoff, *supra* note 207, at 168.

212. *See generally* *Romer v. Evans*, 517 U.S. 620 (striking down the Colorado law as discriminatory on the basis of sexual orientation). *See generally* *Lawrence v. Texas*, 539 U.S. 558 (striking down a Texas anti sodomy law as a violation of due process). The majority decided *Lawrence* on Due Process grounds, however, Justice O'Connor, in her concurrence stated that she would have decided the case on the basis of equal protection. *Lawrence*, 539 U.S. at 564, 579 (O'Connor, J., concurring).

213. *Romer*, 517 U.S. at 624.

214. *Id.*

215. *Id.*

mined that the Colorado state law was a violation of equal protection.²¹⁶ Since the Court concluded that the law's only purpose was animus towards a particular group of people, namely homosexuals, the Court found that the law could not survive even under the rational review test.²¹⁷ Since the Court held that the law failed under rational review, it did not need to address the question of whether a heightened standard of review for sexual orientation was required.²¹⁸

Of particular concern to the Court was how the state attempted to use the Equal Protection Clause to further its desire to harm a politically unpopular group.²¹⁹ The Court stated that at a bare minimum the Equal Protection Clause could not allow this.²²⁰ It further determined that a statute that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" will be unconstitutional.²²¹ This

216. *See generally Romer*, 517 U.S. 620 (striking down the Colorado law and holding that the law was a violation of the Equal Protection Clause). In this case, Colorado enacted a law known as Amendment 2 which essentially denied homosexuals the right to receive aid from the government. *Id.* at 624. The statute stated:

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

Id. at 624.

217. *Id.* at 633 ("[B]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.")

218. *See generally Romer*, 517 U.S. 620 (striking down the Colorado law and holding that the law was a violation of the Equal Protection Clause).

219. *Id.* at 634. The state argued that by removing these rights from homosexual citizens of Colorado, it was putting them in the same place, politically, as the rest of its citizens. *Id.* at 626. The statute, the state said, does no more than deny homosexuals special rights. *Id.*

220. *Id.*

221. Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH ROUNDTABLE 61, 78 (2000).

analysis is in line with Canada's determination that homosexuals in Canadian society have been subjected to discrimination in a way that makes them unequal to everyone else and, therefore, under Section 15(1) and Section 1 of the Charter, are entitled to protection.²²² The purpose of the Equal Protection Clause of the Constitution, like Section 15(1) of the Charter, is to protect politically unpopular and disadvantaged groups.²²³

The *Romer* Court's decision demonstrates that the Supreme Court is gradually becoming more sensitive to gay and lesbian rights.²²⁴ However, *Romer* only determined that a bare desire to harm a group is not a legitimate interest.²²⁵ Therefore, with only *Romer* as precedent it would be difficult for the Court to strike down a state law that banned same-sex marriage. The rational basis test would likely allow a state to produce what the Court could determine to be a legitimate government interest.²²⁶ Moreover, many lawyers have found the Court's reasoning in *Romer* evasive, and have criticized it for not providing an enduring or workable legal framework, which the Court had done in previous race and gender cases.²²⁷

It is yet to be determined whether *Lawrence v. Texas*, the next case addressing constitutional questions concerning sexual orientation and equal protection, created the legal framework necessary to extend marriage rights to same-sex couples and expand the rights of homosexuals in general.²²⁸ While the *Lawrence* majority decided the case on due process grounds,²²⁹ Jus-

222. *Halpern*, 65 O.R.3d at 184.

223. U.S. CONST. amend. XIV §1. See also *United States v. Virginia*, 518 U.S. at 557; CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15 and §1; See also *Layland*, 104 D.L.R. at 223 (Greer, J., dissenting).

224. See generally *Romer*, 517 U.S. 620 (holding that the Colorado law which discriminated on the basis of sexual orientation could not survive even rational basis review).

225. *Id.*

226. See *infra* Part IV for a more thorough discussion.

227. *Sanders*, *supra* note 7, at 3C.

228. See generally *Lawrence*, 539 U.S. 558 (striking down a law that imposed criminal sanctions for engaging in sodomy).

229. *Lawrence*, 539 U.S. at 564. The *Lawrence* majority relied on the Due Process Clause and its implicit protection of the right to privacy. *Id.* (holding that the Texas law was unconstitutional under the Due Process Clause). The Court found that the consequences of the Texas law, which made it a crime for a person to "engage in deviate sexual intercourse with another individual or

tice O'Connor stated in her concurrence that she would have decided the case on equal protection grounds.²³⁰ While O'Connor's conclusion may help the overall plight of homosexuals, it hampers similar progress in relation to same-sex marriage because she specifically stated that in her opinion, a state could put forth a legitimate reason to prohibit same-sex marriage.²³¹ O'Connor stated that, under the rational basis test, the law in *Lawrence* was unconstitutional since it applied only to homosexuals.²³² Although she noted that most laws survive under the rational basis test, she stated that when the challenged legislation inhibits personal relationships, the Court is most likely to find the law unconstitutional.²³³ Here, she determined that there is no legitimate government interest in protecting the morals of a particular group.²³⁴ She stated that the Court has never held that "moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."²³⁵ Moral disapproval, she stated, like a bare desire to harm a group, should not satisfy the rational basis test.²³⁶

However, O'Connor ended her concurrence by stating that all laws differentiating between heterosexuals and homosexuals would not automatically be considered unconstitutional.²³⁷ If the state puts forth a legitimate reason, the law will be upheld.²³⁸ Under this reasoning, the state could hide its moral dis-

the same sex," involved more than denying the right to engage in sexual acts, it also involved criminal penalties and sought to control behavior involving personal relationships in the privacy of one's own home. *Id.* at 567–69. Adults, the court said, may choose to enter into a sexual relationship in their own home and private lives, and still maintain their dignity and freedom: "The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.* at 576.

230. *Lawrence*, 539 U.S. at 579–85 (O'Connor, J., concurring) (Since the Texas sodomy law only applied to homosexuals, O'Connor relied on the Equal Protection Clause of the Fourteenth Amendment.).

231. *Id.* at 585 (O'Connor, J., concurring).

232. *Id.*

233. *Id.* at 580.

234. *Id.*

235. *Id.* at 582.

236. *Id.*

237. *Id.* at 585.

238. *Id.*

approval of homosexuals behind what the Court will accept as legitimate state interests. One such instance, she stated, would be to preserve the institution of marriage.²³⁹ She did not however, provide any rationale for why the protection of marriage includes reserving it for couples of the opposite sex.²⁴⁰ O'Connor's reasoning is similar to the rationale used by the Canadian Supreme Court in *Egan*.²⁴¹ In *Egan*, the court was willing to proclaim that most laws that discriminate on the basis of sexual orientation are unconstitutional but, unlike the court in *Halpern*, it was unwilling to hold that a prohibition on same-sex marriage was unconstitutional as well.²⁴²

IV. SEXUAL ORIENTATION SHOULD BE ELEVATED FROM A "NON-SUSPECT" CLASS TO A "SUSPECT" CLASS

Both the United States and Canada have constitutional guarantees for fundamental freedoms and equality.²⁴³ Both countries' constitutions can be, and have been, used to litigate in the area of relationship recognition.²⁴⁴ As noted above, the litigation in Canada has fallen under Section 15(1) and Section 1 of the Charter of Rights and Freedoms, and U.S. claims have been made under the Equal Protection Clause of the Constitution.

There are notable differences between the modes of analysis used by Canadian courts and the U.S. courts. Canadian courts have determined that a law cannot discriminate based on the

239. *Id.*

240. *Id.*

241. *See generally Egan*, 2 S.C.R. 513 (The court found that most laws that discriminate on the basis of sexual orientation are unconstitutional, however, the court was not willing to extend this rationale and hold that a prohibition on same-sex was unconstitutional.).

242. *Id.* In O'Connor's concurrence in *Lawrence*, she stated that although she thought the law in question was unconstitutional, she specifically declared that her opinion should not be extended to laws prohibiting same-sex marriage. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

243. *See* U.S. CONST. amend. XIV §1; *See* CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15 and §1.

244. Nicole LaViolette, *Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada*, 19 CAN J. FAM. L. 115, 161 (2002).

traits enumerated in Section 15(1) of the Charter,²⁴⁵ nor on any ground analogous to those listed, including sexual orientation.²⁴⁶ If a law is challenged as being discriminatory under Section 15(1) of the Charter, the court must first determine whether the law actually is discriminating against a particular individual or group of people.²⁴⁷ If the law is found to be discriminatory, the court then turns to Section 1 and determines whether the discrimination imposed by the law can be justified by a legitimate state interest.²⁴⁸ Canada, unlike the United States, does not first determine which class the recipient of the disparate treatment falls into before determining which level of scrutiny to apply to the law; instead, the Canadian courts afford the same level of review to all laws that are found to be discriminatory under Section 15(1).²⁴⁹

Therefore, in Canada, discrimination based on sexual orientation receives the same level of scrutiny as discrimination based on race, whereas in the United States discrimination based on race receives a level of scrutiny significantly higher than the level afforded to discrimination based on sexual orientation.²⁵⁰ In the United States, the level of scrutiny will determine how strong the state's interest must be in order for the state's law to be upheld, whereas in Canada the state's interest does not vary based upon who or what group is being discriminated against.²⁵¹ The Canadian courts have determined that barring same-sex couples from the institution of marriage is a violation of Section 15(1) of the Charter since it is discriminatory and the violation cannot be saved under Section 1 because the legislature did not put forth any pressing and substantial objective for the law.²⁵² The Canadian analysis under Section 15(1) and Section 1 is most similar to the U.S. level of intermediate scrutiny.

245. CAN CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), §15 (Section 15(1) lists race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.).

246. *Egan*, 2 S.C.R. at 528.

247. *Halpern*, 65 O.R.3d at 179.

248. *Law*, 1 S.C.R. at 529. See discussion *supra* Part II.

249. Maxwell, *supra* note 184, at 159; *Halpern*, 65 O.R.3d at 179–90.

250. Maxwell, *supra* note 184, at 159; *Egan*, 2 S.C.R. at 528.

251. Maxwell, *supra* note 184, at 159; *Halpern*, 65 O.R.3d at 179–90.

252. See generally *Halpern*, 65 O.R. 3d 161 (holding that the denial of marriage rights to same-sex couples violated Section 15(1) of the Charter).

Under the current state of the Equal Protection Clause, it would be harder for the U.S. Supreme Court to reach the same conclusion as the *Halpern* court did. This is because sexual orientation has been deemed a “non-suspect” class, and therefore only receives rational review.²⁵³ As stated earlier, under rational review it is the plaintiff who has the burden of demonstrating that the discrimination is not “rationally related to a legitimate government interest.”²⁵⁴ This is a lower standard than Canada’s “pressing and substantial objective” for the law. Typically, statutes which come under the rational basis test are found to be constitutional, since all the court requires to uphold the law is a legitimate government interest for the discrimination.²⁵⁵

When a plaintiff brings a claim under the Equal Protection Clause stating that a law is discriminatory based on sexual orientation most courts will apply rational basis review.²⁵⁶ However, based on the three criteria from *Carolene Products* Footnote 4 discussed in Part III, this level of review is arguably incorrect.²⁵⁷ This is because gays and lesbians have suffered a history of discrimination, sexual orientation is an immutable characteristic, and while it may be claimed that gays and lesbians

253. See generally *Romer*, 517 U.S. 620 (holding that sexual orientation should only receive rational basis review).

254. Maxwell, *supra* note 184, at 159.

255. *Id.*

256. See *In re Cooper* 592 N.Y.S.2d 797 (App. Div. 1993) (applying rational basis review in response to 14th Amendment claims challenging classifications based on sexual orientation); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 829–30 (S.D. Iowa 2004) (in the Eighth Circuit, discrimination based on sexual orientation is subject to rational basis review); *Miguel v. Guess*, 51 P.3d 89, 97 n3 (Wash. Ct. App. 2002) (concluding that the court need not reach question of suspect classification based upon sexual orientation as policy in question violated federal Equal Protection Clause based even upon rational basis test), review denied by *Miguel v. Guess*, 2003 Wash. LEXIS 171 (Wash. 2003); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp.2d 1279, 1287–89 (D. Utah 1998) (holding that the decision not to assign a teacher to the position of volleyball coach based on her sexual orientation had no rational basis and violated Equal Protection Clause); *Cleaves v. City of Chicago*, 21 F. Supp.2d 858, 862 (N.D. Ill. 1998) (sexual orientation does not involve a suspect classification or impact a fundamental interest, and thus, equal protection claims on this basis are examined under the rational basis test); *Anderson v. Kind County*, 2004 WL 1738447 *5 (finding homosexuals not a suspect class on basis that older federal cases had ruled homosexuals were not a suspect class).

257. See *supra* notes 206–10 and accompanying text.

are not politically powerless, other groups that have political power receive heightened scrutiny.²⁵⁸

The first criteria under *Carolene Products* is that the class must have a demonstrated history of discrimination.²⁵⁹ It is basically conceded, even by opponents of elevating sexual orientation to heightened scrutiny, that homosexuals have had a history of discrimination in the United States.²⁶⁰ Moreover, the only courts that have addressed the issue agree that while homosexuals are not a suspect class, they have a history of discrimination.²⁶¹ The *Halpern* court easily made the same determination. Citing *Egan*, the court stated “[T]he historic disadvantage suffered by homosexual persons has been widely recognized and documented.”²⁶²

While historic disadvantage remains uncontroversial, the second criteria from Footnote 4, immutability, has been strongly debated.²⁶³ Gay rights advocates say that sexual orientation is a genetically influenced characteristic and not a choice and, therefore, is immutable.²⁶⁴ The Canadian Supreme Court agrees with this.²⁶⁵ In *Egan*, the court stated that sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.”²⁶⁶ In part because of its immutability, the court in *Egan* unanimously affirmed that sexual orientation is an analogous ground to those enumerated in Section 15(1).²⁶⁷

Opponents of granting heightened review to sexual orientation say that anti-sodomy laws single out homosexuals for voluntary behavior, not a common orientation.²⁶⁸ Most courts have accepted this argument.²⁶⁹ “[a]s the Sixth Circuit stated, ‘Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation

258. Drew, *supra* note 198, at 303; *Egan*, 2 S.C.R. at 528.

259. Drew, *supra* note 198, at 303.

260. *Id.*

261. *Id.*

262. *Halpern*, 65 O.R.3d at 184 (quoting *Egan*, 2 S.C.R. at 600–02).

263. Drew, *supra* note 198, at 304–05.

264. Drew, *supra* note 198, at 304.

265. *Egan*, 2 S.C.R. at 528.

266. *Id.*

267. *Id.*

268. Drew, *supra* note 198, at 304.

269. *Id.* at 305.

but rather by their conduct which identifies them as homosexual.”²⁷⁰ Furthermore, the Ninth Circuit stated that “homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.”²⁷¹ But this argument is no more than a semantic sleight-of-hand. When one says that a person is “gay” or a “lesbian” they are not saying merely that the person engages in sexual activity with others of the same sex.²⁷² Rather, they are recognizing something fundamental about the person, which is that the person’s most intimate feelings of love and companionship are directed towards members of the same sex.²⁷³ Clearly, the Canadian Supreme Court does not think that sexual orientation is fundamentally different from race, gender, or alienage.²⁷⁴ In fact, when the court determined that sexual orientation was analogous to those classes already listed in Section 15(1), it gave sexual orientation the same status as race, gender, and alienage.²⁷⁵

Political powerlessness is the third criterion from *Carolene Products*²⁷⁶ and, like immutability, whether homosexuals are in fact politically powerless has been the subject of ongoing debate.²⁷⁷ When courts determine whether a group is politically powerless, they tend to consider whether the group has been

270. *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995), vacated and remanded, 116 S. Ct. 2519 (1996). See also Drew, *supra* note 198, at 304.

271. *High Tech Gays*, 895 F.2d at 573–74. See also Darren Lenard Hutchison, *Discrimination and Inequality Emerging Issues “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L.REV. 1358, 1379 (2000).

272. This notion was articulated in *Egan* when the court stated that sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” *Egan*, 2 S.C.R. at 528.

273. The dissenting opinion in *Egan* stated that “sexual orientation is more than simply a ‘status’ that an individual possesses: it is something that is demonstrated in an individual’s conduct by the choice of a partner.” *Egan*, 2 S.C.R. at 601 (Cory, J. and Iacobucci, J., dissenting).

274. *Egan*, 2 S.C.R. at 528.

275. *Id.*

276. Drew, *supra* note 198, at 303.

277. Patrick Otto Bomberg, *A Survey of Recent Cases Affecting the Rights of Gays, Lesbians, and Bisexuals*, 3 B.U. PUB. INT. L.J. 392, 394 (1993).

able to attract the attention of lawmakers.²⁷⁸ In *City of Cleburne*, the Court stated that “any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.”²⁷⁹ This view was adopted by the Ninth Circuit when it found that homosexuals were not politically powerless. It stated that “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.”²⁸⁰

Justice Scalia’s dissent in *Romer* is in line with the view that homosexuals are not politically powerless.²⁸¹ Scalia stated

because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.²⁸²

Scalia, in describing gays and lesbians as wealthy and politically powerful, is asserting that he believes they are “undeserving of judicial protection.”²⁸³ But Scalia does not provide any support for his factual assertions. Rather, the fact that thirty-nine states have enacted Defense Of Marriage Acts, and only one state supports gay marriage (and only by virtue of a court

278. *City of Cleburne*, 473 U.S. at 445 (In regard to subjecting the mentally retarded to rational review, the court stated that this class was not politically powerless: “[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”).

279. *Id.*

280. *High Tech Gays*, 895 F.2d at 574.

281. *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting).

282. *Id.*

283. Hutchison, *supra* note 271, at 1382 (arguing that Scalia characterizes gay and lesbian civil rights efforts as an exertion of this disproportionate power).

decision, not legislative action) indicates that homosexuals do not have political clout.²⁸⁴ The Ninth Circuit is correct in stating that homosexuals do attract the attention the lawmakers, but this attention is to the overwhelming detriment of gays and lesbians.

Moreover, the argument that heightened scrutiny depends in part on whether a group is politically powerless no longer holds water. Gender discrimination or, rather, laws that discriminate against women, receive heightened scrutiny; however, it is no longer plausible to say that women are a politically powerless group. Currently, women occupy fourteen seats in the Senate and sixty-eight seats in the House of Representatives.²⁸⁵ In his dissent in *United States v. Virginia*, Scalia argued that women are not politically powerless.²⁸⁶ He stated "it is hard to consider women a 'discrete and insular minority' unable to employ the 'political process ordinarily to be relied upon,' when they constitute a majority of the electorate.... Moreover, a long list of legislation proves the proposition false."²⁸⁷ The court in *Halpern* did not even examine whether homosexuals were politically powerless, presumably because it is irrelevant. Presumably

284. DOMA Watch, *available at* <http://www.domawatch.org/index.html> (last visited Jan. 23, 2005). The eleven states that do not have junior DOMA's are the following: Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Wisconsin, and Wyoming. Peterson, *supra* note 8. But it should be noted that in New Hampshire and Wyoming there is a state law that bans same-sex marriage and pre-dates DOMA laws; and in Wisconsin there has been a state Supreme Court ruling stating that only heterosexual marriages are legal. *Id.* See generally *Goodridge*, 798 N.E.2d 941 (holding that the prohibition on same-sex marriage violated the Massachusetts constitution).

285. Guide to the New Congress, *available at* <http://oncongress.cq.com/corp/flatfiles/editorialFiles/temporaryItems/mon20041103-3demographics.pdf>. (last visited Jan. 29, 2005).

286. *United States v. Virginia*, 518 U.S. at 575 (Scalia, J., dissenting).

287. *Id.* at 575-76. The legislation Scalia spoke of includes the Equal Pay Act, Title VII of the Civil Rights Act, Title IX of the Education Amendments, the Women's Business Ownership Act, and the Violence Against Women Act. See Equal Pay Act, 29 U.S.C. § 206(d) (1993); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (1964); Title IX of the Education Amendments, 20 U.S.C. § 1681 (1972); Women's Business Ownership Act, Pub. L. No. 100-533, 102 Stat. 2689 (1988); Violence Against Women Act of 1994, Pub. L. No. 107-249, 108 Stat. 1902. The U.S. Supreme Court in *U.S. v. Morrison* held that the Violence Against Women Act was unconstitutional. *U.S. v. Morrison*, 529 U.S. 598 (2000).

Canada has anti-discrimination laws much like the United States, but the Canadian courts do not use these laws *against* those claiming discrimination.

We see that sexual orientation meets the first two criteria for heightened scrutiny and, arguably, the third test (if it is necessary to apply it) as well. In fact, there have been some state courts that have granted sexual orientation the heightened level of scrutiny it deserves.²⁸⁸ The Court of Appeals of Oregon had “no difficulty” concluding that sexual orientation is a suspect class and stated that “sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”²⁸⁹

If sexual orientation is granted heightened scrutiny, as it should be, then it would be nearly impossible for a law prohibiting same-sex marriage to survive. Under the heightened scrutiny test, the state must show that “the legislative use of the classification ‘reflects a reasoned judgment consistent with the ideal of equal protection that furthers a substantial interest of the state’”²⁹⁰ and the party seeking to defend the law must show an “exceedingly persuasive justification” for the law.²⁹¹ The standard for the Canadian courts is virtually the same, which is that the law must be pressing and substantial and the means chosen to achieve the objective are reasonably and demonstrably justifiable in a free and democratic society.²⁹² Applying the Canadian courts standard to the case before it, the *Halpern* court’s analysis led it to its holding that there was no “pressing and substantial” legislative reason for justifying the discrimina-

288. *See generally* Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (dismissing case in which same-sex couples sought to be married based on intervening amendment to the state constitution, but noting that sexual orientation constitutes a suspect classification and therefore would be subject to heightened scrutiny); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 524 (Or. Ct. App. 1998) (same-sex couples constitute a suspect class for purposes of constitutional discrimination analysis).

289. *Tanner*, 971 P.2d 524 (The court did not discuss the politically powerlessness of homosexuals.).

290. Maxwell, *supra* note 184, at 159–60.

291. United States v. Virginia, 518 U.S. at 531.

292. *Halpern*, 65 O.R.3d at 191.

tory law. Using the same analysis and applying it to the U.S. standard of heightened scrutiny, the U.S. courts should come to the same conclusion as the Canadian courts.

V. UNDER CURRENT UNITED STATES JURISPRUDENCE, THE U.S. SUPREME COURT SHOULD REACH THE SAME CONCLUSION AS *HALPERN*

While the U.S. Supreme Court should give sexual orientation heightened scrutiny, even under a rational review standard the Court should conclude that a ban on same-sex marriage is unconstitutional. Although *Halpern's* analysis is most similar to intermediate scrutiny, the court's analysis of the arguments given by the Attorney General would yield the same result under a rational basis review standard. Support for this conclusion is found in *Goodridge v. Department of Public Health*, in which the Massachusetts Supreme Court applied a rational review standard to the arguments advanced by the Massachusetts Attorney General in support of denying the right to marry to same-sex couples.²⁹³ In *Goodridge*, the court held that a prohibition on same-sex marriage failed the rational review test, and was therefore unconstitutional under Massachusetts law.²⁹⁴

In *Goodridge*, the state proposed three reasons to justify the refusal to allow same-sex marriages:²⁹⁵ (1) the traditional notion that marriage's primary purpose is procreation; (2) opposite-sex marriage ensures that children are raised in the optimal set-

293. *Goodridge*, 798 N.E.2d at 961. The Massachusetts courts use the same language as the Supreme Court of the United States for rational review: "[a] regulatory authority must, at the very least, serve 'a legitimate purpose in a rational way'; a statute must 'bear a reasonable relation to a permissible legislative objective.'" *Id.* at 960-61. In *Goodridge* the court stated that since the statute did not survive rational basis review it did not need to consider whether sexual orientation was entitled to heightened scrutiny. *Id.* at 961.

294. Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 657 (2004) ("The court found that the exclusion of marriage for same-sex couples failed to pass the rational basis test for both Due Process and Equal Protection. The decision was hailed as the wedding bell that might be heard around the world.")

295. *Goodridge*, 798 N.E.2d at 960-61.

ting; and 3) desire to conserve scarce state and private financial resources.²⁹⁶

The first argument was rejected for the same reasons the argument was rejected in *Halpern*. The court found that procreation is not a condition of marriage; instead it said that the essence of marriage is a mutual commitment.²⁹⁷ Furthermore, the court stated that marriage should not remain a heterosexual union merely because historically it has only been a heterosexual union.²⁹⁸ The *Halpern* court rejected the same argument made by the Attorney General.²⁹⁹ In *Halpern*, the Attorney General wanted to preserve the institution of marriage as heterosexual because it had always been that way.³⁰⁰ In response, the court stated that “stating that marriage is heterosexual because it has always been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a Charter guarantee.”³⁰¹ As for the second argument, the court held that while protecting children is a legitimate state policy, denying same-sex marriage will not achieve that policy because the best interest of a child does not depend on a parent’s sexual orientation.³⁰² The court found there was “no rational relationship between the marriage statute and the Commonwealth’s proffered goal of protecting the ‘optimal’ child rearing unit.”³⁰³

Under the third rationale, the state argued that same-sex couples are more financially independent than married couples and less reliant on public resources.³⁰⁴ The court rejected this argument, stating that the “absolute statutory ban on same-sex

296. *Goodridge*, 798 N.E.2d at 960. See also Wojcik, *supra* note 294, at 663–67. Other arguments, which were not as strong as these three, were put forth by the state and were subsequently rejected by the court. *Goodridge*, 798 N.E.2d at 965–69.

297. *Goodridge*, 798 N.E.2d at 961. See also Wojcik, *supra* note 294, at 664.

298. *Id.* at 332.

299. *Halpern*, 65 O.R.3d at 190.

300. *Id.*

301. *Id.*

302. *Goodridge*, 798 N.E.2d at 961–63. “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” *Id.* at 963.

303. *Goodridge*, 798 N.E.2d at 963.

304. *Id.*

marriage bears no rational relationship to the goal of economy.³⁰⁵ The *Halpern* court rejected a similar argument finding that because both same-sex and opposite-sex couples raise children, the argument that only opposite-sex couples should receive an economic benefit from the state is not viable.³⁰⁶

There were other arguments advanced by the state and subsequently rejected by the court.³⁰⁷ While they were not as strong as the first three, one of them is worthy of note. The Commonwealth argued that same-sex marriage would “trivialize or destroy the institution of marriage as it has historically been fashioned.”³⁰⁸ The court rejected this argument, stating that same-sex couples did not want to abolish the institution of marriage, but wanted access to it.³⁰⁹ The rejection of this argument by the court echoes *Halpern*, which stated that “it is not disputed that marriage has been a stabilizing and effective societal institution. The Couples (same-sex couples) are not seeking to abolish the institution of marriage; they are seeking access to it.”³¹⁰

Not only did the *Goodridge* court reach the same conclusion as *Halpern* under a rational review test, but it also cited *Halpern* when it determined the proper remedy to apply. The *Goodridge* court found that Canada’s new definition of marriage, being “the voluntary union of two persons as spouses, to the exclusion of all others,” should also be Massachusetts’ new definition of marriage.³¹¹ The Massachusetts court made a powerful statement by declaring that even under a rational basis review, a prohibition on same-sex marriage is unconstitutional. However, since the Massachusetts court did not discuss whether a prohibition on same-sex marriage violated the U.S. Constitution, and because this case was decided completely as a violation of the state constitution,³¹² it remains to be seen

305. *Id.*

306. *Halpern*, 65 O.R.3d at 188.

307. *Goodridge*, 798 N.E.2d at 963–65.

308. *Id.*

309. *Id.*

310. *Halpern*, 65 O.R.3d at 194.

311. *Halpern*, 65 O.R.3d at 197. *Goodridge*, 798 N.E.2d at 969.

312. *Goodridge*, 798 N.E.2d at 958.

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ

whether the U.S. Supreme Court would reach the same conclusions based on a rational level of review. However, as demonstrated by both *Halpern* and *Goodridge*, there is no rational reason for the prohibition on same-sex marriage.

After examining the arguments in these cases it seems clear that the only remaining argument for banning same-sex marriage is that marriage traditionally has been only between opposite-sex couples. But as *Halpern* and *Goodridge* stated, arguing that marriage should be heterosexual because it has always been that way is not a sufficient reason for discriminating against a certain group of people.³¹³ Moreover, the argument that our society should continue to do something because it is the way it has traditionally been done is not a sufficient ground for upholding a discriminatory practice. If tradition were permitted to be a rationale for upholding a discriminatory law, then different races would not be permitted to marry,³¹⁴ women

essentially the same language. That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.

Id. at 959 (quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)).

313. *Halpern*, 65 O.R.3d at 192.

314. For a more thorough discussion, see RANDALL KENNEDY, *INTERRACIAL INTIMACIES* (2003) (describing and assessing the beliefs, customs, laws, and institutions of interracial relationships).

would be considered the property of their husbands,³¹⁵ and slavery would still exist.³¹⁶

VI. CONCLUSION

Once it is established that a statute discriminates against a recognized class, the Canadian courts determine the constitutionality of the statute by analyzing whether the purpose of the statute is pressing and substantial and whether the means chosen to achieve the objective are reasonably and demonstrably justifiable in a free and democratic society.³¹⁷ The U.S. courts should use the same analysis under the heightened scrutiny test, although under the current state of the law the U.S. courts would use the rational review test. Regardless of the test used by U.S. courts, as *Halpern* and *Goodridge* demonstrate, the arguments made to justify prohibitions on same-sex marriage, including that the purpose of marriage is to unite the opposite sexes, encourage procreation, and companionship, are insufficient to support a continued ban on same-sex unions.³¹⁸

Whether sexual orientation is granted the heightened scrutiny it deserves or the courts choose to continue to use rational review, there is no constitutional basis for denying same-sex couples the same right to marry enjoyed by heterosexual couples. Many people in both the United States and Canada hold strong religious and moral views against same-sex marriages

315. For a more thorough discussion, see ALVAH L. STINSON, *WOMEN UNDER THE LAW* (1914) (discusses the rights, privileges, and disabilities of women under the law at the turn of the 20th century). See also Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 *BROOKLYN L. REV.* 1, 20 (2002) ("At common law, women were classified as personal property of the male head of household."); Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 *COLUM. L. REV.* 1164, n.102 (1992) ("At common law, the husband had extensive rights in his wife's property, and she lacked the power to contract or engage in litigation except through her husband."); Sandra L. Rierison, *Race and Gender Discrimination: A Historical Case For Equal Treatment Under the Fourteenth Amendment*, 1 *DUKE J. GENDER L. & POL'Y* 89, 89-94 (1994).

316. For a more thorough discussion, see ALEXANDER TSEHIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* (2004) (discussing the history and ratification of the Thirteenth Amendment and the concept of freedom).

317. *Halpern*, 65 O.R.3d at 191.

318. *Id.* at 188-94.

and homosexuality, based on their personal religious beliefs and views of morality.³¹⁹ However, as a legal matter, these beliefs and views do not determine whether a law is unconstitutionally discriminatory.³²⁰ As stated by the court in *Goodridge*,

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. “Our obligation is to define the liberty of all, not to mandate our own moral code.”³²¹

Both Canadian and U.S. courts have found that “tradition” is not a sufficient constitutional justification for discrimination.

319. See e.g., *Goodridge*, 798 N.E.2d at 948; Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinion*, 27 HARV. WOMEN'S L.J. 345, 354–55 (2004); Gary Chamberlain, *Same-Sex Marriage: A Religious Argument for Same-Sex Marriage*, 2 SEATTLE J. SOC. JUST. 495 (2004); Religious Tolerance.Org, available at http://www.religioustolerance.org/hom_marb.htm.

320. Justice Scalia, however, does believe that morality can and even should influence the court. In his dissent in *Romer*, he stated that he believed that the Colorado legislature was not hiding behind a “bare desire to harm” homosexuals, but preserving what it determined to be traditional sexual mores. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). The State, he believes, is entitled to make this determination. *Id.* Under Scalia’s interpretation of the Equal Protection Clause, a state legislature would be permitted to determine that a particular practice, even if based on race, is morally unacceptable, and thus, is not a violation of the Equal Protection Clause. With Scalia’s analysis of the Equal Protection Clause, states could still have anti-miscegenation laws. If Scalia’s reasoning is followed to its logical conclusion, then even under the strict scrutiny test, a law supporting segregation could be upheld if it were based on traditional customs, which at one point in our country’s history there were. Scalia seems to be saying that as long as a law is in accord with the majority of society’s view of morality, it will be constitutional.

Justice Stevens, however, stated in his dissent in *Bowers* that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

321. *Goodridge*, 798 N.E.2d at 948 (quoting *Lawrence* 539 U.S. at 571).

As stated by Lord Sankey in *Edwards v. A.G. Canada*, “[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.”³²² This “living tree” is the Canadian Constitution and as *Halpern* aptly stated,

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.³²³

The U.S. courts have utilized a similar approach. As stated in *United States v. Virginia*, “[a] prime part of the history of our constitution is the story of the extension of constitutional rights and protections to people once ignored or excluded.”³²⁴ The U.S. courts should not permit “tradition” any more than personal religious beliefs or views of morality to substitute for the kind of legal and logical analyses used by the courts in *Halpern* and *Goodridge*. Those courts’ analyses show that prohibitions on same-sex marriage cannot withstand heightened scrutiny or

322. *Halpern*, 65 O.R. 3d at 175 (quoting *Edwards v. A.G. Canada*, [1930] A.C. 124).

323. *Halpern*, 65 O.R. 3d at 175 (quoting *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 155).

324. *United States v. Virginia*, 518 U.S. at 557.

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rational review, and should be held to be unconstitutional under the U.S. Constitution, as they were under the Canadian Charter.

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