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Perry v. Schwarzenegger, Proposition 8, and the Fight for Same-Sex Marriage

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PERRY V. SCHWARZENEGGER, PROPOSITION 8, AND THE FIGHT FOR SAME-SEX MARRIAGE

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I. INTRODUCTION

“Marriage is a coming together for better or for worse, hopefully enduring,

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and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects.”¹

Marriage is a legal union that confers social acceptance, a union historically denied to same-sex couples.² On August 4, 2010, the Northern District of California became the first federal court to hold sexual orientation a suspect class and to strike down a state constitutional amendment that prevented same-sex couples from marrying in *Perry v. Schwarzenegger*.³ An appeal in the case is currently pending in the Ninth Circuit and the parties will likely appeal to the Supreme Court.⁴ This Note argues that the Court should uphold the district court’s finding that sexual orientation is a suspect class subject to heightened scrutiny and that Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses of the Constitution.

II. BACKGROUND

Over the last fifty years, gays and lesbians have struggled for equality. Gradually, courts have invalidated laws prohibiting “homosexual” behavior and legislatures have enacted laws aimed at banning discrimination against gays and lesbians.⁵ Despite this progress towards equal rights, states still deny marriage to same-sex couples. Historically, only a man and a woman could enter into marriage and, today, only five states and the District of Columbia allow same-sex marriage.⁶ To date, Massachusetts is the only state in which courts have held that a same-sex marriage ban is unconstitutional.⁷

1. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (invalidating a state law criminalizing the use of contraceptives because it infringed upon the right to privacy).

2. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 445 (Cal. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003).

3. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 16, 2010) (holding the amendment unconstitutional).

4. *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Aug. 16, 2010).

5. See William N. Eskridge, *The Supreme Court of California 2007-2008: Foreword: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1805 (2009) (describing the gay rights movement’s shift from focusing on outlawed behavior to tolerance to equality).

6. See *id.* at 1839-40 (arguing that a Court decision on same-sex marriage could cause backlash from non-supporters); see also CONN. GEN. STAT § 46b-20 (West 2010); D.C. CODE § 46-401 (LexisNexis 2010) (defining marriage as a legal union between two persons); *In re Marriage Cases*, 183 P.3d at 407-09, 451 (indicating that the California Constitution referred to a “wife” as early as 1849 and that early California Supreme Court decisions limited marriage to a relationship between a man and a woman) (citing *Mott v. Mott*, 22 P. 1140 (Cal. 1890)).

7. *Goodridge*, 798 N.E.2d at 969.

A. The Legislative Background of Same-Sex Marriage in California

In 1999, California created a statewide domestic registry for same-sex couples and, over the next seven years, the State gradually expanded the scope of rights that it granted to domestic partners until those rights matched the ones granted to married couples.⁸ While purporting to provide equal rights to both same-sex and opposite-sex couples, the law only permits marriage between a man and a woman and denies same-sex couples the legal designation of “marriage.”⁹ In May of 2008, the California Supreme Court found a provision limiting marriage to opposite-sex couples unconstitutional and required the language “between a man and a woman” to be stricken from the statute.¹⁰ California voters sought to reinstate the limitations on marriage by adopting Proposition 8, which amended the California Constitution to define marriage as a union between a man and a woman.¹¹ On November 5, 2008, the state of California stripped gays and lesbians of their right to marriage by adopting Proposition 8.¹²

B. Perry v. Schwarzenegger and the Fight to Legalize Same-Sex Marriage in California

In May of 2009, California refused to issue marriage licenses to two same-sex couples due to the Proposition 8 amendment, which effectively banned same-sex marriage.¹³ Both couples subsequently brought suit in the Northern District of California, arguing that Proposition 8 denied them the fundamental right of marriage and violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁴ Proposition 8 could not withstand strict scrutiny because it failed the court’s more deferential

8. See CAL. FAM. CODE §§ 297-297.5 (Deering 2010) (defining a domestic partnership under California law and granting domestic partners the same rights and responsibilities as married couples); see also *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1219 (Cal. 2005) (finding both the language of the act and legislative intent show a clear attempt to create equal status for registered domestic partners and married couples).

9. See CAL. FAM. CODE § 300 (Deering 2010) (limiting marriage to a union between a man and a woman).

10. *In re Marriage Cases*, 183 P.3d at 453.

11. Compare CAL. FAM. CODE § 308.5 (Deering 2010) (repealed 2008) (amending the statute to state that “[o]nly a marriage between a man and a woman is valid or recognized in California”), with CAL. CONST. art. I, § 7.5 (amending the California Constitution to state the same).

12. CAL. CONST. art. I, § 7.5.

13. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927-28 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 16, 2010) (summarizing an unsuccessful state court challenge that argued that Proposition 8 improperly amended the California Constitution).

14. *Id.* at 927.

rational basis review.¹⁵ The court found no rational relation to a legitimate state interest among those interests proffered by Proposition 8 proponents.¹⁶ Thus, the court invalidated Proposition 8 under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the measure “both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.”¹⁷

III. ANALYSIS

In 2008, the California Supreme Court awarded a groundbreaking victory to gays and lesbians. In its ruling in *In re Marriage Cases*, the court invalidated a state statute barring same-sex marriage and held both that sexual orientation is a suspect classification subject to strict scrutiny and that the fundamental right to marry applies to same-sex couples.¹⁸ The Northern District of California was the first federal court to adopt these key holdings from the *Marriage Cases* decision.¹⁹

A. The Fundamental Right to Marriage Applies to Same-Sex Couples

The Due Process Clause of the Fourteenth Amendment protects fundamental rights and liberties against government intrusion.²⁰ A right is fundamental if it is “deeply rooted in this Nation’s history and tradition” and if liberty and justice would be impeded by the right’s abrogation.²¹ When a right is fundamental, the government must narrowly tailor any attempt to infringe upon that right to serve a compelling state interest.²²

The fundamental right to marriage is entrenched in our nation’s history. Over sixty years ago, the California Supreme Court declared marriage a basic civil right in *Perez v. Sharp*, a landmark decision that invalidated an

15. See *id.* at 997 (arguing that a statute that does not pass rational basis review cannot survive strict scrutiny).

16. See *id.* at 998 (including among purported interests the promotion of opposite-sex parenting and the protection of the First Amendment freedoms of those who oppose same-sex marriage).

17. See *id.* at 991, 1003 (enjoining the enforcement or application of Proposition 8).

18. See generally *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

19. See generally *Perry*, 704 F. Supp. 2d at 991-1002.

20. See *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)) (noting that because fundamental rights are largely out of legislative reach, the Court must exercise caution in recognizing an asserted right as fundamental).

21. See *id.* at 721 (describing U.S. history and tradition as “guideposts” for deciding whether a right is fundamental).

22. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that courts only invalidate legislation if it has no rational basis or, in the case of certain fundamental rights, it fails to meet heightened scrutiny).

anti-miscegenation law under the Due Process Clause of the Fourteenth Amendment.²³ Federal courts followed suit, culminating in the United States Supreme Court's adoption of the *Perez* holding almost twenty years later in *Loving v. Virginia*.²⁴

Forging a similar path, the federal district court in *Perry* properly adopted the California Supreme Court's view that the right to same-sex marriage is inherent in the fundamental right to marriage.²⁵ In cases invalidating anti-miscegenation statutes, courts characterized the constitutional right in question as the right to marriage rather than the right to interracial marriage.²⁶ Likewise, the right that same-sex couples seek to exercise is the fundamental right to marriage, not the right to same-sex marriage.²⁷ The restrictions on marriage at issue in *Loving* and *Perry* both make distinctions on the basis of status; however, just as race is irrelevant to marriage, so is sexual orientation.²⁸ The same-sex couples here seek the same rights, obligations, and social status as opposite-sex couples and do not wish to modify the "existing institution of marriage."²⁹

When *Loving* reached the Supreme Court, American society was divided regarding interracial marriage, just as it is in regard to same-sex marriage today.³⁰ Nonetheless, the Court made a controversial change to constitutional law and gradually reaffirmed its holding in *Loving* by upholding the right to marriage for other groups.³¹ Despite the controversy over same-sex marriage that exists today, the Court should hold that the

23. See *Perez v. Sharp*, 198 P.2d 17, 19 (Cal. 1948) (defining marriage as "the right to join in marriage with the person of one's choice").

24. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the State cannot restrict an individual's right to marry a person of another race).

25. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991-93 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 16 2010) (finding same-sex relationships consistent with the history and tradition of marriage).

26. See *Loving*, 388 U.S. at 10-11; *In re Marriage Cases*, 183 P.3d 384, 420 (Cal. 2008) (citing *Perez*, 198 P.2d at 17) (indicating that this freedom is a fundamental right).

27. *Perry*, 704 F. Supp. 2d at 993.

28. See AM. PSYCHOLOGICAL ASS'N (APA), REPORT OF THE APA TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 63 (Aug. 2009), *available at* <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> (defining same-sex orientation as a normal variant of sexuality rather than a mental or developmental disorder and reporting attempts to change it as unsuccessful and harmful).

29. See *In re Marriage Cases*, 183 P.3d at 421 (noting that the federal right to marriage is well-established in both state and federal courts).

30. Compare *Loving*, 388 U.S. at 7 n.5 (indicating that, while fifteen states still outlawed interracial marriage, fourteen others had repealed similar laws over the previous fifteen years), with Eskridge, *supra* note 5, at 1812-14 (noting that by 2008, only Massachusetts and five foreign countries recognized same-sex marriage).

31. See generally *Turner v. Safley*, 482 U.S. 78 (1987) (upholding the right to marriage for prisoners).

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fundamental right to marriage applies to gays and lesbians and should reaffirm the protection of that fundamental right from government intrusion.

B. Sexual Orientation is a Suspect Class Subject to Heightened Scrutiny

To date, the United States Supreme Court has not ruled on whether a heightened level of scrutiny applies to sexual orientation discrimination. In *Romer v. Evans*, the Court invalidated legislation that discriminated against gays, lesbians, and bisexuals.³² The Court found it unnecessary to determine the level of scrutiny that should apply to sexual orientation because the legislation at issue failed even rational basis review.³³

Of the federal appellate courts addressing the issue, only the Ninth Circuit has held that strict scrutiny should apply to sexual orientation.³⁴ In *Watkins v. U.S. Army*, the Ninth Circuit found that same-sex oriented individuals suffered a history of discrimination and political powerlessness, and found that sexual orientation is an immutable characteristic.³⁵ However, a year later, the Ninth Circuit distinguished *Watkins* and returned to rational basis review for discrimination based on sexual orientation.³⁶ In light of these decisions, the appropriate level of scrutiny for sexual orientation remains unclear.

In evaluating whether a classification is suspect and, therefore, subject to heightened scrutiny, the Court considers three factors. First, the Court considers the history of discrimination against the group in question.³⁷ Second, the Court evaluates the group's ability to protect itself through the political process.³⁸ Finally, the Court considers whether the class is defined by immutable characteristics, like race.³⁹

32. See 517 U.S. 620, 632 (1996) (finding no rational basis for legislation that imposed a "broad and undifferentiated disability" on same-sex oriented individuals and seemed motivated only by animus toward those individuals).

33. Compare *id.* at 632 ("Amendment 2 fails, indeed defies, even this conventional inquiry"), with *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997-98 (N.D. Cal. 2010), appeal docketed, No. 10-16696 (9th Cir. Aug. 16, 2010) (finding strict scrutiny unnecessary because "Proposition 8 fails to survive even rational basis review").

34. *But see, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (holding that sexual orientation does not warrant review under the strict scrutiny standard).

35. 875 F.2d 699, 724-28 (9th Cir. 1989).

36. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (holding that gays and lesbians are not a suspect class because sexual orientation is *not* an immutable characteristic and because gays and lesbians are *not* politically powerless) (emphasis added).

37. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (citation omitted) (holding that age is not a suspect classification because there was no history of purposeful discrimination against the elderly).

38. *Id.*

39. See *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring)

Based on these criteria, the Court should recognize sexual orientation as a suspect class. The history of discrimination against gays and lesbians is well-documented and includes acts of violence, statutes forbidding same-sex marriage, and job discrimination based on sexual orientation, among other practices.⁴⁰ Although recent legal reforms suggest that gays and lesbians are not as politically powerless as they once were, the Court's jurisprudence makes clear that powerlessness is not a prerequisite to qualification as a suspect class.⁴¹ Finally, the bulk of contemporary research suggests that sexual orientation is not a choice but an immutable characteristic influenced by a combination of genetic, hormonal, and environmental factors.⁴²

Recognizing sexual orientation as a suspect classification is a major constitutional change, but it is not without precedent.⁴³ The Court has adopted a number of California decisions once deemed controversial, giving California courts the reputation as both influential and cutting-edge.⁴⁴ When the Court decided *Romer*, gays and lesbians were not socially accepted and courts did not consider sexual orientation immutable.⁴⁵ However, increased awareness of discrimination against gays and lesbians, recognition of the immutability of sexual orientation, and evolving social acceptance all weigh in favor of recognizing sexual orientation as a suspect class.

(suggesting that such characteristics are irrelevant in most government decisions).

40. *Cf.* Lawrence v. Texas, 539 U.S. 558, 562-63 (2003); Romer v. Evans, 517 U.S. 620, 623-24 (1996); *High Tech Gays*, 895 F.2d at 563; *Watkins*, 875 F.2d at 701-02; *In re Marriage Cases*, 183 P.3d 384, 397 (Cal. 2008) (documenting allegations of discrimination against same-sex oriented individuals in a variety of contexts).

41. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (defining a suspect class as subject to disabilities, intentional unequal treatment, or political powerlessness).

42. *See* Barbara L. Frankowski & The American Academy of Pediatrics Committee on Adolescence, *Clinical Report: Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1828 (2004) (noting that past characterizations of homosexuality as a mental disorder have long since been abandoned).

43. *See, e.g.,* People v. Wheeler, 583 P.2d 748, 768 (Cal. 1978); People v. Belous, 458 P.2d 194 (Cal. 1969); Perez v. Sharp, 198 P.2d 17, 29 (Cal. 1948); Mulkey v. Reitman, 413 P.2d 825, 836 (Cal. 1966) (holding controversial legislation unconstitutional in opinions later adopted by the Supreme Court).

44. *See* Eskridge, *supra* note 5, at 1785-86 (suggesting that California's reputation, population, and economy create a "ripple effect [that extends] well beyond its borders").

45. *See id.* at 1811-15 (suggesting that society has become acclimated to and accepting of same-sex unions and marriage).

C. California's Constitutional Ban on Same-Sex Marriage is Invalid Under the Due Process and Equal Protection Clauses of the Constitution

1. Proposition 8 Intrudes Upon the Fundamental Right to Marriage Under the Due Process Clause

Under the Fourteenth Amendment, the State cannot “deprive any person of life, liberty, or property, without due process of the law.”⁴⁶ Marriage is a fundamental liberty protected by this clause.⁴⁷ To comply with the Fourteenth Amendment, a government intrusion upon marriage must be narrowly tailored to serve a compelling state interest.⁴⁸

Proposition 8 prevents gays and lesbians from exercising their fundamental right to marriage because it limits marriage to a union between a man and a woman.⁴⁹ The domestic partnerships provided under California law are not marriages and differ from marriage in a number of ways.⁵⁰ Perhaps the most important difference between domestic partnerships and marriage is the associated level of social acceptance: society does not regard same-sex domestic partnerships as the equivalent of marriages.⁵¹

Because the right to same-sex marriage implicates the fundamental right of all individuals to marry and because Proposition 8 prevents gays and lesbians from exercising that right, the Court should evaluate the constitutionality of Proposition 8 using strict scrutiny.⁵²

2. Proposition 8 Classifies on the Basis of Sexual Orientation Under the Equal Protection Clause

Under the Fourteenth Amendment, the state cannot deny an individual equal protection of its laws.⁵³ The Court has repeatedly used equal protection jurisprudence to invalidate legislation that discriminates against a protected class.⁵⁴ The Court evaluates the validity of legislation that

46. U.S. CONST. amend. XIV, § 1.

47. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that abridging the right to marriage on the grounds of racial classification violates the Due Process Clause).

48. *See* *Washington v. Glucksberg*, 521 U.S. at 702, 721 (1997) (describing the strict scrutiny analysis as a complex balancing of competing interests).

49. *See* CAL. CONST. art. I, § 7.5 (limiting same-sex marriage by excluding gays and lesbians from the definition of marriage).

50. *See* CAL. FAM. CODE § 297 (Deering 2010) (requiring registry and a common residence to qualify for a domestic partnership).

51. *In re Marriage Cases*, 183 P.3d 384, 445 (Cal. 2008).

52. *See infra* Part III.A (arguing that same-sex couples seek the same rights and obligations as opposite-sex couples).

53. U.S. CONST. amend. XIV, § 1.

54. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (reaffirming the Court's

targets a suspect class of people, such as gays and lesbians, using strict scrutiny.⁵⁵

In *Loving*, the Court held that the Virginia statute prohibiting interracial marriage violated the Equal Protection Clause because it rested solely on racial classifications.⁵⁶ Similarly, Proposition 8 categorically excludes gays and lesbians from marriage based solely on their sexual orientation.⁵⁷ Moreover, Proposition 8 treats gays and lesbians less favorably than heterosexuals by denying them the social benefits of the legal designation of marriage.⁵⁸

Proposition 8 distinguishes between individuals who may and may not exercise their right to marriage based on their sexual orientation.⁵⁹ Because the court in *Perry* recognized sexual orientation as a suspect class,⁶⁰ Proposition 8 should be narrowly tailored to serve a compelling state interest.

3. No Compelling Government Interest Exists for Proposition 8

Proposition 8 interferes with the fundamental right to marriage and classifies individuals on the basis of sexual orientation, which is a suspect class.⁶¹ Therefore, Proposition 8 must be narrowly tailored to serve a compelling state interest.⁶² Strict scrutiny requires both an important reason for a law and proof that the law's ends cannot be achieved through less restrictive means.⁶³

None of the potential government interests advanced by proponents of

use of the equal protection clause when it struck down segregation in public schools).

55. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (introducing the strict scrutiny standard).

56. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding that the decision to marry someone of another race lies with the individual, not the state).

57. See CAL. CONST. art. I, § 7.5 (stating that California will only recognize the marriages of heterosexual couples).

58. See *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (indicating that exclusion from marriage harms both same-sex couples and their children).

59. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug 16, 2010) (noting that the State granted no marriages to same-sex couples after Proposition 8 passed).

60. See *id.* at 997 (noting that “[t]he trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation”).

61. See *id.* at 927 (stating a complaint from two same-sex couples that they were not permitted to marry because California only recognized heterosexual marriages).

62. See *id.* at 997 (arguing that all classifications based on sexual orientation are subject to strict scrutiny).

63. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (noting that a suitable alternative at a tolerable administrative expense may be sufficient).

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Proposition 8 are legitimate, let alone compelling.⁶⁴ For example, proponents argue that the government has an interest in promoting opposite-sex parenting over same-sex parenting; however, studies indicate that concerns about same-sex parenting are unfounded and that children of same-sex couples are “well-adjusted, demonstrating more competencies and fewer behavioral problems than their peers”⁶⁵ Proponents also argue that Proposition 8 is valid for the purposes of preserving marriage as a union between a man and a woman, protecting the freedom of those who oppose marriage for same-sex couples, and treating same-sex couples differently from opposite sex couples; however, Proposition 8 does not interfere with the beliefs or the rights of those who oppose same-sex marriage.⁶⁶ The proffered interests are more properly characterized as animus or a personal moral code, which cannot properly serve as an impetus for legislation.⁶⁷

Because no legitimate interest for Proposition 8’s ban on same-sex marriage exists, the Court should invalidate the proposition.⁶⁸ Without a rational basis, it is impossible for the interests set forth by proponents of Proposition 8 to qualify as the compelling interests necessary for Proposition 8 to survive the more stringent strict scrutiny review.⁶⁹ Thus, Proposition 8 cannot pass heightened scrutiny under either the Equal Protection or Due Process Clause of the Fourteenth Amendment because no compelling state interest exists to justify California’s intrusion on the fundamental right to marriage or discrimination on the basis of sexual orientation.

IV. CONCLUSION

Should *Perry v. Schwarzenegger* reach the Supreme Court, the Court should adopt the California Supreme Court’s holdings for two reasons. First, the fundamental right to marriage applies to same-sex couples, who

64. See *Perry*, 704 F. Supp. 2d at 1001 (finding many of these interests reflected only fear or dislike of gays and lesbians).

65. See Nanette Gartrell & Henny Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28, 34 (2010) (finding that children of same-sex couples have higher performance in academic and social settings and fewer indicators of social problems, like rule-breaking or aggressive behavior, than other teens).

66. See *Perry*, 704 F. Supp. 2d at 997-1001 (noting that neither parents’ rights to educate their children nor any personal moral or religious belief is affected by invalidating Proposition 8).

67. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (holding that the state cannot use its power to enforce a moral code).

68. *Perry*, 704 F. Supp. 2d at 995.

69. *Id.*

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seek no additional rights beyond those given to opposite-sex couples.⁷⁰ Second, the history of discrimination against gays and lesbians and the immutable nature of their sexual orientation warrant their designation as a suspect class.⁷¹ Infringement of a fundamental right and class-based legislation trigger strict scrutiny review and provide the grounds on which the Supreme Court should affirm *Perry* because Proposition 8 is not narrowly tailored to a compelling state interest.

70. *See id.* at 992-93 (equating same-sex marriage with any other marriage).

71. *See id.* at 964 (finding sexual orientation a fundamental characteristic of an individual's identity).