

OF FRUIT FLIES AND MEN: RETHINKING IMMUTABILITY IN EQUAL PROTECTION ANALYSIS – WITH A VIEW TOWARD A CONSTITUTIONAL MORAL IMPERATIVE

SHANNON GILREATH*

*The biggest problem in the world today is
that we draw the circle of our family too small.*
– Mother Teresa

INTRODUCTION: ARGUING WHAT?

In this essay, I address claims of equal protection for gay rights, specifically arguing that the relatively recent focus on trait immutability in equal protection jurisprudence is improperly restrictive of the Constitution's moral vision. As an alternative, I argue that a moral-centered equal protection analysis should take precedence. I reason that trait immutability is completely irrelevant to an essentialist equal protection norm, which ought properly to prohibit the marginalization of a citizen or group of citizens when that marginalization is based only on the merely descriptive moral disapproval of an identity trait – immutable or otherwise – by the larger society. Consequently, I shift equal protection analysis to focus on state action, omission, and complicity in the perpetration and perpetuation of irrational class-based prejudice. With regard to gays, this is the irrational prejudice of homophobia.

* Associated Professor of Law and Divinity and Adjunct Professor of Women's and Gender Studies, Wake Forest University, and Assistant Director, Master of Laws (LL.M.) in American Law Program, Wake Forest University School of Law. While writing this essay, I benefited greatly from conversations with my colleagues, Professors Michael Kent Curtis and Ronald Wright. I thank my exceptionally able research assistant, Ms. Stacy Gomes. For their patience and insight, gratitude is also due the students in my 'Sexual Orientation and the Law' and 'Sexuality, Religion, and the Law' seminars. Thanks are also due to Ms. Ellen Makaravage, Ms. Rosemary Sigmon, Ms. Jennifer Kalcevic, and Mr. Erik Lindahl. The title of this essay derives from recent experiments by scientists purporting to change the sexual orientation of fruit flies by mutating their genetic compositions. See Elisabeth Rosenthal, *For Fruit Flies, Gene Shift Tilts Sex Orientation*, N.Y. TIMES, May 3, 2005, at A1.

The first part of the essay aims to extract the immutability fallacy and arrive at a purer equal protection formula. Part Two will apply my derived formula to gay Americans. Part Three supposes the effect of *Lawrence v. Texas* on the future of equal protection for gays and lesbians and argues that, while not explicitly, the Court's opinion has as many powerful implications for equal protection jurisprudence as it does for substantive due process.

I.

A. Gays and the Problem of Immutability

The Constitution's equal protection norm informs us that all citizens must be treated equally under the law unless there is a justifiable reason, beyond mere collective prejudice, for imposing legal burdens. With that standard in mind, gays remain one of the most inequitably treated groups in the twenty-first century United States, leading me to observe elsewhere that the problem of the twenty-first century will be the "sexuality line."¹ Recently, I discovered a 1973 article, "Is Gay Suspect?" by two non-academicians, Ellen Chaitin and V. Roy Lefcourt.² Reading that article, penned thirteen years before the now-infamous *Bowers v. Hardwick*,³ thirty years before *Lawrence v. Texas*⁴ and *Goodridge v. Dep't of Pub. Health*,⁵ and thirty-two years prior to the moment at which I began this essay, I was reminded just how little has changed for gay Americans in terms of legal equality. As a matter of culture, gays appear on television programs, in the movies, in music videos, and even in cartoon shows,⁶ but gays, except in

¹ SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* ix (forthcoming 2006) (referring to W. E. B. DuBois' observation that "the problem of the 20th century will be the color line.").

² 8 LINCOLN LAW REV. 24 (1973).

³ 478 U.S. 186 (1986).

⁴ 539 U.S. 558 (2003).

⁵ 798 N.E.2d 941 (Mass. 2003).

⁶ See Shannon Gilreath, *Outing Sponge Bob: The Mis-Education of America's Gay Youth*, QUEER DAY, (Feb. 21, 2005), http://www.queerday.com/2005/feb/21/outing_spongebob_the_miseducation_of_americas_gay_youth.html

Massachusetts, still cannot marry, have no federally mandated protection from discrimination in employment or housing,⁷ and may lose custody of their children upon divorcing a heterosexual spouse⁸ or even upon the dissolution of a same-sex relationship.⁹ Most recently, gays are blamed for the disintegration of the American family and are the subject of state and federal constitutional amendment efforts to curtail the possibility of gay marriage.¹⁰ Many of the same realities were reported by Chaitin and Lefcourt in 1973.¹¹

Gays have suffered persecution and discrimination throughout history. In response to the 1986 decision by the United

⁷ The U.S. Supreme Court protected gay and straight against same-sex sexual harassment in *Oncale*, but the nuanced opinion was careful to construe Title VII as protecting discrimination based on sex – not sexual orientation – which is underscored in Justice Thomas' concurrence. See *Oncale v. Sundowner Offshore Svcs.*, 523 U.S. 75, 82 (1998) (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'")

⁸ See, e.g., *Pulliam v. Smith*, 501 S.E.2d 898 (1998).

⁹ In states where second parent adoption is unavailable, the non-biological/non-adoptive parent often has no legal rights to children of the same-sex relationship once the relationship is terminated. See SEAN CAHILL ET AL., NAT'L GAY AND LESBIAN TASK FORCE, FAMILY POLICY: ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES 77-78 & n.241 (2003), available at <http://www.thetaskforce.org/downloads/familypolicy/familypolicy-fullversion.pdf>.

¹⁰ In addition to the federal Defense of Marriage Act (DOMA) and numerous state DOMAs, thirty-five states have now passed constitutional amendments to prohibit same-sex marriage, and Republicans have raised a proposed federal amendment in two sessions of Congress. See Shannon Gilreath, *The Constitutional Status of Gay Marriage*, in MICHAEL K. CURTIS ET AL., 1 CONSTITUTIONAL LAW IN CONTEXT 922, 922 (2d ed. 2006) ("Between 1995 and 2001, . . . 34 states enacted laws expressly providing that marriage was limited to one man and one woman. . . .")

¹¹ This is in no way meant to discount the momentousness of advances like *Lawrence*, *Goodridge*, *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Connecticut civil union law (P.A. 05-10 (2005), available at <http://www.cga.ct.gov/2005/ACT/Pa/pdf/2005PA-00010-R00SB-00963-PA.pdf>) and other partnership initiatives. I acknowledge how far gays have come in the quest for equal rights and dignity, but I must also, realistically, acknowledge how far gays have yet to go.

States Supreme Court in *Bowers v. Hardwick*, the case that upheld the criminalization of consensual gay sex acts, Richard Posner made the following comment in his book *Sex and Reason*:

[S]tatutes which criminalize homosexual behavior express an *irrational fear and loathing* of a group that has been subjected to discrimination, much like that directed against the Jews, with whom indeed homosexuals—who, like Jews, *are despised more for who they are than for what they do*—were frequently bracketed in medieval persecutions. The statutes thus have a quality of invidiousness missing from statutes prohibiting abortion or contraception. The position of the homosexual is difficult at best, even in a tolerant society, which our society is not quite; and it is made worse, though probably not much worse, by statutes that condemn the homosexual's characteristic methods of sexual expression as vile crimes . . . There is a gratuitousness, an egregiousness, a cruelty, and a meanness about [such laws] . . .¹²

Judge Posner recognized what Chaitin and Lefcourt recognized before him: “[In] the reality of American society, homosexuals are a minority group with the accompanying characteristics of all harassed and oppressed [minorities], and they are in need of special protection by our legal system to combat these institutionalized injustices.”¹³

One logical vehicle for this protection is the Equal Protection Clause of the Fourteenth Amendment.¹⁴ Gays and the discrimination they face would seem to fall squarely within the Fourteenth Amendment's protections. The Equal Protection Clause should be understood “as an attempt to protect disadvantaged groups from [irrational] discriminatory practices,

¹² RICHARD POSNER, *SEX AND REASON* 346 (1992) (emphasis added).

¹³ Chaitin & Lefcourt, *supra* note 2, at 35.

¹⁴ “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Court has held that the Fifth Amendment equal protection clause is comparable to the Fourteenth Amendment clause. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954).

however deeply engrained and longstanding.”¹⁵ The Clause “looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.”¹⁶ When attempting to make their cases for equal treatment under the Equal Protection Clause of the Fourteenth Amendment, gays and their advocates have seized on the most obvious biological marker of the Supreme Court’s paradigm suspect class – race. Race, they observe, is immutable, and immutability has, after all, found its way into textbooks and court decisions concerning equal protection analysis. But it is precisely this immutability linchpin, once introduced by gay advocates and ultimately pulled by the court, which causes equal protection claims for gay Americans to come unhinged.¹⁷

Various legal formulae have evolved in an effort to demystify suspect class review. Primarily, they take the course of the formula laid out in *Watkins v. United States*.¹⁸ The *Watkins* panel majority held that “suspect classes” for purposes of equal protection analysis are (1) groups that have “suffered a history of purposeful discrimination”; (2) that such discrimination “embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious”; (3) and that “the group burdened by official discrimination lacks the political power necessary to obtain redress from the political branches of government.”¹⁹ No court seems to dispute that gays have been the

¹⁵ Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1998).

¹⁶ *Id.*

¹⁷ Lower courts have held that gays and lesbians meet the criteria of a suspect class for Equal Protection purposes, yet they have all been reversed on appeal. See, e.g., *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 436 (S.D. Ohio 1994), *rev’d*, 54 F.3d 261, 267-68 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001, 1001 (1996); *Able v. United States*, 968 F. Supp. 850, 862 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628, 632 (2d Cir. 1998).

¹⁸ 847 F.2d 1329, 1345-49 (9th Cir. 1988) (en banc), *diff. results reached on reh’g*, 875 F.2d 699, 724-28 (Canby, J., concurring) (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

¹⁹ Modern Equal Protection analysis was born with *Carolene Products* and its famous footnote four. *United States v. Carolene Products*, 304 U.S. 144, 152 n.

subject of historical persecution; indeed, *Bowers* itself – particularly Chief Justice Burger’s vitriolic concurrence – settled that point.²⁰ But most courts denying gays suspect class status and strict scrutiny have held that gays do not lack political power in a way that renders them “discrete and insular.”²¹ This was Justice

4 (1938). In an opinion in which the Court basically surrendered in its war on Franklin Roosevelt’s New Deal policies, the Court used Footnote 4 to restate its guardianship of individual liberties and to preserve its power of review over such matters in the future. Because the Court specifically marked the rights of “discrete and insular” minorities for an especially searching review, the debate has arisen as to what constitutes “discrete and insular.” The “immutability” argument is one attempt at an answer. The full text of Footnote 4 is as follows:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restrict those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

(internal citations omitted)

²⁰ Burger claimed that prohibitions against homosexual conduct had “ancient roots.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (quoting majority opinion at 192). That question is certainly debatable, with many historians arguing that widespread repression of gays is a phenomenon of the past fifty years (see historians brief in *Lawrence*), but Burger’s perception of “ancient” animus says something about the insidiousness of contemporary prejudice against lesbians and gays.

²¹ The whole idea of political powerlessness is more than a little difficult to square with a Supreme Court jurisprudence that allows white male litigants to prevail under a suspect class rationale. See, e.g., *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 290 (1978) (“[D]iscreteness and insularity [do not] constitute necessary preconditions to a holding that a particular classification is invidious.”)

Scalia's argument in his dissent from *Romer v. Evans*.²² If this argument ever possessed any rationality, the argument is baseless in today's political climate. Despite massive and often well-funded campaigns to defeat state constitutional amendments aimed at prohibiting gay marriage, such measures have passed in every jurisdiction in which they have made it onto the ballot – and by wide margins.²³ The simple mathematics involved in voting along group lines demonstrates the political impotence of gays as a class.

At the heart of the immutability controversy is the claim that sexual orientation is not a discreet factor by which gays may be identified as a group. This claim is incorporated by Bruce Ackerman, for example, as follows:

As a member of an anonymous group, each homosexual can seek to minimize the personal harm due to prejudice by keeping his or her sexual preference a tightly held secret. Although this is hardly a fully satisfactory response, secrecy does enable homosexuals to “exit” from prejudice in a way that blacks cannot.²⁴

Thus, the argument proceeds that gays are not definable in the way necessary to attain suspect class status. Professor Ackerman ultimately concludes that groups like gays and lesbians may be even less politically powerful than usually obviously insular and discreet groups, i.e., African Americans, and that equal protection should be most concerned with those groups where the members are anonymous and diffuse and where detachment from the group is easier for members thereof. This is a conclusion with which I do not wish to argue. However, I think that Ackerman's

²² 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (“[B]ecause 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.”) (internal citations omitted)

²³ See Gilreath, *supra* note 10, at 924 (“In the November 2004 elections, constitutional amendments to ban same-sex marriage passed in every state (11 total) in which they appeared on the ballot.”).

²⁴ Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. LAW REV. 713, 730-31(1985).

discussion of gays as an anonymous and diffuse minority conjures a more pointed and important equal protection question. It is not the ability of gays to distance themselves from their "group" that should essentially trouble us; rather it is the prejudice that drives the desire of some (if not many) gays to engage in this group exit that is most troublesome from an equal protection standpoint. The ability of gays to " 'pass' and hide their sexual orientation when the going gets too rough. . . . while it may have saved a neck from the noose, is in no way less of a relinquishment of dignity, a loss of freedom, than otherwise inescapable victimization or brutality. Elementally, they are the same."²⁵ Of course, not even all blacks would fit Ackerman's definition of discreteness. American blacks have (particularly historically) engaged in what is known as "passing," in which an African- American with particularly Caucasian features passed as white to avoid discrimination.²⁶

The *Watkins* majority noted that, rightly or wrongly, immutability has become a catchphrase in equal protection jurisprudence most often associated with the third prong of the *Watkins* test.²⁷ The requirement of immutability is a critical problem for gays asserting equal protection claims. It also seems, as I indicated earlier, largely a problem that arises not from a settled jurisprudence, but from an admittedly long-standing misconception about equal protection analysis. Still, the ability of gays to escape group prejudice by pretending to be straight remains a critical problem for gays asserting equal protection claims.

B. A Word on Choice

As I begin to argue against the centrality of immutability to suspect class status, I am compelled to note that I find it worse than benighted that a debate over the immutability of sexual orientation

²⁵ GILREATH, *supra* note 1, at 129.

²⁶ For a dramatic portrayal of this concept, see generally ALEX HALEY & DAVID STEVENS, *QUEEN: THE STORY OF AN AMERICAN FAMILY* (1993) (chronicling the life of Haley's grandmother).

²⁷ See *supra* text accompanying note 19.

still rages in our nation.²⁸ As one pair of scientific observers has noted:

Because we are biological beings, all our thoughts, actions, and emotions must have a biological substrate at some fundamental level. Thus, we should not ask if sexual orientation is biological. We should not even ask if it is primarily biological. How could biological and psychosocial factors be teased apart, and what units of measurement would allow them to be assessed and weighed against one another to determine which is more important? From a scientific perspective, it would be more productive to ask about the alternative pathways through which biological and experiential factors might interact to influence sexual orientation.²⁹

Those who cling to the rhetoric of choice to support their prejudices need only consult gay people themselves to dispel the myth that sexual orientation is a chosen “lifestyle.”³⁰ I can do little better than to quote British poet and novelist Vita Sackville-West (perhaps best known now as the sometime lover of Virginia Woolf) who put it most eloquently:

I am qualified to speak with the intimacy a professional scientist could acquire only after years of study and indirect information, because I have the object of study always at hand, in my own heart, and can gauge the exact truthfulness of what my own

²⁸ See, e.g., Dean H. Hamer et al., *A Linage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991); J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 38 ARCHIVES GEN. PSYCHIATRY 1089 (1991). See generally TIMOTHY F. MURPHY, *GAY SCIENCE* (1997).

²⁹ William Byne & Mitchell Lasco, *The Origins of Sexual Orientation: Possible Biological Contributions*, in SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 107 (John Corvino ed., 1997).

³⁰ Moreover, the very work (be it arguably important) of searching for a “cause” of homosexual sexual orientation reflects the longstanding belief that homosexuality is a glitch in need of explanation. No one, we might observe, is searching for the “cause” of heterosexuality.

experience tells me. However frank, people would always keep something back. I can't keep back anything from myself.³¹

Consequently, Sackville-West knew, with certainty, that she was lesbian (or, at least, bisexual) in the same way she might have known of any other personal fact about herself: woman, mother, Briton. Her sexual orientation was as much a part of her identity as any of those, and she did not need the deliberation of science to place the fact beyond doubt. Nevertheless, the debate continues, with people, whether through obtuseness or pathology, refusing to accept the naturalness of gay sexuality³² – with a great many of those people appointed to the federal bench.

C. Hardwick's Long Shadow: The Cost of Immutability

How exactly did the focus on biological immutability for sexual orientation arise? It seems to have arisen in a desperate attempt to litigate around the Supreme Court's opinion in *Bowers v. Hardwick*.³³ Gay rights litigators were at a loss as to a

³¹ NIGEL NICOLSON, PORTRAIT OF A MARRIAGE 106 (1973).

³² Of course, there is not consensus on the importance or even morality of biologic/genetic studies for the "cause" of homosexuality among scientists or gay rights activists themselves. See, e.g., Paul R. Wolpe, 7 NATURE NEUROSCI. 1031, available at <http://www.nature.com/neuro/journal/v7/n10/full/nn1324.html> ("Scientific inquiry into sexuality is among the most ethically charged of all behavioral research.") For a famous criticism linking the search for a "cause" to the perpetuation of stigma, see Donna Minkowitz, *Recurit, recruit, recruit!*, THE ADVOCATE, Dec. 29, 1992, at 17. Minkowitz touched off a firestorm by stating that she chose to be a lesbian. Nevertheless, it is important to note that Minkowitz's self-perceived ability to make a choice about her sexuality, might itself be an inborn feature that she did not choose and has no control over. Essentially, she is claiming to be bisexual. I am skeptical about how many true bisexuals there are, but there are doubtless some, and there seem to be more bisexual women than men. The true bisexual has the ability to be fulfilled sexually with either gender, an ability that is lacking in the vast majority of people who perceive themselves to be either "gay" or "straight" by no choice of their own, and beyond their control. Those terms are simplistic, but the point is, sexual variations or shades of gray say nothing about whether people choose to fall here or there on the Kinsey scale of shades of gray. The extent of polarization of sexual orientation (in any individual or people generally) is a totally separate issue from the extent of choice involved in sexual orientation.

³³ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (finding no "fundamental right to engage in homosexual sodomy" in refusing to invalidate a state sodomy law).

conceivable way to protect gays from various forms of discrimination in employment, housing, and so on, when the nation's highest court had ruled "the conduct that defines the class criminal."³⁴ *Hardwick*, lower courts reasoned, had foreclosed the possibility of heightened scrutiny for gay discrimination claims.³⁵

Hoping to escape the Court's heavy hand, gay advocates seized on a body of academic literature taking shape in the early 1980s.³⁶ Most academic treatment centered on the growing belief that sexual orientation was settled by the time of or shortly after birth and was prospectively unchangeable. Attorneys and law professors drew from many of the studies recounted earlier,³⁷ in hope of responding to a door opened³⁸ in the Supreme Court's decision of *Frontiero v. Richardson*.³⁹ In *Frontiero*, the plurality reasoned that sex discrimination claims deserved heightened constitutional scrutiny because they involve: "a long and unfortunate history of sex discrimination" perpetuated through "stereotyped distinctions between the sexes"; the "high visibility of the sex characteristic: exposing women to 'pervasive . . .

³⁴ *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

³⁵ See, e.g., *Padula*, 822 F.2d at 103 ("We therefore think the courts' reasoning in *Hardwick* . . . forecloses appellant's efforts to gain suspect class status for practicing homosexuals. It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir.) ("[B]ecause homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class . . ."), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990).

³⁶ See, e.g., Richard Delgado, *Fact, Norm, and Standard of Review – The Case for Homosexuality*, 10 U. DAYTON L. REV. 575, 583-85 (1985).

³⁷ See *supra* note 28.

³⁸ This is a supposition endorsed by Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507 (1994), and with which I agree.

³⁹ A plurality of the Court concluded that sex-based discrimination warranted strict scrutiny. 411 U.S. 677, 688 (1973). The concurring justices, however, refused to mandate this standard. 411 U.S. at 691-92 (Powell, J., concurring). The Court resolved the scrutiny issue three years later in *Craig v. Boren*, 429 U.S. 190, 197 (1976), in which a majority of the Court compromised and applied an intermediate level of scrutiny to gender discrimination claims.

discrimination” and the fact that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”⁴⁰

But the immutability argument, when introduced by gay advocates, proved to be friendly fire, precisely because of the volatile state of the scientific arguments concerning sexual orientation.⁴¹ Generally, the courts have rejected the immutability claim outright. Even in *Romer v. Evans*, the moment when gays arguably began to emerge from *Hardwick*’s shadow, the immutability argument fell on deaf judicial ears. As testament to the plaintiffs’ counsels’ wisdom, or at least their ingenuity, the immutability argument presented to the *Romer* court was a substantially watered down version. The plaintiffs argued that, though sexual orientation is “highly resistant to change,” its “etiology” is unknown and that “it is not necessary for a trait to be genetically determined for it to be an involuntary trait that is highly resistant to change.”⁴² But underscoring the danger of muddying the waters with immutability assertions, the court apparently heard, and certainly addressed, a much more stringent argument.⁴³ The court rejected the immutability claim by a reading of precisely the same science with which the plaintiffs’ hoped to buttress it.⁴⁴

⁴⁰ *Frontiero*, 411 U.S. at 684-686 (as summarized in Halley, *supra* note 38, at 507).

⁴¹ See, e.g., *Baehr v. Lewin*, No. 91-1394-05, at 5 (Haw. Cir. Ct. Oct. 1, 1991) (granting Defendant’s motion for judgment on the pleadings) (holding that homosexuals do not constitute a suspect class, in part because “[t]he issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community.”), *rev’d on other grounds*, 852 P.2d 44 (Haw. 1993).

⁴² Trial Memorandum on Plaintiffs’ Case in Chief at 35 & n. 8, *Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993).

⁴³ “Plaintiffs strongly argue that homosexuality is inborn.” *Evans v. Romer*, 1993 WL 518586, at *11.

⁴⁴ “The preponderance of credible evidence suggests that there is a biologic or genetic ‘component’ of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is *some* genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on ‘nature’ vs ‘nurture’ is a decision for another forum, not this court, and the court makes no determination on this issue.” *Id.*

Be it true or not, the argument from science has done little to advance the gay cause in the courts. Nor do I see any indication that the courts are poised to accept the immutability argument in the near future. Consequently, gay advocates should cease the ubiquitous insertion of immutability into judicial claims and find instead some avenue of attack in common with those gays who reject the biological determination argument.⁴⁵

The concentration on immutability in legal arguments is not only unwise, it is also unnecessary in a well-framed equal protection analysis. Despite references to it by the courts, immutability has never been decisively established by the Supreme Court as necessary for a sustainable claim under the Equal Protection Clause.⁴⁶ The Court so held in *Bowen v. Gilliard*,⁴⁷ when it decided that relatives are not a suspect class. This lack of an immutability requirement could hardly be more evident than in

⁴⁵ I am not suggesting that gays and their allies should shy away from the science surrounding homosexuality in other areas. Proving that sexual orientation, particularly gay orientation, is not volitional may be the key to arresting longstanding religious and social prejudices. For a discussion, see GILREATH, *supra* note 1, at 121 (“[H]omosexuality as biological goes a long way toward debunking the ‘against nature’ and religious arguments upon which antigay prejudice is founded. If homosexuality is imbedded in natural design, then it cannot, by definition, be unnatural. Excluding a person on the basis of biology is out of sync with the New Testament theology of the Christian right.”)

⁴⁶ Indeed, at least two Supreme Court justices have declared that settled equal protection doctrine does not include immutability. In a dissent from a denial of certiorari, Justices Brennan and Marshall wrote:

[D]iscrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.

First, homosexuals constitute a significant and insular minority of this country’s population. [Gays] are particularly powerless to pursue their rights openly in the political arena. [And] homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely . . . to reflect deep-seated prejudice rather than . . . rationality.’

Rowland v. Mad River Local School District, 470 U.S. 1009, 1014 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982))

⁴⁷ 483 U.S. 587, 602-03 (1987).

the Supreme Court's decision in *Graham v. Richardson*,⁴⁸ holding that aliens constitute a suspect class. Alienage is not immutable.⁴⁹ In order to escape the class, one need only become a naturalized citizen. Yet the Court held that "[a]liens as a class are a prime example of a 'discrete and insular minority' . . . for whom such heightened judicial solicitude is appropriate."⁵⁰ Even if one were to argue that becoming a citizen is not a simple task and that alienage is not transitory, one could hardly argue with seriousness that one can easily change sexual orientations, even if such orientation is, in fact, mutable.⁵¹ The *Watkins* court seems to agree:

Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?⁵²

⁴⁸ 403 U.S. 365, 376 (1971) (striking an Arizona law that forbade welfare payments to aliens unless they had lived in the country for at least 15 years).

⁴⁹ State courts, as well, have reached suspect class status for gays without invoking trait immutability. For example, the Oregon Court of Appeals held that "immutability – in the sense of inability to alter or change – is not necessary" because alienage and religious affiliation, which are not immutable, have been held to be suspect classifications. The court held that the definition of a suspect class depends upon whether the characteristic assigned relevance has historically been regarded as defining a distinct and recognizable group and whether that group has been the target of social and political discrimination. *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 446 (1998).

⁵⁰ *Graham*, 403 U.S. at 372.

⁵¹ For an example of the horrors of treatment in the past, see Anonymous, *Electroshock: "The Agony of the Years After"*, in JONATHAN NED KATZ, *GAY AMERICAN HISTORY* 201 (Meridian Books 1992) (1976).

⁵² 875 F.2d at 726 (emphasis in original) (citations omitted).

There is additional strong support for the argument that immutability, by itself, is irrelevant to constitutional inquiry. There are a number of groups with characteristics that are, so far as we can know, immutable, whose claims are not afforded heightened scrutiny for equal protection purposes. For example, neither the traits of intelligence nor physical disability have formed the basis for suspect class status under the Equal Protection Clause.⁵³ Instead, it may be “immutability plus” that makes the difference in certain factual contexts. The *Frontiero* plurality held that strict scrutiny was warranted for gender discrimination claims because gender, in addition to being immutable, “frequently bears no relation to ability to perform or contribute to society.”⁵⁴ *Frontiero*, then, stands for the premise that “when a characteristic is both immutable *and* unrelated to the legitimate purposes at hand, discrimination based on it *may* suggest unfairness.”⁵⁵

II.

A. If Not Immutability, Then What?

What, if we eschew immutability as a basis for suspect classification, is the alternative formula for an ethical equal protection analysis? My concern in this portion of the essay is not so much with the idea of equal protection as a judicial phenomenon; rather, my concern is with getting to the purest conception of equal protection possible. Constitutional law is at

⁵³ See, e.g., *Frontiero*, 411 U.S. at 686

⁵⁴ *Id.* at 686. (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”). But see Halley, *supra* note 38, at 508 n. 15 (“There are plenty of careless misreaders of *Frontiero* who construe it to state a freestanding immutability factor uninflected by relatedness. See, e.g., *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989) (holding that prisoners do not constitute a suspect classification because the status of incarceration is neither immutable nor an indicator of invidiousness) (citing *Frontiero* on immutability without reference to relatedness).”).

⁵⁵ Halley, *supra* note 38, at 508 (emphasis in original).

bottom an exercise in interpretive theory;⁵⁶ consequently, what follows is my best estimation of a sustainable equal protection theory.

My thesis is influenced by Michael Perry's 1979 article, *Modern Equal Protection: A Conceptualization and Appraisal*.⁵⁷ Perry supposed that equal protection is best understood as guarding against the punishment of an individual by the use of certain traits that are irrelevant to an individual's "physical or mental capacity – in the form of native talent, acquired skills, temperament or the like."⁵⁸ Race is the paradigm irrelevant trait – what possible effect could the color of one's skin have on his native abilities? There obviously is no corollary between race and ability. My problem with Perry's analysis is that it failed to include sexual orientation within its wide swath, because Perry believed sexual orientation not to be an immutable characteristic. Perry fell into the same trap of exaggerating the importance of the immutability factor discussed earlier.⁵⁹ Nevertheless, his clear view of the ultimate moral thrust of the equal protection clause is unblemished. As understood most basically, the equal protection principle is aimed at ensuring that the irrational and fickle prejudices of a given age are not institutionalized and compounded by a government understood to be conceived for *all* its citizens. Thus, government may not give its imprimatur to activity that is aimed at perpetuating the unjust marginalization of a disfavored group by effectively punishing that group's members on the basis of a trait that has no relationship to the group members' physical or mental capacity in the form of native talent, acquired skills, temperament,

⁵⁶ See generally, Shannon Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy*, 9 TEX. J. C.L. & C.R. 23 (2003).

⁵⁷ 79 COLUM. L. REV. 1023 (1979).

⁵⁸ *Id.* at 1066.

⁵⁹ Perry tells me personally that the "young[er] Michael Perry" who authored the 1979 critique of equal protection at issue here has "died many times." E-mail from Michael Perry to Shannon Gilreath (Feb. 28, 2005) (on file with author). I am, as yet, unclear as to Perry's ultimate judgment on the importance of immutability to suspect classification, but I am more certain, as Perry is my former teacher and mentor and friend of many years, that his view about the mutability of the homosexual sexual orientation has changed.

or the like. This disenfranchisement on the basis of preconceived irrational prejudice is the particular evil at which equal protection is aimed.

Perry's explication reveals that equal protection is not simply about a politically identifiable trait; that is to say, we are not merely concerned that circles are drawn around people with an easily discernible trait. The law makes and must be able to make distinctions based on necessary classifications of citizens. For example, the law may allow that those born with immutable handicaps not be hired for jobs when reasonable accommodation cannot bring their functionality in line with the parameters of the job requirements. Or consider that universities are allowed to accept only those who meet stringent academic requirements, while the ability to meet such requirements arguably turns in part on immutable genetic factors over which one has no control. Viewing equal protection as invalidating every conceivable trait-based classification is an unreasonably expansive reading. Conversely, reading equal protection as invalidating state action only in the face of an immutable trait is unreasonably cramped. Rather, equal protection is concerned that members of a group not be punished for a trait that has no relationship to their intrinsic worth to society merely because some animosity exists between a dominant group and the group displaying the trait.

The constitutional principle of equal protection, then, recognizes the existence of the political evil of class-based political subjugation and seeks to eliminate (or, at least, to alleviate) its degrading effects on the subjugated segment of society. This would seem to be the aspiration of the framers of the Fourteenth Amendment. These politicians realized that the key to transforming the racial prejudices of centuries of physical and moral degradation of blacks was the use of the government to protect consistently the rights of blacks.⁶⁰ A major thrust of the Equal Protection Clause and the Reconstruction amendments was righting the historical ills of racism, but they were also intended to protect members of other unpopular groups – white Republicans in

⁶⁰ The 1871 enactment of 42 U.S.C. § 1983 is an example. § 1983 is an enforcement provision, supplying a remedy for violations of the trilogy of post-Civil War amendments (U.S. CONST. amend. XIII, XIV, XV), which the Reconstruction Congress knew were likely to happen in the South.

the South, for example. To oversimplify equal protection by transforming it into a concern about “classification” on the basis of “immutability” is contra contextual.⁶¹ For example, if we were to extend this “immutability” rationale to its limits, we would have to conclude that the framers of the Fourteenth Amendment would have extended the force of equal protection only to those blacks for whom race was easily identifiable, but not to those who could “pass” as white and, thus, effectively transmute races. Rather, equal protection is ultimately aimed at the type of prejudice and animus that would drive a light-skinned black person to separate from home and kin when possible. Those who disapprove of applying equal protection analysis to laws that do not explicitly disadvantage blacks on the basis of race and are not specifically discriminatory ignore the fact that the Fourteenth Amendment is not written with the specificity of the Civil Rights Act of 1866.

Rather, the Fourteenth Amendment, approved by Congress in June 1866, spoke in more global terms of unabridged equitable citizenship.⁶² It was predicated on an ethical constitutionalism which drew its power from moral dissent and genuine concern with “the right to conscience,” a central value of American constitutionalism that allowed the framers of the Reconstruction amendments to successfully bring content to the constitutional norm of equality – a content which went appreciably beyond the definition of the equality norm afforded by the courts of the day.⁶³ The work of the Reconstruction amendments, centering on equality and equal protection, constituted a moral restructuring of the American democratic order based on a respect for universal human rights. When the Court later dropped its famous Footnote Four in *Carolene Products*,⁶⁴ it signaled that, while it was abandoning its New Deal fight about property rights, on this fundamental ideal it could foresee no compromise.

⁶¹ For a theory of equal protection in which immutability is central, see generally, ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁶² Even the *Slaughter-House* Cases concede this. 83 U.S. 36, 72 (1872) (“The first section of the fourteenth article, [sic] to which our attention is more specially invited, opens with a definition of citizenship.”).

⁶³ See generally Gilreath, *supra* note 56.

⁶⁴ See *supra* note 19.

But the reader need not rely on my assessment alone; she may instead turn to a hallowed bit of American jurisprudence for which we recently celebrated a fiftieth anniversary: *Brown v. Board of Education*.⁶⁵ If race is the paradigm suspect class and *Brown* is the paradigm race case, then it is only natural to see what *Brown* lends to the discussion of an essentialist equal protection formula. In fact, it lends much. The Court struck down school segregation laws, without a single mention of the immutable nature of race. The Court did this out of recognition that American racism had for too long enjoyed the life-giving force of constitutional imprimatur. Blacks were degraded and dismissed as unfit even to mingle with whites based purely on an irrational prejudice and fear of a trait unrelated to the black person's intrinsic worth or ability.⁶⁶

Thus, as the Court understood it in *Brown*, race is not a suspect classification because of the weight of some oppressive physiological trait from which group members cannot escape. Historically, race in this country was defined by "one-drop" laws, holding that individuals sufficiently removed from black ancestors to be able to "pass" for white were still black by law.⁶⁷ But some people black by law who could "pass" as white nevertheless evaded the defining trait of "blackness" by refusing to self-identify as black. In such situations, race, at least as a socially constructed trait, was, indeed, mutable.

Brown made no explanation of race as a genetics issue; instead, it seemed to be focused on something else that, though related, is quite different. *Brown* is cast in terms of state action,

⁶⁵ 347 U.S. 483 (1954).

⁶⁶ See *id.* at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . 'The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.'"). Of course, not all critics agree that the Court's guiding principle was quite so clear. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959) (decrying the Court's failure to justify its result in *Brown*).

⁶⁷ See, e.g., Carrie Lynn H. Okizaki, Comment, "What Are You?": *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 473-74 (2000) (examining the development of the "one-drop" rule)

omission, and complicity in the perpetration and perpetuation of an irrational class-based social ethos.⁶⁸ Race, then, is a suspect class chiefly because society has assigned meaning, in the form of irrational prejudice, to a trait displayed by a group that has historically been the subject of social derision, subjugation, and marginalization. The fact that one might seek to – or even could – evade identification with the trait is irrelevant to *Brown*'s analysis. Thirteen years later, in *Loving v. Virginia*, the Court finished what it had begun in *Brown*. In *Loving*, the Court invalidated the states' remaining antimiscegenation laws prohibiting interracial marriage. Chief Justice Warren's *Loving* analysis eschewed any immutable trait-based approach and, instead, focused on the Virginia law's irrational classification of blacks and its ultimately illegitimate purpose (the perpetuation of white supremacy).⁶⁹

B. Translating Equal Protection to Gays

From this perspective, equal protection analysis for gay people gains plausibility and teeth. One need only read the concurring opinion of Chief Justice Burger in *Bowers v. Hardwick* for evidence of the social ethos that has oppressed gays as long-suffering victims of a discrimination akin to that perpetrated against blacks.⁷⁰ Burger's opinion resonates with echoes of gays as *inter christianions non noninandum* – not fit to be named or discussed – invisible *unless* they seek some measure of equality. Then they must be put down. The irrational fear and prejudice against gays has been scaffolded by government action in the form

⁶⁸ For a similar articulation of the *Brown* analysis see DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 170-174 (1993).

⁶⁹ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). For a discussion of equal protection after *Loving*, see generally Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁷⁰ 478 U.S. at 197 (Burger, J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.")

of laws against sodomy, cross-dressing, same-sex marriage, and gay adoption.

Historically, anti-sodomy statutes were the most effective mechanism by which governments sought to categorize and subjugate gays.⁷¹ The laws were driven by a growing social disapprobation for gays and homosexuality generally. Perhaps this disfavor grew out of a Millennialist religious revival; whatever the reason, by the late 1800s, religious groups and “moral societies” were pressing the law to weigh heavier on gays and lesbians. Civic groups began to form in order to quell sexual deviance, a job they believed the law was not doing satisfactorily. For example, New York City’s Comstock Society (the Society for the Suppression of Vice) was founded in 1872 for just such a purpose. By the 1890s, the Comstock Society was assisting police in monitoring “degenerate” behavior in the gay subculture. They urged officials to use the sodomy law to combat sexual deviants. Anthony Comstock, from whom the Society took its name, had this to say:

These inverts are not fit to live with the rest of mankind. They ought to have branded in their foreheads the word ‘Unclean,’ and as the lepers of old, they ought to cry ‘Unclean! Unclean!’ as they go about, and instead of the [sodomy] law making twenty years imprisonment the penalty for their crime, it ought to be imprisonment for life.”⁷²

Consequently, the legal regime governing homosexuals changed in menacing ways. Earlier in American history, most sodomy laws covered only anal sex, and prosecutions were mainly of opposite-sex offenders.⁷³ But by the late nineteenth and early twentieth centuries, many states changed their sodomy laws to

⁷¹ Much of this historical discussion is taken from my forthcoming book, *GILREATH*, *supra* note 3, at 13-17.

⁷² WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 24 (1999).

⁷³ Case law and statutory construction imported from England confined “sodomy” or “buggery” to anal penetration. But this was prosecutable between opposite-sex participants, even between husband and wife. See *R v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1718); *R v. Jellyman*, 173 Eng. Rep. 637 (1838). See also *R v. Jacobs*, 168 Eng. Rep. 830 (1817) (holding that fellatio did not constitute sodomy).

make it easier to target gays: either judges expanded the definition or legislatures simply rewrote their sodomy or “buggery” statutes to encompass oral sex.⁷⁴ In still others, a more indirect approach was taken; Massachusetts, for instance, made it a crime to be a “lewd, wanton, or lascivious person.”⁷⁵ Once sodomy laws encompassed oral sex, lesbians were vulnerable to the felony prohibitions of sodomy, a virtual impossibility before, although lesbians still counted for a mere fraction of the sodomy arrests of the period.⁷⁶

Sodomy laws, however, still proved unwieldy. Because they carried felony penalties, their use was limited by procedural safeguards like indictment and trial by jury. Aggressive laws against cross-dressing were implemented to take up the slack. Gays joined the ranks of Joan of Arc and Elizabeth Cady Stanton as degenerates for wearing *dress not belonging to his or her sex*. A proliferation of “disorderly conduct” laws further added to the arsenal of gay suppression.

The paranoid McCarthyism of the 1950’s asserted that gays were security risks, easily susceptible to blackmail because of their subversive lifestyles. This era was the origin of the security risk argument for the military’s gay ban. As is true today, the government inexplicably discharged openly gay men and women also, despite the apparent blackmail threat having been removed by their coming out. J. Edgar Hoover aimed to ferret out “sex perverts” holding government jobs. In 1951, Hoover had identified 406 such “perverts” in government employ. In 1953, President Eisenhower issued Executive Order 10450, formally dismissing gays from government service.⁷⁷

⁷⁴ Prior to 1900, only four fellatio cases were before the courts as criminalized sodomy. By 1920, however, 24 states had crafted laws that included fellatio in the sodomy definition. A further 11 states had their existing statutes judicially reinterpreted to include fellatio as criminalized activity.

⁷⁵ MASS. GEN. LAWS ch. 165, § 28 (1860)

⁷⁶ The first cunnilingus conviction to stand was in a 1917 decision from North Dakota. *State v. Nelson*, 36 N.D. 564 (1917) (“We do not desire to discuss the revolting details of an act such as that complained of. We are satisfied, however, that it involves an attempt to carnally know with the mouth.”)

⁷⁷ Exec. Order 10,450 § 8(a)(1)(iii), 3 C.F.R. 936 (1949-1953) (mandating investigation of “immoral, or notoriously disgraceful conduct” – including “sexual perversion” – by a government employee) *See also Webster v. Doe*,

Newspapers frequently printed the names of alleged homosexuals apprehended in police raids. Everywhere gays were subject to victimization and violence by thugs and police alike. In 1955, Harry Hay, founder of the now legendary Mattachine Society, one of the earliest organizations for the promotion of gay rights, was called to testify before the House Un-American Activities Committee. The message conveyed by Hay's summons was clear: homosexuality was "un-American."

The continuing, corrosive force of irrational prejudice against gays was sorely evident in the 2004 election, with constitutional amendments banning gay marriage passing in every state in which they appeared on the ballot, heedless of principled arguments by gay citizens for respect for their love lives and families.⁷⁸ The force of homophobia is not found in the suppression of one right, e.g., sexual privacy or gay marriage, but rather in the creation and maintenance of a social ethos in which gay citizens are told they have nothing to offer their country and that their country has little regard for them. It is a socialization process that begins at birth and is inculcated even in the supposedly "neutral" policies of the public education system, in which discussion of homosexuality is not allowed, while straights discuss their sexuality so openly and often that they do not even realize they are doing it.⁷⁹

For illustrative purposes, let us look at what is now one of the least contentious of gay rights issues – the ban on gays in the military.⁸⁰ Understanding the longtime ban on gays in the military

486 U.S. 592 (1988) (upholding government policy of summary dismissal of gays).

⁷⁸ Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah.

⁷⁹ See Gilreath, *supra* note 6 ("In many schools, a so-called 'neutral policy' is adopted whereby talk of all sexuality is prohibited. But where, I ask, is the neutrality in a policy that precludes discussion of homosexuality when heterosexuality is discussed so often and frankly that most heterosexuals do not even realize they are discussing it?").

⁸⁰ I say least controversial because an August 2003 Fox News poll revealed that sixty-four percent of Americans favored allowing gays to serve openly in the armed forces (a Gallup Poll of the same year put the number at an even greater 79 percent), a significant increase from the numbers in a similar 2001 poll. It is also worth noting that the "unbiased" media seems to be signaling different

and the more recent “don’t ask, don’t tell” policy requires realizing that within the military there is a fear of a shifting in the traditional dominance of machismo, which has heretofore reigned supreme in the armed forces, as in most of society. The gay man, according to traditional stereotypes, is puny, weak, and girlish – not fit for armed service. The straight man, by contrast, is strong and robust, an engineered warrior. The bigot thrives on difference, real or perceived, and his hatred is particularly dependent upon it in order to survive. He is especially pleased when he can point to a long history of bigotry to validate his continuing position as a bigot.

This was evident in the firestorm created when the United States Supreme Court forced the gender integration of the Virginia Military Institute (VMI).⁸¹ Until that time, Virginia did not permit women to enroll as cadets at VMI. Of course, the usual arguments about the morality of men and women in close quarters, the morale of the cadets, and the need to maintain an ordered and disciplined environment for the all-male population were offered as justifications for retaining the ban on women. The Court, however, decided that the justifications were insufficient to survive constitutional scrutiny, and that the VMI policy violated equal protection. A majority of the justices reasoned, quite rightly, that a longstanding tradition of discriminating against women was in no way a justification for compounding that unfortunate historical error by perpetuating it.

Institutionalized bigots, as typified by misogynists at VMI, are afraid of losing more ground by giving in on the issue of the integration of openly gay soldiers into the military. In his dissent, Justice Scalia noted that the Court’s decisions “ought to be crafted so as to reflect those constant and unbroken national traditions that

cultural attitudes here: the Fox News headline chose to focus on the lack of support for same-sex marriage, rather than the apparent support for lifting the military ban. See Press Release, UCSB Center for the Study of Sexual Minorities in the Military, New Poll Finds Historic Support For Gays In Military (Dec. 23, 2003), available at http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_1223.htm. See also Dana Blanton, Majority Opposes Same-Sex Marriage (Aug. 26, 2003), <http://www.foxnews.com/story/0,2933,95753,00.html>; Darren K. Carlson, Public OK With Gays, Women in Military (Dec. 23, 2003), <http://poll.gallup.com/content/default.aspx?ci=10240>.

⁸¹ United States v. Virginia, 518 U.S. 515 (1996).

embody the people's understanding of ambiguous constitutional texts. More specifically, . . . 'when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.'"⁸² Extended to its logical limits, Scalia's argument reads that there is no constitutionally mandated reason to end a traditional discrimination – unless the Constitution were to specifically say, "Women must be allowed entrance to any public educational institution," or "Gays must be allowed to serve in the nation's armed forces." Of course, the Constitution makes no such explicit guarantees, and it is important to realize that if such reasoning predominated, not only would homosexual equality be impossible, but most of the significant social advances of the last century, like the advancement of woman's rights or racial desegregation, would never have come to pass. Scalia's argument is a variant of the popular argument that because differences have traditionally been observed – that is, differences in men and women or gays and straights have traditionally been observed (and manipulated to leave women and gays powerless) – we should go right on exaggerating those differences, for no better reason than simply because it has always been that way. This is exactly the sort of ingrained trait-based marginalization at which equal protection is aimed.

Such arguments engender not a legitimate concern for morality, or security, or morale, or privacy, but rather an irrational contempt for the homosexual as a person. The example shows that, viewed through the lens of our essentialist equal protection principle, the inclusion of gays as a suspect class for equal protection purposes should turn on the existence of a culture of degradation and subjugation of gays coupled with the political legitimization of that social ethos by complicit state action and validation of prejudice.

C. Equality as Constitutional Morality

⁸² *Id.* at 568 (Scalia, J., dissenting) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).

There is much discussion today about the proper place of religion and religious morality in American politics and law.⁸³ Yet the Constitution provides for Americans an independent morality of reason, republican government, and democratic justice. The Equal Protection Clause was aimed at righting centuries of racial degradation and subjugation aimed at American blacks. Blacks were held captive by a morality that made no place for them and not only defined them by a trait that was part of their physiological definition, but also *redefined* – constructed – that trait into something wholly separate from its essential biology for use as a tool of subjection. *Brown*, in turn, was a step toward righting the immorality of *Plessy*,⁸⁴ in which the Court, contrary to obvious principles of equality, drew circles around American blacks based on a trait that bore no relationship to their personhood.

I have elsewhere compared the historical status of gays in this country with the caste-based prejudices against the Indian *pariah*.⁸⁵ Equal Protection forbids the arbitrary isolation of groups of people into untouchable categories exempt from basic moral freedoms of self-determination and liberty of conscience that subject caste members to numerous legal burdens not borne by citizens outside the caste.⁸⁶ For example, in declaring that the

⁸³ See, e.g., ROBERT F. DRINAN, S.J., CAN GOD AND CAESAR CO-EXIST? BALANCING RELIGIOUS FREEDOM & INTERNATIONAL LAW (2004) (particularly Ch. 4 “Religious Freedom in the United States”) (discussing the interrelationship of government and religion in the promotion of morality and stability); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991) (addressing the role of religious morality in the politics of a morally pluralistic society); ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE (1997) (presenting differing viewpoints on the appropriateness of religious morality in politics).

⁸⁴ Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) with *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸⁵ See GILREATH, *supra* note 3, at 99 (“In the past century, every state made homosexuality a felony or otherwise criminal offense. The gay person was brutalized, politically marginalized, and shoved into a pariah caste.”); see also *id.* at 90-91 (comparing the treatment of the Indian “Untouchables” under the Nehru administration with the treatment of American gays.)

⁸⁶ For a similar, but decidedly narrower caste-based equal protection articulation, see Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). Sunstein articulates his anticaste principle as follows:

Massachusetts state constitution mandated gay marriage, the *Goodridge* court noted that same-sex couples were deprived of many statutory benefits extended to married couples, including:

joint state income tax filing; tenancy by the entirety; extension of benefit of homestead protection to one's spouse and children; automatic rights to inherit property of a deceased spouse who does not leave a will; rights of elective share and of dower; entitlement to wages owed to a deceased employee; eligibility to continue certain businesses of a deceased spouse; the right to share the medical policy of one's spouse; thirty-nine-week continuation of health coverage for the spouse of a person who is laid off or dies; preferential options under the state's pension system; preferential benefits in the state's medical program; access to veterans' spousal benefits and preferences; financial protections for spouses of certain state employees killed in performance of duty; equitable division of marital property on divorce; temporary and permanent alimony rights; the right to separation support that does not result in divorce; the right to bring claims for wrongful death and loss of consortium; funeral and burial expenses and punitive damages resulting from tort actions.⁸⁷

[T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so. On this view, a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant from a moral point of view. This form of inequality is likely to be unusually persistent and to extend into multiple social spheres, indeed into the interstices of everyday life.

Id. at 2411-12. Sunstein's focus on trait visibility, however, would bring discrimination against women and blacks into the anticaste purview but would leave the poor, Jews, and gays outside of the principle. *See id.* at 2438, 2444.

⁸⁷ Gilreath, *supra* note 10, at 923. *See also* *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955-57 (Mass. 2005) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that 'hundreds of statutes' are related to marriage and to marital benefits. With no attempt to be comprehensive, we note . . . some of the statutory benefits conferred by the Legislature on those who enter into civil marriage. . . .")

The placement of gay couples, similarly situated with straight couples, into a lower legal caste is evident.

In his oft-invoked *Plessy* dissent, Justice Harlan intoned that “[t]here is no caste here We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.”⁸⁸ In *Plyler v. Doe*, the Court, in striking a law depriving illegal alien children of a public education, noted that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based . . . legislation.”⁸⁹ Likewise, the Court has noted that the Constitution does not permit states to “divide citizens into . . . permanent classes.”⁹⁰ This interpretation of the Fourteenth Amendment seems consistent with the defense of the amendment proffered during the Reconstruction debates by Senator Howard, who declared the amendment’s major purpose to “abolish all class legislation . . . and . . . the injustice of subjecting one caste of persons to a code not applicable to another.”⁹¹

Equal Protection is rightly invoked to right historical wrongs in which a group is held in bondage by a prevailing cultural morality, imprisoning them in a lesser caste and conflicting with our constitutional morality of equality for all people. Constitutional equal protection doctrine, if interpreted and applied in its essential formula, may be the only *real* morality involved in these repressive equations. The morality, be it religious or otherwise, which has historically belittled gays has been *descriptive*, offering only a restatement of societal prejudices: “Discrimination against gays is justified because gays are *immoral*.” If the implied morality here is merely a restatement of social mores of fear and hatred of gays, then the issue is indeed one of moral import. The problem inheres in the extension of this

⁸⁸ *Plessy v. Ferguson*, 163 U.S. 537, 559; 562 (1896) (Harlan, J., dissenting).

⁸⁹ 457 U.S. 202, 213 (1982).

⁹⁰ *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (“It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.”)

⁹¹ CONG. GLOBE, 39th Cong. 1st Sess. 2766 (1866).

logic. By this definition of morality, even the Nazis were moral when they began a campaign to systematically murder Europe's Jews.⁹² Surely, Americans should reject the mere regurgitation of phobias and neuroses as moral authority. In order to draw legal and political boundaries around groups of citizens, we need a normative morality – one that is prescriptive and based on reason. Normative morality is based on fairness and an essential consistency in the way we apply our moral prescriptions to members of society. Such is the central thrust of the Equal Protection Clause: All citizens must be treated equally under the law – unless there is a justifiable reason, beyond mere collective prejudice, for imposing legal burdens. Such reason arises only when the trait which is the subject of the moral judgment is directly related to the person's physical or mental capacity – in the form of native talent, acquired skills, temperament, or the like. By this definition, the fact that many – or even most – people dislike gays is not reason enough to legally discriminate against them.

Here, we might tweak (or perhaps more fully develop) Professor Perry's definition of equal protection. We might say that equal protection is meant to prohibit the marginalization of a citizen or group of citizens based on a merely descriptive moral disapproval of a trait, or the display of a trait, immutable or otherwise. This is the answer to the inevitable but ultimately false moral conundrums asserting that favorable legal treatment for gays will lead to leniency regarding rape, incest, bestiality, murder, and a host of other horrors. Viewed in light of a moral imperative, the answer is quite simple – there is an independent, normative basis, beyond the merely descriptive, for condemning these "choices." These activities are inherently injurious to their objects or victims, and society's just condemnation goes well beyond any merely descriptive dislike or discomfort.⁹³

⁹² For an elaboration of this point, see RICHARD MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 31 (1998).

⁹³ Some critics might regard my normative reasoning here as ultimately merely descriptive and, thus, self-defeating. They might say that my rationale, exemplified by the differences I perceive between partners in a same-sex relationship and murderers or rapists, is little more than my preference for a society in which we do not kill or sexually violate our fellow citizens (in much the same way that religious fundamentalists prefer only heterosexual families or missionary sex). But I submit that there is a reasonable, rational difference –

An excellent example of this theory at the state level is the decision of *Commonwealth v. Wasson* by the Kentucky Supreme Court in 1993.⁹⁴ The *Wasson* Court concluded that Kentucky's constitution barred the criminalization of consensual same-sex sex acts by addressing the commonwealth's contentions thusly:

The issue here is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference. . . . The question is whether a society that no longer criminalizes adultery, fornication, or [sodomy] between heterosexuals, has a rational basis to single out homosexual acts for different treatment.⁹⁵

The *Wasson* Court, albeit on state constitutional grounds, broke with the prevailing trend and declared homosexuals a "separate and identifiable class" for purposes of equal protection analysis.⁹⁶ The Kentucky court answered the question as follows:

The Commonwealth has tried hard to demonstrate a legitimate governmental interest justifying a distinction [between homosexuals and heterosexuals], but has failed. Many of the claimed justifications are simply outrageous: that "homosexuals are more promiscuous than heterosexuals . . . that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public." The only proffered justification with superficial validity is that "infectious diseases are more readily transmitted by anal sodomy than by other forms of sexual copulation." But this statute is not limited to anal

just because there is. The reasoning of my imagined critics is the same kind of thinking that led Arthur Leff to conclude that "normative [legal] thought crawled out of the swamp and died in the desert." Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 454 (1974) Normative thought is more than just nose counting and loud voices. Like Professor Leff, I am not prepared to give up on normative thought. I may not be able to articulate it beyond its irritating simplicity, but, damn it, "napalming babies is bad And the 'law' has always known it; that is the source of its tension and complexity." *Id.* at 481 (emphasis in original).

⁹⁴ 842 S.W.2d 487.

⁹⁵ *Id.* at 499-501.

⁹⁶ *Id.* at 501.

copulation, and this reasoning would apply to male-female anal intercourse the same as it applies to male-male anal intercourse.

....

In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform. . . . We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.⁹⁷

Use of the political process to coerce disfavored individuals into different ways of being – or at least of seeming – would fall squarely within the Equal Protection Clause and *Carolene's* protection.⁹⁸ Thus, gay rights advocates would do well to shift the debate to this sort of question: Is an individual displaying a particular trait (homosexuality) being coerced into altering the display of that trait to fit conventional norms or otherwise be punished? Of course, the question must be cast to demonstrate that the trait is not conduct alone, but rather conduct as the result of some deeper (if not strictly immutable) trait. To put it another way, the debate must focus on the trait – the sexual orientation – that produces the behavior. This echoes Judge Reinhardt's dissenting view in *Watkins*: sodomy may be an issue of privacy, but homosexuality is an issue of identity.⁹⁹ Equal protection, then, guards against a type of moral slavery that would cause one to alter one's identity to avoid peril at the whim of the dominate society.¹⁰⁰ Immutability's importance, if it had any, recedes; unless the identity trait, be it chosen or immutable, relates to the individual's native physical or mental ability in a way that would allow normative moral action, it cannot be the basis for different treatment under the law.

⁹⁷ *Id.* at 501.

⁹⁸ See *supra* note 19.

⁹⁹ *Watkins v. U.S. Army*, 847 F.2d 1329, 1353 (9th Cir. 1988) (en banc) (Reinhardt, J., dissenting), *diff. results reached on reh'g*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

¹⁰⁰ David A.J. Richards coined the term "moral slavery" in *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 56 (1999).

III. LAWRENCE AND THE FUTURE OF EQUAL PROTECTION FOR GAYS

This discussion would be far from complete if I were to stop short of any discussion of *Lawrence v. Texas*¹⁰¹ and of what that case might mean for equal protection claims brought by gays and lesbians. Most scholars, including me, anticipating the decision in *Lawrence* surmised that the Court would strike the Texas statute at issue on equal protection grounds. Few anticipated the broad strokes with which the Court actually painted in its explicit overruling of *Bowers v. Hardwick* and striking all sodomy laws – even facially neutral laws – because they infringed the rights of gay people.

In the last paragraph of his dissenting opinion from *Bowers v. Hardwick*¹⁰² – a dissent which reads like the collective sigh of America's gay citizens, Justice Blackmun posited that:

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis* [a case requiring salute to the American flag over religious objection] and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.¹⁰³

It would be seventeen years before Justice Blackmun's mustered hopefulness became reality and the Court explicitly

¹⁰¹ 539 U.S. 558 (2003).

¹⁰² *Id.* at 578 (“*Bowers v. Hardwick* should be and now is overruled. . . . The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”)

¹⁰³ 478 U.S. 186, 213-14 (1986) (Blackmun, J., dissenting) (citations omitted).

overruled *Hardwick* in *Lawrence v. Texas*.¹⁰⁴ Of course, both of these cases dealt with claims disposed of by a reliance on the due process clause of the Fourteenth Amendment, not by any recourse to equal protection *per se*. It is embarrassing (or should be) to have to point out to law students that due process and equal protection are two separate animals, let alone to point this out to a federal judge. Yet, in his dissent in *Romer*, Justice Scalia reasoned that, after *Hardwick*, it would be anomalous to declare gays a suspect class for equal protection purposes.¹⁰⁵

The *Hardwick* Court's analysis turned on the perceived unimportance of the asserted liberty interest, as the Court cast it – the right to engage in homosexual sodomy – to America's "concept of ordered liberty."¹⁰⁶ The gravamen of the *Hardwick* discussion, then, turned on the nature of the asserted liberty and not on the invidious intent of the state of Georgia in enacting its sodomy laws. But if my view of the general thrust of the equal protection clause as detailed above is accurate – that equal protection is aimed at forbidding irrational, subjective, prejudicial responses on the part of the majority toward an identifiable minority – the alleged triviality of any one asserted liberty interest in the scheme of the Court's due process jurisprudence should carry little weight. In my opinion, *Romer*, while stopping short of announcing a heightened classification for sexual orientation, was a logical step in that direction. In *Romer*, we have the Court recognizing that a specific law targeting gays is the result of a wider, more pervasive discrimination.¹⁰⁷ This is why Justice Scalia is quick to reprimand

¹⁰⁴ 539 U.S. at 578 ("The rationale of *Bowers* does not withstand careful analysis. . . . [The dissent], in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

¹⁰⁵ *Romer v. Evans*, 517 U.S. 620, 642 (1996) (Scalia, J., dissenting) ("Bowers still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.").

¹⁰⁶ 478 U.S. 186, 191-94 (1986).

¹⁰⁷ *Romer*, 517 U.S. at 631-32 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry. . . . [T]he amendment seems inexplicable

the Court for “mistak[ing] a Kulturkampf for a fit of spite.”¹⁰⁸ Once this pattern of discrimination has been established, it becomes permissible to ask if *all* laws targeting gays do not somehow grow out of this same pervasive prejudice – the key ingredient to equal protection analysis as I described above.

By this same reasoning, we also see that, although Justice Scalia’s pronouncement of *Hardwick*’s prohibition of suspect or quasi-suspect class status for gays as a *non sequitur* was fallacious, because the two provisions – equal protection and due process – are separate and independent jurisprudential mechanisms, there might, indeed, be some cognizable link between the two. This is because in analyzing a law under equal protection we look at *why* that law exists. We ask whether it is a law animated by some bare prejudice against gays as a class, as explained above, without some relevant relation to their abilities or personhood. By looking at such laws through the lens of *Hardwick*, we have a pointed *de jure* pronouncement that gays are immoral, and that laws that target them, based on nothing more than the prevailing societal view that they are immoral and must be controlled as such, is sufficient to provide a rational basis for discriminatory laws. Thus, *Hardwick*, taken to its limits, informs us that, in so far as gays are concerned, a legal recognition and promotion of this morality cannot constitute the invidious intent necessary to bring the laws into equal protection’s purview.

Enter *Lawrence*. The *Lawrence* decision can, admittedly, be confusing in terms of equal protection at a first read. In fact, one might conclude, particularly after reading Justice O’Connor concurring in the judgment,¹⁰⁹ that the Court is specifically eschewing an equal protection approach. *Lawrence* explicitly overrules *Hardwick* and announces a “protection of liberty under the Due Process Clause [that] has a substantive dimension of

by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”) (citations omitted)

¹⁰⁸ *Id.* at 636 (Scalia, J., dissenting)

¹⁰⁹ *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring) (“I agree with the Court that Texas’ statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.”) (citation omitted)

fundamental significance in defining the rights of the person.”¹¹⁰ Certainly, its direct relation to *Hardwick*, along with such statements, indicates that the Court took action by employing a substantive due process rationale. Indeed, the Court notes that to leave intact sodomy laws neutral on their faces (like the law at issue in *Hardwick*), as the Court would have done under Scalia’s (and O’Connor’s) understanding of equal protection, would have left the state free ultimately to criminalize the lifestyles of gays—to ultimately brand gays criminals—simply because a law, though unfairly applied, purported to apply equally to homosexuals and heterosexuals.¹¹¹

For precisely this reason, Justice O’Connor’s rush to a tidy solution by employing an equal protection analysis was insufficient for the majority. Justice O’Connor’s reasoning relied on a noble but ultimately misplaced assurance that if sodomy laws applied equally to the heterosexual majority, who she apparently reasoned also engage in oral and anal sex, then the majority would not long tolerate such laws that also put them at risk of criminal sanctions. But O’Connor apparently forgot the lesson taught to us by *Hardwick*. Michael Hardwick was joined in his petition by a heterosexual couple who claimed that they wanted to engage in sodomy but were “chilled” from doing so by Georgia’s facially neutral law; however, the *Hardwick* Court wasted no time in declaring that these parties lacked standing, since it seemed unlikely that they would be subject to arrest, let alone prosecution.¹¹² Justice O’Connor failed to recognize that a law that demeans a minority by inference from their consensual sexual relationships, while leaving the majority – although threatened by the letter of the law – unaffected, provides little in the way of impetus for the majority to demand the law’s demise. One might also take O’Connor to task for failing in her statement that “so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and

¹¹⁰ *Id.* at 565 (majority opinion).

¹¹¹ *Id.* at 575 (“Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”)

¹¹² *Bowers v. Hardwick*, 478 U.S. 186, 188 n.2 (1986).

heterosexuals alike, such a law would not long stand in our democratic society”¹¹³ to remember that Hardwick also raised an equal protection claim for discriminatory enforcement that was quickly dismissed when the Court completely rewrote the question with which it was presented.

Despite the shortcomings in her opinion, however, O'Connor's reasoning does indicate the equal protection problems inherent in facially neutral statutes that criminalize sodomy. She argued that even an unenforced sodomy prohibition “brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.”¹¹⁴ By subjecting homosexuals to “a lifelong penalty and stigma,” this was a “legislative classification that threatens the creation of an underclass.”¹¹⁵ In other words, even when not enforced against heterosexuals, a law that definitely applies to homosexuals, assuming that they do not remain as life-long celibates, leaves the state free to discriminate against homosexuals in employment, parenting, marriage, and so on, simply by charging that the conduct to which they inevitably subscribe is illegal. Surely, the law may treat criminals differently. The dissenting justices in *Lawrence* underscored this view, missing the majority's point but making it in the same sweep by claiming that sodomy's criminalization justified turning gays and lesbians into second-class citizens.¹¹⁶

O'Connor's point, despite her ultimate skirting of the problem, that such laws lead to “discrimination both in the public and the private spheres”¹¹⁷ and the classing of gays as “unequal in the eyes of the law,”¹¹⁸ is salient. Accordingly, the majority

¹¹³ *Lawrence*, 539 U.S. at 584-85 (O'Connor, J. concurring).

¹¹⁴ *Id.* at 581.

¹¹⁵ *Id.* at 585 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

¹¹⁶ *Id.* at 596 (Scalia, J., dissenting) (“It is (as Bowers recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were ‘directed at homosexual conduct as a distinct matter.’ . . . [T]he only relevant point is that it was criminalized.”)

¹¹⁷ *Id.* at 583 (O'Connor, J., concurring) (quoting *id.* at 575 (majority opinion))

¹¹⁸ *Id.* at 581 (O'Connor, J., concurring)

responded with a rationale that goes further in blending substantive due process and equal protection analysis, and, I submit, to moving gays to quasi-suspect or suspect class status, than any precedent of the Court. Writing in dissent, Justice Scalia thinks that he has scored the sinking hit when he proclaims that “[n]ot once does [the majority] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest.’”¹¹⁹ Of course, he is right. But far from failing to recognize the significance of the issues presented, as Scalia would charge, the majority chose to focus on the status of the relationship targeted by the law because the law at issue in *Lawrence* presented questions of a relational nature, i.e., questions of the human dignity of those in the targeted group and the relation of that dignity to the majority society, as much as it implicated spatial questions, i.e., the extent to which certain sex acts are within the constitutional purview of privacy.¹²⁰ Because sodomy is so completely (and surely *Hardwick* helped perpetuate this) associated with gay men, and to a lesser degree lesbians, even if the Texas law at issue in *Lawrence*, like the Georgia law at issue in *Hardwick*, had been applied equally to gays and straights, or not applied at all to either group, the law would still have been antigay in terms of its inherent demeaning cultural statement.¹²¹

Thus, the Court’s decision in *Lawrence* ripped away any basis the dissenting justices and their ilk had for turning a history of prejudicial treatment against American gays into a

¹¹⁹ *Id.* at 594 (Scalia, J., dissenting)

¹²⁰ I would also point out that despite a vigorous dissent in which Scalia declares that the Court applied an “unheard-of form of rational basis review,” *id.* at 586, it is far from clear that this is the level of scrutiny the Court is, in fact, applying. The cases with which the Court began, *Griswold*, *Eisenstadt*, etc. are all cases in which the Court found the liberty interest at stake to be of a fundamental nature. These cases culminate in perhaps the most contested fundamental right in our Nation’s history – certainly since *Brown* struck “separate but equal” – the right of a woman to secure an abortion in her first trimester as enunciated in *Roe v. Wade*. The majority ends its opinion by asserting that the state provides no “legitimate” interest for its sodomy law, but this could easily, in the context of the rest of the opinion’s focus on the fundamental dimensions and pedigree of the right to sexual privacy in question, be read as “has not even” produced a legitimate basis, let alone one that would survive the heightened level of scrutiny I believe the majority applied.

¹²¹ As Justice Kennedy put it, such a law “demean[s] gay] existence [and] control[s] their destiny.” *Id.* at 578 (majority opinion).

constitutionally sanctioned activity merely by invoking sodomy's criminalization. To achieve this, the majority realized, invalidating only facially discriminatory sodomy laws would not suffice. Thus, the majority's decision, grounded as it is in substantive due process, has significance of a far greater reach in terms of equal worth and human dignity when viewed through the lens of equal protection. The majority recognized this when Justice Kennedy wrote, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."¹²² Accordingly, the Court's decision, focusing as it does on equal respect and dignity for gay people, extends equal protection of the laws to gays without express focus on any "immutability" factor, and provides a future basis for equality advocates to argue for quasi-suspect or suspect class status for gay and lesbian Americans.¹²³

¹²² *Id.* at 575.

¹²³ Even if my theory of the scrutiny applied in *Lawrence* is error, one can easily conclude, as Justice Scalia seems to, that the Court has applied some heightened rational basis standard – what some constitutional scholars call rational basis “with bite.” Even if this is the case, my theory that *Lawrence* has, or should by judicial integrity extended to its natural limits, put gays on the path to quasi-suspect or suspect status is not deflated. An inching toward heightened scrutiny has been the modus operandi of the Court before. For example, the Court purported to apply a minimal level of review to invalidate a law preferring men over women to be estate administrators in *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced. . . .”). Under traditional rational basis review, a justification of preferring the sex generally possessing the greater business experience should have proved sufficient to sustain the law. Five years later, the Court abandoned any pretense of rational basis and declared gender discrimination subject to intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). The same arc is seen in the illegitimacy cases. After it invalidated laws discriminating against illegitimate children or their parents under a purported minimum scrutiny, the Court determined that laws based on illegitimacy should be subjected to intermediate scrutiny. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (law invalidated under minimal scrutiny); *Labine v. Vincent*, 401 U.S. 532, 536 n.6 (1971) (law upheld under minimal scrutiny); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (intermediate scrutiny applied).

CONCLUSION

I have no crystal ball that allows me to forecast the changes George W. Bush's Supreme Court appointments will bring to equal protection jurisprudence. I am certainly not naïve enough to believe that a moral theory of equal protection of the kind I argue here will soon find general application. For this reason, critics might brand it of limited practicality. Yet I believe that it is more workable than the immutability-based theory with which courts are currently asked to grapple – generally to no avail. Given the central place of equality in our understanding of democratic liberty, it is an honest base from which to view the gay rights struggle – certainly more so than a reduction of equality to a reliance on immutability or *cause* of sexual orientation. Discrimination against gays is sufficiently akin – in a morally substantial way – to discrimination based on race and gender. The remedies available to these groups ought to be available to those denigrated because of sexual orientation. Both the *Romer* and *Lawrence* Courts lend support to this position in their articulation of the fundamental importance of the liberty at stake in those cases. Far from being result-oriented anomalies, *Romer* and especially *Lawrence*, like *Brown*, are, in my view, a resettling of equal protection on its essentially moral foundations – an effort for which the Court deserves praise.