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MARRYING LIBERTY AND EQUALITY: THE NEW JURISPRUDENCE OF GAY RIGHTS

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INTRODUCTION

DUE process and equal protection “are different in important ways.”¹ Due process safeguards certain critical rights for everyone, while equal protection shields a particular set of social groups from discrimination across the board. Put more succinctly: Due process protects the “whats,” and equal protection, the “whos.”² But scholars have long observed that the law in practice is somewhat less tidy than these schematic doctrinal guidelines suggest.³ For many decades, “concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process”;⁴ and influence sometimes travels in the other direction as well.⁵ Due process and equal protection often work in tandem to illuminate important aspects of constitutional questions that can be seen less clearly through the lens of a single clause.⁶

The interrelationship between due process and equal protection has played an especially prominent role in the adjudication of gay rights cases—perhaps because so many of these cases seem simultaneously to

¹ Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. Rev. L. & Soc. Change 199, 204 (2013).

² Heather K. Gerken, Larry and *Lawrence*, 42 Tulsa L. Rev. 843, 852 (2007).

³ For more on the interrelationship between due process and equal protection, see, e.g., William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. Rev. 1183 (2000); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473 (2002); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. Rev. 99 (2007) [hereinafter Karst, *Liberties*]; Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694 (2008); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935 (1989); 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 (1988); Laurence H. Tribe, *Lawrence v. Texas: The ‘Fundamental Right’ That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004); Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747 (2011).

⁴ Karst, *Liberties*, supra note 3, at 102.

⁵ See, e.g., Karlan, supra note 3, at 478–80 (suggesting that, in several key voting rights decisions, “the importance of protecting the right to vote may have been driven home by the Court’s sense that the distinction that kept some citizens from the polls was a particularly invidious one”).

⁶ See *id.* at 474 (arguing that “the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other. . . . [and] that sometimes looking at an issue stereoscopically—through the lens of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself”).

involve acts and identities.⁷ The Court acknowledged the intertwined nature of due process and equal protection quite explicitly in *Lawrence v. Texas*,⁸ and again last year in *United States v. Windsor*.⁹ Because same-sex marriage by its nature implicates both the liberty interest protected by due process and the equality interest safeguarded by equal protection, plaintiffs in same-sex marriage cases generally make both due process and equal protection arguments. In recent years, courts have often found laws restricting marriage to different-sex couples unconstitutional on both grounds.¹⁰

This Article examines the jurisprudential implications of this intertwining of due process and equal protection in the context of same-sex marriage. How has this interwoven Fourteenth Amendment analysis affected the meaning of the marriage cases? How does it shape their significance as constitutional precedents? How should it influence our understanding of the propositions for which these cases stand? Now that

⁷ For more on acts and identities in the context of gay rights, see Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After *Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1726 (1993); Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915, 946 (1989) [hereinafter Halley, Politics of the Closet].

⁸ 539 U.S. 558, 575 (2003) (“Equality 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.”).

⁹ 133 S. Ct. 2675, 2695 (2013) (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.” (internal citations omitted)); see also *Williams v. King*, 420 F. Supp. 2d 1224, 1250 (N.D. Ala. 2006) (observing that “‘due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix’” (quoting Tribe, *supra* note 3, at 1898)); *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1998 (12) BCLR 1517 (CC) at 106 para. 112 (S. Afr.) (Sachs, J., concurring), available at <http://www.concourt.gov.za/judgments/1998/gayles.html> (“The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion.”).

¹⁰ See, e.g., *Bostic v. Rainey*, 970 F. Supp. 2d 456, 466, 483 (E.D. Va. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1187–88 (D. Utah 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929–30 (N.D. Cal. 2010).

judicial recognition of the constitutional right of same-sex couples to marry seems inevitable—a question of when, rather than if, the Court will invalidate the remaining state laws restricting the right to different-sex couples—these second-order questions will become increasingly central to constitutional contestation over same-sex marriage. At some point, advocates will stop arguing about whether judges *should* hold “traditional” marriage laws unconstitutional, and start arguing about the constitutional meaning and precedential significance of such rulings.

In fact, this shift has already begun to occur. While proponents of same-sex marriage continue to try to persuade trial and appellate courts throughout the country that the Fourteenth Amendment affords gays and lesbians the right to marry, a growing number of prominent opponents of same-sex marriage have shifted their attention to the next set of battles. Having recognized that courts will soon do away with laws restricting marriage to different-sex couples, these advocates have begun to focus on questions of interpretation. They have started to construct a narrative about the meaning of the marriage cases, the constitutional values these cases affirm, and the legal principles they establish.

Among the most prominent of these advocates is David Blankenhorn. When Blankenhorn appeared in court in 2010 as the star witness in defense of Proposition 8¹¹—the constitutional amendment that prohibited California from recognizing same-sex marriage—he had been a leader in the campaign to protect “traditional” marriage for over two decades and had published two key books on the subject.¹² Thus, Blankenhorn surprised many when he came out, in 2012, in favor of same-sex marriage.¹³

Blankenhorn’s “change of heart” attracted considerable attention in the media,¹⁴ but as he made clear in an op-ed in the *New York Times*, his

¹¹ See *Perry*, 704 F. Supp. 2d at 945–50 (discussing Blankenhorn’s testimony in the Proposition 8 trial, including his claims that “married biological parents provide a better family form than married non-biological parents” and that “recognizing same-sex marriage will lead to the deinstitutionalization of marriage”).

¹² See David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (1995); David Blankenhorn, *The Future of Marriage* (2007) [hereinafter Blankenhorn, *Future of Marriage*].

¹³ David Blankenhorn, Op-Ed., *How My View on Gay Marriage Changed*, N.Y. Times (June 22, 2012), http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=0 (“[T]he time has come for me to accept gay marriage and emphasize the good that it can do.”).

¹⁴ See, e.g., James Taranto, *Switching Teams: A Leading Opponent of Same-Sex Marriage Defects*, Wall St. J. (June 26, 2012), <http://online.wsj.com/news/articles/>

heart had not changed all that much.¹⁵ Rather than continuing to wage a losing battle against same-sex marriage, Blankenhorn decided to launch a new initiative aimed at shaping its social and legal meaning. To this end, he began to argue that the extension of marriage rights to same-sex couples ought to be viewed as an affirmation of traditional family values: a declaration “that marrying before having children is a vital cultural value that all of us should do more to embrace,” that “marriage is preferable to cohabitation,” and that children have “the right to know and be known by their biological parents.”¹⁶ By the time the Court granted certiorari in *Hollingsworth v. Perry*¹⁷ and *Windsor*,¹⁸ Blankenhorn had recruited seventy-five prominent political and academic leaders to join him in this pro-marriage campaign.¹⁹ In the run-up to the Court’s decisions, the campaign issued an open letter to the nation, calling on all Americans—regardless of their views on homosexuality—to unite behind the idea that marriage is the pinnacle of adult relationships, that it is the “basis of the family”²⁰ and the “creat[or of] kin,”²¹ and that as such, public policy should strive to bring more people within its fold.²² The

SB10001424052702304782404577490811082202938 (“Normally a *New York Times* op-ed in favor of same-sex marriage would barely merit a ho-hum, but the one the other day made news because of the byline: David Blankenhorn of the Institute for American Values.”). National Public Radio produced a documentary about Blankenhorn’s decision to come out in favor of same-sex marriage, which aired the same day as his op-ed in the *New York Times*. See David Blankenhorn and the Battle over Same-Sex Marriage, WNPR News (June 22, 2012), <http://www.yourpublicmedia.org/content/wnpr/david-blankenhorn-and-battle-over-same-sex-marriage>.

¹⁵ Blankenhorn, *supra* note 13 (“No same-sex couple, married or not, can ever under any circumstances combine biological, social and legal parenthood into one bond. For this and other reasons, gay marriage has become a significant contributor to marriage’s continuing deinstitutionalization, by which I mean marriage’s steady transformation in both law and custom from a structured institution with clear public purposes to the state’s licensing of private relationships that are privately defined. I have written these things in my book and said them in my testimony, and I believe them today. I am not recanting any of it.”).

¹⁶ *Id.*

¹⁷ 133 S. Ct. 2652 (2013) (considering the constitutionality of California’s Proposition 8).

¹⁸ 133 S. Ct. 2675 (2013) (considering the constitutionality of the federal Defense of Marriage Act).

¹⁹ See Inst. for Am. Values, *A Call for a New Conversation on Marriage: An Appeal from Seventy-Five Leaders*, 10 Propositions 1 (2013), available at <http://americanvalues.org/catalog/pdfs/2013-01.pdf>.

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.* In fact, the letter urged Americans to stop focusing on the battle over same-sex marriage and start focusing on the broader battle to protect “traditional” marriage against threats such as divorce and out-of-wedlock births. The real focus of Blankenhorn’s work has always

aim of this appeal, as characterized by its chief architect, was to “influence the course of events by getting in front of the issue”²³ and constructing a narrative about same-sex marriage that would shape its cultural and constitutional meaning for generations to come.

Erstwhile opponents of same-sex marriage have recently begun to extend such efforts into the courtroom. In the months before the Court heard *Perry* and *Windsor*, Ken Mehlman, former head of the Republican National Committee, spearheaded efforts to recruit dozens of prominent conservative signatories to a Supreme Court amicus brief in support of same-sex marriage.²⁴ The brief, which was signed by Republican office-

been this broader battle, so in this sense, his “conversion” was far less dramatic than it appeared. For a critical take on Blankenhorn’s conversion, see Richard Kim, What’s Still the Matter with David Blankenhorn, *Nation* (June 24, 2012, 12:12 AM), <http://www.thenation.com/blog/168545/whats-still-matter-david-blankenhorn#> (“Blankenhorn has attacked single mothers, championed federal marriage promotion as welfare policy, railed against cohabitation and no-fault divorce, and opposed access to new reproductive technologies. . . . Blankenhorn once thought gay marriage could be a useful instrument to instill his . . . punitive views on marriage in the public and in the law. He still thinks that. He’s just made a political calculation that gays are more valuable now as recruits than as scapegoats.”).

²³ Blankenhorn, *Future of Marriage*, supra note 12, at 1; see also *id.* (recalling a conversation in which Evan Wolfson, a leading gay rights advocate, urged him to make a “hardheaded political” calculation and come out in support of same-sex marriage while he could still play a significant role in crafting its social meaning); David Blankenhorn, Op-Ed., What Matters Now About Marriage, *L.A. Times* (May 26, 2013), <http://articles.latimes.com/2013/may/26/opinion/la-oe-blankenhorn-gay-marriage-supreme-court-20130526> (noting that “[t]he gay marriage debate is nearly over,” and describing his “strategy” for uniting “social conservatives and gay rights liberals [in] a coalition that could put an end forever to the conflict between gay rights and family values”). Interestingly, British conservatives seem currently to be making the same calculation. Tim Montgomerie, one of Britain’s leading opponents of same-sex marriage, announced in the *Independent* that he had changed his mind about same-sex couples’ right to marry three months prior to Blankenhorn’s own announcement. See Andrew Grice, Prominent Tory Disowns “Religious Right” and Supports Gay Marriage, *Independent* (Feb. 6, 2012), <http://www.independent.co.uk/news/uk/politics/prominent-tory-disowns-religious-right-and-supports-gay-marriage-6579531.html> (reporting that Montgomerie urged Tories to embrace same-sex marriage as a conservative institution and to portray the extension of marital rights to gays and lesbians as an affirmation of the idea that marriage is essential for everyone); see also David Cameron, Prime Minister, Address to the Conservative Party Conference (Oct. 5, 2011) (transcript available at <http://www.bbc.co.uk/news/uk-politics-15189614>) (“And to anyone who has reservations, I say: Yes, it’s about equality, but it’s also about something else: commitment. Conservatives believe . . . that society is stronger when we make vows to each other and support each other. So I don’t support gay marriage despite being a Conservative. I support gay marriage because I’m a Conservative.”).

²⁴ See Sheryl Gay Stolberg, Republicans Sign Brief in Support of Gay Marriage, *N.Y. Times*, Feb. 26, 2013, at A1.

holders, lawyers, pundits, and Clint Eastwood, argued that extending marriage to same-sex couples would affirm core conservative values, both social and economic.²⁵ It argued that “marriage is so important in producing and protecting strong and stable family structures”²⁶ that the state cannot afford *not* to try to steer all Americans into the institution—especially as marriage “reduces the need for reliance on the state”²⁷ by privatizing dependency and ennobling family breadwinners. More recently, a group of Western Republicans submitted a very similar brief to the U.S. Court of Appeals for the Tenth Circuit, arguing that extending marriage to same-sex couples would bolster traditional family values because it would constitute “a clear endorsement of the multiple benefits of marriage . . . and a reaffirmation of the social value of this institution for all committed couples and their families.”²⁸

A generation ago, when the gay rights movement first began to pursue same-sex marriage,²⁹ a number of critics, otherwise supportive of gay rights, opposed the idea precisely because they feared that advocating for, and winning, the right to marry would foster a traditionalist legal and political agenda.³⁰ Even if the movement secured the right to marry,

²⁵ See Brief for Kenneth B. Mehlman et al. as Amici Curiae Supporting Respondents at 2–3, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“Many of the signatories to this brief previously did not support civil marriage for same-sex couples . . . [but] amici have concluded that marriage is strengthened, not undermined, and its benefits and importance to society as well as the support and stability it gives to children and families promoted, not undercut, by providing access to civil marriage for same-sex couples.”).

²⁶ *Id.* at 10.

²⁷ *Id.* at 18.

²⁸ See Brief for Western Republicans as Amici Curiae Supporting Appellees at 15, *Bishop v. Smith*, 2014 WL 3537847 (10th Cir. July 18, 2014) (Nos. 14-5003, 14-5006); *Kitchen v. Herbert*, 2014 WL 2868044 (10th Cir. June 25, 2014) (No. 13-4178); see also *id.* at 21 (arguing that marriage is an important social good because it “reduces the need for reliance on the State”).

²⁹ The idea of same-sex marriage long predates the 1990s, but it was not until the 1990s that the gay rights movement made marriage its top priority. For more on same-sex marriage advocacy prior to the 1990s, see Mary Anne Case, Of “This” and “That” in *Lawrence v. Texas*, 2003 Sup. Ct. Rev. 75, 137 [hereinafter Case, “This” and “That”] (“The question of marriage has been an undercurrent in gay rights activism and litigation for more decades than is generally acknowledged. The August 1953 issue of *ONE*, ‘The Homosexual Magazine,’ was held up by postal inspectors for three weeks, perhaps in part because the issue’s cover posed the question, ‘Homosexual Marriage?’”); Mary Anne Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1761–64, 1784–93 (2005) [hereinafter Case, *Marriage Licenses*] (discussing the pioneering but ultimately unsuccessful efforts of two gay men, Jack Baker and Michael McConnell, to obtain a marriage license in the early 1970s).

³⁰ For a selection of essays from the late 1980s and early 1990s making this argument, see *Same-Sex Marriage: Pro and Con, a Reader* 121–34 (Andrew Sullivan ed., 1997).

they argued, it would be a Pyrrhic victory. It would bolster the hegemony of the institution and increase the legitimacy of social policy that rewards people who enter marriage while punishing those who remain outside it. Thus, these critics warned that prioritizing marriage would lead the movement “into a trap”.³¹ Same-sex couples might gain the right to marry, but would, in the process, reinforce the very set of “traditional family values” that had historically been used to incite and justify discrimination against sexual minorities.³² Perhaps this would benefit gays and lesbians whose foremost desire was to settle down with someone of the same sex, “adopt[] kids . . . go[] to church, coach[] little league, [and] collect[] stamps,”³³ but it did not offer much to—and, indeed, was likely to further stigmatize—those whose interests ran to pursuits other than monogamy and stamp-collecting.

Recent efforts by Blankenhorn, Mehlman, and others might seem to bear out the concerns of these early marriage skeptics. But a funny thing happened on the way to the altar. As marriage became increasingly central to the agenda of the gay rights movement over the past two decades, social and legal contestation over same-sex marriage came to be about much more than the institution of marriage. When courts began seriously to interrogate why gays and lesbians were barred from marrying their partners, they began to uncover and confront a wellspring of anti-homosexual stereotyping and prejudice that had fueled discrimination on the basis of sexual orientation for nearly a century. For much of the twentieth century, stereotyped conceptions of homosexuals as enemies of the family, sexually predatory, and dangerous to children (both physically and psychologically) formed the basis of a social status regime in which failure to conform to heterosexual norms relegated one to the lower rungs of the social hierarchy. The stigma surrounding homosexu-

³¹ Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *Out/Look*, Fall 1989, at 9, 12, reprinted in *Same-Sex Marriage: Pro and Con, a Reader*, supra note 30, at 125.

³² For arguments of this nature, see, e.g., Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* 91 (1999) (arguing that “the crucial founding insights behind several decades’ worth of gay and lesbian politics are now being forgotten” in the rush to embrace the institution of marriage); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 *Va. L. Rev.* 1535, 1546 (1993) (arguing that the gay rights movement’s fundamental-rights rhetoric obscures “the limitations of marriage, and of a social system valuing one form of human relationship above all others”).

³³ Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron’s Dignity, Rights, and Responsibilities*, 43 *Ariz. St. L.J.* 1177, 1183 (2012).

ality attached to gays and lesbians in “all spheres of life.”³⁴ It subjected them to “strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.”³⁵

In recent years, courts, legislatures, and the American people have begun to view such anti-gay stereotyping and the discrimination to which it gives rise as inconsistent with constitutional equality guarantees. Decision makers inside and outside the judiciary have begun to view laws that discriminate against gays and lesbians not as natural and benign, nor as isolated instances of unfairness, but rather, as part of an interlocking network of regulations that have relegated homosexuals to the status of second-class citizens. This “new perspective, [or] new insight,”³⁶ has yielded important changes in the way homosexuality is regulated.³⁷

From a constitutional perspective, the most significant result of this social and legal revolution has been the development of a new “mediating principle”³⁸ for applying the Fourteenth Amendment in the context of sexual orientation: Courts have increasingly begun to hold that the state may not regulate homosexuality in ways that reflect or reinforce the kind of anti-gay stereotypes long used to justify the secondary status of gays and lesbians in the American legal system.³⁹ This anti-

³⁴ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008) (quoting Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1302 (1985)).

³⁵ *Id.* (quoting Richard Posner, *Sex and Reason* 291 (1992)) (internal quotation marks omitted).

³⁶ *Windsor*, 133 S. Ct. at 2689.

³⁷ See, e.g., *Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010) (invalidating the last state law explicitly barring gays and lesbians from adopting children); see also *Maps of State Laws and Policies*, Human Rights Campaign, <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (follow “Statewide Employment Laws and Policies” hyperlink) (last updated May 15, 2014) (showing that thirty-three states and the District of Columbia now bar discrimination on the basis of sexual orientation in public employment, and that twenty-one states and Washington, D.C. also bar private employers from discriminating on this basis).

³⁸ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 108 (1976) (defining a mediating principle as a “guide for decision” that “give[s] meaning and content to an ideal embodied in the text” of the Constitution).

³⁹ This principle is akin to the anti-stereotyping principle operative in the context of constitutional sex discrimination law, which bars state action that reflects and reinforces traditional stereotyped conceptions of men’s and women’s sex and family roles. For more on the anti-stereotyping principle in the context of sex discrimination law, see generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 *N.Y.U. L. Rev.* 83 (2010).

stereotyping principle has played a far more important role in recent gay rights cases than has the determination of what level of scrutiny should apply to orientation-based state action. Courts in recent years have reached widely varying conclusions about the appropriate level of scrutiny to apply in this context,⁴⁰ but the outcomes in these cases have been remarkably consistent. Regardless of what level of scrutiny they choose to apply, courts have begun routinely to invalidate laws that discriminate against gays and lesbians. What unites these cases is not the level of scrutiny, but the new conception of equality and the substantive constitutional principle on which they rest. There is now a substantial body of caselaw holding that state action that perpetuates anti-gay stereotypes and historical patterns of discrimination against homosexuals is inconsistent with equal protection.

Laws restricting marriage to different-sex couples have been a prominent casualty of this new constitutional doctrine. Courts in recent same-sex marriage cases have held laws reserving marriage to different-sex couples unconstitutional on the ground that these laws reinforce “historical prejudice and stereotyping”⁴¹ and foster the kind of caste structure the Fourteenth Amendment was designed to combat. As we shall see, this doctrinal framing matters. This Article seeks to explain how the application of anti-stereotyping doctrine to the context of marriage shapes

⁴⁰ See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014) (holding that discrimination on the basis of sexual orientation is subject to heightened scrutiny); *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012) (holding that discrimination on the basis of sexual orientation is subject to intermediate scrutiny); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) (holding that discrimination on the basis of sexual orientation warrants a more searching inquiry “than the light scrutiny offered by conventional rational basis review”); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *14 (W.D. Tex. Feb. 26, 2014) (declining to apply heightened scrutiny to gay and lesbian plaintiffs’ claim because “Texas’ ban on same-sex marriage fails even under the most deferential rational basis level of review”); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1210 (D. Utah 2013) (evaluating same-sex couples’ equal protection claim under “the well-settled rational basis test”); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (holding that discrimination on the basis of sexual orientation triggers strict scrutiny); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 475–76 (Conn. 2008) (holding that discrimination on the basis of sexual orientation triggers at least intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009) (holding that discrimination based on sexual orientation triggers at least intermediate scrutiny); *Griego v. Oliver*, 316 P.3d 865, 871 (N.M. 2013) (holding that discrimination on the basis of sexual orientation is subject to intermediate scrutiny).

⁴¹ *Varnum*, 763 N.W.2d at 896 (quoting *Kerrigan*, 957 A.2d at 432).

the constitutional meaning of the recent marriage decisions and their implications for future cases.

For a start, “the starring role recently awarded to equality”⁴² in the battle over same-sex marriage has meant that the specialness of marriage—the idea that this institution is, in the words of David Blankenhorn, *the* “basis of the family” and *the* “creat[or of] kin”⁴³—is not the primary driver of judicial decisions invalidating laws reserving the right to marry to different-sex couples. Courts in recent cases have not analyzed laws governing marriage as *sui generis*, or in isolation, but rather, as part of an increasingly discredited legal regime in which gays and lesbians are accorded secondary legal status. It is the continuity of laws excluding same-sex couples from marriage with other forms of discriminatory regulation that has led to their invalidation. To focus primarily on the *marriage* part of marriage equality is to miss the broader equality project of which the marriage cases are only one manifestation.

Reading these cases primarily as an affirmation of the institution of marriage also obscures the nature of the liberty interest at stake. The anti-stereotyping doctrine courts have recently developed in gay rights cases is directly responsive to the history of discrimination gays and lesbians have experienced in the American legal system. Historically, anti-gay stereotypes had a powerful prescriptive component. Laws and policies that banned same-sex intimacy, barred gays and lesbians from the military, and excluded them from certain jobs all sought to enforce traditional, normative conceptions of sexuality and gender. A central aim of such laws was to channel men and women into a single, normative family form: the heterosexual marital family. Discrimination against gays and lesbians was often justified on the ground that this model of the family was superior to all others, and that the law ought to encourage all Americans to assimilate into it. Courts in the recent marriage cases have held that state action that enforces this single, heterosexual model of the family violates gays’ and lesbians’ equality interests *and their liberty interests*. Historically, laws that discriminated on the basis of sexual orientation sought to dissuade people from engaging in homosexual behavior and to steer them into heterosexual relationships and conventionally gendered family structures. But now, courts have begun to hold that the state has no constitutionally cognizable interest in steering individuals

⁴² Tribe & Matz, *supra* note 1.

⁴³ See *supra* notes 20–21 and accompanying text.

into heterosexuality or encouraging them to conform to traditional, heterosexual sex and family roles.⁴⁴

In light of this liberty analysis, this Article suggests that the recent marriage decisions have a much more complicated relationship to marriage than advocates such as Blankenhorn and Mehlman might have hoped—and that early marriage critics might have feared. The recent marriage decisions do not simply endorse the institution of marriage. Courts have observed in these decisions that the Due Process Clause “protects an individual’s ability to make deeply personal choices about love and family free from government interference.”⁴⁵ Obviously, this freedom is far from absolute. The state regulates intimate relationships and family formation in all sorts of ways. But the recent marriage decisions circumscribe the state’s power to enforce heterosexuality and heterosexual marriage—just as earlier decisions barred the state from channeling people into same-race marriages and enforcing traditional stereotyped conceptions of men’s and women’s roles in the family. To that extent, these cases do not simply expand access to the institution of marriage. They also place a new limit on the kinds of sex and family roles the government may legitimately enforce.

Until quite recently, the harms wrought by “compulsory heterosexuality”⁴⁶ and the legal structures designed to enforce it were invisible to courts. Without knowing anything about the history of anti-gay stereotyping and discrimination in this country, judges lacked both the motivation and the tools to formulate an effective constitutional response. Today, that is changing. Parts I and II of this Article aim to show how. Part I excavates some of the central themes in anti-gay discrimination over the past century with the aim of explaining why the recent doctrinal re-

⁴⁴ See, e.g., *Kitchen*, 961 F. Supp. 2d at 1200 (rejecting the argument that gays and lesbians already possess the right to marry (because they are permitted to marry someone of a different sex) on the ground that “this purported liberty is an illusion,” and finding that the Constitution guarantees gays and lesbians the autonomy to express their sexual orientation and form families with partners of the same sex); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010) (“California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California.”); *id.* at 998, 1000 (finding that “the state has no interest in preferring opposite-sex couples to same-sex couples[,] . . . in preferring heterosexuality to homosexuality,” or “in preferring opposite-sex parents over same-sex parents”).

⁴⁵ *Kitchen*, 961 F. Supp. 2d at 1203.

⁴⁶ See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *Signs* 631, 632–40 (1980) (using the term to describe the cultural assumption that heterosexuality is the only natural and normal mode of existence for women).

sponse to this history has assumed the particular shape it has. For the better part of a century, stereotyped conceptions of homosexuals (particularly gay men) depicted them as sexually predatory, dangerous to children, and antithetical to the family. These stereotypes incited widespread discrimination; indeed, Part I shows that notions of this sort provided the foundation for an entire legal and social regime relegating gays and lesbians to the status of second-class citizens. Part II examines the recent repudiation of this legal and social regime. All three branches of government have begun to reject anti-gay stereotypes and dismantle the discriminatory structures such stereotypes have incited and justified. As we shall see, this new governmental approach to the regulation of homosexuality has helped to spur doctrinal development under the Fourteenth Amendment. Even before the recent wave of same-sex marriage cases, courts had begun to hold that state action that reflects or reinforces anti-gay stereotypes runs afoul of equal protection.

Part III examines the application of this anti-stereotyping doctrine in recent same-sex marriage cases. Courts today have begun to invalidate laws restricting marriage to different-sex couples on anti-stereotyping grounds, holding that such laws perpetuate historical patterns of discrimination in ways now deemed inconsistent with equal protection. Part III seeks to explain why this doctrinal framing matters. It matters because it makes these cases about something more than marriage; it affords them a constitutional significance that extends beyond their immediate context. By situating laws that deprive same-sex couples of the right to marry in a broader legal and historical context—treating them as part of a network of laws and policies that have deprived gays and lesbians of equal citizenship—courts have indicted not simply the regulation of marriage, but the entire structure of discrimination in which it is embedded. As a result, decisions extending the right to marry to same-sex couples do not stand to benefit gays and lesbians only when—or if—they decide to marry. These decisions suggest that all forms of orientation-based state action that perpetuate “state-sponsored group stereotypes rooted in, and reflective of, historical prejudice”⁴⁷ raise constitutional equality concerns.

⁴⁷ *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994)) (internal quotation marks omitted). The court in *SmithKline* relied on constitutional principles articulated in recent same-sex marriage decisions to hold that equal protection forbids the striking of jurors on the basis of sexual orientation. *Id.* at 485–86.

The recent marriage cases also illustrate how concerns about group equality can illuminate aspects of liberty that would otherwise be invisible: Attending to the plight of the “whos” can help us to appreciate the “what” that needs protecting. As the history in Part I demonstrates, gays and lesbians have long been deprived of the ability to make important determinations regarding sexuality, gender, and the family. Historically, anti-gay laws and policies sought to enforce a single, heterosexual model of the family—a goal that courts have increasingly deemed inconsistent not only with equal protection, but also with due process. As Part III shows, by framing the due process issue in this way, courts have situated recent marriage cases in a broader strand of liberty jurisprudence: one that has placed a series of limits on the state’s power to enforce a single, traditional model of sexuality and the family.⁴⁸ Gays and lesbians are the latest in a succession of constitutional plaintiffs to demonstrate, through their particular own experiences, why the Fourteenth Amendment respects “the autonomy of the person”⁴⁹ to make certain intimate decisions: Such “matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . could not define the attributes of personhood were they formed under compulsion of the State.”⁵⁰

I. THE ARCHITECTURE OF EXCLUSION

To determine whether a social group warrants protected status under the Equal Protection Clause, courts typically inquire whether the group

⁴⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (1992) (invalidating a spousal notification requirement in an abortion law on the ground that it unconstitutionally reinforced a traditional conception of the family in which the “woman is still regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution” (internal quotation marks omitted)); *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion) (invalidating a city ordinance limiting the ability of extended family members to cohabit in a single dwelling unit on the ground that “the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns”); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (invalidating a Virginia law that permitted whites to marry whites, and racial minorities to marry racial minorities, but barred marriage between whites and racial minorities); cf. *Lawrence v. Texas*, 539 U.S. 558, 571, 574 (2003) (noting that laws barring homosexual conduct were motivated by “respect for the traditional family,” but holding that the Fourteenth Amendment protects individuals’ autonomy to make certain crucial decisions about sexuality and family for themselves).

⁴⁹ *Lawrence*, 539 U.S. at 574.

⁵⁰ *Id.* (quoting *Casey*, 505 U.S. at 851) (internal quotation marks omitted).

is politically powerless, has suffered a history of discrimination, and is marked by immutable or distinguishing characteristics that bear no relation to its members' ability to contribute to society.⁵¹ Scholars have often noted an irony in this test—namely that “a status group must display some degree of political power—whether at the ballot box or in the streets—before it can be considered ‘politically powerless’ and hence deserving of legal protection.”⁵² But there is another, less frequently noted, irony in courts' equal protection calculus: A social group must also have begun to record and surmount the history of discrimination it has suffered before it will be deemed to have experienced such a history. Consider the development of constitutional sex discrimination law. For most of American history, judges knew little about the history of women's subordination in the American legal system, in part because that history had yet to be written.⁵³ It was only after the emergence of wom-

⁵¹ Political powerlessness and history of discrimination have consistently been the most important of these factors. Immutability has been the most heavily criticized, and it is not clear how central a role this factor actually plays in equal protection analysis. See Jack M. Balkin, *The Constitution of Status*, 106 *Yale L.J.* 2313, 2323–24 (1997) (arguing that immutability is neither necessary nor sufficient to the scrutiny analysis and that the operative question is actually whether a trait can sustain a stable social meaning); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *Stan. L. Rev.* 503, 507–16 (1994) (arguing that courts are concerned not with the physical permanence of a group characteristic but with the fact that it may lead to political process failure); Halley, *Politics of the Closet*, *supra* note 7, at 926–27 (arguing that courts have retreated from immutability, in part because the mutability of a disfavored trait may reduce a group's political power, thereby heightening its need for constitutional protection).

⁵² Balkin, *supra* note 51, at 2340; see also Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 *Utah L. Rev.* 527, 539 (“[A] group usually must have significant political power before the Court grants it heightened scrutiny. If a group is sufficiently politically powerless, it will never even get on the Court's radar. We could think here of groups, such as the intersexed, that are so marginal that the Supreme Court has not even acknowledged their existence.”). This paradox was certainly evident in the case of women. A plurality of the Court deemed women politically powerless and thus entitled to heightened scrutiny at the very moment the women's movement began to make substantial headway in the legislative realm. See *Frontiero v. Richardson*, 411 U.S. 677, 687–88 & nn.19–21 (1973) (plurality opinion) (noting that, among other sex-based antidiscrimination laws, Congress had recently passed the Equal Pay Act of 1963, Title VII of the 1964 Civil Rights Act, and the Equal Rights Amendment (“ERA”), which was submitted to the states for ratification in 1972). Indeed, the women's movement had achieved so much legislatively by 1973 that Justice Powell urged the Court to wait for the ERA ratification process to unfold before according heightened scrutiny to sex-based state action under the Fourteenth Amendment. See *id.* at 692 (Powell, J., concurring).

⁵³ See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 *U. Chi. Legal F.* 9, 11 (recalling that reading all available material on women and the law in 1970 “proved not to be a burdensome venture. So little had

en's history as a robust field of inquiry in the 1970s and 1980s⁵⁴ that the Court began to analyze how contemporary forms of regulation might reflect or reinforce a set of practices that had historically deprived women of equal citizenship.⁵⁵

In the early 1990s, when the gay rights movement first began to pursue the right to marry, the history of gays and lesbians in the United States had yet to be written.⁵⁶ In 1989, the entire corpus of gay American history consisted "of several monographs . . . and perhaps as many articles. One could read it all during a single summer and still take a leisurely vacation."⁵⁷ This lack of interest in, and appreciation of, gays' and

been written, one could manage it all in a matter of weeks"). The first sex discrimination casebooks—including one authored by Ginsburg herself—did not appear until several years later. See Linda K. Kerber, *Writing Our Own Rare Books*, 14 *Yale J.L. & Feminism* 429, 430–31 (2002).

⁵⁴ For more on the development of women's history, see Nancy F. Cott, *What's in a Name? The Limits of "Social Feminism"*; or, *Expanding the Vocabulary of Women's History*, 76 *J. Am. Hist.* 809 (1989); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 *J. Am. Hist.* 9 (1988); Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 *Am. Hist. Rev.* 1053 (1986).

⁵⁵ See Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "The Woman Question" in the Discourse of Sex Discrimination*, in *History, Memory, and the Law* 131, 177–79 (Austin Sarat & Thomas R. Kearns eds., 1999) (observing that it took "two decades, and more than twenty-five opinions, for the Court to ground equal-protection analysis of sex discrimination questions in a narrative" about the history of women's subordination in the American legal system, in part because the Justices were "raised in a world where few would have had cause to know much about" this history). Justice Ginsburg has been particularly active in bringing the history of women's subordination to bear on current questions in sex-based equal protection law. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (Ginsburg, J.) (holding that the Virginia Military Institute's exclusion of women violated equal protection because it perpetuated women's disenfranchisement in the American legal system); see also *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (observing that "[t]here was a time, not so long ago, when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution," and arguing that this history should inform the adjudication of reproductive rights cases (internal quotation marks omitted)).

⁵⁶ See John D'Emilio, *Not a Simple Matter: Gay History and Gay Historians*, 76 *J. Am. Hist.* 435, 436–37 (1989) (describing gay history prior to the late 1980s as "an area of research for which there was no context, no literature, no definition of issues, and no sources that had ever been tapped"). This problem was confounded by the fact that "young historians were warned that pursuing research on such matters would destroy their careers . . . [and] few private foundations or federal agencies [would] consider funding gay research." George Chauncey, *Why Marriage?: The History Shaping Today's Debate over Gay Equality* 12 (2004).

⁵⁷ D'Emilio, *supra* note 56, at 440. Among the very few works of gay American history available in the early 1990s were Allan Bérubé, *Coming Out Under Fire: The History of Gay*

lesbians' experience of discrimination meant there was little chance in the 1980s and 1990s that courts would accord sexual minorities any special solicitude under the Equal Protection Clause. Indeed, the government in this period continued actively to regulate gays and lesbians in ways that perpetuated their second-class status. In the mid-1990s, Congress passed two landmark statutes—in both cases with the support, or at least ready acquiescence, of the executive branch—that were founded on the very stereotypes that had fueled discrimination against gays and lesbians for over half a century. Judges, who knew next to nothing about this history of discrimination,⁵⁸ did little to restrict such forms of regulation. As we shall see, this lack of historical awareness severely curtailed the viability of equal protection as a tool to combat anti-gay discrimination. Judges who knew little about the history of anti-gay regulation in this country were not apt to recognize the ways in which contemporary state action perpetuated historical forms of discrimination.

Thanks to efforts by historians and advocates, courts in the twenty-first century have become increasingly familiar with the history of discrimination against gays and lesbians in the American legal system. Increased familiarity with this history, along with a newfound commitment to equality in the context of sexual orientation, has enabled courts to craft an equal protection doctrine that seeks to counteract the particular forms of discrimination gays and lesbians have encountered. This Part examines the history of anti-gay stereotyping in the United States and the anti-gay politics and legal regime to which it gave rise. In so doing, it provides insight into what courts (and other branches of government) are repudiating when they condemn the “outdated social stereotypes”⁵⁹

Men and Women in World War Two (1990); John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (1983); and Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth Century America* (1991). In 1989, Martin Duberman published an edited collection of essays called *Hidden From History: Reclaiming the Gay and Lesbian Past*, which contained several essays on the history of homosexuals in the United States, and in 1976, Jonathan Ned Katz published *Gay American History: Lesbians and Gay Men in the U.S.A.*, a collection of primary source documents from the sixteenth through the twentieth centuries that pertained in some way to homosexuality.

⁵⁸ See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 *Colum. L. Rev.* 1753, 1753–56 (1996) (discussing judges' ignorance of the history of anti-gay discrimination).

⁵⁹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 472 (Conn. 2008) (emphasis omitted) (internal quotation marks omitted).

that rendered gays and lesbians second-class citizens for most of the twentieth century.

A. Don't Ask, Don't Tell

One could hardly find a better illustration of the persistence of historical prejudice and anti-gay stereotyping into the final decade of the twentieth century than the law known as “Don't Ask, Don't Tell” (“DADT”).⁶⁰ As a candidate for President in 1992, then-Governor Bill Clinton vowed to end the longstanding exclusion of gays and lesbians from the military.⁶¹ Once in office, he reneged on this promise.⁶² Rather than lifting the ban, President Clinton proposed a new policy that would allow homosexuals to serve as long as they did nothing, in word or deed, to make others aware of their orientation.⁶³ Anyone who witnessed the congressional hearings on DADT in the summer of 1993 might have guessed that the new law would not improve the status of gays in the military.⁶⁴ At one point, Senator Sam Nunn brought members of the Armed Services Committee to the barracks of a submarine stationed

⁶⁰ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (2006)), repealed by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

⁶¹ Eric Schmitt, *Challenging the Military: In Promising to End Ban on Homosexuals, Clinton Is Confronting a Wall of Tradition*, N.Y. Times, Nov. 12, 1992, at A1.

⁶² For more on the political climate in which Clinton rescinded his promise, see Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 60–63 (2013).

⁶³ The statute, as it was enacted, ordered that an individual be separated from the armed services upon any of the following findings: “(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . (2) That the member has stated that he or she is homosexual or bisexual . . . (3) That the member has married or attempted to marry a person known to be of the same biological sex.” 10 U.S.C. § 654 (b)(1)–(3) (2006) (repealed 2010). The “don't ask” portion of the policy was contained in a separate regulation stating that “[a]pplicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual.” U.S. Dep't of Def., Directive No. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction*, encl. 1 ¶ 2.8.1 (Dec. 21, 1993); see also U.S. Dep't of Def., Directive Nos. 1332.40 & 1332.14 (stating that the “don't ask” policies applies to officers and enlisted service members).

⁶⁴ In fact, the law made their situation much worse. See Philip Shenon, *Pentagon Moving to End Abuses of 'Don't Ask, Don't Tell' Policy*, N.Y. Times, Aug. 13, 1999, at A1 (noting that sixty-seven percent more gay and lesbian troops were discharged in 1997 than in 1994, the first full year the DADT policy was in effect). For an extended meditation on the reasons why DADT worsened the situation for gays in the military, see Janet E. Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* 1–5 (1999).

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near the nation's capital to solicit servicemembers' views on gays in the military and to demonstrate just how close sailors slept to one another.⁶⁵ The images of tightly-packed bunks, broadcast on the evening news and printed in the next day's newspapers, encapsulated better than any words could the set of stereotypes that had long fueled discrimination on the basis of sexual orientation.

Americans today often assume that social hostility toward gays and lesbians has been constant throughout the nation's history, but in fact, the conception of homosexuals Nunn activated with his maritime excursion was less than a century old. Prior to the twentieth century, there were no laws in the United States targeting "homosexuals." Theologically inspired laws prohibited sodomy and other "immoral" sexual conduct, but these laws applied regardless of the sex of the participants,⁶⁶ and engaging in such acts with a person of the same sex was not understood to constitute the basis of a social or group identity. The concept of the "homosexual" as a distinct type of person emerged only in the late nineteenth century.⁶⁷ By then, theological discourse had given way to a new medicalized discourse that defined as degenerate a broad range of deviations from traditional gender roles, including cross-dressing and prostitution. In the early decades of the twentieth century, homosexual desire was viewed as "a logical but indistinct aspect"⁶⁸ of such gender-bending and was surprisingly well tolerated in the urban centers where it formed

⁶⁵ See Eric Schmitt, *Gay Shipmates? Senators Listen as Sailors Talk*, N.Y. Times, May 11, 1993, at A1.

⁶⁶ In fact, for the entire colonial period, "with one brief exception," sodomy statutes "applied exclusively to acts performed by men, whether with women, girls, men, boys, or animals, and not to acts committed by two women. Only the New Haven colony penalized 'women lying with women,' and this for only ten years." Brief of Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners at 7, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief of Professors of History].

⁶⁷ The word "homosexual" appeared for the first time in a German publication in 1868, and did not come into common use in English until the first quarter of the twentieth century. Jonathan Ned Katz, *The Invention of Heterosexuality* 10 (1995); see also Michel Foucault, *The History of Sexuality* 43 (Robert Hurley trans., 1978) (famously noting of this historical moment that "the sodomite had been a temporary aberration; the homosexual was now a species").

⁶⁸ George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, *Salmagundi*, Fall 1982–Winter 1983, at 114, 116; see also William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 14 (1999) (noting that by the end of the nineteenth century, "gender inversion had superseded (but by no means displaced) disgusting acts as the chief concern with same-sex intimacy").

the basis of a visible subculture.⁶⁹ In the 1930s, this began to change. Homosexuality came to be seen as a distinct, and perverted, *sexual* identity, and one that posed a grave threat to the well-being of American society.⁷⁰ This paradigm shift precipitated a vigorous, decades-long campaign to extirpate homosexuality, or at least banish it from the public sphere.

The anti-homosexual campaigns of the 1930s, 1940s, and 1950s were driven primarily by fears about the changing demographics of the American family. The Great Depression and the Second World War triggered “a massive crisis in gender and family relations”⁷¹ as men lost their jobs, women went to work, and mass migration separated young adults from their families of origin. After these social upheavals, “society and the state [sought to] renormalize[] with a vengeance.”⁷² “[T]he media promoted idealized versions of the nuclear family, heterosexuality, and traditional gender roles,” and “[a]ccompanying this preoccupation with conformity was a fearful scapegoating of those who deviated from a narrowing ideal of the nuclear family and the American way of life.”⁷³ Gays and lesbians, who seemed to embody a disruption in the traditional gender and sexual order, bore the brunt of these efforts. States and municipalities passed harsh new laws targeting homosexuals, and police began to conduct stakeouts and raids designed to flush “sexual perverts” out of public spaces.⁷⁴ Demonic new stereotypes of homosexuals as child mo-

⁶⁹ See generally George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940* (1994) (recounting the history of the long-forgotten but remarkably visible gay male culture that flourished in New York City in the first third of the twentieth century).

⁷⁰ Vestiges of older forms of discourse about homosexuality persisted long after such paradigm shifts. See *id.* at 23 (“Cultural transformations as fundamental as these occurred neither suddenly nor definitively, of course, and traces of the prewar sexual regime and gay world persisted in the postwar years and into our own era (in the continuing association of effeminacy with male homosexuality, for instance).”); Eskridge, *supra* note 68, at 143–44 (“[A]nti-gay rhetoric has shifted from religious tropes about immoral sodomites, to medical ones of degeneracy and inversion and psychopathy, to legal metaphors invoking the rights of parents, children, and heterosexuals. The rhetorical shift has been cumulative, as new arguments augment rather than displace old arguments.”).

⁷¹ See Chauncey, *supra* note 56, at 18.

⁷² Eskridge, *supra* note 68, at 59.

⁷³ Bérubé, *supra* note 57, at 258.

⁷⁴ See George Chauncey, Jr., *The Postwar Sex Crime Panic*, in *True Stories from the American Past* 160, 172 (William Graebner ed., 1993); Estelle B. Freedman, “Uncontrolled Desires”: The Response to the Sexual Psychopath, 1920–1960, 74 *J. Am. Hist.* 83, 83–85 (1987).

lesters gave rise to increasingly draconian forms of regulation. A wave of “sex murders” in the 1930s (mostly involving little girls) prompted unprecedented crackdowns on gay men,⁷⁵ and fears about child predation resurfaced in even more virulent forms after the war.⁷⁶ Between 1946 and 1961, as many as one million gays and lesbians were arrested and punished for crimes relating to their sexuality.⁷⁷ The media aided and abetted this homosexual panic with lurid portrayals of gay men and lesbians as sex-crazed predators, stalking the nation for innocent, young prey.⁷⁸

The sustained, state-sponsored campaign against homosexuals in the middle decades of the twentieth century gave rise to an “architecture of exclusion,”⁷⁹ an interlocking set of regulations that rendered sexual minorities social pariahs. Stereotyped conceptions of homosexuals as a threat to children and the family were baked into a new regulatory structure in mid-century America that rendered gays and lesbians second-class citizens and deprived them of legal recourse against discrimination. Historian Margot Canaday has argued that it is not coincidental that the emergence of homosexuality as a distinct (and disfavored) identity category coincided with the birth of the modern regulatory state. The increased power and regulatory authority of the federal government in the decades after the New Deal provided government officials with “the conceptual and legal apparatus to respond”⁸⁰ to evidence of sexual and

⁷⁵ See Chauncey, *supra* note 69, at 359–60.

⁷⁶ For more on the “postwar sex crime panic,” see David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* 55–64 (2004).

⁷⁷ Eskridge, *supra* note 68, at 60; see also *id.* at 60–65 (describing the mobilization of the police and the increased deployment of criminal law against homosexuals in the years after the Second World War).

⁷⁸ See Bérubé, *supra* note 57, at 258–59 (“The press added to the national hysteria by portraying gay men as molesters of children, corrupters of youth, and even perpetrators of violent sexual crimes; lesbians were sometimes portrayed as malevolent seducers of women and girls. Some pulp magazines ran antigay articles in nearly every issue with titles such as ‘Homosexuals Are Dangerous’ and ‘Lesbians Prey On Weak Women.’”).

⁷⁹ Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* 263 (2009).

⁸⁰ *Id.* at 205; see also *id.* at 258, 263 (noting “homosexuality went from a total nonentity to a commonly understood category in the same years that the federal government went from a fledgling to a full-service bureaucracy,” and arguing this is why “[h]omosexual exclusion and heterosexual privilege [were] written into so many different elements of federal citizenship policy”); Eskridge, *supra* note 68, at 43 (“The modern regulatory state cut its teeth on gay people.”).

gender nonconformity in unprecedentedly pervasive and organized ways.⁸¹

Not surprisingly, given its centralized organizational structure, the military was among the first institutions to begin policing the emerging heterosexual/homosexual binary. In 1949, the Department of Defense instituted a new policy barring from military service any persons who committed homosexual acts or exhibited homosexual “tendencies.”⁸² The adoption of this policy was driven by the same set of concerns that motivated police in this period to crack down on homosexuals in public spaces—namely, concerns about sexual predation. To protect vulnerable, young recruits from “sex perverts” lurking in the ranks, the military in the early 1950s instituted a new series of lectures to be delivered to all personnel. The lectures intended for female recruits portrayed lesbians “as sexual vampires . . . who greedily seduce young and innocent women,”⁸³ and warned that falling prey to such advances would destroy a recruit’s ability to assume proper wifely and maternal roles upon leaving the service.⁸⁴ The lectures designed for male recruits warned that most of the grisly murders reported in the newspapers—especially those involving children—were committed by gay men, and that the recruit must be on guard at all times against the advances of such predators.⁸⁵

⁸¹ Indeed, Canaday argues that our current understanding of homosexuality as a salient identity category is itself a product of the modern regulatory state. Canaday, *supra* note 79, at 4 (arguing that the state did not “simply encounter homosexual citizens, fully formed and waiting to be counted, classified, administered, or disciplined. . . . Rather, the state’s identification of certain sexual behaviors, gender traits, and emotional ties as grounds for exclusion . . . was a catalyst in the formation of homosexual identity. The state . . . did not merely implicate but also *constituted* homosexuality in the construction of a stratified citizenry” (emphasis in original)).

⁸² *Id.* at 186–87; see also Bérubé, *supra* note 57, at 261 (noting the new policy made the prompt separation of homosexuals mandatory and ended wartime policies permitting their rehabilitation).

⁸³ Allan Bérubé & John D’Emilio, *The Military and Lesbians During the McCarthy Years*, 9 *Signs* 759, 763 (1984).

⁸⁴ See *Indoctrination of WAVE Recruits on Subject of Homosexuality (1952)*, in Bérubé & D’Emilio, *supra* note 83, at 764, 768–69 (“By her conduct a Navy woman may ruin her chances for a happy marriage. . . . The Creator has endowed the bodies of women with the noble mission of motherhood and the bringing of human life into the world. Any woman who violates this great trust by participating in homosexuality not only degrades herself socially but also destroys the purpose for which God created her.”).

⁸⁵ See Bérubé, *supra* note 57, at 263–64; *id.* at 264 (“With these and other lectures, the military began to teach millions of young men and women to accept a uniform image of homosexuals, to fear them and report them, and to police their own feelings, friendships, and environment for signs of homosexual attraction.”).

The military's mass expulsion of homosexuals from its ranks in the post-war period⁸⁶ prompted legislators in Congress to launch an investigation into whether homosexuals had similarly infiltrated the ranks of the civil service. The Senate subcommittee charged with conducting this investigation reached the same conclusion as the military: Homosexuals present a threat in the workplace because they "frequently attempt to entice normal individuals to engage in perverted practices," and "[t]his is particularly true in the case of young and impressionable people who might come under the influence of a pervert."⁸⁷ Thus, the subcommittee recommended that in order to protect "the thousands of young men and women who are brought into Federal jobs,"⁸⁸ homosexuals should be barred from the civil service. In 1953, this recommendation became law when President Eisenhower issued Executive Order 10,405, which added "sexual perversion" to the list of characteristics that warranted mandatory investigation and dismissal under the federal loyalty-security program.⁸⁹ Within a few years, many state and local governments had adopted similar policies, extending the ban on homosexuality to over twelve million workers, or more than a fifth of the American workforce.⁹⁰ Countless private employers also adopted such bans,⁹¹ forcing

⁸⁶ See *id.* at 262 (noting that between 1947 and 1950, the rate of discharge for homosexuals was triple the wartime rate and the discharge rate remained at post-war levels throughout the 1950s, dropping only during the Korean War when the Navy needed additional personnel).

⁸⁷ Subcomm. on Investigations, S. Comm. on Expenditures in Exec. Dep'ts, *Employment of Homosexuals and Other Sex Perverts in Government*, S. Doc. No. 81-241, at 4 (1950). It is unsurprising that the subcommittee reached this conclusion, given that it "invited intelligence officers—whose job it was to interrogate suspected homosexuals—to present the military rationale for eliminating such people" and heard testimony "that male homosexual personnel were dangerous because they preyed on young boys in the service." Bérubé, *supra* note 57, at 267.

⁸⁸ S. Doc. No. 81-241, at 4. The subcommittee's report famously noted that even "[o]ne homosexual can pollute a Government office." *Id.*

⁸⁹ Exec. Order No. 10,450, § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1953). In the two decades after Eisenhower issued this order, thousands of federal employees lost their jobs because they were suspected of being homosexual. Even at the height of the McCarthy era, the State Department fired more people on suspicion of homosexuality than on suspicion of Communism. See Chauncey, *supra* note 56, at 6; see also William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America, 1861–2003*, at 75 (2008) (noting that "[t]he paranoid domestic politics of the 1950s ultimately expended more resources in its anti-homosexual witch hunts than in its anti-Communist ones").

⁹⁰ Bérubé, *supra* note 57, at 269.

⁹¹ *Id.* at 270.

gay men and lesbians to conceal their sexuality if they wished to find work or remain gainfully employed.

Historian George Chauncey has argued that the primary purpose of this new network of regulations “was not to eradicate homosexuality altogether, a task the authorities considered all but impossible, but to contain it by prohibiting its presence in the public sphere.”⁹² The demographic and social changes wrought by the Second World War had created sizable and visible gay communities in major urban centers, and the state responded by attempting to erase homosexuality from public view. Government officials routinely asserted that their aim, in regulating homosexuality, was to make the country safe for children and young adults. But their goal was not simply to protect America’s youth from sexual molestation. It was also to protect them from homosexuals who might interfere with their development in more intellectual and psychological ways, by actively recruiting them into homosexuality or simply by signaling that same-sex sexuality was an acceptable alternative to more normative forms of sexual behavior. For this reason, state-sponsored campaigns to purge homosexual teachers from schools and universities continued long after the other purges of the 1950s had ended.⁹³ The state officials who conducted these campaigns feared not only that homosexuals would abuse young people’s bodies, but also—perhaps even primarily—that they would influence their minds.⁹⁴

This history explains why President Clinton, when confronted with opposition to ending the ban on gays and lesbians in the military, concluded that a good compromise would be to allow homosexuals to serve,

⁹² Chauncey, *supra* note 69, at 9.

⁹³ The most vigorous of these campaigns occurred in Florida, where the state legislature in the 1950s and 1960s sought to purge all state schools—from elementary schools to universities—of homosexuals. See Karen L. Graves, *And They Were Wonderful Teachers: Florida’s Purge of Gay and Lesbian Teachers*, at xii (2009); James A. Schnur, *Closet Crusaders: The Johns Committee and Homophobia, 1956–1965*, in *Carryin’ on in the Lesbian and Gay South* 132, 133–58 (John Howard ed., 1997). In the late 1970s, California State Senator John Briggs, head of California Defend Our Children, placed an initiative on the state ballot to disqualify from public school employment any individual engaged in “advocating, soliciting, imposing, encouraging or promoting private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees.” See Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* 377–90 (1999). The initiative failed, but not before Briggs had blanketed the state with lurid propaganda depicting homosexuals as child molesters. *Id.*

⁹⁴ See Fla. Legislative Investigation Comm., *Report on Homosexuality and Citizenship in Florida* 8 (1964) (“The homosexual’s goal and part of his satisfaction is to ‘bring over’ the young person, to hook him for homosexuality.”).

but to prohibit them from speaking openly about their sexuality. This compromise did not address concerns about sexual molestation, which remained shockingly prevalent in the debates over DADT.⁹⁵ (One military official, who testified at length about the predatory nature of gays and lesbians, opined that permitting a homosexual to serve in the military would be “like putting a hungry dog in a meat shop.”⁹⁶) But Clinton’s compromise did address a related set of concerns pertaining to the particular harms that would result from allowing homosexuals to serve openly. Witness after witness warned that if homosexuals were permitted to “tell” of their sexual orientation, the government “would be implicitly condoning the homosexual lifestyle in the eyes of impressionable young men, thereby weakening official and cultural barriers that otherwise discourage homosexual behavior.”⁹⁷ This would make it easier for homosexuals to recruit fellow soldiers, but even more importantly, many speakers stressed, open service would make it easier for gays and

⁹⁵ See, e.g., Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the H. Comm. on Armed Servs., 103d Cong. 78 (1993) [hereinafter HASC Hearings] (statement of Rep. Robert Dornan, Member, H. Comm. on Armed Servs.) (asserting that homosexuals are sexually attracted to young boys and that he personally had “been hit on by teachers” and “hit on when [he] was hitchhiking in the service at least once a month”); id. at 166 (statement of Colonel John Ripley, U.S. Marine Corps (“USMC”) (Ret.)) (asserting homosexuals are dangerous because “they prey . . . on otherwise decent Marines”); Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs., 103d Cong. 605 (1993) [hereinafter SASC Hearings] (statement of Major Kathleen G. Bergeron, USMC) (asserting homosexuals would be unable to control their voracious sexual appetites and would constantly “prey on more vulnerable recruits”).

⁹⁶ HASC Hearings, supra note 95, at 165 (statement of Brigadier General William Weise, USMC (Ret.)). The General also testified, *inter alia*, that:

Homosexuals are 18 times more likely to engage in sexual practices with minors than are heterosexuals. . . . Crime statistics reveal that at least one-third to one-half of all child molestations involve homosexual activity (even though homosexuals are less than 2 percent of the American population) . . . [and] homosexual teachers have committed up to [four]-fifths of all molestations of pupils.

Id. at 116–17; see also Jane Gross, Navy Is Urged to Root Out Lesbians Despite Abilities, N.Y. Times, Sept. 2, 1990, at 24 (quoting a memorandum by U.S. Navy Vice Admiral Joseph S. Donnell ordering the Atlantic fleet to work harder to identify and expel lesbian sailors; Donnell explained that despite their excellent job performance, lesbians create a “‘predator-type environment’ in which ‘more senior and aggressive female sailors’ exert ‘subtle coercion’ or [make] ‘outright sexual advances’ on ‘young, often vulnerable’” recruits).

⁹⁷ HASC Hearings, supra note 95, at 345 (statement of Norman E. Pearson, National Executive Secretary, Fleet Reserve Association).

lesbians to recruit children everywhere, because it would convey to the nation's youth that homosexuality was an acceptable lifestyle choice.⁹⁸

Of particular concern to many participants in the DADT hearings was the effect that allowing homosexual servicemembers to "tell" would have on the youngest members of the military community. Military officials warned that if homosexuals were permitted to serve openly, children living on military bases would be exposed to the gay "lifestyle."⁹⁹ Avowed homosexuals would be on their streets and in their schools, and children would likely witness same-sex couples holding hands or even living together.¹⁰⁰ A captain in the Marines testified that the deepest fear of military families was that permitting homosexuals to disclose their

⁹⁸ See, e.g., SASC Hearings, *supra* note 95, at 610 (statement of Sen. Strom Thurmond, Member, S. Comm. on Armed Servs.) (noting "the U.S. military is a very well respected institution" and "the public sees our armed forces as a role model for youth in America"); Many participants in the hearings argued that allowing gay servicemembers to "tell" would not only facilitate their efforts to recruit children, but also interfere with the military's own recruitment efforts. See Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Subcomm. on Military Forces & Personnel of the H. Comm. on Armed Servs., 103d Cong. 55–56 (1993) (statement of General Carl Mundy, USMC) (claiming to have received "a considerable amount of mail . . . from parents" saying that "if there is a significant change in the policy that will allow homosexuality, then my kid isn't coming in"); SASC Hearings, *supra* note 95, at 599 (statement of General H. Norman Schwarzkopf, U.S. Army (Ret.)) (asserting that allowing gays to serve openly would "endanger recruitment and retention, by . . . making parents of potential servicemembers reluctant to recommend or approve the enlistment of their sons and daughters in an organization in which they would be forced to live and work with known homosexuals"); *id.* at 630 (testimony of Major Bergeron) (stating, "I do not think the mothers and fathers of America are going to send us their children so willingly" if known homosexuals are allowed to serve); HASC Hearings, *supra* note 95, at 188 (statement of Brigadier General Weise (Ret.)) ("[W]hat mother would want her son or daughter to be placed in a situation with a homosexual leader? Although not all homosexuals are child molesters . . . [w]ould you play Russian roulette with the lives of your children? Do you want to take that kind of a chance?").

⁹⁹ See, e.g., SASC Hearings, *supra* note 95, at 604 (statement of Major Bergeron) ("[Y]ou must understand that any attempt to assimilate homosexuals into the workplace will automatically attempt to assimilate homosexuals into our military communities, at our very heart . . . our families . . . at my family . . . my children." (ellipses in original)); HASC Hearings, *supra* note 95, at 194 (statement of Colonel John Ripley, USMC (Ret.)) (noting that if homosexuals were permitted to disclose their orientation, military "families would have to live . . . next to a homosexual couple or would have to expose their children to that sort of conduct openly"); *id.* at 132 (statement of Brigadier General Weise (Ret.)) (asserting that if gays and lesbians were permitted to serve openly, it is likely "that homosexual couples would press for equal access to base housing without regard for the impact that their open embrace of homosexuality might have on children").

¹⁰⁰ SASC Hearings, *supra* note 95, at 630 (statement of Major Bergeron) (asking if this "would be acceptable behavior in the communities, in the schools? Because what you are doing is taking away a parent's choice as to what they want to expose their children to").

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sexual orientation would “eventually . . . lead to same-sex marriages on base . . . and quite frankly that is nothing they want to expose their children to while they are deployed.”¹⁰¹ DADT was designed to quell these fears. By requiring gay and lesbian servicemembers to remain in the closet, DADT aimed to shield impressionable youngsters from homosexual influences and to protect the American family from incursive, non-normative manifestations of gender and sexuality.¹⁰²

It is not obvious, in the abstract, why a debate about whether to allow homosexuals to serve openly in the military should have focused so intently on children and the family. The fact that it did demonstrates the degree to which stereotypes forged in the middle decades of the twentieth century continued to inform lawmaking and inspire social hostility toward gays and lesbians many decades later.¹⁰³ To be sure, many of the

¹⁰¹ Id. at 588 (statement of Captain Gary Fulham, USMC); see also HASC Hearings, *supra* note 95, at 104 (statement of Brigadier General Weise (Ret.)) (quoting a letter from a Marine wife and mother who asks, “When two gays decide to ‘get married’ will the gay Active Duty person be able to claim his lover as a dependent? Will they be eligible for base housing, medical and PX privileges? That should set a good example for the kids in the neighborhood”); id. at 132 (statement of Brigadier General Weise (Ret.)) (“Once sexual orientation is eliminated as a selective factor, marriage itself will be redefined or suffer reduced status. . . . [I]n the wake of adoption of special rights for homosexuals at Stanford University, the campus now extends housing privileges to same-sex couples. Objections by families with children were brushed aside as ‘bigotry.’”).

¹⁰² A steady undercurrent of concerns about gender ran through the DADT hearings. DADT’s author, military sociologist Charles Moskos, had also opposed efforts to expand women’s military service. Linda Hirshman, *Victory: The Triumphant Gay Revolution* 229 (2012); see also Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 *Minn. L. Rev.* 96, 99 (2008) (arguing that many legislators in the 1970s and 1980s opposed expanding women’s service on the ground that it would erode traditional sex and family roles and alter the masculine character of the military). In 1993, many expressed similar concerns about gay servicemembers. See, e.g., HASC Hearings, *supra* note 95, at 93 (statement of Brigadier General Weise (Ret.)) (arguing the military would lose its authority if it became “a wishy-washy force”); Gerald J. Garvey & John J. DiIulio, Jr., *Only Connect?*, *New Republic*, Apr. 26, 1993, at 18, 21 (noting that “many military leaders believe that the sexual orientation of gays . . . makes them incapable of participating in the meaning of the military” because, by “cultural definition, a soldier can’t be gay and be a part of all that is best or most cherished in military life and lore”); see also Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. Rev.* 499, 546 (1991) (“When a gay soldier comes to the Army’s official attention, the real threat is not the hindrance of day-to-day operations, but rather the tarnishing of the Army’s traditionally masculine image.”).

¹⁰³ I do not mean to suggest that stereotypes concerning sexual predation and the threat gays and lesbians purportedly pose to the American family are the only stereotypes that have fueled discrimination on the basis of sexual orientation. See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) (noting that in addition to depicting

anti-gay regulations enacted during the 1950s had been dismantled by the time Clinton assumed the presidency,¹⁰⁴ and the cultural landscape had changed quite a bit, due in significant part to the emergence of the women's rights and gay rights movements. But Clinton's retreat from his campaign promise and the passage of DADT illustrated the continuing resonance in the latter decades of the twentieth century of the notion that homosexuals constitute a threat to the "traditional" model of the American family.

B. Protecting "Traditional Family Values"

In the same year Congress passed DADT, a court in Hawaii declared for the first time in American history that laws barring same-sex couples from marrying were constitutionally suspect.¹⁰⁵ It is not surprising, given the tenor of the national conversation about homosexuality in this period, that this decision prompted a backlash, but the backlash was impressive nonetheless. In 1996, Congress voted overwhelmingly in favor of the Defense of Marriage Act ("DOMA"), which specified, among other things, that "only a legal union between one man and one woman as

gays and lesbians as child molesters, anti-gay stereotypes "depict them as wealthy and promiscuous, and as 'disease vectors'"). As this Article demonstrates, however, stereotypes of gays and lesbians as a threat to children and the family have played an especially powerful role in inciting and justifying discrimination on the basis of sexual orientation—and this is particularly true in the marriage context.

¹⁰⁴ See, e.g., *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 254 n.14, 255 n.15 (9th Cir. 1976) (describing the process which led to the 1975 rescission of the policy barring homosexuals from federal government employment). Under the new rule, a federal employee could no longer be discharged "solely because that person is homosexual or has engaged in homosexual acts," but could still be discharged if his or her sexual conduct was found to "affect[] job fitness." *Id.* at 255 n.15; see also Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (codified as amended at 8 U.S.C. § 1182(a) (2012)) (removing "sexual deviation" from § 212 of the Immigration and Nationality Act as a ground for excluding immigrants from the United States, which was considered to include homosexuality). For more on the history of discrimination against sexual minorities in the context of immigration, see Canaday, *supra* note 79, at 19–54, 214–54.

¹⁰⁵ *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that a statute restricting marriage to different-sex couples established sex-based classification and was therefore subject to strict scrutiny under Hawaii's constitution). Same-sex couples in Hawaii never gained the right to marry because this ruling was superseded by a constitutional amendment that defined marriage as the legal union between one man and one woman. See Haw. Const. art. I, § 23 (1998).

husband and wife”¹⁰⁶ could count as a marriage for purposes of federal law. In the wake of DOMA’s passage, most states followed the federal government’s lead, enacting “mini-DOMAs” that defined marriage as the union of one man and one woman for purposes of state law.¹⁰⁷ By 2006, most states had also amended their constitutions in order to protect “traditional” marriage from the threat presented by same-sex couples.¹⁰⁸

The congressional hearings and national debate over DOMA sounded many of the same themes as the debates over DADT. DOMA’s proponents warned that a parade of horrors would ensue if the government failed to defend “traditional” marriage: Gays and lesbians would demand the right to adopt children;¹⁰⁹ the state would “be forced to send a message to our children” that homosexuality was an acceptable lifestyle choice;¹¹⁰ “schoolchildren” would be indoctrinated with homosexual values;¹¹¹ and “‘Heather Has Two Mommies’ would . . . become a staple of [the] sex education curriculum.”¹¹² Advocates of the law argued that same-sex marriage and attendant social changes would imperil parents’ ability to guide their children’s development. They claimed that allowing same-sex couples to marry would distort “the shaping of human sexuality, particularly among the young,”¹¹³ and mislead children into thinking “the sexes are interchangeable.”¹¹⁴

¹⁰⁶ Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), invalidated by *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁰⁷ See *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat’l Conference of State Legislatures (June 26, 2014), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

¹⁰⁸ *Id.*

¹⁰⁹ See *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 127 (1996) [hereinafter *DOMA Hearings*] (statement of Dennis Prager); see 142 Cong. Rec. H7495 (daily ed. July 12, 1996) (statement of Rep. Lamar Smith).

¹¹⁰ 142 Cong. Rec. H7487 (daily ed. July 12, 1996) (statement of Rep. Thomas Delay).

¹¹¹ *Id.* (statement of Rep. David Funderburk).

¹¹² *Id.* at H7495 (statement of Rep. Smith).

¹¹³ *Id.*

¹¹⁴ *DOMA Hearings*, supra note 109, at 133 (statement of Dennis Prager); see also 142 Cong. Rec. H7491 (daily ed. July 12, 1996) (statement of Rep. Charles Canady) (“Should the law elevate homosexual unions to the same status as the heterosexual relationships on which the traditional family is based[?] . . . Should this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?”); *id.* at H7495 (statement of Rep. Smith) (“Marriage is not an arbitrary constrict [sic]; it is an ‘honorable estate’ based on the different

DOMA's proponents argued, above all, that the law was necessary to protect "traditional family values." Legislators deployed this concept as if it referred to a timeless and universal set of beliefs about gender, sexuality, and the family. But in fact, the particular conception of family values that motivated the passage of DOMA—one that knit together the preservation of conventional gender roles and the suppression of homosexual identity—was of relatively recent vintage. It was constructed in the 1970s in response to political gains by the women's rights and gay rights movements, and it was designed, quite self-consciously, to galvanize voters behind a new conservative agenda.

Among the chief architects of the "traditional family values" meme were Paul Weyrich, founder of the Heritage Foundation, Howard Phillips, founder of the Conservative Caucus, and Richard Viguerie, a fantastically successful direct mail entrepreneur who was arguably "the most important individual on the American political Right"¹¹⁵ in the late 1970s.¹¹⁶ Viguerie and his associates decided in this period that the Republican Party needed reinvigorating; to this end, they set out to create a New Right. Their strategy—which reconstituted the Republican Party and fundamentally changed American politics—was to unite previously disparate groups of cultural conservatives into a single movement organized around the concept of "traditional family values."¹¹⁷

In so doing, the leaders of the New Right drew heavily on the work of pioneering conservative women who had initially led the charge against the women's rights and gay rights movements in the 1970s by arguing that these movements presented interrelated threats to children and the family. Phyllis Schlafly's campaign, called STOP ERA, did just that by convincing voters in southern and western states to reject the ratification of the Equal Rights Amendment ("ERA").¹¹⁸ Schlafly's strategy was to

complementary nature of men and women—and how they refine, support, encourage and complete one another.”)

¹¹⁵ Alan Crawford, *Fission on the Right: Richard Viguerie's Bid for Power*, *Nation*, Jan. 29, 1977, at 104, 105.

¹¹⁶ For more on Weyrich, Phillips, and Viguerie, see Laura Kalman, *Right Star Rising: A New Politics, 1974–1980*, at 21–33 (2010).

¹¹⁷ For more on the rise of the New Right, see *id.*; *Rightward Bound: Making America Conservative in the 1970s* (Bruce Schulman & Julian Zelizer eds., 2008); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *Yale L.J.* 2028, 2061–71 (2011).

¹¹⁸ When the time allotted for the ERA's ratification ran out in 1982, Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Utah, and Virginia had yet to ratify the amendment. See Jane J. Mansbridge,

“link[] together the ERA, abortion, and homosexuality . . . and mobilize[] a grassroots, ‘profamily constituency’ to oppose this unholy trinity.”¹¹⁹ She argued that the ERA would force women to work outside the home and thus require them either to abort their children or place them in government-run childcare centers;¹²⁰ she likewise argued that the amendment would authorize same-sex marriage, furthering the notion that the sexes were interchangeable and mothers and fathers were expendable.¹²¹ Anita Bryant echoed Schlafly’s “pro-family” rhetoric in her own campaign to overturn first Miami’s, and then other cities’, new gay rights ordinances. Her campaign, named, quite pointedly, Save Our Children, warned that homosexuals had set their sights on the nation’s children: Because “homosexuals cannot reproduce,” she argued, “to freshen their ranks, they must recruit the youth of America.”¹²² Bryant portrayed gay men and lesbians as child molesters and told lurid tales of their crimes,¹²³ but her real target was “role-modeling homosexuals, the ones who aren’t openly recruiting, but who don’t stay in the closet.”¹²⁴ Bryant argued that homosexuals of this sort were particularly dangerous because even criminal laws could not stop them, and their presence in

Why We Lost the ERA 13–14 (1986) (noting all the states that failed to ratify “were Mormon or southern states, except Illinois, which required a three-fifths majority for ratifying constitutional amendments and which had a strongly southern culture in the third of the state surrounded by Missouri and Kentucky”).

¹¹⁹ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Calif. L. Rev.* 1323, 1390 (2006).

¹²⁰ Phyllis Schlafly, *What’s Wrong with “Equal Rights” for Women?*, Phyllis Schlafly Rep., Feb. 1972, at 4 (“Women’s lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society. Women’s libbers are trying to make wives and mothers unhappy with their career, make them feel that they are ‘second-class citizens’ and ‘abject slaves.’ Women’s libbers are promoting free sex instead of the ‘slavery’ of marriage. They are promoting Federal ‘day-care centers’ for babies instead of homes. They are promoting abortions instead of families.”).

¹²¹ Phyllis Schlafly, *The Power of the Positive Woman* 90 (1977) (“It is precisely ‘on account of sex’ that a state now denies a marriage license to a man and a man, or to a woman and a woman. A homosexual who wants to be a teacher could argue persuasively that to deny him a school job would be discrimination ‘on account of sex.’”). For a more extensive examination of Schlafly’s “pro-family” ideology, see Siegel, *supra* note 119, at 1389–1402.

¹²² Anita Bryant, *The Anita Bryant Story: The Survival of Our Nation’s Families and the Threat of Militant Homosexuality* 62 (1977).

¹²³ See, e.g., *id.* at 89–91, 118–20.

¹²⁴ Morton Kondrake, *Anita Bryant Is Mad About Gays*, *New Republic*, May 7, 1977, at 13, 14 (quoting Mike Thompson, chairman of the Florida Conservative Union and leader in the Save Our Children campaign) (internal quotation marks omitted).

the community gravely threatened parents' ability to steer children into normative sex and family roles.¹²⁵

Viguerie and others in the New Right recognized in this "pro-family" rhetoric a new form of discourse that could unite a wide array of heretofore unaffiliated political and religious groups.¹²⁶ In 1979, they approached Reverend Jerry Falwell and encouraged him to organize evangelical Christians into a "Moral Majority" that would promote new "pro-family" politics motivated in large part by opposition to abortion and homosexuality.¹²⁷ The link made sense to Falwell. He argued in 1980 that changing gender roles and the increased visibility of homosexuality were two sides of the same coin. "We would not be having the present moral crisis regarding the homosexual movement if men and women accepted their proper roles as designated by God," he claimed. "In the Christian home the father is . . . to be the head over his wife and children . . . [and] the woman is to be submissive Homosexuality is Satan's diabolical attack upon the family."¹²⁸ Falwell was not the only convert to this "pro-family" ideology. By 1980, the New Right had united evangelical Protestants, conservative Catholics, and traditionalists of all stripes behind its new agenda.¹²⁹ Ronald Reagan won the presidency that year on a Republican platform that vowed, for the first time, to en-

¹²⁵ See Bryant, *supra* note 122, at 114 ("My primary concern was voiced as a mother. . . . Known homosexual schoolteachers and their possible role-model impact tore at my heart in a way I could not ignore."); see also Anita Bryant & Bob Brake, Advertisement, *The Civil Rights of Parents: To Save Their Children from Homosexual Influences*, *Miami Herald*, Mar. 20, 1977, at 9D (asserting "tolerance toward homosexuality is based on the understanding that homosexuals . . . will not be allowed to preach their sexual standards to, or otherwise influence, impressionable young people").

¹²⁶ In August 1977, Viguerie published an article entitled "Anita Bryant's Crusade: Where Next?" in his magazine, *Conservative Digest*. In the piece, Mike Thompson, communications director of Save Our Children, "urges the Republican Party to take up an anti-gay policy nationally and 'position itself as the party of the family.'" Jere Real, *Gay Rights and Conservative Politics*, *Nat'l Rev.*, Mar. 17, 1978, at 342, 344 (quoting Mike Thompson); see also Greenhouse & Siegel, *supra* note 117, at 2060–61 ("Schlafly's campaign against the Equal Rights Amendment demonstrated how . . . the abortion issue . . . could be tapped to mobilize a wide array of cultural conservatives in politics. . . . By the late 1970s, Richard Viguerie and other Republican architects of the New Right had begun to focus on abortion as an issue around which to build party discipline . . .").

¹²⁷ Daniel K. Williams, *God's Own Party: The Making of the Christian Right* 171, 174–75 (2010).

¹²⁸ Jerry Falwell, *Listen, America!* 183 (1980).

¹²⁹ See Jeffrey L. Brudney & Gary W. Copeland, *Evangelicals as a Political Force: Reagan and the 1980 Religious Vote*, 65 *Soc. Sci. Q.* 1072, 1072–78 (1984).

force “traditional family values.”¹³⁰ Over the next two decades, this conception of family values would shape everything from abortion politics, to the government’s response to the AIDS crisis, to the substance of social welfare policy.

By 1996, nearly half of American voters named “moral values” as the most important issue facing the nation.¹³¹ The phrase “traditional family values” had by then become so ingrained in American political discourse that proponents of DOMA did not need to explain what it meant; to many, the idea that gays and lesbians presented a threat to children and the family was simply common sense.¹³² Comparisons to pedophilia and incest, made during the DOMA hearings, conjured up the most demonic stereotypes of homosexuals.¹³³ But DOMA traded even more heavily on fears about subtler forms of predation, including the fear that homosexuals who emerged from the closet would influence children to become gay, or at least to approve of homosexuality, and thereby undermine the traditional conceptions of gender and sexuality on which the marital family was based. Representative Bob Barr, the author of DOMA, referenced all of these concerns when he warned, on the floor of Congress, that the flames of the gay rights movement were “licking at the very foundations of our society: the family unit.”¹³⁴ Although President Clinton initially opposed DOMA, he ultimately signed it into law, asserting that he too thought it was important “to do things to strengthen the American family.”¹³⁵ More than half a century after police began to crack down on “sex perverts,” the notion that homosexuals constitute a

¹³⁰ The Judiciary, 1980 Republican Party Platform, *reprinted in* 38 Cong. Q. 2030, 2046 (1980); see also Perry Deane Young, *God’s Bullies: Native Reflections on Preachers and Politics* 104 (1982) (recalling that a Christian group affiliated with the New Right paid for television ads during the 1980 presidential election that showed images of “militant homosexuals” and warned that “Carter advocates acceptance of homosexuality. Ronald Reagan stands for the traditional American family” (internal quotation marks omitted)).

¹³¹ *The Triumph of the Religious Right*, *Economist*, Nov. 13, 2004, at 27, 27–28.

¹³² During the 1992 Republican National Convention, delegates held aloft banners reading, “Family Rights For Ever, Gay Rights Never”; by then, the relationship needed no further elucidation. See Andrew Sullivan, *The Politics of Homosexuality*, *New Republic*, May 10, 1993, at 24, 25.

¹³³ See 142 Cong. Rec. H7489 (daily ed. July 12, 1996) (statement of Rep. Robert Dornan); *id.* at H7501 (statement of Rep. Henry Hyde).

¹³⁴ *Id.* at H7482 (statement of Rep. Barr).

¹³⁵ 142 Cong. Rec. H7274 (daily ed. July 11, 1996) (statement of Rep. Scott McInnis) (quoting the President’s spokesman).

threat to children and the family continued to incite and justify anti-gay lawmaking at the highest levels of American government.

II. THE CHANGING PROSPECTS OF EQUAL PROTECTION

To say that there are deep continuities between the anti-gay lawmaking of the 1930s, 1940s, and 1950s and the anti-gay lawmaking of the 1990s is not to say that American attitudes toward homosexuality remained static over the course of half a century. In fact, this period witnessed great social change with respect to sexual orientation. In the 1930s, the Hays Code effectively prohibited filmmakers from depicting gay and lesbian characters, incorporating gay themes, or making any reference to homosexuality in their films.¹³⁶ In 1993, Tom Hanks won an Oscar for portraying a gay lawyer dying of AIDS in the film *Philadelphia*.¹³⁷ In 1953, President Eisenhower issued an executive order barring gays and lesbians from working for the federal government.¹³⁸ In 1998, President Clinton issued an executive order banning the federal government from discriminating against gay and lesbian employees.¹³⁹ By this time, several states and dozens of municipalities had enacted laws prohibiting discrimination on the basis of sexual orientation, often in public employment, and sometimes in other areas as well.¹⁴⁰ These developments did not mean, however, that regulations such as DADT and DOMA were political outliers at the time they were passed. In fact, they were part of a vast network of laws and practices that continued, even into the final decade of the twentieth century, to relegate gays and lesbians to the closet and deprive them of equal citizenship.

Twenty years ago, such discrimination was not generally viewed as inconsistent with constitutional equality norms. Today, that is rapidly changing. Most Americans now view discrimination against gays and lesbians as an equality problem.¹⁴¹ There is a growing consensus among

¹³⁶ See Chauncey, *supra* note 56, at 5–6.

¹³⁷ Clifford Rothman, “Philadelphia”: Oscar Gives Way to Elegy, *N.Y. Times*, Jan. 1, 1995, at H9.

¹³⁸ Exec. Order No. 10,450, 3 C.F.R. 936, 938 (1953).

¹³⁹ Exec. Order No. 13,087, 3 C.F.R. 191, 191 (1998).

¹⁴⁰ For a list of statutes enacted between 1972 and 1998 prohibiting discrimination on the basis of sexual orientation, see Eskridge, *supra* note 68, at 356–61.

¹⁴¹ See Jeffrey M. Jones, Most in U.S. Say Gay/Lesbian Bias Is a Serious Problem, *Gallup Politics* (Dec. 6, 2012), <http://www.gallup.com/poll/159113/most-say-gay-lesbian-bias-serious-problem.aspx> (reporting that sixty-three percent of Americans now believe discrimination against gays and lesbians to be a “very” or “somewhat” serious problem). Since May

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officials in all three branches of government that discrimination against gays and lesbians (at least in some instances) implicates legal equality concerns. This Part examines how we got from that world to this one. The story of this transformation is largely a story of social movement activism and social change: The gay rights movement's campaign to combat prejudice and stereotyping has produced a substantial shift in public attitudes toward homosexuality. This Part focuses on the constitutional dimensions of this change.

Over the past two decades, courts have begun explicitly to repudiate the legal regime under which homosexuals were regulated for most of the twentieth century. In so doing, they have begun to formulate an anti-stereotyping doctrine that prohibits the state from regulating in ways that reflect or reinforce traditional anti-gay stereotypes, particularly those that depict gays and lesbians as a threat to children and the family. As Part III will show, the emergence of this anti-stereotyping doctrine has profoundly altered the conceptual landscape on which battles over same-sex marriage are currently playing out. It has influenced the meaning of the marriage cases and their implications for future legal contests involving both discrimination on the basis of sexual orientation and the regulation of the American family. When, however, the campaign for same-sex marriage began two decades ago, the legal landscape looked quite different than it does today. Arguments now deemed compelling were far less accessible to gay rights advocates at the time—and these limitations shaped the nature of early marriage advocacy.

A. Obstacles to Equal Protection

Historically, the Equal Protection Clause provided little protection to gays and lesbians. This is not surprising: Equal protection typically provides little protection to social groups as stigmatized as homosexuals were for most of the twentieth century. To secure heightened scrutiny, a group must establish that it has suffered a history of discrimination; where stereotypes about a group have fueled regulation, that group must convince courts that those stereotypes no longer constitute a legitimate

2011, Gallup polls have consistently shown that a majority of Americans believes same-sex couples should have the right to marry. Jeffrey M. Jones, Same-Sex Marriage Support Solidifies Above 50% in U.S., Gallup Politics (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx>.

ground for state action.¹⁴² But anti-gay stereotypes remained prevalent and continued to motivate regulation even in the latter decades of the twentieth century, and judges in this period had little cause to appreciate the ways in which such regulation perpetuated historical injustices. Gay American history emerged as a field only in the 1990s, and even then, it is unlikely most judges had immediate exposure to it. This lack of historical knowledge contributed to decisions like *Bowers v. Hardwick*,¹⁴³ in which the Court confidently, and erroneously, opined that “[p]roscriptions against [homosexual sodomy] have ancient roots,”¹⁴⁴ and that it was therefore “at best, facetious”¹⁴⁵ to suggest that such prescriptions might violate the Constitution.¹⁴⁶

Against this backdrop, it was nearly impossible for gay rights advocates to persuade courts that the Fourteenth Amendment prohibited discrimination on the basis of sexual orientation. Every federal appellate court in the twentieth century that considered the question of whether orientation-based discrimination warranted heightened scrutiny ultimately rejected the claim.¹⁴⁷ The Court’s decision in *Bowers* made the case for equal protection even more difficult. After *Bowers*, courts consistent-

¹⁴² See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (holding that stereotyped conceptions of men’s and women’s sex and family roles no longer justified a law that permitted fathers to stop providing financial support to their daughters at a younger age than their sons).

¹⁴³ 478 U.S. 186 (1986).

¹⁴⁴ *Id.* at 192.

¹⁴⁵ *Id.* at 194.

¹⁴⁶ See Brief of Professors of History, *supra* note 66, at 1–2 (explaining that laws proscribing homosexual sodomy, as opposed to laws proscribing sodomy in general, are a relatively recent innovation and that discrimination against individuals “on the basis of their homosexual status is an unprecedented project of the twentieth century”).

¹⁴⁷ See, e.g., *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292–93 (6th Cir. 1997); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Nat’l Gay Task Force v. Bd. of Educ. of Okla. City*, 729 F.2d 1270, 1273 (10th Cir. 1984). A few federal district courts in the 1980s and 1990s found that discrimination on the basis of sexual orientation warranted heightened scrutiny, but all were overturned on appeal. See, e.g., *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991), *rev’d*, 976 F.2d 623 (10th Cir. 1992); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev’d*, 895 F.2d 563 (9th Cir. 1990); see also *Watkins v. U.S. Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated and aff’d on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc) (holding that it was unnecessary to reach the equal protection question because, after fourteen years of reenlisting and promoting an openly gay soldier, the Army was estopped from relying on the soldier’s homosexuality as a reason for barring his reenlistment).

ly rejected homosexual equality claims on the ground that “[i]t would be quite anomalous . . . to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”¹⁴⁸

It is no wonder, given the dim prospects of equal protection for most of the past century, that lawyers representing sexual minorities historically relied more heavily on due process arguments. Bill Eskridge has shown that during the long period in which the “equal protection clause had no critical bite”¹⁴⁹ in the context of sexual orientation, due process often “came to the aid of gay people.”¹⁵⁰ Although courts were generally loath to protect gays and lesbians as such, they did sometimes “wield the libertarian features of the Constitution—the Due Process Clause and the First Amendment—to destabilize some of the more extreme or vicious policies”¹⁵¹ targeting sexual minorities, such as police entrapment of gay men in public bathrooms and the criminalization of cross-dressing.¹⁵² Thus, even when courts were not willing to recognize homosexuals as a social group entitled to wholesale protection under the Equal Protection Clause, they were sometimes willing to invalidate isolated policies that deprived even socially disfavored individuals of important rights.

This is why, when confronted in the mid-1980s with the choice of whether to challenge the constitutionality of sodomy laws on equal pro-

¹⁴⁸ See *Steffan*, 41 F.3d at 684 n.3 (quoting *Padula*, 822 F.2d at 103); see also *Equal Found.*, 128 F.3d at 292–93 (reaffirming its holding that “under *Bowers v. Hardwick* . . . and its progeny, homosexuals did not constitute either a ‘suspect class’ or a ‘quasi-suspect class’ because the conduct which defined them as homosexuals was constitutionally proscribable”); *High Tech Gays*, 895 F.2d at 571 (asserting “because homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes”); *Ben-Shalom*, 881 F.2d at 464 (“If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.”); *Woodward*, 871 F.2d at 1076 (“After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.”); Matthew Coles, *The Meaning of Romer v. Evans*, 48 *Hastings L.J.* 1343, 1357 (1997) (noting that although *Bowers* was a “case about strict scrutiny due process . . . it became the governing law on whether classifications which disadvantage lesbians and gay men are suspect under equal protection”).

¹⁴⁹ Eskridge, *supra* note 3, at 1200.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1214.

¹⁵² See *id.* at 1201–11 (examining a wide range of instances in which courts relied on due process to vindicate the rights of sexual minorities despite widespread social disapproval of homosexuals as a group).

tection or due process grounds, Larry Tribe opted for the latter.¹⁵³ Given the general animosity toward homosexuals in this period, “the only course that seemed viable to [Tribe] was to highlight the scary reach of Big Brother’s gaze and of his long, accusing arm into the most private of places and most intimate of relationships.”¹⁵⁴ Tribe hoped that by focusing on the state’s intrusion on the fundamental right to privacy, rather than on its discrimination against homosexuals as a class, he might persuade the Court to view the criminalization of sodomy as an issue that implicated the freedom of all Americans, not only gays and lesbians.¹⁵⁵ The Burger Court declined to make this leap; the majority in *Bowers* focused almost obsessively on “homosexual sodomy”¹⁵⁶ despite Tribe’s best efforts to steer the Justices’ attention away from the topic. But the fact that this strategy failed—and that the Justices in the majority “seemed to take umbrage at the idea that heterosexual relationships could have anything to do with homosexual ones”¹⁵⁷—vindicated Tribe’s assessment that the Court was in no way prepared, in the 1980s, to recognize homosexuals as a group warranting heightened concern under the Equal Protection Clause.

Of course, this does not mean gay rights advocates in the latter decades of the twentieth century did not make equal protection claims.¹⁵⁸ A number of legal scholars argued in the early 1990s that although the gay rights movement had been defeated in *Bowers*, a loss in the arena of due process did not mean “claims under the Equal Protection Clause

¹⁵³ When Tribe agreed to argue *Bowers*, another sodomy case, *Baker v. Wade*, was making its way through the federal courts. See 553 F. Supp. 1121 (N.D. Tex. 1982), rev’d, 769 F.2d 289 (5th Cir. 1985) (en banc). Unlike the sodomy statute in *Bowers*, which prohibited both same-sex and cross-sex sodomy, the statute in *Baker* prohibited only same-sex sodomy. Consolidating the cases would have foregrounded the equal protection claim; arguing *Bowers* alone would allow Tribe to concentrate on the due process claim. He chose the latter. For more on Tribe’s decision to pursue due process rather than equal protection, see Tribe, supra note 3, at 1951–53; Kenji Yoshino, Tribe, 42 Tulsa L. Rev. 961, 962–64 (2007).

¹⁵⁴ Tribe, supra note 3, at 1953.

¹⁵⁵ Id. at 1951–52.

¹⁵⁶ *Bowers*, 478 U.S. at 190.

¹⁵⁷ Yoshino, supra note 153, at 964.

¹⁵⁸ For a list of federal district courts that granted heightened scrutiny on the basis of sexual orientation (before having their rulings overturned) in the years after *Bowers*, see supra note 147. A handful of courts in this period also invalidated orientation-based state action under rational basis review. See, e.g., Meinhold v. U.S. Dep’t of Def., 34 F.3d 1469 (9th Cir. 1994); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991); Dahl v. Sec’y of the Navy, 830 F. Supp. 1319 (E.D. Cal. 1993).

should . . . *ipso facto*, be foreclosed.”¹⁵⁹ Indeed, as the next section shows, equal protection began to emerge in this era as an increasingly viable strategy for challenging laws that discriminated on the basis of sexual orientation.

Despite the changing prospects of equal protection, however, many proponents of gay rights in the 1990s continued to perceive an advantage in focusing on the fundamental rights guaranteed to everyone under due process, rather than on the constitutional protections due to gays and lesbians as a group. This focus was evident in much early same-sex marriage advocacy. In 1995, Evan Wolfson and other leading proponents of same-sex marriage founded an organization called Freedom to Marry,¹⁶⁰ which urged supporters to speak about marriage as “a basic human right and an individual personal choice,”¹⁶¹ rather than emphasizing the ways in which “traditional” marriage laws cemented a social status hierarchy. Some of the most prominent champions of same-sex marriage argued that marriage was good for gays because it was good for everyone: It was “civilizing,”¹⁶² it channeled sexuality into committed, monogamous relationships,¹⁶³ and it marked an individual as

¹⁵⁹ Nan D. Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 545 (1992); see also Sunstein, *supra* note 3, at 1163 (arguing that because due process and equal protection involve separate lines of analysis, the Court’s holding in *Bowers* ought not to preclude gay rights advocates from making equal protection claims).

¹⁶⁰ See Yoshino, *supra* note 3, at 793 (noting the significance of advocates’ decision to name this organization “Freedom to Marry” and to “argue for the ‘right to marry’ rather than for the right to ‘marriage equality’ or even the ‘right to gay marriage’”); see also Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. Rev. L. & Soc. Change 567, 580 (1994) (emphasizing “marriage’s central symbolic importance” in American society); Jonathan Rauch, *For Better or For Worse?*, *New Republic*, May 6, 1996, at 18, 19 (arguing that all adults need access to marriage because “marriage is society’s most fundamental institution”).

¹⁶¹ See Evan Wolfson, *Why We Should Fight for the Freedom to Marry*, 1 *J. of Gay, Lesbian & Bisexual Identity* 79, 82 (1996).

¹⁶² William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* 8 (1996); Rauch, *supra* note 160, at 22.

¹⁶³ See, e.g., Eskridge, *supra* note 162, at 9 (arguing that homosexuals could benefit from “a greater degree of domestication” and that “[i]t should not have required the AIDS epidemic to alert us to the problems of sexual promiscuity”); Rauch, *supra* note 160, at 23 (arguing that channeling gay men into marriage will ensconce them in “a web of expectations that they will spend nights together, go to parties together, take out mortgages together, buy furniture at Ikea together, and so on—all of which helps tie them together and keep them off the streets and at home”); Gabriel Rotello, *Creating a New Gay Culture: Balancing Fidelity & Freedom*, *Nation*, Apr. 21, 1997, at 11, 15 (“The core institution that encourages sexual restraint and monogamy is marriage.”).

fully mature and entitled to “social status and respect”¹⁶⁴ in the eyes of the community. In keeping with this theme, some of the more conservative proponents of same-sex marriage argued that gays and lesbians did not wish to disrupt the traditional regulation of the family, but rather, to subject themselves to it.¹⁶⁵ Indeed, some went so far as to embrace the notion that gay male sexuality constituted a danger to society and that same-sex marriage was necessary in order to cabin the threat.¹⁶⁶

Even as proponents of same-sex marriage began to develop these neo-traditionalist fundamental-rights arguments,¹⁶⁷ however, the cultural and

¹⁶⁴ Gabriel Rotello, *Sexual Ecology: AIDS and the Destiny of Gay Men* 252 (1997); see also Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* 20 (2004) (“Marriage confers status: to be married, in the eyes of society, is to be grown up.”); Sullivan, *supra* note 132, at 37 (asserting that marriage is “the way in which our families and friends reinforce us as human beings”).

¹⁶⁵ See, e.g., Rotello, *supra* note 163, at 16 (1997) (arguing “that marriage would provide status to those who married and implicitly penalize those who did not In a culture where unrestrained multipartnerism has produced ecological catastrophe, [this is] precisely what is needed”); Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* 112 (1995) (“Rather than liberating society from asphyxiating conventions, [marriage] actually harnesses one minority group—homosexuals—and enlists them in the conservative structures that liberationists find so inimical.”).

¹⁶⁶ See, e.g., Rauch, *supra* note 160, at 23 (arguing same-sex marriage would benefit society by ending a destructive “culture of furtive sex with innumerable partners in parks and bathhouses”); Rotello, *supra* note 163, at 12–14 (arguing marriage will help a dysfunctional gay culture “to embrace the whole human being, his spiritual and personal self, his humanity, his vocations, his dreams, and not just his muscles or his libido or his penis”).

¹⁶⁷ Despite the prominence of these fundamental-rights arguments, equality-based arguments were certainly not absent from same-sex marriage advocacy in the 1990s. Although Evan Wolfson and others in the national movement for same-sex marriage decided in the mid-1990s to prioritize arguments regarding the “freedom to marry,” rather than “marriage equality,” concerns about equality obviously underwrote much of their advocacy and played a nontrivial role in their arguments. See, e.g., Wolfson, *supra* note 161, at 81 (relying on an analogy between race-based and orientation-based discrimination to argue that restricting marriage to different-sex couples “deprives gay and lesbian people of a basic human right *and* brands us as inferior, second-class citizens, thus justifying and reinforcing stereotypes and prejudice as well as other discrimination” (emphasis added)). In fact, concerns about equality played a central role in the two most prominent same-sex marriage cases of the 1990s: *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); and *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999). In *Baehr*, the Hawaii Supreme Court held that restricting marriage to different-sex couples constituted discrimination on the basis of sex and should thus be subject to strict scrutiny under the state constitution. 852 P.2d at 67. In *Baker*, the Vermont Supreme Court held that denying same-sex couples the rights and benefits associated with marriage violated the state constitution’s Common Benefits Clause. 744 A.2d at 867. Neither case resulted in same-sex couples obtaining the right to marry. The Hawaii Supreme Court’s ruling in *Baehr* was superseded by a constitutional amendment that allowed the legislature to define marriage as the legal union between one man and one woman. See *supra* note 105. The Vermont legislature responded to the decision in *Baker* by granting same-sex couples the right to enter

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constitutional landscape was changing. As anti-gay stereotypes began to erode, courts began to raise questions about the constitutionality of state action premised on such stereotypes. This change did not happen all at once, but rather through an extended interchange between the courts, the coordinate branches of government, and the American people. Courts began, tentatively at first, and then more assertively, to hold that stereotyped conceptions of homosexuals as a threat to children and the family no longer served as a legitimate ground for lawmaking. As we shall see, this shift opened new possibilities for framing gay rights claims under the Fourteenth Amendment. If proponents of same-sex marriage had incentives in the twentieth century to argue that the institution of marriage was essential to a dignified adult life—so essential that even people who faced discrimination in myriad other contexts should have the right to partake in it—social and doctrinal changes would soon create a new, and quite different, constitutional framework for conceptualizing the right to marry.

B. Equal Protection Trial Balloons

In 1996, for the first time in history, and again in 2003, the Supreme Court invalidated laws that discriminated on the basis of sexual orientation under the Fourteenth Amendment.¹⁶⁸ In neither case did the Court hold that sexual orientation warrants heightened scrutiny under the Equal Protection Clause. The Court in *Romer v. Evans* purported to apply rational basis review;¹⁶⁹ *Lawrence v. Texas* was not even an equal protection case.¹⁷⁰ In both cases, the Court came in for criticism—not least from dissenting Justices—for seeming to elevate the level of scrutiny applied to orientation-based discrimination without acknowledging

civil unions, which entitled them to the public benefits associated with marriage, but still deprived them of the right to marry. See An Act to Create Civil Unions, Vt. Stat. Ann. tit. 15, §§ 1201–05 (2000) (partially repealed 2009). Although the Vermont court's reasoning about the common benefits provision applied only in that state, and courts outside Hawaii generally declined to adopt the sex discrimination argument, these cases demonstrate the emergence of equality-based reasoning at the state level in the 1990s and foreshadow the emergence of more robust and universally applicable forms of orientation-based equal protection law in the twenty-first century.

¹⁶⁸ See *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁶⁹ 517 U.S. at 631–32.

¹⁷⁰ 539 U.S. at 564 (analyzing whether state action violated petitioners' rights under the Due Process Clause).

it was doing so. But there were benefits to this obliqueness. It allowed the Court to initiate a conversation with the public and the coordinate branches of government about whether certain ways of regulating gays and lesbians might violate constitutional equality norms, and it enabled equal protection doctrine to develop in a manner that was responsive to the public's evolving understanding of homosexuality.

Romer concerned an amendment to the Colorado Constitution that prohibited state and local government entities from taking any action to shield gays, lesbians, or bisexuals from discrimination.¹⁷¹ The Court held the amendment unconstitutional for two reasons: (1) It abrogated the power of government to protect one particular group, and only that group, from discrimination—a move that was unprecedented and antithetical to the very notion of equal protection;¹⁷² and (2) the “sheer breadth” of the legal and social disabilities the amendment imposed on homosexuals was so discontinuous with its stated aims that it “seems inexplicable by anything but animus toward the class it affects.”¹⁷³ These were not, to put it mildly, well-established reasons for invalidating state action under the Equal Protection Clause.¹⁷⁴ In the years after *Romer*, academics produced a voluminous body of scholarship criticizing the Court's reasoning and/or attempting to identify the constitutional principle actually underlying its decision to invalidate Amendment 2.¹⁷⁵

¹⁷¹ Amendment 2, entitled “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation,” provided as follows:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. art. II, § 30b.

¹⁷² *Romer*, 517 U.S. at 627–31.

¹⁷³ *Id.* at 632.

¹⁷⁴ See Coles, *supra* note 148, at 1345 (discussing the novelty of the idea that “taking away the power of government to protect [a particular] group from discrimination” violates equal protection, and noting the Court “did not cite a single case in support of it”); *id.* (noting this novel idea had been suggested to the Court in an amicus brief by Larry Tribe, which also failed to cite any cases in which the Court had relied on this principle); Karlan, *supra* note 3, at 484 (arguing “there is a vacuum at the core of the Court's analysis” because “[a]ll sorts of laws reflect the majority's disapproval of (‘animus toward’) an unpopular group, and yet are constitutional”).

¹⁷⁵ See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 220 (1996) (arguing Amendment 2 violates the constitutional prohibition on

With the benefit of hindsight, it is easier to discern in *Romer* the outlines of a new constitutional principle that would later come to play a central role in cases involving discrimination on the basis of sexual orientation. But to recognize the outlines of this principle, it is necessary to look beneath the surface of the terse majority opinion.

Amendment 2 was the brainchild of Colorado for Family Values, an organization founded in response to the passage of gay rights ordinances in several of the state's more progressive municipalities.¹⁷⁶ This organization bore a distinct resemblance to Save Our Children, and its arguments in favor of Amendment 2 echoed those of Anita Bryant.¹⁷⁷ On the eve of the vote, proponents of the amendment distributed to 800,000 Colorado households a brochure that warned, in the starkest terms, of the dangers homosexuals presented to "traditional family values and structures."¹⁷⁸ In sections headed "Target: Children" and "Attack on the Family,"¹⁷⁹ the brochure informed voters that "[s]exual molestation of

bills of attainder); William N. Eskridge, Jr., Democracy, Kulturkampf, and the Apartheid of the Closet, 50 Vand. L. Rev. 419, 435 (1997) (suggesting *Romer* reflects a constitutional presumption against Kulturkampf); Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 Const. Comment. 257, 258 (1996) (asserting *Romer* prohibits the state from treating people as pariahs); Pamela S. Karlan, Just Politics? Five Not So Easy Pieces of the 1995 Term, 34 Hous. L. Rev. 289, 296 (1997) (arguing that, in *Romer*, the real "core of the injury to gays and lesbians concerned the political process," though the Court failed to ground its decision in its political participation precedents); Jane S. Schacter, *Romer v. Evans* and Democracy's Domain, 50 Vand. L. Rev. 361, 402–03 (1997) (arguing *Romer* bars state action that reinforces "[s]ocial disenfranchisement and caste-like practices"); Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 62–63 (1996) (suggesting the "underlying concern" in *Romer* "must be that a measure discriminating against homosexuals . . . is likely to reflect sharp 'we-they' distinctions and irrational hatred and fear, directed at who they are as much as what they do"); cf. Andrew Koppelman, *Romer v. Evans* and Invidious Intent, 6 Wm. & Mary Bill Rts. J. 89, 90 (1997) ("The Court's inference of unconstitutional animus was central to its holding, but almost no scholar who has read the opinion has been willing to believe that this was what really was going on.").

¹⁷⁶ For more on the history of Colorado for Family Values and the events that precipitated its formation, see Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law 95–103 (2010).

¹⁷⁷ George Chauncey notes that, "[i]n the twenty years after Anita Bryant's campaign in Miami, gay activists faced more than sixty antigay rights referenda around the country" and that "[n]ationwide, gay rights supporters lost almost three-quarters of them." Chauncey, *supra* note 56, at 46.

¹⁷⁸ Brief for Respondents at 7, *Romer*, 517 U.S. 620 (No. 94-1039) (quoting Colorado for Family Values campaign material).

¹⁷⁹ Robert F. Nagel, Playing Defense, 6 Wm. & Mary Bill Rts. J. 167, 192 (1997) (reproducing the brochure in its entirety).

children is a large part of many homosexuals' lifestyle,"¹⁸⁰ and that homosexuals are "18 times more likely to engage in sex with minors than heterosexuals."¹⁸¹ The brochure also warned that if the amendment failed, parents would be powerless to combat "the influence of homosexuals on their children,"¹⁸² as schools and daycares would be forced to hire gay teachers and to impart the lesson that homosexuality was an acceptable lifestyle choice.¹⁸³ After Amendment 2 passed, the state defended it in court by arguing, among other things, that it was necessary to protect "the physical and psychological well-being of our children."¹⁸⁴ The state contended that the amendment accomplished this goal both by promoting "heterosexual marriage as the foundation of a stable family unit"¹⁸⁵ and by helping "to avert unnecessary suffering for those [young people] who may be influenced relative to their sexual preference" if the government failed sufficiently to convey its disapprobation of homosexuality.¹⁸⁶

When the controversy over Amendment 2 reached the Supreme Court, gay rights advocates flooded the Justices with briefs refuting these claims and demonstrating how efforts to enforce "traditional family values" reinforced anti-gay stereotypes and fueled discrimination against homosexuals. Armed with studies on the actual incidence of child molestation in the United States, lawyers challenging the amendment argued that "[g]ay men and lesbians are stereotyped frequently but erroneously as child molesters," and that the vast majority of child molestation was actually committed by people who identified as heterosex-

¹⁸⁰ Id. at 193.

¹⁸¹ Id.

¹⁸² Id. at 198.

¹⁸³ Id. at 193.

¹⁸⁴ Brief of American Bar Ass'n as Amicus Curiae in Support of Respondents at 15, *Romer*, 517 U.S. 620 (No. 94-1039) [hereinafter ABA Brief] (quoting defendants' trial brief). Interestingly, the state modified its statement of this interest in the brief it submitted to the Supreme Court. In that brief, the state asserted Amendment 2 was necessary to protect parents' right to inculcate traditional moral values in their children—thereby demonstrating the way in which justifications for discrimination against gays and lesbians evolve over time but continue to draw on stereotypes of homosexuals as sexual predators. See Brief for Petitioners at 46, *Romer*, 517 U.S. 620 (No. 94-1039). For analysis of this phenomenon, which Reva Siegel has called "preservation through transformation," see Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2178–87 (1996) (arguing that when a social movement successfully contests the justification for a status regime, the regime will translate the justification into more socially acceptable terms).

¹⁸⁵ ABA Brief, *supra* note 184, at 16.

¹⁸⁶ Id. (alteration in original).

ual.¹⁸⁷ Historian George Chauncey testified at trial about the ways in which Amendment 2, and the campaign that generated it, reinforced conceptions of homosexuals as a threat to children and the family, and explained how these conceptions had been used over the past half-century to deprive gays and lesbians of equal citizenship.¹⁸⁸ Opponents of Amendment 2 drew on this material in the brief they submitted to the Court, arguing that equal protection precluded the state from perpetuating this history of discrimination.¹⁸⁹

The Court's decision to begin its opinion in *Romer* with a quotation from Justice Harlan's famous dissent in *Plessy v. Ferguson* evinced no small sympathy for this argument.¹⁹⁰ Yet the Court was clearly hesitant in *Romer* to articulate a constitutional principle that would, at least potentially, invalidate vast amounts of legislation currently on the books¹⁹¹—or, in the case of DOMA, currently being made. Consider how differently the Court spoke about equal protection in *United States v. Virginia*,¹⁹² which it decided the same term as *Romer*. The Court characterized its decision to invalidate Virginia Military Institute's ("VMI") male-only admissions policy as a "respon[se] to volumes of history"¹⁹³ in which women were treated as second-class citizens and subject to discrimination based on stereotyped conceptions of their sex and family roles. After recounting this history at some length, the Court held that the exclusion of women from VMI violated equal protection because it

¹⁸⁷ Brief for Respondents, supra note 178, at 48 n.33 ("Much of the material about gays as pedophiles, used in the anti-gay rights initiatives across the country, was generated by the Family Research Institute and its founder, Paul Cameron, a psychologist . . . [who] has been sanctioned by the American Psychological Association, the American Sociological Association, and the Nebraska Psychological Association for unethical conduct and the misuse of data.").

¹⁸⁸ See Brief of American Psychological Ass'n et al. as Amici Curiae in Support of Respondents at 19 n.64, *Romer*, 517 U.S. 620 (No. 94-1039) (referencing Chauncey's testimony); see also Lisa Keen & Suzanne B. Goldberg, *Strangers to the Law: Gay People on Trial* 87 (1998) (discussing and quoting Chauncey's testimony).

¹⁸⁹ See, e.g., Brief for Respondents, supra note 178, at 48; id. at 4 n.4 (discussing the history of discrimination against homosexuals in the United States).

¹⁹⁰ *Romer*, 517 U.S. at 623 (quoting Justice Harlan's admonition that the Constitution "neither knows nor tolerates classes among citizens" (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion))).

¹⁹¹ See Nussbaum, supra note 176, at 113 (observing that "*Romer* is a narrow holding, which offers little guidance for future antidiscrimination cases involving sexual orientation").

¹⁹² 518 U.S. 515 (1996).

¹⁹³ Id. at 531.

“perpetuate[d these] historical patterns of discrimination.”¹⁹⁴ The Court in 1996 was not prepared to articulate a similarly robust anti-stereotyping principle in the context of sexual orientation; hence the question-begging, anti-moral-disapproval principle on which it purported to rely.

But what the Court’s decision in *Romer* lacked in analytic clarity, it made up for in flexibility. Deciding *Romer* as it did enabled the Court to invalidate a particularly egregious instance of discrimination against gays and lesbians, but did not commit it to doing so in every case. In the context of sexual orientation, unlike in the context of sex, the Court was not willing to grant wholesale constitutional protection against discrimination. But its rejection of Colorado for Family Values’ political handiwork was a tentative first step toward the conclusion that equal protection bars state action that reflects or reinforces stereotyped conceptions of gays and lesbians as a threat to one’s “grandkids.”¹⁹⁵

If the Court in *Romer* cabined its equal protection holding by relying, ostensibly at least, on a novel and not entirely satisfying form of constitutional reasoning, it cabined its discussion of equality in *Lawrence* by encasing it in a due process holding. The Court in *Lawrence* struck down Texas’s prohibition of same-sex sodomy on the ground that it encroached on important liberty and privacy interests protected by the Due Process Clause.¹⁹⁶ Despite this doctrinal casing, however, the Court in *Lawrence* expressed deep concern about the fact that the Texas law imposed “stigma” on gays and lesbians,¹⁹⁷ “demean[ed]” them,¹⁹⁸ and deprived them of the “respect” they deserved.¹⁹⁹ It observed that when the state criminalizes homosexual conduct, “that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”²⁰⁰ The themes of stigma and respect, and this concern about class-based discrimination,²⁰¹ are hall-

¹⁹⁴ Id. at 542 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)).

¹⁹⁵ The campaign slogan of Will Perkins, the Colorado Springs Chrysler dealer who spearheaded Colorado for Family Values’ efforts to pass Amendment 2, was: “I’m doing this for my grandkids.” Stephen Bransford, *Gay Politics vs. Colorado and America: The Inside Story of Amendment 2*, at 32 (1994).

¹⁹⁶ *Lawrence*, 539 U.S. at 578–79 (2003).

¹⁹⁷ Id. at 575.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ See Case, “This” and “That,” *supra* note 29, at 91–92 (observing that the fact that the law in *Bowers* targeted homosexuals prompted the Court to uphold it, while the fact that the

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marks not of the Court's due process jurisprudence, but of its equal protection decisions. As many scholars have noted, *Lawrence* was a constitutional hybrid, drawing on both strands of Fourteenth Amendment doctrine.²⁰² But as in *Romer*, the Court formally cabined its discussion of equality in such a way that it would not henceforth be required to treat all laws that discriminate on the basis of sexual orientation as constitutionally suspect.

In his Harvard Foreword on the Court's 2002 Term, Robert Post argued that by casting *Lawrence* as a due process, rather than an equal protection, decision, the Court was able "to enter into the national debate about the status of homosexuality in a manner that stresse[d] the positive value of nondiscrimination while preserving [its] options in deciding how far it [wa]s willing to go in striking down legislation adversely affecting homosexuals."²⁰³ Due process enabled the Court to confine its holding to one particular right, rather than declaring all forms of discrimination against gays and lesbians constitutionally suspect. Yet despite these doctrinal limitations, *Lawrence* implicitly called into question the constitutionality of the longstanding legal regime under which gays and lesbians were governed. Texas's sodomy statute was enacted in the early 1970s in response to the increased visibility of gay communities in the state's major cities.²⁰⁴ It was intended to protect children and families from the threat these communities ostensibly posed. But the Court in *Lawrence* rejected this reasoning. It suggested that the sodomy statute itself was a threat to domestic relationships—only this time, for the first time ever, the Court suggested that the bonds that required protection were those between same-sex couples.²⁰⁵ In so doing, the Court flipped the "traditional family values" ideology on its head: It rejected the notion that homosexuals constitute a threat to the family and held that a

law in *Lawrence* did the same prompted the Court to invalidate it, and asserting that "[i]f there is a sea change, this might be it: gay people may not be 'us' but they are fellow 'citizens' with a dignitary interest worthy of the Court's solicitude").

²⁰² See, e.g., Pamela S. Karlan, Foreword: Loving *Lawrence*, 102 Mich. L. Rev. 1447, 1458–59 (2004); Karst, *Liberties*, supra note 3, at 136–42; Robert C. Post, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts and Law, 117 Harv. L. Rev. 4, 97–100 (2003); Tribe, supra note 3, at 1902–07.

²⁰³ Post, supra note 202, at 101.

²⁰⁴ See Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* 11–12 (2012); Eskridge, supra note 89, at 302–05.

²⁰⁵ *Lawrence*, 539 U.S. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.").

law designed to protect a single heteronormative conception of sexuality was constitutionally suspect, in part because it interfered with the intimate relationships of gays and lesbians.²⁰⁶

Katherine Franke has criticized *Lawrence* for extending to sexual minorities only a “domesticated”²⁰⁷ form of liberty. She suggests the Court had to (re)imagine the two men in *Lawrence* as engaged in a loving, long-term relationship before it felt comfortable extending them constitutional protection.²⁰⁸ There is certainly something to this critique; sexual conduct between members of the same sex has been known to make the Court squeamish.²⁰⁹ From the standpoint of equal protection, however, there is also something potentially subversive about the domestic tableau the Court conjured up in *Lawrence*. After nearly a century of discrimination predicated on the notion that gays and lesbians constitute a threat to the family, the Court had begun to change its mind about what

²⁰⁶ Justice Scalia protested vigorously against the Court’s rejection of traditional anti-gay stereotypes and its reconceptualization of what constitutes harm and what constitutes protection when it comes to homosexuals and the family. See *id.* at 602 (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children, as teachers in their children’s schools or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be im-moral and destructive. The Court views it as ‘discrimination’ which it is the function of our judgments to deter.”).

²⁰⁷ Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *Colum. L. Rev.* 1399, 1400 (2004).

²⁰⁸ *Id.* at 1408 (“In two paragraphs, Justice Kennedy does a thorough job of domesticating John Lawrence and Tyron Garner—Lawrence an older white man, Garner a younger black man, who for all we know from the opinion, might have just been tricking with each other. Did they even know each other’s name at the point police entered Lawrence’s apartment? Did they plan on seeing each other again? None of these facts is in the record, none of the briefing in the case indicated that they were in a relationship. Nevertheless, the Court took it as given that Lawrence and Garner were in a relationship, and the fact of that relationship does important normative work in the opinion. Remember, sex is but one element in a personal bond that is more enduring.”). In fact, Dale Carpenter suggests that Lawrence and Garner were not even engaged in sexual activity when the police barged into Lawrence’s apartment and arrested the two men. See Carpenter, *supra* note 204, at 70–74. The (possible) absence of any kind of intimate relationship between the petitioners in *Lawrence* renders Franke’s observations about the Court’s hypothesizing of a long-term, loving relationship between the two all the more pointed.

²⁰⁹ See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76–77 (1998) (declining to describe an incident of male-on-male sexual assault, saying only: “The precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally”); see also Carpenter, *supra* note 204, at 13 (noting that courts in sodomy cases have frequently been reticent to discuss the issue, and citing one Kentucky court that simply said: “It is not necessary to set out the revolting facts” (internal quotation marks omitted)).

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really constitutes a threat to Americans' intimate and domestic lives. Its decision in *Lawrence* was an invitation to the public and the other branches of government to consider how efforts to preserve "traditional" conceptions of sexuality and the family might violate the equality of gays and lesbians and infringe on freedoms that belong to all Americans. But it did not press the equal protection point so far that it could not reverse course if others, inside and outside the government, declined to take up this project.²¹⁰

*C. "A Classic Equal Protection Issue"*²¹¹

In the decade since the Court decided *Lawrence*, the American public and all three branches of government have embraced the notion that anti-gay discrimination implicates constitutional equality concerns to a degree scarcely imaginable even ten years ago. Over the past decade, equal protection has emerged as the dominant framework for analyzing and adjudicating gay rights claims under the Fourteenth Amendment. *Lawrence's* overruling of *Bowers*²¹² facilitated this shift: The state's ability to criminalize same-sex sodomy had presented a major obstacle to the development of orientation-based equal protection law. But even more important than the fall of this doctrinal barrier to equal protection has been the enormous change in social attitudes toward homosexuality. In the 1990s, courts routinely dismissed the notion that gays and lesbians had suffered a history of discrimination sufficient to trigger heightened scrutiny. By 2012, the notion that gays and lesbians had faced significant discrimination in both the public and private spheres had become sufficiently well-accepted that the Second Circuit could declare the question "not much in debate."²¹³ In the past few years, all three branch-

²¹⁰ Post, supra note 202, at 104–05 ("The Court has advanced a powerful and passionate statement that is plainly designed to influence the ongoing national debate about the constitutional status of homosexuality. But the Court has not committed itself to the full consequences of its position. It has crafted its opinion so as to allow itself flexibly to respond to the unfolding nature of public discussion.").

²¹¹ See Katharine Q. Seelye, Marriage Law Is Challenged as Equaling Discrimination, N.Y. Times, May 7, 2010, at A16 (quoting Mary Bonauto, director of the civil rights project for Gay and Lesbian Advocates and Defenders ("GLAD"), who has long emphasized the equality dimensions of same-sex marriage).

²¹² *Lawrence*, 539 U.S. at 578.

²¹³ *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012); see also *Griego v. Oliver*, 316 P.3d 865, 882 (N.M. 2013) (asserting that the question of whether gays and lesbians "have been subjected to a history of purposeful unequal treatment is not fairly debatable").

es of government have sought in various ways to repudiate this history of discrimination and to discontinue laws and practices that perpetuate it.

DADT and DOMA have both been casualties of these efforts. In 2010, after a federal district court in California enjoined the enforcement of DADT,²¹⁴ the Department of Defense (“DOD”) commissioned a comprehensive review of the policy.²¹⁵ The DOD working group charged with completing this review solicited the views of nearly 400,000 servicemembers and 150,000 military spouses.²¹⁶ Some respondents expressed concerns similar to those that had motivated the law’s passage: that gay servicemembers “would behave as sexual predators and make unwelcome sexual advances on heterosexuals,”²¹⁷ and that “‘exposing’ their children to the ‘gay lifestyle’” would interfere with parents’ attempts to inculcate traditional family values.²¹⁸ Unlike in 1993, however, the DOD concluded that these concerns “were based on stereotype,”²¹⁹ and did not justify the military’s gag rule. Relying on the DOD’s report, the 111th Congress repealed DADT,²²⁰ observing that the law had been “‘driven by misperceptions and stereotypes’” that could no longer justify forcing gay and lesbian servicemembers into the closet.²²¹ In so doing, Congress explicitly repudiated the anti-gay stereotypes that had driven a previous Congress, not twenty years earlier, to enact the law in the first place.

While Congress was in the process of repealing DADT, courts began to conclude that DOMA too perpetuated traditional stereotyped conceptions of gays and lesbians. Between 2010 and 2013, nearly a dozen fed-

²¹⁴ *Log Cabin Republicans v. United States*, 716 F. Supp 2d 884, 888 (C.D. Cal. 2010).

²¹⁵ See Report of the Department of Defense Working Group That Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., “Policy Concerning Homosexuality in the Armed Forces”: Hearings Before the S. Comm. on Armed Servs., 111th Cong. 2–4 (2010) [hereinafter DADT Repeal Hearings] (statement of Sen. Carl Levin, Chairman, S. Comm. on Armed Servs.).

²¹⁶ U.S. Dep’t of Def., Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell” 1–2 (2010) [hereinafter DOD Report], available at [http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf).

²¹⁷ *Id.* at 122.

²¹⁸ *Id.* at 55.

²¹⁹ *Id.* at 13.

²²⁰ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

²²¹ DADT Repeal Hearings, *supra* note 215, at 3 (statement of Sen. Levin) (quoting DOD Report, *supra* note 216).

eral courts ruled Section 3 of DOMA unconstitutional, either on its face or as applied, generally on the ground that it violated equal protection.²²² While the Court in *Romer* and *Lawrence* had been hesitant to hold that discrimination on the basis of sexual orientation warrants special scrutiny under the Equal Protection Clause, federal courts a decade later no longer felt so constrained. These courts situated DOMA in the context of “a long history of anti-gay discrimination”²²³ that began in the period “[b]etween the 1920s and the 1950s”²²⁴ when the government sought to expel homosexuals from the public square. Drawing on the legislative history of the statute,²²⁵ courts concluded that DOMA was a product of the same stereotypes that gave rise to these earlier forms of anti-gay state action. In 1996, as in 1956, state actors had justified discrimination against gays and lesbians by depicting them as a threat to “the American family.”²²⁶ But courts in the DOMA cases explicitly rejected this suggestion and held that such notions were no longer a constitutionally licit ground for lawmaking.

²²² See *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012); *In re Levenson*, 560 F.3d 1145, 1151 (9th Cir. 2009); *Pederson v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 347 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012); *Dragovich v. U.S. Dep’t of Treasury*, 764 F. Supp. 2d 1178, 1192 (N.D. Cal. 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010); *In re Balas*, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011).

²²³ *Pederson*, 881 F. Supp. 2d at 318.

²²⁴ *Id.* at 315 (quoting historian George Chauncey, who served as an expert witness in the case) (internal quotation marks omitted); see also *Golinski*, 824 F. Supp. 2d at 985 (asserting “lesbians and gay men have experienced a long history of discrimination” and citing the testimony of George Chauncey). Chauncey has testified as an expert, either at trial or through declaration, in most of the recent cases in which courts ruled § 3 of DOMA unconstitutional. See, e.g., Expert Affidavit of George Chauncey, Ph.D., *Pedersen*, 881 F. Supp. 2d 294 (No. 3:10-cv-01750-VLB); Declaration of George Chauncey in Support of Plaintiffs’ Motion for Summary Judgment or Summary Adjudication, *Dragovich*, 764 F. Supp. 2d 1178 (No. CV 4:10-01564-CW); Expert Affidavit of George Chauncey, Ph.D., *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435); Expert Affidavit of George Chauncey, Ph.D., *Gill*, 699 F. Supp. 2d 374 (No. 09-10309); Affidavit of George Chauncey, Ph.D., *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (No. 09-11156).

²²⁵ See, e.g., *Gill*, 699 F. Supp. 2d at 378–79 (“In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality They argued that marriage by gays and lesbians would ‘demean’ and ‘trivialize’ heterosexual marriage and might indeed be ‘the final blow to the American family.’”).

²²⁶ *Id.* at 379 (quoting 142 Cong. Rec. H7276 (daily ed. July 11, 1996) (statement of Rep. Steven Largent)); *Golinski*, 824 F. Supp. 2d at 990 (same).

In the summer of 2013, the Court in *United States v. Windsor* struck Section 3 of DOMA from the United States Code.²²⁷ Like the federal courts that preceded it, the Court cited DOMA's legislative history as evidence that its "purpose [wa]s to impose inequality"²²⁸ on gays and lesbians. Indeed, the Court concluded that Congress's stated "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws"²²⁹ was just another way of expressing disapproval of homosexuality, and thus failed to comport with equal protection.²³⁰ If *Romer* and *Lawrence* raised questions about the constitutionality of orientation-based state action that seeks to enforce "traditional family values," *Windsor* goes some way toward answering those questions. It suggests that equal protection bars the state from seeking to enforce "traditional (especially Judeo-Christian) moral[]"²³¹ views about sexuality, gender, and the family when those views perpetuate the secondary status of gays and lesbians in the American legal system.

Justices Scalia and Alito accuse the Court in *Windsor* of throwing "caution and humility"²³² to the wind and arrogating to itself powers that properly lie with the people. They characterize the majority's decision as a gross exercise of "black-robed supremacy"²³³ by an institution that has "an exalted conception"²³⁴ of its role in American democracy and sees no need to consult the people or the elected branches when interpreting the Constitution. This is a strange charge to levy at the Court in relation to its recent gay rights jurisprudence. One of the most notable aspects of this jurisprudence has been its considerable attentiveness and solicitousness to the views of the American people and the actions of the legislative and executive branches. The Court invalidated DOMA only after Congress had repealed DADT and rejected the stereotyped conceptions

²²⁷ 133 S. Ct. 2675, 2696 (2013).

²²⁸ *Id.* at 2694.

²²⁹ *Id.* at 2693.

²³⁰ *Id.* at 2693–94 (noting "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was its essence," and suggesting this preference for heterosexuality "raises a most serious question under [equal protection]").

²³¹ *Id.* at 2693.

²³² *Id.* at 2715 (Alito, J., dissenting).

²³³ *Id.* at 2698 (Scalia, J., dissenting).

²³⁴ *Id.*; see also Jillian Rayfield, Scalia: "It's Not Up to the Court to Invent New Minorities," *Salon* (Aug. 20, 2013), http://www.salon.com/2013/08/20/scalia_its_not_up_to_the_courts_to_invent_new_minorities/ (reporting on comments made by Justice Scalia shortly after the Court's decision in *Windsor*).

of gays and lesbians that fueled the passage of both pieces of legislation. By the time DOMA reached the Court, it had been repudiated by the President who signed it,²³⁵ the Representative who authored it,²³⁶ and many of those who voted for it.²³⁷ So anathema was DOMA to the Obama administration that the Justice Department took the unusual step of refusing to defend it in court. In announcing this decision, Attorney General Eric Holder noted that “the legislative record underlying DOMA’s passage . . . contains numerous expressions . . . [of] precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.”²³⁸ To better combat such stereotyping, Holder argued that courts should apply heightened scrutiny when assessing the constitutionality of laws that discriminate on the basis of sexual orientation.²³⁹

These developments reflect a sea change in American attitudes toward homosexuality. By the time *Windsor* reached the Court, a majority of Americans supported same-sex marriage²⁴⁰ and a supermajority believed employers should be prohibited from discriminating on the basis of sexual orientation.²⁴¹ If *Romer* and *Lawrence* were “opening

²³⁵ Peter Baker, Now in Defense of Gay Marriage, Bill Clinton, N.Y. Times, Mar. 26, 2013, at A1.

²³⁶ Bob Barr, Op-Ed., Wedding Blues, L.A. Times, Jan. 5, 2009, at A13.

²³⁷ See David Weigel, The Supreme Court and the End of Gay Marriage Bans, Slate (June 26, 2013), http://www.slate.com/blogs/weigel/2013/06/26/the_supreme_court_and_the_end_of_gay_marriage_bans.html (noting that prior to the Court’s decision in *Windsor*, “scores of representatives had apologized for DOMA”).

Polling data in the weeks before the Court decided *Windsor* indicated that a significant majority of the American public also supported the invalidation of DOMA. See CNN & ORC Int’l, Poll 7, at 4 (June 11–13, 2013), <http://i2.cdn.turner.com/cnn/2013/images/06/20/rel7d.pdf> (noting that sixty percent of Americans believe that the federal government should recognize same-sex marriages lawfully performed by states); Wash. Post & ABC News, Poll (June 5–9, 2013), <http://apps.washingtonpost.com/g/page/politics/washington-post-abc-news-poll-june-5-to-9/224> (noting that sixty-three percent of Americans believe that the federal government should provide the same benefits to same-sex couples who are lawfully married that it provides to other married couples).

²³⁸ Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Holder Letter].

²³⁹ Id. (describing a “significant history of purposeful discrimination against gay and lesbian people . . . based on prejudice and stereotypes that continue to have ramifications today”).

²⁴⁰ See sources cited supra note 141.

²⁴¹ See Jeff Krehely, Polls Show Huge Public Support for Gay and Transgender Workplace Protections, Ctr. for Am. Progress (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender->

bid[s]”²⁴² in a national conversation about the constitutionality of discrimination against gays and lesbians, they triggered a sufficiently positive reaction that by the time the Court decided *Windsor*, it was responding to, rather than dictating, a view that such discrimination violates constitutional equality principles.²⁴³

In his dissent in *Windsor*, Justice Scalia predicted that state laws restricting marriage to different-sex couples will be the next form of regulation to fall under the Court’s new constitutional approach to gay rights.²⁴⁴ Scalia has a good track record in this area,²⁴⁵ and he is almost certainly right in this case as well. Federal district courts and state courts have already begun to invalidate such laws at a remarkably fast clip²⁴⁶—

workplace-protections/ (noting that seventy-three percent of voters support workplace protections for gay and transgender workers and that this support cuts across party lines).

²⁴² Post, supra note 202, at 104.

²⁴³ See *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *12 (W.D. Ky. Feb. 12, 2014) (“In *Romer*, *Lawrence*, and finally, *Windsor*, the Supreme Court has moved interstitially, as Holmes said it should, establishing the framework of cases from which district judges now draw wisdom and inspiration. Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled.”).

²⁴⁴ *Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting) (pointing out that if the federal government has no legitimate interest in protecting “traditional” marriage, and may not “de-mean” homosexual relationships by suggesting they are unequal to heterosexual relationships, it is very hard to see why states should be constitutionally permitted to maintain their prohibitions of same-sex marriage).

²⁴⁵ See *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (“[T]he Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Do not believe it.”).

²⁴⁶ See, e.g., *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105, at *1 (M.D. Pa. May 20, 2014) (striking down Pennsylvania’s prohibition of same-sex marriage); *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC, 2014 WL 2054264, at *1 (D. Or. May 19, 2014) (striking down Oregon’s prohibition of same-sex marriage); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *1 (D. Idaho May 13, 2014) (striking down Idaho’s prohibition of same-sex marriage); *Deboer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *1 (E.D. Mich. Mar. 21, 2014) (striking down Michigan’s prohibition of same-sex marriage); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *1 (W.D. Tex. Feb. 26, 2014) (striking down Texas’s prohibition of same-sex marriage); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680, at *1–2 (N.D. Ill. Feb. 21, 2014) (striking down Illinois’s prohibition of same-sex marriage, but limiting its holding to Cook County); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (striking down Virginia’s prohibition of same-sex marriage); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1258 (N.D. Okla. 2014) (striking down Oklahoma’s prohibition of same-sex marriage); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1188 (D. Utah 2013) (striking down Utah’s prohibition of same-sex marriage); *Wright v. State*, No. 60CV-13-2662, slip op. at 13 (Ark. Cir. Ct. May 9, 2014) (striking down Arkansas’s prohibition of same-sex marriage); *Garden State Equal. v. Dow*, 79 A.3d 1036, 1039 (N.J. 2013) (declining to stay a trial court order directing state officials to

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and “sometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.”²⁴⁷ Part III asks what difference it makes that laws restricting marriage to different-sex couples are being invalidated now—after the development of the constitutional equality doctrine examined in the preceding sections.

III. THE MEANING OF THE MARRIAGE CASES

United States v. Windsor was (at least in part) an equal protection decision—about that, lower courts are in agreement.²⁴⁸ But when it comes

grant marriage licenses to same-sex couples); *Griego v. Oliver*, 316 P.3d 865, 872 (N.M. 2013) (striking down New Mexico’s prohibition of same-sex marriage).

Courts have also issued pro-plaintiff opinions in a number of other post-*Windsor* cases challenging states’ non-recognition of same-sex marriages validly entered into in other jurisdictions. See, e.g., *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525, at *1–2 (M.D. Tenn. Mar. 14, 2014) (enjoining enforcement of Tennessee’s anti-recognition provisions on equal protection grounds, but only with respect to the six plaintiffs); *Bourke*, 2014 WL 556729 at *1, *12 (finding state’s non-recognition provision unconstitutional, and suggesting state’s prohibition on performing same-sex marriages within its border may be unconstitutional as well); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (finding that state’s non-recognition provision violates due process and equal protection, but limiting its ruling to the recognition of valid out-of-state marriages on Ohio death certificates).

²⁴⁷ *Bourke*, 2014 WL 556729, at *12.

²⁴⁸ 133 S. Ct. 2675 (2013). The consensus on this point is not too surprising: The Court held in *Windsor* that DOMA “violates basic due process and equal protection principles applicable to the Federal Government,” 133 S. Ct. at 2693, and its opinion is replete with equality rhetoric. Nonetheless, Justice Scalia was not entirely wrong when he suggested that the Court could have been clearer about the doctrinal underpinnings of its holding. He put it (perhaps more strongly than is warranted) like this: “The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) . . .” *Id.* at 2707 (Scalia, J. dissenting). This Part discusses the equal protection and due process components of recent same-sex marriage jurisprudence, but it may be worth saying a few words about *Windsor*’s discussion of federalism. Justice Scalia was, again, almost surely right when he predicted that the discussion of federalism at the start of *Windsor* would not ultimately, or even in the short run, preclude the Court from recognizing a constitutional right to marry for same-sex couples. For a start, the Court declined to rest its holding on federalism grounds. *Id.* at 2692 (“[I]t is unnecessary to decide whether [DOMA’s] intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”). It also repeatedly noted that state authority over marriage is “subject to constitutional guarantees.” *Id.* Not one of the many lower courts that have thus far considered the constitutionality of same-sex marriage bans post-*Windsor* has suggested that concerns about federalism trump (what they now believe to be) the constitutional right of same-sex couples to marry. See, e.g., *Deboer*, 2014 WL 1100794, at *16 (finding that the federalism argument “is just as ineffectual now as it was in *Loving*”); *Bishop*, 962 F. Supp. 2d at 1279 (suggesting “the ‘states rights’ portion of the *Windsor* decision stands for the unremarkable proposition that a state has broad authority to regulate marriage, so long as it does

to the formal doctrinal aspects of the holding, that is where the agreement ends. Some courts have concluded that the *Windsor* Court applied heightened scrutiny;²⁴⁹ others have found that it applied intermediate scrutiny.²⁵⁰ Still others have determined that the Court applied rational basis review²⁵¹—or perhaps the “more searching form of rational basis review”²⁵² known colloquially as rational basis with bite. Yet regardless of where they stand on the scrutiny question, all of the courts that have considered the question of same-sex marriage post-*Windsor* have reached the same conclusion: Laws depriving gays and lesbians of equal access to marriage are no longer constitutionally permissible. Courts’ uniformity on this point, in the face of widely varying opinions regarding the standard of review, suggests that formal doctrinal categories are far less important in this context than substantive constitutional principles. In the words of the district court that struck down Oklahoma’s ban on same-sex marriage: There may not be a “precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one.”²⁵³ Courts today talk differently about the rights of gays and lesbians under the Fourteenth Amendment than they used to. This “rhetorical shift” reflects an emerging consensus that, in

not violate its citizens’ federal constitutional rights”); *Kitchen*, 961 F. Supp. 2d at 1215–16 (noting that Utah’s attorneys made the same federalism arguments in defense of the state’s same-sex marriage ban that Virginia’s attorneys made in *Loving*, and concluding that these arguments are no more persuasive today than they were fifty years ago because federalism concerns do not trump rights protected by the Fourteenth Amendment). As these decisions suggest, federalism arguments are unlikely to save state bans on same-sex marriage in the face of an emerging consensus that such bans violate due process and equal protection.

²⁴⁹ See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014).

²⁵⁰ See, e.g., *Griego*, 316 P.3d at 884.

²⁵¹ Courts that have relied on rational basis review to strike down laws barring same-sex marriage post-*Windsor* have tended to settle on this standard after concluding that *Windsor* was unclear on this point and that the issue need not be resolved because same-sex marriage bans violate even rational basis. See, e.g., *Bourke*, 2014 WL 556729, at *4–5 (applying rational basis after concluding that *Windsor* did not definitively apply heightened scrutiny and that “the result in this case is unaffected by the level of scrutiny applied”).

²⁵² *SmithKline*, 740 F.3d at 483 (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003)). The Ninth Circuit ultimately concluded in *SmithKline* that *Windsor* applied heightened scrutiny, see *id.* at 481, but other courts have read *Windsor* as a rational-basis-with-bite decision—falling short of heightened scrutiny, but somewhere north of traditional rational basis. See, e.g., *Kitchen*, 961 F. Supp. 2d at 1208 (“The [*Windsor*] Court did not analyze the legitimate interests cited by DOMA’s defenders as would be typical in a rational basis review.”).

²⁵³ *Bishop*, 962 F. Supp. 2d at 1296.

the context of sexual orientation, “[t]he Constitution cannot countenance ‘state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.’”²⁵⁴

This Part examines what this changing constitutional backdrop has meant for the adjudication of same-sex marriage cases. Most notably, it has meant that courts do not treat the marriage question as isolated or exceptional, but rather, as embedded in a larger set of social, political, and legal changes. The invalidation of laws restricting marriage to different-sex couples is part of the dismantling of an entire social status regime in which gays and lesbians rank as second-class citizens. Extending marriage rights to same-sex couples on the same terms as different-sex couples is part of a broader equality project founded on the notion that discrimination on the basis of sexual orientation violates core constitutional values.

Courts’ repudiation of the long history of discrimination against gays and lesbians is often couched in equal protection terms, but this Part shows that it also has implications for how courts understand the liberty at stake in the marriage question. There are different ways of thinking about liberty in this context. One approach emphasizes the centrality of the institution of marriage. This approach suggests that marriage is deeply rooted in the history and traditions of the nation and that gays and lesbians should have the right to enter the institution for the same reasons others do: It is a way of signaling to the community one’s commitment to another person; it enhances one’s social and legal standing; it increases social stability; it decreases dependence on the government; and it benefits children. As we have seen, some advocates of same-sex marriage have deployed arguments of this kind,²⁵⁵ and some former opponents of same-sex marriage have begun to make similar arguments today.²⁵⁶

But as courts in recent years have begun to invalidate laws restricting marriage to different-sex couples, they have often conceptualized the liberty interest involved in a different way. Instead of simply venerating traditional marriage, this approach adopts a critical stance toward the relevant history. Courts have noted that “times can blind us to certain truths”²⁵⁷ and that sometimes only “later generations can see that laws

²⁵⁴ *SmithKline*, 740 F.3d at 486 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994)).

²⁵⁵ See supra notes 160–66 and accompanying text.

²⁵⁶ See supra notes 11–28 and accompanying text.

²⁵⁷ *Lawrence*, 539 U.S. at 579.

once thought necessary and proper in fact serve only to oppress.”²⁵⁸ The Court in *Windsor* observed that, in the past, “marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.”²⁵⁹ But now, Americans have gained “a new perspective”;²⁶⁰ they have come to recognize that this traditional model of marriage and sexuality is not right for everyone, and that the state has no interest in trying to funnel its citizens into heterosexual unions. In fact, courts have repeatedly concluded in recent same-sex marriage cases that efforts to recruit or coerce people into heterosexuality or different-sex marriage by stigmatizing the alternatives cause serious harm—to individuals of all ages and to society itself. They have held that due process prohibits the enforcement of this prescriptive conception of sexuality and the family, as it infringes people’s liberty to make certain “deeply personal choices about love and family”²⁶¹ for themselves. Thus, this Part suggests that courts’ reasoning about liberty in recent same-sex marriage cases—like their reasoning about equality—has applications beyond the context of marriage.

A. *Dismantling the Architecture of Exclusion*

One of the hallmarks of equal protection is that it applies across the board: It does not safeguard a particular right, but instead provides a particular group with protection against discrimination of all sorts. Courts that have recently extended marriage rights to same-sex couples have framed this development not as an isolated change in the regulation of marriage, but as part of a much broader, “fundamental and dramatic transformation”²⁶² in the regulation of homosexuality. Just as Americans in the second half of the twentieth century recognized “that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior” and “that it was not constitutionally acceptable to treat women as less capable than and unequal to men,” courts in recent marriage cases have asserted, “we now similarly recognize that an individual’s homosexual orientation is not a constitutionally legitimate basis for

²⁵⁸ Id.

²⁵⁹ *Windsor*, 133 S. Ct. at 2689.

²⁶⁰ Id.

²⁶¹ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013).

²⁶² *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008).

withholding or restricting the individual's legal rights."²⁶³ Courts extending the right to marry to same-sex couples have cited a wealth of new statutes barring discrimination on the basis of sexual orientation as evidence of this changed attitude.²⁶⁴ Indeed, courts have noted that the recent repudiation of anti-gay regulation—instantiated by laws barring discrimination in employment, education, housing, credit, public accommodations, and other contexts—has helped to expose the inequity of reserving marriage to different-sex couples.²⁶⁵

²⁶³ Id. at 429.

²⁶⁴ See, e.g., id. at 428–29 (“[T]he change in this state’s past treatment of gay individuals and homosexual conduct is reflected in scores of legislative, administrative, and judicial actions that have occurred over the past 30 years or more.”); id. at 428 & n.46 (citing laws barring discrimination on the basis of sexual orientation in education, housing, and the provision of services by any business establishment, public utility, or program operated by, or that receives financial assistance from, the state as evidence of the state’s recognition “that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 447–48 (Conn. 2008) (discussing the many contexts in which Connecticut law now bars discrimination on the basis of sexual orientation); *Varnum v. Brien*, 763 N.W.2d 862, 891 & n.19 (Iowa 2009) (listing the many contexts in which Iowa law now bars discrimination against gays and lesbians, including employment, public accommodations, housing, credit, state licensing regimes, law enforcement, adoption, sex education, public health, social work, and the provision of state benefits); *Griego v. Oliver*, 316 P.3d 865, 880 (N.M. 2013) (noting that the New Mexico Human Rights Act was amended in 2003 to include “sexual orientation” among the list of protected categories, and that New Mexico law now prohibits profiling by law enforcement on the basis of sexual orientation and accords sexual orientation protected status under the state’s Hate Crimes Act).

This is not to suggest that discrimination against gays and lesbians does not remain a serious problem. The Justice Department and one of the federal district courts that found § 3 of DOMA unconstitutional recently cited Congress’s repeated failure to amend Title VII to prohibit employers from discriminating on the basis of sexual orientation as evidence that discriminatory attitudes persist. See *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012); Holder Letter, *supra* note 238. Hate crimes against gays and lesbians also remain dismayingly common. See Fed. Bureau of Investigation, *Hate Crimes Statistics* (Dec. 10, 2012), <http://www.fbi.gov/news/stories/2012/december/annual-hate-crimes-report-released/annual-hate-crimes-report-released>. Despite the persistence of these forms of discrimination, it is nonetheless significant that gays and lesbians are gaining the right to marry now, as part of broader effort by all branches of government to end anti-gay discrimination. This broader effort has enabled courts to recognize the exclusion of same-sex couples from marriage as one of a long list of restrictions that have deprived gays and lesbians of equal citizenship.

²⁶⁵ See, e.g., *In re Marriage Cases*, 183 P.3d at 452 (observing that, in light of “the historic disparagement of gay persons” and the growing repudiation of such disparagement by California’s citizens, the exclusion of gays and lesbians from marriage has begun to look like “a mark of second-class citizenship”).

By associating “traditional” marriage regulations with other, now-illegal forms of orientation-based discrimination, courts have framed these laws as part of a network of regulatory and social practices that have historically, and sometimes still do, deprive gays and lesbians of equal citizenship. The exclusion of same-sex couples from the institution of marriage reinforces stereotyped conceptions of homosexuals as enemies of, or strangers to, the family; it pushes them, through financial incentives and social stigma, to relinquish or at least camouflage their homosexuality. Such laws powerfully bolster a sexual status hierarchy and reinforce the closet from which gays and lesbians have only recently emerged. For these reasons, courts have begun to treat the exclusion of same-sex couples from marriage as an equal protection problem.

The fact that courts today are extending marriage rights to gays and lesbians as part of a more comprehensive effort to dismantle a regulatory regime that has long punished people for failing to conform to heterosexual norms has implications for the constitutional meaning of the marriage cases. In 1967, when the Court invalidated racial restrictions in marriage, it did so as part of a fundamental reorientation toward all forms of race-based discrimination. *Loving v. Virginia*²⁶⁶ was part of that reorientation: It opened the institution of marriage to interracial couples as part of a more general repudiation of forms of regulation that elevated one race above all others and required individuals to conform to state-sanctioned ideals regarding the proper complexion of the American family. Likewise, in the 1970s, when the Court invalidated scores of regulations that restricted men’s and women’s roles in marriage, it did so as part of a more general repudiation of all forms of state action that pressured men and women to conform to conventional gender stereotypes.²⁶⁷ The Court held in these cases that the Fourteenth Amendment limited the states’ authority to enforce traditional gendered conceptions of marriage and the family. In recent years, courts and other branches of government have begun to implement an analogous principle in the context of sexual orientation. The repudiation of DADT, the invalidation of DOMA, the repeal of laws barring sexual minorities from teaching or adopting children—as well as the recent passage of laws barring “gay conversion therapy”²⁶⁸—are products of a new attitude toward the regu-

²⁶⁶ 388 U.S. 1, 2 (1967) (holding antimiscengenation laws unconstitutional).

²⁶⁷ For more on these cases, see Franklin, *supra* note 39.

²⁶⁸ See *Pickup v. Brown*, 728 F.3d 1042, 1048 (9th Cir. 2013) (upholding California Senate Bill 1172, which bans state-licensed mental health providers from engaging in “sexual

lation of homosexuality. The American legal system has grown increasingly skeptical of state action that perpetuates stereotyped conceptions of gays and lesbians as a threat to the family and attempts to steer them into traditional heterosexual relationships.

Nowhere has this change been more pronounced than in the way courts talk about homosexuality and children. As we have seen, stereotyped conceptions of gays and lesbians as predatory toward, or a bad influence on, children have long fueled discrimination on the basis of sexual orientation. Such discrimination was historically viewed as beneficial to society. But in recent years, courts have inverted this traditional calculus, holding that it is not gays and lesbians, but rather discrimination against gays and lesbians, that constitutes the real threat to children's well-being. In the 1970s, Anita Bryant campaigned successfully against gay rights ordinances by persuading voters that such efforts were necessary to "save our children."²⁶⁹ Today, courts treat this kind of campaigning on behalf of laws designed to protect "traditional" marriage as evidence of their constitutional infirmity. The district court in *Perry v. Schwarzenegger* pointed specifically to the pro-Proposition 8 campaign's child-centered advertisements²⁷⁰ (which suggested that homosexuals were determined to press their marriage agenda, and maybe more, on vulnerable schoolchildren²⁷¹) as a reason for concluding that

orientation change efforts" with patients under eighteen years of age); Geoffrey A. Fowler, California Bill Bans Gay-Conversion Therapy, *Wall St. J.* (Aug. 30, 2012), <http://online.wsj.com/article/SB10000872396390444914904577622153696305>; Kate Zernike, Christie Signs Gay 'Conversion Therapy' Ban, *N.Y. Times*, Aug. 20, 2013, at A14 (noting that New Jersey is the second state, after California, to ban "conversion therapy"). Similar bills have since been introduced in other states. See Jacob M. Victor, Ending 'Gay Conversion' for Good, *N.Y. Times*, Feb. 13, 2014, at A27.

²⁶⁹ See supra notes 122–25 and accompanying text.

²⁷⁰ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 987–91 (N.D. Cal. 2010) (discussing Internet, television, radio, and print ads in support of Proposition 8 suggesting that homosexuals constitute a threat to children, perhaps physically and certainly psychologically); *id.* at 988 (quoting the political strategists who designed and orchestrated the Yes on 8 campaign and very consciously decided to make the protection of children the centerpiece of their campaign).

²⁷¹ *Id.* at 989 (noting that one campaign video in support of the marriage amendment was entitled "Everything to Do With Schools"—a title that pretty much summed up the campaign's strategy). For more on the Proposition 8 campaign's reliance on the notion that gays and lesbians pose a threat to children and family, see generally Melissa Murray, *Marriage Rights and Parental Rights: Marriage, the State, and Proposition 8*, 5 *Stan. J. C.R. & C.L.* 357 (2009).

the amendment violated equal protection.²⁷² The district court that invalidated Ohio's refusal to recognize same-sex marriages performed out of state likewise cited "misleading statements"²⁷³ about children by that state's anti-same-sex marriage campaign as evidence that the marriage recognition ban reflected "negative attitudes, fear, irrational prejudice, [and] some instinctive mechanism to guard against people who appear to be different in some respects from ourselves"²⁷⁴—and was therefore unconstitutional.

Courts in the recent marriage cases have held that, rather than protecting children, laws based on such stereotypes actually cause them harm. The Court in *Windsor* observed that DOMA's differentiation between straight and gay couples "demeans" the latter, and in so doing, "humiliates tens of thousands of children now being raised by same-sex couples."²⁷⁵ Part of the constitutional problem with DOMA is that it reinforced an old message—that heterosexuality is preferable to homosexuality—that is no longer viewed as consistent with equal protection. The children of same-sex couples are not the only ones harmed by this message. Courts have observed that other children suffer as well, as the stigma such laws perpetuate encourages "[s]chool-yard bullies" to continue "psychologically [grinding] children with apparently gay or

²⁷² *Perry*, 704 F. Supp. 2d at 1003 (concluding that the ad campaign on behalf of Proposition 8 "echo[ed] messages from previous campaigns to enact legal measures to disadvantage gays and lesbians," that the ads "ensured California voters had these previous fear-inducing messages in mind" when they went to the polls, and that laws founded on such stereotypes violate equal protection). Supporters of Proposition 8 appealed this decision all the way to the Supreme Court, but the Court declined to reach the merits in the case because it determined that the amendment's supporters lacked standing to appeal. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (holding that petitioners did not suffer a sufficiently concrete and particularized injury to give rise to Article III standing). Thus, the district court judgment and opinion in *Perry* stands.

²⁷³ *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013). These "misleading statements" include the assertion "that marriage equality advocates sought to eliminate the age requirements for marriage," that "[w]e won't have a future unless [heterosexual] moms and dads have children," and that "children do better with a mother and a father." *Id.* (alterations in original).

²⁷⁴ *Id.* at 992 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448, 450 (1985)) (internal quotation marks omitted); see also *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

²⁷⁵ *Windsor*, 133 S. Ct. at 2694; see also *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 474 (Conn. 2008) (asserting that "the ban on same-sex marriage is likely to have an especially deleterious effect on the children of same sex couples" because it suggests their parents are not equal to other children's parents).

lesbian sexual orientation in the cruel mortar and pestle of school-yard prejudice.”²⁷⁶

As this soliticitude for kids on playgrounds suggests, courts in the recent marriage cases have been quite explicit about the fact that their decisions indict an entire social and legal regime, not just one particular form of regulation. “Equal protection is at the very heart of our legal system and central to our consent to be governed,” the district court that invalidated Oklahoma’s ban on same-sex marriage opined: “It is not a scarce commodity to be meted out begrudgingly or in short portions.”²⁷⁷ The anti-stereotyping logic driving the recent marriage decisions raises constitutional concerns about any and all forms of state action that reinforce anti-gay stereotypes. Courts have made this clear by very self-consciously situating the marriage cases as the latest in a long line of equal protection cases that have dismantled various forms of status hierarchy.²⁷⁸ The Iowa Supreme Court proudly noted in its opinion extending marriage to same-sex couples that it had “struck blows”²⁷⁹ against the practice of slavery long before the Civil War, and against racial segregation in the decades before *Brown*. It noted too that Iowa was the first state to reject stereotypes about the incompatibility of women and work, and thus permit women to join the bar.²⁸⁰ Today, the court suggested, it is time to extend protection to gays and lesbians, dismantling the web of laws that deprives them of equal citizenship. In the years since Iowa issued its decision, many other courts have echoed this sentiment, observing that the “‘history of the Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or ex-

²⁷⁶ *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009); see also *Kerrigan*, 957 A.2d at 432–33 (“Gay and lesbian adolescents are often taunted and humiliated in their school settings.”).

²⁷⁷ *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014).

²⁷⁸ *Varnum*, 763 N.W.2d at 878 (“[T]oday, this court again faces an important issue that hinges on our definition of equal protection. This issue comes to us with the same importance as our landmark cases of the past.”); see also *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *11 (W.D. Ky. Feb. 12, 2014) (“History has already shown us that, while the Constitution itself does not change, our understanding of the meaning of its protections and structure evolves. If this were not so, many practices that we now abhor would still exist.”).

²⁷⁹ *Varnum*, 763 N.W.2d at 877.

²⁸⁰ *Id.*

cluded.”²⁸¹ Gays and lesbians have faced a long history of exclusion; the recent marriage cases are part of rectifying that history.

Obviously, the holdings in the same-sex marriage cases apply only to marriage. But ironically, as the gay rights movement has focused increasingly on the issue of marriage and courts have issued an ever-growing number of decisions pertaining to marriage, constitutional gay rights jurisprudence has become about much more than marriage. Courts in recent same-sex marriage cases have analyzed the exclusion of same-sex couples from marriage as one part of a pervasive and longstanding regulatory regime that has deprived gays and lesbians of equal standing in American society. In so doing, they have suggested that discrimination against gays and lesbians is an equality problem across the board.

In fact, courts have already begun to draw on the marriage cases to invalidate discrimination against gays and lesbians in other contexts. Not long after the Court issued its decision in *Windsor*, the Ninth Circuit held—in an opinion that relied heavily on *Windsor*—that the use of peremptory strikes to exclude gays and lesbians from juries violates equal protection.²⁸² The court noted that “*Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians,” and that it was “concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society.”²⁸³ On this basis, the court concluded that *Windsor* had (at least in practice) applied heightened scrutiny to orientation-based state action, and that “gays and lesbians are no longer a group or class of individuals normally subject to rational basis review.”²⁸⁴ Applying a heightened form of scrutiny, the court asked whether permitting orientation-based peremptory challenges was liable to “perpetuate . . . stereotypes” about gays and lesbians that had long been used to justify discrimination against them.²⁸⁵ The court answered in the affirmative: It held that such challenges could not survive the broad anti-stereotyping reasoning underwriting recent gay rights cases—including those involving marriage.²⁸⁶

²⁸¹ *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014) (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)).

²⁸² See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014).

²⁸³ *Id.* at 482.

²⁸⁴ *Id.* at 484 (citations omitted) (internal quotation marks omitted).

²⁸⁵ *Id.* at 486.

²⁸⁶ *Id.* at 474.

Social and legal contestation over same-sex marriage is obviously, to some degree, about marriage. Photographs of same-sex couples spilling out of city hall, arms raised high with marriage licenses in hand are some of the most indelible images of our time. Nor is there any question about the significance of marriage to the plaintiffs who have fought long and hard for it and are now able to obtain it. Recent same-sex marriage decisions acknowledge their struggles and vindicate their rights. But the marriage cases are not only about these plaintiffs and this particular right; they are also about the rights of gays and lesbians more generally to equality under the law. They provide doctrinal tools that are useful not only for reforming the institution of marriage, but also for dismantling the entire “architecture of exclusion” that has long rendered gays and lesbians second-class citizens in this country. Thus, although the immediate beneficiaries of these decisions are the couples lining up at city hall, their ultimate beneficiaries may be gays and lesbians everywhere—whether or not they’re the marrying kind.

B. The Liberty to Marry

A decade ago, in the wake of *Lawrence v. Texas*, Larry Tribe memorably observed that “due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix.”²⁸⁷ One implication of this close doctrinal interrelationship is that the ascendance of equal protection in recent same-sex marriage decisions does not mean that due process has dropped out of the constitutional equation. In fact, the development of orientation-based equal protection law has served only to enhance courts’ understanding of the liberty values at stake in cases challenging the constitutionality of laws limiting marriage to different-sex couples. This section considers how new conceptions of equality in the context of gay rights have influenced courts’ understanding of the liberty implicated in the marriage cases.

The most notable way in which equal protection has influenced due process in the context of same-sex marriage has to do with courts’ new understanding of the long history of discrimination gays and lesbians have experienced in the American legal system. As we have seen, some early proponents of same-sex marriage advocated a legal and political strategy that downplayed group identity, calculating, perhaps correctly,

²⁸⁷ Tribe, *supra* note 3, at 1898.

that calling attention to their homosexuality would not improve their chances with courts or the public at the time.²⁸⁸ Better, they thought, to frame their claims in universal terms by emphasizing the pervasive desire of individuals, regardless of sexual orientation, to marry the person they love rather than call attention to group difference by focusing on the unfairness of depriving gays and lesbians of rights most heterosexuals took for granted. A variation on this theme has emerged recently in the briefs and public appeals of a number of former opponents of same-sex marriage.²⁸⁹ These neo-traditionalist advocates make little mention of gays and lesbians. They frame recent legal victories by same-sex couples as an endorsement of the institution of marriage, perhaps even an implicit suggestion not only that marriage should be available to everyone, but also that everyone should avail themselves of it.

Yet the prominence of equality-based reasoning in the recent marriage decisions means that the social group responsible for bringing these cases remains stubbornly in view. The ostensible universality of the right at issue does not obscure the fact that it is gays and lesbians who are asking for that right. As a result, the particular forms of discrimination this class of individuals has experienced over the past century have informed courts' analysis of the liberty interest implicated by laws restricting marriage to different-sex couples. More specifically, awareness of this history of discrimination has prompted courts to recognize laws restricting marriage to one man and one woman as part of a broader regulatory regime enforcing heterosexual sex and family roles—a regime no longer viewed as consistent with constitutional liberty interests.

The most obvious and dramatic way in which the state has attempted to enforce heterosexual sex and family roles is by criminalizing homosexual sex. Short of arrest, gays and lesbians have encountered forms of harassment by state authorities that rendered daily life and intimate and friendly associations difficult—sometimes extraordinarily so. Even when states began to repeal their anti-sodomy statutes and police harassment eased, the social stigma associated with homosexuality caused many individuals to continue to camouflage their sexual orientation for fear of losing their jobs, their friends, and their membership in various communities. These legal and social pressures exerted a powerful coercive influence: They effectively required people either to be straight or,

²⁸⁸ See *supra* notes 160–66 and accompanying text.

²⁸⁹ See *supra* notes 11–28 and accompanying text.

at a minimum, to act as if they were.²⁹⁰ In other words, for most of the past century, laws governing homosexuality operated in concert with strong social norms to steer people into heterosexuality, or at least to dissuade them from adopting an openly homosexual “lifestyle.”²⁹¹

The enforcement of traditional conceptions of the family played a central role in fostering this system of “compulsory heterosexuality.”²⁹² Stereotypes of gays and lesbians as enemies of the family did not simply incite and justify discrimination on the basis of sexual orientation; they also had a prescriptive component. They worked to conscript people into heterosexual families and to enlist them in heteronormative sex and family roles. Individuals who failed to comply with these norms risked harsh social sanctions or worse. Until 2003, engaging in homosexual sex could still (at least theoretically) land one in jail.²⁹³ It put one at risk of losing one’s children in custody disputes,²⁹⁴ and it most certainly meant forgoing the various benefits and protections available to people who married a partner of a different sex. These legal and social sanctions acted as a deterrent to the expression of forms of sexuality, and the building of families, that did not conform to normative heterosexual models. These sanctions sent an unmistakable message that there is only one kind of sexuality and family here, and it is a heterosexual marital one.

²⁹⁰ Kenji Yoshino has termed this set of demands—in descending order of coerciveness—“conversion, passing, and covering.” See Kenji Yoshino, *Covering*, 111 *Yale L.J.* 769, 772 (2002) (“In fact or in the imagination of others, gays can assimilate in three ways: conversion, passing, and covering. Conversion means the underlying identity is altered. . . . Passing means the underlying identity is not altered, but hidden. . . . Covering means the underlying identity is neither altered nor hidden, but is downplayed.”).

²⁹¹ See *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (asserting that “[m]any Americans do not want persons who openly engage in homosexual conduct” in their neighborhoods, schools, and workplaces, and view laws criminalizing same-sex sodomy as a means of “protecting themselves and their families from a lifestyle that they believe to be immoral and destructive”). This assertion explicitly invokes a stereotyped conception of gays and lesbians as a threat to children and the traditional marital family, and gives some sense of the kinds of social stigma individuals might face if they decided to publically identify as gay.

²⁹² See *supra* note 46 and accompanying text.

²⁹³ See *Lawrence*, 539 U.S. at 563, 573 (noting that the petitioners were arrested, held in custody overnight, and charged and convicted under the state’s anti-sodomy law, but that such prosecutions were extremely rare: “Texas admitted in 1994 that as of that date it had not prosecuted anyone” for engaging in private, consensual homosexual conduct with another adult).

²⁹⁴ See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Anti-Gay Discourse and the Channeling Effect of Judicial Review*, 75 *N.Y.U. L. Rev.* 1327, 1360 (2000) (noting that “the state traditionally has denied custody, visitation, and adoption rights to parents open about their variant orientation”).

Courts in recent same-sex marriage cases have repudiated this history of discrimination. They have uniformly found that the state has no interest in deterring homosexuality, in “asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians.”²⁹⁵ Indeed, the numerous trials that have now been held on the question of same-sex marriage have produced voluminous evidence of the harmful effects of such efforts and the toll anti-gay stereotypes take on those toward whom they are directed. This evidence demonstrates that, rather than improving social well-being, efforts to stigmatize and deter homosexuality generate fear, anxiety, and other negative mental health outcomes.²⁹⁶ Following from this, courts have concluded that the state has no interest in steering people into heterosexuality or different-sex marriages. They have found that “[m]arrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals,”²⁹⁷ and that heterosexual relationships are in no way preferable to homosexual ones.²⁹⁸ In other words, courts have found that the state has no interest in preferring a single heterosexual model of the family above all others: “‘The composition of families varies greatly from household to household,’ . . . and there exist successful, well-adjusted children from all

²⁹⁵ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010) (“The American Psychiatric Association, the American Psychological Association and other major professional mental health associations have all gone on record affirming that homosexuality is a normal expression of sexuality and that it is not in any way a form of pathology.”).

²⁹⁶ See *id.* at 942 (“Ilan Meyer, a social epidemiologist, testified as an expert in public health with a focus on social psychology and psychiatric epidemiology. Meyer offered three opinions: (1) gays and lesbians experience stigma, and Proposition 8 is an example of stigma; (2) social stressors affect gays and lesbians; and (3) social stressors negatively affect the mental health of gays and lesbians.”); see also *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1214–15 (D. Utah 2013) (observing that the traditional regulation of, and social stigma surrounding, homosexuality generated anxiety and fear in gay and lesbian individuals).

²⁹⁷ *Perry*, 704 F. Supp. 2d at 969; see also *Kitchen*, 961 F. Supp. 2d at 1200 (finding that the “right to marry someone of the opposite sex is meaningless” to gays and lesbians, as they have no interest in “develop[ing] the type of intimate bond necessary to sustain a marriage with a person of the opposite sex”).

²⁹⁸ See, e.g., *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1290 (N.D. Okla. 2014) (finding that “upholding one particular moral definition of marriage . . . is not a permissible justification” for discriminating against same-sex couples in the absence of any evidence that heterosexual relationships are superior to homosexual ones); *Kitchen*, 961 F. Supp. 2d at 1215 (finding that the state may not “demean[] the children of same-sex couples” by conveying the harmful and erroneous message “that their families are less worthy of protection than other families”); *Griego v. Oliver*, 316 P.3d 865, 887 (N.M. 2013) (“[T]here is no scientific evidence that parenting effectiveness is related to the parents’ sexual orientation.”).

backgrounds.”²⁹⁹ Contrary to Tolstoy’s suggestion, all happy families are not alike.³⁰⁰ Traditional heterosexual marriage is not the only successful way to arrange intimate and family life.³⁰¹

This is not the first time courts have placed limits on governmental efforts to enforce one particular model of the family. Nearly forty years ago, the Court rejected efforts by the city of East Cleveland to enforce an ordinance limiting occupancy of a dwelling unit to the members of a traditional, “nuclear family.”³⁰² Justice Powell asserted in that case that “the Constitution prevents [the government] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.”³⁰³ He noted, in support of this proposition, that due process “is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”³⁰⁴ Justice Brennan saw racial stakes in the government’s infringement of liberty in this case. He argued that the ordinance enforced “the ‘nuclear family’ . . . pattern so often found in much of white suburbia,” at the expense of “[t]he ‘extended’ form . . . especially familiar among black families.”³⁰⁵

Constitutional concerns about equality have often been instrumental in convincing courts to set limits on the state’s power to enforce a single, normative model of marriage and family. Concerns about racial equality led the Court in *Loving* to recognize Virginia’s ban on interracial marriage as a violation of its citizens’ liberty interests.³⁰⁶ “To deny this fundamental freedom,” the Court held, “on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty with-

²⁹⁹ *Bostic v. Rainey*, 970 F. Supp. 2d 456, 479 (E.D. Va. 2014) (quoting *Troxel v. Granville*, 530 U.S. 57, 63 (2000)).

³⁰⁰ See Leo Tolstoy, *Anna Karenina* 1 (Richard Pevear & Larissa Volokhonsky trans., Penguin Books 2000) (1877) (“All happy families are alike; each unhappy family is unhappy in its own way.”).

³⁰¹ See, e.g., *Windsor*, 133 S. Ct. at 2689 (observing that, until quite recently, Americans simply assumed that heterosexuality was an essential component of marriage, but that today, many have “a new perspective” on the issue).

³⁰² See *Moore v. City of East Cleveland*, 431 U.S. 494, 502–03 (1977). The ordinance allowed extended family members to cohabit, but only in a few narrowly-defined arrangements. *Id.* at 496 n.2.

³⁰³ *Id.* at 506 (plurality opinion).

³⁰⁴ *Id.* at 504.

³⁰⁵ *Id.* at 508–09 (Brennan, J., concurring).

³⁰⁶ See *Loving*, 388 U.S. at 12.

out due process of law.”³⁰⁷ Concerns about sex discrimination have likewise prompted the Court to recognize as violative of due process laws that seek to enforce a single, conventional model of men’s and women’s roles in marriage and the family.³⁰⁸ Today, concerns about gay and lesbian equality are driving courts to recognize how the enforcement of a traditional, heterosexual model of the family infringes the liberty protected by the Due Process Clause. This liberty is the “libert[y] of equal citizens”³⁰⁹ to make certain crucial determinations about the nature of their intimate and family lives. Courts have now begun to hold that laws limiting marriage to different-sex couples abrogate that liberty. Such laws reflect and reinforce a set of stereotypes about sexuality, gender, and the family that have long fueled discrimination on the basis of sexual orientation. In so doing, they perpetuate the second-class status of gays and lesbians—in part, by depriving these individuals of the autonomy to make decisions about relationships and family that are generally within the power of heterosexuals to make.

When the Court in *Windsor* invalidated Section 3 of DOMA as a violation of both equality and liberty, the dissenting Justices strenuously disagreed that the Due Process Clause could sustain such an interpretation. Justice Scalia argued that due process is an inherently conservative doctrine, designed to preserve and protect rights that Americans have long recognized as fundamental. He argued that this backward-looking orientation was enshrined in the doctrinal test the Court reaffirmed relatively recently in *Washington v. Glucksberg*, which determines whether a right is fundamental by asking whether it “is ‘deeply rooted in this Na-

³⁰⁷ *Id.*

³⁰⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897–98 (1992) (invalidating, under due process, an abortion law’s husband-notification provision because it reflected and reinforced a traditional, stereotyped conception of women’s role in marriage and the family). For more on the way in which equality concerns inform the Court’s understanding of liberty in reproductive rights cases, see Siegel, *supra* note 3, at 1765 (“Justice Kennedy explains [in *Casey*] that the Constitution protects women’s decisions about motherhood because there is a fundamental difference between family roles that women choose and family roles that government imposes on women by law. The Constitution protects the abortion decision because government may not impose on women ‘its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.’ Respecting women’s capacity to decide whether and when to become a mother—and prohibiting government policies that impose traditional sex-roles on women—simultaneously vindicates . . . autonomy and . . . equality . . . much as the Court’s equal protection sex discrimination opinions do.” (citation omitted)).

³⁰⁹ Karst, *Liberties*, *supra* note 3, at 99.

tion's history and tradition,' [or implicit in the concept] of 'ordered liberty.'"³¹⁰ Scalia contended it would be "absurd" to suggest that same-sex marriage satisfies this test,³¹¹ and Justice Alito agreed.³¹²

For years now, however, the Court has declined to apply this doctrinal test in this rigid way in the context of gay rights. In *Lawrence*, which was framed as a due process decision, the Court observed that those who authored the Due Process Clause "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."³¹³ Thus, the Court reasoned, those who drafted the Fifth and Fourteenth Amendments were not very "specific"³¹⁴ about the particular rights due process guaranteed: They foresaw that "persons in every generation [would] invoke [the Constitution's] principles in their own search for greater freedom."³¹⁵ The Court echoed this forward-looking understanding of due process a decade later in *Windsor*, when it held that Section 3 of DOMA infringed constitutional liberty values even though the injustice it constituted was not one Americans had previously recognized. We understand the law differently now, the Court suggested, because we have come to think differently about gays and lesbians—and it is right that our conception of liberty should be informed by our new conception of equality in this context.³¹⁶

For this reason, courts in recent same-sex marriage decisions have not defined the relevant liberty interest in a narrow way; they have not asked, for instance, whether the right to same-sex marriage is deeply

³¹⁰ *Windsor*, 133 S. Ct. at 2706–07 (Scalia, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 720–21).

³¹¹ *Id.* at 2707. Justice Scalia's use of the word "absurd" to describe constitutional arguments in favor of same-sex marriage cannot help but evoke the Court's use of the word "facetious" to describe constitutional arguments against anti-sodomy laws in *Bowers v. Hardwick*. See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

³¹² *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition.").

³¹³ *Lawrence*, 539 U.S. at 578–79.

³¹⁴ *Id.* at 578.

³¹⁵ *Id.* at 579; see also Post, *supra* note 202, at 95–96 (observing that the Court's opinion in *Lawrence* "shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace in which *Glucksberg* had sought to encase substantive due process").

³¹⁶ See *Windsor*, 133 S. Ct. at 2692–93 (observing that the repeal of laws restricting marriage to different-sex couples "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality").

rooted in the nation's history and traditions.³¹⁷ They have focused instead on whether laws limiting marriage to different-sex couples infringe on the "freedom of personal choice in matters of marriage and family."³¹⁸ In framing the question this way, courts are taking their cue not from *Glucksberg*, but from Justice Harlan's opinion in *Poe v. Ullman*, which observed that the liberty protected by due process "'is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on,'" but something broader.³¹⁹ *Poe* concerned a Connecticut statute that prohibited the use of contraceptives. Harlan explained that due process protects not simply the right to use contraceptive devices, but rather, the right to be free from government intrusion into certain intimate personal choices involving sexuality, reproduction, and family size: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code."³²⁰ It protects not a predetermined and unchanging list of rights, but rather, a particular realm of decision making. It secures to individuals a measure of freedom and autonomy, particularly in matters as intimate as those implicated by statutes banning birth control.

In the aftermath of *Windsor*, numerous courts have found that laws barring same-sex marriage infringe this freedom and autonomy. Such laws seek to impose a single heterosexual model of the family on all

³¹⁷ Indeed, the Court in *Lawrence* identified the specificity with which *Bowers* defined the plaintiff's liberty interest as the root of its error. See *Lawrence*, 539 U.S. at 566–67 ("The Court began its substantive discussion in *Bowers* as follows: 'The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.' That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." (citations omitted)).

³¹⁸ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1198 (D. Utah 2013) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)); see also *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *19 (W.D. Tex. Feb. 26, 2014) (same).

³¹⁹ See, e.g., *Kitchen*, 961 F. Supp. 2d at 1197 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

³²⁰ *Poe*, 367 U.S. at 542; *id.* ("The best that can be said [of due process] is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.").

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Americans. This model reflects and reinforces stereotyped conceptions of sexuality, gender, and the family, and in so doing, abrogates the right of gays and lesbians to make critical decisions about the organization of their lives. Thus, when the state seeks to enforce this model, it engages in “unwarranted usurpation”³²¹ of decisions that properly lie with the individual and evinces “disregard . . . [and] disrespect”³²² for a social group that has long been subordinated in the American legal system. The recent marriage decisions hold that due process does not permit such exercises of state power in an era in which the American people have come to recognize gays and lesbians as individuals worthy of equal constitutional regard.

CONCLUSION

Against the backdrop of this evolving constitutional approach to gay rights, it is myopic to read the recent same-sex marriage cases exclusively as affirmations of the fundamental importance of marriage. To read the cases in this way is to miss what is most significant about them: They adapt and continue to develop an anti-stereotyping principle that has played a significant role in the emerging Fourteenth Amendment jurisprudence of gay rights. This principle protects against state action that reinforces stereotypes that have long incited and justified discrimination on the basis of sexual orientation; it prohibits demands by the government that gays and lesbians conform to particular heteronormative sex and family roles.

In recent years, courts have applied this principle to laws regulating marriage, and found that the restriction of marriage to different-sex couples violates the Fourteenth Amendment. But marriage is not the only context in which this principle applies. Consider *D.M.T. v. T.M.H.*,³²³ a case decided by the Florida Supreme Court in the wake of *Windsor*. The plaintiff in *D.M.T.* donated her eggs to her long-time, same-sex partner who used those eggs to have a child, whom the couple planned to raise together. Had the plaintiff been a man who donated sperm to a female partner under these circumstances, Florida law would have recognized her parental rights, but as a lesbian, and member of a same-sex couple,

³²¹ *De Leon*, 2014 WL 715741, at *19 (characterizing the holding in *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

³²² *Id.*

³²³ 129 So. 3d 320 (Fla. 2013).

she was not entitled to any such rights.³²⁴ Noting that the U.S. Supreme Court had recently held in *Windsor* that “federal law may not infringe upon the rights of [same-sex] couples ‘to enhance their own liberty’ and to enjoy protection ‘in personhood and dignity,’”³²⁵ the Florida court held the differential treatment of same-sex and different-sex couples in the state’s law governing assisted reproductive technology unconstitutional. Citing a lower court that had recently invalidated Florida’s ban on adoption by same-sex couples, the court suggested that it was now undisputed “that gay people and heterosexuals make equally good parents.”³²⁶ Thus, the court held that, under due process *and* equal protection,³²⁷ “a same-sex couple must be afforded the equivalent chance as a heterosexual couple to establish their intentions in using assisted reproductive technology to conceive a child.”³²⁸

This holding inspired a forceful dissent. The dissenting judge argued that the issue “really comes down to whether [same-sex] relationships . . . have been treated as a protected family unit under the historic practices of our society.”³²⁹ In fact, the judge observed, “history indicates that quite the opposite is true as our society has historically protected the legal rights of birth mothers and the traditional family. . . . ‘[T]he claim that a State must recognize multiple [mother]hood has no support in the history or traditions of this country.’”³³⁰ As the majority in *D.M.T.* explained, however, the fact that the state has long enforced a single, heterosexual model of the family is not a reason to permit it to continue to do so. Indeed, that is the central lesson of the recent wave of same-sex marriage decisions. Those decisions protect the right of same-sex couples to marry, of course. But, as the Florida court recognized, their implications extend beyond marriage. They are part of a broader anti-stereotyping jurisprudence that has begun to vindicate the liberty and equal standing of gays and lesbians, not just in the context of marriage, but throughout the American legal system.

It is not yet clear how far this jurisprudence will extend. The nation is still very much engaged in a first-order fight about same-sex marriage—

³²⁴ Id. at 341.

³²⁵ Id. at 337.

³²⁶ Id. at 343 (internal quotation marks omitted).

³²⁷ Id. at 341, 344.

³²⁸ Id. at 343.

³²⁹ Id. at 355 (Polston, C.J., dissenting) (internal quotation marks omitted).

³³⁰ Id. at 355–56 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989)).

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and still awaiting a decision by the Supreme Court that will invalidate all remaining laws restricting marriage to different-sex couples. But it is not surprising that advocates—particularly advocates once opposed to same-sex marriage—have begun to look to a time, most likely in the near future, when the first-order question will be resolved and we will have to make sense of the meaning and implications of decisions extending marriage rights to same-sex couples. Neo-traditionalists have offered one reading of those decisions. They have suggested that the extension of marriage rights to same-sex couples vindicates the notion that marriage is superior to all other family forms and bolsters the case for rewarding those who marry and stigmatizing those who do not.

This Article offers a different reading of the recent marriage decisions. It suggests that for all the celebration of marriage entailed in (and inspired by) these decisions, they also have a critical edge. They indict multiple regulatory traditions—the tradition of stereotyping gays and lesbians as enemies of the family, and the tradition of enforcing a single, heterosexual model of marriage and family life. Decisions extending marriage rights to same-sex couples enjoin these traditions in only one respect: Their immediate effect is to bar the state from reserving marriage to different-sex couples. But the conceptions of equal protection and due process these decisions advance are not so easily cabined. These conceptions raise questions about the legality of other forms of discrimination against gays and lesbians, and other ways in which regulations of marriage ostensibly designed to help children and families might actually harm them. Although today our attention is focused on the question of same-sex marriage, history will not end when this question is resolved. In the future, gays and lesbians—and indeed, all Americans—whether or not they are married, or even want to be, may invoke the conceptions of due process and equal protection articulated in the marriage cases “in their own search for greater freedom.”³³¹

³³¹ Lawrence v. Texas, 539 U.S. 558, 579 (2003).

