

5-1-2019

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Recommended Citation

Shannon Gilreath (2019) "A Comprehensive Rethinking of Equal Protection Post-Obergefell: A Plea for Substantivity in Law," *Barry Law Review*: Vol. 24 : Iss. 2 , Article 2.

Available at: <https://lawpublications.barry.edu/barryrev/vol24/iss2/2>

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A COMPREHENSIVE RETHINKING OF EQUAL PROTECTION POST- *OBERGEFELL*: A PLEA FOR SUBSTANTIVITY IN LAW

Shannon Gilreath*

Obergefell v. Hodges, the case holding that same-sex marriage is a fundamental right that states cannot deny, is widely regarded by progressives as a civil rights milestone. *Lochner v. New York*, on the other hand, is nearly uniformly considered by constitutional scholars, progressive or not, as a virtual epithet—one of the worst blunders in Supreme Court history. In this Article, drawing together years of my ideas and scholarship written to link substantive equality outcomes with the practice of law, I argue, from a pro-gay rights perspective, that *Obergefell* and *Lochner* are actually cut from the same cloth and ultimately that substantive due process, the engine of both decisions, will never successfully vindicate the rights of gay Americans or of other marginalized classes. I contend that, under Justice Kennedy’s leadership, the Court’s continued subsumption of equal protection into the Due Process Clause actually perpetuates inequality, even when the outcome (like access to marriage) appears to promote equality. The culmination of this analysis is my proffering of a theory of equal protection that is substantive in its own right.

INTRODUCTION

Each concept—liberty and equal protection—leads to a stronger understanding of the other.¹

The notion of equality can capture some of our highest goals, but the law of equality does not correspond to those aspirations. In many respects it has made them incapable of legal achievement.²

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

2. CATHARINE A. MACKINNON, *Substantive Equality*, in BUTTERFLY POLITICS 111 (2017). Professor MacKinnon’s work, of over four decades, on making equality material to those who need it most, is foundational in all that follows. Particularly, see CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED], and CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS 44-57 (2005).

I began writing about equality in law, through the lens of gay experience, over a decade ago, with my first law review article on the topic published in 2006.³ Since then, my work has focused, nearly singularly, on the questions of the meaning of equality and how to make equality meaningful in law. From an initial inquiry into the inequality inherent in the Supreme Court's tiered approach in its class-based equal protection jurisprudence,⁴ to a look at the interaction between the First and Fourteenth Amendments in free speech challenges involving anti-equality speech,⁵ to a reappraisal of *Lawrence v. Texas*, the case decriminalizing same-sex sex,⁶ in light of the inequalities that the much-heralded case perpetuated,⁷ to a plea for a sex equality appraisal of the same-sex marriage question,⁸ I have challenged the basic conceptions underpinning the "equality" agenda of the legal arm of the gay rights movement and, in doing so, argued for a reconceptualization of equal protection doctrine itself. Often, especially in the case of my reservations about same-sex marriage as an equality goal, I have felt a little like I was standing against a tidal wave.

With the decision in *Obergefell v. Hodges*, which commanded, on substantive due process and equal protection grounds, access to marriage for same-sex couples, it seemed to me that it was time to bring together in one piece my argument for a substantive, not merely formal, approach to equality in law. In material ways, my fears, that access to marriage finally granted may upend the very movement for gay rights that achieved it, seem to be coming true. Now, it seems, is the time for a renewed plea for equality as distinct from equal access and for a fulsome argument about how modern equal protection doctrine actually works to entrench inequality.

To that end, this article first traces the roots of equal protection jurisprudence, in Part I. In Part II, I examine the interplay between the substantive due process and Equal Protection Clauses of the Fourteenth Amendment in Supreme Court jurisprudence, referred to here as the "abstractions" approach. Indeed, the melding of the substantive due process and Equal Protection Clauses that began in *Lochner v. New York*⁹ has, perhaps, reached its apogee in *Obergefell*. In Parts III and IV, respectively, I revisit my analysis of the Supreme Court's tiered equal protection doctrine, focusing primarily on the "immutability" requirement, reinforced as dicta in *Obergefell*, and its "similarly situated" method as primary engines of inequality. In Part V, I ask what exactly *Obergefell* achieves and what it means for the future of equality. Finally, in Part VI, I offer a hopeful, albeit tentative, look at the future of equality through an equal protection doctrine that is—can be—finally substantive.

3. Shannon Gilreath, *Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—with a View toward a Constitutional Moral Imperative*, 9 LAW AND SOCIAL CHANGE 1, 1 (2006) [hereinafter Gilreath, *Of Fruit Flies and Men*].

4. *Id.*

5. Shannon Gilreath, *Tell Your Faggot Friend He Owes me \$500 for My Broken Hand*, 44 WAKE FOREST L. REV. 557, 558 (2009).

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

7. Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas*, 30 WOMEN'S RTS. L. REP. 442, 442 (2009).

8. Shannon Gilreath, *Arguing Against Arguing for Same-Sex Marriage*, 159 U. PA. L. REV. 21, 28-35 (2010).

9. *Lochner v. New York*, 198 U.S. 45 (1905).

I. THE FOURTEENTH AMENDMENT AND SUBSTANTIVITY: NECESSARY HISTORICAL FRAMEWORK

Between 1865 and 1870, we adopted three major constitutional amendments dealing with the civil and political rights of citizens.¹⁰ The Thirteenth Amendment abolished slavery and “involuntary servitude”¹¹; the Fifteenth Amendment guaranteed the right to vote regardless of “race, color, or previous condition of servitude”¹²; and the Fourteenth Amendment, in relevant part, provided that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹³ The Privileges or Immunities Clause,¹⁴ which is the most intuitive guarantee of civil and political rights, was early on given a very limited construction by the Supreme Court in *The Butchers’ Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Company*, known to posterity as the Slaughter- House Cases.¹⁵

In 1869, Louisiana chartered a corporation and gave it a monopoly of slaughterhouses, landings for cattle, and stockyards in a large area centered in New Orleans.¹⁶ Butchers shut out of competition by the monopoly sued to challenge the state law under the Thirteenth and Fourteenth Amendments.¹⁷ The high Court split 5-4 and sustained the Louisiana law.¹⁸ According to the opinion written by Justice Miller, the trilogy of post-war amendments were limited in nature and effect, relating almost exclusively to “the freedom of the slave race ... and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹⁹ The Privileges or Immunities Clause was effectively rendered a redundancy, purportedly protecting only a handful of rights—notably interstate travel—already protected elsewhere in the Constitution.²⁰ The “substantive” revival of the Due Process Clause was not yet accomplished—indeed, the evisceration of the Privileges or Immunities Clause would give birth by necessity of so-called “substantive due process” in the coming decades—therefore, Miller entertained the due process challenge only in so far as it implicated a taking of property without due process.²¹ Miller found that it did not.²² Most introductory courses in constitutional law focus only on the importance of the Slaughterhouse Cases as the

10. Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 548 (1998).

11. U.S. CONST. amend. XIII, § 1.

12. U.S. CONST. amend. XV, § 1.

13. U.S. CONST. amend. XIV, § 1.

14. *Id.*

15. Slaughter-House Cases, 83 U.S. 36, 36 (1872).

16. *Id.*

17. *Id.* at 43.

18. *Id.* at 83.

19. *Id.* at 71-72.

20. *Id.* at 74-77.

21. *Id.* at 79-81.

22. *Id.* at 80-81.

catalyst of the future development of the doctrine of substantive due process. But the Court went on to say, importantly for our purposes, “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview” of the Equal Protection Clause.²³

There are significant reasons to doubt Justice Miller’s narrowing construction of the post-war amendments.²⁴ Justice Bradley dissented on this point, writing, “[Blacks] may have been the primary cause of the [Fourteenth] [A]mendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.”²⁵ Yet while the slash and burn jurisprudence of the Slaughterhouse Cases became the root sustaining a flowering judicial industry of discovering new rights embedded in the Due Process Clause—indeed, Justice Miller himself pronounced as much just four years after the Slaughterhouse Cases in *Davidson v. New Orleans*²⁶—no such substantive dimensions of equal protection would emerge.

This preference shown for due process as a font of civil rights produced some bizarre decisions that were starkly anti-equality in effect. Perhaps the most infamous of these—an epithet in its own right—is the 1905 decision in *Lochner v. New York*. A New York statute set maximum daily and weekly working hours for bakers.²⁷ Joseph Lochner, who owned a bakery employing mostly immigrants, challenged the law.²⁸ A cursory examination of the history of this period reveals appalling—by modern standards—working conditions in countless working-class jobs, baking included.²⁹ But a six justice majority in *Lochner* found labor laws “mere meddlesome interferences with the rights of the individual.”³⁰ Among these rights, the Court went on, extending its earlier decision in *Allgeyer v. Louisiana*,³¹ were “[t]he general right to make a contract in relation to his business [and] the right to purchase or sell labor....”³²

Lochner has gone down in infamy as the acme of judicial over-reach. Yet to my way of thinking, the problem with *Lochner* is not that the justices recognized a right to contract. In fact, the Ninth Amendment taken together with the Privileges or Immunities Clause may leave room for the existence of such a right. Rather the problem is that the Court refused to take account of the equality implications of its decision, namely that the decision made possible the continued, unfettered exploitation of a relatively powerless working underclass. This blindness to equality as a preeminent constitutional value is shot through the Court’s substantive due process jurisprudence up until its most recent decisions.

23. *Id.* at 81.

24. *Id.* at 82.

25. *Id.* at 123 (Bradley, J., dissenting).

26. *Davidson v. New Orleans*, 96 U.S. 97, 101-102 (1877).

27. *Lochner v. New York*, 198 U.S. 45, 52 (1905).

28. PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 1, 12 (1998).

29. *Id.* at 8-12.

30. *Lochner*, 198 U.S. at 61.

31. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

32. *Lochner*, 198 U.S. at 53.

Robert Bork, most famous for his failed nomination to the Supreme Court, wrote of the high Court's substantive due process jurisprudence, quoting Lenin no less, "Who says A must say B." "Whoever says Roe," Bork continued, "must say *Lochner* and [Dred] Scott."³³ I will come to *Roe* shortly, but first I will say a word about *Lochner* and *Dred Scott*, taking *Dred Scott* first. Bork was expanding on Professor David Currie's contention that *Dred Scott* "was at least possibly the first application of substantive due process in the Supreme Court. . . ."³⁴ This may well be true, but it does not follow that *Lochner*, or even *Roe*, must follow *Scott*, even though there is much truth in Bork's belief that they do.

Dred Scott, possibly the darkest mark on the Supreme Court's jurisprudential record, saw a slave, Dred Scott, who had been taken for extended periods of residence in a free territory, challenge the right of his master to take him back as a slave to the slave holding state of their origin.³⁵ Chief Justice Roger Taney and a Court made up primarily of other Southerners decided against Scott. But they went further, and it is this overreach that precipitated the Civil War.³⁶ To summarize the 241 pages of convoluted opinion writing for our purposes, Taney wrote, in relevant part:

The rights of property are united with the rights of person, and placed on the same ground by the [F]ifth [A]mendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name due process of law.³⁷

Unpacking this a bit, we see Taney effecting a substantive packing of a clause that otherwise speaks only to procedural guarantees—e.g., has the law been passed by Congress and signed by the President according to the constitutional mechanism. Taney's second sentence in particular, "who had committed no offense,"³⁸ assumes that the conduct of holding slaves in a free territory is a right that cannot be taken away by any means of process, otherwise any man who in fact did so would be committing an "offense against the laws."³⁹ This is the essence of substantive due process as we know it—the principle that some rights are so fundamental that they cannot be abridged, regardless of process.

33. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990) [hereinafter BORK, *TEMPTING OF AMERICA*].

34. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888* 271 (1985).

35. *Scott v. Sanford*, 60 U.S. 393, 452 (1857).

36. Cass R. Sunstein, *The Dred Scott Case: With Notes on Affirmative Action, the Right to Die & Same-sex Marriage*, 1 GREEN BAG 2d 39, 39, 40, 43 (1997).

37. *Scott*, 60 U.S. at 450.

38. *Id.*

39. *Id.*

Having established that *Dred Scott* was a substantive due process case, we can now examine whether Bork is right. Must whoever says *Roe* also say *Lochner* and *Dred Scott*? First, *Lochner v. New York*. The primary difference between *Dred Scott* and *Lochner* is that *Lochner* is a Fourteenth Amendment case. True enough, the Fourteenth Amendment and Fifth Amendment, under which *Dred Scott* was decided, have identical due process commands.⁴⁰ But the Fourteenth Amendment commands something that the Fifth Amendment, glaringly, does not: equality.⁴¹

II. THE SUBSTANCE OF EQUALITY AND JUDICIAL ABSTRACTION: SOME EXAMPLES

Lochner, standing as it now does as the premier example of what is wrong with substantive due process and, by extension, substantivity in judicial process generally, is a considerable barrier to acknowledging the inescapable way that law is made from the bench. The principle line of attack against *Lochner*, by Bork and numerous others on the political right, is that it is constitutionally rootless. In other words, say conservatives, substantivity in law means little more than the public policy preferences of unelected judges substituted for the legislative process.⁴² And, in the realm of substantive due process, this is invariably true. The criticism from the left is that substantivity in law, following *Lochner*, may lead to the wrong substance winning.⁴³ This is the principle argument against regulating anti-equality speech, or pornography, or, indeed, for admitting that substance drives legal decision-making even when that substance is masquerading as formalism. When equality is conceived of as merely an abstraction, avoiding substance at all costs may seem necessary, if not inevitable.

A substantive equality critique of *Lochner*, by contrast, does not fault the decision for its substantivity, but for its lack of equality, which is itself a substantive choice.⁴⁴ Put another way, the Court's failure to consider the equality implications of the liberty to contract took the substance of equality off the table and out of the decision, in effect reading it out of the Constitution. The fault in *Lochner*, therefore, is not its substantivity, but rather what that substance amounts to, which was the advancement of powerful economic interests at the expense of the less powerful. The abstraction of the liberty to contract, expressed as substantive due process rights always are, as wholly individualistic, obscured the actual substance (always there) of the decision itself. And that substance was unquestionably power-based.

40. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

41. U.S. CONST. amend. XIV, § 1.

42. No legal choice can be exactly amoral. Even the question of whether to choose a distributive form of equality or a substantive one does not happen in a vacuum. Judge Bork is as guilty as anyone of abstract defenses of cases he thinks were decided properly. For example, *Brown v. Board of Education* he says was "correct both legally and morally," without further comment. See Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003). Any argument for gay rights in the name of equal protection, on the contrary, is simply a hoax perpetrated by the upper classes. *Id.*

43. *Id.*

44. For an illuminating discussion, see MACKINNON, WOMEN'S LIVES, MEN'S LAWS, *supra* note 2 at 7-8.

Now, consider *Roe*. Are there, in fact, equality dimensions to the abortion question? It seems to me that the answer is undoubtedly yes. Judge Bork did not think so, writing, “no argument can be made that *Roe v. Wade* has any constitutional foundation whatever.”⁴⁵ This is such a curious stance, coming just after his admission that “equality was the theme of the Equal Protection Clause.”⁴⁶ Thus, in *Brown*, he rightly suggests, the choice had to be against inequality.⁴⁷

The inequalities inherent in the social circumstances that make abortion necessary are inescapable, especially when it is admitted that they are material, in an existential sense, to only half the population, defined as female. Most women who seek abortions have become pregnant by having sexual intercourse with men. As I have explored elsewhere, the very nature of this intercourse is unequal.⁴⁸ Thus, in order to discuss the abortion consequences of this particular economy of inequality is necessarily to broach the question of consent and sexual inequality generally. At this point, I will simply say that, while beyond the scope of this particular Article, the question of this underlying inequality is, curiously, most exposed in the abortion debate, when, for example, opponents of state funding for abortion would nevertheless permit funding for abortion when the pregnancy results from rape or incest, as if in all other circumstances women, in fact, control sex.⁴⁹ By treating pregnancies that result from rape or incest as if they warrant exceptions—thus, as if *they* are *exceptional*—renders invisible the sexual violence that is the norm in sexual relations in the heterosexual model.⁵⁰ Thus, sexual violence—a crucible of social inequality of the sexes—as a power relation goes unchallenged and unchanged.

These same assumptions go unchallenged by the marriage equality movement, so-called, vindicated in *Obergefell*. In *Lawrence*, *Obergefell*'s precursor, Justice Kennedy waxed poetic about a same-sex relationship, which he was bent on transfiguring into a love story in the heterosexual (fictional) image.⁵¹ Justice Kennedy wrote about John Lawrence and Tyrone Garner as if the two were living a romantic ideal.⁵² They were not. No one, it seems, wanted to question the disparity in age, race, or class actually present.⁵³ Our legal system does not care about inequalities in sexual relationships. At least, that is, the system does not care about inequalities that are normalized because they are principal tenets of male dominance. The general

45. See BORK, TEMPTING OF AMERICA, *supra* note 33, at 23.

46. *Id.* at 22.

47. *Id.* at 23.

48. See, Shannon Gilreath, *Same-Sex (Monogamous) Marriage v. Polygamy: Macedo's Incomplete Sex Equality Analysis*, legal studies paper (2017), manuscript available at SSRN <http://dx.doi.org/10.2139/ssrn.3009869> (“But a consent standard that requires a yes, with the default being no, while a vast improvement over the old no-means-yes default, is still problematic in a context in which sex between men and women is, in fact, unequal”).

49. Sandra Berenknopf, *Judicial and Congressional Back-Door Methods That Limit the Effect of Roe v. Wade: There Is No Choice If There Is No Access*, 70 TEMP. L. REV. 653, 656–57 (1997).

50. Melanie Randall & Vasanthi Venkatesh, *Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AJIL UNBOUND 189, 189 (2016).

51. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

52. *Id.* at 567, 573–74, 578–79.

53. Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1476 (2004).

assumption of consent in sexual relationships that do not involve children⁵⁴ or animals⁵⁵ or (more recently) rape as defined by law⁵⁶ is a preeminent heterosexual value.⁵⁷ In reality, heterosexuality's privileges of privatized violence, economic inequality, and sexual aggression are simply extended, with impunity supplied by state sanction, into gay relationships, cloaked, as they now are after *Obergefell*, in privacy and the romanticism of the family ideal. Substantive due process is too often employed to elide inequality's substance.

And, of course, another issue raised in *Lawrence*, both by the penultimate paragraph of the majority opinion⁵⁸ and in Justice Scalia's dissent⁵⁹ and by *Obergefell*'s specific exclusion of polygamy⁶⁰ highlights the presumption of consent as the normal course of sexual relationships in the monogamous heterosexual model. The ability of more people to see the harm in polygamous marriage exists precisely because assumptions run the other way. The kind of scrutiny with which we approach ideas of sexual agency, emotional and physical well-being, and consent in the context of polygamy is by and large absent from any mainstream academic discussion of marriage per se. Most of the time it seems it is hardly worth asking whether the marriage is violent, whether it is happy, or even why so many end up with the death of the woman at the hands of her husband. Few are asking what connection there may be between marriage and family (read: heterosexuality, generally) and sexual harassment and prostitution.⁶¹

This last point is important, again in both the context of abortion and of same-sex marriage as examples. What defines prostitution and sexual violation? Generally, in the West, it is the standard of consent.⁶² But a consent standard that requires a yes, with the default being no,⁶³ while a vast improvement over the old no-means-yes default, is still problematic in a context in which sex between men and women is, in fact, unequal.⁶⁴ How often is a yes a meaningful yes? How often is a yes simply surrender to the inevitable: "Okay, let's just get it over with." How many

54. See, e.g., 18 U.S.C. § 2251 (2012); N.C. GEN. STAT. § 14-27.25 (2016); *Petit v. Erie Ins. Exch.*, 699 A.2d 550, 224-25 (Md. Ct. Spec. App. 1997).

55. Rebecca F. Wisch, *Table of State Animal Sexual Assault Laws*, ANIMAL LEGAL & HIST. CTR. MICH. ST. UNIV. COLL. OF L. (2017), <https://www.animallaw.info/topic/table-state-animal-sexual-assault-laws>, archived at <https://perma.cc/CV6F-ZXSB>.

56. See, e.g., CAL. PENAL CODE § 261 (2016); N.C. GEN. STAT. § 14-27.24 (2016).

57. Shannon Gilreath, *Macedo's Incomplete Sex Equality Analysis*, SYNDICATE, (February 1, 2018), <https://syndicate.network/symposia/philosophy/just-married/> archived at <https://perma.cc/33B8-KS54> [hereinafter Gilreath, SYNDICATE].

58. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

59. *Id.* at 590 (Scalia, J., dissenting).

60. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

61. There are notable feminist exceptions, see, e.g., CATHARINE A. MACKINNON, HUMAN RIGHTS AND GLOBAL VIOLENCE AGAINST WOMEN, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 29 (2006).

62. Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 436 (2016).

63. Jessica Bennett, *Campus Sex...With a Syllabus*, N.Y. TIMES (Jan. 9, 2016), http://www.nytimes.com/2016/01/10/fashion/sexual-consent-assault-college-campuses.html?_r=0, archived at <https://perma.cc/MQJ4-KKBV>.

64. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 69 (1990); for a sex equality alternative to "consent," see MacKinnon, *Rape Redefined*, *supra* note 62.

women surrender to the patriarchal imperative that the delivery of sex and sexuality is necessary for material survival, as in: she needs to stay in his house; she wants to keep the lights on; or the line of credit open; or money in the child's college fund. Is this kind of capitulation really meaningful consent? In other words, does a consent standard simply raise the floor of sex inequality, so that men and women remain substantively unequal in sex, at an elevated but nevertheless static level? Because polygamy is exotic—because the problems inherent in polygamous marriage are not “normal”—these problems of sexual abuse and gender hierarchy emerge in the public consciousness.⁶⁵ They emerge as social systemic and systematic. When they occur pervasively and systematically in monogamous marriages—indeed, it seems they are rarely not there—they are seldom examined.⁶⁶ Socialization demands that they remain hidden. When they are visible, they are explained away as episodic, not systemic.

Consider, for example, how little things have changed in the 30 years since Professor Catharine MacKinnon wrote, “[A]bortion policy has never been explicitly approached in the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality; that is, as an issue of forced sex.”⁶⁷ Consider here the marital rape exception. Students, evidently misled by someone, will often say to me, “But Professor, the marital rape exception has been eliminated.” This is not true. Marriage, as we know it, which depends on sexual delivery, usually by women to men, would not survive if it were eliminated. So, in the face of much feminist organizing, it has adapted. Forced sex is still largely rendered invisible in the marital context.⁶⁸ In roughly 20 states, special exemptions from prosecution exist if the parties are not living apart, or legally separated, or have not filed for divorce or an order of protection.⁶⁹ Some states require the wife to report the rape within a short period of time.⁷⁰ Some require that a wife's resistance be overcome by physical force.⁷¹ Another group exempts husbands who rape wives under the age of consent or who are incapacitated physically or mentally.⁷² No can still mean yes in the context of marriage, where presumably, the relationship between rapist and raped is most intimate. But apparently, this degree of intimacy is not necessary to render a “yes” less free or a “no” less meaningful.⁷³ None of this is to say that the Supreme Court should have denied equal access to marriage on substantive due process grounds, but it is only to highlight how the pro-marriage movement used by the Court's substantive due process precedent largely ignores equality to accomplish a

65. Gilreath, SYNDICATE, *supra* note 57.

66. *Id.*

67. MACKINNON, FEMINISM UNMODIFIED, *supra* note 2 at 95-96.

68. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1485 (2000).

69. *See, e.g.*, S.C. CODE ANN § 16-3-615(A) (2018).

70. *See, e.g.*, S.C. CODE ANN § 16-3-615(B) (2018).

71. *See, e.g.*, NEV. REV. STAT. ANN § 200.373 (LexisNexis 2018); OKLA. STAT. tit. 21 § 1111(B) (2018).

72. *See, e.g.*, KY REV. STAT. ANN § 510.030 (LexisNexis 2018); N.H. REV. STAT. ANN. § 623-A:2(h) (2018).

73. *See State v. Way*, 254 S.E.2d 760, 761-62 (N.C. 1979) (clarifying that “if the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape....”).

goal that, in the long term, may actually entrench inequality. “Marriage equality” in this context is an oxymoron.

Returning to Bork’s assertion that whoever says *Roe* must also say *Lochner*, we find that he is both correct and incorrect. He is correct in so far as the substantive due process analysis of the opinions goes. But Bork, like the *Lochner* Court itself, fails to acknowledge the equality interests—the substantive interests—placed out of reach by the abstractions employed to justify the outcome. For the *Lochner* Court it was the abstraction of the liberty to contract.⁷⁴ For Bork it was the abstraction of textualism as an interpretive commitment.⁷⁵ In modern equal protection jurisprudence, it has been the abstraction of the class-based approach, made further abstract through the Court’s shift to classification (as distinct from class) and the individuality that that entails, and its “similarly situated” requirement.⁷⁶

III. PROBLEMS WITH THE CURRENT EQUAL PROTECTION FRAMEWORK

The substantive usefulness of equal protection, and thus the promise of equality as a question of substance on which the Constitution is decidedly not neutral, lies mostly unfulfilled. Equality jurisprudence, as it is most often encountered in American constitutional law, is rarely substantive. The Immutability Doctrine serves as the linchpin of an (in)equality system that takes caste, in the form of hierarchy based on moral judgment codified in law, as an objective measure of some *difference* that merits legal (normative) disadvantage.⁷⁷ The self-reinforcing duplicity of this system, whereby powerful people (usually judges) mete out *justice* and right *inequality* when they see *similarly situated* persons treated *differently*, is a racket of sheer genius, wherein the already-powerful always control the standard by which sameness/difference is measured and, thereby, the mechanism of caste mobility, socially and legally.⁷⁸ The truth of my assertion about power insulating itself is revealed in the Court’s own insight into its deliberative process—a rare glimpse into a process that is overwhelmingly accomplished *sub rosa*—in *Washington v. Davis*,⁷⁹ requiring proof of intentional differential treatment, rather than disparate impact (proof of subordination alone), to establish discrimination in violation of the Fifth and Fourteenth Amendments.⁸⁰ Distinguishing Title VII, under which proof of disparate impact is sufficient to establish a *prima facie* case,⁸¹ the Court opined:

However this process [the disparate impact (subordination) test] proceeds, it involves a more probing judicial review of, and less def-

74. *Lochner v. New York*, 198 U.S. 45, 45 (1905).

75. See BORK, TEMPTING OF AMERICA, *supra* note 33, at 33.

76. *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1076-77 (1969).

77. SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION 39 (2011) [hereinafter GILREATH, THE END OF STRAIGHT SUPREMACY].

78. This is what Catharine MacKinnon was criticizing, in the context of feminism, when she criticized a “differences approach.” See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN; A CASE OF SEX DISCRIMINATION 42-4 (1979).

79. *Washington v. Davis*, 426 U.S. 229 (1976).

80. GILREATH, THE END OF STRAIGHT SUPREMACY, *supra* note 77, at 39.

81. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

erence to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than the more affluent white.

*Given that rule, such consequences would perhaps be likely to follow.*⁸²

In other words, a genuine subordination/caste-based inquiry into purportedly neutral and objective laws would expose them as anything but.⁸³

In the law, the sameness/difference approach is, like all liberal constructs, focused on individual rights, even when it speaks categorically. First, in its legal manifestation, requiring proof of discriminatory intent in order to establish discrimination, it requires discriminatory motivation by an individual institution or actor.⁸⁴ Second, it requires discriminatory impact to be measured in terms of discrete individuals, not groups.⁸⁵

Consequently, in critiquing equality arguments based on sameness/difference via trait immutability, my concern is both social and jurisprudential: social because focus on immutability is so important to popular argumentation about the legitimacy of anti-gay animus generally, and jurisprudential in that immutability has been central in justifying the institutionalization of anti-gay discrimination in law. No critique of objectification, of dominance as such, can be had when the totality of the formulae available for analysis reduces to the objectivity—the normativity—of the descriptive perceptions of majoritarian morality (Your “choices” mark you for maltreatment because we say your “choices” are “bad.”). This is the purpose and effect (even when invoked with the best of intentions) of an immutability-based analysis. It keeps purely epistemic notions of right and wrong materially maintained by “science” or other supposedly-objective disciplines, presenting descriptive morality as ontology.

In this system, those who are “socially allowed a self are also allowed the luxury of postulating its illusoriness and having that called a philosophical [or religious] position.”⁸⁶ Immutability allows the powerful to say, simply, “your choice is the

82. *Davis*, 426 U.S. at 247-248 (emphasis added).

83. This seems to be exactly what the staunchest opponents of substantive equality historically have feared the most. *See, e.g.*, R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 412 (1977); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 8 (1978); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 594-95 (1982). It is also why, when on the rare occasion that the law does side with the powerless, it is taken to be at its most illegitimate. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

84. GILREATH, *THE END OF STRAIGHT SUPREMACY*, *supra* note 77, at 40.

85. *Id.*

86. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 210 (1989).

prerogative of law, but not your personhood,”⁸⁷ while simultaneously regulating both. Or, as Robert Nagel put it, “There is the obvious but important possibility that one can ‘hate’ an individual’s behavior without hating the individual.”⁸⁸ In this system, gay personality is merely performative and morality is political; politics *are* morals. Since no existentiality is conceded for us, their values look benign, and oppression, if not obfuscated entirely, is presented as collateral. Richard Posner tells the truth when he writes:

[I]f you (being male) say that you’d like to have sex with that nice-looking young man but of course will not because you are law-abiding, afraid of AIDS, or whatever, you will stand condemned in the minds of many as a disgusting faggot. Homosexual acts are punished in an effort, however futile, to destroy the inclination.⁸⁹

It is the identity that is assumed from the acts; and the acts are subsumed in (and assumed from) the identity. “I am gay,” is a philosophical/ontological statement, not merely a performative one.

The gay side of the argument from immutability has usually been one of apology: “Don’t punish us for something we cannot control.” It hasn’t worked well, since most religionists think that perfection comes through suffering⁹⁰ and that, even if gays are concededly “born that way,” we should not act on it. Straights, of course, are not told that their sexuality is merely performative or that they should refrain from acting on their heterosexuality⁹¹; thus the hermetic precision of a system that takes its own descriptive value judgments to be definitively objective. Even gays’ supposedly-destructive sexual “lifestyles” are not descriptively immoral in the same ways when their ingredients are remixed in the straight recipe. “Unsafe” sex, for example, is roundly condemned as irresponsible and dangerous when it is useful to do so in condemning gay people (usually gay men).⁹² But that same condom-less sex is a *cause célèbre* in straight society, where the potential for procreation sanctifies it.⁹³ When engaged in by straight enthusiasts, “unsafe sex” quickly gives way to pleasanter euphemisms like “in the family way.”⁹⁴ This “lifestyle choice” even becomes a party theme—we call it the “baby shower.” Under the aegis of this kind of epistemologically hermetic doublethink, descriptive morality is presented in society

87. And, concomitantly, “my straight self is not chosen, is natural, and therefore the measure of law.” GILREATH, THE END OF STRAIGHT SUPREMACY, *supra* note 77, at n.36.

88. Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS, May 1998 at 34, 35.

89. RICHARD A. POSNER, SEX AND REASON 233 (1992).

90. Mother Teresa, with a smile, reported telling a patient suffering terrible agony in the last stages of cancer, “You are suffering like Christ on the cross. So Jesus must be kissing you.” The patient replied, “Mother Teresa, please tell Jesus to stop kissing me!” Philip Kosloski, *5 Enduring Quotes from St. Theresa of Calcutta*, ALETEIA (Sept. 5, 2017), <https://aleteia.org/2017/09/05/5-enduring-quotes-from-st-teresa-of-calcutta/>, archived at <https://perma.cc/CCG9-MEXR>.

91. The exception to this rule is when straights’ sexual expression looks too much like gay sex, as in the case of facially “neutral” “sodomy” in some states. GILREATH, THE END OF STRAIGHT SUPREMACY, *supra* note 77, at 41.

92. *Id.* at 41-2.

93. The Roman Catholic Church, the world’s largest Christian denomination, actually requires that heterosexual sex be “unsafe” in order for it to be considered holy (procreative). *Id.* at 42.

94. *Id.*

as natural and in the law as neutral.⁹⁵ In other words, sexuality is mutable (straights can concede this because they know they have nothing to lose in the concession), and there is justification for punishing some types of sexual expression (those of gays and lesbians) because straights, in their majoritarian omnipotence, decree that those sexual expressions are “bad” or “deviant” or “unnatural” or “abnormal” or whatever other referent one might substitute for “different.” What passes for normal is based entirely on the straight say-so.

British scholar, Nicholas Bamforth, summarizes immutability’s appeal⁹⁶:

Supporters of immutability claims ... maintain that it is ... impermissible for the law to penalize a person because of their sexual orientation, and arguably to penalize expressions of it in the form of sexual activity. The law does not penalize people due to accidents of birth such as their sex or race, and even seeks to prevent them from being discriminated against on this basis in employment and related contexts—and it would surely be morally arbitrary to treat people unfavorably because of a characteristic which they have acquired via an accident. In consequence, the law cannot consistently—and should not—treat people unfavorably where an analogous accident such as their sexual orientation is in issue.⁹⁷

The last sentence of Professor Bamforth’s synopsis reveals immutability’s importance to a legal regime intent on seeing only sameness and difference as workable legal categories and, thereby, maintaining its hegemony.⁹⁸ It is also a window into

95. Adrienne Rich has written that under patriarchy for a woman to be “barren” is the mark of ultimate “human failure.” ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 249-52 (1976). The unwillingness of many gays to procreate in the vagina-insert-penis model is a major source of our condemnation by the Heteroarchy, where procreation is seen as the ultimate human good—the ultimate fulfillment of nature. Gays are, therefore, “unnatural.”

96. NICHOLAS BAMFORTH, *SEXUALITY, MORALS AND JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW* 203-06 (1997) [hereinafter BAMFORTH, *SEXUALITY, MORALS AND JUSTICE*].

On the whole, I think Bamforth provides a brief but lucid account of the problems inherent in the argument from immutability. I do take issue, however, with his view, perhaps inherent in his own preoccupation with the moral model of argumentation, that “even if clear proof [of the biology of sexuality] could be found, theorists would still need to produce a separate moral account of why this particular immutable characteristic was not a valid basis for judging or regulating a person’s life.” *Id.* at 204. In the footnote to this assertion, Bamforth goes on to say that any related argument that sexual orientation is irrelevant to an individual’s ability to lead a meaningful life is unsupported. *Id.* I don’t agree. Equality is not a constitutionally neutral concept, nor is it subsumed in merely moral reasoning. Equality, if it means anything substantive, must mean that personal values, even those based on choices (as most are), cannot be the basis for caste-based disadvantages unless they can be shown to work a normatively demonstrable civic harm (in the “John hit Mary” model), not merely a descriptively moral one (of the “God said so” model). Being equal or unequal in a constitutional system based on equality is first a legal status; only derivatively is it a moral one. Such was the case in *Plessy v. Ferguson*, finding inequality based on descriptive morality legal, see 163 U.S. 537, 495 (1896) and in *Brown v. Board of Education*, finding inequality substantively unequal and therefore illegal, see 347 U.S. 483, 549 (1953). Considerable moral justification preceded and followed *Plessy*, necessarily. Like moralizing was not necessary after *Brown*; its legality, based upon the central assumption of a legal regime premised on equality—that equality is not neutral about inequality—needed no moralization. In other words, once the objectivity of the “moral” position is exposed as a naked grab for power in a constitutional order supposedly not neutral on abuses through naked power, there is no need for a separate moral inquiry into what ought to be.

97. BAMFORTH, *SEXUALITY, MORALS AND JUSTICE*, *supra* note 96 at 203-04.

98. *Id.* at 205-06.

why the majority in *Lawrence v. Texas* decided to focus on an abstract notion of “liberty” as opposed to equality. And it reveals why immutability is difficult as a winning strategy—why working within the system has garnered such unsatisfactory results, on the whole, for gay advocates.⁹⁹ How do you prove immutability? More generally, how do you prove causation in a system and to a system that simply changes the definition of causality when it is forced to confront difficult data? Radical feminists in the 1980s presented sociological data establishing the link between pornography and sexual violence against women.¹⁰⁰ The causality was ignored. Other “unbiased” studies appeared to refute it. There is an even greater body of literature, scientific studies and personal accountings, establishing the biologic causality of sexuality.¹⁰¹ It is ignored.¹⁰²

The Equal Protection Clause should be understood “as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.”¹⁰³ The Clause “looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.”¹⁰⁴ When attempting to make their cases for equal treatment under the Equal Protection Clause of the Fourteenth Amendment, gays and their advocates have seized on the most obvious biological marker of the Supreme Court’s equality paradigm—race. Race, they observe, is immutable, and immutability has, after all, found its way into textbooks and court decisions concerning equal protection analysis.¹⁰⁵ But it is precisely this immutability linchpin, once introduced by gay advocates and ultimately

99. *Id.*

100. *See, e.g.,* Catharine A. MacKinnon, *Pornography as Sex Discrimination*, 4 *LAW & INEQ.* 17, 38 (1986).

101. *See, SHANNON GILREATH, SEXUAL IDENTITY LAW IN CONTEXT: CASES AND MATERIALS* (2007) (Chapter 1, collecting studies).

There is also a body of literature arguing the legitimacy of chosen “political lesbianism.” *See, e.g.,* SHELIA JEFFREYS, *THE LESBIAN HERESY: A FEMINIST PERSPECTIVE ON THE LESBIAN SEXUAL REVOLUTION* (1993). “Many lesbians, after all, have chosen to love women for political reasons, very often after half a lifetime of wifehood and motherhood in which they never thought of being attracted to women” *Id.* at 92. I don’t really buy the idea that sexual orientation is socially constructed, although I think its political meanings certainly are; and thus, sexuality reconstituted, as we experience it under hetero-supremacy, certainly is. I hope that I am never confronted with someone who asks me to believe that they “love [me] for political reasons.” I know too much about how quickly fainthearted political people, even lesbian feminists, can be to find that kind of love comforting. I also think that the fact that fewer gay men claim this as their experience of their sexuality speaks to the place of gender in sexuality. And even though there is something appealing in the idea of having men or women embrace homosexuality as a political statement, something about it is unsettling—primarily the idea that anyone could suddenly “choose” to be gay and then claim to know what that means politically or otherwise. It’s an uneasiness akin to the discomfort that some feminists, including myself, feel about male-to-female transsexuals claiming that they suddenly know what being a woman is all about.

102. It should also be pointed out that the immutability syllogism unwinds if we revisit the question of race as the paradigm immutable trait. If, suddenly, people could choose their race, and if people chose to be Black instead of white, would being Black become, again, a justifiable basis for imposing legal disadvantages? Or would we accept that in a post-Fourteenth Amendment America hierarchy based on race (or on any characteristic that does not produce demonstrable harm or otherwise limit the ability of a person to contribute meaningfully to the civic endeavor) are patently unconstitutional?

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

104. *Id.*

105. GILREATH, *THE END OF STRAIGHT SUPREMACY*, *supra* note 77, at 47.

pulled by the courts, which causes many gay equal protection claims to come unhinged.¹⁰⁶

Various legal formulae have evolved in an effort to demystify the U.S. Supreme Court's class/classification-based approach to equality. Primarily, they take the course of the formula laid out in *High Tech Gays v. Defense Industrial Security Clearance Office*.¹⁰⁷ In *High Tech Gays*, the court held that suspect and quasi-suspect classes for purposes of equal protection analysis are groups that (1) have "suffered a history of discrimination"¹⁰⁸; (2) "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; (3) "are a minority or politically powerless."¹⁰⁹

No court seems to dispute that gays have been the subject of historical persecution; indeed, *Bowers* itself—particularly Chief Justice Burger's vitriolic concurrence—settled that point.¹¹⁰ But many courts have denied gays suspect class status and strict scrutiny, holding sexual orientation (usually spoken of strictly as homosexuality) to be behavioral and, therefore, not immutable, or holding that gays do not lack political power in a way that renders them discrete and insular.¹¹¹

106. Lower courts have held that gays and lesbians meet the criteria of a suspect class for Equal Protection purposes, yet they have all been reversed on appeal. *See, e.g.,* Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 436 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261, 267-68 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001, 1001 (1996); *Able v. United States*, 968 F. Supp. 850, 862 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628, 632 (2d Cir. 1998). In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), the trial judge, in dicta, determined that gays were a suspect class, but did so without relying on immutability.

107. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 572-73 (9th Cir. 1990).

108. It is often said that this discrimination must be "invidious," in that it "embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious". *See, Watkins v. United States*, 847 F.2d 1329 (9th Cir. 1988) (en banc), *diff. results reached on reh'g*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990). In *Watkins*, the Court associated the immutability query with the invidiousness query. 847 F.2d at 1346.

109. *High Tech Gays*, 895 F.2d at 573.

Modern Equal Protection analysis was born with *Carolene Products* and its famous footnote four. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). In an opinion in which the Court basically surrendered in its war on Franklin Roosevelt's New Deal policies, the Court used Footnote 4 to restate its guardianship of individual liberties and to preserve its power of review over such matters in the future. Because the Court specifically marked the rights of "discrete and insular" minorities for an especially searching review, the debate has arisen as to what constitutes "discrete and insular." The "immutability" argument is one attempt at an answer. The full text of Footnote 4 is as follows:

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

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

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

Id. (internal citations omitted).

110. Burger claimed that prohibitions against homosexual conduct had "ancient roots." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (quoting majority opinion at 192). That question is certainly debatable, with many historians arguing that widespread repression of gays is a phenomenon of the past 50 years (see historians brief in *Lawrence*), but Burger's perception of "ancient" animus says something about the insidiousness of contemporary prejudice against gays.

111. *High Tech Gays*, 895 F.2d at 573.

But at the heart of the immutability controversy has been the claim that sexual orientation is not a discrete factor by which gays may be identified as a group. Professor Bruce Ackerman, for example, explained it this way:

As a member of an anonymous group, each homosexual can seek to minimize the personal harm due to prejudice by keeping his or her sexual preference a tightly held secret. Although this is hardly a fully satisfactory response, secrecy does enable homosexuals to “exit” from prejudice in a way that blacks cannot.¹¹²

Thus, the argument proceeds that gays are not definable in the way necessary to attain suspect class status. Professor Ackerman concludes that gays may be even less politically powerful than more obviously insular and discrete groups, e.g., African Americans, and that equal protection should be most concerned with those groups where the members are anonymous and diffuse and where group detachment is easier.¹¹³ I agree. The detachment Ackerman notes creates for gays a problem even worse than “tokenism”¹¹⁴; it creates “hiddenism,” by which “acting straight” is turned into a sado-profession and amplified into a sado-professionalism by which closeted gays actively work to injure the careers and professional/political/social aspirations of other gays.¹¹⁵ This is what Eve Kosofsky Sedgwick named when she said, “it is entirely within the experience of gay people to find that a homophobic figure in power has, if anything, a disproportionate likelihood of being gay and closeted.”¹¹⁶

Professor Ackerman’s discussion of gays as an anonymous and diffuse minority conjures a pointed and important equality question. It is not the ability of gays to distance ourselves from our “group” that should essentially trouble us; rather it is the prejudice that drives the desire of some (if not many) gays to engage in this group exit that is most troublesome from an equality standpoint. The ability of gays to “pass’ and hide [our] sexual orientation when the going gets too rough. . . . while it may have saved a neck from the noose, is in no way less of a relinquishment of

The whole idea of political powerlessness is more than a little difficult to square with a Supreme Court jurisprudence that allows white male litigants to prevail under a suspect classification rationale. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (“[D]iscreteness and insularity [do not] constitute necessary preconditions to a holding that a particular classification is invidious.”). But supremacist logic is rarely consistent on anything but the importance of supremacy itself. For an illuminating look at the Court’s lexicographic project of shifting subtly from “class” to “classification” in order to entrench power, see generally EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* (1999).

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

113. J.M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313, 2372 n.188 (1997).

114. By “tokenism” I mean the presence of a few gays in places we have not been, visibly, before, often for the purpose of signaling (false) progress.

115. Ackerman, *supra* note 112 at 730-31.

116. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 81 (1992).

dignity, a loss of freedom, than otherwise inescapable victimization or brutality. Elementally, they are the same.”¹¹⁷ “Escape is a compromised freedom with a very heavy price.”¹¹⁸

And, of course, not even all Blacks would fit the conventional definition of discreteness. African Americans have (particularly historically) engaged in what is known as “passing,” in which an African American with particularly Caucasian features passed as white to avoid discrimination.¹¹⁹ But historical analogy notwithstanding, the fact that gays’ caste status is not necessarily marked by spatial segregation can make it harder to see; and yet this same lack of visibility highlights the derivative nature of our status. Emphasis on immutability is thus a critical problem for gays asserting equality claims. It is also largely a problem that arose not from a settled jurisprudence, but from a long-standing misconception about equal protection analysis.

Immutability does not figure centrally with any consistency in the Supreme Court’s equal protection jurisprudence. In *Lyng v. Castillo*,¹²⁰ cited as controlling in *High Tech Gays*, the Supreme Court declined to use strict scrutiny in assessing the constitutionality of provisions of the Federal Food Stamp Act that imposed different requirements on distant relatives or unrelated cohabitants than those for parents and children, holding that close relatives are not a suspect or quasi-suspect class because “as a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and that they are not a minority or politically powerless.”¹²¹ Lawyers know that language matters, but, as to equal protection, many seem to forget this important lesson. The conjunction *or*, used to link alternatives,¹²² gets ignored, and the Court’s actual language (obvious, immutable, *or* distinguishing characteristics) gets reduced to immutability only,¹²³ or, at least, to immutability superordinately.¹²⁴ This could be due in part to the insistence of gay advocates and allies on stressing immutability, which continues to be an important part of political and legal strategy.¹²⁵

117. SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* 129 (2006) [hereinafter GILREATH, *SEXUAL POLITICS*].

118. ANDREA DWORKIN, *SCAPEGOAT: THE JEWS, ISRAEL, AND WOMEN’S LIBERATION* 15 (2000).

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

120. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

121. *Id.*

122. See, *Or*, *ENCARTA WORLD ENGLISH DICTIONARY* (St. Martin’s Press 1999 ed.) (“CORE MEANING: a conjunction used to link two or more alternatives.”).

123. See, *Anderson v. King Cty.*, 138 F.3d 963, 974 (Wash. 2006) (rejecting a challenge to a straight-only marriage law and holding that the challenge failed because “plaintiffs *must make a showing of immutability*, and they have not done so in this case.”) (emphasis added).

124. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“Members of recognized suspect or quasi-suspect classes...exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.”).

125. For a lucid discussion of the social and political importance of biologic immutability to the acceptance of gays (and to gays’ understanding of what gay is), see Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495 (2009). Schmeiser recounts the reaction to Bill Richardson’s (2008 Democratic candidate for president) answer, in response to gay singer Melissa Etheridge’s question, that homosexuality is “a choice.” The gay audience booed and hissed. *Id.* at 1500.

Generally, the courts have rejected the immutability claim outright. Even in *Romer v. Evans*, the moment when gays arguably began to emerge from *Hardwick*'s shadow, the immutability argument fell on deaf judicial ears.¹²⁶ The immutability argument presented at trial in *Romer* was a substantially watered down version; the plaintiffs argued that, although sexual orientation is “highly resistant to change,” its “etiology” is unknown and “it is not necessary for a trait to be genetically determined for it to be an involuntary trait that is highly resistant to change.”¹²⁷ But underscoring the danger of muddying the waters with immutability assertions, the court apparently heard, and certainly addressed, a much more stringent argument.¹²⁸ The court rejected the immutability claim by a reading of precisely the same science with which the plaintiffs’ hoped to buttress it.¹²⁹ Be it true or not, the argument from science has done little to advance the gay cause in the courts.

In any event, immutability has never been decisively established by the Supreme Court as necessary for a sustainable claim under the Equal Protection Clause. The Court so held in *Bowen v. Gilliard*,¹³⁰ when it decided that relatives are not a suspect class. This lack of an immutability requirement could hardly be more evident than in the Supreme Court’s decision in *Graham v. Richardson*,¹³¹ holding that aliens constitute a suspect class. Alienage is not immutable,¹³² in order to escape the class, one need only become a naturalized citizen.¹³³ Yet the Court held that “[a]liens as a class are a prime example of a ‘discrete and insular minority’ . . . for whom such

Immutability is the party line of the Human Rights Campaign, the nation’s largest LGBT advocacy group. See HUMAN RIGHTS CAMPAIGN FOUNDATION, RESOURCE GUIDE TO COMING OUT FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 11 (2004) (“Your Sexuality or Gender Identity Is Not a Choice. It Chooses You.”). And it continues, despite its ineffectiveness, to be a part of litigation strategies. See, e.g., Chai Feldblum’s admission that, despite misgivings, she continues to make equal protection arguments grounded in immutability. See, e.g., Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 278 n.189 (1996) (Feldblum admits that, despite misgivings, she continues to make equal protection arguments grounded in immutability).

126. Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 516 (1994).

127. *Id.*

128. “Plaintiffs strongly argue that homosexuality is inborn.” *Evans v. Romer*, No. 92 CV 7223, 1993 WL 518586, at *11 (D. Colo. Dec. 14, 1993), *aff’d*, 882 P.2d 1335 (Colo. 1994), *aff’d*, 517 U.S. 620, (1996).

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

130. *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

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

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

133. Some lower courts have, for some time, seen this inconsistency bespeaking a receding importance for immutability, see, e.g., *Watkins v. United States Army* 875 F.2d 699, 711-28 (9th Cir. 1989)(Norris, J., concurring); *Tanner*, 971 P.2d. Scholars, too, have noted immutability’s relative unimportance or advocated its outright demise. See Balkin, *supra* note 113; Halley, *supra* note 126 at 507.

heightened judicial solicitude is appropriate.”¹³⁴ Even if one were to argue that becoming a citizen is not a simple task and that alienage is not transitory, one could hardly argue with seriousness that one can easily change sexual orientations, even if such orientation is, in fact, mutable.¹³⁵ As put succinctly in *Watkins v. United States Army*:

Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?¹³⁶

There is additional support for the argument that immutability, by itself, is irrelevant to constitutional inquiry. There are a number of groups with characteristics that are, so far as we can know, immutable, whose claims are not afforded heightened scrutiny for equal protection purposes. For example, neither the traits of intelligence nor physical disability have formed the basis for suspect class status under the Equal Protection Clause.¹³⁷ Instead, where immutability is salient, it may be “immutability plus” that is really at work. The *Frontiero* plurality held that strict scrutiny was warranted for gender discrimination claims because gender, in addition to being immutable, “frequently bears no relation to ability to perform or contribute to society.”¹³⁸ *Frontiero*, then, may stand for the premise that “when a characteristic is both immutable *and* unrelated to the legitimate purposes at hand, discrimination based on it *may* suggest unfairness.”¹³⁹ One could also plausibly read Justice Brennan’s formula in *Frontiero* as having nothing to do with the immutability of any physical trait, per se, but rather as focusing on the generally unalterable nature of stereotypes, which frequently bear no relation to the ability of the stereotyped to contribute to society. This

134. *Graham*, 403 U.S. at 372.

135. For an example of the horrors of treatment in the past, see Anonymous, *Electroshock: “The Agony of the Years After”*, in JONATHAN NED KATZ, *GAY AMERICAN HISTORY* 201 (1992). The American Psychiatric Association confirms that there is no scientific proof that “reparative therapy” (the so-called “ex-gay” movement) successfully changes sexual orientation and that “[t]he potential risks of ‘reparative therapy’ are great, including depression, anxiety, and self-destructive behavior.” *Id.*

136. *Watkins*, 875 F.2d at 726 (emphasis in original) (citations omitted).

137. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

138. *Id.* at 686 (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”); *But see*, Halley, *supra* note 126, at 508 n.15 (“There are plenty of careless misreaders of *Frontiero* who construe it to state a freestanding immutability factor uninflected by relatedness”). See, e.g., *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989) (holding that prisoners do not constitute a suspect classification because the status of incarceration is neither immutable nor an indicator of invidiousness) (citing *Frontiero* on immutability without reference to relatedness). For a discussion of how *Frontiero*’s exceptions swallow its theory, see JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 261 (1983).

139. Halley, *supra* note 126, at 508 (emphasis in original).

kind of caste-based understanding of *Frontiero* is commensurate with Brennan's observation that:

[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.¹⁴⁰

IV. SIMILARLY-SITUATED FORMALISM AND THE FUTURE OF GAY RIGHTS: *LAWRENCE V. TEXAS AS A CASE STUDY*

Lawrence is largely a decision about the protection of sex generally—specifically of “sexual intimacy”—which the Court primarily equates to all sex, presumptively consensual,¹⁴¹ in the heterosexual image. In this way, the Court avoids the equality concerns at stake in *Hardwick*,¹⁴² namely that only homosexual sex is neither presumptively free nor constitutionally protected. The Court's concern with liberty's substance meant that the Court extended heterosexuality's presumptive right to sexual privacy to homosexuals, so long as the gay sex being had sufficiently resembled heterosexual sex.¹⁴³ This assimilation principle, reduced to equivalence, undergirds the *Lawrence* decision and permeates it.¹⁴⁴

The assimilation principle says to gay people that equality is defined in terms of equivalence to the pre-existing heteronormative standard.¹⁴⁵ “Gay person,” says the assimilationist, “if you want equality with straight people, the approach is simple: be the same as straight people.” This is exactly what most gay rights advocates, and ultimately the Court, said in *Lawrence*.¹⁴⁶ Gay people deserve equality because they are constitutionally (morally, socially, jurisprudentially) equivalent to straight people. Much of the Court's logic, indeed most of the pro-gay rights briefs submitted on appeal,¹⁴⁷ argues that gay people are deserving of equal protection in their sexual

140. *Frontiero*, 411 U.S. at 686-687.

141. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (discussing rights of adults to enter into relationships within the confines of their homes). The presumption of consent bothers sex equality theorists like Professor Marc Spindelman. See Spindelman, *Surviving Lawrence v. Texas*, *infra* note 147. It bothers me, too.

142. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

143. *Id.* at 191.

144. “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” *Lawrence*, 539 U.S. at 574. As Angela Harris notes, “*Lawrence* looks like an attempt to rebrand patriarchy by making it gay-friendly.” Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1577 (2006) (emphasis added).

145. Harris, *supra* note 144 at 1563.

146. *Lawrence*, 539 U.S. at 574.

147. See, e.g., Brief for Constitutional Law Professors, et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139 [hereinafter Law Professors]. In an effort to demonstrate to the Court just how much gay people are like straight people, the brief highlights “facts” that are so obvious that they sound totally absurd when read aloud: “[gay people] shop, cook, and eat together, celebrate the

activity precisely because that activity sufficiently mirrors heterosexual sexual activity, which is (of course) the presumptive good.¹⁴⁸ The Court's very discussion of the history of sodomy prohibitions connects these demeaning laws by the ways in which they influenced the *heterosexual* sexual experience (remember, the presumptive good) to show their constitutional deficiencies.¹⁴⁹ The Court's treatment of sodomy prohibitions in this way has equal protection ramifications to be sure. Unfortunately, the question of whether the Court's analysis will morph into a later argument which will claim that anti-sodomy laws (associated as they now are primarily with the heterosexual experience) do not provide evidence of a history of "invidious" discrimination against gays as is required by generally accepted equal protection analysis is not yet answerable. I hope not.

Situating *Lawrence* as the natural outgrowth of the reproductive privacy cases, the Court is able to declare that, "[p]ersons in a homosexual relationship may seek autonomy for these purposes [defining one's own concept of existence, of meaning, of the universe, and the mystery of human life], just as heterosexual persons do."¹⁵⁰ The Court's assimilation of homosexual sex into the heterosexual norm is thereby complete. Gay people do not deserve protections as gay people, but rather because we are sufficiently like straight people to merit protection.

Viewing the Court's decision in this way brings new meaning to the Court's assertion that a decision grounded in "liberty," in fact, advances equality. Indeed, the *Lawrence* majority assures, concerned as they were with Justice O'Connor's envisioned ban on heterosexual sodomy,¹⁵¹ that heterosexual men can now engage in oral

holidays together, and share one another's families. . . . They rely on each other for companionship and support." *Id.* at 13.

The amicus brief filed by the ACLU likewise focuses on the domestic normalcy of gay people. "As adults, [gay people] form intimate relationships with one another, often have or adopt children, and interact with groups of relatives that make up their extended families." Brief for the American Civil Liberties Union and the ACLU of Texas as Amici Curiae Supporting Petitioners, at 8, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164132.

Similar "like-straight" characterizations of gay life are to be found in the amici briefs of the Human Rights Campaign and the National Lesbian and Gay Law Association. For an excellent summary of the briefs and discussion, see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1619-1621 (2004) [hereinafter Spindelman, *Surviving Lawrence v. Texas*]. Spindelman's work critiquing like-straight politics is excellent and foundational. In addition to the article, see Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1362 (2005).

The urgency of the pro-gay groups to connect gays with the acceptable straight paradigm is overwhelming in these briefs. Their arguments reduce to an essence: Gays are sufficiently like straights to merit constitutional protection for their sexual behavior, because that sexual behavior is sufficiently domesticated to straight acceptability. One notable exception is the Brief for the Cato Institute by Professor William Eskridge. Eskridge specifically argues that "[t]he Texas Homosexual Conduct Law violates the Equal Protection Clause . . . for it targets gay people as an outlaw class because of antigay animus." Brief for CATO Institute, et al. as Amici Curiae Supporting Petitioners, at 18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152342.

148. As the Law Professors' Brief put it, since the Court had recognized the undeniable importance of heterosexual intimacy, this recognition should be "for gay people no less than for heterosexuals." Law Professors, *supra* note 147, at 13.

149. Students sometimes ask me: Does homosexuality have a history? After *Lawrence*, the answer to that question, at least legally, appears to be "yes," if history means what historians make of an actual experience. See, Brief for Professors of History George Chauncey, et al. as Amici Curiae Supporting Petitioners, at 3-4, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 1152350.

150. *Lawrence*, 539 U.S. at 574.

151. "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-

sex without fear of prosecution. The Equal Protection Clause means that gay men receive the protection by default.

The Court's assimilation strategy becomes clear in its near wholesale adoption of Justice Stevens' *Hardwick* dissent as the controlling analysis in *Lawrence*.¹⁵² Stevens' dissent proceeds on the logic that Georgia's law at issue in *Hardwick* was constitutionally faulty because it treaded on *heterosexual* autonomy.¹⁵³ He is preoccupied with the notion that to "totally prohibit" sodomy would collide with the privacy rights of heterosexuals, as established, both married and single, by the very line of privacy cases the Court relies upon in its articulation of the liberty of sexual intimacy.¹⁵⁴ Stevens believed that such a prohibition clearly violated these heterosexual rights.¹⁵⁵ This starting move by Stevens reflects his inability to abstract himself from the dictates of his own identity position, from which he can only analogize or generalize. Then, by an equal application theory, he extends heterosexual privilege to the homosexual, made as he is in the heterosexual's image:

Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the [heterosexual] majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.¹⁵⁶

The Court's transmutation of Stevens' *Hardwick* dissent into Kennedy's *Lawrence* majority opinion gives life to its dubious prophecy:

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. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.¹⁵⁷

sex participants." *Id.* at 575. Indeed, Justice O'Connor raised precisely this question. *Id.* at 584-85. (O'Connor, J., concurring).

152. "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here." *Id.* at 578.

153. *Bowers v. Hardwick*, 478 U.S. 186, 215-16 (1986) (Stevens, J., dissenting).

154. *Id.* (Stevens, J., dissenting).

155. *Id.* at 219 (Stevens, J., dissenting).

156. *Id.* at 218-19 (Stevens, J., dissenting).

157. *Lawrence*, 539 U.S. at 575.

This is a curious formula. As Marc Spindelman observed, “the Court vindicates sexual liberty by recognizing heterosexuals’ sexual rights and advances ‘equality of treatment’ by extending liberty to [gays]. Rights that are made to the king’s measure are fit for a queen.”¹⁵⁸ This is distributive justice at its acme. The more the Court critically evaluates the rights of gays the more it concentrates on the presumptive rights of heterosexuals.

Would not the Court have taken a more honest jurisprudential look at the plight of gay Americans had it engaged in a substantive equality analysis? That is to say had it seen the hierarchical and, therefore, anti-equality dimensions of a law that criminalizes homosexual expressions of intimacy (or even non-intimate sex)—the very conduct by which gays as totally sexualized beings are defined—even if such laws facially applied to heterosexuals, too.¹⁵⁹ One needs no analogies to marriage or romanticized heterosexual intimacy to see this. Justice O’Connor’s nominally equal protection-based concurrence hints at this problem,¹⁶⁰ but her analysis of the issues stops far short of substantive equality (although it may constitute a classic formal equality analysis).¹⁶¹ By refusing to acknowledge hierarchy in this way, the Court scaffolds it. The superior constitutional status of heterosexuals (men, at least) is both the doorway and the ceiling of homosexual rights.

And what’s wrong with that? *Lawrence*’s celebrants will ask. Well, nothing if you believe, as the Court apparently did, that equality is a numbers game, counting rights, quantities and uniformities: likes alike and unalikes unlike.¹⁶² But if you believe that true equality cannot be found in acquiescence in a system where the oppressed must assume the appearance of the oppressor in order to enjoy freedom, then the Court’s analysis presents serious moral and philosophical dilemmas. If freedom for gays is to be had only in the legal institutionalization of compulsory heterosexuality, in the mere mimicry of the privileged, is it really freedom at all? Does real equality lie in the exchange of gay identity for the implicit safety of heteronormative assimilation?

158. Spindelman, *Surviving Lawrence v. Texas*, *supra* note 147, at 1630.

159. “Sodomy . . . is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym.” Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1737 (1993).

160. “Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.” *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

161. Justice O’Connor, of course, begins with the faulty premise that Equal Protection “is essentially a direction that all persons similarly situated should be treated alike.” *Id.* (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)). She goes on to recognize that the effects of the existence of the Texas statute go far beyond the potential for criminal prosecution. *Id.* at 581-82. But the “similarly situated” principle blinds Justice O’Connor to the caste-creating effects of the statute, were its facial discrimination removed. “The Equal Protection Clause ‘neither knows nor tolerates classes among citizens.’” *Id.* at 584 (citing *Romer v. Evans*, 517 U.S. 620, 623 (1996)) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). “Whether a sodomy law . . . is neutral both in effect and application . . . is an issue that need not be decided today.” *Id.* What Justice O’Connor fails to realize is that a sodomy law can never be neutral in “effect,” even if it were to be neutral in application. Even in such an imaginary regime, heterosexuals would always be being punished for engaging in acts common to homosexuals, not for any quality of their superior heterosexual orientation.

162. “Likes alike, unalikes unlike” is a useful coinage I first heard Catharine MacKinnon employ in public lectures, for example at the University of North Carolina-Chapel Hill (Feb. 18, 2009). *See also*, MACKINNON, *Substantive Equality*, *supra* note 2, at 111.

In fact, *Lawrence*, its equality outcome notwithstanding, further isolates gays rather than providing them equal citizenship. From the very outset of its opinion, the *Lawrence* majority, in the parlance of privacy, makes clear that what they are articulating is an individuated and individuating right.¹⁶³ “Liberty,” Kennedy posits, “protects *the person* [read: individual] from unwarranted government intrusions into . . . private places.”¹⁶⁴ This pronouncement, coupled with the historiography the Court embraces—a history that disconnects anti-sodomy persecutions from the gay experience—avoids the class-based analysis that a substantive equality approach would have required and, thereby, overlooks (or at least looks through) the gay *community*.¹⁶⁵ As the *Lawrence* decision sees gay people, we have no identity or worth of our own, nothing that is separate from the heteronormative definition. As long as that definition is intact, gay people can continue with the “lifestyle” choices that Justice Kennedy concedes by analogy from straight identity. In the Court’s analysis, heterosexuals are again the heroes of the constitutional drama, and gay people are the mendicants. The use of privacy, not equality, reifies the bitter heteronormative prerequisite gay people face daily: to be free we must be *like*, we must be palatable to the heterosexual majority.

Justice Kennedy’s explication of liberty seems to presuppose that gay people have the same inner-self recognized for straight people and denied to gay people in *Hardwick*. What Kennedy drastically misapprehends, however, is whether this inner-self can be free in the isolation to which Kennedy’s majority opinion assigns it. *Lawrence* announced a curious rule: Gay people have a right to define their own destinies, which includes, the Court says, their intimacies.¹⁶⁶ But that destiny seems to extend only as far as the door of the new closet the Court creates. Gay people will not be sent to jail for consensual sex in private, but any illumination of these “bond[s] that [may be] more enduring”¹⁶⁷ to an unwilling heterosexual establishment is subject to the hammer of heteronormative conformity. Lower courts have held *Lawrence* to cover only the most closeted of sex—the most private—so that oral sex, for example, can still be punished more harshly than paradigmatic heterosexual sex (vaginal) if it occurs in public,¹⁶⁸ or for hire,¹⁶⁹ or even when state legislatures have gone to great pains to decriminalize the conduct, as have many states with oral sex between minors close in age.¹⁷⁰ Even rapists may have their sentences enhanced if they

163. *Lawrence*, 539 U.S. at 565.

164. *Id.* at 562 (emphasis added).

165. The imperative of an equality norm that recognizes group realities has been understood from perspectives other than gay liberation as well. “With the inability to assert a group reality—an ability that only the subordinated need—comes the shift away from realities of power in the world and toward the search for ‘identity’ It changes the subject, as it were, or tries to.” Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism”*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 75 (Francisco Valdes et al. eds., 2002).

166. *Lawrence*, 539 U.S. at 578.

167. *Id.* at 567.

168. *See, e.g.*, In re R.L.C., 635 S.E.2d 1, 5 (N.C. Ct. App. 2006) (“It was undisputed that the conduct occurred in a car parked in a bowling alley parking lot. The crimes against nature statute remains applicable where public conduct is involved.”).

169. *See, e.g.*, State v. Thomas, 891 So. 2d 1233, 1236 (La. 2005).

170. *See*, In re R.L.C., 635 S.E.2d at 5-8 (Elmore, J., dissenting).

violate their victims orally or anally.¹⁷¹ This is not to suggest—in any way—that the rapist is sympathetic; rather I am suggesting that rape is made no worse simply because the form it takes is a violent mirror of traditionally homosexual sex acts. All of these painful associations make it difficult for gays to have the free inner-self Kennedy’s opinion imagines for us. *Lawrence* allows bigoted judges, reminiscent of Chief Justice Burger in *Hardwick*, to continue to enact homophobia into law.

Of course, a necessary precursor to the Court’s approach is the a priori assertion, taken as gospel, that heterosexuality is the measure of the good.¹⁷² Heterosexuality *is* citizenship, presumptively and really. The assimilationist, “similarly situated” standard says gays are to be judged equivalent to the “good” when we are sufficiently proximate to the heterosexual paradigm. In the case of *Lawrence* and *Garner*, a gay couple happened to be engaging in a sex act that a substantial number of straight couples engage in; therefore, those acts and the participants deserve protection based upon the heterosexual paradigm.¹⁷³ Privacy protects gay sexual conduct because it (as suggested by current data) is substantially equivalent to heterosexual sexual conduct. The conduct at issue (oral and anal sex) must be, and presumptively should be, protected for heterosexuals. Gay people get the benefit of this protection, too. But make no mistake: heterosexuality is the individuating standard. The individuated right of sexual autonomy elucidated in *Lawrence* has no room for the group realities that define the place of the gay individual in American society, law, and politics. These defining issues of dominance and hierarchy are both the symptom and the root cause of sodomy prohibitions aimed at same-sex sexual expression.

V. *OBERGEFELL V. HODGES*: MORE ABSTRACTION, AND SOME POSSIBLE HINTS AT FUTURE DIRECTION

As he did in *Lawrence*, Justice Kennedy begins his opinion in *Obergefell* with an abstraction, writing:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the

171. See, e.g., *Wilson v. State*, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006).

[I]f a seventeen-year-old male who engages in an act of sodomy with a female under the age of sixteen years is convicted of aggravated child molestation, he is subject to a mandatory sentence of ten years imprisonment without possibility of parole. If, however, that same teenage male engages in an act of sexual intercourse with the same female child and is convicted of statutory rape, he is guilty of only a misdemeanor.

172. See, e.g., Jose Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 2 (2008).

173. See, WILLIAM D. MOSHER ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVICES, SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15-44 YEARS OF AGE, UNITED STATES, 2002, at 3 (2005), www.cdc.gov/nchs/data/ad/ad362.pdf, archived at <https://perma.cc/YX6W-Y2K8> (reporting that 90% of males and 88% of females between 25 and 44 years of age had engaged in oral sex with a member of the opposite sex. The figures for anal sex were 40% percent for males and 35% for females. Among males 22 to 24 years of age, 7.4% reported engaging in sex with another male. 12.4% of females between 15 and 24 years of age reported engaging in sex with another female).

same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.¹⁷⁴

Building on what he did doctrinally in *Lawrence*, Kennedy writes equal protection into the Due Process Clause—a move that is curious given the reality that equal protection stands on its own terms in the same amendment. Equality in any substantive sense simply isn't present. The nearest thing to it in the opinion seems to be a principle of equal access which, again, follows the similarly situated analysis, arguing forcefully that gay people are just like straight people.¹⁷⁵ The work begun in *Lawrence* is perfected.

In part II of the opinion, Kennedy explains, completely accurately, that the work of the gay marriage lobby has only ever been about merely assimilating into marriage as it is, without change.¹⁷⁶ Then, for the first time at the Supreme Court, Kennedy describes homosexuality as *immutable*, writing, “And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”¹⁷⁷ Then, explaining how liberty in due process has come to include “dignity” for homosexuals “in their own distinct identity,”¹⁷⁸ Kennedy reiterates that homosexuality “is both a normal expression of human sexuality and immutable.”¹⁷⁹ Taken alone, such expressions by the Court are extraordinary, even though they do little work (mechanically, so to speak) in the *Obergefell* decision itself.

Given the centrality that immutability has assumed historically in the development of equal protection jurisprudence, especially where gays have been concerned,¹⁸⁰ numerous possibilities are opened by the Court's acquiescence in the, now largely-undisputed, idea that sexual orientation is immutable.¹⁸¹ Will gays now be elevated from bottom-tier scrutiny status on par with women or Blacks (or gender or race, respectively)? Having supplied the final necessary piece of the tiered-scrutiny analysis, such would seem to be the logical extension of *Obergefell*, even though that is not what Justice Kennedy ultimately does in the opinion itself.

If this elevation in fact happens, will it be to intermediate scrutiny, which seems to be mostly likely and had, in fact, been argued by the justice department under President Obama,¹⁸² or to strict scrutiny? Are there reasons for gay advocates to argue for one over the other? And are the concerns that drove some advocates for women's equality to argue for something less than strict scrutiny, fearing strict scrutiny's double-edged consequences, even cognizable to a gay movement that now

174. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015).

175. *See id.* at 2604.

176. *Id.* at 2595-97.

177. *Id.* at 2594.

178. *Id.* at 2596.

179. *Id.*

180. *See*, GILREATH, THE END OF STRAIGHT SUPREMACY, *supra* note 77, at 50-52.

181. *Obergefell*, 135 S. Ct. at 2596.

182. *See*, Letter from Eric Holder, Attorney Gen., to John Boehner, Speaker, U.S. House of Representatives (Sept. 4, 2013), <https://www.justice.gov/iso/opa/resources/557201394151530910116.pdf>, archived at <https://perma.cc/2LNV-BQNF>.

prizes assimilation above all? By potentially opening up the legal horizon for gays as a class, *Obergefell* raises these questions and more.

But Kennedy's opinion merely gestures to the familiar equal protection framework; it does not engage it directly. *Obergefell* is first and foremost a due process decision, with privacy as its substance. Kennedy situates his opinion as a natural consequence of the privacy cases including those regarding contraception, family relationships, procreation, and childrearing. From this posture, Kennedy makes the shift to fundamental rights language that *Lawrence* did not muster. "A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to individuals."¹⁸³ Kennedy then moves to deal with *Lawrence* directly, holding that *Lawrence* was about a "right...to...intimate association."¹⁸⁴ The next several pages of the opinion are devoted to waxing eloquent about marriage as an institution, explaining how marriage has changed over time (the elimination of coverture, for example), and to explaining how same-sex couples are similarly situated to opposite-sex couples with regard to marriage.¹⁸⁵

Justice Kennedy gets to equal protection last by way of what constitutional scholars generally call a "hybrid" equal protection claim. This type of claim works when a non-suspect class nevertheless receives heightened scrutiny because the right of which they are deprived by operation of the law, which targets them as a class, happens to be, by the Court's denomination, fundamental.¹⁸⁶ For an example, Justice Kennedy offers *Zablocki v. Redhale*.¹⁸⁷ Marriage was the fundamental right at issue in *Zablocki*, since fathers who were behind on their child support payments were prohibited from marrying under the state law before the Court.¹⁸⁸ And the father's claim received strict scrutiny because, even though deadbeat dads have not been held to be a suspect class, defined as such they were being denied a fundamental right.¹⁸⁹

His use of *Zablocki* as illustrative highlights what Justice Kennedy did not do in *Obergefell*. Despite his admission that sexual orientation is immutable, he did not elevate gay people from the bottom of the tiered hierarchy for deciding equal protection claims to the top, suspect rung.¹⁹⁰ They only receive heightened scrutiny in *Obergefell* because of the all-important right of marriage at stake.¹⁹¹ This is made all the stranger considering this example is followed immediately by a retrospective on cases involving "invidious sex-based classifications," which get heightened, intermediate scrutiny.¹⁹² Is sexual orientation like gender, which is to say is it pertinent as a classification in its own right, or isn't it?

183. *Obergefell*, 135 S. Ct. at 2589.

184. *Id.*

185. *Id.* at 2595-97.

186. *Id.* at 2597-99.

187. *Id.* at 2590.

188. *Zablocki v. Redhail*, 434 U.S. 374, 375-76 (1978).

189. *Id.* at 383.

190. *See Obergefell*, 135 S. Ct. at 2604.

191. *Id.* at 2602.

192. *Id.* at 2604.

Ultimately, however, it is the hybrid claim analysis that controls the opinion. “[T]he Equal Protection Clause, like the Due Process Clause, prohibits *this unjustified infringement of the fundamental right to marry*.”¹⁹³ Ultimately, the right at issue takes precedence. Nothing new, doctrinally speaking, is happening here. Gay people remain on the bottom of the equality pile, vindicated momentarily because they are similarly situated with straight people in relation to a fundamental right. The right drives the case opinion; gay people are simply the vehicle. The abstraction that is substantive due process continues to control the outcome, and no substantive change for gays and lesbians, as such, happens. Do other forms of discrimination against us merit heightened scrutiny review, like “invidious sex-based classifications” would? By avoiding a substantive equality decision of the case, the *Obergefell* decision leaves us with no answers. There is a net increase in equality here, if that is taken to be equal access to a right deemed fundamental, but this is not an equality-based decision. And whether or not Justice Kennedy’s concession of immutability will propel us further along the formal equality route remains to be seen.

VI. EQUALITY: THE FUTURE

What would substantive equality look like for gay people—for all people? First, substantive equality would abandon the tiered framework currently advanced by the Court. If inequality is a question of hierarchy, then a hierarchical approach cannot do anything other than entrench inequality. Second, and relatedly, the similarly-situated threshold to even getting an inequality claim heard must also be abandoned. It conceals the status quo by ignoring the fact that inequality, as a social construct predominantly, precedes government action. In the marriage context, for example, the question—seemingly determinant in the Court’s logic—is how closely the relationships of homosexual people approximate those of heterosexual people. But why should the burden lie with gay people to prove we are like straight people before we deserve equality with them? After all, heterosexuality is as different from homosexuality as homosexuality is from heterosexuality. Justice Kennedy’s poetic commitment to allowing people to control their own destinies seems rather petty if that destiny is already scripted for us.

From this perspective, sexual orientation may not qualify as a difference at all, except that it has been constructed into one by the heterosexual hierarchy that has used it as a tool for dominance. From the assumptions of heterosexual male supremacy come categorical distinctions that matter, which have been gender and sexual orientation. In this political reality, difference is only consequential as a tool for social power. Justice Kennedy’s privacy-based hybrid rationale recognized that a constructed difference existed and should be unconstitutional because, as the majority understood it, the difference (the gender of partners in marriage) was an artificial one. The individuated nature of the substantive due process right, however, ensured that the Court stopped here, without exposing and considering the root cause of the epistemological distinctions drawn by the prohibition. The kind of substantive equality approach I envision would have gone further. It would have given gay people

193. *Id.*

access, finally, to the standard by which differences are measured and power meted out, rather than, as *Obergefell* does, rest on the determination that resulted when the Court measured one group's (gays) differences against the standard set by the group (straights) that constructed the differences.¹⁹⁴

If the Court is to cease asking questions of categorized difference, what questions should the Court ask? A substantive approach to inequality would ask whether the law at issue promoted the dominance of one group with the consequence of the subordination of the target group, in a socio-political reality in which the groups are, in fact, unequal as demonstrated by the existence of an apparent power differential, and where the socio-political (and legal) hierarchy is constructed to exclude the target group from power. In short, this approach is the revivification of Justice Harlan's *Plessy* dissent: There is no caste here.¹⁹⁵ This approach, of course, requires the Court to realize things it may not wish to realize. It requires the Court to depart from a historical jurisprudence of formal equality only, and to begin to ask questions that are so hard because they are so simple. It requires the Court to distinguish the oppressed from the oppressor, victim from victimizer—powerful from powerless. It requires that the Court examine inequality as it *really* exists—in reality—not merely in the abstract world of judges and law professors.

The paradigm case for a substantive equality analysis of the questions presented by *Obergefell* is not found in the contraception cases and their endangered privacy, but rather in another case the Court relies on to prove its due process analysis, *Loving v. Virginia*¹⁹⁶, in which the Court struck down anti-miscegenation laws as discriminatory tools to maintain white supremacy.¹⁹⁷ The Court invalidated the Virginia law

194. I continue to believe that "Equality, then, is the combination of personal and civic freedom; it is a combination of the private and the public. While it is fair to say that one cannot enjoy civic freedom without first possessing personal liberty, one is not free until one has a role in shaping the public mechanisms that govern one's destiny." GILREATH, *SEXUAL POLITICS*, *supra* note 117, at 129-130.

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

196. I have not chosen *Brown v. Board of Education of Topeka* as my paradigm (though it is the most commonly touted equality case), because I do not believe *Brown*, in fact, to be a substantive equality case. 347 U.S. 483 (1953). By my reading of it, *Brown*, unlike *Loving*, announces no new equality theory. The *Brown* Court simply applied the *Plessy* Court's formal equality analysis (the likeness/difference approach) to evolved social facts. In other words, the Court decided that Black people were sufficiently like white people to merit integration. Viewed in this way, *Brown* is the mirror of *Lawrence*: the minority "wins" because it has sufficiently—in the eyes of a Court constituted primarily by the majority—come to resemble the majority (or has the potential to). There is an equality there, for sure, but one without substance.

197. It is interesting that the justices dissenting in *Hardwick* apparently thought *Loving* to be the most analogous precedent, too. Justices Stevens and Blackmun, both joined by Justices Brennan and Marshall, wrote dissents that relied on *Loving*. Justice Blackmun noted that "[t]he parallel between *Loving* and this case is almost uncanny." 478 U.S. at 210, n.5 (Blackmun J., dissenting). Likewise, in a footnote, Justice Stevens notes the parallels between the crimes of miscegenation and sodomy. *Id.* at 216, n.9 (Stevens J., dissenting).

The *Loving* analogy has been made by academics. For a lucid analysis, see Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 *YALE L. J.* 145 (1989). Professor Koppelman and I cover some of the same ground, albeit from distinctly different starting points—he from the already well-framed law of sex discrimination and I from the far less well-framed law and theory of gay liberation.

It is no surprise that *Loving* should figure so prominently in the thinking and rethinking of gay equality claims. The relationship between *Loving* and *Lawrence* provides an historical analogy, but it, in multiple ways, provides a converged reality as well. Gay people have never been owned as chattel property (at least not *as* gay people—surely there were slaves who happened to be both Black and gay); otherwise, their treatment has been similarly tragic. Like Blacks, gay people have been subject to systemic abuses, sexual and other physical violence, condoned and, indeed,

at issue in *Loving* because it was “designed to maintain White Supremacy.”¹⁹⁸ The Court’s focus on the statute’s use to further “White Supremacy” is also a departure from the “trait-based” jurisprudence that has come to define equality doctrine.¹⁹⁹ The Court spends no time expostulating on the evils of classifications drawn on the paradigmatic trait—race. Rather the Court focused on the power relationships at play in a system of supremacy—power hierarchy which “violates the central meaning of the Equal Protection Clause.”²⁰⁰ The one exception being Justice Stewart, who argued that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.”²⁰¹ Race was determinative for him. No other justice joined his opinion, and Chief Justice Warren’s majority opinion is indubitably concerned with the consequences of power and caste.²⁰²

An analogy between *Loving* and *Obergefell* is also important because it illuminates the faultiness, constitutionally speaking at least, of transmuting the old talisman “love the sinner, hate the sin,” into jurisprudential theory. The “possibility that one can ‘hate’ an individual’s behavior without hating the individual”²⁰³ has been a stumbling block even to those who are largely sensitive to claims for equal citizenship made by gays and lesbians. Michael Perry, for instance, wonders whether an “irrational fear and loathing” of homosexuals really motivates many of the laws that deny gays equal citizenship, for example opposition to opening civil marriage to gay couples.²⁰⁴ Perry wonders whether such resistance is rather a genuine expression of religiously-based moral disapproval (presumptively more benign?) for homosexual activity, and thus a reluctance to “incentivize” it.²⁰⁵ Andrew Koppelman, a consistent proponent of marriage equality, has also argued that, “[n]ot all antigay views...deny the personhood and equal citizenship of gay people....There is a serious discussion to be had here about sexuality and morality.”²⁰⁶

Now, opposition to gay “conduct” or the conduct of same-sex marriage may be, as Professors Perry and Koppelman see it, a genuine expression of religious morality. Or it may be, as I see it, a convenient rationalization for bigotry. Or it may be both. What *Loving*’s equality analysis makes quite plain, however, is that the answer to this conundrum makes absolutely no difference in the way the Court should adjudicate an equality-based claim under the Fourteenth Amendment. Religious justifications supporting anti-equality legal regimes have served as no magic shield from

often encouraged by the American legal order from the top down. Blacks, gays, and women have all been systematically sexualized by their governments. But these realities of the lives lived by the powerless or less powerful are seldom the stuff of which decisions are made in formal equality adjudication.

198. *Loving v. Virginia*, 358 U.S. 1, 11 (1967).

199. See Gilreath, *Of Fruit Flies and Men*, *supra* note 3, at 16.

200. *Loving*, 358 U.S. at 12.

201. *Id.* at 13 (Stewart, J., concurring).

202. *Id.* at 12 (majority opinion).

203. Nagel, *supra* note 88, at 37. For my original critique of Nagel’s position, see GILREATH, SEXUAL POLITICS, *supra* note 117, at 49.

204. GILREATH, THE END OF STRAIGHT SUPREMACY, *supra* note 77, at 97.

205. *Id.*

206. Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOKLYN L. REV. 125, 145 (2006).

constitutional scrutiny. Indeed, the Virginia trial judge who sentenced Richard and Mildred Loving to banishment for the “conduct” of engaging in interracial marriage buttressed his decision by concluding that interracial marriage violated the laws of “the Creator.”

Almighty God created the races white, black, yellow, malay [sic] and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.²⁰⁷

Was this religious pronouncement a reflection of the deeply-held moral conviction of the Virginia electorate, or was it a rationalization, religion as a tool (a very effective one) for the maintenance of White Supremacy? The Court made no effort to solve the dilemma because it was constitutionally irrelevant. Regardless of whether the impetus for the miscegenation statute was one of moral force, the sentiments in legal operation denied equality for blacks.

Indisputably, a religious teaching about the natural separation of the races was part and parcel of the Southern establishment that kept Blacks powerless.²⁰⁸ Anti-gay laws rest on powerful religious convictions, too. Some such expressions mirror those of pro-segregation preachers in that they affirm that gays should be treated with “respect, compassion, and sensitivity.”²⁰⁹ Only their *conduct* (having sex with same-gender partners or marrying someone of the same gender) is morally dubious and regulable.²¹⁰ No such posturing mattered to the *Loving* Court. All that mattered

207. *Loving*, 358 U.S. at 11.

208. See, Shannon Gilreath and Arley Ward, *Religious Accommodation and the Race Analogy*, 41 VT. L. REV. 237 (2017).

209. U.S. Conference of Catholic Bishops Admin. Comm., *Promote, Protect, Preserve Marriage: Statement on Marriage and Homosexual Unions*, 33 Origins 257, 259 (2003). This concededly pretty language rings rather hollow to many Gay people, especially considering that the Vatican has also labeled us “inherently disordered” and equates our mere contact with children with child abuse.

210. Similar arguments, resting on moral grounds, were used to deny women equal citizenship. Consider Justice Bradley’s explanation of his decision in *Bradwell v. State* in which the Court upheld laws prohibiting the “conduct” of a woman’s practice of law: “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” 83 U.S. 130, 143 (1873) (Bradley, J., concurring). Or this attack on women abolitionists:

We invite your attention to the dangers which at present seem to threaten the female character with widespread and permanent injury. The appropriate duties and influence of women are clearly stated in the New Testament. Those duties, and that influence are unobtrusive and private, but the sources of mighty power. When the mild, dependent, softening influence upon the sternness of man’s opinions is fully exercised, society feels the effect of it in a thousand forms. The power of woman is her dependence, flowing from the consciousness of that weakness which God has given her for protection.

ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* (rev. ed. 1975) (1959) (quoting a pastoral letter).

Or: “The Creator has endowed the bodies of women with the noble mission of motherhood...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.” GILREATH, *THE END OF STRAIGHT SUPREMACY*, *supra* note 77, at n.99 (emphasis added).

Condemnation of the “conduct” at issue in these statements was done to protect and further “respect, compassion and sensitivity” toward women, not to deny a woman’s personhood. Indeed, the hate the sin, love the sinner camp

was that Virginia's anti-miscegenation law, whatever its religious justification, served to entrench the power of the white hierarchy—a consequence that struck at “the central meaning of the Equal Protection Clause.”²¹¹ The Court saw hierarchy in its material, not merely formal aspects.

What the Court saw in *Loving*, however momentarily, was that effectively addressing legal inequality meant recognizing the realities of social inequality. This approach has sadly been a limited one in U.S. constitutional jurisprudence.²¹² In other regimes, equality has fared better. Consider three Canadian milestones: cases holding that anti-equality propaganda and pornography threaten equality rights safeguarded by the Canadian constitution. One case involved a man who taught Holocaust denial to high school students²¹³; one case involved heterosexual pornography²¹⁴; and the other involved homosexual pornography.²¹⁵ In each of these cases, the Supreme Court of Canada recognized Jews, women, and gays as historically disadvantaged groups and recognized that, given the material backdrop of inequality that contextualized the speech in question, their equality rights were more important than any speech interests restricted by criminalizing expressions that actively promoted their inequality. The Supreme Court of the United States, still in the grips of the formal equality approach to the Fourteenth Amendment, remains unable to see the inequality dimensions of hate propaganda and pornography at all.²¹⁶

The goal of substantive equality theory is to institutionalize and operationalize social equality through legal equality. It begins by articulating the systemic and systematic operationalization of inequality throughout society and moves to empower, in material ways, those at the bottom of social hierarchy. In this sense, it is specific and particular, not abstract. Its goal is to close the gap between the promise of legal equality and social reality.²¹⁷

would argue that the condemnation is there solely so that personhood may be fully recognized. Likewise for homosexuals. The abiding insult of such pronouncements is that the pontificators purport to know what is good for gays better than gays know it for ourselves. Enforcing this descriptive “good” by the power of the state is exactly what makes such laws violate the substantive equality guaranteed by the Fourteenth Amendment. For further discussion, see Shannon Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy*, 9 TEX. J. C.L. & C.R. 23, 33-36 (2003).

211. *Loving*, 358 U.S. at 12.

212. *But see*, *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Shelley v. Kramer*, 334 U.S. 1 (1948).

213. *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

214. *Regina v. Butler*, [1992] 1 S.C.R. 452 (Can.).

215. *Little Sisters Books & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Can.).

216. *See*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992); *Am. Booksellers Ass'n Inc. v. Hudnut*, 771 F.2d 323, 333-34 (7th Cir. 1985).

217. *See* MacKinnon, *Substantive Equality*, *supra* note 2.