The National Masturbators' Task Force; or, The Importance of LGBT Political Organizing for Evaluating LGBT Equal Protection Claims in Competition with Free Exercise of Religion Claims

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Two bedrock principles of Constitutional law in the United States are on a collision course. Recent events in law and politics threaten to put the promise of equal protection of the laws in the Fourteenth Amendment[1] into conflict with the guarantee of free exercise of religion in the First Amendment.[2] Even before the recent Supreme Court decision in *Obergefell v. Hodges*,[3] finding a right in same sex couples to marry on equal terms with different sex couples, the issue of same sex marriage was producing increasingly vitriolic battles between advocates of lesbian, gay, bisexual and transgendered (LGBT)[4] equality, claiming their right to equal protection of the laws, including the right of same-sex couples to marry, and Christian conservatives, who oppose LGBT equality to varying degrees, but who are mostly uniformly opposed to allowing legal recognition for same-sex marriages, claiming their right to freedom of religious belief and practice.[5] The issue has been formally joined

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1 "No state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amdmt XIV.

2 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. Const. Amdmt I.

3 No. 14-556, June 26, 2015.

4 At a few points in this document, the acronym, "LGBTQ" appears. The Q stands for "queer," which can be a separate designation indicating a more radical, oppositional political stance, but can also be a catch-all term for LGBT. See William B. Turner, A Genealogy of Queer Theory (2000).

5 A particularly ill informed version of this claim came from day time television, unsurprisingly. Appearing on *The View*, Candace Cameron Bure insisted that a right in businesses to discriminate against LGBT persons on the basis of the owners' religious beliefs is "what makes our country so wonderful." Matthew Tharrett, *Candace Cameron Bure: Freedom To Discriminate Is What "Makes America Wonderful,"* Newnownext, 5 August, 2015, http://www.newnownext.com/candace-cameron-bure-freedom-to-discriminate-is-what-makes-america-wonderful/08/2015/. Ms. Bure seems unaware that, as a legal question, her blanket permission for business owners to excuse their discrimination by appeal to their religious beliefs cannot be cabined just to LGBT persons, but would also enable discrimination on any other basis, unless one adopted a special rule allowing only discrimination against LGBT persons, an option that the Supreme Court opinion in Romer v. Evans would seem to foreclose. A mostly unacknowledged subtext in the debate over LGBT civil rights has been the extent to which discrimination on the basis of sexual orientation and gender presentation is morally equivalent to racial discrimination. In backhanded recognition of the success of the African American civil rights movement, conservatives have strenuously opposed that analogy, realizing that, if it takes hold, they will immediately lose the war against LGBT civil rights. The best explanation for Jimmy Carter's willingness, very early in the LGBT civil rights movement, to grant its representatives extraordinary access to his White House staff was his general sympathy for African American civil rights. See William B. Turner, *Mirror Images: Lesbian/Gay Civil Rights in the Carter and Reagan Administrations*, in Creating Change: Sexuality, Public Policy, and Civil Rights (John D'Emilio, William B. Turner, and Urvashi Vaid, 2000), 3-28.

in federal court. On August 12, 2015, Federal District Judge David L. Bunning in the Eastern District of Kentucky issued, then stayed, a preliminary injunction against Kim Davis, court clerk in Rowan County.[6] The Sixth Circuit has refused to issue a stay of its own,[7] as has the Supreme Court.[8] On Thursday, September 3, 2015, after a hearing in which Davis refused to start issuing marriage license as Bunning had ordered, he sent her to jail, where she remained for five days, resolute in her claim that having to issue marriage licenses to same-sex couples would violate her right to free exercise of her religion.[9] On September 8, Judge Bunning released Davis from jail with instructions not to interfere with the personnel in her office who had agreed to start issuing licenses to all qualified couples.[10] The complaint in this case aligns the Fourteenth and First Amendments on the side of the plaintiffs, asserting that the clerk's action violates the establishment clause of the First Amendment and their rights to due process of law under the Fourteenth Amendment.[11]

According to Judge Bunning's opinion, Davis has "a sincere religious objection to same-sex marriage," and she "specifically sought to avoid issuing licenses to same-sex couples without

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6 Memorandum Opinion and Order, April Miller, et al. v. Kim Davis, et al. Civil Action No. 14-44-DLB, EDKY, 12 Aug., 2015. In at least one case, the judge had no opportunity to render a decision of any kind because the defendant county clerk, who had refused to give a gay couple a license the previous week because of her religious beliefs, reversed course and issued the license almost immediately after the filing of the suit. David Warren, Gay Couple Quickly Granted Marriage License After Lawsuit, NBCDFW, 6 July 2015, http://www.nbcdfw.com/news/local/Gay-Couple-Quickly-Granted-Marriage-License-After-Lawsuit-311779371.html.

7 Claire Galofaro and Adam Beam, *Appeals Court Upholds Gay Marriage Ruling*, ABC News, 26 Aug. 2015, http://abcnews.go.com/US/wireStory/appeals-court-upholds-gay-marriage-ruling-kentucky-33341899. See also, Kim Davis loses latest gay marriage appeal, The Courier-Journal, 5 Nov., 2015, http://www.courier-journal.com/story/news/politics/2015/11/05/kim-davis-loses-latest-gay-marriage-appeal/75235338/?utm_medium=twitter&utm_source=dlvr.it

8 Sam Smith, *U.S. Supreme Court rejects Kim Davis' case; clerk must issue marriage licenses*, WKYT, 31 Aug, 2015, http://www.wkyt.com/home/headlines/Gay-couple-denied-marriage-license-three-times-sues-Rowan-County-Clerk-Kim-Davis-323488531.html

9 Greg Toppo, Kentucky clerk remains behind bars after 5 days, appeals judge's order, USA Today, 7 Sept. 2015, http://www.usatoday.com/story/news/2015/09/07/kentucky-clerk-jail-appeal/71849526/.

10 David Weigel, Abby Phillip, and Sarah Latimer, *Kim Davis released from jail, ordered not to interfere with same-sex marriage licenses*, Washington Post, 8 Sept. 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail/.

11 Complaint, Miller v. Davis, ¶1, 4-11, http://www.aclu-ky.org/wp-content/uploads/2015/07/Rowan-complaint.pdf.

discriminating against them" with her policy of not issuing marriage licenses at all.[12] The judge himself characterized the issue thus: "At its core, this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence. One is the fundamental right to marry implicitly recognized in the Due Process Clause of the Fourteenth Amendment. The other is the right to free exercise of religion explicitly guaranteed by the First Amendment."[13] Despite the apparent difficulty in balancing competing principles when both are "sacrosanct," Judge Bunning had no trouble issuing a preliminary injunction against Davis. He noted that, while the State clearly had an interest in protecting Davis' right to free exercise of her religion, it had a countervailing interest in not establishing any official religion, in deference to the other prong guaranteeing religious freedom in the First Amendment. Davis had "arguably committed...a violation" of the establishment clause with her policy.[14]

The judge went on to note that the law in question is facially neutral toward religion and therefore does not require strict scrutiny from him.[15] He further noted that Davis' name on the license form does not entail any endorsement of any marriage on her part; it merely shows that the couple in question has provided the information the law requires and has legal permission to wed.[16] Issuing marriage licenses to same-sex couples in no way interferes with Davis' freedom to engage in any religious practice, including going to church and bible study, and ministering to inmates at the local women's prison. She also remains free to believe that same-sex marriages are not morally valid.[17]

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12 Memorandum Opinion, supra, at 1. This is, one supposes, a slightly perverse application of the principle of equal protection of the laws.

13 Id. at 2. Note here that Judge Bunning characterizes "the right to marry," not making it specific to same sex marriage, which it was not, given Davis' choice to stop issuing marriage licenses altogether. On the relationship between the Due Process clause and the Equal Protection clause in *Obergefell*, see infra, text accompanying note 199ff.

14 Id. at 15.

15 Id. at 19.

16 Id. at 22.

17 Id. at 27. Interestingly, in an interview on 23 Sept., when asked why she did not just resign after losing the legal battle, Davis responded, "If I resign, I lose my voice." Equal protection claims usually present in court as relatively specific, narrow violations of the principle, but the principle applies very broadly in the sense that all public officials in the United States have the same

Having weighed the four factors that govern the issuance of a preliminary injunction, Judge Bunning found that all four favor the issuance of such injunction and granted it.[18]

Most of the response to national permission for same-sex marriage has reflected more political than legal considerations, especially coming as the *Obergefell* decision did during the very early stages of the next election for President, guaranteeing that every declared candidate has taken a position on this issue that is still, in the political realm at least, highly contentious.[19] The purpose of this article is

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responsibility to treat all of their constituents equally. Here is where the intersection, or in this case, tension, between the Free Exercise Clause and the Establishment Clause becomes critical. Davis has the right to the free exercise of her religion. She does not, however, have the right to use a public office to amplify her distinctly religious claims – establishment of religion in the most obvious sense – at all, but especially not at the expense of her constituents. The imbroglio she has created illustrates vividly why equal protection claims must trump free exercise claims, and how her putative free exercise claim is not really a free exercise claim at all. *Kim Davis: "If I resign, I Lose My Voice,"* Fox News Insider, 23 Sept., 2015, http://insider.foxnews.com/2015/09/23/kim-davis-kelly-file-its-never-been-gay-or-lesbian-issue-me

[18] Memorandum opinion, supra, at 28. As of this writing, other clerks in Davis' office have issued marriage licenses to same-sex couples, but those licenses have used forms that Davis altered as soon as she returned to work from her stint in jail, according to the ACLU, which now raises concerns about the validity of the licenses. Davis' own lawyers, with Liberty Counsel, reply that Governor Beshear, Judge Bunning, and the Attorney General of Kentucky have all asserted that the licenses are valid. Liberty Counsel has also claimed in a court filing that, by instructing Kentucky clerks to issue licenses in compliance with Obergefell, Governor Beshear had "usurped control of Kentucky marriage law." Exactly how a Governor could "usurp" law in the State he governs is not clear. Tim Stelloh, *Kentucky Clerk Kim Davis is Meddling and Altering Marriage Licenses, ACLU Says*, NBC News, 22 Sept., 2015, http://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-altering-marriage-licenses-aclu-says-n431336; *ACLU Targets Kim Davis and Religious Liberty Again*, Liberty Counsel, 22 Sept., 2015, https://www.lc.org/newsroom/details/aclu-targets-kim-davis-and-religious-liberty-again; *Kentucky Clerk Kim Davis Blames Governor for Legal Woes*, Associated Press, 25 Sept., 2015, http://abcnews.go.com/US/wireStory/kentucky-clerk-kim-davis-blames-governor-legal-woes-34023257.

[19] Unsurprisingly, Democratic candidates all support the decision, while Republicans all oppose it. The Republicans vary in what they propose as a response. For an overview, see Nick Gass and Jonathan Topaz, Republican presidential candidates condemn gay-marriage ruling, Politico, 26 June 2015 http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466.html?ml=ri. Reporting from the 2015 Values Voters Summit, the reporter for the gay newspaper, Washington Blade asserted that the top two candidates in terms of polling hardly addressed same-sex marriage at all, but the less successful candidates made much of the issue. They repeatedly addressed it as infringing on the right to free exercise of religion. Referring to Kim Davis, Senator Ted Cruz said, "Now, six months, a year ago, if I had come and said that a Christian woman was going to be thrown in jail, locked up in jail, for living her faith, the media would have dismissed me as a nutcase. That's where we are today." Chris Johnson, *At summit, GOP hopefuls lower in polls inclined to LGBT attacks*, Washington Blade, 25 Sept., 2015, http://www.washingtonblade.com/2015/09/25/at-summit-gop-hopefuls-lower-in-polls-inclined-to-

to offer a historically informed exploration of the legal issues involved in the hopes of providing some small assistance to any judge who does have to decide such a potentially difficult Constitutional contest. The possibility of such conflicts also presents an unusual opportunity to introduce some little known historical information into the legal debate around LGBT equal protection claims.

This article takes the position that there is no contest between the First and Fourteenth Amendments because the Constitution defines a political space and the most important form of equal protection of the laws in our polity is equal access to the political process, which the First Amendment protects vigorously,[20] in addition to the right to freedom of religious belief and practice. Because the polity, by definition, commands universal adherence, potentially coercively, from all who live in it in a way no set of religious principles does, and because the First Amendment prohibits any law respecting establishment of religion even as it guarantees the right to free exercise, rights under the equal protection clause must take precedence over rights under the free exercise clause insofar as the two genuinely come into conflict.[21]

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[20] See infra, n. 238ff for discussion of this point in terms of a Supreme Court opinion. No one has ever explicitly addressed the issue this way, but it is only an exaggeration to say that, containing as it does no limiting language at all in terms of its application, the First Amendment contains an implied equal protection component in the sense that it provides no textual basis on which to choose any group to exclude from its operation.

[21] The Christian conservative position, from start to finish, fails to appreciate how the free exercise and establishment clauses work together. While there are any number of ways one can ensure every individual's right to exercise her/his religious beliefs freely, one obvious way to do so is to prohibit all public officials from appealing to any religious belief or doctrine as the basis for any official act – to prohibit the establishment of religion. Especially in a republic, the state is just the beliefs of the entire society formalized and codified. When Christian conservatives assert that the United States is a “Christian nation,” they are saying that they believe their version of Christianity should govern. They would prefer to have their moral prejudices so deeply and universally ingrained in the culture that no legislation would be necessary to enforce those prejudices, but given the current, in their view, parlous character of U.S. society, they will resort to legislating their prejudices as necessary in order to defend them. Such is the origin of prohibitions on same-sex marriage, which have no logical basis apart from conservative Christian belief. In terms of the micro politics of daily interactions, Christian conservatives would prefer that their moral disapproval as individuals carried sufficient weight alone to shame persons into compliance. Although they never put the point this way, conservative Christian business owners wish, in effect, to establish their religious beliefs as governing in the micro realm.

To put the point expressly in terms of the case against Ms. Davis, the Kentucky county clerk from above, in running for elective office in the United States, Davis explicitly sought a position[22] that requires her to take an oath to support and defend the U.S. Constitution,[23] which is a fundamentally secular social contract containing express prohibitions on religious tests for public offices[24] and on establishment of religion,[25] as well as the protection for religious belief and practice that she hangs her refusal to issue marriage licenses on. That is, in seeking and holding the office, she has already compromised with the patently secular principles that govern the Republic, making her retreat to her religion in the present case obviously absurd. Having deliberately sought an office in a secular polity that abjures the possibility of imposing a religious test on her for the job, she violates in the most obvious way the terms of the contract when she then attempts to impose her religious test on citizens who seek from her the services that define the office she holds.

It may be the case that, in the long run, no real conflict between the two will ever exist. Certainly none should. Members of both groups, Christian conservatives and LGBT persons, are, by definition, equal in our polity and so should have the same rights. The meat of this article is the history of vigorous use of the political process by LGBT activists over the past sixty years, which they have every right to continue. Christian conservatives also participate vigorously in the political process and have the identical right to continue.[26] The point of the *Obergefell* decision is that prohibitions on legal

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[22] Travis Gettys, *Kim Davis was overpaid as a deputy cler, barely won a primary election – and then hired her 21 year old son*, Raw Story, 10 Sept., 2015, http://www.rawstory.com/2015/09/kim-davis-was-overpaid-as-a-deputy-clerk-barely-won-a-primary-election-and-then-hired-her-21-year-old-son/.

[23] "[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution…." U.S. Const., Article VI

[24] "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const., Article VI.

[25] Congress shall make no law...respecting an establishment of religion…." U.S. Const., Amendment I.

[26] At this writing, there is much in the news about the Freedom 2015 Conference, which Republican presidential candidates Ted Cruz, Mike Huckabee, and Bobby Jindal all attended. The organizer of the Conference spoke, stating that various passages of the bible mandate death for all LGBT persons, and implicitly endorsing that idea as a policy proposal for the United States. James DiVinnie, "Gays are Worthy of Death," Says Pastor to Silently Complicit Republican Candidates,

recognition of same-sex marriage violate the principle of equal protection of the laws (and of due process of the laws)[27] because they treat differently individuals, or couples, who are similarly situated for all purposes that are relevant to the State. Any religious individual or organization is perfectly free, under both the free exercise and establishment clauses, to continue to assert that they believe different sex couples are morally superior to same-sex couples and the only type to whom the designation "married" may properly apply, and the courts should – and in all likelihood will – continue to defend that right, as well as the right of religious actors to bruit their position publicly as they see fit. This obviously includes the right to refuse automatically to perform any wedding, same-sex or otherwise, that contravenes the teachings of the religious organization in question. The *Obergefell* decision has no apparent effect on any free exercise or free expression rights, unless one takes the legally absurd position that the mere fact of legal recognition for same-sex marriage impinges anyone's free exercise rights.

The responses of some Christian conservatives to same-sex marriage have approached the comical.[28] There are afoot, however, serious proposals, if not to reverse *Obergegell*, at least to limit its effects as much as possible, with the justification of protecting the free exercise rights of persons whose religious beliefs lead them to oppose same sex marriage.[29] Governor Sam Brownback of Kansas has

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Occupy Democrats, 8 Nov. 2015, http://www.occupydemocrats.com/gays-are-worthy-of-death-says-pastor-to-silently-complicit-republican-candidates/

[27] See text accompanying n. 206 for discussion of the legal reasoning of the opinion.

[28] Daniel Oines, *Pat Robertson Says the Gays will Kick you Out of America if You Don't Sleep with Them*, BLUE NATION REVIEW, 31 July 2014; Brian Tashman, *Pat Robertson: Gay Marriage Will Stifle Free Speech, Just Like in Bob Jones University Case*, RIGHT WING WATCH, 4 June 2015; Miranda Blue, *Bob Vander Plaats: Gay Marriage Leading to Legalization of Pedophilia, Criminalization of Bible*, RIGHT WING WATCH, 6 July 2015; *Pastor John Hagee tells God: Punish America for same-sex marriage or "apologize to Sodom and Gomorrah,"* RAW STORY, 1 July 2015, http://www.rawstory.com/2015/07/pastor-john-hagee-tells-god-punish-america-for-same-sex-marriage-or-apologize-to-sodom-and-gomorrah/, Brian Tashman, *Franklin Graham: God may Smite Obama with Lightning in Gay Marriage Punishment*, Right Wing Watch, 8 July, 2015, http://www.rightwingwatch.org/content/franklin-graham-god-may-smite-obama-lightning-gay-marriage-punishment.

[29] An entity calling itself the American Principles Project, under the direction of Catholic "Natural Law" scholar Robert George, has issued a statement condemning *Obergefell* and calling on ideologically sympathetic individuals to resist compliance with it in any lawful manner. They

issued an executive order purporting to protect "any individual clergy or religious leader" because s/he refuses to perform a same-sex wedding. This is a solution in search of a problem.[30] It seems reasonable to assume that no government actor in the United States would even consider imposing any such penalty.[31] Presumably, had that happened, conservatives would be up in arms about it – rightly so – and would ensure the event received ample press coverage. More troubling is the protection the order provides to any organization that declines to "provide services, accommodations, facilities, goods, or privileges...based upon or consistent with a sincerely held religious belief or moral conviction…."[32] The newspaper article states that part of the goal is to allow adoption agencies to refuse to place children with same-sex couples,[33] which itself seems like a presumptive violation of equal protection

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justify this call in part by asserting that anyone who opposes same-sex marriage "will be vilified, legally targeted, and denied constitutional rights in order to pressure them to conform to the new orthodoxy." Obviously, there is no reason to think that anyone will suffer diminution of rights for opposing a decision of the Supreme Court. Statement Calling for Constitutional Resistance to Obergefell v. Hodges, 8 Oct., 2015, https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/; Kim Chandler, *Groups urge Ala. Supreme Court to resist gay marriage ruling*, LGBTQ Nation, 20 July, 2015, http://www.lgbtqnation.com/2015/07/groups-urge-ala-supreme-court-to-resist-gay-marriage-ruling/; Todd Beamon, *Black Pastors' Group Urges Civil Disobedience Against Gay Marriage Ruling*, Newsmax, 27 June, 2015,https://www.newsmax.com/Newsfront/bill-owens-caps-gay-marriage/2015/06/27/id/652541/ Daniel Strauss, *Scott Walker calls for Constitutional amendment to let states define marriage*, Politico, 26 June 2015, http://www.politico.com/story/2015/06/scott-walker-ban-gay-marriage-constitutional-amendment-119470.html; Ben Jacobs, *"This decision will not stand": Republicans seek common cause against same-sex marriage*, THE GUARDIAN, 4 July 2015, http://www.theguardian.com/us-news/2015/jul/04/republicans-against-same-sex-marriage?CMP=ema_565 (last visited 5 July 2015), David Edwards, Emma Margolin, *Rick Santorum "will not stand" for marriage equality ruling*, THE ED SHOW, 2 July 2015, http://www.msnbc.com/msnbc/rick-santorum-will-not-stand-marriage-equality-ruling, Allegra Kirkland, *Huckabee Outlines Plan to Resist "Judicial Tyranny" after SCOTUS Gay Marriage Ruling*, TALKING POINTS MEMO, 3 July 2015, http://talkingpointsmemo.com/livewire/huckabee-plan-judicial-tyranny-scotus-gay-marriage, Mark Hensch, *Jindal: "Let's just get rid of the court,"* THE HILL, 26 June 2015, http://thehill.com/blogs/ballot-box/presidential-races/246301-jindal-lets-just-get-rid-of-the-court

30 Bryan Lowry, *Gov. Sam Brownback issues executive order on religious liberty after same-sex marriage ruling*, The Wichita Eagle, 7 July, 2015, http://www.kansas.com/news/politics-government/article26668207.html.

31 See infra, text accompanying n. 50ff for further explanation of this point.

32 Executive Order 15-05, Office of the Governor, Kansas, https://governor.ks.gov/media-room/executive-orders/2015/07/07/executive-order-15-05.

33 Lowry, supra note 4; Lowry, *Judge in 2013 ruling: DCF conducted 'witch hunt' against lesbian foster parents*, Wichita Eagle, 4 Dec., 2015, http://www.kansas.com/news/politics-

and may be the next battle.[34] Another concern, long standing for same-sex couples,[35] is that religious hospitals will refuse to recognize their marriages if one partner is a patient at the hospital. Any aggrieved couple could file suit in federal court, and it seems unlikely that any discriminatory actor would prevail there, but Brownback's action still potentially imposes that cost on same-sex couples.

Two state legislators in Tennessee have gone one long step further, introducing the Tennessee Natural Marriage Defense Act, which asserts that "Any court decision purporting to strike down natural marriage, including (a recent U.S. Supreme Court decision), is unauthoritative, void, and of no effect."[36] A Vanderbilt law professor discusses the historical context, noting that the bill's proponents point to the Virginia and Kentucky resolutions opposing the Alien and Sedition Acts and the states that rejected the Fugitive Slave Act. The professor, Suzanna Sherry, points to the much more recent, and legally more closely analogous example of southern states pledging "massive resistance"[37] to school

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government/article48108120.html

[34] Kim Chandler, Gay Couples win parenting rights in wake of marriage ruling, Miami Herald, 18 July 2015, http://www.miamiherald.com/news/local/community/gay-south-florida/article27611656.html; Martha Stoddard, Without fanfare, Nebraska lifts ban on gay people being foster parents, Omaha.com, 2 March, 2015; Lawsuit challenges Mississippi's same-sex adoption ban, LGBTQnation, 12 August, 2015, http://www.lgbtqnation.com/2015/08/lawsuit-challenges-mississippis-same-sex-adoption-ban/; Elizabeth Daley, Married Same-Sex Arkansas Couples Fight to be Listed on Kids' Birth Certificates, The Advocate, 11 Dec., 2015,

[35] Protecting Your Visitation & Decision-Making Rights, Human Rights Campaign, . Katie Ferrell, Barrett Tryon, and Michelle Pekarsky, Update: Hospital: Man OK to visit sick husband, Fox4KC.com, 10 April 2013, http://fox4kc.com/2013/04/10/man-no-longer-allowed-to-visit-husband-at-kc-area-hospital/. A man who tried to visit his partner in a hospital suffered arrest for trespassing when staff asked him to leave and he refused.

[36] David Boucher, *Lawmakers file "Tennessee Natural Marriage Defense Act*," The Tennessean, 17 Sept, 2015, http://www.tennessean.com/story/news/politics/2015/09/17/lawmakers-file-tennessee-natural-marriage-defense-act/32570645/?from=global&sessionKey=&autologin=. While the legal implications are not clear, this language significantly muddies the issue by calling marriage "natural" when in fact, the only marriage that really matters is that which has the license of the state. In the history of Anglo American political philosophy, the creation of the state is an act by which humans remove themselves from the state of nature, substituting a political order for it. Thus, licensed marriages are, by definition, not "natural."

[37] This is the term historians routinely use, borrowing from the originators of the reaction, to describe the response of southern white supremacists to African American civil rights generally, but especially to school desegregation. See Clive Webb, Massive Resistance: Southern Opposition to the Second Reconstruction (2005); George Lewis, Massive Resistance: The White Response to the Civil Rights Movement (2006); John Kyle Day, The Southern Manifesto: Massive Resistance and the Fight to Preserve Segregation (2014).

desegregation after *Brown v. Board of Education*,[38] and the governors of Mississippi and Alabama going to great lengths to prevent the admission of African Americans to their respective States' flagship universities.[39] She points out that, as a purely legal question, the *Obergefell* opinion much more closely resembles the *Brown* decision than either the Alien and Sedition Acts or the Fugitive Slave Act, all of which had the effect of diminishing, rather than defending or expanding, rights. One of the legislators who filed the bill spoke on the same day that they introduced their bill at a Religious Freedom Rally on Legislative Plaza in Nashville. "Hands swayed above the crowd while shouts of 'Amen' and 'praise Jesus' filled the air as pastors and activists preached for religious liberty and against same-sex marriage, abortion, 'Islamic indoctrination' and a slew of other issues at an event set to coincide with Constitution Day."[40]

So it is that, in Tennessee, at least, the putative conflict between same sex marriage and religious liberty looks set fair to recapitulate long running battles between federal and state laws on matters of fundamental rights. If the bill becomes law in Tennessee, litigation is virtually inevitable. In light of this action and Governor Brownback's order, the recent victory for LGBT equality that is *Obergefell* remains highly contested, so it is well to ground it as firmly in the Constitution as possible.[41]

This article takes the position that the most important form of legal equality in the United States is equal access to the political process, which is implicit in the First Amendment and where the First

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38 347 U.S. 483 (1954).

39 Suzanna Sherry, *Marriage defense backers mirror segregation defenders*, The Tennessean, 20 Sept. 2015. http://www.tennessean.com/story/opinion/contributors/2015/09/20/marriage-defense-backers-mirror-segregation-defenders/72514590/

40 Dave Boucher, Hundreds rally in Nashville for religious liberty, The Tennessean, 17 Sept. 2015, http://www.tennessean.com/story/news/2015/09/17/hundreds-rally-nashville-religious-liberty/32505421/?from=global&sessionKey=&autologin=.

41 Some of the proposed responses from opponents of same-sex marriage do not make a lot of sense, either practically or legally. Joey Bunch, Colorado ballot measure seeks to limit gay marriages as civil unions, Denver Post, 3 July, 2015, http://www.denverpost.com/news/ci_28430496/colorado-ballot-measure-seeks-limit-gay-marriages-civil: "A proposed ballot initiative filed Thursday would redefine same-sex marriages in Colorado as civil unions. A second initiative would allow wedding-related businesses opposed to gay marriage to hire a contractor to serve the couples." http://www.hrc.org/resources/entry/protecting-your-visitation-decision-making-rights

and Fourteenth Amendments intersect. Given the peculiarities of LGBT identities, any statutes that discriminate in any way on the basis of sexual orientation or gender identity impede LGBT participation in the political process and therefore must fall at that intersection in the name of ensuring equal access of LGBT persons to the political process, given that there is no valid basis for denying that right to them. We live in a republic, a defining characteristic of which is self-governance. Discrimination against LGBT persons entails infringement on their right to participate in that self-governance.[42] That is, in any contest between equal protection rights and the right to freedom of religious belief and practice, the freedom of religion claim must defer to the equal protection claim, which is also a free expression claim.

This is so because equal protection of the right to full participation in the political process necessarily implicates First Amendment concerns for freedom of expression and assembly, and the right to petition government. In other words, the contest is not really between the First Amendment and the Fourteenth Amendment, but between clauses of the First Amendment, with the clauses that address political participation taking precedence over the clauses that address religious belief and practice. The free exercise and establishment clauses are also in contest here because any official action limiting the rights of LGBT persons in the name of another individual's free exercise rights would have the effect of establishing that individual's religion, as Judge Bunning suggested might be the case in the Kentucky dispute above.

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[42] To state what may be obvious, the choice to marry and whom to marry is a key component of self-governance. Discrimination against LGBT persons even threatens to metastasize into limitations on the right of others to self-governance. Rafael Cruz, father of U.S. Senator and presidential candidate Ted Cruz, denounced the *Obergefell* decision at the same time that he spoke to a group that is currently trying to repeal a civil rights ordinance in Houston, Texas that protects LGBT persons. He also lamented that Houston had elected a lesbian mayor. Cruz blamed such developments on the separation of church and state, a concept he called a "lie." So it is that this particular conservative Christian, at least, would deny to the citizens of a municipality the power to choose their elected officials and to adopt specific ordinances insofar as the officials and the ordinances violate his preference for discrimination against LGBT persons. Brian Tashman, *Rafael Cruz: "Appalling" That Houston Elected A Lesbian Mayor*, Right Wing Watch, 24 Sept. 2015, http://www.rightwingwatch.org/content/rafael-cruz-appalling-houston-elected-lesbian-mayor

This argument might seem to allow restriction of equal protection claims to specifically political activities, but especially for LGBT persons, and really for everyone, identities are fundamentally political if we understand "political" to denote the constant negotiation of power differentials among persons that take place any time more than one person is present. This is another way of saying the old feminist adage that the personal is political. As with any tautology, the reverse is also true: the political is personal. Unusually for identities, we can trace the articulation of "homosexual" as an identity to a specific historical period and a fairly specific set of events and anxieties.[43] In this sense, all aspects of human identity are potentially political. The attempt to deny the political character of human identity, to reify identity characteristics as resulting from "nature" or divine will, is a characteristically conservative and intellectually indefensible position.[44]

The first section of this article sets up the problem, looking at recent political events and the legal context of LGBT civil rights. This issue is a classic study in law and society, with citizens who lack legal training asserting rights that they do not understand fully[45] and pitting two powerful social movements against each other. Indeed, this article uses the history of one of those social movements as

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[43] Justice Anthony Kennedy acknowledged this point in his majority opinion in *Lawrence v. Texas*, the decision that struck down all sodomy laws, an area of human experience that might seem to be far removed from politics narrowly defined, but merely by becoming an issue of public contention, is political in that sense even as it is also uniquely relevant to the politics of LGBT identities. *Lawrence v. Texas*, 539 U.S. 558 (2003) at 4-5. It is well to note that the same is true of the articulation of "white" as an identity. See Peter Kolchin, *Whiteness Studies: The New History of Race in America*, 89 JOURNAL OF AMERICAN HISTORY 154 (2002).

[44] See supra, note 29, and accompanying text for efforts by conservative legislators to define different sex marriage as "natural."

[45] Cyd Zeigler, *Fired anti-gay sportscaster Craig James sues Fox Sports over "religious freedom,"* Outsports, 4 August 2015, http://www.outsports.com/2015/8/4/9095653/craig-james-gay-fox-sports-lawsuit; Zack Ford, *Kentucky Clerk Sues Governor for Making Her Do Her Job and Issue Same-Sex Marriage Licenses*, Think Progress, 6 August 2015, http://thinkprogress.org/lgbt/2015/08/06/3688648/kentucky-county-clerk-job-suit/. During the interview cited above, Kentucky clerk Kim Davis said, "You have millions of Christians who object to this whole same-sex marriage issue. Are their rights invalid? Are their rights not worth anything?" Dawn Ellis, *Watch: The Kim Davis Fox News Interview You've Got to See*, The Advocate, 24 Sept., 2015, http://www.advocate.com/marriage-equality/2015/9/24/watch-kim-davis-fox-news-interview-youve-got-see. Ms. Davis apparently has not considered the difficult task of balancing competing rights claims, or the idea that her rights stop where the rights of others begin.

a central prop in its answer to the legal question. While it is never possible fully to separate politics from law, it is even less so in the equal protection v. free exercise imbroglio that same-sex marriage specifically, and LGBT civil rights generally, has wrought. Political history can and should inform legal decisions.

The second section of this article examines the key decisions that provide the basis for holding legislative classifications based on sexual orientation or gender identity invalid as violations of the Equal Protection Clause of the Fourteenth Amendment. The third section explores LGBT civil rights in terms of First Amendment doctrine. LGBT activists have taken three cases involving First Amendment claims to the Supreme Court in the last twenty years; they lost all three. This does not seem to be a promising avenue for LGBT civil rights. That outcome does have the virtue of refuting the proposition that Supreme Court justices are too eager to advance LGBT rights claims. But we forget about *One, Inc. v. Olesen*, an old decision robustly vindicating the First Amendment rights of LGBT activists, and explicitly in terms of political contest, which I explain in detail in this section. Finally, Section IV offers a brief overview of the history of LGBT organizing as a political movement in order to illustrate just how important First Amendment rights have already been to that movement in order to demonstrate, which Antonin Scalia implicitly admits, that First Amendment rights have been critical to the equal protection victories LGBT persons have won for themselves.

Section I: The Context

Incidents in states that provide statutory protection against discrimination on the basis of sexual orientation[46] in which Christian conservatives have suffered penalties for refusing to provide goods or services to lesbians or gay men, usually, coincidentally, presenting as a same sex couple seeking the good or service in question as a prospective married couple,[47] have resulted in calls by Christian

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[46] For an overview of state laws on this topic, see Lambda Legal's web site: http://www.lambdalegal.org/states-regions.

[47] That LGBT civil rights has intruded more directly into the lives of non-LGBT persons via same-sex

conservatives for states to enact statutes explicitly protecting their right to the free exercise of their religious beliefs.[48] Such a statute recently provoked considerable political debate and some backtracking by the Governor of Indiana who signed the Religious Freedom Restoration Act, but then faced widespread backlash from around the country, as well as from many of his own citizens,

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marriage should not surprise us. Most LGBT persons learn early in life that their days usually are much easier insofar as they manage whom they disclose that aspect of their identities to. This self-imposed silence is itself a major example of the micro discipline of personal politics at work. Obviously, any same-sex couple that discloses their intent to marry must needs identify themselves as either lesbian or gay (or potentially as bisexual, although insofar as a bisexual person decides to marry a person of the same sex, for most public purposes, s/he reads as lesbian or gay).

[48] A legislator in Florida has introduced a bill to shield from liability an array of entities, including health care facilities and corporations with fewer than five owners for any refusal to provide any goods or services because of religious or moral objections. The legislator who introduced the bill could identify no cases in Florida of litigation by LGBT persons over such denials, but pointed specifically to the case in Colorado of a baker who became the defendant in a suit after refusing to bake a cake for a same-sex wedding. Zac Anderson, Venice lawmaker files controversial "religious freedom" bill opposed by gay rights groups, Herald Tribune, 27 Oct. 2015, http://politics.heraldtribune.com/2015/10/21/venice-lawmaker-files-religious-freedom-bill-highly-opposed-by-gay-rights-groups/; for the Colorado incident, see Ivan Moreno, *Judge Orders Colo. Cake-Maker to Serve Gay Couples*, Denver Post, 06/12/2013, http://www.denverpost.com/news/ci_24672077/judge-orders-colorado-cake-maker-serve-gay-couples (last visited 17 June, 2015); *NY farm owners who denied lesbian couple wedding appeal*, CNSnews.com, 24 Nov., 2015, http://cnsnews.com/news/article/ny-farm-owners-who-denied-lesbian-couple-wedding-appeal; Jason Silverstein, *Oregon Bakery will have to pay lesbian couple up to $150,000 for refusing to make wedding cake*, NEW YORK DAILY NEWS, 4 February 2015, http://www.nydailynews.com/news/national/oregon-bakery-pay-gay-couple-refused-cake-article-1.2103577 (last visited 17 June 2015). The Oregon case seems almost tailor made to illustrate this article. The complainants moved to Portland, OR from Texas and had become foster parents to two special needs children before the incident, with the stipulation by the child welfare agency that they keep the children's identities private. One complainant asserted that the reason for the move from Texas was to avoid discrimination on the basis of sexual orientation. The two women had decided to get married because they planned to adopt their two children and wanted to provide as much stability as possible for them. After one of the respondents cited a bible passage using the term, "abomination" to describe LGBT persons, one of the complainants became distraught, thinking the claim might be true. News of the situation exacerbated already difficult family relationships for both complainants. The final opinion describes complainants' emotional distress in decidedly existential terms. Respondents insisted that any enforcement of Oregon's antidiscrimination statute in this case infringed their right to freedom of religious belief and practice. Evidence reproduced in the opinion includes text from a radio interview with one of the respondents, who said, "what I don't understand is the government sponsorship of religious persecution." Because respondents argued that the statute in question violated their rights under both the federal and state constitutions, the opinion includes a discussion of that issue. It notes that the statute is entirely neutral toward

including some fellow Republicans,[49] after which he urged his Party members in the State legislature to "clarify" the law.[50] The original statute mostly mirrored its federal counterpart of the same name, but because LGBT persons have no specific legal protections from discrimination in Indiana, most observers believed, given the current political context, that the statute in Indiana had the effect of allowing business owners to discriminate against LGBT persons with impunity.[51]

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religion and therefore does not discriminate on that basis, and that the discriminatory act in question was not inherently religious but only "motivated by their religious beliefs." It also distinguishes between protected speech and unlawful conduct. Explaining the purpose of Oregon's nondiscrimination statute, the opinion states, "[w]ithin Oregon's public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. The ability to enter public places, to shop to dine to move about unfettered by bigotry. When respondents denied RBC and LBC a wedding cake, their act was more than the denial of the product. It was, and is, a denial of RBC's and LBC's freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do… or be." While the instant article has emphasized the right to full participation in the formal political process, this passage nicely captures how daily activities can impact a person's sense of self-worth and belonging, which in turn can impact her/his willingness/ability to participate in formal politics. https://www.oregon.gov/boli/Legal/BOLI%20Final%20Orders%20issued%20in%202015/Sweet_Cakes_44-14_and_45-14.pdf.

[49]Brian Eason, *Ballard, Council to Legislature: Repeal Law, protect LGBT from discrimination*, INDYSTAR, 30 March 2015, http://www.indystar.com/story/news/politics/2015/03/30/ballard-council-address-rfra-today/70674176/ (last visited 14 June 2015); Cole Stangler, *Indiana "Anti-Gay Law": Firms Criticizing Pence Funded Him as He Fought LGBT Rights*, INTERNATIONAL BUSINESS TIMES, 02 April 2015, http://www.ibtimes.com/indiana-anti-gay-law-firms-criticizing-pence-funded-him-he-fought-lgbt-rights-1867874 (last visited 16 June 2015).

[50] Scott Neuman, *Indiana Governor: Lawmakers To 'Clarify' Anti-Gay Law*, NPR NEWS, 29 March 2015, http://www.npr.org/sections/thetwo-way/2015/03/29/396131254/indiana-governor-lawmakers-to-clarify-anti-gay-law (last visited 13 June 2015). Cara Anthony, *Indy Pride Event Draws Record Crowd*, INDYSTAR, 13 June 2015 http://www.indystar.com/story/news/2015/06/13/indy-pride-parade-draws-historic-crowd/71195812/ (last visited 14 June 2015); Mitch Smith, *Indianapolis Rallies around its Gay Citizens After Law Sets Off a Flood of Support*, NEW YORK TIMES, 12 June, 2015, http://www.nytimes.com/2015/06/13/us/indiana-gay-community-grows-in-confidence-and-pride.html?_r=0 (last visited 14 June 2015).

[51] Sandhya Somashekhar, *Christian activists: Indiana law tried to shield companies against gay marriage*, WASHINGTON POST, 3 April 2015, (last visited 13 June, 2015), *http://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89_story.html.* As The New Republic pointed out, the entire imbroglio missed the point that, in the absence of specific protections in state law, discrimination against LGBT persons in Indiana, as in most states, was legal before the enactment of the new statute. Michael Lindenberger, *"Religious Freedom" Laws Don't Legalize LGBT Discrimination. That's Already Legal in Most of America*. THE NEW REPUBLIC, 30 March 2015,

The controversy surrounding the statute prompted the legislature to pass, and the Governor to sign, a "fix" to it, providing that the statute neither authorized refusal of services nor established any legal defense to any prosecution for such refusal on the basis of a list of identity characteristics, including sexual orientation and gender identity.[52] This "fix" and local ordinances protecting LGBT civil rights have elicited a law suit by three conservative Christian organizations, with prominent conservative activist litigator James Bopp as counsel, that may indicate conservative legal thinking in this area.[53] The suit is complex, aiming at the statutory fix to the State's RFRA, but also local nondiscrimination ordinances in Indianapolis and Carmel, in a move that invites comparison to the Amendment 2 that the Supreme Court struck down in Romer v. Evans.

The legal reasoning adds complexity. The complaint asserts that, in first granting increased protection for the free exercise of religion, then withdrawing that protection from some citizens, the State has violated the equal protection clause. The suit thus aligns the free exercise clause and the equal protection clause on the side of the plaintiffs. According to the complaint, the factor differentiating the classes that get increased free exercise from those that do not is invalid viewpoint discrimination regarding same-sex marriage.[54] This alleged viewpoint discrimination violates the relevant provisions of both the U.S. and the Indiana Constitutions.[55] The plaintiffs marshall a range of theories, mostly under the First Amendment, to support their challenge.

The complaint states that "The RFRA...provisions provide some with the public benefit of a

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http://www.newrepublic.com/article/121417/indiana-religious-freedom-law-lgbt-discrimination-mostly-legal (last visited, 16 June 2015).

52 Sunnivie Brydum, Gov. Mike Pence Signs "Fix" to Religious Freedom Restoration Act, Advocate, 2 April, 2015, http://www.advocate.com/politics/2015/04/02/gov-mike-pence-signs-fix-religious-freedom-restoration-act.

53 Stephanie Wang, Conservative groups' lawsuit says RFRA fix unconstitutional, IndyStar, 10 Dec., 2015, http://www.indystar.com/story/news/politics/2015/12/10/conservative-groups-lawsuit-says-rfra-fix-unconstitutional/77102680/?from=global&sessionKey=&autologin=.

54 Verified Complaint for Declaratory and Injunctive Relief, Indiana Family Institute, et al., v. City of Carmel, Indiana, et al., State of Indiana, Hamilton County Superior Court 1, at 20-22, http://www.jamesmadisoncenter.org/cases/files/ifi-carmel/filed-complaint.pdf

55 Id. at 35-36.

religious-free exercise defense (under heightened scrutiny), but not others, based on religious belief. They attempt to coerce expressive conduct and association by depriving those who do not want to engage in such expressive conduct and association of the public benefit of an otherwise available religious-free-exercise defense for their decisions. The RFRA...provisions are an unconstitutional condition in violation of the state and federal constitutions."[56] It goes on to attack the two municipal ordinances, asserting, "Given that the RFRA...provisions are unconstitutional for the reasons stated in Count I, the Carmel Ordinance and Indianapolis Ordinance must be justified, as applied to Plaintiffs and their activities, under RFRA's strict scrutiny. As applied to Plaintiffs, their activities, and those similarly situated, the Carmel Ordinance and Indianapolis Ordinance fail strict scrutiny because it [sic] 'substantially burden[s]' Plaintiffs' 'exercise of religion' and the government entities cannot demonstrate that the ordinance is 'in furtherance of a compelling governmental interest' and is 'the least restrictive means of furthering that compelling governmental interest,' which test applies 'even if the burden results from a rule of general applicability."[57]

Of course it is no surprise that Christian conservatives do not see protecting LGBT persons from discrimination as a compelling governmental interest, since their whole point is that their religion requires them so to discriminate and the guarantee of free religious belief and exercise in the First Amendment should protect their right to do that. Robert Katz, professor at the Indiana University School of Law disparaged the suit, calling it "more a political statement than a serious law suit" in which "the plaintiffs tie themselves into pretzels trying to argue that the RFRA fix is unconstitutional."[58] Serious or not, it does provide one window into conservative Christian thinking on this issue.

The *Obergefell* decision has only exacerbated this contretemps, as Christian conservatives especially political leaders, have decried the substance of the opinion for permitting same sex

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[56] Id. at 36-37.
[57] Id. at 41.
[58] Wang, *supra*.

marriages nationally and numerous county officials have protested that they should not have to issue marriage licenses to same sex couples in contravention of their religious beliefs.[59] Although some of the more histrionic claims of Christian conservatives are easy to dismiss,[60] it seems highly likely that various law suits will result from the skirmishing in the aftermath of *Obergefell*.[61]

A court clerk in Indiana has suffered dismissal for insubordination after she requested

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[59] Paige Lavender, *Rick Santorum: Gay Marriage in the U.S. Will Have "Profound Consequences" Worldwide*, HUFFINGTON POST, July 6, 2015, http://www.huffingtonpost.com/2015/07/06/rick-santorum-gay-marriage_n_7735740.html?ncid=fcbklnkushpmg00000013, Aditya Tejas, *Texas Attorney General Defies Supreme Court Same-Sex Marriage Ruling*, INTERNATIONAL BUSINESS TIMES, 29 June 2015, http://www.ibtimes.com/texas-attorney-general-defies-supreme-court-same-sex-marriage-ruling-1987381, *Marina Fang, Bobby Jindal Gives up Last Stand Against Gay Marriage Licenses in Louisiana*, HUFFINGTON POST, 2 July 2015, http://www.huffingtonpost.com/2015/07/02/bobby-jindal-marriage-equality_n_7718088.html?ncid=txtlnkusaolp00000592, Kerry Eleveld, *Alabama, Texas, and North Dakota slowest to comply with marriage equality ruling*, DAILY KOS, 2 July 2015, http://m.dailykos.com/story/2015/07/02/1398652/-Alabama-Texas-and-North-Dakota-slowest-to-comply-with-marriage-equality-ruling?detail=facebook, Tom Boggioni, *"For the Glory of God": Entire staff in Tenn. County clerk's office resigns over same-sex marriage*, RAW STORY, 4 July 2015, http://www.rawstory.com/2015/07/for-the-glory-of-god-entire-staff-in-tenn-county-clerks-office-resigns-over-same-sex-marriage/, David Edwards, *South Dakota county clerk threatens to marry her dog after Supreme Court legalizes same-sex marriage*, RAW STORY, 30 June 2015, http://www.rawstory.com/2015/06/idaho-county-clerk-threatens-to-marry-her-dog-after-supreme-court-legalizes-same-sex-marriage/, Bobby Rodrigo, *Same-Sex Kentucky Couples Sue Clerk for Refusing to Issue Marriage License*, RAW STORY, 3 July 2015, http://www.rawstory.com/2015/07/same-sex-kentucky-couples-sue-clerk-for-refusing-to-issue-marriage-licenses/; Kim Palmer, *Northwest Ohio judge refuses to perform gay marriage*, Reuters, 8 July 2015, http://www.reuters.com/article/2015/07/08/us-usa-gaymarriage-ohio-idUSKCN0PI1W920150708.

[60] Miranda Blue, *FRC Warns Obama Trying to "Eliminate" Christianity Through Gay Rights*, RIGHT WING WATCH, 30 June 2015, http://www.rightwingwatch.org/content/frc-warns-obama-trying-eliminate-christianity-through-gay-rights.

[61] The exact contours of legal wrangling over the implications of same-sex marriage are already proving surprising. U.S. district court judge Orlando Garcia on 5 August, 2015, ordered the Attorney General of Texas to appear in court to answer for the fact that the State had refused to amend a death certificate to reflect the decedent's status as the legally married spouse of his husband, who also faces life threatening health problems. Guillermo Contreras, *Judge orders Paxton to court over gay-marriage order*, Houston Chronicle, 5 August, 2015, http://www.chron.com/news/houston-texas/houston/article/Judge-orders-Paxton-to-court-for-failing-to-6427132.php. On the other hand, the State of Texas has withdrawn two suits, one its defense of its prohibition on legal recognition of same-sex marriages, which was still under consideration in the Fifth Circuit Court of Appeals at the time of the Obergerfell decision, and a separate suit the State had initiated to challenge a federal rule change that would have required it to confer benefits under the Family Medical Leave Act on same-sex couples who had married legally

exemption from the directive her supervisor issued to all clerks in her office to process marriage applications according to the law and without regard for their religious beliefs. The clerk has filed suit in federal court claiming violation of her First Amendment rights as well as violation of the county's nondiscrimination policy, which is functionally an equal protection policy.[62] Other employees in the office had offered to handle any offending applications so she would not have to. On Monday, November 9, a disciplinary hearing began for a judge in Oregon who stopped performing weddings entirely some time after he specifically refused to perform same-sex weddings. He is also charged with hanging a portrait of Adolph Hitler in the courthouse and soliciting money from attorneys who appeared before him, among other violations of the Code of Judicial Conduct. He claims that the Commission has targeted him unlawfully because of his Christian beliefs.[63]

To some extent, the hysteria among conservative Christians stems from a mistaken extrapolation of the legal principle underlying penalties for businesses that refuse to serve same-sex couples to the belief that judges will order churches to perform same-sex weddings.[64] Any well

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in other states. Alexa Ura, *Texas Concedes Legal Challenge to Same-Sex Marriage Ban*, The Texas Tribune, 1 July 2015, http://www.texastribune.org/2015/07/01/texas-concedes-legal-challenge-ban-gay-marriage/; Alexa Ura, *Texas Concedes Case over Benefits for Same-Sex Couples*, Texas Tribune, 20 July 2015, http://www.texastribune.org/2015/07/20/texas-concedes-case-over-benefits-same-sex-couples/; see also, John Wright, Texas to Pick Up $605,000 Tab in Same-Sex Marriage Case, Texas Observer, 4 Dec. 2015, http://www.texasobserver.org/texas-tab-same-sex-marriage-605000/.

62 Bethania Palma Markus, *Indiana clerk fired for refusing to issue same-sex marriage licenses sues, claiming discrimination*, Raw Story, 24 July 2015, http://www.rawstory.com/2015/07/indiana-clerk-fired-for-refusing-to-issue-same-sex-marriage-licenses-sues-claiming-discrimination/.

63 Oregon judge who refused to perform same-sex marriages goes before disciplinary commission, The Register-Guard, 9 Nov. 2015, http://registerguard.com/rg/news/local/33696251-75/oregon-judge-who-refused-to-perform-same-sex-marriages-goes-before-disciplinary-commission.html.csp.

64 Ben Mathis-Lilley, *Ted Cruz's Father Predicts That Churches Will Be Forced to Hire Gay Janitors*, Slate, 29 Oct. 2015, http://www.slate.com/blogs/the_slatest/2015/10/29/ted_cruz_father_warns_of_mandatory_gay_church_janitors.html; Tim Wildmon, *Gay Marriage: Three Things your church must do immediately to protect itself*, www.afa.net/the-stand/. The conservative Christian response also reflects the failure to appreciate that business owners have only, and can only, incur penalties for discriminating in states that prohibit such discrimination. There is no federal law prohibiting such discrimination. Religious freedom restoration acts, insofar as the concern they purport to address involves disputes between conservative Christians and LGBT persons, are irrelevant in those states that do not prohibit such discrimination either.

informed legal scholar knows to a certainty that no judge in the United States would ever presume to order any church to perform any wedding. As proof of this claim, one would point to the recent decision of the Supreme Court ratifying the ministerial exception to federal employment nondiscrimination laws. Federal judges have long taken the position that the right to free exercise in the First Amendment trumps federal statutes prohibiting employment discrimination. In *Hosanna-Tabor Lutheran Church and School v. Equal Employment Opportunity Commission*,[65] the Supreme Court unanimously endorsed this position, upholding the dismissal of a teacher at a religious school against a challenge under the Americans with Disabilities Act on the grounds that the employee was a "minister" within the determination of the denomination, precluding further inquiry from any court.[66] For present purposes, there is no significant legal difference between federal nondiscrimination statutes and the equal protection clause. It is no more reasonable to expect a judge to order a church to perform a same-sex wedding in contravention of the church's teaching than it is to expect a judge to order a synagogue to perform a Baptist wedding under the principle of non-discrimination in public accommodations because of religious belief. In sum, part of the reason to favor equal protection over free exercise is that the courts have already demonstrated willingness to enforce a robust, reasonable definition of free exercise of religion. The horrible conservative Christians most fear is unthinkable.

A broadly related case turned on the same legal issue, although with the opposite outcome on the basis of different facts. In *Catholic Charities of Sacramento v. Superior Court*, the petitioners sued because they believed they should not have to comply with a state statute requiring them to include contraceptives in the health insurance plans they offered to their employees.[67] Catholic Charities is not the Catholic Church. It is a charitable corporation organized under the non profit section of the Internal Revenue Code. The statute in question does have an exception for religious employers, but Catholic

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65 10-553, 11 Jan, 2012.

66 Jed Glickstein, *Should the Ministerial Exception Apply to Functions, not Persons?* 122 YALE L.J. 1964 (2013).

67 *Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4Th 527, 85 P. 3d 67, CA 2004.

Charities, by its own admission, did not qualify for that exception, not being a religious employer as the statute defined it. Churches, by necessity, are corporations in a non-trivial sense, but corporations of a highly specific kind that, as a result, enjoy freedom from certain laws. The line dividing churches from non-churches is bright. Commercial activity is not religious activity, and business owners, no matter how deeply religious, do not engage in specifically religious activities when they operate their businesses, just as there is nothing at all religious about Kim Davis' conduct of her responsibilities as county clerk in Kentucky.

The California Supreme Court relied heavily on the U.S. Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith*[68] finding neutral, generally applicable laws do not infringe on the right to free exercise of religion. The underlying point is that, when persons with strong religious beliefs choose to engage in commerce, there is no reason to think that their religious beliefs should exempt them from neutral laws of general application that all other commercial actors must abide by. Although in the cases of same-sex couples, most of the businesses have lost custom by refusing to serve same-sex couples, quite apart from any legal penalties for discriminating,[69] it is not difficult to imagine situations in which a blanket religious exemption from laws regulating commerce would confer an unfair advantage on religious business owners.

The distinction between public and private is less clear with statutes some states have recently adopted that apply, not to public officials, but to private entities that receive public funds. On June 11, 2015, Michigan passed a statute allowing private adoption and foster care agencies that receive state funds to refuse potential parents on religious grounds[70] and North Carolina passed a statute allowing

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68 *Employment Div., Ore. Dept. of Human Res. v. Smith*, 474 U.S. 872 (1990).

69 But see, Kerry Eleveld, Christian bakery owners flout legally binding order to pay damages to lesbian couple, Daily Kos, 1 Oct., 2015, http://www.dailykos.com/story/2015/10/01/1426719/-Christian-bakery-owners-flout-legally-binding-order-to-pay-damages-to-lesbian-couple#

70 Kathleen Gray, *Michigan Law Allows Adoption Agencies to Say No to Gays*, USA TODAY, 11June, 2015, http://www.usatoday.com/story/news/politics/2015/06/11/gay-unmarried-couple-adoption-michigan/71058222/ (last visited 16 June 2015).

local officials to refuse to perform marriages on religious grounds.[71] It is difficult to see how statutory permission obviates the concern about establishment of religion. If anything, it exacerbates the equal protection problem, since the Fourteenth Amendment directs its prohibitions expressly at the states. Again, partisans who support these new bills can point to various instances around the country in states that provide specific protections to LGBT persons where advertedly Christian business owners have suffered consequences after refusing to provide goods and/or services to LGBT persons.[72] The claim is that the statutes are necessary to protect the right to religious belief and practice of persons who do not wish to engage in commerce with persons whom they disapprove of on moral grounds that have religious roots. Coming from business owners, this claim is importantly different, from a legal perspective, than the claim coming from public officials, given that business owners obviously lack the ability to establish religion in violation of the First Amendment, although the question is less clear when the business in question receives public funds as part of its regular operations. As we have seen, the idea that religious business owners should be able to claim exemption from neutral laws of general application on free exercise grounds is legally dubious.

A. Equal Protection

The Supreme Court has relied on the Equal Protection clause of the Fourteenth Amendment to protect the rights of LGBT persons to equality of opportunity and treatment. In *Romer v. Evans,* the Court struck down a state constitutional amendment that repealed all local lesbian/gay civil rights ordinances and prohibited the enactment or enforcement of any policy at any level of government within the State for the purpose of protecting persons on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."[73] In 2013, the case *United States v. Windsor* required

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[71] Jonathan M. Katz, *North Carolina Allows Officials to Refuse to Perform Gay Marriages*, NEW YORK TIMES, 11 June 2015, http://www.nytimes.com/2015/06/12/us/north-carolina-allows-officials-to-refuse-to-perform-gay-marriages.html (last visited 16 June 2015).

[72] Supra, note 8.

[73] Romer v. Evans, 517 U.S. 620 (1996).

the Court to review the operative section of the "Defense of Marriage Act," which defined marriage exclusively as a relationship between one man and one woman for all purposes throughout the federal statutes. Respondent in the case was a lesbian who was unable, as the result of the statute, to claim the spousal exemption from federal estate taxes after the death of her spouse, whom she had married in Canada. The couple's home State, New York, recognized their marriage as legally valid. The Court relied heavily on the Equal Protection Clause, in conjunction with the Due Process Clause of the Fifth Amendment,[74] to strike down the part of DOMA that defined federal statutes to exclude same sex married couples from all rights and benefits.[75] Insofar as the policies in both of these cases grew, more or less explicitly, out of a specifically Christian moral framework, one can say the Supreme Court has already decided this issue by asserting that the Equal Protection Clause trumps discrimination based on religious belief, although neither case addressed the issue in those terms.[76]

Now, of course, again relying on the equal protection clause in conjunction with the due process clause, the Court, in *Obergefell*, has found that same-sex couples have the same right to marry as different-sex couples. Both LGBT activists and conservative Christians are treating this decision as the apotheosis, of justice in the case of LGBT activists, of injustice in the case of conservative Christians.

As an abstract theoretical proposition, the question is a simple one. Anyone who spends any

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[74] See infra, note 206 and accompanying text for discussion of this point.

[75] U.S. v. Windsor, 133 S. Ct. 2675 (2013), 2693-2696. See infra, pp. 43ff for discussion of this case.

[76] It might seem that the recent decision in Burwell v. Hobby Lobby, 134 S. Ct. 2751, where the Supreme Court allowed a closely held corporation to refuse to comply with a federal mandate to provide its employees with health insurance policies that include coverage of prescription contraceptives, is relevant here, but that decision only applied the federal Religious Freedom Restoration Act. The issue was that, while the contraceptive coverage mandate was a compelling state interest, the mechanism in question was not the least restrictive means for achieving the goal in question, or so the Court found. This is a much narrower question than the one this article addresses. Burwell v. Hobby Lobby, In a new twist on this specific issue, a state legislator in Missouri has sued, claiming that the contraceptive coverage requirement in the Affordable Care Act requires him to violate his religious beliefs by making contraceptives more accessible to his daughters. The trial judge dismissed the case for lack of standing, but the appeals court reinstated the suit. This claim nicely illustrates the potential absurdity of taking free exercise claims to their logical extreme – one person's right to free exercise of religion becomes the grounds for denying to other persons the right to make extremely personal choices.

significant amount of time in the United States enjoys the benefit of and implicitly agrees to abide by the U.S. Constitution and in doing so makes no commitment whatsoever to any specific religious group or doctrine. The Constitution, by its own terms, is universal, speaking on behalf of and binding "we the people." It also explicitly prohibits the official establishment of religion.[77] No religious group in the United States has ever been able to claim universal acceptance. With respect to the issue this article addresses, there is considerable disagreement among Christians, with some explicitly supporting LGBT equality while others emphatically oppose it,[78] to say nothing of the many other religious groups in our highly pluralistic Republic. From this perspective, it is obvious that the equality claim of the universal polity must trump the desire to discriminate of a minority of the population.

This formulation poses a problem for LGBT civil rights activists insofar as it seems to present Christians as a minority who wish to vindicate their rights against a majority, a proposition with deep roots and substantial legal grounding in our nation's history, and the proposition LGBT civil rights activists rely on in their litigation against discriminatory statutes. But it has never been the case that U.S. law has allowed a minority to appeal to the courts for the purpose of continuing to discriminate against another minority. In the cases where the courts have struck down majoritarian statutes the purpose has always been to stop discrimination, not enable it. Stated more specifically in terms of U.S. law, the issue appears to pit the First Amendment's guarantee of the right to free exercise of religion against the right to equal protection of the laws as guaranteed in the applicable clause of the Fourteenth Amendment. However, in procedural terms, the area where equal protection of the laws matters most in the U.S. is the right to participate fully in the political process – our polity depends critically on the proposition that all individuals have the opportunity to enter the lists publicly on behalf of whatever

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[77] "Congress shall make no law...respecting an establishment of religion…." U.S. CONST., First Amendment. "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. Article VI.

[78] *List of Christian denominational positions on homosexuality*, Wikipedia, https://en.wikipedia.org/wiki/List_of_Christian_denominational_positions_on_homosexuality (last visited, 16 June 2015).

issue they consider sufficiently important, and, as we shall see, the Court has looked at capacity for political involvement in deciding equal protection cases, and it has explicitly protected the right of LGBT activists to state their positions as part of robust public debate. Christians as a class enjoy that right fully and unquestioningly, substantial conservative blather to the contrary notwithstanding.[79] LGBT persons as a class very nearly enjoy that right fully, but only under contest and as the result of considerable struggle over the past sixty years or so. An important event in that struggle serves as the linchpin of the present article. Given that opponents of LGBT equality yet have the weight of cultural habit on their side, the courts still should look with disfavor on any statute or other policy that discriminates on the basis of sexual orientation or gender identity.

In the twentieth century, the Equal Protection Clause became an extremely important vehicle for vindicating the rights of minorities. The list of important cases in which the Supreme Court has struck down discriminatory legislation using the Equal Protection Clause as their legal basis is long.[80] Even so, the historical roots of the Equal Protection Clause are not that deep. It is part of the Fourteenth Amendment, the second of the Reconstruction Amendments, revisions to the Constitution the Republic added in the immediate aftermath of the Civil War to eliminate slavery and at least attempt to ensure some measure of equality for the newly freed slaves.[81] The problem these new statutes present is that they pit the relatively new equal protection claims against the much older right to freedom of religious belief and practice, as guaranteed in the First Amendment, which the Republic added to the Constitution almost immediately after ratification, indeed as a condition of ratification for persons who worried that the government of the new Constitution would be too powerful and a threat to individual

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79 *Schlafly Warns Christians Rightly Fear Persecution over "Gay Marriage,"* WND FAITH, 14 June 2015, http://www.wnd.com/2015/06/schlafly-warns-christians-rightly-fear-persecution-over-gay-marriage (last visited 16 June 2015).

80 Justice O'Connor offers a partial list of important cases while reviewing the key concepts of the Court's equal protection jurisprudence in her concurrence in *Lawrence v. Texas*, 539 U.S. 558, 579-581 (2003), O'Connor concurring.

81 Laura F. Edwards, A Legal History of the Civil War and Reconstruction (2015); David A. J. Richards, Conscience and Constitution: History, Theory, and Law (2014).

liberty.[82]

Challenges to these statutes are inevitable. As we have seen, the ACLU has already filed suit to challenge, not a statute, but an ad hoc policy decision by a county official in Kentucky. LGBT civil rights activists have long since mastered the art and science of defending themselves and their rights against attacks by majorities with law suits. This is, of course, a critical component of their active participation in the political process. Balancing the competing demands of equality and religious liberty is no easy task. It is impossible, of course, to predict how the courts will decide any challenges to these statutes, although the Kim Davis case in Kentucky, with its preliminary injunction from a federal district court judge that neither the circuit court nor the Supreme Court would stay is some indication. This article presents a historically informed account of political organizing, including litigation, by LGBT persons to argue that the equality the Equal Protection Clause protects necessarily implicates the First Amendment because the key form of equality government should concern itself with in the United States is equal opportunity to participate fully in the political process. It argues that, more so than most, LGBT identities are deeply political, if by political, we include not only the formal activities of elections and governing, but also the micro politics of daily interactions in which humans learn from other persons what their culture will and will not allow.[83]

As the persistence of racism well after the enactment of major statutes to eliminate legal

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[82] Birth of the Bill of Rights: Major Writings, Jon L. Wakelyn, ed. (2004); Richard Labunski, James Madison and the Struggle for the Bill of Rights (2006); Leonard Williams Levy, Origins of the Bill of Rights (2001).

[83] Richard Troiden, Gay and Lesbian Identity: A Sociological Analysis 1988. Bullying and LGBT Youth, http://www.mentalhealthamerica.net/bullying-and-gay-youth. Kim Davis' complaint that defending the rights of same-sex couples to marry entails trampling the free exercise rights of conservative Christians illustrates that this is more a debate about cultural politics than it is about settled law. Again, Judge Bunning had no hesitation about issuing a preliminary injunction against Davis and ordering her to jail when she defied him. A preliminary injunction is not a final determination on the merits, but it does require the judge to find a high likelihood that the petitioner will succeed on the merits. Both the Sixth Circuit and the Supreme Court refused to stay the injunction. The problem is that Christian conservatives have long enjoyed cultural hegemony in the United States and expect their moral prejudices to hold sway. Davis' position reflects, not the law, but her sense of cultural entitlement. See supra, note 37.

discrimination against African Americans attests, formal political and policy mechanisms cannot guarantee changes in micro politics. Culture resists change. However, formal policy can abet or hinder changes in micro politics, and nowhere more clearly than in the case of LGBT persons. Identifying African Americans is usually a simple matter of glancing at the person and noting her/his skin color. Identifying LGBT persons is much more difficult because they can easily conceal their minority identities and most learn to do so early in life as the result of micropolitics.[84] A significant impediment to full political participation by LGBT persons has long been the reluctance many of them feel about disclosing their identities publicly, which is a precondition of full participation as an LGBT person, much less express advocacy on behalf of LGBT equality.[85]

So it is that, logically as well as legally, freedom of expression, arguably the originary right in the polity that is the United States, undergirds equality. Further, the most important form of equality in the United States is equality of opportunity to participate fully in the political process to address whatever issue one thinks merits one's attention. Certainly this is true historically for LGBT persons.

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[84] Derald Wing Sue and David Rivera, *Microaggressions in Everyday Life: A new view on racism, sexism, and heterosexism*, Psychology Today, undated, https://www.psychologytoday.com/blog/microaggressions-in-everyday-life. This relative, chosen invisibility is usually an advantage for LGBT persons, but it can be a disadvantage, too: *Canada's asylum system re-victimizing LGBTQ refugges: Study*. "A study finds gay refugee claimants are confronted by a system that focuses more on confirming their sexuality than the persecution they faced at home." Metro News, 28 Sept., 2015, http://www.metronews.ca/news/canada/2015/09/29/canadas-asylum-system-revictimizes-lgbtq-refugees.html. Among the most important and effective components of LGBT political organizing in the past sixty years has been the ongoing campaign to encourage all LGBT persons to disclose their identities as such to important persons in their lives, the most obvious manifestation of which is National Coming Out Day, October 11, on which LGBT organizations exhort their constituents to reveal themselves publicly. See, e.g., http://thetaskforceblog.org/2012/10/11/come-out-at-work-on-national-coming-out-day/.

[85] No better example of this problem could exist than Barney Frank, long time member of the House of Representatives, who, by his own account, chose initially not to disclose his identity as a gay man when running for his seat, doing so only as the result of a scandal involving a male prostitute. By that time, Frank was manifestly popular enough with his constituents that they continued to elect him until he retired many years later. Ed O'Keefe, *When Barney Frank announced he was "coming out of the room" (er...the closet)*, Washington Post, 3 Dec., 2012, http://www.washingtonpost.com/blogs/2chambers/wp/2012/12/03/when-barney-frank-announced-he-was-coming-out-of-the-room-er-the-closet/

Discrimination on the basis of gender presentation and/or sexual orientation,[86] like discrimination on the basis of race, works directly in depriving persons of opportunities and subjecting them to disparate treatment, and indirectly by discouraging them from speaking publicly on their own behalf, which is critical in our Republic as a chief means for eradicating direct discrimination. Government in the United States has an express commitment to combating both types of discrimination. The commitment to combating direct discrimination dates only to the Civil Rights Era,[87] when African Americans, after long decades of struggle, finally persuaded at least most government actors that discrimination against minorities, however defined, indicates a failure by the United States to live up to its founding principles. The commitment to combating indirect discrimination that inhibits full political participation plainly stems from our founding charter, the Constitution, which, in various ways, from the broadest idea of defining a republic as the form of government in the United States, to the most specific of prohibiting the national legislature from enacting laws "abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition Government for a redress of grievances"[88] reflects the belief that all citizens should have the right to participate in the political process.

This argument assumes that "LGBT civil rights" is a thinkable proposition. Opponents of LGBT equality disagree. The majority opinion in *Lawrence v. Texas*, according to Justice Antonin

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[86] The issue seems now largely settled, but for some time there was debate among LGBT leaders about whether to include protections for gender expression in a proposed statute to prohibit employment discrimination on the basis of sexual orientation. This debate mostly characterized the issue in terms of inclusion or exclusion of transgendered persons in the policy proposal and, by implication, the political movement, but this was a mistake. Given an employer who wishes not to employ lesbians or gay men, she, or more likely he, is not going to go to employees' residence and peek in the windows to ascertain the employee's sexual practices. He is going to make an ad hoc evaluation on the basis of the employee's gender presentation, firing women who are too butch and men who are too femme. In practice, the distinction between "sexual orientation" and "gender presentation" is a false one. *Transgender Politics: ENDA Articles*, LAURA'S PLAYGROUND, http://www.lauras-playground.com/transgender_politics_enda.htm (last visited 18 June, 2015).

[87] Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy (1990).

[88] U.S. Constitution, First Amendment.

Scalia in dissent, "effectively decrees the end of all morals legislation."[89]According to Scalia, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are… sustainable only in light of *Bowers* [*v. Hardwick's*] validation of laws based on moral choices."[90] This proposition depends on the belief, which Scalia articulated in his *Romer v. Evans* dissent,[91] that some distinctive conduct of lesbians and gay men is all that defines them as a class. Scalia's belief about conduct defining the class is essential to his legal reasoning: restrictions on the liberty of lesbians and gay men are constitutionally permissible because the root issue is regulation of conduct, making prohibitions in American law on status-based distinctions[92] inapplicable. "Homosexuality" is only a distinctive set of sex acts; therefore, it cannot be a minority identity. No rational basis exists, on this view, for differentiating lesbians and gay men from adulterers, prostitutes, and practitioners of adult incest.[93] On this view, just as "civil rights of adulterers and prostitutes" as such makes no sense, similarly "LGBT civil rights" is a nonsensical term.[94] The law must have the power to prohibit conduct, and merely claiming a propensity to engage in the conduct as the basis for an identitarian civil rights movement is illogical. Scalia implicitly claims that sex and sexuality is not a

[89], 599 (2003) (Scalia dissenting).
[90] Id. at 590, citing Bowers v. Hardwick, 478 U.S. 186 (1986).
[91] Romer v. Evans, 517 U.S. 620, 641-43 (1996) (Scalia dissenting).
[92] This is at base the point of the 13th amendment: imprisonment, and presumably lesser impositions, is permissible as punishment for crime – that is, for actions – but not for status – who a person is. The distinction is similar to that which Akhil Amar makes in his article arguing that Colorado's Amendment 2, which the Court struck down in *Romer v. Evans*, violates the prohibition on bills of attainder. Bills of attainder are illegal precisely because they punish persons solely on the basis of the person's identity, not on the basis of her/his conduct.
[93] See also, *Lawrence*, 517 U.S. at 601 (Scalia dissenting): "A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.' But be that as it may. Even if the Texas law does deny equal protection to 'homosexuals as a class,' that denial still does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality." This proposition is useful to conservatives because it appears to be a rational, empirical prop on which to rest the distinction they wish to vindicate between discrimination on the basis of race and discrimination on the basis of sexual orientation and/or gender presentation. See supra, n. 4.
[94] Recently, Scalia elaborated on this argument while criticizing the Obergefell decision. He argued that the "democratic process" should decide which minorities deserve protection under the Constitution, not the Supreme Court. Adam Liptak, *Justice Antonin Scalia Questions Logic Behind Gay Rights Protections*, New York Times, 16 Nov., 2015, http://www.nytimes.com/politics/first-draft/2015/11/16/justice-antonin-scalia-questions-logic-behind-gay-rights-protections/?_r=0.

properly political topic, so it cannot serve as the basis for political involvement.

Frustratingly, the Justices of the Supreme Court who have written to defend the rights of lesbians and gay men have consistently failed to address the issue in these terms. It would be nice to have a Justice of the United States Supreme Court explain why Scalia's reasoning is badly flawed. Their failure to do so when they are manifestly willing to defend the rights of such persons with their decisions could indicate that they know of no effective response to Scalia's claim; they are unaware of any reliable basis for differentiating between lesbians and gay men, on one hand, and adulterers, fornicators, and practitioners of bestiality on the other hand.[95]

This article provides one such response: does anyone really believe that LGBT persons could have built and sustained a social movement over decades with nothing at its core but a propensity for a particular type of sex acts? What is the type of sex acts that lesbians and gay men have in common? The inclusion of transgender persons alone gives the lie to this position.[96] Transgender identity is not about sex acts at all per se, but about the perception of a profound disconnect between the person's sense of her/his gender identity and her/his sexed anatomy. That a person identifies as transgender tells us nothing necessarily about her/his sexual practice,[97] or about any other specific acts s/he may

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[95] It is also possible, of course, that other Justices consider Scalia's position too ridiculous to merit refutation.

[96] J. Courtney Sullivan, *What Marriage Equality Means for Transgender Rights*, New York Times, 16 July 2015, http://www.nytimes.com/2015/07/16/opinion/what-marriage-equality-means-for-transgender-rights.html

[97] *Sexuality and Transgender People*, http://www.transgenderkenya.com/index.php?option=com_content&view=article&id=72. Even more damaging to Scalia' position is the recognition among some LGBT civil rights activists of the need to include explicitly intersex persons within their political and policy umbrella. "Intersex" are persons who are born with ambiguous genitalia. Adults with the condition increasingly oppose the common practice of assigning a conventional sex to infants with surgery, which invariably, activists note, entails removal of highly sensitive sexual tissue that will never grow back. Even more than transgender persons, intersexed persons disprove the conservative claim that "biology" is a transcendent substrate on which culture rests, in that surgical interventions on infants represent the attempt to impose arbitrary cultural preferences onto the biological reality of ambiguous bodies. See the Task Force's concern for this issue at http://thetaskforceblog.org/2015/05/06/a-good-start-but-still-just-a-start/. See also, http://www.isna.org/. In an interesting twist on the question of sex discrimination, an intersex person has filed suit against the State Department for refusing to issue a passport that has no sex designation. Lambda Legal, the LGBT(I) non-profit, public interest law firm is

engage in, except possibly appearance in public in clothing that we do not conventionally associate with persons of her/his gender, which used to violate various state statutes and municipal ordinances[98] that would be impossible to sustain in light of decisions prohibiting discrimination on the basis of sex.[99] But the short answer is this: why should LGBT persons let Antonin Scalia define them? When did the title, Associate Justice of the United States Supreme Court, carry the authority to decide the identities of entire minority groups? The overweening arrogance is palpable.[100]

The proposition itself is also patently absurd. How did the public authorities of Colorado propose to enforce Amendment 2? If all that defined the targets of the Amendment was a propensity for a certain type of sex acts, then presumably enforcement would depend on somehow ascertaining what sort of sex acts the individual in question had a propensity for. Further, it is impossible to conceive how organized opposition to Amendment 2 could have existed without violating

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representing the plaintiff in the case, further disproving Scalia's claim that only a propoensity for a certain type of sex act is all that defines "homosexuals" as a class. Michael K. Lavers, Intersex person sues State Department over passport denial, Washington Blade, 26 Oct. 2015, http://www.washingtonblade.com/2015/10/26/intersex-person-sues-state-department-over-passport-denial/

98 http://fashionlawwiki.pbworks.com/w/page/11611171/Cross-Dressing%20and%20the%20Law

99 See, e.g., Reed v. Reed, 404 U.S. 71 (1971).

100 Perhaps the greatest irony in all of this debate is that, even as he fulminates about the supposedly unjust arrogation of authority that the *Obergefell* opinion enacts with five justices removing an issue from the political sphere, Scalia would arrogate to himself the much larger, more consequential power to define ex cathedra an entire subset of the population, telling them who they are and what the proper limits of their political participation should be. See *Obergefell*, Scalia dissenting. In another breathtaking departure from the principles of judicial conservatism, at oral arguments over the use of race as a factor in the discretionary admissions program at the University of Texas, Scalia attempted to define African Americans as intellectually deficient as a class when he reiterated the claim that affirmative action pushes them into institutions they are ill prepared for, where they perform badly. See Adam Edelman, *During Supreme Court hearing on affirmative action, Justice Scalia claims that 'most black scientists in the U.S.' benefit from not being admitted into top programs*, New York Daily News, 9 Dec. 2015, http://www.nydailynews.com/news/politics/supreme-court-hears-texas-affirmative-action-challenge-article-1.2460038?utm_content=bufferf2db7&utm_medium=social&utm_source=twitter.com&utm_campaign=NYDailyNewsTw. For a discussion of the likely origins of this claim in the debate about affirmative action in law school admissions, see William B. Turner, "'A Bulwark Against Anarchy': Affirmative Action, Emory University, and Southern Self-Help," 5 *Hastings Journal of Race and Poverty Law* 195, 2008.

prohibitions on public indecency, which LGBT activists have never challenged. What happens at meetings of LGBT activists other than sex, if that is the only commonality they all claim? Do they have separate rooms for lesbians and for gay men? Do bisexuals get to go back and forth between the two rooms? What is the sex act that lesbians and gay men have in common? What is the sex act that is common to lesbians and gay men, but that other persons never engage in? The more one thinks about the logistics of even attempting to sustain LGBT identity in the manner that Scalia suggests, the more absurd the proposition becomes.[101]

The majority opinion in *Lawrence* is ambiguous on the question of who LGBT persons are. It compares same-sex couples to married couples, asserting that same-sex couples should have the same right of privacy in their sexual conduct as married couples.[102] This militates in favor of the respectability of same-sex couples.[103] Ultimately, however, *Lawrence* still makes being lesbian or gay all about sexual conduct, especially insofar as both the majority and the concurrence carefully cabin their reasoning to preclude the possibility of recognizing same-sex marriage[104] – same-sex couples should be able to screw all they want to, but they still can't get married. Kennedy cannot have known when he wrote the majority opinion in *Lawrence* that he would subsequently cite that

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[101] The fact that an otherwise apparently intelligent person such as Antonin Scalia could utter such nonsense with a straight face and apparently have other apparently intelligent persons accept his claim as reasonable only demonstrates the extent to which cultural prejudice can overwhelm basic logic and evidence.

[102] *Lawrence*, 539 U.S. at 567, 577-78 (citing Justice Stevens' dissent in *Bowers*, 478 U.S. at 216).

[103] Respectability itself can be a mixed blessing, of course, as Katherine Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 Colum. L. Rev. (2004) and Teemu Ruskola, *Gay Rights versus Queer Theory: What is Left of Sodomy after* Lawrence v. Texas? 23 Social Text 235 (2005), have pointed out.

[104] *Lawrence*, 539 U.S. at 578; 585 (O'Connor concurring). Although *Lawrence* had the distinctly liberal effect of striking down all sodomy statutes in the Republic, still, the move to make everything all about sex is a distinctly conservative one, as we saw recently with "conservative" radio entertainer Rush Limbaugh saying that Georgetown law student Sandra Fluke was a "slut" and a "prostitute" for criticizing the Catholic Georgetown for failing to include contraceptives in their student health policies. *Rush Limbaugh v. Sandra Fluke: A Timeline*, The Week, 9 March 2012. http://theweek.com/articles/477570/rush-limbaugh-vs-sandra-fluke-timeline. Fluke's complete statement, at a hearing under Democratic auspices, gives the lie to Limbaugh's calumny. She cites the example of a married student who had to stop using contraceptives because she and her husband could not afford them, and another woman who was taking contraceptives to treat polycystic ovarian syndrome. Molly Moorhead, In Context: Sandra Fluke on contraceptives and women's health, Politifact, Tampa Bay Times, 6 March 2012. The key point, however, is that women should be free to make their own choices about sexual activity with no outside interference at all.

opinion in two later opinions that would result in legal recognition of same-sex marriages. nationally.[105]

The title of this article makes the basis for the distinction between lesbians and gay men, and various other sexual outlaws, obvious: lesbians and gay men have built a large, well organized, in some ways highly effective political movement with nothing at its core except the common identity that lesbians and gay men – and, at the movement's best, bisexual and transgender (LGBT) persons as well – see themselves as having. To put the point in terms of the First Amendment, this is peaceable assembly to petition government writ large. LGBT persons have created a movement out of self-defense, and as an act of self-definition. LGBT identities invite harassment and persecution in our culture in a way that no other minority identities currently do.[106] But LGBT persons have demonstrated definitively that LGBT identity is no bar – or should be no bar -- to full participation as first-class citizens, with the same rights and responsibilities as everyone else. There is a National LGBTQ Task Force, which has existed now for forty-two years.[107] There is no National Masturbators'

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[105] *Windsor*, supra, at 19; *Obergefell*, supra, at 14.

[106] Examples include the killing of Lawrence King, age 15, at his school in California on February 12, 2008 because of his sexual orientation and gender expression. http://www.glsen.org/cgi-bin/iowa/all/home/index.html (last visited April 7, 2008); Dylan Purcell, *3 held for trial in Center City gay assault case*, Philly.com, 18 Dec., 2014, http://articles.philly.com/2014-12-18/news/57159361_1_conspiracy-case-boyfriend-ufc-fighter; A.J.Walkley, *2014 Transgender Violence Statistics Sobering Thus Far, Huffington Post*, 12 July 2014, http://www.huffingtonpost.com/aj-walkley/2014-transgender-violence_b_5298554.html; a student at a Christian school in Tennessee has precipitated a controversy by trying to take his male date to the school homecoming dance. Most recently, town Commissioner Clark Plunk posted on Facebook, "I would say let the little homo sue all he wants!!!!!….This is not about a homo and his rights it's about a school that is loved by thousands and their memories and their right to keep their history and Christian values intact…. This is a threat to our values, our Christian values." Felicia Bolton, *CBHS student responds to Lakeland commissioner's anti-gay rant*, WMC News, 1 Oct., 2015, http://www.wmcactionnews5.com/story/30153434/lakeland-commissioner-rants-on-gay-cbhs-student-calls-gays-spiteful; Bethania Palma Markus, *"Let the little homo sue": TN official bashes teen who wanted to bring boyfriend to homecoming dance*, RawStory, 1 Oct., 2015, http://www.rawstory.com/2015/10/let-the-little-homo-sue-tn-official-bashes-teen-who-wanted-to-bring-boyfriend-to-homecoming-dance/; Daniella Silva, Lesbian Couple Courtney Wilson and Taylor Guerrero Claim They Were Arrested in Hawaii for Kissing, NBC News, 29 Oct., 2015, http://www.nbcnews.com/news/us-news/lesbian-couple-courtney-wilson-taylor-guerrero-claim-they-were-arrested-n454051

[107] www.taskforce.org. Other major LGBT civil rights organizations include Lambda Legal Defense and Education Fund, the only national public-interest law firm dedicated exclusively to LGBT issues, www.lambdalegal.org; the Gay and Lesbian Victory Fund, www.victoryfund.org; the National Center for Lesbian Rights, www.nclrights.org; Gender PAC, www.gpac.org; Parents, Family, and Friends of Lesbians and Gays (PFLAG), www.pflag.org; the Gay, Lesbian, and Straight Education Network

Task Force, or National Fornicators' Task Force.[108]

Especially since *Obergefell*, but even at the time of *Romer*, the mere fact that marriage would become a major desideratum of LGBT civil rights activists disproves Scalia's claim that only a proclivity for a certain sort of sex acts defines the class.[109] Even before *Lawrence*, actual prosecutions for violating sodomy statutes were exceedingly uncommon. Such statues rarely, if ever, prevented gay men, much less lesbians, from enjoying their particular sex acts.[110] If LGBT identity were only about sex, then marriage would be irrelevant as unnecessary for facilitating sex. The other point that *Romer* itself makes abundantly clear is that whoever wrote the amendment at issue in that case clearly thought lesbians, gay men, and bisexuals shared a common identity in some important sense, and apart from a propensity to engage in a certain type of sex. Otherwise, its language refers to a chimera. That a significant proportion of Colorado citizens believed that the amendment sufficiently interpellated them

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(GLSEN), http://www.glsen.org/splash/index.html; the Human Rights Campaign (HRC), www.hrc.org; and the Gay and Lesbian Alliance Against Defamation (GLAAD), http://www.glaad.org/. One should avoid confusing this GLAAD with GLAD, or Gay and Lesbian Advocates and Defenders, the public interest law firm based in Massachusetts that pursued the Massachusetts same-sex marriage case. Although initially a regional organization, GLAD announces on its web site (April 4, 2008) that it has filed an amicus brief in the state litigation against Iowa's ban on same-sex marriages, http://www.glad.org/.

[108] To be clear, I do not intend this argument as an endorsement of statutes prohibiting fornication, masturbation, adultery, obscenity, prostitution, or bigamy, the moral status of which varies significantly, in my view, but none of which should be any business of the state. Adult incest and bestiality, we can talk about. The relevant question for the present article is, what is it about LGBT identity that makes it the reliable basis for a long-running political movement when none of the other activities that Scalia lists has produced anything remotely similar?

[109] It also dispenses with the other favorite red-herring argument that comes up frequently in this debate, whether anyone chooses LGBT identity. This is only a slightly more blunderbuss version of the claim that such identities are only about sex acts. This claim is not really worth engaging seriously. Imagine that Individual X does wake up in the morning and thinks, "I'm feeling LGBT today. I'll be [insert letter]." So what? Why is that the business of anyone other than X's potential sex partners? It is obviously ridiculous in the extreme to suggest that anyone would seek to marry on the basis of an identity that is so easily chosen. Jenna Johnson, *Scott Walker on whether being gay is a choice: "I don't know the answer to that question*," Washington Post, 19 July 2015, http://www.washingtonpost.com/blogs/post-politics/wp/2015/07/19/scott-walker-on-whether-being-gay-is-a-choice-i-dont-know-the-answer-to-that-question/.

[110] I write "gay men" here because the applicability of many sodomy statutes to lesbian conduct was not always clear. Further, insofar as one wishes to posit some sort of "homosexual conduct" that supposedly provides the connection between lesbians and gay men and differentiates them from everyone else, one must specify what that conduct is. Obviously, lesbians and gay men do not engage in the same sex acts. That is anatomically impossible, as surely even Scalia must know.

to demand a legal challenge alone refutes Scalia's position on the existence of LGBT identities. Obviously, the plaintiffs and the attorneys who represented them saw them as having distinct identities apart from their sex acts.

This might seem like a dangerous observation from the lesbian/gay rights perspective. One justification for appealing to the courts for protection is that the group in question lacks sufficient political power to defend itself in the majoritarian process.[111] Lesbian, gay, bisexual, and transgender (LGBT) persons, on this view, point to the political power of their movement only at their own peril. In his *Romer* dissent, Justice Scalia went to considerable lengths to describe what he considers the disproportionate political power of LGBT persons in order to justify his claim that such persons need no particular protection from the courts.[112]

But for anyone who lacks Scalia's hostility toward LGBT persons, the problem with his approach is immediately obvious: minorities are damned if they do, and damned if they don't. Any group that suffers invidious discrimination faces the choice, under the Scalia regime, of accepting the discrimination as valid, or fighting back by whatever means are available, at which point Scalia will assert that the minority exerts disproportionate political influence, invalidating any claim for protection from the courts. To put the point in a way that better reveals the invidious character of the claim, what Scalia implicitly argues is that any political success by a minority group is enough and indication of sufficient political power to defeat any appeal to the courts for protection.[113]

Scalia would punish LGBT persons for their active participation in American politics. The more

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[111] See *infra*, notes 63ff and accompanying text for full discussion.

[112] *Romer*, 517 U.S. at 645-47 (Scalia dissenting).

[113] According to this logic, apparently African Americans as a class no longer deserved any special consideration from the courts after the passage of the 1965 Voting Rights Act, a policy victory that far surpasses anything LGBT persons have yet achieved, yet ironically, Loving v. Virginia, 388 U.S. 1 (1967), the Supreme Court decision striking down state antimiscegenation statutes, only occurred two years after the Voting Rights Act. To make his position that LGBT persons deserve no particular solicitude from the courts defensible, Scalia would have to explain why Loving v. Virginia was a valid decision two years after major political/policy victories for African Americans, but Romer v. Evans was somehow a feat of excessive deference to LGBT activists in the wake of not negligible, but still far more modest political/policy success for them.

legitimate approach appears in several decisions of the United States Supreme Court that have quite reasonably looked at the citizenship capacity of the targeted group, finding the presence of such capacity to increase the likelihood that the group deserves heightened protection from the Court.[114] Being responsible citizens should ensure that individuals who are such have the same rights as all others. Scalia effectively looks at a group of highly involved, responsible citizens and endorses depriving them of equal rights on the grounds of their active involvement in politics. This reasoning by the Court – that responsible citizenship deserves the Court's protection from discrimination – is implicitly a version of the argument of this article – anyone who demonstrates the willingness and ability to participate in the political process deserves the full and fair opportunity to do so by implication of the intersection between the free speech and free assembly provisions of the First Amendment and the equal protection provision of the Fourteenth Amendment. Although the *Romer* opinion makes no such argument, one could use it to reach the same outcome that the actual opinion does. By prohibiting a specific policy outcome LGBT citizens might seek, Amendment 2 had the effect of nullifying their political participation.

The present article turns Scalia's reasoning inside out. To begin, the existence of a political movement of, by, and for a minority group necessarily indicates that the members of that minority see themselves as suffering some sort of discrimination. Whether the identity category is race, gender, religion, sexual orientation, or some other, the problem remains: how to decide if the majority's choice to discriminate against the minority is valid? Or, how to decide if the minority's grievance is legitimate? One answer to that question takes the form of another question: why else would members of the minority group invest precious resources in a political movement? Why would thousands of struggling African Americans send their mites every month to the NAACP unless they saw themselves as suffering some oppression and they hoped that the NAACP would help them fight it?[115]

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[114]See *infra*, note 84ff and accompanying text.
[115]Manfred Berg, "The Ticket to Freedom": The NAACP and the Struggle for Black Political Integration (2005).

This question by itself does not settle the issue. Members of the majority who wish to discriminate will no doubt respond that political protest against discrimination just proves how misguided the members of the minority group really are.[116] The existence of the National Association for the Advancement of Colored People did not often lead white supremacists to see the error of their ways. Instead, it produced denunciations from white supremacists, who frequently asserted that race relations would continue just fine under segregation in their area but for the meddling of the NAACP.[117]

But the persistence of the NAACP under white supremacy,[118] the persistence of the National Organization for Women (NOW) under male supremacy,[119]the persistence of the National LGBTQ Task Force (The Task Force)[120] under heterosexual supremacy all allow us to ask the question of what the United States Constitution is for. Is it importantly related to these organizations and their underlying movements? One way to answer that question is that it defines the space in which politics can occur. By its own terms, it includes everyone in its political space: "We the People of the United States of America." One way of understanding the infamous *Dred Scott v. Sandford* decision is that it defines all persons of African descent as outside the category, "[w]e the people of the United States of America."[121] Less drastically, Colorado's Amendment 2 did the same thing to lesbian, gay, and bisexual

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[116]See James Dobson, Marriage Under Fire: Why We Must Win This War 66 (2003): "The shouting and blustering of homosexual activists is not unlike that of a rebellious teen who slams doors, throws things around, and threatens to run away. Most parents have had to deal with this kind of behavior and have learned that giving in at such a time can be disastrous for both parties. What's needed is loving firmness in the face of temper tantrums and accusations."

[117]For a readily accessible example of this type of statement, see the documentary, Eyes on the Prize, episode 1, "Awakenings" (Blackside/PBS Productions 1986). Note that Scalia's reasoning would lead ineluctably to the conclusion that the mere existence of the NAACP precludes any protection for racial minorities from the court.

[118] White supremacists, of course, tried to eradicate the NAACP. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958).

[119]See Cynthia Harrison, On Account of Sex: The Politics of Women's Issues, 1945-1968 (1988).

[120]See John D'Emilio, *Institutional Tales*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS (ed. John D'Emilio, William B. Turner, and Urvashi Vaid, 2000).

[121]*Dred Scott v. Sandford*, 60 U.S. 393, 403, 404 (1857): "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in cases specified in the Constitution…. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can

persons.[122] Similarly, we can understand the blanket prohibition in the First Amendment on Congressional interference in various forms of political activity[123] as a statement that the people of the United States operate with a strong presumption in favor of permitting that activity, no matter who engages in it, and no matter how strongly the majority may oppose their message – the Amendment itself states the rights in question in completely unqualified terms. They apply to everyone. We will see that this reasoning was critical to the decision of the Supreme Court vindicating the right to participate of LGBT persons before they called themselves such.[124]

The comparison between African Americans and LGBT persons is instructive. One of the perverse advantages of racial segregation was that it made political organizing easier by forcing African Americans to live close to each other in segregated neighborhoods, attend segregated schools, and build their own segregated churches. Segregation forced a measure of cooperation among African Americans that contributed to their ability to organize politically. Insofar as we see LGBT activists as having emulated African Americans in terms of their strategies, tactics, and goals in civil rights organizing and having achieved similar victories, without comparable segregation, we have to ask, would any of that have been possible if the only commonality among the individuals was a desire for similar sorts of sex?

B. Equal Protection/Due Process

Legal scholar Janet Halley made a similar point thirty-six years ago.[125] She noted the Supreme Court's assertion in *Bowers v. Hardwick* that it would not interfere with the majority's decision to

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therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."

[122] Amendment 2 and the resulting Supreme Court case came about before transgendered persons had succeeded in putting themselves and their issues into the public discourse to the extent that they later would. I omit them from this list only because Amendment 2 did not mention them.

[123] U.S. Const., amend. I: "Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." N.Y. Times v. Sullivan. See also discussion of Roth v. United States, *infra*.

[124] See infra, text accompanying n. 173ff for discussion of this point in terms of a Supreme Court opinion.

[125] Janet Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915 (1988-1989).

prohibit sodomy. Given the Court's own equal protection jurisprudence, Halley explained that the *Bowers* opinion should have led the Court to take on the explicit responsibility of ensuring the ability of persons who suffered from the enforcement of sodomy statutes to participate fully in the political process.[126] But genuinely defending the participation rights of persons who suffer by the existence of sodomy statutes would immediately entail overruling *Bowers* itself precisely because part of the harm that sodomy statutes caused was that they impaired the ability of lesbians and gay men to participate fully in the political process.[127] Note that Halley articulated this position before the Supreme Court had used the Equal Protection Clause to strike down any laws that discriminate against LGBT persons.

Judges and legal scholars in the United States have coined the oxymoronic "substantive due process" to describe legal claims such as that the respondent made in *Bowers*. The idea is that, even though "due process" obviously points to political and legal processes, still sometimes the outcome of the political process can violate Constitutional principles even if the process seemed completely fair.[128] Halley did not put her point this way, but she could as easily have stated that, at least for LGBT persons and sodomy statues, substantive due process v. ordinary due process is a distinction without a difference. Sodomy statutes had the effect of invalidating the political process as it implicated LGBT persons because they imposed on such persons the disability of labeling one's self a presumptive

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[126] Id. at 918.

[127] Justice Roberts' dissent in *Obergefell*, arguing at length as it does that the decision has the effect, in his mind, unjustifiably, of removing the debate about same-sex marriage from the political process, falls to the same argument. Scalia's paean to the potential glories of "democracy" [sic], which an "unelected committee of nine" infringes on with its decisions, falls similarly. Both reflect a persistent refusal to recognize the inherent unfairness of a political process in which members of any identifiable minority (or majority, in the case of women) suffer under the disability of an identity that the culture overtly deprecates through various mechanisms.

[128] Justice Roberts offers a lengthy disquisition on the perils of substantive due process in his *Obergefell* dissent, finding its origins in the odious *Dred Scott* opinion and linking it to the widely discredited *Lochner v. New York* as a potentially fertile field of illegitimate judicial policymaking, which is the primary conceit of his entire dissent. He consistently fails thereby to notice that, whatever the legal theory, the problem with *Dred Scott* was the continued deprivation of slaves' liberty and that *Lochner* involved purely economic relationships that do not implicate individual identities as issues such as race and sexual orientation do. *Obergefell* at 10-15 (Roberts dissenting) (slip opinion).

violator of the relevant law simply by identifying one's self as a member of the class, with the consequent risk of having one's fellow citizens dismiss one's opinions as coming from a presumptive criminal.[129] Even absent any realistic threat of prosecution, still identifying as a sodomite carried a threat of reputational harm. Political participation entails identification of the interest one hopes to defend, which in turn entails the identification of the individual(s) as a particular type of person. All politics is identity politics. If, in order to identify your interest and your identity, you risk branding as an outlaw, you will hesitate to enter the lists.

Again, this might seem like a dangerous observation only thirteen years after the Supreme Court struck down all sodomy statutes – if lesbians and gay men no longer operate under that particular sword of Damocles, then why do they still need protection from the depredations of the majoritarian process? At least two answers leap to mind. First, one cannot expect the effects of growing up with sodomy statutes to disappear overnight. Second, *Lawrence* contributed to substantial backlash, only inspiring conservatives to increased attacks on the rights of lesbians and gay men.[130] In some ways, the situation is arguably worse now than it was before *Lawrence*.[131] Plainly, the rash of state constitutional amendments prohibiting recognition of same-sex marriages that occurred in 2004 and 2006 was at least partly a response to the *Lawrence* decision. The proof is in the pudding. Twelve years after *Lawrence*, a decision granting marriage rights to all same-sex couples has produced another major outcry from opponents of LGBT equality, including various attempts to reassert the discrimination.

Halley focused primarily on the social-psychological process of forming lesbian/gay identities. This article focuses primarily on the historical evidence demonstrating the political engagement of

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[129] Justice Kennedy recognizes this point in his *Obergefell* opinion, writing, "in effect, Bowers upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation." *Obergefell* at 25 (slip opinion).

[130] See William B. Turner, Chasing Queers: The Radicalism of Conservative Legal Attacks on Lesbians and Gay Men, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120023.

[131] This is not to suggest that I think Lawrence was a bad idea. Anyone who waits until no backlash will occur before taking action will never take any action at all.

lesbians and gay men in opposition to their own oppression. The two are closely related. Politics is the most public, formal manifestation of social psychology. In both cases, the emphasis is on the importance of the political process, and of equal access to it, as a component for evaluating the legitimacy of law and policy in the United States. That LGBT persons continue to suffer significant discrimination in spite of their determined participation in the political process is all the evidence one needs to justify increased judicial scrutiny of such discrimination under the equal protection clause, just as continued discrimination against African Americans justifies continued scrutiny of any law or policy that relies on racial classifications.[132]

The key point is that LGBT identity in the United States is inherently political. LGBT persons necessarily formulate not only their political movement and its organizations, but their very identities as individuals, in response to external political pressures. The attempt to deny the fundamentally political character of identity formation – to insist that LGBT identity is solely a matter of conduct or mental illness,[133] to reify race, gender, and sexual orientation as biological characteristics, rather than political choices[134] – is itself part of the political move, of the discrimination. Oppressors strive to avoid recognizing that they are oppressors by shifting the causation for oppression from themselves to the oppressed. Insofar as we define "politics" as a purely public enterprise of choosing elected officials and having them make laws, it is simple to suggest that individual identity characteristics are not political. Refusing to recognize the political character of these choices and the resulting identities is itself a highly political act.

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[132] An important difference in the facts of the two programs produced different results under the same legal standard of strict scrutiny for the use of racial classifications in Grutter v. Bollinger, 539 U.S. 306 (2003) and Gratz v. Bollinger, 539 U.S. 244 (2003). Justice Thomas' dissent in *Grutter* offers a brief overview of the contours of strict scrutiny and the compelling state interest that is necessary for any use of a racial classification to survive that scrutiny. Grutter, 539 U.S. at (Thomas, dissenting).

[133] RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981).

[134] Barbara J. Fields, Of Rogues and Geldings, 108 AMERICAN HISTORICAL REVIEW 1397, 1398 (2003): "Disguised as race, racism becomes something Afro-Americans are, rather than something racists do."

But LGBT identity would not exist in its present form absent substantial stress around issues of gender and sexuality that is plainly political in a much broader sense.[135] Although we must define "politics" broadly in order to understand the constant contest that occurs around LGBT identities and individuals, still we must also pay close attention to how politics in the narrow sense is a major component of that contest and, plainly, has enormous impact on LGBT persons. As Scalia himself states, judges in the United States have the responsibility to ensure the proper functioning of the political system.[136] Even the judges and justices who defend the rights of lesbians and gay men too often overlook what we might call, borrowing from feminists, the personal component of politics, or the political component of the personal. The result is that they miss the full impact of political decisions, narrowly defined, on individuals. From reading *Lawrence*, one could easily conclude that sodomy statutes are only about sex. But they are not – they are very much about the politics of perpetuating heterosexual supremacy.[137] To put the point another way, assuming that anyone who identifies as LGBT is concerned only about sex is part of the problem, itself works discrimination against those persons. Scalia's is the characteristically conservative move of attempting to embed political choices into definitions to make them seem "natural" and inevitable when they are neither.[138]

This article will offer a different doctrinal genealogy than what Halley presented twenty years ago. Much relevant legal history has occurred since she published. She began with the famous

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[135] See JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 1-26 (1999); EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); George Chauncey, From Sexual Inversion to Homosexuality; MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION (1978); Halley, supra note 22 at 920: "This Article argues that homosexual identity is the product not of sodomitic acts simpliciter, but of a complex political discourse that is threatened in ways that the *Carolene Products* formulation prohibits, by antihomosexual discrimination."

[136] *Lawrence*, 539 U.S. 602 (Scalia dissenting): "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." But see *Vieth v. Jubelirer*, U.S. 267 (2004) (Scalia writing for Court to assert that judiciary should not take political gerrymandering cases for lack of justiciable standards).

[137] See, e.g., Elizabeth Erin Bosquet, Contextualizing and Analyzing Alabama's Approach to Gay and Lesbian Custody Rights, 51 ALA. L. REV. 1625 (2000).

[138] See supra, note 29, and accompanying text for efforts by conservative legislators to define different sex marriage as "natural."

footnote four in *United States v. Carolene Products*[139] as the basis for judicial review of legislation in terms of its impact on the political process.[140] Plainly she participates with this argument in a long and estimable tradition of legal history.[141] *Carolene Products* is famous as one of the decisions with which the Supreme Court indicated that it would increasingly refrain from striking down the economic regulations of the New Deal. Other cases are more important for indicating the Court's shift per se.[142] What makes *Carolene Products* so famous now is that it contains "the most celebrated footnote in American Law,"[143] Footnote Four. This footnote is important because it lays out the doctrinal basis by which the Court expects to distinguish in the future which classifications it will examine minimally under the Equal Protection Clause, and which it will examine closely for evidence of discriminatory intent or effect. In other words, to return to *The Slaughterhouse Cases*, how to distinguish butchers from LGBT persons.[144]

I have no desire to dispute the prevailing version of the story. I do wish to complicate the story by adding in subsequent case law and by noting that the analysis in Footnote Four treats minority groups as inherently distinct and self-existing, failing largely to appreciate the role of politics in creating "minority" groups in the first place, and therefore the myriad, deep interpenetrations between politics in the conventional sense and participation in its processes with the self-understandings and identity definitions of all persons, but especially of members of minority groups.[145] The primary

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[139] 304 U.S. 144 (1938).
[140] Halley, 916 to 918.
[141] See, e.g., LAWRENCE FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY (2000).
[142] See, e.g., *Wickard v. Filburn*, 311 U.S. 111 (1942) (upholding federal law regulating farmer's wheat production for personal use); *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) (upholding application of the National Labor Relations Act).
[143] Powell, Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1087 (1982).
[144] Or bakers, for that matter. In his dissent in *Obergefell*, Justice Roberts invokes Locher v. New York, 198 U.S. 45 (1905), the notorious case in which the Supreme Court relied on the Due Process clause to strike down a state labor regulation. Roberts' position here is not importantly different from Scalia's, in that he implicitly argues that LGBT identity is as labile as one's occupation, just as Scalia insists that LGBT identity is analogous to any other choice of immoral sexual conduct. To state what may be obvious, this position is insulting.
[145] Obviously, the identification of Africans and their descendants in British North America and later the United States as "black" persons who are somehow fundamentally different from "white" persons is the result of myriad political and policy decisions since 1619.

articulations of equal protection doctrine as requiring the invalidation of specific statutes aimed at LGBT persons similarly treat LGBT persons as entities apart from the political process who happened to get caught up in it.[146] A deeper appreciation of the necessarily political character of LGBT identity points us to a different precedent, a First Amendment precedent,[147] that addresses the political process directly, and the active use LGBT persons have made of that process over the past sixty years, to define themselves as political actors, rather than in terms of apparently epiphenomenal effects of otherwise unpolitical events.

As part of this increased complication, I want to remind us of the case that is perhaps the most important ever in the history of the LGBT civil rights movement, and today largely ignored, *One, Inc. v. Olesen*.[148] Noticing this case allows us to invoke an entirely new realm of constitutional doctrine on

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[146]See Romer, 517 U.S. at 632: "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group." That is, the group exists independently of the political process that produced Amendment 2.

[147]See infra notes 128ff and accompanying text for full discussion.

[148] 241 F. 2d 772 (CA9, 1957), r'hng. denied, rev'd. per curiam, 355 U.S. 371 (1958). See *infra*, note 134ff and accompanying text for complete discussion of this case. See also, *The National Gay Task Force v. Board of Education*, 729 F.2d 1270 (CA10 1984), aff'd. by equally divided Court, *Board of Education v. National Gay Task Force*, 470 U.S. 903 (1985). In this case, the court upheld in part, and struck down in part, a state statute that provided for firing or other adverse employment action for any public school teacher who "engaged in public homosexual conduct or activity." The statute defined "public homosexual activity" as any violation of the state sodomy statute "a. committed with a person of the same sex, and b. indiscreet and not practiced in private." It defined "public homosexual conduct" as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." Not surprisingly, the court had no trouble finding that states could legitimately fire public school teachers who engaged in public same-sex sex (and presumably they would also fire any teacher who engaged in public opposite-sex sex, statute or no, but their failure to do so would create an interesting basis for a challenge. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down facially neutral statute as discriminatorily applied to Chinese owners of laundries)). But the court also had no trouble finding that the prohibition on "public homosexual conduct" was "overbroad" for purposes of the First Amendment; "we must be especially willing to invalidate a statute for facial overbreadth when, as here, the statute regulates 'pure speech.'" *NGTF*, 729 F.2d at 1274. The court cited *Brandenburg v. Ohio*, 395 U.S. 444 (1969), for the proposition that the state may not prohibit advocacy of illegal activity unless that advocacy is "'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *NGTF*, 729 at 1274, citing *Brandenburg*, 395 U.S. at 447. The interesting point that both the majority and the dissent by Judge Barrett, id. at 1276-77, agree on is that public advocacy by "homosexuals" can ONLY mean encouraging people to engage in sodomy. This position perpetuates the belief that somehow lesbian/gay rights issues are not political. It's all about sex. Contrast *Rowland v. Mad River Local School District*, 470 U.S. 1009 (1985) (Brennan dissenting from denial of certiorari). This case involves a public school guidance counselor who was fired after disclosing her bisexuality to

behalf of LGBT civil rights claims – the First Amendment's prohibition on interference with political debate. Thanks to *One, Inc.*, LGBT activists have been able to take First Amendment protections for their formal political participation for granted since 1957. Although equal protection doctrine is concerned with the results of the political process and preventing outcomes that are unfair to unpopular minorities, plainly the relevant sections of the First Amendment are far more directly concerned with the political process, including deliberate acts of self-definition. External political forces have shaped LGBT identity in the United States, but LGBT persons have participated actively in this process of definition and deserve every right to continue such participation without such restrictions as Amendment 2, sodomy statutes, or the denial of their right to marry one another. If *One, Inc*. had gone the other way, early lesbian/gay rights activists would have had to fight their battle of self-definition without the use of the mails which, before the advent of email and web sites, would have been disastrous.

Conservatives will still try to insist that they can distinguish reliably between properly political activity, on one hand, and merely immoral activity on the other, another way of stating Justice Scalia's opinion of LGBT identity. Robert Bork eventually relinquished his claim that political speech was a distinct category from other forms of speech for constitutional purposes, but only on the practical grounds that anyone who wanted to say anything could just add on some politics at the end, adopting a cloak of constitutional protection in the process.[149] In their brief supporting the Texas sodomy statute in *Lawrence*, The Center for the Original Intent of the Constitution asserted that *Romer* was about political rights, not homosexual rights[150] – in the minds of this group's members, anyway,

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colleagues. A jury awarded damages based on the finding that the district had violated both her first amendment right to free speech and her right to equal protection under the fourteenth amendment. Id. at 1010. The Sixth Circuit reversed, holding, inter alia, that petitioner's speech did not merit first amendment protection because it did not address "'a matter of public concern.'" Id. The Supreme Court refused certiorari. Id. at 1009. Again, the proposition seems to be that LGBT issues are somehow not political. These two opinions are impossible to reconcile.

[149]ROBERT BORK, THE TEMPTING OF AMERICA (1990).

[150]Brief Amicus Curiae of the Center for the Original Intent of the Constitution in Support of Respondent at *23, *Lawrence v. Texas*, 539 U.S. 558 (2003), citing *Romer v. Evans*, 517 U.S. 620 (1996).

discrimination against lesbians and gay men is somehow not political. It's all about the sex, which is not political. Kim Davis performs the inverse move with the same outcome when she asserts that "It's never been a gay or lesbian issue for me. It has been about upholding the word of God and how God defined marriage from the beginning of time."[151] This claim nicely illustrates the problem: with this assertion of her religious belief, Davis completely erases LGBT subjectivity and the possibility of LGBT political participation. The Christian conservative position here entails silencing LGBT persons. The same-sex couples who left Davis' office without marriage licenses are acutely aware that it was their sexual orientations that lay at the heart of the dispute. How it could not be a gay or lesbian issue when apparently Davis was perfectly happy to issue marriage licenses until lesbians and gay men began to apply for them is unclear.

And what could be more political than to dispute an entire group's characterization of itself? To take the extreme case – hyperbolic here, but illustrative – one way of understanding slavery is as the owner's imposition of the identity, "slave," onto the slave. To state the obvious, slaves have no right to participate in the political process. Sodomy statutes define persons who engage in sodomy as criminals, a definition lesbians and gay men have fought for decades. Criminals, of course, are the one category of persons whom the Thirteenth Amendment excepts from its prohibition of slavery.[152] Anyone who fails – or refuses -- to see the political and moral freight in such an imposition cannot ever have suffered under a challenge to her/his identity. One suspects this is true of many conservatives, who are, if nothing else, typically very confident of their own identities.[153] This is the point of what Scalia denounced as "the famed sweet-mystery-of-life passage," the expansive definition of "liberty" in *Planned Parenthood v. Casey* that the *Lawrence* court quoted to support its argument that prohibitions

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151 See Kim Davis interview, supra, note 23.

152 "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., Amendment Thirteen.

153 That the most public manifestation of LGBT identities most non LGBT persons are likely to encounter is annual parades and other events celebrating LGBT "pride" is further evidence for this point.

on sodomy interfere impermissibly with… well, with self-definition.[154] Scalia, not surprisingly, evaluated this quotation in terms of his claim that sodomy statutes only regulate conduct, and that such regulation is reasonable: "I have never heard of a law that attempts to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate actions *based on* one's self-defined 'concept of existence, etc.,' it is the passage that ate the rule of law."[155] Sodomy statutes restricted the right of LGBT persons to define their own identities. That Scalia so happily occupies the hegemonic position with respect to the connection between his choice of sexual partners and activities and his identity is no reason to disregard the political claims of persons who are not so happy.

One reason why Scalia is wrong here is that not all impositions on individuals' self-definitions and resulting actions produce political movements. Sometimes, the personal is not political, at least not in the sense of producing noticeable reverberations in the realm of elections and public policy. Or, in many instances, the micropolitics of shame work to prevent many persons from contesting the laws that prohibit the conduct they engage in. Perhaps, in theory, the constitutional reasoning of the *Lawrence* majority invalidates laws against fornication, masturbation, and bigamy. Those laws will survive, however, until and unless their primary targets muster sufficient resources to challenge them in court[156] (or, even less likely, to persuade legislatures to repeal them).[157] But this observation alone solves the perennial problem of how to differentiate valid from invidious legislative classifications.

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[154] *Lawrence*, 539 U.S. at 574, quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). The point is perhaps not legally relevant, but it is well here to note the profound contempt Scalia exhibits towards his fellow citizens and their efforts to define their lives and their identities as they see fit. Again, legally relevant or not, such contempt is certainly reprehensible.

[155] *Lawrence*, 539 U.S. at 588. Emphasis in original.

[156] See Tanya Marie Johnson, The Secular Fourteenth Amendment: Lawrence v. Texas and Polygamy, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895552 (last visited April 7, 2008) (advocating due process and equal protection challenges to laws prohibiting polygamy).

[157] An initial wave of sodomy law repeals occurred beginning in 1961 in Illinois and continuing through the 1970s. By the 1990s, however, most of the states that still had sodomy statutes were unlikely places to achieve repeal. One of the last repeals was Rhode Island, in 1998. LGBT activists there teamed with disability-rights activists, who noted that, depending on one's disability, acts that the statute prohibited could often be the only ones disabled persons could enjoy. Carey Goldberg, *Rhode Island Moves to End Sodomy Ban*, NY TIMES, May 10, 1998.

Although it currently manifests primarily in terms of LGBT civil rights claims, the problem is no different now than it was in the *Slaughterhouse Cases*.[158] As Justice Kennedy stated the problem in *Romer*, "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[159] Is it really okay to disadvantage butchers, but not LGBT persons? If so, why?

Section II: Equal Protection

When the Court announced its decision in *Lawrence v. Texas*, at least one observer compared it to *Brown v. Board of Education* in terms of its legal and political significance.[160] I believe that, in the long run, we will see that *Romer v. Evans* is a much more important decision. Eliminating sodomy statutes was extremely important, not least because judges used them for the purpose of justifying decisions minimizing custody and visitation for lesbian/gay parents, and as the excuse for other forms of discrimination as well.[161] Sodomy laws were always the most concrete manifestation of the belief that lesbian/gay identity is always and only about sex, and specifically about immoral sex, and that sex is somehow not political. Even so, eliminating sodomy statutes was, by 2003, leftover business from the earliest stages of the LGBT civil rights movement, while equal protection claims have proved to be

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[158] 83 U.S. 36 (1873). The *Slaughterhouse* Court focused on the privileges and immunities clause, not the equal protection clause, of the 14th Amendment, but the underlying conceptual issue is still the same.

[159] *Romer*, at 631

[160] Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004). See also, Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005) (not necessarily asserting that *Lawrence* is the queer *Brown*, but systematically comparing the two decisions in a very helpful way).

[161] See *Lawrence*, 539 at 581-82 (O'Connor concurring), discussing consequences of conviction under Texas sodomy statute. For a particularly egregious, and not particularly old, example of this, see Elizabeth Erin Bosquet, *Contextualizing and Analyzing Alabama's Approach to Gay and Lesbian Custody Rights*, 51 ALA. L. REV. 1625 (2000). This article begins with the example of Ex Parte D.W.W., where the Alabama Supreme Court endorsed a trial court decision granting custody of children to their father even though the trial record contained evidence that he was an alcoholic, and numerous examples of his maltreatment of his children. 717 So. 2d 793, 797 (Kennedy dissenting). Why would a trial judge do such a thing? Why would a state supreme court approve such a decision? Because the mother was a lesbian. 717 So. 2d at 796.

even more prominent since 2003. Thanks to Justice Kennedy, however, this turns out to be a false dichotomy.[162]

Lawrence is still useful in making a key point of this article – that LGBT identity is about more than just the sex. The case dealt with a statute that specifically prohibited sexual acts between persons of the same sex. If those sex acts alone genuinely differentiated the persons who engage in them from all other persons, there would be no need for a statute specifying that the acts are unlawful when those persons engage in the acts because those persons would be the only ones who engage in them. By passing a statute specifically prohibiting sex acts between persons of the same sex, Texas implicitly admitted that persons who have sex with their own sex are somehow different from persons who commit the same acts with others of a different sex, else why bother to prohibit those acts only when that *type* of person engaged in them? Or, why implicitly condone the exact same conduct when a different *type* of person engages in it? That is, sodomy alone does not differentiate gay men – to say nothing of lesbians – from the rest of the population.

To be sure, Justice Kennedy was correct when he asserted in the *Lawrence* opinion that striking down the Texas statute solely on the basis of equal protection, without invalidating sodomy statutes in substantive terms, would only have invited state legislatures to enact facially neutral sodomy statutes to replace the overtly discriminatory variety.[163] They could then have rested safe in the knowledge that same-sex couples – usually gay male couples – are virtually the only real targets of enforcement even for facially neutral sodomy statutes. The hypocrisy of the culture would achieve what the language of the statute could not.[164] Justice O'Connor was in La-La Land somewhere when

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[162] See text accompanying n. 163 infra for explanation of this point.

[163] *Lawrence*, 539 U.S. at 574-75.

[164] See *Bowers*, 478 U.S. at n.2, where the Court ratifies the trial court's decision to dismiss a heterosexual couple from the challenge to the sodomy statute because they lacked standing. According to the trial court, the heterosexual couple was in no danger of having the law enforced against them. This, of course, is a clear admission that the issue is a status distinction – different types of persons engage in the same prohibited conduct, with one type potentially subject to arrest, while the other type can rest safe in knowing that they will never be subject to arrest. This fact was so obvious and reasonable to five members of the Supreme Court that they endorsed it without discussion. It also by

she wrote that the equal protection requirement alone would prevent legislatures from enacting sodomy statutes simply because facially neutral statutes would apply to everyone.[165] This assertion was demonstrably false when she wrote it. The due process liberty/privacy argument that Justice Kennedy developed was essential to the outcome LGBT activists hoped for.

A. Carolene Products

For examining the law of equal protection, following Halley, it is helpful to have the full text of Footnote Four from *Carolene Products* to refer to:

> 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 restricts 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.[166]

Thus, we have three distinct reasons why judges might strike down majoritarian legislation: 1) overt

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itself disproves Scalia's contention that LGBT identity is only about sex acts.

[165] Id. at 584-85: "I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society." As the majority noted, id. at 570, only nine states ever enacted sodomy statutes directed only at same-sex couples. All others were facially neutral, including statutes that existed at the time of the *Lawrence* decision.

[166] 304 U.S. 152 n.4 (citations omitted).

conflict with the terms of the Constitution, 2) interference with the ordinary functioning of the legislative process, and 3) targeting of minority groups.

We might be tempted to say that reason number three is but a subset of reason number two – that legislation targeting minorities is but a form of interference in the ordinary functioning of the political process, especially if we recall James Madison's analysis in Federalist #10.[167] Madison deplored "democracy," by which he meant simple majority rule. His chief concern about democracy as he defined it was that he considered it inevitable that majorities, however defined, would eventually engage in tyranny over minorities, however defined, with a resulting loss of liberty for the minority or, if the minority could fight back effectively, a loss of liberty for all when growing numbers of citizens came to support some form of autocracy in order to eliminate the fighting between majority and minority. Majorities picking on minorities was an inevitable feature of political systems that allowed simple majority rule. By definition, Madison expected the structure of the republic under the United States Constitution to serve in much the same way that the courts should serve according to Footnote Four – as a check on overweening majorities. In this sense, while the First Amendment is older than the Fourteenth Amendment, it is not wrong to say that the Equal Protection Clause simply embodies the primary effect the Founders hoped the structure of government under the Constitution would have.

No system is perfect. Obviously, Madison's Constitution completely failed for seventy-six years to prevent the white majority from enslaving the black minority, and it failed for another one hundred years after that – despite substantial modifications – to prevent the white majority from segregating and otherwise oppressing the black minority. Again, the prejudice of the culture can accomplish what the law cannot,[168] or the law will reflect the prejudice of the culture.[169] Here is the

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[167] FED. NO. 10 (Madison).

[168] See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down facially neutral statute as discriminatorily applied to Chinese owners of laundries).

[169] See, e.g., BSA v. Dale, 530 U.S. 640 (2000) (allowing Boy Scouts to flout state nondiscrimination ordinance), see infra note 129ff and accompanying text for full discussion; Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding statute requiring racial segregation on public conveyances); Dred Scott v. Sandford, 60 U.S. 393, 403, 404 (1857) (holding that no person of African descent in the United States is a citizen, with the result that such persons may not bring suit in federal courts).

most obvious way of approaching equal protection analysis – judges should look for prejudice against minority groups in evaluating legislation for invidious intent or effect.[170] The problem, of course, is that one person's prejudice is another person's moral imperative (and note that this is as true of racial segregation as it is of sodomy statutes – segregationists saw segregation as a moral imperative).[171] We still have no Archimidean point from which to assert definitively that one position is correct and the other is incorrect. This was the dispute in *Romer v. Evans* – the majority saw prejudice, or "animus," as they chose to put it, while Scalia saw only ordinary citizens perpetuating their preferences in matters of sexual morality.[172]

One way to solve this problem is through the use of the political process – majorities get to decide what constitutes a moral imperative. Or, we could strive to ensure that all self-identified minorities have equal access to the political process to defend their own interests. This is the effect Madison hoped the structure of government under the Constitution would have inherently. The 1965 Voting Rights Act had this purpose with respect to African Americans.[173] Quite apart from its substantive effects, the amendment at issue in *Romer* had the effect of uniquely prohibiting one group of persons from pursuing legislation that would benefit them – interference in the ordinary workings

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[170] *Romer*, 517 U.S. at 632: Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests"; U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973): "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Emphasis in original.

[171] *Romer*, 517 U.S. at 653 (Scalia dissenting): "Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before." *Lawrence*, U.S. at 602 (Scalia dissenting): "Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as 'discrimination' which it is the function of our judgments to deter." See also, Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 Ky. L. J. 885 (2000-2001), describing "the unresolved animus/morality dichotomy."

[172] *Romer*, 517 U.S. at 636 (Scalia dissenting): "The constitutional amendment before us here is not the manifestation of a "'bare . . . desire to harm'" homosexuals, ante, at 634, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."

[173] 42 USC §1971.

of the political process. Because African Americans are easy to identify, preventing them from voting was also easy. Preventing LGBT persons from voting is nearly impossible, so Colorado achieved the same effect by prohibiting the sort of law they would most likely use their political involvement to pursue. Not overtly prohibiting their participation, but significantly nullifying their participation by prohibiting the mostly likely policy goal they would want given their minority identities.

Scalia's position in *Romer* invites reiteration of Halley's point: he claims that he would simply leave determination of lesbian/gay rights issues to the operation of the political process. Unlike the *Bowers* court, Scalia was plainly cognizant of the very tradition of equal protection analysis that he believed should not apply in this instance, although he carefully avoided all mention of that tradition in his dissent. He did, however, gin up evidence to support his contention that lesbians and gay men exerted disproportionate political influence, at least at the local level, and that the lesbian/gay rights ordinances that Amendment 2 repealed were the result of such influence.[174] One rather doubts that Antonin Scalia reads Janet Halley's articles, but it is uncanny how his argument in *Romer* attempted to address Halley's argument about the Court's duty to protect a minority group in the political process if the Court plans to leave that minority to the political process. According to Scalia,

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[174] *Romer*, 517 U.S. at 645-47 (Scalia dissenting). We have no way of knowing if Scalia failed to notice the contradiction inherent in his position, or he just hoped no one else would notice. The contradiction is that, on the one hand, he goes to great lengths to insist that common sexual conduct is all that defines lesbian, gay, and bisexual identity, but he then talks about the supposedly disproportionate political power of LGB persons. He wants us to believe that LGB persons somehow managed to build a politically powerful social movement around nothing more than an interest in a particular form of sexual conduct. It is theoretically possible that one could define a political group solely on the basis of a shared interest in a particular sexual activity, but I know of no examples in which this has happened. This is my point about the National Masturbators' Task Force – the reason why that organization does not exist when the National LGBTQ Task Force has existed for 42 years is that LGBT persons have a minority identity apart from sex. The inclusion of transgender persons in the movement proves the point – the issue for transgender persons has nothing to do with sex per se. Transgender persons feel some sort of profound disconnect between their sexual anatomy and their gender identity, and/or they see constraints on their gender expression as completely unjustified. Should a woman who chooses not to shave her beard really suffer discrimination in employment, or in any other area of life? I'm sure I cannot see why. It may be that, at this stage in the history of the world, women who choose not to shave their beards are also more likely to be lesbians, but I would suggest that this is simply a reflection of heterosexual supremacy. If heterosexual women felt comfortable letting their beards grow – if they did not live with the constant barrage of words and images telling them that their highest calling in life is to make themselves attractive to men – they might well do so more often.

this particular minority – lesbians, gay men, and bisexual persons – needs no protection from the judiciary because they already have all the political power they deserve and then some.[175] Of course, Scalia did not, because no one can, articulate a standard for deciding if any given group has the correct, or an excessive, amount of political power.

Note also that Footnote Four as well implicitly articulates the point that substantive v. procedural due process is, or can be, a distinction without a difference. The problem it identifies with laws that discriminate against "discrete and insular minorities" is not the direct harm it causes when African-Americans cannot secure medical treatment in segregated hospitals, or lesbians and gay men may not visit their ill partners in the hospital as spouses, but that such discrimination "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," it makes due process impossible. Sodomy statutes, which Kennedy struck down on grounds of "substantive due process," interfere with the operation of the political process in just the way Footnote Four predicts by inhibiting the political participation of LGBT persons. They stack the deck against LGBT persons.

B. The LGBT Minority: Diffuse and Indiscrete

Halley rehearses Bruce Ackerman's observations about why "discrete and insular" minorities, in the language of Footnote Four, may not be the most vulnerable.[176] Lesbians and gay men are perhaps the paradigm case of this point. Ackerman notes that discrete and insular minorities can more readily apply pressure to individuals in order to minimize free-riding, and they are more likely to be highly concentrated geographically, increasing their chances of electing one of their own so long as they have the same voting rights as the majority. They also have lower costs of organizing insofar as they are already concentrated.[177]

Lesbians and gay men have won election to public office at every level of American

[175] *Romer*, 517 U.S. at 652. See infra note 70 and accompanying text.
[176] Halley, 930-31.
[177] Bruce Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985).

government, from local councils[178] to the United States Senate.[179] They have even formed an organization, the Gay and Lesbian Victory Fund, for the express purpose of electing LGBT candidates.[180] They have not, however, relied on their own dominance in a given geographical area to win these elections. At least one political scientist has asserted that lesbians and gay men are unlikely to make up the electoral majority even in famous gay ghettos such as Castro Street in San Francisco or the French Quarter of New Orleans.[181] Scalia is certainly correct to suggest that LGBT persons have taken to politics with gusto. In his *Romer* dissent, he wrote, "[i]t is… nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2."[182]

This is a characteristically tendentious way of analyzing the situation. What Scalia does here is try, *ex cathedra*, to define in advance just how much political involvement by LGBT persons is enough. Obviously the courts are not the legislature, but if anything, the right to self-representation in the courts is even more important that in the legislature, insofar as litigants can expect to find some protection in the courts from the depredations of the political process. Except that he carefully, and unconvincingly, insists he has no objection to the full participation of LGBT persons in the political process, it is hard to see Scalia's position here as being too much different from the majority that defined African Americans as not eligible to represent themselves in court in *Dred Scott*.[183] Both involve a powerful person deciding for a relatively powerless group what the terms of their participation in governing shall be in the United States. That the defining feature of a republic is self-governance alone invalidates Scalia's

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[178]See, e.g., RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE & TIMES OF HARVEY MILK (1982).

[179] https://www.baldwin.senate.gov/contact

[180]www.victoryfund.org.

[181] Gary M. Segura, Institutions Matter: Local Electoral Laws, Gay and Lesbian Representation, and Coalition Building Across Minority Communities, in GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION 220, 225 (Ellen D.B. Riggle & Barry Tadlock, eds. 1999).

[182]*Romer*, 517 U.S. 652 (Scalia dissenting).

[183]*Dred Scott v. Sandford*, 60 U.S. 393, 403, 404 (1857)

argument. Scalia implicitly expects LGBT persons simply to accept his characterization of their identities and correct measure of political power and to shut up about it. A more reasonable approach would be to ask why lesbian, gay, and bisexual[184] persons ever became the target of such legislation to begin with. When the *Romer* majority wrote of Amendment 2 that "[t]he resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence," this is what they meant.[185] Whom else has this ever happened to?

Scalia pointed to Mormons when he cited *Davis v. Beason*, which endorsed the requirement during the late nineteenth century that states include a renunciation of polygamy in their constitutions in order to join the union.[186] Regardless of what one thinks about polygamy, to endorse the treatment of Mormons in the United States – hounded across the continent for their unusual religious beliefs[187] – hardly seems like a prescription for equal protection of the laws, or for just government. They suffered their greatest persecution before anyone thought to use the Equal Protection Clause to stop tyranny of the majority – indeed, even before the Fourteenth Amendment came into existence – but many of the things that happened to them would constitute violations of that Clause. Indeed, Mormons could probably qualify easily for suspect class status on the basis of their history of discrimination if they chose to pursue it.

The key point is this: by definition, politically powerful minorities do not have to worry about state constitutional amendments that would preclude them from all civil rights protections and repeal all existing local ordinances that protect them. Thinking of potential analogies illustrates the point well. What would Scalia do if Coloradans passed a state constitutional amendment that was identical in all respects to Amendment 2, but targeted at Jews?[188] Given the history of anti-Semitism in the

[184] I omit transgender persons from this list only in the interest of historical accuracy – Amendment 2 made no mention of transgender persons. See *Romer*, 517 U.S. at 624.
[185] *Romer*, 517 U.S. at 633.
[186] Id. at 648-51 (Scalia dissenting).
[187] KENNETH H. WINN, EXILES IN A LAND OF LIBERTY: MORMONS IN AMERICA, 1830-1846 (1989); RICHARD EDMOND BENNETT, MORMONS AT THE MISSOURI, 1846-1852: "AND SHOULD WE DIE—" (1987).
[188] Striking down such an amendment would be easy because Jews potentially count as both a religions and an ethnic minority, of course, but we can bracket that issue for purposes of the hypothetical. Would

United States, the fact that no state ever did enact such a statute or amendment only proves Kennedy's point in *Romer* that Amendment 2 is unprecedented in our law.[189] According to the Jewish Virtual Library, the Jewish population of Colorado is 1.7 percent of the state's total population.[190] In Scalia's view, does that fact alone make them more, or less, eligible for increased judicial scrutiny, as compared to the 4 percent that is lesbian/gay according to Scalia? Anti-semitism is at least as deeply engrained in American culture as heterosexual supremacy.[191] How big a margin would Jews have to lose a hypothetical anti-Jewish Amendment 2 battle by in order to demonstrate that they were sufficiently powerless to merit the court's protection? Why would not the mere existence of such an amendment proposal indicate a strong need for protection from the courts?[192] Scalia's approach has the effect of holding political success by LGBT persons against them when the courts should reward displays of political engagement by minority groups.

C. *Cleburne v. Cleburne Living Center, Inc.*

Moreover, political success alone is not sufficient to preclude solicitude by the Court under

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Scalia refuse to strike such an amendment on rational basis grounds under the equal protection clause? Is it really only suspect class status that allows Jews to live free of patently discriminatory legislation? See Yick Wo v. Hopkins, 118 U.S. 356 (1886); Korematsu v. U.S., 323 U.S. 214 (1944); McLaughlin v. Florida, 379 U.S. 184 (1964); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[189] *Romer*, 517 U.S. 633.

[190] http://www.jewishvirtuallibrary.org/jsource/US-Israel/usjewpop.html

[191] See, e.g., Ryan D. King and Melissa F. Weiner, *Group Position, Collective Threat, and American Anti-Semitism*, 54 Social Problems 47 (2007); Robert Michael, A Concise History of American Antisemitism (2005).

[192] In March 2015, the Sodomite Suppression Act attracted attention in California. An attorney there filed the necessary documents with the State government to begin the process of collecting signatures to place on the ballot a referendum that would require any person who has sex with another person of the same sex be "put to death by bullets to the head." Adam Nagourney, *Gays Targeted in a California Initiative*, The New York Times, 24 March 2015, http://www.nytimes.com/2015/03/25/us/california-initiative-would-kill-gay-people.html?_r=0. How, under Scalia's jurisprudence, would any federal court find reason to strike such a law down? The story points out that the proposal seemed unlikely to gather enough signatures to appear on the ballot, much less pass, but the statute governing such matters in California required the Attorney General to take the proposal seriously and write a title and description for it so its proponent could begin collecting signatures. Again, the very idea defeats the distinction between procedural and substantive due process.

equal protection. In *Cleburne v. Cleburne Living Center, Inc.*, Justice White wrote,

> the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.[193]

In other words, a politically defenseless, if not unpopular, minority will not automatically receive increased protection from the courts. It also has to suffer as a target of invidious legislation or other regulation.

Extrapolating Scalia's reasoning in *Romer* to *Cleburne*, apparently the evidence of political success by the mentally disabled should have led the Court to allow the City of Cleburne to persist in its discrimination. Indeed, if anything, under White's description, the mentally disabled have been notably more successful than LGBT persons in the political sphere. What legal principle would allow Scalia to escape this conclusion? In both cases, the discriminatory government action is a departure from a larger history of political success, and an unusual policy choice. Scalia cannot point out that LGBT persons are notably less popular than the mentally disabled, because he is committed to the position that they are not such, and he is so committed because admitting the unpopularity of LGBT persons militates in favor of protection from the Court, which Scalia will apparently go to any lengths to dispute the need for.

A point that always remains implicit in these cases, and is not relevant in *Cleburne*, is that one potential reason for political powerlessness is discrimination by the majority. The Amendment in question in *Romer* flatly forbade lesbians, gay men, and bisexual persons from seeking a particular form of law that anyone else might seek. African Americans suffered under laws forcing racial segregation because the white majority would not let them vote. This is what Footnote Four meant when it pointed to the potentially deleterious effects on the political process of substantive

[193] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 443 (1985).

discrimination. There is a psychological component to this problem as well. Persons feel more or less authorized to speak on their own behalf as the result of deep-seated conditioning by the culture along lines of race, gender, class, and sexual orientation, among other factors. The law cannot remedy the self-imposed psychological reluctance to speak up on one's own behalf, but it can refrain from reinforcing it by heaping yet more discrimination onto the heads of persons who already suffer condemnation in the micro politics of daily life. Again, reliably preventing LGBT persons from voting is virtually impossible, but Amendment 2 had essentially the same effect – prohibiting a specific goal LGBT persons might seek with their political involvement. Enforced political powerlessness is a violation of the equal protection clause via violation of the right to political participation in the First Amendment.

White's assertion above is somewhat at odds with the actual outcome of the case – the Court held that a heightened licensing requirement for a home for the mentally disabled violated equal protection as lacking a rational relationship to a legitimate state interest, especially where similar group homes would not require such heightened licensing.[194] That is, while White offered various examples of legislators acting to protect the mentally disabled, the Court still found in this instance that the municipal officials of Cleburne, Texas were picking on the mentally retarded. The answer, of course, is simple: White's legislative examples reflect the prevailing approach to the mentally retarded, while the City of Cleburne reflects a minority approach, and an unconstitutional one at that. Again, that Amendment 2 both prohibited any specific protections on the basis of lesbian, gay, or bisexual identity and repealed all existing local ordinances further indicates how close the analog between the mentally disabled in *Cleburne* and LGBT persons in *Romer* is. Both involve highly unusual acts singling out an identifiable minority, the basis for the minority identity being irrelevant. The opinion does not state the point in this way, but the implicit point is that the Court approved of legislative solicitude for the

[194] Id. at 450: "[T]his record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes."

mentally disabled and was willing to supply it where legislators failed to do so. The problem is not just ability to participate in the political process, but also evidence that the majority is actually picking on the relatively powerless minority.[195] It is important to note that White's discussion of this point came during the section in which he considered whether the mentally retarded should have "quasi-suspect" class status, as women do, in the Court's equal protection jurisprudence.[196]

The Court held that they should not, expressing the concern, *inter alia*, that putting the mentally disabled into such a classification might actually make it harder to enact legislation benefiting them, as well as legislation harming them.[197] In making his argument, White appealed to examples of legislation benefiting the mentally disabled, but he also noted that the mentally disabled typically exhibit characteristics that are genuinely relevant to their ability to function fully as citizens.[198] This, of course, differentiates the analysis of the mentally disabled from the analysis of discrimination on the basis of sex in *Frontiero v. Richardson* that produced the notion of a "quasi-suspect" classification to begin with.[199] There the court stated point blank that sex is almost never relevant to evaluations of ability.[200]

D. Are LGBT Persons Necessarily Deficient Citizens?

On the basis of *Cleburne*, two key issues exist: 1) is the majority picking on the minority; and 2) do members of the minority group suffer deficiencies in their ability to function as citizens?

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[195]It is worthwhile to note the obvious: these cases only arise when some law or policy emerges that one group considers legitimate, but another group considers invidious.
[196] Id. at 442-447.
[197]d. at 444-45. We might call this the affirmative action worry. The composition of the Court has changed dramatically in the interim, but according to *Parents Involved in Community Schools v. Seattle School District No 1* and *Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald v. Jefferson County Board of Education et al.*, 127 S. Ct. 2738, 2007 U.S. Lexis 8670 (2007), even demonstrably beneficial programs that rely on racial classifications will fall under strict scrutiny because they use racial classifications.
[198]*Cleburne*, 473 U.S. at 442: "it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world."
[199] Id. at 440-41, citing *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion). Compare, e.g., *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) (age not a suspect or quasi-suspect classification because the aged have not suffered systematic discrimination, and because age is potentially related to legitimate government interests), cited in *Cleburne*, 473 U.S. at 441.
[200] *Frontiero*, 411 U.S. at 686-87.

Whether the electoral majority was picking on lesbian, gay, and bisexual persons with Amendment 2 was the debate in *Romer*, with the Court majority saying they were and the dissenters saying they were not. Lacking any Archimedean point from which to establish definitively what is "picking on" and what is "upholding legitimate moral standards," we can appeal to the second criterion, ability to function as citizens.

Conservatives implicitly take the position that LGBT persons lack the ability to make responsible decisions as citizens.[201] What other basis could exist for prohibiting recognition of same-sex marriages except the belief that persons who want to enter same-sex marriages demonstrate some clear, socially harmful irresponsibility with their choices?[202] Although he does not make the point explicitly, knowing that the claim would lead him to violate principles of U.S. law, Scalia's insistence that LGBT identity rests on nothing but a propensity for a particular type of sex acts rests on his implicit belief that the sex acts in question are definitionally immoral and therefore irresponsible. His position is closely aligned with that of other conservative Catholic scholars.[203]

But this is why the existence of a political movement of, by, and for LGBT persons provides the definitive refutation. By what logic are persons who have created a number of different advocacy organizations at the national and state level incompetent to serve as first-class citizens?[204] On this view,

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[201] See, e.g., Dobson, supra note 93.

[202] Peter Sprigg, The Top Ten Harms of Same-Sex Marriage, Family Research Council, undated, http://www.frc.org/brochure/the-top-ten-harms-of-same-sex-marriage; "First, society will be harmed by being denied the right to hold out as normative, and particularly desirable, the only type of human relationship that every society must cultivate for its perpetuation. This compelling interest is strengthened by the fact that there is strong evidence to support what common sense suggests, namely, that children fare best when raised by their married mother and father who are both responsible for bringing them into the world and who provide maternal and paternal influences and care." Statement Calling for Constitutional Resistance to Obergefell v. Hodges, 8 Oct., 2015, https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/.

[203] See John Finnis, Law, Morality, and "Sexual Orientation," 9 Notre Dame J. L. Ethics & Pub. Pol'y 11, 14-15 (1995) (note that Finnis puts "sexual orientation" into scare quotes to make the same point that Scalia does – lesbian/gay sex acts do not a minority identity make); Robert P. George, In Defense of Natural Law 152 (1999). For discussion of theses points, see William B. Turner, Of Marriage and Monarchy: Why John Locke Would Support Same-Sex Marriage, http://ssrn.com/abstract=968274.

[204] See supra, note 10.

political success by members of an unpopular minority is no reason to preclude increased judicial scrutiny of legislation targeting that minority. Rather, increased judicial scrutiny of targeting legislation is the judiciary's way of reaffirming the rights of that minority to participate fully in the political process. As Scalia himself implicitly admits, even groups whose members are highly politically active on their own behalf sometimes end up on the receiving end of legislative classifications.[205]

Cleburne is a particularly useful decision for this purpose. O'Connor relied heavily on it in elaborating the equal protection argument of her *Lawrence* concurrence.[206] It nicely articulates the question of a group's political powerlessness in terms of actual legislative outcomes. My point here is not to suggest that LGBT persons operate with anything like the political powerlessness of the mentally disabled – quite the opposite. In some sense, LGBT persons are the inverse of the mentally disabled. LGBT persons have a high degree of autonomous political participation, unlike the mentally disabled. On the other hand, it is clearly the case that LGBT persons have suffered a number of highly adverse legislative outcomes over the past forty years, mostly with respect to legal recognition for same-sex marriages, but in other areas as well.[207] These losses reflect nothing other than the prejudice of the majority – heterosexual supremacy. They are a clear case of the majority picking on a minority, or so the LGBT minority has loudly and repeatedly claimed. Scalia would have the courts ignore them and leave their issues exclusively to the tender mercies of the political process.

It is also the case that these legislative failures reflect an ongoing history of discrimination, starting roughly in the late nineteenth century, when self-styled experts in Europe and the United States first articulated the notion of "homosexuals" as a distinct class of persons, itself a discriminatory act.[208] The very definition of the identity category worked discrimination. Indeed, that act also disproves

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[205] *Romer*, 520 U.S. at 636 (Scalia dissenting). Scalia nowhere makes exactly this point in his dissent, but he does attribute political power to LGBT persons, id. at 645-46, and he acknowledges that Amendment 2 does target LGB persons, even if he denies that it even "disfavors" them, id. at 653.
[206] *Lawrence*, 539 U.S. at 579, 580 (O'Connor concurring).
[207] See, e.g., *Rumfeld v. FAIR* (upholding against constitutional challenge a statute that requires law schools to provide the same access to military job recruiters as to all others or face loss of entire classes of federal funds).
[208] See sources at supra note 28.

Scalia's claim because it entailed turning what had long been a sex act – sodomy – into a type of persons. It was literally the creation of an identity category, "homosexual," out of whole cloth, and that primarily in service to social control for its own sake, surely a gross imposition on the very liberty that Scalia claims to guard so jealously.[209] Indeed, it may be that powerlessness is not so much the criterion as unpopularity. Most people choose not to pick on persons who are both powerless and popular, city leaders of Cleburne, Texas to the contrary notwithstanding. Rather, they pick on people who are unpopular, and whom they perceive to be easy targets. They may find out that the target is not as easy as they thought, but that is a separate matter.

And this is all the equal protection clause does: where a majority has imposed a disability on a minority, the equal protection clause simply asks if the majority can provide some motive other than hostility toward the minority. The other case that O'Connor cited more than once in her *Lawrence* concurrence was *Department of Agriculture v. Moreno*, which is another classic case of picking on – the Department adopted a specific regulation in order to minimize the access of hippies to the federal food stamp program.[210] The Court struck the regulation down.[211] An important case on this point that often gets overlooks is *Palmore v. Sidoti*, where the Court reversed a trial court decision granting custody of a child to the father solely because the mother had married a black man.[212] The *Palmore* Court put the point very well: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[213] The law cannot eradicate prejudice from the culture, but it can refuse to perpetuate prejudice and inflict it on the targets of the prejudice. This is all the more true when, by giving effect to private biases, the law would also have the effect of endorsing a particular religion.

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[209] See Michel Foucault, The History of Sexuality, Volume One: An Introduction, trans. Robert Hurley (1978).
[210] 413 U.S. 528 (1973).
[211] Id.
[212] 466 U.S. 429 (1984).
[213] Id. at 433.

E. Non-Marital Children

The other instructive place to look is the court's cases regarding non-marital children. This is an area that lesbians and gay men should pay attention to given the proliferation of non-marital children that same-sex couples are busy producing at this moment, although the issue loses much of its relevance with national permission for same-sex marriage.[214] More importantly for present purposes, it is also an area of the law where the debate is strikingly similar to that over lesbian/gay civil rights – should non-marital children suffer social stigma and legal disabilities purely as a reflection of the community's moral sentiment? It is also an interesting counter-example from the political perspective. To my knowledge, no organization specifically dedicated to defending the rights of non-marital children currently exists or has ever existed.[215] The NAACP did file an amicus brief on behalf of the non-marital petitioners in *Levy v. Louisiana*, the Court's first case on this topic.[216] The Legal Aid Society of New York filed an amicus brief in *Lalli v. Lalli*,[217] and the American Civil Liberties Union filed amicus briefs in four cases involving non-marital children.[218] *Griffin v. Richardson* was a class action suit, suggesting that someone helped the plaintiffs organize it (or perhaps one of the plaintiffs was an attorney?).[219] On the other hand, the issue has not come up since 1986,[220] suggesting that states have completely abandoned efforts to impose disabilities on non-marital children.

Levy involved holdings by the Louisiana state courts that non-marital children could neither pursue a wrongful death action on the death of their mother, nor continue a suit she had filed herself before dying. The Supreme Court reversed on both points. *Levy* contains a very interesting paragraph

[214] Indeed, I think the next major LGBT civil rights organization should consist of the non-marital children of same-sex couples and call itself the Queer Bastards Task Force.
[215] But see *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (per curiam) (striking down on equal protection grounds provision of New Jersey welfare statute that categorically denied benefits to non-marital children). This is the only case involving non-marital children that I am aware of in which an advocacy organization served as the plaintiff.
[216] 391 U.S. 68 (1968).
[217] 439 U.S. 259 (1978).
[218] *Trimble v. Gordon*, 430 U.S. 762 (1977); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty & Surety Co*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971).
[219] 346 F. Supp. 1226 (Md.).
[220] Reed v. Campbell, 476 U.S. 852 (1986).

on the topic at hand:

> In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. Even so, would a corporation, which is a 'person,' for certain purposes, within the meaning of the Equal Protection Clause, be required to forego recovery for wrongs done to its interests because its incorporators were all bastards? However that might be, we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is an issue, why, in terms of "equal protection," should the tort feasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?[221]

Why should a citizen lack the right to choose a marriage partner just because his choice is not the kind the majority prefers? Note the reliance on the reasoning of Footnote Four at the outset. Note also the anticipation of *Frontiero* in the assertion that non-marital children have all the responsibilities of citizens, so they should have all the rights. LGBT persons have all the responsibilities of citizens, so they should have all the rights.

Nothing in this passage explicitly discusses the political process, or the issue of picking on

[221] *Levy*, 391 U.S. at 71 (citations omitted). Note how the point here about the court's willingness to strike down invidious classifications even if they had "history and tradition" on their side implicitly responds to Roberts' lament in his *Obergefell* dissent that the majority opinion ignores history, and in two ways: First, disregarding history in favor of rights claims is, in the most literal sense, what this country is all about. The United States has a fine history of ignoring history in order to defend the rights of individuals, starting with the Revolution and continuing to the present. Second, when the historical practice in question is deliberate discrimination against a subordinate group, we should disregard it and begin a new tradition. Roberts is in the characteristic dilemma of conservatives in the United States, who have to distort our nation's history to avoid recognizing its distinctively liberal character.

unpopular minorities, but both are implicit. The point of mentioning responsibilities is that they carry corresponding rights, including voting (surely the Court would disallow a statute restricting the voting rights of non-marital children?)[222] and all of the closely related rights, and the implication of the entire passage is that the majority was simply picking on the minority in this instance. The question of the rights of non-marital children actually occupied the Court quite a bit between 1968 and 1986.[223]

In Reed v. Campbell,[224] the 1986 case, the Court summarized itself thus:

> we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct. We have, however,

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[222] See, e.g. Dunn v. Blumstein, 405 U.S. 330, 336 (1972): "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."

[223] *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding against equal protection challenge a New York state statute requiring non-marital child to show judicial recognition of decedent's paternity before allowing the child to take in intestacy); Trimble v. Gordon, 430 U.S. 762, 767 n.11 (1977) (striking down on equal protection grounds an Illinois statute that categorically prohibited non-marital children from taking in intestacy from their fathers even where the decedent had legally acknowledged paternity): "This case represents the 12th time since 1968 that we have considered the constitutionality of alleged discrimination on the basis of illegitimacy"; *Matthews v. Lucas*, 427 U.S. 495 (1976) (upholding against due process/equal protection challenge federal statute requiring showing claimant's actual dependence on decedent in order for non-marital children to receive survivors' benefits under Social Security); *Beaty v. Weinberger,* 478 F.2d 300 (CA5 1973), *summarily aff'd*, 418 U.S. 901 (1974) (striking down on equal protection grounds federal policy categorically prohibiting non-marital children from receiving Social Security benefits via parent's disability claim); *Jimenez v. Weinberger,* 417 U.S. 628 (1974) (striking down on due process/equal protection grounds a categorical prohibition on receipt of Social Security disability benefits by non-marital children born after the parent's disability); *Gomez v. Perez*, 409 U.S. 535 (1973) (striking down on equal protection grounds Texas law holding that non-marital children have no claim to support from their fathers, unlike marital children); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (striking down on equal protection grounds provision of New Jersey welfare statute that categorically denied benefits to non-marital children); *Weber v. Aetna Casualty & Surety Co*, 406 U.S. 164 (1972) (striking down on equal protection grounds Louisiana statute allowing unacknowledged, non-marital children to recover under workers' compensation only to the extent that other claimants did not exhaust the amount available for remedy); *Griffin v. Richardson*, 346 F. Supp. 1226 (Md.), *summarily aff'd*, 409 U.S. 1069 (1972) (striking down on equal protection grounds portion of federal statute that allows non-marital children to receive Social Security benefits on parent's death only if other, favored, claimants do not exhaust the available benefit); *Davis v. Richardson*, 342 F. Supp. 588 (Conn.), summarily aff'd, 409 U.S. 1069 (1972) (same as Griffin); *Labine v. Vincent*, 401 U.S. 532 (1971) (upholding against equal protection and due process challenges a Louisiana statute excluding non-marital children from taking in intestacy unless the father legally acknowledge paternity); *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968) (striking down on equal protection grounds Louisiana statute that prohibited mother from filing wrongful death suit at death of her non-marital child).

[224] 476 U.S. 852 (1986).

> also recognized that there is a permissible basis for some "distinctions made in part on the basis of legitimacy"; specifically, we have upheld statutory provisions that have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death.[225]

Note the point: moral disapproval *simpliciter* is not a sufficient ground for imposing legal disabilities on a minority group. According to the *Reed* court, expression of moral disapproval is not a legitimate state interest. Not surprisingly, Scalia carefully avoids mention of these cases in his *Lawrence* dissent since they directly contradict his claim that the majority's moral preferences provide a Constitutionally adequate basis for legislation.[226]

The Court concluded that the state court's decision was unconstitutional. The state court in *Reed* excluded the plaintiff from recovery solely because her father died four months before the Supreme Court's opinion in *Trimble v. Gordon*, which squarely held that the practice of preventing non-marital children from inheriting in intestacy unless their parents had subsequently married was unconstitutional. In *Reed*, the state court held that the plaintiff was ineligible to inherit under such a rule, and that it had no responsibility to apply the holding of *Trimble* retroactively. The Supreme Court could see no rational basis for refusing to apply *Trimble* retroactively.

Interestingly, the Court consistently refused to find that non-marital children constitute a suspect, or even a quasi-suspect, classification for purposes of equal protection analysis. They did their work on behalf of non-marital children using rational basis review. In *Mathews v. Lucas*, the Court wrote,

> It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in *Weber* that visiting condemnation upon the child in order to

[225] Id. at 854-55.
[226] *Lawrence*, 539 U.S. at 586ff (Scalia dissenting).

> express society's disapproval of the parents' liaisons "is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as unjust – way of deterring the parent."[227]

Part of the problem, as this passage demonstrates, is that every time the Court articulates the point, even when it quotes itself, it still comes up with a slightly different formulation.

Rational basis review, as the non-marital children cases illustrate, tends to be a problem for conservatives because many of their moral prejudices are irrational. As the quotation above states, "penalizing the illegitimate child is an ineffectual – as well as unjust – way of deterring the parent." One sometimes hears from conservatives the proposition that discrimination against LGBT persons is desirable because it will help deter impressionable young people from "choosing" to become LGBT.[228] It seems fairly obvious that discrimination against LGBT persons has not had the effect of minimizing the population of such persons. This is the perennial frustration of conservatives in the United States. In keeping with our nation's founding, official condemnation often incites, not obedience, but defiance. It is impossible to be sure, but one could suggest that, in good American fashion, the existence of discrimination has only propelled more LGBT persons into public declarations of their identities, which, for LGBT persons, is itself a political act, and an important step in the direction of overt political activity toward their own public goals.

The other important difference between non-marital children and LGBT persons, as the quotation above from *Reed v. Campbell* indicates,[229] is that the courts have found legitimate reasons to allow the use of the marital/non-marital distinction, especially where the state can show a

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[227] *Mathews*, 427 U.S. at 505, quoting *Weber*, 406 U.S. at 175

[228] See section on American Vision at https://www.splcenter.org/fighting-hate/intelligence-report/2015/18-anti-gay-groups-and-their-propaganda.

[229] Supra note 108.

legitimate concern for fraud in the disposition of estates. Non-marital children may in some instances operate under increased burdens of proof.[230] One of the claims of this article is that no legislative classifications based on sexual orientation or gender presentation are rational. But the underlying point is that the courts have been quite thoughtful in their willingness to evaluate the actual circumstances that the cases of non-marital children present, and they have achieved a reasonable, consistent balance between the rights of non-marital children and the legitimate administrative needs of government.

F. The Due Process/Equal Protection Combo

Were it legally possible, Justice Kennedy might well copyright his due process/equal protection combo, which he has now invoked in three cases involving LGBT civil rights claims. He articulated it first in *Lawrence*, which noted in its summary of court action at the state level that the Texas court had rejected a due process challenge on the grounds that the Supreme Court had previously rejected a due process challenge to a state sodomy statute in *Bowers v. Hardwick*. Thus, the due process clause of the Fourteenth Amendment was the starting point for *Lawrence*. Kennedy situated the due process question within the context of various decisions by the Court finding that familial and sexual relationships fall within the compass of liberty as the due process clause protects it. Then, after a long and striking disquisition on the complicated history of the relationship between sodomy as act and "homosexual" as identity, he writes:

> As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn

[230] See, e.g., *Lalli*, 439 U.S. 259; *Matthews*, 427 U.S. 495.

differently, say, to prohibit the conduct between same-sex and different-sex participants.[231] Thus, the due process/equal protection combo seems to be the child of necessity in *Lawrence*. Kennedy did not disagree with the equal protection argument, but he believed the Court should disallow all sodomy statutes, not just facially discriminatory ones, in order to achieve the goal of protecting the liberty of LGBT persons.

Windsor

After *Windsor* and *Obergefell*, however, it seems increasingly likely that Kennedy just likes the argument. In *Windsor*, having established that Congressional action to define the terms of marriage at the expense of states is both a historical and legal anomaly in the United States, Kennedy begins his discussion of the Constitutional issues by stating that "[w]hen New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law."[232] This would militate in favor of a discussion of equal protection as the linchpin of the decision. Indeed, he goes on to detail at length the various deleterious consequences, not only for same-sex couples themselves, but for their children, of the inequality DOMA enforced on them. Nowhere in this passage, however, does he connect these harms to any prohibition in the Constitution.

The first paragraph in the next section, however, does state that "though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment."[233] The first clause echoes Footnote Four in its assertion of the presumption of Constitutionality, but then pivots from the equal protection argument one might expect to point to the Due Process Clause instead. That is, for Kennedy, due

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231 *Lawrence*, supra, at 14.

232 *Windsor*, supra, at 22.

233 Id., at 25. To be sure, Kennedy signals where he will end up at the beginning of this section of his opinion, when he writes, "DOMA seeks to injure the very class New York seeks to protect. By doing so, it violates the basic due process and equal protection principles applicable to the Federal Government." Id. at 20.

process v. equal protection is a distinction without a difference because due process assumes equal protection. In other words, there is no difference between "substantive" and "procedural" due process. Part of due process is not picking on minorities. Two paragraphs later, he says exactly that: "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."[234] He goes on to write, "While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[235] Laws enacted in derogation of the principles of equal protection by definition also violate the principle of due process. The selective deprivation of liberty works a Constitutional violation not only because it is a deprivation of liberty, but because it is selective. The two points are analytically distinguishable, but operationally unitary. The polity typically only tries to restrict the liberty of minorities who are unpopular.

One implicit point in this argument is that Kennedy is willing to think creatively about ways to combine Constitutional principles that others had not yet thought to combine. He also implicitly makes the historical argument that the equal protection clause builds on and further elaborates the purpose of the due process clause. It is not clear why noticing the intersection between the First and Fourteenth Amendments is any more peculiar than noticing the intersection between due process and equal protection. To state what may be obvious, while we usually think of due process as applying to legal proceedings, it is relevant to the political process as well. Denying any individual or group the right to participate fully in the political process is as much a due process as an equal protection violation. Apparently, this reasoning had not yet occurred to Kennedy when he wrote the *Romer* opinion because it would apply just as well there as in the subsequent decisions where he invoked it.

Unlike *Lawrence*, however, *Windsor* in no way demands discussion of the due process angle, except via the jurisprudential technicality that the Supreme Court has historically derived the legal

[234] Id.
[235] Id.

principle of equal protection of the laws as it applies to the federal government via the due process clause of the Fifth Amendment, since the Fourteenth Amendment, on its face, does not apply to the federal government.[236] Through the meat of the opinion, Kennedy repeatedly refers to DOMA as having the effect of rendering same-sex couples unequal. Where the question of sodomy statutes in *Lawrence* started with a specific precedent that made due process a necessary issue in the decision, no such precedent existed in *Windsor*. The Equal Protection Clause could easily have provided ample legal ammunition to shoot down DOMA with. He saw a peculiar need to examine sodomy statutes under due process. No such need existed with respect to DOMA. Kennedy explains why he sees due process and equal protection as interlocking legal concepts, but he could have achieved the same outcome relying on equal protection alone. With this move, Kennedy perhaps rescues substantive due process from the cloud of legal suspicion it has long suffered under.[237]

Obergefell

The similarity between the opening of *Obergefell* and the opening of *Lawrence* is striking. *Lawrence* begins: "Liberty protects the person from unwanted government intrusions into a dwelling or other private spaces."[238] Obergefell begins: "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."[239] In other words, Kennedy gets it.[240] Recurring to the "famed 'sweet mystery

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[236] Bolling v. Sharpe, 347 U.S. 497, (1954).

[237] See, e.g., Erwin Chermerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501 (1998-1999). In his *Obergefell* dissent, Justice Roberts also attempts to rescue substantive due process, but in a way that prevents it from requiring permission for same-sex marriage, in contrast to Kennedy's use of it.

[238] *Lawrence*.

[239] *Obergefell*.

[240] Scalia, and evidently, Roberts, in contrast, do not get it. In the section of his dissent where he critiques what he calls Kennedy's reliance on "substantive due process" (Kennedy notably abjures this phrase), Roberts rehearses at length the various precedents that limn the contours of "substantive due process" and the major cases articulating both marriage as a fundamental right and the right to privacy. He distinguishes the marriage cases from the issue in *Obergefell* by insisting that they entailed no fundamental alteration of the definition of marriage, as permission for same-sex marriages allegedly do, and the privacy cases by noting that same-sex couples do not, in this instance, seek privacy. They seek the public license to marry. He then appeals to the argument

of life' passage,"[241] the point is that the Constitution, without saying so explicitly, creates a space in which individuals should be as free as possible to "define and express their identity."

Scalia, by contrast, would, at least with respect to LGBT persons, arrogate to himself the power to define their identities for them and without consulting them. Given that neither the language of the Constitution, nor any identifiable tradition in U.S jurisprudence give to judges such power (indeed, the principles of judicial conservatism forbid it), this alone looks like a galloping violation of the due process rights of LGBT persons. In broadest historical terms, Scalia would have to answer how such arrogation on his part is ever permissible in this, the most upstart of nations, one that founded itself on a refusal to accept an authoritarian attempt to define its collective identity. The die was cast with the Declaration of Independence, an impetuously adolescent move if ever there was one, that has long since played out brilliantly, albeit with some major stumbles. We fought each other over the right of African Americans to be free of the identity of slaves, women fought for the right to have independent political identities as direct participants in the political process, and now LGBT persons are engaged in much the same struggle on their own behalf. Following Scalia's logic, slaves just have to accept their

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most beloved of conservatives, that the majority's position ignores history: "The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now." Roberts, dissenting at 22 (slip op.). But it is Roberts, not Kennedy, who "overlooks our country's entire history…." Except perhaps for the Glorious Revolution, which was importantly different, there was no historical precedent for the American Revolution, a fact that slowed down neither the revolutionaries, nor the authors of the Constitution, who were acutely aware of the absence of historical precedent for their actions, not a whit. Similarly, there was no historical precedent for emancipating an entire class of slaves or to attempt to provide them with a measure of legal equality after their emancipation. The same goes for allowing women to vote. Our "country's entire history" includes a fine, well established tradition of ignoring history when it would prevent the doing of justice. See also, quotation from Levy v. Louisiana, supra at n. 194. Roberts' claim is, ironically, breathtaking in its disregard for history. Conservatives are always eager to ignore the various miniature revolutions that have characterized the history of the Republic since the one that enabled its founding, including the revolution in attitudes towards LGBT citizens. This is why the active pursuit of that miniature revolution by LGBT persons and their allies is the definitive refutation of the conservative position. Of course no one knew that discrimination against LGBT persons was unjust until those persons themselves used their access to the political process to bruit that message loudly and repeatedly. That conservatives like neither the bruiting itself nor its effects is any legally valid reason to try to prevent either one.

[241] Supra, note 80.

designation as slaves – performing menial agricultural labor for no pay and on pain of violent punishment for inadequate performance, or at the master's whim – and women have to stay at home baking on election day.[242]

Kennedy does not address the issue this way, and it seems unlikely any judge will, but one could make the argument, pointing to the Kim Davis imbroglio in Kentucky, that the granting of marriage licenses is a matter of due process, such that refusing lesbian, gay, and bisexual persons access to such licenses is a due process violation in the most obvious sense. Here, Kennedy's claim about the Equal Protection Clause giving greater specificity to the Due Process Clause, making due process "all the more specific and all the better understood and preserved"[243] becomes even more obviously sensible. The deprivation of due process can stand on its own as the basis for granting relief, but the claim becomes only more powerful when conjoined to the equal protection argument.

Thus, multiple avenues exist under equal protection and/or due process analysis for demonstrating why courts in the United States should routinely look with considerable suspicion on the use of sexual orientation and gender identity in legislative classifications. This is pretty standard stuff, or Kennedy would make it so. The next section of this article offers an argument that may strike many as highly counterintuitive – that LGBT persons have long benefited, and continue to benefit, from essential First Amendment protections.

III. First Amendment Doctrine

It might seem odd at this moment to offer First Amendment doctrine as a source of LGBT civil rights. The last three times LGBT activists presented First Amendment claims to the Supreme Court,

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[242] Except that there is nothing funny about it, Scalia's plaint in his *Obergefell* dissent that the majority opinion robs him of his right to self-governance would be risible, since, as we have seen, his position with respect to LGBT civil rights consistently over multiple decisions has entailed his always histrionically stated but never yet effective wish to exercise his personal totalitarian governance over LGBT persons, instructing them from on high who they are and how much political participation he will allow them. *Obergefell* (Scalia dissenting).

[243] Supra, note 213.

they lost. This section points us much further back, forty years before the first of the recent decisions, to a case in which the Supreme Court defended the First Amendment rights of lesbian and gay activists in robust, if laconic, terms. That case, *One, Inc. v. Olesen*, presented to the Court an issue of free expression and political participation by lesbians and gay men much more directly than any of the more recent cases. Two of these cases present difficulties for the argument of this article because they pose conflicts between the free expression provisions of the First Amendment and statutory expressions of the principle of equal protection. That is, while the argument of this article is that, for LGBT persons, equal protection usually works in tandem with freedom of expression as part of the right to participate in the political process, in two of the recent First Amendment cases, it was the right of persons who wanted to exclude LGBT persons to freedom of expression that the Court defended.

The three recent cases involving First Amendment claims by LGBT activists are *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[244] *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), Inc.*,[245] and *Boy Scouts of America v. Dale*.[246] In two cases, the Court ruled against the lesbian/gay activists' position unanimously, while in the third, *BSA v. Dale*, the court ruled against the lesbian/gay activists' position by a five-to-four majority. This would seem to bode ill for LGBT claims under the First Amendment, but it does not. *Hurley* and *Rumsfeld* both involved completely predictable – and, to reiterate, unanimous – applications of well established First Amendment doctrine. No one should have found those holdings surprising. Again, in *Hurley*, the equal protection claim of the LGBT plaintiffs lost to the First Amendment claims of the putatively heterosexual, Irish defendants. *BSA v. Dale*, by contrast, is undoubtedly an egregious example of knee-jerk homophobia by five members of the Supreme Court, including the belief that being gay is only about sex. It should certainly serve as a caution in various ways, but the First Amendment rights in question there were those of the Boy Scouts, not the gay respondent, so the case really says nothing

[244] 515 U.S. 557 (1995).
[245] 547 U.S. 47 (2006)
[246] 530 U.S. 640 (2000).

about the willingness of the Court to defend the First Amendment rights of LGBT persons. Also, the extremely compelling dissent in this case made clear that, on a more careful reading of the evidence, the equal protection claim should have prevailed. But most importantly, no one has ever challenged the Supreme Court's holding in favor of First Amendment protection for lesbian/gay expression in *One, Inc. v. Olesen*.

Rumsfeld v. FAIR

Rumsfeld v. FAIR does not seem to be a very important decision for precedential value, involving as it does a highly specific, highly unusual set of facts. It involved a challenge by several law schools to a federal statute that threatened loss of certain classes of federal funds[247] by any institution where job recruiters from the United States Armed Forces lacked access equal to all other job recruiters.[248] Although the opinion discusses the issue primarily in terms of First Amendment doctrine, it strongly signals at the outset of the substantive discussion where it will fall out by referring to the power of Congress to raise and support armies.[249] The Court certainly does not assert that Congress is free of constitutional constraints when it uses this power, but it quotes *Rostker v. Goldberg* for the proposition that "'judicial deference… is at its apogee' when Congress legislates under its authority to raise and support armies."[250]

But the constitutional bar is even lower here, according to the Court, because Congress did not choose to impose the requirement directly.[251] Instead, it used the spending power, giving law schools the option: grant equal access to military job recruiters, or lose several types of federal funds. The Court acknowledges once more that Congress is not free from constitutional restraints in its use of the spending power, but it also states what is logically obvious and necessary – if the underlying

[247] Id. at 54 n. 3.
[248] Id. at 51, 52.
[249] Id. at 58.
[250] Id., quoting Rostker v. Goldberg, 453 U.S. 57, 67 (1981).
[251] Rumsfeld, 547 U.S. at 58-59: "Congress' power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds."

requirement is constitutional on its own terms, then it cannot be unconstitutional as imposed via the spending power.[252]

Again, where the Court would end up is obvious from the beginning of the next section: "The Solomon Amendment neither limits what law schools may say nor requires them to say anything."[253] The Court relied here on the distinction between speech and conduct, finding that job recruiting is conduct, not speech, and the conduct in question was not expressive for purposes of First Amendment analysis.[254]Therefore, the Solomon Amendment does not infringe on the universities' free speech. The lesbian/gay activist position lost here, but the opinion is a pedestrian application of First Amendment doctrine. Activists pursued *Rumsfeld* as a battle in the war over allowing openly lesbian/gay persons to serve in the U.S. military, with the First Amendment only serving as the most obvious hook on which to hang this particular argument. Activists on behalf of LGBT rights were the plaintiffs in the case, but, again, the Court found, in effect, that the issue in fact did not implicate the First Amendment, since it involved conduct, not speech, so this case says effectively nothing about the First Amendment rights of LGBT activists. It seems likely that, in the long run, *Rumsfeld* will prove to have been more a distraction than anything else.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston

Similarly, *Hurley* involved a very pedestrian application of First Amendment doctrine, the outcome of which should have surprised no one.[255] In Hurley, a group that wished to march in Boston's annual St. Patrick's Day Parade as an openly lesbian, gay, and bisexual[256] contingent challenged their exclusion under the Massachusetts statute that prohibits discrimination generally and

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[252] Id. at 59-60.
[253] Id. at 60.
[254]Id.: "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do – afford equal access to military recruiters – not what they may or may not say." See also id. at 64-65, 66.
[255] 515 U.S. 557.
[256] Again, I omit "transgender" here only in the interest of historical accuracy.

includes sexual orientation as a protected category.[257] The state courts all found for the plaintiffs,[258] but the U.S. Supreme Court unanimously reversed. The Supreme Court held that parades are a quintessential form of expression, and that, in speech, what one does not say is as important as what one does say.[259] Therefore, requiring a parade organizer to include a group whose message the organizers did not approve was plainly an infringement on the organizers' First Amendment right to free speech. So this was not a case about the First Amendment rights of LGBT activists, but about LGBT activists asserting an equal protection claim in derogation, or so the Supreme Court found, of First Amendment rights. The harm to LGBT activists -- exclusion from a parade -- was de minimis.

Some LGBT activists deplored this decision, but it seems obvious that organizers of LGBT Pride parades can deploy it to exclude Klansmen or "ex-gay" groups from their parades. It is a reasonable decision, consistent with the Court's well established doctrine. Also, perhaps more significantly in the long run, LGBT legal scholar Arthur Leonard noted the contrast between the tone and language of *Hurley* and the tone and language of the immediately preceding Court opinion on lesbian/gay civil rights, *Bowers*.[260] Whereas the *Bowers* court was openly dismissive, virtually contemptuous -- infamously dismissing the claim to a right to commit sodomy as "facetious"[261] – the *Hurley* opinion spoke with respect about lesbian, gay, and bisexual persons even as it rejected their legal claim.

BSA v. Dale

BSA v. Dale[262] is plainly the worst of these three decisions, reflecting nothing other than knee-jerk homophobia on the part of the five justices in the majority (which included Justices O'Connor and

[257] Id. at 561.
[258] Id. at 562, 563.
[259] Id. at 573-74.
[260] Arthur Leonard, *From* Bowers v. Hardwick *to* Romer v. Evans, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS (John D'Emilio, William B. Turner, and Urvashi Vaid, 2000), 57-80.
[261] 478 U.S. 194.
[262] 530 U.S. 640 (2000).

Kennedy). It illustrates nicely how cultural politics, especially stereotypes about minorities, can infect legal decisions. In this case, a Boy Scouts council in New Jersey fired a former Eagle Scout from his position as a volunteer adult Scout after seeing a story about him as a lesbian/gay civil rights activist in a newspaper. He filed suit under a New Jersey statute that prohibits discrimination and includes sexual orientation as a protected category. The New Jersey courts held for the plaintiff at the appeals and supreme court level, reversing the trial court and ordering the Boy Scouts to reinstate him.[263] The case turned on whether having an openly gay leader would interfere with the Scouts' right to expressive association. That is, did this application of New Jersey's antidiscrimination statute infringe on the Scouts' First Amendment rights?

A five-justice majority of the United States Supreme Court found that it did,[264] but only after a studiously superficial review of the record. As both the New Jersey Supreme Court[265] and Justice Souter in dissent[266] pointed out, the Boy Scouts could present very little evidence to support their claim that opposition to lesbian/gay civil rights was part of the Scouts' expressive mission. Indeed, the record showed that the Scouts as an organization instructed its leaders to avoid talking about issues of sex and sexuality at all with individual scouts, referring them instead to family, religious leaders, or medical professionals. As Souter argued, if the Court consistently took so deferential an attitude toward the claims of litigants in expressive association cases, then the claim to freedom of expressive association would become an automatic pass out of antidiscrimination laws.

Part of the concern with so-called Religious Freedom Restoration Acts is that "sincerely held religious beliefs" could also come to serve as such an automatic pass. Again, absent a special rule allowing the pass to apply only to LGBT persons, which itself looks like a galloping equal protection violation, it is impossible to see how the pass out of antidiscrimination laws would apply only to LGBT persons. It is perhaps easy to forget that the U.S. has a long and sorry history of discrimination against

[263] Id. at 646.
[264] Id. at 643.
[265] Dale v. BSA, 734 A.2d 1196 1203, 1222-28 (N.J. 1999).
[266] 664-65 (Stevens)

religious minorities, including Mormons and Catholics, as well as Jews, and that many Christians considered racial segregation a moral imperative growing out of their religious beliefs. Allowing exemptions on the basis of religious beliefs will predictably have vast, and vastly unwanted, consequences. *BSA v. Dale* is a useful illustration of how the weight of culture is itself often highly conservative. Presumably because of the unique status of the Boy Scouts as a cultural institution, two justices of the Supreme Court who were, given different facts, willing to vindicate LGBT civil rights claims proved, in this instance, susceptible to some of the worst stereotypes about gay men and failed signally in their duties as examiners of evidence. Culture relies heavily on stereotypes, the pernicious effects of which can pop up in unpredictable places.

Given these three cases, the First Amendment does not seem to be a promising place to look for support for LGBT civil rights claims. But that is only because we have yet to look at the one case that presents most directly the most basic issue of the First Amendment: the right of citizens to participate in advocacy on behalf of themselves and their views.

One, Inc. v. Olesen

One, Inc. v. Olesen[267] is the single most overlooked case in the history of lesbian/gay civil rights activism. Yet it is arguably the single most important case in that history as well. *One* was an early lesbian/gay rights, or homophile as they then said, publication. A postmaster in California declared it unmailable solely because of its lesbian/gay content. The Ninth Circuit Court of

[267] 355 U.S. 371 (1958).

Appeals upheld the postmaster's decision.[268] The Supreme Court reversed the Ninth Circuit.[269]

How the Supreme Court reversed the Ninth Circuit is interesting – the Court issued a terse, per curiam opinion that offered no explanation for its reasoning, except a citation to *Roth v. United States*.[270] This seems odd on its face because, in *Roth*, the Court upheld two convictions, one under federal law and one under state law, for distribution of obscenity.[271] One might reasonably expect that *Roth* required affirming, rather than reversing, the Ninth Circuit in its decision to ratify the postmaster's choice. The *Roth* opinion is famous and important for providing justification for the continued prohibition of obscenity even under the First Amendment to the Constitution.[272]The Court in *Roth* demonstrated that, even as the states adopted bills of rights including protections for free speech during the period of the Constitution's ratification, they retained prohibitions on blasphemy, profanity, and related crimes.[273]To the Founders, that is, guaranteeing free speech and prohibiting obscenity were perfectly consistent actions.

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[268]241 F. 2d 772 (CA9, 1957), r'hng. denied. Because the Supreme Court reversed per curiam, this is the sole source for the facts of the case. This opinion, although mercifully brief, is still much longer than it needs to be. Anyone who wants an example of judges tripping over themselves to be prolix, tendentious, and tautological could hardly do better. See, e.g., id. at 776: "the Supreme Court in distinguishing matter which is coarse and vulgar, from obscene, lewd and lascivious matter, held that coarse and vulgar language is not within the meaning of the words, obscene, lewd, and lascivious." That is, coarse and vulgar language is not obscene, lewd, or lascivious, and you can tell because it's not obscene, lewd, or lascivious.

[269]355 U.S. 371 (1958).

[270] Id., citing Roth v. United States, 354 U.S. 476 (1957).

[271] Roth, 355 U.S. at 494.

[272]See, e.g., Ashcroft v. ACLU, 535 U.S. 564, 574 (2002): "Obscene speech, for example, has long been held to fall outside the purview of the First Amendment. See, e.g., *Roth v. United States*" (citation omitted); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001): "Our opinion in *New York Times v. Sullivan* reviewed many of the decisions that settled the 'general proposition that freedom of expression upon public questions is secured by the First Amendment"…; see *Roth v. United States*" (citations omitted); *U.S. v. Playboy Entm't. Group*, 529 U.S. 803 (2000) (Thomas concurring): "A governmental restriction on obscene materials receives no First Amendment scrutiny. *Roth v. United States*" (citation omitted); *New York Times v. Sullivan*, 376 U.S. 254 : "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations," citing *Roth* (other citations omitted).

[273]Id. at 482-83. Interestingly, the opinion in Roth is structurally very similar to the opinion in Bowers. Both rely on extensive citations to legislation existing in the colonies at the time of the Constitution's ratification. Compare *Roth*, 355 U.S. at 482-83, to *Bowers*, 478 U.S. at 194-95.

But the *Roth* court then offered two extremely important caveats. First, "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[274] That is, the First Amendment reflects the extremely high value the Founders placed on unfettered political debate. This formulation also reveals the implicit liberal bias built into the Constitution – whether any given change is desirable is an open question, but the Constitution enacts a presumption in favor of at least considering any proposal for change, no matter how offensive or outlandish it might initially seem. The Court stated the coverage of the First Amendment in very broad terms: "All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties…."[275] This is the point of the present article, stated, not in terms of identities, but in terms of the speech that those identities may produce, or it makes the point that Scalia's obsession with identities is misplaced, or that he fails to appreciate fully the connection between speech and identity.[276] Who is speaking matters not at all. What matters is that they choose to speak.

Here the issue appears solely as one under the First Amendment, but recurring to *Dred Scott*, absent the principle of equal protection, it is theoretically possible simply to state that certain classes of persons may not use the courts to vindicate their rights. Would Scalia allow the application of equal protection to prevent a blanket exclusion of LGBT activists from the courts? Grant, for the sake of argument, Scalia's claim that LGBT identity is a matter of nothing but a propensity for a particular type of sex acts. How exactly would that work? How would it function as a justification for

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[274] Id. at 484.

[275] Id.

[276] This point may mark a decisive dividing line between liberalism and conservatism as political philosophies. Conservatives so fear change that they would happily stifle even the advocacy of change, preferring instead to live, again, in a culture where no apparent challenge to their moral prejudices existed. Liberals, in contrast, have a strong preference for free and open debate, being always willing to contemplate the possibility that the current social order operates with beliefs and practices that are unjust or otherwise mistaken.

excluding litigants from the use of the federal courts? One could simply forbid the courts to address any issues relating to LGBT sexuality, which already would fail because, again, being transgender is not specifically about sex or sexuality at all. But in both *Bowers v. Hardwick* and *Lawrence v. Texas* the issue intruded into the courts via criminal prohibitions, which is the practical difficulty Scalia faces. Any activity that operates under statutory prohibition by definition becomes thereby a political issue. How is forbidding any group from using the courts not a violation of their First Amendment rights, to petition government if nothing else, as well as a violation of equal protection?

That is, it matters not a whit what the basis for LGBT identities is, whether a proclivity for certain sex acts or any other. What matters is the existence of political disputes over the issue, and the desire of parties, especially those on the losing end, to speak to the dispute. So, recurring to sodomy statutes, a substantial percentage of persons who were potentially subject to their operation considered them to be inherently unjust and were willing to risk the potential harm to say so publicly. Apparently adulterers and fornicators do not feel a sense of injustice so keenly, whether because the risk of actual prosecution is even smaller or because they implicitly admit that they deserve public censure, or – the key point – adulterers and fornicators feel no sense of common identity beyond their alleged sexual immorality – it really is all about the sex for them – is not clear, but it matters not. They choose not to enter the lists on their behalf, so the equal protection of their rights to participate in the political process does not become an issue as it does for LGBT persons. However, should they choose to start speaking up, the discrimination against them that statutes criminalizing their actions works would also prove at least highly suspect, if not automatically unconstitutional, under the argument of this article.

Second, from *Roth*, "sex and obscenity are not synonymous."[277] The Court stated in vigorous terms the point that, however much the Founders may have wished to prevent blasphemy and obscenity, they were at least as concerned, if not more concerned, to ensure robust political debate. Insofar as robust political debate involves discussion of sex, or of sex-related topics, then sex gets First

[277] Id. at 487.

Amendment protection. "It is… vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[278] It's still all about the sex, but the Roth court recognized that sex can be political. What matters is not the specific topic, but the political contest around it. The postmaster and the Ninth Circuit looked at LGBT political speech and saw only the sex part. The Supreme Court replied that what mattered was not the identities of the speakers, but the political character of the speech. Had the *One, Inc.* Court adopted the position of at least some conservatives – that LGBT issues are not properly political issues[279] – presumably they would have upheld the Ninth Circuit, with what consequences for the emerging lesbian/gay rights movement one shudders to consider.

In terms of the present article, what rational principle could one articulate to justify imposing disabilities uniquely on LGBT persons in terms of their ability to participate in the "unfettered interchange of ideas"? Amendment 2 had the effect of so imposing, as did sodomy statutes, as did prohibitions on legal recognition of same-sex marriages. "Unfettered" means unfettered. This opinion also implicitly makes the basic point of this article. Although *Roth* is facially only a First Amendment free expression opinion, it also functions, especially as applied to *One, Inc*. as an equal protection decision. Essentially what the Court did in *One, Inc*. was to insist that the First Amendment protections for controversial expression should apply equally to LGBT persons. The decision does not discuss the issue in these terms, but one could also as easily say that the Court found that the postmaster was picking on the publishers of *One*. In *Romer*, although Amendment 2 made no reference to free expression or the political process, it still had the effect, by prohibiting a type of legislation, of foreclosing political debate, of interfering with the political process.

This brings us back to Justice Scalia and the famed "sweet mystery of life" passage.[280] What more politically consequential act could there be than to say to an entire group of persons that

[278] Id. at 488.
[279] See infra, note 148.
[280] Supra note 40.

they may not organize themselves politically because the issue they would organize around is not properly political, or that their belief in their group identity is misplaced? What else could possibly define an issue as political except that persons and groups publicly take conflicting positions on the issue? To define summarily one position as beyond the pale of acceptable political positions – what Amendment 2 in Colorado effectively did – is to restrict arbitrarily, not defend, the political process. Surely government whose purposes include protection of a robust political debate may not legitimately hamper minority organizing efforts by denying them the use of what was, before e-mail and web sites, the most efficient method for such organizing? This is, in effect, what the Ninth Circuit said to the publishers of *One*. Scalia, apparently recognizing the absurdity of this position, is careful in his dissents to assert that he has no objection to active participation in the political process by lesbian, gay, and bisexual persons, although this claim rings distinctly hollow in the context of his willingness to allow states to impose disabilities uniquely on those persons.[281] Other conservatives are not so careful. They openly make statements that lead inexorably to the conclusion that they would exclude LGBT persons from full participation in the political process if they could. The most effective defense LGBT persons have is their own active participation in the political process, a point that African Americans have demonstrated with gusto since the passage of the Voting Rights Act.

Again, in *Lawrence*, The Center for the Original Intent of the Constitution submitted an *amicus* brief containing this statement: "*Romer* [*v. Evans*] is fundamentally about political rights, not homosexual rights."[282] It is probably impossible to state more clearly the belief that lesbian/gay rights issues are not political issues. The Christian conservative organization, Focus on the Family, as part of its literature opposing legal recognition of same-sex marriages, asserts that "marriage precedes and exceeds the church and the state."[283] If one opposes marriage rights for an entire class of persons, then

[281] Romer, 517 U.S. at 646 (Scalia dissenting).
[282]Brief Amicus Curiae of the Center for the Original Intent of the Constitution in Support of Respondent at *23, Lawrence v. Texas, 539 U.S. 558 (2003), citing Romer v. Evans, 517 U.S. 620 (1996).
[283]Glenn T. Stanton, *Why Not Gay Marriage?*, undated PDF, available at http://www.family.org/cforum/pdfs/fosi/marriage/Why_Not_Gay_Marriage.pdf, last visited, October 8,

asserts that marriage precedes and exceeds the state, is it possible to deduce anything other than the conclusion that one would exclude members of the class, not only from marriage, but from participation in the state? This claim implicates the argument of the present article in that it attempts to link marriage to the founding of the state, and therefore to the creation of the political sphere thus tying it, in the United States, anyway, into the foundational commitment to equality. Again, there is, in our founding documents, no textual basis for isolating any individual or group of individuals for exclusion from full participation, and there is much textual basis for refusing to do so. So it is that the attempt by Christian conservatives to put themselves, theoretically, at the founding runs headlong into the concrete reality of the founding that gives no permission for their preferred policy move of excluding LGBT persons and same-sex couples from full participation. Taken together, the Establishment Clause and the Free Exercise Clause prevent the Christian conservative move. The Equal Protection Clause does so as well. That they want to do so alone should make all legal and policy choices involving sexual orientation as a classification highly suspect as examples of a religious minority taking a position that flies in the face of the universal definition the polity chose for itself at its founding. Again, the Christian conservative position with respect to free exercise has the effect of violating the establishment clause.

Christian conservatives, of course, are fond of asserting that the United States is a "Christian nation," by which they mean, not merely the indisputable empirical point that the vast majority of the European Americans in the colonies at the time of the founding were Christian, but the theoretical point that the Founders somehow intended their heirs in perpetuity to attempt to govern the Republic according to the particular version of Christianity that modern Christian conservatives espouse. The esteemed political scientist Hugh Heclo addressed this question in an essay titled, "Is America a Christian Nation?"[284] He made clear that the question itself, and virtually any answer one could give

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[284] Hugh Heclo, Is America a Christian Nation, 122 Political Science Quarterly (2007): 59-87.

to it, is a political football that activists on both sides use to keep their constituents riled up, liberals with visions of theocrats bent on imposing Christianity by force on everyone in sight, conservatives with visions of libertines bent on destroying the moral fabric of the Republic. By way of answering the question, he points out that American Christianity is distinctly Protestant Christianity, that is, resistant to institutional authority. One of several observations that reiterates the obvious point that the United States is empirically Christian -- most people in the United States identify themselves, in some important sense, as Christian -- but it is not officially or formally Christian, is "Christianity was not established by law as the legal religion of the state, but is was the religion of the people."[285] That is, in the sense that Christian conservatives mean, the United States is not a "Christian nation," and, to the extent that it is such, it is not in the sense that Christian conservatives mean. There is no legal basis for allowing Christians in the United States to impose their moral prejudices on an unwilling LGBT minority, or any other unwilling minority.

To state what should be obvious, I have no desire to prevent conservatives from articulating their positions on these issues. The whole concept is to ensure robust political debate by hearing from all sides. But in order to do that, all sides must have equal opportunities to state their case. It is the conservative position that inherently and necessarily involves purely content-based limitations on the speech of LGBT persons. LGBT activists have fought back with increasing success since the early 1950s, but the battle is far from won, so LGBT persons continue to merit protection from tyranny of the majority by the courts. The next section describes some of the major components of the LGBT Civil Rights Movement since *Olesen* in 1958.

IV. The Political History of the LGBT Civil Rights Movement

It would be hard to overestimate the importance of *One, Inc. v. Olesen* for the future development of the LGBT civil rights movement. Imagine, in the days before e-mail and web sites,

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[285] Id. at 77.

how else a fledgling political movement could have grown except through use of the mail. Early homophile organizations, as they tended to call themselves, routinely started publications as one of their first actions. Historian John D'Emilio subtitled his classic study of the homophile movement "the making of a homosexual minority in the United States" precisely to foreground his observation that fomenting an active sense of group identity and group grievance among lesbians and gay men was a task.[286] It required work.

The other option was for lesbians and gay men just to continue accepting the official account of them as necessarily suffering from some mental illness, making their identities pathological rather than political. It is impossible to explain, consistently with the U.S. Constitution, how anyone other than lesbians and gay men themselves could or should have the authority to make this decision,[287] and events over the past sixty years or so make abundantly clear that the vast majority of lesbian, gay, bisexual, and transgender persons choose politics over pathology. The work of helping lesbians and gay men to understand their oppression as political relied heavily on various publications.

Heterosexual supremacists could reply that the need to convince lesbians and gay men that they suffered oppression itself proves the point that they did not. It actually proves just the opposite. Heterosexual supremacists want to assert that a set of sex acts is all that LGBT persons have in common. But the difficulty of bringing large number of lesbians and gay men to political consciousness of their plight in the 1950s and 1960s proves that it's not all about the sex. If it were all about the sex, the minority group consciousness would have existed on that basis alone. It did not.

The heterosexual supremacist reasoning is no different from the segregationist claim that African Americans in the South never minded segregation until the NAACP showed up to foment

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[286]JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1945-1970 (1983).

[287] To state what may be obvious, my critique above of Justice Scalia's position on LGBT identity is precisely that he arrogates to himself the authority to dictate to LGBT persons which account of their identities should prevail, and he manifestly lacks any constitutional or other legal warrant to undertake such a task.

trouble.[288] More importantly for present purposes, it only begs the question: if, as seems indisputable, a substantial debate exists among citizens about whether lesbians and gay men suffer oppression, then does the Court not have an obligation to ensure that all sides have a full and fair opportunity to participate in the debate? Deliberately excluding the parties who claim to suffer oppression from the debate only increases the oppression. Certainly the Court saw itself in *One, Inc.* as having the responsibility to protect the rights of the lesbians and gay men who advocated the belief that they and their kind did suffer oppression, in keeping with the Constitutional -- which is to say, liberal -- ethos of allowing "unfettered" debate of public issues.

This is where the real difficulty emerges. Halley started with *Bowers v. Hardwick* to reason that, if the Court really meant what it said about allowing the decision for or against sodomy statutes to take place in the majoritarian process, then it had the responsibility to protect the ability of persons who suffer from the existence of sodomy statutes – that is, persons who oppose sodomy statutes – to participate fully in that process. She is undoubtedly right, although one supposes she was also disingenuous in that particular article in that she could not really have expected the Court to act on her reasoning. The trickier claim is the one that goes the other way: given the Court's demonstrated willingness to defend the First Amendment rights of lesbians and gay men, it also had the responsibility to strike down sodomy laws on political process grounds, because the mere existence of sodomy laws impaired the willingness and ability of many lesbians and gay men to participate in the political process as lesbians and gay men, that is, on their own behalf. Again, substantive due process v. procedural due process is a distinction without a difference. Obviously, the impediment was not entirely effective.

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[288] See Herbert Shapiro, White Violence and Black Response: From Reconstruction to Montgomery, (1988), at 323: "Accusing both the NAACP and black newspapers of troublemaking, Dowling stated: 'They have been fomenting trouble with their crusades in the Negro neighborhoods from the start. If you want to do something constructive in this situation you might try to control the Negro press.' According to an affidavit sworn by a Detroit minister, Dowling privately stated with regard to the NAACP: 'They were the biggest instigators of the recent race riot.'" Although the case provides no indication the Postmaster thought such in One, Inc., still, functionally, there is no difference between his refusal to mail the homophile publication and this white supremacist's call to "control the Negro press" as a means of stifling African American protest. It seems obvious that "control[ling] the Negro press" would have worked simultaneous violations of both the First and Fourteenth Amendments, as government action restricting the freedom of the press in a way that Roth prohibits, and picking on a minority in a way the Fourteenth Amendment, as interpreted, prohibits.

Some brave souls did risk the implication that they violated state sodomy laws by becoming vocal LGBT civil rights activists, but again, this only proves further that the sex alone is not what defined and motivated them.

Similarly, none of the current crop of Religious Freedom Restoration Acts aims explicitly at the functions of government or at the right of LGBT persons to participate in the political process. It is hard to see how the inability of a same-sex couple to get the exact wedding cake they want much interferes with their political rights.[289] But political participation depends on commerce with a wide range of suppliers of goods and services that have no direct connection to government, such as printers and mailing services, and, in the modern era internet service providers and web site hosting companies. As it happens, the high technology sector is notoriously LGBT friendly,[290] but that historical accident cannot answer the legal question. The courts still have an obligation to prevent discrimination against a minority. Child custody decisions have no obvious implications for political participation, but the Court still reversed a lower court's decision when it reflected prejudice against a minority.[291]

Unexpectedly, if not perversely, I will here embrace wholeheartedly Scalia's proposition that certain sexual acts define lesbians and gay men as a class. At the level of the society as a whole, this is an accurate claim, even if it is empirically false.[292] That is, given that most people falsely associate sodomy only with lesbians and gay men, the fact of heterosexual sodomy becomes invisible, and sodomy does in fact come to define lesbians and gay men as a class.[293] Halley quotes *West Virginia*

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289 See supra n. 17 and accompanying text for fuller discussion of this point.

290 Jonathan Capehart, *Don't Bite Apple and Tim Cook for gay-rights "hypocrisy,"* THE WASHINGTON POST, 2 April 2015, http://www.washingtonpost.com/blogs/post-partisan/wp/2015/04/02/dont-bite-apple-and-tim-cook-for-gay-rights-hypocrisy/ (last visited 20 June 2015).

291 *Palmore, supra*.

292 At a minimum, insofar as the putative class is "lesbians and gay men," or, more tendentiously, "homosexuals," exactly what is the sex act that lesbians have in common with gay men?

293 Senators Loudly Debate Gay Ban, New York Times, 8 May, 1993: "Senator Strom Thurmond of South Carolina at one point argued that only homosexuals perform sodomy. 'Heterosexuals don't practice sodomy,' he shouted. The comment by Mr. Thurmond, the ranking Republican on the committee, brought laughter from the audience. Senator John Kerry, a Massachusetts Democrat who was testifying, said he disagreed with the statement. He also pointed out that there were homosexuals working in Congress and that none had been arrested for sexual practices. 'You want

State Board of Education v. Barnette: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[294] She could as easily have quoted *Roth* making essentially the same point, but explicitly with respect to sex. The existence of sodomy statutes per se becomes a mechanism for the enforcement of political orthodoxy, of at least attempting to enforce silence on anyone who opposes such statutes. Under the First Amendment, deprivation of the right is a harm in itself. The silencing inherent in sodomy statutes as a violation of the First Amendment is inseparable from the equal protection violation inherent in leaving only one class of persons subject to enforcement under them.

We can see this dynamic at work in the case of Franklin Kameny, who lost his job with the Army Map Service in 1957 after an arrest for soliciting in a park in Washington, D.C. as part of the purging of LGBT employees from the federal civil service. Kameny went on to fight a twenty year battle, mostly in the courts, but including picketing, a very brave act for a gay man in 1960, to stop the federal civil service from using sexual orientation as a factor in deciding suitability for federal employment.[295] In 1975, after losing in the District of Columbia Circuit Court and the Federal District

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them arrested for that,' Mr. Thurmond said. Mr. Kerry replied sharply, 'Do you, sir?' Mr. Thurmond responded: 'Sodomy is against the law. Why shouldn't they be arrested?'" Although he does not explicitly say so, it is hard to avoid the conclusion that Thurmond was willing to contemplate the arrest of gay employees in Congress merely on the presumption that they committed sodomy. The distinction between "procedural" and "substantive" due process does not operate here. As a further indication, both of the backlash *Obergefell* has produced, and of the lack of any meaningful distinction between substantive and procedural due process, a candidate for mayor of Kings Mountain, N.C., has explicitly proposed automatically arresting and jailing any gay man (he fails to state his opinion about lesbians, bisexuals, and transgender persons). This proposal would obviously work a galloping violation of procedural due process rights that grows out of the would-be officials ideas about the identities of gay men. Andrew Husband, *Kim Davis Fan and NC Mayoral Candidate: "What's Wrong with Eradicating Homosexuals?"* Mediaite, 18 Sept. 2015, http://www.mediaite.com/online/kim-davis-fan-and-nc-mayoral-candidate-whats-wrong-with-eradicating-homosexuals/.

[294] 319 U.S. 624, 642 (1943), quoted in Halley at 972.

[295] For Kameny's own account of these events, see *Government v. Gays: Two Sad Stories with Two Happy Endings, Civil Service Employment and Security Clearances*, in CREATING CHANGE, supra, 188-208.

Court for the Northern District of California, the federal civil service announced that it would no longer use sexual orientation as a factor in deciding suitability for federal employment.[296] Returning to Scalia's *Romer* dissent, is this an appropriate amount of political participation? How do we know? Would Scalia be willing to deny Kameny the use of the courts? The difference between Scalia's *ex cathedra* pronouncement of LGBT persons' excess political power and the denial of access to the courts is one of degree, not of kind.

Or take the case of Jose Serrano, the first openly gay person to run for office in San Francisco.[297] According to the postmaster in *One, Inc.*, he should be able to deny use of the mails to lesbian/gay publications simply because of their lesbian/gay content, which the postmaster found definitionally obscene. Would he also be able to refuse to mail literature from Serrano about Serrano's candidacy for office? What amount of information would be necessary to trigger the prohibition? Should the municipal authorities of San Francisco have had the power to silence Serrano's political speech because he was openly gay? If homosexual rights are not political rights, one might think this would be the case. Or might the authorities require strict separation between his "political" speech and his "lesbian/gay" speech? But the two were inseparable. How is the decision to silence a candidate for public office with respect to the issue he most wants address not a political decision in the most to obvious sense? Serrano's candidacy alone refutes the conservative claim that LGBT civil rights issues are not political issues. Again, why should any LGBT person accept the characterization of their involvement in public policy debates as apolitical? Where does the Constitution grant any one group the power to dictate the correct level of political participation by any other group?

Serrano ran quite deliberately as an openly gay candidate in order to promote lesbian/gay visibility and a sense of political self-efficacy, but what if he had chosen not to mention his sexual orientation at all in his literature? Would that render the material mailable? Would we not wish to say

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[296] Norton v. Macy, 417 F. 2d 1161 (1969) (reversing appelant's discharge from position with NASA after arrest for "immoral conduct"); Society for Individual Rights v. Hampton, 63 F.R.D. 399 (N.D.Cal.1973)

[297] NAN ALAMILLO BOYD, WIDE-OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965 (2003).

that, if candidates for public office have to withhold information about themselves from their literature in order to use the mails, a *prima facie* violation of their First Amendment rights had taken place? And of their right to equal protection, assuming other candidates suffered under no such prohibition? Or, what if Serrano chose to omit information about his sexual orientation purely voluntarily, but the postmaster happened to see reports about Serrano's work as a cabaret performer in a notoriously queer bar and decided that any such individual's campaign literature was definitionally obscene?[298] This is not far different from what happened to James Dale of *BSA v. Dale* fame.

What is the rational basis for prohibiting masturbation?[299] According to Scalia, it is the interest in perpetuating the majority's preferences regarding matters of sexual morality. But such preferences almost automatically become a potential site for vigorous social and political debate – unless anyone who occupies one position in the debate immediately becomes subject to significant stigma, in which case virtually no one will publicly defend that position. It is almost impossible in the United States even now to take a public position in support of LGBT civil rights without creating in the minds of some significant percentage of observers that one is LGBT.[300] Thanks to substantial political activism

[298]See McConnell v. FEC, 540 U.S. 93 (2003) for a recent, exhaustive discussion of what limits government may place on candidates for elective office.

[299] Yet another illustration of how there is no difference between substantive and procedural due process. One wants to know how Scalia plans to enforce his prohibition on masturbation without violating the Fourth Amendment/due process rights of violators? Put cameras in every bedroom and shower?

[300]A highly effective illustration of this point appears in the film, *Philadelphia*. After agreeing to represent Tom Hanks in a suit complaining that his firm fired him for having AIDS, Denzel Washington gets propositioned by another man in a grocery store. What makes this a particularly interesting example is that Washington in this instance is not even litigating a lesbian/gay civil rights claim per se – he is litigating an AIDS discrimination claim, but such are the strengths of the associations involved that representation of a client with AIDS is sufficient to create the assumption that one is lesbian/gay. Note also that the person making the assumption in this instance is himself a gay man. The practical implications of the association become clear in the case of Vaughn Walker, the federal judge who struck down California's notorious Proposition 8, prohibiting legal recognition of same-sex marriages. Walker never discussed his identity as a gay man publicly until after he retired, but a book about the case recounts his emotional response to testimony from another gay man about undergoing "ex-gay" therapy, which opponents of Proposition 8 introduced at trial to make clear how intimately linked sexual orientation is to individual identity – de facto refutation of Scalia's claim. That Walker himself is gay prompted howls from conservative opponents of same-sex marriage who argued

by lesbians and gay men and their supporters, the stigma associated with lesbian/gay identity has decreased significantly in recent years.[301] But, as we have seen, a critical component of effective activism by lesbians and gay men has been defense by the Court of their First Amendment rights in a manner that reflects an implicit principle of equal opportunity to participate in the political process.

Conclusion

It is possible to enact significant regulations on sexual activity in the name of health and safety concerns. To suggest, however, as Scalia does, that the majority's moral preferences *simpliciter* is a rational basis for legislation is to give the majority an unfettered power to impose stigma as it likes on unpopular minorities. One may try to insist that I must at least cabin this assertion to read, "on unpopular sexual minorities," but it is easy to demonstrate that claims of incorrigible sexual irresponsibility by African Americans were a set-piece of white supremacy.[302] This fact alone buttresses the case for heightened judicial scrutiny of sexual-orientation classifications because it demonstrates that our nation has a clear history of using attributions of sexual immorality for the primary purpose of perpetuating stigma and discrimination. We now tend to focus in antidiscrimination law on the identities of the victims of discrimination, which is reasonable on its own terms. However, the obvious

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he should have recused himself. By this logic, Antonin Scalia, a conservative Catholic who, his own protestations to the contrary notwithstanding, obviously opposes virulently legal recognition of same-sex marriages, should recuse himself from any consideration of the issue. That conservatives see a man's status as gay as infecting his ability to render a dispassionate verdict on a related legal question itself refutes Scalia's claim, unless he also wishes to assert that he knows Walker to have been sexually attracted to the plaintiffs, who included lesbian as well as gay couples. Aliyah Shahid, *Judge's sexual orientation sparks argument over impartiality on Prop 8 case*, Daily News, 6 August 2010.

[301] Jeni Loftus, America's Liberalization in Attitudes toward Homosexuality, 1973 to 1998, 66 AMERICANSOCIOLOGICAL REVIEW 762 (2001); Rebekah Herrick and Sue Thomas, The Effects of Sexual Orientation on Citizen Perceptions of Candidate Viability, Ewa A. Golebiowska and Cynthia J. Thomsen, Group Stereotype and Evaluations of Individuals: The Case of Gay and Lesbian Political Candidates, both in Riggle & Tadlock, supra note 69.

[302] See, e.g., Henry Yu, Tiger Woods is ,ot the End of History; or, Why Sex Across the Color Line Won't Save Us All, 108 American Historical Review 1406 (2003); James Tyner and Donna Houston, Controlling Bodies: The Punishment of Multiracialized Sexual Relations, 32 Antipode 387 (2000). The pretext for most lynchings of African-American men was some claim of having made and/or acted on sexual advances to a white woman.

differences between race and sexual orientation as characteristics of human identity make it all too easy to overlook the fact that the reasoning of white supremacy is no different from the reasoning of heterosexual supremacy. Racism in the United States was (is) all about sex. The easiest way to precipitate a lynching of a black man was to assert that he had made some sexual advance toward a white woman.[303]

Perhaps the best way to evaluate claims of discrimination is to listen carefully to those who suffer from the disability. Of course the Court should evaluate such claims in light of empirical evidence, but this is only to say that the Court should be a court. The problem in *BSA v. Dale* is precisely that the Court took the BSA's claims at face value when they could present essentially zero evidence to support their claim about their own expressive association. What *One, Inc. v. Olesen* involves is the recognition that, in order for minority groups to make their claims of discrimination effectively, they must have the same access to the public debate as everyone else. Again, LGBT persons have spent nearly the past sixty years battling discrimination against them, with some notable successes, and some notable setbacks. But in terms of ensuring a fair political process, the important thing is not any group's win/loss record. The important thing is who chooses to show up and play the game.

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[303] *The History of Lynching in America is Worse than you Think, Study Says*, HUFFINGTON POST, 10 February 2015, http://www.huffingtonpost.com/2015/02/10/history-of-lynching-us-worse_n_6656604.html (last visited 16 June 2015). Particularly horrifying evidence of this point emerged as I was writing this article. On 17 June, 2015, a white man opened fire during a bible study class in a historic African American church in Charleston, South Carolina, killing nine persons. According to a survivor, he claimed he had to kill black people because "you rape our women and you're taking over our country." Nico Hines, Jason Ryan, and Katie Zavadski, *Behind the Hate Crime Massacre in a Black Charleston Church*, DAILY BEAST, 18 June 2015. http://www.thedailybeast.com/articles/2015/06/18/behind-the-hate-crime-massacre-in-a-charleston-church.html (last visited, 19 June 2015).