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The National Masturbators Task Force

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The National Masturbators’ Task Force

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The majority opinion in *Lawrence v. Texas*, according to Justice Antonin Scalia in dissent, “effectively decrees the end of all morals legislation.” 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.” This proposition depends on the belief, which Scalia articulated in his *Romer v. Evans* dissent, 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 inapplicable. “Homosexuality” is only a 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.5

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 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

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4 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.
5 *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.”
gay men, on one hand, and adulterers, fornicators, and practitioners of bestiality on the other hand.

The majority opinion in *Lawrence* is ambiguous on this point. 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. This militates in favor of the respectability of same-sex couples. 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 – same-sex couples should be able to screw all they want to, but they still can’t get married.

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. LGBT persons have created a movement out of self-defense. LGBT identities invite harassment and persecution in our culture in a way that no other minority identities currently do. 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 Gay

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6 *Lawrence*, 539 U.S. at 567, 577-78 (citing Justice Stevens’ dissent in *Bowers*, 478 U.S. at 216).
7 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.
8 *Lawrence*, 539 U.S. at 578; 585 (O’Connor concurring)
9 Only the most recent outrage was 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](http://www.glsen.org/cgi-bin/iowa/all/home/index.html) (last visited April 7, 2008).
and Lesbian Task Force, which has existed now for thirty-five years.\textsuperscript{10} There is no National Masturbators’ Task Force, or National Fornicators’ Task Force.\textsuperscript{11}

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.\textsuperscript{12} 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.\textsuperscript{13}

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. Scalia would punish LGBT persons for their active participation in American politics. The more legitimate approach appears in several decisions of

\textsuperscript{10} \url{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, \url{www.lambdalegal.org}; the Gay and Lesbian Victory Fund, \url{www.victoryfund.org}; the National Center for Lesbian Rights, \url{www.nclrights.org}; Gender PAC, \url{www.gpac.org}; Parents, Family, and Friends of Lesbians and Gays (PFLAG), \url{www.pflag.org}; the Gay, Lesbian, and Straight Education Network (GLSEN), \url{http://www.glsen.org/splash/index.html}; the Human Rights Campaign (HRC), \url{www.hrc.org}; and the Gay and Lesbian Alliance Against Defamation (GLAAD), \url{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 website (April 4, 2008) that it has filed an amicus brief in the state litigation against Iowa’s ban on same-sex marriages, \url{http://www.glad.org/}.

\textsuperscript{11} 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?\textsuperscript{12} See infra, notes 63ff and accompanying text for full discussion.

\textsuperscript{12} \textit{Romer}, 517 U.S. at 645-47 (Scalia dissenting).
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.¹⁴

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?¹⁵

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.¹⁶ 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

¹⁴ See infra, note 84ff and accompanying text.
¹⁵ Manfred Berg, “The Ticket to Freedom: The NAACP and the Struggle for Black Political
Integration” (2005).
¹⁶ 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.”
frequently asserted that race relations would continue just fine under segregation in their area but for the meddling of the NAACP.\textsuperscript{17}

But the persistence of the NAACP under white supremacy, the persistence of the National Organization for Women (NOW) under male supremacy,\textsuperscript{18} the persistence of the National Gay and Lesbian Task Force (NGLTF)\textsuperscript{19} 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 \textit{Dred Scott v. Sandford} decision is that it defines all persons of African descent as outside the category, “we the people of the United States of America.”\textsuperscript{20} Less drastically, Colorado’s Amendment 2 did the same thing. Similarly, we can understand the blanket prohibition in the First Amendment on Congressional interference in various forms of political activity\textsuperscript{21} 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.

\textsuperscript{17} For a readily accessible example of this type of statement, see the documentary, \textit{Eyes on the Prize}, episode 1, “Awakenings” (Blackside/PBS Productions 1986).


\textsuperscript{20} \textit{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 therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”

\textsuperscript{21} 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.” \textit{N.Y. Times v. Sullivan. See also} discussion of \textit{Roth v. United States}, infra.
Legal scholar Janet Halley made a similar point twenty years ago.\(^\text{22}\) She noted the Supreme Court’s assertion in *Bowers v. Hardwick* that it would not interfere with the majority’s decision to 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.\(^\text{23}\) 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.

Again, this might seem like a dangerous observation only five 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 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* has contributed to substantial backlash, only inspiring conservatives to increased attacks on the rights of lesbians and gay men.\(^\text{24}\) In some ways, the situation is arguably worse now than it was before *Lawrence*.\(^\text{25}\) 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.

\(^{23}\) *Id.* at 918.
\(^{25}\) 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.
Halley focused primarily on the social-psychological process of forming lesbian/gay identities. This article will focus primarily on the historical evidence demonstrating the political engagement of lesbians and gay men in opposition to their own oppression. 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.

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, to reify race and gender as biological characteristics, rather than political choices – is itself part of the political move. 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.

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. Although we

28 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,
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. 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 completely 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.

To put the point another way, assuming that anyone who identifies as LGBT is concerned only about sex is part of the problem.

This article will offer a different doctrinal genealogy than what Halley presented twenty years ago. She began with the famous footnote four in Carolene Products as the basis for judicial review of legislation in terms of its impact on the political process. Plainly she participates with this argument in a long and estimable tradition of legal history. 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

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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.”

29 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, 541 U.S. 267 (2004) (Scalia writing for Court to assert that judiciary should not take political gerrymandering cases for lack of justiciable standards).


31 Halley, 916 to 918.

are more important for indicating the Court’s shift per se. What makes Carolene Products so famous now is that it contains “the most celebrated footnote in American Law,” 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.

I have no wish to dispute the prevailing version of the story. I do wish to complicate the story 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. The primary 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. A deeper appreciation of the necessarily political character of LGBT identity points us to a different precedent, a First Amendment precedent, that addresses the political process directly, and the active use LGBT person have made of that process over the past fifty years, rather than in terms of apparently epiphenomenal effects on 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

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33 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).
35 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.
36 See infra notes 128ff and accompanying text for full discussion.
Noticing this case allows us to invoke an entire new realm of constitutional doctrine on 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 operation of the political process and preventing unfair outcomes 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 or sodomy statutes. If

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37 241 F. 2d 772 (CA9, 1957), r’hd, 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. 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 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.
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.

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. 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.38 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 rights39 – in the minds of this group’s members, anyway, discrimination against lesbians and gay men is somehow not political. It’s all about the sex.

But what could be more political than to dispute an entire group’s characterization of itself? Anyone who fails – or refuses -- to see the political and moral freight in such action 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. 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 on sodomy interfere impermissibly with… well, with self-definition.40 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

40 Lawrence, 539 U.S. at 574, quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)
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.”

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. 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 (or, even less likely, to persuade legislatures to repeal them). But this observation alone solves the perennial problem of how to differentiate valid from invidious legislative classifications. 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*. 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.”

Is it really okay to disadvantage butchers, but not LGBT persons? If so, why?

This article provides an overview of selected Fourteenth Amendment decisions in order to explain why LGBT persons merit the protection of the courts from legislative classifications based on sexual orientation and/or gender identity. (I had said “invidious legislative

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41 *Lawrence*, 539 U.S. at 588. Emphasis in original.


43 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.

44 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.

45 631.
classifications based on sexual orientation and/or gender identity,” but that is redundant – part of the point is that all such classifications are invidious.) It also provides a brief history of the LGBT civil rights movement by way of making a closely related point: conservatives try to insist that legislation aimed at lesbians and gay men (and, presumably, at bisexual and transgender persons) does nothing other than regulate conduct in a manner that is or should be well within the legitimate police powers of the state.\textsuperscript{46} It’s all about the sex.

If so, then conservatives must explain why LGBT persons have proven consistently willing for over fifty years now to devote considerable time, money, and energy to building and sustaining a political movement dedicated to the proposition that discrimination on the basis of sexual orientation and/or gender identity is necessarily invidious. Why does the force of conservative moral condemnation work against adulterers, fornicators, and others in a way that it fails to work against LGBT persons? Why is there no National Fornicators’ Task Force? Why should LGBT persons accept Scalia’s characterization of them as no different from fornicators and adulterers?

The first 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 second 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. But we forget about \textit{One, Inc. v. Olesen}, which I explain in detail in this section. Finally, Section III

\textsuperscript{46} \textbf{Bowers,} 478 U.S. at 197 (Burger concurring): “This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.” In other words, if the state cannot prohibit sodomy, then it cannot do anything.
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.

I. Fourteenth Amendment Jurisprudence

When the Court announced its decision in Lawrence v. Texas, some observers compared it to Brown v. Board of Education in terms of its legal and political significance.\(^{47}\) I believe that, in the long run, we will see that Romer v. Evans is a much more important decision. Eliminating sodomy statutes is 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.\(^{48}\) 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. Even so, eliminating sodomy statutes was, by 2003, leftover business from the earliest stages of the LGBT civil rights movement, while equal protection claims will likely become even more prominent in the future.

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

\(^{47}\) 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).

\(^{48}\) 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.
neutral sodomy statutes to replace the overtly discriminatory variety.\textsuperscript{49} 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.\textsuperscript{50} Justice O’Connor was in La-La Land somewhere when she wrote that the equal protection requirement alone would prevent legislatures from enacting sodomy statutes simply because facially neutral statutes would apply to everyone.\textsuperscript{51} This assertion was demonstrably false when she wrote it.\textsuperscript{52} The due process liberty/privacy argument that Justice Kennedy developed was essential to the outcome LGBT activists hoped for.

In the future, however, it seems clear that the types of issues LGBT activists will want to raise – especially the right to marriage for same-sex couples, and the right to military service – will lend themselves more to the equal protection argument than to the due process liberty/privacy argument. Indeed, although O’Connor may have been in La La Land about the likelihood of legislatures enacting facially neutral sodomy statutes, the equal protection analysis in her \textit{Lawrence} dissent is very useful. She articulates well in terms of existing doctrine the rationale for examining under the equal protection clause laws that target lesbians and gay men.

Following Halley, we should start our history of equal protection doctrine with \textit{United States v.} 

\textsuperscript{49} \textit{Lawrence}, 539 U.S. at 574-75.
\textsuperscript{50} \textit{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.
\textsuperscript{51} \textit{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, \textit{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 \textit{Lawrence} decision.
\textsuperscript{52} As Kennedy points out in his opinion, only nine states ever had same-sex-specific sodomy statutes. \textit{Lawrence}, 539 U.S. at 570.
Carolene Products. From that point forward, however, we can hardly do better than to follow the analysis that O’Connor laid out in her Lawrence concurrence.

A. Carolene Products

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. Thus, we have three distinct reasons why judges might strike down majoritarian legislation: 1) overt conflict with the terms of the Constitution, 2) interference with the ordinary functioning of the legislative process, and 3) targeting of minority groups.


54 304 U.S. 152 n.4 (citations omitted).
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. Not, however, if we recall James Madison’s analysis in Federalist #10.  

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 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.

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, or the law will reflect the prejudice of the culture. Here is the most obvious way of approaching equal protection analysis – judges should look for prejudice against minority groups in evaluating legislation for invidious intent or

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55 FED. NO. 10 (Madison).
56 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).
57 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).
effect. The problem, of course, is that one person’s prejudice is another person’s moral imperative. 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. 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 real access to the political process to defend their own interests.

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

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58 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.

59 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.”

60 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.”

61 Supra note Error! Bookmark not defined.
of such influence. 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, this particular minority – lesbians and gay men – needs no protection from the judiciary because they already have all the political power they deserve and then some.

**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. 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.

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62 *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 supposed disproportionate political power of LGB persons. 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 Gay and Lesbian Task Force has existed for 35 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.

63 *Romer*, 517 U.S. at 652. See infra note 70 and accompanying text.

64 Halley, 930-31.

Lesbians and gay men have won election to public office at every level of American
government, from local councils\textsuperscript{66} to the United States House of Representatives.\textsuperscript{67} They have
even formed an organization, the Gay and Lesbian Victory Fund, for the express purpose of
electing LGBT candidates.\textsuperscript{68} 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.\textsuperscript{69} Scalia is certainly
correct to suggest that LGBT persons have taken to politics with gusto. In his \textit{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.”\textsuperscript{70}

This is a highly and characteristically tendentious way of analyzing the situation. A more
reasonable approach would be to ask why lesbian, gay, and bisexual\textsuperscript{71} persons ever became the
target of such legislation to begin with. When the \textit{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.\textsuperscript{72} Who else has
this ever happened to? Scalia pointed to Mormons when he cited \textit{Davis v. Beason}, which
endorsed the requirement during the late nineteenth century that states include a renunciation of

\textsuperscript{66} \textit{See}, \textit{e.g.}, \textit{Randy Shilts, The Mayor of Castro Street: The Life & Times of Harvey Milk} (1982).
\textsuperscript{67} \texttt{http://tammybaldwin.house.gov/}, \texttt{http://www.house.gov/frank/}
\textsuperscript{68} \texttt{http://victoryfund.org/}
\textsuperscript{69} Gary M. Segura, \textit{Institutions Matter: Local Electoral Laws, Gay and Lesbian Representation, and Coalition
Building Across Minority Communities}, in \textit{Gays and Lesbians in the Democratic Process: Public Policy,
\textsuperscript{70} \textit{Romer}, 517 U.S. 652 (Scalia dissenting).
\textsuperscript{71} I omit transgender persons from this list only in the interest of historical accuracy – Amendment 2 made no
\textsuperscript{72} \textit{Romer}, 517 U.S. at 633.
polygamy in their constitutions in order to join the union.\textsuperscript{73} 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\textsuperscript{74} – hardly seems like a prescription for equal protection of the laws. 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 if they chose to pursue it.

The key point is this: 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?\textsuperscript{75} Given the history of anti-Semitism in the United States, the fact that no state ever did enact such a statute or amendment only proves Kennedy’s point in \textit{Romer} that Amendment 2 is unprecedented in our law.\textsuperscript{76}

According to the \textit{Jewish Virtual Library}, the Jewish population of Colorado is 1.7 percent of the state’s total population.\textsuperscript{77} 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? Anti-semitism is

\textsuperscript{73} \textit{Id.} at 648-51 (Scalia dissenting).

\textsuperscript{74} \textsc{Kenneth H. Winn, Exiles in a Land of Liberty: Mormons in America, 1830-1846} (1989); \textsc{Richard Edmond Bennett, Mormons at the Missouri, 1846-1852: “And Should We Die—”} (1987).

\textsuperscript{75} 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 Scalia refuse to strike such an amendment on rational basis grounds? Is it really only suspect class status that allows Jews to live free of patently discriminatory legislation? \textit{See} \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886); \textit{Korematsu v. U.S.}, 323 U.S. 214 (1944); \textit{McLaughlin v. Florida}, 379 U.S. 184 (1964); \textit{Church of Lukumi Babalu Aye v. City of Hialeah}, 508 U.S. 520 (1993); \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972).

\textsuperscript{76} \textit{Romer}, 517 U.S. 633.

\textsuperscript{77} \url{http://www.jewishvirtuallibrary.org/jsource/US-Israel/usjewpop.html}
at least as deeply engrained in American culture as heterosexual supremacy. 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? 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 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. 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.

White’s assertion here is somewhat at odds with the actual outcome of the case – the Court held that a heightened licensing requirement for a home for the retarded violated equal protection as lacking a rational relationship to a legitimate state interest, especially where similar

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group homes would not require such heightened licensing. That is, while White offered various examples of legislators acting to protect the mentally retarded, 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. 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.

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.

The Court held that they should not, expressing the concern, inter alia, that putting the mentally retarded in such a classification might actually make it harder to enact legislation benefiting them, as well as legislation harming them. In making his argument, White appealed to examples of legislation benefiting the mentally retarded, but he also noted that the mentally retarded typically exhibit characteristics that are genuinely relevant to their ability to function fully as citizens. This, of course, differentiates the analysis of the mentally retarded from the analysis of discrimination on the basis of sex in *Frontiero v. Richardson* that produced the notion.

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80 *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.”

81 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.

82 *Id.* at 442-447.

83 *Id.* 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.

84 *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.”
of a “quasi-suspect” classification to begin with.\textsuperscript{85} There the court stated point blank that sex is almost never relevant to evaluations of ability.\textsuperscript{86}

\textbf{D. Are LGBT Persons Necessarily Deficient Citizens?}

On the basis of \textit{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? Whether the electoral majority was picking on lesbian, gay, and bisexual persons with Amendment 2 was the debate in \textit{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.\textsuperscript{87} 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? And 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?\textsuperscript{88} On this view, 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

\textsuperscript{85} \textit{Id.} at 440-41, citing \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973) (plurality opinion). \textit{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), \textit{cited in Cleburne}, 473 U.S. at 441.

\textsuperscript{86} \textit{Frontiero}, 411 U.S. at 686-87.

\textsuperscript{87} \textit{See, e.g., Dobson, supra} note 16.

\textsuperscript{88} \textit{See supra}, note 10.
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.89

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.90 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 retarded – quite the opposite. In some sense, LGBT persons are the inverse of the mentally retarded. LGBT persons have a high degree of autonomous political participation, unlike the mentally retarded. On the other hand, it is clearly the case that LGBT persons have suffered a number of highly adverse legislative outcomes over the past twenty years, mostly with respect to legal recognition for same-sex marriages, but in other areas as well.91 These losses reflect nothing other than the prejudice of the majority – heterosexual supremacy.

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.92 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

89 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.
90 Lawrence, 539 U.S. at 579, 580 (O’Connor concurring).
91 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).
92 See sources at supra note 28.
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. The Court struck the regulation down. 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. 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.”

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. 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

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93 413 U.S. 528 (1973).
94 Id.
96 Id. at 433.
97 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.
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.98

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.99 The Legal Aid Society of New York filed an
amicus brief in Lalli v. Lalli,100 and the American Civil Liberties Union filed amicus briefs in
four cases involving non-marital children.101 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?).102 On the other hand, the issue has not come up since 1986,103 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 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

98 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.
102 346 F. Supp. 1226 (Md.).
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 tortfeasors 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?  

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.

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

104 Levy, 391 U.S. at 71 (citations omitted).

105 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.”

106 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
In Reed v. Campbell,\(^{107}\) 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, 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.\(^{108}\)

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.\(^{109}\)

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

\(^{108}\) Id. at 854-55.  
\(^{109}\) Lawrence, 539 U.S. at 586ff (Scalia dissenting).
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 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.”

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.

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The other important difference between non-marital children and LGBT persons, as the quotation above from *Reed v. Campbell* indicates,\(^{111}\), 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 legitimate concern for fraud. Non-marital children may in some instances operate under increased burdens of proof.\(^{112}\) One of the claims of this article is that no legislative classifications based on sexual orientation 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.

Thus, multiple avenues exist under equal protection 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. 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.

**II. 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, 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*,

\(^{111}\) *Supra* note 108.

\(^{112}\) See, e.g., *Lalli*, 439 U.S. 259; *Matthews*, 427 U.S. 495.
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.

The three recent cases involving First Amendment claims by LGBT activists are *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 113 *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), Inc.*, 114 and *Boy Scouts of America v. Dale*. 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. *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 about the willingness of the Court to defend the First Amendment rights of LGBT persons. 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. It involved a challenge by several law schools to a federal statute that threatened loss of certain classes of federal funds 115 by any institution where job recruiters from the United States Armed

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115 *Id.* at 54 n. 3.
Forces lacked access equal to all other job recruiters.\textsuperscript{116} 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.\textsuperscript{117} The Court certainly does not assert that Congress is free of constitutional constraints when it uses this power, but it quotes \textit{Rostker v. Goldberg} for the proposition that “judicial deference… is at its apogee’ when Congress legislates under its authority to raise and support armies.”\textsuperscript{118}

But the constitutional bar is even lower here, according to the Court, because Congress did not choose to impose the requirement directly.\textsuperscript{119} 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 requirement is constitutional on its own terms, then it cannot be unconstitutional as imposed via the spending power.\textsuperscript{120}

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.”\textsuperscript{121} 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.\textsuperscript{122} Therefore, the Solomon Amendment does not infringe

\begin{flushright}
\textsuperscript{116} Id. at 51, 52.
\textsuperscript{117} Id. at 58.
\textsuperscript{119} 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.”
\textsuperscript{120} Id. at 59-60.
\textsuperscript{121} Id. at 60.
\textsuperscript{122} 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.” \textit{See also} id. at 64-65, 66.
\end{flushright}
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. 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. In *Hurley*, a group that wished to march in Boston’s annual St. Patrick’s Day Parade as an openly lesbian, gay, and bisexual contingent challenged their exclusion under the Massachusetts statute that prohibits discrimination generally and includes sexual orientation as a protected category. The state courts all found for the plaintiffs, 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. 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.

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

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123 515 U.S. 557.
124 *Id.* at 561.
125 *Id.* at 562, 563.
126 *Id.* at 573-74.
between the tone and language of *Hurley* and the tone and language of the immediately preceding Court opinion on lesbian/gay civil rights, *Bowers*.\(^\text{127}\) Whereas the *Bowers* court was openly dismissive, virtually contemptuous – infamously dismissing the claim to a right to commit sodomy as “facetious”\(^\text{128}\) – 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*\(^\text{129}\) 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 Kennedy). 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.\(^\text{130}\) 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,\(^\text{131}\) but only after a studiously superficial review of the record. As both the New Jersey Supreme Court\(^\text{132}\) and Justice Souter in dissent\(^\text{133}\) 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

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\(^\text{128}\) 478 U.S. 194.


\(^\text{130}\) *Id.* at 646.

\(^\text{131}\) *Id.* at 643.

\(^\text{132}\) *Dale v. BSA*, 734 A.2d 1196 1203, 1222-28 (N.J. 1999).

\(^\text{133}\) 664-65 (Stevens)
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.

So from this perspective, 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\(^{134}\) 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 Appeals upheld the postmaster’s decision.\(^{135}\) The Supreme Court reversed the Ninth Circuit.\(^{136}\)

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.


\(^{135}\) 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.

United States. 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. 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. 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. To the Founders, that is, guaranteeing free speech and prohibiting obscenity were perfectly consistent actions.

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.” The Court stated the coverage of the First Amendment in very broad terms: “All ideas having even the slightest redeeming social

\[138\] Roth, 355 U.S. at 494.
\[139\] 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).
\[140\] 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.
\[141\] Id. at 484.
importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties…”\textsuperscript{142}

Second, “sex and obscenity are not synonymous.”\textsuperscript{143} The Court stated in vigorous terms the point that, however much the Founders may have wished to prevent blasphemy, 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 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.”\textsuperscript{144} It’s still all about the sex, but the\textit{ Roth} court could recognize that sex can be political. Had the\textit{ One, Inc.} Court adopted the position of at least some conservatives – that lesbian/gay issues are not properly political issues\textsuperscript{145} – presumably they would have upheld the Ninth Circuit, with what consequences for the emerging lesbian/gay rights movement one shudders to consider.

This brings us back to Justice Scalia and the famed “sweet mystery of life” passage.\textsuperscript{146} What more politically consequential act could there be than to say to an entire group of persons that they may not organize themselves politically because the issue they would organize around is not properly political? 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 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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 487.
\item \textsuperscript{144} Id. at 488.
\item \textsuperscript{145} See infra, note 148.
\item \textsuperscript{146} Supra note 40.
\end{enumerate}
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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 lesbians and gay men. 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.

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.” 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.” If one opposes marriage rights for an
entire class of persons, and one 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 alone should make all legal and
policy choices involving sexual orientation as a classification highly suspect.

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

147 Romer, 517 U.S. at 646 (Scalia dissenting).
148 Brief Amicus Curiae of the Center for the Original Intent of the Constitution in Support of Respondent at *23,
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.

### III. 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, 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 sub-titled 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. It required work. And 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.

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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 trouble. 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? 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.

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 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.

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. 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. Halley quotes *West Virginia 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.”\(^{150}\) 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.

Or take the case of Jose Serrano, the first openly gay person to run for office in San Francisco.\(^{151}\) 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.

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 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

\(^{150}\) 319 U.S. 624, 642 (1943), quoted in Halley at 972.

Amendment rights had taken place? 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? This is not far different from what happened to James Dale of BSA v. Dale fame.

What is the rational basis for prohibiting masturbation? 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. Thanks to substantial political activism by lesbians and gay men and their supporters, the stigma associated with lesbian/gay identity has decreased significantly in recent years.

But, as we have seen, an important component of effective activism by lesbians and gay men has been defense by the Court of their First Amendment rights.

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153 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.

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. 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 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.

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

155 See, e.g., Henry Yu, Tiger Woods is Not 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.
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.