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Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest- Convergence Dilemma

Anthony Michael Kreis†

Introduction

In 1986, in the midst of a rapidly spreading HIV/AIDS epidemic,¹ the United States Supreme Court narrowly held there was no constitutional right to engage in same-sex sodomy.² A mere ten years later, the Court made a sharp departure from its earlier posture towards sexual minorities.³ In *Romer v. Evans*,⁴ the Court struck down a state constitutional amendment that established a wholesale prohibition⁵ of pro-sexual minority rights

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1. See CDC, *HIV AND AIDS—UNITED STATES, 1981–2000*, 50 MORBIDITY & MORTALITY WKLY. REP. 430 (2001), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5021a2.htm> (“AIDS incidence increased rapidly through the 1980s, peaked in the early 1990s, and then declined.”); see also, e.g., Philip M. Boffey, *Surgeon General Urges Frank Talk to Young on AIDS*, N.Y. TIMES, Oct. 23, 1986, at A24 (describing the federal government’s first major report on stopping the spread of HIV/AIDS and projections of future transmission rates).

2. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (5-4 decision) (finding no federal constitutional right to same-sex sexual relations), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

3. “Sexual minorities” includes all non-heterosexual persons and is conterminal with the term “LGBT” which includes lesbian, gay, bisexual, and transgender persons.

4. 517 U.S. 620 (1996).

5. The challenged Colorado state constitutional provision, commonly referred to as Amendment 2, reads:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school

legislation on the state and local level.⁶ The *Romer* Court effectively ruled that a class of citizens distinguishable by their constitutionally unprotected and often criminalized⁷ conduct had a right to be free of invidious government discrimination.⁸ For lawyers, whose very entrance into the profession relies on a test of logic,⁹ such inconsistencies are surely confounding.

There were also significant favorable shifts in demeanor towards sexual minorities on the individual level. Justice O'Connor voted with the *Bowers* majority that the criminalization of same-sex sexual conduct met constitutional muster,¹⁰ yet voted

districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b, *invalidated by Romer v. Evans*, 517 U.S. 620 (1996).

6. *Romer*, 517 U.S. at 632 (“[Amendment 2] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

7. At the time *Romer* was decided in 1996, same-sex sodomy was still proscribed in twenty-three states including: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia. See WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA 1861-2003*, at 388–407 (2008).

8. Justice Scalia in his dissent noted this logical inconsistency in *Romer*. “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” *Romer*, 517 U.S. at 642 (Scalia, J., dissenting). The Court of Appeals for the District of Columbia also posited in a 1987 rejection of a sexual orientation discrimination claim that:

If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). Members of the academy have also pointed out the incongruence of *Bowers* and *Romer*. For example, one scholar argues:

According to *Bowers*, gays and lesbians can rightly be stigmatized as criminals. But of course many provisions, thought to be constitutional, disadvantage criminals in the political process. Take, for example, the laws on the books in many states that remove the vote from convicted felons. If gays are or can legally be made criminals, can't they be treated unequally in the political process?

MARTHA NUSSBAUM, *FROM DISGUST TO HUMANITY* 105 (2010).

9. See Law School Admissions Council, *About the LSAT*, <http://www.lsac.org/JD/LSAT/about-the-LSAT.asp> (last visited Sept. 24, 2012) (noting the logical skills testing component of the Law School Admissions Test).

10. *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986).

with the *Romer* majority.¹¹ O'Connor again somewhat dodged her 1986 vote in *Lawrence v. Texas*.¹² There, she opined that while there is no fundamental constitutional right to sodomy, a law banning only same-sex sodomy could not survive Equal Protection scrutiny.¹³ Justice Lewis Powell, uneasy with his majority vote in *Bowers* from the very beginning,¹⁴ publicly voiced regret over it in 1990.¹⁵

The pro-gay rights trajectory of the 1990s was not limited to federal courts. Between 1986 and 1998, numerous state courts invalidated anti-sodomy laws under their respective constitutions and rejected *Bowers*. In 1992, the Kentucky Supreme Court was the first court of last resort to invalidate a state sodomy statute under state constitutional grounds after *Bowers*.¹⁶ Between 1992 and 2002, five additional state high courts followed Kentucky's lead.¹⁷ Notably, these courts declined to extend *Bowers* notwithstanding widespread public opposition to homosexuality.¹⁸

11. *Romer*, 517 U.S. at 621.

12. 539 U.S. 558, 579 (2003). There is some level of irony worth teasing out about *Lawrence*. One petitioner, John Geddes Lawrence, was White. His codefendant, Tyron Garner, was Black. Neither was affluent. Thus, there is some irony that interracial sexual partners of lesser means lead the path towards achieving a pivotal legal victory for a community that is often portrayed as more White and affluent than the general population. See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1502-03 (2004) (exploring the possible racial dynamics of the initial arrest and prosecution of Lawrence and Garner).

13. In her concurring opinion, Justice O'Connor wrote:

The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

Lawrence, 539 U.S. at 579 (O'Connor, J., concurring) (internal citations omitted). Unlike the Texas statute in *Lawrence*, the 1986 Georgia statute proscribed sodomy for heterosexual and homosexual couples, creating distinguishable issues in *Lawrence* not present in *Bowers*. See GA. CODE ANN. § 16-6-2(a)(1) (1986) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."), *invalidated by Lawrence v. Texas*, 539 U.S. 558 (2003).

14. JOHN CALVIN JEFFRIES, JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 522 (1994).

15. *Id.* at 530 (quoting Justice Powell on *Bowers*, "I think I probably made a mistake in that one.").

16. *Commonwealth v. Wasson*, 842 S.W.2d 487, 500 (Ky. 1992).

17. *Jegley v. Picado*, 80 S.W.3d 332, 353-54 (Ark. 2002); *Powell v. State*, 270 Ga. 327, 336 (1998); *Gay & Lesbian Advocates & Defenders v. Att'y Gen.*, 436 Mass. 132, 133 (2002); *Gryczan v. State*, 283 Mont. 433, 456 (1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996).

18. Gallup polls revealed that as late as 1998, less than forty percent of

The development of sexual minority rights jurisprudence on the state and federal level suggests that something significant helped usher in a watershed era of unparalleled success for sexual minority litigants in the early 1990s. While these post-*Bowers* decisions were undoubtedly correct in their outcome, there is little explanation in academic literature for the timing and manner in which they came about.¹⁹

There is, however, a framework of analysis originally proffered by the civil rights academic and critical race theory pioneer, Professor Derrick Bell, which can help explain the logical inconsistencies between *Bowers* and *Romer*. Professor Bell tackled the great unanswered question about the timing and substance of *Brown v. Board of Education*²⁰: what caused the Court in 1954 to profoundly depart from the “separate but equal” doctrine at a time when desegregation was widely opposed by the public?²¹

Professor Bell’s answer was a new theory of interest-convergence.²² Bell wrote:

Translated from judicial activity in racial cases both before and after *Brown*, this principle of “interest convergence” provides: The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for [B]lacks where the remedy sought threatens the superior societal status of middle and upper class [W]hites.²³

Using this theoretical framework, Professor Bell posited that the *Brown* decision was a reverberation of overriding national security and international relations concerns²⁴ and “not the Court’s sudden awakening of a long-dormant morality with respect to the subjugation of Blacks.”²⁵

respondents found homosexuality acceptable and substantially less than fifty percent supported legalization of same-sex conduct. See ESKRIDGE, *supra* note 7, at 267.

19. See *infra* text accompanying note 27.

20. 347 U.S. 483 (1954) (holding that racially segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment).

21. Southern states successfully fought federal efforts to integrate public schools until the adoption of the Civil Rights Act of 1964. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39–157 (2008) (analyzing the implementation of *Brown v. Board of Education* to desegregate public schools).

22. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

23. *Id.* at 523.

24. *Id.* at 524–25.

25. Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L.

Academics have applied the interest-convergence theory to a host of legal contexts. As Professor Justin Driver notes, “Among the extremely broad range of issues that scholars believe the interest-convergence theory can remedy or illuminate are the following: educational reform, pension reform, animal rights, domestic violence, concentrated poverty, and even the war on terror.”²⁶

Academics have not squarely applied the theory, however, to sexual orientation and the sexual minority rights movement.²⁷ Professor Kenji Yoshino applied a variant of the theory to sexual minorities’ rights in a 2008 *New York Times Magazine* piece where he argued, “If more straights could come to see marriage as a universal right that belongs to all human beings, that would, indeed, be a convergence of interest.”²⁸

A slightly modified framing of interest-convergence theory, if applied to the sexual minority rights movement, can illuminate the timing and motivation behind the movement’s earliest and continued successes: *sexual minorities’ Fourteenth Amendment challenges will be successful provided the LGBT community’s*

REV. 149, 162 (2011).

26. *Id.* at 155.

27. To date, Westlaw and Lexis searches indicate no journal articles that squarely address sexual orientation and interest-convergence theory. The only scholarship that glosses over a connection between rights for sexual minorities and interest-convergence theory is Professor Victor Romero’s single sentence suggesting that interest-convergence theory does not explain the expansion of all minority rights. Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275, 295 (2011) (“[T]here might be a different explanation for minorities’ gains apart from interest convergence that becomes apparent by examining the Court’s recent gay rights jurisprudence.”). This is not to suggest that quality, meaningful work published in highly regarded journals addressing the portrayal, or non-portrayal, of intersectional identities in political movements has not been done. Indeed, Professor Jane Schacter, Professor Darren Lenard Hutchinson, and others time and again illuminate the misguided and widely held perceptions of the sexual minority community that inform the underpinnings of this Article. However, none of them apply interest-convergence theory nor did those prior scholarly works have the benefit of recent pro-LGBT rights decisions. See, e.g., Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (published two years prior to *Romer v. Evans*); Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358 (2000) (published three years prior to *Lawrence v. Texas* and the first state same-sex marriage decision, *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)). Marc Fajer, too, hinted at problems arising from interest divergence. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633–51 (1992) (arguing, conversely, after *Bowers* but before *Romer* that social stereotypes might negatively impact the outcome of gay and lesbian equality litigation).

28. Kenji Yoshino, *Marriage Partners*, N.Y. TIMES MAG., June 1, 2008, at 26.

interests converge with White heterosexual elites' and the remedy sought does not threaten heteronormative superiority or heteronormative institutions.

This thesis can help explain why, despite widespread public opposition to homosexuality and rights for same-sex couples,²⁹ courts favored sexual minority plaintiffs in greater numbers throughout the mid-1990s and 2000s.

Racialized and socioeconomic arguments formulated by anti-gay rights groups in the early 1990s dominated the politics of the contemporary movement and established the framework in which gay rights opponents approached constitutional litigation.³⁰ Opponents' propagation of a falsehood that non-heterosexuals were White, wealthy, educated, urban elites seeking special, elitist rights, did not slow the movement. Rather, the racial and class-based attacks shifted the tenor of litigation. The focal point of judges veered away from the types of arguments prevalent in the 1970s and 1980s that linked homosexuality with predatory sexual deviancy, to arguments on "homosexual elitism."³¹

Once these arguments of White privilege were coupled with LGBT activists' efforts to seek equality through whitewashed and heteronormative institutions, e.g., marriage and the military,³² in the 1990s, the interests of the LGBT community and judicial decision makers further aligned. Thus, anti-gay forces ironically helped pave the way for judicial expansion³³ of sexual minority

29. See ESKRIDGE, *supra* note 7, at 267.

30. See COLORADO FOR FAMILY VALUES, EQUAL RIGHTS—NOT SPECIAL RIGHTS! (1992), reprinted in Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 191–99 (1997); Brief of the American Center for Law & Justice Family Life Project as Amicus Curiae in Support of Petitioners, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

31. *New York Times* columnist Frank Bruni recently illustrated this concept particularly well when he wrote, "It's funny (but, then again, not): in the past, homosexuals were denounced as sexual libertines who brazenly flouted society's norms. Now many of us are pleading to be yoked to those norms, only to be told by many Americans, including many political leaders, that that's not O.K. either." Frank Bruni, Op-Ed., *Value Our Families*, N.Y. TIMES, Feb. 21, 2012, at A25.

32. See *infra* Part I.E for broader discussion on the relationship between marriage, military service, and constructions of Whiteness; see also RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?* (2011) (describing the intersection of legal, social, and media constructions of marriage and decreasing marriage rates among the African-American community); GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 70–104 (2006) (addressing the intersection of White privilege and military service).

33. While the expansion is best evident in federal courts, the interest-convergence theory can help explain some of the pro-sexual minorities' rights decisions in state courts. While some may suggest state court decisions post-*Bowers* that were not favorable for sexual minorities undermine the theory, the theory is best applied to federal courts. This is because Article III judges, by virtue

rights and still, notably, without popular backing.³⁴

Litigation participants in the 1990s began to ask judges to view sexual minorities as a subset of a White, politically potent, elite class, who “looked” and “sounded” like them.³⁵ The result was a newly realized “shared” identity that rendered the interests of White elites, jurists, and sexual minorities virtually indistinguishable. The stage was now set for positive dispositions of LGBT constitutional claims. Shared identity alone, however, is not sufficient for litigation success. Judges will not authorize remedies against sexual minority inequality if those remedies undermine the established heteronormative power hierarchy.

State marriage equality legislation, changes in military policy, and non-domestic policy developments ensure that sexual minorities and elite interests will remain converged and that heteronormative power norms³⁶ are not substantially challenged. Success on constitutional claims will continue if judges perceive sexual minorities as not only innocuous to heterosexuals but as allies seeking to exercise their rightful *noblesse oblige* within whitewashed social institutions.³⁷

However, the fiction of gay privilege is not uniformly advantageous to the sexual minority community—which is demographically representative of the population as a whole.

of having life tenure during good behavior, are not subject to popular will to retain their position, thus theoretically eliminating public opinion as a confounding variable.

34. See ESKRIDGE, *supra* note 7, at 267.

35. See, e.g., Brief of the American Center for Law & Justice Family Life Project as Amicus Curiae, *supra* note 30, at 10–11.

36. By heteronormative power norms I intend to capture the interests and traditions of heterosexuals who historically hold positions of influence and power. These interests can be broadly grouped into three categories: religious, fraternal, and national security. Religious interests are closely tied to organized religion and religious leaders, fraternal interests relate to private organizational interests like the Boy Scouts, Free Masons, or the Knights of Columbus, and national security interests include military and diplomatic affairs—a public policy arena often associated with heterosexual males.

37. Literature suggests that there are internal elements of racial prejudice within the LGBT community. See, e.g., ROBERT STAPLES, *EXPLORING BLACK SEXUALITY* 62 (2006) (highlighting accusations of racial prejudice within the LGBT community social circles). Studies in sociological and psychological literature have hypothesized and/or demonstrated with empirical evidence that internalized racial prejudices exist among LGB Whites. See Margaret Rosario et al., *Ethnic/Racial Differences in the Coming-Out Process of Lesbian, Gay, and Bisexual Youths: A Comparison of Sexual Identity Development Over Time*, 10 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 215, 217–18 (2004), available at <http://digilib.bc.edu/reserves/py528/cher/py52820.pdf> (summarizing the hypothetical and empirical findings regarding internal racial prejudice among LGB Whites).

While interest-convergence theory predicts favorable outcomes for sexual minorities on constitutional claims, regardless of the level of scrutiny applied, the salient gay privilege myth is a roadblock to securing long-term discretionary statutory protections and benefits.

I. From Moral Panic to Unrestrained White Privilege

The years immediately preceding the *Bowers* and *Romer* decisions saw dramatically different rhetorical tactics utilized by opponents of sexual minority rights. The 1977 Save Our Children campaign and the 1992 battle over Amendment 2 in Colorado are highly informative case studies that illustrate the shift in gay rights rhetoric between the 1970s and 1990s.

A. *The Citrus Queen's Warpath*

The first large scale effort to repeal pro-sexual minority rights legislation came out of Dade County, Florida in 1977. Earlier that year, the Dade County Commission passed a county ordinance prohibiting employment discrimination on the basis of sexual orientation in county or municipal employment.³⁸ Florida Citrus Fruit spokeswoman, musician, and former Miss Oklahoma Anita Bryant waged a large-scale assault against the nondiscrimination provision.³⁹ Her campaign, strategically entitled Save Our Children, successfully led efforts against the ordinance. Bryant's campaign forced a referendum that repealed the ordinance by a two-to-one margin.⁴⁰

Professor William Eskridge recently summarized the Save Our Children Campaign's tactical approach:

The Save Our Children model for antigay politics combined (1) appeals to Scripture and religious authority demonizing homosexuality as an "abomination" in the eyes of God, with (2) baseless stereotypes about homosexual men as predatory, sex-crazed, diseased, and hedonistic, and (3) concerns that "special rights" for these immoral, selfish, and predatory people would invade constitutional rights and liberties of God-fearing people and their vulnerable children.⁴¹

38. GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 38 (2004).

39. William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 694 (2011); see also ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* (1977) (articulating Anita Bryant's perspective on the Save Our Children campaign).

40. Eskridge, *supra* note 39, at 695.

41. *Id.*

Anita Bryant's widespread media blitz included propaganda that labeled sexual minorities as predatory sexual deviants.⁴² Bryant suggested that sexual minorities actively sought to prey on children and lure them into a homosexual lifestyle. Bryant famously proclaimed, "This recruitment of our children is absolutely necessary for the survival and growth of homosexuality—for since homosexuals cannot reproduce, they *must* recruit, *must* freshen their ranks."⁴³ Save Our Children's message was communicated to large audiences in Southern Florida, including a full-page newspaper advertisement in the *Miami Herald* that dramatically headlined "There is No 'Human Right' to Corrupt Our Children," and described non-heterosexuals as pedophiles who preyed upon, molested, and targeted children.⁴⁴

The predatory-deviant rhetoric was not quarantined in Southern Florida. Readers of the *New York Times*,⁴⁵ *The Pittsburgh Post-Gazette*,⁴⁶ *The Star-News* of Wilmington, North Carolina,⁴⁷ and Oregon's *Eugene Register-Guard*,⁴⁸ for example, could see the Save Our Children Campaign line of argumentation grace the pages of their local newspapers. Conservative syndicated columnist William Safire used his platform to nationally diffuse the predatory portrayal of LGBT people endorsed by Bryant and her allies. "If avowed gays were to be teachers, the example they would set to children might induce some toward emulation of their abnormality, which society wants to discourage," he wrote.⁴⁹

Others involved in the anti-gay movement depicted non-heterosexuals as violent thugs. Jerry Falwell told a Miami crowd that non-heterosexuals are "a vile and vicious and vulgar gang. They'd kill you as quick as look at you."⁵⁰

Anita Bryant and Jerry Falwell used fear to drum up support

42. *There is No "Human Right" to Corrupt Our Children*, MIAMI HERALD, Mar. 20, 1977, at B-7.

43. BRYANT, *supra* note 39, at 146.

44. *There is No "Human Right" to Corrupt Our Children*, *supra* note 42, at B-7.

45. William Safire, Editorial, *Now Ease Up, Anita*, N.Y. TIMES, Jun. 9, 1977, at 21.

46. William Safire, Editorial, *Anita Can Ease Up on Battle*, PITT. POST-GAZETTE, Jun. 11, 1977, at 6.

47. William Safire, Editorial, *Okay, Now Ease Up, Anita*, STAR-NEWS, Jun. 12, 1977, at 2-D.

48. William Safire, Editorial, *Miami Gay Activists Asked for Too Much*, EUGENE REG.-GUARD, Jun. 9, 1977, at 19A.

49. *Id.*

50. FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY* 134 (2008).

for their cause. But anti-gay activists also tapped into the politics of disgust. Bryant once warned that to grant rights to non-heterosexuals would lead to protections for those who engage in bestiality. Bryant said, "If gays are granted rights, next we'll have to give rights to prostitutes and to people who sleep with St. Bernards."⁵¹

The Save Our Children Campaign expanded to repeal nondiscrimination ordinances outside Florida. The inflammatory rhetoric used in Florida did not cool elsewhere. Indeed, one religious leader who headed efforts to stave off a 1978 sexual orientation nondiscrimination law in St. Paul, Minnesota claimed, "Homosexuality is a murderous, horrendous, twisted act. It is a sin and a powerful, addictive lust."⁵² In Wichita, Kansas, activists distributed pamphlets suggesting that nondiscrimination laws for sexual minorities could turn communities into red light districts.⁵³

The campaigns of the late 1970s did not capitalize on depictions of non-heterosexuals as wealthy, well-educated, White elites. Though the "special rights" component of the anti-sexual minority political forces issue framing existed, those issues were mere subtext to the more dangerous depictions of sexual minorities as Biblically condemned, sexually predatory, social degenerates.⁵⁴ If the medical and scientific community evolved on sexual orientation by demonstrating homosexuality was not abnormal, immutable, or otherwise non-volitional, sexual minority rights opponents would need something more than anti-

51. NANCY J. KNAUER, *GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES* 28 (2011).

52. DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 327 (Touchstone ed., Simon & Schuster 2001) (1999).

53. *Voting Against Gay Rights*, TIME MAG., May 22, 1978, at 21 ("Our community could become a haven for practicing homosexuals, lesbians, prostitutes and pimps," said one pamphlet distributed by the Concerned Citizens for Community Standards of Wichita, Kans.). Save Our Children Campaign was also associated with the 1978 California gubernatorial candidate John Briggs's initiative in California, which, had it been adopted by voters, would have mandated the termination of openly gay public school teachers. See CHRIS BULL & JOHN GALLAGHER, *PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT* 18 (2001). This garnered national attention in part due to then-Governor Ronald Reagan's opposition. See Ronald Reagan, Editorial, *Two Ill-advised California Trends*, L.A. HERALD EXAM'R, Nov. 1, 1978, at A-19 (arguing that banning "advocacy" of the gay lifestyle was too vague).

54. See, e.g., Max Rafferty, *Joining the Bryant Brigade*, reprinted in BRYANT, *supra* note 39, at 141 (advocating in the *Los Angeles Times* for readers to join the "Bryant Brigade" because homosexuals are "spiritually isolated from the deepest instincts of homosapiens [sic]" and should, therefore, be banned from teaching in schools).

homophobic vitriol. Similarly, if the LGBT community abandoned its liberationist ambitions for assimilationist ones, anti-rights groups would need to counter with new strategies. As history would have it, both of these came to fruition.⁵⁵ Anita Bryant and the Save Our Children Campaign laid the groundwork for the next phase: the special rights argument. But the special rights argument alone was not sufficient—it was time to divide and conquer. And so the special rights argument was married with racial and class based identity politics.

B. *The Wooing of Justice Powell*

In June 1986, the Supreme Court handed down *Bowers*, finding no right to homosexual sodomy.⁵⁶ The very same year, notably, the virus that causes AIDS was first named HIV⁵⁷ and the Surgeon General issued a report on the HIV/AIDS epidemic for the first time.⁵⁸ Some scholars have argued that the HIV/AIDS crisis informed and influenced the majority's decision in *Bowers* even though the Court did not support its position with any public health justification.⁵⁹

These theories are not without merit. There is some extra-opinion support for the HIV/AIDS thesis. Justice O'Connor, for example, at the closure of oral argument hinted at the public health implications of anti-sodomy statutes like the challenged Georgia law, but did not make any specific mention of HIV or

55. In 1973, the American Psychological Association removed homosexuality from its status as a mental illness. BULL & GALLAGHER, *supra* note 53, at 28; see American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620, 633 (1975). That same year, the American Psychiatric Association wrote homosexuality out of its *Diagnostic and Statistical Manual*, and stated that homosexuality "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." American Psychiatric Association, *Position Statement on Homosexuality and Civil Rights* (1973), reprinted in 131 AM. J. PSYCHIATRY 497, 497 (1974).

56. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

57. See STEVEN EPSTEIN, *IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE* 77 (1996) ("In response to the confusing array of acronyms then in use—HTVL-III, LAV, ARV, HTLV-III/LAV, and others—the Human Retrovirus Subcommittee of the International Committee on the Taxonomy of Viruses . . . agreed on a new, compromise, name in 1986: HIV, human immunodeficiency virus.").

58. See Boffey, *supra* note 1, at A24.

59. See, e.g., William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L. J. 333, 338 n.25 (1992) ("Posner notes that AIDS was discussed in the [*Bowers*] briefs . . . and is widely believed to have had some influence on the Justices who formed the majority."); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 462–71 (2001) (summarizing the possible role the HIV/AIDS crisis may have played in the *Bowers* decision).

AIDS.⁶⁰ Briefs from the American Psychological Association and the Georgia Attorney General squarely addressed the relationship between anti-sodomy statutes, HIV/AIDS, and public health.⁶¹

It would be disingenuous to discount fully the possibility that the public health environment may have played a part of the *Bowers* Court's decision-making process. However, the private memoranda circulated among the members of the Court do not suggest that public health considerations played a critical role.⁶² The most important of these memoranda does, however, unabashedly toe the Anita Bryant deviancy line.

Bowers required the Supreme Court to answer whether a right to engage in same-sex relations was enshrined in the Constitution. Justice Powell was uneasy finding a substantive right to homosexual conduct.⁶³ He was equally hesitant to side with the eventual majority. Instead, Powell searched for an Eighth Amendment theory to invalidate Respondent Hardwick's sodomy conviction as cruel and unusual punishment.⁶⁴ He considered treating sexual orientation as a status akin to drug

60. See Spindelman, *supra* note 59, at 468–69.

61. See Brief of American Psychological Ass'n & American Public Health Ass'n as Amicus Curiae in Support of Respondents at 3, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) ("Based on scientific and clinical data, amici also respectfully submit that the Georgia statute does *not* further individual mental health or the public health. Indeed, in several ways, the statute actually disservices these goals."). Conversely, the brief submitted by the Attorney General of Georgia articulated a public health argument that made one mention of the AIDS epidemic couched within language articulating a predatory depiction of homosexuals. Brief of Michael J. Bowers for the Petitioners, at 37, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). The document stated:

[T]he legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases such as anorectal gonorrhea, Hepatitis A, Hepatitis B, enteric protozoal diseases, and Cytomegalovirus, and the concomitant effects of this relationship on the general public health and welfare.

The AIDS argument may not have been given undue emphasis because Georgia first proscribed sodomy many years before the epidemic in 1867. *Bowers*, 478 U.S. at 193 n.6 (citing GA. CODE §§ 4286, 4287, 4290 (1867)).

62. See The Burger Court Opinion Database: *Bowers v. Hardwick* [hereinafter *Bowers Memoranda*], http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1985/85-140.pdf (last visited Sep. 22, 2012) (making no reference to the health concerns).

63. Memorandum from Justice Lewis Powell to United States Supreme Court Justices, Apr. 8, 1986, *Bowers Memoranda*, *supra* note 62 ("I may say generally, that I also hesitate to create another substantive due process right.").

64. *Id.* ("At Conference last week, I expressed the view that in some cases it would violate the Eighth Amendment to imprison a person for a private act of homosexual sodomy. I continue to think that in such cases imprisonment would constitute cruel and unusual punishment.").

addiction.⁶⁵ Justice Powell laid out these concerns and his theoretical approaches to an evenly divided conference.⁶⁶

Chief Justice Burger sent Justice Powell a private memorandum to disabuse Justice Powell of his inclination to apply the Eighth Amendment and convince the Virginian to join the eventual majority opinion as its fifth vote.⁶⁷ Burger's private plea echoed the Save Our Children era rhetoric.

Burger first addressed Powell's flirtation with analyzing anti-sodomy statutes as status crimes that contravened the Eighth Amendment's prohibition of cruel and unusual punishment.⁶⁸ Burger wrote, "even if homosexuality is somehow conditioned, the decision to commit an act of sodomy is a choice, pure and simple—maybe not so pure!"⁶⁹

Burger then took Powell's status theory and threw sexual minorities into the same lot as degenerates and drug addicts, "We can only speculate as to why Hardwick did not make this particular argument that you advance [that there might be an Eighth Amendment violation]. Maybe Hardwick did not want to become subject to 'compulsory treatment programs' that are prescribed for 'helpless' people like narcotics addicts."⁷⁰

Burger told Powell that homosexuals seeking their own "form of sexual gratification" are not unlike "those in society who wish [to] seek gratification through incest, drug use, gambling, exhibitionism, prostitution, rape, and what not . . ." and should be treated like any other group claiming a right to engage in "prohibited acts."⁷¹

Burger, with subtlety, invoked the predatory language of the anti-LGBT rights campaigns of the late 1970s and early 1980s. Burger warned Powell that finding a right to engage in

65. *Id.* Justice Powell wanted to fashion his opinion in the mold of *Robinson v. California*, 370 U.S. 660 (1962), which held that imprisonment resulting from a misdemeanor conviction for one's status as drug addict violated the Eighth Amendment. While Justice Powell's proposed disposition of the case was substantially better for Hardwick, it nevertheless would have placed homosexuality among a class of societal degenerates. The Anita Bryant, social deviant paradigm of the LGBT community colored even the best of Justice Powell's intentions.

66. *Id.* ("[M]y vote was to affirm [on Eighth Amendment grounds] rather than the view of four other Justices that there was a violation of a fundamental right.")

67. Memorandum from Chief Justice Burger to Justice Powell, Apr. 3, 1986, *Bowers Memoranda*, *supra* note 62 (labeled as "Personal").

68. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

69. Memorandum from Chief Justice Burger to Justice Powell, Associate Justice of the Supreme Court, Apr. 3, 1986, *Bowers Memoranda*, *supra* note 62.

70. *Id.* (internal citations omitted).

71. *Id.*

homosexual sodomy “would forbid the states from adopting any sort of policy that would exclude homosexuals from class rooms [sic] or state-sponsored boys’ clubs and Boy Scout adult leadership.”⁷²

The Chief was successful. Justice Powell announced his decision to provide the final vote necessary to cement a majority five days after the Chief’s personal memorandum.⁷³ A mere four years later, Justice Powell backpedaled from his vote.⁷⁴ But, more importantly, after 1986 the Burger-Bryant logic would never gain traction with the Court again.

C. *Special Rights and the Colorado Constitution*

In 1992, a statewide effort to repeal a scattering of local nondiscrimination ordinances protecting sexual minorities in Denver, Aspen, Boulder, and elsewhere began in Colorado.⁷⁵ That effort sought to repeal those ordinances through a voter-approved constitutional amendment, known as Amendment 2, to the Colorado Constitution eliminating all protections for sexual orientation discrimination.⁷⁶

Colorado for Family Values and other supporters of Amendment 2’s strategy retained the deviant-oriented arguments of the Save Our Children era and heavily overlaid them with overt attempts to segregate sexual minorities as a rich, White phenomenon that unfairly sought “special rights.”⁷⁷ This depiction, or orientation abstraction,⁷⁸ took great strides to depict

72. *Id.* It is worth highlighting that Chief Justice Burger’s concerns were cabined to predatory homosexual males.

73. Justice Powell’s announcement was dated April 8, 1986. See Memorandum from Justice Powell, *supra* note 63. Chief Justice Burger’s personal memorandum to Justice Powell was dated April 3, 1986. See Memorandum from Chief Justice Burger, *supra* note 69.

74. See JEFFRIES, *supra* note 14, at 530 (talking about his *Bowers* vote, Powell conceded in a lecture in 1990 that he “probably made a mistake . . .”).

75. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

76. See COLO. CONST. art. II, § 30b, *invalidated by Romer v. Evans* 517 U.S. 620 (1996).

77. COLORADO FOR FAMILY VALUES, *supra* note 30, at 191.

78. Professor Jane S. Schacter first developed this concept. See Schacter, *supra* note 27, at 313. The concept, as employed in this Article, suggests that since not all sexual minorities are known to the general public or readily identifiable by physical characteristics, individuals who seek to frame sexual minorities as dominantly coming from a certain racial or social background can do so with relative ease by abstracting anecdotal vignettes and purporting that anecdotal evidence to be representative of the “defined” class. For sexual orientation, abstraction that depicts sexual minorities as wealthy and White may be easier to sell to the general public because vocal proponents of LGBT rights might likely be wealthier and Whiter than the population as a whole. This assumption stems from the theory

civil rights protections as a zero-sum game: rights for non-heterosexuals threatened the civil rights of all.⁷⁹ This was particularly true, pro-Amendment 2 surrogates argued, for the African-American community.

The zero-sum game theme was not only prominent in campaign literature,⁸⁰ but was also embedded within the text of Amendment 2. Amendment 2 banned sexual minorities from enjoying “quota preferences,”⁸¹ alluding to affirmative action programs that operated on strict racial quotas.⁸² Amendment 2’s quota preference prohibition reinforced the idea that if protections are afforded to sexual minorities it will *necessarily* come at the expense of some other group. Amendment supporters’ *quid pro quo* message was tailored for non-White audiences. If sexual minorities received quota benefits, according to anti-gay groups’

that those with greater wealth or who face greater societal discrimination due to plainly obvious physical attributes (i.e., race and sex) will face more barriers to openly expressing their sexual identity and assuming great personal risk by engaging in pro-LGBT political activities. See Darren Lenard Hutchinson, “*Claiming*” and “*Speaking*” *Who We Are*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 37 (Devon W. Carbado ed., 1999) (“[There is a] virulent homophobia and racism of American society and [a] heterosexist construction of racial identity Coming out *and* being Black, in a world of racial and sexual hierarchy requires both courage and privilege. Thus, it is not surprising that many Black gays and lesbians choose to remain silent about their sexuality”); Hutchinson, *supra* note 27, at 1384. Hutchinson notes:

The debilitating effects of intertwined poverty, racism, patriarchy, and heterosexism render the most vulnerable members of the gay and lesbian population less visible; gay and lesbian activism and legal advocacy are dominated by privileged individuals who have historically failed to comprehend, challenge, or feel concern for the subordination endured by less powerful gays and lesbians; and racism, sexism, and class insensitivity plague gay and lesbian theory and activism.

Id. Rosario et al., *supra* note 37, at 217–18 (explaining that a lack of participation among non-White males in gay organizations may be attributable to internal racial prejudices held by LGB Whites while also noting that the same lack of participation does not hold in lesbian social activities).

79. This approach would resurface with vigor in the early legal and legislative struggles to enact marriage equality. See *infra* Part III.

80. This tactic was perhaps employed because polling data suggested it might prove the most effective. See Amy L. Stone & Jane Ward, *From “Black People are Not a Homosexual Act” to “Gay is the New Black”: Mapping White Uses of Blackness in Modern Gay Rights Campaigns in the United States*, 17 *SOC. IDENTITIES* 605, 617 (2011) (“[P]olls repeatedly indicated that Black voters were more supportive of eliminating discrimination than providing equal rights for gays and lesbians.”).

81. COLO. CONST. art. II, *invalidated by* *Romer v. Evans* 517 U.S. 620 (1996). Similar language was presented twice to Oregon voters in 1992 and 1994. See Brief of Oregon Citizens Alliance, No Special Rights Committee and Stop Special Rights-Pac as Amicus Curiae in Support of Petitioners at 1, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

82. The United States Supreme Court expressly prohibited quota-based affirmative action programs in the public sector fourteen years earlier. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–17 (1978).

logic, White, wealthy individuals would benefit and displace non-Whites from attaining preference for educational admission or government contracts—one-for-one.

These types of arguments were plainly articulated in campaign literature. Colorado for Family Values published a tabloid blasting arguments supporting sexual orientation nondiscrimination laws. That publication, EQUAL RIGHTS—NOT SPECIAL RIGHTS!,⁸³ opened up with quotations from purported civil rights experts:

“If we include a group of people who are generally identified as a deviant group sexually, it would erode, and seriously damage the legitimate civil rights protections that have been gained by ethnic minorities.”⁸⁴

“I don’t see gay ghettos. I don’t see the gay homeless. I don’t see the gays being disadvantaged politically or economically. I don’t think that they are in the same class as the traditional minority groups, Hispanic or Indian women.”⁸⁵

“Making sexual preference a protected class does a disservice to all those people presently being discriminated against or mistreated, by diluting the significance of civil rights protection. I hate to see resources taken away from those who are truly in need of protection.”⁸⁶

Amendment 2 proponents supported their position by arguing that non-heterosexuals did not need nondiscrimination protections, unlike racial minorities, because there was no outward evidence of disadvantage.⁸⁷ They further suggested that non-heterosexuals’ calls for nondiscrimination protections were not just unnecessary, they were greedy and unprincipled.⁸⁸ The *Equal Rights—Not Special Rights* pamphlet, for example, told voters that members of the gay community had an “average income . . . more than \$30,000 over that of the average” American.⁸⁹ The campaign piece stated that gays were “over three times more likely to be college graduates,”⁹⁰ and, perhaps as a result, “[t]hree times as

83. See COLORADO FOR FAMILY VALUES, *supra* note 30.

84. *Id.* at 192 (quoting Ignacio Rodriguez, former chairman of the Colorado Civil Rights Commission).

85. *Id.* (quoting Tom Duran, a “[w]ell-known state civil rights professional”).

86. *Id.* (quoting John Franklin, former chairman of the Colorado Civil Rights Commission).

87. This was not limited to Colorado. Proponents of a similar measure in Oregon touted comparable logic, arguing for a constitutional amendment that would prohibit the state from any action that would “advise or teach children, students, employees that homosexuality equates legally or socially with race, other protected classifications.” Schacter, *supra* note 27, at 290 n.47.

88. COLORADO FOR FAMILY VALUES, *supra* note 30, at 192.

89. *Id.*

90. *Id.*

likely to hold professional or managerial positions.⁹¹ After detailing all the supposed economic advantages the gay community enjoyed, the literature concluded its sketch of gay individuals stating that they were “[f]our times as likely to be overseas travelers” than heterosexuals.⁹² A reasonable reader could easily surmise that since gay people enjoyed such a privileged, well-to-do lifestyle, their claims to need protections from discrimination were no more than crying wolf. These statistics could not be further from the truth—both in reality and pure republication accuracy.

First, Amendment 2 proponents distorted the data from a Simmons Market Research survey supposedly published in the *Wall Street Journal* in 1991 that the proponents purported to cite.⁹³ As it happens, no such survey appeared in the *Wall Street Journal* in 1991,⁹⁴ but the cited data resembled that of an oft-quoted study that actually reported that, of the gay and lesbian respondents, the average⁹⁵ income was \$36,000.⁹⁶ The median income for American men working non-seasonal, full-time jobs was \$27,342 per year.⁹⁷ The alleged heterosexual-homosexual income disparity was clearly not “more than \$30,000” as Colorado for Family Values told voters.⁹⁸ The “difference” was slightly over

91. *Id.*

92. *Id.*

93. COLORADO FOR FAMILY VALUES, *supra* note 30, at 192.

94. *Id.* The tabloid cites a July 18, 1991 article published in the *Wall Street Journal*. However, that article makes no mention of a marketing survey. The *Journal* had, however, cited two Simmons Market Research Bureau surveys in 1988 and 1989. See Dennis Kneale, *Folks at CBS Should Have Bet the Ranch on 'Lonesome Dove,'* WALL ST. J., Feb. 10, 1988, at B3; Ronald Alsop, *Advertisers Retreat From Making Direct Pitch to the Gay Market,* WALL ST. J., Jan. 26, 1988, at 39.

95. The use of average is also suspect here. The mean of LGBT respondents' income is much more likely to be manipulated because it is more susceptible to outlier data. The median is a more descriptive statistic to use. In calculating the mean, the sum of all values is divided by the number of values, which result may be skewed high if there are several “off-the-charts” data points, or low if there is a large cluster of data at the bottom of the list. In other words, if the data is not symmetrically distributed, the mean may be a misleading indicator. In such cases, the median is more descriptive because it is precisely the middle value of all values when sorted in ascending order; by definition, fifty percent of all values will be above the median and fifty percent will be below. The median is thus the more reliable “average” of asymmetrical data.

96. Kneale, *supra* note 94, at B3.

97. M.V. LEE BADGETT, MYTHS, MONEY, AND CHANGE 23 (2001).

98. COLORADO FOR FAMILY VALUES, *supra* note 30, at 192. It is possible that the tabloid misleadingly compared average household income to per-capita income in order to get to the \$30,000 figure. The average gay respondent's household income, according to the 1988 survey, was \$47,800 compared to the 1989 surveys reported per-capita income of \$12,287 for the general population.

\$8,000 per year.⁹⁹

Even if these numbers were accurately republished, problematic data collection methods caution against use of the findings. The cited survey only solicited responses from readers of LGBT-oriented newspapers and magazines. This almost ensures a skewed sample that is not truly random and unlikely to represent the population as a whole. As Professor M.V. Lee Badgett notes, "It is well known that readers of magazines and newspapers tend to be better educated and have higher incomes and are, therefore, not representative of the larger society."¹⁰⁰

Additionally there is a problem of self-identification. It is difficult to imagine someone who wishes to conceal his or her sexual orientation or who has not fully accepted his or her sexual orientation subscribing to LGBT publications in 1991. Self-identified sexual minorities are merely a subset of the sexual minority population—and readers of LGBT periodicals are a subset of that sub-population. While to offer these statistics as either representative of the population or as incontrovertible truth was disingenuous, this survey and others like it were routinely used to support the illusion of gay wealth.¹⁰¹

But this was only the beginning—the pamphlet brazenly employed racialized rhetoric. Another section of the pamphlet headlined, "Sound like an oppressed minority to you? Judge for yourself—Take a look at the hardships Black Americans have had to face. Then see if homosexuals compare. Special rights for homosexuals just isn't fair—especially to disadvantaged minorities in Colorado."¹⁰²

The pamphlet included a chart under the headline with six categories relating to voting rights, *de jure* segregation, *de facto* segregation (both past and present), and economic detriment resulting from systematic discrimination.¹⁰³ In the horizontal columns next to it, there were two categories: "Homosexuals" and "Black Americans."¹⁰⁴ The pamphlet assessed each category with a "yes" or a "no," indicating that non-heterosexuals had suffered no such impediments while African Americans had in every

99. This is the difference between the purported mean income of the LGBT community and the reported median income for American males during the same time period. *Id.*

100. BADGETT, *supra* note 97, at 25.

101. *Id.*

102. COLORADO FOR FAMILY VALUES, *supra* note 30, at 193.

103. *Id.*

104. *Id.*

enumerated category.¹⁰⁵ Though substantively untrue, the most notable aspect of the chart is the message it does not expressly convey—that sexual minorities and African Americans are mutually exclusive groups. The racial-sexual orientation binary, taken together with prior argumentation related to allegations of gay wealth, intimated that White privilege was a major impetus behind the push for sexual orientation nondiscrimination provisions.¹⁰⁶

The folding of sexual minorities into a socioeconomic and racially homogenous class continued well into the conclusion of the document: “Historically, anti-discrimination laws were written for specially protected classes—and nobody else. Caucasian males under forty aren’t protected by those laws. Millionaires born that way aren’t protected by those laws.”¹⁰⁷ The last message left to Colorado voters was that gays, millionaires, and youth are all cut of the same cloth. Whether by virtue of the drafters’ deliberate intent or otherwise, the language presented to Colorado voters contained the unmistakable message that sexual minority rights was merely code for White privilege.

D. *The Deepening Myth*

An increasingly noticeable divide between some members of the African-American community and the LGBT community began to publicly deepen through the 1990s—a time Professor Ladelle McWhorter calls “a decade of growing animosity and distrust.”¹⁰⁸ Notable African-American ministers and activists, like Alveda King, the niece of Martin Luther King, Jr., spoke out against homosexuality and sexual minority rights in the late 1990s.¹⁰⁹ However, White evangelical leaders seeking to exploit racial divisions exacerbated the ever more publicly noticeable divisions, real or imagined.

Some, like the White Cleveland civil rights era leader Rev. Dennis Kuby,¹¹⁰ planted more seeds of division in print. Kuby wrote in the *New York Times*, “Gays are not subject to water hoses or police dogs, denied access to lunch counters or prevented from

105. *Id.*

106. *Id.*

107. COLORADO FOR FAMILY VALUES, *supra* note 30, at 197.

108. LADELLE MCWHORTER, RACISM AND SEXUAL OPPRESSION IN ANGLO-AMERICA: A GENEALOGY 23 (2009).

109. *Id.* at 24–25.

110. See *Words of the Week*, JET MAG., Oct. 6, 1966, at 30 (providing a brief profile of Rev. Kuby).

voting. Most gays are perceived as well educated, socially mobile and financially comfortable."¹¹¹

Others, like the Traditional Values Coalition (TVC), took a visual route. In 1993, the TVC widely distributed¹¹² a video production entitled *Gay Rights/Special Rights*.¹¹³ The video highlighted interviews from leading conservatives including former Mississippi Senator Trent Lott, Grover Norquist, Ralph Reed, and Bill Bennett.¹¹⁴

That film, like the pro-Amendment 2 campaign literature, framed the question of sexual minority rights with racialized discourse. It began by pairing film footage of Martin Luther King, Jr.'s "I Have a Dream" speech and participants in the 1963 March on Washington for Jobs and Freedom with the 1993 pro-sexual minority rights march.¹¹⁵ The film drew a stark contrast between the throngs of Black protesters in 1963 juxtaposed to the overwhelmingly White 1993 crowds. It then moved into a vetting of the differences between race and sexual orientation, leading one woman, identified as Cheryl Coleman, to conclude that sexual orientation protections "would completely neutralize the Civil Rights Act of 1964."¹¹⁶

The TVC's faux documentary, leaning on the Anita Bryant-like predatory argumentation, suggested a major policy aim of the sexual minority community was to repeal all age of consent laws.¹¹⁷ As the film narrator delves into the claim that the sexual minority community sought repeal of age of consent laws, footage shows two very young African-American boys, presumably at the 1993 Washington D.C. march, waving while draped in rainbow flags.¹¹⁸ While the film's producers utilized minutes of reel showing overwhelmingly White crowds and White "spokespersons"¹¹⁹ for the

111. Dennis G. Kuby, *Different Set of Rights*, N.Y. TIMES, Apr. 25, 1993, at 16.

112. Bettina Boxall, *Gays, Foes Seek Spin that Sells*, L.A. TIMES, Oct. 12, 1993, at A1 (discussing the national distribution of the "Gay Rights/Special Rights" videotapes); Farai Chideya, *How the Right Stirs Black Homophobia*, NEWSWEEK, Oct. 18, 1993, at 73 (noting a purported 50,000 copies of the video were sold nationwide).

113. GAY RIGHTS/SPECIAL RIGHTS: INSIDE THE HOMOSEXUAL AGENDA (Jeremiah Films 1993), available at <http://video.google.com/videoplay?docid=7664929225320091404>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. The film shows interviews with supposed participants in the 1993 Washington march as well as other activists who held an official capacity with an organized group—all were White. GAY RIGHTS/SPECIAL RIGHTS, *supra* note 113.

sexual minority community, they deliberately chose to focus on two, non-White children as they linked LGBT people to pedophilia. The tactics of the Save Our Children Campaign now merged with racialized rhetoric successfully used the year prior in Colorado.

This trend continued well into the late 1990s and early 2000s. A study by professors Amy Stone and Jane Ward analyzed 452 political messages from 53 different sexual minority-related initiatives or referenda between 1977 and 2000.¹²⁰ They concluded that as the LGBT Rights Movement progressed, anti-rights groups' dichotomous treatment of homosexuality and Blackness as mutually exclusive traits increased.¹²¹ Stone and Ward's research suggests that the racialized language increased because it had more currency with the electorate in the late 1990s and early 2000s. The depictions garnered more traction with LGBT rights-opponents because LGBT activists "validated" the depictions by pursuing equality within establishment institutions. They conclude:

[T]he more radical, countercultural, and coalition-leaning gay liberation movement of the 1970s (as well as the AIDS devastated and outrage-driven queer movement of the 1980s and 1990s) worked *against* divisive comparisons to Blackness by asserting that solidarity across difference and freedom from all forms of violent oppression were primary movement goals. Admittedly, such efforts were far from intersectional, in that they still regarded queerness and Blackness as separate and distinct subjectivities. However, the gay and lesbian movement of the twenty-first century has moved even further away from the work of intersectional social justice; its outrage is now aimed at those who would deny us the entitlements of normal, hardworking, upwardly-mobile—and White—citizens: family, privacy, patriotism, respectability.¹²²

Stone and Ward's conclusion argues that, in part, LGBT rights opponents were able to capitalize on a racial and class divide-and-conquer scheme because the sexual minority community moved away from intersectional messages of liberation towards whitewashed demands for equality vis-à-vis assimilation.

E. Not Liberation, but Assimilation

The sexual minority community's activism efforts prior to the late 1980s were more liberationist in their flavor than pro-assimilation.¹²³ The rhetoric surrounding those campaigns

120. Stone & Ward, *supra* note 80, at 609.

121. *Id.* at 621.

122. *Id.*

123. *Id.* at 619.

reflected that, when the LGBT community fought for liberation, the response rested on efforts to suppress them and stave off a burgeoning predatory class. When that class sought and continues to seek assimilation, the response takes a different tenor: special rights.

The early 1990s saw new prominent efforts to secure equality for sexual minorities through the institution of marriage.¹²⁴ The underlying impetus behind this movement may have its roots in 1989 when the State Bar Association of California publicly endorsed same-sex marriages.¹²⁵ As reported in *The New York Times*, the same-sex marriage movement between the 1970s and 1980s was “all but dormant.”¹²⁶ The article posited that “the debate [was] revived . . . [because of] the AIDS epidemic, which [had] brought questions of inheritance and death benefits to many people’s minds.”¹²⁷ A few short years later in 1993, Hawaii courts began an inquiry into the constitutionality of Hawaii’s denial of marriage rights to same-sex couples.¹²⁸ Other cases would follow in the late 1990s in Alaska¹²⁹ and Vermont.¹³⁰

However, it was the Hawaii state cases that prompted a national backlash. In 1996, Congress was fearful Hawaii’s courts would mandate marriage equality.¹³¹ If Hawaii’s Supreme Court found a right to same-sex marriage, a flood of same-sex couples could travel to Hawaii, marry, and return to the lower forty-eight

124. Prior attempts to secure marriage equality through the courts were unsuccessful. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (“No connection between family, marriage, or procreation *on the one hand* and homosexual activity *on the other* has been demonstrated, either by the Court of Appeals or by respondent.”) (emphasis added); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (striking down a constitutional claim to same-sex marriage); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (rejecting claims of a state statutory and federal constitutional right to same-sex marriage), *cert. denied*, 409 U.S. 810 (1972) (dismissing for want of a substantial federal question).

125. Phillip S. Gustis, *Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. TIMES, Nov. 5, 1989, at E24.

126. *Id.*

127. *Id.*

128. *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993), *reconsideration and clarification granted in part*, 852 P.2d 74 (Haw. 1993).

129. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at 6 (Alaska Super. Ct. Feb. 27, 1998) (finding a fundamental right to same-sex marriage).

130. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (mandating equal civil benefits akin to marriage for same-sex couples).

131. H.R. REP. NO. 104-664, at 2 (1996) (“[The Defense of Marriage Act] is a response to a very particular development in the State of Hawaii. . . . The prospect of permitting homosexual couples to “marry” in Hawaii threatens to have very real consequences both on federal law and on the laws (especially marriage laws) of the various States.”).

and Alaska seeking marital reciprocity in their home state.¹³² To hedge against that scenario, Congress passed the Defense of Marriage Act.¹³³ The issue of marriage equality took center stage the same year *Romer* was decided and seven years before *Lawrence*.

Marriage is a whitewashed, upper income institution in its social construction¹³⁴ and, for some feminist scholars, marriage represents traditional forms of patriarchal repression.¹³⁵ The racial construction of marriage is possibly attributable, in part, to rapidly declining rates of married Black households and dominant cultural portrayals of single Black mothers.¹³⁶ It may be due to the way in which government administers marital benefits. Black families are disproportionately disadvantaged with respect to marital tax policy.¹³⁷ Some scholars convincingly argue that these perceptions of marriage are tied to a shift in marital culture that holds marriage as an institution for higher income earners.¹³⁸ Professor Ralph Richard Banks argues the shift created a “paradox of marriage in the United States . . . [in] that its cultural prominence persists even as it has shed many of the social functions that traditionally prompted people to marry.”¹³⁹ Thus, while marriage was at one time a means to an end of financial and social stability, today financial and social stability are prerequisites to marriage.¹⁴⁰ A newly entered marriage, as it is contemporarily understood, is a mark of already cemented achievement and a means to the end of fulfilling the desire for a loving relationship.¹⁴¹ If Professor Banks is correct in his analysis of marriage in the modern United States, LGBT rights advocates play into the White privilege stereotype by grounding the modern LGBT rights movement in marriage equality.

132. *Id.*

133. Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (codified as amended in sections of 1 U.S.C. and 28 U.S.C.) [hereinafter DOMA].

134. See BANKS, *supra* note 32, at 27; NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 203 (2000) (“Only 56 percent of all adults were currently married in the later 1990s . . . [T]his general percentage, skewed by the majority [W]hite population, masked the markedly lower rate of current marriage among African American adults (about 40 percent).”).

135. See CHAUNCEY, *supra* note 38, at 93–94 (describing feminist perspectives on marriage equality advocacy).

136. BANKS, *supra* note 32, at 6–8.

137. Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1501–02 (1997).

138. BANKS, *supra* note 32, at 27.

139. *Id.* at 25.

140. *Id.*

141. *Id.*

Assimilation efforts were not reserved for civil society alone. Renewed efforts to permit open military service began in the early 1990s. In 1993, President Bill Clinton and LGBT rights advocates pushed to end the military's prohibition of homosexual service.¹⁴² After a decade in which nearly 17,000 men and women in uniform were dishonorably discharged for their sexual orientation at a cost of \$500 million to support investigations, the "Don't Ask, Don't Tell" policy was a compromise between advocates for the status quo and those for open service.¹⁴³ The policy permitted gays, lesbians, and bisexuals to serve in the armed forces provided they did not disclose their sexual orientation.¹⁴⁴ Though a far cry from equality, the efforts, nevertheless, brought sexual minorities into the establishment fold.¹⁴⁵ Rather than taking an anti-establishment posture, LGBT rights advocates sought equality through avenues of patriotism.

The open military service agenda may seem to lack the racial and class elements present on the marriage front. However, the initial efforts to repeal the homosexual ban came off the heels of heightened glorification of pre-Vietnam, whitewashed military service. Professor George Lipsitz argues that prominent depictions of military service that repeatedly resonated throughout the "patriotic renewal" of the 1980s were a "conflation of whiteness, masculinity, patriarchy, and heterosexuality"¹⁴⁶ Indeed, government and military officials employed the imagery of World War II to embolden feelings of patriotism while overlooking a stunning defeat in Vietnam. Professor Lipsitz synthesized the whitewashing of military service in the 1980s:

World War II served as a suitable vehicle for patriotic revival in the post-Vietnam era because of the contrasts between it and the Vietnam War. The United States and its allies secured a clear victory over the Axis powers in the Second World War, the postwar era brought unprecedented prosperity, and the unity forged in the face of wartime emergencies did much to define the nationalism and patriotism of the Cold War era. Yet the deployment of memories about World War II as a "good war" also rested on nostalgia for a preintegration America, when segregation in the military meant that most war heroes were [W]hite, while de jure and de facto segregation on the

142. Eric Schmitt, *Military Cites Wide Range of Reasons for Its Gay Ban*, N.Y. TIMES, Jan. 27, 1993, at A1.

143. Paul F. Horvitz, *New U.S. Military Policy Tolerates Homosexuals: 'Don't Ask, Don't Tell, Don't Pursue' Is White House's Compromise Solution*, INT'L HERALD TRIB., July 20, 1993, at 1.

144. *Id.*

145. *Id.*

146. LIPSITZ, *supra* note 32, at 75.

home front channeled the fruits and benefits of victory disproportionately to [W]hite citizens.¹⁴⁷

Products of popular culture during the 1990s also whitewashed the military service of the “greatest generation.” The 1998 blockbuster film *Saving Private Ryan*, for example, did not depict a single Black soldier throughout the Normandy invasion, contrary to history.¹⁴⁸ Similarly, books like Tom Brokaw’s *The Greatest Generation*¹⁴⁹ received criticism for lauding the efforts of that Second World War generation that achieved undeniably heroic military success, but did so within segregated military units.¹⁵⁰ If one can fairly assert that these reflections of military service in the 1980s and 1990s significantly color Americans’ perceptions of military service, then there may be a legitimate claim that popular constructions of honorable military service are culturally whitewashed.

Even the quest for open service subtly suggested a connection between the LGBT community and affluence. One example is a 2007 *New York Times* op-ed arguing for the repeal of Don’t Ask, Don’t Tell. The piece emphasizes discharges of outed highly educated military personnel holding “critical jobs in intelligence, medicine and counterterrorism.”¹⁵¹ The op-ed, entitled “Don’t Ask, Don’t Translate,” highlights the more than fifty-eight Arabic linguists discharged along with 11,000 other military men and women under the policy.¹⁵² Later media reports echoed this emphasis.¹⁵³

The racial and class aspects of military service notwithstanding, the military is undoubtedly an establishment institution like marriage. Marriage and the military are

147. *Id.* at 76.

148. SAVING PRIVATE RYAN (Dreamworks SKG 1998); NAT’L ARCHIVES & REC. ADMIN., ANNUAL REPORT 14 (1999), <http://www.archives.gov/about/plans-reports/performance-accountability/annual/1999/1999-annual-report.pdf> (“Nearly 1.2 million African Americans served in World War II, yet for the tens of millions of moviegoers watching the epic D-day battle in *Saving Private Ryan*, not a single African American soldier is presented.”).

149. TOM BROKAW, *THE GREATEST GENERATION* xix-xx (1998).

150. *See, e.g.*, Paul Duke, *The Greatest Generation?*, 78 VA. Q. REV. 19, 22 (2002) (“[Respect for veterans] does not justify a promotion [of the “greatest” generation] to sainthood. The historical record compels honest and candid appraisal without revisionist sugarcoating.”).

151. Stephen Benjamin, Op-Ed., *Don’t Ask, Don’t Translate*, N.Y. TIMES, June 8, 2007, at A29.

152. *Id.*

153. *See, e.g.*, Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop “Don’t Ask, Don’t Tell,”* N.Y. TIMES, Feb. 1, 2010, at A1 (“[Don’t Ask, Don’t Tell] has led to the discharge of more than 13,000 gay men and lesbians, including desperately needed Arabic translators.”).

foundational building blocks in which American culture is grounded. By seeking acceptance through marriage and military service, sexual minorities communicated to the public and to elites that they sought assimilation into mainstream, patriarchal institutions that would not undermine traditional heteronormative power structures but rather reinforce them.

II. Convergence Realized

A. *The Road Through Romer*

Ten years after the Supreme Court rejected the idea that there was a constitutional right to engage in homosexual conduct in *Bowers*,¹⁵⁴ the Court decided *Romer*.¹⁵⁵ As previously argued, the contours of sexual minority politics mutated between the 1970s and the 1990s. The shift was not cabined in the political realm. To the contrary, the underpinnings of sexual orientation rights legal argumentation and doctrinal developments mirrored the prevailing LGBT rights rhetoric of the day.

Intimations of homosexual wealth were replete in the briefs submitted supporting Amendment 2 in *Romer*. The briefs expressly depicted the LGBT community as wealthy, powerful, and educated while subtly drawing a racial dichotomy between the LGBT and African-American communities.

The State of Colorado's brief pointed to the electoral results of Amendment 2 as evidence of LGBT power, arguing, "A group with substantial political power . . . exercised that power in a general election and attracted nearly 47% of the State's voters to its position."¹⁵⁶ An amicus brief submitted by seven states' attorneys general described the LGBT community as a "special interest group."¹⁵⁷ That brief paralleled the dissent from the appealed Colorado Supreme Court decision in which the dissenting justice described the sexual minority community as a "relatively

154. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

155. *Romer v. Evans*, 517 U.S. 620 (1996).

156. Reply Brief of Petitioners at 9, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (citation omitted). This argument was also successful in a 1990 case in the Court of Appeals for the Ninth Circuit regarding sexual minorities in the military. See also *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) ("Moreover, legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation.") (citation omitted).

157. Brief for Alabama et al. as Amici Curiae in Support of Petitioners at 24, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

politically powerful and privileged special interest group.¹⁵⁸ This term has a connotation of wealth, privilege, and elitism attached to it; for Washington elites, like the Justices, it echoes of K Street dominance.¹⁵⁹

The briefs reflected the racialized language presented in campaign literature in a more tempered manner. One brief headlined, “There Is No Proof Here Of Purposeful Discrimination Against A Racial Or Other Constitutionally Suspect Class.”¹⁶⁰ Another brief described the Colorado Supreme Court’s striking down Amendment 2 as “declining to bootstrap homosexuals into the classical civil rights framework of suspect classifications, [but] nevertheless . . . [according] homosexuals the protections of a special class.”¹⁶¹ These descriptions paint a class based on non-heterosexual sexual orientation as distinct from racial minorities, thus whitewashing the LGBT community and denying the existence of intersectional identities, such as sexual minorities of color.

The brief submitted by the Family Research Council honed in on the notion that the LGBT community sought rights above and beyond necessity. That brief mentioned “special” in six distinct variations that included “special protection,”¹⁶² “special status,”¹⁶³ “special constitutional guarantee,”¹⁶⁴ “special recognition,”¹⁶⁵ “special class,”¹⁶⁶ and “special privileges”¹⁶⁷ to describe what Amendment 2 prohibited. The “special rights” argument prominently resurfaced in oral arguments—the term was used in some variation numerous times.¹⁶⁸

158. *Evans v. Romer*, 882 P.2d 1335, 1366 (Colo. 1994) (Erickson, J., dissenting).

159. K Street is where a large number of lobbying and special interest organizations are located within the District of Columbia. It is often associated with powerful political interests with deep pockets. See Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street; Lobbying Firms Hire More, Pay More, Charge More to Influence Government*, WASH. POST, June 22, 2005, at A1 (describing the political clout and wealth held by lobbyists and lobbying organizations located on K Street).

160. Brief for Colorado for Family Values as Amicus Curiae in Support of Petitioners at 16, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

161. Brief of the Family Research Council as Amicus Curiae in Support of Petitioners at 15–16, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

162. *Id.* at 6.

163. *Id.*

164. *Id.* at 14 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965) (Black, J., dissenting)).

165. *Id.* at 15.

166. Brief of the Family Research Council, *supra* note 161, at 16.

167. *Id.*

168. See, e.g., Transcript of Oral Argument at 20–21, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

The American Center for Law and Justice Family Life Project's amicus brief in *Romer* massaged constructions of White privilege into the special rights argument:

First, homosexuals are not a group in need of special protection from majoritarian processes. Homosexuals as a group are comparatively more affluent and better educated than similarly situated heterosexuals. Homosexuals also are not a politically powerless minority. Second, homosexuality, unlike race, national origin, and sex, is not an immutable characteristic that is irrelevant to personal character. Rather, homosexuals as a class are defined by their sexual proclivities and conduct.¹⁶⁹

The State of Colorado's brief piggybacked on the false statements iterated in other briefs to support the State's first justification for Amendment 2: "[G]iven limited resources, the people of Colorado plainly could conclude that anti-discrimination protections should be reserved for those who are particularly *deserving* of special protection."¹⁷⁰ Surely, the State would argue, those who were Whiter, wealthier, more educated, more mobile, more traveled, and disproportionately more politically powerful than the general population—people who might well be among the Justices' elite social circles—could not possibly need additional protections of the law.

Like those in *Romer*, the *Lawrence*¹⁷¹ briefs also made racial and class based arguments. The amicus brief for Pro Family Law Center, Traditional Values Coalition, Traditional Values Education and Legal Institute, and James Hartline tapped into language suggesting racial minorities and sexual minorities are mutually exclusive groups. The brief read, "[I]t is wrong for Petitioners to compare homosexual persons with minorities and women for purposes of Equal Protection."¹⁷² Using *Romer* era rhetoric, the brief warned that if "the mere tendency to engage in sodomy is a protected Constitutional status, being a woman or a racial minority becomes meaningless."¹⁷³

Of greater importance, however, was that LGBT rights opponents in *Lawrence* honed in upon the institution of

169. Brief of the American Center for Law & Justice Family Life Project as Amicus Curiae in Support of Petitioners at 3, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

170. Brief for Petitioners at 13, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (emphasis added).

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

172. Brief of Pro Family Law Center et al. as Amicus Curiae in Support of Respondents at 25, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

173. *Id.*

marriage—anti-sodomy laws were the final backstop to same-sex marriage. The Family Research Council warned the Court of the looming “threat”:

This Court is probably aware of political movements [sic] which seek to reform marriage law, precisely to require recognition of same-sex relationships as marriages. This Court is also probably aware of political movements [sic] which seek to re-affirm, and thereby to preserve marriage as the union of a man and a woman.¹⁷⁴

Another amicus brief warned that to find a constitutional right to sodomy would invalidate “any law precluding same-sex couples from marriage or other family relations [as] a product of . . . individious [sic] discrimination.”¹⁷⁵ The brief cited pending marriage equality litigation before state courts in Massachusetts, New Jersey, and Indiana.¹⁷⁶

The amicus brief for Alabama, South Carolina, and Utah sought to steer the Court away from applying heightened scrutiny for constitutional claims arising from sexual orientation discrimination, suggesting that “ruling on that question might have implications not just for the anti-sodomy statutes of Texas and *amici*, but also for laws that prohibit same-sex marriages and laws that permit only heterosexual couples to adopt.”¹⁷⁷

The cases also differ in emphasis in oral arguments. In *Lawrence*, Texas’s representative concluded by emphasizing that if the Court found a right to engage in sodomy, it would undermine the constitutionally protected status of heterosexual marriage:

I’m sure it’s obvious to this Court that the issues of homosexual rights are highly emotional for the petitioner in these quarters but equally anxious in this Court’s—for this Court’s decision are those who are, number one, concerned with the rights of states to determine their own destiny, and, two, and possibly more important, those persons who are concerned that the invalidation of this little Texas statute would make marriage law subject to constitutional challenge.¹⁷⁸

174. Brief of the Family Research Council, Inc. & Focus on the Family as Amicus Curiae in Support of the Respondent at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

175. Motion for Leave to Submit Brief for the Center for Marriage Law as Amicus Curiae in Support of Respondent at 18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

176. *Id.* at 19.

177. Brief of the States of Ala., S.C., & Utah as Amici Curiae in Support of Respondent at 20, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

178. Transcript of Oral Argument at 28, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

Compare this with the *only* mention in *Bowers's* oral argument that cautioned a right to sodomy threatened the institution of "traditional" marriage. There, the State of Georgia's solicitor warned that a right to sodomy would call into question the "legitimacy of statutes which prohibit polygamy; homosexual, same-sex marriage; consensual incest; prostitution; fornication; adultery; and possibly even personal possession in private of illegal drugs."¹⁷⁹ In *Lawrence*, same-sex marriage was singled out for special consideration, whereas in *Bowers* same-sex marriage was cast as one element in an entire parade of horrors.

Same-sex marriage simply carried greater weight in *Lawrence* than in *Bowers*. There is no better evidence of this than in the briefs. Only two briefs submitted before the *Bowers* Court visited the relationship between the constitutionality of anti-sodomy laws and same-sex marriage.¹⁸⁰ Conversely, ten briefs in *Lawrence* specifically raised same-sex marriage as an issue—an increase of 400 percent.¹⁸¹

While the decisions in both *Bowers* and *Lawrence* turned on the issue of a constitutional right to homosexual sodomy, it is clear from the briefs and oral argument that the Justices were much more informed (and presumably mindful) of the decision's potential impact on related matters embedded in family law.¹⁸²

179. Transcript of Oral Argument at 9, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

180. See Reply Brief of Petitioner Michael J. Bowers Attorney General of Ga. at 38, 478 U.S. 186 (1986) (No. 85-140); Brief of the Rutherford Institute et al. in support of Petitioner as Amicus Curiae at 27–28, 478 U.S. 186 (1986) (No. 85-140).

181. See Brief of Agudath Israel of America as Amicus Curiae in Support of Respondent at 12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Center for Ariz. Policy & Pro-Family Network as Amicus Curiae in Support of Respondent at 4, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of the American Center for Law and Justice as Amicus Curiae in Support of Respondent at 1, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Motion of Center for Marriage Law for Leave of Court to File Brief as Amicus Curiae in Support of Respondent at 21, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (motion granted Mar. 3, 2003); Motion of the Center for Law & Justice International for Leave to File Brief as Amicus Curiae in Support of Respondent at 18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (motion granted Mar. 10, 2003); Brief of the Family Research Council, Inc. & Focus on the Family as Amicus Curiae in Support of the Respondent at 15–21, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Liberty Counsel as Amicus Curiae in Support of Respondent at 20–23, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of Pro Family Law Center et al. as Amicus Curiae in Support of Respondent at 8, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of the States of Ala., S.C., & Utah as Amici Curiae in Support of Respondent at 20, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief of United Families International as Amicus Curiae in Support of Respondent at 2, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

182. Oral argument in *Lawrence*, for example, also delved into same-sex adoptions. See Transcript of Oral Argument, *Lawrence v. Texas*, *supra* note 178, at

Indeed, Justice Kennedy took great care to distance *Lawrence* from the fomenting marriage equality debate.¹⁸³

By linking challenges to Texas's sodomy prohibition to marriage equality efforts, opponents of sexual minority rights reaffirmed their early depictions of sexual minorities as White and privileged. Texas's representatives and their allies highlighted that same-sex couples sought full acceptance and assimilation through the conservative institution of marriage, which is increasingly the hallmark of economic, societal, and professional success.¹⁸⁴

B. *The Proof of the Pudding is in Scalia's Eating*

Professor Bell's original interest-convergence theory, as applied to *Brown*¹⁸⁵, may have been supported by greater evidence had the *Brown* decision been divided.¹⁸⁶ The opinion was unanimous. However, sexual minorities have yet to see a unified Supreme Court decision in their favor.¹⁸⁷ There is jurisprudential evidence that the White privilege undertones struck a chord with the dissenting Justices—which is perhaps the best evidence, barring an express admission, that the White privilege-laced arguments were discussed in conference and positively resonated with the Justices forming the *Romer* and *Lawrence* majorities.

Justice Scalia is one of the Supreme Court's consistent dissenters in its recent pro-sexual minority rights jurisprudence in *Romer*, *Lawrence*, and *Martinez*.¹⁸⁸ Scalia's dissents in *Romer* and

20–21.

183. "[The *Lawrence* decision] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. See *infra* Part II.B for greater discussion on this part of Justice Kennedy's opinion.

184. For a larger discussion, see *infra* Part II.E.

185. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

186. See Bell, *supra* note 22, at 527–28.

187. *Bowers* was a 5-to-4 decision with Justice Powell and Chief Justice Burger writing individual concurrences. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring); *id.* at 197 (Powell, J., concurring); *id.* at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, J.J., dissenting). *Romer* was a 6-to-3 decision. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (opinion of Scalia, J., joined by Rehnquist, C.J., Thomas, J., dissenting). *Lawrence* mustered a five-Justice majority finding a substantive due process right to engage in same-sex relations. Justice O'Connor's vote concurred with the majority's result but saw the case better suited for an Equal Protection analysis. See *supra* text accompanying note 13; see also *Lawrence*, 539 U.S. at 586 (opinion of Scalia, J., joined by Rehnquist, C.J., Thomas, J., dissenting).

188. *Christian Legal Soc. v. Martinez*, 130 S.Ct. 2971 (2010) (upholding law school's policy of requiring officially recognized student groups to comply with school's nondiscrimination policy, prohibiting sexual orientation discrimination, as

Lawrence reflect the rhetoric of the 1990s that sexual minorities are a privileged elite class. He regurgitated the unreliable statistics concerning “gay wealth” cited by Amendment 2 opponents in *Romer*, writing that “those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities [and] have high disposable income.”¹⁸⁹

Justice Scalia hinted at an insightful interest-convergence argument as to why his fellow Justices felt comfortable overturning Amendment 2. Scalia opined, “This Court has no business imposing upon all Americans the resolution *avored by the elite class from which the Members of this institution are selected*, pronouncing that ‘animosity’ toward homosexuality is evil.”¹⁹⁰

The articulate and fierce dissenter took it one step further in his *Romer* dissent:

How [the legal community] feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant’s homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: “assurance of the employer’s willingness” to hire homosexuals.¹⁹¹

The Justice’s intent was surely to highlight that the LGBT community is a powerful and visible force within the legal community and that visibility makes it easier for his fellow Justices to grant rights to a group of people with whom lawyers typically associate. Bringing Scalia’s point to its logical end, LGBT people typically look and behave just as privileged, well-to-do lawyers look and behave. But Scalia actually couched homosexuality among the vestiges of elite privilege. Justice Scalia treats same-sex sexual conduct as the equivalent of playing a game of squash at the country club.

Justice Scalia’s dissent in *Lawrence* assailed the majority as

not violative of free speech or free association).

189. *Romer*, 517 U.S. at 645 (Scalia, J., dissenting).

190. *Id.* at 636 (Scalia, J., dissenting) (internal citations omitted) (emphasis added).

191. *Id.* at 652–53 (Scalia, J., dissenting).

a “product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, . . . [which constitutes] . . . the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”¹⁹² The *Lawrence* dissent expanded on his *Romer* dissent. Justice Scalia interpreted the majority opinion as a byproduct of elitist convergence:

So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination” under Title VII have repeatedly been rejected by Congress.¹⁹³

The *Lawrence* dissent when taken as a whole with the *Romer* dissent stands for the proposition that despite “widespread” disapproval of homosexuality, the merger of elite legal interests and the White privileged LGBT community’s interests marked the death knell of *Bowers*.

The identity jurisprudence aside, it is also important that finding a constitutional right to private homosexual conduct did not undermine heteronormative interests—a point Justice Kennedy made very clear in the majority opinion:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.¹⁹⁴ The petitioners are entitled to respect for their private lives.¹⁹⁵

Justice Kennedy’s opinion emphasizes that there is no harm to heteronormative norms with the majority’s decision.¹⁹⁶ But

192. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

193. *Id.* at 602–03 (Scalia, J., dissenting).

194. I submit that the term “lifestyle” also has a similar connotation that fits within the view of the LGBT community as one of wealthy WASPs. This is arguably a more difficult case to make because the word, by definition, is class neutral. The Merriam-Webster definition of “lifestyle” is “the typical way of life of an individual, group, or culture.” In its colloquial use, I believe there is an undertone of suggested opulence, e.g., “lifestyles of the rich and famous.”

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

196. Also of note, there is no mention of HIV/AIDS or other sexually transmitted diseases in any of the *Lawrence* opinions. The Court in *Bowers* did not address concerns about sexually transmitted diseases either. See *supra* Part I.B for a

there is something more that Justice Kennedy did not directly address that Justice Burger's memorandum did: the threat that the *Lawrence* decision might have posed to heteronormative institutions like religious organizations or the Boy Scouts.¹⁹⁷ The *Lawrence* Court's remedy did not threaten these heteronormative institutions. In actuality, the Court already neutralized many of these concerns.

In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*,¹⁹⁸ an Irish-American association challenged a court order that forced it to allow an LGBT Irish organization to march in their annual parade consistent with Massachusetts's public accommodations law.¹⁹⁹ The parade organizers argued that the LGBT group communicated a message that conflicted with the organizers' beliefs, thus forcibly compelling speech.²⁰⁰ The Supreme Court held that Massachusetts could not compel the parade organizers to include the LGBT organization in its public Saint Patrick's Day parade consistent with the First Amendment.²⁰¹

Similarly, in *Boy Scouts of America v. Dale*,²⁰² the Supreme Court rejected New Jersey's application of a state public accommodations law that forced Boy Scout troops to accept openly gay leadership over the Boy Scouts's moral objections.²⁰³ The Supreme Court held that the First Amendment's right to free association protected the Boy Scouts of America's right to prohibit openly gay leadership notwithstanding state nondiscrimination laws.²⁰⁴

Taken together, the majority and dissenting opinions make clear that the shift from *Bowers* to *Lawrence* was driven by

broader discussion of *Bowers* and HIV/AIDS. For *Lawrence*, whatever fears may have emanated from public health concerns were possibly assuaged by the medical community's assertion that the majority's position would not act as a detriment to the public health. See Brief of the American Public Health Ass'n. et al. as Amici Curiae in Support of Petitioners at 10–18, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). However, similar arguments were also made in briefs submitted before the Court in *Bowers*. See Brief of American Psychological Ass'n. & American Public Health Ass'n. as Amici Curiae in Support of Respondents at 20–27, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

197. See Memorandum from Chief Justice Burger to Justice Powell, *supra* note 67.

198. 515 U.S. 557 (1995).

199. *Id.* at 561–62.

200. *Id.* at 574–75.

201. *Id.* at 566.

202. 530 U.S. 640 (2000).

203. *Id.* at 644.

204. *Id.*

something more than the fact *Bowers* “was not correct when it was decided.”²⁰⁵ The confluence of judicial perceptions of shared identity, doctrinal developments in *Hurley* and *Dale*, and the lack of a threat posed to the heteronormative establishment by private homosexual conduct paved the way for *Bowers*’s demise.

Ironically, the greatest alleged threat to the establishment was the looming possibility of thousands of same-sex couples waiting at floodgates to get married.²⁰⁶ But this supposed “gloom and doom” was not given consideration in *Bowers* despite a few failed attempts to secure marriage equality through litigation in the 1970s, because converging identity interests had not yet fused. The *Bowers* Justices failed to move cognitively beyond the prevailing deviant construction.

With respect to the same-sex marriage threat, the *Lawrence* dissenters’ argument backfired. By highlighting that sexual minorities sought acceptance into a conservative social institution, the dissenters actually minimized perceptions of sexual minorities as a radical threat to existing social order. The dissenters’ peripheral warnings that the *Lawrence* majority posed a threat to traditional heteronormative institutions, like the Boy Scouts or religious organizations, were already largely neutralized by the Court in *Dale* and *Hurley*. As a result, the focus was even more concentrated on marriage. Similarly, in *Romer* the dissenters’ outcry of LGBT privilege had the opposite of the intended effect. For the elite Justices, there was little threat to the body politic in protecting a “privileged” class’s ability to exercise political power.

The *Bowers*, *Romer*, and *Lawrence* opinions are strong evidence that once shared identity interests are realized, judicial remedies favoring sexual minorities will be authorized provided they do not undermine the power or authority of peer, heterosexual stakeholders.

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

206. *See id.* at 600 (Scalia, J., dissenting) (“This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, . . . laws refusing to recognize homosexual marriage.”); *id.* at 585 (O’Connor, J., concurring) (foreshadowing challenges to same-sex marriage prohibitions) (“Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”).

III. The Marriage Trajectory

A. Early Marriage Equality Efforts

The first successful effort to achieve marriage equality was in a 2003 decision from the Massachusetts Supreme Judicial Court finding a constitutional right to same-sex marriage under the Massachusetts Constitution.²⁰⁷ The Massachusetts ruling had profound consequences for religious social service organizations, most notably Catholic Charities. Catholic Charities withdrew from the business of foster care rather than serve same-sex couples.²⁰⁸ Opponents of marriage equality decried the developments in Boston, fearing they would likely reverberate throughout the country, threatening religious liberty.²⁰⁹ But as legislatures began to assume the duties of implementing marriage equality, legislators and religious liberty scholars²¹⁰ would craft public policy that advanced civil equality for sexual minorities and preserve religious institutions' religious liberty.

If interest convergence will continue to benefit sexual minorities in federal constitutional challenges to marriage discrimination, these types of religious liberty suppression fears cannot remain. As the theory proffers, judges will authorize remedies only when both interests converge *and* the remedy to enforce those interests will not threaten heteronormative power, e.g., the Catholic Church.²¹¹

207. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

208. See Patricia Wen, "They Cared for the Children": *Amid Shifting Social Winds, Catholic Charities Prepares to End its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOS. GLOBE, June 25, 2006, at A1 (reporting Massachusetts's consideration to revoke Catholic Charities's adoption license for religious-based refusals to place children in same-sex households); see also Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 482 (2008) (describing dismissals and resignations of social services workers in jurisdictions without individual conscience same-sex marriage protections).

209. See, e.g., 152 CONG. REC. S5527 (June 7, 2006) (statement of Sen. Santorum) ("Is the fate of Catholic Charities of Boston an aberration or a sign of things to come? Some say we are overreacting, but the truth is that while the ramifications in the battle for social policy, procreation, and even protecting children may be clear, the real—but hidden—battle[]lines are for the religious liberty of all faiths.").

210. See Peter Steinfelds, *Same-Sex Marriage Laws Pose Protection Quandary*, N.Y. TIMES, May 22, 2009, at A13 (describing the work of religious liberty scholars Professor Robin Fretwell Wilson and Professor Douglas Laycock lobbying for religious liberty protections in New Hampshire's then-pending marriage equality legislation).

211. I use the Catholic Church as an example of heteronormative institutional power not to demonize the Church, but to highlight a prominent example of a religious institution that has a large following, carries significant political weight,

B. Religious Liberty in the Laboratories of Democracy

In every jurisdiction where marriage equality was legislatively enacted and took effect²¹² and in Connecticut,²¹³ there has been an increasing emphasis on religious accommodation exemptions and religious liberty protections.

All of the aforementioned jurisdictions provide exemptions in existing nondiscrimination law for religious institutions from providing space for the celebration or solemnization of marriages inconsistent with those institutions' religious tenants.²¹⁴ Four states allow religiously affiliated organizations to limit privileges in celebration of marriage.²¹⁵ Another four jurisdictions expressly immunize religious institutions or religious organizations from private suits for failing to solemnize or celebrate a marriage.²¹⁶ Yet another four provide in their marriage equality legislation prohibitions of government penalties, e.g., the awarding of government contracts or tax exemption status for religious

and has presented a unified front opposing marriage equality, as opposed to evangelicals who lack comprehensive hierarchical organization or the Episcopal Church which has no unified position on marriage equality. See Laurie Goodstein, *Bishops Open 'Religious Liberty' Drive*, N.Y. TIMES, Nov. 15, 2011, at A14 (citing Roman Catholic bishops' political activities in opposition to same-sex marriages); see also Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 26, 2011, at A1 (highlighting the New York Catholic bishops' opposition to the 2011 New York Marriage Equality Act); Shaila Dewan, *True to Episcopal Church's Past, Bishops Split on Gay Weddings*, N.Y. TIMES, July 19, 2011, at A1 (noting a division among New York's Episcopal bishops' positions concerning same-sex marriage ceremonies).

212. These jurisdictions include Vermont, New Hampshire, the District of Columbia, and New York. Maine legislatively enacted marriage equality but that legislation was repealed by referendum. See Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>. Washington and Maryland successfully passed marriage equality legislation with robust religious liberty protections in 2012 that are pending due to referendum challenges. Governor Christopher Christie vetoed New Jersey's 2012 legislation, which contained similar religious liberty protections. That veto faces the potential for override until January 2014. See Alice Popovici, *Maryland Gay Marriage Bill Passes, Heads to Governor*, REUTERS, Feb. 23, 2012, <http://www.reuters.com/article/2012/02/24/us-usa-gaymarriage-maryland-idUSTRE81M2CW20120224> (summarizing the status of marriage equality legislation in Maryland, New Jersey, and Washington).

213. The Connecticut Supreme Court mandated marriage equality under the Connecticut State Constitution. *Kerrigan v. Comm'r. of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

214. CONN. GEN. STAT. ANN. § 46b-35a (West 2012); D.C. CODE § 46-406(e)(1) (LexisNexis 2012); N.H. REV. STAT. ANN. § 457:37(iii) (2011); N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2012); VT. STAT. ANN. tit. 8, § 4502(a)(4) (2011)

215. § 46b-35a; § 457:37(iii); DOM. REL. § 10-b (1); tit. 8, § 4502(a)(4).

216. § 46b-35a; D.C. Code § 46-406(e)(2) (Lexis Nexis 2012); DOM. REL. § 10-b(1); tit. 8, § 4502(a)(4).

organizations that object to same-sex marriages.²¹⁷ New Hampshire and Vermont grant exemptions for religious organizations that do not want to provide insurance coverage for married same-sex couples.²¹⁸ Connecticut's exemptions permit adoption and foster care agencies, like Catholic Charities, to limit placement of children to married heterosexuals, provided they receive no government funding.²¹⁹ New Hampshire and New York provide immunity for individual employees of religious organizations that refuse to solemnize or celebrate same-sex marriages from lawsuits.²²⁰

These legislative developments were crucial to the passage of marriage equality legislation²²¹ and continue to drive the debate in current marriage equality efforts.²²² These religious liberty provisions do not operate in a vacuum. Rather, they exist within a broader backdrop of First Amendment jurisprudence that protects religious and quasi-secular organizations from government compelled speech to support homosexuality,²²³ forced association with openly LGBT people,²²⁴ and government interference with ministerial employees at religious institutions.²²⁵

These developments form the underpinnings of what interest-convergence theory suggests will happen to future constitutional challenges to same-sex marriage bans. Preexisting notions of

217. § 46b-35a; § 46-406(e)(2); § 457:37(iii); DOM. REL. § 10-b(1).

218. N.H. REV. STAT. ANN. § 457:37(iv) (2011); VT. STAT. ANN. tit. 8, § 4501(b) (2011).

219. § 46b-35b.

220. § 457:37(iii); DOM. REL. § 10-b(1).

221. See Nicholas Confessore & Danny Hakim, *Cuomo Is Urged to Alter Same-Sex Marriage Bill*, N.Y. TIMES, June 17, 2011, at A28 (reporting the backroom haggling over religious liberty provisions between New York State Senate Republicans and Governor Andrew Cuomo).

222. See, e.g., Annie Linskey, *Church Support for Marriage Bill*, BALTIMORE SUN, Jan. 25, 2012, at A2, available at http://articles.baltimoresun.com/2012-01-25/news/bs-md-same-sex-religion-20120124_1_marriage-bill-gay-marriages-religious-protections (describing Maryland Governor Martin O'Malley's push for marriage equality with improved religious liberty provisions from earlier failed marriage equality legislation).

223. See *Hurley v. Irish American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 557 (1995) (holding that the State of Massachusetts could not compel an Irish-American organization sponsoring a public parade to include an LGBT organization under state nondiscrimination law, because the LGBT organization conveyed a message contrary to the organizers' wishes).

224. *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000) (ruling that the First Amendment's right to free association protected the Boy Scouts of America to prohibit openly gay leadership, notwithstanding state nondiscrimination laws).

225. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 132 S.Ct. 694, 710 (2012) (holding that the First Amendment prohibits a dismissed minister's employment discrimination suit against a religious employer).

LGBT community affluence and political clout continue²²⁶ to exist in society and are widely reflected in the media.²²⁷ These notions are reinforced in marriage-related litigation, because it projects, as feminist theorist Audre Lorde might describe it, that the LGBT community is seeking to dismantle the master's house with the master's tools.²²⁸ But the convergence of interests vis-à-vis

226. Some of the racialized aspects of the 1990s rhetoric are reinforced by the marriage equality debate. Take, for example, the 2008 vote for Proposition 8 in California. A majority of Black voters voted to ban same-sex marriages, exacerbating the schism between the African-American and White LGBT communities. The deepening divide is not limited to the ballot box. In Maryland, where legislators in 2011 and 2012 considered marriage equality legislation, the strong opposition to marriage equality by the African-American community, African-American legislators, and African-American pastors was prominent. See Sabrina Tavernise, *Gay Marriage Bill Posing a Tough Sell To Blacks in Maryland*, N.Y. TIMES, Feb. 16, 2012, at A18. See also Frank Bruni, *Race, Religion and Same-Sex Marriage*, N.Y. TIMES, Nov. 1, 2011, at A27 (discussing promotional efforts by the Human Rights Campaign to gain Black voters' support for Maryland's same-sex marriage bill, in response to polling results indicating lower rates of support among Black Americans); Petula Dvorak, *For Maryland's Gay Legislators, Moment of Truth Looms on Same-Sex Marriage*, WASH. POST, Feb. 16, 2012, http://www.washingtonpost.com/local/for-marylands-gay-legislators-moment-of-truth-looms-on-same-sex-marriage/2012/02/16/gIQAEng8HR_story.html (describing one lesbian legislator in Maryland as "a little tired of African Americans who dismiss [marriage equality efforts in 2012] as [an issue] that matters only to a bunch of well-to-do gay [W]hite men.") (last visited Sept. 19, 2012); Miranda S. Spivak, *Speaking Out for Same-Sex Marriage Law, Black Minister Stands Apart*, WASH. POST, Feb. 13, 2012, http://www.washingtonpost.com/local/speaking-out-for-same-sex-marriage-law-black-minister-stands-apart/2012/02/12/gIQA8jj5BR_story.html (documenting an African-American preacher publicly backing the Maryland same-sex marriage bill, despite his home community's lack of support) (last visited Sept. 19, 2012).

227. See BADGETT, *supra* note 97, at 116–17; see also, e.g., Tina Mabry, *The Preponderance of Flat-screen TVs Doesn't Mean LGBT Characters of Color Have to Flatline*, HUFFPOST GAY VOICES (Dec. 11, 2011, 7:15 PM), http://www.huffingtonpost.com/tina-mabry/lgbt-african-american-characters_b_1156076.html (critiquing the limited exposure of Black LGBT characters in American television) (last visited Sept. 19, 2012); Rob Smith, *Opinion: The Bearable Whiteness of Being Gay*, CNN.COM (Feb. 2, 2012, 1:29 PM), <http://inamerica.blogs.cnn.com/2012/02/02/opinion-the-bearable-whiteness-of-being-gay/> (describing the whitewashed, affluent portrayal of the LGBT community in advertisement, pop culture, and media circles) (last visited Sept. 19, 2012). Prominent television series also reinforce the myth. See, e.g., *Will & Grace* (NBC television broadcast 1998-2006) (featuring as a main character an affluent gay lawyer who has an Ivy League pedigree and is from a wealthy, White Connecticut family). Academic writing also reflects this line of thought. See, e.g., THOMAS SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* xxv (2005) (connecting urban revitalization with the rise of LGBT neighborhoods) ("Nearly every city has a trendy 'gayborhood,' hip artists' colonies and loft districts, and funky enclaves where young people sip lattes and buy vintage clothing. Urban places that were once written off as dead are now buzzing with life.").

228. See Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *FEMINIST POSTCOLONIAL THEORY: A READER* 25 (Reina Lewis & Sara

“shared” wealthy, White identity alone will not authorize full marriage equality. Without assurance that marriage equality will not threaten the heteronormative establishment, judicial remedies may only mandate civil union-like partnerships for LGBT individuals seeking same-sex marriage.

A 2006 decision from the New Jersey State Supreme Court best illustrates the complications that constrain judicial remedies for marriage inequality. In *Lewis v. Harris*,²²⁹ the court unanimously held that denying same-sex couples the benefits afforded to married opposite-sex couples violated the guarantees of equal protection under the New Jersey State Constitution.²³⁰ However, what divided the court was the remedy. A four-justice majority held that the remedy was a matter of legislative deference.²³¹ The remaining three justices rejected the majority’s decision to defer the question of appropriate remedy to the New Jersey legislature and proffered that marriage alone was the proper remedy.²³²

Full equality for sexual minorities demands that the right to marry be extended to all individuals without regard to sexual orientation. Civil unions, though an important step in the long march to LGBT equality, communicate inferiority.²³³ Civil unions are not an acceptable or permanent solution.²³⁴ However, to avoid

Mills eds., 2003).

229. 908 A.2d 196 (N.J. 2006).

230. *Id.* at 224.

231. *Id.* (“[T]he Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.”).

232. *Id.* at 231 (Portiz, C.J., dissenting) (“On this day, the majority parses plaintiffs’ rights to hold that plaintiffs must have access to the tangible benefits of state-sanctioned heterosexual marriage. I would extend the Court’s mandate to require that same-sex couples have access to the ‘status’ of marriage and all that the status of marriage entails.”).

233. See, e.g., Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL’Y & L. 291, 338 (2001) (“[I]f a State passed a civil union statute for same-sex couples that paralleled marriage, it would be sending a message that these unions were in some way second class units . . .”).

234. The New Jersey legislature recently rejected the argument that civil unions are an acceptable alternative to marriage. See S. 1, 2012 Leg., 215th Sess. (N.J. 2012) (“Both the New Jersey Civil Union Review Commission and the Senate Judiciary Committee heard overwhelming evidence that the separate and inferior label of civil union stigmatizes children and parents in civil unions, at school and in other settings, and causes psychological harm.”). The New Jersey legislature passed marriage equality, but the measure was vetoed by the New Jersey governor. See Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19. Litigation is underway in the New Jersey courts to invalidate the civil union law and mandate marriage equality as the only appropriate remedy to ensure the full recognition of rights found in *Lewis*. *Garden State Equality v. Dow*, No. 1729-11 (N.J. Super. Ct. filed June 30, 2011).

future decisions that parallel *Lewis*, good political lawyering must emphasize the minimal impact that marriage equality will have on heteronormative institutions and interests. If the justices in New Jersey, New York, Maryland, Vermont, and Washington had been able to avail themselves of the fomenting policy debates and enacted legislation squaring religious liberty with civil marriage equality in 2008 and 2009, then each of these courts may very well have mandated marriage equality.²³⁵ The current policy debates in states working to enact marriage equality will help sustain sexual minorities' claims to a fundamental right to marry. The statutory schemes enacted in those states serve as indispensable evidence for judges that the interests of the LGBT community do not undermine the rights of religious institutions, religious social service groups, or other fraternal organizations.

C. National Security Convergence Returns

As Professor Bell originally commented, the *Brown v. Board of Education*²³⁶ decision came to fruition due to overriding national

Importantly, this case may very well turn on the robust religious liberty protections provided in the legislatively successful marriage equality effort. New Jersey legislators signaled to the New Jersey Supreme Court that the legislature was willing and able to provide religious exemptions to minimize the potential for conflict between religious liberty and civil marriage equality.

235. It is worth noting that expansive religious liberty policy debates relating to marriage equality had not yet unfolded. The first states to legislatively enact marriage equality with religious liberty protections were Connecticut (pursuant to judicial order) and Vermont in 2009, three years after *Lewis*. See Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1 ("The step makes Vermont the first state to allow same-sex marriage through legislative action instead of a court ruling, and comes less than a week after the Iowa Supreme Court legalized same-sex marriages in that state."). These religious policy debates also occurred before the publication of the first in-depth scholarly treatment of marriage equality and religious liberty. See SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008) (proposing policies to advance LGBT equality and religious liberty). Had the justices of the New Jersey Supreme Court been able to avail themselves of tangible examples of marriage equality and religious liberty coexisting within existing state nondiscrimination law and amended family law provisions, it is plausible that the thin four-to-three margin in *Lewis* may have been reversed. Similarly, three courts of last resort declined to extend marriage rights to same-sex couples through state constitutional interpretations. All three of these cases were decided *before* legislative efforts secured marriage equality with religious liberty protections. See *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (4-3 decision) (holding that no state constitutional right to same-sex marriage or marriage-like rights existed); *Hernandez v. Robles*, 855 N.E.2d.1, 22 (N.Y. 2006) (4-2 decision) (holding that no constitutional right to same-sex marriage existed under the New York Constitution); *Andersen v. King Cnty.*, 138 P.3d 963, 980 (Wash. 2006) (en banc) (plurality opinion) (4-3 decision) (finding no state constitutional right to same-sex marriage existed).

236. 347 U.S. 483 (1954).

security and international relations concerns.²³⁷ Similar interests reemerged in recent equal protection claims challenging the constitutionality of affirmative action programs. In *Grutter v. Bollinger*,²³⁸ Justice O'Connor highlighted the national security advantages of limited race-conscious admissions programs.²³⁹ Professor Bell saw the Michigan affirmative action cases as a "definitive example"²⁴⁰ of his original interest-convergence theory; in his view, the Court upheld race-conscious admissions policies that favored Black interests primarily because those interests converged with Whites'.²⁴¹ These types of national security and international relations interest convergences will soon materialize in parallel form in pending sexual minority rights litigation.

In 2011, President Barack Obama officially ended the policy of "Don't Ask, Don't Tell,"²⁴² permitting open service in the United States military.²⁴³ The argument that open service aligned with national security interests justified, at least in part, the law's repeal.²⁴⁴ The tie between demands for open service and national security emerged in response to reports that numerous service members in critical posts, including Arabic translators, were dismissed under "Don't Ask, Don't Tell."²⁴⁵

The Obama Administration repealed the discriminatory policy in the midst of ongoing litigation²⁴⁶ to invalidate the Defense

237. See Bell, *supra* note 22, at 524–25.

238. 539 U.S. 306 (2003).

239. *Id.* at 331 ("What is more, high-ranking retired officers and civilian leaders of the United States military assert that, [b]ased on [their] decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.") (citations omitted) (internal quotation marks omitted).

240. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (discussing both *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the two central Michigan affirmative action cases).

241. *Id.* at 1624 (describing judicial remedies for Black suffering as dependent upon a perception by policymakers that such relief would "[further] interests or [resolve] issues of more primary concern.")

242. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 170 Stat. 1547, 1671, *repealed* by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

243. Elisabeth Bumiller, *A Final Phase for Ending 'Don't Ask, Don't Tell,'* N.Y. TIMES, July 23, 2011, at A13 (outlining the ultimate repeal of "Don't Ask, Don't Tell").

244. See Ed O'Keefe, *'Don't Ask, Don't Tell' Repealed: Reactions*, WASH. POST, Sept. 20, 2011, at A19 (reporting on various perspectives immediately following the policy's repeal, including sentiments that the policy "undermined our national security" and that the military "will be stronger because . . . we will have the best and brightest service members on the job").

245. See Benjamin, *supra* note 151, at A29.

246. See OFFICE OF PUBLIC AFFAIRS, U.S. DEPT OF JUSTICE, PRESS RELEASE 11-

of Marriage Act.²⁴⁷ Soon after the repeal of “Don’t Ask, Don’t Tell,” current service members and veterans joined efforts to challenge the Defense of Marriage Act.²⁴⁸ Surely, if the interest convergence Bell identified in *Grutter* signifies anything, it illuminates an opening for challenges to the Defense of Marriage Act (DOMA). If DOMA hinders the ability of the United States military to recruit highly qualified personnel because the federal government refuses to recognize same-sex marriages valid in the private sector, the Act threatens national security vis-à-vis military recruitment.

Pro-LGBT developments have also emerged on the international affairs front. Recently, the Obama Administration announced new efforts to promote LGBT rights globally, making such rights a more prominent component of American foreign policy.²⁴⁹ Secretary of State Hillary Clinton pronounced to the United Nations Human Rights Council that “gay rights” were “human rights.”²⁵⁰ Though promising, these late 2011 policy announcements are too recent to truly understand the extent of their impact on future American diplomacy. As arose in *Brown*, the United States can hardly demand universal dignity for a group of people that neither its own federal nor many of its state governments treat equally.²⁵¹

It is in the United States’ diplomatic and national security interests to cease subjugating the LGBT community to second-class citizenship status, lest the nation suffer from impaired military preparedness and international accusations of hypocrisy.

222. STATEMENT OF THE ATTORNEY GENERAL ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT (2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (last visited Sept. 20, 2012) (illustrating two ongoing lawsuits by the Department of Justice challenging the Defense of Marriage Act prior to the repeal of “Don’t Ask, Don’t Tell”).

247. DOMA, *supra* note 133. For a discussion about the historical events surrounding the passage of the Act, see *supra* Part I.E.

248. *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. filed Oct. 27, 2011). See also Ed O’Keefe, *Gay Troops and Veterans to Sue over Defense of Marriage Act*, WASH. POST, Oct. 27, 2011, at A19 (“The [*McLaughlin*] suit also challenges provisions of federal code regarding spouses that lawyers said bar gay couples from accessing benefits provided by the Pentagon and the Department of Veterans Affairs. Those benefits include military identification cards, access to bases, recreational programs, spousal support groups and burial rights at national cemeteries.”). President Obama and Attorney General Holder declined to defend this suit, claiming it failed to meet constitutional muster under heightened scrutiny. Letter from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 17, 2012), available at <http://www.justice.gov/ag/boehner02-17-12.pdf>.

249. See Steven Lee Myers & Helene Cooper, *U.S. to Aid Gay Rights Abroad, Obama and Clinton Say*, N.Y. TIMES, Dec. 7, 2011, at A4.

250. *Id.*

251. See Bell, *supra* note 22, at 524–25.

If such concerns were sufficient to authorize remedies for discriminatory governmental treatment in *Brown* and race-conscious admissions programs in *Grutter*, they will certainly play a role in the inevitable fall of DOMA and marriage inequality in general.

IV. Rational Basis and the Irrelevance of Scrutiny

The false perceptions of the sexual minority community as privileged are not, at first blush, universally beneficial in the constitutional domain. Some prominent scholars on the intersectional aspects of race and sexual orientation argue that the myth of privilege is a barrier to full LGBT equality in general,²⁵² and a hindrance to achieving higher levels of scrutiny for sexual orientation discrimination claims in particular.²⁵³ From a judge's perspective, it might very well be considerably difficult to apply a more exacting level of judicial review to a class of people that appear privileged. If judges—even those sympathetic to LGBT constitutional rights—view sexual minorities through the same lens as Justice Scalia does,²⁵⁴ applying heightened scrutiny is questionably justifiable.²⁵⁵

The lack of consensus regarding the application of heightened scrutiny is clear. Clearer yet, the failure to apply intermediate or strict scrutiny to sexual orientation discrimination claims does not appear to matter. Take, for example, *Perry v. Schwarzenegger*.²⁵⁶ There, Judge Vaughn Walker applied rational basis scrutiny to invalidate California's Proposition 8, which constitutionally banned same-sex marriage in California.²⁵⁷ Like *Perry*, the first judicial mandate for same-sex marriage out of Massachusetts employed rational basis review.²⁵⁸ In 2008, the California Supreme Court invalidated a statutory ban against same-sex marriage using strict scrutiny.²⁵⁹ In 2009, the Iowa Supreme Court,

252. See Lorde, *supra* note 228, at 27.

253. See, e.g., Hutchinson, *supra* note 27, at 1386–88 (arguing that perceptions of White LGBT privilege prevent sexual orientation claims from receiving more than rational basis scrutiny).

254. See *supra* Part II.B.

255. See William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L. J. 1 (2010) (discussing the application of heightened scrutiny to sexual orientation).

256. 704 F.Supp.2d 921 (N.D. Cal., 2010), *aff'd sub nom.* *Perry v. Brown*, 2012 WL 372713, at 29 (9th Cir. 2012) (overturning California's same-sex marriage ban by applying rational basis scrutiny).

257. *Id.* at 997.

258. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

259. *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008), *superseded by*

following Connecticut,²⁶⁰ invalidated Iowa's statutory prohibition of same-sex marriages by invoking intermediate scrutiny under the Iowa Constitution.²⁶¹ The use of differing standards of scrutiny to achieve the same end results is not confined to the marriage context alone.²⁶²

These cases all highlight the same point, as it relates to interest convergence: scrutiny is irrelevant. So long as the interests of judges and White elites remain converged with the interests of the LGBT community due to a perceived common intersection of identity, and so long as remedies for LGBT discrimination do not undermine heteronormative interests, LGBT rights will ultimately prevail.

Conclusion

The gentrification of sexual orientation inoculated gays, lesbians, and bisexuals against becoming a threat to the establishment heteronormative hierarchy. The depiction of sexual minorities as White, affluent, urban dwelling, educated, and successful, however, displaces people of color, transgender and gender-non-conforming individuals, those of lesser means, and those living in rural America from much of the discourse on sexual minority rights. The myth of LGBT privilege is a marked departure from the depictions of gays, lesbians, bisexuals, and transgender people as degenerate, deviant, and predatory that dominated anti-gay rhetoric in the 1970s and 1980s.²⁶³

As this Article demonstrates, the political rhetoric that framed the LGBT rights movement bled into contemporary legal argumentation. Chief Justice Burger's influential memorandum to Justice Powell paralleled the predatory, deviant construction of sexual minorities that pervaded the political discourse of the late 1970s and early 1980s. In contrast, later opinions penned by

constitutional amendment, CAL. CONST. art. 1, § 7.5 (2008) (applying strict scrutiny under the California Constitution to strike California's statutory same-sex marriage ban).

260. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008).

261. *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009) (invalidating Iowa's statutory prohibition of same-sex marriages using intermediate scrutiny under the Iowa Constitution).

262. *Compare, e.g., Florida Dep't. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 91 (Fla. Dist. Ct. App. 2010) (applying rational basis to strike down Florida's homosexual adoption ban under the Florida Constitution), *with Arkansas Dep't of Human Servs. v. Cole*, No. 10-840, slip op. at 145 (Ark. Apr. 7, 2011) (striking down Arkansas's ban on adoption by cohabiting couples by utilizing strict scrutiny under the Arkansas Constitution).

263. *See supra* Part I.A.

Justice Kennedy and Justice Scalia reflected the radically different, elitist perceptions of sexual minorities that anti-gay activists propagated throughout the late 1980s and early 1990s.²⁶⁴

Interest-convergence theory suggests that this shift was necessary for sexual minority litigants to achieve success on their constitutional claims. Provided that these new faux constructions of LGBT identity remain intact, and provided that newly promulgated policies neutralize threats to heteronormative hegemony, there is no practical need to deem sexual orientation as a suspect class. The degree of scrutiny applied is irrelevant provided interest convergence remains.

Political rhetoric is not the only source of the privilege myth. The media and advertising also play a role in perpetuating tropes of rich, rosy gays and lesbians that fail to communicate the variety of lived LGBT experiences.²⁶⁵ One needs to look no further than primetime television to see a rosy portrayal of gays and lesbians that does not speak to the typical LGBT experience.

It is morally right to open the public's eyes to the reality that sexual minorities cut a wide swath across many other identities. Aggressive efforts to eliminate racial prejudices within the White LGBT community are also necessary. The moral justification for emphasizing identity intersectionality does not stand alone, however; it is equally imperative to dispel the whitewashed privilege myth for the health of future LGBT advocacy efforts.

The constitutional successes that segments of the LGBT community have enjoyed will not necessarily translate into public policy success for the entire community. Highlighting the fact that men, women, transgender and gender-non-conforming individuals of many races, ethnicities, religions, and levels of socioeconomic security comprise the sexual minority community can help overcome the dilemma that the great gay myth created. While the myth has propelled advantageous constitutional litigation, it serves as a hurdle to securing discretionary benefits. Making the case for affirmative action programs or for nondiscrimination protections in employment, housing, and public accommodations law is harder if policymakers instinctively link gays, lesbians, and bisexuals with White privilege. Opponents will stall these important legislative endeavors by suggesting that sexual minorities neither deserve nor need nondiscrimination protections

264. See *supra* Part II for a discussion on the Justices' articulations of LGBT elitism.

265. See *supra* note 227.

because they are privileged and not subjected to discrimination.²⁶⁶

As this Article theorizes, popular perceptions of a “privileged” LGBT community accelerated interest convergence and the positive advancement of sexual minority constitutional rights. But at what cost has the rapid recognition of these rights come? And what costs do gentrified projections of sexual minorities impose upon current LGBT advocacy efforts?

The LGBT community must examine the virtue in achieving significant advances in the recognition of constitutional rights on the backs of the most vulnerable and invisible among our ranks. The need for reflection and self-examination is not for the LGBT community alone. Members of the academy, legal practitioners, sexual minority rights activists, and members of the LGBT community all have a clear duty to expose “gay wealth” and “gay White privilege” for the baseless, charged products of fiction that they are.

266. See, e.g., Rosalind Helderman, *No 'Rampant Discrimination' Against Gay Employees to Argue for Law, McDonnell Says*, WASH. POST, Mar. 25, 2010, http://voices.washingtonpost.com/viriniapolitics/2010/03/legal_protections_for_gays_not.html (quoting Virginia Governor Bob McDonnell as saying that “[t]here really isn't any rampant discrimination on any basis in Virginia. If you're going to have a law, it needs to actually address a real problem.”) (last visited Sept. 21, 2012); Mark McGregor, *Anti-Gay Bias Not a Problem, City Says*, SPRINGFIELD NEWS-SUN, Feb 28, 2012, available at <http://www.springfieldnewssun.com/news/springfield-news/anti-gay-bias-not-a-problem-city-says-1335890.html> (quoting the Springfield City commissioners, who found “no compelling evidence of discrimination to substantiate” adding sexual orientation to local nondiscrimination protections) (last visited Sept. 21, 2012). Views that acts of discrimination against members of the LGBT community are mere aberrations and therefore do not warrant legislative action do not comport with reality. See, e.g., BADGETT, *supra* note 97 (debunking the myth of gay and lesbian affluence through an economic analysis of the costs of discrimination); David Christafore & Susane Leguizamon, *The Influence of Gays and Lesbian Coupled Households on House Prices in Conservative and Liberal Neighborhoods*, 71 J. URB. ECON. 258 (2012) (providing empirical evidence of housing discrimination against sexual minorities in conservative neighborhoods); Andras Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 605 (2011) (concluding in an empirical study that openly gay males are forty percent less likely to receive job interviews than equally qualified heterosexual peers).

