

2004

From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition

Miranda Oshige McGowan

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Part of the [Law Commons](#)

Recommended Citation

Oshige McGowan, Miranda, "From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition" (2004). *Minnesota Law Review*. 731.
<https://scholarship.law.umn.edu/mlr/731>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

From Outlaws to Ingroup: *Romer, Lawrence*, and the Inevitable Normativity of Group Recognition

Miranda Oshige McGowan[†]

INTRODUCTION

Justice Kennedy's opinion for the Court in *Lawrence v. Texas*¹ presents a problem of interpretation. Some aspects of the opinion suggest that it is grounded in libertarianism; other aspects suggest that it is grounded as much in the Equal Protection Clause as it is in substantive due process. Which is it? Did the Court decide in *Lawrence* and *Romer v. Evans*² that legislative acts backed solely by moral reasons will never survive rational basis scrutiny? That is Justice Scalia's charge: "[*Lawrence*] effectively decrees the end of all morals legislation"³ because "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."⁴ It is also Justice Scalia's condemnation: "This Court has no business imposing upon all Americans the resolution . . . that 'animosity' toward homosexuality is evil."⁵ Professor Randy Barnett agrees with Justice Scalia that the *Lawrence* Court enshrines the harm principle, that the state may not curtail an individual's liberty absent economic or physical harm to others,⁶ as a constitutional principle.⁷ He thinks, however, that we

[†] Associate Professor of Law, University of Minnesota. I wish to thank the members of the Half-Baked Club as well as Bill Eskridge, Dan Farber, and David McGowan for helpful comments and questions. All errors remain mine.

1. 123 S. Ct. 2472 (2003).

2. 517 U.S. 620 (1996).

3. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

4. *Id.* (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

5. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (citation omitted).

6. JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

should congratulate, not denigrate, the Court for doing so.

Attempts to characterize *Lawrence* as an example of this Court's libertarianism are wrong. *Lawrence* has not ruled out moral distaste as a rational basis for state regulation. Though Justice Kennedy's opinion contains some language to support the notion that the harm principle has become a constitutional principle, it is just rhetoric. Loose language aside, *Lawrence* does not hold that the Constitution incorporates the harm principle. In fact, *Lawrence* is more of an equal protection case than a substantive due process case. Justice Kennedy's opinion does not talk about the rights of persons generally as against the state. Rather, the opinion constantly refers to the rights of "homosexual persons"⁸ and the right of gays to make "choices central to personal dignity and autonomy."⁹

These limitations and references to gays and lesbians are as central to *Lawrence*'s holding as are the references to liberty. Gays and lesbians win in *Lawrence* and *Romer*, because the challenged legislation explicitly targeted gays, and gays constitute a group that, in the Court's eyes, is socially salient. In this respect, the Court sees gays and lesbians as being like persons with disabilities¹⁰ and hippies.¹¹ In contrast, felons, nude dancers, and men who frequent strip clubs lose in *Richardson v. Ramirez*¹² and *Barnes v. Glen Theatre, Inc.*,¹³ because felons and nude dancers are not, in the Court's eyes, socially salient groups. After *Lawrence*, it is more accurate to say that the Court will strike state statutes that limit the liberties of a group—like gays and lesbians, hippies, persons with disabili-

7. Randy E. Barnett, *Kennedy's Libertarian Revolution*, NAT'L REV. ONLINE (July 10, 2003), at <http://www.nationalreview.com/comment/comment-barnett071003.asp>.

8. See, e.g., *Lawrence*, 123 S. Ct. at 2478 (emphasis added).

9. *Id.* at 2481–82 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

10. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that a zoning law violated the Equal Protection Clause because the city's only justification for it was animus towards persons with disabilities).

11. See generally *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that a food stamp restriction violated the Equal Protection Clause because it was purposefully designed to prevent hippies from receiving food stamps). For a discussion of the case, see also *infra* text accompanying notes 174–81.

12. 418 U.S. 24 (1974).

13. 501 U.S. 560 (1991).

ties, or people who sacrifice animals as part of their religion¹⁴—if the state's reason for the regulation is grounded in moral distaste *for the group*.

This conclusion, however, raises a problem with which the Court has not yet come to grips. The Court does not have a consistent approach for differentiating “groups” from mere classifications of individuals. Put slightly differently, the Court has not articulated why gays and lesbians, hippies, and the disabled are socially salient groups that merit recognition under the Fourteenth Amendment while felons and nude dancers are not.

The Court seems to think that it is using a kind of social fact analysis, which resembles Professor William Eskridge's analysis of identity-based social movements.¹⁵ The Court, however, is doing more than describing the social landscape. Indeed, the Court's analysis is much more normative than descriptive.

I do not intend this observation as a criticism. The Court's recognition of the social fact that some people *compose a group* (and are not just a bunch of people who do the same thing) is inherently normative, because the Court's recognition inevitably and necessarily legitimizes that group and its acts. Once the Court has recognized a group, it requires the government to articulate reasons beyond moral distaste for regulating that group. Granting even this minimal protection creates an inevitable feedback loop by removing much of the stigma associated with being a member of the group. This feedback loop has been at work in *Romer* and *Lawrence*. These two cases have removed much of the stigma associated with being gay or lesbian. Being gay or lesbian is significantly less costly now—both emotionally and otherwise—than it was even ten years ago. Because the Court's recognition of a group's existence constructs and legitimizes that group, the Court has only recognized and protected those groups whose common conduct it considers worth protecting.

14. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (declaring unconstitutional a city ordinance that banned religious ritual animal sacrifice).

15. See generally William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) (describing the evolution of “identity-based social movements” as a process in which law provides stigmatized groups with a forum to object to exclusion and discrimination at the hands of hostile groups, and thus lay claim to constitutional rights which courts should protect).

Let me first turn to explaining why it is wrong to cast *Lawrence* as a libertarian decision. My discussion begins with the first Supreme Court victory for gays and lesbians, *Romer v. Evans*.¹⁶

I. LAWRENCE DOES NOT ENACT THE HARM PRINCIPLE

A. ROMER, AND THE RECOGNITION OF GAYS AND LESBIANS AS A SOCIAL GROUP

In 1992, Colorado voters passed “Amendment 2” to their state constitution.¹⁷ It precluded the state and local governments from outlawing discrimination on the basis of sexual orientation. This meant that if gays and lesbians wanted legal protection from sexual orientation discrimination, they would have to amend the state constitution.¹⁸ According to the state, Amendment 2 just “put[] gays and lesbians in the same [legal] position as all other persons,” as people may freely discriminate against one another except on the basis of special, prohibited categories, such as race, sex, national origin, religion, and color.¹⁹

The Court flatly rejected Colorado’s argument in *Romer*, holding that Colorado’s Amendment 2 denied gays and lesbians equal protection under the Fourteenth Amendment.²⁰ A law that makes it “more difficult for one *group* of citizens than for all others to seek aid from the government is . . . a denial of equal protection of the laws in the most literal sense.”²¹ Amendment 2’s denial of equal protection was unconstitutional because it bore no “rational relationship to legitimate state interests.”²² Amendment 2 “had the peculiar property of imposing a broad and undifferentiated disability on a single named *group*, an exceptional and . . . invalid form of legislation.”²³ The breadth of the disability the amendment imposed on gays, lesbians, and bisexuals also was completely “discontinuous with

16. 517 U.S. 620 (1996).

17. *Id.* at 623.

18. *Id.* at 626–27.

19. *Id.* at 626 (noting also that “the State says[] the measure does no more than deny homosexuals special rights”).

20. *Id.* at 623.

21. *Id.* at 633 (emphasis added).

22. *Id.* at 632.

23. *Id.* (emphasis added).

the reasons offered for the amendment."²⁴ So discontinuous, the Court found, that only "animus" toward gays, lesbians, and bisexuals could explain it.²⁵ Animus towards a group is never a "legitimate" reason for state regulation: "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular *group* cannot constitute a *legitimate* governmental interest."²⁶

After *Romer*, was *Bowers v. Hardwick*²⁷ still good law? *Hardwick*, after all, had sustained Georgia's conviction of Michael Hardwick for same-sex sodomy under rational basis scrutiny.²⁸ In *Lawrence v. Texas*, the Court answered "no."²⁹ Since 1973, Texas made same-sex sodomy between consenting adults a crime.³⁰ John Lawrence and Tyron Gardner were charged and convicted under this law after police discovered them having consensual sex in Mr. Lawrence's bedroom.³¹ The Court held that earlier sexual privacy cases—*Griswold v. Connecticut*,³² *Eisenstadt v. Baird*,³³ *Roe v. Wade*,³⁴ and *Planned Parenthood v. Casey*³⁵—required the conclusion that individuals have the right to have sex with partners of the same sex:

[A]dults may choose to enter [into sexual relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.³⁶

Justice Kennedy's opinion for the Court in *Lawrence* explic-

24. *Id.*

25. *Id.*

26. *Id.* at 634 (emphasis added) (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

27. 478 U.S. 186 (1986) (holding that the constitutional right to privacy did not encompass the right to engage in same-sex sodomy), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

28. *Id.* at 196.

29. 123 S. Ct. 2472, 2483–84 (2003).

30. *Id.* at 2479–80 (citing 1973 Tex. Gen. Laws ch. 399, codified as TEX. PENAL CODE ANN. § 21.06 (Vernon 2003)).

31. *Id.* at 2475–76.

32. 381 U.S. 479 (1965).

33. 405 U.S. 438 (1972).

34. 410 U.S. 113 (1973).

35. 505 U.S. 833 (1992).

36. *Lawrence*, 123 S. Ct. at 2478.

itly overruled *Hardwick*.³⁷ Criminal sodomy laws and the Court's opinion in *Hardwick* "demeaned the lives" of gays and lesbians and stigmatized them as individuals.³⁸ Texas, furthermore, had no legitimate reason for its criminal sodomy statute. Texas argued that it was permitted to prohibit immoral acts.³⁹ But the Court disagreed. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."⁴⁰ Texas's justification seemed only to compound the equal protection violation rather than to ameliorate it; prohibiting an activity because it is deemed immoral necessarily stigmatizes and demeans the people who engage in it.

After *Lawrence* one thing is clear: All state laws prohibiting sodomy are now unconstitutional. Just what else *Lawrence* and *Romer* mean is the question of the day.

B. THE LIBERTARIAN BRIEF FOR *LAWRENCE* AND *ROMER*

Both critics and proponents of *Romer* and *Lawrence* point to them as evidence of the Court's libertarian leanings.⁴¹ On this account, *Romer* and *Lawrence* stand for the proposition

37. *Id.* at 2484.

38. *Id.* at 2482.

39. Respondent's Brief at 41, *Lawrence*, (No. 02-102) (arguing that Texas's law against same-sex sodomy "rationally furthers other legitimate state interests, namely, the continued expression of the State's long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals"), available at http://supreme.usatoday.findlaw.com/supreme_court/briefs/02-102/02-102.resp.pdf.

40. *Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

41. For example, Professor Barnett praises the Court for embracing the libertarian harm principle, see *supra* note 7 and accompanying text, while the Web site CitizenSoldier.org decries *Lawrence* as throwing out "the last remaining tie in American law to the Judeo-Christian moral principles our nation was founded upon" in favor of libertarian principles, see *Lawrence v. Texas—America Dies*, Citizen Soldier, at www.citizensoldier.org/deathofamerica.html (last visited Mar. 13, 2004). See also *Lawrence*, 123 S. Ct. at 2595 (Scalia, J., dissenting) (criticizing the Court for putting an end to "all morals legislation"); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1282–84, (claiming the Court's "consistent disinclination" to allow morals rationales to justify lawmaking indicates that "mere reference" to morality will not justify government action, and arguing that "the Court's avoidance of morals rationales as the exclusive justifications for government action is not only reasonable" but also inevitable.)

that the Court will strike state restrictions on liberty if a state cannot show that the restriction protects third parties from physical or economic injuries. Without some evidence that economic or physical harm will result, moral disapproval for an activity will not justify restrictions on individual liberties.

The evidence that the Court has embraced the harm principle is largely by way of negative implication and the Court's use of vague language. In both cases, the Court appears to hold that morality does not satisfy even minimal rational basis scrutiny. *Romer* does not hold that gays are a suspect class, which would warrant strict or intermediate scrutiny.⁴² Rather, *Romer* deploys rational basis scrutiny, and the Court rejects the proposition that Coloradoans' moral distaste for gays and lesbians is a rational justification for treating gays and lesbians differently than others.⁴³ In *Lawrence*, the Court never says that gays and lesbians have a *fundamental* right to sexual privacy.⁴⁴ Here, too, the Court appears to apply rational basis scrutiny (though it never actually specifies the level of scrutiny).⁴⁵

The Court's opinion in *Lawrence* also takes seriously Texas's arguments that same-sex sodomy would undermine morality in Texas, and it acknowledges that many people seriously and sincerely condemn sodomy and homosexuality as immoral: "For many persons [objections to homosexual sex] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."⁴⁶ But the Court strikes down the ban anyway; however deeply and sincerely held, these moral beliefs do not count as rational justifications to restrict the liberty of gays and lesbians. Twice, then, the Court has held that morality does not rationally justify restrictions on liberty.

Justice Kennedy's opinion also invokes language reminis-

42. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

43. *Id.* at 632, 635.

44. See *Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting) ("Not once does [the Court] describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty' . . .").

45. See *id.* (Scalia, J., dissenting) (contending that the majority applied rational basis scrutiny to strike Texas's ban on same-sex sodomy). The fact that *Lawrence* overrules *Hardwick*, which upheld Georgia's sodomy ban on the ground that moral disapproval of sodomy and of gays was a rational justification for the statute, suggests that *Lawrence* itself applies rational basis scrutiny. See *id.* at 2483-84.

46. *Id.* at 2480.

cent of the harm principle. He speaks very broadly of “liberty,” not of “fundamental rights.”⁴⁷ Perhaps most strikingly, he stresses the fact that the Texas ban “seek[s] to control a personal relationship [that] is within the liberty of persons to choose without being punished as criminals.”⁴⁸ “This, as a general rule, should counsel against attempts by the State to . . . define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”⁴⁹ In a case involving only consenting adults, there is no such harm.⁵⁰ This caution sounds like the harm principle: The state should not curtail personal freedom absent harm to others.

Lawrence also subtly alters the substantive due process “history and tradition” analysis. According to the majority, the question is not whether the right to engage in sodomy is grounded in the history and tradition of our nation.⁵¹ Rather, the question is whether there has been a long-standing tradition of treating sex between same-sex partners differently under the law than sex between members of the opposite sex.⁵² The Court brushes aside the fact that state and common law had long prohibited sodomy, as these laws were rarely enforced against private sexual acts.⁵³

Lawrence’s alteration of history and tradition analysis suggests that the Court no longer presumes the validity of state restrictions of liberties, regardless whether a liberty has traditionally been considered fundamental. The history and tradi-

47. See, for example, the first sentence of Justice Kennedy’s analysis, stating that “[w]e conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their *liberty* under the Due Process Clause of the Fourteenth Amendment to the Constitution.” *Id.* at 2477 (emphasis added).

48. *Id.* at 2478.

49. *Id.*

50. Justice Kennedy wrote:

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. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id. at 2484.

51. See *id.* at 2478–79.

52. See *id.*

53. *Id.* at 2479 (“Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”).

tion inquiry now asks whether traditionally a specific activity has been actively regulated by the states. What the state has not traditionally and actively regulated seems to fall into the realm of "liberty," and states will need to justify their incursions into that realm.

Were there any remaining doubts about the Court's libertarian leanings, Justice Kennedy appears to banish them with this declaration: Justice Stevens was right in *Hardwick* that "[o]ur prior cases make . . . abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."⁵⁴ Justice Kennedy concludes that Justice Stevens's reasoning "should have been controlling in [*Hardwick*], and should control here."⁵⁵

Lawrence certainly gives devotees of the harm principle much to celebrate. Yet, construing *Lawrence* as libertarian misses a crucial aspect of the case—the fact that Texas's sodomy statute banned only sodomy between gays and lesbians. Because the state restricted the liberties of *gays and lesbians*, the Supreme Court struck the statute.

C. THE MORAL FOUNDATION OF *LAWRENCE*

To overturn *Hardwick*, the *Lawrence* Court had to do one of two things. First, it could have decided that *Hardwick* was wrong when it decided that the Constitution does not include a fundamental right for gays and lesbians to have sex. The *Lawrence* Court does criticize *Hardwick*, but it never holds that the private, sexual liberties of gays and lesbians are fundamental ones. *Lawrence* instead speaks of "rights" and "liberties" unadorned by adjectives. Second, the Court could have decided that *Hardwick* was wrong on its own terms—that criminal sodomy laws had no rational basis. Though it never says so directly, the Court appears to have taken this latter tack.⁵⁶

1. The Court's Puzzling Claim to Value Neutrality

The Court acknowledges that for many people, including

54. *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

55. *Id.* at 2484.

56. Justice Scalia points out that the Court uses the language of rational basis when it holds, "The Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 2492 (Scalia, J., dissenting).

apparently the people of Texas, homosexuality is a serious moral issue based on “profound and deep convictions . . . to which [these people] aspire and which thus determine the course of their lives.”⁵⁷ This fact appears to complicate rather than resolve the dispute in *Lawrence*: “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”⁵⁸ In *Lawrence*, the Court describes its obligation under the Constitution as “to define the liberty of all, not to mandate our own moral code.”⁵⁹

Framing the issue this way is startling—the Court inverts the usual criticism of substantive due process analysis. The usual critique of substantive due process analysis is that the Court necessarily defines a particular moral code for the country when it decides that some unenumerated rights are so fundamental that democratic majorities may not curtail them.⁶⁰ The process of culling among rights, anointing some to be fundamental and beyond regulation, and deeming others to be less so and subject to regulation, both relies upon and creates a code of values.

From this perspective, the Court’s statement in *Lawrence* simply makes no sense. The Court *is* mandating a moral code—one that protects the sexual liberties of gays and lesbians because those liberties are more important than the moral preferences of a majority of Texans. The usual critique of substantive due process would advise that the Court could only avoid mandating a moral code by leaving the decision to regulate sodomy to legislatures.

Does the *Lawrence* Court have any basis for saying that its task is to “define the liberty of all, not to mandate [its] own moral code,”⁶¹ or is this just so much rhetoric? I will argue that the Court is right, because a contrary decision would have decided as a constitutional matter that gay and lesbian personal relationships are different and lesser than heterosexual rela-

57. *Id.* at 2480.

58. *Id.*

59. *Id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

60. *See, e.g.*, *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293–301 (1990) (Scalia, J., concurring) (criticizing the Court’s substantive due process jurisprudence as inherently subjective and arguing that “[t]his Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself”).

61. *Lawrence*, 123 S. Ct. at 2480 (citing *Casey*, 505 U.S. at 850).

tionships. The Court's description, therefore, is not a rhetorical flourish.

2. The Analogy to *Griswold*, *Eisenstadt*, and *Roe*

The *Lawrence* Court begins its analysis of the rights of gays and lesbians with *Griswold v. Connecticut*,⁶² *Eisenstadt v. Baird*,⁶³ and *Roe v. Wade*.⁶⁴ These cases look like an odd place to start, as they all dealt with the right to decide "whether to bear or beget a child."⁶⁵ This right is not at issue in *Lawrence*.

But these cases—especially as the Court interpreted them in *Casey*—strongly imply that states could not constitutionally criminalize heterosexual sodomy. Justice Harlan's objections to state regulation of the use of contraceptives by married persons would apply with full force to state regulation of a couple's choice of particular sexual practices. He wrote in dissent in *Poe v. Ullman* that state restrictions on the use of contraceptives were unconstitutional:

[T]he State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. [No] elaboration of presumptions, testimonial privileges, or other safeguards, [could] alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges.⁶⁶

Whether a state enforces a law against contraceptive use or a law against sodomy, the state equally invades marital relationships. Police would have to search homes and bedrooms for evidence of the couple's sex practices; to defend themselves against conviction, spouses would be forced to divulge details of their relationship ordinarily shielded by the marital testimonial privilege.⁶⁷ It is one thing, Justice Harlan continued, for the state "to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it under-

62. 381 U.S. 479 (1965).

63. 405 U.S. 438 (1972).

64. 410 U.S. 113 (1973).

65. *Eisenstadt*, 405 U.S. at 453.

66. 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

67. *Id.*

takes to regulate by means of the criminal law the details of that intimacy.⁶⁸ States despoil marital intimacy whenever they regulate the private, sexual conduct of married couples, whether by forbidding them to use contraceptives, or by criminalizing sodomy.

Eisenstadt extends *Griswold's* protection from "unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" to unmarried persons.⁶⁹ *Eisenstadt* is an equal protection case, not a substantive due process case. The Court uses the Equal Protection Clause as a kind of rights ratchet to expand the universe of people entitled to exercise the liberty interest established by *Griswold*.⁷⁰ *Eisenstadt* finds that there is no principled distinction between married and unmarried people.⁷¹ The right to marital privacy (*Griswold*) thus becomes in *Eisenstadt* the more general right to sexual privacy.⁷²

With *Eisenstadt* in place, concluding that the Constitution forbids states from prohibiting heterosexual sodomy becomes pretty easy. Indeed, shielding heterosexual sodomy from state regulation is a far easier case than *Roe*, as the constitutional right of abortion must mediate between competing liberty and life interests.⁷³

Were there any doubts about this conclusion, the *Casey* plurality dispels them. *Casey* transforms *Griswold's* holding that married couples have a right to privacy and autonomy to conduct their married lives into the more general holding that individuals have a right to autonomy in their private sexual lives. Though it trims the scope of a woman's right to abortion, *Casey* emphasizes that *GrEisenRoe* are not merely about the right to prevent and terminate pregnancies. The plurality writes:

Our precedents have respected the private realm of family life which the state cannot enter. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central

68. *Id.* at 553.

69. 405 U.S. 438, 453 (1971).

70. *Id.* (holding that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike").

71. *Id.* at 454 (stating that "the State could not, consistently with the Equal Protection Clause, outlaw distribution [of contraceptives] to unmarried but not to married persons").

72. *Id.*

73. *Roe v. Wade*, 410 U.S. 113, 163-65 (1973).

to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁷⁴

The right of married people to conduct their intimate lives free from government regulation is now just one specific instance of the more general individual right to make decisions about the details of one's family life and one's sexual relationships. After *Casey*, the scope of "family life" sweeps broadly as well. For abortion rights to be about "family life," the concept of "family life" must be capacious enough to include individuals who have relationships outside of marriage and without children, and indeed it must also include individuals who have sex without the "relationship."

If this analysis is right, then the *Lawrence* Court was half right to say that its role was "to define the liberty of all, not to mandate our own moral code."⁷⁵ The Court's statement implies that leaving gay sodomy subject to state regulation would not be a morally neutral decision. The Court is correct. To hold that the Fourteenth Amendment permits democratic majorities to prohibit gay sodomy, the Court would have to distinguish gay sex from straight sex. *Griswold's* analysis appears to protect a full menu of sexual acts between husbands and wives, including sodomy; the Court thus could not distinguish gay sex from straight based on the kinds of activities involved. *Eisenstadt* forecloses the sanctity of the marital relationship as a basis for distinguishing gay sex from straight sex, and *Roe* and *Casey* foreclose the definition of sex as a procreative act to serve as a basis for such a distinction.

To distinguish gay sex from straight sex, then, the Court would have to hold that the sexual relationships of loving, gay couples are different from those of unmarried heterosexual couples, and that they are less important to the lives of gay persons than they are to heterosexuals. The Court articulates this problem explicitly: "[The] continuance [of *Hardwick*] as precedent demeans the lives of homosexual persons. The stigma this criminal statute imposes . . . is not trivial."⁷⁶ Leav-

74. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion) (citation and quotations omitted).

75. *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003) (quoting *Casey*, 505 U.S. at 850).

76. *Id.* at 2482.

ing the status quo in place is not a morally neutral decision.

But the Court is only half right, because the Court's decision in *Lawrence* is also not morally neutral. This does not weaken *Lawrence*'s constitutional legitimacy. No morally neutral decision was in fact possible. The decision certainly reflects a particular moral outlook. *Lawrence* holds that criminal sodomy statutes demean the lives and sexual relationships of gay persons. The Supreme Court strikes sodomy statutes because states have no legitimate interest in demeaning gays and lesbians.⁷⁷ As far as the Constitution is concerned, gay and lesbian relationships deserve as much protection from state interference as straight relationships: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."⁷⁸ Permitting states to deprive gays and lesbians of this autonomy would denigrate their relationships as deviant and undesirable. Once *GrEisenRoe* puts the bedroom out of bounds, the moral impetus to denigrate gay relationships, the Court declares, cannot be rational. When the Court forbade states from criminalizing sodomy, the Court declared, in essence, that gays have a right not to be demeaned or stigmatized.

D. HERE'S THE RUB: ALL LAWS STIGMATIZE AND RESTRICT THE LIBERTIES OF GROUPS

There is a catch to the Court's declaration. Justice Scalia rightly objects in *Lawrence* that all criminal laws stigmatize the prohibited conduct and by extension stigmatize people who do the prohibited act.⁷⁹ The fact that the Court considers this kind of stigma unconstitutional in *Lawrence* leads Justice Scalia to believe that the Court has adopted the harm principle,⁸⁰ but his conclusion is too quick. The Court's analysis in other cases involving restrictions on liberties for moral reasons demonstrates how centrally important it is to *Lawrence* that Texas singled out gays and lesbians and sought to control only

77. *Id.* at 2484.

78. *Id.* at 2482.

79. *See id.* at 2495–96 (Scalia, J., dissenting) (arguing that laws that regulate sexual behavior reflect society's belief "that certain forms of sexual behavior are immoral and unacceptable"); *cf.* *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) ("I had thought that one could consider certain conduct reprehensible—murder[,] . . . or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct.").

80. *See Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (stating that the Court has "effectively decree[d] the end of all morals legislation").

their sexual relationships. Let me begin my explanation of this point by contrasting *Barnes v. Glen Theatre, Inc.*⁸¹ with *Lawrence*.

In *Barnes*, Indiana defended the application of its public indecency law to nude dancers in adult-only strip clubs. The dancers at the Kitty Kat Lounge and Glen Theatre wanted to dance completely nude. They sued to enjoin the enforcement of an Indiana public indecency statute requiring dancers to wear pasties and g-strings.⁸² Chief Justice Rehnquist's plurality opinion for the Court held that the dancers' naked gyrations were First Amendment expression.⁸³ Over Justice Scalia's vituperative concurrence,⁸⁴ the plurality required Indiana to justify the public indecency statute under intermediate scrutiny.⁸⁵ Chief Justice Rehnquist observes that the "statute's purpose" is to "protect[] societal order and morality."⁸⁶ Statutes like this one plainly "reflect moral disapproval of people appearing in the nude among strangers in public places."⁸⁷ The plurality concludes, without any fuss, that bans on public indecency fit well within "[t]he traditional police power of the States . . . to provide for the public health, safety, and morals" of their citizens.⁸⁸ Consequently, Indiana's requirement that nude dancers wear pasties in strip clubs "furthers a substantial government interest in protecting order and morality."⁸⁹

Indiana's reason for prohibiting public nudity was very similar to Texas's reason for banning same-sex sodomy. Indiana wanted to stigmatize nude dancers and people who frequented nude clubs as criminals and their conduct as indecent and immoral. *Barnes*, however, upholds Indiana's restriction, even though the fit between the statute and public decency was

81. 501 U.S. 560 (1991).

82. *Id.* at 563 (plurality opinion) (noting that the statute required that dancers wear "pasties" and "G-strings"). The owners of these clubs also joined the lawsuit. *Id.* (plurality opinion).

83. *Id.* at 565-66 (plurality opinion).

84. Justice Scalia would only have required Indiana to demonstrate that the law had a rational basis. *Id.* at 580 (Scalia, J., concurring).

85. *Id.* at 567-68 (plurality opinion) (holding that Indiana's public indecency statute "furthers substantial governmental interests"); see also *id.* at 579 (Scalia, J., concurring) ("The plurality purports to apply . . . an intermediate level of First Amendment scrutiny.").

86. *Id.* at 568 (plurality opinion).

87. *Id.* (plurality opinion). To be fair, Indiana also seems to disapprove of people being nude around their friends in public.

88. *Id.* at 569 (plurality opinion).

89. *Id.* (plurality opinion).

far more opaque than the pasties the dancers have to wear under Indiana law. Think about it—after *Barnes* the dancers have to wear pasties. Lap dances with pasties are not much more decent than lap dances without pasties. Lap dances in anything short of footed pajamas would not meet any definition of “decent” in any of Justice Scalia’s dictionaries.⁹⁰ The Court ignores the limited effect that this statute would actually have on the moral tone of South Bend. The only “public” that ever saw nude dancers at the Kitty Kat Lounge were people who knew what they would find when they walked in off the street—and they would only be offended by the club’s “decency,” not its indecency. Patrons wanted to see what Indiana did not want them to see, and the Court lets Indiana impose its moral preference that the patrons’ preferences be made illegal.

How can it be that Indiana’s moral preferences outweigh the free expression rights of nude dancers and the liberty interests of their patrons, but Texas’s moral preferences do not outweigh the liberty interests of gays and lesbians? As a legal matter, *Barnes* would seem to present the more compelling constitutional case. The Court assumed that the dancing was protected expression, so the Indiana law had to satisfy intermediate scrutiny. Indiana justified the statute solely on grounds of morality, and the evidence of the statute’s enhancement of South Bend’s moral tone was skimpy at best. Nevertheless, the strip club goes and nude dancers lost. The plurality opinion upheld the statute because states, after all, have a substantial interest in morality.⁹¹

90. Actually, footed pajamas would be kinky. My imagination is either far too limited or far too active to come up with a garment that would render lap dancing “decent.”

91. Professor Suzanne Goldberg argues in this symposium that *Barnes* demonstrates the Court’s increasing acceptance of the harm principle, in part because only four Justices in *Barnes* accepted the proposition that morality standing alone could justify limits on expression. Goldberg, *supra* note 41, at 1270. Justice Souter—the fifth vote to uphold Indiana’s statute—concurred separately on the grounds that ameliorating the deleterious secondary effects from nude dance clubs was a substantial enough state interest to justify the limits on the dancers’ expression. *Barnes*, 501 U.S. at 582 (Souter, J., concurring). Justice Souter is silent about the state’s interest in morality, but the fact that he wrote a separate concurrence on other grounds suggests he disagreed with the plurality’s reasoning. Professor Goldberg rightly points out that the Court is uneasy with stand-alone moral justifications for government restrictions on personal liberty. See Goldberg, *supra* note 41, at 1282. But, at this point in the Court’s history, I disagree that the Court’s unease has ripened into an across-the-board rejection of laws that seek solely to improve the morality of the citizenry. Chief Justice Rehnquist and Justices O’Connor and

The Court appears to believe that the stigma of same-sex sodomy laws is notable because it is directed toward gays and only gays. Unfortunately, this objection does not really distinguish same-sex sodomy laws from other laws.⁹² The public indecency statute in *Barnes* surely stigmatized the set of guys who

Kennedy have never indicated that they would reject *Barnes*'s reasoning or outcome today. Justice Scalia faulted the Court opinion for giving too little deference to the state's interest in morality. See *supra* notes 3–4 and accompanying text. Similarly Justice Thomas explains in his dissent in *Lawrence* that morality-based restrictions on liberties might be silly and misguided, but they are nevertheless constitutional. *Lawrence v. Texas*, 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting).

In assessing whether the Court has indeed declared the end of morals legislation, it is also important to ask what level of scrutiny the Court is applying in the various cases. The Court upholds the state law in *Barnes* under *intermediate* scrutiny—the state's interest in morality was sufficiently important to justify the incursion on free expression. *Barnes*, 501 U.S. at 569–70 (plurality opinion). At the end of 2003, it is fair to say that in cases to which intermediate scrutiny applies, there is no stable consensus within the Court as to whether morality standing alone will satisfy intermediate scrutiny. The Court has not been squarely presented with the issue since *Barnes*, and it is not looking for an opportunity to reconsider *Barnes*. Indeed, the Court dodged the opportunity to answer that question squarely in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), which upheld a public indecency statute that was nearly indistinguishable from Indiana's. *Id.* at 278. The state in *Pap's A.M.*, however, had presented evidence to the trial court that strip clubs and other adult entertainment businesses increased prostitution, drug sales and use, and crime in the areas in which they were located. *Id.* at 297–98. The Court thus did not have to decide the more contentious issue—whether morality is a substantial or important state interest. *Griswold* and *Roe*, however, make it plain that a state's interest in morality alone is not a *compelling* state interest and could not withstand strict scrutiny. How the Court will handle morals legislation under rational basis scrutiny is the most interesting question, and the one I address here.

92. This distinction may not be true as a factual matter, either. People who do not identify as gay, lesbian, or bisexual sometimes experiment with having sex with partners of the same sex. In a 1992 survey of Americans about sexuality, about four percent of women surveyed reported that they had had sex with a woman at some point in their lives, two percent said that they had had sex with a woman in the last year, but only 1.4 percent of women identified themselves as lesbian or bisexual. The survey also found that about three percent of men had had sex with men but did not identify as gay. ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 174–77 (1994). There are even nicknames for young women who experiment with having sex with other women during college: L.U.G.s (Lesbians Until Graduation). See, e.g., Deirdre Dolan, *Lesbian Lolitas: High-School Girls Want to Be Gay-ish*, N.Y. OBSERVER, Dec. 12, 2002, <http://www.nyobserver.com/pages/story.asp?ID=6716> (“While ‘L.U.G.’s (lesbians until graduation) became a term of derision in the 1990’s—applied to college women who slept with women on campus but would immediately link up with socially appropriate males once they left college—the trend seems to have worked its way into a younger crowd.”).

visited totally nude clubs and stigmatized nude exotic dancers. The public indecency statute and the prosecution of the Kitty Kat Lounge reflected the state's moral distaste for the kinds of people who would like to appear nude in public and who frequent totally nude clubs; Indiana offered no other justification for its statute.

E. TOWARD A WORKABLE DISTINCTION BETWEEN "GROUPS" AND "CLASSIFICATIONS"

Why don't the liberties of nude dancers and strip club goers count, and the liberties of gays do? Because the Court thinks (and I would agree) that gays as a set are a *group*, while the set of nude dancers and people who go to strip clubs are not a group, in the Equal Protection Clause sense. It is therefore more accurate to say that the Court will strike state statutes that restrict the liberties of *groups*, if the state's reason for the regulation is grounded in moral distaste.

This conclusion dovetails with the Court's analyses in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁹³ *City of Cleburne v. Cleburne Living Center*,⁹⁴ and *Plyler v. Doe*.⁹⁵ In *Lukumi Babalu Aye*, the Court struck a city ordinance that banned animal sacrifices "for any type of ritual"—whether or not the animal would be eaten.⁹⁶ The city of Hialeah, Florida, passed the ordinance when members of the Church of Santeria decided to open a church, school, and cultural center in the town.⁹⁷ Ritual animal sacrifice is an integral part of the Sante-ria religion.⁹⁸ Some Hialeah residents balked at practicing members of this church living in their midst, and the city council acted quickly to ban animal sacrifice.⁹⁹ The city council drafted the statute narrowly so that it would ban only the types of slaughter and sacrifices that the church practiced; it exempted kosher animal slaughter, hunting, euthanasia, killing animals for food if it was not part of a ritual, and pest eradication.¹⁰⁰ During a city council meeting, citizens and city council members specifically disparaged and denounced the Church of

93. 508 U.S. 520 (1993).

94. 473 U.S. 432 (1985).

95. 457 U.S. 202 (1982).

96. 508 U.S. at 524, 527.

97. *Id.* at 526, 527.

98. *Id.* at 524.

99. *Id.* at 526–27.

100. *Id.* at 537.

Santeria and its practices.¹⁰¹ Hialeah justified the ban as furthering the health, safety, and morals of its citizens.¹⁰²

The Court struck the ban because the ban's narrow scope and the town's disparaging comments revealed that the city council passed the ban "because of, not merely in spite of," residents' desire to suppress Santeria religious practices.¹⁰³ Moreover, the statute's narrow scope meant that it did not further the city's purported health and safety aims or its purported concern for animal welfare.¹⁰⁴ The statute's only real purpose was to drive members of the church from the city of Hialeah and to brand them and their religious practices as deviant and illegal.¹⁰⁵

Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court found that a city zoning regulation violated the Equal Protection Clause because it required a group home for persons with mental disabilities to get a special use permit before it was allowed to operate.¹⁰⁶ The Court concluded that the city imposed this regulation because of prejudice against persons with disabilities.¹⁰⁷ Had the group home's residents not had mental disabilities, it could have opened without a special use permit.¹⁰⁸ The Court held that disabled persons were not a suspect category.¹⁰⁹ But the city had no rational basis for requiring group homes for persons with mental disabilities to get special use permits, but not fraternities, nursing homes, hospitals, or boarding houses.¹¹⁰ The city had worried about the "negative attitude" of nearby property owners and of students at a nearby junior high school¹¹¹ and worried about the possibility that the home's residents would be injured in a flood.¹¹² These concerns, the Court found, "rest[ed] on an irrational

101. *Id.* at 541-42.

102. *Id.* at 528.

103. *Id.* at 540.

104. *See id.* at 544-45.

105. *See id.* at 540-42 (citing evidence that citizens and members of the city council believed that the Santeria religion was immoral and concluding that "the ordinances were enacted because of, not merely in spite of their suppression of Santeria religious practice" (internal quotations omitted)).

106. 473 U.S. 432 (1985).

107. *Id.* at 450.

108. *Id.* at 437.

109. *Id.* at 442-43.

110. *Id.* at 446-48.

111. *Id.* at 448-49.

112. The home was situated on a 500-year flood plain. *Id.* at 449.

prejudice against the mentally retarded”¹¹³ and were indistinguishable from “a bare desire . . . to harm a politically unpopular group.”¹¹⁴

Plyler v. Doe may provide the closest analogue to *Lawrence*. In the 1970s, Texas prohibited school districts from using state funds to educate illegal aliens and required them to deny admission to undocumented alien children.¹¹⁵ The Court held these restrictions violated the Equal Protection Clause—despite the fact that alienage is not a suspect class and education is not a fundamental right.¹¹⁶ The state argued that its restrictions husbanded scarce educational resources, enhanced education for its citizens and legal aliens, and discouraged illegal aliens from migrating to Texas.¹¹⁷ The Court deemed these “insubstantial” reasons to deny public education to undocumented alien children, largely because Texas’s cost savings were low, and Texas could not explain how excluding undocumented children improved education or how it discouraged migrants from coming to Texas.¹¹⁸ The restrictions would, however, ensure that undocumented alien children would inhabit a permanent, illiterate subclass in the United States.¹¹⁹ In other words, the Texas law unconstitutionally cemented illegal aliens’ status as outsiders.

The *Lawrence* Court recognized that the same-sex sodomy ban similarly stigmatized gays and lesbians convicted under the statute.¹²⁰ If their convictions were sustained, the Court observed that John Lawrence and Tyron Garner would “bear on their record the history of their criminal convictions.”¹²¹ Were they to move from Texas, at least four states would require them to register as sex offenders.¹²² Texas’s criminalization of same-sex sodomy threatened to impose palpable injuries and legal disabilities on gays and lesbians that extended far beyond moral condemnation of their acts. This aspect of the *Lawrence*

113. *Id.* at 450.

114. *Id.* at 447 (ellipses in original) (quoting United States Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

115. *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

116. *Id.* at 230.

117. *Id.* at 228–30.

118. *Id.* at 230.

119. *Id.* at 223.

120. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

121. *Id.*

122. *Id.* (citing statutes in Louisiana, Mississippi, South Carolina, and Idaho).

Court's opinion closely parallels the Court's reasoning in *Lukumi Babalu Aye*, *Cleburne Living Center*, and *Plyler*.

II. DISTINGUISHING BETWEEN GROUPS AND CLASSIFICATIONS

To say that the Court will strike state statutes that restrict the liberties of groups if the state's reason for the regulation is grounded in moral distaste raises a new problem. If all laws classify, and if most prohibitions stigmatize the behavior they restrict, then the question becomes: When does a law restrict and stigmatize some class of activities (nude dancing), and when does a law restrict and stigmatize the activities of a group (gay sodomy)? The Court must think that these are different situations, because it only rejects moral distaste as a sufficient justification in the latter case.

But what makes these situations different? The difference cannot lie in *Romer*'s assertion that some laws are meant to stigmatize, and *only* to stigmatize a group.¹²³ *Romer*'s assertion begs the question I wish to answer. If it is true that all legislation grounded in morality classifies and stigmatizes the prohibited behavior (and by extension the people who do the prohibited things), then *Romer* merely restates the question. What we need to know is how to distinguish between morals legislation that restricts and stigmatizes some class of *activities* (say, nude dancing) and morals legislation that restricts and stigmatizes the activities of a *group* (gay sodomy).

A. JUST THE [SOCIAL] FACTS, MA'AM

To the extent that I can discern a pattern from its cases, the Court appears to be trying to use a descriptive social-fact analysis that partly resembles Professor William Eskridge's description of identity-based social movements. Professor Eskridge identifies racial groups, feminists, gays and lesbians, and the disabled as the major identity-based social movements (IBSMs) of the twentieth century.¹²⁴ As Professor Eskridge describes it, IBSMs formed in response to comprehensive systems

123. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

124. Eskridge, *supra* note 15, at 423-24.

of legal regulation that treated some characteristic or behavior as the norm, while punishing people who deviated from that norm and excluding them from full political participation.¹²⁵ These legal restrictions pulled people with these characteristics together into groups. These “groups of otherwise dissimilar people came to feel that they were, because of their [legal] classification, ‘similarly situated.’”¹²⁶ Over time, people began to consider these traits as an essential part of their identity.¹²⁷

Identity-based social movements fight to abolish laws that treat their trait as a “malignant” deviation from the norm.¹²⁸ They want the law to stop treating people with these traits as threatening and malign. At the very least they want the law to stop punishing them and excluding them from political and social life. Ultimately, IBSMs want their characteristics to be accepted as “benign” variations from the norm.¹²⁹ Historically, the Court has not extended constitutional protection to an IBSM until the political and social consensus that the IBSM and its trait are malignant has begun to break down. The Court generally waits until society tolerates a group to some extent before extending constitutional protection to it.¹³⁰ Thus, the Court decided *Brown* after President Truman desegregated the military,¹³¹ *Cleburne Living Center* after Congress passed the Rehabilitation Act,¹³² and *Craig v. Boren* after the Equal Pay Act and

125. *Id.* at 425–26.

126. *Id.* at 433.

127. *Id.*

128. *Id.* at 467–68, 478–79.

129. *Id.* at 478–79.

130. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 54 (1994). Professors Eskridge and Frickey argue:

If anything, the Court’s equal protection jurisprudence has shown an “inverted *Carolene*” quality: so long as a group really is politically marginalized, the Court will tolerate virtually any action by Congress or the States that adversely affects the minority; it is only when a minority is becoming a key player in national politics that the Court constitutionalizes longstanding concerns about discrimination.

Id.

131. *Brown v. Board of Education* held that segregation in public schools was unconstitutional in 1954, 347 U.S. 483, 495, six years after President Truman’s executive order desegregated the military in 1948, Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948).

132. *Cleburne* found no rational basis for requiring a group home for the mentally handicapped to obtain a special use permit in 1985, 473 U.S. 432, 449–50, more than ten years after Congress enacted the Rehabilitation Act of 1973 to ensure that handicapped persons were not denied access to jobs, train-

Title VII.¹³³

Professor Eskridge's account seems to fit with the Court's approach in *Lawrence* and the other cases discussed above. The fact that the *Lawrence* Court could plausibly analogize gay sex (*Lawrence*) to unmarried sex (*Eisenstadt*)¹³⁴ means that gay sex is now—in Professor Eskridge's vocabulary—a “tolerable” variation of sex. Similarly, in *Lukumi Babalu Aye* the Court tamed the exotic practice of animal sacrifice by situating it within the traditions of Judeo-Christian and Islamic religious practices.¹³⁵ *Plyler* brought compassion to the plight of the children of illegal immigrants, emphasizing that by excluding them from public school Texas sought to burden innocents who have committed no crime but with that of their parents.¹³⁶ And in each of these cases, the Court has been right as a descriptive matter that these groups are groups in an important social sense and not just “sets” or “classifications” of people who have some activity in common.

B. THE INEVITABILITY OF NORMATIVE ANALYSIS

A closer examination of the Court's cases reveals that the Court's practice is essentially normative. The Court is not just describing the existing social landscape. A comparison of *Richardson v. Ramirez*¹³⁷ and *Romer* demonstrates this point. In *Ramirez*, the Supreme Court rejected an equal protection challenge to California's law that denied felons who had completed their sentences the right to vote.¹³⁸ The California constitution prohibited persons who had been convicted of a felony

ing, or public facilities, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797 (2000)).

133. *Craig v. Boren* rejected gender-based discrimination in the sale of alcohol in 1976, 429 U.S. 190, 210, more than ten years after Congress prohibited discrimination against women in the workplace in the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2000)), and in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 25 (codified as amended at 42 U.S.C. §§ 2000-2000h (2000)).

134. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2493 (2003).

135. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524-25 (1993) (noting that animal sacrifices were mentioned throughout the Old Testament, were important to the early practice of Judaism, and remain a part of current Islamic practices).

136. See *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982) (holding that illegal immigrant children were not responsible for their parents' violations of law and could not constitutionally be punished for their crimes).

137. 418 U.S. 24 (1974).

138. *Id.* at 56.

from voting.¹³⁹ An individual who wanted to register to vote had to sign an affidavit stating whether he had ever been convicted of “a felony [that] disqualifies [him] from voting.”¹⁴⁰ People with felony convictions who had completed their sentences could not vote, unless they had petitioned for, and been granted, a pardon from the Governor.¹⁴¹ In practice only a tiny fraction of ex-convicts could vote.¹⁴² California said that denying felons the right to vote preserved “the purity of the ballot box” against abuse by “morally corrupt and dishonest voters.”¹⁴³ The ex-convict plaintiffs argued that the California law denied them a fundamental right—the right to vote—in violation of the Equal Protection Clause.

The Court rejected the plaintiffs’ equal protection challenge without ever entertaining its merits. The Court upheld California’s disenfranchisement of ex-convicts under Section 2 of the Fourteenth Amendment.¹⁴⁴ Section 2 specifies how congressional representatives will be apportioned among the states. Most relevantly, it provides that if “the right to vote” was “denied to any of the male inhabitants” of the state who were citizens and at least twenty-one years old, the state’s “representation [in Congress] shall be reduced” proportionately.¹⁴⁵ States, however, could deny men the right to vote “for participation in rebellion, or *other crime*,” without reducing their number of representatives.¹⁴⁶ According to the Court, the phrase “or other crime” encompassed felonies in general.¹⁴⁷ The Fourteenth Amendment, the Court reasoned, must therefore

139. *Id.* at 27 (citing the relevant portion of the California constitution).

140. *Id.* at 28.

141. *Id.* at 30.

142. *Ramirez v. Brown*, 507 P.2d 1345, 1347 (Cal. 1973), *rev'd sub nom. Richardson v. Ramirez*, 418 U.S. 24 (1974). Felons who had been sentenced to prison had to be certified as “rehabilitated” by a California superior court and granted a pardon by the Governor. *Ramirez*, 418 U.S. at 30. The Governor could not pardon a person who had been convicted of two felonies unless a majority of the justices of the California Supreme Court concurred. *Id.* at 30 n.7. Between 1968 and 1971, California released more than 34,000 people from state prisons and restored the right to vote to fewer than 300. *Id.* at 31 n.8. In 1973, the California Supreme Court estimated that more than 100,000 persons were ex-felons. *Ramirez*, 507 P.2d at 1347 n.2.

143. *Ramirez*, 507 P.2d at 1349.

144. *Ramirez*, 418 U.S. at 54–55.

145. U.S. CONST. amend. XIV, § 2.

146. *Id.* (emphasis added).

147. *Ramirez*, 418 U.S. at 53–54.

permit states to deny felons the right to vote.¹⁴⁸

The Court's reading of Section 2 is not bulletproof. The phrase "or other crime" can be read just as plausibly to modify the phrase "for participation in rebellion." Read this way, "or other crime" broadens "participation in rebellion" to include acts against the Union that fell short of actual participation in the Civil War. This reading harmonizes nicely with the overall purpose of Section 2—to penalize states that denied African-Americans the right to vote, but to permit states to prohibit former Confederates from voting.¹⁴⁹

The more serious objection to the Court's conclusion, however, is that it begs the question whether Section 2 immunizes laws stripping felons of their voting rights from equal protection scrutiny. Just because Section 2 provides that such denials will not reduce a state's representation in Congress, it does not necessarily mean that states are authorized to deny the right to vote or to impose other civil disabilities, such as exclusion from jury service, to all who have been convicted of "other crimes."¹⁵⁰ One could still ask whether the extent of the disability or the manner in which it was imposed denied felons equal protection of the laws. It is not inconsistent to leave a state's representation in Congress in place if it denies felons the right to vote, and to strike those state statutes that do so in a manner that denies felons equal protection of the laws. Additionally, Professor David Shapiro has argued that there is absolutely no evidence—either in the text or legislative history of the Fourteenth Amendment—suggesting that Section 2 bars judicial review under the Equal Protection Clause of state schemes that stripped felons of their civil rights.¹⁵¹ The legislative history cited by the Court suggests at most that Congress knew that some states deprived felons of the right to vote, and that Congress did not intend to reduce a state's representation on that ground.¹⁵² The Court's reasons for declaring felon disenfran-

148. *Id.* at 43, 53.

149. See Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1104 (explaining that Section 2 was intended "to allow states to disenfranchise former Confederates, after Congress decided not to do so itself").

150. Brief of the American Bar Association, *Amicus Curiae* at 5, 17–20, *Ramirez*, 418 U.S. 24 (1974) (No. 72-1589).

151. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303–04 (1976).

152. See *Ramirez*, 418 U.S. at 45–48 (detailing comments by congressmen pertaining to Section 2 of the Fourteenth Amendment).

chisement laws beyond the reach of the Equal Protection Clause fail to justify that conclusion.

More generally, the *Ramirez* Court's question-begging analysis reveals how inconsequential felons' voting rights are to the Court and how reasonable it seemed to strip felons of these rights.¹⁵³ The practice of stripping felons of their civil rights does indeed have a long history, extending back to the Greeks.¹⁵⁴ The Greeks believed that felons forfeited their civil rights because a felony was a crime against society.¹⁵⁵ Felons, in effect, banished themselves.¹⁵⁶ According to the Greeks, felons lived in "infamy."¹⁵⁷ Earlier provisions of the California Constitution had referred to felonies as "infamous crimes" in a nod to this Greek concept.¹⁵⁸ Being stripped of civil rights communicates an unambiguous message: You are no longer one of us.¹⁵⁹

As a matter of descriptive social fact, felons who have com-

153. Had the Supreme Court considered the merits of the question, California's disenfranchisement of felons appeared to violate the Equal Protection Clause. Indeed, the California Supreme Court had found that California's law violated the Equal Protection Clause. See *Ramirez v. Brown*, 507 P.2d 1345, 1357 (Cal. 1973) (striking California's disenfranchisement of felons because a statute penalizing voter fraud, rather than "outright disenfranchisement of persons convicted of crime," is the best way to prevent fraud and the "the least burdensome" on the right to vote), *rev'd sub nom.* *Richardson v. Ramirez*, 418 U.S. 24 (1974). Just the year before, in *Dunn v. Blumstein*, the Supreme Court had found Tennessee's durational residency requirement for voter registration violated the Equal Protection Clause. 405 U.S. 330, 353-54 (1972). The Supreme Court had applied strict scrutiny because voting is a fundamental right. Tennessee had asserted that durational residency requirements were necessary to prevent voter fraud, just as California asserted its disenfranchisement of felons was. In striking Tennessee's durational residency requirement, the Court had found that if a state "supplement[s] its voter registration system" with a panoply of criminal sanctions punishing election and voter fraud, "it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud." *Id.* at 353-54. California laws regulating the voting process and criminalizing its misuse were even stricter than Tennessee's—certainly "more than adequate to detect and deter whatever fraud may be feared." *Ramirez*, 507 P.2d at 1356 (quoting *Dunn*, 405 U.S. 330 at 353).

154. Walter M. Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941-42 (1970) (describing ancient Greek practice of stripping felons of all of their civil rights).

155. *Id.*

156. *United States v. Boney*, 977 F.2d 624, 638 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part).

157. *Id.*

158. *Ramirez*, 507 P.2d at 1346.

159. *Boney*, 977 F.2d at 638 (Randolph, J., dissenting in part and concurring in part).

pleted their sentences seem to be a “group.” A person’s status as a felon affects many different aspects of his economic, social, and political life. Felons are among the most discriminated against groups in America.¹⁶⁰ Most job applications ask whether the applicant has ever been convicted of a felony, and most employers will not knowingly hire people who have a criminal record.¹⁶¹ Felons often cannot be bonded, which means that felons cannot hold jobs that require them to handle money, and state and federal law prohibit felons from holding certain types of jobs.¹⁶² Being a former felon forges a persons’ identity—if by nothing else, than by mere force of circumstance and treatment by those on the outside.

If group protection under the Constitution is solely an empirical matter, the equal protection case for felons should be an airtight one—a reviled group has been stripped of a fundamental right. Indeed, in *Romer v. Evans*, the Supreme Court found that by prohibiting all legislative, executive, or judicial action that would protect gays and lesbians from discrimination,¹⁶³ Colorado’s Amendment 2 violated the Equal Protection Clause.¹⁶⁴ A law that makes it harder “for one group of citizens than for all others to seek aid from the government” violates the Equal Protection Clause in “the most literal sense.”¹⁶⁵

160. A recent Urban Institute study found that employers were less willing to hire former felons than they were any other disadvantaged group, such as applicants who only had a GED, were on welfare, had a spotty work history, or were unemployed. HARRY J. HOLZER ET AL., URBAN INST., CAN EMPLOYERS PLAY A MORE POSITIVE ROLE IN PRISONER REENTRY? 14 (2002), http://www.urban.org/UploadedPDF/410803_PositiveRole.pdf. There is little information about the unemployment rate of former felons, but a study of California parolees in the 1990s suggested that fewer than twenty-one percent of parolees had full-time jobs; ex-convicts also make less than people without criminal records. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 38 (2001), http://www.urban.org/pdfs/from_prison_to_home.pdf; see also DINA ROSE & TODD CLEAR, URBAN INST., INCARCERATION, REENTRY AND SOCIAL CAPITAL: SOCIAL NETWORKS IN THE BALANCE 186–87 (2002) (documenting myriad difficulties that former felons have in finding employment due to social stigma of having a criminal record), http://www.urban.org/UploadedPDF/410623_SocialCapital.pdf.

161. Two-thirds of employers surveyed in five major cities said that they would not “knowingly hire an ex-offender” and “at least one-third checked the criminal histories of their most recently hired employees.” Travis et al., *supra* note 160, at 31.

162. Holzer et al., *supra* note 160, at 4.

163. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

164. *Id.* at 635.

165. *Id.* at 633.

The *Romer* Court disavowed *Davis v. Beason*,¹⁶⁶ which had upheld an Idaho statute that denied the right to vote to polygamists and people who advocated polygamy.¹⁶⁷ The *Romer* Court observed that “to the extent [that *Davis*] held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome.”¹⁶⁸ Yet in the same breath that it disavows this aspect of *Davis* and strikes Amendment 2, the *Romer* Court explicitly affirms that “[t]o the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.”¹⁶⁹ The Court cites *Ramirez* for this proposition.¹⁷⁰

After *Romer*, ex-convicts remain out in the cold even though the state’s only real interest in stripping ex-convicts of their civil rights is moral disapproval. *Romer*’s disavowal of ex-convicts is somewhat incongruous, as before *Lawrence* was decided, felons and gays had a lot in common (and not just a tradition that can be traced back to the Greeks). Sodomy laws were an important way for communities to brand gays as criminals (even if only symbolically, if sodomy laws were unenforced) and to render them outsiders and strangers to the community, as Professor Christopher Leslie’s work has documented in great detail.¹⁷¹ In states where sodomy was a felony,¹⁷² a conviction could be used to strip a gay man or a lesbian of the right to vote. Additionally, the logic of *Dunn v. Blumstein*¹⁷³ and *Romer* strongly imply that denying felons the right to vote raises serious issues under the Court’s equal protection and funda-

166. 133 U.S. 333 (1890).

167. *Id.* at 347–48.

168. *Romer*, 517 U.S. at 634.

169. *Id.*

170. *Id.*

171. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 115 (2000) (explaining that even unenforced sodomy laws were used by states to “defin[e] a specific class of Americans as inferior and . . . remove them from view”).

172. See, e.g., MISS. CODE ANN. § 97-29-59 (1972) (defining sodomy as a “detestable and abominable crime against nature,” punishable with up to ten years in prison); see also Alliance of Sodomy Supporters, *United States Sodomy Laws*, at <http://www.sodomy.org/laws> (Jan. 28, 1998) (compiling penalties for sodomy in various states).

173. 405 U.S. 330 (1972) (striking state minimum residency requirement for new state residents to register to vote because it unconstitutionally infringed the right to vote); see *supra* note 153.

mental rights jurisprudence.

C. HIPPIES—A STIGMATIZED CASTE?

So why is it that the Court can hold so casually that denying felons the right to vote is "unexceptionable"? Two cases decided contemporaneously with *Ramirez* shed light on this issue. In *United States Department of Agriculture v. Moreno*,¹⁷⁴ the Supreme Court struck a statute that had been designed to disadvantage hippies; and in *Parr v. Municipal Court*,¹⁷⁵ the California Supreme Court did the same thing.

Moreno struck down a late-1960s food stamp eligibility regulation that denied benefits to households that contained unmarried adults.¹⁷⁶ The legislative history showed that Congress had crafted this limitation to make sure that hippies living in communes would be ineligible for food stamps and could not leech off of the tax-paying citizens of this great country.¹⁷⁷ Applying rational basis scrutiny, the Court struck down the food stamp restriction. The Court held:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."¹⁷⁸

If this language sounds familiar, that is because it is: *Romer* quotes directly from this passage in *Moreno* when it holds that Colorado's desire to strip gays of their protection under local antidiscrimination laws is not a legitimate state interest.¹⁷⁹ This language, "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest," actually originated in the district court opinion in *Moreno*.¹⁸⁰

174. 413 U.S. 528 (1973).

175. 479 P.2d 353 (Cal. 1971).

176. *Moreno*, 413 U.S. at 532-33.

177. *Id.* at 534 (citing H.R. Conf. Rep. No. 91-1793, at 8 (1970), and 116 Cong. Rec. 44,439 (1970) (statement of Sen. Holland)).

178. *Id.* at 534-35 (alterations in original) (quoting the district court opinion, *Moreno v. United States Dep't of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

179. See *Romer v. Evans*, 517 U.S. 620, 634.

180. See *Moreno*, 345 F. Supp. at 314 n.11 ("In order to qualify as 'legitimate' under the Equal Protection Clause, a legislative purpose must arguably be related to the improvement of the general welfare. . . . The mere intent to

That opinion cited *Parr v. Municipal Court*, the other hippie case, for this precise proposition.¹⁸¹

In *Parr*, the California Supreme Court struck a 1968 Carmel-by-the-Sea ordinance that prohibited persons from sitting or lying on the grass in Carmel's parks. Carmel had passed the ordinance to discourage hippies who might otherwise try to move the Summer of Love south to Carmel's beaches and parks.¹⁸² Using rational basis scrutiny, the California Supreme Court struck Carmel's ordinance on equal protection grounds. Carmel's "discriminatory antagonism [was] unmistakable" in its "description of the problem" that purportedly required it "to prohibit sitting or lying in the park."¹⁸³ Carmel violated the Equal Protection Clause because it "use[d] official Municipal Code language to single out a social group and stigmatize its members as 'undesirable' and 'unsanitary.'"¹⁸⁴ At the same time it also stigmatized "the entire class of youthful Carmel visitors whose mode of dress and life style differ from and irritate the majority of the residents and tourists in the city."¹⁸⁵ Perhaps somewhat hyperbolically, Justice Mosk inveighed, "[W]e cannot be oblivious to the . . . avowed[] purpose . . . of the ordinance in question: to discriminate against an ill-defined social caste

harm a politically unpopular group will not suffice." (citation omitted)).

181. *Id.*

182. Carmel's brief to the Court had urged the California Supreme Court to examine the historical context and the conditions existing prior to enactment of the ordinance:

We hope the court will not shut its eyes to matters of public notoriety and general cognizance. We hope the court has seen the instant slum created in the Haight-Ashbury. We hope the court has seen the deterioration if not destruction of the Telegraph-campus in Berkeley; we hope the court has seen the squalor and filth of the communes in Big Sur, and the damage caused by the sheer numbers of this transient phenomenon. The court may be aware that Carmel had become a meeting place—a mecca—for the hippies who had become disenchanted with the Haight-Ashbury and Berkeley. Regarding this ordinance we hope that the court observed the conditions existing prior to its enactment. The mass of humanity that occupied the park smothered the grass by their very numbers. The grass competed with and struggled against the overwhelming effect of heavy usage—cigarettes, bottles, knives, and just plain people.

Parr v. Mun. Court, 479 P.2d 353, 357–58 (Cal. 1971) (quotations omitted) (citing the brief for the city of Carmel, Brief for Respondent and Real Party in Interest at 11–12, *Parr* (No. 26, 594)).

183. *Id.* at 358.

184. *Id.*

185. *Id.* (noting that the "Carmel City Council made no effort to define the term 'hippie' so as to limit the application of its hostile rhetoric to persons who are engaged in illegal conduct").

whose members are deemed pariahs by the city fathers."¹⁸⁶ In short, the ordinance could not stand because it was, as Professors Tussman and tenBroek had said, an "expression[] of hostility or antagonism to certain groups of individuals."¹⁸⁷

D. THE CONSTITUTIONAL DISTINCTION BETWEEN GROUPS AND CLASSIFICATIONS IS BASED ON A NORMATIVE JUDGMENT

Moreno and *Parr* bring us right back to where we started. The Court pronounces that the Equal Protection Clause forbids laws that are intended to disadvantage a group. The Court says that gays, lesbians, hippies, people who engage in ritual animal sacrifice, illegal immigrants, and persons with disabilities count as "groups," but it does not say why that is the case. At the same time, the Court says that felons, nude dancers, and men who go to strip clubs are not "groups," but does not say why not. Can we find a basis for saying that some of these categories of people make up "groups" and the others do not?

It might be said that some of these groups are "identity" groups, and the Court grants constitutional protection to identity groups. But this answer is unsatisfactory because it is both too powerful and too weak. It is too powerful, because it suggests that the Court would extend group recognition to groups that it has not (for example, felons and polygamists). Moreover, whether some activity constitutes personal identity is highly individual and may be difficult for the Court to pin down as an empirical matter.

It is too weak, because the idea that identity marks the distinction between categories of persons and groups in the Court's eyes cannot explain the Court's treatment of some groups that simply cannot be described as identity groups. Take illegal immigrants. Illegal immigrants who associate with other illegal immigrants increase their risk of getting caught—and most illegal immigrants would prefer to lose their status as "illegal" immigrants to become *legal* ones.

Nor does the Court rely on the social fact of association among people with similar tastes and preferences to distinguish socially salient groups from mere categories of individuals. Association has not been sufficient to create a group in the Court's eyes—there are an endless variety of fetish chat rooms

186. *Id.* at 360.

187. *Id.* at 355 (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 358 (1949)).

and Web sites on the Internet, but the Court is not going to recognize “furries”¹⁸⁸ as an identity group any time soon.

Instead, *Ramirez, Moreno, Cleburne, Romer, and Lawrence* reveal that that the Court’s decision to treat some classifications of persons as “groups,” but not others, is an essentially normative one. And it *has* to be normative. When the Court has recognized as a constitutional matter the social fact that some people *compose a group* and are not just a bunch of people who happen to do the same thing, it has always required a state to articulate a *reason*—some reason, even a thin one, but a reason nonetheless—to curtail that group’s liberties. Social disapproval and moral objections do not count as reasons.

This minimal level of protection inevitably and necessarily legitimizes the group (and their acts), because it means quite literally that the Court deems moral objections and social disapproval to be *irrational*. Consequently, the Court only recognizes and protects those groups whose common conduct is seen as worth protecting. As Professor Eskridge might say, the Court grants a group constitutional protection when the Court and society have come to see the conduct at issue as a tolerable or benign deviation from the norm.

Granting a group protection—even such minimal protection as making states say something more than “yuck, we don’t like this activity”—also creates an inevitable feedback loop by making group identification and membership far less dangerous and costly. As with American Express, so with the Equal Protection Clause: Membership has its privileges. *Romer* and *Lawrence* have removed much of the stigma that had come with being gay. Being gay or lesbian is significantly less costly now—both emotionally and otherwise—than it was even ten years ago.¹⁸⁹ The same has been true for racial groups. It is no

188. For more on “furries,” see Dan Savage’s column, *Savage Love*, <http://www.thestranger.com/2002-08-08/savage.html> (Aug. 8–14, 2002).

189. If movies and television are any indication, over the last ten years, Americans have become increasingly tolerant of gays and lesbians. Ten years ago in the movie *Philadelphia*, a straight actor, Tom Hanks, played a sympathetic gay lawyer who was dying of AIDS. Tom Hanks’s portrayal sought to persuade viewers that his character deserved our sympathy and affection. And Tom Hanks made that point explicit in his (in)famous Oscar acceptance speech. (As you may recall, he also “outed” his high school drama teacher.) Five years ago, Rupert Everett, an out gay actor, played Julia Roberts’s sexy and gay best friend in *My Best Friend’s Wedding*. Four years ago, Everett played Minnie Driver’s suitor and “ideal husband” in *An Ideal Husband*. Two years ago, he was Reese Witherspoon’s suitor in *The Importance of Being Earnest*. And now, every Tuesday night on *Queer Eye for the Straight Guy*, five

accident that black pride emerged as a movement after *Brown v. Board of Education*¹⁹⁰ and after *Loving v. Virginia*,¹⁹¹ not before. "Latinos" and "Asians" exist as a racial group and not merely as a term for separate and very different national origin groups in part because identifying as a racial group confers advantages. The movement for women's rights similarly grew in strength after Congress passed the Equal Pay Act and Title VII and after the Court protected a woman's right to contraceptives in *Griswold*. These gains, in turn, paved the way for *Roe* and the Court's gender equal protection jurisprudence in the 1970s and 1980s.

CONCLUSION

The conclusion that the Court grants constitutional protection to socially salient groups whose common conduct it deems worth protecting is ironic. It stands the *Carolene Products* mantra of "discrete and insular minorities"¹⁹² on its head: A group will not receive Constitutional protection until it has already achieved a substantial measure of social acceptance and legal protection. That protection, in turn, may solidify group identity. Truly discrete and insular minorities may find cold comfort in the Constitution.

This conclusion implies a further irony: If I am right about what the Court is saying and doing, then the logic of group recognition of *Lawrence* undercuts the Court's rhetoric about *Hardwick* having been wrong when it was decided.¹⁹³ If I have gotten the Court right, then *Lawrence* is not about timeless principles like the harm principle. *Lawrence* is about harms to topical, sociological groups. If I have gotten the Court's logic right, then *Hardwick* may have been correctly decided in 1986, and it would have been correct in the 1960s and 1970s at the time of *GrEisenRoe*. Indeed, under the Court's logic, *Hardwick* only *became* wrong once the Court decided in *Romer* that gays

handsome, wise, and stylish gay men improve the life of some hapless straight man by dispensing both fatherly advice on how to shave correctly (with, not against, the grain) and treat a woman, and hip-older-brother advice on how to decorate, dress, dance, coif, and woo.

190. 347 U.S. 483 (1954).

191. 388 U.S. 1 (1967).

192. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (noting that more searching review may be appropriate where a statute manifests "prejudice against discrete and insular minorities").

193. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

as a group *deserved* the equal protection of the laws.

One concluding irony. In *Romer*, Justice Scalia is partially correct when he inveighs that the “Court [has] take[n] sides in the culture wars” by extending to gays and lesbians the legal protections that *GrEisenRoe* gives to heterosexuals.¹⁹⁴ Justice Scalia is wrong to say the Court will no longer tolerate morals-based legislation, however. *Lawrence* suggests only that the Court will not tolerate the unequal treatment of members of a recognized group who claim for themselves a right the Court has deemed fundamental, and which the legislative majority claims for its own members but seeks to deny to persons in the group. It is only in this sense—the meanness inherent in claiming for one’s self that which one would deny others—that “animus” or abstract morality has been reined in.

194. *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting); see also *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting) (criticizing the majority opinion as being “the product of a Court, which is the product of a law-profession culture . . . that has largely signed onto the so-called homosexual agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”).