

Equal Protection and Same-Sex Marriage

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This paper examines constitutional issues concerning same-sex marriage. Although same-sex relations concern broader ethical issues as well, I set these aside to concentrate primarily on legal questions of privacy rights and equal protection. While sexual orientation is neither a suspect classification like race, nor a quasi classification like gender, there are strong reasons why it should trigger heightened scrutiny of legislation using sexuality as a standard of classification. In what follows, I argue that equal-protection doctrine is better suited for including same-sex couples where legal benefits and burdens of marriage are at stake. (1) I reconstruct arguments from privacy and the controversial ruling of *Bowers v. Hardwick* but discount this strategy for problematic legal reasons. (2) In order for equal protection to apply, sexual orientation must meet the criteria of suspect classification that the Court has established. (3) Since sexual orientation meets these criteria, heightened scrutiny should be applied to such legislation on equal-protection grounds. (4) Finally, I rely on some familiar Rawlsian arguments of public justification that demonstrate why this extension of marriage rights is consistent with basic constitutional principles.

Before turning to the main argument, some brief remarks about the broader ethical issues are in order. While there is still moral disagreement about same-sex relations generally, public opinion polls show a majority of Americans are disposed toward tolerance. There are degrees as to how much and under what circumstances they think same-sex relations are to be recognized. Conservatives generally believe that any social recognition is a slippery slope that will inevitably lead to the destruction of the family and social fabric. Liberals typically encourage tolerance of sexual minorities despite predominant religious sentiments that condemn homosexuality as "immoral."¹ By no means do these views exhaust the spectrum of beliefs concerning same-sex relations, and there is no well-defined consensus morally or politically.

Moral disagreement on this subject has serious political consequences for sexual minorities, however. Religious views that condemn homosexuality continue to influence the exercise of political coercion, resulting in the use of state power to deny individuals equal protection. Special-interest groups now represent sexual minorities to secure access to the political process and promote legislative protection such as the Employment Non-Discrimination Amendment (ENDA). These groups often raise legal issues of privacy and equal protection in the courts, but the results are mixed. For example, the

Supreme Court held in *Bowers v. Harwick* (1986) that constitutional protections of privacy rights do not include in their scope “a fundamental right to engage in homosexual sodomy.” By contrast, in *Baehr v. Lewin* (1993), the Hawaii Supreme Court invalidated a state statute barring same-sex marriage on the grounds that it violated the state constitution’s equal-protection provisions. In terms of legislation, Vermont became the first state (in July 2000) to provide same-sex couples with recognition of “civil unions” that extend legal benefits and burdens to same-sex partners. This prompted immediate action by many other states and the federal government to pass legislation defining “marriage” as a heterosexual union. Conflicting legislation like this has serious constitutional repercussions that I aim, in part, to address.

What happens when a same-sex couple from Vermont moves to a different state because of a job transfer? Will the Full Faith and Credit Clause of the Constitution require other states to recognize same-sex unions? Does the Constitution’s Equal Protection Clause require states to extend legal entitlements to same-sex couples that are legally recognized in other states? With legislation pending in other states to recognize same-sex couples in “civil unions,” it is clear that ethical and legal questions on this issue must be answered.

1. Substantive Due Process, Privacy, and *Bowers*

In *Griswold v. Connecticut* (1965), the Supreme Court invalidated a state statute prohibiting the use of contraception on the grounds that it violated an individual’s fundamental liberty interest to “zones of privacy.” Writing for the majority opinion, Justice William O. Douglas used a “holistic approach” in fixing the scope of various constitutionally guaranteed protections to determine whether the intimate affairs of married couples fell within them. The ruling states that the statute “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”² These “penumbral rights” emanate from various explicit protections of an individual’s personal autonomy regarding expression and speech, unreasonable search and seizure, due process, and rights not specifically enumerated by the Constitution. In this way, various individual rights are brought into a “constellation” based on the specific protections of the First, Third, Fourth, Fifth and Ninth Amendments. The majority opinion claimed that if any private activities of individuals should be protected, those within the intimate confines of marriage are to be considered fundamental. (In a similar substantive due-process ruling, a majority of the Court in *Zablocki v. Redhail* [1978] argued that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship.”)³

Similarly, the landmark ruling of *Roe v. Wade* (1973) extended protection of an individual’s personal autonomy to include a woman’s liberty interest in terminating a pregnancy within certain limits. While the Court did acknowledge that the state does have an interest in the control of safe medical procedures and determining the viability of a fetus, it also held that the

privacy interests of the *individual* require the standard of strict scrutiny to review concerned legislation. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."⁴ As in *Griswold*, the Court held that the Constitution guarantees a "zone of privacy" protecting an individual's personal autonomy, especially regarding intimate matters of sex and family planning. In order for state intervention to be legitimate, it must demonstrate a compelling interest that legislation addresses in the narrowest possible terms.

If the personal decision making of heterosexual couples and pregnant women is protected (two central components that make up "privacy" concerns), are there reasons to think that homosexual couples, in determining matters of sexuality and family, should be protected as well? In the *Bowers* decision, the Court held that homosexual sodomy was not a constitutionally protected activity that falls within this zone of privacy. Michael Hardwick was arrested and charged with sodomy when police officers, acting on an unrelated matter, entered his home and discovered him engaged in a sexual act with another man. Although the charges were later dismissed, Hardwick sued on the grounds that Georgia's sodomy statute violated his privacy rights. The Supreme Court disagreed and claimed the ruling was consistent with precedent. In fact, prior rulings on privacy went out or their way to *exclude* same-sex relations from the constellation of protections making up zones of privacy. In a concurring opinion in *Griswold*, Justice John M. Harlan twice refers to homosexuality as a "private" activity excluded from protection, noting that Connecticut's argument that its statute acts "to protect the moral welfare of its citizenry" is legitimate for a variety of laws prohibiting certain activities, including homosexuality. In addition, the majority opinion insists that the ruling in *Griswold* establishes no "absolute" right to privacy. "Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."⁵

The *Bowers* ruling claims that there is no relation between privacy interests and the case in question involving homosexual activity. "The right pressed upon us here has no similar support in text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment."⁶ As a result, the standard of rational-basis review was applied, so that the state had to demonstrate only minimally that it had *legitimate* interests in prohibiting such conduct. The Court even went so far as to endorse the state's view that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is enough justification to let stand the law prohibiting such conduct.⁷ In making this claim, the majority made an extremely problematic conceptual error. It mistakenly and unjustifiably conflated consensual homosexual activity with other sexual crimes of nonconsensual nature. This includes "incest and other sexual crimes," and basing their judgment on the category mistake, it claimed that the Court would be "ill-advised in protecting such activities merely because they are committed in the home."⁸

Why should zones of privacy for individuals regarding matters of sexual intimacy and family planning extend only to heterosexuals? As dissenters in *Bowers* noted, the protections afforded individuals regarding sexual choices need not be directly related to matters of family planning by married couples. They cited as an example the Court's ruling in *Eisenstadt v. Baird* (1972) that protections afforded married couples regarding the use of contraceptives also extend to unmarried couples.⁹ The majority opinion's belief that the legal issue is a right to "homosexual sodomy" completely misconstrues what is being protected by the various guarantees of personal autonomy afforded by the Constitution. This is "the right to be left alone" where an individual's choices do not adversely affect others. In his dissenting opinion Justice Harry Blackmun notes, "what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."¹⁰ His opinion thus follows the line of substantive due-process considerations previously established by court precedent, a line of reasoning the majority willfully ignored. Privacy interests for heterosexuals that fall within an appropriate "zone" should include same-sex activity.

In a separate dissenting opinion, Justice John Paul Stevens establishes a different line of reasoning to conclude that the Georgia statute violates some important liberty interest. He notes that the Georgia statute, as well as the majority opinion, "applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes."¹¹ The majority's analysis is wrong to focus on the lack of privacy rights for homosexuals, since the real constitutional issue is equal protection and its application. The proper question, according to Stevens, is (i) can the state prohibit conduct "by means of a neutral law applying without exception to all persons," and (ii) if not, can the state "only enforce the law against homosexuals"?¹² Since *Griswold* and similar cases at least establish "the right to engage in non-reproductive, sexual conduct that others may consider offensive or immoral," the constitutional problem involves equal protection of that same fundamental liberty interest.¹³ The Georgia statute cannot be enforced against a majority of its citizens, since as heterosexuals their intimate relations are plainly protected as a fundamental liberty interest. The state would have to justify its "selective application" of the law to homosexual citizens only. Since "the statute does not single out homosexuals as a separate class meriting special disfavored treatment," but its application and enforcement does, the law is a clear violation of equal-protection considerations incorporated by the Fourteenth Amendment.¹⁴

Stevens's reasoning establishes that such prohibitions violate received judicial standards of equal protection. There is a paradox here: Either (i) privacy rights extend to same-sex activity, or (ii) statutory prohibition of such activity violates equal-protection interests. The arguments from privacy generate controversies that I think considerations of equal protection altogether avoid. All things considered, the best jurisprudential route for sexual minorities appears to be (ii). The next two sections isolate the elements of equal protection involved: suspect classification and compelling state interest.

2. Sexual Orientation, Suspect Classification, and Equal Protection

Unlike race and gender, sexual orientation does not automatically trigger strict or heightened scrutiny of legislation. Is sexual orientation a suspect classification on par with race, or does it occupy some intermediary standard like gender? There are strong reasons to think that sexual orientation should count as some form of suspect classification based on established criteria, as well as more recent conceptual developments concerning the status of “sexual orientation.”

When a statute involves classification, the standard of strict scrutiny is required to conclude whether the statute violates some fundamental liberty interest. To determine whether suspect classification applies, the Court has identified and relied on three criteria: (i) the class of individuals must historically be the target of *purposeful* discrimination; (ii) the discrimination must violate an established constitutionally protected right; and (iii) a set of features to determine whether (ii) applies must identify the relevant features of the specific class in question. For example, a defining feature of the class must be “immutable” in some sense, that is, individuals discriminated against because of the characteristic must not be able to change it. Minimally, courts have taken (iii) to mean that the immutable feature cannot be changed without causing undue hardship to the individual.¹⁵

The modern suspect classification test was first established in *Korematsu v. United States* (1944), and despite upholding the constitutionality of a facially discriminatory action, for reasons of national security, the decision in *Korematsu* nonetheless establishes that racial classification is almost always invalid. Since racial minorities, like Asian Americans interred during World War II, have been traditional targets of discrimination, such classification requires strict scrutiny by courts. Gender occupies an intermediate level of classification in this respect, because unlike racial classification, some differential treatment of gender is thought to serve the rational interests of the state. For example, in *Reed v. Reed* (1971), the Court struck down an Idaho statute establishing a preference of awarding the administration of estates of deceased relatives to men. Subsequent rulings, such as *Craig v. Boren* (1976), invalidated laws in which differential treatment based on gender was at issue. Unlike those for racial classification, however, the standards for review of gender classification require the state to demonstrate some *legitimate* interest in differential treatment that is not overly broad.

Given established criteria, it is clear that the category of sexual orientation is a suspect classification, or at least an intermediate classification like gender. First, sexual minorities like gays and lesbians have historically been discriminated against, as the majority in *Bowers* demonstrated by applying a clearly unconstitutional statute selectively to a disfavored minority.¹⁶ Second, homosexuals are also denied protection of rights on the basis of their sexual orientation. For example, no federal statute and very few states include “sexual orientation” in basic civil-rights legislation protecting individuals from discrimination in housing, employment, and family law. Finally, sexual minorities have a characteristic that is immutable or cannot be changed.

The last point is controversial and lacks a clear consensus in beliefs and attitudes regarding sexual orientation. There are widespread views that conflate “behavior” and “orientation” without having a clear and consistent application. For example, many people believe that sexual orientation is determined by activity or behavior, rather than understanding that sexual orientation, even for heterosexuals, determines the object of sexual choice. The mistaken view that one’s sexual behavior is an issue amenable to “choice” is characteristic of conservatives who see homosexuality as a “lifestyle” rather than an orientation.¹⁷ In addition, information about the genetic sources of sexual orientation call into question the idea that gays and lesbians “choose” to be sexually different, despite the fact that biological arguments might never provide a reductive explanation. The well-established consensus of the scientific community is that gays and lesbians could no more opt for a heterosexual orientation without a radical, damaging change in their identity than straight individuals could opt for a homosexual orientation.¹⁸ The so-called immutability test involving criterion (iii) for determining suspect classification raises the most controversy precisely because there is no way, because of scientific and conceptual change, of fixing in advance what counts as “immutable.” The emergence of technology that intervenes in the genetic code, for example, raises doubts about the very category of “immutability,” since even the most seemingly immutable traits of individuals might, in principle, be modified.

While the Supreme Court has yet to designate sexual orientation as a classification requiring strict or heightened scrutiny, many lower federal courts have held that it does fit established criteria. In *Watkins v. United States Army* (1990), the Ninth Circuit Court of Appeals reached this conclusion. First, it said, “the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.”¹⁹ The second factor of classification the court admitted was difficult to define, although it took a holistic conceptual approach in determining that there was a “central idea” behind “a cluster of factors,” namely, “whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious.”²⁰

The ruling in *Watkins* specified the following criteria for establishing group legitimacy in determining equal-protection considerations:

- (i) The class may be defined by a trait that bears “no relation to ability to perform or contribute to society.”
- (ii) The class has been unfairly burdened with unique disabilities as the result of stereotypes.
- (iii) The characteristic or trait defining the class is “immutable.”

No doubt both (i) and (ii) apply to sexual orientation, as homosexuals continue to be defined by stereotypes and views that question their social contributions and burden them with political disabilities. But (iii) seems to be incontrovertible even if construed along weaker lines. The *Watkins* ruling noted that “immutability” does not necessarily require that the class be phys-

ically unable to change the trait, as racial or gender classifications seem to imply. At a minimum, the Supreme Court has recognized those traits as “immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.” For the purposes of equal-protection considerations, it is reasonable to conclude that sexual orientation is “immutable” even in that weak sense. (This is why the American Psychological Association’s official position is against so-called reparative therapy, which tries to convince individuals that their sexual orientation is psychologically malleable.) Where sexual classification is involved in legislation, the criteria require applying strict or heightened scrutiny as a constitutional matter of equal protection.

3. Liberty Interests, State Interests, and Equal Protection

State and federal legislation that defines marriage in heterosexual terms precludes certain individuals from participating in an institution that imparts legal benefits and burdens. A certain class of individuals is excluded from doing so on the grounds that they are sexually different. For example, the Defense of Marriage Act of 1996 (DOMA), passed by Congress and signed by President Bill Clinton, establishes two things. First, states are protected from being forced to recognize same-sex marriages approved in other states. (The Full Faith and Credit Clause of the Constitution has traditionally been taken to hold that states must recognize the valid laws of other states for obvious reasons, from facilitating commercial transactions to allowing unrestricted travel across state lines.) Second, “marriage” is defined for the purpose of federal law as the union of a man and a woman.

What is the problem with laws like DOMA? Again, there are strong reasons to suspect that they conflict with fundamental liberty interests that individuals are guaranteed by the Constitution. Where such conflicts are thought to exist, the courts play an important role in protecting the rights of individuals. Since they have the power of judicial review, which gives them the authority to invalidate statutes or laws that conflict with those interests, minorities historically have turned to the courts in order to facilitate their incorporation into political processes and protect their liberty interests from invidious legislation.²¹

The Supreme Court has utilized three standards for deciding cases in which state or federal law conflicts with protected liberty interests: (i) Rational-basis review is the minimal standard, since it requires the state to have only a *legitimate* interest in pursuing some goal and the statute in question to be designed broadly to achieve that goal. This is a less demanding standard for states to justify their statutes, since what counts as a “legitimate interest” and a “rational basis” can be broadly construed and may be based on considerations relative to time and place. (ii) Heightened scrutiny is an intermediary standard that requires the state have an “*important interest*,” and that the means for achieving it are “*substantially related*.” (iii) The most difficult standard for the state to meet is required by the strict-scrutiny test. This requires the state to show that it has a *compelling* interest that the statute pursues by the narrowest means possible. As the Court noted in a freedom-

of-expression case, *NAACP v. Alabama* (1958), a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”²² When a statute conflicts with a fundamental liberty interest of the individual, strict scrutiny is the test used by courts. Strict scrutiny usually favors the liberty interest ahead of the compelling state interest because constitutional protections of various individual liberties is thought to be of crucial importance in a democratic, open, and free society.

Concerning the development of equal-protection doctrine, strict scrutiny has been the standard used to invalidate many state and federal laws like those that used racial classification during segregation. The landmark decision of *Brown v. Board of Education* (1954) ruled that segregated schools violated the protections afforded to African Americans under the Equal Protection Clause of the Fourteenth Amendment. Similarly, such equal-protection considerations should extend to same-sex relations where the fundamental interest of marriage is involved. Before considering the *interests* that the state might have in regulating sexual activity and marriage as a matter of law, it may help to clarify in what ways equal-protection doctrine is implicated by current legislative trends.

There are two reasons why statutes defining marriage in narrow, heterosexual terms violate equal-protection considerations *prima facie*. First, a fundamental liberty interest is at stake. As the Court held in *Loving v. Virginia* (1967), “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”²³ The ruling stated “that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”²⁴ The Court invalidated antimiscegenation laws prohibiting interracial marriages on the grounds that the state is in no position to determine what counts as “appropriate” in matters of marriage, which individuals have a strong liberty interest in determining for themselves. Moreover, the majority’s analysis rejected the idea that the statute was on its face “neutral” with respect to racial classification, since it applied equally to both blacks and whites.

The ruling in *Loving* bears considerable importance for at least one line of argument against same-sex marriage made by the state of Hawaii in *Baehr*. The state argued that since the statute barring same-sex marriage was facially neutral with respect to gender classifications, it did not violate the state’s constitutional protection against gender discrimination. Put another way, since the law applies equally to both men and women there is no discrimination of gender involved. The state’s supreme court did not agree and remanded the case to a lower court to determine whether the state had a compelling interest that the statute was narrowly tailored to meet.²⁵

Second, statutes that define marriage as the union between man and woman are open invitations to challenge on the basis of equal-protection doctrine. These statutes are analogous to antimiscegenation laws of the segregation era. Their sole purpose is to exclude a class of individuals from participating in a given institution by enacting a statute with an inclusive

definition. Heterosexuals are obviously included by statutory definition, while homosexuals are excluded, since any same-sex union cannot meet the stipulated definitions of the law. Here there seems to be an explicit violation of equal protection.

Since marriage is a state-sanctioned institution that imparts various legal entitlements to couples participating in it, the exclusion of a class of individuals through sexual classification violates equal protection to such fundamental liberty interests. The law extends three classes of benefits to married couples: (i) furthering emotional bonds associated with marriage, (ii) facilitating economic sharing, and (iii) supporting parents raising children.²⁶ Examples of (i) include emotional and material investments like the right to be appointed guardian of an injured or ill partner, which allows partners to make important decisions concerning hospitalization and treatment. And (ii) allows marital partners to qualify automatically as dependents for purposes of insurance. I return to the issues involving (iii) below, since they involve questions about the status of the family.

Since the legislation in question excludes a class of individuals from enjoying the same rights as their heterosexual counterparts regarding family life and sexual intimacy, the constitutional violation involved here is not *prima facie* a privacy issue. If equal protection means anything, it "does not permit notions of majoritarian morality to serve as compelling justification for laws that discriminate against suspect classes."²⁷ Ironically, by rushing to pass laws that stipulate heterosexual marriage in order to exclude same-sex individuals, states have made fairly obvious the equal-protection violations that neutral statutes might avoid. Moreover, by legally defining marriage to exclude interstate recognition of same-sex marriage, DOMA further demonstrates why same-sex couples should not be excluded from such liberty interests on grounds of equal protection. As one commentator notes, laws "banning same-sex marriage to punish or penalize gays, lesbians, or bisexuals or even to express disapproval of that 'lifestyle' are using a rational means to promote an illegitimate end, namely, disadvantaging a disfavored minority."²⁸

Does the state have a legitimate, important, or compelling interest in regulating marriage where (iii) is concerned? The existence of family law indicates that the state does have a legitimate and important interest in the sex lives of its citizens, since promoting stable family life is fundamental to the health and well-being of modern societies. How far the scope of regulation may extend when such regulation runs up against the liberty interests of individuals is an issue for the courts to decide. While it is not possible to settle in advance the appropriate boundaries of specific legislation, the courts have drawn that line for heterosexual individuals, namely, specifying certain "zones of privacy" to protect their family matters and intimacy. These must apply to homosexuals as well or risk violating equal-protection doctrine. If the state does have a stronger *compelling* interest in such matters, then it cannot extend its reach so far as to violate the fundamental liberty interests of some because they are members of a disfavored minority.

The received views of homosexuality notwithstanding, there is no credible evidence to demonstrate that members of sexual minorities are either less healthy and well adjusted than members of sexual majorities or have a neg-

ative influence on the stability of the family. Although there is widespread belief to the contrary, most of the reasoning involved in such beliefs is grounded on social bigotry and homophobia.²⁹ Studies that do measure childhood development of same-sex couples find no credible data to support these widespread beliefs.³⁰ This has led the American Association of Pediatrics (AAP) to conclude that same-sex marriage is in the best interest of children with homosexual parents.³¹ The alleged decline of the family in the United States has more to do with the changing “family wage system,” the rise of dual-income families, and the excessively high divorce rate among heterosexuals than it does with the existence of so-called sexual alternatives. That gays and lesbians continue to be the target of unpopular views merely reinforces those false beliefs that influence social policy about sexual minorities that deny them equal protection under the law.

4. Public Reason and Same-Sex Marriage

There are strong jurisprudential reasons to extend marriage rights to same-sex couples on grounds of equal protection. Are there public reasons to justify this extension? I conclude the argument by examining the issue of justification for such an extension. In my view, same-sex marriage is consistent with democratic principles and values and justified by them.

The main idea of public reason is to explore the possibility of consensus on important political issues where there is disagreement because of plural conceptions of the good. The ability to provide public reasons for institutional arrangements and objectives also provides a kind of transparency that ensures their longevity and legitimacy, since individuals can be assured that the state regards its members with equal regard.³² Rawls offers a defense of political liberalism as the most appropriate form of political justice available in a democratic society characterized by “the fact of reasonable pluralism.”³³ Public reasons thus provide the necessary background agreement for institutions to promote political justice.

The fact of reasonable pluralism is that citizens in a democratic society share different comprehensive religious, philosophical, or moral backgrounds. None of these should be allowed to infringe upon or circumvent the democratic rights and liberties that are guaranteed to all by citizenship. Political liberalism remains neutral on questions of goods, or what substantive values should inform the shape of an individual’s life plans. It does not enforce one vision of the good at the expense of competing versions held by different individuals. In this sense, Rawls characterizes the basic structure of society as “freestanding,” and institutions must be organized around structural constraints of neutrality toward any one comprehensive doctrine. The basic idea is that an “overlapping consensus” can be achieved by appeal to public reasons where those do not rely on fundamental conceptions of the good beyond what is required for maintaining stable political and social institutions.³⁴ According to Rawls, “the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.”³⁵

What is “public reason” and why should we be concerned with it here? First, it is clear that comprehensive religious and moral doctrines that condemn homosexuality seek to do more than just verbally condemn. Beyond basic moral disagreement, people who hold such views also actively promote political curtailment of same-sex relations by means of legislation that actively excludes sexual difference from legal and political consideration. DOMA is a clear example of various legislative efforts to deny same-sex couples equal access to legal benefits and burdens where marriage is concerned.

How is it possible to justify the incorporation of same-sex relations into political processes with a tradition of religious homophobia that excludes equal protection of homosexuals? One line of argument by conservatives holds that such exclusion is in line with the values of a constitutional democratic society.³⁶ The idea is that public inclusion of homosexuals, through legal protection of their rights, is an endorsement of homosexuality on the part of the state. Since the state itself should remain neutral or refuse to promote “immoral” behavior on the part of its citizens, recognizing same-sex relations is tantamount to promoting “immoral lifestyles.” More extreme views condemn homosexuality outright and see no problem using coercive state mechanisms or violence to deny homosexuals basic political rights. Downplaying these views is a recent rhetorical strategy of “compassionate” conservatives, who want to avoid alienating a large number of people who do not advocate intolerant homophobia.³⁷ This moderate strategy achieves the same results. Sexual minorities are disadvantaged relative to other groups who have their basic political rights protected by legislation and, more importantly, secured through adequate enforcement. The argument from neutrality is a covert way of denying same-sex couples the same political and legal recognition as heterosexual couples. Remaining neutral on this question promotes unequal protection de facto, because it is thought that granting such basic rights is “endorsement” of homosexuality.

This position results in absurdities. If basic legal protection of fundamental liberty interests counts as endorsement, then heterosexual marriage is an illegitimate endorsement by a political framework purported to be neutral in its conception of the good. To maintain the neutrality doctrine, the state would have to separate the legal recognition of marriage from its religious context. That the state already does this, insofar as marriage can be recognized by the state without religious sanction (common-law marriage), indicates the unequal treatment suffered by gay and lesbian couples. Are there any public reasons for withholding this recognition that are not informed by religious reasons? To provide such justification it would have to be demonstrated that same-sex couples have adverse effects on an important aspect of public life that the state has a compelling interest to protect. Furthermore, such justification would have to occur independently of religious reasons in order to qualify as legitimate reasons that all could reasonably accept, a constraint that is central to the idea of public reason.

Do public reasons for exclusion exist? In my view, they do not, and there are no good reasons for denying same-sex couples legal recognition that are public and legitimate. For example, when the Americans With Disabilities Act

of 1990 provided disabled individuals with civil-rights protections, no one argued that it was giving them undeserved “special rights” merely because of their classification. These rights are not “special,” because they are the same rights enjoyed by other individuals not excluded by affiliation with a group. Without these rights being protected, excluded individuals are open to discrimination, for example, in employment, housing, family law, and education.³⁸

Excluding individuals because of their sexual orientation is a clear violation of the state’s obligation to treat citizens with equal regard. Rawls’s “criterion of reciprocity” justifies the idea that deliberative values in a democratic society are to be protected by including all individuals in decision-making processes. This can only be achieved if those same individuals share equally the benefits and burdens imposed on them by the law. And this requires at least some restraint on the part of the state in determining substantive values that potentially compromise an individual’s contribution to public concerns. For these reasons, the assertion of political power as a force arising from collective decision making must be constrained in order to avoid the imposition of one comprehensive doctrine upon others. This is the objective of public reason. “The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.”³⁹ Surely, citizens marginalized as members of a disfavored minority cannot reasonably agree to political decisions that deny them basic political rights extended to other marginalized groups. This is consistent with equal-protection jurisprudence, which historically has refused to consider substantive values of one comprehensive doctrine as reason enough to deny certain liberty interests to others.

Public reasons therefore cannot be given for denying same-sex couples the legal benefits of marriage. To illustrate this conclusion we could appeal to the straightforward decision procedure devised by Rawls for determining such matters. Rawls’s device of the original position strips us of our ability to formulate principles of justice with knowledge that unfairly advantages us at the expense of others. In a decision-making situation, where sexual orientation is not a kind of knowledge we have of ourselves, we could not reasonably be expected to agree to principles that recognize only heterosexual relations. The legal benefits and burdens that accompany marriage can be denied to homosexuals neither on grounds that they are sexually different nor because of religious reasons that condemn such activity. Political decisions informed by a comprehensive doctrine of the good (whether explicitly or *de facto*) cannot pass the test of public reason and thus cannot reasonably demand our normative allegiance regarding the shape and arrangement of our public institutions.

Same-sex relations must have the same protections and legal entitlements that heterosexual relations enjoy, including the right of marriage (whether it’s called “marriage” is irrelevant, since the legal benefits are, in fact, what is being denied to same-sex couples).⁴⁰ While there is widespread religious hostility toward same-sex marriage, homophobia as a political doctrine cannot

be allowed unfairly to influence equal protection of this disfavored minority.⁴¹ Although there is no clear consensus among communities of sexual minorities about the political and social efficacy of same-sex marriages recognized by the state, it is clear that expanding legal protection to same-sex couples is an extension of basic democratic principles. This extension corrects the historical exclusion of a traditionally disfavored sexual orientation from participating equally in political decision-making processes and is thus consistent with equal-protection doctrine.

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Notes

¹ Arguments about the immorality of same-sex relations turn on the confusion of "nature" for social convention, and convincing someone that her views on homosexuality arise as a result of such a category mistake may not overcome her personal allegiance to such views. For an argument against the received "unnaturalness" doctrine on same-sex relations, see my "Kant, Political Liberalism, and the Ethics of Same-Sex Relations," *Journal of Social Philosophy* 32, no. 3 (Fall 2001): 446–62.

² *Griswold v. Connecticut*, 943. All court citations are from Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet (eds.), *Constitutional Law*, 3rd ed. (Boston: Little, Brown, 1996).

³ *Zablocki v. Redhail*, 1022.

⁴ *Roe v. Wade*, 957.

⁵ *Griswold v. Connecticut*, 947.

⁶ *Bowers v. Hardwick*, 1032.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ For a summary of that ruling, see Stone et al., *Constitutional Law*, 954.

¹⁰ *Bowers v. Hardwick*, 1033.

¹¹ *Ibid.*, 1034.

¹² *Ibid.*, 1035.

¹³ *Ibid.*

¹⁴ *Ibid.*, 1036.

¹⁵ See *Watkins v. U.S. Army* (1990): "[At] a minimum, [the] Supreme Court is willing to treat a trait as effectively immutable if changing it would involve a great difficulty, such as requiring a major physical change or a traumatic change of identity" (768).

¹⁶ For a history of intolerance and discrimination toward sexual minorities in the postwar period, see John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*, 2nd ed. (Chicago: University of Chicago Press, 1998).

- ¹⁷Some conservatives go so far as to claim that homosexuals can be “cured” of their dispositions through religious and pseudoscientific treatment but many independent, professional organizations like the American Psychological Association have publicly announced their opposition to so-called reparative therapy as being scientifically bogus and ethically problematic.
- ¹⁸For discussions of the biology of sex, see Richard Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992), chap. 4; Simon LeVay, *The Sexual Brain* (Cambridge, MA: MIT Press, 1993). For the standard account of the genetics of homosexuality, see Dean Hamer, Stella Hum, Victoria Magnuson, Nan Hu, and Angela Pattatucci, “A Linkage between DNA Markers on the X Chromosome and Male Sexual Orientation,” *Science* 261, no. 16 (July 1993): 321–27. A review of recent findings can be found in David Fernbach, “Biology and Gay Identity,” *New Left Review* 228 (March/April 1998): 47–66.
- ¹⁹*Watkins v. U.S. Army*, 767.
- ²⁰*Ibid.*
- ²¹For discussion of the “representation-reinforcing” model of judicial review, see Jon Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), chaps. 4–6. Ely tries to show that courts in exercising judicial review are not (and should not be) involved in imposing value choices. Rather, Ely thinks that so-called noninterpretive review can be legitimate if “extra-constitutional” values are consistent with democratic principles, procedures, and goals. As a result, a distinction is to be made between courts’ choosing outcomes and their reinforcing democratic procedures. This view is consistent with the argument I am making here, namely, that the protection of basic liberty interests for same-sex couples should not be viewed as giving them so-called special rights, but as including them in some liberty interest to which they have traditionally been denied access, especially by political decision-making processes.
- ²²Cited in *Griswold v. Connecticut*, 943; the Court’s opinion in *NAACP v. Alabama* can be found at 1743.
- ²³*Loving v. Virginia*, 636.
- ²⁴*Ibid.*, 637.
- ²⁵For a discussion of the details of *Baehr* and parallels drawn to *Loving*, see Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca: Cornell University Press, 1997), 44–46.
- ²⁶Marriage automatically extends the following sample of rights to partners: right to be appointed conservator by a court if partner is incapacitated; right not to testify against a partner in a trial; right of privileged private communications between partners; right to take unpaid leave from work to care for dependents; right to visit partners in correctional institutions; right to presumption of paternity if partner has biological child; right to be considered a “parent” and child custody and visitation rights that go with it; stepparent adoption rights apply. All of these rights apply to married heterosexual couples and none to same-sex couples. See the Stanford Law report “Same-Sex Couples: Marriage, Families, and Children,” available at <http://www.law.stanford.edu/faculty/wald>.
- ²⁷*Watkins v. U.S. Army*, 769.
- ²⁸Strasser, *Legally Wed*, 154.
- ²⁹For example, Victoria Clarke, in a study of individual attitudes concerning gay and lesbian couples, cited six primary reasons why individuals did not think favorably of same-sex marriage: (1) “The bible tells me that lesbian and gay parenting is a sin”; (2) “Lesbian and gay parenting is unnatural”; (3) “Lesbian and gay parents are selfish because they ignore ‘the best interests of the child’”; (4) “Children in lesbian and gay families lack appropriate role models”; (5) “Children in lesbian and gay families grow up lesbian and gay”; (6) “Children in lesbian and gay families get bullied.” See her “What about the Children? Arguments against Lesbian and Gay Parenting,” *Women’s Studies International Forum* 24, no. 5 (September/October 2001): 555–70. It is interesting to note that the most common response is colored by religious attitudes toward homosexuals, and that concern about the children in such families is cited less frequently.

This appears to be a clear case of social bigotry's informing people's attitudes about same-sex parenting.

- ³⁰Judith Stacey and Tim Biblarz, "(How) Does the Sexual Orientation of Parents Matter?" *American Sociological Review* 66, no. 2 (April 2001): 159–83. The authors comprehensively reviewed findings over the past decade, noting that researchers frequently downplay differences of children with homosexual parents, but these do not adversely affect child development. The evidence is also examined by Posner, *Sex and Reason*, 418–19. These issues are also discussed in "A Rainbow of Differences in Gays' Children," *New York Times*, July 17, 2001, p. F1. For an interesting argument as to why same-sex couples provide a more just model for gendered division of labor, see Susan Moller Okin, "Sexual Orientation and Gender: Dichotomizing Differences," in *Sex, Preference, and the Family*, ed. David Estlund and Martha Nussbaum (Oxford: Oxford University Press, 1997): 44–59.
- ³¹"Group Wants Gays to Have a Right to Adopt a Partner's Child," *New York Times*, February 4, 2002, p. A17. The AAP noted in its journal *Pediatrics* that "most studies over the past two decades indicate children of gay or lesbian parents are as well adjusted socially and psychologically as those of heterosexual parents."
- ³²For a discussion of equality and "openness" as two "fundamental principles of institutional design," see Gerald Postema, "Public Practical Reason: Political Practice," in *Theory and Practice*, ed. Ian Shapiro and Judith Wagner DeCew (New York: New York University Press, 1995), 373–77; for a general overview and critical discussion of the idea of public reason, see Charles Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), chaps. 6–7.
- ³³John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 4.
- ³⁴For a critical discussion of the minimal moral conception involved here, see Larmore, *Morals of Modernity*, 155–63.
- ³⁵John Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64, no. 3 (Summer 1997): 765–807, at 766. It is interesting that Rawls provides a great deal of space to the role of the family as part of the basic structure in order to answer feminist critics of political liberalism, but he does not mention the democratic controversy of excluding nontraditional families, such as same-sex relations, from publicly accepted versions of the family (787–94).
- ³⁶See Robert Knight, "How Domestic Partnerships and 'Gay Marriage' Threaten the Family," *Insight: A Bulletin of the Family Research Council* (1997); and John Finnis, "Law Morality, and 'Sexual Orientation,'" *Notre Dame Law Review* 69, no. 5 (1994). A critical reply to some of Finnis's views can be found in Martha Nussbaum, "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies," *Sex and Social Justice* (Oxford: Oxford University Press, 1999), 299–331 (abridged from longer version originally published in *Virginia Law Review* 80 (1994): 1515–1651).
- ³⁷Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* (New York: Vintage, 1995), chap. 3.
- ³⁸See Richard Mohr, "Black Law and Gay Law: Do Civil Rights Have a Future?" in *Gay Ideas: Outing and Other Controversies* (Boston: Beacon Press, 1992).
- ³⁹Rawls, "Idea of Public Reason Revisited," 770; see also Larmore, *Morals of Modernity*, 144–51, for a critical discussion.
- ⁴⁰See Strasser, *Legally Wed*, 64–66.
- ⁴¹Rawls makes this clear in numerous places; cf. *Political Liberalism*, 190–95. In "Idea of Public Reason Revisited," he argues, as well, that political discourse "aims for public justification," which means that no comprehensive doctrine can politically force others to accept institutions and policies based on unreasonable premises (786). Jürgen Habermas makes a similar argument in holding that "features of argumentation" can exclude contributions that attempt to exclude, coerce, or otherwise undermine the contribution of others. See Habermas, *The Theory of Communicative Action*, vol. 1, trans. T. McCarthy (Cambridge: MIT Press, 1984), 22–42; see also Habermas, "A Genealogical Analysis of the Cognitive Content of Morality," in *The Inclusion of the Other: Studies in Political Theory*, trans. C. Cronin and P. De Greiff (Cambridge: MIT Press, 1998), 43–44.