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# “Immutability” and Stigma: Towards a More Progressive Equal Protection Rights Discourse

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# “IMMUTABILITY” AND STIGMA: TOWARDS A MORE PROGRESSIVE EQUAL PROTECTION RIGHTS DISCOURSE

M. KATHERINE BAIRD DARMER\*

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## I. INTRODUCTION

It was only seven years ago that the Supreme Court found anti-sodomy laws unconstitutional in *Lawrence v. Texas*.<sup>1</sup> As recently as 1986, the Court had put its imprimatur on the continued criminalization of sodomy in a brutally dismissive opinion in *Bowers v. Hardwick*.<sup>2</sup> The literal “outlaw status” of lesbian, gay, bisexual, and transgender (“LGBT”) people prior to *Lawrence* made the attainment of equal rights impossible. However, the seventeen years between *Bowers* and *Lawrence* witnessed a number of

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1. See 539 U.S. 558, 585 (2003) (discussed in Part II, *infra*).

2. See 478 U.S. 186, 196 (1986) (discussed in Part II, *infra*); see also MARTHA J. NUSSBAUM, FROM DISGUST TO HUMANITY 84 (2010) (“*Bowers* is a low point in recent Supreme Court jurisprudence. Its result and the harshness of the majority and concurring opinions not only left vital liberty interests unaddressed but also gave comfort to the idea that gays are outlaws.”). For further description of the brutality of *Bowers*, see Kendall Thomas, *Beyond Privacy*, 92 COLUM. L. REV. 1431 (1992).

gains for LGBT people. The landscape has changed even more since *Lawrence*, of course, with the ongoing struggle for LGBT rights now focused on attaining such rights as marriage equality.

Yet during this LatCrit conference, with its focus on “outsiders” gaining the status of “insiders” and ways in which critical outsider theory and praxis can make a difference in the policymaking of the “new American regime,” it seems appropriate to start this article with the stated premise that attainment of true equality remains elusive. Not only is marriage equality a reality in only a handful of states, but the 2008 election saw Arkansas voters forbid adoption rights to gays and lesbians.<sup>3</sup> Employment rights for LGBT people are also insecure in a number of states.<sup>4</sup> The federal Defense of Marriage Act (“DOMA”) ensures continued inequality from a federal rights perspective, even for those who live in states that recognize marriage of same-sex couples.<sup>5</sup>

Indeed, despite the LGBT community’s extensive support of the Obama administration, significant frustrations have developed with the slow pace of promised political change regarding such issues as repealing DOMA and getting rid of the highly problematic “don’t ask, don’t tell” policy. In recognition of the limits of a political regime for making fundamental change, this article focuses on the ongoing need for robust judicial protections of LGBT rights.

Working largely within the framework of traditional equal protection doctrine,<sup>6</sup> this paper expands upon the thesis that arguments regarding “immutability” have hampered the attainment of true equality for LGBTs.<sup>7</sup>

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3. See Robbie Brown, *Antipathy Toward Obama Seen as Helping Arkansas Limit Adoption*, N.Y. TIMES, Nov. 9, 2008, at A26 (reporting that Arkansas passed a referendum that prohibited unmarried couples from adopting or fostering children in November 2008). The ban, however, was recently struck down in state court after a group of families represented by the ACLU filed suit challenging the law. See *National Briefing: Arkansas: Adoption Ban Struck Down*, N.Y. TIMES, Apr. 17, 2010, at A12.

4. See HUM. RTS. CAMPAIGN FOUND., *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2007-2008* 3 (2009) (stating that only twelve states and the District of Columbia have outlawed employment discrimination based on sexual orientation and gender identity, while eight states have outlawed discrimination based solely on sexual orientation).

5. See Defense of Marriage Act, 1 U.S.C. § 7 (2006) (stating that for federal purposes, such as income tax, marriage is defined to exclude same-sex couples).

6. Some scholars have argued persuasively for a complete overhaul of the equal protection doctrine. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 582 (2004) (arguing for the overhaul of equal protection doctrine through the imposition of a single standard of review). However, this article takes the current three-tiered model of equal protection doctrine as a “given” and argues, less ambitiously, that within the existing framework of review, LGBTs should be accorded the protections of “suspect classification” status.

7. See M.K.B. Darmer & Tiffany Chang, *Moving Beyond the “Immutability Debate” in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 2-3 (2009) (arguing that the focus on immutability in discrimination cases has prevented LGBT

It also contends that a focus on other prongs of “suspect classification” requirements within the equal protection doctrine argues powerfully for expanded judicial protections for those individuals who define themselves as LGBT.

Constitutional issues affecting the rights of LGBT persons have arisen under the Fourteenth Amendment, which guarantees both “equal protection” and the “due process” of law.<sup>8</sup> Challenges to discriminatory laws have been made on both equal protection and due process grounds, but the focus of this article is on the equal protection doctrine, which I believe offers the strongest possibility for securing meaningful rights for LGBT persons.

Protections for LGBT persons under a due process analysis generally focus on a right to privacy. More than twenty-five years ago, an insightful student note in the *Harvard Law Review* succinctly explained why providing protections under a “privacy” rubric is incomplete and suffers from theoretical limitations:

Although extending the protection of privacy doctrine to consensual gay conduct might help to promote gay equality, privacy analysis suffers from fundamental flaws in its conception of social relations in general and homosexuality in particular. Privacy analysis assumes a dual structure—a division between the home and the outside world—that does not adequately capture the complexity of social life.<sup>9</sup>

Even more problematically, “[r]elegating sexuality to the private sphere” smacks of the old “separate but equal” doctrine. “Withholding social recognition from the public aspects of gay personhood while ‘[h]eterosexual society revolves around its sexual orientation’ is inherently unequal not only in its substantive restriction of gay liberties, but also in its imputation of stigma: homosexuality, like obscenity, may be tolerated only if quarantined.”<sup>10</sup>

Under the Equal Protection Clause, a law that discriminates against a

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individuals from obtaining legal equality and that courts should follow the California Supreme Court’s lead in *In re Marriage Cases* and abandon immutability in favor of an analysis based on the question of whether the trait leading to discrimination is so integral to a person’s identity that s/he should not be required to change it).

8. See U.S. CONST. amend. XIV, § 1 (stating that the states may not “deprive any person of life, liberty, or property without due process, nor deny anyone equal protection under their laws”).

9. See Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1289 (1985) (footnotes omitted) (arguing that the privacy doctrine’s public versus private dichotomy is inadequate because most people experience at least four overlapping “spheres” in their lives, each one exhibiting both public and private qualities).

10. See *id.* at 1290-91 (contending that the public versus private dichotomy is inadequate to promote the advancement of gay rights because homosexuality is an aspect of an individual’s personality that must be expressed both publicly and privately rather than a type of conduct that only takes place in private).

particular group of people has traditionally been subject to one of three levels of scrutiny: “rational basis” review, “intermediate scrutiny,” or “strict scrutiny.” While most laws are subject to only rational basis analysis, which gives great deference to the state’s actions, those that discriminate based upon a “suspect” or “quasi-suspect” classification receive heightened scrutiny.<sup>11</sup>

Following this Introduction, Part II of this article will lay out the history of Supreme Court jurisprudence in the area of LGBT rights,<sup>12</sup> starting with *Bowers v. Hardwick*, in which the Court rejected a Fourteenth Amendment challenge to anti-sodomy laws brought under the Due Process Clause.<sup>13</sup> The article will then outline the Court’s decisions in *Romer v. Evans* and *Lawrence v. Texas*, which were decided pursuant to rational basis review under the Equal Protection and Due Process Clauses, respectively.<sup>14</sup> Part III will briefly address the limits of those decisions for the development of robust protections for LGBT individuals and will address the ways in which questions regarding “immutability” have disserved LGBT persons in the development of equal protection law. The article concludes that equal protection doctrine and rhetoric would be improved by abandoning any focus on “immutability.”

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11. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (explaining that state action with regard to state welfare programs must only be rationally related to its objective and devoid of “invidious discrimination” in order to be upheld). Under strict scrutiny, the state must satisfy a more exacting standard: the law in question must be narrowly tailored to address a “compelling” state interest. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (indicating that certain statutory classifications are often motivated by prejudice and are seldom relevant to the achievement of a legitimate state interest). Race, alienage, and national origin have traditionally been deemed “suspect classifications.” See, e.g., *id.* (suggesting that these factors are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that all laws that restrict the rights of a particular racial group are “immediately suspect”). In federal jurisprudence, gender falls in the mid-spectrum, as classifications based upon gender are deemed “quasi-suspect” and must be shown to have a substantial relationship to an important government interest. See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976) (invalidating a statute that permitted women to purchase beer with an alcohol content of 3.2% at age eighteen and men at the age of twenty-one).

12. I note that the *Bowers* Court used the term “homosexual” and the *Romer* Court dealt with an underlying attempt to amend the state constitution to eliminate protections for gay, lesbian or bisexual persons; neither decision dealt with issues related to transgender persons. However, I use the term “LGBT” throughout this article because it is more inclusive and because transgender persons have suffered a history of discrimination similar to that faced by gay, lesbian, and bisexual persons.

13. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The case descriptions contained in this Part are modified from Darmer & Chang, *supra* note 7.

14. *Lawrence v. Texas*, 529 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

II. *BOWERS, ROMER, AND LAWRENCE*: A HISTORY OF THE DEVELOPMENT OF  
LGBT PROTECTIONS

In the narrative underlying *Bowers v. Hardwick*, Michael Hardwick was arrested for sodomy when a police officer entered his home and found him engaging in oral sex with another man.<sup>15</sup> Hardwick challenged the Georgia anti-sodomy law, which prohibited oral and anal sex between both different-sex and same-sex couples, arguing that the right to privacy is implicit in the Fourteenth Amendment and protects personal liberty in private sexual matters. The Supreme Court rejected this argument and held that "homosexual sodomy" was not a fundamental right.<sup>16</sup> Because the Court determined that enforcing morality was a legitimate governmental interest, it found that the law survived rational basis review.<sup>17</sup> The Court decided the case as a matter of due process rather than equal protection. The decision underwent withering criticism in the academic community, particularly for its almost singular focus on "homosexual sodomy" despite the fact that the statute at issue applied to heterosexual sodomy as well.<sup>18</sup> In *Beyond Privacy*, Professor Kendall Thomas issued a particularly stinging indictment of the case, arguing that it effectively legitimated violence perpetrated upon gay men and lesbians.<sup>19</sup> As Thomas put it, "the lived experience of gay men and lesbians under the legal regime challenged and upheld in *Bowers v. Hardwick* is one in which government not merely passively permits, but actively protects, acts of violence directed toward individuals who are, or are taken to be, homosexual."<sup>20</sup>

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15. See 478 U.S. at 187-88. By engaging in consensual sexual activity, Hardwick was violating the Georgia law prohibiting the act of engaging in sodomy with another man. For a thorough discussion of the background facts of the case, see NUSSBAUM, *supra* note 2, at 54-55, 77-79.

16. See 478 U.S. at 190-92 (asserting that because homosexual sodomy is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition, it does not constitute a fundamental right).

17. See *id.* at 196 (holding that majoritarian morality provided a rational basis to uphold the statute).

18. See WILLIAM N. ESKRIDGE, JR., *GAYLAW* 150 (1999). He writes:

The Court's decision . . . has become infamous, partly because [majority opinion author, Justice] White[,] went out of his way to focus on 'homosexual sodomy' and to disrespect "homosexuality," a feature more pronounced in Chief Justice Warren Burger's concurring opinion, which invoked "Judeo-Christian moral standards" and "millennia of moral teaching" against "homosexual sodomy."

*Id.* (citing 478 U.S. 186, 197 (Burger, C.J., concurring)); see also NUSSBAUM, *supra* note 2, at 84 ("*Bowers* is a low point in recent Supreme Court jurisprudence. Its result and the harshness of the majority and concurring opinions not only left vital liberty interests unaddressed but also gave comfort to the idea that gays are outlaws.").

19. See Thomas, *supra* note 2.

20. *Id.* at 1461. Professor Thomas observes that "[l]ike people of color, gay men

In 1996, however, the Court provided some protections to gay, lesbian, and bisexual persons under the auspices of the Equal Protection Clause in *Romer v. Evans*.<sup>21</sup> In its decision, the Court rejected an effort by the State of Colorado to deny gays and lesbians the protections of anti-discrimination laws via a statewide referendum repealing then-existing anti-discrimination laws and precluding the future enactment of similar laws. Writing for a six-to-three majority, Justice Kennedy declared, “[a] State cannot so deem a class of persons a stranger to its laws.”<sup>22</sup> Finding the law invalid, the Court invoked only the “rational basis” test in lieu of upholding the state court’s finding that strict scrutiny was the appropriate test for a case involving impairment of a fundamental right for gay, lesbian, and bisexual persons.<sup>23</sup>

In reaching its decision that the amendment failed equal protection requirements, the *Romer* Court rejected Colorado’s primary argument that the amendment only precluded extension of “special rights” based upon sexual orientation,<sup>24</sup> an argument that Justice Scalia also advanced in his dissenting opinion.<sup>25</sup> Rather, the Court found that “the amendment imposes a special disability upon [homosexual] persons alone.”<sup>26</sup> Indeed, the Court noted, “[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint,” and “[t]hese are protections taken for granted by most people either because they already have them or do not need them.”<sup>27</sup> The Court also rejected two other arguments for Colorado’s Amendment Two: first, that it was rooted in the right to freedom of association under the First Amendment to the United States Constitution; and second, that it was an effort to conserve government resources to combat discrimination against other groups.<sup>28</sup> Repealing and preventing

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and lesbians always have to live their lives on guard, knowing that they are vulnerable to attack at every turn.” *Id.* at 1465.

21. 517 U.S. 620, 635-36 (1996). For a thorough discussion of the background of *Romer*, see NUSSBAUM, *supra* note 2, at 94-113.

22. *See* 517 U.S. at 635 (arguing that the Colorado amendment’s legislative end was not only improper, but served to make homosexuals “unequal to everyone else”).

23. *See id.* at 625, 631-32 (explaining that the state supreme court held that Amendment Two was subject to strict scrutiny under the Fourteenth Amendment because it infringed on the fundamental right of gays and lesbians to participate in the political process and stating that the United States Supreme Court would only uphold the amendment if it was rationally related to a legitimate governmental end).

24. *See id.* at 631 (asserting that the amendment denies homosexuals the protections that all other groups of Colorado citizens enjoy and all groups should have access to remedies when the government endeavors to curb their rights).

25. *Id.* at 637-38 (Scalia, J., dissenting).

26. *Id.* at 631 (majority opinion).

27. *See id.* (identifying the special disability placed on homosexual persons by the Colorado amendment as the inability to seek full inclusion in everyday civic life).

28. *See id.* at 635 (finding no legitimate governmental objective to justify the disparate treatment of homosexual persons under Colorado’s Amendment Two because

any future legislation that protects a particular disadvantaged group, the Court concluded, did not bear a rational relation to those stated government interests.<sup>29</sup>

Justice Kennedy wrote in the *Romer* decision that "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."<sup>30</sup> Moreover, the Colorado amendment was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."<sup>31</sup> The Court therefore found such animus-based lawmaking to be illegitimate. In the words of the Court, Amendment Two's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."<sup>32</sup> As one scholar noted, the focus on "animus" was "remarkable" because "it is the only time the Court has used that word to invalidate a law under equal protection."<sup>33</sup> Arguably, the finding of animus has also limited the application of *Romer* in other contexts, where discrimination may be more subtle.

As Justice Scalia pointed out in his dissent, the *Romer* holding sat uncomfortably with the Court's earlier decision in *Bowers v. Hardwick*, which affirmed that sodomy could be criminalized. In Scalia's view, the majority opinion flew in the face of precedents such as *Bowers v. Hardwick* and *Davis v. Beason*.<sup>34</sup>

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it was an overbroad law that did not further any legitimate government objective and because its status-based principle ran afoul of the Fourteenth Amendment's Equal Protection Clause).

29. *See id.* (holding that the Colorado amendment was too broad to have been motivated by the state's claimed policy goals of supporting freedom of association and conserving resources to fight discrimination against other groups).

30. *See id.* at 634 (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)) (explaining that a state may not impose laws rooted in animosity towards a particular class of persons, as they cannot be rationally related to a legitimate government objective).

31. *See id.* at 635 (maintaining that laws that classify citizens for any overly broad purpose are unconstitutional for lack of a rational relation to legitimate state interests).

32. *See id.* at 632 (adjudging the Colorado amendment unconstitutional because it imposes an all-encompassing proscription on access to justice and anti-discrimination protections for a single group, without grounding the prohibition in a legitimate state objective).

33. *See* Sharon E. Rush, *Whither Sexual Orientation Analysis? The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 718 (2008) (noting that *Romer* is unique for its analytical focus on "animus," but that the Court ultimately struck down the Colorado amendment because it failed to serve a legitimate state interest).

34. *See Romer*, 517 U.S. at 636, 642, 649-50 (Scalia, J., dissenting) (arguing that the majority's decision contradicted *Bowers* by holding that Amendment Two was impermissible, claiming that it is appropriate to deny gays state protection because homosexual conduct can be criminalized, and citing *Davis* for the proposition that



Seven years later, however, the Court directly overruled *Bowers v. Hardwick* by overturning a Texas law criminalizing “deviate sexual intercourse” between consenting adults. In that case, *Lawrence v. Texas*, John Geddes Lawrence and Tyron Garner, both adult males, were arrested for having consensual sex with one another when police entered Lawrence’s home in response to a reported weapons disturbance.<sup>35</sup> The men were charged with and convicted of violating a Texas statute prohibiting sexual intercourse between people of the same sex, a conviction that was sustained by the Texas Court of Appeals pursuant to the precedent set forth in *Bowers*.<sup>36</sup>

The Supreme Court invalidated the two men’s convictions on due process grounds, focusing on the right to privacy.<sup>37</sup> In the course of its opinion, the majority briefly explained why it did not rely upon the Equal Protection Clause. While acknowledging that equal protection was a “tenable argument,” the Court noted that if the case were decided on that basis, then *Bowers* could be distinguished because that case dealt with an anti-sodomy law applicable to both same-sex and opposite-sex couples.<sup>38</sup> Deciding *Lawrence* based on the Equal Protection Clause would have left *Bowers* as good law, thereby permitting similarly discriminatory penal provisions as long as they applied to opposite-sex as well as same-sex couples.<sup>39</sup> Instead, the Court focused on the Due Process Clause, explaining that the majority in *Bowers* erroneously framed the issue as the right to engage in particular sexual conduct rather than a person’s right to privacy—including the right to privacy in intimate sexual behavior.<sup>40</sup> According to the Court, “[t]o say that the issue in *Bowers* was simply the

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conduct running afoul of community morals, such as polygamy, can properly be criminalized). For a further discussion of the case, see NUSSBAUM, *supra* note 2, at 107.

35. See 539 U.S. 558, 563 (2003) (indicating that the police complaint described the petitioners’ crime as “deviate sexual intercourse, namely anal sex, with a member of the same sex”).

36. See *id.* (explaining that the Court of Appeals for the Texas Fourteenth District heard and rejected the petitioner’s equal protection and due process arguments under the Fourteenth Amendment pursuant to the precedent established in *Bowers v. Hardwick*).

37. See *id.* (holding that the determination of whether petitioners were “free to engage” in private homosexual conduct required a reconsideration of *Bowers*).

38. See *id.* at 574-75 (reasoning that an assessment under the Equal Protection Clause may render a statute legislating private sexual conduct valid as long as it applied to both heterosexual and homosexual behavior).

39. Cf. *id.* at 582 (O’Connor, J., concurring) (arguing that the Texas law should be invalidated under the Equal Protection Clause because it singled out conduct related to gays and lesbians and was distinguishable from *Bowers*).

40. See *id.* at 567 (majority opinion) (describing the laws involved in *Bowers* and *Lawrence* as having “far-reaching consequences, touching upon private human conduct inside the home”).

right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>41</sup>

Rejecting *Bowers* in unusually strong terms, Justice Kennedy wrote, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”<sup>42</sup> Finding that there was no legitimate governmental interest to justify the Texas anti-sodomy law, the Court held that private sexual conduct between two consenting adults is a protected liberty interest under the Due Process Clause.<sup>43</sup> Specifically, the Court asserted,

[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the right to engage in their conduct without intervention by the government.<sup>44</sup>

In *Romer* and *Lawrence*, the Supreme Court opened the door to providing LGBTs with limited protections under the Fourteenth Amendment.<sup>45</sup> Nevertheless, the framework the Court provided has led to inconsistencies in the lower courts.<sup>46</sup> Neither *Romer*, in the equal protection context, nor *Lawrence*, using a due process analysis, purported to apply any form of heightened scrutiny.<sup>47</sup> Lower courts have thus been

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41. *Id.*

42. *Id.* at 578.

43. *See id.* (distinguishing consensual homosexual sexual practices from non-consensual sexual conduct and sexual conduct that is otherwise deemed illegal, such as prostitution or the commission of public sex acts).

44. *Id. Contra id.* at 595-96 (Scalia, J., dissenting) (claiming that whether the Texas law targeted homosexuals, the undisputed history of criminalizing sodomy in general preempts a finding that homosexual sodomy is a fundamental right, as a fundamental right is defined as “deeply rooted in our Nation’s history and tradition”). Justice Scalia argued that because there was no fundamental right that would invoke heightened scrutiny, moral disapproval of certain sexual conduct was a legitimate governmental interest sufficient to satisfy the rational basis test used in the majority’s due process analysis and the equal protection analysis suggested by Justice O’Connor. *Id.* at 599. According to Justice Scalia, existing laws criminalizing “fornication, bigamy, adultery, adult incest, bestiality, and obscenity” were based on sexual morality and would also presumably fail a rational basis test after *Lawrence*. *Id.* However, he also suggested that there was no equal protection violation in *Lawrence* because the Texas law equally prohibited all people—both heterosexuals and homosexuals—from engaging in sexual acts with someone of the same sex. *Id.* at 599-600. Lastly, the dissent attempted to distinguish *Lawrence* from the anti-miscegenation cases because while a racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, in Justice Scalia’s view, only rational basis review applies in cases like *Lawrence*, involving discrimination based on sexual orientation. *Id.* at 600.

45. *See id.* at 584 (O’Connor, J., concurring) (asserting that the Equal Protection Clause prohibits the “singling out of an identifiable class of citizens for punishment” where moral disapproval serves as the only asserted state interest).

46. *See Darmer & Chang, supra* note 7, at 21.

47. *Cf. id.* (noting that some scholars have suggested that both the *Romer* and

able to read the cases narrowly, continuing to permit discrimination against LGBTs.

### III. THE LIMITS OF CURRENT LGBT PROTECTIONS AND RETHINKING THE “IMMUTABILITY” STANDARD

Despite the significant breakthroughs represented by the extension of rights by both *Romer* and *Lawrence*, their protections have been incomplete. A paradigmatic example is the Sixth Circuit’s decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.<sup>48</sup> On remand following the *Romer* decision, the Court of Appeals in *Equality Foundation* upheld a city’s voter initiative to prevent individuals from gaining protection from discrimination based upon sexual orientation. The Court distinguished *Romer* on the ground that the City of Cincinnati’s initiative was both narrower in scope than Colorado’s Amendment Two and not motivated merely by “animus.”<sup>49</sup>

The Court declined to apply any form of heightened scrutiny to a classification based upon sexual orientation. It did so, in part, by suggesting that sexual orientation would fail an “immutability” requirement, a traditional factor in determining whether a classification is “suspect.”<sup>50</sup> Similarly, in *Woodward v. United States*, where the Federal Circuit upheld a Navy discharge based upon homosexuality, the Court proclaimed that “[h]omosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes, e.g., blacks or women, [which] exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.”<sup>51</sup>

While the Supreme Court has “never held that only classes with immutable traits” can achieve suspect classification status, the Court has “often focused on immutability” in its equal protection jurisprudence.<sup>52</sup> An examination of the Court’s references to immutability, however, reveals that immutability is not necessary for a classification to be deemed

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*Lawrence* Courts applied de facto heightened scrutiny).

48. 128 F.3d 289 (6th Cir. 1997).

49. *See id.* at 299-300 (holding that the Cincinnati initiative was motivated by a “valid interest to conserve public and private financial resources” and not by a desire to express “community moral disapproval of homosexuality” as occurred in Colorado).

50. *See* Goldberg, *supra* note 6, at 502 n.84 (citing *Equality Foundation*, 128 F.3d at 293 n.2, 300-01) (noting that “[w]ith some frequency, lower courts have relied on the ‘immutability test’ to refuse close review of sexual orientation-based classifications”).

51. *See* *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied* 494 U.S. 1003 (1990).

52. *See* *Watkins v. U.S. Army*, 875 F.2d 699, 725-26 (9th Cir. 1989) (en banc) (Norris, J., concurring) (suggesting that the Court never intended “immutability” to be interpreted so strictly that individuals of a class must be physically unable to alter the trait defining their class).

“suspect” for classification purposes. Moreover, the “requirement” is theoretically problematic in the sexual orientation context.

The Supreme Court’s reference to “immutability” in the equal protection context can be traced to its decision in *Weber v. Aetna Casualty & Surety Co.*, in which the Court confronted discrimination against illegitimate children.<sup>53</sup> In that particular context, the Court noted that “imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”<sup>54</sup> If the state desires to discourage adults from engaging in particular behaviors, it is inappropriate to burden the disincentives on their unwitting children.<sup>55</sup>

Justice Brennan picked up this language from *Weber* in a plurality decision the following year in *Frontiero v. Richardson*.<sup>56</sup> Emphasizing the unfairness of gender discrimination, Justice Brennan provided the “immutability” of the character trait of sex as one reason why such discrimination was wrong. Specifically, quoting *Weber*, he wrote that:

Moreover, since sex, like race and national origin, is an immutable character determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .’<sup>57</sup>

In *Frontiero*, Justice Brennan took the notion that a trait belonging to a person through no fault of his or her own (such as the status of being “illegitimate”) and added to it the notion of unchangeability in using the “immutability” label. While closely related, however, the concepts of faultlessness and unchangeability are analytically distinct.<sup>58</sup> As pointed out by others, an “illegitimate” child can “gain legitimacy” if the child’s parents marry.<sup>59</sup> Similarly, a young child brought into the country illegally, before she has the autonomy to make such decisions, might be deemed an

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53. See 406 U.S. 164, 168 (1972) (discussing the lower court’s ruling which upheld a Louisiana workmen’s compensation statute under which illegitimate children were denied recovery because legitimate children exhausted existing available benefits).

54. *Id.* at 175.

55. See *id.* at 175-76 (noting that while the Court cannot prevent the “social opprobrium” to which illegitimate children are often subject, it may use the Equal Protection Clause to invalidate discriminatory laws relating to the status conferred on them at birth).

56. See 411 U.S. 677, 680 (1973) (assessing a case wherein a female United States Air Force lieutenant’s husband was denied benefits on account of being unable to demonstrate that he was her “dependent”—a burden not required of wives seeking the military benefits of their enlisted husbands).

57. *Id.*

58. Cf. Note, *supra* note 9, at 1302 (“Describing a trait as immutable in an equal protection analysis often implies that it is unchosen as well as unalterable.”).

59. Goldberg, *supra* note 6, at 506.

“undocumented alien” or “illegal alien” though the child is faultless, but that trait, like “illegitimacy,” is not beyond the capacity for change, as a child whose parents brought the child into the country without proper documentation may eventually obtain citizenship.<sup>60</sup>

What Justice Brennan seems to be expressing, which is intuitively appealing, is the notion that people should not be “faulted” for aspects of their personhood that are not choices made by those persons.<sup>61</sup> Ordinarily, though not inevitably, persons do not choose (or change) their gender. However, even notions of gender are far more fluid now than they were when Justice Brennan was writing in 1973. Yet, just because I could theoretically change my gender, is it any more appropriate for me to be discriminated against on the basis of gender?<sup>62</sup> While something unchosen should surely not subject a person to legal disadvantage, it does not follow that someone should be subject to legal disadvantage for “retaining” such a trait that causes no harm to others. To the extent that the idea of immutability had its genesis in *Weber*, it is important to note that punishing children for their illegitimate status was insufficiently connected to any state goal of disincentivizing irresponsible adult sexual behavior.<sup>63</sup> In the words of the Court, “no child is responsible for his birth.”<sup>64</sup> *Weber* therefore implicitly problematized the birthing of children out of wedlock, but made clear that the children themselves were not the responsible parties.<sup>65</sup>

A number of scholars have criticized the use of “immutability” in equal protection doctrine in part because “immutability” is analytically

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60. *See id.* (noting that alienage, like illegitimacy, can be changed). *See generally* Jessica Sharon, *Passing the Dream Act: Opportunities for Undocumented Aliens*, 47 SANTA CLARA L. REV. 599, 620-25 (2007) (highlighting proposed legislation that would enable the children of illegal immigrants to seek citizenship and better access to higher education if certain qualifications are met).

61. *See Frontiero*, 411 U.S. at 680 (noting that sex is an “accident of birth”); *cf. id.* at 686-87 (asserting that statutory distinctions between sexes tend to “invidiously relegate[]” an entire sex to a separate legal status, thus differentiating which sex would receive benefits and rights without regard to an individual’s needs and capabilities).

62. *Cf. Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) (stressing that racial discrimination would not suddenly become constitutional if a medical procedure emerged capable of altering one’s skin pigment).

63. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (stating that discriminating between legitimate and illegitimate children in the receipt of workman’s compensation does not serve the state’s interest in “legitimate family relationships”). I want to emphasize that I am not myself endorsing the view that adults themselves should be disincentivized from having children “out of wedlock,” as I personally think that such families are as equally “legitimate” as those in which children are born and raised in traditional marriages. The point is that the Court was drawing a distinction between potentially responsible adults on the one hand and the utterly blameless children on the other.

64. *Id.* at 175.

65. *Id.* at 174-75.

troublesome when applied to sexual orientation.<sup>66</sup> While sympathetic jurists have noted that "scientific research indicates that one has little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change,"<sup>67</sup> that view is not universally shared. Moreover, if a state seeks to regulate conduct, rather than status, the application of any "immutability" prong can be problematic.

The further problem with a focus on "immutability," however, is that it is inherently stigmatizing to ask whether a person's sexual orientation can be "changed."<sup>68</sup> Implicit in the very question is the heteronormative assumption that heterosexuality is the "preferred" sexual orientation and that it would be better if folks *could* change their sexual orientation if it deviates from that norm. The attitude that an unchosen sexual orientation should not be criminalized or penalized, while perhaps preferable to a society that terrorizes members of the LGBT community, is still not an embracing theory that is truly accepting of the legitimacy of being LGBT.

In the 1985 Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, written before either *Romer* or *Lawrence* were decided, the authors argued for extending "suspect classification" status by refining the immutability question: "[a]n alternative view of the importance of immutability might thus focus on the argument that the characteristics of race and sex are important not because they are (usually) determined at birth, but because they are such determinative features of personality."<sup>69</sup> Similarly, Judge Norris in his concurring *Watkins* opinion suggested:

[r]eading the case law in a more capacious manner, 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change

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66. See Goldberg, *supra* note 6, at 506 (noting that the "importance accorded to immutability as an indicia of suspectness runs contrary to the Court's own recognition that society, not nature, gives many traits their significance"). Goldberg explains that the "immutability requirement also finds itself in conflict with the factual reality that purportedly fixed traits, such as sex, are in fact more alterable and flexible than commonly presumed." *Id.* Furthermore, the "Court itself has acknowledged that the immutability requirement . . . fails to filter classifications meriting heightened judicial skepticism in a meaningful way" and has been "subject to greatest misapprehension by lower courts." *Id.* (citations omitted). Likewise, in Martha Nussbaum's recent book, she offers a sustained critique of immutability. See NUSSBAUM, *supra* note 2, at 114-22. She concludes that "the legal notion of immutability is confused, but it leads us to two good ideas . . . the idea of relevance and the idea of depth or centrality." *Id.* at 122.

67. See *Watkins*, 875 F.2d at 726 (Norris, J. concurring).

68. See *id.* (suggesting that an appropriate inquiry in demonstrating that homosexuality is something beyond control is to ask heterosexuals whether they believe they can alter their sexual orientation).

69. See Note, *supra* note 9, at 1303 (reasoning that there are a "myriad of immutable characteristics," such as eye color, that would not become "grounds for the creation of a suspect class" and thus subject to heightened scrutiny because of their relative unimportance to the concept of personhood).

them, regardless of how easy that change might be physically.<sup>70</sup>

Reading “immutability” in a generous manner, or seeking to define immutability in a different way, however, seems to me far less preferable than simply candidly acknowledging that a requirement of “immutability” is unnecessary for a finding of suspect classification in the equal protection context. Rather, a straightforward focus on a trait’s essential connection to personhood can surely animate equal protection doctrine without trying to fit that notion under an ill-fitting “immutability” label.<sup>71</sup>

In *Frontiero*, the Court’s plurality opinion drew on *Weber* to explicitly inquire for the first time whether a trait was “immutable” in the suspect classification context.<sup>72</sup> It also asked whether a characteristic related to an “ability to perform or contribute to society” might be a legitimate basis for classification in certain circumstances.<sup>73</sup> This analysis seems designed to uncover whether a classification is legitimate, and the Court’s traditional focus on whether a group has suffered a history of discrimination is also helpful in determining whether a classification is “suspect.”<sup>74</sup> Where a group, such as the LGBT community, has demonstrably suffered from a history of discrimination, it raises the likelihood that efforts to impose additional burdens on the group or prevent them from enjoying certain benefits (such as marriage) are borne of historic prejudice, rather than on any compelling state interest.

Immutability, however, does not clearly “fit” with the goals of equal protection doctrine. Indeed, as more fully explored in an earlier article,<sup>75</sup> the California Supreme Court eschewed an “immutability” requirement altogether in its recent decision in *In re Marriage Cases*.<sup>76</sup> The court

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70. *Watkins*, 875 F.2d at 725-26 (Norris, J. concurring).

71. See *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (discussed in Darmer & Chang, *supra* note 7).

72. See Goldberg, *supra* note 6, at 501-02 (suggesting that the concept of immutability was used to “refine and control” those classifications eligible for heightened scrutiny).

73. See *id.* at 501 (asserting that the *Frontiero* Court contrasted gender with “nonsuspect statuses such as intelligence and physical disability” in order to distinguish immutable classifications subject to heightened scrutiny).

74. See *id.* at 503 (indicating that another traditional factor for affording a particular group suspect status is political powerlessness). While other scholars have recently problematized the focus on political power, commenting upon those arguments is beyond the scope of this article.

75. See generally Darmer & Chang, *supra* note 7 (arguing that a focus on whether sexual orientation is an immutable characteristic harms the attainment of equality for LGBTs).

76. See 183 P.3d at 384, *superseded in part by amendment*, C.A. CONST. art. 1, § 7.5 (the part of the Court’s holding stating that gays and lesbians are a suspect classification was not affected by the amendment); see also *Strauss v. Horton*, 207 P.3d 48, 102 (Cal. 2009) (asserting that the court’s determination that gays and lesbians are a suspect classification for state equal protection purposes remains good law, albeit limited in impact by Proposition 8); Darmer & Chang, *supra* note 7, at 6-7 (suggesting

likened sexual orientation to religion and found that it was so "integral an aspect of one's identity that it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."<sup>77</sup> The court disagreed with the lower court in the case, which rejected a finding of "suspect classification" based upon an immutability analysis.<sup>78</sup>

Indeed, the California Supreme Court became the first court in the country to find that sexual orientation is a suspect classification, an important finding that will transcend the short-term political setback of Proposition 8. As Tiffany Chang<sup>79</sup> and I have argued elsewhere, "[b]y finding immutability to be unnecessary and acknowledging the integral nature of sexual orientation to personhood, the court issued a decision profoundly respectful of gay men and lesbians that is straightforward in its analysis of the criteria for finding a classification 'suspect.'"<sup>80</sup>

#### IV. CONCLUSION

In this article, I have attempted to argue further for a rejection of "immutability" in the equal protection context. While the notion of a trait being an "accident of birth," and thus an unfair basis for classification, had intuitive appeal where illegitimacy was at issue, any requirement for "immutability" is deeply problematic in the development of equal protection doctrine with regard to the LGBT community. An immutability inquiry is inherently stigmatizing and loaded with heteronormative assumptions. As we move beyond fighting for baseline rights for the LGBT community and envision a society in which different sexual orientations are celebrated and embraced, our discourse and doctrine will hopefully catch up with our ideals.

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that *In re Marriage Cases* assessed fundamental questions regarding the rights of sexual orientation minorities that will likely prove important in future jurisprudence).

77. *In re Marriage Cases*, 183 P.3d at 442.

78. *See id.* at 403-04 (discussing the procedural history that upheld laws limiting marriage to opposite-sex couples because they did not discriminate on the basis of sex).

79. Chang is a 2010 graduate from Chapman University School of Law and a board member of the Orange County Equality Coalition who has described the discrimination she has faced as a lesbian. *See Darmer & Chang, supra* note 7, at 1 nn. 9-11.

80. *See id.* at 28 (comparing the irrelevancy of immutability with that of current political powerlessness for the purposes of equal protection analysis).