

December 2005

## Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion

William N. Eskridge Jr.

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### Recommended Citation

William N. Eskridge Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 Fla. L. Rev. 1011 (2005).

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Formerly

University of Florida Law Review

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VOLUME 57

DECEMBER 2005

NUMBER 5

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## DUNWODY DISTINGUISHED LECTURE IN LAW

### BODY POLITICS: *LAWRENCE* v. *TEXAS* AND THE CONSTITUTION OF DISGUST AND CONTAGION

*William N. Eskridge, Jr.\**

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\* John A. Garver Professor of Jurisprudence, Yale Law School.

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The Supreme Court ruled in *Lawrence v. Texas*<sup>1</sup> that states could not constitutionally criminalize private oral or anal sex between consenting adults.<sup>2</sup> How far does the decision sweep? Is it limited to its facts, with no broader implications for constitutional law, as the Eleventh Circuit recently held?<sup>3</sup> Or does *Lawrence* entail a massive shift, not only protecting any and all private sexual activities, but also writing the entire “homosexual agenda” into the Constitution, as Justice Scalia charged in dissent?<sup>4</sup> Both of these extreme reactions can be logically and responsibly argued from the majority and concurring opinions delivered by Justices Kennedy<sup>5</sup> and O’Connor,<sup>6</sup> respectively. But few constitutional scholars think the narrowest or the broadest reading of *Lawrence* is correct. Its charged reasoning cannot be limited to the sodomy context alone, but neither does it entail same-sex marriage.

One cannot interpret or apply *Lawrence* without situating it in history—not just the history of judicial review of morals legislation, as Suzanne Goldberg has done;<sup>7</sup> or the history of equal protection doctrine, as Nan Hunter and Pam Karlan have done;<sup>8</sup> or the history of privacy rights litigation, as Larry Tribe has done;<sup>9</sup> or the history of the lesbian and gay social movement, as Miranda Oshige McGowan has done;<sup>10</sup> or the history of what transpired the night of Lawrence and Garner’s arrest, as Dale Carpenter has done,<sup>11</sup> but also the history of traditionalist and religious

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1. 539 U.S. 558 (2003).  
 2. *Id.* at 578-79.  
 3. *See* Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004).  
 4. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).  
 5. *Id.* at 562-79 (majority opinion).  
 6. *Id.* at 579-85 (O’Connor, J., concurring in the judgment).  
 7. *See generally* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004).  
 8. *See generally* Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004); Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004).  
 9. *See generally* Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).  
 10. *See generally* Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004).  
 11. *See generally* Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464 (2004).

responses to the lesbian and gay rights movement. What I call the “traditional family values” (TFV) countermovement created a constitutional theory that has its origins in the Save Our Children campaign in Dade County, Florida. Save Our Children synthesized a new kind of anti-gay politics and energized a vigorous, new identity-based social movement. The new politics was both aggressively negative, invoking themes of disgust and contagion, as well as surprisingly positive, re-aligning Protestants and Catholics, blacks and whites in a new identity arrayed around marriage and family. The Save Our Children campaign also was an example of popular constitutionalism, for it offered a vision of the Constitution that allowed the state to exclude and suppress people (homosexuals) who flaunted their disgusting practices and threatened to pollute the body politick. Not all traditionalists subscribed to its tenets, but almost none disagreed publicly.

This Constitution of (Anti-Homosexual) Disgust and Contagion had a surprising degree of support within the federal judiciary. Led by the Chief Justice of the United States Supreme Court, prominent Republican jurists endorsed that Constitution, while others acquiesced in it. During the Burger Court era (1969-86), federal judges rarely interfered with traditionalist efforts to censor, imprison, or exclude homosexuals because of their disgusting conduct and their contagious immorality. The Supreme Court and the D.C. Circuit interpreted the First Amendment to allow suppression and censorship of contagious homosexuals,<sup>12</sup> the Due Process Clause (the home of the right to privacy) to allow the state to make disgusting homosexual sodomy a crime,<sup>13</sup> and the Equal Protection Clause to allow virtually any state discrimination against contagious homosexuals or disgusting homosexual sodomites.<sup>14</sup> The Constitution of Anti-Homosexual Disgust and Contagion was one that tolerated or encouraged the closet as a condition for homosexual citizenship in this country. Ironically, it fell to the Rehnquist Court to set constitutional limits on this body politics, in large part for pragmatic reasons appealing to Republican centrists. The Texas sodomy case,<sup>15</sup> as well as the Boston parade case<sup>16</sup> and the Colorado initiative case,<sup>17</sup> represent the Court’s affirmation that the core libertarian, free speech, and equality principles of the Constitution

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12. See *Miller v. California*, 413 U.S. 15 (1973) (upholding censorship of sodomy-soaked erotica).

13. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the privacy right does not debar the state from making “homosexual sodomy” a crime).

14. See *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (Bork, J.) (holding that homosexuality is a classification the state can deploy to impose a wide array of disabilities).

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

16. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

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

apply to lesbians, gay men, and bisexuals and sometimes protect them against a politics that presents them as people whose disgusting features represent a contagious threat to others and to society.

But in setting some limits, the Court has by no means rejected the general idea that the Constitution at least tolerates a body politics that trades on appeals to disgust and contagion. The continuing legitimacy of such a politics has serious consequences for women seeking abortions, people with disabilities, lesbians, gay men, and transgendered people in the United States. Specifically, body politics helps us understand why the Supreme Court is and will remain reluctant to recognize new constitutional rights for these minorities, how the state can continue to justify discrimination against these minorities, and how traditionalists are winning new constitutional rights of their own. The ongoing culture conflicts between traditionalists and these minorities are certain to have destabilizing effects on constitutional law, creating a passive-aggressive First Amendment, a privacy right with unstable public-private borders, and an Equal Protection Clause that protects only occasionally and always unequally.

### I. SAVE OUR CHILDREN AND ANTI-HOMOSEXUAL BODY POLITICS, 1977-86

In 1971, the Florida Supreme Court declared the state's crime against nature law unconstitutional because it was too vaguely worded to give citizens notice of what was criminal and what was allowable conduct inside the bedroom.<sup>18</sup> After anguished backroom debate, the Florida Legislature in 1974 not only failed to enact a law defining more specifically what was entailed in the crime against nature, but also repealed the old law.<sup>19</sup> Although the judicial and legislative actions left in place a law making "unnatural and lascivious act[s]" a misdemeanor,<sup>20</sup> gay rights groups read these developments as an encouraging signal. After being witch-hunted by the state in the 1950s and ignored by law reform commissions in the 1960s, openly gay, lesbian, and bisexual people were more numerous than ever in Florida's cities, especially Miami and other cities in Dade County.

Once a sleepy southern state, by 1970 Florida had become a multicultural state of almost 6.8 million, and it grew by another three

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18. *Franklin v. State*, 257 So. 2d 21, 24 (Fla. 1971).

19. 1974 Fla. Laws ch. 121, 371-72 (repealing present Chapters 794 and 800, Florida Statutes, except sections 794.05, 800.03, and 800.04, and creating Chapter 794, Florida Statutes).

20. FLA. STAT. § 800.02 (2005); *Thomas v. State*, 326 So. 2d 413, 414 (Fla. 1975) (finding that the unnatural and lascivious conduct law, applied to consensual oral sex, was not void for

million during the 1970s.<sup>21</sup> Much of the in-migration came to Miami, Miami Beach, and their suburbs.<sup>22</sup> Flocking to a climate that was sunny, hot, and humid all year long were anti-Castro Cuban refugees, Jewish retirees from the Northeast, and homosexuals. Miami and South Beach had long been homosexual havens, and by the 1970s gay culture was out in the open and increasingly politicized. The founder of Club Baths, a national chain of gay bath-houses, Jack Campbell worked with activists such as Bob Basker to create the Dade County Coalition for the Humanistic Rights of Gays at his Coconut Grove bachelor's pad in the summer of 1976.<sup>23</sup> In the November elections, Campbell's group helped elect a majority of the Metro-Dade County Commission which governs the Miami metropolitan area.<sup>24</sup> One of their candidates, Ruth Shack, a school board administrator who had worked in the civil and women's rights movements, agreed to introduce a bill to prohibit employment discrimination on grounds of sexual orientation. County and municipal employers would no longer refuse to hire lesbian, gay, or bisexual people as firefighters, secretaries, or even police officers.<sup>25</sup>

Or as schoolteachers. This bothered Anita Bryant, who lived in an opulent thirty-three room mansion on Biscayne Bay in Miami with her husband Bob Green and their four vigorously scrubbed children. Bryant was a former Miss Oklahoma whose trademark rendition of "Battle Hymn of the Republic" entertained thousands of American troops in Vietnam, President Johnson and his guests at several White House functions, and the mourners at Johnson's funeral. The auburn-haired beauty had, since 1968, enjoyed great fortune, as well as fame, as the spokesperson for the Florida Citrus Commission ("A day without orange juice is like a day without sunshine."). A Baptist who had accepted Jesus Christ as her Savior at age eight, Bryant mixed religious disapproval of unnatural relations with some nutty views about homosexuals. Certain that God disapproved of "known homosexuals teaching my children," Bryant called Ruth Shack, whom she had helped elect because Ruth's husband, Dick, was her booking agent. "I expressed the valid fears we now felt of widespread militant homosexuals' efforts to influence children to their abnormal way of life." Shack told Bryant these fears were unfounded.<sup>26</sup>

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21. POPULATION DIVISION, U.S. BUREAU OF THE CENSUS, FLORIDA: POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1900-1990, <http://www.census.gov/population/cencounts/fl190090.txt> (last visited Aug. 14, 2005).

22. *Id.*

23. JAMES T. SEARS, *REBELS, RUBYFRUIT, AND RHINESTONES: QUEERING SPACE IN THE STONEWALL SOUTH* 229-33 (2001); DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 293-94 (1999).

24. CLENDINEN & NAGOURNEY, *supra* note 23, at 294-95.

25. *Id.* at 295.

26. ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES*

After a prayerful night, Bryant wrote a letter to each commissioner arguing that the antidiscrimination ordinance would not only violate God's biblical commandments, but also would

be infringing upon my rights and discriminating against me as a citizen and a mother to teach my children and set examples . . . of God's moral code as stated in the Holy Scriptures. Also, you would be discriminating against my children's right to grow up in a healthy, decent community.<sup>27</sup>

Bryant made the same argument at the public hearing on January 18, 1977. Joining her were prominent Baptist preachers, a representative of the Catholic Archdiocese, and a leading orthodox rabbi. These witnesses probably swayed a vote or two, but the Commission still voted five-to-three for the ordinance. Bryant was "afire with indignation" that God's Word had been disregarded. On the spot, she and other citizens vowed to overturn the Commission's action.<sup>28</sup>

Like the charters of many other states, cities, and counties, Dade County's charter provides that a law can be revoked if enough citizens petition for a referendum and a majority of voters reject the law in the next election.<sup>29</sup> Bryant easily found more than enough people to sign their names on her petition. She devoted the next four months to a campaign called Save Our Children. Its premise was that the law should not give special rights to people who adhere to homosexuality (a lifestyle that is "immoral and against God's wishes"), especially teachers charged with children's education.<sup>30</sup> "[P]ublic approval of admitted homosexual teachers could encourage more homosexuality by inducing pupils into looking upon it as an acceptable life-style."<sup>31</sup> The debate was not one of gay rights versus discrimination, but of gay rights versus parents' and children's rights. This platform brought an unprecedented coalition of religious leaders under one political tent: Southern Baptist pastors, the Catholic Archbishop of Miami, and Orthodox Jewish rabbis all endorsed the referendum and touted it from their pulpits.<sup>32</sup> Governor Reubin Askew, a moderate Democrat, endorsed

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AND THE THREAT OF MILITANT HOMOSEXUALITY 13-15 (1977) (relaying Bryant's shock when the antidiscrimination law was proposed, and her conversation with Shack); SEARS, *supra* note 23, at 234 (relaying Shack's account of her conversation with Bryant).

27. BRYANT, *supra* note 26, at 16.

28. *Id.* at 22-27; SEARS, *supra* note 23, at 233-36.

29. Home Rule Amendment and Charter, Miami-Dade County, Florida (Mar. 9, 2004), 30-32, <http://www.miamidade.gov/charter/library/04-09-03-charter.pdf> (last visited Aug. 14, 2005).

30. Joe Baker, *Anita . . . with the Smiling Cheek*, ADVOCATE, Apr. 20, 1977, at 6; BRYANT, *supra* note 26, at 41, 47.

31. BRYANT, *supra* note 26, at 114.

32. *Id.* at 22-27.

the effort. “I would not want a known homosexual teaching my children,” he said.<sup>33</sup>

Nonetheless, Save Our Children’s professional organizers realized, through their private polling, that most Dade County voters (especially women) supported the ordinance. Their campaign responded with charges that homosexuals are not just icky role models, but are aggressive and predatory. In a *Miami Herald* advertisement that ran on March 20, 1977, Save Our Children set forth the major themes of its campaign: “Homosexuality is nothing new. Cultures throughout history, moreover, have dealt with homosexuals almost universally with disdain, abhorance [sic], disgust—even death.” The advertisement continued: “This recruitment of our children is absolutely necessary for the survival and growth of homosexuality—for since homosexuals cannot reproduce, they *must* freshen their ranks.”<sup>34</sup> In the final weeks before the vote, Reverend Jerry Falwell addressed thousands of voters and their families at a Miami Convention Center rally: “So-called gay folks [would] just as soon kill you as look at you.”<sup>35</sup> The day before the vote, the *Miami Herald* ran an advertisement that read: “The Other Side of the Homosexual Coin is a Hair-Raising Pattern of Recruitment and Outright Seduction and Molestation.”<sup>36</sup> These fantastic claims preyed on mothers’ concerns for their children, as well as men’s anti-homosexual prejudices. Most extreme was Bryant’s press release, “Why Certain Sexual Deviations Are Punishable by Death.” Fearing God’s imminent judgment, Bryant commented that “these vile beastly creatures” were engaging in “frantic efforts” to achieve public acceptance and were thereby dragging the whole community down with them—just like Sodom and Gomorrah!<sup>37</sup>

Underfunded and politically inexperienced, the Coalition conducted an ineffective campaign. Its leaders underestimated the power of Bryant’s gay-bashing stars and, more important, failed to mobilize grass-roots opposition.<sup>38</sup> On June 7, 1977, Dade County voters revoked the antidiscrimination ordinance by more than a two-to-one margin.<sup>39</sup> A day after the vote, the Florida legislature barred homosexuals from adopting

33. CLENDINEN & NAGOURNEY, *supra* note 23, at 301 (quoting Governor Askew).

34. *Kill a Queer for Christ*, ADVOCATE, June 1, 1977, at 6 (quoting Save Our Children’s March 20, 1977 advertisement and asking for donations to help oppose the referendum).

35. CLENDINEN & NAGOURNEY, *supra* note 23, at 306.

36. *There Is No “Human Right” to Corrupt Our Children*, MIAMI HERALD, June 6, 1977, at 7B (advertisement) [hereinafter MIAMI HERALD Advertisement], *quoted in* CLENDINEN & NAGOURNEY, *supra* note 23, at 304.

37. PERRY DEANE YOUNG, *GOD’S BULLIES: NATIVE REFLECTIONS ON PREACHERS AND POLITICS* 44 (1982).

38. *See* SEARS, *supra* note 23, at 236-45 (offering a critical account of the campaign in defense of the antidiscrimination law).



children.<sup>40</sup> Fueled by her Florida success, Bryant announced that her allies would “carry our fight against similar laws throughout the nation that attempt to legitimize a lifestyle that is both perverse and dangerous to the sanctity of the family, dangerous to our children, dangerous to our freedom of religion and freedom of choice, dangerous to our survival as one nation, under God.”<sup>41</sup> True to her word, Bryant traveled from locale to locale preaching against antidiscrimination laws.<sup>42</sup> Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon, immediately followed Dade County in repealing their gay rights ordinances by referenda.<sup>43</sup>

In 1978, California state Senator John Briggs, who had been part of Save Our Children’s campaign, took Bryant’s idea one step further. His organization, California Defend Our Children, placed on the state ballot an initiative to disqualify from public school employment anyone engaged in “advocating, soliciting, imposing, encouraging or promoting private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees.”<sup>44</sup> Rather than repeal a gay rights law, the Briggs Initiative sought to reaffirm traditional state discriminations against lesbian and gay teachers that had been substantially nullified by the California Supreme Court.<sup>45</sup> The initiative also would have encoded the preservationist message of Save Our Children: Open homosexuality, per se, is a threat to children because its appeal is as alluring as its practice is ruinous. Rhetorically, Briggs followed the Dade County script, depicting homosexuals as disgusting people and predatory child molesters. One pamphlet distributed by his campaign pictured a boy lying in a pool of blood, with this caption: “You can act right now to help protect your family from vicious killers and defend your children from homosexual teachers.”<sup>46</sup>

Briggs made explicit, more than anyone before him, the connection among “unnatural relations” (sodomy); “dishonorable passions” (homosexuality); and immoral hedonistic ideology (Gay is Good, Hedonism is All, etc.). He also went further than Bryant in naming the culprits in America’s moral pollution. According to Briggs, it was not only homosexual schoolteachers who polluted public culture, but also their straight allies. The homosexual-heterosexual, as well as the public-private,

40. 1977 Fla. Laws ch. 140 (codified at FLA. STAT. § 63.042(3)).

41. See BRYANT, *supra* note 26, at 131.

42. *Id.* at 131-38.

43. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1703 (1993). For a discussion on the unusual success of antigay referenda between 1974 and 1993, see Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997).

44. CLENDINEN & NAGOURNEY, *supra* note 23, at 377-79, 381.

45. See Bd. of Educ. v. Jack M., 566 P.2d 602 (Cal. 1977) (barring school boards from dismissing gay teachers without proof of conduct inappropriate to the job).

46. See *supra* note 23, at 381 (quoting Briggs’s pamphlets).

line completely disappeared in Briggs's Initiative: Straight teachers who "encourag[e] or promot[e]" private homosexual activity must be discharged if such activity is "likely to come to the attention of [] schoolchildren."<sup>47</sup> This was the initiative's Achilles Heel, for it threatened to embroil schools in ongoing disputes and litigation over teachers' statements on this sensitive subject. Former Governor Reagan opposed the measure for this reason, and his declared opposition turned an apparent vote for the Briggs Initiative into a rout against it in November 1978.<sup>48</sup>

Although the Briggs Initiative failed and Bryant's own star faded, a new TFV movement already had formed organizations and personal networks that enabled the traditionalist perspective to be heard in the public culture, to raise money for friends and against enemies, and to affect politics at every level of government. The structure of an organized constellation of anti-gay organizations was in place by the summer of 1977, including the Survival of a Free Congress, The Conservative Caucus, and, of course, Save Our Children.<sup>49</sup> The emerging king of direct-mail fundraising, Richard Viguerie, helped coordinate these groups and was channeling them to support Ronald Reagan's third run for the presidency in 1980.<sup>50</sup> The anti-gay network only diversified and grew. New groups included the National Conservative Political Action Committee, run by Terry Dolan; the Christian Voice and the Religious Roundtable; Congressman John Ashbrook's American Conservative Union; and the Moral Majority, founded by Reverend Falwell in 1979.<sup>51</sup> These groups contributed, perhaps significantly, to Reagan's election in 1980. The Christian Voice paid for television advertisements in the Midwest and South that portrayed images of "militant homosexuals," with this admonition: "Carter advocates acceptance of homosexuality. Ronald Reagan stands for the traditional American family."<sup>52</sup> The Moral Majority deployed messages such as this to register and bring millions of fundamentalists to the polls, most of whom voted for Reagan.<sup>53</sup> Reagan's large majority resulted from his ability to make great inroads into traditionally Democratic Baptists in the South and Catholics in big cities—precisely the voters targeted by the Christian Right.<sup>54</sup>

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47. Hunter, *supra* note 43, at 1703 (quoting Cal. Proposition 6, § 3(b)(2) (1978)). For a discussion of the novel discourse of the Briggs Initiative, see *id.* at 1703-04. See also Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1993) (discussing the current national debate about extending civil rights laws to gay men and lesbians).

48. CLENDINEN & NAGOURNEY, *supra* note 23, at 387-88.

49. Sasha Gregory-Lewis, *Unraveling the Anti-gay Network*, ADVOCATE, Sept. 7, 1977, at 6.

50. *Id.*

51. YOUNG, *supra* note 37, at 88-103.

52. *Id.* at 104.

53. JERRY FALWELL, STRENGTH FOR THE JOURNEY 365 (1987).

## II. BODY POLITICS: DISGUST AND CONTAGION AS POTENT POLITICAL TROPES

Anita Bryant's campaign changed people's minds about rights for gay people, and in my opinion revolutionized American politics. It did so through a *body politics*, which localized discrimination against a group of Americans by reference to their *natures* and the dangers of contagion posed by *unnatural* acts, people, and ideologies. As Victoria Nourse argues, such a body politics has been a staple in United States history.<sup>55</sup> Similar, or cognate, claims were made by our English ancestors as reasons to exterminate Native Americans, enslave Africans, marginalize and even demonize Roman Catholics, discriminate against Italian and Irish immigrants, purge Jews from civic life, engage in a massive federal Kulturkampf against the Church of Jesus Christ of the Latter-Day Saints, bar Chinese and other "Mongol races" from immigrating here, detain Japanese-Americans during World War II, and deny basic state services to the children of Latino immigrants.<sup>56</sup> The politics of the body is an effort to naturalize inferiority. I agree with Nourse, albeit for theoretical reasons somewhat different than hers, that such a naturalized discourse is a powerful form of politics.

In the account that follows, I want to show how the rhetoric of Save Our Children appeals to very powerful emotions of disgust and plays upon strong human desires to maintain and reaffirm boundaries. I shall tie their rhetoric to an astounding theoretical literature of disgust and contagion, which helps explain the power of this rhetoric to persuade. Not irrelevant was the ability of Bryant and her allies to tie their rhetoric to sacred texts, namely, the Torah and the New Testament. This not only heightened the appeal of body politics to Jewish and Christian fundamentalists, but also suggested that the campaign was not just appealing to people's prejudices. There was a historical and normative depth to Save Our Children that Club Baths could not match.

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*the 1980 Religious Vote*, 65 SOC. SCI. Q. 1072, 1072-79 (1984).

55. Victoria Nourse, In Evil on Reckless Hands: Science Crime and Constitution in Depression and War—The History of *Skinner v. Oklahoma* (Oct. 2005) (unpublished manuscript, on file with author) (setting forth, with breathtaking historical depth, the ways in which naturalized political tropes play out in race and sexual orientation settings).

56. See, e.g., LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA (1994) (describing prejudice against Jews as having been justified by their alleged sexual improprieties); Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 543 (1964); Ronald J. Ross, *Enforcing the Kulturkampf in the Bismarckian State and the Limits of Coercion*

### A. Disgust and Homosexual Acts

A central claim of Bryant's campaign was to remind voters that homosexuals did disgusting things, a claim verified by the Bible. The most dramatic was her pamphlet, "Why Certain Sexual Deviations Are Punishable by Death."<sup>57</sup> The reference was to Leviticus 20:13, which states, "If a man lies with a male as with a woman, both of them have committed an abomination [to the Lord]; they shall be put to death, their blood is upon them."<sup>58</sup> Chapter 20 mainly concerns rules of incest and also renders intercourse with animals a capital offense. If either a man (20:15) or a woman (20:16) lies with a beast, not only must the human be executed, but so too the beast, for "their blood is upon them."<sup>59</sup> For Christians, Romans 1:24-32 picks up this theme that crimes of the body are the worst. Romans, St. Paul charged, were "dishonoring . . . their bodies among themselves," which is the worst of sins against God.<sup>60</sup> He then condemns women who "exchanged natural relations for unnatural," and the men who "gave up natural relations with women and were consumed with passion for one another."<sup>61</sup> The precise activities being condemned are not named, but the men and women who commit them are subjected to a litany of Pauline calumnies stretching across several verses: "Full of envy, murder, strife, deceit, malignity, they are gossips, slanderers, haters of God, insolent, haughty, boastful, inventors of evil, disobedient to parents, foolish, faithless, heartless, ruthless."<sup>62</sup>

From that Biblical foundation, Anita Bryant justified all kinds of wacky statements and beliefs about homosexuals, whom she referred to, in writing, as "vile beastly creatures."<sup>63</sup> In 1978, she reportedly told an interviewer that "homosexuals are called fruits" because they "eat the

57. See YOUNG, *supra* note 37, at 44.

58. *Leviticus* 20:13 (Revised Standard Version) (1952). All Bible quotations are from the Revised Standard Version (1952), the Bible I was given when I was confirmed into the Presbyterian Church in 1962. Other versions of the Bible will offer somewhat different terminology, but nothing about my argument depends upon such terminology.

59. *Leviticus* 20:15-16.

60. *Romans* 1:24-25.

61. *Romans* 1:26-27.

62. *Romans* 1:29-31. There is a large critical literature on Romans 1:24-32. For a detailed debate, compare Mark D. Smith, *Ancient Bisexuality and the Interpretation of Romans 1:26-27*, 64 J. AM. ACAD. RELIGION 223 (1996) (representing a traditionalist reading), with Daniel A. Helminiak, *Ethics, Biblical and Denominational: A Response to Mark Smith*, 65 J. AM. ACAD. RELIGION 855 (1997), and Dale B. Martin, *Heterosexism and the Interpretation of Romans 1:18-32*, 3 BIBLICAL INTERPRETATION 332 (1995) (representing gay-friendly readings). For the best historical treatment, see BERNADETTE J. BROOTEN, *LOVE BETWEEN WOMEN: EARLY CHRISTIAN RESPONSES TO FEMALE HOMOEROTICISM* (1996).

forbidden fruit of the tree of life,” namely sperm.<sup>64</sup> In 1977, Bryant could not bring herself even to mention the sex acts performed by homosexuals, but she could assume that her audience shared her revulsion at the insertion of penises and tongues in places where they did not belong (i.e., mouths and anuses). It remains unclear exactly what she and her allies said in public appearances, for she believes she was frequently misquoted. The only example of misattribution mentioned in her autobiography is this: The media quoted her as saying that homosexuals were “garbage.” Instead, “I said, ‘If [children] are exposed to homosexuality, I might as well feed them garbage.’”<sup>65</sup> If anything, what Bryant says she said was an even more powerful appeal to a politics of the body. She had already dismissed homosexuals as “beastly,” their own bodies polluted; and her new charge was that even “expos[ing]” children to homosexuals was like “feed[ing] them garbage,” namely polluting children’s innocent bodies with the filth of homosexuality.<sup>66</sup> These and other tropes reflect a central feature of body politics—its open appeal to feelings of *disgust* among the audience. Such appeals have a unique power.

Social psychologists have demonstrated that human judgment is strongly influenced by cognitive stereotypes and emotional prejudices that are resistant to rational analyses and argumentation.<sup>67</sup> “[S]ocial intuitionist” thinkers say that “moral judgment is caused by quick moral intuitions and is followed (when needed) by slow, ex post facto moral reasoning.”<sup>68</sup> Jonathan Haidt, the leading conceptualizer, has found that sexual taboos are particularly susceptible to disgust-driven rather than harm-driven moral reactions.<sup>69</sup> In laboratory experiments, self-identified liberals (whose moral metric is the harm principle) and conservatives (whose moral metric is tradition) had almost the same level of negative reaction to scenarios involving incest and masturbation. The subjects’ post hoc justifications differed dramatically, but their bottom-line moral

64. *Bryant’s Boyfriend Tells All*, *ADVOCATE*, May 3, 1978, at 7.

65. BRYANT, *supra* note 26, at 27.

66. *See id.*; YOUNG, *supra* note 37, at 44.

67. *See generally* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814 (2001) [hereinafter Haidt, *Emotional Dog*]; Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 *J. APPLIED SOC. PSYCHOL.* 191 (2001) [hereinafter Haidt, *Sexual Morality*]; Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 *TRENDS IN COGNITIVE SCI.* 517 (2002) (providing a neutral basis for the social intuitionist theory of how we form moral judgments). We first learned of this literature from Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *NW. U. L. REV.* 1543 (2005).

68. Haidt, *Emotional Dog*, *supra* note 67, at 817.

69. Haidt, *Sexual Morality*, *supra* note 67, at 191.

judgments were very similar. Interestingly, there was the greatest variation between liberal and conservative subjects as to disapproval of consensual gay sex, suggesting a strong correlation between conservative attitudes and disgust toward homosexual intercourse.<sup>70</sup>

Paul Rozin maintains that our most primordial disgust responses arise out of emotional efforts to humanize our animal bodies and distance ourselves from physical functions that are “reminders of our animal vulnerability.”<sup>71</sup> Like prejudices, feelings of disgust are nonrational responses to physical phenomena, yet they may be underlying motivations for our rational discourses. Sexuality is an obvious situs for disgust. Almost anything related to sex is disgusting to some people; some sexual practices are disgusting to almost all people; and almost all people feel their disgust intensely. Although most people engage in oral sex, and many in anal sex, a lot of Americans find these activities disgusting. Anal sex is particularly disgusting because the anus is a gateway to one of the body’s most private areas and its function is to expel and not to receive. The anus’s unseemly appearance and odor only serve to deepen its unique potential to disgust most Americans.<sup>72</sup> Because male homosexuality (and, quite irrationally, female homosexuality as well) is deeply associated with anal sex, it has long been disgusting to Americans. And their disgust-driven view that homosexual sex is immoral has persisted (even if at reduced levels) as the majority view during the twentieth century.<sup>73</sup>

### B. *Boundary Maintenance and Homosexual Contagion*

Save Our Children would not have been as successful as it was if Bryant had just focused on the disgusting features of homosexuality. Bryant’s key move was to recall and invoke tropes of homosexual predation: Because homosexuals cannot reproduce, they recruit—*your* children. “Some of the stories I could tell you of child recruitment and child abuse by homosexuals would turn your stomach,” she warned.<sup>74</sup> In the 1950s and 1960s, the Florida Legislative Investigation Commission, nicknamed the “Johns Commission” after its chair, had engaged in witch-

70. *Id.* at 213-16.

71. Paul Rozin, Jonathan Haidt, & Clark R. McCauley, *Disgust*, in HANDBOOK OF EMOTIONS 637, 642 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2000); *see also* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 89 (2004) (drawing from Rozin’s work and exploring the way disgust emotions “polic[e] the boundary between ourselves and nonhuman animals, or our own animality”).

72. WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 98-101 (1997).

73. *See, e.g.*, AMERICAN ENTERPRISE INSTITUTE, ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 2-3 (2004) (updated May 20, 2005) (compiled by Karlyn Bowman), *available at* <http://www.aei.org/publication14882>.

hunts designed to uncover and purge closeted homosexuals from the public school, college, and university system.<sup>75</sup> Its final report, issued in a paperback with an erotic adolescent male pictured on the purple cover, declared a state of sexual emergency in Florida to stave off “homosexual recruiting of youth.” To accomplish this, “the closet door must be thrown open and the light of public understanding cast upon homosexuality.”<sup>76</sup> Neither the Commission’s state of sexual emergency nor Bryant’s campaign depended entirely on the myth of the recruiting homosexual, however. For both, the mere presence of the homosexual represents a temptation to youth. Homosexuality itself always risks contagion, and contagion spells doom. The contagious diseased things, not really “human beings,” must be purged.

The Briggs Initiative pressed Bryant’s idea toward the notion that even tolerance of, or neutral reference to, homosexuality is dangerous because it sends the wrong message to youth.<sup>77</sup> “A teacher who is a known homosexual will automatically represent that way of life to young, impressionable students at a time when they are struggling with their own critical choice of sexual orientation,” Briggs warned. “When children are constantly exposed to such homosexual role models, they may well be inclined to experiment with a life-style that could lead to disaster for themselves and, ultimately, for society as a whole.”<sup>78</sup> A deep reason homosexuality is alluring to immature youth is that it represents the pleasure principle in its most naked form: Oral or anal sex cannot be procreative, and therefore not marital either, and its only justification is pleasure. Short-term pleasure sounds great to immature teenagers—indeed, it all but defines “adolescent” thinking and behavior—but traditionalists say adults know that pleasure is fleeting and cannot be the basis for the larger purposes God has for us. Once you are addicted to homosexuality, as the immature adolescent might be, notwithstanding his parents’ best efforts, it is hard to return to the straight and narrow. And once some youth become hooked on homosexuality, it is easier for others to follow the path of alluring pleasure. Before you know it, “dishonorable passions” dominate a community.<sup>79</sup>

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75. The Johns Commission is discussed at length in JAMES T. SEARS, *LONELY HUNTERS: AN ORAL HISTORY OF LESBIAN AND GAY SOUTHERN LIFE, 1948-1968*, at 48-108 (1997).

76. FLA. LEGIS. INVESTIGATION COMM’N, *HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA 14* (1964) (available at Fla. Dep’t of State, Div. Of Archives, ser. 1486, carton 1, Tallahassee, Fla.), discussed in William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 747-50 (1997).

77. John V. Briggs, *Deviants Threaten the American Family*, L.A. TIMES, Oct. 23, 1977, at VII-5.

78. *Id.*

As before, there were Scriptural foundations, or at least parallels, for this kind of thinking. The Old Testament story of Sodom and Gomorrah is a morality tale that can be understood as God’s judgment on the “cities of the plain,” either for homosexual licentiousness that spread through those cities (a very aggressive reading of Genesis 19:1-29) or attempted sexual assault by the men of Sodom against the angels visiting Lot’s house (a more widely accepted reading).<sup>80</sup> Either interpretation suggests that the sexual impropriety of a few can infect an entire community, for Genesis suggests that the infraction was one that the entire community shared.<sup>81</sup> Accordingly, God punished them all. St. Paul implicitly reminded the Romans of the fate of Sodom when he warned them that “the wrath of God is revealed from heaven against all ungodliness and wickedness of men.”<sup>82</sup> The sins of Sodom seemed to him proliferating among the Romans, and the whole community was at risk because it did not purge itself of the “inventors of evil.”<sup>83</sup> “Though they know God’s decree that those who do such things deserve to die, they not only do them but approve those who practice them.”<sup>84</sup> Good Christians and Jews should purge their communities of these inventors of evil, and at least must turn their back upon perdition, lest they suffer the fate of Lot’s wife.<sup>85</sup>

In *Purity and Danger*, anthropologist Mary Douglas helps us understand how feelings of disgust are related to community fears of contagion and their cure through purity rituals. Douglas understands disgust as a matter of *pollution*.<sup>86</sup> Human beings derive emotional as well as intellectual security from familiar patterns, many of which we receive from the surrounding culture. Institutions and practices achieve much of their normative power by their ability to give us a tidy grid in which to organize our thinking about an untidy world. We are emotionally committed not only to our cherished institutions and practices, but also to the labels they deploy and the lines they draw. So disgust is a reaction to

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80. See JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 42-50 (4th ed. 1993). For readings that distance the Sodom story from homosexuality, per se, see also DERRICK SHERWIN BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 1-25 (Archon Books 1975) (1955); JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 93 (1980).

81. See MCNEILL, *supra* note 80, at 43.

82. *Romans* 1:18.

83. *Romans* 1:30.

84. *Romans* 1:32.

85. See *Genesis* 19:26.

86. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* (1966). In contrast, Martha Nussbaum situates Douglas’s theory as an account of “taboos and prohibitions,” and not “disgust” per se. NUSSBAUM, *supra* note 71, at 91. Nussbaum prefers



phenomena and practices that do not fit labels or that cross lines. For Douglas, disgust is a reaction that serves the role of *boundary maintenance*.<sup>87</sup> She would treat Rozin's theory of disgust as a specific example of her more general theory. Certain physical phenomena (such as sodomy) are disgusting to many of us because they threaten the boundaries between human being and animal; other phenomena are disgusting because they threaten social boundaries and institutional lines.<sup>88</sup>

Leviticus illustrates Douglas's theory beautifully. The rules in Chapter 20 not only prohibit sexually disgusting conduct, ranging from adultery and incest to sodomy and bestiality, but also admonish the People of God to purge impure people from their community.<sup>89</sup> Because of their inappropriate deployment of body parts, "their blood is upon them" when members of the community violate the prohibitions.<sup>90</sup> Leviticus is filled with admonitions against the mixing of the pure and the impure, together with rituals for cleansing impurity. Hence, there are detailed dietary restrictions in Chapter 11, such as the rule that prohibits the eating of winged insects that go on all fours<sup>91</sup> but that allows the eating of locusts or crickets.<sup>92</sup> The most detailed prescriptions relate to leprosy, a disease of the skin,<sup>93</sup> and "discharges" from the body, including semen and menstrual blood.<sup>94</sup> The rules against mixing extend so far that the Israelites were admonished not to wear "a garment of cloth made of two kinds of stuff."<sup>95</sup> Pollution is the mixing of pure and impure things. The worst pollution occurs under circumstances where the impure will pollute the pure.

This is why Save Our Children was so upset by Dade County's antidiscrimination ordinance: By protecting homosexuals *against* exclusion, it was not only inviting more of them to come to Dade County and live open and unashamed lives, but it was a civic ritual that was the opposite of purification. "If [children] are exposed to homosexuality, I might as well feed them garbage," namely, disgusting stuff.<sup>96</sup> This is the worst kind of pollution, for it not only mixes the impure (homosexuality) with the pure (children), but it does so under circumstances where

87. DOUGLAS, *supra* note 86, at 122-24; *see also* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1061-65 (2002) (discussing the law's obsession with classifications and grids); Cahill, *supra* note 67, at 1580-81 (applying Douglas's social pollution idea to incest taboos).

88. DOUGLAS, *supra* note 86, at 41-57.

89. *Leviticus* 20.

90. *Id.*

91. *Leviticus* 11:20.

92. *Leviticus* 11:22.

93. *Leviticus* 13-14.

94. *Leviticus* 15.

95. *Leviticus* 19:19.

contagion of the latter by the former is inevitable. This was a powerful message to Dade County parents, particularly mothers.

*C. Disgust and Boundary Maintenance as Constitutive: The Creation of a New Traditionalist Identity*

William Ian Miller adds an important affirmative dimension to the analysis: Disgust is constitutive. One’s individual identity is, to some extent, created or molded by one’s disgusts. “Our durable self is defined as much by disgust as by any other passion. . . . It installs large chunks of the moral world right at the core of our identity, seamlessly uniting body and soul and thereby giving an irreducible continuity to our characters.”<sup>97</sup> And so is the larger community itself. Disgust is “especially useful and necessary as a builder of moral and social community. It performs this function obviously by helping define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.”<sup>98</sup>

The Levitical rules served three purposes: They showed obedience to God’s commands; assured the Israelites of an unpolluted and therefore healthy community; and distinguished the Israelites from the impure peoples they were displacing (and eradicating) in Palestine. Said The Lord: “You shall therefore keep all my statutes and all my ordinances, and do them; that the land where I am bringing you to dwell may not vomit you out.”<sup>99</sup> Note the close contrast between the purifying rules and the disgusting consequences of disobeying them. Paul’s letter is addressed to “all God’s beloved in Rome, who are called to be saints”<sup>100</sup> and invites them to differentiate themselves from the bulk of Romans, whom God gave up “in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves.”<sup>101</sup>

Like the Israelites and Rome’s community of saints, Bryant and her allies saw themselves as the Chosen of The Lord. What bound them together as a faith community was their shared disgust against impure sexual conduct, epitomized by homosexuality. This is an important phenomenon, for this kind of thinking was recasting the lines of religious

97. MILLER, *supra* note 72, at 194-95.

98. *Id.* at 250-51; see also Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing Miller’s book); Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54 (1968) (discussing “disinterested indignation” as “one kind of deviance designation” where “hostility [is] directed against a norm violator despite the absence of direct or personal damage to the norm upholder and designator”).

99. *Leviticus* 20:22.

100. *Romans* 1:7.

101. *Romans* 1:24.

identity in the United States. Before the 1970s, Americans treated denominational lines—especially the Catholic-Protestant and Christian-Jewish ones—as fraught with enormous moral significance. Once abortion became legal (1973) and homosexuality a protected classification in Dade County (1977), traditionalists of all faiths found they had much in common, rooted in disgust and boundary maintenance. Just as they did in Save Our Children, conservative Catholics, orthodox Jews, and fundamentalist Baptists worked together and liked it.

Religious fundamentalists were united by more than a mutual disgust, however. Disgust also served a positive project: the valorization of marriage and the family. Although Leviticus nowhere admonishes the Israelites to marry and procreate, that is the assumption of many of its rules. Saint Paul is more explicit in his first Letter to the Corinthians. “The body is not meant for immorality, but for the Lord, and the Lord for the body.”<sup>102</sup> This epitomizes body politics, and Paul spends much of the letter suggesting that the body is best not polluted at all by sexual activities of any sort.<sup>103</sup> But it is no sin to marry, “[f]or it is better to marry than to be aflame with passion.”<sup>104</sup> The goal of a Christian marriage is to join as sexual partners two believers who beget and rear “clean” and “holy” children.<sup>105</sup>

Modern fundamentalists such as Anita Bryant have none of Paul’s ambivalence. At least publicly, they are sex-positive, but only within the context of procreative marriage. This is the traditional Roman Catholic position, but one that fundamentalist Protestants have also announced as their own.<sup>106</sup> Almost any sexual activity is disgusting to most Americans, especially when *other* people engage in it, but the presumption of disgust is rebutted when sexual activities are tied to love, intimacy, marriage, or family. Among our friends and family, we tolerate habits that we should label as disgusting if done by strangers. But with our lovers and spouses, “we understand the disgusting behavior or substance to be a privilege of intimacy, which would be a grave offense if it were not understood that it was privileged; this last often involves the intersection of disgust and sexual pleasure (but need not).”<sup>107</sup> For Christians, Saint Paul insists that the

102. 1 *Corinthians* 6:13.

103. 1 *Corinthians* 7:8 (urging the unmarried and widows “to remain single as I do”); 1 *Corinthians* 7:25-26 (opining that the unmarried should remain as they are, “in view of the impending distress”).

104. 1 *Corinthians* 7:9.

105. 1 *Corinthians* 7:12-14.

106. See Congregation for the Doctrine of the Faith, “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons” (June 3, 2003), reprinted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 511-15 (2d ed. 2004).

107. MILLER, *supra* note 72, at 132-33.

blank check for engaging in (disgusting) sexual activities can be cashed only when the love and intimacy are in the context of a marriage that is (1) a lifetime commitment, (2) engaged in for procreative purposes, (3) between spouses who have both accepted the Lord.<sup>108</sup> Paul's ideal is two fleshed made one, a merger which sanctifies the otherwise disgusting and sinful activities of the two sexualized bodies.<sup>109</sup> His was a high standard for marriage. When Anita Bryant left her husband in 1980, she justified the break-up of her marriage by her doubts that her husband was a proper Christian.<sup>110</sup> Bryant's leaving her husband and her remarriage several years later directly violated Paul's admonition: "If any woman has a husband who is an unbeliever, and he consents to live with her, she should not divorce him."<sup>111</sup>

So the new identity created in the 1970s is not simply an anti-gay identity, based upon the shared belief that homosexuals engage in disgusting practices, which yield diseased bodies, and represent a contagious threat to youth. It is also a pro-traditional family values identity. Americans were anti-gay before 1977, and they favored families too. What was novel about Save Our Children was its wedding of an anti-gay body politics of disgust and contagion with a pro-family politics of romance and religion. To satisfy God's plan *and* achieve great happiness for yourself and your children, you *must* help purge public culture of open homosexuality and other forms of sexual contagion.

### III. THE BURGER COURT ACQUIESCES IN THE CONSTITUTION OF ANTI-HOMOSEXUAL DISGUST AND CONTAGION

Although not as well-specified as its moral theory and its body politics, Save Our Children and the Briggs Amendment also had a constitutional theory.<sup>112</sup> We the People hold ultimate authority in the United States, and ordinary Americans, especially parents, understand ours as a civic community imbued with moral values. Politics is the arena where those values are debated. Fundamentalist Christians and some orthodox Jews were confident that their Godly values were intrinsically correct and would be persuasive to ordinary Americans. Hence, the first proposition of their Constitution was popular sovereignty, with little or no role for elite officials. Judges were suspect, for lawyers' culture was strongly secular and most judges seemed not particularly religious. And the judges who had

108. 1 *Corinthians* 7:1-7.

109. See 1 *Corinthians* 7:10-16.

110. See ANITA BRYANT, A NEW DAY (1992).

111. 1 *Corinthians* 7:13.

112. On the constitutional theory of traditional family values groups, see generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 90 *Michigan Law Review* 2062, 2179-93 (2002).

delivered *Roe v. Wade*—abomination itself—seemed tempted to deliver rights for homosexuals as well. Such officials must be disciplined with some of the same popular accountability that made legislators pause before delivering rights to homosexuals.<sup>113</sup>

The second plank of the Save Our Children Constitution was that an important role of law is to instantiate moral values, both by legislating against disgusting activities and by protecting vulnerable citizens against moral pollution as well as predation. Certainly, moral boundary-maintenance is a core role for government, and novel constitutional rights, (notably, the right to choose abortions) that limit this role cannot legitimately be created. Hence, homosexuals ought not be able to challenge sodomy laws that make their disgusting conduct illegal. Because the most important feature of law is meta-normative—creating the conditions whereby members of society *can* flourish and are most likely to make good choices (e.g., to marry and form loving families)—homosexuals had no constitutional basis for objecting when the state or private parties treated them as morally inferior and even contagious. Optimally, from Bryant's point of view, the legal regime would include an array of mutually reinforcing statutes reflecting natural law morality and making sure that the law did not promote homosexuality. Thus, Bryant followed up her Dade County victory with petitions for the Florida Legislature to reinstate its sodomy law and to bar homosexuals from adopting children.<sup>114</sup>

Bryant's third proposition was that parents and children have civil rights that are more fundamental than the superficial rights claimed by feminists, abortionists, and homosexuals. Family-based rights include the rights of parents to direct the sexuality and control the education of their children, as well as the rights of children to be free from state-required or supported pollution. Indeed, there was a broader right all normal Americans enjoyed: Just as a healthy person has a right not to be exposed to a diseased person, so a normal American and especially her children have rights not to be exposed to the contagion of homosexuality.<sup>115</sup>

During the period when Warren Burger was Chief Justice of the Supreme Court (1969-86), this Constitution of Anti-Homosexual Disgust and Contagion was, by default, the law of the land. The Burger Court never explicitly adopted this sectarian reading of the Constitution, but it managed to reject or duck, and never accept, the constitutional claims brought to it by homosexuals objecting to this Constitution. The nation's leading Republican jurists—Warren Burger, William Rehnquist, and Robert Bork—explicitly endorsed such a Constitution. The usual explanation for the Burger Court's anti-gay constitutionalism is that the Justices were

113. *Id.* at 2180-81.

114. *See id.* at 2180, 2193.

115. *See* Eskridge, *supra* note 74, at 2186.

aggressively homophobic, a charge that is true for the Chief Justice but not the others (in my opinion). I think the better explanation is that the Justices were homo-ignorant and believed the legitimacy of the judiciary was at risk if they trumped anti-gay body politics with constitutional principle. Unfortunately, the Justices dodged gay rights in the clumsiest possible ways, and they ended up harming their own institution more than they harmed homosexuals.

### A. *Substantive Due Process (Privacy)*

The most obvious illustration of my thesis is the Burger Court's sodomy jurisprudence. In the 1970s, the Court summarily rejected claims that crime-against-nature statutes violated the clear notice requirement of the Due Process Clause. The Justices believed that the crime "that dare not speak its name"<sup>116</sup> could describe itself as little as possible in the state code, so long as there was some public interpretation that could plausibly include fellatio, cunnilingus, and other activities that had not traditionally been included in that crime.<sup>117</sup> This judicial response was surely embedded within the kind of body politics explained above: All the cases involved unmarried straight and gay persons engaging in sexual activities the Justices considered disgusting and preferred not even to contemplate. Consistent with its approach to the vagueness challenges, the Burger Court was not eager to take on gay people's claims that consensual sodomy laws violated the right of privacy the Court had recognized in its contraception and abortion cases. Three years after *Roe*, the Court in *Doe v. Commonwealth's Attorney for Richmond* summarily affirmed a lower court decision upholding Virginia's consensual sodomy law against right to privacy attacks.<sup>118</sup>

The Court continued to struggle with defining the contours of the privacy right, mainly in evaluating contraception and abortion statutes aimed at minors. The most important doctrinal development, after *Roe*, was the Court's recognition in 1979 that "'parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society'" justified some state restrictions upon minors' abortion choices.<sup>119</sup> In *Dronenburg v. Zech*, Judge Robert Bork surveyed the Court's privacy jurisprudence in a case involving the discharge of a

116. See Tribe, *supra* note 9.

117. *Rose v. Locke*, 423 U.S. 48, 50-52 (1975) (per curiam); *Wainwright v. Stone*, 414 U.S. 21, 22 (1973), *rev'g* 478 F.2d 390 (5th Cir. 1973); see also *Canfield v. Oklahoma*, 414 U.S. 991 (1973), *dismissing appeal from* 506 P.2d 987 (Okla. Crim. App. 1973); *Connor v. Arkansas*, 414 U.S. 991 (1973), *dismissing appeal from* 490 S.W.2d 114 (Ark. 1973).

118. 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court).

119. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (quoting *Ginsberg v. N.Y.*, 390 U.S. 629

Navy cryptographer for engaging in a consensual relationship with another Navy man.<sup>120</sup> Judge Bork's analysis was a brilliant legal distillation of the anti-gay constitutionalism pioneered by Save Our Children. First, Judge Bork carefully analyzed the Supreme Court's privacy jurisprudence and demonstrated that the Court had only extended the right to activities relating to marriage, decisions whether to procreate, family relationships, and childrearing and education.<sup>121</sup> Those cases did not "provide even an ambiguous warrant" for Dronenberg's claimed right to engage in what Judge Bork deemed "homosexual conduct" (not just sodomy).<sup>122</sup> Second, Judge Bork opined that the Constitution not only tolerates but also contemplates that the state will adopt laws grounded upon We the People's concepts of morality. Unless constitutional text says otherwise, the democratic process is free to regulate. "If the revolution in sexual mores that [Dronenberg] proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the judicial ukase of this court."<sup>123</sup> These first two propositions decided the case before Judge Bork, but he felt it appropriate to add, in dicta, that even if anti-homosexual morality were not a sufficient basis for expelling Dronenburg, the legitimate needs of the Navy were. "The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline." Among the reasons were that "[e]pisodes of this sort" are certain "to generate dislike and disapproval among many who find homosexuality morally offensive," and "to enhance the possibility of homosexual seduction."<sup>124</sup>

Two years later, the Supreme Court finally adjudicated the constitutionality of applying state sodomy laws to private consensual activities in *Bowers v. Hardwick*.<sup>125</sup> Justice White's brusque opinion for the Court followed Judge Bork's analytical model in *Dronenburg*. Like Judge Bork, Justice White framed the constitutional issue as whether *Hardwick* had a fundamental right to engage in "homosexual sodomy,"<sup>126</sup> limited the Court's previous privacy precedents to situations unique to heterosexual couples (marriage, procreation, family), and found that Georgia was within its constitutional discretion to criminalize homosexual sodomy to reflect "majority sentiments about the morality of homosexuality."<sup>127</sup> Unlike Judge Bork's opinion, Justice White's opinion

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120. 741 F.2d 1388 (D.C. Cir. 1984).

121. *Id.* at 1395.

122. *Id.* at 1397.

123. *Id.*

124. *Id.* at 1398.

125. 478 U.S. 186 (1986).

126. *Id.* at 190.

127. *Id.* at 196.

engaged in a historical examination to determine whether the nation's legal traditions supported such a constitutional right and found none that were relevant. "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' . . . is, at best, facetious."<sup>128</sup> As Justice Stevens demonstrated in his dissent, Justice White's history was, at best, superficial, and subsequent scholars have shown that it is riddled with anachronism and error.<sup>129</sup>

Chief Justice Burger wrote a separate concurring opinion elaborating on Justice White's historical discussion and deepening its anachronism.<sup>130</sup> Blackstone, the English commentator every American lawyer would have known at Independence, described "'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape."<sup>131</sup> Sodomy was a capital crime until the nineteenth century. "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."<sup>132</sup> Justice Powell's gentler concurring opinion suggested that a prison term for acts of consensual sodomy within the home would be subject to Eighth Amendment question, but Hardwick's case did not present that issue.<sup>133</sup> Justice Powell concluded "for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right."<sup>134</sup>

Speaking for four dissenters, Justice Blackmun argued that the case was "no more about 'a fundamental right to engage in homosexual sodomy,' . . . than *Stanley v. Georgia* . . . [had been] about a fundamental right to watch obscene movies."<sup>135</sup> The statute made no such distinction; indeed, the state had expanded the law in 1968 to make sure it included heterosexual as well as homosexual cunnilingus.<sup>136</sup> Hardwick was only asking for the right to be left alone that the state conceded to married couples and *Eisenstadt* assured unmarried straight couples. The Court's sexual privacy precedents guarantee his freedom to make *decisions*

128. *Id.* at 194.

129. The Court was right to say that sodomy was long condemned by Anglo-American law, but the damnable conduct was *always* understood to apply to men and women, men or women with breasts, as well as men and men. The crime against nature could be committed by married men with their wives. *Id.* at 214-20 (Stevens, J., dissenting). For a discussion of deeper historical problems with the Court's opinion, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073 (1988); William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 *U. ILL. L. REV.* 631.

130. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

131. *Id.* at 197 (quoting WILLIAM BLACKSTONE, 4 *COMMENTARIES* \*215).

132. *Id.* For critique of Burger's historical discussion, see the sources cited *supra* note 129.

133. *Bowers*, 478 U.S. at 197-98 (Powell, J., concurring).

134. *Id.* at 198 n.2.

135. *Id.* at 199 (Blackmun, J., dissenting) (citations omitted).



regarding intimate relations, and its privacy-of-the-home precedents guarantee his freedom against state intrusion into certain *places*.<sup>137</sup> “[T]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.”<sup>138</sup> Even if Hardwick had no fundamental right, however, Blackmun argued that anti-homosexual *sentiments* could not provide the rational basis the Constitution requires for *any* statute, especially criminal laws.<sup>139</sup> Certainly, the sectarian justifications emphasized by the state (and the Chief Justice) cannot be a *neutral* reason that can justify “invading the houses, hearts, and minds of citizens who choose to live their lives differently.”<sup>140</sup>

### B. *Equal Protection (No State Obligations)*

Since the 1960s, gay rights advocates and litigants have argued that homosexuals are a minority unfairly persecuted because of social prejudice and unfounded stereotypes. The Burger Court denied review to the few cases squarely raising such claims. One case was *Rowland v. Mad River Local School District*,<sup>141</sup> where the lower courts had upheld the discharge of a high school guidance counselor because she was an admitted bisexual. The Sixth Circuit reasoned that there was no violation of equal protection because Rowland was not fired simply because of her status as a bisexual, but also because she spoke about it to her secretary and the assistant principal—a disclosure that sent Mad River into a protect-the-children-from-this-knowledge frenzy.<sup>142</sup> Dissenting from the denial of review, Justice Brennan, joined by Justice Marshall, laid out substantive reasons for reversing the lower court.<sup>143</sup> Because Rowland’s disclosure was speech protected by the First Amendment, she could not be fired for that reason.<sup>144</sup> Nor could the state discriminate because of her bisexuality. Sexual orientation—like sex, illegitimacy, and race—ought to be a suspect classification.<sup>145</sup> Like people of color, the group stigmatized by the classification (bisexuality) has been the object of hostile state action reflecting prejudice rather than rationality and has been relatively

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137. *Id.* at 203-04 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *United States v. Karo*, 468 U.S. 705 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Rios v. United States*, 364 U.S. 253 (1960)).

138. *Id.* at 208.

139. *Id.* at 208 n.3.

140. *Id.* at 213.

141. 470 U.S. 1009 (1985), *denying cert. to* 730 F.2d 444 (6th Cir. 1984).

142. *See* 730 F.2d at 446.

143. *Rowland*, 470 U.S. at 1009-18 (Brennan, J., dissenting from denial of certiorari).

144. *Id.* at 1011-14.

powerless in the political process. Even if sexual orientation were not a suspect classification per se, Justice Brennan argued that the state bears a high burden of justification when it denies a minority group public rights, including employment opportunities, because of either their private choices and conduct or their “nondisruptive *expression* of homosexual preference.”<sup>146</sup> There is no evidence that Justice Brennan’s and Justice Marshall’s other seven colleagues had any sympathy or even understanding for this line of argument.

Judge Bork certainly believed it was hokum. In *Dronenburg*, he ruled that the constitutionality of homosexual sodomy laws foreclosed equal protection claims by homosexuals.<sup>147</sup> The Uniform Code of Military Justice made consensual sodomy by military personnel a serious crime, punishable by prison time and/or dishonorable discharge from the armed forces.<sup>148</sup> After ruling that this policy did not violate Dronenburg’s privacy rights, Judge Bork ruled that it required dismissal of his equality claim as well. Homosexuals are, by definition, people whose sexual enjoyment comes from acts that are felonious. Therefore, discrimination against homosexuals is based upon their (presumed) *conduct* and not their *status*. The Supreme Court’s race and sex equality jurisprudence polices status-based, rather than conduct-based, discriminations and so is wholly inapplicable.<sup>149</sup>

The logical appeal of Judge Bork’s opinion rested primarily upon a greater-includes-the-lesser mode of reasoning: If the Navy can imprison James Dronenburg for having consensual sex with a nineteen-year-old seaman, it surely has the discretion to choose a more humane sanction, namely, expulsion. But the opinion also had an emotional appeal directly linked to the Constitution of Anti-Homosexual Disgust and Contagion. Like Save Our Children, Judge Bork believed that the Constitution allows states to adopt laws with no other purpose than the expression of moral principles. He further believed that disgust most Americans “naturally” have for “homosexual conduct” is a morality-based reason that can constitutionally justify the state’s decision *either* to imprison Dronenburg (no privacy right) *or* expel him (no equality right), *or* both. Unless a more specific provision is violated, the Constitution imposes no limits on state laws animated by anti-homosexual disgust. And if a neutral reason were needed, it is easy to find—because homosexuals are disgusting and contagious! According to Judge Bork, “[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to

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146. *Id.* at 1014-16.

147. *Dronenburg v. Zech*, 741 F.2d 1388, 1388-89, 1397 (D.C. Cir. 1984).

148. *Id.* at 1389 & n.1.

morale and discipline.”<sup>150</sup> Among the reasons were that “[e]pisodes of this sort are certain . . . to generate dislike and disapproval among many who find homosexuality morally offensive, and . . . to enhance the possibility of homosexual seduction.”<sup>151</sup>

### C. First Amendment (No Contagious Speech)

The First Amendment explicitly bars the government from abridging a person’s freedom of speech and publication, and implicitly bars the government from invading his or her freedom of association. Surely these specific, and unqualified, rights guarantee homosexuals protection against state censorship. The Warren Court, no friend to the homosexual, ruled that the First Amendment protected nonobscene homophile materials from state censorship.<sup>152</sup> The Burger Court, in contrast, expanded the definition of “obscene” materials (definitionally unprotected by the First Amendment) not only to include homo-erotica, but also to render homosexuality itself the epitome of obscenity, viz. disgusting materials. In *Miller v. California*,<sup>153</sup> the Court upheld state suppression of materials the state described as “depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more.”<sup>154</sup> Chief Justice Burger’s opinion for the Court could not bear even to name these perversions, but it did manage to expand permissible state regulation of obscene speech to include materials offensive to the moral standards of the local, rather than national, community.<sup>155</sup> *Miller* triggered a brief new wave of censorship, especially of gay publications, almost all of which the Burger Court upheld, sometimes in openly homophobic opinions.<sup>156</sup>

150. *Id.* at 1398.

151. *Id.*

152. *See One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (summarily reversing censorship on the basis of *Roth v. United States*, 354 U.S. 476 (1957)); *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (invalidating a state law barring depictions of “sexual immorality, perversion, or lewdness . . . as desirable” in movies, as this was viewpoint discrimination); *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962) (overturning censorship of male physique magazines).

153. 413 U.S. 15 (1973).

154. Brief for Respondent at 26, *Miller*, 413 U.S. 15 (No. 70-73).

155. *Miller*, 413 U.S. at 36-37; *see also Kaplan v. California*, 413 U.S. 115, 117 (1973) (holding obscene a book describing “every conceivable variety of sexual contact, homosexual and heterosexual”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (upholding the closure of an adult theater).

156. *See Ward v. Illinois*, 431 U.S. 767, 771-72 & nn.3-5 (1977) (White, J.) (upholding a statute criminalizing the depiction of “abnormal” sex and lumping together rape, sado-masochistic sex, and same-sex foreplay and intercourse); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, & Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 892-95 (1997) (describing the binge of anti-gay censorship and the

Notwithstanding these efforts, pornography grew like weeds in a vacant lot, and the cases stopped coming to the Supreme Court, in part because most governments (including the federal government) abandoned their efforts at censorship of adult pornography and in part because local censorship efforts were easily evaded by national channels of communication.

As in the sodomy and equal protection cases, the Burger Court was not eager to take review in cases involving homosexuals' expression, and sometimes this gave gay rights a boost. Most lower federal courts were skeptical of the censorship of gay student groups at state universities, and none of these cases reached the Supreme Court. In *Ratchford v. Gay Lib*,<sup>157</sup> within a year of the Save Our Children campaign, the Court denied review of a decision that the University of Missouri could not, consistent with the neutrality the First Amendment imposes on state universities, purge its campus of a student gay rights group.<sup>158</sup> Dissenting from the Court's refusal to take the appeal, Justice Rehnquist saw the case as one involving "the extent to which a self-governing democracy, having made certain acts [i.e., homosexual sodomy] criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws."<sup>159</sup> This was an open appeal to generalize anti-homosexual disgust as a basis for curtailing the free speech and anticensorship norms as applied to gay people and their friends.<sup>160</sup> Rehnquist's dissent then rejected the students' argument that they were engaged in protected speech and association. No, their advocacy was tantamount to conduct that was not only disgusting but also contagious, Rehnquist argued. If so,

the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State . . . .<sup>161</sup>

Rehnquist suggested that "this danger [of contagion] may be particularly acute in the university setting where many students are still coping with

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157. 434 U.S. 1080 (1978).

158. See *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 850 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978).

159. *Ratchford*, 434 U.S. at 1082 (Rehnquist, J., dissenting from denial of certiorari).

160. See *Gay Lib*, 558 F.2d at 850 n.3, 851 & n.4. It was also a serious overstatement, as Missouri then criminalized homosexual sodomy only as a misdemeanor and the student club did not advocate breaking the law.

161. *Ratchford*, 434 U.S. at 1084 (Rehnquist, J., dissenting from denial of certiorari).

the sexual problems that accompany late adolescence and early adulthood.”<sup>162</sup>

It is hard to imagine a more explicit statement of the Constitution of Anti-Homosexual Disgust and Contagion than Justice Rehnquist’s dissenting opinion. Justice Blackmun joined every line of it, and Chief Justice Burger also registered a dissent from the Court’s refusal to hear the case.<sup>163</sup> The other Justices did not reveal their views, but the division within the Court became clearer in *Board of Education v. National Gay Task Force*.<sup>164</sup> In 1978, months before the defeat of the Briggs Initiative, a near-unanimous Oklahoma legislature honored Anita Bryant, its native daughter, by enacting a statute stipulating that school boards could suspend or dismiss public school teachers or teachers’ aids for either ““public homosexual activities”” (namely, “public” sodomy) or ““public homosexual conduct.””<sup>165</sup> The law defined the latter as ““advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.””<sup>166</sup> The law would seem to violate core tenets of the Court’s First Amendment jurisprudence, which protects “advocacy” even of illegal conduct except when the advocacy is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>167</sup>

Notwithstanding this jurisprudence, the trial judge upheld the statute by interpreting it narrowly, allowing discipline only when a teacher’s pro-gay advocacy creates a ““material and substantial disruption”” in the classroom.<sup>168</sup> A divided Court of Appeals for the Tenth Circuit rejected that gloss on the statute and ruled it unconstitutional because it was “overbroad, [was] ‘not readily subject to a narrowing construction by the state courts,’ and ‘its deterrent effect on legitimate expression [was] both real and substantial.’”<sup>169</sup> A dissenting judge argued that, because “[s]odomy is *malum in se*, i.e., immoral and corruptible in its nature,” any teacher who promotes it in any way “is in fact and in truth *inciting* school

162. *Id.* at 1083.

163. *Id.* at 1080 (Burger, C.J., dissenting from denial of certiorari) (“The Chief Justice would grant the petition and give plenary consideration to this case.”).

164. 470 U.S. 903 (1985).

165. *Bd. of Educ. v. Nat’l Gay Task Force*, 729 F.2d 1270, 1272 (10th Cir. 1984) (quoting Okla. Stat. tit. 70 § 6-103.15).

166. *Id.* (quoting Okla. Stat. tit. 70 § 6-103.15).

167. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), quoted in *Nat’l Gay Task Force*, 729 F.2d at 1274 (1984). In *Brandenburg*, the Court overturned a conviction of KKK members who called for the suppression of minority races but not for immediate lawless actions against them. *Brandenburg*, 395 U.S. at 444-45 (per curiam).

168. *Nat’l Gay Task Force*, 729 F.2d at 1272 (quoting the trial judge).

children to participate in the abominable and detestable crime against nature.”<sup>170</sup> The Supreme Court accepted review in the case. As Justice Blackman’s conference notes reveal, Chief Justice Burger and Justices White, Rehnquist, and O’Connor were bothered by the possibility that even discussion of disgusting homosexuality would create possibilities of contagion among vulnerable schoolchildren.<sup>171</sup> In the end, the Court ducked this case as well, splitting four-to-four (with Justice Powell not participating) and therefore creating no precedent.<sup>172</sup>

#### IV. THE REHNQUIST COURT SETS (AMBIGUOUS) LIMITS ON THE CONSTITUTION OF ANTI-HOMOSEXUAL DISGUST AND CONTAGION

After *Rowland*, *National Gay Task Force*, *Dronenburg*, and, especially, *Bowers v. Hardwick*, lesbians, gay men, and bisexuals viewed the Supreme Court as a hostile institution that had capitulated to the constitutional vision of Anita Bryant. Anti-gay body politics, with its emphasis on disgusting homosexual conduct and contagious homosexuality, had no discernible constitutional limits. Under *Dronenburg*, the state could not only imprison homosexuals, but also discriminate in almost any way against such persons because of public disgust and fear of contagion. *Bowers* seemed to confirm the *Dronenburg* Constitution, with possible protection (thanks to the Powell concurring opinion) for homosexuals sent to prison for consensual activities in the home. These decisions infuriated gay Americans, many of whom came out of their closets (for this and other reasons). According to *Newsweek*’s poll, 22% of Americans had a close friend they knew to be gay before *Bowers*, a figure that doubled to 43% by 1994.<sup>173</sup> Many of these friends were lawyers. The Stonewall riots are credited with triggering thousands of gay people to step out of their closets, but very few of the uncloseted were lawyers. Lesbian and gay lawyers did not come out in great numbers until *Bowers*, and they vowed to continue legal, as well as political, struggles for decent treatment.<sup>174</sup>

Almost all the constitutional and political efforts concentrated on state courts and legislatures, with significant success in the Northeast, West

170. *Id.* at 1276 (Barrett, J., dissenting).

171. Papers of Justice Harry A. Blackmun, Library of Congress, Manuscript Reading Room, Box 699, Folder S (Notes for Conference in *N6TF*, No.83-2030).

172. *Bd. of Educ. v. Nat’l Gay Task Force*, 470 U.S. 903, 903 (1985).

173. See AMERICAN ENTERPRISE INSTITUTE, *supra* note 73, at 16.

174. On post-*Bowers* law student campaigns to pressure law firms to welcome openly gay or lesbian attorneys, see, e.g., *Firms Step Up Hiring of Gay and Lesbian Lawyers*, N.Y. TIMES, Feb. 7, 1992; Jane Goldman, *Coming Out Strong*, CALIF. LAW., Sept. 1992, at 31; John Greenya, *The Last Minority*, WASH. LAW., Nov.-Dec. 1993, at 21; Christi Harlan, *Yale Law Students Turn the Tables on Job Interviewers—Recruits Ask About Attitudes Toward Homosexuals and Public Service*

Coast, and Great Lakes regions of the country. Many of gay people's political successes were state and municipal laws prohibiting sexual orientation discrimination by employers and public accommodations, the kind of law Save Our Children had overturned in Dade County.<sup>175</sup> Its Constitution of Anti-Homosexual Disgust and Contagion turned to the First Amendment to undermine pro-gay laws that traditionalists could not defeat in the political process. They had a receptive audience in the Rehnquist Court, which turned strongly to the right after liberal Justices Brennan and Marshall were replaced by more conservative Republicans, Justices Souter and Thomas. Centrist Justices White and Blackmun were replaced by centrist Democrats, Justices Ginsburg and Breyer. Three of the *Bowers* dissenters (Brennan, Marshall, and Blackmun) were off the Court by 1993.

In 1995, the Rehnquist Court expanded the First Amendment to protect TFV speech in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.<sup>176</sup> Massachusetts courts interpreted the state antidiscrimination law to require the Boston St. Patrick's Day Parade to include a LGBT marching group. A unanimous Court ruled that their inclusion violated the traditionalist message of the parade organizers.

[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.<sup>177</sup>

Like the homosexual schoolteacher in Oklahoma, the lesbian marcher in Boston was by her presence tagged with representing disgusting conduct and with advancing an unhealthy homosexual agenda. The parade organizers were constitutionally entitled to treat this as a hostile viewpoint and to distance themselves from it by excluding the group. This was a viewpoint the parade organizers were entitled to exclude, ruled the Court.<sup>178</sup>

*Hurley* represented an important expansion of the First Amendment to create a new right consistent with the Constitution of Anti-Homosexual Disgust and Contagion. Scholars bemoaned what seemed like an

175. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* app. B2, at 356-61 (1999) [hereinafter ESKRIDGE, *GAYLAW*] (listing state and local antidiscrimination laws as of 1998).

176. 515 U.S. 557 (1995).

177. *Id.* at 574.

aggressive anti-gay judicial activism that complemented the anti-gay passivity of the Court in *Rowland*, *NGTF*, and *Bowers*.<sup>179</sup> The year 1996 represented the zenith of this Save Our Children Constitution. Homosexuals had no constitutional rights to speak of, while traditionalists enjoyed an expanding array of constitutional protections against having to expose themselves to open homosexuals. Their Constitution had also gone national in a big way. In 1993, President William Clinton and Senator Sam Nunn (Democrats) joined General Colin Powell and Senator Bob Dole (Republicans) in creating a permanent statutory exclusion of lesbians, gay men, and bisexuals from the armed forces.<sup>180</sup> Their justification was that the presence of open homosexuals was so disgusting, and even potentially contagious, to soldiers that morale and unit cohesion were undermined. In May 1996, Senator Dole and President Clinton joined forces to support the Defense of Marriage Act (DOMA), the most ambitious anti-gay legislation in American history.<sup>181</sup> DOMA sailed through Congress by huge majorities and committed the federal government to discriminating against same-sex married couples in more than one thousand federal statutory and regulatory provisions creating benefits or obligations based on marriage and spousehood.<sup>182</sup>

As before, the argument was that “homosexual marriage” was so disgusting to Americans that it threatened the institution of marriage for everyone, and it was so contagious that it infringed the rights of parents and children. Almost no one thought the Supreme Court would find the blatant discrimination entailed in DOMA or the 1993 armed forces exclusion to be unconstitutional. Although academics complained, the judiciary and the country seemed to have accepted the Constitution of Anti-Homosexual Disgust and Contagion. Indeed, these landmark statutes have most of the hallmarks of what Bruce Ackerman deems to be transformative *constitutional moments*.<sup>183</sup> Ackerman argues that the New

179. For criticisms of the Court’s broad protection of traditionalists’ right to exclude, see William N. Eskridge, Jr., *A Jurisprudence of ‘Coming Out’: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411 (1997); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 *HARV. C.R.-C.L. L. REV.* 1 (2000); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 *STAN. L. REV.* 767 (2001).

180. 10 U.S.C. § 654 (2000); see also Don’t Ask, Don’t Tell, Don’t Pursue Database, Robert Crown Law Library at Stanford Law School, <http://dont.stanford.edu> (last visited Aug. 22, 2005).

181. 1 U.S.C. § 7; 28 U.S.C. § 1738C (2000).

182. Letter from Barry R. Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to the Honorable Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives (Jan. 31, 1997) (identifying 1049 federal laws and regulations in which rights or duties depend on marital status), available at <http://www.qrd.org/qrd/browse/gao.report.on.federal.marriage.benefits-01.31.97>.

183. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS 49-50* (1991) (discussing historical moments of “interbranch struggle” followed by “popular mobilization” creating “decisive events



Deal changed the Constitution because the showdown between President Roosevelt and the Old Court was resolved, thanks to Roosevelt's 1936 landslide victory, in his favor.<sup>184</sup> Ackerman's model is that We the People have engaged in *higher lawmaking* in these circumstances: "Interbranch Impasse → Decisive Election → Reformist Challenge to Conservative Branches → Switch in Time."<sup>185</sup> The gay rights issues fit the model in every way except the timing of the election: President Clinton proposed in January 1993 that gay people be allowed to serve, Congress and the Joint Chiefs of Staff objected, the President backed down in the face of popular opposition, and his party was routed in the 1994 election, in part because Clinton was considered pro-gay. DOMA might have been an even more decisive constitutional moment because tiny Hawaii's suggestion that same-sex marriage was on the way provoked a congressional reaction that the President joined immediately.

Yet at the apex of its triumph, in 1995-96, Anita Bryant's Constitution—the Constitution of Anti-Homosexual Disgust and Contagion—ran into trouble from an unlikely source, namely, a Supreme Court filled with Reagan-Bush Republicans.<sup>186</sup> The trouble began, ironically, in *Hurley*. Justice Souter's majority opinion, for the first time in Supreme Court history, treated gay litigants with respect and under an apparent assumption that they actually enjoyed constitutional rights. "GLIB was formed . . . in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community . . ."<sup>187</sup> Souter deemed their activity "equally expressive" as that of the parade organizers, and presumably protected by the First Amendment.<sup>188</sup> Albeit nothing more than a suggestion teased out of dicta, this logic would have probably required overturning the Briggs Initiative and the Oklahoma teachers' statute.

A more explicit curtailment of anti-gay constitutionalism came in May 1996, shortly after DOMA had been introduced in Congress. Like Dade County in 1977, several Colorado cities had adopted sexual orientation

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in constitutional history").

184. *Id.* at 48-50.

185. *Id.* at 49.

186. Four of the Justices (Rehnquist as Chief Justice and O'Connor, Scalia, and Kennedy as Associate Justices) were appointed by President Reagan, and two justices (Justices Souter and Thomas) were appointed by the first President Bush. Members of the Supreme Court (1789 to Present), <http://www.supremecourtus.gov/about/about.html> (last visited Oct. 10, 2005). One justice (Justice Stevens) was a Republican appointed by President Ford. *Id.* Two justices (Justices Ginsburg and Breyer) were Democrats appointed by President Clinton. *Id.*

187. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995).

antidiscrimination laws.<sup>189</sup> Unable to revoke them at the local level, Colorado for Family Values (CFV) sought to amend the state constitution to preempt them.<sup>190</sup> Its campaign to persuade voters to adopt the Amendment was a version of the popular Constitution of Anti-Homosexual Disgust and Contagion. CFV made the following arguments in advertisements and its voter information pamphlet: Pedophilia, said CFV, “is actually an accepted part of the homosexual community!” Not only do “homosexuals” molest children, but they are pushing educational materials that “try and convince children—maybe even your own—that they should consider homosexuality!” “Homosexuals” are sexually promiscuous. “‘Monogamy’ is virtually unknown in the homosexual lifestyle.” Gay men tend to be afflicted with AIDS. Even those not afflicted with AIDS die young; according to CFV, the average reported age of death for gay men is 42 years old and for lesbians, 45 years old. “To this angry, alienated minority, the family is the symbol of everything they attack.” “Militant” gay rights people want to destroy the family and the state’s churches. “‘Gay-rights’ destroys basic freedoms.” The freedom of “your child” at the University of Colorado not to have a gay roommate has been taken away by Boulder’s antidiscrimination law. Gay rights will suppress free speech and deny straight people jobs they ought to have.<sup>191</sup>

Responding to this still-powerful body politics, Colorado voters adopted Amendment 2, and thereby added to their constitution a new provision prohibiting or preempting any law or policy “whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”<sup>192</sup> The ACLU and local gay rights groups challenged this unprecedented initiative as a violation of the Equal Protection Clause.<sup>193</sup> Although the Colorado courts agreed with the challengers, they seemed to have an uphill battle when the

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189. See *Romer v. Evans*, 517 U.S. 620, 624-25 (1996) (citing DENVER, COLO., REV. MUN. CODE, art. IV, §§ 28-91 to 28-116 (1991); ASPEN, COLO., MUN. CODE § 13-98 (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-11 (1987), and explaining that these ordinances “gave rise to . . . statewide controversy” because of the “protection [they] afforded to persons discriminated against by reason of their sexual orientation”).

190. On the CFV campaign to overturn the local antidiscrimination laws, see STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2* (1994).

191. These quotations are taken from the ballot pamphlet supporting Colorado’s Amendment 2 (1992), reprinted in *ESKRIDGE & HUNTER, supra* note 106, app. 3, at 1523-31.

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

193. See *Evans v. Romer*, 854 P.2d 1270, 1271-73 (Colo. 1993), *aff’g* No. 92 CV 7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993).

Supreme Court took review in late 1995.<sup>194</sup> Colorado Solicitor General Tim Tymkovich relied on a kinder, gentler version of the Constitution of Disgust and Contagion to argue that this anti-gay discrimination was needed to conserve scarce resources for enforcing civil rights laws; to protect the rights of landlords and employers not to associate with gay people; and to send a message that homosexuality was disapproved by the state.<sup>195</sup> All of these policies are more rational-seeming than the anti-homosexual sentiment held to be a rational basis for sodomy laws in *Bowers v. Hardwick*,<sup>196</sup> but a six-Justice majority ruled in *Romer v. Evans* that the Colorado initiative was invalid because “its 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.”<sup>197</sup> The Court characterized the initiative as a “status-based” law aimed at a class of citizens; such laws violate the core equal protection command that “‘a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.’”<sup>198</sup>

Vigorously dissenting, Justice Scalia argued that *Romer*'s holding was completely inconsistent with *Bowers*.<sup>199</sup> He was right.<sup>200</sup> Handed down almost 100 years to the day after *Plessy v. Ferguson*,<sup>201</sup> *Romer* certainly seemed to be at least a qualified rejection of the Constitution of Anti-Homosexual Disgust and Contagion that was articulated most completely in *Dronenburg*, a decision that Scalia joined when he was a judge on the D.C. Circuit,<sup>202</sup> and that precisely anticipated the reasoning as well as the result in *Bowers*.<sup>203</sup> To begin with, Justice Kennedy's opinion for the Court announced that it was not permissible for the state constitution to say that the state and local governments are free to engage in any kind of anti-gay discrimination.<sup>204</sup> Under Amendment 2, a lesbian could presumably sue Denver for discriminating against her because she was a woman, but

194. See *Romer v. Evans*, 513 U.S. 1146 (1995).

195. Transcript of Oral Argument at 3-5, 17-25, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

196. See *supra* text accompanying notes 125-40.

197. *Romer*, 517 U.S. at 632.

198. *Id.* at 634-35 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

199. *Id.* at 636 (Scalia, J., dissenting).

200. See, e.g., ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 112-14 (1996) (urging the Court to abandon *Romer* and reaffirm *Bowers*); ESKRIDGE, GAYLAW, *supra* note 175, 150-51, 209-11 (urging the Court to abandon *Bowers*); Thomas C. Grey, *Gay Rights and the Courts: The Amendment 2 Controversy: Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373 (1997) (similar).

201. See *Romer*, 517 U.S. 620 (1996) (decided on May 20); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (decided on May 18).

202. *Dronenburg v. Zech*, 746 F.2d 1579 (D.C. Cir. 1984).

203. See *supra* text accompanying notes 125-40.

204. *Romer*, 517 U.S. at 632-33.

Denver could win the lawsuit by claiming it only discriminated against her because she was a lesbian who was disgusting to other Coloradans. “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”<sup>205</sup> *Romer* abrogates *Dronenburg*’s suggestion that such discrimination is constitutionally permissible.<sup>206</sup> That was a fundamental retreat from Save Our Children’s constitutionalism.

Justice Kennedy also rejected Tymkovich’s constitutionalism, under which tolerant Coloradans do not criminalize homosexual conduct that disgusts them but can assure landlords and employers (and co-workers) freedom to avoid contact and possible contagion.<sup>207</sup> This was straight out of Mary Douglas and Leviticus: The holy should not mix with the unholy.<sup>208</sup> Justice Kennedy not only found “it impossible to credit” this justification, but he ruled that the breadth of the new constitutional language was so far removed from it that the Court was left with the inference that Amendment 2 was inspired by “animus” toward the excluded class.<sup>209</sup> This was a remarkable holding. The CFV ballot materials quoted above support Justice Kennedy’s conclusion, as false stereotypes and appeals to prejudice pervade those materials.<sup>210</sup> What Judge Bork considered morality in *Dronenburg*, Justice Kennedy considered animus in *Romer*.

If popular disgust toward homosexual sodomy could not supply the rational basis for state discrimination against homosexuals under the Equal Protection Clause, could it supply the rational basis under the Due Process Clause for making homosexual sodomy a crime? In *Lawrence v. Texas*,<sup>211</sup> the Court said it could not. In another opinion by Justice Kennedy, the Court overruled *Bowers*’ holding that anti-homosexual disgust or morality could form a rational basis for state criminal prohibitions.<sup>212</sup> That holding, alone, represented a repudiation of the Constitution of Anti-Homosexual Disgust and Contagion, but Justice Kennedy’s reasoning process deepened the rejection. To begin with, Justice Kennedy substantially accepted the academic criticisms that *Bowers*’ historical analysis was riddled with errors and anachronisms, but then he conceded that

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205. *Id.* at 633.

206. *See Dronenburg*, 746 F.2d at 1583.

207. *Romer*, 517 U.S. at 635.

208. *See supra* notes 86-95 and accompanying text.

209. *Romer*, 517 U.S. at 632, 634-35.

210. *See supra* text accompanying notes 189-91.

211. 539 U.S. 558 (2003).

212. *Id.* at 578.

the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’<sup>213</sup>

This was a remarkable claim: A Constitution that credits anti-homosexual morality is one that is not truly neutral, and judges must be wary of allowing their own attitudes of disgust to influence their application of the law. Thus fell the central principle of *Dronenburg*, *Bowers*, and the Save Our Children Constitution.

Consistent with that sweeping move, Justice Kennedy linked Texas’s denial of ordinary sexual liberties to gay people with its denial of equal protection of the laws. “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>214</sup> This was unacceptable to the Court. “*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>215</sup>

Justice Scalia’s dissenting opinion in *Lawrence* lacked the untamed passion of his *Romer* dissent, but it was still a hard-hitting plea for the Court (or the country) to resuscitate the Constitution of Disgust and Contagion. In addition to several technical objections to the majority’s reasoning, Justice Scalia accused the Court of trumping the popular will with the views of legal elites. Morality ought to be a rational basis for criminal laws, especially when the moral judgment involved contagion as well as disgust.

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as

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213. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (joint opinion)).

214. *Id.* at 575.

215. *Id.* at 578.

scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.<sup>216</sup>

The contagion threatened by the Court extended way beyond Texas's sodomy law. The Court has opened Pandora's Box, creating a constitutional rule debarring the state from enacting laws criminalizing polygamy, fornication, adultery, incest, obscenity, bestiality, prostitution, and masturbation.<sup>217</sup> Scalia's point is that almost everybody is disgusted by something on this list, and so the Court's protection of "homosexual sodomy" is doubly or triply disgusting and, in fact, threatens to unleash a torrent of disgust. More alarmingly, the Court's opinion adopts the "homosexual agenda," which Scalia defines as "the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."<sup>218</sup> And the homosexual agenda now features same-sex marriage, which Justice Scalia claims will now be imported from Canada.<sup>219</sup> Foreign homosexual contagion is the worst, one suspects.

#### V. WHY CONSERVATIVES SHOULD ABANDON THE CONSTITUTION OF ANTI-HOMOSEXUAL DISGUST AND CONTAGION

Justice Scalia made two kinds of claims in his *Romer* and *Lawrence* dissents. One is that the Court *should* be confirming rather than limiting Anita Bryant's and Robert Bork's Constitution of Anti-Homosexual Disgust and Contagion. The second is that these decisions in fact have completely abandoned that Constitution in favor of the Homosexual Agenda Constitution. Both claims are false. Even conservative Republicans—indeed, especially such Justices—ought to reject the Constitution of Anti-Homosexual Disgust and Contagion. It is inconsistent with the original purposes of the Fourteenth Amendment *and* with the stable pluralist system created by the Constitution. Abandoning *that* Constitution, however, does not entail adoption of the Homosexual Agenda Constitution, and certainly not immediately.

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216. *Id.* at 602 (Scalia, J., dissenting).

217. *See id.* at 590 (contending that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers'* validation of laws based on moral choices"); *id.* at 599, 600.

218. *Id.* at 602.

219. *Id.* at 604.

### A. *Conservative Theories of Constitutionalism in a Pluralist Democracy*

Why should constitutional conservatives (as well as progressive constitutionalists) be skeptical of the Borkian Constitution of Anti-Homosexual Disgust and Contagion? One reason is libertarian. The American Revolution and the Constitution of 1789 were strongly libertarian. The Declaration of Independence asserted that it was “self-evident” that men “are endowed by their Creator with certain unalienable Rights,” to wit: “Life, Liberty, and the pursuit of Happiness.”<sup>220</sup> Consistent with social contract theory, the Revolutionaries and then the Framers of the Constitution established national governments whose federalist and separated-powers structure would assure citizens of breathing room to enjoy their traditional liberties.<sup>221</sup> A body politics that assails a group of citizens as disgusting and contagious tends to create sprawling regulatory schemes and apparatuses. Although Dade County Save Our Children sought to repeal a regulatory statute, protecting gay people against job discrimination,<sup>222</sup> California Save Our Children’s Briggs Initiative would have created a potentially terrorizing gendarmerie to police schoolteacher behavior, expression, and even pedagogy.<sup>223</sup> Before Anita Bryant, Florida’s Johns Commission subjected thousands of Floridians to humiliating interrogations and spying; dozens, perhaps hundreds, lost their jobs or were expelled from the University of Florida and other state colleges.<sup>224</sup>

Such disgust-based regulatory schemes tend to sacrifice the liberties of the minority in pursuit of goals that are often not linked to the common good. The constitutional checks and balances that ordinarily preserve liberty against crazy regulation do not work when the body politick is bestirred by an effective body politics. This alone is cause for constitutional concern, but there is a deeper reason the Libertarian Constitution might discourage this kind of body politics. A politics of disgust and contagion tends to demonize the minority as subhuman, not just mischevous. When Anita Bryant referred to homosexuals as “these vile beastly creatures,” when she compared exposing children to homosexuals with forcing them to eat “garbage,” when she reminded citizens that Leviticus required death for sodomites, she was inviting her

220. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

221. Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 37 (2005) (explaining how a “multiplicity of sects” guards against the threat of majority tyranny) (quoting THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961)).

222. See *supra* Part I.

223. See *supra* Part I.

224. See Eskridge, *supra* note 56, at 748-50.

audience to treat gays as animals, as refuse, as stuff to be disposed of.<sup>225</sup> Her body politics turned homosexuals into non-people. There is no more antilibertarian role that the state can play than to be a forum or even a conduit for this kind of discourse.

To be sure, Anita Bryant presented her campaign as one protecting the liberties of parents and children not to be exposed to homosexuality.<sup>226</sup> Requiring churches, families, or even Boy Scout troops to accept homosexuals within their intimate associations represents valid liberty claims,<sup>227</sup> but requiring workplaces and public accommodations to integrate are not deep invasions of personal liberty in an interdependent world.<sup>228</sup> More important, allowing a schoolteacher to be openly lesbian does not impose upon unhappy parents or even traumatized children the kind of scarlet letter that body politics imposes upon homosexuals. Even the most politically correct regulations do not trumpet an image of the bigot as someone whose body is a corrupt situs of disgusting actions, whose soul is degenerate and subhuman, and whose polluted presence is contagious. In short, even if traditionalist claims can be deemed liberties, the demonization of the anti-gay bigot is in no way commensurable with the demonization of the homosexual.

There is a second, perhaps more fundamental, reason why constitutional conservatives should reject the Constitution of Anti-Homosexual Disgust and Contagion. It is inconsistent with the proper functioning of America's democratic pluralism. Although democratic pluralism is not an explicit theme of the Constitution the way liberty is, it was the animating idea behind the Religion Clauses and is a precondition for the survival of constitutionalism itself. I have developed this theme in a companion article, but let me suggest its contours here.<sup>229</sup>

A pluralist political system is one whose goal is the accommodation of the interests of as many salient groups as possible, without disturbing the ability of the state and the community to press forward with collective projects.<sup>230</sup> In a pluralist democracy, social, economic, and ideological groups compete for the approval and support of representatives and the electorate. The state, in turn, encourages groups to participate in the marketplace of politics. If significant groups became alienated from, or

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225. See *supra* notes 63-66 and accompanying text.

226. See *supra* Part I.

227. E.g., *Boy Scouts v. Dale*, 530 U.S. 640 (2000).

228. E.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

229. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279 (2005).

230. ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 24 (1967); Nicholas R. Miller, *Pluralism and Social Choice*, 77 *AM. POL. SCI. REV.* 734,



even turned against, the pluralist democratic process, the polity is weakened. Alienation of many groups brings the polity down. Turmoil and social violence are possible; civil war is the nightmare scenario. Culture wars and intense normative polarities within the country pose threats to the stability of the country's governance.

Drawing from European experience, political scientist Adam Przeworski has concluded: "Constitutions that are observed and last for a long time are those that reduce the stakes of political battles."<sup>231</sup> Although the Framers of our Constitution did not anticipate our modern culture wars, they too appreciated the fragility of democracy when the "stakes" of politics get too high. Stakes get high when the system becomes embroiled in bitter disputes that drive salient, productive groups away from engagement in pluralist politics. Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or due to their perception that the process is stacked against them, or when the political process imposes fundamental burdens upon them or threatens their group identity or cohesion. At the founding of our nation, religion was the classic example of high-stakes politics. The Religion Clauses of the First Amendment<sup>232</sup> sought to lower the stakes of religion-based politics, essentially by forbidding the state from discriminating against persons based upon their religious beliefs (the Free Exercise Clause) and from imposing religious orthodoxy upon everyone (the Establishment Clause).<sup>233</sup>

One reason religious politics was high stakes was the strong cultural connection between religion and social identity. So persecuting someone for her religion or forcing orthodoxy upon all citizens was an affront to the deeply held, primordial identities of many—precisely the kind of state policy that would drive minorities out of the system, and maybe against it. Religious antimony had another divisive feature: Opposing parties in religion-based culture wars typically not only had *contempt* for one another's views, but also considered opponents *disgusting* and their theologies a *contagion*. America's long history of anti-Catholicism and anti-Semitism, for example, not only condemned these faiths as theologically wrong or even Godless, but also dismissed the faithful as disgusting. In communities where Catholics and Jews were marginalized minorities, majorities labeled them dirty, filthy, promiscuous, sex-crazed,

231. ADAM PRZEWSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 36-37 (1991).

232. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

233. Cf. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 202-09, 222-27 (1995) (interpreting the Religion Clauses to support "gag rules"

sodomy-obsessed, and indecent.<sup>234</sup> Together with the politics of race and slavery, emotional religion-based disputes were our nation's first and dirtiest *body politics*.

Religious wars are destructive enough, but a religious war where the state takes sides, which is properly called "Kulturkampf," is potentially disastrous for the polity.<sup>235</sup> The Religion Clauses recognized this and instantiated a jurisprudence of tolerance as regards religion. The central idea is that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."<sup>236</sup> This not only kept the state from engaging in Kulturkamps, but it has actually had the effect of lowering the stakes of religion-based body politics more generally. Over time, religious majorities learned to live with minorities, which undercut the nastiest features of body politics. Minorities felt more secure that they would not be eradicated so long as they played by the legal rules, and that gave them an incentive not to defect. Most important, the jurisprudence of tolerance pressed religious politics away from the body politics of disgust and contagion and toward positive appeals to values more widely shared in the community. Paradoxically, such a jurisprudence of tolerance has contributed to a country where religious faith has flourished in a rainbow array of denominations, even as the Religion Clauses are heatedly debated, litigated, and enforced to keep the state reasonably neutral.

As I have argued earlier, the philosophy of the Religion Clauses provides a philosophy through which to apply the open-textured provisions of the Fourteenth Amendment.<sup>237</sup> By lowering the stakes of homosexual body politics, the Court is creating spaces in which two conflicting groups can co-exist, and maybe learn to tolerate one another. If they never learn to tolerate one another, the Court will not let them hurt one another, especially through state action. This philosophy, by the way, does not ask the Supreme Court to sweep away anti-gay discriminations. Quite the contrary, this is a *conservative* philosophy that not only leaves the political process alone most of the time, but also insists that traditionalist groups receive the benefit of constitutional principle. Thus, a Constitution of Tolerance does not allow homosexuals to rain on—or march in—the traditionalists' parade, precisely as the Court held in *Hurley*.<sup>238</sup> Nor does

234. See generally DINNERSTEIN, *supra* note 56 (describing various grounds for anti-Semitism); LES WALLACE, *THE RHETORIC OF ANTI-CATHOLICISM: THE AMERICAN PROTECTIVE ASSOCIATION, 1887-1911* (1990) (describing similar grounds for anti-Catholicism).

235. See Eskridge, *supra* note 179, at 2413-16 (explaining the meaning of "Kulturkampf" and identifying the "two most prominent examples of Kulturkampf in the United States during the last hundred years [as] the campaign in the 1880s to discipline the Church of Jesus Christ of Latter Day Saints and the campaign in the 1950s to suppress homosexuality").

236. *Lee v. Weisman*, 505 U.S. 577, 587-89 (1992); *id.* at 609-31 (Souter, J., concurring).

237. Eskridge, *supra* note 179, at 2427-30.

238. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 575 U.S. 567

it allow the state to target only politically incorrect hate speech, and leave anti-religious hate speech unregulated, as the Rehnquist Court held in *R.A.V. v. City of St. Paul*.<sup>239</sup> Indeed, my theory provides a neutral justification for the Supreme Court's controversial opinion in *Boy Scouts v. Dale*,<sup>240</sup> handed down between *Romer* and *Lawrence*, and joined by Justices O'Connor and Kennedy. Expanding upon *Hurley*, *Dale* ruled that the Boy Scouts was an expressive association that could not be required to retain an "avowed homosexual" as an assistant scoutmaster.<sup>241</sup>

### B. *An Originalist Theory of the Fourteenth Amendment*

There is a third reason constitutional conservatives should reject the Constitution of Anti-Homosexual Disgust and Contagion: It is inconsistent with the original expectations of the Framers of the Fourteenth Amendment. Here, I am inspired by Judge Bork, the exemplar of modern originalism. Admitting that the Framers of the Fourteenth Amendment did not intend to eliminate racial segregation, Bork defends *Brown v. Board of Education* because it was consistent with the original purposes of the Fourteenth Amendment, as applied to modern circumstances.<sup>242</sup> The principles undergirding Reconstruction include the liberty idea, analyzed above, but also two other principles: legality and equality. Together, these three principles constitute a constitutional understanding of the rule of law as neutral, inclusive, and libertarian. Neutrality means that people are evaluated by their conformity to rules of conduct needed to advance social projects, not by their status or other "irrelevant" traits. Inclusion means the rule of law is accessible to all; there is no pariah class in America. Libertarian is the presumption that the state leaves us alone to choose our own path to happiness. Consider these principles in greater detail.<sup>243</sup>

*First* is the principle of *legality*. The Fourteenth Amendment's Due Process Clause was copied from the Fifth Amendment's Due Process Clause.<sup>244</sup> The framing generation understood the Fifth Amendment's provision to reflect the Magna Carta's concept of *per legem terram*.<sup>245</sup> For

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(1995).

239. 505 U.S. 377 (1992) (striking down a hate speech ordinance because it regulated only politically incorrect hate speech, not hate speech targeting, for example, the devoutly religious).

240. 530 U.S. 640 (2000).

241. *Id.* at 655.

242. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 12-15 (1971); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 75-82 (1990).

243. The discussion that follows is taken from the Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

244. *Id.* at 3.

the government to act “according to the law of the land” required something more than procedural regularity; it also required state officials to follow the rule of law and not their own arbitrary whim or caprice.<sup>246</sup> Thus, defendants cannot be imprisoned unless a criminal statute clearly announces the illegality of their conduct.<sup>247</sup> As the Supreme Court’s post-1868 precedents made clear, this requirement of due process was animated not only by the defendant’s need for adequate notice, but also by the notion that official discretion be tightly cabined.<sup>248</sup> Some of the precedents also support a broader idea. In *Papachristou v. City of Jacksonville*, the Court ruled that an “archaic” vagrancy law violated the Due Process Clause, because it made “criminal activities which by modern standards are normally innocent,” and which are indeed fundamental freedoms traditionally enjoyed by Americans.<sup>249</sup> The Jacksonville ordinance was not intelligible to the “poor among us, the minorities, the average householder,” and seemed to be enforced mainly against “nonconformists” and “suspicious persons.”<sup>250</sup> “The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”<sup>251</sup>

*Second* is the *equality* principle.<sup>252</sup> The Framers of the Fourteenth Amendment emphasized that “the American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness.”<sup>253</sup> This equality principle served two powerful norms:

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UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351 n.1 (2d ed. 1871) (1868) (translating the Magna Carta admonition that “[n]o freeman” should be imprisoned etc. “unless by the judgment of his peers, or the law of the land”).

246. Brief of the Cato Institute, *supra* note 243, at 3-4.

247. *Id.* at 4.

248. See Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80, 88-90 (1960).

The common fault of [vague statutes] . . . is that each injects into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically . . . and to result in a significant number of impermissible public-versus-private-interest resolutions which are beyond the effective discovery or appraisal of the Court.

*Id.* at 90.

249. 405 U.S. 156, 162-63 (1972).

250. *Id.* at 162, 169, 170.

251. *Id.* at 171; see also *City of Chicago v. Morales*, 527 U.S. 41 (1999) (following *Papachristou* to invalidate an antigang ordinance posing unacceptable risks to normal assembly on city streets).

252. Brief of the Cato Institute, *supra* note 243, at 4.

253. *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 1088-89 (1866) (Rep. Bingham)). On the equality rhetoric of Bingham and other framers, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 48-57, 71-80 (1988).

rationality and anti-class legislation. Foundational for the modern liberal state, the rationality norm insists that state differentiations be reasonably connected to legitimate public policies and not be the result of prejudice against an unpopular minority. Important for the peaceful functioning of modern pluralist democracies, the anti-class legislation norm debars the state from creating a subordinate underclass without very good justification.<sup>254</sup> As Justice Harlan argued in *Plessy v. Ferguson*, the rationality and anti-class norms are two sides of the same equality coin.<sup>255</sup> Although the obvious and immediate beneficiaries of this equality principle were the freed slaves, the Framers understood the principle to apply more broadly, to protect any social class against special penalties or disabilities.<sup>256</sup>

*Third* is the *liberty* principle.<sup>257</sup> Before the Civil War, judges interpreted the Due Process Clause of the Fifth Amendment and the Privileges and Immunities Clause of Article IV to impose substantive limits on government regulation of private activities that imposed no discernible third-party effects.<sup>258</sup> When the Framers of the Fourteenth Amendment borrowed the due process and privileges and immunities language to frame rights in Section 1, they intended to provide specific protections of liberty against state intrusion. Early on, the Supreme Court and some state courts interpreted the Due Process Clause to protect various dimensions of a “right ‘to be let alone.’”<sup>259</sup> In *Union Pacific Railway Co. v. Botsford*, the Court recognized *bodily integrity* as a species of constitutionally protected liberty and ruled that the state could not require a personal injury plaintiff to submit to a medical examination.<sup>260</sup> In *Maynard v. Hill*<sup>261</sup> and *Meyer v. Nebraska*,<sup>262</sup> the Court held that the state could not intrude into the *personal relationships* of marriage and childrearing. A third line of cases recognized the idea of *physical inaccessibility*: The state is barred, by the

254. Brief of the Cato Institute, *supra* note 243, at 4-5. Introducing the revised draft of the Fourteenth Amendment, “Senator Howard said it would ‘abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another.’” *Id.* at 5 n.4 (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard)).

255. See *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

256. *Id.* (Harlan, J., dissenting); NELSON, *supra* note 253, at 78-80.

257. Brief of the Cato Institute, *supra* note 243, at 3, 5-6.

258. *E.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Justice Washington construed the Privileges and Immunities Clause of Article IV to protect rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”).

259. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888)); see also *Commonwealth v. Campbell*, 117 S.W. 383, 387 (Ky. 1909). For an intellectual history of the different constitutional ramifications of this idea, see Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335.

260. 141 U.S. 250 (1891).

261. 125 U.S. 190 (1888).

Fourth Amendment especially, from invading or snooping into people's private spaces without a proper warrant.<sup>263</sup>

As they were applied in 1868, sodomy laws were *not* inconsistent with these principles. As I argued to the Supreme Court in *Lawrence*, reported cases in the nineteenth century were wholly limited to unconsented sexual activities or, later on, public activities.<sup>264</sup> Hence, the libertarian presumption was fully respected, nor was there an outlaw class of good citizens created by these laws. As late as 1950, it was not clear that state sodomy laws violated the Fourteenth Amendment, even though there were prosecutions and exclusions based upon private consensual activities. In 1950, it was possible for educated Americans to believe that homosexuals were a social menace. Doctors taught that they were mentally ill, indeed psychopathic; law enforcement officers portrayed them as child molesters; politicians and presidents dismissed them as disloyal.<sup>265</sup>

By 1977, when Save Our Children left its mark on American history, social and legal circumstances had changed. The medical profession had massively repudiated its prior understanding of homosexuality as a mental illness; myths of the homosexual as a child molester or traitor were discredited; and peaceful, productive lesbian and gay subcultures flourished in—and reconstructed—cities all over the country.<sup>266</sup> With these social changes came a new sodomy jurisprudence. No longer were sodomy laws enforced against private consensual activities; the only social role served by *consensual* sodomy laws was to identify a subclass of sodomites—the homosexuals—and mark them off as citizens who could be subjected to a wide array of collateral state and private discriminations.<sup>267</sup> At the very point Anita Bryant announced the Constitution of Anti-Homosexual Disgust and Contagion, that Constitution was at war with the original principles of the Fourteenth Amendment. Likewise, the Burger Court era decisions following Save Our Children Constitutionalism—*Dronenburg* and *Bowers*—were deeply wrong.

Conversely, the original principles underlying the Fourteenth Amendment firmly support the Rehnquist Court's decisions in *Romer* and *Lawrence*. Although *Romer* rested on the Equal Protection Clause and *Lawrence* was a substantive due process decision, both of them have the

263. See *Boyd v. United States*, 116 U.S. 616, 630 (1886) (holding that the Fourth Amendment protects the “sanctity of a man’s home and the privacies of [his] life”); COOLEY, *supra* note 245, at 299-300.

264. Brief of the Cato Institute, *supra* note 243, at 11-15 & app. 2 (listing reported sodomy cases from the nineteenth century). These passages are closely paraphrased in Justice Kennedy’s opinion for the Court. *Lawrence v. Texas*, 539 U.S. 558, 568-69, 572 (2003).

265. See ESKRIDGE, GAYLAW, *supra* note 175, at 57-62, 67-72.

266. *Id.* at 99-137.

same underlying message: The state cannot create a pariah class of useful, productive citizens and deny them a broad range of legal rights and protections simply because their presumed private activities are disgusting to other citizens. The state may allow traditionalist churches and neighborhood organizations to exclude such a group (*Dale*), and the state is not required to protect unpopular minorities against private discrimination (*Romer*). However, the state cannot tell gay people that they are strangers to the law. The state cannot tell gay people they do not have access to state services and courts for redress of their grievances (*Romer*) or that they are presumptive outlaws who can for that reason be denied civil service employment, licenses, and various state benefits (*Lawrence*). Nor can the state tell gay people that the price of citizenship for them is to remain in the closet. Just as traditionalists can proclaim themselves fans of family values without state meddling, so lesbians and gay men can be open about their sexual orientation. Race-based apartheid was a fundamental denial of core Fourteenth Amendment principles; so too, ultimately, is the apartheid of the closet.

### C. Putting It All Together

Return to Justice Scalia's charge that the Constitution now bars the state from any morals regulation altogether.<sup>268</sup> The original principles undergirding the Fourteenth Amendment *plus* the admonition against raising the stakes of politics can be synthesized into doctrinal variables—features of a liberty-infringing policy that render it more or less constitutionally vulnerable under the Fourteenth Amendment. So a morals law that criminalizes conduct that (1) is no longer widely criminalized and (2) does not seem to impose harm on third parties but (3) is important to a coherent and well-organized social group is most constitutionally objectionable. Like consensual sodomy, fornication easily fits within this unregulable core: Most states have decriminalized it, there is virtually no evidence of third-party harms, and a whole generation (the baby boomers) consider the right to fornicate important to their lives, or formative experiences in their youths. Masturbation is an even easier call from Scalia's list,<sup>269</sup> as it is not a crime anywhere in the United States, and it does not harm anyone.

Conversely, laws criminalizing conduct that (1) is still a crime in a large majority of states, (2) demonstrably harms third parties or the community, and (3) has not become the focus of a social movement are easy calls in the other direction—the state has substantial freedom to

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268. *Lawrence*, 539 U.S. at 590, 599-600 (Scalia, J., dissenting).

269. *Id.* at 590 (Scalia's list included bigamy, same-sex marriage, adult incest, prostitution,

criminalize. Most of the items on Scalia's list fall within this category of permissible state regulation: adultery, which violates a promise of fidelity and often imposes reliance and other costs on the innocent spouse; public prostitution, which remains universally regulated and is associated with nuisances of various sorts; child pornography, which is universally regulated and has properly been upheld on the ground that participation in it harms children; and incest involving minors, which is universally regulated and has not become the focus of a social movement.<sup>270</sup> Since 1900, most morals regulations have been laws protecting children against a variety of sexual knowledges and experiences.<sup>271</sup> One may debate the wisdom of this wide array of laws, and many of them have proven vulnerable under the First Amendment, but neither *Lawrence* nor the jurisprudence of tolerance poses any constitutional threat to them.

As Brett McDonnell has argued, the hardest calls are some of the adult incest cases, including sex between first cousins and siblings by affinity (marriage) rather than blood.<sup>272</sup> Although adult incest between siblings is criminal almost everywhere, many states do not include siblings by affinity, and most do not make it a crime for first cousins to have sex.<sup>273</sup> If the reported cases are any guide, these statutes are almost never enforced in cases involving consensual intercourse.<sup>274</sup> The harm of adult incest seems speculative but plausible: If close relatives (cousins) or people raised together (siblings by affinity) could engage in sex once they became adults, the family as a sexually "safe" place would be undermined. On the other hand, there are none of the collateral consequences for adult incestophiles that *Lawrence* found troubling for homosexual sodomy laws. And, no social movement has formed to persuade America that adult incest is okay. In large part because the social and normative stakes of adult incest among cousins or siblings by affinity are so low, *Lawrence* and its (or my) jurisprudence of tolerance do not clearly require that even these statutes violate the Fourteenth Amendment.

A constitutional right to same-sex marriage is supported by the equality principle, for lesbian and gay couples will not be fully equal citizens until they have the same choices for state recognition of their relationships that

270. On the continuing widespread regulation of adultery, prostitution, child pornography, and child incest, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* (1996).

271. See ESKRIDGE, GAYLAW, *supra* note 175, app. A3, at 342-51.

272. See Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 350 (2004) (post-*Lawrence* analysis); see also Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYUJ. PUB. L. 21 (1993); Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262 (2000).

273. See McDonnell, *supra* note 272, at 349-50.



straight couples have. But the state's limitation of marriage to different-sex couples does not much implicate the liberty principle. The legality principle cuts strongly against same-sex marriage at this time: Not only have the states traditionally not recognized same-sex unions as marriage, but only one state (Massachusetts) does today.<sup>275</sup> So the case for same-sex marriage as a constitutional matter is powerfully debatable. Under such circumstances, the Supreme Court has the discretion to engage in at least a moderately active judicial review or to do nothing. The politics of tolerance strongly counsels that the Court do nothing for the time being. Either rejecting or endorsing the constitutionality of same-sex marriage bars would immediately raise the stakes of national politics. The reason is that the issue of same-sex marriage not only remains divisive, but also divides in ways that cut to the core of people's identities. Under these circumstances, the Court's best strategy is to leave the matter to the states, the famous "laboratories for experimentation."<sup>276</sup> Indeed, this is the strategy the Court took, with success, in the right to die case, *Washington v. Glucksberg*.<sup>277</sup> Although the Chief Justice's opinion for the Court rejected any constitutional right to die, five Justices took the position that the matter was not ripe for complete resolution and pronounced themselves open to future claims.<sup>278</sup> Meanwhile, the states are free to recognize a right to die, and the experience from those states (and from abroad) will provide valuable information for other states and for the courts in future cases.

On the other hand, most of the state and local discriminations explicitly targeting lesbian and gay citizens ought to be suspect after *Romer* and *Lawrence*. A controversial example brings us back to Dade County and Florida—the 1977 Florida law which broadly prohibits lesbians, gay men, and bisexuals from adopting children.<sup>279</sup> The Eleventh Circuit upheld the law in *Lofton v. Secretary of the Department of Children & Family Services*.<sup>280</sup> Consistent with *Romer*, Judge Birch's opinion appropriately declined to attribute a morality-based justification for the statutory discrimination and instead defended it as a reasonable signal by the state that it considers husband-wife households to be the best situses for rearing

275. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (abrogating state discrimination against same-sex couples and requiring the state to issue marriage licenses).

276. See *United States v. Lopez*, 514 U.S. 549, 581 (1995).

277. 521 U.S. 702 (1997).

278. Five Justices were open to a "constitutionally cognizable interest in controlling the circumstances of his or her imminent death," but they felt that it was premature to decide one way or another in 1997. *Id.* at 736-38 (O'Connor, J., concurring); *id.* at 738-52 (Stevens, J., concurring in the judgments); *id.* at 752-89 (Souter, J., concurring in the judgments); *id.* at 789 (Ginsburg, J., concurring in the judgments); *id.* at 789-92 (Breyer, J., concurring in the judgments).

279. 1977 Fla. Laws ch.77-140, § 1 (codified at FLA. STAT. § 63.042(3) (2003)).

280. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *en*

children. The anti-homosexual rule was, according to Judge Birch, “designed to create adoptive homes that resemble the nuclear family as closely as possible.”<sup>281</sup> He accepted the state’s position that “disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida’s interest in promoting adoption by marital families.”<sup>282</sup>

Dissenting from denial of a petition for the whole circuit to hear the case, Judge Barkett argued that the Florida law is awfully similar to the Colorado initiative struck down in *Romer*.<sup>283</sup> Like Colorado’s Amendment 2, Florida’s law was innovative anti-gay discrimination, the first of its kind in the United States; even today, no state singles out lesbians and gay men, and them alone, as a class unfit to adopt children.<sup>284</sup> Additionally, the discriminatory classification is greatly under-inclusive, for it allows unmarried heterosexuals to adopt. If the state goal were, genuinely, to encourage adoption within marital households, one would expect the state either to bar adoption by single people or, at least, to create a presumption favoring adoption by married people. Florida does neither.<sup>285</sup> Moreover, the state rule allows heterosexual child molesters, wife-beaters, and drug addicts to adopt children, even though they pose great risks to children’s welfare.<sup>286</sup> And Florida’s discrimination, like that of Colorado’s Amendment 2, is woefully over-inclusive. Many gay and lesbian households are among the *best* situses for childrearing, even under the state’s rationale. As Judge Birch generously explained, Stephen Lofton and Douglas Houghton, the gay men who brought the challenge, are near-saints whose “courage, tenacity and devotion” to the children under their care as foster parents are an example every parent—straight as well as gay—can appreciate and applaud.<sup>287</sup>

281. *Id.* at 818.

282. *Id.* at 818-19.

283. *Lofton*, 377 F.3d at 1290-313 (Barkett, J., dissenting from the denial of rehearing en banc).

284. *Id.* In 2000, Mississippi barred adoptions by “couples of the same gender.” MISS. CODE ANN. § 93-17-3(2) (2004). In 1999, Arkansas adopted an administrative rule barring homosexuals from becoming foster parents, but not from adopting. 22 Ark. Reg. 22 (May 1999), *invalidated by* Howard v. Child Welfare Agency Review Bd., No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004) (referring to the rule as Regulation 200.3.2). Between 1987 and 1999, New Hampshire followed Florida in barring homosexuals from adopting children, *see* 1987 N.H. Laws ch. 343 (codified as amended at N.H. REV. STAT. ANN. § 170-B:4 (1987)), but the statute was amended in 1999 to allow homosexuals to adopt, *see* 1999 N.H. Laws ch. 18 (codified at N.H. REV. STAT. ANN. § 170-B:4 (1999)) (amending the 1987 version of the statute).

285. *Lofton*, 377 F.3d at 1290, 1297 & n.14, 1298 (Barkett, J., dissenting from the denial of rehearing en banc).

286. *Id.* at 1290; *see* FLA. STAT. § 63.042 (2005).

287. *Lofton*, 377 F.3d at 1290 (Birch, J., specially concurring in the denial of rehearing en banc) (upholding the Florida Legislature’s statute although finding it “misguided”).

At bottom, Florida's rationale sounded a lot like the one the Supreme Court attributed to Colorado: excluding homosexuals simply *because* the majority doesn't like them. Florida's response would be that, "No, we're excluding them because they are not married!" But this is circular, for Lofton and his partner (Roger Croteau) would get married if the state would let them. Florida's we-prefer-married-couples argument is a lavender herring.<sup>288</sup> Ultimately, Florida's position is that "dual-gender parenting" is important for shaping a child's "sexual and gender identity and in providing heterosexual role modeling."<sup>289</sup> But under that rationale, it is just as bad for single heterosexuals as for single homosexuals to adopt. Indeed, in Dade County, where Lofton and Croteau were living and raising their five foster children, forty percent of the adoptions from foster care are to single people.<sup>290</sup>

Moreover, the Florida statute had a feature the *Romer* Court did not know Amendment 2 had: open appeal to anti-gay animus. Justice Kennedy inferred animus from Amendment 2's over- and under-inclusion, but Judge Barkett found the animus right in the legislative history—a history that followed the aggressively anti-gay script Anita Bryant had written in Dade County.<sup>291</sup> Senator Curtis Peterson introduced the anti-gay adoption proposal in the legislature during the Save Our Children campaign. At the Senate committee hearing on the bill, supporters referred to the campaign as one that had galvanized constituent interest in protecting children from homosexuals.<sup>292</sup> At the House committee hearing on May 19, 1977, the sponsor said that "the majority of the committee supports Ms. Bryant and her move to do what she is doing."<sup>293</sup> When the bill was passed by the Senate on May 31, Senator Peterson stated its message to homosexuals: "We're really tired of you. We wish you would go back into the closet."<sup>294</sup> Echoing precisely the Save Our Children Constitutionalism, Senator Peterson continued: "The problem in Florida is that homosexuals are surfacing to such an extent that they're beginning to aggravate the ordinary folks, who have a few rights of their own."<sup>295</sup> Governor Askew,

288. Indeed, Lofton and Croteau, now living in Oregon, did get married in 2004, when Multnomah County (Portland) issued marriage licenses to same-sex couples. Telephone Interview with Steven Lofton (May 18, 2005).

289. *Lofton*, 358 F.3d at 818 (panel opinion).

290. *Lofton*, 377 F.3d at 1297 n.14 (Barkett, J., dissenting from the denial of rehearing en banc).

291. *Id.* at 1301-02.

292. *Id.* at 1302-03.

293. *See id.* at 1302 n.31 (surveying the legislative history and quoting from the tape-recorded proceedings of the House Judiciary Committee on May 19, 1977).

294. *Id.* at 1303 (quoting Senator Peterson as reported in *Gay Bills Pass Both Chambers*, FLA. TIMES UNION, June 1, 1977).

295. *Id.* at 1303 n.36 (quoting Senator Peterson as reported in *Gay Bills Pass Both Chambers*, 50

who had endorsed Bryant's politics of disgust and contagion, signed the bill into law on June 8, the day after Dade County revoked its antidiscrimination ordinance.<sup>296</sup>

Like Judge Barkett and unlike Judge Birch, I believe the actual legislative history of the Florida adoption law is relevant. Not only does it help explain why the statute is so enormously under- and over-inclusive, but it also identifies the purpose of the statute: to drive homosexuals back into the closet, and perhaps out of the state. This is a classic stakes-raising rationale, one that alienates a minority from ordinary politics and fuels violence as well as hatred among the majority. And it is a stakes-raising rationale that is deeply inconsistent with the legality and equality principles of the Fourteenth Amendment. Picking on homosexuals as enemies of family values violates both neutrality and inclusion norms of the Constitution of Tolerance.

The Supreme Court denied review in *Lofton*,<sup>297</sup> probably to allow the country to simmer down after *Lawrence* and the advent of same-sex marriage the next year in Massachusetts.<sup>298</sup> Although the Florida adoption statute is precisely the kind of discriminatory law that should fall under the Constitution of Tolerance, the judges who either sustained the law or ducked the case were not behaving irrationally. The body politics classically embodied in Save Our Children is one that has not died in America, and it is a politics that could be turned against the judiciary. If ordinary Americans believed the Supreme Court were promoting disgusting behavior and opening the country to sexual contagion, as Justice Scalia charged in his *Romer* and *Lawrence* dissents, the Court's legitimacy would suffer, however rigorous its reasoning or just its judgments. This is why the Court will not—and ought not—require the states to recognize same-sex marriage issue anytime soon. But the Florida adoption law remains a lonely remnant of Anita Bryant's anti-homosexual crusade, and striking it down would not put federal judges at risk in the same way same-sex marriage would. If the Eleventh Circuit was not crazy in declining to review the law en banc, neither was it wise. Given our current understanding of family and childrearing, the Eleventh Circuit should have followed Judge Barkett.

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FLA. TIMES UNION, June 1, 1977).

296. *Id.* at 1303.

297. 125 S. Ct. 869 (2005).

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

## VI. CONCLUSION: BODY POLITICS AS A POWERFULLY DANGEROUS DISCOURSE

The body politics and its disgust-based constitutionalism I have sought to recapture in this article has a rich history in our country. It not only helps us understand the anti-homosexual laws and regulatory practices created, and often sustained, in the twentieth century, but also helps us understand why race-based apartheid, state sterilization and castration schemes, and even the anti-Mormon Kulturkampf of the nineteenth century flourished and were constitutionally acceptable for most of the nation's history.<sup>299</sup> While sterilization is long gone, and apartheid no longer acceptable, this body politics is not only still viable, but perhaps as viable as it has ever been. Traditional family values groups no longer favor putting homosexuals in jail, but same-sex marriage has provided them with a new situs for a kinder, gentler body politics. Gone are Anita Bryant's declaration that homosexuals are disgusting beasts, but still with us are open depictions of homosexuals as diseased (because they do disgusting things). Gone is the charge that homosexuals are child molesters, replaced by the charge that they threaten the family and other cherished institutions by their mere presence. Disgust and contagion are still the hallmarks of anti-gay discourse, but the discourse has genuinely changed in response to *Romer* and the cultural shift that created the conditions for *Romer*.

Body politics is also a powerful way to understand the abortion wars in the United States. The politics of abortion involves uniquely high stakes, because each side can intelligently understand abortion as a gruesome body politics. Pro-choice Americans understand compulsory pregnancy and childbearing as state commandeering or colonization of women's bodies.<sup>300</sup> Even more disgusting to them are the stories of bodily mutilation from earlier eras or even today (in some places), where young women did or do not have access to abortions.<sup>301</sup> Pro-life Americans understand abortion choice as destruction of a human body. Texas's brief in *Roe v. Wade* included ten photographs of fetuses with discernible child-like features.<sup>302</sup> Texas dared the Justices to allow murder of these obvious human beings. Today, lurid descriptions of partial-birth abortions (graphically sounding in murder and torture language) supplement these pictures.<sup>303</sup> These photos and descriptions inspire disgust and revulsion even among many who

299. See *supra* notes 55-56 and accompanying text.

300. Brief of Appellants at 94-115, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18); Brief on Behalf of Plaintiff-in-Error at 33-39, *Sanger v. New York*, 251 U.S. 537 (1919) (No. 75) (applying similar body politics in the pioneer contraception brief).

301. See generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

302. See Brief for Appellee, figs. 1-10, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

303. *Stenberg v. Carhart*, 530 U.S. 914, 983-87 (2000) (Thomas, J., dissenting) (providing a detailed description of partial-birth abortion, a procedure likened to "infanticide").

support a woman's right to choose abortions. For both groups, the politics of disgust serves to unite as well as divide: A pro-life identity entails feeling the same revulsion at abortion that others feel; to a lesser extent, a pro-choice identity entailed feeling the same revulsion at backroom butcheries that prevailed before *Roe* and still exist all over the country. And the politics of disgust renders each group's stance intensely held and relatively intractable.

Perhaps most interesting is how a body politics of disgust and contagion are showing up in new situses. Although technically prohibited by the Americans with Disabilities Act (ADA),<sup>304</sup> discrimination against people with AIDS (PWAs) remains pervasive. PWAs are the new embodiment of the disgusting, contagious American. Many people incorrectly assume that the PWA comes by his or her infection because of disgusting conduct (sodomy, drug use) and that he or she is contagious. Even though the ADA's legislative history could not have been clearer, the Supreme Court (in another courageous opinion by Justice Kennedy) only narrowly ruled (five votes to four) that PWAs are disabled and therefore protected under the ADA.<sup>305</sup>

Body politics helps us understand the long and vicious history of discrimination suffered by people with physical and mental disabilities in the United States. Few people realize how pervasively state and local governments stigmatized, excluded, sterilized, and persecuted people with disabilities throughout the twentieth century. For example, until 1974 Chicago made it a crime for persons to appear in public who are "diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object."<sup>306</sup> The same kind of body politics was involved: These people look disgusting, and their presence threatens the integrity of the body politick. The persistence of these feelings may help explain why federal judges, including most of the Supreme Court, have applied the ADA much more reluctantly than they have applied any other civil rights statute in living memory. Some of the doctrines judges have devised are direct testimony to this effect. Employers have had great success in defending their exclusion of people with mental disabilities on the ground that their disabilities are, literally, contagious.<sup>307</sup>

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304. Pub. L. No. 101-336, 104 Stat. 327 (1990).

305. *Bragdon v. Abbott*, 524 U.S. 624, 655 (1998).

306. Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA L. REVIEW 855, 863 (1975) (quoting CHICAGO, ILL., MUN. CODE § 36-34 (1966) (repealed 1974)).

307. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 93 GEO. L.J. (forthcoming 2005).

The most obvious, and least predictable, ramifications of a body politics of disgust and contagion is the new war on terrorism. The threat of terrorism is real and serious—as are the risks of policies that target Americans based on their race, ethnicity, or religion.<sup>308</sup> What must be avoided is a politics that renders Arab bodies corrupt, demonizes Muslim gods, and exploits racist fears of ethnic contagion. The judiciary plays a marginal role in the war on terrorism, but it makes constructive contributions in reducing its temperature through reassuring minorities that the Constitution applies to them,<sup>309</sup> their mistreatment carries with it judicial remedies (through habeas corpus, for example),<sup>310</sup> and statutes will not be aggressively construed to enable their segregation and forced detention.<sup>311</sup>

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308. E.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

309. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

310. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

311. *Hamdi*, 124 S. Ct. at 2656-57 (Souter, J., dissenting in part); *id.* at 2671-72 (Scalia, J.,