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Moving Beyond Rhetoric

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William Eskridge's *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*[1] is an unusually rhetorical piece. At times it appears that Eskridge thinks that if he characterizes his opponents' position as one of "disgust" and fear of "contagion" often enough (by my count, 142 and 58 times, respectively), that will make it so. On numerous occasions, he goes beyond the pale of responsible scholarship, in my

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

opinion, not only characterizing his opponents' position himself (from an external standpoint), but also formulating their own position in those terms, and doing so utterly without justification.[2]

Of course, articles can be highly rhetorical and still have keen analysis. Unfortunately, we have to wait a long time to get around to any serious constitutional argument by Professor Eskridge in his article, and in the end, that argument is not particularly satisfactory.

I. SITUATING THE HOMOSEXUALITY ISSUE

Professor Eskridge situates the homosexuality issue by saying, "[w]hat I call the 'traditional family values' (TFV) counter movement 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."[3] Perhaps Save Our Children was a certain kind of politics, and perhaps it was a social movement, but the source of a "constitutional theory"? What is the value of looking to Anita Bryant, of all people, for constitutional theory? Of course, eventually Professor Eskridge will get around to commenting on legal scholars like Antonin Scalia and Robert Bork, but he simply subsumes them into the description he has given of Anita Bryant. There is no discussion of other, serious scholars and practitioners he might have confronted. John Harvey, Jeffrey Satinover, Joseph Nicolosi, George Rekers, Richard Fitzgibbons, Robert George, and Michael Pakaluk[4] are ignored, and the case these scholars make against legitimizing homosexual activity is reduced to the press releases and political slogans of activists, such as Anita Bryant and John Briggs. The response to such caricaturing by Professor Eskridge should be the same as it would be if someone were to reduce all liberal, pro-choice scholarship to certain recent egregious left-wing activist embarrassments, such as the NARAL advertisement linking then Supreme Court nominee John Roberts

2. For example, "[u]nder *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," *id.* at 1039; "[t]heir justification was that the presence of open homosexuals was so disgusting, and even potentially contagious, to soldiers that morale and unit cohesion were undermined," *id.* at 1041;"[u]nder Amendment 2, a lesbian could presumably sue Denver for discriminating against her because she was a woman, but Denver could win the lawsuit by claiming it only discriminated against her because she was a lesbian who was disgusting to other Coloradans," *id.* at 1044-45; "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," *id.* at 1047.

3. *Id.* at 1012-13.

4. These authors deal with various aspects of homosexuality in my edited volumes HOMOSEXUALITY AND AMERICAN PUBLIC LIFE (Christopher Wolfe ed., 1999) and SAME-SEX MATTERS: THE CHALLENGE OF HOMOSEXUALITY (Christopher Wolfe ed., 2000).

to violent anti-abortionists,[5] or the animated video released by Planned Parenthood Golden Gate portraying a pro-choice superhero shooting condoms around Christian anti-abortion protesters, which then explode.[6] Professor Eskridge owes us a serious discussion of a serious issue, and reducing the argument to an analysis of Anita Bryant's exploits just will not do.

Having erected his straw-man, Professor Eskridge then says that "[t]his 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."[7] What is the evidence for the federal judiciary supporting the "Constitution of (Anti-Homosexual) Disgust and Contagion" (CAHDC)? "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."[8] They "allowed" this and "allowed" that. That is, they *did not mangle* the Constitution to create in it something that is patently not there, namely a defense of homosexual rights. I suppose that in one sense the Burger Court also "allowed" Congress to cut taxes and "allowed" state legislatures to increase state funding for education—that is, they did not intervene to prohibit such things. This did not mean, however, that they favored cutting taxes or increasing state education funding. Nor did their allowance of laws prohibiting homosexual activity mean that they favored doing so. It just meant that they saw nothing in the Constitution to prohibit such state laws. The supposed federal judicial

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5. Brooks Jackson, *NARAL Falsely Accuses Supreme Court Nominee Roberts*, FACTCHECK.ORG, Aug. 9, 2005, http://www.factcheck.org/article340.html (modified Aug. 12, 2005).

> The ad shows images of a bombed clinic before a woman identified as Emily Lyons appears on screen, saying 'I nearly lost my life.' An announcer says, 'Supreme Court nominee John Roberts filed court briefs supporting violent fringe groups and a convicted clinic bomber.' The announcer then urges viewers to 'call your Senators' and 'tell them to oppose John Roberts' because we 'can't afford a Justice whose ideology leads him to excuse violence against other Americans.'

Id.

6. *See Pro-Abortion Planned Parenthood Video Depicts "Superhero for Choice" Killing Pro-Lifers*, LIFESITENEWS.COM, Aug. 8, 2005, http://www.lifesite.net/ldn/2005/aug/05080801.html (providing an account of the Planned Parenthood video). While the violence involved in the video may be "comic violence," it takes little imagination to figure out what the response would have been if, for example, Operation Rescue had sponsored a video with "comic violence" against abortionists.

7. Eskridge, *supra* note 1, at 1013.

"support" and "endorsement" for the supposed "CAHCD" then turns out simply to be their refusal to sign on to the gay rights agenda.

II. "DISGUST" AND "CONTAGION"

Professor Eskridge argues that the case of opponents of gay rights rests on "disgust" and fear of "contagion." He offers some discussion of these concepts, but generally it is not very nuanced, and sometimes it is positively misleading.

A. *Body Politics*

Professor Eskridge describes a "body politics" as "localized discrimination against a group of Americans by reference to their *natures* and the dangers of contagion posed by *unnatural* acts, people, and ideologies."[9] He extends this concept to the treatment of Indians and slaves, and also to the religious and racial discrimination against Catholics, Irish, Italians, Jews, Chinese, and Mormons, to the World War II internment camps of Japanese-Americans, and to the denial of "basic state services to the children of Latino immigrants" (presumably illegal immigrants).[10] This "politics of the body is an effort to naturalize inferiority."[11]

Professor Eskridge, however, does not tell us anything about what "nature" is. His list lumps together racial, ethnic, and religious discrimination, even though there are significant differences among them. For example, while there arguably is a "natural" basis for race and ethnicity,[12] religion involves choice and can be changed in a way that race and ethnicity cannot. One of the key issues regarding homosexuality is precisely the question of what the relationship between homosexual inclinations and acts and a person's "natural" identity is. I think it is clear that homosexual inclinations typically are not "chosen," but rather they exist for reasons other than a person's choice. However, I also think that homosexual inclinations are not part of a person's "nature," (i.e., due to genetic or biological determination) and that they are subject to change. While answers to these questions do not settle any issues, they do have a significant impact on our understanding of them. Professor Eskridge does

9. *Id.* at 1020.
10. *Id.*
11. *Id.*
12. I say "arguably" because of the ambiguity of what Professor Eskridge means by "nature." Human beings by *nature* are members of a particular race (or mixture of races), but from the perspective of what constitutes *human nature*, race and ethnicity are accidents: A person is fully human irrespective of his or her race, color, or ethnic background.

not address these matters, and so the relationship of the homosexuality issue to other forms of "body politics" remains unclear.

B. *Disgust, Feelings, and Reason*

Professor Eskridge says: "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."[13] His contention is that "[l]ike prejudices, feelings of disgust are nonrational responses to physical phenomena, yet they may be underlying motivations for our rational discourses."[14] Unfortunately, Professor Eskridge does not explore the more complicated relationship between feelings, on one hand, and rational judgments, on the other. In one sense, feelings are, by definition, nonrational. But, of course, feelings can be in accord with, and directed by, and even be a reflection of, rational judgment as well. During a movie my wife and I watched a few nights ago, we responded with a deep feeling of horror to a scene in which soldiers brutally executed ten American prisoners-of-war. What was the relationship between feeling and rational judgment in that case? It may partly have been a vicarious experience of the horror of being killed, or of standing by helplessly as our fellows are killed, which is part of our natural desire for self-preservation and our natural sympathy with our fellows. But it also was a reflection of a rational judgment that what was being portrayed was a profoundly evil act. (That explanation would help account for the fact that we experienced different feelings when we saw the person who ordered those acts himself killed.).

Feelings are not intrinsically rational, but they are not necessarily antirational either. Feelings may, in a sense, be imbued with reason. Many people have a visceral feeling of disgust at the thought of bestiality (sexual activity with animals) and incest (especially sexual relations between parents and their children). Are such feelings good? The issue can be debated, of course, but my point is that there is no reason simply to assume that such feelings are wrong or misguided or irrational.

So the interesting question with respect to the disgust that some people feel about homosexual acts (e.g., anal intercourse) is whether that disgust is in accord with some rational judgment. That is a question—the really interesting question—that Professor Eskridge never even raises. The whole tone of his paper—and the rhetorical overuse of the terms "disgust" and "contagion"—seems simply to assume that reactions of disgust are irrational and unworthy of respect.

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13. Eskridge, *supra* note 1, at 1020.

14. *Id.* at 1027.

C. *Contagion*

Professor Eskridge emphasizes that the Save Our Children campaign not only focused on the disgusting features of homosexuality, but also invoked "tropes of homosexual predation."[15] It, and other anti-homosexual tracts, did not depend "entirely on the myth of the recruiting homosexual, however . . . 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."[16] Of course, it is Eskridge, not those he criticizes, who says that homosexuals are "diseased things, not really 'human beings,' [and] must be purged"[17]–another example of his dishonest rhetoric, putting words in other people's mouths that just are not there. The use of the word "contagion" also is tendentious. It has strong connotations of involuntary spreading of a harmful disease by some simple form of contact. No one thinks that homosexuality is contagious. For a change, at one point Eskridge actually is willing to quote a somewhat more plausible form of his opponents' argument:

> "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 . . . . 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."[18]

Homosexual influence—not "contagion"—is the issue.

D. *Christian Views of Sexuality*

Professor Eskridge frequently mischaracterizes Christian views on sexuality. For example, he says that "[f]or 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

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15. *Id.* at 1023.
16. *Id.* at 1024.
17. *Id.*
18. *Id.* (quoting California Senator John V. Briggs in John V. Briggs, *Deviants Threaten the American Family*, L.A. TIMES, Oct. 23, 1977, at VII-5). I think Briggs' statement could have stressed the uncertainty of adolescents struggling with their sexual identity rather than referring to it flatly as a "choice," but otherwise it is not a bad characterization of the issue. Note that there is nothing remotely like contagion involved.

the worst of sins against God."[19] But what Romans 1:24-25 actually says is: "Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed forever! Amen."[20] The worst sins are not crimes of the body—they simply are one manifestation or result of the worst sin, which is idolatry.[21]

St. Paul, Eskridge says, spends much of the first Letter to the Corinthians "suggesting that the body is best not polluted at all by sexual activities of any sort."[22] St. Paul encourages virginity for the sake of the kingdom of God, largely because it enables people to attend directly to the things of God, rather than worrying about mundane things. But there is nothing in what St. Paul says that suggests that sex is polluting—that is simply Eskridge's unjustified mischaracterization of St. Paul.[23]

E. *Disgust and Boundary Maintenance*

Professor Eskridge invokes the work of Mary Douglas in *Purity and Danger* to "help[] us understand how feelings of disgust are related to

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19. *Id.* at 1021 (quoting *Romans* 1:24-25). All Bible quotations in this Commentary are from the Revised Standard Version (1952), as are the quotes in Professor Eskridge's article. *Id.* at 1021 n.58.

20. *Romans* 1:24-25.

21. So St. Paul goes on to say:

> For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error.

Romans 1:26-27. That is, because of man's worshiping himself rather than God, God withdrew his assistance to human beings in leading a good life and left them to their own resources, whereupon they fell into sins such as homosexual acts. The bodily sins flow from the worst sin, [self-]idolatry.

22. Eskridge, *supra* note 1, at 1028.

23. St. Paul's positive vision is even clearer in Ephesians, 5:25-33:

> Husbands, love your wives, as Christ loved the church and gave himself up for her, that he might sanctify her, having cleansed her by the washing of water with the word, that he might be holy and without blemish. Even so husbands should love their wives as their own bodies. He who loves his wife loves himself. For no man ever hates his own flesh, but nourishes and cherishes it, as Christ does the church, because we are members of his body. "For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh." This mystery is a profound one, and I am saying that it refers to Christ and the church; however, let each one of you love his wife as himself, and let the wife see that she respects her husband.

Paul's reference to the two beoming one flesh is not just a vague metaphor, but includes the very physical union of the two—and he uses this union as an image of the relationship between Christ and the church. Nothing could be farther from a notion of sex as "polluting."

community fears of contagion and their cure through purity rituals."[24] He argues, "Human beings derive emotional as well as intellectual security from familiar patterns" and so "disgust is a reaction to phenomena and practices that do not fit labels or that cross lines."[25] Disgust serves the role of boundary maintenance, including the boundaries between human beings and animals, social boundaries and institutional lines. Eskridge then invokes William Miller's work on disgust to argue that our individual and community identities are to some extent created or molded by our disgust, which helps "'define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.'"[26]

But what is the order of causality here? Do feelings of disgust create the patterns, or do feelings of disgust reinforce patterns that accord with reasonable norms? (Note too that the "reason" of those norms can be greater than the reason of an individual—that is, it can be the reason that is the accumulated wisdom of much reflection over time.) Again, as with the earlier discussion of "disgust," we have to ask whether it is simply a question of groping for "emotional security." Is the "boundary maintenance" irrational, or can it be in the service of reason? Certainly, boundary maintenance can be irrational, as for example, when the boundary is that you cannot kill people of your tribe, but it is okay to kill people of other tribes. But boundary maintenance can also be rational, as when the boundary is that you can kill and eat animals, but you cannot kill and eat other human beings, or that you can have sex with human beings, but not with animals. The interesting questions are what the boundaries are and whether they are reasonable—questions that we do not find an answer to in Professor Eskridge's article and, worse, questions to which Professor Eskridge does not even allude.

F. *Disgust and Shame?*

Professor Eskridge goes on to say that in the case of religious fundamentalists, "[d]isgust also served a positive project: the valorization of marriage and the family."[27] That is, marriage and family give value to disgusting sexual activities by channeling them toward family. "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."[28] Professor

24. *Id.* at 1025 (discussing MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO (1966)).

25. *Id.* at 1025-26.

26. *Id.* at 1027 (quoting WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 250-51 (1997)).

27. *Id.* at 1028.

28. *Id.* I confess that I wonder if Professor Eskridge and I are living in the same country. Both my general impression of the way things are and academic studies like THE SOCIAL ORGANIZATION OF

Eskridge continues: "But with our lovers and spouses, 'we understand the disgusting behavior or substance to be a privilege of intimacy. . . .'"[29] Why does Eskridge assume that for traditionalists, the "default position," so to speak, is that sex is disgusting and that this default position is supplanted or overcome in the case of marital sex? Their actual position is that in its appropriate context–namely, marriage–sex is a wonderful and delightful thing, and that this wonderful good becomes wrong or even morally "disgusting" only when it is taken outside that appropriate context and perverted. Is that not a more plausible understanding than the idea that "disgusting behavior" is a "privilege" of intimacy?

Part of the problem is that here we find another failure by Eskridge to recognize certain distinctions or nuances. Besides the phenomenon of "disgust," there is another, distinct phenomenon of "shame." (Note that I am not using the word "shame" here with the connotations it has when it is a part of the word "ashamed.") Disgust implies a revulsion—one is repelled by some object or activity. Shame, in one of its meanings, implies not so much revulsion, but rather a feeling of embarrassment due to the public revelation of something that should be private. Married people who think that their sexual activity is wonderful do not engage in such activity in front of their children or in a public park. The "shame" that prevents us from publicly revealing what is most intimate, including our naked bodies, is not premised on an understanding that what is private is bad or disgusting. Unfortunately, this distinction is absent in Professor Eskridge's article.

Professor Eskridge argues that "Americans were anti-gay before 1977, and they favored families too" but "[w]hat 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."[30] But even this overstates the novelty of the movement to oppose gay rights. The only thing really new in the mid-70s was the emergence of a homosexual rights movement.[31] There had never been any need to oppose the legitimization

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SEXUALITY (Edward O. Laumann et al. eds., 1994) suggest that we are a nation that is remarkably un-"hung-up" on most sexual practices. Interestingly—contrary to what one would think from Professor Eskridge's account—those who seem to enjoy sex the most are conservative Protestant women. "The University of Chicago study on sex found that evangelical women reported the highest levels of satisfaction with their sexual lives." Online Interview with W. Bradford Wilcox, author of SOFT PATRIARCHS, NEW MEN: HOW CHRISTIANITY SHAPES FATHERS AND HUSBANDS (2005), http://ctlibrary.com/12157.

29. Eskridge, *supra* note 1, at 1028.

30. *Id.* at 1029.

31. The emergence of the public gay rights movement is usually dated to the Stonewall Riots in New York City, in June, 1969: "The forces that were simmering before the riots were now no longer beneath the surface. The community created by the homophile organizations of the previous two decades had created the perfect environment for the creation of the Gay Liberation Movement.

of homosexual activity earlier in American history, because there had never been efforts to legitimize it. The new movement to legitimize homosexual activity forced the people opposed to it to articulate reasons that had never needed to be articulated before. Those reasons were not so much (1) that homosexual acts were "disgusting," as that they were contrary to individual well-being and the common good (for moral and other reasons), or (2) that they were "contagious," but rather that public toleration of them undermined important social supports for traditional morality and a strong family institution.

III. THE CONSTITUTION OF ANTI-HOMOSEXUAL DISGUST AND CONTAGION

Professor Eskridge goes on to describe Save Our Children's "constitutional theory," which looks something like the following: (1) the norm for ultimate authority is popular sovereignty (based on the moral values of a religious citizenry), minimizing the role of elite officials and lawyers (who tend to be strongly secular); (2) "an important role of law is to instantiate moral values"; and (3) "parents and children have civil rights that are more fundamental than the superficial rights claimed by feminists, abortionists, and homosexuals."[32] Eskridge calls this the "Constitution of Anti-Homosexual Disgust and Contagion."[33] He argues that, while the "Burger Court never explicitly adopted this sectarian reading of the Constitution," it "reject[ed] or duck[ed], and never accept[ed], the constitutional claims brought . . . by homosexuals" against it.[34] Some of the nation's "leading Republican jurists–Warren Burger, William Rehnquist, and Robert Bork–explicitly endorsed such a Constitution."[35] There are numerous problems with this portrayal. Most importantly, if the three principles are divested of their distorting formulations, they do not constitute a merely "sectarian reading of the Constitution,"[36] but rather a simply accurate reading of it.

Let us begin by restating the three principles more fairly. First, the Constitution is a document that ultimately does rest on popular sovereignty. It also is true that most Americans consider our civil community to be "imbued with moral values."[37] And it also is true that

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By the end of July the Gay Liberation Front (GLF) was formed in New York and by the end of the year the GLF could be seen in cities and universities around the country." Wikipedia, Stonewall Riots, http://en.wikipedia.org/wiki/Stonewall_riots.

32. *See* Eskridge, *supra* note 1, at 1029-30.
33. *Id.* at 1030.
34. *Id.*
35. *Id.* at 1030-31.
36. *See supra* text accompanying note 34.
37. Eskridge, *supra* note 1, at 1029.

ordinary Americans tend to be more religious than elites.[38] The Constitution's foundation in popular sovereignty is compatible with limits on popular power, of course, and so judicial review to enforce the Constitution is fully compatible with popular sovereignty. But a form of judicial review that accords judges a relatively unconstrained power to identify and enforce "our" fundamental values as a nation is not very compatible with popular sovereignty.[39] None of this requires a sectarian reading of the Constitution, but only a fair reading of the Constitution and the Founders.

Second, it is true that an important role of law is to instantiate moral values, though not, as Eskridge says, "by legislating against disgusting activities and by protecting vulnerable citizens against moral pollution as well as predation."[40] The law's focus has little to do with disgust and more to do with the common good, and it is less concerned with pollution and predation than it is with a social ecology protecting the conditions of individual and social well-being.

In the United States, that dimension of law is not primarily a concern of the Constitution, but a concern of the states, to which the Constitution leaves the traditional police powers, which extend to the protection of public health, safety, welfare, and morals.[41] Nor is it the case that law is the main source of moral values in society—it is subsidiary.[42] Nonetheless, the law does contribute in important ways to supporting important principles of public morality.[43]

Perhaps the best example in our own time of the profound importance of law in shaping morality is the Civil Rights Act of 1964.[44] It is true that the Civil Rights Act had important practical purposes (such as prohibiting acts of discrimination in public accommodations), and that it dealt with actions that directly harmed others. But it would be a blinkered view indeed that did not recognize as well the important *moral educative* effect

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38. *See, e.g.*, ROBERT LERNER ET AL., AMERICAN ELITES (1996).

39. For such a conception of judicial review see, for example, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1-33 (1962). One cannot say that such a form of judicial review is completely incompatible with popular sovereignty, since it is possible to maintain some form of ultimate popular control (e.g., in the form of power to amend the Constitution to overrule unpopular judicial decisions). But that is similar to claiming that a ten-year term for a popularly elected monarch is compatible with notions of popular sovereignty. Neither approach would be compatible with popular sovereignty as the Founders understood it.

40. Eskridge, *supra* note 1, at 1030.

41. *See* ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES 95-99 (2001).

42. *Id.* at 94.

43. For insightful discussions of this topic, see HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 88-135, 175-209 (1969), and HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY 76-86 (1996) [hereinafter CLOR, PUBLIC MORALITY].

44. Civil Rights Act of 1964, 42 U.S.C. § 2000 (2000).

that the law had, by articulating the nation's opposition to certain acts based on racism.[45]

The third of Eskridge's principles is the most unfairly described. He says that "parents and children have civil rights that are more fundamental than the superficial rights claimed by feminists, abortionists, and homosexuals."[46] This understates the case in one way and overstates it in another. It understates the case because the "rights" claimed by feminists, abortionists, and homosexuals are not merely superficial—they are outright specious. There is *no* constitutional right to kill unborn children or to engage in homosexual acts. So it is not a question of one group's rights outweighing another's. There is no weighing to be done in these cases. It would be somewhat like saying that the right of people to their property "is more fundamental than" the more "superficial" rights of burglars to take it.

But it also overstates the case, in a way, because it is ambiguous about which rights are superficial and less fundamental. If Eskridge means that the specific "rights" to have an abortion or engage in homosexual acts are outweighed by others, then these ersatz rights should indeed give way to the rights of parents and children. But the ambiguity may suggest that somehow feminists, abortionists, and homosexuals *in general* have no rights, or fewer rights, or only rights that are outweighed by others' rights. But the right to life of the feminist or the abortionist is not inferior to the right to life of the unborn child, and the right to due process of feminists and abortionists is neither superior to nor inferior to the same right of parents and children—it is the same for all.

Put another way, the fundamental political principles of our nation—fully embraced by those who oppose the legitimization of homosexual activity—is that every human person has fundamental rights that must be respected, a right to equal concern and respect. This is fully compatible, however, with prohibiting certain acts that are contrary to morality and the common good. I think, for example, that every murderer has a right to equal concern and respect—but I think one way of showing that equal concern and respect is to punish him, which helps to educate him (and others) about the moral wrong of his act, and which also involves him in a certain restoration of the order of justice.

Thus, there is nothing in this Constitution—which is also the actual Constitution itself, not just some sectarian reading of it—that is "anti-homosexual" or that is based on feelings of "disgust" or fear of "contagion." It upholds the power of the people to prohibit homosexual

45. *See id.*

46. Eskridge, *supra* note 1, at 1030.

acts, just as it upholds the power of the people to prohibit larceny or racial discrimination or drug use.

Therefore, the cases Eskridge describes in Part IV, *Doe v. Commonwealth's Attorney for Richmond*,[47] *Dronenburg v. Zech*,[48] *Bowers v. Hardwick*,[49] *Rowland v. Mad River Local School District*,[50] *Miller v. California*,[51] *Ratchford v. Gay Lib*,[52] *Board of Education of Oklahoma City v. National Gay Task Force*,[53] do not at all represent the Court's endorsement of an anti-homosexual Constitution. They simply are good examples of the Court giving a fair reading of the Constitution, despite pleas from homosexual activists to read into it various invented rights.[54]

IV. THE REHNQUIST COURT AND THE CAHDC

Professor Eskridge says that the Rehnquist Court "turned to the First Amendment to undermine pro-gay laws that traditionalists could not defeat in the political process."[55] Its decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[56] recognizing the right of the organizers of a Boston St. Patrick's Day Parade to exclude a homosexual group that wished to participate, "represented an important expansion of the First Amendment to create a new right consistent with the Constitution of Anti-Homosexual Disgust and Contagion," thereby leading scholars to "bemoan[ ] what seemed like an aggressive anti-gay judicial activism."[57] (Notice the fudging that occurs with the use of the word "consistent.") There is nothing in Professor Eskridge's description of the case that lets on that this "activist" decision was unanimous, joined by the liberal members of the Court as well as the conservatives, and represented a long-established trend of reading of the First Amendment broadly.[58]

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47. 425 U.S. 901 (1976).
48. 741 F.2d 1388 (D.C. Cir. 1984).
49. 478 U.S. 186 (1986).
50. 730 F.2d 444 (6th Cir. 1984).
51. 413 U.S. 15 (1973).
52. 434 U.S. 1080 (1978).
53. 470 U.S. 903 (1985).
54. One point on which I share some agreement with Professor Eskridge, though on different grounds, is the inadequacy of the Court's argument in *Bowers v. Hardwick*, which ignored the fact that traditional prohibitions of sodomy applied to heterosexuals as well as homosexuals and which simply fell back on popular sovereignty, unsupported by any showing of why the assumed moral views of the people of Georgia regarding homosexual activity met a rational basis test. *See Bowers*, 478 U.S. at 196. The decision was right, but the reasoning was inadequate.
55. Eskridge, *supra* note 1, at 1040.
56. 515 U.S. 557 (1995).
57. Eskridge, *supra* note 1, at 1040.
58. *See id.*

Professor Eskridge argues that this "zenith" of the CAHDC—which culminated in the Defense of Marriage Act in 1996[59] and the military "don't ask/don't tell" policy[60]—had "most of the hallmarks of what Bruce Ackerman deems to be transformative *constitutional moments*": "We the People have engaged in *higher lawmaking* in these circumstances: 'Interbranch Impasse -> Decisive Election -> Reformist Challenge to Conservative Branches -> Switch in Time.' The gay rights issues fit the model in every way except the timing of the election."[61] This is a truly impressive and egregious mischaracterization of the events. There was no interbranch impasse, no decisive election that broke up the impasse (the timing is off, as he notes), no reformist challenge (here, a reform supposedly "taking away" supposedly established gay rights) to a conservative branch (here, a branch that wanted to "preserve" gay rights), and no switch in time by the Court at all. If anything the "don't ask" part of the "don't ask/don't tell" directive was a small, partial advance for homosexuals in the military—it was only a setback relative to the desires of homosexual activists, not with respect to current policy. Most importantly, the Defense of Marriage Act simply represented the clear status quo, and so nothing was transformed (especially not the Constitution) in this allegedly "transformative" moment.[62] But even at this moment, as Professor Eskridge's story goes, the worm was turning. The Rehnquist Court itself would be the one to introduce a broader view of gay rights into the Constitution in *Romer v. Evans*[63] and *Lawrence v. Texas*.[64]

Eskridge describes some of the ballot materials distributed by Colorado for Family Values as based on "false stereotypes and open appeals to prejudice."[65] But he concedes that Colorado's brief was different, since it argued that the amendment had the rational intent 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

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59. Pub. L. No. 104-199, 110 Stat. 2419.

60. 28 U.S.C. § 1738C (2000).

61. Eskridge, *supra* note 1, at 1041-42 (footnote call numbers omitted) (discussing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 49-50 (1991)).

62. *See* Eskridge, *supra* note 1, at 1042.

63. 517 U.S. 620, 631 (1996) (denying the people of Colorado the right to amend their state constitution to effectively prohibit local gay rights ordinances, on the grounds, inter alia, that homosexuals' political rights were improperly curtailed by such an amendment).

64. 539 U.S. 558 (2003) (denying the people of Texas the right to enforce their moral views through laws prohibiting sodomy, by expanding the already dubious, Court-invented constitutional right of privacy to include homosexual activity).

65. Eskridge, *supra* note 1, at 1045. For a thoughtful analysis of some of the Colorado ballot materials that recognizes some of the excesses of the language, but also articulates insightfully some of the valid underlying concerns (which Professor Eskridge fails to see), see Robert F. Nagel, *Playing Defense in Colorado*, 83 FIRST THINGS 34-38 (May 1998).

homosexuality was disapproved by the state."[66] Justice Kennedy's opinion rejected this argument, saying "that Amendment 2 was inspired by 'animus' toward the excluded class [of homosexuals]."[67] Professor Eskridge characterizes this as "a remarkable holding."[68]

Likewise, in *Lawrence*, Justice Kennedy recognized in his opinion that there had long been moral condemnations of homosexual acts "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[69] But the question was whether these "profound and deep convictions" could be enforced by the State through the criminal law. Kennedy denied this, arguing that the Court's "'obligation is to define the liberty of all, not to mandate our own moral code.'"[70] Again, says Eskridge, "[t]his was a remarkable claim" because "[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."[71]

Indeed, both claims were "remarkable." They were remarkable for their complete lack of any legal foundation. What Kennedy acknowledges to be "profound and deep convictions" in *Lawrence* were treated as mere "animus" in *Romer*, for there was no ground to deny Colorado's contention in *Romer* that it intended "to send a message that homosexuality [or, more precisely, homosexual activity] was disapproved by the state."[72] To treat those profound and deep convictions as mere animus was unjustifiable and reprehensible.

And in *Lawrence*, just as judges should not allow "their own attitudes of disgust to influence their application of the law," so they should not allow their own supposedly more enlightened attitudes to influence their application of the law.[73] Their job was simply to say what the law is, and the Constitution says nothing about morality and homosexual activity, so it is a matter left to the states to determine under their police power.[74]

Eskridge's contention that "[a] Constitution that credits anti-homosexual morality is one that is not truly neutral"[75] can be understood in at least two ways. First, it could mean that such a Constitution is not neutral in the sense that judges are not acting in accord with the rule of law, but instead out of partiality toward a particular set of views. That

66. *Id.* at 1044.
67. *Id.* at 1045 (quoting *Romer*, 517 U.S. at 632, 634).
68. *Id.*
69. *Lawrence*, 539 U.S. at 571.
70. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
71. Eskridge, *supra* note 1, at 1046.
72. *Id.* at 1044. *Compare Lawrence*, 539 U.S. at 571, *with Romer*, 517 U.S. at 632, 634-35.
73. Eskridge, *supra* note 1, at 1046.
74. U.S. CONST. amend. X.
75. Eskridge, *supra* note 1, at 1046.

contention is indefensible here. In upholding the Colorado amendment, judges would only have been acting according to the law, without any need to appeal to their own moral or policy views.[76] Second, it could mean that there is an obligation for the law itself to be morally neutral on homosexual activity. But, just as the Constitution "does not enact Mr. Herbert Spencer's *Social Statics*,"[77] neither does it enact John Rawls's *A Theory of Justice*[78] or Ronald Dworkin's *Taking Rights Seriously*.[79] There is no requirement of moral neutrality in the Constitution, which left to the states the police powers to protect the safety, health, welfare, and morality of the community.[80]

V. ESKRIDGE'S CONSTITUTIONAL ARGUMENT

In the last part of his article, Professor Eskridge finally offers us an argument. It is not a good argument, but at least it goes beyond the rhetoric and caricaturing of the first parts. The argument is that conservatives (and others) should abandon the CAHDC because (1) it is contrary to the libertarian character of the Constitution; (2) it is inconsistent with the stable pluralist system created by the Constitution; and (3) it is inconsistent with the original purposes of the Fourteenth Amendment.[81] At the same time, rejecting the CAHDC does not require the adoption of a Homosexual Agenda Constitution.[82]

A. *The Constitution is Libertarian*

Eskridge appeals to the Declaration's "pursuit of Happiness" and argues that the Constitution established a national government "whose federalist and separated-powers structure would assure citizens of breathing room to enjoy their traditional liberties."[83] But a "body politics that assails a group of citizens as disgusting and contagious tends to create sprawling regulatory schemes and apparatuses."[84] For example, the "California Save Our Children's Briggs Initiative would have created a potentially terrorizing gendarmerie to police schoolteacher behavior, expression, and even pedagogy."[85] The fact of the matter is that the CAHDC—that is, the "failure" to protect homosexual rights—has been in effect for a very long

76. *See Romer*, 517 U.S. at 636.
77. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
78. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).
79. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
80. U.S. CONST. amend. X.
81. *See* Eskridge, *supra* note 1, at 1047, 1049, 1052.
82. *Id.* at 1047.
83. *Id.* at 1048.
84. *Id.*
85. *Id.*

time (since the beginning of the nation, and even in the colonial era) and this had led to no sprawling regulatory scheme (no "Department for the Discovery and Rooting Out of Disgusting and Contagious Homosexuals"). The goal of the laws regarding sodomy has not been to provide a foundation for active efforts to discover and punish homosexual (and other) sodomites, but rather to send a message of moral disapproval.[86]

Even the Briggs Initiative would not have created a "potentially terrorizing gendarmerie,"[87] since the real enforcement of its restrictions on homosexual advocacy in the schools likely would have come from parents complaining about things said in the classroom. Again, the goal there was not an offensive to root out homosexuals, but a defensive effort to prevent homosexuals from using the public schools as a forum for advancing their views when they conflicted with those of parents.[88]

Now, a really plausible threat of "sprawling regulatory schemes and apparatuses"[89] can be found where homosexual activists have succeeded in gaining control over the levers of government and seek to use them to advance their goal of legitimizing homosexual activity. For example, the Ontario Human Rights Commission in 2000 imposed a fine of $5,000 on Scott Brockie, a printer who, as a Christian, had refused to print materials for the Gay and Lesbian Archives, a Toronto-based clearinghouse of information about homosexuals and their history.[90] The Commission's board of inquiry asserted that "it is reasonable to limit Brockie's freedom of religion in order to prevent the very real harm to members of the lesbian and gay community."[91] Similarly, Bishop Fred Henry of Calgary faces two complaints before the Alberta Human Rights Commission for his writing that, according to Catholic social teaching, the "'State must use its coercive power to proscribe or curtail them [homosexuality, adultery, prostitution and pornography] in the interests of the common good.'"[92] One of the complaints stated that "'I believe the publication of Bishop Henry's letter

86. For this view of the purpose of morals laws, see CLOR, PUBLIC MORALITY, *supra* note 43, at 76-86.

87. *See* Eskridge, *supra* note 1, at 1048.

88. For a contemporary re-run of this debate, see Robert B. Bluey, *Same-Sex Marriage Debate Moves into Schools*, CNSNEWS.COM, Feb. 9, 2004, http://www.cnsnews.com/Culture/Archive/ 200402/CUL20040209a.html.

89. *See* Eskridge, *supra* note 1, at 1048.

90. *See* Art Moore, *Freedom of Conscience Debated in Ontario*, WORLDNET DAILY, Dec. 17, 2001, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=25673.

91. *Id.*

92. Religious Tolerance.org, Same-Sex Marriages in Canada, Complaints Before Alberta Human Rights Commission Concerning Bishop Henry's Pastoral Letter, http://www.religioustolerance.org/hom_marb45.htm (last visited Sept. 21, 2005) (quoting Bishop Henry's letter).

is likely to expose homosexuals to hatred or contempt,'"[93] which would be a violation of the Alberta Human Rights, Citizenship and Multiculturalism Act.[94] Efforts to obtain state enforcement of equality are much more likely to spawn the regulatory schemes to which Professor Eskridge refers than traditional morals laws (which were rarely enforced, and usually only in "notorious" cases[95]).

Professor Eskridge goes on to argue that an even deeper reason for libertarian conservatives to reject the CAHDC is that a "politics of disgust and contagion tends to demonize the minority as subhuman, not just mischievous" and "[t]here is no more antilibertarian role that the state can play than to be a forum or even conduit for this kind of discourse."[96] He offers as evidence comments by Anita Bryant that, he says, invited "her audience to treat gays as animals, as refuse, as stuff to be disposed of. Her body politics turned homosexuals into non-people."[97] But even granting for the moment that Bryant's comments were so extreme (which is not clear), why does this determine the issue? Other leaders in the movement to prevent legitimization of homosexual activity would certainly reject any attribution of such opinions to them. Nothing in what Professor Eskridge cites from Robert Bork, for example, suggests that homosexuals are subhuman.[98] Many of the people who have worked to oppose legitimization of homosexuality (some of them former homosexuals) have dedicated much of their lives to work in support groups and ministries for homosexuals.[99] Their work may be right or wrong, but to say that they consider homosexuals subhuman is absurd.

The case against legitimizing homosexual activity is not a politics of disgust and contagion. It is a politics concerned with maintaining social norms that are considered to be essential for the preservation of a stable family as the foundation for society (as well as for the well-being of individuals). Its advocates may or may not be correct about whether those norms are essential, but nothing in their position entails a demonizing of homosexuals.

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93. *Id.* (quoting a complaint letter by Carol Johnson).

94. R.S.A., ch. H-14 (2000), *available at* http://www.canlii.org/ab/laws/sta/h-14/20050801/whole.html.

95. The Court acknowledges the real purpose of the law obliquely in *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) ("Texas's *invocation of moral disapproval as a legitimate state interest* proves nothing more than Texas's desire to criminalize homosexual sodomy." (emphasis added)).

96. Eskridge, *supra* note 1, at 1048-49.

97. *Id.*

98. *See* Eskridge, *supra* note 1, at 1031-35.

99. For examples of these groups, see JOHN F. HARVEY, THE TRUTH ABOUT HOMOSEXUALITY: THE CRY OF THE FAITHFUL ch. 2 (Ignatius Press 1996) (discussing the group, Courage); Exodus International, http://www.exodus-international.org; The National Association for Research and Therapy of Homosexuality, http://www.narth.org.

In contemporary public discussion, it is more likely that opponents of homosexual rights will be demonized. Moreover, there is reason to believe that this often is part of a quite conscious policy. Michael Medved has drawn attention to an article by the gay strategists Marshall K. Kirk and Erastes Pill (members of the National Gay Task Force), in which they argue:

> At a latter stage of the media campaign for gay rights it will be time to get tough with remaining opponents. To be blunt, they must be vilified. . . . Our goal here is twofold. First, we seek to replace the mainstream pride about its homophobia with shame and guilt. Second, the public must be shown images of ranting homophobes whose secondary traits and beliefs disgust middle America.[100]

(Kirk and Pill then go on to give a series of examples about how this might be done.)

Interestingly, Professor Eskridge offers something close to a defense of "demonizing" traditionalists in his response to the contention that his opponents claim to be defending rights of parents and children:

> 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 (e.g., *Lawrence v. Texas*). 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.[101]

So the traditionalists have words put in their mouths that many of them would reject (i.e., words demonizing homosexuals), and then they are told that, because they are so extreme in their supposed demonization of homosexuals, it is not so bad for others to demonize them.

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100. Michael Medved, *Homosexuality and the Entertainment Media, in* SAME-SEX MATTERS: THE CHALLENGE OF HOMOSEXUALITY 9, 163-65 (Christopher Wolfe ed., 2000) (quoting Marshall K. Kirk & Erastes Pill, *Waging Peace: A Gay Battle Plan to Persuade Straight America,* CHRISTOPHER STREET, Dec. 1984, at 38).

101. Eskridge, *supra* note 1, at 1049.

B. *The CAHDC is Inconsistent with America's Democratic Pluralism*

Professor Eskridge uses a certain understanding of the Religion Clauses to inform his understanding of the Constitution as a whole.[102] Pluralist political systems seek to accommodate as many interests as possible, avoiding alienation that can be the source of turmoil or even civil war. Democracy becomes fragile when the stakes are too high. Religion is an example of an area in which the founders sought to lower the stakes of politics by prohibiting discrimination based on religion and attempts to impose religious orthodoxy, which are "affront[s] to the deeply held, primordial identities of many."[103] They "instantiated a jurisprudence of tolerance as regards religion," which prevented state Kulturkampfs and lowered the stake "of religion-based body politics more generally."[104] (Eskridge forces religion into the mold of his body politics model by arguing that "[o]pposing parties in religion-based culture wars typically not only had *contempt* for one another's views, but considered opponents *disgusting* and their theologies a *contagion*," giving anti-Catholicism and anti-Semitism as examples.)[105] "[M]ajorities learned to live with minorities" and minorities thus felt more secure.[106]

There is some considerable truth in this description of democratic pluralism,[107] but it overlooks some important questions. The outside limits of pluralism need to be defined and defended. So, for example, it could be argued that Lincoln violated the norms of democratic pluralism when he raised the stakes of politics by insisting that the United States live up to the principles of the Declaration of Independence, according to which slavery was fundamentally unjust and eventually had to be eliminated. While willing to accommodate his opponents in many ways (e.g., recognizing that the national government had no power to intervene directly in states to

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102. In this regard, his work is similar to that of DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

103. Eskridge, *supra* note 1, at 1050.

104. *Id.* at 1051.

105. *Id.* at 1050.

106. *Id.* at 1051.

107. There is less truth in the analysis of the religion clauses. *See id.* at 1050-52. The key to understanding its original intent was the fact that it received support from Representatives and Senators representing a wide range of views on religion and politics. The best understanding of the religion clauses is therefore much narrower than Professor Eskridge's (and Richards's) views: it was an allocation of power, leaving religious subjects to states, and prohibiting the federal government to establish a national religion or interfere with state legislation on the subject. *See generally* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987) (explaining that the First Amendment's history demonstrates that it was a compromise agreed to by those representing a wide range of views on Church-State relations). It does not represent any one view on broader questions about the relation of religion and politics. *See id.* at 111-18.

prohibit slavery), Lincoln was not willing to say that the nation should, in principle, endure half-slave and half-free.[108] In that case, he thought, for a majority (the Northern opponents of slavery) to "learn[]to live with" a minority (the Southern proponents of slavery), and for the minority to feel more secure (in the permanence of slavery), would not be desirable.[109] So he was willing to risk stability for a fundamental principle.

The question is whether there is some core of sexual morality that is essential to the well-being of the nation, especially because of its relation to the preservation of a stable family unit, and therefore so fundamental as to be worth defending. Because Professor Eskridge never gets beyond caricaturing his opponents–reducing them all to the disgust and contagion mold–he never addresses this question.

Professor Eskridge notes in his discussion of high-stakes politics that

> [g]roups 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.[110]

That is certainly true, but it is worth noting that it can cut both ways. It may apply to homosexuals (as Professor Eskridge presumably intends), but it also applies to their opponents. In particular, traditionalists in the United States might reasonably ask whether the contemporary U.S. political process is "stacked against them."[111] Most notably, they might point out the way in which modern privacy doctrine and strict separationist views of Church and State have enabled judges to act on (minority) intellectual elite views to trump popular views on important moral issues (such as abortion and homosexuality).[112]

C. *The CAHDC is Inconsistent with the Original Intention of the Fourteenth Amendment*

Professor Eskridge then constructs his own vision of the "original" intention of the Fourteenth Amendment (i.e., the original principles, as applied to modern circumstances). He provides an elaborate analysis concluding that the three principles undergirding Reconstruction were

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108. Abraham Lincoln, Republican Candidate for U.S. Senator, Speech at Springfield para. 2 (June 17, 1858), *available at* http://www.bartleby.com/251/.

109. *Cf.* Eskridge, *supra* note 1, at 1051.

110. *Id.* at 1050.

111. *See id.*

112. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003).

liberty, legality, and equality, and that these "three principles constitute a constitutional understanding of the rule of law as neutral, inclusive, and libertarian."[113] This version of "original intention" follows the typical path of modern constitutional scholarship: elevate the Constitution's principles to a very high level of generality, and then leave it to judges to evaluate what result these general principles dictate in a given case.[114] This is simply a prescription for judicial oligarchy. Of course the Constitution values liberty, legality, and equality—we all do, as we understand them, and we all recognize certain limits on them as well. Many of the central, and difficult, questions of politics involve precisely the determination of the appropriate limits of principles like liberty and equality. To permit judges to resolve important political issues (overriding popularly elected representatives) on the basis of such vague generalities is profoundly contrary to liberal democratic principles.

Eskridge applies his general principles to the question of anti-sodomy laws. As applied in 1868, Eskridge argues, anti-sodomy laws were not inconsistent with these principles, because the laws were applied only to "unconsented sexual activities or, later on, public activities," and therefore did not violate the libertarian presumption or create an outlaw class of good citizens.[115] Subsequently, there were prosecutions and exclusions based on private consensual activities, but as late as 1950, they were defensible because "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."[116]

By 1977, however, social and legal circumstances had changed: The medical profession had repudiated its prior understanding of homosexuality as a mental illness, myths of homosexuals as child molesters and traitors were discredited, and peaceful, productive lesbian and gay subcultures flourished.[117] Under these new circumstances, "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."[118] *Romer* and *Lawrence* correctly saw that the "state cannot create a pariah class of useful, productive citizens and deny them

113. Eskridge, *supra* note 1, at 1052.
114. *See* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW pt.3 (1986).
115. Eskridge, *supra* note 1, at 1055.
116. *Id.*
117. *Id.*
118. *Id.*

a broad range of legal rights and protections, simply because their presumed private activities are disgusting to other citizens."[119]

This analysis is indefensible. First, the anti-sodomy laws of the nineteenth century most definitely violated the libertarian presumption (by prohibiting sodomy) and created an outlaw class (sodomites). The fact that most prosecutions involved nonconsensual or public activities has nothing to do with the legal principles and everything to do with certain basic facts. As Justice Scalia argued in his dissent to *Lawrence*:

> If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a "fundamental right," even though all other consensual sodomy was criminalized.[120]

Moreover, Scalia goes on:

> There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880-1995. . . . There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. . . . *Bowers'* conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.[121]

Second, Eskridge in effect recognizes the truth of what Scalia says by pointing out that prosecutions for private activities were defensible because of the generally accepted views of the times regarding homosexuals. That is, Eskridge appears to argue that because everyone thought homosexuals were disgusting and contagious, it was alright to persecute them. But what if someone in 1950 could have shown that homosexuals were not a social menace (in any immediate or acute sense), and that they were not child molesters or traitors? Would sodomy laws have been repeated? Not necessarily. Those were not the only reasons for laws against private

119. *Id.* at 1056.

120. Lawrence v. Texas, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

121. *Id.* (citing WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 375 (1999); J. Katz, Gay/Lesbian Almanac 29, 58, 663 (1983)).

consensual sodomy, as Eskridge's caricature suggests. Even if sodomites were not social menaces or child molesters or traitors, there still would have been sound reasons for maintaining anti-sodomy laws: namely, the immorality of sodomy and its perversion of a fundamental impulse (the sexual impulse) that is at the foundation of social life—the family.

Another reason given by Eskridge for the defensibility of anti-sodomy laws in 1950 is no less applicable today: that homosexuality is a mental illness.[122] Eskridge attempts to refute this by pointing out that the medical profession has repudiated that view.[123] But if Eskridge and others say that the medical profession was wrong about homosexuality in 1950, is there any reason their opponents cannot say that the medical profession is wrong about it today? Anybody who is familiar with the internal politics of professional organizations, and especially anybody familiar with the details of the American Psychiatric Association's decision to exclude homosexuality from its Diagnostic and Statistical Manual (DSM-III) in 1973,[124] has ample reason to conclude that the decision was not a medical decision, but an ideological one.

The situation is complicated by the fact that psychiatry and psychology are deeply shaped by normative assumptions about human nature and the human good that really are borrowed from moral philosophy—and a training in psychiatry is no guarantee of expertise in moral philosophy.[125] The changing attitudes of many contemporary practitioners in those fields simply reflect the increasing spread in our culture—perhaps especially in its intellectual elites—of various forms of moral relativism (at least with respect to "self-regarding" action, or "victimless crimes").[126]

Today, as much as in 1950, there are sound reasons to justify anti-sodomy laws, apart from any purported desire simply "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."[127] Such laws send a message of moral disapproval of homosexual activity, and thereby help to sustain social norms that connect sex with the complementary union of male and female, above all in the privileged context of marriage, the foundation of family life.

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122. *See supra* text accompanying notes 116-17.

123. Eskridge, *supra* note 1, at 1055.

124. *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 179-89 (1987).

125. *See, e.g.*, Cormac Burke, *Does Homosexuality Nullify a Marriage? Canon Law and Recent Developments in Psychology and Psychiatry in* SAME-SEX ATTRACTION 33, 34-42 (John F. Harvey & Gerald V. Bradley eds., 2003).

126. On the commitment of intellectuals to "expressive individualism," see ROBERT LERNER ET AL., AMERICAN ELITES 85-99 (1996).

127. Eskridge, *supra* note 1, at 1055.

VI. MORALS, LAWS, AND THE CONSTITUTION

The last part of Professor Eskridge's paper maps out a strategy for dealing with various morals laws. The most objectionable laws involve conduct that is no longer widely criminalized, does not seem to impose harm on third parties, and is important to a coherent and well-organized social group. The least objectionable laws involve conduct that is still a crime in a large majority of states, demonstrably harms third parties, and has not become the focus of a social movement. Other issues fall on the spectrum somewhere in between those extremes.

There is little "law" in this analysis, however. It simply is Professor Eskridge's policy preferences tailored somewhat to political realities. That this is an argument of convenience appears if we ask how Professor Eskridge would have thought about anti-sodomy laws when they were still widely criminalized and were not the focus of a social movement. I have little doubt that he still would have found a way to justify opposition to those laws.

In applying these norms, Professor Eskridge does a bit of a balancing act on same-sex marriage. He suggests that the Supreme Court has sufficient grounds to "engage in at least a moderately active judicial review," but he also suggests that they could do nothing for the time being, and, in fact, he actually opts for leaving it to the states for now.[128] It is hard to think that this reflects anything other than his policy judgment—based on recent events in American politics—that same-sex marriage still is a bit premature politically, and that it is better to lie low for a while longer in order not to arouse opposition further. (This probably is a prudent strategy for those who share his goals.)

In the meantime, legal challenges to other laws treating homosexuals differently can and should be challenged. For example, the Florida law against adoption by homosexuals passed in the wake of the Save Our Children campaign is constitutionally defective.[129] Florida defended the law in court on the grounds that it advanced the state's "interest in promoting adoption by marital families," because "husband-wife households [are] the best situses for rearing children."[130] But Eskridge argues that it is both underinclusive (since unmarried heterosexuals may adopt, and "the state rule allows heterosexual child molesters, wife-beaters, and drug addicts to adopt children") and overinclusive (since many homosexuals are among the best situses for childrearing).[131]

128. *Id.* at 1058.
129. *Id.* at 1058-61.
130. *Id.* at 1058-59.
131. *Id.* at 1059.

Florida's law is perfectly justifiable, however. Most laws are overinclusive and underinclusive, as in the obvious case of allowing people to vote at age eighteen (since some people under eighteen have the capacity to vote well, and some over eighteen do not). It is the nature of law to lay down general rules that hold for the most part. There is strong social science evidence for the superiority of husband-wife households in the raising of children that justifies Florida's law.[132] Unmarried heterosexuals are different from homosexuals in a crucial respect: They are at least *potentially* part of a husband-wife marital household. (The argument that "the state rule allows heterosexual child molesters, wife-beaters, and drug addicts to adopt children"[133] is ludicrous—you could just as well say that laws allowing people to vote at eighteen permit serial murderers to vote.) If it is true that some homosexuals are dedicated parents, it remains true as well that even the best homosexual parents cannot provide heterosexual role modeling—that in fact, they provide a kind of counter-role-model of homosexual identity—and this argument provides a rational ground for Florida's legal distinction.

Professor Eskridge concludes with an argument that today's opposition to legitimizing homosexual activity is simply "a kinder, gentler body politics."[134] Past statements that homosexuals are disgusting beasts are still with us in depictions of homosexuals as diseased; the charge that homosexuals are child molesters is replaced by the charge that they threaten the family; "[d]isgust and contagion are still the hallmarks of anti-gay discourse."[135]

What Professor Eskridge tries to do here is undermine and defame serious arguments currently used by opponents of legitimizing homosexual activity by tying them to other, less palatable arguments that their most thoughtful representatives would reject. To say that homosexuality is a psychological pathology is not to say that homosexuals are "disgusting beasts." To say that legitimizing homosexual activity involves adoption of social norms that undermine the stability of the family is not to say that homosexuals are "child molesters." It is much easier (rhetorically) to try to discredit arguments by associating them with other bad arguments than it is to confront them directly.

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132. On the superiority of married parents, see SARA MCLANAHAN & GARY D. SANDEFUR, GROWING UP WITH A SINGLE PARENT (1994). On homosexual parenting, and the methodological limitations of studies to date on that subject, see A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & FAM. STUD. 213 (2004). To the extent that the issue is a controversial one, that is only more reason for leaving it to legislatures, rather than to judges, to resolve.

133. Eskridge, *supra* note 1, at 1059.

134. *Id.* at 1062.

135. *Id.*

I have referred a number of times to more serious arguments that Professor Eskridge might have confronted. In my last section I want to give a brief description of what I think these serious arguments are.[136]

VII. A DIFFERENT APPROACH: RE-SITUATING THE ISSUE

I would situate the homosexuality issue differently, in the context of dramatic changes in our society over the last forty years that bear upon the very nature of marriage. These changes have paved the way for the even more dramatic changes implicit in the adoption of homosexual marriage.

The widespread adoption of different versions of no-fault divorce by most states after 1970 was a profound change.[137] The traditional strong presumption of the relative permanence of marriage, except for certain defined reasons, gave way to a situation in which one of the partners, for whatever reason, could unilaterally end the marriage. This change assumed, I think, a new view of marriage, which involved a shift from regarding it as a truly fundamental social institution to regarding it primarily as a personal union, in which there was a very limited social interest. Marriage was virtually redefined as a private contract terminable at the will of either party.

This shift occurred in conjunction with other changes, particularly the widespread availability of contraception, which made possible a radical change in social attitudes toward sexuality.[138] Traditionally, sexual intercourse always carried with it the possibility of conceiving a child, and social norms generally dictated that a man would marry the woman with whom he had conceived a child. With contraception, sex could be, and was, separated from marriage as an autonomous activity independent of childbearing, engaged in for pleasure and personal intimacy, and often engaged in without regard to marriage (present or potential). Elite intellectuals and those who took their ideology as a reference point (including especially the media elite) generally welcomed these changes as opportunities for sexual liberation.[139] These attitudes spread swiftly in

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136. The remainder of this Commentary draws on my forthcoming article, *Defending the Federal Marriage Amendment*. *See* Christopher Wolfe, *Defending the Federal Marriage Amendment*, 42 SAN DIEGO L. REV. (forthcoming 2005).

137. On the impact of no-fault divorce, see HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988).

138. On the relation between contraception and sexual liberation, see Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2272-73 (2001).

139. On the ideology of "expressive individualism" among media elites, see Robert Lerner & Althea K. Nagai, *Family Values and Media Reality*, *in* THE FAMILY, CIVIL SOCIETY, AND THE STATE 173 (Christopher Wolfe ed., 1998). On elite values more generally, see ROBERT LERNER ET AL., AMERICAN ELITES (1996). Elites, of course were not the only ones to welcome sexual liberation,

society, and they were manifested in earlier ages of first sexual experience, more sexual activity outside of a marriage context, widespread cohabitation, and lower birth rates.[140] For reasons that were not entirely accidental, they also were accompanied by growth in pornography and abortion.[141]

With these developments, homosexuality emerged as a new theme of sexual liberation. If heterosexuals could engage in sexual activity for pleasure and personal intimacy, apart from children and marriage, why not homosexuals as well? This sort of logic was implicit in judicial opinions such as the *Bowers v. Hardwick*[142] dissents, especially Justice Stevens's dissent, in which he pointed out that the majority's treatment of the case as one of homosexual sodomy did not square with the actual law in the case—a law that prohibited sodomy (oral or anal sex) whether it was heterosexual (by married or unmarried persons) or homosexual.[143] The assumption behind this observation seemed to be that, since the statute would probably not survive a challenge by heterosexuals (certainly married ones, and probably unmarried ones), its application to homosexuals was dubious as well.[144]

Public opinion generally has moved in the direction of supporting the elimination of legal prohibitions on homosexual activity per se, but that movement has stopped short of legitimizing gay marriage. Americans continue to regard monogamous heterosexual marriage as the normative ideal, and they are unwilling to extend the mantle of marriage to homosexual relationships. The question is whether that attachment to monogamous, heterosexual marriage is simply the retention of an ancient prejudice or a position grounded in some reasonable principles.

VIII. GROUNDS FOR TRADITIONAL MARRIAGE

The case for traditional marriage is grounded in a conviction that marriage is not simply a man-made or socially-devised and revisable institution that can be adapted or accommodated at will to changing social

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but they were more likely to support it than many others. *See id.*

140. On first age and number of partners, see EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 322-28 (1994), on cohabitation, see Lynne M. Casper et al., How Does POSSLQ Measure Up?: Historical Estimates of Cohabitation (May 1999), http://www.census.gov/population/www/documentation/twps0036/twps0036.html (last visited Oct. 11, 2005) ("Our Adjusted POSSLQ estimates indicate that the number of cohabiting households increased from 1.1 million in 1977 to 4.9 million 20 years later in 1997. Cohabiting households made up 1.5 percent of all households in 1977, increasing to 4.8 percent by 1997.").

141. *See* Gerard V. Bradley, *The End of Marriage*, *in* MARRIAGE AND THE COMMON GOOD, 99, 99-103 (Kenneth Whitehead ed., 2001).

142. 478 U.S. 186 (1986).

143. *Id.* at 214-15 (Stevens, J., dissenting).

144. *See id.*

circumstances. While it is true there are many ancillary features of marriage that are quite variable (e.g., the multifarious forms of property arrangements associated with marriage at different times and places), there is a true core of marriage that exists by nature, and is unrevisable. Marriage is fundamentally a pre-political institution, rooted in a natural union of a man and a woman that is ordered to family life and childbearing and childrearing. The political community has very important interests affected by this institution—it is a deeply integral element of the common good—and therefore has a legitimate right and duty to regulate it in certain ways, always acting with respect for its essential features. The political community's most fundamental duty regarding marriage is to help ensure the availability of marriage as a stable institution, promoting the well-being of couples and children, by providing a supportive social ecology.

The fact that marriage is natural is in no way contradicted by the fact that it is also fragile and in need of social support. It is natural that human children grow up, become adults, and develop the capacities associated with fully developed human beings. That is, this pattern is an unfolding of inherent capacities that properly allow a human being to grow and flourish. Yet this whole process very much requires various forms of social support, the absence of which will lead to a frustration of their proper development and flourishing (children not cared for typically do not develop well, or do not even survive). While human beings are naturally ordered to certain ends (that is, certain ends are natural in the sense that they constitute the full development and flourishing of a human being), they also are subject to tendencies that are somewhat at war with their natural ends. For example, one natural end of a person is to cultivate a body that is healthy, yet human beings also are subject to desires that cause them to eat too much, in ways that harm their health.

What are the core natural elements of marriage, which a political community ought to respect and promote? Marriage is the permanent union of one man and one woman, the mutually intertwined ends of which are the good of the spouses and the bearing and raising of children. The political community has a particularly intense interest in children because they are an essential prerequisite for its preservation and perpetuation. Since children benefit most from having a biological mother and father, married to each other and raising their children together, society has strong reasons to promote marriage as a way of ensuring the best interests of children. And, insofar as marriage is an ordinary means to achieving people's happiness, and it both depends on social support and is part of the common good, the political community also has an interest in ensuring that marriage is available for people. Nor are these two interests (children and mutual love) separate and independent; rather, they are deeply intertwined. The commitment of the spouses to love each other—their exclusive, permanent reciprocal self-giving—contributes powerfully to their education of their

children, and the joint project of raising their children contributes powerfully to deepening ties between the parents.

People generally take for granted that marriage will be available, but, despite the powerful forces inclining people to marry, the availability of marriage as an institution they can choose to enter cannot be taken for granted. There are powerful forces inclining human beings to accumulate property, and there is a strong natural basis for (properly qualified) property rights, but in a given society such property rights may not be available. Property is both natural and pre-political, on one hand, and also a social institution essentially dependent on various legal arrangements, on the other. Likewise, marriage is natural and pre-political, but also a social institution dependent on various legal arrangements.

One of the ways in which marriage can become unavailable to people is for the political community to offer people an institution called "marriage" that is not really marriage. By inculcating in its citizens—through social practices and laws—a notion of marriage that lacks some of its essential ingredients, a political society could effectively make "real marriage" impossible for most of its citizens. One way to do this is to make "marriage" a contract that is temporary and terminable at the will of either party. Whatever the impact of the allowance of divorce in a certain limited number of cases has been, the shift to no-fault divorce[145] has profoundly changed the very notion of marriage among Americans, and has damaged it deeply.

How does this change in law affect marriages? How easily people could say in 1970, "if I want to get divorced, that's my business—I'm not making anyone else [except my former spouse] do it. If others want to stay married, let them." The problem is that such an attitude ignores the subtle interplay of personal choice and social mores. So many of our conceptions are shaped by our sense of what is "normal," by the social ecology of which we are a part. No-fault divorce has created a world in which divorce is normal,[146] and it is now a part of the ordinary psychological landscape of many people. For them, marriage is a permanently tentative and revisable commitment. And so, not surprisingly, more marriages break up, and more of the children they produce grow up without a father and mother working together to carry out that profoundly exalting, and often terribly difficult, task. And people grow up believing that couples are unlikely to remain in happy, monogamous marriages for many years. Nor will they be as likely to consider what kind of parents men and women will be if they more or

145. *See supra* note 137 and accompanying text.

146. For statistics on current projected divorce rates and rates over time, see Americans for Divorce Reform, Divorce Statistics Collection, Divorce Rates, http://divorcereform.org/rates.html (last visited Oct. 11, 2005). Projections of how many couples married this year will likely be divorced in the future seem to range from 40% to 50%.

less expect to dispense with their first partners after the children are grown. Marriage as an institution may continue to evolve pragmatically, it is true, but it should give us pause that part of that evolution is developing skills that help children cope with the pain inflicted on them, in many cases, by their parents' pursuit of their own self-fulfillment.

Another way to make real marriage unavailable to people—by changing social understandings of its very nature—is to make "marriage" *essentially* separable from children. This is what happens when homosexual "marriage" is legitimized despite the fact that homosexual unions are essentially—of their very nature—incapable of procreation. (There are, of course, many instances in which a heterosexual union is incapable *in practice*, by reason of age or physical defect, of leading to procreation; but the nature of the union remains the kind of union capable of producing children.)

Homosexual marriage is one more indication from society that marriage is whatever we want it to be: a malleable human institution that we can shape, rather than a natural institution with its own internal dynamics and demands, to which we must submit. But if we go down the road of making marriage such a malleable institution, why should we be surprised if it does not fulfill the functions it is designed to fulfill?[147]

Because there are so many more heterosexuals than homosexuals, I very much agree with those who observe that the most profound damage to marriage as an institution has been wrought by heterosexuals, not homosexuals. Gay marriage is far from the most harmful aspect of contemporary marriage trends. Heterosexuals, without the help of homosexuals, have done an extraordinary job of weakening the family, through adoption of no-fault divorce (which did not reflect a social consensus, but rather legitimized and made socially dominant an elite consensus), and the growth of general promiscuity and cohabitation (ditto).[148]

It has been said that marriage has survived many social events, including the sexual revolution, and it will survive gay marriage too. I do not think marriage survived the sexual revolution. Every war has winners

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147. My argument is not, it should be clear, an argument that homosexuals are per se hostile to the general concept of marriage. Some homosexuals want to marry to express deep and enduring love for one another. At the same time (a) it remains unclear how many homosexuals really want marriage for itself, and not as a simple way of furthering social legitimization of homosexuality, and (b) it seems plausible that they want marriage only under certain conditions, which include nonpermanence and even sexual non-exclusivity; that is, as one person has said, homosexuals "want what marriage has now become," not what it once was thought to be. Bryce Christensen, *Why Homosexuals Want What Marriage Has Now Become*, FAM. AM., April 2004, *available at* http://www.profam.org/pub/fia/fia_1804.htm.

148. On the expansion of divorce as a reflection of elite views, see JACOB, *supra* note 137, at 85. On elite attitudes toward sexual liberation, see *supra* note 139.

and losers, and, as I once heard Mary Ann Glendon say, the boys won the sexual revolution (since it legitimized recreational sex and even induced many women to adopt such male attitudes, especially among elites). The most prominent victims were the children who have been deprived of the enduring husband and wife family that should ordinarily be their birthright.

If it is true that heterosexuals already have deeply damaged marriage as a social institution, that still leaves the question of whether these wounds already inflicted on marriage justify the further infliction of additional wounds, in the form of legitimizing homosexual marriage, with its much more radical separation of marriage and children. The more sensible path, I think, would be to resist further erosion of the institution, and to undertake substantial efforts to reconstruct marriage as a stable institution in our society.[149]

149. *See* AmericanValues.org, *What Next for the Marriage Movement*, INSTITUTE FOR AMERICAN VALUES, Dec. 16, 2004, http://www.americanvalues.org.