

## ***PERRY V. SCHWARZENEGGER AND THE FUTURE OF SAME-SEX MARRIAGE LAW***

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*In Perry v. Schwarzenegger, Chief Judge Vaughn Walker held that Proposition 8—an amendment to the California Constitution that prohibits same-sex couples from marrying—violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. To date, legal experts have claimed that although Judge Walker’s factual findings may be novel and significant, his legal analysis is familiar and not likely to have a significant impact on the future of same-sex marriage law. This Article argues that the common wisdom about Judge Walker’s ruling is misguided, because it overlooks novel aspects of Judge Walker’s legal analysis that have the potential to make valuable contributions to the development of same-sex marriage law, in this case and others. By building upon passages from Judge Walker’s ruling, the Article develops three new challenges to the constitutionality of laws that prohibit same-sex couples from marrying. Part I argues that the historical relationship between discrimination based on sex and discrimination based on sexual orientation can provide a basis for applying heightened scrutiny to laws against same-sex marriage under the Due Process Clause, as an alternative to the prevailing theory that calls for applying heightened scrutiny to such laws under the Equal Protection Clause. Part II argues that the Due Process and Equal Protection Clauses prohibit the state from justifying laws against same-sex marriage based on the fear that exposing children to homosexuality will encourage them to be lesbian, gay, or bisexual, because the state does not have any legitimate interest in encouraging children to be heterosexual. Part III argues that the Due Process and Equal Protection Clauses prohibit the state from justifying laws against same-sex marriage on purely moral grounds—for similar reasons, and to a similar extent, that the Establishment Clause prohibits the state from justifying such laws on purely religious grounds. While each of these challenges represents a significant contribution to the*

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*development of same-sex marriage law, each one also offers a new insight into the meaning of the Due Process and Equal Protection Clauses, thereby contributing to broader developments in the theory and practice of constitutional law. The Article concludes by exploring how these challenges may change the ways that litigants and courts analyze the constitutionality of laws against same-sex marriage and how one of these challenges is likely to be received by the U.S. Supreme Court.*

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## INTRODUCTION

On August 4, 2010, Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California issued a ruling that Proposition 8—an amendment to the California Constitution providing that “only marriage between a man and a woman is valid or recognized in California”<sup>1</sup>—violates both the Due Process and Equal Protection Clauses of the U.S. Constitution’s Fourteenth Amendment.<sup>2</sup> In his due process analysis, Judge Walker held that Proposition 8 infringes on “the fundamental right to marry” and was therefore subject to “strict scrutiny,” the highest standard of judicial review.<sup>3</sup> In his equal protection analysis, Judge Walker held that Proposition 8 discriminates based on sexual orientation and

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1. CAL. CONST. art. I, § 7.5.  
2. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).  
3. *Id.* at 994.

was subject to strict scrutiny on this additional ground.<sup>4</sup> Applying both clauses, Judge Walker found that Proposition 8 failed to satisfy even “rational basis review”—the lowest standard of judicial review—because it was “not rationally related to a legitimate state interest”<sup>5</sup> and indeed, was based on nothing more than “a private moral view that same-sex couples are inferior to opposite-sex couples.”<sup>6</sup> In the media frenzy that followed, the *New York Times* hailed Judge Walker’s decision as “an instant landmark in American legal history,”<sup>7</sup> and the *Los Angeles Times* declared that his ruling “changes the debate over same-sex marriage forever.”<sup>8</sup>

Measured against such hyperbole, the legal community’s response was subdued. As some legal experts have reminded us,<sup>9</sup> Judge Walker was not the first judge to hold that a law prohibiting same-sex couples from marrying is unconstitutional; over the past decade, several state and federal courts have struck down such laws on similar grounds.<sup>10</sup> In one of the earliest assessments of Judge Walker’s ruling, for example, Professor Eugene Volokh claimed, “This decision

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4. *Id.* at 997.

5. *Id.*

6. *Id.* at 1003.

7. Editorial, *Marriage Is a Constitutional Right*, N.Y. TIMES, Aug. 4, 2010, at A26.

8. Editorial, *Reason Prevails on Prop. 8; Wednesday’s Ruling Overturning the Ban on Same-Sex Marriage Changes the Debate Forever*, L.A. TIMES, Aug. 4, 2010, at A26.

9. See, e.g., Eugene Volokh, *Waiting for the Supreme Court*, N.Y. TIMES (Aug. 4, 2010, 10:03 PM), <http://www.nytimes.com/roomfordebate/2010/08/04/gay-marriage-and-the-constitution/waiting-for-the-supreme-court>.

10. Although Judge Walker was the first *federal* judge to conduct a trial on the constitutionality of a law against same-sex marriage, he was not the first judge to conduct such a trial, nor was he even the first federal judge to strike down such a law. In 1996, in *Baehr v. Miike*, Hawai’i Circuit Court Judge Kevin Chang held a trial to determine whether the state’s law against same-sex marriage was justified by “compelling” state interests and narrowly tailored to further those interests. No. 91-1394, 1996 WL 694235, at \*3 (Haw. Cir. Ct. Dec. 3, 1996). Following the trial, Judge Chang issued an order holding that the State had failed to satisfy this burden and the law was therefore unconstitutional. *Id.* at \*22. While the order was stayed pending appeal, voters approved a state constitutional amendment granting the legislature the authority to prohibit same-sex couples from marrying. See HAW. CONST. art. I, § 23.

On May 12, 2005, U.S. District Court Judge Joseph F. Battalion of the District of Nebraska ruled that Initiative Measure 416—a state constitutional amendment that prohibited the legal recognition of same-sex marriages, civil unions, and other same-sex relationships—violated the First Amendment, the Equal Protection Clause, and the Bill of Attainder Clause of the U.S. Constitution. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1008 (D. Neb. 2005), *rev’d sub nom.* *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Most recently, Judge Joseph L. Tauro of the U.S. District Court for the District of Massachusetts issued two separate opinions holding that the Defense of Marriage Act—a federal statute that prohibits the recognition of same-sex marriages under federal law—violates the Equal Protection Clause and the Tenth Amendment. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

itself doesn't much change the likely legal strategies in the same-sex marriage debate," because "Judge Walker's reasoning is close to the standard reasoning that has been urged in such cases by the pro-same-sex marriage forces, and that has been accepted by some state courts."<sup>11</sup> In a similar vein, Professor Andrew Koppelman suggested that "Judge Walker carefully avoided resting his holding on any controversial proposition of law," relying only "on law already laid down by the Supreme Court."<sup>12</sup>

In most of the commentary on Judge Walker's ruling, this view has emerged as the consensus of legal experts. The common wisdom seems to be that although Judge Walker's findings of fact may be novel and significant, his analysis of the law is familiar—and thus, it is not likely to have a significant impact on the future of same-sex marriage law, in this case or others.<sup>13</sup> The reigning assessment of Judge Walker's ruling was colorfully captured by Lisa Bloom, a legal analyst for CNN, in the title of her op-ed: *On Prop 8, It's the Evidence, Stupid*.<sup>14</sup>

This Article argues that the prevailing view of Judge Walker's ruling is misguided, because it overlooks novel aspects of Judge Walker's legal analysis that have the potential to make valuable contributions to the development of same-sex marriage law. By building upon passages from Judge Walker's ruling, the Article develops three new challenges to the constitutionality of laws that prohibit same-sex couples from marrying. The Article aims to show that whatever happens to Judge Walker's ruling on appeal—and this question is far from decided<sup>15</sup>—his

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11. Volokh, *supra* note 9.

12. Andrew Koppelman, *A Constitutional Right to Gay Marriage? Power in the Facts*, N.Y. TIMES (Aug. 4, 2010, 10:03 PM), <http://www.nytimes.com/roomfordebate/2010/08/04/gay-marriage-and-the-constitution/judge-walkers-factual-findings>.

13. See, e.g., Marc Ambinder, *Prop 8 Overturned: The Facts, Not the Law, Matter*, THE ATLANTIC (Aug. 4, 2010, 5:17 PM), <http://www.theatlantic.com/politics/archive/2010/08/prop-8-overturned-the-facts-not-the-law-matter/60957/>; Carlos A. Ball, *What Judge Walker's Ruling Tells Us About the Right's Twenty-Year Campaign of Spreading Fear on Same-Sex Marriage*, THE HUFFINGTON POST (Aug. 5, 2010, 11:44 AM), [http://www.huffingtonpost.com/carlos-a-ball/what-judge-walkers-ruling\\_b\\_671458.html](http://www.huffingtonpost.com/carlos-a-ball/what-judge-walkers-ruling_b_671458.html); Lisa Bloom, *On Prop 8, It's the Evidence, Stupid*, CNN.COM (Aug. 18, 2010, 2:00 PM), <http://www.cnn.com/2010/OPINION/08/17/bloom.prop.8/index.html>; Dalia Lithwick, *A Brilliant Ruling: Judge Walker's Decision to Overturn Prop 8 is Factual, Well-Reasoned, and Powerful*, SLATE (Aug. 4, 2010, 9:27 PM), <http://www.slate.com/id/2262766>; John Schwartz, *In Same-Sex Ruling, an Eye on the Supreme Court*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/2010/08/06/us/06assess.html>.

14. Bloom, *supra* note 13.

15. In *Perry*, the plaintiffs named as defendants the Governor of California, the Attorney General of California, the Director and Deputy Director of Public Health of California, the Alameda County Clerk-Recorder, and the Los Angeles County Registrar-Recorder/County Clerk. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010). The Attorney General conceded that Proposition 8 is unconstitutional. *Id.* The remaining state defendants declined to defend the constitutionality of Proposition 8, and they refused to take any position on the merits of the plaintiffs' claims. *Id.* The district court granted the official proponents of Proposition 8 leave to intervene to defend the constitutionality of Proposition 8. *Id.* Throughout this Article, I refer to the defendant-intervenors as "the proponents."

legal analysis has already established the foundations for new ways of thinking about laws against same-sex marriage that can change how litigants and courts analyze the constitutionality of such laws. In addition, Judge Walker's ruling generates new insights into the meaning of the Due Process and Equal Protection Clauses, which may contribute to broader developments in the theory and practice of constitutional law.

This Article has three parts. Part I argues that the historical relationship between sex discrimination and sexual orientation discrimination can be used to support the application of heightened scrutiny to laws against same-sex marriage under the Due Process Clause as an alternative to the prevailing theory that calls for the application of heightened scrutiny under the Equal Protection Clause. For the past two decades, a number of prominent scholars, lawyers, and judges have argued that laws prohibiting same-sex couples from marrying discriminate based on sex.<sup>16</sup> Because sex classifications are constitutionally suspect,<sup>17</sup> they have claimed that laws against same-sex marriage should be subjected to heightened scrutiny under the Equal Protection Clause.<sup>18</sup> Although this version of the sex discrimination argument was adopted by the Hawai'i Supreme Court in *Baehr v. Lewin*, it has not been adopted by appellate courts in subsequent same-sex marriage cases.<sup>19</sup>

In *Perry*, Judge Walker begins his equal protection analysis by adopting this familiar version of the sex discrimination argument: he holds that Proposition 8 discriminates based on sexual orientation and sex, which he characterizes as "interrelated" classifications.<sup>20</sup> Yet when Judge Walker applies the Equal Protection Clause to Proposition 8, he does not follow through on this conclusion that the law discriminates based on sex. In this section of his analysis, he analyzes Proposition 8 only as a law that discriminates based on sexual orientation, without independently reviewing it as a law that discriminates based on sex.<sup>21</sup>

In his due process analysis, however, Judge Walker develops a new version of the sex discrimination argument.<sup>22</sup> His argument begins by explicitly

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The state defendants have not appealed Judge Walker's ruling, but the proponents of Proposition 8 have attempted to do so, and this appeal is currently pending before the Ninth Circuit Court of Appeals. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1194 (9th Cir. 2011). On January 4, 2011, the Ninth Circuit issued an order certifying a question to the California Supreme Court, to determine whether California law grants the proponents a "particularized interest" in defending the constitutionality of Proposition 8. *Id.* at 1193. On February 16, 2011, the California Supreme Court voted to accept this request. Briefs were submitted in March, April, and May, and oral argument is scheduled for September 6, 2011, the first day of the court's fall calendar. *See Case Information: Perry v. Brown*, CAL. CTS., <http://www.courts.ca.gov/13401.htm> (last visited Aug. 19, 2011).

16. *See infra* Part I.A.

17. *See United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

18. *See infra* Part I.A.

19. *See infra* notes 86–107, 149–54 and accompanying text.

20. *See Perry*, 704 F. Supp. 2d at 996.

21. *See infra* Part I.B.

22. *See Perry*, 704 F. Supp. 2d at 991–95.

acknowledging that discrimination based on sexual orientation and sex are historically linked. “The marital bargain in California,” he explains, “traditionally required that a woman’s legal and economic identity be subsumed by her husband’s upon marriage under the doctrine of coverture.”<sup>23</sup> Yet he emphasizes that “[a]s states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse’s role within a marriage.”<sup>24</sup> Because “[g]ender no longer forms an essential part of marriage,” he reasons, “marriage under law is a union of equals”<sup>25</sup>—and thus, there is no longer any legal significance to the sex of the partners.

As a result, Judge Walker concludes that the “[p]laintiffs do not seek recognition of a new right” under the Due Process Clause.<sup>26</sup> He explains that instead of asserting the right to “same-sex marriage,” the plaintiffs are asserting “the right to marry”—a right that our country’s due process jurisprudence has long recognized as fundamental.<sup>27</sup> Based on this reasoning, Judge Walker finds that Proposition 8 infringes upon the “right to marry”—not the “right to same-sex marriage”—and is therefore subject to heightened scrutiny under the Due Process Clause.<sup>28</sup>

As Part I explains, Judge Walker’s due process version of the sex discrimination argument enjoys the same advantages as the equal protection version of the argument, while avoiding the equal protection argument’s disadvantages.<sup>29</sup> Just as an equal protection argument that relies on sex, rather than sexual orientation, does not require courts to recognize a new classification as “suspect,” Judge Walker’s due process argument relies on the history of sex discrimination rather than sexual orientation and thus does not require courts to recognize a new right as “fundamental.”<sup>30</sup> Moreover, the equal protection argument has been criticized for marginalizing the identities and struggles of gay men and lesbians by attacking laws against same-sex marriage as sexist, rather than challenging such laws as homophobic. Judge Walker’s due process argument not only avoids this dilemma, but manages to reverse this spin of the equal protection argument altogether. By emphasizing that same-sex couples seek to exercise the same right as different-sex couples, Judge Walker’s argument emphasizes that same-sex couples seek to participate in the same history and traditions as different-sex couples.<sup>31</sup> Far from marginalizing the identities of gay men and lesbians, this version of the sex discrimination argument places same-sex couples at the heart of American culture and law.

Part II develops the argument that the Due Process and Equal Protection Clauses prohibit the state from justifying laws against same-sex marriage based on

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23. *Id.* at 992.

24. *Id.*

25. *Id.* at 993.

26. *Id.*

27. *Id.*

28. *Id.* at 993–94.

29. *See infra* Part I.B.

30. *See Perry*, 704 F. Supp. 2d at 991–92.

31. *See id.* at 993.

the fear that exposure to homosexuality will encourage children to be lesbian, gay, or bisexual, because the state does not have any legitimate interest in encouraging children to be heterosexual. This Part focuses on a passage from Judge Walker's analysis of the plaintiffs' equal protection claims in which he finds that "Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual."<sup>32</sup> By subtly implying that parents should not "dread" having a lesbian or gay child, Judge Walker lays the foundation for advocates to confront and reject fears about homosexuality and children—to acknowledge the simple fact that some children are lesbian, gay, and bisexual, and to insist that the fear of such children is nothing more than a form of homophobia, which is not a rational basis upon which to justify laws. In a climate where very few people are even willing to entertain the possibility that a child can be lesbian, gay, or bisexual—let alone that a child's sexual development may be influenced by exposure to lesbian, gay, and bisexual adults—even Judge Walker's cautious, subtle approach to these fears is both a novel and welcome development.

Part III develops the argument that the Due Process and Equal Protection Clauses prohibit the state from justifying laws against same-sex marriage on purely moral grounds—for similar reasons, and to a similar extent, that the Establishment Clause prohibits the state from justifying such laws on purely religious grounds. This Part focuses on a passage from Judge Walker's summary of the proponents'<sup>33</sup> defense of Proposition 8 in which he introduces a distinction between "secular" justifications, on the one hand, and "moral" and "religious" justifications, on the other hand, by claiming that "[t]he state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose."<sup>34</sup> Later in the ruling, Judge Walker reiterates the principle that "[m]oral disapproval alone is an improper basis on which to deny rights to gay men and lesbians,"<sup>35</sup> because "[m]oral disapproval, without any other asserted state interest," cannot be a "rational basis" for any law.<sup>36</sup> To support this principle, Judge Walker cites to a series of Supreme Court cases decided under the Due Process,<sup>37</sup> Equal Protection,<sup>38</sup> and Establishment Clauses.<sup>39</sup>

Based on this reasoning, Part III develops a novel analogy between the constitutional status of moral justifications and religious justifications. This analogy builds on a growing trend in the theory and practice of constitutional law, in which scholars and lawyers have sought to integrate the Supreme Court's interpretations of the Equal Protection Clause and the First Amendment's Religion

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32. *See id.* at 1003.

33. For a definition of the term "proponents," and an explanation of the various defendants in the case, see *supra* note 15.

34. *Perry*, 704 F. Supp. 2d at 930–31.

35. *Id.* at 1003.

36. *Id.* at 1002.

37. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

38. *Id.* (citing *Romer v. Evans*, 517 U.S. 629, 633 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

39. *Id.* at 931 (citing *Everson Bd. of Educ. v. Ewing Twp.*, 330 U.S. 1, 15 (1947)).

Clauses. By suggesting that a parallel version of the “secular purpose” requirement applies to laws challenged under the Due Process and Equal Protection Clauses, Judge Walker illuminates the textual, doctrinal, and analytical foundations for broad interpretations of *Lawrence v. Texas* and *Romer v. Evans* that remain controversial among federal appellate courts. The analogy between moral and religious justifications sheds light on the parallel dilemmas that such justifications pose to courts in pluralist states, where judges are hard-pressed to adjudicate the legitimacy of conflicting moral and religious beliefs.

The Article concludes by exploring how these challenges may change the ways that litigants and courts analyze the constitutionality of laws against same-sex marriage and how one of these challenges is likely to be received by the U.S. Supreme Court.

### I. THE RETURN OF THE SEX DISCRIMINATION ARGUMENT

In his analysis of the plaintiffs’ due process claims, Judge Walker begins by noting that “the freedom to marry is recognized as a fundamental right protected by the Due Process Clause.”<sup>40</sup> “To determine whether a right is fundamental,” he explains, “the court inquires into whether the right is rooted ‘in our Nation’s history, legal traditions, and practices.’”<sup>41</sup> In a line of cases reaching back to *Loving v. Virginia*, he observes that the Supreme Court has repeatedly recognized that the right to marry is fundamental.<sup>42</sup>

As Judge Walker acknowledges, however, the parties in *Perry* do not dispute that the right to marry is fundamental, or that any law that infringes on a fundamental right is subject to strict scrutiny under the Due Process Clause.<sup>43</sup> “The question presented here,” he explains, is whether to characterize the plaintiffs as asserting “the fundamental right to marry” or the “recognition of a new right” to same-sex marriage.<sup>44</sup> If the plaintiffs are asserting the right to marry, then Proposition 8 would be subject to strict scrutiny, because it would be infringing on a fundamental right. But if the plaintiffs are asserting “a new right”—the right to same-sex marriage—then Proposition 8 would likely be subject to rational basis

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40. *Id.* at 991.

41. *Id.* at 992 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997)). In *Glucksberg*, the Court noted “that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” 521 U.S. at 720–21 (citations omitted) (internal quotation marks omitted).

42. *Perry*, 704 F. Supp. 2d at 991–92 (collecting cases). In addition, Judge Walker relies on *Griswold v. Connecticut*, 381 U.S. 479 (1965), a case decided two years before *Loving*. Strictly speaking, the holding of *Griswold* was based on the “right to privacy,” which the *Griswold* Court derived from the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 484. In subsequent cases, however, the Court has interpreted *Griswold* as one of a long line of cases beginning with *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), which are based on the right to “liberty” protected by the Due Process Clause. *See, e.g., Lawrence*, 539 U.S. at 565; *Glucksberg*, 521 U.S. at 719.

43. *Perry*, 704 F. Supp. 2d at 992.

44. *Id.*



review.<sup>45</sup> Almost by definition, a right that is “new” is not likely to be “rooted ‘in our Nation’s history, legal traditions, and practices,’”<sup>46</sup> and thus it is not likely to be recognized as “fundamental” under the Due Process Clause.

To resolve this doctrinal dilemma, Judge Walker turns to two historical shifts in marriage law in the United States: the invalidation of laws against interracial marriage and the abolition of the doctrine of coverture.<sup>47</sup> By recounting these historical developments, he aims to show that the fundamental features of “the right to marry” have remained constant throughout the history of the United States—even as interracial couples were permitted to exercise the right and as men and women were permitted to enter the relationship as equal partners.<sup>48</sup> Reasoning from these historical premises, Judge Walker concludes that the right asserted by the plaintiffs in *Perry* should be framed in broad terms—as “the right to marry”—by reference to the substance of the right, rather than the sex of the persons who are seeking to exercise it.<sup>49</sup>

Judge Walker begins his analysis of the history of marriage law by noting that “[r]ace restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre.”<sup>50</sup> He emphasizes, however, that “[w]hen the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change.”<sup>51</sup> Next, he makes a similar observation about the doctrine of coverture, which was once a fixture in every state’s marriage laws. He writes, “The marital bargain in California (along with other states) traditionally required that a woman’s legal and economic identity be subsumed by her husband’s upon marriage under the doctrine of coverture.”<sup>52</sup> He stresses, however, that “this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals.”<sup>53</sup>

Judge Walker spends only three sentences on the invalidation of laws against interracial marriage,<sup>54</sup> but he describes the abolition of coverture in much greater detail. “As states moved to recognize the equality of the sexes,” he explains, “they eliminated laws and practices like coverture that had made gender a proxy for a spouse’s role within a marriage.”<sup>55</sup> Through such reforms, he claims, “[m]arriage was . . . transformed from a male-dominated institution into an

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45. *Id.*

46. *Id.* (quoting *Glucksberg*, 521 U.S. at 710).

47. *Id.* at 992–93.

48. *Id.*

49. *Id.* at 992; *cf. In re Marriage Cases*, 183 P.3d 384, 421 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (“[I]n evaluating the constitutional issue before us, we consider it appropriate to direct our focus to the meaning and *substance* of the constitutional right to marry, and to avoid the potentially misleading implications inherent in analyzing the issue in terms of ‘same-sex marriage.’” (emphasis added)).

50. *Perry*, 704 F. Supp. 2d at 992.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

institution recognizing men and women as equals.”<sup>56</sup> He insists, however, that “individuals retained the right to marry” throughout this period.<sup>57</sup> He emphasizes that “[the] right did not become different simply because the institution of marriage became compatible with gender equality.”<sup>58</sup>

Taking a broad view of these historical developments, Judge Walker concludes that “[m]arriage has retained certain characteristics throughout the history of the United States”<sup>59</sup>: “The right to marry has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household.”<sup>60</sup> Although he acknowledges that “[r]ace and gender restrictions shaped marriage during eras of race and gender inequality,” he insists that “such restrictions were never part of the historical core of the institution of marriage.”<sup>61</sup>

In light of this analysis, Judge Walker interprets Proposition 8’s exclusion of same-sex couples as a historical product of sex stereotypes—a law that is based on the history of “gender roles mandated through coverture” in addition to “social disapproval of same-sex relationships.”<sup>62</sup> He explains that “the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage.”<sup>63</sup> “That time has passed,” he assures us: “Today . . . [g]ender no longer forms an essential part of marriage; marriage under law is a union of equals.”<sup>64</sup>

Reasoning from these historical premises, Judge Walker concludes his analysis of the plaintiffs’ due process claims by finding that the plaintiffs “do not seek recognition of a new right” under the Due Process Clause.<sup>65</sup> He explains that “[t]o characterize plaintiffs’ objective as ‘the right to same-sex marriage’ would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy—namely, marriage.”<sup>66</sup> Instead, he concludes, “plaintiffs ask California to recognize their relationships for what they are—marriages.”<sup>67</sup> As a result, he finds that Proposition 8 infringes upon the right to marry—a fundamental right—and is therefore subject to heightened scrutiny under the Due Process Clause.<sup>68</sup>

This Part develops the argument that the historical relationship between discrimination based on sex and discrimination based on sexual orientation can be used to support the application of heightened scrutiny to laws against same-sex

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56. *Id.* at 992–93.

57. *Id.* at 993.

58. *Id.*

59. *Id.* at 992.

60. *Id.* at 993.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 994.

marriage under the Due Process Clause. As this Part explains, this argument represents a new and promising alternative to the prevailing theory that calls for heightened scrutiny to such laws under the Equal Protection Clause.

Judge Walker is not the first judge to recognize that there is a relationship between discrimination based on sexual orientation and discrimination based on sex. This claim was originally embraced by the Hawai'i Supreme Court in *Baehr v. Lewin*,<sup>69</sup> and was further developed by Justice Denise Johnson of the Vermont Supreme Court in *Baker v. State*.<sup>70</sup> Likewise, Judge Walker is not the first judge to recognize that laws against same-sex marriage infringe on the right to marry, a fundamental right protected by the Due Process Clause. This claim was originally embraced by Justice John Greaney of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*,<sup>71</sup> and it was further developed by the California Supreme Court in *In re Marriage Cases*.<sup>72</sup>

Judge Walker is, however, the first judge to hold that the former claim supports the latter claim—that the historical relationship between discrimination based on sex and discrimination based on sexual orientation supports the application of heightened scrutiny to laws against same-sex marriage under the Due Process Clause.<sup>73</sup> In every previous same-sex marriage ruling, and in every brief and article on the subject, the sex discrimination argument has been formulated under the Equal Protection Clause—in terms of suspect classifications instead of fundamental rights.<sup>74</sup> Because laws against same-sex marriage discriminate against same-sex couples, the standard argument goes, they

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69. 852 P.2d 44 (Haw. 1993) (plurality opinion).

70. 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

71. 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring).

72. 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

73. As explained in more detail below, Judge Walker's analysis was likely inspired by Chief Judge Kaye's brief reference to the doctrine of coverture in her dissenting opinion in *Hernandez v. Robles*, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, C.J., dissenting). *See infra* notes 221–24 and accompanying text.

74. *See infra* Part I.A. For the sake of simplicity, this Part refers to the “equal protection” and “due process” versions of the sex discrimination argument. Strictly speaking, however, this distinction is oversimplified, because laws that infringe fundamental rights are subject to heightened scrutiny under the Equal Protection Clause as well as the Due Process Clause. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that residency requirements for receipt of welfare benefits violate the right to travel under Equal Protection Clause); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes in state and local elections violate the right to vote under the Equal Protection Clause); *see also Zablocki v. Redhail*, 434 U.S. 374, 400 (1978) (Powell, J., concurring) (claiming that state law preventing individuals who owe child support from marrying violates the right to marry under the Equal Protection Clause). As a result, Judge Walker could have articulated his “fundamental right” version of the sex discrimination argument under the Equal Protection Clause, instead of (or in addition to) articulating the sex discrimination argument under the Due Process Clause. In this respect, it would be more accurate—though perhaps more confusing and cumbersome—to distinguish between the “sex classification” and “fundamental right” versions of the sex discrimination argument.

discriminate based on sex classifications. As a result, they must be subject to heightened scrutiny under the Equal Protection Clause.<sup>75</sup>

While Judge Walker's due process analysis bears a close resemblance to the more familiar version of the sex discrimination argument, it adds a subtle and significant twist. Although Judge Walker acknowledges that the sex discrimination argument under the Equal Protection Clause is logically correct, he does not follow through with this claim by reviewing Proposition 8 as a law that discriminates based on sex in his equal protection analysis.<sup>76</sup> Rather than taking this traditional approach, he redeploys the historical premises of the sex discrimination argument under the Due Process Clause.<sup>77</sup> Instead of using the history of sex discrimination in marriage laws to show that Proposition 8 discriminates based on sex classifications, he uses this history to show that Proposition 8 infringes on the fundamental right to marry.<sup>78</sup> By framing the historical premises of the sex discrimination argument in terms of a fundamental right instead of a protected class, Judge Walker emphasizes that same-sex couples share a common history and common traditions with different-sex couples, and he lays the foundation for a promising new way to challenge the constitutionality of laws against same-sex marriage.<sup>79</sup>

#### *A. The Equal Protection Version of the Sex Discrimination Argument*

In both the scholarship and the case law, the equal protection version of the sex discrimination argument is familiar. In every same-sex marriage challenge since the 1970s, plaintiffs have argued that laws against same-sex marriage should be subject to heightened scrutiny under the state constitution's equal protection clause because they facially discriminate based on sex. In *Singer v. Hara*, for example, two male plaintiffs claimed that if Washington's marriage law were construed "to permit a man to marry a woman but at the same time to deny him the right to marry another man," then it would establish a "classification 'on account of sex'" that should be subject to heightened scrutiny under the Washington Constitution's Equal Rights Amendment.<sup>80</sup> In response, the State argued that the law did not discriminate based on sex because it applied equally to both sexes: "[A]ll same-sex marriages are deemed illegal by the state, and . . . there is no violation of the [Equal Rights Amendment] so long as marriage licenses are denied equally to both male and female pairs."<sup>81</sup> The *Singer* court upheld the marriage law, reasoning that because the plaintiffs were members of the same sex, "[i]n substance . . . what they propose is not a marriage."<sup>82</sup>

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75. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 65 (Haw. 1993) (plurality opinion); Brief for Amicus Curiae Vermont Chapter of the National Organization for Women et al. at 1–8, *Baker*, 744 A.2d 864 (No. 98-032); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

76. See *Perry*, 704 F. Supp. 2d at 995–1003.

77. See *id.* at 996.

78. *Id.* at 996–97.

79. See *id.* at 993.

80. 522 P.2d 1187, 1190 (Wash. Ct. App. 1974).

81. *Id.* at 1191.

82. *Id.* at 1192.

The underlying logic of the equal protection argument seems inherently compelling.<sup>83</sup> By definition, the concept of sexual orientation depends on the concept of sex. To determine a person's sexual orientation, one must determine the person's sex and the sex of the people to whom he or she is attracted. As a result, it is impossible to make distinctions based on sexual orientation without making distinctions based on sex. In this sense, every act of discrimination based on sexual orientation is an act of discrimination based on sex. This logical relationship is especially clear in the case of laws against same-sex marriage; although such laws are intended to discriminate against gay men and lesbians, they achieve this result by classifying couples based on sex.

Doctrinally, the equal protection argument depends on an analogy between laws against same-sex marriage and laws against interracial marriage. In *Loving v. Virginia*, the U.S. Supreme Court reasoned that Virginia's law against interracial marriage established "racial classifications" that were subject to "the most rigid scrutiny" under the Fourteenth Amendment's Equal Protection Clause.<sup>84</sup> Because these classifications had no justification independent of "invidious racial discrimination," the Court held that they violated "the central meaning of the Equal Protection Clause."<sup>85</sup>

In *Baehr v. Lewin*, a plurality of the Hawai'i Supreme Court issued the first appellate opinion adopting the equal protection version of the sex discrimination argument in a same-sex marriage case.<sup>86</sup> Like the plaintiffs in *Singer*, the *Baehr* plurality reasoned that by "restrict[ing] the marital relation to a male and a female," the state's law had established a classification that discriminated "on the basis of the applicants' sex."<sup>87</sup> Because the law facially

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83. See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 492 (2001).

84. 388 U.S. 1, 11 (1967).

85. *Id.* at 11–12.

86. 852 P.2d 44 (Haw. 1993) (plurality opinion). In *Baehr*, the pattern of voting on the sex discrimination argument was somewhat complex. As explained in the text, a plurality of two judges voted to reverse the dismissal of the plaintiffs' claims on the ground that the law discriminated based on sex. In addition, one judge wrote separately concurring in the result on the ground that the case involved a "genuine issues of material fact." *Id.* at 68 (Burns, J., concurring). In particular, this concurring judge reasoned that the validity of the sex discrimination argument depended on "whether heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated,'" and thus, included within the Hawai'i Constitution's prohibition against discrimination "based on sex." *Id.* at 69. The remaining two judges dissented on the ground that the law applied equally to both sexes, and therefore did not discriminate based on sex. *Id.* at 70–75 (Henn, J., dissenting).

In addition to the plurality opinion in *Baehr*, the argument has been adopted by a trial court in Alaska, a dissenting judge in New York, and a judge concurring in part and dissenting in part in Vermont. See *Braise v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Hernandez v. Robles*, 855 N.E.2d 1, 27 (N.Y. 2006) (Kaye, C.J., dissenting); *Baker v. State*, 744 A.2d 864, 904–12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

87. *Baehr*, 852 P.2d at 60.

“discriminate[d] based on sex,” the plurality reasoned that it was subject to heightened scrutiny under the Hawai’i Constitution’s Equal Rights Amendment.<sup>88</sup>

In *Baehr*, two dissenting judges offered the same response to this equal protection argument that Washington state had offered in *Singer*. The marriage law did not discriminate based on sex, they reasoned, because it permitted both men and women to marry a member of the other sex, and it prohibited both men and women from marrying a member of the same sex.<sup>89</sup> They argued that because the law applied equally to both sexes, it should not be subjected to heightened scrutiny under the state constitution’s equal protection clause.<sup>90</sup>

The plurality rejected the dissent’s “equal application” defense of the statute by observing that a similar version of this defense had been rejected by the U.S. Supreme Court in *Loving*.<sup>91</sup> Although the state of Virginia had argued that the antimiscegenation law provided equal punishments for “both the white and the Negro participants in an interracial marriage,” the *Loving* Court refused to distinguish the law on this ground: “[W]e reject the notion that the mere ‘equal application’ of a statute containing race classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”<sup>92</sup> “[T]he fact of equal application,” the Court wrote, “does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”<sup>93</sup> Based on this passage in *Loving*, the *Baehr* plurality adopted the equal protection version of the sex discrimination argument, along with the underlying analogy between the laws challenged in *Loving* and *Baehr*. Substituting the term “sex” for the term “race” in this passage from *Loving*, the plurality reasoned, “yields the precise case before us together with the conclusion that we have reached.”<sup>94</sup>

In subsequent same-sex marriage cases, appellate courts have been less kind to the equal protection version of the sex discrimination argument. In the 18 years since *Baehr* was decided, this argument has been advanced by almost every plaintiff who has challenged the constitutionality of laws against same-sex marriage.<sup>95</sup> While it has been accepted by four trial

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88. *Id.* at 59.

89. *Id.* at 70–71 (Heen, J., dissenting).

90. *Id.* at 71.

91. *Id.* at 61, 67–68 (plurality opinion).

92. *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

93. *Id.* at 9.

94. *Baehr*, 852 P.2d at 68. For an explanation of how the court’s remaining three judges approached the sex discrimination argument in *Baehr*, see *supra* note 86.

95. See, e.g., *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*5 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999); *In re Marriage Cases*, 183 P.3d 384, 437 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 414 (Conn. 2008); *Morrison v. Sadler*, 821 N.E.2d 15, 21 (Ind. Ct. App. 2005); *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 583 (Md. 2007); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003); *Li v. Oregon*, 110 P.3d 91, 94 (Or. 2005);

judges<sup>96</sup> and two appellate judges in separate opinions,<sup>97</sup> it has not been adopted by a majority of judges on any appellate court.<sup>98</sup>

In some of these cases, appellate courts have avoided ruling on the sex discrimination argument by invalidating laws against same-sex marriage on other grounds.<sup>99</sup> In both Connecticut and Iowa, for example, the state supreme courts struck down laws against same-sex marriage because they discriminate based on sexual orientation, without deciding whether such laws discriminate based on sex.<sup>100</sup> In other cases, however, appellate courts have expressly rejected the sex discrimination argument—along with all of the plaintiffs’ arguments—in the course of holding that laws against same-sex marriage are constitutional.<sup>101</sup>

When courts have rejected the sex discrimination argument—instead of avoiding it—they have typically followed the dissent’s argument in *Baehr*, reasoning that laws against same-sex marriage do not discriminate based on sex because they apply equally to both sexes.<sup>102</sup> Such courts have sought to distinguish *Loving* on the ground that even though Virginia’s law applied equally to “white persons” and “colored persons” who married each other, the law did not treat all interracial marriages alike.<sup>103</sup> As the *Loving* Court observed, Virginia’s law prohibited “only interracial marriages involving white persons”;<sup>104</sup> it forbade “white persons” from marrying “colored persons,” but it did not forbid “Negroes,” “Orientals,” or members of “any other racial class” from marrying each other.<sup>105</sup> As a result, the *Loving* Court found that the law was “designed to maintain White Supremacy”<sup>106</sup> by preserving only “the integrity of the white race.”<sup>107</sup>

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Hernandez v. Robles, 855 N.E.2d 1, 20 (N.Y. 2006); Baker v. State, 744 A.2d 864, 869–70 (Vt. 1999); Andersen v. King Cnty., 138 P.3d 963, 973 (Wash. 2006).

96. See *Brause*, 1998 WL 88743, at \*5–6; *In re Marriage Cases*, No. 4365, 2005 WL 583129, at \*8–12 (Cal. Super. Ct. Mar. 14, 2005), *rev’d*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; Varnum v. Brien, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007), *aff’d on other grounds*, 763 N.W.2d 862 (Iowa 2009); Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at \*3–6 (Md. Cir. Ct. Jan. 20, 2006), *rev’d*, 932 A.2d 571 (Md. 2007).

97. *Hernandez*, 855 N.E.2d at 27 (Kaye, C.J., dissenting); *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part).

98. See Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1218 (2010).

99. *Kerrigan*, 957 A.2d 407; *Varnum*, 763 N.W.2d 862; *Goodridge*, 798 N.E.2d 941.

100. *Kerrigan*, 957 A.2d 407; *Varnum*, 763 N.W.2d 862.

101. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 598 (Md. 2007); *Hernandez*, 855 N.E.2d at 20; *Baker*, 744 A.2d at 880 n.13; *Andersen v. King Cnty.*, 138 P.3d 963, 989 (Wash. 2006).

102. See, e.g., *Conaway*, 932 A.2d at 599; *Hernandez*, 855 N.E.2d at 20; *Baker*, 744 A.2d at 880 n.13; *Andersen*, 138 P.3d at 989.

103. See, e.g., *Hernandez*, 855 N.E.2d at 20.

104. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

105. *Id.* at 11 n.11.

106. *Id.* at 11.

107. *Id.* at 11 n.11.

Doctrinally, the attempt to distinguish *Loving* as a case about “White Supremacy” is problematic, because it relies upon yet another version of the equal application defense that the Court rejected in *Loving*. Immediately after finding that Virginia’s law was “designed to maintain White Supremacy,” the *Loving* Court added a footnote explaining that this finding did not make a difference under the Equal Protection Clause.<sup>108</sup> Although the plaintiffs had argued that the law could be invalidated because it prohibited “only interracial marriages involving white persons,” the Court explained, “We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”<sup>109</sup>

Moreover, as Professor Mary Anne Case has argued, the “equal application” defense finds no support in the U.S. Supreme Court’s sex discrimination cases under the Equal Protection Clause.<sup>110</sup> For nearly a century, the Court has insisted that “[i]t is the individual who is entitled to the equal protection of the laws,” as opposed to the class to which the individual belongs.<sup>111</sup> When an individual is denied a right based on her sex, it is no answer that the class to which she belongs (women) is treated the same as another class (men). In *J.E.B. v. Alabama*, for example, the Court held that sex-based preemptory challenges violated the Equal Protection Clause, notwithstanding Justice Scalia’s claim that “for every man struck by the government petitioner’s own lawyer struck a woman,” and his claim that “the system as a whole is evenhanded” because “all groups are subject to the preemptory challenge.”<sup>112</sup>

On a conceptual level, however, it seems likely that appellate courts have avoided relying on the *Baehr* court’s equal protection analysis because it appears too formalistic: it focuses on the facial discrimination in the statute without articulating the substantive harm inflicted on the targeted class. As both judges and scholars have observed, the lack of “connection” or “fit” between the classification deployed by the law (sex) and the class disadvantaged by the law (lesbians and gay men) undermines the equal protection version of the sex discrimination argument, because it creates a logical distinction between laws against interracial marriage and laws against same-sex marriage.<sup>113</sup> In cases like *Loving*, the fit between the classification and the class appears to be perfect. Virginia’s law against interracial

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108. *Id.*

109. *Id.*

110. Case, *supra* note 98, at 1227 (“[N]one of the Supreme Court’s recent constitutional sex discrimination holdings has so much as suggested that equal application might foreclose a claim of sex discrimination.”).

111. *Id.* at 1220 (quoting *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 161–62 (1914)).

112. *Id.* at 1228 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 159 (1994) (Scalia, J., dissenting)).

113. See, e.g., *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (“I recognize, of course, that although the classification here is sex-based on its face, its most direct impact is on lesbians and gay men, the class of individuals most likely to seek same-sex marriage.”); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1509–10 (1993); Stein, *supra* note 83, at 492.



marriage employed race classifications, and it seems to have the primary purpose and effect of disadvantaging people of color.<sup>114</sup> In cases like *Baehr*, however, this same fit seems to be absent. Laws against same-sex marriage employ sex classifications, but they seem to have the primary purpose and effect of disadvantaging lesbians, gay men, and bisexuals rather than disadvantaging women as a class.<sup>115</sup> As a result of this seeming incongruity between the classification deployed and the class targeted, some critics have argued that it is more sensible and straightforward to analyze laws against same-sex marriage as a form of discrimination based on sexual orientation rather than analyzing them as a form of discrimination based on sex.<sup>116</sup>

To be clear, these criticisms of the sex discrimination argument are debatable,<sup>117</sup> and I do not mean to endorse them by recounting them here. My claim is more limited: whether or not the criticisms are valid, they have been articulated by some of the legal academy's leading scholars, and they may have led some appellate courts to steer clear of the sex discrimination argument.

In response to these concerns, some same-sex marriage advocates have sought to bolster and refine the equal protection version of the sex discrimination argument by documenting the historical relationship between discrimination against lesbians and gay men and discrimination against women. In his seminal article *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, Professor Andrew Koppelman argued that laws that discriminate against lesbians and gay men are not only homophobic but sexist: they are based on stereotypes about masculine and feminine roles and behaviors, and they disadvantage all women as well as gay men and lesbians.<sup>118</sup> He explained: "Laws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex."<sup>119</sup> "Such laws," he reasoned, "therefore flatly violate the constitutional prohibition on sex discrimination as it has interpreted by the Supreme Court."<sup>120</sup> In particular, Koppelman argued that such laws run afoul of the Supreme Court's holding in *Stanton v. Stanton*<sup>121</sup> that a law

114. Stein, *supra* note 83, at 492–93.

115. *Id.* at 493.

116. EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 46–51 (2004); Stein, *supra* note 83, at 503.

117. For example, it is not clear whether laws against interracial marriage had the primary purpose or effect of disadvantaging people of color; such laws were directly targeted at interracial couples, which included one white person for every person of color. Koppelman, *supra* note 75, at 223. Similarly, it is not clear whether laws against same-sex marriage are directly targeted at lesbians, gay men, and bisexuals. The earliest examples of such laws were passed before the concept of "homosexuality" had been developed, let alone the identity of the "lesbian," "gay," or "bisexual." I thank Mary Anne Case for reminding me of the latter response.

118. Koppelman, *supra* note 75, at 219.

119. *Id.*

120. *Id.*

121. 421 U.S. 7 (1975).

may not be justified by reference to “archaic or stereotypic notions” about the appropriate preferences, roles, and behaviors of males and females.<sup>122</sup>

Based on his analysis of the historical record, Koppelman claimed that stereotypes about gay men and lesbians were socially and legally derived from broader stereotypes about males and females. “The modern stigmatization of homosexuals as violators of gender norms,” he claimed, developed during the late 1700s in response to “widespread anxieties” about an emerging “egalitarian shift” in relations between the sexes.<sup>123</sup> During the same period in which the two sexes were first regarded as “equals,” he explained, they were relegated into “separate spheres”—public and private—and society began to invest heavily in maintaining the hierarchy between them.<sup>124</sup> In his view, the homosexuality taboo ensured the male’s status as an “impenetrable penetrator”—a person who penetrates others but is not penetrated by others.<sup>125</sup> In this manner, Koppelman claimed, the taboo operated to “police the boundary that separates the dominant from the dominated,”<sup>126</sup> thereby “preserv[ing] the polarities of gender.”<sup>127</sup> “The reinforcement of sexism,” he concluded, “is both a cause and effect of the homosexuality taboo’s survival.”<sup>128</sup>

In *Baker v. State*,<sup>129</sup> a collection of women’s organizations presented a more subdued version of Koppelman’s argument in an amicus brief to the Vermont Supreme Court in support of a constitutional challenge to the state’s law against same-sex marriage.<sup>130</sup> In addition to claiming that the state’s law facially discriminated based on sex, the brief placed the state’s exclusion of same-sex couples in a broader historical context, alongside other sex-based classifications in marriage law.<sup>131</sup> “Like other sex-based classifications within marriage,” the amici argued, “Vermont’s different-sex restriction on marriage is a vestige of the ‘traditional’ common law definition of marriage and perpetuates discrimination based on sex.”<sup>132</sup>

Although a majority of the Vermont Supreme Court rejected this argument, Justice Denise Johnson adopted it in a concurring and dissenting

122. Koppelman, *supra* note 75, at 216.

123. *Id.* at 240–41.

124. *Id.*

125. *Id.* at 202.

126. *Id.*

127. *Id.*

128. *Id.* at 249. In her article *Marriage, Law, and Gender*, Professor Nan Hunter developed a similar argument: “Same-sex marriage could create the model in law for an egalitarian kind of interpersonal relation, outside the gendered terms of power, for many marriages. At the least, it would radically strengthen and dramatically illuminate the claim that marriage partners are presumptively equal.” Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991).

129. 744 A.2d 864 (Vt. 1999).

130. Brief for Amicus Curiae Vermont Chapter of the National Organization for Women, *supra* note 75, at 15–16.

131. *Id.*

132. *Id.* at 17–18.

opinion.<sup>133</sup> Justice Johnson's opinion began by presenting the classic facial version of the argument, asking readers to "consider the following example": "Dr. A and Dr. B both want to marry Ms. C. . . . Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. . . . The statute disqualifies Dr. B from marriage solely on the basis of her sex."<sup>134</sup> "This is sex discrimination," she concluded.<sup>135</sup>

Like many critics of the sex discrimination argument, Justice Johnson acknowledged that the fit between the classification deployed and the class disadvantaged was not perfect: "I recognize," she explained, "that although the classification here is sex-based on its face, its most direct impact is on lesbians and gay men, the class of individuals most likely to seek same-sex marriage."<sup>136</sup> She insisted, however, that "[v]iewing the discrimination as sex-based . . . is important," because it suggests that the state's exclusion of same-sex couples may be "a vestige of sex-role stereotyping."<sup>137</sup> In light of the U.S. Supreme Court's sex discrimination cases, she reasoned that the classification would still be unconstitutional, even if it relied on stereotypes that "applie[d] equally to men and women."<sup>138</sup>

Drawing on the sex discrimination argument presented in the amicus brief, Justice Johnson situated the exclusion of same-sex couples within the broader history of other sex-based restrictions in marriage laws, focusing specifically on the doctrine of coverture: "[H]istorically, the marriage laws imposed sex-based roles for the partners to a marriage—male provider and female dependent."<sup>139</sup> "Under the common law," she explained, "husband and wife were one person" and "[t]he legal existence of a woman was suspended by marriage."<sup>140</sup> She emphasized, however, that "[s]tarting in the late nineteenth century, Vermont, like other states, began to enact statutes, such as the Rights of Married Women Act, to grant married women property and contractual rights independent of their husbands."<sup>141</sup> She concluded that "[t]oday, the partners to a marriage are equal before the law."<sup>142</sup>

In reviewing Vermont's law under the state's equal protection clause, Justice Johnson framed her analysis in terms of whether the law was a "vestige" of coverture. "The question now," she reasoned, "is whether the sex-based classification in the marriage law is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today."<sup>143</sup> After finding that the exclusion of same-sex couples was

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133. *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part).

134. *Id.* at 906.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 908.

140. *Id.*

141. *Id.* at 908–09.

142. *Id.* at 909.

143. *Id.*

not justified by any “valid government purpose,”<sup>144</sup> she concluded that “the classification is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected.”<sup>145</sup>

Many scholars have celebrated Justice Johnson’s adoption of the sex discrimination argument, and a handful of judges have been persuaded by similar claims in subsequent cases.<sup>146</sup> Most notably, in 2006, Chief Judge Judith Kaye of the New York Court of Appeals embraced the sex discrimination argument, in her opinion dissenting from the court’s decision to uphold the constitutionality of the state’s marriage law.<sup>147</sup> The fact remains, however, that the sex discrimination argument has not been adopted by a majority of judges on any appellate court in a same-sex marriage case since *Baehr*.<sup>148</sup>

In *In re Marriage Cases*,<sup>149</sup> the plaintiffs presented a similar version of the sex discrimination argument, but the California Supreme Court “gratuitously” rejected this claim in the course of invalidating the state’s marriage law on other grounds.<sup>150</sup> In their opening brief, the plaintiffs argued that the state’s marriage law should be subject to strict scrutiny under California’s equal protection clause because it “facially discriminates on the basis of sex”<sup>151</sup> and because it impermissibly “perpetuates gender stereotypes.”<sup>152</sup> The court held that “[i]n light of the equality of treatment between genders, the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex.”<sup>153</sup>

144. *Id.*

145. *Id.* at 912.

146. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at \*5–6 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999); *In re Marriage Cases*, No. 4365, 2005 WL 583129, at \*8–12 (Cal. Super. Ct. Mar. 14, 2005), *rev’d*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; Varnum v. Brien, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30, 2007), *aff’d on other grounds*, 763 N.W.2d 862 (Iowa 2009); Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at \*3–6 (Md. Cir. Ct. Jan. 20, 2006), *rev’d*, 932 A.2d 571 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting).

147. *See* Hernandez, 855 N.E.2d at 22 (Kaye, C.J., dissenting). On June 24, 2011, the New York Legislature passed a law that allows same-sex couples to marry. *See* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

148. *See* Case, *supra* note 98, at 1218.

149. 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

150. Case, *supra* note 98, at 1219 (arguing that in *In re Marriage Cases*, the California Supreme Court “gratuitously echoed” the Vermont Supreme Court’s holding in *Baker* by unnecessarily rejecting the sex discrimination argument, in the course of invalidating the state’s law against same-sex marriage on other grounds).

151. Respondents’ Opening Brief on the Merits at 39, *In re Marriage Cases*, 183 P.3d 384 (No. S147999). It is worth noting that in both *Baker* and *In re Marriage Cases*, this argument was advanced by attorneys for the National Center for Lesbian Rights.

152. *Id.* at 39, 44.

153. *In re Marriage Cases*, 183 P.3d at 436.

Although the court struck down the state's marriage law because it discriminated based on sexual orientation, the court refused to recognize that the law discriminated based on sex.<sup>154</sup>

***B. From Equal Protection to Due Process: Reviving the Sex Discrimination Argument***

In *Perry*, the plaintiffs closely tracked the Hawai'i Supreme Court's reasoning in *Baehr*. To the extent that they advanced any version of the sex discrimination argument, they relied almost exclusively on the claim that Proposition 8 facially discriminates based on sex.<sup>155</sup> In the complaint, they argued that Proposition 8 "violates the Equal Protection Clause because it discriminates on the basis of sex."<sup>156</sup> "[A] man who wishes to marry a man may not do so because he is a man," they explained, "and a woman may not marry a woman because she is a woman."<sup>157</sup> In a memorandum opposing summary judgment, the plaintiffs reiterated this argument in more concrete terms: "If either Plaintiffs Katami or Zarrillo were female, and if either Plaintiff Perry or Stier were male, then California law would permit each of them to marry the person with whom they are in a long-term, committed relationship."<sup>158</sup> In addition, the plaintiffs responded to the proponents' argument that Proposition 8 applies equally to men and women by arguing that "the Supreme Court explicitly rejected an identical argument in *Loving*."<sup>159</sup> In his closing argument, the plaintiffs' counsel, Theodore Olsen, again claimed that "[t]he individuals that are before you today do not have a choice for the person they wish to marry because the person is the wrong sex."<sup>160</sup> "Proposition 8," he reasoned, "discriminates on the basis of sex in the same way that the Virginia law struck down in *Loving* discriminated on the basis of race."<sup>161</sup>

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154. *Id.* at 436, 440–41.

155. In her article *What Feminists Have To Lose in Same-Sex Marriage Litigation*, Professor Mary Anne Case argues that the *Perry* plaintiffs have given the sex discrimination argument "short shrift in their papers and in their trial strategy, and have consistently missed important opportunities to highlight its strengths for their case." Case, *supra* note 98, at 1228. While I agree with Case's critique, I am making a more modest claim for present purposes: to the extent that the plaintiffs developed *any* version of the sex discrimination argument, they relied almost exclusively on the *facial* sex discrimination argument that had been developed by the Hawai'i Supreme Court in *Baehr*.

156. Complaint for Declaratory, Injunctive, or Other Relief at 9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292VRW).

157. *Id.*

158. Plaintiffs' and Plaintiff-Intervenors' Joint Opposition to Defendant-Intervenors' Motion for Summary Judgment at 21, *Perry*, 704 F. Supp. 2d 921 (No. 09-CV-2292VRW). In this same memorandum, the plaintiffs informed the court that they were planning to develop historical support for the sex discrimination argument during the discovery process. *See infra* note 183 and accompanying text.

159. Plaintiffs' and Plaintiff-Intervenors' Joint Opposition to Defendant-Intervenors' Motion for Summary Judgment, *supra* note 158, at 22.

160. Transcript of Proceedings, Closing Arguments at 2996, *Perry*, 704 F. Supp. 2d 921 (No. 09-CV-2292VRW).

161. *Id.* at 3002.

In his analysis of the plaintiffs' equal protection claims, Judge Walker adopts the sex discrimination argument—yet he takes great care not to place all of his eggs in this basket. Although he acknowledges that discrimination based on sexual orientation is inherently “related to” discrimination based on sex,<sup>162</sup> he insists that these two kinds of discrimination are socially and legally “distinct.”<sup>163</sup> In applying the Equal Protection Clause, he reviews Proposition 8 as a law that “targets gays and lesbians” rather than as a law that discriminates based on sex.<sup>164</sup>

Under the heading “Sexual Orientation or Sex Discrimination,” Judge Walker explains that the plaintiffs claimed that Proposition 8 violates the Equal Protection Clause on two grounds—because it discriminates based on sexual orientation and because it discriminates based on sex.<sup>165</sup> He begins by acknowledging that as a formal matter, “sex and sexual orientation are necessarily interrelated” because an individual’s “sexual orientation” is primarily defined by the “individual’s choice of romantic or intimate partner based on sex.”<sup>166</sup> He explains that because of the logical relationship between the two concepts, “[s]exual orientation discrimination can take the form of sex discrimination.”<sup>167</sup> Analyzing Proposition 8 in these formal terms, he notes that “Perry is prohibited from marrying Stier, a woman, because Perry is a woman,” but “[i]f Perry were a man, Proposition 8 would not prohibit the marriage.”<sup>168</sup> As a result, he concludes, “Proposition 8 operates to restrict Perry’s choice of marital partner because of her sex.”<sup>169</sup>

Judge Walker does not, however, allow his equal protection analysis to turn on the claim that Proposition 8 discriminates based on sex. After emphasizing that “sexual orientation discrimination is . . . a phenomenon distinct from . . . sex discrimination,”<sup>170</sup> he makes the concept of discrimination based on sexual orientation the focal point of his equal protection analysis. “The evidence at trial,” he finds, “shows that gays and lesbians experience discrimination based on unfounded stereotypes and prejudices *specific* to sexual orientation.”<sup>171</sup> In both the past and the present, he emphasizes, “[g]ays and lesbians have . . . been targeted for discrimination because of their sexual orientation.”<sup>172</sup>

To support these findings, Judge Walker cites to evidence showing that gay men and lesbians suffered a history of public and private discrimination in California and the United States<sup>173</sup> and were subjected to “well-known stereotypes” that portray them as “affluent, self-absorbed and incapable of forming long-term intimate relationships,” and, more darkly, as “disease vectors” and

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162. *Perry*, 704 F. Supp. 2d at 996.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (emphasis added).

172. *Id.*

173. *Id.* at 982–83.

“child molesters.”<sup>174</sup> In light of “the evidence, the relationship between sex and sexual orientation and the fact that Proposition 8 eliminates a right only a gay man or lesbian would exercise,”<sup>175</sup> he proceeds to analyze the plaintiffs’ equal protection challenge as a claim of discrimination “based on sexual orientation,” instead of reviewing it as a claim of discrimination “based on sex.”<sup>176</sup>

In these passages, Judge Walker takes great care to clarify that he is not relying on the sex discrimination argument—yet he takes equal care to clarify that he adopts it. In the same sentence in which he claims that the two forms of discrimination are “distinct,” he acknowledges that they are “related.”<sup>177</sup> Similarly, in the same sentence in which he finds that “Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation,” he adds that, because of the logical relationship between sexual orientation and sex, “Proposition 8 targets them specifically due to sex.”<sup>178</sup> Finally, in the same sentence in which he determines that the “plaintiffs’ equal protection claim is based on sexual orientation,” he insists that “this claim is equivalent to a claim of discrimination based on sex.”<sup>179</sup>

It is worth considering why Judge Walker takes so much trouble to avoid relying on the equal protection version of the sex discrimination argument, especially given that he seems so willing to adopt it. Shortly after this passage, he holds that “strict scrutiny is the appropriate standard of review”<sup>180</sup> to apply to sexual orientation classifications under the Equal Protection Clause, but that “strict scrutiny is unnecessary” in this case, because “Proposition 8 fails to survive even rational basis review.”<sup>181</sup> Given that he ultimately finds that Proposition 8 cannot even satisfy rational basis review, his delicate discussion of the sex discrimination argument—not to mention his puzzling reluctance to rely upon it—may seem gratuitous.<sup>182</sup>

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174. *Id.*

175. *Id.* at 996.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* In this cryptic caveat, Judge Walker seems to confuse his analysis by collapsing the very distinction that he has just articulated. In the passage immediately after this sentence, however, he clearly analyzes the plaintiffs’ equal protection claim under the framework of discrimination based on sexual orientation, rather than discrimination based on sex. *Id.* at 997. In context, Judge Walker’s caveat was likely intended to convey his conclusion that both sex classifications and sexual orientation classifications are inherently suspect, and thus, they are both subject to heightened scrutiny under the Equal Protection Clause. As a result, this sentence is probably meant to convey that his equal protection analysis would proceed in the same manner and produce the same result under both frameworks.

180. *Id.*

181. *Id.*

182. As Case observes, some appellate courts have declined to address the sex discrimination argument in the course of invalidating laws against same-sex marriage on other grounds. *See* Case, *supra* note 98, at 1218–19 (citing *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)).

It is tempting to assume that Judge Walker avoided relying on this argument because it had not been sufficiently developed by the plaintiffs' attorneys, Theodore Olsen and Davis Boies. In opposing summary judgment, the plaintiffs had informed the court that they were planning to develop historical support for the sex discrimination argument during the discovery process:

Plaintiffs are working with experts . . . to demonstrate that marriage laws in California, and the rest of the Nation, historically enforced societally prescribed gender roles for women and men and that, except for Prop. 8 and other laws that limit marriage to opposite-sex couples, marriage has been transformed from an institution of gender inequality and sex-based roles to one in which the sex of the spouses is immaterial.<sup>183</sup>

At trial, however, the plaintiffs failed to follow through on these plans. In both written and oral submissions, they consistently focused on developing analogies to race-based marriage restrictions,<sup>184</sup> but they never claimed that Proposition 8 was based on sex stereotypes or developed the historical connection between laws against same-sex marriage and the doctrine of coverture.<sup>185</sup> Perhaps, as Professor Mary Anne Case hoped, Judge Walker would have adopted Justice Johnson's analysis of sex discrimination under the Equal Protection Clause if the plaintiffs had only developed the underlying historical record.<sup>186</sup>

While this may be a fair criticism of the plaintiffs' trial strategy, it does not adequately explain why Judge Walker avoids relying on the equal protection version of the sex discrimination argument. After all, in his due process analysis, Judge Walker embraces all of the same historical premises that Justice Johnson had adopted in *Baker v. State*, even though they had not been properly developed by the plaintiffs at trial.<sup>187</sup> In this respect, the parallels between the two opinions are striking: Justice Johnson labeled Vermont's marriage law a "vestige of sex-role stereotyping"<sup>188</sup> and a "vestige of the historical unequal marriage relationship,"<sup>189</sup> which was based on "the outmoded conception that marriage requires one man and one woman, creating one person—the husband."<sup>190</sup> In remarkably similar prose, Judge Walker labels Proposition 8 "an artifact of a time when the genders were

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183. Plaintiffs' and Plaintiff-Intervenors' Joint Opposition to Defendant-Intervenors' Motion for Summary Judgment, *supra* note 158, at 46.

184. Plaintiffs' and Plaintiff-Intervenor's Response to Court's Questions for Closing Arguments at 4, *Perry*, 704 F. Supp. 2d 921 (No. 09-CV-2292VRW) (noting that "slaves historically were not allowed to marry" and that "bans on interracial marriage had their origins in the colonial period, were eventually enacted by 41 States, and remained on the books in more than a dozen States as late as 1967").

185. In addition, as Professor Mary Anne Case notes, Olsen and Boies asked historian Nancy Cott to testify about her book *Public Vows: A History of Marriage and the Nation*, rather than any of her other books, which focus more specifically on the history of sex discrimination in the country's marriage laws. See Case, *supra* note 98, at 1230.

186. See *id.* at 1230–32.

187. Compare *Perry*, 704 F. Supp. 2d at 993, with *Baker v. State*, 744 A.2d 864, 906–12 (Vt. 1999).

188. *Baker*, 744 A.2d at 906.

189. *Id.* at 912.

190. *Id.*



seen as having distinct roles in society and in marriage”<sup>191</sup> and “an artifact of a foregone notion that men and women fulfill different roles in civic life.”<sup>192</sup>

Given that Judge Walker was amply aware of the historical support for the sex discrimination argument, he must have had another reason not to rely on this argument in his equal protection analysis. The scholarship on this subject has produced one profound, persistent criticism of the sex discrimination argument: critics have argued that by focusing on the role of sexism rather than homophobia, the sex discrimination argument tends to marginalize the struggle of gay men and lesbians and mischaracterize the primary issues at stake in debates about gay and lesbian rights.<sup>193</sup>

In his article *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, Dean Edward Stein claims that “[w]omen, compared to men, may be more disadvantaged by laws that discriminate on the basis of sexual orientation, but lesbians, gay men, and bisexuals are more significantly disadvantaged by such laws than are women in general.”<sup>194</sup> “[W]hile sexism plays a role in maintaining laws relating to sexual orientation,” he reasons, “homophobia plays a much more central role.”<sup>195</sup> As a result of these incongruities, he argues, “[o]verturning laws that discriminate on the basis of sexual orientation because they discriminate on the basis of sex (or gender) mischaracterizes the core wrong of these laws.”<sup>196</sup> “By failing to address arguments about the morality of same-sex sexual acts and the

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191. *Perry*, 704 F. Supp. 2d at 993.

192. *Id.* at 998. While this second remark is actually made in the context of Judge Walker’s analysis of the plaintiffs’ equal protection claims, this fact has no bearing on my analysis of his ruling. The fact remains that although Judge Walker recognizes the historical premises of the sex discrimination argument, he refuses to consider Proposition 8 as a law that discriminates based on sex.

193. *See infra* notes 194–96 and accompanying text.

194. Stein, *supra* note 83, at 502; *see also* Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 532–33 (2001). As Professor Koppelman has noted, similar critiques have been advanced by a number of other scholars. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 172 (1996) (arguing that the sex discrimination argument has “a transvestite quality,” because “[i]t dresses a gay rights issue up in gender rights garb”); JONATHAN GOLDBERG, *SOMETRIES: RENAISSANCE TEXTS, MODERN SEXUALITIES* 14 (Fordham Univ. Press 2010) (1992) (arguing that the sex discrimination argument “conveys the unfortunate suggestion that [the prohibition of homosexuality is] important only insofar as it bears upon the relations between men and women”); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2362 (1997) (arguing that the sex discrimination argument implies “that discrimination against homosexuals is merely a ‘side effect’ of discrimination against women, and therefore somehow less important”); Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at Baehr v. Lewin*, 9 GEO. MASON U. C.R. L.J. 1, 11 (1998) (arguing that the sex discrimination argument “makes the lives of homosexuals invisible; it sends a clear message to society that it is not acceptable to discuss homosexuality in a public forum; and it reflects and may perpetuate negative attitudes about lesbians and gay men”).

195. Stein, *supra* note 83, at 502.

196. *Id.* at 503.

moral character of lesbians, gay men, and bisexuals,” he concludes, “the sex discrimination argument ‘closets,’ rather than confronts, homophobia.”<sup>197</sup>

To be sure, Judge Walker does not delve deeply into the pros and cons of the equal protection version of the sex discrimination argument. In his effort to avoid relying on it, however, he does not take the customary path of distinguishing *Loving* on “equal application” grounds. Instead, he makes a handful of somewhat cryptic remarks that resonate with Stein’s critiques of the sex discrimination argument. He notes, first, that “[g]ays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation”; second, that “[g]ays and lesbians have historically been targeted for discrimination because of their sexual orientation”; and third, that “[s]exual orientation discrimination is thus a phenomenon distinct from, but related to, sex discrimination.”<sup>198</sup> Like Stein, Judge Walker may avoid relying on the sex discrimination argument under the Equal Protection Clause because it threatens to erase—or at least because it fails to adequately capture—the independent significance of the struggle for gay and lesbian rights.

In response to Stein’s critique, Koppelman has acknowledged that the sex discrimination argument “marginalizes” the “moral claims” of gay men and lesbians<sup>199</sup> by relying “on settled law that was established for the benefit of women, not of gays.”<sup>200</sup> “It can be relied on because it is settled,” he reasons, “but it is settled only because it was devised without thinking about . . . the claims of gays.”<sup>201</sup> Because of the history of sex discrimination law, he admits that “accepting and relying on the sex discrimination argument thus means accepting and relying on a view of the world in which gays are at best marginal.”<sup>202</sup>

Yet Koppelman argues that this feature of the sex discrimination argument should be seen as a virtue instead of a vice, because it is precisely the reason that the argument enjoys a strategic advantage over arguments that focus on the legitimacy of homosexuality itself. As Koppelman explains, “the privacy and suspect classification arguments . . . depend on an innovative extension of existing law to cover gays,” but “[t]he sex discrimination argument does not.”<sup>203</sup> In particular, Koppelman claims that the sex discrimination argument—unlike the fundamental right and suspect classification arguments—enjoys the practical advantage of not asking courts to make “new” law by recognizing a “new” right or “new” class.<sup>204</sup>

If Koppelman’s 1991 analysis of these tradeoffs had been correct, this advantage would have been truly significant: it has been more than 30 years since the Supreme Court has recognized a new right as “fundamental”<sup>205</sup> or a new

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197. *Id.* at 503–04.

198. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010).

199. Koppelman, *supra* note 194, at 532.

200. *Id.* at 534.

201. *Id.*

202. *Id.*

203. *Id.*

204. *See id.*

205. *See Bounds v. Smith*, 430 U.S. 817 (1977) (access to courts).

classification as “suspect,”<sup>206</sup> and since the mid-1980s, the Court has repeatedly affirmed that it is reluctant to take either of these steps.<sup>207</sup> By fitting gay and lesbian claims into well-settled precedents, Koppelman implies, same-sex marriage advocates would be able to win more victories sooner—for the very reason that they would not be asking courts to break quite as much new ground.<sup>208</sup>

With the benefit of hindsight, we now know that Koppelman’s analysis was too optimistic. Since *Baehr*, the sex discrimination argument has been accepted by a handful of judges, but it has not been adopted by a majority of judges on any appellate court.<sup>209</sup> Like Dean Stein and Judge Walker, most appellate courts have preferred to frame the state’s marriage laws as a form of discrimination against gay and lesbian couples rather than as a form of discrimination based on sex.

Yet Judge Walker’s analysis of the plaintiffs’ due process claims illustrates that both Koppelman and Stein overlooked another way to resolve this dilemma: rather than adopting the sex discrimination argument under the Equal Protection Clause, Judge Walker redeploys the historical premises of the sex discrimination argument under the Due Process Clause.<sup>210</sup> Drawing on the historical relationship between laws against same-sex marriage and the doctrine of coverture, he argues that both infringe upon the right to marry—a right that has long been recognized as fundamental under the Due Process Clause.<sup>211</sup>

This approach allows Judge Walker to have it both ways in *Perry*—to enjoy the strategic advantage of relying on existing law without downplaying the role of homophobia in the passage of Proposition 8 or the broader significance of the struggle for gay and lesbian rights. On the one hand, Judge Walker’s argument satisfies Koppelman’s concerns, because it does not ask courts to create any “new” law.<sup>212</sup> Just as the equal protection claim does not seek the recognition of a new classification as “suspect,” the due process argument does not seek the recognition of a new right as “fundamental.” Just as the former argument fits gay men and lesbians into an “existing” class, the latter argument fits same-sex marriage into an “existing” right.<sup>213</sup>

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206. See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (illegitimacy).

207. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (“We are unwilling to start down that road.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (“We are reluctant to set out on that course, and we decline to do so.”); see also *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (describing language from *Cleburne* as “prescient”); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (“[W]e ‘ha[ve]’ always been reluctant to expand the concept of substantive due process.” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

208. See Koppelman, *supra* note 194, at 534–38.

209. Case, *supra* note 98, at 1218.

210. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992–93 (N.D. Cal. 2010).

211. *Id.*

212. *Id.* at 994.

213. To be sure, one could quibble with the semantics of these assertions—in a broader sense, a U.S. Supreme Court decision striking down laws against same-sex marriage would clearly be making “new” law, whether it was decided on equal protection or

On the other hand, Judge Walker's version of the sex discrimination argument also satisfies Stein's concerns, because it enjoys a significant advantage over the equal protection version of the argument: it does not marginalize the struggle for gay and lesbian rights or mischaracterize the primary issues at stake in same-sex marriage cases. On the contrary, by emphasizing that the right to marry is universal—a fundamental right shared by all individuals—Judge Walker's argument actually reverses the spin of the equal protection argument.<sup>214</sup> Instead of marginalizing same-sex couples, it positions them at the heart of American law, by underscoring that same-sex couples share a common history and common traditions with different-sex couples.<sup>215</sup> It not only suggests that same-sex couples have the right to marry, but that this right is rooted in the very same “history, legal practices, and traditions” as the right that different-sex couples have been enjoying for centuries.<sup>216</sup>

There is another way to describe this advantage of Judge Walker's argument, which makes his critique of Proposition 8 more explicit: rather than forcing litigants and judges to choose between conceptualizing the plaintiffs' claims as primarily about sexism or homophobia, Judge Walker allows them to demonstrate—in concrete historical terms—the manifold connections between these two ideologies. In Judge Walker's analysis, the history of marriage law in the United States is both sexist *and* homophobic, a history of discrimination based on two concepts that are both logically and socially intertwined.<sup>217</sup> By claiming that marriage is, at its core, the simple mutual commitment to form a household, Judge Walker shows that same-sex couples embody the genderless model of marriage developed by heterosexual feminists in the modern era.<sup>218</sup> Now that marriage is a “union of equals,” he suggests, the institution is already genderless—and in this sense, it is already “gay.”<sup>219</sup>

Given that the plaintiffs did not develop this argument in *Perry*, it is interesting to ask where Judge Walker might have discovered it. To the best of my knowledge, Judge Walker's due process version of the sex discrimination argument has only one predecessor—a single paragraph in Chief Judge Judith Kaye's dissenting opinion in *Hernandez v. Robles*.<sup>220</sup> In *Hernandez*, the New York Court of Appeals upheld the constitutionality of the state's law against same-sex marriage. In her dissent, Judge Kaye argued that New York's law infringed upon the fundamental right to marry and should therefore be subject to strict scrutiny under the Due Process Clause. In doing so, she criticized the majority for

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due process grounds. In relative terms, however, these assertions seem to describe the due process and equal protection versions of the sex discrimination argument equally well.

214. *Perry*, 704 F. Supp. 2d at 991–92.

215. *Id.* at 993.

216. *Id.* at 992–93. As Professor Kenji Yoshino observes, this tradeoff between the vindication of rights and the protection of groups is always at stake in the Supreme Court's choice between deciding cases under the Due Process and Equal Protection Clause. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011).

217. See *Perry*, 704 F. Supp. 2d at 993.

218. See *id.*

219. *Id.* at 992–93.

220. 855 N.E.2d 1, 29–30 (N.Y. 2006) (Kaye, C.J., dissenting).

“recasting” the plaintiffs’ assertion of the right to marry as “a request for recognition of a ‘new’ right to same-sex marriage.”<sup>221</sup> Over the course of her five-page analysis of the plaintiffs’ due process claims, she relied principally on two analogies. The first analogy was to the Supreme Court’s holding in *Lawrence*, which she interpreted to recognize a “fundamental right . . . to engage in private consensual sexual conduct.”<sup>222</sup> The second analogy was to *Loving*, where the Court overruled “a long and shameful national tradition” of banning interracial marriages.<sup>223</sup>

At the end of this argument, Judge Kaye observed that “[i]t is no answer that same-sex couples can be excluded from marriage because ‘marriage,’ by definition, does not include them.”<sup>224</sup> In the penultimate paragraph of her due process analysis, she explained:

The claim that marriage has always had a single and unalterable meaning is a plain distortion of history. In truth, the common understanding of “marriage” has changed dramatically over the centuries. Until well into the nineteenth century, for example, marriage was defined by the doctrine of coverture, according to which the wife’s legal identity was merged into that of her husband, whose property she became. A married woman, by definition, could not own property and could not enter into contracts. Such was the very “meaning” of marriage. Only since the mid-twentieth century has the institution of marriage come to be understood as a relationship between two equal partners, founded upon shared intimacy and mutual financial and emotional support. Indeed, . . . [t]he historical record shows that, through adjudication and legislation, all of New York’s sex-specific rules for marriage have been invalidated save for the one at issue here.<sup>225</sup>

On the surface, Judge Kaye’s historical argument may seem different than Judge Walker’s: while Judge Kaye claims that coverture was once “the very ‘meaning’ of marriage,”<sup>226</sup> Judge Walker insists that coverture was “never part of the historical core of the institution of marriage.”<sup>227</sup> At a deeper level, however, both judges embrace the historical premise of Justice Johnson’s opinion in *Baker*—the claim that coverture is not just any old “example” about the changing history of marriage laws, but an example that goes to the heart of what marriage was once thought to be.<sup>228</sup> In doing so, both judges demonstrate the specific historical link between discrimination based on sexual orientation and discrimination based on sex in marriage laws. Unlike the law against interracial marriage in *Loving*, the doctrine of coverture is an example of a “sex-specific”

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221. *Id.* at 23.

222. *Id.*

223. *Id.* at 25.

224. *Id.* at 26.

225. *Id.* (internal quotation marks omitted).

226. *Id.*

227. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010).

228. *See Baker v. State*, 744 A.2d 864, 904–12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

restriction on marriage—not just an antecedent of today’s laws that prohibit same-sex couples from marrying but a *progenitor* of those very laws.

In the era of coverture, Judge Kaye implies, the roles of husband and wife were not considered to be ancillary to the social and legal definition of marriage.<sup>229</sup> Like the sex restrictions imposed by today’s laws against same-sex marriage, they were believed to be an inherent aspect of the institution of marriage—“the very ‘meaning’ of marriage” itself.<sup>230</sup> By labeling Proposition 8 an “artifact” of coverture, Judge Walker makes explicit what Judge Kaye’s opinion only implies: today’s laws against same-sex marriage are directly descended from yesterday’s laws based on sex stereotypes—laws that we now know are unconstitutional, even if no court in its own era so held. In light of the historical link between coverture and Proposition 8, it would be especially perverse to justify Proposition 8 on historical grounds. It would, in effect, allow one set of unconstitutional laws to prop up another—to let the history of sex discrimination justify its own revival in the passage of modern-day laws against same-sex marriage.

## II. THE FEAR OF A GAY CHILD

In his analysis of the plaintiffs’ equal protection claims, Judge Walker takes on one of the most controversial issues in the controversy over same-sex marriage—the concern that exposing children to homosexuality will encourage them to be lesbian, gay, or bisexual.<sup>231</sup> In his findings of fact, he concludes that Proposition 8 was based on “fears that children exposed to the concept of same-sex marriage may become gay or lesbian.”<sup>232</sup> Although he acknowledges that these fears were “never articulated in official campaign advertisements,” he insists that “the advertisements insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should dread having a gay or lesbian child.”<sup>233</sup> Later in his ruling, in his equal protection analysis, he returns to the claim that “Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual.”<sup>234</sup> After noting that these Proposition 8 campaign advertisements echoed “fear-inducing messages” similar to those developed in

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229. *Hernandez*, 885 N.E.2d at 26 (Kaye, C.J., dissenting).

230. *Id.*

231. See J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVELOPMENTAL PSYCHOL. 124, 124 (1995) (“[A] primary focus of expert testimony in custody cases has been the impact of being reared by a gay or lesbian parent on children’s sexual orientations.”); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 329–30 (2009) (observing that in custody and visitation cases, “the battle over gay and lesbian parenthood is most often fought in the field of sexual development”); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 163 (2001) (describing the “sexual behavior and identity” of children as “the most politically sensitive issue in the debate” over gay and lesbian parenthood).

232. *Perry*, 704 F. Supp. 2d at 988.

233. *Id.*

234. *Id.* at 1003.

earlier campaigns for ballot initiatives targeting gay men and lesbians, Judge Walker rejects these fears as “completely unfounded.”<sup>235</sup>

By carefully examining the underlying logic of Judge Walker’s equal protection analysis, this Part reveals that he rejects fears about homosexuality and children on both empirical and constitutional grounds. On the one hand, he rejects these fears on the ground that there is “[n]o evidence” to support the stereotype that gay men and lesbians are “child molesters who recruit young children into homosexuality,” so there is no reason to expect that exposing children to same-sex marriage will cause them to be molested or recruited.<sup>236</sup> On the other hand, Judge Walker rejects the fears that children exposed to same-sex marriage will become lesbian, gay, or bisexual on the ground that “California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California,” because a person’s homosexuality “does not result in any impairment in judgment or general social and vocational capabilities.”<sup>237</sup>

Because Judge Walker finds that homosexuality is not legally relevant to any legitimate state interest, he concludes that objections to same-sex marriage are fundamentally irrational—nothing more than a specific form of homophobia, a fear of homosexuality itself. Immediately after finding that fears about turning children gay are “completely unfounded,”<sup>238</sup> he concludes that “[m]oral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.”<sup>239</sup> In this passage, Judge Walker does not clarify whether he is referring broadly to the moral disapproval of gay and lesbian relationships, or specifically to the “fear that exposure to homosexuality would turn children into homosexuals.”<sup>240</sup> This Part argues, however, that Judge Walker’s analysis lays the doctrinal foundation for rejecting fears about homosexuality and children as a basis for justifying laws under the Due Process and Equal Protection Clauses.

Building upon Judge Walker’s equal protection analysis, this Part develops three new claims that have rarely been introduced to the country’s debates over same-sex marriage: (1) some children are lesbian, gay, or bisexual; (2) a child’s homosexuality or bisexuality is nothing to dread; and (3) fears about homosexuality and children are nothing more than a special form of homophobia, which cannot provide a rational basis on which to justify laws. Each of these claims is a novel and significant contribution to the theory and practice of same-sex marriage law and the broader debate over gay and lesbian parenting. Section A sets the stage for this argument by explaining how fears about homosexuality and children have structured debates over same-sex marriage and gay and lesbian

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235. *Id.*

236. *Id.* at 983; *see also id.* at 1003 (citing finding fact no. 76 at 982 to support the conclusion that fears are “completely unfounded”).

237. *Id.* at 967; *see also id.* at 1003 (citing finding of fact no. 47 at 967 to support the conclusion that fears are “completely unfounded”).

238. *Id.* at 1003.

239. *Id.*

240. *Id.*

parenting. Section B draws upon Judge Walker's equal protection analysis to develop the doctrinal basis for rejecting this fear.

*A. The LGBT Movement's State of Denial*

In public debates over homosexuality, marriage, and parenthood, opponents of lesbian, gay, bisexual, and transgender ("LGBT") rights have often claimed that children raised by gay and lesbian parents are more likely to entertain same-sex fantasies, engage in same-sex behavior, and identify as lesbian, gay, or bisexual than children raised by heterosexual parents. Professor Lynn Wardle, for example, has claimed that "the most obvious risk to children from their parents' homosexual behavior . . . [is] the potential that disproportionate percentages of children raised by homosexual parents will develop homosexual interests and behaviors."<sup>241</sup> In a similar vein, Professor Walker Scrum has claimed that "intergenerational transfer of sexual orientation can occur at statistically significant and substantial rates, especially for female parents or female children."<sup>242</sup>

In adoption, custody, and visitation cases, litigants, experts, and judges have expressed similar concerns. In a 2004 case, for example, the Eleventh Circuit upheld a Florida law that prohibited any person who is a "homosexual" from adopting,<sup>243</sup> based on concerns about "the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models."<sup>244</sup> In a 2007 case, a Louisiana trial court transferred custody of four children from a lesbian mother to a heterosexual father based on the father's belief that "kids raised by lesbian parents are more likely to grow up lesbian," and a mental health counselor's belief that "a lesbian partner would distort the children's (especially the girls') perception of female role models."<sup>245</sup> The Louisiana Supreme Court affirmed the custody transfer, and the mother remains bound by a stipulated order that prohibits her children from living, visiting, or associating with her partner.<sup>246</sup>

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241. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852.

242. Walter R. Schumm, *Children of Homosexuals More Apt To Be Homosexuals?*, 42 J. BIOSOCIAL SCI. 721, 721 (2010).

243. 1977 Fla. Laws, ch. 77-140, § 1, Fla. Stat. § 63.042(3) (2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

244. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 822 (11th Cir. 2004). Six years after the Eleventh Circuit upheld this statute under the Due Process and Equal Protection Clauses of the U.S. Constitution, a Florida appellate court held that the statute violated the equal protection clause of the Florida Constitution. *Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So.3d 79, 92 (Fla. Dist. Ct. App. 2010). The state decided not to appeal this ruling, and the Department of Children and Families is no longer enforcing the statute. *Florida Gay Adoption Ban Ends*, MSNBC.COM (Oct. 22, 2010, 6:40 PM), [http://www.msnbc.msn.com/id/39803884/ns/us\\_news-life/t/florida-gay-adoption-ban-ends/](http://www.msnbc.msn.com/id/39803884/ns/us_news-life/t/florida-gay-adoption-ban-ends/).

245. *Cook v. Cook*, 965 So. 2d 630, 633-34 (La. Ct. App. 2007).

246. *Cook v. Cook*, 970 So. 2d 960, 961 (La. 2007).



For decades, LGBT advocates have responded to concerns about homosexuality and children by denying them on factual, empirical grounds. With an unusual degree of unanimity, the legal academy has insisted that the children of gay and lesbian couples are no more likely to be lesbian, gay, or bisexual than anyone else. To support this response, LGBT advocates have consistently advanced one or both of the following claims: first, they have observed that “the vast majority of gays and lesbians were raised by heterosexual parents,”<sup>247</sup> and second, they have cited a growing body of empirical studies that purport to find “no differences in the sexuality of children reared by lesbian parents and those raised by nongay parents,”<sup>248</sup> and more generally, no “significant” differences of any kind.<sup>249</sup>

Upon closer examination, however, neither of these claims turns out to be a compelling response to the concerns that exposing children to homosexuality will encourage them to be lesbian, gay, or bisexual.<sup>250</sup> After all, there is a clear reason why “the vast majority” of gay men and lesbians are raised by heterosexual parents—the vast majority of parents are heterosexual, as is the vast majority of the general public. But opponents of same-sex marriage do not claim that *all* of the children of same-sex couples will be gay; they claim that all other things being equal, *more* of the children of same-sex couples will be gay.<sup>251</sup> Unless LGBT advocates can cite studies showing an equal incidence of homosexuality among the children of heterosexual and gay parents, they cannot reject the fear of gay children on empirical grounds.

Numerous researchers have claimed that the children of lesbian and gay parents are “no different” than the children of heterosexual parents, but the reliability of these claims has not withstood independent review. In 2001, sociologists Judith Stacey and Timothy Biblarz published a comprehensive meta-analysis of the best-designed parenting studies, in which they found that researchers had “downplayed” significant differences in the sexual development of children raised by lesbian and gay parents.<sup>252</sup> Although the authors were

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247. Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 287; see also Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 213 (1995); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 369 (1994); Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 57 (2003); Kathryn Kendall, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 FAM. ADVOC. 21, 24 (1997); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 651 n.158 (1996); Philip S. Gutis, *Homosexual Parents Winning Some Custody Cases*, N.Y. TIMES, Jan. 21, 1987, at C1.

248. Stacey & Biblarz, *supra* note 231, at 163.

249. *Id.* at 162.

250. For a more thorough exposition of this argument, see Rosky, *supra* note 231, at 341.

251. See, e.g., Wardle, *supra* note 241, at 852 (expressing concern that “disproportionate percentages of children raised by homosexual parents will develop homosexual interests and behaviors” (emphasis added)).

252. Stacey & Biblarz, *supra* note 231, at 159.

sympathetic to the cause of lesbian and gay parenting, they found evidence that some children raised by lesbian and gay parents were more likely to entertain same-sex fantasies, engage in same-sex behavior, and identify as lesbian, gay, or bisexual. In particular, the authors cited one study indicating that the daughters of lesbian mothers were more likely to entertain same-sex fantasies and engage in same-sex behavior<sup>253</sup> and another study indicating that the sons of gay fathers were more likely to identify as gay or bisexual in adulthood.<sup>254</sup> In 2010, Stacey and Biblarz published a follow-up analysis in which they found additional evidence that the daughters of lesbian mothers were more likely to engage in same-sex behavior and less likely to identify as heterosexual.<sup>255</sup>

Most recently, the U.S. National Longitudinal Lesbian Family Study found that 18.9% of adolescent daughters raised by lesbian mothers identified as bisexual and another 29.7% of this group identified as “predominantly heterosexual” but “incidentally homosexual.”<sup>256</sup> In addition, the study found that 15.4% of daughters raised by lesbian mothers reported that they had engaged in sexual activity with other girls, compared to just 5.1% of adolescent daughters raised by heterosexual parents.<sup>257</sup>

Needless to say, this handful of studies is not decisive,<sup>258</sup> and there are a number of ways to explain this data without endorsing the notion that lesbian and gay parents are encouraging children to be lesbian, gay, or bisexual.<sup>259</sup>

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253. FIONA L. TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT* (1997).

254. Bailey, *supra* note 231, at 124.

255. Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 14–15 (2010).

256. Nanette K. Gartrell et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, ARCHIVES OF SEXUAL BEHAV. 4, 6 (Nov. 6, 2010), available at <http://www.springerlink.com/content/d967883qp3255733/fulltext.pdf>. The authors noted, however, that with respect to this finding, “the numbers were small and the statistical power was weak.” *Id.* at 7.

257. *Id.* The authors explained that this finding was generated by comparing data collected from daughters raised by lesbian mothers to data collected from a study of children raised by heterosexual parents, which was “weighted to ensure that the sample was similar to the United States population in terms of gender, age, and race/ethnicity.” *Id.* at 4. In addition, the authors indicated that this finding was statistically significant: “Of those who were sexually active . . . , NLLFS adolescent girls were *significantly* more likely to have had sexual contact with other girls.” *Id.* (emphasis added).

258. In the past few decades, researchers have conducted a large number of studies of children raised by lesbian and gay parents, but all of these studies have all been based on small, non-random samples, which cannot provide a basis for statistically reliable generalizations. In addition, many of these studies did not include control groups and were not specifically designed to assess children’s sexual development.

259. In particular, it seems plausible to ask whether the studies are measuring “real” differences in children’s fantasies, behaviors, and identities, as opposed to systematic biases in the children’s reporting patterns. For example, it may be that the children of lesbian and gay parents are more likely to be candid with researchers, or with themselves, or more willing to experiment with same-sex behavior and explore lesbian, gay, or bisexual identities. Moreover, in some of these studies, some of the children were genetically related

Notwithstanding these subtleties, however, opponents of lesbian and gay parenting are having a field day with this data. Professor Wardle, for example, has already cited the first Stacey and Biblarz article seven times in support of his ongoing effort to justify restrictions against same-sex marriage and lesbian and gay parenting.<sup>260</sup>

Most LGBT advocates, by contrast, have remained in a state of denial about this data: rather than confronting the implications of the controversial findings published by Stacey and Biblarz, they have continued to downplay, dismiss, and ignore them. While scholars have often cited the Stacey and Biblarz study's other findings, they have regularly glossed over the study's findings on the "sexual preference" and "sexual behavior" of children raised by gay and lesbian parents.<sup>261</sup>

Given the controversial implications of these findings, it is understandable why LGBT advocates have been so reluctant to discuss them. Yet if Judge Walker's rhetoric is a sign of the times, then perhaps the moment has arrived when the LGBT movement can finally begin to develop a more ambitious case for marriage and parenting—an argument that does not entertain the

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to at least one lesbian or gay parent, which raises the possibility that the children's sexual orientation was influenced by genetic rather than environmental factors. The possibilities are manifold and complex, and the existing data do not come close to resolving them.

260. See Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 AVE MARIA L. REV. 561, 561 n.1 (2005); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 293, 295 (2005); Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbian" Parenting*, 23 QUINNIPIAC L. REV. 541, 550, 561 (2004); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 250 (2006); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 364 (2005); Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 377–78 (2003); Lynn D. Wardle, *The "Inner Lives" of Children in Lesbian and Gay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 512 n.2 (2006). Wardle's argument was picked up by a dissenting judge in *Goodridge v. Department of Public Health*, the first case in which a state's highest court held that a law against same-sex marriage was unconstitutional. 798 N.E.2d 941, 1000 n.29 (Mass. 2003) (Cordy, J., dissenting).

261. See, e.g., Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 216 n.104 (2005); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1968 n.47, 1990 n.140 (2006); Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 300 n.157 (2009); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 26–27 n.97, 32 n.128 (2004); Holning Lau, *Identity Scripts and Democratic Deliberation*, 94 MINN. L. REV. 897, 954 n.259 (2010); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 408 n.23 (2009); Marcus C. Tye, *Lesbian, Gay, Bisexual, and Transgender Parents*, 41 FAM. CT. REV. 92, 95 (2003); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 326 n.104 (2001); Deborah A. Widiss et al., *Exposing Stereotypes in Recent Same-Sex Marriage Jurisprudence* 30 HARV. J. L. & GENDER 461, 490 n.121 (2007).

assumption that homosexuality is harmful, or that all things being equal, children are better off growing up to be heterosexual.

The good news is that LGBT advocates are not without compelling claims and doctrinal hooks upon which to hang them. Alongside the fear of a gay child, opponents of lesbian and gay parenting have often expressed a similar and related fear—the fear of a child who rejects traditional gender roles.<sup>262</sup> In both of the studies published by Stacey and Biblarz, the authors found evidence to substantiate this fear as well: several studies have found that the children of lesbian mothers are less likely to play, dress, and behave in ways that conform to traditional gender roles.<sup>263</sup>

As Professor Carlos Ball has observed, however, there is a strong doctrinal basis for claiming that the state does not have any legitimate interest in attempting to influence children's gender identity, expression, or behavior by fostering masculinity in boys or femininity in girls.<sup>264</sup> In *United States v. Virginia*, the Supreme Court declared that laws may not be justified by “fixed notions concerning the roles and abilities of males and females” or “overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>265</sup> Based on this holding, Professor Ball has urged LGBT advocates to claim that the state may not justify a prohibition against lesbian and gay adoption on the ground that lesbian and gay parents are more likely to raise “masculine” girls or “effeminate” boys.<sup>266</sup>

In the 2004 adoption case mentioned above, Judge Rosemary Barkett developed a similar criticism of Florida's adoption law, in her dissent from the Eleventh Circuit's denial of rehearing en banc:

[T]he panel suggests that placing children with homosexual parents may make it more likely that children will become homosexual, referring cryptically to the “vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling.” In our democracy, however, *it is not the province of the State, even if it were able to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities.* This approach views homosexuality in and of itself as a social harm that must be discouraged, and so demeans the dignity of homosexuals, something that *Lawrence* [*v. Texas*] specifically proscribes.<sup>267</sup>

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262. See, e.g., Wardle, *supra* note 241, at 854 (claiming that “boys raised by homosexual mothers may have a lower self-image regarding masculinity”).

263. See Stacey & Biblarz, *supra* note 231, at 168; Biblarz & Stacey, *supra* note 255, at 11–12.

264. Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 740 (2003).

265. 518 U.S. 515, 533, 541 (1996).

266. See Ball, *supra* note 264, at 717.

267. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting) (emphasis added) (citation omitted). In the quoted passage, Judge Barkett claims that *Lawrence v. Texas* stands for the “finding that gays and

*B. Confronting the Fear of a Gay Child*

In *Perry*, Judge Walker comes closer than any previous judge to confronting fears about homosexuality and children in a same-sex marriage case. While he does not reject these fears in such direct and explicit terms as Judge Barkett, he does demonstrate how LGBT advocates could develop a more robust constitutional framework for doing so.

Early in his ruling, Judge Walker notes that fears about exposing children to homosexuality took center stage during the campaign for Proposition 8—although in this context, they were focused more on teachers than parents, and specifically, on what children would learn about same-sex marriage in schools. After conducting surveys and focus groups, the campaign’s strategists decided to develop the message that if Proposition 8 were not passed, same-sex marriage would be “inculcated in young children through public schools.”<sup>268</sup> In campaign propaganda, one of the proponents of Proposition 8 claimed that if same-sex marriage remained legal in California, “[e]very child, when growing up, would fantasize [about] marrying someone of the same sex” and “[m]ore children would become homosexuals.”<sup>269</sup>

These messages were most widely distributed in television advertisements, in which the proponents warned that children were being taught about same-sex marriage in schools and implied that as a result, an increasing number of children were entertaining the notion of marrying same-sex partners. In one of the campaign’s commercials, *It’s Already Happened*, a young girl was pictured returning from school, presenting her mother with a children’s book titled *King and King*, and telling her mother that today in school, she had been taught “how a prince married a prince and I can marry a princess.”<sup>270</sup> While the mother’s frowning face lingers in the background, a law professor appears in the foreground to underscore the plausibility of this scenario: “Think it can’t happen?” he asks.<sup>271</sup> “It’s *already* happened,” he warns.<sup>272</sup> He then proceeds to describe *Parker v. Hurley*, a case in which the First Circuit affirmed a federal district court’s order denying a group of parents the right to exempt their children from kindergarten, first-grade, and second-grade lessons in which teachers read children’s books depicting same-sex marriage and gay and lesbian parenting.<sup>273</sup>

In the aftermath of Proposition 8, these campaign advertisements were widely credited with swinging the polls in favor of Proposition 8.<sup>274</sup> In the *Perry*

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lesbians are ‘entitled to respect for their private lives.’” *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

268. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 988 (N.D. Cal. 2010).

269. *Id.* at 989.

270. *It’s Already Happened*, PROTECTMARRIAGE.COM, <http://www.protectmarriage.com/video/view/5> (last visited Feb. 26, 2011).

271. *Id.*

272. *Id.*

273. 514 F.3d 87, 105–07 (1st Cir. 2008).

274. See, e.g., Mark DiCamillo, *Why Prop. 8 Confounded Pre-Election Pollsters*, S.F. CHRON., Nov. 10, 2008, at B5 (“Double-digit leads held by the ‘no’ side in the pre-television advertising stages of the campaign declined precipitously as the TV ad campaigns

proceedings, however, the proponents did not argue that Proposition 8 could be justified as a way of protecting children from homosexual influences; throughout the proceedings, the proponents carefully avoided making any suggestion that same-sex marriage would influence children's sexual development. Above all, they claimed that the law could be justified by the state's interest in promoting biological parenting—i.e., “the probability that each child will be raised by both of his or her biological parents.”<sup>275</sup> To support this argument, they claimed that biological parents are more likely to act in a child's “best interests” because they have a “natural bond of affection” for genetic offspring.<sup>276</sup> In addition, they cited studies purporting to find that children raised by biological parents enjoyed superior developmental outcomes—displaying higher levels of “self-esteem,” “academic performance,” and “locus of control,” as well as lower levels of “smoking” and “behavior problems.”<sup>277</sup>

In his equal protection analysis, Judge Walker begins by considering this biological parenting argument, along with several other arguments that the proponents developed at trial.<sup>278</sup> Above all, he relies on the testimony of the plaintiffs' experts, who emphasized that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted.”<sup>279</sup>

Judge Walker does not, however, allow the campaign advertisements for Proposition 8 to escape his analysis. After rejecting all of the justifications put forward by the proponents at trial, he turns back to the arguments that the proponents made during the electoral campaign for Proposition 8. “[T]he campaign to pass Proposition 8,” he writes, “uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally

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hit in mid-to-late-September.”). On the significance of the campaign's television advertisements in the campaign for Proposition 8, see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1321–25 (2010); Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 367–85, 390–94 (2009).

275. Defendant-Intervenors' Trial Memorandum at 9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW).

276. Defendant-Intervenors' Notice of Motion and Motion for Summary Judgment, and Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 68, *Perry*, 704 F. Supp. 2d 921 (No. 09-CV-2292 VRW).

277. *Id.* at 71.

278. According to Judge Walker, the proponents' other arguments were premised on the state's interests in:

- (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage;
- (2) proceeding with caution when implementing social changes;
- (3) promoting opposite-sex parenting over same-sex parenting;
- (4) protecting the freedom of those who oppose marriage for same-sex couples;
- (5) treating same-sex couples differently from opposite-sex couples; and
- (6) any other conceivable interest.

*Perry*, 704 F. Supp. 2d at 998 (internal quotation marks omitted).

279. *Id.* at 980.

superior to same-sex couples.”<sup>280</sup> In particular, he finds that “[t]he campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians.”<sup>281</sup>

Judge Walker observes that throughout the trial, the proponents sought to explain away these themes by claiming that “the campaign wanted to protect children from learning about same-sex marriage in school.”<sup>282</sup> He insists, however, that the campaign played upon a deeper fear—“a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual.”<sup>283</sup> To support this finding, he cites to a video of *It’s Already Happened*, noting that the commercial portrays a “mother’s expression of horror upon realizing her daughter now knows she can marry a princess.”<sup>284</sup> Drawing on the testimony of historian George Chauncey to place the campaign advertisements in “historical context,” he finds that they “echo[ed] messages from previous campaigns to enact legal measures to disadvantage gays and lesbians” by drawing on the same “fear-inducing messages.”<sup>285</sup> He concludes: “The evidence at trial shows those fears to be completely unfounded.”<sup>286</sup>

For present purposes, this conclusion is pivotal, and it merits a much closer look. Judge Walker finds that the fears played upon by the campaign advertisements—namely, “a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual”—were “completely unfounded.”<sup>287</sup> In his ruling, he does not explain precisely *why* he concludes that these fears were unfounded—because they were empirically false or because they were constitutionally irrelevant. He does, however, support his conclusion with a citation to a number of findings, which he includes in his long list of “findings of fact.”<sup>288</sup> By considering the relationship between the fears and the findings, we can infer that Judge Walker has both empirical and constitutional reasons for rejecting these fears.

One of Judge Walker’s reasons for rejecting these fears is simply factual: he finds “[n]o evidence” to support the stereotype that gay men and lesbians are “child molesters who recruit young children into homosexuality.”<sup>289</sup> As a result, he implies, any fears about children becoming gay as a result of molestation or recruitment are “completely unfounded.”<sup>290</sup>

Another of Judge Walker’s reasons for rejecting the fears is purely legal. He reasons that “California has no interest in asking gays and lesbians to change

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280. *Id.* at 1002–03.

281. *Id.* at 1003.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* (citing finding of fact nos. 47–49, 68–73, 76–80).

289. *Id.* at 982.

290. *Id.* at 1003 (citing finding of fact no. 76 at 982 to support conclusion that fears are “completely unfounded”).

their sexual orientation or in reducing the number of gays and lesbians in California,<sup>291</sup> because homosexuality “does not result in any impairment in judgment or general social and vocational capabilities” and “bears no relation to a person’s ability to perform in or contribute to society.”<sup>292</sup> His reference to the “ability to perform in or contribute to society” is almost a verbatim restatement of one of the Supreme Court’s primary tests for determining which classifications must be subject to heightened scrutiny under the Equal Protection Clause, articulated in cases such as *Frontiero v. Richardson*<sup>293</sup> and *City of Cleburne v. Cleburne Living Center*.<sup>294</sup>

The remainder of Judge Walker’s reasons for rejecting fears about homosexuality and children are both factual and legal; they are based on empirical studies, but they closely parallel his constitutional claims. He finds that a person’s homosexuality is not relevant to “the ability to form successful marital unions,”<sup>295</sup> the ability to “have happy, satisfying relationships and form deep emotional bonds,”<sup>296</sup> or the “ability to raise children,”<sup>297</sup> and “is not a factor in a child’s adjustment.”<sup>298</sup>

Among all of these findings, one claim is conspicuously absent. In sharp contrast to most LGBT researchers and advocates, Judge Walker does not argue that children raised by lesbian and gay parents are no more likely to be lesbian, gay, or bisexual than children raised by heterosexual parents. Given that this claim has dominated debates over marriage and parenting for decades, it seems hard to imagine that Judge Walker was simply unaware of it, or that his failure to adopt it was a mere oversight. Indeed, in opposition to summary judgment, the plaintiffs had invited Judge Walker to embrace this claim by criticizing the proponents’ campaign advertisements in precisely these terms. Quoting a report issued by the American Psychiatric Association, they argued that “[c]hildren raised in gay or lesbian households do not show any greater incidence of homosexuality or gender identity issues than other children.”<sup>299</sup>

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291. *Id.* at 967.

292. *Id.*

293. 411 U.S. 677, 686 (1973) (plurality opinion).

294. 473 U.S. 432, 441 (1985) (quoting *Frontiero*, 411 U.S. at 686).

295. *Perry*, 704 F. Supp. 2d at 967.

296. *Id.*

297. *Id.* at 968.

298. *Id.* at 980.

299. Plaintiffs’ and Plaintiff-Intervenors’ Joint Opposition to Defendant-Intervenors’ Motion for Summary Judgment, *supra* note 158, at 33. Nor does Judge Walker justify his conclusion on the ground that a child’s sexual orientation is “immutable”—i.e., on the ground that the sexual development of children cannot be influenced by parents or teachers, or that the sexual orientation of gay and lesbian people is not chosen and cannot be changed. In another passage of the ruling, he endorses the notion that sexual orientation is immutable; in this context, however, he rejects fears about exposing children to homosexuality on more fundamental grounds—because homosexuality “does not result in any impairment in judgment or general social and vocational capabilities.” *Perry*, 704 F. Supp. 2d at 997.



Far from denying or downplaying this fear, Judge Walker makes a special effort to summon it, even after he has rejected each of the proponents' proffered justifications for Proposition 8. Although the proponents were loathe to admit it, Judge Walker insists that the campaign advertisements "insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should dread having a gay or lesbian child,"<sup>300</sup> and that "Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual."<sup>301</sup>

It is difficult to overstate the novelty and significance of these findings, in both legal and cultural terms. Although our world is now filled with people who are willing to defend the liberty and equality of gay adults, there are still very few people who are even willing to acknowledge the existence of gay children. As the late Professor Eve Kosofsky Sedgwick famously observed:

There are many people in the worlds we inhabit . . . who have a strong interest in the dignified treatment of any gay people who may happen to already exist. But the number of persons or institutions by whom the existence of gay people is treated as a precious desideratum, a needed condition of life, is small. The presiding asymmetry of value assignment between hetero and homo goes unchallenged everywhere: advice on how to help your kids turn out gay . . . is less ubiquitous than you might think. On the other hand, the scope of institutions whose programmatic undertaking is to prevent the development of gay people is unimaginably large. There is no major institutionalized discourse that offers a firm resistance to that undertaking.<sup>302</sup>

In her new book, *The Queer Child*, Professor Kathryn Bond Stockton builds upon Sedgwick's insight by observing that throughout the twentieth century, there were literally no representations of gay children in legal and historical texts.<sup>303</sup> On the one hand, these texts maintained the fantasy that children were pre-sexual and therefore had no sexual orientation at all; on the other hand, these same texts insisted that heterosexuality was the natural and normal result of childhood sexual development.<sup>304</sup> Within this framework, the notion of a "gay child" remained something of a paradox; homosexuality was nothing more than a phase that children pass through on the road to heterosexual adulthood.

In more recent years, Stockton observes, our popular and academic discourse have begun to admit the possibility of gay "youths" and "gay

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300. *Id.* at 988.

301. *Id.* at 1003.

302. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in *TENDENCIES* 154, 161 (photo. reprint 1994) (Eve Kosofsky Sedgwick ed., 1993).

303. KATHRYN BOND STOCKTON, *THE QUEER CHILD, OR GROWING SIDeways IN THE TWENTIETH CENTURY* 6, 9 (2010).

304. *Id.* at 7.

teenagers,”<sup>305</sup> and we have even begun to speak of gay “children” in the past tense—such as when Oprah Winfrey says of a guest on her talk show, “He Knew He Was Gay at Age 4.”<sup>306</sup> Yet Stockton suggests that even today, both our courts and our culture are still hesitant to recognize that a child can be “gay” or “lesbian” in the present tense.<sup>307</sup> In a similar vein, Professor Teemu Ruskola claims that for many decades, both law and society have been profoundly complicit in constructing “the fantasy that gay and lesbian youth do not exist.”<sup>308</sup>

Strictly speaking, Judge Walker’s rhetoric may not seem to break with these conventions; in his references to a parent having “a gay or lesbian child” or “children who are not heterosexual,” his tense remains thoroughly ambiguous.<sup>309</sup> By speaking of the “fear that exposure to homosexuality would turn children into homosexuals,”<sup>310</sup> and the notion that “parents should dread having children who are not heterosexual,”<sup>311</sup> Judge Walker does not literally claim that gay and lesbian children exist.<sup>312</sup> It is equally significant, however, that Judge Walker does not follow the easy path by simply denying the fears about children and homosexuality on empirical grounds. At the very least, it is only a small step from his reasoning to acknowledge that some children are lesbian, gay, and bisexual, and to insist that the possibility of a child’s homosexuality (or bisexuality) is not something for a parent to dread.

In the closing passages of his equal protection analysis, Judge Walker develops the doctrinal foundations for translating this argument into constitutional law. After finding that Proposition 8 is not supported by any rational basis, he infers that the law is based on nothing more than anti-gay sentiment. In his more reserved moments, he claims that Proposition 8 is based on what is generally known as heterosexism—the belief that “opposite-sex couples are superior to same-sex couples.”<sup>313</sup> In these passages, he purports to remain agnostic about “[w]hether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and

305. *Id.* at 10 (observing that “there are now many books on ‘queer youth,’ but these focus mainly on gay teenagers and come from the fields of popular psychology, clinical counseling, self-help, parenting, and education studies”).

306. *Id.* at 6–7.

307. *Id.*

308. Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 *YALE J.L. & FEMINISM* 269, 273 (1996).

309. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 988, 1003 (N.D. Cal. 2010). He does, however, refer to the possibility that a parent could have “a gay or lesbian child” in the present, in addition to the possibility that a child “may *become* gay or lesbian” in the future. *Id.* at 988 (emphasis added).

310. *Id.* at 1003.

311. *Id.*

312. *Id.* at 988. In his findings of fact, Judge Walker does refer to a parent having “a gay or lesbian child,” in addition to a child who “may *become* gay or lesbian” in the future. *Id.* (emphasis added). Strictly speaking, however, even these references are ambiguous. In these passages, Judge Walker may be referring to the *possibility* of these things happening in the future, instead of claiming that some children are lesbian, gay, and bisexual in the present.

313. *Id.* at 1003.

a woman is inherently better than a relationship between two men or two women.”<sup>314</sup> In his more candid moments, however, he suggests that the law is based on what is generally known as homophobia—“a fear or unarticulated dislike of same-sex couples,”<sup>315</sup> “negative stereotypes about gays and lesbians,”<sup>316</sup> and “inchoate threats vaguely associated with gays and lesbians.”<sup>317</sup>

Whatever the basis of this belief, Judge Walker reasons that it is not “a proper basis on which to legislate,”<sup>318</sup> citing the Supreme Court’s holding in *Romer v. Evans*.<sup>319</sup> In the following paragraph of his decision, he develops this principle further by claiming that California may not use the “regulation of marriage licenses . . . to mandate its own moral code,” citing the Court’s holding in *Lawrence v. Texas*.<sup>320</sup> In *Romer*, the Supreme Court held that a law could not be justified by reference to “animus” against gay and lesbian people,<sup>321</sup> and in *Lawrence*, the Court held that a law could not be justified by reference to “ethical and moral principles” that “condemn homosexual conduct as immoral.”<sup>322</sup>

In this passage, Judge Walker is building on yet another new trend in the theory and practice of constitutional law. In *Citizens for Equal Protection, Inc. v. Bruning*, a federal district court in Nebraska held that the state’s law against same-sex marriage was based on nothing more than “animus” toward the class and “moral disapproval” of the conduct, which could not be used to justify the law under *Romer* and *Lawrence*.<sup>323</sup> Although the *Bruning* court’s ruling was reversed by the Eighth Circuit,<sup>324</sup> the court’s reasoning was revived only last year, in *Gill v. Office of Personnel Management*, where a federal district court in Massachusetts invalidated the Federal Defense of Marriage Act.<sup>325</sup>

In *Perry*, at the end of his ruling, Judge Walker makes claims that closely track the claims made in *Bruning* and *Gill*—yet he makes them immediately after finding that fears about homosexuality and children were “completely unfounded.”<sup>326</sup> In the next sentence, he declares that “[m]oral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.”<sup>327</sup> “The evidence shows conclusively,” he explains, “that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex

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314. *Id.* at 1002.

315. *Id.*

316. *Id.* at 1003.

317. *Id.*

318. *Id.* at 1002.

319. *Id.*

320. *Id.*

321. 517 U.S. 620, 634–35 (1996).

322. 539 U.S. 558, 583 (2003).

323. 368 F. Supp. 2d 980, 1002 (D. Neb. 2005), *rev’d sub nom.* *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

324. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006).

325. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010). For a recent defense of this ruling, see Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923 (2010).

326. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

327. *Id.*

couples.”<sup>328</sup> Quoting *Romer*, he reasons that “[l]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>329</sup>

In this passage, Judge Walker does not specify whether he is referring broadly to the moral disapproval of gay and lesbian relationships, or specifically to the “fear that exposure to homosexuality would turn children into homosexuals,” which he had rejected only a few sentences earlier.<sup>330</sup> In any case, his analysis shows that the same principles apply to both sentiments, which paves the way for LGBT advocates to reject the fear of a gay child as a matter of constitutional law.

By labeling concerns about children’s sexual development as “fear” and “dread” and linking them to discredited stereotypes of gay and lesbian adults as child molesters and recruiters, LGBT advocates can show that these concerns are based on nothing more than homophobia—precisely the kind of “animus” and “moral disapproval” rejected in *Romer* and *Lawrence*. Invoking these precedents, LGBT advocates can argue that the state does not have any legitimate interest in attempting to influence children’s sexual development by discouraging them from being lesbian, gay, or bisexual, or even from engaging in same-sex behavior.<sup>331</sup> Just as the state cannot legislate based on the fear that gay adults are dangerous, it cannot legislate based on the fear that gay adults will influence children’s sexual development or the fear that there will be more lesbian, gay, or bisexual children in the world.<sup>332</sup> While this litigation strategy surely carries significant risks, it has the benefit of rejecting the assumptions that homosexuality is harmful and that children cannot or should not be lesbian, gay, or bisexual.

### III. ESTABLISHING *ROMER* AND *LAWRENCE*

In one early passage in Judge Walker’s ruling, he lays the groundwork for a novel analogy between the prohibition against moral justifications for challenged government actions under the Due Process and Equal Protection Clauses and the prohibition against religious justifications for such actions under the Establishment Clause. In his initial summary of the proponents’ defense of Proposition 8, he introduces a distinction between “secular” justifications, on the one hand, and “moral” and “religious” justifications, on the other hand.<sup>333</sup> He claims that for the purposes of judicial review, secular justifications are permitted, while moral and religious justifications are prohibited: “A state’s interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose.”<sup>334</sup>

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328. *Id.*

329. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 634–35 (1996)).

330. *Id.*

331. *See, e.g., State v. Limon*, 122 P.3d 22 (Kan. 2005) (applying *Lawrence* to invalidate a law that imposed more severe penalties on adults who engaged in sodomy with minors of the same sex).

332. Rosky, *supra* note 231, at 337.

333. *Perry*, 704 F. Supp. 2d at 930.

334. *Id.* at 930–31.

To support this principle, Judge Walker initially cites to two Supreme Court cases—*Lawrence v. Texas*, a recent case interpreting the Due Process Clause,<sup>335</sup> and *Everson v. Board of Education of Ewing Township*, a much earlier case interpreting the Establishment Clause.<sup>336</sup> At the end of his ruling, Judge Walker returns to the principle that moral justifications are prohibited, reiterating that “[m]oral disapproval alone is an improper basis on which to deny rights to gay men and lesbians,”<sup>337</sup> because “[m]oral disapproval, without any other asserted state interest,” cannot be a “rational basis” for any law.<sup>338</sup> In support of these claims, he cites to two opinions interpreting the Equal Protection Clause—the majority opinion in *Romer v. Evans* and Justice O’Connor’s concurrence in *Lawrence*.<sup>339</sup>

These concise remarks at the beginning and end of Judge Walker’s ruling are easy to overlook, but they raise profound questions of constitutional theory and practice that remain unresolved. Building upon these passages in Judge Walker’s ruling, this Part develops an analogy between the constitutional status of moral and religious justifications and explores the origins, implications, and soundness of the analogy itself. Section A explains why the analogy is novel: it contributes to emerging trends in constitutional law by forging new connections between the Supreme Court’s interpretations of the Due Process Clause, the Equal Protection Clause, and the Religion Clauses. Section B explains why the analogy is significant: it supports broad interpretations of *Romer* and *Lawrence*, under which the state may not justify legislation in purely moral terms under the Due Process and Equal Protection Clauses. Section C explains why the analogy is insightful: it illustrates that when courts attempt to choose among moral and religious justifications in pluralist societies, they are faced with parallel and irresolvable dilemmas. By looking to the Court’s formulation of the secular purpose doctrine under the Establishment Clause, this Part shows why and how a similar doctrine has emerged under the Due Process and Equal Protection Clauses—a principle that prohibits the state from relying explicitly and exclusively on “morality” in the justification of our laws.

#### A. Equality, Liberty, and the Establishment Clause

Although this analogy between the Establishment Clause and the Fourteenth Amendment has never been fully developed, the notion behind it can be traced back to footnote four in *United States v. Carolene Products*,<sup>340</sup> where the Supreme Court originally formulated the test for determining when heightened scrutiny applies. In this passage, the Court famously declared that laws reflecting “prejudice against discrete and insular minorities” may be subject to a “more searching” form of judicial review.<sup>341</sup>

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335. *Id.* at 931 (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).  
 336. *Id.* (citing *Everson Bd. of Educ. v. Ewing Twp.*, 330 U.S. 1, 15 (1947)).  
 337. *Id.* at 1003.  
 338. *Id.* at 1002 (quoting *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring)).  
 339. *Id.*  
 340. 304 U.S. 144, 152 n.4 (1938).  
 341. *Id.*

Traditionally, judges and scholars have read this footnote as the birth of the Court's modern interpretation of the Equal Protection Clause<sup>342</sup>—but the footnote is equally relevant to the Court's interpretations of the Due Process Clause. The footnote itself referred broadly to “the general prohibitions of the Fourteenth Amendment,”<sup>343</sup> and *Carolene* was actually decided under the Fifth Amendment's Due Process Clause.<sup>344</sup> (In this respect, it is worth noting that the case was decided 18 years before *Bolling v. Sharpe*,<sup>345</sup> when the Court first held that the principle of equal protection doctrines would be “incorporated”<sup>346</sup> into the Fifth Amendment's Due Process Clause.) Moreover, in the same sentence that the *Carolene* Court coined the phrase “discrete and insular minorities,” the Court referred more specifically to “religious, national, and racial minorities.” By considering religious and racial minorities under a single banner, the Court hinted at a broad congruence between the purposes of the Equal Protection Clause, the Due Process Clause, and the Religion Clauses.<sup>347</sup>

In recent years, an increasing number of constitutional scholars have taken up these themes by developing connections between the Court's interpretations of the Religion Clauses and the Fourteenth Amendment.<sup>348</sup> They have, however, generally focused on the religious implications of the Equal Protection Clause rather than any potential connections with the Due Process Clause. As several commentators have observed, the Court's cases under both the Free Exercise Clause and the Establishment Clause have embraced a norm of equal treatment—a principle that prohibits the government from favoring one religious sect over another.<sup>349</sup> In a recent book, *Religious Freedom and the Constitution*,

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342. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–77 (1980).

343. *Id.*

344. 304 U.S. at 146–47.

345. 347 U.S. 497 (1954).

346. See Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004) (explaining *Bolling*'s “reverse incorporation” of equal protection principles); Yoshino, *supra* note 216, at 789 (arguing that in *Bolling*, the Court vindicates “equality” interests under the Due Process Clause).

347. *Carolene Prods.*, 304 U.S. at 152 n.4 (footnotes omitted).

348. See Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the “War on Terror,” and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2015 (2011) (noting that some commentators claim that the Supreme Court has adopted “equality as the new touchstone” in free exercise cases, but insisting that “[t]his equal treatment regime . . . has never fully flowered except in the minds of symmetry-obsessed academics” and has recently “come under a great deal of pressure”). For an earlier example of this trend in constitutional theory, see JOHN RAWLS, *POLITICAL LIBERALISM* 236 (1993) (“The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views.”).

349. *Everson Bd. of Educ. v. Ewing Twp.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”). This is the passage that Judge Walker cites to support his claim that “[t]he state does not have an interest in

Professors Christopher Eisgruber and Lawrence Sager have proposed that the Court's interpretations of the Religion Clauses should be guided by an "equal liberty" framework,<sup>350</sup> which they claim has the "great virtue of putting the constitutional ideal of religious freedom in harmony with other prominent and prized features of our constitutional tradition, most notably free speech and equal protection."<sup>351</sup> In a recent article, Professor Kenji Yoshino observes structural parallels between the Court's interpretations of the Equal Protection Clause and the Free Exercise Clause, and he refers to cases decided under both clauses collectively as the Court's "traditional equality jurisprudence."<sup>352</sup> Most relevantly, for these purposes, Professor Andrew Koppelman has claimed that the Court's interpretation of the "secular purpose" doctrine can help us understand cases like *Romer v. Evans* and *Loving v. Virginia*, even though these cases were decided under the Equal Protection Clause rather than the Establishment Clause.<sup>353</sup>

In *Varnum v. Brien*, the Iowa Supreme Court introduced these themes into the field of same-sex marriage law, when the court highlighted the connections between equal protection and religious liberty as a basis for striking down the state's law against same-sex marriage.<sup>354</sup> After rejecting each of the government's arguments in support of the law, the court suggested that "religious opposition to same-sex marriage" may have been an additional, unspoken basis for the law.<sup>355</sup> Although the court admitted that the government had not advanced any explicitly religious justifications in its legal arguments,<sup>356</sup> the court inferred that this "silence" reflected the government's understanding that religious opposition "cannot, under our Iowa Constitution, be used to justify a ban on same-sex marriage."<sup>357</sup> Although the court acknowledged that "much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief,"<sup>358</sup> it insisted that "such views are not the only religious views of marriage," and that some groups "have strong religious views that yield the opposite conclusion."<sup>359</sup> Citing the Iowa Constitution's religion clauses, the court reasoned: "Our constitution does not permit any branch of government to resolve these types

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enforcing private moral or religious beliefs without an accompanying secular purpose." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

350. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

351. *Id.* at 44.

352. Yoshino, *supra* note 216, at 750.

353. Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 161–65 (2002) [hereinafter Koppelman, *Secular Purpose*]. In his forthcoming book, *Religious Neutrality in American Law*, Professor Koppelman pulls together and builds upon his extensive body of work on the meaning of the Establishment and Free Exercise Clauses—including many of the arguments that he first published in his article, *Secular Purpose*. See ANDREW KOPPELMAN, RELIGIOUS NEUTRALITY IN AMERICAN LAW: AN ANALYSIS AND DEFENSE (forthcoming 2012) (manuscript at 173–203).

354. 763 N.W.2d 862, 905–06 (Iowa 2009).

355. *Id.* at 904.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 905.

of religious debates and entrusts to courts the task of ensuring government *avoids* them.”<sup>360</sup> As a result, the court concluded, “civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.”<sup>361</sup> Simply put, the court held that the Iowa Constitution’s religion clauses effectively constrained the government’s defense of the statute under the equal protection clause by prohibiting the government from relying on religious beliefs to justify the law.

In *Perry*, Judge Walker builds on this trend, but he breaks new ground in two different ways—first, by linking the Establishment Clause to the Due Process Clause (in addition to the Equal Protection Clause), and second, by linking the prohibition against religious justifications to the prohibition against moral justifications.<sup>362</sup> By implying that the acceptance of moral justifications could violate a parallel version of the “secular purpose” doctrine, Judge Walker suggests that the Fourteenth Amendment prohibits the state from relying on moral justifications for the same reasons, and to the same extent, that the Establishment Clause prohibits it from relying on religious justifications.<sup>363</sup>

### B. Reading *Romer and Lawrence*

To be sure, Judge Walker only hints at this analogy between moral and religious justifications in his ruling. Yet even so, this analogy plays a pivotal role in his analysis of the plaintiffs’ due process and equal protection claims: it supports his broad interpretations of *Romer* and *Lawrence*, under which the state may not invoke “morality” to justify laws under the Fourteenth Amendment.<sup>364</sup>

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360. *Id.*

361. *Id.*

362. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930–31 (N.D. Cal. 2010).

363. *See id.* In his essay, *The Politics of Free Exercise After Employment Division v. Smith*, Professor Richard Schragger makes a similar observation about Judge Walker’s invocation of the secular purpose doctrine:

Same-sex marriage is in many ways a religious dispute . . . . Indeed, the courts are treating it this way, at least implicitly, by importing a secular purpose requirement into their equal protection analysis. As courts search for a rational basis for the exclusion of same-sex couples from marriage, they demand secular reasons. Thus, the district court in its recent opinion striking down California’s same-sex marriage ban cited *Everson v. Board of Education* for the seemingly unremarkable idea that rational basis review under the Fourteenth Amendment requires that proponents of the law provide secular reasons, not religious ones.

Schragger, *supra* note 348, at 2023 (citation omitted). While I do not disagree with Schragger’s analysis, I am more interested in Judge Walker’s provocative contrast between the legitimacy of “secular” and “moral” justifications, as opposed to his relatively banal contrast between the legitimacy of “secular” and “religious” justifications.

364. In his initial assessment of Judge Walker’s ruling, Professor Yoshino observes that this passage was “crucial” to Judge Walker’s analysis, because it enabled him to “correctly bar[]” the proponents from “relying on religious rationales.” Kenji Yoshino, Op.-Ed., *Too Soon To Declare Victory*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/roomfordebate/2010/8/4/gay-marriage-and-the-constitution/too-soon-to-declare-victory>. In my view, the prohibition against moral justifications is more



At the end of his ruling, once he had already rejected each of the proponents' justifications for Proposition 8, Judge Walker concludes that the law was premised on "the belief that same-sex couples simply are not as good as opposite-sex couples."<sup>365</sup> Purporting not to decide whether this belief was based on "moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women," he nonetheless holds that under *Romer*, the belief is "not a proper basis on which to legislate."<sup>366</sup>

To explain this aspect of his ruling, Judge Walker develops a further parallel between *Perry* and *Lawrence*:

The arguments surrounding Proposition 8 raise a question similar to that addressed in *Lawrence*, when the Court asked whether a majority of citizens could use the power of the state to enforce 'profound and deep convictions accepted as ethical and moral principles' through the criminal code. The question here is whether California voters can enforce those same principles through regulation of marriage licenses.<sup>367</sup>

"They cannot," he concludes.<sup>368</sup> Paraphrasing a well-known passage from *Lawrence*, he reasons that "California's obligation is to treat its citizens equally, not to 'mandate [its] own moral code.'"<sup>369</sup>

#### I. *Romer and Lawrence*

Judge Walker's interpretations of *Romer* and *Lawrence* are familiar to constitutional scholars, but they remain controversial among federal judges. Indeed, in both opinions, the Justices sharply debated whether these rulings amounted to a blanket prohibition against moral justification under the Fourteenth Amendment.

In *Romer*, the Court reviewed Amendment 2, an amendment to the Colorado Constitution that repealed antidiscrimination ordinances that had been passed in Aspen, Denver, and Boulder to protect lesbian, gay, and bisexual people against discrimination in employment, housing, and public accommodations.<sup>370</sup> In response to a challenge under the Equal Protection Clause, the Court held that the law lacked "a rational relationship to legitimate state interests."<sup>371</sup>

The majority did not explicitly address the subject of moral justifications in *Romer*, because the state had not sought to defend Amendment 2 on explicitly moral grounds. Instead, the state's principal argument in defense of Amendment 2

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controversial than the prohibition against religious justifications—and thus, Judge Walker's exclusion of moral justifications plays an even more crucial role in his analysis than Yoshino suggests.

365. *Perry*, 704 F. Supp. 2d at 1002.

366. *Id.*

367. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

368. *Id.*

369. *Id.* (quoting *Lawrence*, 539 U.S. at 571).

370. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

371. *Id.* at 632.

was that “it put[] gays and lesbians in the same position as all other persons” by doing “no more than deny[ing] homosexuals special rights.”<sup>372</sup> In rejecting this reading of Amendment 2, the Court emphasized the “unprecedented” scope of the law and the discontinuity between the law and the state’s justifications.<sup>373</sup> First, the Court explained that “the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group”—that is, “[i]t identifies persons by a single trait and then denies them protections across the board.”<sup>374</sup> Next, the Court reasoned that the law’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>375</sup> After briefly acknowledging the state’s attempt to justify the law as an attempt to protect the associational freedoms of citizens, landlords, and employers, the Court concluded: “The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”<sup>376</sup>

The subject of “moral disapproval” was raised by Justice Scalia, who “vigorously” dissented from the Court’s ruling in *Romer*.<sup>377</sup> Above all, Justice Scalia chastised the Court for ignoring *Bowers v. Hardwick*,<sup>378</sup> a case that had been decided only ten years earlier under the Due Process Clause.<sup>379</sup> In *Bowers*, the Court had upheld a Georgia sodomy law based upon “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”<sup>380</sup> In *Romer*, Justice Scalia reasoned that Amendment 2 was based on precisely this sentiment—“moral disapproval of homosexual conduct,” embodied by “the view that homosexuality is morally wrong and socially harmful.”<sup>381</sup> He explained, “I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”<sup>382</sup> He argued that by rejecting Colorado’s “modest attempt . . . to preserve traditional sexual mores,”<sup>383</sup> the Court had even suggested that laws against polygamy might be unconstitutional.<sup>384</sup>

In *Lawrence*, the Supreme Court explicitly overruled *Bowers*, holding that a Texas sodomy law failed to advance any “legitimate state interest” and therefore violated the Due Process Clause.<sup>385</sup> Because Texas had sought to justify

372. *Id.* at 626.

373. *Id.* at 632.

374. *Id.* at 632–33.

375. *Id.* at 632.

376. *Id.* at 635.

377. *Id.* at 636, 644 (Scalia, J., dissenting).

378. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

*Romer* was decided in 1996—seven years before *Bowers* was overruled in *Lawrence v. Texas*. See *infra* note 385 and accompanying text.

379. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

380. 478 U.S. at 196.

381. *Romer*, 517 U.S. at 644–45 (Scalia, J., dissenting).

382. *Id.* at 644.

383. *Id.* at 636.

384. *Id.* at 648.

385. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

the sodomy law in explicitly moral terms, the Court was forced to directly consider the status of moral justifications under the Due Process Clause.

In this passage—which plays a pivotal role in Judge Walker’s ruling—the *Lawrence* Court explained why Texas’s sodomy law could not be justified by the fact that a majority of Texans believed that sodomy was “immoral.”<sup>386</sup> The Court began by acknowledging that “for centuries there have been powerful voices to condemn homosexual conduct as immoral”<sup>387</sup> and that “the condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”<sup>388</sup> While conceding that many people regarded these beliefs as “profound and deep convictions accepted as ethical and moral principles,” the Court insisted that “[t]hese considerations do not answer the question before us.”<sup>389</sup> “The issue,” the Court reasoned, “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.”<sup>390</sup> Rejecting this argument, the Court declared: “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>391</sup>

Standing alone, this passage seems to represent a broad prohibition against moral justifications under the Due Process Clause, as Judge Walker claims in his ruling. In the penultimate paragraph of *Lawrence*, however, the Court emphasized the limitations of its holding by observing that the case did not involve marriage, among other things. “The present case does not involve minors,” the Court noted, or “persons who might be injured or coerced,” “public conduct,” “prostitution,” or “whether the government must give formal recognition to any relationship that homosexual persons seek to enter,”<sup>392</sup> such as marriages, civil unions, or domestic partnerships.

In another impassioned dissent, Justice Scalia predicted that future courts would ignore this disclaimer and interpret *Lawrence* as an absolute prohibition of moral justifications under the Due Process Clause.<sup>393</sup> He reasoned that “[i]f, as the Court suggests, the promotion of a majoritarian sexual morality is not even a legitimate state interest,” then “criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity” could no longer survive rational basis review.<sup>394</sup> Moreover, Justice Scalia specifically predicted that the Court’s rejection of moral justifications would be extended beyond the domain of criminal law, resulting in the “judicial imposition of homosexual marriage”<sup>395</sup> in a case like *Perry* itself. He explained:

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386. *Id.* at 571.  
 387. *Id.*  
 388. *Id.*  
 389. *Id.*  
 390. *Id.*  
 391. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion)).  
 392. *Id.* at 578.  
 393. *See id.* at 590 (Scalia, J., dissenting).  
 394. *Id.*  
 395. *Id.* at 604.

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct . . . ; and if, as the Court coos . . . “the conduct can be but one element in a personal bond that is more enduring”; [then] what justification could there possibly be for denying the benefits of marriage to homosexual couples?<sup>396</sup>

By rejecting morality as a legitimate state interest, Justice Scalia claimed, the Court had “dismantle[d] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”<sup>397</sup>

## 2. *The Scope of Romer*

In the years since *Romer* and *Lawrence* were decided, federal judges have been divided about how broadly these cases should be interpreted. Although the scope of *Romer* has been addressed in many cases,<sup>398</sup> the disagreement is best illustrated by the trial and appellate court opinions in *Citizens for Equal Protection, Inc. v. Bruning*.<sup>399</sup> In *Bruning*, the plaintiffs challenged the constitutionality of Section 29, an amendment to the Nebraska Constitution that prohibited the state from recognizing same-sex marriages, civil unions, and domestic partnerships.<sup>400</sup> Relying primarily on *Romer*, the plaintiffs argued that the law violated the Equal Protection Clause.<sup>401</sup> In the trial court, Judge Joseph Battalione agreed, ruling for the plaintiffs on a motion for summary judgment.<sup>402</sup> Adopting a broad reading of *Romer*, Judge Battalione found that “Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*.”<sup>403</sup> “Like the amendment at issue in *Romer*,” he explained, “Section 29 attempts to impose a broad disability on a single group.”<sup>404</sup> Continuing the analogy, he reasoned that in *Bruning*, “as in *Romer*, . . . [t]he reach of Section 29 is at once too broad and too narrow to satisfy its purported purpose of defining marriage, preserving marriage, or fostering procreation and family life.”<sup>405</sup> He

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396. *Id.* at 604–05 (citations omitted).

397. *Id.* at 604.

398. *See, e.g.*, Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804, 826–27 (11th Cir. 2004) (distinguishing *Romer* in upholding a Florida statute prohibiting adoption by homosexuals); Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 297 (6th Cir. 1997) (distinguishing *Romer* in upholding a city charter amendment denying protection to gays); Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997) (distinguishing *Romer* in upholding Attorney General’s termination of lesbian attorney for having engaged in same-sex commitment ceremony); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010) (applying *Romer* to invalidate the Federal Defense of Marriage Act).

399. 368 F. Supp. 2d 980 (D. Neb. 2005), *rev’d sub nom.* Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006).

400. *Id.* at 985, 1001.

401. *Id.* at 985.

402. *Id.* at 1008.

403. *Id.* at 1002.

404. *Id.*

405. *Id.*

concluded that “Section 29 goes so far beyond defining marriage that the court can only conclude that the intent and purpose of the amendment is based on animus against this class.”<sup>406</sup>

On appeal, the Eighth Circuit flatly rejected this reading of *Romer*, distinguishing Section 29 from Amendment 2 on several grounds.<sup>407</sup> “The Colorado enactment,” the Eighth Circuit explained, “repealed all existing and barred all future preferential policies based on ‘orientation, conduct, practices, or relationships,’” and “the Supreme Court struck it down based upon this ‘unprecedented’ scope.”<sup>408</sup> The court noted that in contrast to Amendment 2, Section 29 merely “limits the class of people who may validly enter into marriage and the legal equivalents to marriage emerging in other States.”<sup>409</sup> Because Section 29 was narrower than Amendment 2, the court concluded that the law was not “inexplicable by anything but animus” towards same-sex couples.<sup>410</sup> On the contrary, the court explained, Section 29 was justified as a measure “to encourage heterosexual couples to bear and raise children in committed marriage relationships.”<sup>411</sup>

### 3. *The Scope of Lawrence*

Lower courts have been equally divided about how broadly the holding of *Lawrence* should be construed. This question, too, has surfaced in a wide range of cases, but it was most clearly demonstrated by two cases about the constitutionality of laws criminalizing the sale of sex toys, which produced a division of authority between two federal appellate courts.

In *Williams v. Morgan*, the Eleventh Circuit was asked to review an Alabama law that made it a crime to sell “any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”<sup>412</sup> In upholding this law, the court rejected the broad interpretation of *Lawrence* advanced by the plaintiffs: “[W]e do not read *Lawrence* . . . to have rendered public morality altogether illegitimate as a rational basis,”<sup>413</sup> the court explained, because “[t]he law . . . is constantly based on notions of morality” and “the Supreme Court has affirmed on repeated occasions that laws can be based on moral judgments.”<sup>414</sup> For these reasons, the court held that “public morality survives as a rational basis for legislation even after *Lawrence*, and . . . in this case the State’s interest in the preservation of public morality remains a rational basis for the challenged statute.”<sup>415</sup>

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406. *Id.*  
 407. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864–65 (8th Cir. 2006).  
 408. *Id.* at 868 (citing *Romer v. Evans*, 517 U.S. 620, 626, 633 (1996)).  
 409. *Id.*  
 410. *Id.*  
 411. *Id.*  
 412. 478 F.3d 1316, 1318 n.3 (11th Cir. 2007).  
 413. *Id.* at 1323.  
 414. *Id.*  
 415. *Id.*

In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit was asked to review Texas's obscenity law, which made it a crime to sell any device that was "designed or marketed as useful primarily for the stimulation of human genital organs."<sup>416</sup> As the court noted, "[t]he State's primary justifications for the statute [were] 'morality based.'"<sup>417</sup> In particular, the state sought to justify the prohibition by citing interests in "discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex."<sup>418</sup>

In striking down this law, the Fifth Circuit explicitly adopted the interpretation of *Lawrence* that the Eleventh Circuit had rejected in *Williams*. "These interests in 'public morality,'" the court reasoned, "cannot constitutionally sustain the statute after *Lawrence*."<sup>419</sup> Although the court acknowledged that "[t]he Eleventh Circuit disagreed in *Williams*," the court claimed that under *Lawrence*, "public morality cannot justify a law that regulates an individual's private sexual conduct and does not relate to prostitution, the potential for injury or coercion, or public conduct."<sup>420</sup>

### C. Religion, Morality, and the Pluralist Dilemma

In same-sex marriage cases, as in other cases, courts have been sharply divided over the scope of *Romer* and *Lawrence*. Reading these cases broadly, some courts have claimed that the Supreme Court has rejected "moral disapproval" as a justification under the Equal Protection and Due Process Clauses, affirming the principle that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."<sup>421</sup> Reading these cases narrowly, other courts have relied upon the limiting language in both cases: *Romer*'s emphasis on the "unprecedented" scope of Amendment 2<sup>422</sup> and *Lawrence*'s caveat that the case did not involve the "formal recognition" of same-sex relationships.<sup>423</sup>

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416. 517 F.3d 738, 750 (5th Cir. 2008).

417. *Id.* at 745.

418. *Id.*

419. *Id.*

420. *Id.* at 745 n.33.

421. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003); *see also, e.g., Witt v. Dep't of Air Force*, 527 F.3d 806, 813–22 (9th Cir. 2008) (applying *Lawrence* to invalidate the Don't Ask, Don't Tell policy of the U.S. Armed Forces); *Cook v. Gates*, 528 F.3d 42, 52–55 (1st Cir. 2008) (same); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010) ("As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans*, 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law . . .'" (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003))).

422. *See, e.g., Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006) (distinguishing *Romer* based on the "unprecedented" scope of Amendment 2).

423. *See, e.g., id.* at 868 n.3 ("The *Lawrence* majority . . . was careful to note that the Texas statute at issue 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'"); *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006) ("The *Lawrence* Court . . . pointedly noted that the case did 'not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'"); *Andersen v. King Cnty.*, 138 P.3d 963, 979 (Wash.

In *Perry*, Judge Walker attempts to resolve this dispute in favor of the broader interpretations of both *Romer* and *Lawrence* by invoking the “secular purpose” doctrine.<sup>424</sup> Given that the plaintiffs had not challenged Proposition 8 under the Establishment Clause, Judge Walker’s reference to the secular purpose doctrine may seem like a non sequitur. Far from mixing up his constitutional clauses, however, Judge Walker breaks new ground by introducing an insightful analogy between the Establishment Clause, the Due Process Clause, and the Equal Protection Clause. By suggesting that moral justifications are not “secular,” he implies that they are precluded by the Due Process and Equal Protection Clauses for the same reasons, and to the same extent, that religious justifications are precluded by the Establishment Clause.<sup>425</sup>

This Section argues that the analogy between moral justifications and religious justifications is doctrinally, textually, and analytically sound. By acknowledging and responding to three objections about different aspects of the analogy’s foundations, it shows that the secular purpose doctrine offers critical insight into the scope and significance the Court’s interpretations of the Fourteenth Amendment in *Romer* and *Lawrence*.

### 1. Doctrinal Foundations

The doctrinal objection to the analogy between moral and religious justifications is that the prohibition against moral justifications has not enjoyed the same degree of support in Supreme Court cases as the secular purpose doctrine. Prior to *Lawrence*, the Court had never held that morality was not a rational basis for legislation under the Due Process Clause, and in *Romer*, the Court had no occasion to address the status of moral justifications under the Equal Protection Clause. Moreover, as the Eleventh Circuit observed in *Williams*, the Supreme Court has often declared that states have the authority to regulate “public morals” through the traditional exercise of the “police power,” in a line of cases that dates back to the earliest days of the Fourteenth Amendment.<sup>426</sup>

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2006) (“The [*Lawrence*] Court specifically said the case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’”).

424. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930–31 (N.D. Cal. 2010).

425. *See id.*

426. *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1238 n.8 (11th Cir. 2004) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973); *United States v. Bass*, 404 U.S. 336, 348 (1971)). By contrast, the Supreme Court explicitly adopted the “secular purpose” doctrine in *Lemon v. Kurtzman*, a case decided more than 30 years ago. 403 U.S. 602 (1971). In recent years, some Justices have begun to criticize the doctrine, along with other requirements that are known as “the *Lemon* test.” *See Koppelman, Secular Purpose*, *supra* note 353, at 98–102. As Judge Walker’s citation to *Everson* suggests, however, the Court has long recognized the “secular purpose” doctrine in one form or another; for reasons explained in the section that follows, it would be difficult to imagine an interpretation of the Establishment Clause that did not include at least a weak version of the secular purpose requirement. *See id.* at 159–60.

In her article *Morals-Based Justifications for Lawmaking*, however, Professor Suzanne Goldberg demonstrates that this view of the Court's approach is misleading, because the Court has long recognized a de facto prohibition against moral justifications under the Fourteenth Amendment.<sup>427</sup> By conducting a comprehensive examination of constitutional cases in which laws have been justified in moral terms, Goldberg shows that notwithstanding the Court's frequent paeans to the state's authority to enforce the "public morals" through the "police power,"<sup>428</sup> the Court has almost never relied on "morality" as the exclusive or explicit justification for any law.<sup>429</sup> Although states have occasionally sought to justify laws by invoking the authority to enforce "public morals," the Court has often bent over backwards to avoid justifying laws in these terms.<sup>430</sup> Goldberg explains that in the last 50 years, the only clear exception to this unwritten rule was the Court's holding in *Bowers*, which was overruled 17 years later in *Lawrence* itself.<sup>431</sup> She argues that the novel aspect of *Lawrence* is not the substance of the prohibition against moral justifications, but the Court's willingness to explicitly acknowledge that the prohibition exists.<sup>432</sup> She shows that in practice, the Court has long recognized a prohibition against moral justifications under the Fourteenth Amendment—just as it has long recognized a prohibition against religious justifications under the Establishment Clause.

Goldberg's argument applies broadly across the Supreme Court's free speech, due process, and equal protection cases, but it aptly describes the pattern of reasoning that has appeared in same-sex marriage cases decided by state and federal courts. Both before and since *Lawrence*, judges have quietly and consistently obeyed the prohibition against moral justifications in such cases, even though they have not always been willing to acknowledge that the prohibition exists. In defending laws against same-sex marriage, defendants have rarely argued that such laws can be justified by reference to the majority's belief that same-sex marriage is "immoral" or the state's authority to enforce the "public morals"

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427. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1258–83 (2004).

428. *Id.* at 1243–58.

429. *Id.*

430. *Id.* at 1258–83.

431. *Id.* at 1244–45, 1254, 1256–58. In providing comments on this Article, one reader suggested that *Stanley v. Georgia*—a case in which the Supreme Court struck down a state law that prohibited the possession of obscene materials—may be another exception to this general rule. 394 U.S. 557 (1969). In *Stanley*, the Court held that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.* at 566. As I read this sentence, however, the Court was not affirming the principle that the state has a legitimate interest in maintaining the "public morality" independent of any concerns raised by the state's attempt to "control[] a person's private thoughts." *Id.* Instead, the Court was leaving this question unanswered, so that it could be addressed in future cases. In this sense, *Stanley* is consistent with Goldberg's claim that until *Lawrence*, the Court had deliberately avoided articulating a blanket prohibition against moral justifications.

432. Goldberg, *supra* note 427, at 1256–58.



through exercise of the police power.<sup>433</sup> Although defendants have often invoked the need to preserve the “traditional definition of marriage,”<sup>434</sup> they have not explicitly claimed that this definition was based on the majority’s belief that same-sex marriage is “immoral.” In these cases, as in others, Judge Walker’s invocation of the secular purpose doctrine is doctrinally sound: like the secular purpose doctrine, the prohibition against moral justifications has not often been articulated in opinions, but it has long been recognized and respected by judges and litigants.

## 2. Textual Foundations

The textual objection to this analogy between moral and religious justifications is that the prohibition against moral justifications does not enjoy the same degree of support in the text of the Constitution as the secular purpose doctrine. The Establishment Clause specifically provides that “Congress shall make no law respecting an establishment of religion.”<sup>435</sup> This phrase can be plausibly read to prohibit laws that can be justified only in religious terms, even if it does not literally or necessarily impose such a rule.<sup>436</sup> By contrast, the text of the Fourteenth Amendment vaguely provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.”<sup>437</sup> While these phrases can be plausibly read to protect the values of liberty and equality, they do not seem to speak directly to “morality” or the legitimacy of moral justifications advanced by the state.

This objection helps clarify the profound insight at work in Judge Walker’s invocation of the secular purpose doctrine: because moral justifications pose precisely the same constitutional dilemma for courts as religious justifications, it would be difficult, if not impossible, to vindicate the

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433. As Professor Michael Boucai notes, the same cannot be said for the State’s amici curiae, which have remained willing to advance explicitly moral justifications for laws against same-sex marriage, even after *Lawrence*:

[P]ost-*Lawrence* cases reveal a similar pattern: State parties defend same-sex marriage statutes on grounds other than morality; one or two amici (if any) take up the battered flag; judges who rule against same-sex marriage decline to wave it; and judges who rule in favor of same-sex marriage, invoking *Romer* and *Lawrence*, emphasize that moral disapproval of homosexuality is legally out of the question.

Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality* 63 (Aug. 5, 2011) (unpublished manuscript) (on file with author). For examples of amicus briefs in which litigants have advanced moral justifications for same-sex marriage laws, see *infra* note 472.

434. See, e.g., *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006) (noting that “[o]ther than sustaining the traditional definition of marriage, . . . the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges” afforded to married couples).

435. U.S. CONST. amend. I.

436. See Koppelman, *Secular Purpose*, *supra* note 353, at 98–102 (summarizing criticisms of the “secular purpose” doctrine).

437. U.S. CONST. amend. XIV.

Amendment's commitments to liberty and equality without interpreting the text in a manner that broadly prohibits courts from accepting moral justifications.

The logic of this claim is twofold. On the one hand, if judges were to accept all moral justifications, then they would render the Equal Protection and Due Process Clauses irrelevant—just as if they accepted all religious justifications, they would render the Establishment Clause irrelevant.<sup>438</sup> In a pluralist nation like the United States—in which moral and religious disagreement is a pervasive fact of political life—the state could manufacture a plausible “moral” or “religious” justification for almost any law.<sup>439</sup> On the other hand, if judges were to accept some moral justifications and reject others, then they would be forced to favor one set of moral beliefs over another—just as if they accepted some religious justifications, they would be forced to favor one set of religious belief over another.<sup>440</sup> The neutral path, in both cases, is for courts to eschew any explicit, exclusive reliance on moral and religious justifications altogether.

This insight helps us make sense of two of the *Lawrence* Court's most puzzling pronouncements.<sup>441</sup> First, in defining the “liberty” protected by the Due Process Clause, the *Lawrence* Court invoked remarkably sacred terms: “At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>442</sup> Although Justice Scalia famously mocked this language as “the sweet-mystery-of-life passage,”<sup>443</sup> it sounds more like a definition of “religion” than anything else—a definition of precisely that which the Establishment Clause prohibits the government from

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438. See Koppelman, *Secular Purpose*, *supra* note 353, at 105. At one point in his article, Koppelman seems to make a similar claim about the impact of the prohibition against religious justifications on the meaning of the Due Process Clause, as well as the Equal Protection Clause. He writes:

[T]he law might be radically transformed if overtly religious considerations were a permissible basis for state decisionmaking. Much that is not now permissible would become permissible if religious justifications could be offered. In particular, there would be little left of the Fourteenth Amendment, since most forms of discrimination that the amendment forbids have at one time or another been defended on religious grounds.

*Id.* at 160–61. Although he refers generally to the impact of the prohibition against religious justifications on “the Fourteenth Amendment,” he does not seem to include the Due Process Clause in his analysis. In the passages that follow, he focuses specifically on the “discrimination that the amendment forbids,” and he cites examples that deal exclusively with the effect on the Equal Protection Clause without exploring any similar effect on the Due Process Clause. *Id.*

439. See *id.* at 88 (“[A] religious justification is available for nearly anything that the state wants to do to anyone.”).

440. *Id.*

441. Both of these pronouncements were quoted from the plurality opinion in *Planned Parenthood v. Casey*, the well-known abortion case decided ten years before *Lawrence*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

442. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).

443. *Id.* at 588 (Scalia, J., dissenting).

“establishing.”<sup>444</sup> Far from representing a confusion of constitutional principles, the *Lawrence* Court’s use of this language reveals an underlying synergy between the purposes of the Due Process Clause and the Establishment Clause.<sup>445</sup> By defining “liberty” and “religion” in such similar terms, the Court seeks to relieve itself of the task of distinguishing between them, thereby avoiding the parallel dilemmas posed by moral and religious justifications in pluralist states.<sup>446</sup>

Second, in rejecting the state’s claim that the Texas sodomy law was justified on moral grounds, the *Lawrence* Court reasoned: “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>447</sup> Without a proper understanding of the moral justifications dilemma, this statement seems no less puzzling than the last one, in which the Court defined “liberty” in religious terms. In *Lawrence*, the State of Texas did not ask the Justices to impose the Court’s own idiosyncratic moral beliefs upon the people of Texas; rather, it asked the Justices to uphold the moral beliefs of the people of Texas, insofar as those beliefs were reflected in the state’s sodomy law, which was passed by representatives elected by the people of Texas.<sup>448</sup>

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444. In his article *Secular Purpose*, Koppelman argues that “[o]ne commonality among religions is that they all regard human life per se as in some way deeply flawed, and all offer a remedy for what they take to be the universal human malady.” Koppelman, *Secular Purpose*, *supra* note 353, at 131–32. Based on this definition of the religious enterprise, Koppelman argues that the Establishment Clause permits the state to promote “religion-in-general,” but it prohibits the state from adjudicating among “religious” claims. *Id.* at 133–39.

445. By claiming that the Due Process Clause and the Establishment Clause share the purpose of maintaining the state’s neutrality vis-à-vis moral and religious beliefs, I do not mean to suggest that the two clauses share other purposes. While both clauses may share the broader purpose of protecting minorities, the Establishment Clause has the unique purpose of preventing the “corruption and degradation of religion that the Framers associated with religious establishments.” Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1834 (2009). Although it is conceivable that the Due Process Clause has a similar purpose of preventing the government from corrupting or degrading the country’s moral beliefs, I do not mean to advance such a claim in this Article.

446. To the extent that the Free Exercise Clause stands in tension with the Establishment Clause, it may impose significant constraints on the Court’s ability to avoid these dilemmas—especially by defining “liberty” and “religion” in similar terms. As the Supreme Court has acknowledged, “the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion.” *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713 (1981). It seems plausible to think that in order to enforce this clause, the Court will be forced to distinguish between religious and non-religious beliefs and practices, and to protect the former somewhat more than the latter. In light of this apparent tension between the Free Exercise Clause and the Establishment Clause, the Court’s attempt to avoid distinguishing between religious and moral beliefs by defining liberty in religious terms may not ultimately be successful.

447. *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

448. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 219 (1986) (Stevens, J., dissenting) (arguing that Georgia’s law “presumably reflects the belief that all sodomy is immoral and unacceptable” (emphasis omitted)), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

What the *Lawrence* Court was saying, however, is that this distinction does not make a difference, because the Justices are not permitted to pick and choose among moral beliefs in interpreting the Due Process Clause. For if the Court had accepted the majority's moral belief as a justification in *Lawrence*, then it would have been forced to accept the majority's moral belief as a justification in other cases. As a practical matter, the state could claim that almost any law is justified by the majority's belief that a prohibited practice is "immoral." If the Court were to read the Due Process Clause in this manner, the term "liberty" would become a dead letter; rather than guaranteeing "liberty" for all, it would guarantee only the right to engage in those practices that the majority happens to regard as "moral" in a particular place at a particular time.

A concrete example of this dilemma can be found in *Loving v. Virginia*, the Court's most famous analysis of a state's marriage law under the Fourteenth Amendment.<sup>449</sup> In *Loving*, the trial court had justified Virginia's prohibition against interracial marriage on explicitly religious grounds:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>450</sup>

In his article, *Secular Purpose*, Professor Andrew Koppelman reminds us that "the Supreme Court did not even pause to consider whether the trial court had correctly understood God's intentions"<sup>451</sup> before striking down Virginia's antimiscegenation law. If the Court had attempted to pass judgment on the validity of these religious beliefs, Koppelman suggests, it would have violated the secular purpose doctrine by doing so.<sup>452</sup> Without dwelling on the trial court's religious claims, the Court struck down the law under both the Equal Protection Clause and the Due Process Clause—first, as a measure designed to preserve "the integrity of the white race," and second, as an infringement on the individual's "freedom to marry," which the Court described as "one of the basic civil rights of man."<sup>453</sup>

Although Koppelman's analysis is specific to the state's reliance on religious beliefs, it applies with equal force to the state's reliance on moral beliefs, which had also been invoked to justify laws against interracial marriage. In *Naim v. Naim*,<sup>454</sup> an early predecessor to *Loving v. Virginia*, the Virginia Supreme Court had justified Virginia's antimiscegenation law on both moral and religious grounds, relying explicitly on the state's traditional authority to enforce "public morals" through the exercise of the "police power":

The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the

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449. 388 U.S. 1 (1967).

450. *Id.* at 3.

451. Koppelman, *Secular Purpose*, *supra* note 353, at 164.

452. *Id.* at 164–65.

453. *Loving*, 388 U.S. at 12.

454. 87 S.E.2d 749 (Va. 1955).

laws of God, and the laws of propriety, *morality* and social order demand, has been exercised by all civilized governments in all ages of the world. . . .

The institution of marriage has from time immemorial been considered a proper subject for State regulation in the interest of the public health, *morals* and welfare, to the end that family life, a relation basic and vital to the permanence of the State, may be maintained in accordance with established tradition and culture and in furtherance of the physical, *moral* and spiritual well-being of its citizens. . . .

Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state.<sup>455</sup>

In *Loving*, the Supreme Court explicitly overruled *Naim*, pausing only for a moment to note that “the State’s police power” was limited by “the commands of the Fourteenth Amendment.”<sup>456</sup> Just as the Court did not stop to consider the merits of the trial court’s religious claims, it did not stop to consider the merits of the Virginia Supreme Court’s moral claims.

### 3. Analytical Foundations

The analytical objection to the analogy between moral and religious justifications is that the contrast between a “moral belief” and a “secular purpose” is false, because a society’s “secular” purposes are based upon underlying “moral” beliefs. The paradigm of secular morality is John Stuart Mill’s “harm” principle, which suggests that the state may only prohibit citizens from engaging in “harmful” conduct—especially conduct that is harmful to others, but perhaps even conduct that is harmful to oneself.<sup>457</sup> This principle is surely “moral” in the sense that it is related to and based upon underlying distinctions between right and wrong conduct. In this broader sense, every “secular purpose” must be based on some kind of moral belief. Just as one person’s “principle” is often another person’s “prejudice,” one person’s “secular purpose” will often be another person’s “moral belief.”

Stated in these simple terms, this objection is easy to answer because it misconstrues the nature of Judge Walker’s claim that moral beliefs cannot be used to justify laws under the Fourteenth Amendment. In his ruling, Judge Walker does not claim that morality cannot have anything to do with the law or that the law may not overlap with the majority’s moral beliefs. Rather, he claims that independent from any moral purposes, the law must have an “accompanying secular purpose”—an additional purpose that is neither religious nor moral.<sup>458</sup> In

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455. *Id.* at 752, 754, 756 (emphasis added).

456. 388 U.S. at 8.

457. *See generally* JOHN STUART MILL, ON LIBERTY (1859). Many commentators have claimed that *Lawrence* follows—perhaps even adopts—Mill’s harm principle. *See* Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 291 n.37 (2006) (collecting sources).

458. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

other words, Judge Walker claims that the law cannot be *exclusively* and *explicitly* justified by the majority's moral beliefs. If invoking the majority's belief that a practice is "immoral" is all that one can say in defense of a law, he reasons, then the law cannot be justified under the Fourteenth Amendment.

In this respect, the prohibition against moral justifications closely parallels the Supreme Court's articulation of the secular purpose doctrine under the Establishment Clause. As Professor Koppelman explains, the secular purpose doctrine does not require that religion have nothing to do with the law or that the law not overlap with any sect's religious beliefs.<sup>459</sup> Instead, the doctrine requires the state to articulate justifications for laws that rely on something other than religious beliefs—most commonly, some conception of "harm" to others or oneself.<sup>460</sup> For example, "thou shalt not murder" is one of the Ten Commandments, and it is one of the foundational rules of criminal law. To justify laws against murder, the state cannot cite Genesis 9:6 or Leviticus 24:17; it must provide a rationale that is based upon the harms inflicted by the crime of murder.<sup>461</sup> In a similar vein, Judge Walker's reasoning suggests that the Fourteenth Amendment requires the state to articulate justifications that rely on something more than the state's interest in protecting the "public morals" or the majority's belief that a practice is "immoral."<sup>462</sup>

There is, however, a more sophisticated version of the analytical objection: the claim that Judge Walker's concept of a "secular" justification is fundamentally incoherent, because there is no such thing as a justification that does not rely implicitly on moral beliefs.<sup>463</sup> In *Lawrence*, Justice Scalia articulated a version of this objection in his dissent.<sup>464</sup> Even as the Court claimed to exclude

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459. See Koppelman, *Secular Purpose*, *supra* note 353, at 138.

460. *Id.*

461. Remarkably, in some of the earliest same-sex marriage cases, some courts flouted this well-settled rule of constitutional law by explicitly invoking Biblical passages in support of marriage laws. See, e.g., *Dean v. District of Columbia*, No. 90-13892, slip. op. at 18–20 (D.C. Super. Ct. Dec. 30, 1991) (claiming that references to marriage in Genesis, Deuteronomy, Matthew, and Ephesians establish historical support the state's law against same-sex marriage); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."). In *Dean*, the plaintiffs claimed that the court's Biblical references violated the Establishment Clause, but the court rejected the plaintiff's establishment claim as "patently frivolous," after emphasizing that it had only turned to the Bible "as a historical aid." *Dean v. District of Columbia*, No. 90-13982, 1992 WL 685364, at \*4 (D.C. Super. Ct. June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995). See generally Koppelman, *Secular Purpose*, *supra* note 353, at 163 & n.282 (arguing that although "[s]ome judges have explicitly invoked sectarian teachings as a basis for their decisions . . . such behavior is not to be found in modern majority opinions of the U.S. Supreme Court, and it is inappropriate in any American court").

462. See *Perry*, 704 F. Supp. 2d at 1002–03.

463. Several critics have developed a similar critique of the secular purpose requirement itself: they claim that the concept of a non-religious purpose is incoherent, either because it does not exist, or it is not knowable by judges. See Koppelman, *Secular Purpose*, *supra* note 353, at 97 (citing *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting)).

464. *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).

“morality” as a justification for the Texas sodomy law, Justice Scalia insisted that the Court was just taking sides in a conflict over the morality of homosexual conduct, favoring one group’s moral beliefs over another’s:

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . . Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as 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. The Court views it as “discrimination” which it is the function of our judgments to deter.

So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination” under Title VII have repeatedly been rejected by Congress; that in some cases such “discrimination” is *mandated* by federal statute; and that in some cases such “discrimination” is a constitutional right.<sup>465</sup>

Just as one person’s principle can be another’s person’s prejudice, Justice Scalia suggests, one person’s “discrimination” can be another person’s moral belief. The objection closely echoes Justice Scalia’s dissent in *Romer*, where he accused the Court of “mistak[ing] a Kulturkampf for a fit of spite.”<sup>466</sup> By rejecting “moral disapproval of homosexual conduct” as a form of “animus” against gay men and lesbians, he claimed, the Court was guilty of “tak[ing] sides in culture war” and “verbally disparaging as bigotry adherence to traditional attitudes.”<sup>467</sup>

In response to such a critique of Judge Walker’s broad readings of *Romer* and *Lawrence*, it will not suffice to say that the state must explain how the prohibited conduct is “harmful” to others or oneself. As Justice Scalia implies, any conception of “harm”—like any conception of “discrimination” or “animus”—will ultimately depend upon underlying, contestable assumptions about the boundaries between right and wrong.

Given the pluralist nature of the United States, it seems unlikely that the Court can completely escape this dilemma.<sup>468</sup> Yet if Justice Scalia is right, then the

465. *Id.*

466. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

467. *Id.* at 652.

468. It is tempting to say that this dilemma can be resolved by reference to the majority’s view of what counts as “moral.” Perhaps the state must articulate a justification that is not recognizable as “moral,” because it draws on such widely held assumptions about right and wrong, like the harm principle itself. But this is no answer to Justice Scalia’s objection, because it reintroduces the problem that the “secular purpose” doctrine is designed to avoid: if a justification can only qualify as “secular” or “non-moral” when the majority so regards it, then the prohibition against moral justifications is no constraint on the tyranny of the majority at all.

Constitution may well be wrong: in pluralist societies, the principles of liberal democracy may be a kind of a “suicide pact” after all.<sup>469</sup> For the question remains how the Court should proceed in cases like *Bowers* and *Lawrence*—and perhaps cases like *Perry*—when it is asked to review laws that can be justified only by reference to the majority’s moral beliefs. In such cases, if the Court endorses some moral justifications and not others, then the Justices would be effectively imposing their own moral beliefs instead of interpreting the Fourteenth Amendment; yet if the Court accepts the state’s moral justifications at face value, then the Justices would be effectively failing to uphold the nation’s “moral” commitments to due process and equal protection, which are codified in the Fourteenth Amendment itself. Judge Walker suggests that when judges are faced with these unsavory options, they should strive to hold the Constitution above the pluralism of moral conflict by requiring the state to defend laws in more universal terms—even if we know that in a diverse nation committed to liberty and equality for all persons, the state cannot perfectly achieve this ideal.

### CONCLUSION

Notwithstanding the legal community’s consensus, Judge Walker’s ruling breaks new ground in debates over the constitutionality of laws against same-sex marriage. Whether or not it qualifies as “an instant landmark in American legal history”<sup>470</sup> or “changes the debate over same-sex marriage forever,”<sup>471</sup> the ruling develops the legal foundations for three new challenges to the constitutionality of laws that prohibit same-sex couples from marrying. The question remains whether these arguments are likely to gain any traction in higher courts, and thus, whether they are likely influence the future of same-sex marriage and constitutional law.

To evaluate the impact of these challenges in future cases, it is helpful to examine how they could have been used to address issues raised in previous cases. Surprisingly, however, two of the three issues that I have considered here—the fears about homosexuality and children discussed in Part II, and the moral justifications for state action analyzed in Part III—have rarely been raised by defendants in previous same-sex marriage cases. Like the proponents in *Perry*, most defendants have been reluctant to argue that laws against same-sex marriage could be justified by reference to the possibility that children raised by same-sex couples are more likely to be lesbian, gay, or bisexual, or the majority’s belief that same-sex marriage is immoral.<sup>472</sup> In light of the studied silence surrounding these

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469. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

470. Editorial, *supra* note 7.

471. Editorial, *supra* note 8.

472. See *supra* Part III.C.1. While defendants have generally been reluctant to make such claims, States’ amici have been somewhat more willing to do so. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (“Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral”); Amicus Brief of the American Center for Law and Justice in Support of Appellants and Urging Reversal at 6, *Perry v. Schwarzenegger*, 628



subjects, one may wonder whether Judge Walker was tilting at windmills—criticizing straw defenses of Proposition 8 that he could have easily and safely ignored.

We should not presume, however, that the pattern of arguments made in past same-sex marriage cases is a reliable indicator of the arguments that will be made in future cases. It is true that to date, defendants have generally avoided making arguments based on concerns about children’s sexual development or the majority’s moral beliefs in same-sex marriage cases. Yet it is equally true that in cases involving adoption,<sup>473</sup> custody,<sup>474</sup> and the regulation of sex toys,<sup>475</sup> defendants have been more willing to make these arguments and judges have been more willing to embrace them.<sup>476</sup> Although defendants in same-sex marriage cases have not yet followed suit, the success of these defenses in similar cases may prompt future defenders of laws against same-sex marriage to adopt them.

More than anything else, the absence of concerns about homosexuality and children and the absence of moral justifications are likely explained by the

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F.3d 1191 (9th Cir. 2011) (No. 10-16696) (arguing that “morality is a legitimate basis for legislation” and that “[t]he Supreme Court’s decision in *Lawrence v. Texas* did not abolish the legitimacy of morality as a state interest”); Proposed Amicus Brief of Liberty Counsel et al. in Support of Defendant-Intervenors-Appellants at 11–22, *Perry*, 628 F.3d 1191 (No. 10-16696) (arguing that “Children Need A Father and A Mother” because “Male Gender Identity and Female Gender Identity are Each Uniquely Important to a Child’s Development,” “no one knows exactly what ‘causes’ a person to identify as homosexual,” “[c]hildhood gender nonconformity turns out to be a very strong predictor of adult sexual preference among . . . males,” and “the most common pathway to lesbianism is a life situation that creates a deeply ambivalent attitude toward femininity” (internal quotation marks omitted)); Brief of Amici Curiae Robert George et al. in Support of Reversal and the Intervening Defendants-Appellants at 7, 20, *Perry*, 628 F.3d 1191 (No. 10-16696) (arguing that Proposition 8 serves “legitimate moral purposes” and is “consistent with *Lawrence*”); Brief of Family Research Council as Amicus Curiae in Support of Defendants-Appellants at 34, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44, Sept. Term, 2006) (“The evidence, while scanty and underanalyzed, hints that parental sexual orientation is positively associated with the possibility that children will be more likely to attain a similar orientation—and theory and common sense also support such a view.” (quoting Stacey & Biblarz, *supra* note 231, at 177–78)); Brief of Amici Curiae Focus on the Family et al. in Opposition to Plaintiffs’ Motion for Summary Judgment at 21, *Goodridge v. Dep’t of Pub. Health*, No. 01-1647-A (Mass. Super. Ct. Dec. 19, 2001), 2001 WL 34825140 (citing studies purporting to find that “children of lesbians became active lesbians themselves [at] a rate which is at least four times the base rate of lesbianism in the adult female population” and “9 percent of the adult sons of homosexual fathers were homosexual in their adult sexual behavior” (citations omitted)); Brief of Defendant-Intervenors Defense of Marriage Coalition et al. at 35 n.30, *Li v. Oregon*, 110 P.3d 91 (Or. 2005) (No. CC 0403-03057, CA A124877, SC S51612) (arguing that some studies of the children of same-sex parents “clearly show a difference when it comes to sexuality” (citing Stacey & Biblarz, *supra* note 231, at 178)).

473. See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 822 (11th Cir. 2004).

474. See, e.g., *Cook v. Cook*, 970 So. 2d 960 (La. 2007).

475. See, e.g., *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

476. See *supra* Parts II.A, III.C.1.

regional litigation strategy of LGBT advocacy groups, rather than any broad consensus that such arguments are no longer valid in light of *Romer* and *Lawrence*. For many years, LGBT advocates have been careful to bring same-sex marriage challenges only in jurisdictions that are favorable to plaintiffs. Until *Perry*, almost all of these claims had been filed in jurisdictions that had not adopted any constitutional amendments prohibiting the recognition of same-sex marriages, civil unions, or domestic partnerships.<sup>477</sup> In some of these cases, moreover, the state had already permitted same-sex adoptions,<sup>478</sup> and in many of these cases, the state had already adopted comprehensive nondiscrimination statutes protecting LGBT people in employment, housing, and public accommodations.<sup>479</sup>

In jurisdictions that have adopted nondiscrimination statutes, defendants have been reluctant to argue that laws against same-sex marriage could be justified by the majority's belief that homosexuality is immoral, or the fear that exposure to homosexuality will encourage children to be lesbian, gay, or bisexual. Such claims are difficult to sustain when the state has already prohibited discrimination based on sexual orientation in other spheres. In New Jersey, for example, the state was not even willing to argue that its law against same-sex marriage could be justified based on the state's interests in procreation or dual-gender parenting, the two

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477. See, e.g., *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Li v. Oregon*, 110 P.3d 91 (Or. 2005); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006). In Hawai'i, Alaska, and California, the state statutes that prohibited same-sex marriage challenges were brought before constitutional amendments were passed.

The only exception to this rule is *Bruning*, in which the plaintiffs filed a lawsuit in federal district court challenging a Nebraska constitutional amendment that prohibited the recognition of marriages, civil unions, and domestic partnerships between same-sex partners. *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 985 (D. Neb. 2005), *rev'd sub nom. Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006). In this case, however, the plaintiffs were careful to emphasize that although they were seeking to invalidate the state's constitutional amendment, they were not seeking to invalidate the state's statute that prohibited same-sex couples from marrying. *Id.* at 997 ("Plaintiffs do not seek any determination of the validity of the State of Nebraska's definition of marriage as a relationship between a man and a woman."). In this sense, *Bruning* seems to be the exception that proves the rule: to date, advocates have been careful to challenge same-sex marriage restrictions only in favorable jurisdictions.

478. See, e.g., *Goodridge*, 798 N.E.2d at 962 (observing that the state allows same-sex couples to jointly adopt).

479. See, e.g., *Varnum*, 763 N.W.2d at 890–91 (observing that the state prohibits discrimination based on sexual orientation in employment, housing, public accommodations, education, and credit practices).

defenses most commonly advanced by defendants in such cases.<sup>480</sup> Two recent developments in this longstanding trend include the Governor of California's unwillingness to defend Proposition 8<sup>481</sup> and the President's unwillingness to defend the Federal Defense of Marriage Act.<sup>482</sup>

Yet the struggle for LGBT rights is far from resolved. Looking ahead, challenges to laws against same-sex marriage will not always be confined to states like New Jersey and California. In recent years, 29 states have adopted constitutional amendments prohibiting same-sex marriage,<sup>483</sup> and an equal number have declined to adopt statewide antidiscrimination protections.<sup>484</sup> In such jurisdictions, defendants seem far more likely to defend laws against same-sex marriage by invoking moral justifications and concerns about children's sexual development. Moreover, in these jurisdictions, defendants have reason to believe that courts may be more receptive to these arguments: recall that in 2004, the Eleventh Circuit held that fears about "role modeling" and "sexual development" were acceptable justifications for a Florida law that prohibited gay and lesbian people from adopting,<sup>485</sup> and in 2007, the same court held that "morality" was an acceptable justification for Alabama's law that prohibits the sale of sex toys.<sup>486</sup> Sooner or later, the battle over same-sex marriage will come to places like Alabama and Florida, where states are more likely to invoke moral justifications and fears about child sexuality in defense of marriage laws.<sup>487</sup> Someday, the Supreme Court will be forced to decide whether such justifications pass muster under the Due Process and Equal Protection Clauses, or whether the foundations laid by Judge Walker's ruling can support enduring principles of constitutional law.

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480. See *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006) ("The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children.").

481. See *supra* note 15.

482. Eric H. Holder, Jr., *Letter from the U.S. Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, U.S. DEP'T OF JUSTICE (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

483. *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) (last updated Jan. 13, 2010).

484. *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf) (last updated July 11, 2011).

485. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818, 822 (11th Cir. 2004).

486. See, e.g., *Williams v. Morgan*, 478 F.3d 1316, 1323 (11th Cir. 2007).

487. It is encouraging to note, however, that in two recent cases, the child welfare departments in Arkansas and Florida have declined to invoke fears about exposing children to homosexuality in the course of defending state laws that restrict lesbians and gay men from adopting. In both cases, state appellate courts have invalidated these laws. See *Arkansas Dep't of Human Servs. v. Cole*, No. 10-840, 2011 WL 1319217 (Ark. Apr. 7, 2011); *Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010).

The argument developed in Part I—the sex discrimination argument under the Due Process Clause—is a horse of another color. In contrast to the arguments about moral justification and child sexual development, a version of the sex discrimination argument has been raised in every same-sex marriage case since the 1970s. Although appellate courts have rarely adopted this argument in the past, Judge Walker’s ruling breathes new life into it by reformulating it under the Due Process Clause. The final question to consider is whether this doctrinal distinction is likely to make any difference to higher courts—especially to the U.S. Supreme Court, if and when the Justices decide to have the final word on the constitutionality of laws against same-sex marriage.

A thorough response to this question is beyond this Article’s scope, but there are reasons to believe that Judge Walker’s version of the sex discrimination argument may fare better than the traditional alternative. In his recent article, *The New Equal Protection*, Professor Kenji Yoshino argues that the Supreme Court’s Fourteenth Amendment jurisprudence is undergoing a broad, long-term shift from equality toward liberty—away from the protection of groups under the Equal Protection Clause toward the protection of rights under the Due Process Clause.<sup>488</sup> To support this argument, Yoshino observes that the Supreme Court has not recognized a new classification as “suspect” since 1977,<sup>489</sup> and in subsequent cases, they have frankly acknowledged that they are “reluctant to set out on that course.”<sup>490</sup>

More than anything else, Yoshino’s argument seems to depend on his contrast between *Romer* and *Lawrence*, two cases in which the Supreme Court avoided deciding whether classifications based on sexual orientation are suspect.<sup>491</sup> In *Perry*, Judge Walker seems to be well aware that the constitutionality of laws against same-sex marriage will turn on how the Supreme Court interprets *Romer*

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488. Yoshino, *supra* note 216, at 748–50.

489. *Id.* at 757.

490. *Id.* at 759 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)); *see also id.* at 773 (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001)). There are reasons to doubt whether Yoshino has identified a broad trend in the Supreme Court’s Fourteenth Amendment jurisprudence. Although it is true that the Court has not recognized a new classification as “suspect” since 1977, *see Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (recognizing that classifications based on non-marital parentage are subject to intermediate scrutiny), it is equally true that the Court has not recognized a new right as “fundamental” since 1977, *see Bounds v. Smith*, 430 U.S. 817, 828 (1977) (recognizing the right of access to courts as “fundamental”). Moreover, in subsequent cases, they have likewise admitted that they are “unwilling to start down *that road*” as well. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (emphasis added), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); *see also Washington v. Glucksberg*, 521 U.S. 702 (1997) (“[W]e ‘ha[ve] always been reluctant to expand the concept of substantive due process.’” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))). In light of these parallels, it seems plausible to conclude the Court’s Fourteenth Amendment jurisprudence is undergoing a broader shift away from applying the “heightened scrutiny” standard, rather than the narrower shift from equality-based claims to liberty-based claims that Professor Yoshino describes.

491. *See Yoshino, supra* note 216, at 776–81.

and *Lawrence*. Judge Walker's ruling is peppered with no less than 15 citations and quotations from these two opinions.<sup>492</sup>

Given that Justice Kennedy authored the Court's majority opinions in *Romer* and *Lawrence*, and he is widely regarded as the swing vote in *Perry*,<sup>493</sup> some have suggested that Judge Walker was "speaking to Justice Kennedy"<sup>494</sup> in his ruling—tailoring a specific appeal for support by invoking Justice Kennedy's own rhetoric and reasoning from *Romer* and *Lawrence*.<sup>495</sup>

If Judge Walker was writing for Justice Kennedy, then his redeployment of the sex discrimination argument under the Due Process Clause may well have been especially deft. In both *Romer* and *Lawrence*, Justice Kennedy displayed a marked reluctance to engage in the traditional "tiered" structure of judicial review under the Fourteenth Amendment. In *Romer*, he authored an opinion striking down Colorado's Amendment 2 under the Equal Protection Clause—but he applied rational basis review, rather than determining whether heightened scrutiny applies because classifications based on sexual orientation are "suspect." In *Lawrence*, he

492. See Lithwick, *supra* note 13 (counting seven citations to *Romer v. Evans* and eight citations to *Lawrence v. Texas* in Judge Walker's ruling).

493. See Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006–2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 3 (2007) (noting 2006–2007 as the year of the "rise of the Kennedy Court"); Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST, May 13, 2007, at A1 (discussing Kennedy's new role as the median Justice); Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11 (discussing Kennedy's role in two key decisions since he became the median Justice); Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16; Stuart Taylor Jr., Evan Thomas & Katie Connolly, *The Power Broker*, NEWSWEEK, July 16, 2007, at 36 (detailing an exclusive interview with Justice Kennedy); Edward Lazarus, *The Current Supreme Court Term, and the Pivotal Role of "Swing" Justice Anthony Kennedy*, FINDLAW (Dec. 6, 2007), <http://writ.news.findlaw.com/lazarus/20071206.html> (discussing the media attention Kennedy has received since becoming the Court's new median Justice).

494. Schwartz, *supra* note 13 (quoting Professor Douglas NeJaime's suggestion that Judge Walker is "speaking to Justice Kennedy").

495. See, e.g., Kimberly Atkins, *Was the Prop 8 Judge Speaking to Justice Kennedy?*, DC DICTA (Aug. 5, 2010), <http://lawyersusaonline.com/dcdicta/2010/08/05/was-the-prop-8-judge-speaking-to-justice-kennedy/>; Steve Bensen, *Judge Walker, Thinking Ahead*, WASH. MONTHLY (Aug. 5, 2010), [http://www.washingtonmonthly.com/archives/individual/2010\\_08/025054.php](http://www.washingtonmonthly.com/archives/individual/2010_08/025054.php); Rick Hasen, *Why It Might Be Rational for Judge Walker to Stay His Own Ruling in the Prop. 8 Case*, ELECTION L. BLOG (Aug. 4, 2010), <http://electionlawblog.org/archives/016619.html> ("I imagine it was written primarily for one pair of eyes—Justice Kennedy's."); Lithwick, *supra* note 13 ("Justice Kennedy? Hot sauce to go with those words?"); Jon Perr, *Justice Kennedy's Past and the Future of Prop 8*, PERSPECTIVES (Aug. 5, 2010), <http://www.perspectives.com/blog/archives/001936.htm>; Thomas Peters, *Judge Walker's Decision—aimed at Justice Kennedy?*, AM. PRINCIPLES PROJECT (Aug. 5, 2010), <http://www.americanprinciplesproject.org/blogs/judge-walkers-decision-aimed-at-justice-kennedy.html>; George Stephanopoulos, *Proposition 8 Ruling Takes Aim at Justice Kennedy*, ABC NEWS (Aug. 5, 2010, 8:32 AM), <http://blogs.abcnews.com/george/2010/08/proposition-8-ruling-takes-aim-at-justice-kennedy.html>.

authored an opinion striking down the Texas sodomy statute under the Due Process Clause—but he again applied rational basis review, instead of determining whether heightened scrutiny applies because the right to engage in private consensual sexual behavior is “fundamental.” Each opinion ignored what appeared to be relevant precedents—*Romer* ignored *Bowers*, and *Lawrence* ignored *Glucksberg*—and thus, each opinion gave little guidance to lower courts in future cases, when they will be asked to apply the Fourteenth Amendment to similar laws.

As Professor Yoshino argues, however, there seem to be some significant distinctions between the Court’s reasoning in *Romer* and *Lawrence*, which may indicate that Justice Kennedy may be more receptive to future LGBT rights claims formulated under the Due Process Clause. In *Romer*, Justice Kennedy emphasized that the harm inflicted by Amendment 2 was “unprecedented in our jurisprudence.”<sup>496</sup> This emphasis, Yoshino reasons, sent a strong signal that the Court’s reasoning “might be a ticket good only for one day.”<sup>497</sup> “Taking this cue,” he notes, “subsequent decisions by lower courts have consistently distinguished *Romer* on the basis of the distinctive breadth of the harm inflicted by Amendment 2.”<sup>498</sup>

In *Lawrence*, by contrast, Justice Kennedy spoke in more sweeping terms. Rather than emphasizing the peculiar nature of the Texas sodomy law, he explicitly linked it to other forms of discrimination against gay men and lesbians by observing that “[w]hen 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>499</sup> Although he did not describe the right asserted as “fundamental,” he emphasized that the right was universal—a right shared by both heterosexual and homosexual persons—and sharply criticized the *Bowers* Court for suggesting otherwise and thereby failing “to appreciate the extent of the liberty at stake.”<sup>500</sup> Most importantly, Yoshino observes that Justice Kennedy “struck the chains of history from due process jurisprudence.”<sup>501</sup> Quoting his own concurring opinion in *County of Sacramento v. Lewis*, Justice Kennedy declares that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>502</sup>

To be sure, this contrast between the two opinions can be overstated. As noted earlier, in the penultimate paragraph of *Lawrence*, Justice Kennedy warned that “[this case] does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter,”<sup>503</sup> among

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496. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

497. Yoshino, *supra* note 216, at 778.

498. *Id.*

499. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

500. *Id.* at 567.

501. Yoshino, *supra* note 216, at 780.

502. *Lawrence*, 539 U.S. at 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

503. *Id.* at 578.

other things. In the next paragraph, however, he quickly undercut his own caveats by ending the opinion with an invitation for future generations to bring broader claims:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>504</sup>

None of this means that the plaintiffs in *Perry* will ultimately prevail, or win Justice Kennedy's vote, or even have the opportunity to argue the case before the Supreme Court. In light of the Supreme Court's discretion to deny certiorari—not to mention the complex standing issues raised by the state's failure to appeal Judge Walker's ruling<sup>505</sup>—there are still many ways that a Supreme Court ruling could be avoided, and Judge Walker or the Ninth Circuit may yet have the final word on the constitutionality of Proposition 8.

What this does mean, however, is that if and when the Court decides to review the constitutionality of laws against same-sex marriage, it may be more sympathetic to a claim based on the freedom to marry than a claim based on the equality of gay men and lesbians. If plaintiffs seek to develop the sex discrimination argument before the U.S. Supreme Court, they might do well to accept Justice Kennedy's invitation at the end of *Lawrence*—to follow Judge Walker's lead by articulating the argument under the Due Process Clause, rather than relying on the more traditional argument under the Equal Protection Clause.

Whatever fate awaits Judge Walker's ruling in this case and others, his legal analysis has made an enduring contribution to the country's ongoing debate over same-sex marriage by developing the foundations for three new challenges to the constitutionality of laws against same-sex marriage. Rather than downplaying the novelty and significance of these arguments, legal experts should be carefully considering them. They have produced critical insights that can help us reframe the country's broader debates over the future of same-sex marriage, the constitutional status of LGBT rights, and the meaning of the Due Process and Equal Protection Clauses.

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504. *Id.* at 578–79.

505. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1192 (9th Cir. 2011) (certifying question of state law to California Supreme Court in order to determine whether proponents have standing to appeal Judge Walker's ruling).